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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

RECORD NO. 770130

WANV, INC.,

Appellant

v.

MR. AND MRS. E. F. HOUFF, JR.,
et al

and

THE ZONING ADMINISTRATOR FOR
ROCKBRIDGE COUNTY, VIRGINIA,

Appellees

APPENDIX

FROM THE CIRCUIT COURT OF ROCKBRIDGE COUNTY

William B. Poff
Diane McQ. Strickland
Woods, Rogers, Muse, Walker & Thornton
105 Franklin Road, S.W.
Roanoke, Virginia 24004

Humes J. Franklin, Jr.
Ronald W. Denney
Franklin and Franklin
129 North Wayne Avenue
Waynesboro, Virginia 22980

Counsel for WANV, Inc.

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[PETITION - Filed June 17, 1976]

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF ROCKBRIDGE

MR. and MRS. E. F. HOUFF, JR.

MR. and MRS. GEORGE S. WHITNEY

MR. and MRS. S. E. HICKMAN

MR. and MRS. ARCHIE CHILDRESS

MR. and MRS. WALTER P. MASSIE

MR. and MRS. E. WAYNE STRAUB

MR. and MRS. GEORGE WARDEN

MR. and MRS. O. T. ENGLEMAN, JR.

MR. and MRS. STANLEY D. MAYS

MR. and MRS. HERBERT A. RHODENIZER

MR. and MRS. ORVILLE W. SMITH

MRS. MABEL W. MCKEMY

MR. and MRS. CALVIN D. CUMMINGS

MR. and MRS. ANDREW D. MOORE

MR. and MRS. EDWARD L. MOHLER

MR. and MRS. BOYD STUART

MR. and MRS. WAYNE BURKS

MR. and MRS. R. B. TOPPING

MR. and MRS. FRED M. SENSABAUGH

MR. and MRS. FREDERICK L. SCHWAB

MRS. BERT CUPP

MR. and MRS. L. VERNON SNYDER

Complainants

VS.

WANV, INC.
c/o M. Robert Rogers, President
Waynesboro, Virginia

THE ZONING ADMINISTRATOR
FOR ROCKBRIDGE COUNTY, VIRGINIA
Lexington, Virginia

Defendants

P E T I T I O N

TO: THE HONORABLE JUDGE OF THE CIRCUIT COURT FOR THE COUNTY OF ROCKBRIDGE, VIRGINIA

Your Complainants would respectfully show unto your Honor the following facts and circumstances which they believe to entitle them to the relief herein requested, to-wit:

1. Your Complainants are landowners or occupants of land located in the general or immediate vicinity of real estate standing in the name of William M. Agnor, Jr. located approximately 3/10 of one mile southeast of the intersection of Route 11 and Route 11A, in the County of Rockbridge, Virginia.

2. WANV, Inc. has applied for and been granted a building permit by the County of Rockbridge, Virginia for the construction of a utility building and the erection of a two hundred foot radio tower upon the property above described.

3. That the purpose for which said building permit was issued is not a permissible use under the Zoning Ordinance of the County of Rockbridge, Virginia. The permit was issued on December 17, 1975.

4. That said building permit issued to WANV, Inc., by the terms and conditions of said Zoning Ordinance is null, void, and without effect. Said building permit has been illegally issued as it is contrary to the provisions of said Zoning Ordinance. The erection of a radio tower pursuant to the permit would result in a non permissible use under said Zoning Ordinance.

5. Your Complainants have a right to bring this suit as they are citizens of Rockbridge County, Virginia, who are entitled to the enforcement and protection of the Zoning Ordinance of said County.

6. In the event that said radio tower and utility building are constructed pursuant to this permit the result will be irreparable harm to the Complainants in that the use and enjoyment of their property will be materially and permanently affected and the value of their property will be substantially deminished.

WHEREFORE, the Complainants respectfully request the Court to enter an Order either accumulatively or in the alternative that will provide for the following:

(A) To enjoin WANV, Inc. from constructing a radio tower or utility building pursuant to said building permit.

(B) To declare said building permit to be null, void and without effect as a violation of the Zoning Ordinance for Rockbridge County, Virginia.

(C) To issue a mandatory direction that the appropriate administrative personnel for the County of Rockbridge take such action as may be appropriate to strictly enforce the Zoning Ordinance for the County of Rockbridge as it may apply to the building permit which is the subject matter of this proceeding.

Your Complainants would further request and pray for all such other and further relief in the premises as may be deemed proper and appropriate by this Court.

MR. and MRS. E. F. HOUFF, JR.
AND THE OTHER COMPLAINANTS LISTED
ABOVE

BY _____
Counsel

W. T. Robey, III, p.q.
140 West 20th Street
Buena Vista, Virginia 24416

[MOTION TO DISMISS AND ANSWER- Filed July 7, 1976]
OF WANV

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF ROCKBRIDGE

MR. and MRS. E. F. HOUFF, JR., et al	:	
VS.	:	MOTION TO DISMISS AND ANSWER
WANV, INC.	:	
and	:	
THE ZONING ADMINISTRATOR FOR	:	
ROCKBRIDGE COUNTY, VIRGINIA	:	

MOTION TO DISMISS

The defendant, WANV, INC., states that the complainants' Petition should be dismissed by this Honorable Court for the following reasons:

1. That complainants' have failed to state facts which demonstrate that they will suffer irreparable harm. Rather, they offered only their own conclusion on this matter to the Court, and this is not a matter for which equity will enter an injunction.

2. That complainants' have not complied with the statutory requirements as set out in Va. Code Ann. § 15.1 - 496.3, in having failed to file suit within the requisite fifteen (15) days after the start of construction.

ANSWER

The defendant, WANV, INC., answers the Petition as follows:

1. That the truth of the facts as stated in Paragraph One is neither admitted nor denied, but strict proof is require thereof.

2. That Paragraph Two is admitted.

3. That Paragraph Three is admitted in that said permit was issued on December 17, 1975, but all other facts and inferences of Paragraph Three, Four, Five and Six are denied as the defendant's building permit is valid and the defendant, WANV, INC., will suffer irreparable harm through the loss of it's contract with Rockbridge Broadcasting Corporation (Radio Station WREL), if said

LAW OFFICES
FRANKLIN AND FRANKLIN
WAYNESBORO, VIRGINIA

permit were revoked.

4. That WANV, INC., acquired said building permit as a condition of a contract of sale with said Rockbridge Broadcasting Corporation, the validity of said contract having been previously upheld by Judge Stevenson of the Circuit Court of Rockbridge County.

WHEREFORE, the defendant, WANV, INC., respectfully moves that the complainants' Petition be dismissed and the defendant be awarded the costs in defending this suit.

WANV, INC.

BY COUNSEL

Ronald W. Denney
Franklin and Franklin
P. O. Drawer 1140
Waynesboro, Virginia 22980

CERTIFICATE

I hereby certify that I have mailed a true copy of the foregoing instrument to W. T. Robey, III, Esq., 144 West 20th Street, Buena Vista, Virginia 24416, this 6 day of July, 1976.

Ronald W. Denney

Ronald W. Denney

LAW OFFICES
FRANKLIN AND FRANKLIN
WAYNESBORO, VIRGINIA

[ANSWER OF DEFENDANT ZONING ADMINISTRATOR]
Filed July 19, 1976

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF ROCKBRIDGE

T. F. HONEY, et al, Complainants	)	
vs.	)	ANSWER
WAMV, Inc., et al, Defendants	)	

Defendant, The Zoning Administrator for the County of Rockbridge, Virginia (hereinafter "Zoning Administrator"), for the answer to the petition says:

1. The Zoning Administrator neither admits nor denies the truth of the allegations of paragraph 1 of the petition, but calls for strict proof thereof.

2. The Zoning Administrator admits the allegations of paragraph 2 of the petition.

3. The Zoning Administrator admits that the building permit was issued to WAMV, Inc. on December 17, 1975, as alleged in paragraph 3 of the petition, answering further the Zoning Administrator neither admits nor denies the truth of the remaining allegations of paragraph 3 of the petition, but calls for strict proof thereof.

4. The Zoning Administrator neither admits nor denies the truth of the allegations in paragraphs 4, 5 and 6 of the petition, but calls for strict proof thereof.

5. The Zoning Administrator states that the issuance of this building permit to WAMV, Inc. was within the scope of the powers and duties of the Zoning Administrator and that in issuing the building permit to WAMV, Inc. the Zoning Administrator acted honestly and in accordance with what he understood the law to be. The Zoning Administrator issued the building permit to WAMV, Inc. in good faith and solely in reliance upon an earlier opinion of the former Commonwealth's Attorney dated August 26, 1974 involving a similiar situation which stated:

> "In reading Article IV of our Zoning ordinance it would appear that a public utility pole (transmitting tower approximately 165 feet in height) such as the one he (Mr. Harry Poytus of radio station WXLA, Roanoke, Virginia) is requesting would be permitted under the guise of 4-1-1 of Article IV."

A copy of this opinion is attached hereto and marked Exhibit A. Also attached as Exhibit B is a copy of another opinion letter from the former Commonwealth's Attorney dated September 16, 1974 confirming his interpretation of Rockbridge County's Zoning Ordinance to allow the placing of a radio tower in a residential area.

Furthermore, the Zoning Administrator states that the issuance of this building permit to WLNV, Inc. to include the construction of a utility building by WLNV, Inc. was done because he believed such to be allowed in Section 4-1-10 of the Zoning Ordinance which would permit the construction of " . . . other facilities necessary for the provision and maintenance . . ." of the radio tower.

WHEREFORE, the Zoning Administrator respectfully requests the Court to provide guidance and advice regarding interpretation of Section 4-1-10 of the Zoning Ordinance of Rockbridge County, Virginia in a manner equitable to all parties concerned.

The Zoning Administrator would further pray for all such further relief as may be deemed proper and appropriate by the Court.

THE ZONING ADMINISTRATOR
FOR THE COUNTY OF ROCKBRIDGE,
VIRGINIA

By [illegible]
Commonwealth's Attorney
For Rockbridge County,
Virginia

[illegible]
[illegible] Washington Street
Lexington, Virginia 24450

[illegible]
Commonwealth's Attorney
For Rockbridge County,
Virginia

I certify that on 7-10-76
[illegible] the foregoing to the [illegible] and a true copy to all counsel of record.

[illegible]

[LETTER FROM COUNSEL FOR WANV TO COURT - Dated July 13, 1976]

LAW OFFICES OF
FRANKLIN AND FRANKLIN
P. O. DRAWER 1140
WAYNESBORO, VIRGINIA 22980

HUMES JEFFERSON FRANKLIN
HUMES JEFFERSON FRANKLIN, JR.
RICHARD A. SCHOLES
Ronald W. Denney

TELEPHONE 942-6191
AREA CODE 703
TIME BUILDING
128 N. WAYNE AVE.

July 13, 1976

The Honorable Paul A. Holstein
Court House Square
Lexington, Virginia 24450

RE: Our file # 6145 WANV

Dear Judge Holstein:

I am in receipt of a copy of Mr. Robey's letter to you concerning the above styled. I feel that several initial observations are in order: Firstly, I do not believe that Mr. Robey's pleading will sustain a Motion for a temporary injunction; secondly, by the time this letter reaches Your Honor, there will be on file a Motion to Dismiss the complaint for lack of timeliness which I would think would have to be disposed of at the outset; thirdly, at this writing I have been requested to file a petition to intervene on behalf of Rockbridge Broadcasting Corporation (WREL) and I hope to have that pleading before the Court within the next several days. I would therefore respectfully take the position that these matters would have to be disposed of prior to any hearing on a temporary injunction as Mr. Robey suggests.

However, let me hasten to add that at this time there are no immediate plans by WANV to construct a tower. The building being constructed is one which is permitted in all zones in Rockbridge County. Should there be any change in plans insofar as construction of a tower is concerned, we would certainly notify the Court as well as counsel for all parties.

I trust this letter finds Your Honor in good health. Dad sends his best.

I remain,

Very truly,

FOR YOUR INFORMATION

Humes J. Franklin, Jr.

/am
CC: W.T. Robey, III
CC: John Read
CC: Lou Costello
CC: M. Robert Rogers

VIRGINIA:

IN THE CIRCUIT COURT OF ROCKBRIDGE COUNTY

E. F. HOUFF, JR., ET AL Petitioners	)	
vs.	)	OPINION
WANV, INC., ET AL Defendants	)	

This is a controversy over the proposed construction of a radio tower by the defendant, WANV, incorporated, in a residential district of Rockbridge County near the southeast corporate limits of the City of Lexington.

Pursuant to the application filed by WANV, incorporated, a building permit for the construction of a radio tower was issued by the Rockbridge County zoning administrator to the radio corporation on December 17, 1975.

On June 17, 1976 forty-two citizens, most of whom reside within the said residential district and the others residing in the close proximity thereof, seeking to prevent the construction of the radio tower, availed themselves of the 'direct access' provision of Virginia Code section 15.1-496.3, instead of appealing their grievances to the zoning board of appeals.

A motion to dismiss the proceedings was filed by WANV on July 7, 1976, on the ground that the complainants have not complied with the statutory requirements as set out in Virginia Code section 15.1-496.3, in having failed to file suit within the requisite fifteen days after the start of construction.

The issue of whether the complainants had actual notice of the issuance of the permit was not raised in the motion to dismiss.

While I do not have a transcript of the testimony taken at the hearing on October 21, 1976, I recall that two witnesses were called and testified. One of the complainants, S. E. Hickman, testified that he knew in January that the permit had been issued. The second witness, R. B. Topping, also a complainant testified that he did not know that a permit had been issued until just about the same time suit was filed in June. The defendant WANV offered no evidence to refute the testimony of Mr. Topping.

The statute (15.1-496.3) does not require that a person be a resident of the locality in which the building (radio tower) is being constructed, nor does the statute require more than one person to bring the suit. Mr. Topping resides on Thornhill road just within the City limits, and near the locality.

In the answer filed by the zoning administrator on July 19, 1976 the Court is requested to provide guidance and advice regarding interpretation of section 4-1-10 of the zoning ordinance of Rockbridge County in a manner equitable to all parties concerned.

By an order entered on August 28, 1976 the Rockbridge Broadcasting Corporation on its petition was permitted to intervene as a party defendant; but has not filed any responsive pleadings.

An evidentiary hearing was convened on October 21, 1976 to hear and determine the issues raised in this litigation.

It is my opinion that the evidence established that the complainants' suit was filed within fifteen days after the start of construction. This opinion is based on the evidence adduced

at the October 21 meeting, and is supported by a letter dated July 13, 1976 from counsel for the defendant, WANV, advising the Court "At this time there are no immediate plans by WANV to construct a tower" and "should there be any change in plans insofar as construction of a tower is concerned, we would certainly notify the Court as well as counsel for all parties".

I am not unmindful of the reliance by counsel for WANV on BOCA and the definition of "construction", citing section 201.0--This section refers to section 1301.0 which defines "Construction operation"; "the erection, alteration, repair, renovation, demolition or removal of any building or structure; and the excavation, filling, grading and regulation of lots in connection therewith."

It is my opinion that the operation of the backhoe by William Agnor on or about May 14, 1976 is not covered by this definition.

A primary issue to determine is whether the issuance of the building permit by the zoning administrator to WANV, Inc. on December 17, 1975 for the construction of a radio tower in a residential district violates the Rockbridge County zoning ordinance and was void ab inititio.

Article 4 of the Rockbridge County Zoning ordinance provides that regulations for a residential district are designed to stablize and protect the characteristics of the district, to promote and encourage a suitable environment for family life where there are children, and to prohibit all activities of a commercial nature.

Section 4-1-10 of the ordinance permits public utilities such as poles, lines, distribution transformer, pipes, meters and/or other facilities necessary for the provision and maintenance,

including water and sewerage facilities.

It is my opinion that a radio tower is not a public utility and/or other facility necessary for provision and maintenance within the meaning of Section 4-1-10 of the zoning ordinance.

A public utility, according to Virginia Code sections 56-232 and 56-265.1, is defined as "any company (or individual) which owns or operates facilities within the Commonwealth of Virginia for the generation, transmission or distribution of electric energy for sale, for the production, transmission, or distribution, otherwise than in enclosed portable containers, of natural or manufactured gas for sale for heat, light or power, or for the furnishing of telephone service, sewerage facilities or water"; and is defined in Ballentine's law dictionary as "That which serves, or stands ready to serve, an indefinite public which has a legal right to demand and receive its services or commodities. Including every common carrier, gas, electric, telephone, telegraph, water, etc."

A radio tower clearly is not a public utility within the meaning of the statutory definition of a public utility, nor can it be considered a facility necessary for the provision and maintenance of those persons residing in a residential district.

The complainants' petition to prevent the construction of the radio tower is supported by the request of the zoning administrator that the Court provide guidance and advice regarding interpretation of Section 4-1-10 of the Zoning ordinance of Rockbridge County, and praying for all such further relief as may be deemed proper and appropriate by the Court; and supported further by the written opinion of the Commonwealth's Attorney for Rockbridge County, counsel for the zoning administrator, filed on

October 20, 1976 that "a radio tower is not a public utility within the meaning of Section 4-1-10" and "in my opinion, the zoning administrator should withdraw the building permit and issue a denial of such permit:" and

In the brief filed by the Commonwealth's Attorney on behalf of the zoning administrator on October 27, 1976 he says "The zoning administrator is charged under section 12-1 of the Rockbridge zoning ordinance and section 15.1-491 of the Code of Virginia with the continuing duty of enforcing the zoning ordinance. Having been charged with this duty, the zoning administrator believes that he will be bound to take only such action with reference to the building permit as this Honorable Court now directs. Therefore, the zoning administrator respectfully requests the guidance and advice of this Court in that regard."

Section 12-1 of the Rockbridge County zoning ordinance provides "This ordinance shall be enforced by the administrator who shall be appointed by the governing body, etc."

Section 15.1-491 (d) of the Code of Virginia provides "The zoning administrator shall have all necessary authority on behalf of the governing body to administer and enforce the zoning ordinance, including the ordering in writing of the remedying of any condition found in violation of the ordinance, and the bringing of legal action to insure compliance with the ordinance, including injunction, abatement, or other appropriate action or proceeding."

Since it has been held that use and building permits issued in violation of a zoning ordinance are absolutely void, how can any time limitation be placed upon the right of a private citizen to challenge construction of the particular building (radio tower)

involved? Certainly the passage of fifteen days does not magically transform a void permit into a valid one. However, it appears that under the direct access provision of section 15.1-496.3, while the permit is still void, a private citizen has no standing to challenge it after the expiration of the fifteen day period. That right resides solely in the local authorities, who are not hampered by the doctrine of laches and estoppel.

In Segaloff vs. City of Newport News, 209 Va. 259, 163 S. E. 2d 135 it was held "if a building permit is issued in violation of law, it confers no greater rights upon a permittee than an ordinance itself, for the permit cannot in effect amend or repeal an ordinance, or authorize a structure at a location prohibited by the ordinance. Its issuance by such a municipal officer is unauthorized and void;" and

"The officials of the City could not have authorized a violation of the Zoning ordinance and any permit issued for such a violation would be invalid."

It is aruged that in Segaloff the proceeding was brought by public authority while in our present case it was brought by private citizens, and that they have no legal standing now to contend that the building permit was void.

It is my opinion that the complainants do have legal standing in this suit. The object of section 15.1-496.3 is clear. A person to whom a building permit has been issued is protected from suffering irreparable damage in the event of a person or persons failing to seek the prevention of the construction until the building is substantially constructed or even completed. However, in our present case wherein I find that the complainants have sued timely to prevent the construction, the defendant WANV, Incorporated, has not suffered irreparable damage--the construction has not begun, the land has not been purchased and other locations are available for the construction of a radio tower.

It is my further opinion that the zoning administrator for Rockbridge County, a defendant in this suit, in seeking the advice and guidance of the Court, has the authority pursuant to section 12-1 of the ordinance and Virginia Code section 15.1-491 to challenge the validy of the permit, and to rescind and withdraw the same it being void ab initio.

I find from the evidence and the law applicable thereto that the building permit issued to the defendant, WANV, Inc. by the zoning administrator for Rockbridge County on December 17, 1975 to construct a radio tower in a residential district of Rockbridge County is in violation of the zoning ordinance and is void ab initio. The zoning administrator, pursuant to his atatutory authority, has ordered in writing the rescission and withdrawal of the building permit as of November 3, 1976.

This written opinion is accompanied by a copy of the decretal order entered this date.

JUDGE

November 9, 1976

[COURT ORDER - Dated November 9, 1976]

VIRGINIA:

IN THE CIRCUIT COURT OF ROCKBRIDGE COUNTY

E. F. HOUFF, JR., ET AL Petitioners	)	
vs.	)	DECRETAL ORDER
WANV, INC., ET AL Defendants	)	

This cause came on to be heard upon the petition of the complainants; upon the motion to dismiss and the answer of the defendant, WANV, Inc., upon a letter dated July 13, 1976 from counsel for WANV to the Court; upon a letter dated July 16, 1976 from the Court to counsel for WANV and counsel for the complainants; upon the answer of the zoning administrator for Rockbridge County, and the exhibits filed therewith; upon the petition of Rockbridge Broadcasting Corporation to intervene as a party defendant; upon the order permitting Rockbridge Broadcasting Corporation to intervene; upon a letter dated October 2, 1976 from counsel for WANV to the Court; upon a letter dated September 30, 1976 from Federal Communications Commission to WANV, Inc., upon a hearing for a temporary injunction on October 7, 1976, and the granting of a temporary injunction restraining WANV from proceeding with the construction of a radio tower until October 21, 1976, the date set and agreed for a full-scale evidentiary hearing; upon testimony heard ore tenus, the exhibits admitted into the record, and argument of counsel at the evidentiary hearing on October 21, 1976; upon the memorandum of counsel for the complainants filed October 20, 1976; upon the memorandum of counsel for the zoning administrator filed October 20, 1976; upon the brief of counsel for the zoning

administrator praying for the guidance and advice of the Court filed October 27, 1976; upon the memorandum of counsel for WANV filed October 27, 1976; upon the memorandum of counsel for the complainants filed October 28, 1976; upon all exhibits filed herein; upon letters of November 1 and 3, 1976 from counsel for WANV, and the Court's letters of November 1 and 5, 1976 to counsel, and

It appearing therefrom that:

This is a controversy over the proposed construction of a radio tower by WANV, incorporated, in a residential district of Rockbridge County near the southeast corporate limits of the City of Lexington; and

Article 4 of the Rockbridge County Zoning ordinance provides that regulations for a residential district are designed to stablize and protect the characteristics of the district, to promote and encourage a suitable environment for family life where there are children, and to prohibit all activities of a commercial nature; and section 4-1-10 of the ordinance permits public utilities and/or other facilities necessary for the provision and maintenance, including water and sewerage facilities; and

On December 17, 1975 a building permit was issued to WANV, Inc., operating as a radio station, by the zoning administrator for Rockbridge County, for the construction of a radio tower, which is the subject matter of this litigation; and

On June 17, 1976 forty-two citizens, most of whom reside within the said residential district and the others residing in the close proximity thereof, availed themselves of the 'direct access' provision of Virginia Code section 15.1-496.3, in lieu of appealing to the Zoning board of appeals, seeking to prevent the construction of the radio tower; and

The defendant, WANV, Incorporated, filed a motion to dismiss on the ground that the complainants have not complied with the statutory requirements set out in Virginia Code section 15.1-496.3 in having failed to file suit within the requisite fifteen days after the start of construction. Neither defendant, Rockbridge Broadcasting Corporation, or the Rockbridge County zoning administrator joined in the motion to dismiss; but to the contrary, the zoning administrator by its counsel, the commonwealth's attorney for Rockbridge County, says that a radio tower is not a public utility within the meaning of section 4-1-10 of the ordinance, and that the building permit should be withdrawn.

Upon consideration thereof, the Court finds:

A radio tower is not a public utility and/or other facility necessary for provision and maintenance within the meaning of the Rockbridge County zoning ordinance and the Virginia statutes; and

The issuance of the building permit to the defendant WANV, incorporated for the construction of a radio tower in a residential district was absolutely void; and should be rescinded and withdrawn; and

The suit brought by the complainants was filed within fifteen days after the start of construction, and the motion to dismiss filed by the defendant radio station should be overruled.

It is therefor ORDERED and DECREED that the motion to dismiss filed by the defendant WANV, incorporated,be and the same is hereby overruled and dismissed; and

It is further ORDERED and DECREED that the building permit issued on December 17, 1975 by the Zoning administrator to WANV, Incorporated, for the construction of a radio tower in a residential district of Rockbridge County be and the same is hereby determined and declared void, and the action of the Rockbridge County zoning administrator, taken November 3, 1976 pursuant to his statutory

authority, notifying WANV, incorporated, in writing that building permit number 1253, issued to WANV, Inc. on December 17, 1975 was ordered rescinded and withdrawn, be and the same is hereby ratified and approved.

This cause stands continued until further order of this Court.

Enter: November 9, 1976

Paul E. Hatfield JUDGE

[NOTICE OF APPEAL - Filed December 3, 1976]

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF ROCKBRIDGE

Houff et al :
:
vs : NOTICE OF APPEAL
:
WANV, Inc. et al :

The defendants in the above styled case, WANV, Inc. and Rockbridge Broadcasting Corporation, do hereby give NOTICE OF APPEAL from the decision stated in the Judicial Order issued by the Honorable Judge Holstein dated November 9, 1976. Also, in accordance with Rule 5:6 of the Virginia Supreme Court, the defendants do hereby state that a transcript of the proceedings at trial will be hereafter filed with the court.

Respectfully submitted,

WANV, Inc.

Rockbridge Broadcasting, Inc.

BY COUNSEL

_____
Humes J. Franklin, Jr.
Franklin and Franklin
P. O. Drawer 1140
Waynesboro, Va. 22980

_____
William Poff
Woods, Rogers, Muse, Walker & Thornton
105 Franklin Road SW
Roanoke, Va. 24001

* * C E R T I F I C A T E * *

I hereby certify that I have this ___ day of _____, 1976, mailed a true and accurate copy of the foregoing to William T. Robey, III, Box 669, Buena Vista, Va. 24416 and to Beverly C. "John" Read, Commonwealth Attorney County of Rockbridge, Lexington, Va. 24450.

_____
Humes J. Franklin, Jr.

OFFICES
ND FRANKLIN

[NOTICE OF TRANSCRIPT FILING - Filed December 8, 1976]

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF ROCKBRIDGE

HOUFF, et al	:	
vs	:	NOTICE OF TRANSCRIPT
WAIW, Inc. et al	:	

The Appellant does hereby give Notice that the typed transcript of the above styled case which was heard on October 21, 1976 is hereby filed and delivered to the Clerk of the Rockbridge Circuit Court and ask to be made a part of the record pursuant to Rule 5:9 (3) of the Virginia Rule of the Supreme Court.

Ronald W. Denney
Franklin and Franklin
P.O. Drawer 1140
Waynesboro, Va. 22980

William B. Hoff
Woods, Rogers, Muse, Walker & Thornton
105 Franklin Road SW
Roanoke, Va. 24011

* * CERTIFICATE * *

I hereby certify that I have this 7th day of Dec., 1976 mailed a true and accurate copy of the foregoing to W. F. Doley, III, Box 663 Buena Vista, Va. 24416 and to Beverly C. "John" Read, Commonwealth Attorney, County of Rockbridge, Lexington, Va. 24450.

Ronald W. Denney

FOR YOUR INFORMATION

LAW OFFICES
FRANKLIN AND FRANKLIN
WAYNESBORO, VIRGINIA

ASSIGNMENTS OF ERROR - Filed January 27, 1977

(1) The trial Court committed error in overruling WANV's motion to dismiss and motion to strike because the evidence clearly established as a matter of law that the complainants lacked standing to attach the issuance of a building permit to WANV as they had failed to meet the jurisdictional requirements of §15.1-496.3 of the Code of Virginia (1950, as amended).

(2) The trial Court committed error in refusing to admit into evidence a copy of the opinion of the Commonwealth's Attorney of Rockbridge County on which the Zoning Administrator had relied in making his determination that a building permit could be issued to WANV for construction of a radio tower and utility building under §4-1-10 of the Zoning Ordinance of Rockbridge County, Virginia.

(3) The trial Court committed error in refusing to admit into evidence a certified copy of the minutes of the meeting of the Board of Supervisors of Rockbridge County at which the previous zoning ordinance had been repealed, the minutes having been tendered for the purpose of showing the legislative intent of the Board of Supervisors in enacting the current zoning ordinance, as this evidence was relevant to the determination of whether the issuance of the permit by the Zoning Administrator was arbitrary and capricious.

(4) The trial Court committed error in overruling WANV's motion to strike and in rendering its decretal order, directing revocation of WANV's building permit, because the evidence failed as a matter of law to establish that the issuance of the building permit by the Zoning Administrator was arbitrary or clearly unlawful and because the evidence failed to overcome the presumption of validity attaching to the issuance of the building permit.

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18. WITNESS - M. ROBERT ROGERS

19. Direct Examination by Mr. Robey:

20. Q. Would you state your full name for the benefit of the
21. Court and the record, sir?
22. A. It is M. Robert Rogers, R-o-g-e-r-s.
23. Q. And your occupation?
24. A. I own broadcast properties, and I own a farm, and have

1. some other business activities.
2. Q. You are president and owner of WANV, are you not?
3. A. That is correct.
4. Q. And you are the person who applied for the building
5. permit which is in question here, is that correct, sir?
6. A. The Corporation applied for the building permit.
7. Q. And you signed the application, did you not?
8. A. That is correct.
9. Q. Now, your counsel, by opening statement here, has made
10. reference to the fact that you haven't certified any-
11. thing, in regard to your compliance with the Zoning
12. Ordinances and so forth of Rockbridge County. I'm going
13. to show you a paper here, which appears to bear your
14. name, which says that the application for this permit,
15. made in accordance with the description and for the
16. purpose herein set forth . . . I call your attention to
17. this. This application is made subject to all County
18. and State laws, and Ordinances, and which are hereby
19. agreed to the undersigned, and which shall be deemed a
20. condition to entering into the exercise of this permit.
21. I show you that paper, and ask you whether that is your
22. signature on that paper?
23. A. That is my signature.
24. Q. You did certify then, that you would comply by the laws

1. of the County of Rockbridge, when you applied for this
2. permit, did you not?
3. A. I did whatever that paper calls for.
4. MR. ROBEY: We would introduce this into the
5. evidence, Judge.
6. COURT: Any objection, gentlemen?
7. MR. FRANKLIN: No objections, Your Honor please.
8. COURT: All right; this document is admitted
9. into the evidence and identified as
10. Petitioners' Exhibit Number One.
11. Q. Mr. Rogers, you obtained this permit to build a two
12. hundred foot tower in this residential area, did you not?
13. A. I obtained the permit that is described on that applica-
14. tion.
15. Q. Well, it is a permit to build a two hundred foot tower
16. in a residential area?
17. A. That is correct.
18. Q. And you knew that the area was residential when you
19. applied for it, did you not?
20. A. Yes, I did.
21. Q. And it is still your intent, as I understand it, to build
22. a two hundred foot radio tower on this site?
23. A. The antenna will be built in accordance with the permit.
24. Q. And who is the owner of that land?

1. A. William Agnor is the present owner; we have it under a
2. lease option, and we are to acquire it in the near
3. future.
4. Q. Then you have no actual title or deed--the property has
5. not been deeded to you? Is that correct?
6. A. It is under an option of purchase, and a lease in the
7. meantime; and the lease specifies the purpose for which
8. it is to be used.
9. Q. Did Mr. Agnor appear before the Building Inspector with
10. you in order to apply for this permit?
11. A. No, he did not.
12. Q. Do you have any signed authorization from the landowner
13. to build a tower on Mr. Agnor's land?
14. A. I believe it is included in the lease option. I do not
15. have that document here . . .
16. Q. Do you have that lease option with you?
17. A. I doubt that we do. But Mr. Agnor will be a witness
18. later, I'm told.
19. Q. Well, is your answer to my question that you do not have
20. any signed authorization from the landowner to apply for
21. building something on his property?
22. A. Within the terms of the lease option, I believe we do.
23. Q. Mr. Rogers . . . I'm sorry, I didn't understand you.
24. A. I said within the terms of the lease option, I believe

1. we do.
2. Q. He did agree to you applying for a building permit?
3. A. He agreed to our putting the structure on the site.
4. He knew what the purpose of the lease option was.
5. Q. All right. What have you built out there already, Mr.
6. Rogers?
7. A. To date, we have completed excavations and grading, and
8. have installed the foundation for the tower base, and
9. what are called the tower anchors, the--I think there are
10. six of them.
11. Q. What does that amount to? Some concrete?
12. A. At the moment, it amounts to concrete that at the
13. highest point projects three feet above grade level.
14. And that structure itself is approximately two by ten
15. feet. And we have also constructed, which is included
16. in the permit, a ten by ten utility building. And that
17. is complete, except for wiring, and . . .
18. Q. Tell the Judge where . . . How big is this tract of land?
19. A. About three acres.
20. Q. Tell the Judge where on that three acre tract of land
21. you chose to put this metal utility building?
22. A. It's put quite close to the entrance, but it meets the
23. zoning specifications.
24. Q. How far is it from the property line?

1. A. More than five feet.
2. Q. More than five feet--but not hardly an inch more, is it?
3. A. It was put that close in order to be able to reach it in
4. emergencies, in times of bad weather.
5. Q. When did you build this utility building--this metal
6. building?
7. A. I believe it was in July. I don't have the . . .
8. Q. It was after we filed this suit, and you had notice of
9. this situation before the Court, wasn't it?
10. A. That is correct.
11. Q. And the building permit that you were issued--what did
12. you do with it?
13. A. Mr. Agnor, who was subcontractor of the tower con-
14. struction--Mr. Agnor is, himself, a contractor, as is
15. known in this community--subcontracted the initial work;
16. and he has the building permit in his possession.
17. Q. And have . . .
18. A. And he has had all along, since it was issued.
19. Q. Have you been abiding by the Building Code as you went
20. along here, Mr. Rogers?
21. A. I assume that the people who perform the actual con-
22. struction did so.
23. Q. Well, you signed up on the building permit to comply with
24. the Building Code, didn't you?

1. A. I did.
2. Q. And were you aware that the Building Code requires you to
3. post a copy of the permit on the construction site, so
4. that it is available to the public for inspection, so
5. they know what you're doing?
6. A. I'm aware of that.
7. Q. Did you post it?
8. A. I didn't. But I'm quite sure the contractor did.
9. Q. You're sure the contractor did?
10. A. Well, I think he'll speak for himself when he gets here.
11. Q. Where was it posted?
12. A. I think he should speak for himself. I did not witness
13. it.
14. Q. Well, you didn't post it, and you didn't see it posted?
15. A. I personally did not post it.
16. Q. When did you notify the Building Inspector that you were
17. going to start work out there, in accordance with the
18. Building Code, which says you shall give the Building
19. Inspector twenty-four hours' notice of starting con-
20. struction?
21. A. I'm sorry--I don't recollect that.
22. Q. Well, you certainly don't represent to the Court that
23. you notified the Building Inspector before you started
24. construction, did you? You called him up when you got

1. through with that building, and said, "I'm through with
2. it," didn't you?
3. A. I talked to somebody in the County government before
4. starting the operation on the building.
5. Q. Well, did you notify him the day that you were going to
6. start construction? Twenty-four hours in advance?
7. A. I'm quite sure I notified the . . . Yes, I recall now.
8. Mr. Miller was out on an inspection. I called the office.
9. And in his absence, I told Mr. Austin that we had
10. decided to go ahead forthwith with the construction of
11. the utility building. And I . . .
12. Q. You notified Mr. Austin?
13. A. In the absence of Mr. Miller.
14. Q. You talked with Mr. Austin?
15. A. I talked with Mr. Austin. And at the time I also asked
16. him what the Code required in distance from the property
17. line. And that's when he read to me from the Code about
18. the five feet.
19. Q. So you went ahead and started to construct, after this
20. suit was started, apparatus for radio broadcasting; is
21. that correct? Buildings and structures that would be
22. used to do that--is that correct?
23. A. Well, as you know, we had actually started earlier, but
24. that particular building was started after the suit was

1. filed.
2. Q. When did the FCC issue you a construction permit?
3. A. September thirtieth, 1976.
4. Q. Well, now, Mr. Rogers, you have just told the Court that
5. you got your construction authorization from the FCC
6. on September thirtieth; and you had previously said that
7. you had started building much prior to that. Aren't the
8. two a little inconsistent?
9. A. No, not at all.
10. Q. Why not?
11. A. The FCC permit is for the--the major construction . . .
12. specifically, the antenna itself. Minimal site work
13. related to construction, and constituting the start of
14. construction, doesn't require FCC permission.
15. Q. Well, are you saying for FCC purposes you did start con-
16. struction, or you didn't start construction prior to
17. September thirtieth?
18. A. We started certain elements of the construction that were
19. for FCC purposes not pertinent on May fourteenth, 1976.
20. Q. That was test borings, wasn't it?
21. A. No, it wasn't. It was much more than that. That was just
22. part of what happened then.
23. Q. What did you build then?
24. A. At that time, on May thirteenth, our tower contractor,

1. Mr. William Angle--and this was a Thursday--went out
2. there, in order to lay out the position for the anchors.
3. The tower base position had already been fixed, in
4. December, by Clark and Company Surveyors, who were in
5. charge of the survey. The position of the tower base is
6. extremely sensitive, because when applying to the
7. Federal Communications Commission, and to the Federal
8. Aviation Administration, you must specify precise
9. coordinates, longitude and latitude. The position of
10. the anchors for the guy wires is, to a certain extent,
11. optional. They can be swung in a three hundred and sixty
12. degree arc. They appear at a hundred and twenty degree
13. intervals. And they can be changed to adjust for
14. ground conditions. The tower base itself is fixed. It
15. could not be changed without making a new application to
16. the Federal Communications Commission. Therefore, Mr.
17. Angle went out there on May thirteenth. This is his
18. specialty, to position the anchors, and to see if he
19. wanted to exercise his options to swing them in this arc,
20. in case he found difficult ground conditions. So, to
21. that extent, some testing of the ground was done on the
22. thirteenth.
23. On the fourteenth, he was . . . By the fourteenth,
24. he was satisfied. As a matter of fact, he was satisfied,

1. as I understand it, by the morning of the thirteenth.
2. And Mr. Agnor, the subcontractor, had sent for a backhoe
3. operator. But the backhoe was having mechanical diffi-
4. culties and didn't arrive until the fourteenth.
5. At that time, the backhoe substantially completed
6. the excavation for the tower base, and also completed the
7. excavations for the anchors. And they were ready then
8. to pour concrete the next day, the fifteenth. However,
9. in the interim, Mr. Read, the Commonwealth's Attorney,
10. the evening of the fourteenth, had asked us--through
11. calling me at my home--to cease construction operations
12. at the site forthwith. So, for that reason, the concrete
13. was not poured the next day as was scheduled.
14. Q. All right, sir. Are you familiar with the letter dated
15. July thirteenth, wherein your counsel wrote the Court
16. stating that you had no immediate plans to construct the
17. tower at this site?
18. A. May I see it? I am familiar with it, but I'd better
19. refresh my memory.
20. Q. I refer you to the last paragraph.
21. A. Yes. As you can see, I received a copy of it.
22. Q. And it states in there that you had no immediate plans
23. to construct a tower, doesn't it?
24. A. That's what it states.

1. Q. Well, is it . . . was that true, or not true?
2. A. It was true, and still is true. But I think that Mr.
3. Franklin, who is a professional in law and a layman in
4. radio broadcasting, very possibly didn't express himself
5. as he might have on hindsight. What he knew, and which
6. I knew, and which was still the case even in early
7. October, is that we were not going to put up any steel
8. at that time. That's what he was thinking about, the
9. tower. And there was no connotation that we were contem-
10. plating changing the site, or moving it elsewhere
11. immediately, that at that stage of the game we had no
12. immediate plans to erect the steel for a tower. That
13. was true then; it is true now; and it was true the first
14. week of October, although if we were free from restraint,
15. we would now put up the steel. In early October, at
16. the time you asked for your temporary injunction, there
17. was no steel at that site--the reason being that the
18. foundation must harden a considerable length of time,
19. a couple of weeks at least, before it would be prudent to
20. put two hundred feet of steel on it.
21. Q. Mr. Rogers, I want to take you back to about September
22. twenty-second or so of 1974, and especially to refer you
23. to a Rockbridge County News-Gazette article that
24. appeared in the newspaper on September twenty-fifth, 1974,

1. purporting to quote you in regard to your understanding
2. of what you and any other radio people could do in
3. Rockbridge County, under the Zoning Ordinance. And I
4. just want to ask you whether these comments in the news-
5. paper attributed to you are correct or incorrect. And
6. I read, sir, referring to you, addressing the Rockbridge
7. County Board of Supervisors: "'Communication authorities,
8. including the FCC, do not consider broadcast stations
9. to be public utilities, and they are not regulated by
10. the Virginia State Corporation Commission, which has
11. jurisdiction over bona fide utilities,' Rogers said."
12. Going on with what you said: "'Zoning authorities,'
13. he claimed, 'know of no other community which permits
14. radio broadcast towers in their residential zones, as a
15. matter of right without at least a special use permit,
16. requiring a public hearing. As a rule,' he said, 'such
17. towers are restricted to industrial, commercial, and
18. rural zones, and even there a conditional use permit is
19. usually required. Radio station installations of four
20. or more towers each three hundred to four hundred feet
21. high are not uncommon,' Rogers points out. 'Some TV
22. transmission towers go up a hundred feet or more. Tall
23. towers are painted bright orange and white, and must
24. carry . . . '" and so forth. And . . . well . . .

1. A. May I see that?
2. Q. Yes, sir. And you will notice the date of it, sir.
3. A. Yes. Well, the headline, of course--and it's from your
4. very excellent News-Gazette--says: "Radio towers may
5. rise without hearing." And that's the chief import of
6. the article. And . . .
7. Q. You appeared before the County Board of Supervisors and . . .
8. MR. FRANKLIN: Your Honor please, I think he's got
9. the right to respond to Mr. Robey's
10. rather lengthy question.
11. COURT: You're right.
12. A. Mr. Robey, I regret that you are incorrect. I did not
13. appear before the County Board of Supervisors. I have
14. never appeared before the County Board of Supervisors
15. until this year. And this was merely an interview based
16. on a press release, with a reporter from the News-
17. Gazette, who called me by telephone. And the information
18. in it, Mr. Robey, if I may refresh your memory, was
19. based on a memorandum you wrote to me, when you were our
20. counsel at that time, and gave us advice because our
21. interest in it was opposite at that time.
22. Subsequently, Mr. Robey, you changed your mind and
23. advised us that we had no case and that the law supported
24. the applicant--there was another applicant--and that the

1. County had the right to issue the permit. At least, that
2. was the substance of a letter that you wrote to us,
3. giving us a case from the State of Washington; and you
4. orally advised me not to pursue the matter.
5. Our Company made no protest, or any form of objection,
6. to the Rockbridge County Board of Supervisors at that
7. time. And indeed, I consulted the Chairman of the Board,
8. who, at that time, was Tom Dixon, and asked him if he
9. supported the County's position on the permission for
10. broadcast towers; and he said that he did and as far as
11. he knew, so did the other members of the Board at that
12. time.
13. Q. All right, sir. If I understand you, you are saying
14. that you did make a statement, although it was not before
15. the Board of Supervisors, that radio stations were not a
16. public utility?
17. A. I did so at that time on your advice, which you later
18. changed; and I myself, of course, am a layman. I'm not
19. a lawyer. I'm not an authority on public utilities, or
20. zoning laws.
21. Q. Well, you referred in here to the fact that radio towers
22. are not permitted in a residential area.
23. A. Based on a memorandum you wrote me about that time.
24. Q. Yes, sir. And that continues to be the situation, doesn't

1. it?
2. A. No. You changed your mind later, and advised me other-
3. wise.
4. Q. Are you saying that you are willing to discuss the matters
5. that you discussed with me when you were trying to defeat
6. another radio station from coming into Rockbridge County?
7. I think maybe you ought to consult with your counsel,
8. first, sir, as to whether or not . . .
9. MR. POFF: Your Honor please, that doesn't
10. seem necessary. I think that line
11. of questioning is certainly improper;
12. to get into the specifics of the
13. conversation between counsel and a
14. client certainly seems to me involves
15. the attorney-client privilege, and
16. would not contribute anything rele-
17. vant to this discussion.
18. COURT: Well, normally, that would be true,
19. Mr. Poff; but Mr. Rogers himself has
20. voluntarily testified as to the
21. conversation he had with Mr. Robey,
22. and the advice given by Mr. Robey to
23. Mr. Rogers; and I believe in that
24. instance, it gives Mr. Robey an

1. opportunity to explain, or to bring
2. such evidence out. It was Mr.
3. Rogers who volunteered that Mr. Robey
4. had advised him one way, and . . .
5. MR. POFF: I would suggest to the Court that
6. Mr. Robey is treading on rather
7. dangerous ground here, because
8. when he gets involved in cross-
9. examining the witness on conversations
10. that he had with the witness, who
11. was then his client, he himself is
12. very likely to be put on that stand
13. as a witness, and . . .
14. MR. ROBEY: I don't want to do that, and . . .
15. MR. POFF: . . . disqualify himself as counsel.
16. MR. ROBEY: . . . I agree. And that's the reason
17. I said it was a matter of--well, if
18. they don't waive it, then fine. I
19. certainly don't want to pursue it.
20. But I didn't bring it up. He
21. brought it up, and . . .
22. MR. POFF: While it might be very interesting
23. to go into the details of their
24. relationship . . .

1. MR. ROBEY: It would be.
2. MR. POFF: . . . I would suggest it is not going
3. to contribute anything more than
4. volume to the record of this case.
5. MR. ROBEY: I'd welcome it, but it's not a
6. matter of that. I think it's a
7. matter of . . . all he's got to do
8. is say, "I don't want you to go into
9. it," and I think that's where I
10. would stop it.
11. COURT: All right.
12. MR. ROBEY: I just want to ask him . . .
13. COURT: So we can leave the Court's ruling.
14. All right, gentlemen.
15. Q. So if you would just answer my question directly as to
16. what I am asking you, Mr. Rogers, you do concede that you
17. made these statements?
18. A. That's a paraphrase of the statements I made about that
19. time, before I was fully informed.
20. Q. All right.
21. MR. ROBEY: We would introduce that into the
22. evidence.
23. MR. POFF: Well, Your Honor please, the
24. allegedly relevant part of this is

1. already in the evidence, and I don't
2. know that this adds or detracts from
3. that. Personally, if Mr. Robey
4. wants it in, I don't object to it.
5. COURT: All right. This newspaper publication
6. is admitted into the evidence, and
7. is identified as Petitioners'
8. Exhibit Number Two.
9. Q. Mr. Rogers, you own a station over in Waynesboro; is
10. that correct?
11. A. That is correct. It's licensed to Waynesboro; it's
12. physical location is in Augusta County.
13. Q. And the tower that you have over there is so situated
14. with the present radio tower of WREL that the FCC won't
15. approve you; they would approve somebody else, but they
16. won't approve you using that tower out there--is that
17. correct, sir?
18. A. I don't know what they'd do about somebody else. Our
19. own position is in the record; it was put there on
20. October seventh. The FCC requires us to move. So does
21. our contract with WREL require us to move. So as I see
22. it there is nothing else in front of us.
23. Q. So is it correct that . . .
24. MR. FRANKLIN: Your Honor please, I would object to

1. this line of questioning going any
2. further--unless the Court takes the
3. position that we're wrong in what
4. we said in the opening as to the
5. posture that this case is in, we
6. don't reach this line of questioning.
7. Mr. Robey is--I think his questions
8. are proper insofar as they deal with
9. the building permit and insofar as
10. they deal with the start of con-
11. struction, and this type of thing,
12. if Your Honor please. But until he
13. produces evidence to show that there
14. has been an arbitrary and capricious
15. decision, then we don't even reach
16. this line of questioning.
17. MR. ROBEY: I agree.
18. COURT: Well, just a moment. To avoid any
19. confusion in the record, in reading
20. the responsive pleadings to the
21. petition, it is my interpretation of
22. the pleadings that these gentlemen,
23. in defense, were offering, in
24. support of your defense, Section

1. 15.1-496.3, which provides, among
2. other things, for a city to prevent
3. construction of buildings in viola-
4. tion of the Zoning Ordinance, where
5. a building permit has been issued
6. and the construction of the building
7. for which such permit was issued
8. is subsequently sought to be pre-
9. vented, restrained, corrected, or
10. abated as a violation of the Zoning
11. Ordinance, by suit filed within
12. fifteen days after the start of
13. construction, by a person who had
14. no actual knowledge of the issuance
15. of the permit, the Court may hear
16. and determine the issues raised in
17. litigation, even though no appeal
18. was taken from the decision of the
19. administrative officer to the Board
20. of Zoning Appeals.
21. That is my understanding from
22. your responsive pleadings, gentle-
23. men, that . . .
24. MR. FRANKLIN: If I might--if Your Honor would

1. indulge me just for a moment.
2. COURT: Yes, sir.
3. MR. FRANKLIN: If the Court please, our responsive
4. pleadings dealt with that in the
5. motion to dismiss, which the Court,
6. at this juncture, has overruled.
7. And we go on to further answer,
8. saying, in Paragraph Three of our
9. Answer, that we have a valid building
10. permit, if Your Honor please. I
11. think we're . . . I wish we were
12. back, if Your Honor please, into our
13. motion to dismiss; but I think at
14. this juncture, from what was said
15. at the opening today, we're past
16. that and into really the crux of the
17. case, which we believe is whether
18. or not there is a valid building
19. permit. And if there is, in fact,
20. a building permit that was issued in
21. December, then it must be clearly
22. shown that there was action in an
23. arbitrary and capricious manner, or
24. that it's plainly wrong--or we don't

1. reach the questions that Mr. Robey
2. touches on.
3. MR. ROBEY: I withdraw the question, sir. It's
4. getting over into the area of why
5. he's got to go to another place,
6. and why he's insisting on that . . .
7. COURT: Well, gentlemen, let it be under-
8. stood that when I make these observa-
9. tions in the record, it's purely
10. to remove any possible misunder-
11. standing that I may have as to the
12. respective positions taken by the
13. parties.
14. MR. FRANKLIN: I understand that, Judge.
15. COURT: I have no feeling in this matter at
16. all; I am sitting here, and I will
17. try the case according to the evi-
18. dence and the law.
19. MR. FRANKLIN: I understand that, Judge. I wasn't--
20. I hope Your Honor didn't glean the
21. impression that I was implying other-
22. wise.
23. COURT: No. No. All right.
24. Q. Just these last two or three questions, Mr. Rogers. This

1. tower, you say, is two hundred feet high; is that right?
2. A. That's right.
3. Q. And the site is what altitude above sea level?
4. A. It's in my papers, but I . . . suspect it's somewhere
5. between twelve hundred and fourteen hundred feet.
6. Q. Does your investigation reveal that that's one of the
7. highest areas around here, outside of the mountain
8. ranges?
9. A. It's among the generally higher areas, yes, sir.
10. Q. All right. It will be located how many feet from the
11. closest home?
12. A. About two hundred, maybe more.
13. Q. And you talked in terms of it being necessary to put
14. up guy wires, or cables, to keep it standing?
15. A. To support the tower. That's conventional, and . . .
16. Q. And how many of those do you have to run?
17. A. As I understand it--now, you know, you're asking me
18. things that I'm not completely prepared on, because I
19. have the documentation elsewhere--but the conventional
20. situation, for that height tower, would show six or nine
21. guy wires, but only on three radii, if you follow me.
22. Q. Six to nine guy wires, you say?
23. A. Yes.
24. Q. On three radii?

1. A. They would be placed on three radii. And the closest
2. guy anchor, or the farthest guy anchor--which I think is
3. the thing you'd be most interested in . . . the farthest
4. one from the tower . . .
5. Q. Yes, sir.
6. A. . . . would be approximately seventy percent of the
7. tower height, which, in this case . . . well, you do the
8. arithmetic. I'm not too good at that. A hundred and
9. forty feet. That would be the . . .
10. Q. Going in all directions, I suppose?
11. A. There are three.
12. Q. Completely surrounding the tower?
13. A. But only on three radii. In other words, three sets--
14. in other words, it's not going to be an entire ring.
15. I think the people of this community must be fairly
16. familiar with this, because the present tower, up also
17. on a high elevation, has a similar arrangement. And
18. more recently, the Columbia Gas tower, built in a resi-
19. dential area in 1967, has that same arrangement. Those
20. towers, incidentally, are about twice the height of the
21. one we propose.
22. Q. You talk in terms of the Columbia Gas tower being built
23. in a residential area. You don't represent to the Court
24. that this Zoning Ordinance was in effect in 1967?

1. A. No. We know perfectly well that the County was between
2. ordinances, at that time.
3. Q. It was not . . .
4. A. But that already had been designated on paper as a
5. residential area.
6. Q. All right. So you say the wires will extend seventy per-
7. cent of the height of the tower?
8. A. The farthest, for a guy anchor--and it operates at a
9. slant, going up to support the tower.
10. Q. And you estimate two hundred feet from the homes around
11. there to the tower?
12. A. Yes. It's estimated. I don't have the plat in front of
13. me. And I'm talking now of a residence itself, as I
14. estimate--not necessarily of a fence line.
15. Q. And how far would you estimate that you chose, on this
16. three-acre tract out there--how far did you build, or
17. choose to build, this utility building, as you call it,
18. from Mr. Houff's house?
19. A. As I told you, it was constructed five or more feet from
20. the property line, and was put at that position for
21. reasons of access. Because occasionally, although there
22. will be no regular personnel at the site--there will be
23. no studios or offices there, and the station will be
24. operated by remote control, as I would say most stations

1. of this kind are in the United States--but there is a
2. weekly inspection required; and there would be times
3. when it goes off the air, and somebody's got to go out
4. there and fix it.
5. Q. Tell me what's housed in that building?
6. A. A thousand-watt transmitter.
7. Q. A thousand-watt transmitter?
8. A. Yes. That's . . .
9. Q. All right. Go ahead.
10. A. That's somewhat less than the power emitted by an electric
11. toaster.
12. Q. A thousand watts?
13. A. Yes, a thousand watts.
14. Q. Of transmission? Well, go ahead.
15. A. We have a picture of it over there. Would you like to
16. have it?
17. Q. A thousand watts transmission what, goes in there?
18. A. It's a steel case, about the size of a large refrigerator.
19. Q. And what do you call it?
20. A. An AM transmitter, with a rated power of a thousand
21. watts.
22. Q. What else goes in there?
23. A. Some small interconnecting devices about the size of an
24. average stereo or television set. And, of course,

1. electricity will go to it. Two hundred and twenty, one-
2. ten volt lines, similar to a residential line.
3. Q. And then you go from the building, or utility building,
4. with a line to the tower, and up the tower?
5. A. There will be a line, maybe a quarter of an inch thick,
6. that will lead from the transmitter house to the tower.
7. That could be buried, or else it would be on low supports,
8. about three feet from the ground.
9. Q. And how far will it be from the tower to the transmitter
10. building?
11. A. About a hundred and sixty feet maybe, maybe a hundred and
12. seventy.
13. Q. And you are saying you chose to put this transmission
14. building, or whatever it is, five feet from Mr. Houff's
15. property line, to save walking once a week a hundred and
16. fifty feet?
17. A. No, Mr. Robey. It would actually be more efficient for
18. us to put the transmitter house almost at the base of
19. the tower, because the shorter the line, the better off
20. we are.
21. Q. Right. Well, why'd you put it up there on Mr. Houff's
22. line?
23. A. Well, we didn't put it on Mr. Houff's line. We put it
24. on the property that we are occupying. And we put it as

1. close to the access road because it's been known to snow
2. in Rockbridge County, and at a time of deep snow, it
3. would be better to have that building for ready access
4. in case it needs service. And that was the sole reason
5. we put it there. Believe me, if we were in Florida or
6. California, or Acapulco, we would put it within three or
7. four feet of the tower. And if it really made a differ-
8. ence to your clients' position, we'd consider moving it.
9. Q. Mr. Rogers, is WANV, Inc., and WREL, Inc.--or whatever
10. the name of the Corporation is--in any way, as a radio
11. station, regulated by the State Corporation Commission?
12. A. No, they are not.
13. Q. That's all I have.
14.
15. Cross Examination by Mr. Poff:
16. Q. Mr. Rogers, with regard to the last question of Mr. Robey,
17. are you aware, sir, of why radio stations are not con-
18. trolled by the State Corporation Commission, but, rather,
19. are controlled by the Federal Communications Commission?
20. A. Well, I'm a layman, as you know; but having been in the
21. broadcast business a long time, I've picked up at least
22. what's called guardhouse law on the subject; and the
23. Federal Communications Act precludes other governments
24. from entering into the regulation of radio broadcasts and

1. TV broadcasts.
2. Q. It's an instance, then, of Federal pre-emption of State
3. regulations?
4. A. Right. Right.
5. Q. Mr. Rogers, you have been asked, sir, about the building
6. permit, which, despite some of the questioning of Mr.
7. Robey, I think is the crucial issue in this case. I will
8. ask you, sir, if you remember--and if you can't, I'll
9. show you documentation to refresh your memory--when you
10. made application for this particular building permit?
11. A. Yes, it's fixed in my mind. It was December the seven-
12. teenth, 1975.
13. Q. All right, sir.
14. MR. POFF: May I ask, Your Honor please, that
15. this document be marked for identi-
16. fication. It is the letter of, I
17. think, December sixteenth, as opposed
18. to December seventeenth as stated
19. by the witness.
20. COURT: Is there any objection to it?
21. MR. ROBEY: No, sir.
22. COURT: All right. The same is admitted into
23. the evidence, and identified as
24. Respondents' Exhibit Number One.

1. Q. May I ask you, Mr. Rogers, just to identify this docu-
2. ment, if you will, sir, and tell us when it's dated and
3. what it is?
4. A. That's a true copy of the letter that accompanied the
5. application. That's dated December the sixteenth, but
6. it was actually filed on December seventeenth.
7. Q. All right, sir. After the filing of Respondents' Exhibit
8. Number One, was a building permit issued?
9. A. Forthwith.
10. Q. I show you, sir, a document that I will ask to be marked
11. Respondents' Exhibit Two for identification, and ask you
12. if you can identify what that document is?
13. A. That is the building permit I received on December seven-
14. teenth, 1975. At least, it's a reproduction of it.
15. Q. So a building permit, pursuant to your application, was
16. then issued on December seventeenth, 1975?
17. A. That's correct.
18. MR. POFF: I would ask that this document be
19. received as Respondents' Exhibit
20. Number Two.
21. COURT: Any objection, Mr. Robey?
22. MR. ROBEY: No, sir.
23. COURT: The same is admitted into the evi-
24. dence and identified as Respondents'

1. Exhibit Number Two.
2. Q. Without asking you to read Respondents' Exhibit Number
3. One, sir, was that application for a permit to build the
4. structure that is at issue in this case--the radio
5. antenna and transmitter?
6. A. Yes. The two were coupled. It is an official reflection
7. of what's in that letter.
8. Q. The letter of December sixteenth outlines and describes
9. the construction that you planned to make, or build, out
10. there?
11. A. Right. Right.
12. Q. Now, there has been reference to what that construction
13. consists of, and am I correct in interpreting what you
14. say that there are basically two elements of it--the
15. antenna structure part of it, and the transmitter?
16. A. The little house for the transmitter, yes. Those are
17. the two basic elements. And as Mr. Robey has mentioned,
18. there will be a connecting wire, which, incidentally,
19. will not be carrying any electric AC on it, because we
20. went to considerable expense later in the proceedings
21. in front of the FCC and the FAA, in order to get exempt
22. from painting the tower or lighting it. So for that
23. reason, we will not have to carry any normal electric
24. current out to the tower.

1. Q. To break this construction into its constituent elements,
2. and talk about the transmitter for a moment--I show you,
3. sir, a document that I will ask to be marked as
4. Respondents' Exhibit Three for identification, and ask
5. you if you can identify that?
6. A. Yes. That's a picture of a typical thousand-watt
7. AM transmitter of the type that we are proposing at this
8. location.
9. Q. And what's the size of that transmitter?
10. A. Well, you have that on another page, so if you'll give
11. it to me, I'll try to give it precisely. I know it's
12. six feet tall. As I said, it's approximately the size
13. of a large refrigerator or home freezer. The actual
14. dimensions are seventy-two high, thirty-one inches wide,
15. and thirty-one inches deep.
16. Q. That was seventy-two inches high?
17. A. Yes, six feet high. And less than three feet wide, and
18. less than three feet deep.
19. Q. Now, is there any reason that you know about, sir, why
20. this kind of transmitter couldn't, for example, be
21. installed in a private home--Mr. Houff's home, or any-
22. body else's home?
23. A. Well, there's no practical reason; I don't know what the
24. regulations are. But it would not create any electrical

1. or other problems in somebody's home. And, as you know,
2. CB and ham radios are regularly installed in homes; and
3. they both transmit and receive in equipment not much
4. different from this.
5. Q. All right, sir.
6. MR. POFF: Your Honor please, this is
7. Respondents' Exhibit Number Three,
8. consisting of two pages; and after
9. Mr. Robey has an opportunity to
10. examine it--he may or may not have
11. seen that before--I will move its
12. receipt into the evidence.
13. A. Let me clarify that that is not precisely the transmitter
14. that we are necessarily going to put there, but they all
15. run to type. It will be . . . its outer characteristics
16. will be no different, and its electrical characteristics
17. will be no different.
18. Q. Will there be any difference in the wattage?
19. A. Oh, no. No. The wattage is controlled by the permit.
20. The permit is for a thousand-watt station.
21. COURT: Any objection, Mr. Robey?
22. MR. ROBEY: No, sir.
23. Q. There has been already in evidence now, sir, the fact
24. that you made an application for a permit, and that you

1. received the permit on December seventeen, 1975. When did
2. construction begin, sir?
3. A. Construction was ordered to begin on May thirteenth, but
4. as a practical matter it didn't begin until May four-
5. teenth, because, as I explained in direct with Mr. Robey,
6. the backhoe was late in getting on the site.
7. Q. All right. So construction began on May fourteenth, 1976,
8. and if I understood your direct testimony correctly,
9. when you were being questioned by Mr. Robey, the con-
10. struction continued that day and was terminated as a
11. result of a call which you had from the Commonwealth's
12. Attorney on the night of the fourteenth?
13. A. That is correct. And the tower contractor himself, for
14. that reason, returned to his base in North Carolina, and
15. was unavailable to start again after Mr. Read reconsidered
16. and said it was all right to go ahead.
17. Q. All right, sir. Now, one final point, sir--you were
18. asked about--and it was introduced into evidence--a news-
19. paper article in which you were quoted somewhat extensively
20. about construction of a tower, of a radio antenna and
21. transmitter, here in Rockbridge County. And I take it
22. that that was the time when you had an interest adverse
23. to that which you have at the present time?
24. A. Well, actually, it was only moderately adverse. We, at

1. the same time, were applying against a rival applicant
2. to put up a radio station to serve Buena Vista. We had
3. settled on the transmitter site inside the City of
4. Buena Vista. As a matter of fact, Mr. Robey very skill-
5. fully represented the City of Buena Vista in those nego-
6. tiations.
7. And because the site we had chosen in the City of
8. Buena Vista is in a flood plane, which was reconfirmed
9. in yesterday's newspaper, we didn't think it was practical
10. to have studios or offices, at least, permanently in
11. that location. And since this matter had surfaced--
12. you see, it was presented by the rival applicant to the
13. Federal Communications Commission, as if he could have
14. tower transmitting ability and studio office capability
15. at the one site in the residential zone. And that
16. puzzled us. So that's how we got into that situation;
17. and that's when we were advised correctly that you cannot
18. have studios and office operations in a residential
19. zone under the Code. And, of course, we're not going to
20. do that at the present site.
21. But that was the only situation. We were not trying
22. to disqualify the other applicant from having a tower.
23. And we never entered it on that basis.
24. Q. And as I understand it, sir, the comments or whatever

1. legal effect, if any, that they had, were made on the
2. advice that you had received from counsel?
3. A. Yes. And he, at that time, of course, said that in the
4. early stages, that his opinion was that even the tower
5. couldn't go there.
6. Q. And you are referring to Mr. Robey, I take it?
7. A. Right.
8. Q. I believe there came a time, did it not, sir--and I think
9. you alluded to this in your earlier evidence--when Mr.
10. Robey wrote to you and had a change of heart in this
11. matter?
12. A. Well, the thing that . . .
13. MR. ROBEY: Well, Judge, if he wants to go into
14. it, now, I want to go into it. I
15. absolutely want to. It just tickles
16. me to death. Just go right on.
17. COURT: Well, Mr. Poff, I believe you had
18. objected to Mr. Robey's line of
19. questioning, and . . .
20. MR. POFF: I objected to Mr. Robey's line of
21. questioning, sir, insofar as it went
22. into the details of the conversations
23. that they had.
24. COURT: Well, what you're doing now, though,

1. I believe, is . . . maybe it's in-
2. directly, but you're doing something
3. which I would rule to be objection-
4. able. And it places Mr. Robey in a
5. position where he can't defend him-
6. self unless he resigns from the
7. case.
8. MR. POFF: I understand that.
9. COURT: And I would suggest, since Mr. Robey
10. stated in the record that he was
11. withdrawing anything further with
12. regard to his relationship, the
13. attorney-client--that was in response
14. to your objection . . .I would
15. suggest that you not pursue that,
16. sir.
17. MR. POFF: All right, sir. Perhaps Mr. Robey
18. would stiuplate that he wrote this
19. particular letter to Mr. Rogers on
20. or about the date of . . . Well,
21. what is the date of that, Mr. Robey?
22. MR. ROBEY: It was prior to the date of the
23. newspaper article.
24. MR. POFF: All right, sir.

1. MR. ROBEY: But this is a letter, Judge, that
2. just says--at the end, it says, he
3. ought to go consult with his lawyers
4. in regard to this. But if you're
5. going to get into that, then I
6. think you've got to get into it all.
7. If he claims that I was his attorney,
8. which it says in here he ought to
9. go consult with his lawyer--but it's
10. just trying to monkey me around, is
11. what it amounts to. And I object
12. to it, unless we go into the whole
13. thing.
14. COURT: I don't think it should be brought
15. in.
16. MR. POFF: I'm certainly not trying to monkey
17. him around, as Mr. Robey said; I
18. think he opened this line of ques-
19. tioning himself, and I believe Mr.
20. Rogers has testified in the record
21. that . . .
22. COURT: Well, my ruling would close the
23. door on it. All right.
24. MR. POFF: Your Honor, we would, of course, like

1. to reserve the right to recall Mr.
2. Rogers, if necessary, as part of
3. our case, when we get to that . . .
4. COURT: Yes, sir; that's understandable.
5. MR. POFF: That's all.
6. COURT: All right. Mr. Read?
7.
8. Cross Examination by Mr. Read:
9. Q. With reference just to your line of testimony that I
10. called you and advised you to stop construction back on
11. May fourteenth of '76--just so that the record is clear
12. and the Court is advised, I think that I'd like to ask
13. you, were you not aware, at that time, that my office
14. had submitted a memorandum of law to the Attorney General
15. of Virginia, requesting guidance and an opinion from that
16. office as to the status of the building permit which had
17. been issued to WANV?
18. A. Yes, Mr. Read, I was aware of it. And I was aware . . .
19. Q. Also, were you aware of the fact that your attorney
20. consented, as did you, to holding in abeyance any activ-
21. ity with reference to construction on that site until an
22. opinion had been issued by the Attorney General?
23. A. If my attorney had that conversation with you, he did
24. not report it to me. And he'll just have to . . . if he's

1. allowed to speak for himself . . . There was no report
2. to me that we were inhibited in any way while this matter
3. was pending in your office.
4. Q. All right.
5. MR. READ: Let me see if Mr. Franklin, then,
6. will stipulate that.
7. MR. FRANKLIN: Your Honor, I don't recall it. I
8. don't know, Mr. Read--I'm not
9. accusing Mr. Read of anything. If
10. he's got a letter from me, or if
11. he's got anything . . . I don't see
12. the relevance of it, you know.
13. MR. READ: I just don't want the record, as
14. it stands right now, to suggest that
15. the Commonwealth's Attorney, or my
16. office, precluded construction.
17. There was an agreement between Mr.
18. Franklin and myself that while my
19. request to the Attorney General,
20. which is dated April ninth, 1976,
21. and which was offered to the Court
22. at the preliminary motion for the
23. temporary restraining order--that
24. this memorandum had been sent to the

1. Attorney General with a request for
2. guidance on how to interpret this
3. section of the Zoning Ordinance and
4. whether the permit should be revoked,
5. and that that was the reason that
6. Mr. Franklin and myself and Mr. Rogers
7. agreed to hold off any construction
8. until we got some sort of a ruling
9. from the Attorney General's office.
10. And if there cannot be a stipulation
11. as to that fact, then I would just
12. like for the record to so show.
13. Q. And you were aware of the fact, Mr. Rogers, of this
14. letter to the Attorney General?
15. A. Mr. Read, as I earlier answered, I was aware of the
16. letter to the Attorney General. I had no personal
17. discussions with you about ceasing operations; and I had
18. no communication from my counsel about ceasing operations,
19. until you called on May fourteenth and requested that
20. the operations be ceased.
21. MR. READ: Your Honor, I would like to ask that
22. as Rockbridge County Exhibit Number
23. One my letter of April ninth, 1976,
24. and the attached memorandum of law,

1. which is three pages--I believe of
2. which you already have a copy in your
3. file--to be marked as Rockbridge
4. County Exhibit Number One.
5. MR. POFF: Your Honor please, as far as the
6. fact that Mr. Read made a request
7. of the Attorney General's office for
8. an opinion, we will stipulate the
9. fact that such a request was made.
10. But I think that as far as the opinion
11. itself is concerned, I am aware that
12. it has apparently been thrown into
13. the Court's file and maybe presented
14. to the Court, and maybe read to the
15. Court--but I don't think Mr. Read's
16. memorandum of law is properly a part
17. of the record in this case. The
18. fact that he made a request for an
19. opinion is perhaps relevant, but . . .
20. MR. READ: Your Honor, I'm just concerned--I
21. don't want any implication by WANV,
22. or anyone else, that this halting
23. of construction was by any other
24. means other than by mutual agreement,

1. until there was a decision by the
2. Attorney General. I don't want it
3. to be interpreted any other way.
4. That's my only concern.
5. COURT: Well, I believe that Mr. Rogers
6. has testified that pursuant to a
7. call from Mr. Read, the Commonwealth's
8. Attorney, the construction was
9. stopped.
10. A. That is correct, Your Honor; yes, sir. That's the
11. fact.
12. MR. READ: Well, I just wanted to set forth
13. the reason for that; and apparently
14. he did not give the reason as being
15. that it was the basis for this
16. opinion from the Attorney General.
17. COURT: All right.
18. MR. READ: Those are the only questions I have.
19. So if we could have that marked as
20. an exhibit . . .
21. COURT: Well, there's an objection to it,
22. and . . . In this record--I took
23. this file home last night and reviewed
24. it--I found that the memorandum . . .

1. Is it referred to as a memorandum
2. of law?
3. MR. READ: Yes, sir, Your Honor. It's three
4. pages long, and it was attached to
5. a letter dated April ninth, 1976,
6. from myself to Andrew Miller, the
7. Attorney General.
8. COURT: It certainly would not, at this
9. stage of the proceeding, have any--
10. serve any useful purpose. That is,
11. the Court . . . you would be given
12. an opportunity to express your
13. views with regard to the facts as
14. established, and also your opinion
15. of the law which is applicable to
16. such facts. But I don't believe
17. that this memorandum of law would
18. be considered at this time as an
19. exhibit.
20. MR. READ: I didn't mean to offer it for that
21. purpose. I didn't mean to offer
22. it for that purpose at all. I think
23. that Mr. Poff and Mr. Robey and Mr.
24. Franklin know that. I'm only

1. offering it because I don't want
2. anything in this record that would
3. suggest that Rockbridge County was
4. the cause of the halting of this
5. construction. It was in an effort
6. to get an opinion from the Attorney
7. General. It doesn't make any
8. difference what is in the opinion
9. with reference to my legal analysis;
10. that's within the purview of the
11. Court; and that's why we have asked
12. for the guidance of the Court. And . . .
13. COURT: Well, my interpretation . . .
14. MR. READ: . . . I want that to show in the
15. record.
16. COURT: My interpretation of what you're
17. saying, Mr. Read, is that you did
18. this of your own volition, to seek
19. whatever advice or opinion that the
20. Attorney General's office might
21. offer.
22. MR. READ: Yes,sir.
23. COURT: And it was not at the direction of
24. the governing body that you called

1. and asked that this construction
2. cease.
3. MR. READ: That's correct.
4. COURT: Can't that be stipulated in the
5. record?
6. MR. POFF: The extent of our stipulation
7. is that Mr. Read requested an opinion
8. from the Attorney General's office.
9. His motivation for doing so, though--
10. he can testify to it if he likes;
11. and I suppose he has already stated
12. in the record, but I don't think
13. that's testimony. I think Mr. Rogers
14. will testify that as far as his
15. conversation with Mr. Read is con-
16. cerned, he was told to halt the
17. construction forthwith--with no
18. reference to any Attorney General's
19. opinion. Now, whatever discussions
20. Mr. Read may have had with others,
21. or whatever his motivation may have
22. been, that's something else. But
23. that wasn't . . . I think the state-
24. ment of Mr. Read is somewhat

1. misleading as far as Mr. Rogers's
2. perspective in this case. Because
3. it was not explained to Mr. Rogers
4. in the fashion that Mr. Read has
5. just offered it.
6. MR. FRANKLIN: Aren't we really dealing, Your Honor
7. please, with the fact that con-
8. struction was stopped on the four-
9. teenth pursuant to his call, for
10. whatever reason?
11. COURT: Well, this may be the foundation
12. of some future action, maybe.
13. That's why . . .
14. MR. FRANKLIN: Then it would be admissible at that
15. time. But, again, I . . .
16. COURT: I'm going to sustain the objection
17. to the filing of this at this time;
18. but, Mr. Read, just hold this matter
19. in abeyance for the time being.
20. All right; let's proceed, gentle-
21. men. Is there anything further of
22. Mr. Rogers?
23. MR. READ: No. I don't really think that that's
24. a significant point; I just wanted

1. the record to reflect it.
2. COURT: All right.
3. MR. READ: I have no other questions.
4. MR. FRANKLIN: Just so it's clear, I think Mr.
5. Poff did note that we, of course,
6. would reserve the right to recall
7. Mr. Rogers.
8. COURT: Well, Mr. Rogers was called as an
9. adverse witness by the Petitioners;
10. you didn't even have to examine him
11. at this stage.
12. MR. FRANKLIN: I understand that; yes, sir.
13. COURT: You have that right.
14. MR. FRANKLIN: Yes, sir.
15. COURT: Anything further, Mr. Robey?
16. MR. ROBEY: No, sir.
17.
* * *
18.
19.
20.
21.
22.
23.
24.

1. WITNESS - ERIC LEE SISLER

2. Direct Examination by Mr. Robey:

3. Q. State your name for the record, please, sir?

4. A. Eric Lee Sisler.

5. Q. And your occupation?

6. A. I am an attorney.

7. Q. And is it correct that you were Commonwealth's Attorney
8. for the County of Rockbridge on December seventeenth of
9. 1975?

10. A. That is correct.

11. Q. And, Mr. Sisler, are you generally familiar with the
12. building permit that was issued to WANV in December of
13. 1975, by Mr. Miller, and of the intentions of Mr. Rogers,
14. as stated on the stand here this morning, to construct
15. a transmitter building and put a transmitter and so forth
16. in a residential area of Rockbridge County? Are you
17. generally familiar with that situation?

18. A. Mr. Robey, the first time I saw the permit--the one I
19. think you have in your hand there, or close to it--was
20. maybe sometime in February of 1976.

21. Q. Tell me this, then: Were you consulted with by Mr. Miller
22. in regard to the issuance of this WANV permit?

23. A. No, sir.

24. Q. What was your answer?

1. A. No, sir.
2. Q. So you did not give . . . Is it correct, sir, you did not
3. give advice to Mr. Miller that this permit would be
4. properly issued?
5. A. No, sir. I did not. I had, on previous occasions--or on
6. a previous occasion, I believe, in '74, had correspondence
7. with Mr. Austin concerning another request for a building
8. permit, by a gentleman by the name of Mr. Peyton. Also, I
9. in '74--I believe it was in '74, sometime prior to this--
10. also had correspondence with Mr. Rogers concerning Mr.
11. Peyton's request. I believe it's alleged in the plead-
12. ings that I did, of course, render an opinion in '74, to
13. Mr. Peyton. That opinion was rendered to Mr. Austin. For
14. some reason--I don't know why--Mr. Peyton apparently
15. elected not to pursue his remedy. I heard nothing further
16. about a radio tower until, I guess, I was, you know, out
17. of office. In other words, I had not been consulted on
18. this; I had not issued any opinions on this.
19. Sometime after . . . late December, I believe it was--
20. and I'm not exactly sure, but I believe it was sometime
21. prior to Christmas, I did have a request from Mr. Read's
22. office, or somebody who was working for Mr. Read . . .
23. It may have been shortly after the first of the year; I'm
24. not sure . . . but requesting a copy of my opinion that I

1. had rendered Mr. Peyton some several years prior. I don't
2. know who the fellow was, but it was a young student, I
3. think, who was apparently working with Mr. Read.
4. I advised him that he should see Mr. Austin, because
5. I'm sure that Mr. Austin had the original opinion. And
6. if he could not find it, I was sure that I had a copy of
7. it that I could provide him, but that I would have to
8. look for it. He left the office, and that was the last
9. I heard about it, until, of course, there was some
10. publicity about the present case, and the statement was
11. made that this was issued pursuant to my opinion, which
12. was incorrect. It was not.
13. Q. It was not issued pursuant to your opinion?
14. A. No, sir; I was not consulted. I think it was certainly
15. issued, as alleged in the pleadings . . . you know, I
16. think Mr. Miller was obviously relying upon a previous
17. opinion; but I think there is a distinction to be made
18. between that reliance and the statement that this partic-
19. ular permit was issued pursuant to my opinion, because
20. I did not see it until that statement was made sometime
21. in February. And I think I went to Mr. Austin's office
22. and asked for a copy of the permit, because up until that
23. time I had not seen it.
24. Q. Don't answer this question until the Court has ruled on

1. a possible objection--I want to ask you whether or not
2. this WANV permit would have been issued, had it been
3. run by you before Mr. Miller made his decision. And
4. don't answer that question now, until . . . See if
5. there's any objection.
6. MR. FRANKLIN: We do object to it, Judge. Again,
7. that's not the question; it's
8. irrelevant. He may--Mr. Sisler . . .
9. we've got Mr. Robey's, we've got
10. mine, we've got Mr. Poff's, we've
11. got Mr. Read's . . . I'm sure Mr.
12. Sisler has an opinion, as does the
13. Court by this time, from the volum-
14. inous record, as to whether or not
15. it's permitted or not permitted.
16. But that's not the question; and we
17. do object.
18. COURT: I think the objection is well
19. taken.
20. MR. ROBEY: All right. I withdraw the question.
21. Your witness.
22.
23. Cross Examination by Mr. Franklin:
24. Q. Mr. Sisler, it's a part of the record, but just so we're

1. perfectly clear on the matter--you did, to Mr. Austin,
2. send a letter of August twenty-sixth, 1974 . . .
3. COURT: Now, if you're seeking to intro-
4. duce in the evidence any suggestion
5. or advice given by Mr. Sisler to
6. Mr. Austin, then I'm going to per-
7. mit the admission into the record of
8. a statement of his opinion at that
9. time.
10. MR. FRANKLIN: His opinion at that time--right.
11. His opinion in 1974; yes, sir. Yes,
12. sir.
13. COURT: Well, you can't . . . I don't
14. follow you, Mr. Franklin.
15. MR. FRANKLIN: It's a part of the record, anyhow--
16. what his opinion in 1974 was.
17. MR. POFF: Your Honor please, I believe that's
18. a part of the record, in that . . .
19. in Mr. Read's Answers . . .
20. MR. FRANKLIN: It's filed as an Exhibit, and . . .
21. MR. ROBEY: If it's a part of the record, then
22. why was my question objected to, is
23. the thing that I can't understand.
24. Because that's in regard to another

1. situation, which is not in issue
2. here. Mr. Sisler has said he did
3. not render an opinion in regard to
4. this permit.
5. MR. POFF: No one contends that he did.
6. MR. ROBEY: Then why is that relevant?
7. MR. POFF: Because . . . it's not relevant for
8. whether it's accurate or inaccurate;
9. it's simply relevant for the fact
10. that that was the legal background
11. that Mr. Miller had when he issued
12. this particular permit.
13. MR. ROBEY: Then why isn't it relevant that he
14. would or would not have issued this
15. permit? You're asking him for his
16. opinion on another permit--why isn't
17. it relevant as to . . .
18. MR. FRANKLIN: No, we're not.
19. MR. ROBEY: . . . this permit?
20. MR. FRANKLIN: No, we're not. We're just stating
21. that this is what Mr. Miller had.
22. COURT: Gentlemen, I'm not going to permit
23. this to be introduced in the record,
24. because you have objected, and I

1. sustained the objection, to the
2. introduction into the evidence of the
3. opinion of Mr. Sisler with regard to
4. this present situation. And I don't
5. think it would be fair to the wit-
6. ness, or to the Petitioners, to
7. allow it to come in. So I would rule,
8. gentlemen, that if you're going to
9. allow that to come in, I think the
10. other should come in, too. I don't
11. think it's relevant because, after
12. all, aren't you invading the province
13. of the Court in determining whether
14. or not this was legal, whether or
15. not to revoke the permit. It's not
16. what the Commonwealth's Attorney--
17. what his opinion was . . .
18. MR. FRANKLIN: Right. The only thing we're . . .
19. We're not introducing it . . . we're
20. almost into the hearsay evidence
21. area, Judge. We're not introducing
22. it for the correctness or the incor-
23. rectness of it, but merely the fact
24. that it was--whether correct or

1. incorrect--communicated to the
2. County Administrator, and to his
3. office . . . not whether it's correct
4. or incorrect. I think Your Honor's
5. right--that that would be . . . that
6. would be opening the door. And we're
7. not offering it for the correctness
8. or incorrectness of it--merely to
9. show that it was, in fact, done, in
10. both instances. Not for the correct-
11. ness of it.
12. COURT: I don't see how you can differenti-
13. ate between what Mr. Sisler may have
14. said in '74 and what he may have said
15. in '75 or '76. You have two
16. different transactions, do you not?
17. This letter to Mr. Peyton--does that
18. deal with the very same problem we
19. have today?
20. MR. ROBEY: No, sir.
21. MR. FRANKLIN: It was an interpretation of 4-1-10.
22. COURT: Of the Zoning Ordinance?
23. MR. FRANKLIN: Of the Zoning Ordinance.
24. COURT: Well, why, then, did you object to

1. the introduction of his interpre-
2. tation of the Zoning Ordinance in
3. February of 1976, or in April of
4. '76?
5. MR. FRANKLIN: Because he wasn't Commonwealth's
6. Attorney, and because Mr. Miller
7. didn't rely on what he may have said
8. after the fact.
9. COURT: Gentlemen, I think we're getting
10. into irrelevant issues, and I don't
11. think it's proper, and so I'm not
12. going to admit it into the evidence.
13. MR. FRANKLIN: We would ask . . . of course, they
14. are Exhibits, attached to Mr. Read's
15. pleadings; but we would respectfully
16. except to the Court's ruling . . .
17. COURT: All right.
18. MR. FRANKLIN: . . . on that matter.
19. COURT: Let's proceed, gentlemen.
20. Q. Mr. Sisler, they have not been introduced, but subsequent
21. to the letters of August twenty-sixth and September six-
22. teenth, 1974, did you at any time until you left office
23. render another letter to either Mr. Miller or to Mr.
24. Austin, dealing with this precise issue?

1. A. Mr. Franklin, what my files reflect . . . I'm trying to
2. find the date of the letter to Mr. Austin. That was in
3. August sometime I believe--concerning Mr. Peyton. I think
4. that's the letter you referred to . . . August the twenty-
5. fourth is the date that I wrote Mr. Austin. Now, your
6. question was whether or not any other opinions were
7. rendered, subsequent to that time?
8. Q. Dealing with this particular . . .
9. MR. ROBEY: This "particular?" I don't under-
10. stand what "this particular" is.
11. MR. FRANKLIN: This particular issue.
12. MR. ROBEY: Well, we're talking about this
13. building permit; that's the only
14. question . . .
15. MR. FRANKLIN: Right. This building permit in
16. question.
17. Q. Did you ever render an opinion on WANV's building permit?
18. A. Well, I can tell you what happened--and I don't know if
19. this answers your question directly or not. Subsequent
20. to my letter of the twenty-fourth to Mr. Austin, I
21. received a letter from Mr. Austin, dated September the
22. thirteenth, 1974; and he had enclosed with that letter a
23. copy of a letter that he--Mr. Austin--had received from
24. Mr. Rogers, who at that time was president of WANV,

1. dated September the tenth. In response to Mr. Austin's
2. letter of the thirteenth, and in further, actually, in
3. response to Mr. Roger's inquiry in his letter of the
4. tenth . . .
5. Q. Well, this is the one . . . this is the sixteenth letter;
6. this is the one the Judge already . . . I don't want to
7. tread on the Court's ruling. This is the one that the
8. Court has already said is not admissible; so I don't
9. want to get into that.
10. A. Well, I don't know, you know, what the Court has ruled
11. on--but to answer your question, I did write Mr. Rogers.
12. Q. That is the September sixteenth letter, that the Court
13. has ruled inadmissible?
14. A. Let's see--what date that was . . . his letter--Mr.
15. Rogers's letter--to Mr. Austin was the tenth; Mr. Austin's
16. letter to me was the thirteenth, asking me, as Common-
17. wealth's Attorney to respond to Mr. Rogers, and the
18. inquiries raised in his letter of the tenth--which I did.
19. And that letter to Mr. Rogers, with a copy to Mr. Austin,
20. was September the sixteenth. That's correct.
21. Q. No further questions.
22. COURT: Gentlemen, since this case is not
23. being tried with a jury, I would
24. like to know just what probative

1. value all of this has, to do with
2. the issues--our present issues?
3. Mr. Poff?
4. MR. POFF: Your Honor please, I think the only
5. probative value that any of this
6. evidence has, as far as Mr. Sisler
7. is concerned, is that Mr. Miller, or
8. the Zoning Administrator, was
9. fortified with an interpretation--
10. whether it was a right interpretation
11. or a wrong interpretation--of
12. 4-1-10 of the Zoning Ordinance. And
13. that is the only relevance in that.
14. COURT: Well, what you are saying, in sub-
15. stance, is that it bolsters your
16. contention that Mr. Miller did not
17. act arbitrarily or capriciously--that
18. he was . . .
19. MR. POFF: Right.
20. COURT: . . . acting on the advice of
21. counsel?
22. MR. POFF: That's the only relevancy.
23. COURT: Well, I think about thirty minutes
24. ago, we--I think the Petitioners,

1. through counsel, said that they're
2. not charging the Administrator with
3. any capricious or arbitrary conduct.
4. MR. ROBEY: They didn't charge him with any
5. bad faith, Your Honor. Now, when
6. it comes to whether or not he made
7. a decision plainly wrong--that's
8. something else.
9. COURT: Yes, sir.
10. MR. ROBEY: Well, but, you can be wrong, and be
11. the most well-meaning person in the
12. world; and we just say he was wrong,
13. and it was plainly wrong.
14. COURT: All right.
15. MR. ROBEY: That's all.
16. COURT: Anything further of Mr. Sisler?
17. MR. READ: I don't have any questions.
18. MR. ROBEY: I'd like to call Mr. Miller, in
19. order to establish the existence of
20. the Zoning Ordinance.
21.
22. WITNESS - RICHARD MILLER
23. Direct Examination by Mr. Robey:
24. Q. State your name, please, sir?

1. A. Richard Miller.
2. Q. And your occupation?
3. A. I am the Building Inspector and Zoning Administrator for
4. Rockbridge County.
5. Q. And were you serving in that capacity in December of
6. 1976 . . .
7. A. Yes, sir.
8. Q. . . . when this particular building permit was issued?
9. A. Yes, sir.
10. Q. Being the Zoning Administrator . . .
11. MR. ROBEY: We want to introduce the Zoning
12. Ordinance, and most particularly
13. Article IV, that relates to residential
14. property.
15. COURT: Any objection, gentlemen?
16. MR. FRANKLIN: That is the Zoning Ordinance . . .
17. no, sir.
18. COURT: I do think it should be put in,
19. unless it is stipulated . . .
20. Q. Mr. Miller, you do vouch for this being the document
21. which is the Zoning Ordinance for Rockbridge County?
22. A. Yes, sir.
23. Q. And are you familiar with the location of the property
24. owned by Mr. Agnor which is the subject matter of this

1. proceeding?
2. A. Yes, sir.
3. Q. And is it correct to say that that property lies in a
4. residential area, as described in Article Four of the
5. Rockbridge County Zoning Ordinance?
6. A. Yes, sir.
7. Q. Mr. Miller, in regard to the main structures for resi-
8. dential areas of Rockbridge County, can you construct
9. a main structure five feet from somebody else's property
10. line?
11. A. No, sir; that's accessory structures.
12. Q. Only accessory structures?
13. A. Right.
14. Q. And when you talk in terms of "accessory" structures, I
15. guess you are talking in terms of accessory to that
16. which is built as the main structure in a residential
17. area? Your garages and tool sheds and that type of thing
18. fall in that category?
19. A. Accessory buildings, right.
20. Q. Have you issued any building permit for the subject
21. property which would permit a main residential structure?
22. A. If a tower is considered a residential structure, yes.
23. Q. All right. Then are you saying that the structure which
24. is called a transmitter station, and so forth, would have

1. to be an accessory to the tower, in order to be five feet
2. from the property line?
3. A. Yes, sir.
4. Q. If it's the main structure, then it's got to come down,
5. hasn't it?
6. A. Well, it would have to be ten feet away.
7. Q. That would have to be ten feet away?
8. A. Right.
9. Q. From the side yard, or front yard, or what?
10. A. The side yard.
11. Q. What road does this property front on?
12. A. I don't know what the road number is.
13. Q. Well, do you know whether this building is built . . .
14. where it is in relationship to the road?
15. A. Yes, sir.
16. Q. Is it in the front? Well, what is the distance from the
17. building to the front of the lot, or the area?
18. A. From the fence to the building?
19. Q. Mmm hmm.
20. A. Approximately five feet or so.
21. Q. Approximately five feet?
22. A. Right.
23. Q. And the fence borders the road which serves this
24. property, does it not?

1. A. That's right.
2. Q. So the structure would be five feet from the front of
3. the property, wouldn't it?
4. A. That's right.
5. Q. And that would be a violation of the Building Code
6. and the Zoning Ordinance, wouldn't it?
7. A. It would be one of the Zoning Ordinance.
8. Q. Mr. Miller, with respect to that violation of the Zoning
9. Ordinance that has occurred, I call your attention to
10. Section 114.9 of the Building Code, which says that
11. prior to construction, the applicant, or the builder,
12. must notify you twenty-four hours in advance, before
13. starting construction?
14. A. That's correct.
15. Q. And I ask you whether or not you were notified by Mr.
16. Robert Rogers, or anybody on his behalf, of starting any
17. construction out at the subject site?
18. A. Not to my knowledge.
19. Q. I ask you whether or not you know of any building permit
20. being posted out there at the subject site?
21. A. No, sir.
22. Q. And now, sir, I ask you what your duties, and what the
23. Building Code of Rockbridge County calls for you to do
24. when an applicant of this--like this situation--a person

1. who's got a building permit, has violated the Building
2. Code and the Zoning Ordinance? Doesn't it tell you you're
3. supposed to withdraw that permit?
4. A. That's right.
5. Q. Have you withdrawn it yet?
6. A. No, sir.
7. Q. That's all I have.
8.
9. Cross Examination by Mr. Poff:
10. Q. Mr. Miller, I want to clarify for the record something
11. that these other gentlemen probably know, but I don't.
12. You are familiar, are you not, sir, with Mr. Don Austin?
13. A. Yes, sir.
14. Q. And he is the County Administrator, is that right?
15. A. Yes.
16. Q. And now what is your title?
17. A. I am the Zoning Administrator and the Building Inspector
18. for Rockbridge County.
19. Q. All right. Do you work under Mr. Austin?
20. A. Yes.
21. Q. Would it be fair to say that he's your supervisor?
22. A. Yes.
23. Q. And does he work . . . you work kind of out of the same
24. general office?

1. A. Out of the same building.
2. Q. The same building?
3. A. Right.
4. Q. Now, Mr. Miller, then, when Mr. Rogers, or he on behalf
5. of the Corporation, applied for this building permit,
6. back in--I believe the evidence is--December the sixteenth
7. or seventeenth, 1975 . . .
8. A. Right.
9. Q. . . . you were then the Zoning Administrator?
10. A. Yes, sir.
11. Q. And you had been Zoning Administrator, I believe, earlier,
12. in 1974, when there had been . . .
13. A. That's right.
14. Q. . . . an application for a similar type of structure in
15. a residential area?
16. A. Yes, sir.
17. Q. Is that correct?
18. A. Yes, sir.
19. Q. And you were aware that you were being called upon to
20. make your own determination of whether this complied
21. with 4-1-10 of the Building Code?
22. A. Would you repeat that again?
23. Q. Well, let me rephrase it. The applicable building
24. section--or the applicable section of the Zoning Ordinance

1. that was involved was 4-1-10?
2. A. Right.
3. Q. And you were aware . . . you were fortified at that time
4. with an earlier opinion that had been rendered by the
5. then Commonwealth's Attorney on that section?
6. A. The same situation, in a residential zone.
7. Q. All right. And it was on the basis of that opinion, I
8. gather, sir, that you then issued Mr. Rogers . . .
9. A. That is correct.
10. Q. . . . that permit?
11. A. Right.
12. Q. And then, as I understand it from Mr. Robey's question,
13. you have not, to this day, withdrawn that permit?
14. A. No, sir.
15. Q. Now, you said with regard to the posting of the building
16. permit--you are not in a position to say that the
17. building permit was not posted, are you, sir?
18. A. No, sir. The only first notice that I knew that any
19. work actually was going on, was a letter dated sometime
20. in August, saying that the utility building had been
21. completed, and wanted an inspection on it.
22. Q. You don't know whether Mr. Austin, your supervisor,
23. received any calls from Mr. Rogers with regard to that?
24. A. No, sir, I don't.

1. Q. All right. And you never made any visits to the scene
2. to determine for yourself whether the building permit was
3. posted?
4. A. No, sir.
5. Q. All right, sir; that's all.
6. MR. READ: I don't have any questions at this
7. time.
8.
9. Re-Direct Examination by Mr. Robey:
10. Q. I have just one further question: Does the Building Code
11. call for the Building Administrator to be notified, or
12. the County Executive?
13. A. The building official.
14. Q. The building official?
15. A. Right.
16. Q. And are you the building official?
17. A. Yes, sir.
18. Q. And Mr. Austin is the County Administrator, isn't he?
19. A. That's correct.
20. Q. And they're two separate jobs, aren't they?
21. A. Yes, sir.
22. Q. Thank you.
23.
24. Re-Cross Examination by Mr. Poff:

1. Q. Mr. Miller, I believe Mr. Robey did this, sir, but let
2. me be sure--as far as the five feet is concerned. If
3. the basic structure . . . and it goes to the ultimate
4. issue here, I guess--if the basic structure that we're
5. talking about is proper, then there is nothing improper
6. with this accessory building, is there?
7. A. It would have required a setback from the main road--from
8. the road.
9. Q. The five feet would apply to the accessory building . . .
10. A. Off of the side properties.
11. Q. Thank you.
12.
13. Re-Direct Examination by Mr. Robey:
14. Q. What does it require from the front?
15. A. Well, my interpretation of it, any structure is required
16. a certain setback, depending on the right of way of the
17. road.
18. Q. And what is that setback?
19. A. On that road out there, it would be seventy-five feet
20. from the center of the road.
21. Q. Right. And that's from the front?
22. A. Well, I don't know if it's the front, or the back--it's
23. just whatever the road runs by.
24. Q. Thank you, Mr. Miller.

1. MR. ROBEY: At this point, will the Court--I
2. didn't get it done through Mr. Miller--
3. take judicial notice that the BOCA,
4. 1970, Building Code is the building
5. code for Rockbridge County. BOCA
6. Code is a standard building code
7. for . . .
8. COURT: Is it so stipulated, gentlemen?
9. MR. POFF: Yes, sir.
10. MR. FRANKLIN: Well, it's been revised--and I think
11. that each year, it gets . . . every
12. five years it gets revised. We are
13. really operating under the '75
14. BOCA Code. If we can understand
15. that we're operating under the '75
16. BOCA Code, yes, sir.
17. MR. ROBEY: I think that's correct.
18. COURT: All right.
19. MR. READ: Your Honor, just on that point, if
20. you're going to have one introduced,
21. let's introduce the 1970 one, which
22. was the one that was in effect when
23. the permit was issued, as opposed to
24. the 1975 one. It says the same thing

1. on the point in issue here.
2. COURT: All right.
3. (Short recess.)
4.
5. WITNESS - S. E. HICKMAN
6. Direct Examination by Mr. Robey:
7. Q. State your name for the record, if you would, please?
8. A. S. E. Hickman.
9. Q. And your address?
10. A. RFD 4.
11. Q. And is that RFD 4, Lexington?
12. A. Lexington, yes.
13. Q. And you are a resident of Rockbridge County, and one of
14. the many Petitioners in this suit, are you not?
15. A. Yes, sir.
16. Q. Mr. Hickman, do you live in the vicinity of where WANV
17. wants to build this radio tower?
18. A. Yes, sir--I'm the adjacent property owner.
19. Q. And have you taken note of the . . . Well, first of all,
20. from a physical surroundings standpoint, what activity--
21. living activities--and what type of structures surround
22. the location where Mr. Rogers wants to build his radio
23. tower?
24. A. Just a quiet, peaceful community of families.

1. Q. Are there any commercial activities there?
2. A. To my knowledge, no, sir.
3. Q. How many homes are within sight of the ground level of
4. where this tower is going to be?
5. A. Twelve to fourteen.
6. Q. How many would be in sight of . . . well, I don't
7. suppose that's relevant, under the Court's ruling. Your
8. property and this property are zoned residential?
9. A. It's my understanding, yes, sir.
10. Q. And have you taken note of any structures which WANV
11. has already put out there?
12. A. Yes, sir.
13. Q. When did building start on the only structure that's
14. built out there--and that would be this transmitting
15. building?
16. A. I believe that was July the seventh.
17. Q. Was there any work done in regard to that building, or
18. any construction done as to that building, prior to
19. July seventh?
20. A. Only core drilling, is what they told us was going on.
21. Q. There's been some discussion here about a building permit
22. being posted. You are familiar with this three-acre
23. tract we're talking about, are you not?
24. A. Yes, sir.

1. Q. Was there any building permit posted out there, where
2. you as the public--for public inspection, as required by
3. this Building Code?
4. A. To my knowledge, I've never seen such a permit.
5. Q. Are there any children that live out there in this
6. immediate area as described or referred to in the Zoning
7. Ordinance?
8. A. Yes, sir, there's children. I don't believe there's any
9. real small children now. There have been, but most of
10. them have grown up.
11. Q. You have heard the statements here in regard to how
12. close this transmitting building was built to Mr. Houff's
13. house. Are those statements correct?
14. A. Yes, sir.
15. Q. What road does this three-acre tract front on?
16. A. It would front on the road of Mr. Houff's property, and
17. the other landowners going up there.
18. Q. What road number is that?
19. A. I'm not sure of that highway number.
20. Q. But at any rate, it fronts--the three-acre tract fronts
21. on the road that goes to Mr. Houff's house?
22. A. Yes, sir.
23. Q. How far is that transmitting building from the road that
24. the property fronts on?

1. A. I would say not over a hundred feet.
2. Q. Now, I'm not talking about the tower; I'm talking about
3. the building.
4. A. Oh, the building--it's practically up against the fence.
5. Q. And where is the fence in relation to the roadway?
6. A. The fence runs to the left of the road.
7. Q. And how close is the fence to the road?
8. A. Twenty-five to fifty feet, I'd say, the first part of it.
9. Q. All right. At the point where the road runs by this
10. building, how far is the building from the road?
11. A. A very short distance. I don't know exactly.
12. Q. Could you estimate approximately?
13. A. Twenty feet.
14. Q. Mr. Hickman, is it my understanding that you and twenty-
15. some other Petitioners in this case are simply asking
16. the Court for a strict enforcement of the Zoning Ordinance?
17. A. That's correct, sir.
18. Q. You answer any questions that counsel may have for you,
19. sir.
20.
21. Cross Examination by Mr. Poff:
22. Q. Mr. Hickman, you are familiar, are you not, sir, with
23. Mr. William Agnor?
24. A. Yes, sir.

1. Q. Is he a neighbor of yours?
2. A. Yes, sir.
3. Q. As a matter of fact, what does he live--a couple of doors
4. from you?
5. A. No, sir, he lives quite a ways from me, sir.
6. Q. And where is it that you live with reference to this
7. particular construction site?
8. A. Well, the entrance to my property would be off of U.S.
9. 11, coming back up on the hill; and my property line
10. joins--would be joining the property line of the
11. construction site.
12. Q. Your house is some distance away, as I understand it?
13. A. No, sir, not too far away.
14. Q. Well, then, I'm trying to get you related to Mr. Agnor.
15. Now, Mr. Agnor . . .
16. A. All right. Mr. Agnor's home is quite a ways down the
17. road. In other words, as you come up the road to the
18. first turn, you make a left and go to Mr. Agnor's. You
19. make the turn and come on up the hill to the site. And
20. I live down over the hill from there.
21. Q. Well, can you give us . . . I don't want to belabor the
22. point--but how far does Mr. Agnor live from where the
23. proposed construction is taking place?
24. A. Oh, it would be . . .

1. Q. A block, or two blocks . . .
2. A. I would say three blocks.
3. Q. All right. And he is the one who owned the site, and
4. sold it to Mr. Rogers, is he not?
5. A. That's my understanding, yes, sir.
6. Q. All right. Now, Mr. Hickman, let's see . . .
7. MR. POFF: May I ask the Clerk, sir, or the
8. Court, to tell me what the record
9. shows is the date this suit was
10. filed?
11. COURT: Yes, sir. The Petition was filed
12. June the seventeenth, 1976.
13. Q. All right. Mr. Hickman, you have just heard from the
14. Court that the record shows that this litigation was
15. instituted on June seventeenth, 1976.
16. A. Yes, sir.
17. Q. You were a party to this lawsuit initially, weren't you,
18. sir?
19. A. Yes, sir.
20. Q. So you and your friends who joined in this litigation
21. knew about the proposed construction, obviously, prior
22. to that date, did you not?
23. A. The first I knew of it was on . . . about January the
24. second. That they was going to construct one there.

1. Q. That was the time that you learned that a permit had
2. been issued, and that the construction was planned?
3. A. That's correct.
4. Q. All right, sir. Thank you.
5.
6. Re-Direct Examination by Mr. Robey:
7. Q. What was the date of that, Mr. Hickman, when you first
8. learned that?
9. A. Around the first or second of January.
10. Q. Do you represent . . . Are most of your Petitioners here
11. today, Mr. Hickman?
12. A. I would say half of them.
13. Q. And do you state the views of these people in your area?
14. A. I believe so, yes, sir.
15. Q. All right, sir.
16. MR. READ: I have no questions.
17. MR. ROBEY: We would call Mr. Houff, please.
18. MR. POFF: I thought, when he was testifying,
19. that Mr. Hickman was representative
20. of this group; and we would stipu-
21. late that the rest of the group will
22. testify as has Mr. Hickman.
23. MR. ROBEY: I still have a few matters that
24. weren't stated there, that I want to

1. prove. I certainly am not going to
2. be repetitious.
3. COURT: All right.
4.
5. WITNESS - E. F. HOUFF, JR.
6. Direct Examination by Mr. Robey:
7. Q. You are Mr. E. F. Houff, Jr.?
8. A. Yes, sir.
9. Q. And Mr. Houff, you live in the immediate vicinity of
10. this proposed structure, do you not?
11. A. Yes.
12. Q. And your home is a residence?
13. A. Yes.
14. Q. Mr. Houff, you at one time worked for WREL, did you not?
15. A. That is correct.
16. Q. How many years did you work for WREL?
17. A. Approximately nineteen.
18. Q. And is it correct to say that WREL has a transmitter
19. site, or a tower, right now, that's approved by the FCC?
20. A. Yes.
21. Q. And is that the tower which functioned during your twenty
22. years of working for WREL?
23. A. Yes.
24. Q. From your experience in broadcasting at WREL for twenty

1. years, can you state for the Court, from your personal
2. knowledge, whether or not the signal emitted from that
3. now-approved location covered the Rockbridge County
4. area?
5. A. Yes.
6. Q. That's all I have.
7. MR. POFF: No questions.
8. MR. READ: No questions, Your Honor.
9.
10. WITNESS - R. B. TOPPING
11. Direct Examination by Mr. Robey:
12. Q. Mr. Topping, are you one of the Petitioners in this
13. proceeding?
14. A. Yes, sir.
15. Q. Mr. Topping, would you give the Court the benefit of your
16. first knowledge, or when you first learned that this
17. building permit was issued?
18. A. In the early part of June.
19. Q. Just prior to the filing of this Petition?
20. A. Yes, sir.
21. Q. Thank you, sir.
22.
23. Cross Examination by Mr. Poff:
24. Q. Mr. Topping, what is your address, sir?

1. A. 908 Thorn Hill Road.
2. Q. That's in the City of Lexington, is it not?
3. A. Yes, sir.
4. Q. Sir?
5. A. Yes, sir.
6. Q. It is?
7. A. Yes, sir.
8. Q. Thank you, sir.
9. * * *
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9. MR. POFF: Your Honor please, I move that the
10. evidence of this witness be stricken
11. because he is a resident of the
12. City of Lexington, and not of Rock-
13. bridge County; this is a County case.
14. COURT: Well, Thorn Hill Road is right in
15. the same area where the tower is
16. being constructed.
17. MR. POFF: I understand there may be some
18. proximity, sir; but I do not believe
19. that the residents of the City of
20. Lexington would have standing to
21. challenge, or . . . As a matter of
22. fact, the allegation in the Petition,
23. as Mr. Franklin points out, is that
24. they are all residents of Rockbridge

1. County. As a matter of fact, most
2. of them are not--or many of them are
3. not.
4. MR. ROBEY: No, the Petition does not say that,
5. either.
6. MR. POFF: Well, it says they claim they have
7. the right to bring this suit as they
8. are citizens of Rockbridge County.
9. COURT: Now, it says here, that your Com-
10. plainants are landowners or occu-
11. pants of land located in the general
12. or immediate vicinity of the real
13. estate that is . . .
14. MR. FRANKLIN: Judge, keep going, to Paragraph
15. Number Five, if Your Honor please.
16. COURT: Paragraph Five?
17. MR. FRANKLIN: Of the original petition filed by
18. Mr. Robey.
19. COURT: Oh, yes. Your Complainants have a
20. right to bring this suit as they are
21. citizens of Rockbridge County,
22. Virginia, who are entitled to be
23. afforded the protection of the Zoning
24. Ordinance of said County. I am going

1. to overrule your motion, and permit
2. Mr. Topping's testimony to remain in
3. the record.
4. MR. FRANKLIN: We would ask the Court to save our
5. point.
6. COURT: All right.
7.
8. * * *
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1. WITNESS - LEWIS M. COSTELLO

2. Direct Examination by Mr. Franklin:

3. Q. Mr. Costello, for purposes of the record, would you state
4. your full name, occupation, and address, please?
5. A. I am Lewis M. Costello. I live at Stephens City, Virginia.
6. I am a partner in the firm of Kuykendall, Whiting,
7. Costello & Hanes, Attorneys at Law; we practice in
8. Winchester, Virginia.
9. Q. State for the Court, please, what, if any, association
10. you have with Rockbridge Broadcasting, one of the
11. Respondents in this case?
12. A. Originally, I was counsel for Rockbridge Broadcasting
13. Corporation, in the case of Wilmer, et al., v. Rockbridge
14. Broadcasting Corporation, which was filed in this Court
15. February nineteenth, 1974; it's Chancery Cause 3372.
16. Pursuant to a memorandum of agreement, which was entered
17. into the third of December, 1974, between all parties,
18. Harry P. Anderson, of the City of Richmond, Virginia, who
19. was counsel for the Complainants in that case, and I,
20. were agreed to be trustees of the voting stock of Rock-
21. bridge Broadcasting Corporation, constituting some two
22. hundred and twenty out of two hundred and fifty-three
23. shares of the voting stock; and that memorandum of agree-
24. ment and our consequent assumption of the position of

1. trustees of that voting stock was ratified by the Court
2. on the thirtieth of January, 1975.
3. Since that time, Harry Anderson and I have been
4. co-trustees of the voting stock throughout the transaction.
5. Q. Would you state for the Court please, in your capacity as
6. a trustee of Rockbridge Broadcasting Corporation, whether
7. or not you had occasion to become involved with one of
8. the other Respondents in this action, WANV?
9. A. Yes, we did. After having our trusteeship ratified, we
10. proceeded to try to get offers on the radio station. A
11. great deal of negotiation took place from January through
12. July. On a hearing in Staunton, Virginia, on the twenty-
13. seventh of July, we presented the offers that we had,
14. which included an offer by Mr. Rogers to purchase the
15. station.
16. * * *
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8. * * *
9.
10. Q. Do you have my last question--to pick it up . . .
11. A. I think I can pick it up. On the twenty-second of July,
12. 1975, at a hearing in Staunton, Virginia, the trustees
13. presented the offers at that time--and we had four--and
14. the Court instructed us to accept the Rogers contract,
15. which we did; and it was then to be reduced to writing.
16. As of September second, 1975, we still hadn't been
17. able to reduce it entirely to writing, because of some
18. disagreements--particularly our concern that it be tied
19. down as to when that station was going to be moved,
20. because the trustees were firmly of the view that to get
21. the most for that property, the radio station needed to be
22. segregated from the real estate, an Interstate having
23. passed around and close to that property, in the course
24. of it.

1. We then brought the matter back on for hearing.
2. Frankly, the trustees, at that time, thought we were not
3. going to go on with the contract with Mr. Rogers. But
4. the Court, at a hearing, I believe in Fincastle, on the
5. tenth of September, 1975, instructed the trustees to
6. withdraw from the Courtroom with Mr. Rogers and to work
7. out the details of that contract. One of the details
8. was that he must acquire an option within thirty days,
9. under Paragraph 5-B, Page Five of that contract.
10. Q. Well, let me interrupt you here, Mr. Costello, and ask
11. you, pursuant to Judge Stephenson's direction that you
12. retire and attempt to finalize and reduce to writing the
13. contract, was a contract between the trustees of Rock-
14. bridge Broadcasting and WANV, Inc., entered into?
15. A. Yes, it was. Now, I told you that hearing date was the
16. second of September, 1975; it was actually signed--it
17. was taken back down and approved, with the requisite
18. trustee vote, etcetera, by the shareholders, and was
19. actually signed on the tenth day of September, 1975.
20. This is a photocopy of my file copy, which I made this
21. morning.
22. Q. All right, you do have . . .
23. MR. FRANKLIN: We would tender this as the
24. next-following Respondents'

1. Exhibit. (Number Four.)
2. Q. Now, to pick up, if you would, Mr. Costello, where you
3. left off, I believe you were referring to one of the
4. paragraphs within this written agreement approved by the
5. Court?
6. A. Yes. Mr. Rogers, the trustees required him to acquire an
7. option within thirty days, under Paragraph 5-B, on Page
8. Five; and required him to file all necessary applications
9. for zoning and occupancy permits immediately. And he was
10. to apply to the FCC for transfer, and was to pursue that.
11. There were provisions in the contract, under 5-B, 5-C,
12. providing him a rental after the transfer was approved,
13. for a short period of six months, which was subject to an
14. extension of twelve months if he had not been able to
15. get the site transferred. That's on Page Six.
16. And we did require that time was of the essence in
17. that contract. The application was subsequently filed on
18. October twenty-second, 1976, with the Federal Communica-
19. tions and Exchange Commission, and the closing was
20. required, under Paragraph 10, at Page Fourteen, to be the
21. first day of the month following the month in which the
22. Commission's action was finalized.
23. Immediately after entering this contract, and within
24. the thirty days, Mr. Rogers advised us, on October tenth,

1. 1975, that he had obtained the land option agreement
2. contemplated by 5-B; and he also advised us that he had
3. been advised that it was not timely to obtain an occu-
4. pancy permit or zoning permit. We then had a substantial
5. disagreement on how quickly he was having to pursue that,
6. because we could envision coming down to the end of the
7. contract fifteen months later, and not know that we had
8. the transaction completed when the FCC took its steps.
9. So on the fourth of November, the twelfth of November,
10. and the sixteenth of December, very pointed letters were
11. written by the trustees. They were actually written by
12. Mr. Harry Anderson after we had conferred and decided
13. that he would, because he handled the negotiation pri-
14. marily with Mr. Rogers--demanding copies of the option,
15. and demanding to know when he was going to get the zoning
16. and the permits approved, even though he had told us in
17. correspondence that advice to him was that it was still
18. premature.
19. On the seventeenth of December, 1975, we were advised
20. that the building permit had been obtained, and that our
21. responsibility to apply for such a permit for the transfer,
22. as contemplated in the agreement, would not then be
23. required because the zoning permit had been obtained.
24. Relying on that, we have waited, patiently, for the

1. FCC's approval on this contract. This approval was
2. granted September thirtieth, 1976, and we are presently
3. anticipating closing the sale of the station on the
4. first day of November, with a time-is-of-the-essence
5. clause in our contract.
6. Our position as trustees, based on appraisals we
7. have obtained of the property, is that the property is
8. too valuable, separate and apart from this radio station,
9. to sell it with the radio station attached. And frankly--
10. as a trustee, I'm speaking now--if the station can't be
11. moved somewhere under the Ordinance, there is a strong
12. possibility that if we get the price we're asking for
13. that land, we're going to have to sell that land, whether
14. that station is going to stay in operation or not.
15. Now, you've always got the opportunity to work out
16. subleases, etcetera, with the purchaser; but I can't
17. speculate as to that. But our appraisal indicated that
18. the station should be separated from that land, because
19. of the proximity of the Interstate 64. And we have been
20. acting on that, and, in fact, deliberately sold to Mr.
21. Rogers, with the stipulation that he would move that
22. station as quickly as possible after that closing was to
23. take place. We have pursued him actively throughout this
24. time period to produce evidence to us that he could perform

1. under the agreement. And this evidence was the option
2. agreement and permit.
3. Q. You mentioned a closing date of November first, 1976, and
4. said that time was of the essence in this contract. Is
5. it not correct that there is some provision in this
6. contract which would indicate that should an impairment
7. exist, that the contract might terminate?
8. A. We've been in litigation about fifteen months on the
9. thing. Without commenting as to the position the trustees
10. would take, we have been advised that 13-D and 5-B would
11. be a way that would be sought by the purchaser to avoid
12. the contract if that closing doesn't take place. I do
13. not, in this testimony, say that there is a disagreement,
14. and that we're going to roll over and play dead; but it's
15. going to be additional litigation, as far as we, the
16. trustees, are concerned, in disposing of these assets.
17. Q. What was the total purchase price of the radio station,
18. since that's what we're dealing with, as opposed to the
19. land--the radio station and the facilities?
20. MR. ROBEY: Again, I would interpose an objection
21. I feel compelled, for my clients, to
22. get into the record. If they're
23. permitted to do that, we're permitted
24. to show diminishment of land values

1. out there on that hill.
2. COURT: What is the purpose, Mr. Franklin,
3. for inquiring as to the . . .
4. MR. FRANKLIN: Well, we've offered the contract
5. into the record. The contract
6. speaks for itself. I was just going
7. to have Mr. Costello read off, for
8. purposes of the record . . .
9. MR. ROBEY: I've got to . . . All of this
10. is irrelevant, and should not be
11. considered in the decision of the
12. Court--and I have to . . . It's a
13. technical thing, because I don't
14. think any harm's done--but I have
15. to object . . .
16. COURT: All right.
17. MR. ROBEY: . . . and take exception.
18. COURT: Frankly, I don't see the value in it.
19. I don't see what useful purpose can
20. be served in permitting it into the
21. record.
22. MR. FRANKLIN: All right. We, of course, have
23. tendered the contract. Has the
24. Court received it into the evidence?

1. COURT: Is this the agreement of September
2. tenth?
3. MR. FRANKLIN: Yes, sir.
4. COURT: There was no objection made to that;
5. and that was admitted into evidence.
6. Q. The contract, the WREL assets and sale agreement, entered
7. into, dated September tenth, 1975, and approved by the
8. Court--under those terms, under the terms of that Court-
9. approved contract, can the radio station stay where it
10. is?
11. A. No. The trustees made the contract specifically to get
12. it moved. And the application contemplates the removal,
13. and the condition of the application is the removal; and
14. that approval took approximately one year.
15. Q. That's all the questions I have.
16. COURT: Mr. Robey?
17.
18. Cross Examination by Mr. Robey:
19. Q. Mr. Costello, as I understand it from the start of your
20. testimony, on July twenty-second of last year, you took
21. four offers to the Court for the purchase of this
22. station; is that correct, sir?
23. A. Right.
24. Q. So there were--or are--three other individuals who were

1. interested, just as much . . . or interested, as is Mr.
2. Rogers, in buying this station?
3. A. There were, at that time. Two of them have since bought
4. stations somewhere else. The problem was--and, of course,
5. this was one thing the Court had to address, because the
6. trustees had a little disagreement over whether you take
7. cash now, or a package deal--with this offer, was a
8. hundred and sixty-seven thousand ($167,000.00) in cash
9. for the station, which left the land. The highest offer
10. we had for the land and station was two hundred and
11. ninety thousand dollars ($290,000.00). Based on
12. appraisals of three hundred and fifty ($350,000.00) for
13. the land without the station, the question was, were we
14. duty bound to sell them in package or not. And the Court
15. said we weren't; so we were going to sell it for the
16. hundred and sixty-seven thousand.
17. Q. But if you would address yourself to my question, it was
18. that there were four potential buyers . . .
19. A. Yes.
20. Q. . . . for the station, at that time?
21. A. Yes.
22. Q. Now, as I understand it, you are saying that you are
23. trustees who are working for the benefit of the stock-
24. holders of that Company, and . . . Is that right?

1. A. Yes, sir. Right.
2. Q. And they . . . And if you can do it the way you're talking
3. about now, it means more money for the stockholders. Is
4. that right?
5. A. Yes, sir.
6. Q. And if you can sell to Rogers, the stockholders get more?
7. A. That's right.
8. Q. And, in order to do that, you have got to get this thing
9. through here, to put a radio tower out here in a
10. residential area, where these Petitioners are, haven't
11. you?
12. A. To go through with this contract--that's right.
13. Q. And the people who benefit are going to be the stock-
14. holders?
15. A. The people who benefit will be the holders of the stock;
16. that's correct.
17. Q. All right. Now . . . and I understand you to say that
18. you can get even more money by working around a way to
19. get the radio tower out here in a residential area, so that
20. you can utilize the land out there--is that right? That
21. you consider it to be more valuable land for some other
22. purpose?
23. A. Whether the radio station is there or not, it's probable
24. that the land will be more valuable as land, than with

1. the station; so what I am saying is that it's possible
2. that that station will go black.
3. Q. How much land is out there?
4. A. I don't have that exact . . .
5. Q. Well, approximately how much?
6. A. About three acres, three and a half acres . . . right
7. there on the interchange there.
8. Q. How much? Well, you're the man . . .
9. A. I don't have the . . .
10. Q. . . . in charge of selling it, aren't you? You've got
11. over seven acres out there, haven't you?
12. A. The vacant land is more than that. Let me find it--
13. check it . . .
14. Q. Well, how much total land is out there?
15. A. I really don't know. I don't know what the acreage is
16. on it.
17. Q. Well, it's got a tower out there now, hasn't it?
18. A. Yes. Mmm hmm. I'm not sure whether I have a plat of
19. that land, frankly, here. I'd have to check the Court
20. file to know what the exact acreage is on it.
21. Q. You wouldn't argue the fact that there's seven acres out
22. there, would you?
23. A. Frankly, I don't know what the acreage is; but I could
24. find out reference to the Court file.

1. Q. Well, if you were to leave a tower out there on the
2. existing site, on three acres or less, you'd still have
3. four acres or more to use for commercial purposes, wouldn't
4. you?
5. A. I'm not sure that's the point. I think the point is that
6. the land, being at an interchange on an Interstate, that
7. a radio station is not an economic use of the land, so
8. that on balance, the economic use is going to determine
9. whether you sell it or not.
10. Q. Let's talk about the tower site, and forget about the
11. station. The station can be in town, like Mr. Rogers
12. proposes to do right now, can't it?
13. A. Yes.
14. Q. You can put the station in here, and put the tower--
15. keep the tower where it is, or move it within your seven
16. acres, can't you?
17. A. I would presume so. I think there are some problems--one
18. is that it's an old tower. . . Now, I'm not an engineer;
19. so if an engineer comes, I'm subject to being second-
20. guessed--but my understanding is that that tower would
21. not be replaced in the form, or in the exact nature, that
22. it is right now; that it's an old-style tower, and the
23. length of distance you'd have to run to transmit from
24. that site didn't make that very practicable. But, frankly,

1. if somebody will come along and offer to do that, and
2. we can get it through the FCC in another year, we would
3. consider it. But we were advised that that's not a
4. practical use of that land.
5. Q. All right. So it all boils down to what's in the best
6. interests of the owners out there, or what's to the
7. detriment of these people right here, doesn't it--these
8. seventeen people.
9. A. It all boils down to me being the trustee before the
10. Court on that, and my job is to get the most money for
11. the assets being held by the Corporation. And that's
12. the duty I'm pursuing.
13. Q. And money is the name of the game here in this situation,
14. isn't it? That's it?
15. A. If my duties as trustee can be characterized that way,
16. you might say it that way.
17. Q. Thank you, Mr. Costello.
18. COURT: Do you gentlemen mind if I ask this
19. witness a few questions?
20. MR. FRANKLIN: No, sir, Your Honor.
21. MR. ROBEY: No, sir.
22.
23. Examination by the Court:
24. Q. The hearing of WREL, and the property of Rockbridge

1. Broadcasting Corporation--that was presided over by Judge
2. Stephenson, was it not?
3. A. Yes, it was.
4. Q. And that was the suit that was brought by two shareholders,
5. to liquidate the assets of the Corporation?
6. A. Yes, under 13-194. It's Chancery 3872.
7. Q. Did I understand you to say that if WANV is prohibited
8. from erecting this tower, that means that the radio
9. business will close up?
10. A. I don't know what's going to be done there. The problem
11. is that since that Interstate's open now--and it has
12. recently opened--we are getting interest in the land as
13. commercial land, and not in the radio station. And,
14. frankly, being in the position that it is, if a sufficient
15. price is paid for the land, we're going to have to
16. consider what we'll do. We're going to really be put in
17. a box.
18. We tried to avoid that, by entering the contract--
19. knowing it would take a year with the FCC, we entered
20. the contract first, letting the Interstate get completed
21. while we waited for the FCC approval, on the assumption
22. that the timing would be right--we would sell the
23. station, transfer the station, and have a piece of land
24. at an interchange of 64 which, down to this point, looked

1. like a good plan. And the only way we could see to
2. protect ourselves was to make sure that the fellow got
3. his application in on time, and had his right to build
4. his station; and as trustees we think we've done what
5. we're supposed to do. I don't know if we have or not;
6. but we think we have, at this point. And the timing
7. does look like it's working out.
8. Q. Do you have reason to believe that the radio operation
9. would cease if . . .
10. A. I think that's a possibility, because . . . In any event,
11. we would have to keep pursuing selling the station, and
12. having it moved off of that site--which, frankly, puts
13. me in a difficult position, in this litigation, of
14. knowing who we would sell it to if the Zoning Ordinance
15. is interpreted so that it can't go anywhere under your
16. Zoning Ordinance. That's not my place to argue, or to
17. worry about--so I'll stay out of that.
18. Q. My questions are just purely to seek certain information
19. that I hadn't interpreted from your testimony.
20. A. Yes, sir.
21. Q. All right. That's all I have.
22. MR. FRANKLIN: We have no re-direct.
23.
24. Re-Cross Examination by Mr. Robey:

1. Q. In light of what he said there--something about that the
2. radio station couldn't go anywhere . . . What do you mean
3. by that, Mr. Costello?
4. A. You can only put these stations in certain places. Again,
5. I'm not an engineer, but I happen to be the secretary of
6. five stations, and three cable systems. There are only
7. certain places you can put these things. And a list of
8. these were pursued in finding a location that came here;
9. and my understanding was that no other such location could
10. be purchased. So anybody else that's got the same
11. engineering problems is going to have to go through the
12. same list, and check out the same locations, and find
13. someplace.
14. Q. Are you saying that your information is that there are
15. no commercial or business properties for sale in Rock-
16. bridge County where you can put a radio tower? Is that
17. what you're telling the Court?
18. A. No, I didn't say that.
19. Q. All right. That's all I wanted to know. You're not repre-
20. senting to the Court that Mr. Rogers couldn't buy a
21. business place, a commercial area, and put up a tower?
22. A. No, I didn't say that.
23. Q. All right. That's all. Thank you, sir.
24.

1. WITNESS - WILLIAM AGNOR, JR.

2. Direct Examination by Mr. Poff:

3. Q. Mr. Agnor, would you please state your full name and
4. address for the Court, please, sir?
5. A. William Agnor, Jr., Route 4, Lexington.
6. Q. And what is your address, sir?
7. A. Route 4, Lexington.
8. Q. Mr. Agnor, are you retired at the present time?
9. A. I am.
10. Q. I take it that you live somewhere in the vicinity, I
11. believe, from what some of the other witnesses have
12. told us, of where this radio antenna is being constructed,
13. or where they want it constructed?
14. A. I do.
15. Q. About how far do you live from that?
16. A. Oh, I'd say three tenths of a mile.
17. Q. Now, there is some evidence as to the fact, I believe,
18. that you own that land on which it . . .
19. A. I own all of it, yes, sir.
20. Q. And I believe that . . . Are they buying it from you, or
21. leasing it from you, or how?
22. A. Mr. Rogers was, yes, sir.
23. Q. Which was he doing--buying it, or . . .
24. A. Well, he leased it first, with the option of buying it.

1. Q. All right. So it was sort of a lease-purchase agree-
2. ment?
3. A. That's right, exactly.
4. Q. Now, I believe you also are in--or were at that time,
5. some months ago--in the construction business?
6. A. Yes, sir, I was.
7. Q. And now did you . . . Well, when did you enter into this
8. agreement with Mr. Rogers for the . . .
9. A. September of 1975.
10. Q. Now, then, were you called upon to . . . Well, I take
11. it you knew at that time that he planned to get a permit
12. to build a radio tower, or this antenna, out there?
13. A. That's the way his option reads.
14. Q. And were you aware that in December of 1975, he did get
15. such a permit?
16. A. Yes, sir, I was.
17. Q. Now, then, was there a time when you were called upon or
18. hired to do any work on that site?
19. A. He asked me to tend to getting the backhoe and the con-
20. crete, and the forms, since he didn't know nobody in this
21. area. And I told him I would--I'd be glad to.
22. Q. Did you have a bulldozer, or backhoe?
23. A. Backhoe.
24. Q. And so what did you do with that backhoe? Excavation

1. type work?
2. A. On May the thirteenth of this year, I ordered the backhoe
3. to come up there to do some work, and it broke an oil
4. hose on it, and it couldn't come until the fourteenth.
5. Q. And I take it that Mr. Rogers gave you the building permit
6. that he had . . .
7. A. Yes, sir. He did.
8. MR. ROBEY: Judge, I would ask that he not be
9. leading the witness, sir, and pro-
10. ceed in the normal . . .
11. MR. POFF: Let me rephrase the question, if I
12. may.
13. Q. Mr. Agnor, did you at any time see the building permit
14. that Mr. Rogers obtained for the . . .
15. A. He gave it to me the day he come to my house, on Decem-
16. ber the seventh, I believe it was. I have it in my
17. possession now.
18. Q. And did you or did you not have it in your possession
19. while you were doing this excavating work at the site?
20. A. Yes, sir. We did. We fastened it on the front of a
21. jeep.
22. Q. And that was right out there where the radio antenna
23. was supposed to be built?
24. A. That is correct.

1. Q. And I take it that you were--and I think Mr. Robey will
2. agree to this leading question--you were advised by Mr.
3. Rogers and Mr. Franklin later that they had been
4. instructed by the Commonwealth's Attorney not to proceed
5. with this?
6. A. The night of May the fourteenth is when I got the word.
7. Q. All right. So they told you to leave the job at that
8. time?
9. A. That's right, exactly.
10. Q. All right, sir. That's all I have.
11.
12. Cross Examination by Mr. Robey:
13. Q. Mr. Agnor, did I understand you to say that you took a
14. backhoe up there?
15. A. On May the fourteenth.
16. Q. On May the fourteenth--and did what?
17. A. We dug the holes for the tower, and for the anchor holes.
18. Q. You dug a hole?
19. A. Holes. And had the foreman out to build the forms.
20. Q. And how big a hole did you dig?
21. A. Oh, I wouldn't know right off.
22. Q. Roughly?
23. A. I would say they were six foot long and two foot and a
24. half deep.

Q. How long did it take you to do it?

A. Two hours.

Q. Two hours? How much did you charge for it?

A. Well, now, the other man owns the backhoe; I don't set his price. I have nothing at all to do with that.

Q. So we've got the work done there was two hours of moving some dirt with a backhoe?

A. That is right--on that particular time.

Q. All right. Did you do any more work?

A. Yes, sir.

Q. When did you do that?

A. On . . . oh, I've got this down at home.

Q. Was it when they built that building up there?

A. Yes. Oh, yes, that was the next thing--that was on July the sixth.

Q. Okay.

A. July the fifth or sixth.

Q. Okay. That was in July?

A. Right.

Q. Okay. Is that two hours . . .

A. That don't include that at all.

Q. Right. Is the two hours with the backhoe, digging some holes up there . . .

A. That is right.

1. Q. . . . . the only work that you did before July?
2. A. That is right, sir.
3. Q. What was done with the dirt?
4. A. The dirt was left laying there; it's still laying there.
5. Q. How many truck loads do you reckon it is?
6. A. I wouldn't know that.
7. Q. Could you estimate?
8. A. No. But if you wish to have it measured, we'll go out
9. there and measure it. I wouldn't know.
10. Q. You are the owner of this land, aren't you, Mr. Agnor?
11. A. I am.
12. Q. And you agreed to sell it to Mr. Rogers, but you've still
13. got the deed to it, haven't you? You haven't been paid
14. for it, have you?
15. A. No, sir, I haven't been paid for it--nothing but the
16. option; he paid me the option.
17. Q. Okay. But you haven't deeded it to him?
18. A. No, I haven't deeded it to him.
19. Q. So you were the owner of the property when this building
20. permit was applied for; is that correct?
21. A. That's exactly right.
22. MR. ROBEY: I would like to refer counsel to
23. Section 113.3 of the Building Code,
24. in regard to the application for

1. building permits and whether or not--
2. who can apply for a building permit,
3. and ask the Court to read--or call
4. the Court's attention to--that Section,
5. before I ask the next question.
6. COURT: Do you want me to read it for the
7. record?
8. MR. ROBEY: Section 113.3, at the bottom there.
9. MR. POFF: You are referring, I gather, to the
10. BOCA Code, right?
11. MR. ROBEY: Right.
12. MR. POFF: Well, it seems to me that, Your
13. Honor please, as far as what Mr.
14. Robey's question may be directed
15. to, this lawsuit goes to the issuance
16. of the building permit under the
17. Zoning Ordinance, and I am not aware
18. that any issue has been raised as to
19. the propriety under the BOCA Code,
20. by the pleadings in this case--and I
21. think it's a little late in the case
22. to try to interject that kind of
23. issue into it. I think the pleadings
24. as Mr. Robey has filed them, and as

1. they exist in this case, as I under-
2. stand it, is simply that because of
3. the definition of public utility in
4. the Zoning Ordinance, that this is
5. an improper building permit. And I
6. think he's interjecting extraneous
7. and new issues into the case.
8. MR. ROBEY: Judge, my response to that would be
9. that Mr. Poff does not represent the
10. County of Rockbridge, and cannot.
11. I have a suit, in two regards here--
12. or my clients, rather, have a suit--
13. alleging that the building permit
14. issued was invalid, and calling upon
15. the Building Inspector, Zoning Admin-
16. istrator, or whatever, to meet their
17. responsibilities and to take back
18. whatever permits that had been issued
19. that were invalid in this case. And
20. for the construction of this tower,
21. if the County has issued an invalid
22. permit, then it's a matter of simply
23. just declaring the permit invalid;
24. and they can start again if they want

1. to, someplace else. But here, it
2. provides, in that building permit
3. section there, that the application
4. for the permit shall be by the
5. owner of the property.
6. MR. POFF: It also says "or lessee."
7. MR. ROBEY: Or the lessee, with affidavit . . .
8. MR. POFF: Or agent of either.
9. MR. ROBEY: Now, that's what I'm fixing to ask.
10. Q. Mr. Agnor, did you ever sign an affidavit and submit it
11. to the Building Inspector for this permit to be issued?
12. A. I signed a contract with Mr. Rogers.
13. Q. Well, how about did you take an affidavit to the Building
14. Inspector over here?
15. A. No, I didn't go to no Building Inspector.
16. Q. Thank you. That's all I have.
17. MR. READ: I have no questions.
18. Re-Direct Examination by Mr. Poff:
19. Q. Mr. Agnor, was the work that was being done on the land
20. in accordance with your agreement with Mr. Rogers?
21. A. That is for sure; yes, sir.
22. Q. You understood that he was going to apply for a building
23. permit to do that?
24. A. Yes, sir; that's in my contract. The contract that I had,

1. I figured it's just the same as giving him the deed.

2. * * *

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18. * * *
19. WITNESS - J. W. CLARK
20. Direct Examination by Mr. Franklin:
21. Q. Mr. Clark, for purposes of the record, would you state
22. your full name, address, and profession, please, sir?
23. A. I am J. W. Clark; I live in Fishersville, Virginia; I am
24. a certified land surveyor.

1. Q. And in your professional capacity as a certified land
2. surveyor, did you have occasion to be present on property
3. under a lease-purchase, belonging to Mr. Agnor?
4. A. Yes, I did.
5. Q. I wonder if you would tell the Court, please, the date
6. you were there, and your purpose in being there?
7. A. My first time on the site in question was on December the
8. nineteenth, 1975; and my purpose was to perform a boundary
9. survey for the . . . to define the separate tract of
10. land that is apparently being discussed here today. I
11. believe the tract would be 3.60 acres.
12. Q. And subsequent to that first occasion there, did you, on
13. any--at any subsequent time, were you present there?
14. A. I was present again on the site on January the second,
15. 1976.
16. Q. On either of those occasions, other than your conversa-
17. tions with Mr. Agnor, did you have conversations with any
18. of the property owners there?
19. A. Yes, I had conversations with several of them. Some of
20. them, their names I don't remember. There was a conver-
21. sation--and I don't know which day it was on; I believe
22. it was the first day that we were there, in December,
23. on December the nineteenth--there was a conversation with
24. Mr. Houff, who, I believe, owns the house, the home that

1. is probably the closest to this site.
2. Q. And did you at that time explain your purpose in being
3. there to Mr. Houff?
4. A. The situation was discussed. I don't recall the exact
5. conversation. He was told--and not specifically by me,
6. but by a member of my surveying party, I believe--that
7. we were surveying a site for the radio tower. The first--
8. this was how the thing . . . how he . . . I wasn't right
9. at the . . . directly in the presence at the time on the site;
10. but I was elsewhere on the site. But there was conver-
11. sation during the time we were on the site, and dis-
12. cussion--some discussion of the fact that the tower was
13. going to be . . .
14. Q. Well, your son was there with you, was he not?
15. A. My son was a member of the surveying party, yes.
16. Q. And he is present here in the Courtroom today?
17. A. Yes, he is.
18. Q. All right. Answer Mr. Robey's questions.
19.
20. Cross Examination by Mr. Robey:
21. Q. Did I understand you to say that you didn't have conver-
22. sation--that you did not hear the conversation that you
23. referred to?
24. A. Not initially. The conversation was initially with my

1. son, a member of the survey party. But I did talk to
2. Mr. Houff at that time, and I believe again on January
3. the second.
4. Q. Did you . . . you did a survey out there?
5. A. Yes.
6. Q. Did you do anything else?
7. A. We did the boundary survey, and we staked the location
8. for the tower itself on the site.
9. Q. Did you do a topographic?
10. A. We did a very preliminary and brief topographic survey,
11. in locating the high point on the hill and the bottom
12. of a hollow, and--in fact two hollows, one on each side
13. of the tower site.
14. Q. You had not done a topographic prior to the application
15. for the building permit, on the seventeenth? Is that
16. right?
17. A. No, sir. My first time on the site was on the nineteenth.
18. Q. So would it be correct to say that there is no way that
19. a topographic done by you could have been submitted with
20. an application for the building permit as required by the
21. Building Code?
22. A. I made no topographic survey on the site.
23. Q. Have you ever submitted a topographic for Mr. Rogers to
24. the Building Inspector?

1. A. No, sir. I have not submitted anything to the Building
2. Inspector.
3. Q. All right, sir. That's all.
4. MR. READ: We have no questions.
5.
6. WITNESS - M. ROBERT ROGERS, recalled
7. Direct Examination by Mr. Poff:
8. Q. I believe you were sworn this morning, were you not?
9. A. Yes, sir, I was.
10. Q. I will try not to duplicate any more than I have to the
11. testimony that you gave this morning. As I understand
12. it, sir, you are the owner of a radio station in Waynes-
13. boro?
14. A. Yes.
15. Q. And what is your contractual relationship with WREL?
16. A. Well, our Corporation, which owns a licensed facility,
17. radio facility, in Waynesboro, has a contract to purchase
18. the broadcast assets of WREL, which was submitted by
19. Mr. Costello, as you know.
20. Q. Would you go forward, in light of what Mr. Costello has
21. told the Court, sir, and just outline to us the consid-
22. erations that led you to this particular site for the
23. construction of this radio antenna?
24. A. Well, as the Court knows, the contract required us to move

1. to a new site. As was also explained this morning, we
2. entered into . . . Well, let me backtrack a moment here.
3. We entered into the contract with some caution, being
4. aware of the County's position on where a radio tower
5. might go--or at least what appeared to us to be the
6. County's position; because knowing that it had to move
7. somewhere else in the County, we had to determine where
8. it could go on two counts. One, where might there be an
9. available site; and, two, how would that site meet the
10. engineering requirements of the Federal Communications
11. Commission, which are very severe and very tight. And
12. since you will have another witness on that subject later,
13. and I have just practical but not complete technical
14. knowledge, I will just refer in passing to the fact that
15. the station, from any new site, must be quite close to
16. the City limits of Lexington, in order to provide the
17. intensity of coverage that the FCC today demands for
18. serving a city of license; those requirements are con-
19. siderably tighter now than they were thirty years or so
20. ago when WREL was founded.
21. Q. In that connection, sir, are you sufficiently knowledge-
22. able to advise the Court as to whether the present tower,
23. where it is now located, could be used, or could be--if
24. it were being constructed today, could it be used, under

1. the FCC requirements as to the placement of the tower?
2. A. Our professional people tell us that it does not meet
3. the requirements; and our professional witness, if he
4. goes on, will show . . .
5. MR. ROBEY: I object to what the professional
6. people tell him; it's hearsay, Judge.
7. MR. POFF: We'll withdraw that, because we'll
8. put on the witness for that purpose.
9. Q. All right, sir; go forward, sir, then, and how did you
10. happen to, in trying to cope with the various problems
11. that you have outlined to us, what led you to this
12. particular site?
13. A. Our consulting engineers drew up for us what is called a
14. site selection map, showing the very limited area in
15. which WREL could operate as an alternate site. And I
16. gave that site selection map which was drawn--it was
17. the first document that was drawn, just a rough copy,
18. because we wanted to work in a hurry--to Ruth Agnor
19. Herring, who is an experienced real estate broker and
20. agent in Lexington, and delegated to her the assignment
21. of locating a willing seller within those boundaries.
22. She came up with what appeared to two willing sellers--
23. Mr. Agnor, and another up the hill from Route 60, east
24. of the City. That gentleman, in the end, decided he

1. really wasn't willing to sell. So we were left with the
2. only one willing seller, Mr. Agnor, who, as you know,
3. entered into a contract with us at a price that we could
4. afford; and that was all that was in front of us.
5. But again, out of prudence, before I took the option
6. for my Company, I consulted with the County officials,
7. to find out if the 1974 opinion, which had guided them
8. in another case, as is in the record here, was still
9. the prevailing position of the County administration and
10. Board of Supervisors; and I was advised that there was no
11. change.
12. Q. Was that request made to Mr. Austin, or Mr. Miller, or . . .
13. A. That was made to Mr. Austin, who was at that time the
14. the Chairman of the Board of Supervisors. He didn't say
15. he was speaking for anybody but himself, but he did say
16. that that was the County's position in this matter.
17. Q. Now, Mr. Rogers, it is in evidence here that you applied
18. for, I believe, and obtained this building permit in
19. December--about the seventeenth of December, 1975; is
20. that correct?
21. A. Right.
22. Q. Did you, subsequent to that time, have any discussion with
23. any of the Petitioners in this case, to apprise them of
24. your plans in constructing this radio antenna?

1. A. Well, subsequent to the survey, when the tower site was
2. designated, the actual base coordinates, I myself, on or
3. about January twelfth, 1976, went to the site to take
4. photographs, which were a required part of the engineering
5. application to the Federal Communications Commission.
6. And at that time, I sought out Mr. Houff, whom I had met
7. casually earlier, in order to discuss with him what our
8. plans were, in person. I had already been told by Mr.
9. Clark that his party had mentioned the plans.
10. I found that day that Mr. Houff, unfortunately, was
11. sick with the flu, and instead his wife received me. And
12. I talked with Mrs. Houff, who did tell me that that
13. wasn't the happiest thing she wanted near her home, but
14. that . . . the conversation didn't go much beyond that.
15. Q. Were they, at that time, aware of the fact that you had
16. the building permit for the radio antenna?
17. A. Yes. She said that she was well aware of it, and had
18. discussed it with the neighbors.
19. Q. Now, do I gather, Mr. Rogers, correctly, that everything
20. as far as the FCC is concerned is now approved for your
21. purchase of this station?
22. A. Yes. That's in evidence here; but there is a very heavy
23. condition on it. Unless we can move that tower, that
24. radio antenna--or to put up a new one, actually--within

1. six months, the FCC document requires us to surrender
2. the license. And if it took that route--see, we have six
3. months of permission to broadcast from the present
4. facility, to allow a reasonable time for the construction
5. of a new facility. And if that should happen, of course,
6. there is another channel by which Lexington could literally
7. lose its radio station.
8. Q. Well, I gather your closing date under the contract, as
9. I believe Mr. Costello told us, is a few days off--Novem-
10. ber one, 1976?
11. A. That's the contemplated closing date.
12. Q. And unless you close at that time, and take the risk of
13. your getting an approved tower site within six months,
14. then you just won't go through with the purchase of the
15. station; is that correct?
16. A. Well, I really . . . that's a business judgment that would
17. have to be made. But I think it would be . . . I really
18. can't make that judgment from the witness stand, with
19. your permission. You heard Mr. Costello say that they
20. are confronted with--from the point of view of their
21. responsibilities as trustees--to make the most advantageous
22. sale of the land. We would have to decide what risks
23. we would take if we closed and ended up with a total
24. loss, because then we would not only have paid out the

1. investments that we have already made in processing this
2. matter, which is a considerable investment, approaching
3. a hundred thousand dollars, because of legal complica-
4. tions and other matters; we would also have to consider
5. that in that framework we could end up having bought
6. the station, and not being able to operate it.
7. Q. Do I understand correctly that if this permit is revoked,
8. or if you are not permitted to build, if the injunction
9. is not released--then you would have to find another
10. site within six months from November 1, 1976?
11. A. Well, I don't know where we'd find such a site, on two
12. counts, from what I have learned through this process.
13. One, we know of no other willing seller; and, second,
14. I have the impression--and you lawyers will have to find
15. out whether it's correct or not--that if we can't go
16. in any one zone of the County, we can't go in any zone.
17. Q. All right, sir. Thank you.
18.
19. Cross Examination by Mr. Robey:
20. Q. Mr. Rogers, you had knowledge back in early May, or
21. April, that there was some substantial question in regard
22. to the neighbors, and Mr. Read's office, in regard to
23. the propriety of this tower going in a residential area,
24. didn't you? You knew that there was substantial objection?

1. A. I knew the question had been raised; of course, I did.
2. Q. And you knew that the Commonwealth's Attorney's office
3. had been asked to see into it, and, in fact, he called
4. you and told you to stop out there, didn't he?
5. A. That's right.
6. Q. And so you were in a position way back then to hold up
7. and see what happened, weren't you?
8. A. No, Mr. Robey, I was not in such a position.
9. Q. Why weren't you?
10. A. Because, as you heard, we were under the need to perform.
11. Q. Well, you had signed a contract, without a place to per-
12. form it on, hadn't you? You signed a contract to buy
13. the station, and didn't have a tower site, did you?
14. A. We were under that contract supposed to get a tower site
15. within thirty days, which we did. And had we not gotten
16. a tower site in thirty days, then the contract would not
17. have been operable, and we would have had minimal out-of-
18. pocket loss.
19. Q. When did you sign the contract?
20. A. Well, it was ratified by both parties sometime between
21. September tenth and twelfth, as Mr. Costello said.
22. Q. And you are now telling the Court you got a tower site
23. in thirty days?
24. A. We got the option within thirty days, yes.

1. Q. I thought you signed the deal with Mr. Agnor in December?
2. A. No. Mr. Agnor testified that the option lease deal was
3. signed in September.
4. Q. And in thirty days you were supposed to get approval of
5. that as a building site, under the terms of the contract?
6. A. That is not . . . I'm not completely sure of that. The
7. contract language, as I recall it--and it's not in front
8. of me--specifies getting a zoning permit, because the . . .
9. Q. Within the thirty days?
10. A. Yes. But . . .
11. Q. Did you get it?
12. A. It turned out that no zoning permit was needed--that . . .
13. Q. Did you get a building permit in thirty days?
14. A. There was no requirement to do that, in the contract.
15. Q. Well, a building permit would signify that it could be
16. built in that zone, wouldn't it?
17. A. Well, the advice we received was that the tower--the radio
18. antenna tower--goes in as a matter of right, and we had
19. performed.
20. Q. Tell me this, Mr. Rogers, there are some commercial
21. and business sites available in and about the City of
22. Lexington, are there not?
23. A. Well, my real estate adviser had better comment on that.
24. I'm told that sites of this nature are not available; and

1. even if they were, there would remain the question of
2. whether the Code, by your interpretation, permits such a
3. use. Studios and offices, yes; but . . .
4. Q. Well, let's talk in terms of the land where the tower
5. is now. That's for sale; or it was for sale when you
6. made your bid, wasn't it?
7. A. Right.
8. Q. Why didn't you buy that land?
9. A. Because, as Mr. Costello said, they were looking for
10. three hundred and fifty thousand dollars, which is twice
11. what the station itself is worth.
12. Q. Well, what you're saying is that the price was too
13. expensive?
14. A. It is not a viable way to have a radio staion, in a
15. market of this size--that's right.
16. Q. I agree. Now, that being the situation, then, in order
17. for you to make money, and to save money on your invest-
18. ments, you want to put the tower around these people's
19. homes, at a cheaper price; isn't that what it amounts to,
20. Mr. Rogers?
21. A. We have to move the tower, as it was said to you, because
22. it is not economically viable to keep it there; but--or for
23. anybody to keep it there.
24. Q. So it's money . . .

1. A. So it has to go somewhere.
2. Q. It's money, for you, and it's money for the shareholders
3. of the WREL Corporation--is what it amounts to--is the
4. reason that you're moving that tower; isn't it?
5. A. Well, there are equities involved, yes, I would think so--
6. very much so.
7. Q. All right. And what equities are taken into consideration
8. about the propriety of a radio tower right next to some-
9. body's house? What account did you take for the diminish-
10. ment of that, to their homes?
11. A. Well, you didn't want that in the record. We did . . . we
12. do have a radio broadcasting station in Waynesboro; in
13. fact, there are two of them there, and they don't seem
14. to have harmed the adjacent residential property owners.
15. Q. You say a radio tower in a residential area does not harm
16. the value of the property? Is that what you're telling
17. the Court?
18. A. I didn't say that. I said that that's a conclusion . . .
19. Q. Well, you . . .
20. A. I said that in Waynesboro there is WAYB radio within the
21. City limits, which has a radio tower which doesn't appear
22. to have been detrimental to the residential landowners
23. that . . .
24. Q. And that radio tower was build prior to the Zoning

1. Ordinance of Waynesboro, wasn't it?
2. A. We have four three-hundred foot towers in Augusta County,
3. and the residential development in that area has been
4. excellent, right across the street . . .
5. Q. I'm talking about the tower that you brought up--it was
6. built in 1947, wasn't it?
7. A. Which one?
8. Q. The one . . . the WAYB tower.
9. A. That's right. And that has been intensively developed
10. for residential use since.
11. Q. Since then?
12. A. Yes. But in the case of our four towers, which are
13. three hundred feet high, and four in a row, we haven't
14. had any complaints from the neighbors.
15. Q. How much are you paying Mr. Agnor for the land out there?
16. A. Fifteen thousand odd dollars.
17. Q. And you will concede to the Court that while the price
18. may not suit you, there is property available around
19. the Lexington area, at a price?
20. A. None was disclosed to me.
21. Q. Well, we disclosed one--the WREL site.
22. A. We have explained--that site is just too, too valuable.
23. Q. Too expensive?
24. A. And we've gotten into some things before, Mr. Robey, that

1. I could help clarify. You see, a radio antenna isn't
2. just a pole in the air. There also has to be around it
3. some . . . this is for AM radio.
4. Q. Not just a pole in the air?
5. A. No, it is not.
6. Q. There's a whole lot more to it, isn't it?
7. A. The more to it is that there has to be installed--and
8. which is something called a ground system. And the ground
9. system consists of really almost miles of copper wires.
10. They have no, you know, electrical energy of the sort
11. you're thinking about. And these are distributed on
12. radials in the ground, in a circumference around the tower.
13. And these radials--there would be a hundred and twenty
14. of them for a single tower--are part . . . are the most,
15. really, in a sense, the most important part of the radiating
16. system--because by day, that's about the only signal
17. most people receive; by night, you have the sky wave
18. enters into it. And, therefore, that's why the large
19. acreage is needed. You see, to that extent it's different
20. from a say, a tower that supports a television transmitting
21. or receiving thing, because the tower itself is inanimate
22. there--it's just a supporting structure. In the case of
23. the AM radio, which this is, the tower is the radiator--
24. it's kind of an enlargement of the buggy whip on your

1. automobile. And this is not, in my opinion--and my
2. qualifications include sitting on the District Planning
3. Commission--a really provident use of commercial land
4. in any case. You have very little commercial land, or
5. industrial land, in Rockbridge County. And the most
6. provident use of that in the field of tax base, and
7. return to the County, of course, would be something like
8. a Holiday Inn or the shopping centers, which can make
9. use of the scarce commercial land; whereas tying it up
10. in open acreage, which this amounts to, seems to me is
11. not the most provident use, even if we didn't have these
12. other considerations.
13. Our tower, as planned, in its present site, does
14. produce very possibly some benefits. It is guaranteed
15. that those adjacent homeowners--and only a few of them
16. have direct line sight of it--have open land there; where-
17. as, if it should some day get water and sewer and be sub-
18. developed, it would be intensively subdeveloped. So that
19. is one gain. It doesn't produce . . .
20. Q. Did I understand you to say that it's an advantage to have
21. the tower there, as opposed to homes? Is that what
22. you're saying?
23. A. It could be, because the land is kept open.
24. Q. I think you've answered my question, Mr. Rogers. Thank

1. you.
2.
3. Examination by the Court:
4. Q. Mr. Rogers, when you applied for this building permit,
5. did you advise the Building Inspector--or the Administrator--
6. of the purpose that you were going to use this land
7. for?
8. A. Oh, yes, sir; there was a letter attached to it. I think
9. it's in evidence, isn't it? I'm sure the attorneys have
10. it--the December sixteenth letter, in which I made the
11. complete disclosure.
12. MR. FRANKLIN: Judge, there was a letter--we got
13. it in earlier this morning. There
14. is a letter that was attached to his
15. application, if Your Honor please,
16. as Exhibit Number One. This is the
17. letter that was attached to the
18. application . . .
19. A. December the sixteenth--it was written the day before.
20. And I had felt the desire--although there was no such
21. need; you can just apply for a permit on a form--I had a
22. desire to make a complete disclosure.
23. Q. And you presented this letter together with your applica-
24. tion . . .

1. A. That's right; and I requested that it be filed with the
2. application, which I believe happened.
3. Q. Tell me something about . . . I have no knowledge at all--
4. my education in these radio towers is very limited. Now
5. these people are strongly objecting to this tower, as you
6. know. And what . . . how does it function? How does this
7. tower function?
8. A. Well, I'm going to say what I have to say; and if Mr.
9. Robey is dissatisfied, then we do have the man who
10. designed it and submitted the application.
11. Q. Oh, well, perhaps I should ask him. I don't know.
12. A. I think it would really be better. I will answer
13. briefly, and then he can go into it in more detail.
14. The tower, I repeat--and, first of all, my education was
15. limited in this, too, until I became an owner, I assure
16. you--but I think it's pretty generally understood that an
17. antenna can either transmit or receive. And we're very
18. much aware of that through the CB movement, in which the--
19. or the ham radio, or things like that. In this case,
20. the tower--the antenna--we're looking at, which is the
21. technical term, is what is called an AM radiator, meaning
22. it radiates out the AM signal which is fed to it from the
23. transmitter. It radiates the electronic impulses which
24. are received by radio receivers.

1. Q. Is it noiseless?
2. A. Absolutely noiseless. It makes no noise.
3. Q. Is it hazardous?
4. A. It is not hazardous, by any authority.
5. Q. Well, I know, that I have observed the tower up here;
6. and there are lights flashing on that--a red light . . .
7. A. Yes. Right. The reason for that--it has nothing to
8. do with the FCC. We have another regulatory agency,
9. called the Federal Aviation Administration. And they
10. have taken the position, which I think is correct, that
11. any tower two hundred feet or higher--or, higher than
12. two hundred feet--must have this orange and white
13. painting on it, and must also have these flashing lights.
14. That is why we went to considerable trouble and added
15. expense to reduce the height of our proposed tower to
16. two hundred feet, so that . . . and we did get an
17. exemption from the painting requirements and the lighting
18. requirements, so that, at night, the tower will not be
19. a mark on the horizon, and by day it will be a neutral
20. kind of gray, and rather slender, and . . .
21. Q. Will this interfere with the TV reception?
22. A. It will not. And, again, I prefer that the expert tell
23. you why; but I'll tell you briefly that the AM radio
24. broadcast is emitted in what is called thousands of

1. cycles. You have heard it on radio stations, I'm sure,
2. where WREL is 1450 kilocycles. I'm not even sure I've
3. got that right, but it's something like that. And TV
4. signals are in millions of cycles--megacycles. And they
5. really are so distant that interference with TV is not
6. realistic. Our man will explain that to you.
7. Q. Well, I know, Mr. Rogers, that you are interested also
8. in retaining the good will of the people in that neigh-
9. borhood . . .
10. A. I couldn't think more of retaining good will, because
11. all a radio broadcaster has is to serve the community,
12. and to produce good will. I do not want to offend them.
13. But I do know, from experience, that they will be much
14. less bothered by this than they think they are going to
15. be. And I then refer, as a practical matter, since this
16. is a community that you are all familiar with--take a
17. look at what's happened around the Columbia Gas tower,
18. which is a three hundred and seventy foot tower, like
19. WREL's, and has the flashing lights and the orange and
20. white paint, and also is a short-wave communications
21. system, which, in theory, could interfere with TV. We
22. have none of those characteristics.
23. I have no hesitation in saying that I am among those
24. who moved to this area--I came from a metropolitan area,

1. seeking peace and quiet--and that all of us would rather
2. not see any change. I also learned, many years ago, that
3. if you don't want change, you better not buy next to any
4. empty ground. And obviously, the last thing we want to
5. do is to offend anybody. Our whole future depends upon
6. pleasing this community. We really felt we had no choices
7. here. We couldn't go farther out in the County--in
8. other words, in land which is still more open--for reasons
9. that will be explained by the technical expert.
10. Q. Thank you.
11. COURT: Mr. Read, did you have some questions
12. for Mr. Rogers?
13. MR. READ: Yes, sir.
14.
15. Cross Examination by Mr. Read:
16. Q. I wanted to ask the same question I asked earlier when
17. you were testifying, and that is, with reference to my
18. telephone conversation to you on May fourteenth--I would
19. like to ask you if, subsequent to that conversation, that
20. is the next day, whether WANV agreed not to continue any
21. further construction?
22. A. That is right, Mr. Read. We had . . . I'm in the communi-
23. cations business, you know, and we had a communications
24. gap. I thought that the import of your question was

1. that we had reached that agreement before May fourteenth,
2. which, of course, we now agree we did not. But subse-
3. quent to your telephone call, we mutually agreed that at
4. that time we still thought there might be an opinion from
5. the Attorney General--that until such an opinion was
6. rendered, we would not do further construction there; and
7. we would resume it only when and if . . . And, of course,
8. by June second, or whatever the date is on your letter,
9. we had received the information that he was not going to
10. render an opinion. And then you said we had a standing
11. permit.
12. Q. Thank you very much; that's the only question I had.
13. MR. FRANKLIN: I agree with what Mr. Read said
14. earlier now, Judge; I didn't realize
15. he was talking about the fourteenth
16. of May. That was the date of the
17. agreement.
18. A. So, therefore, Mr. Read agrees we didn't breach that
19. agreement made on May fifteenth.
20. Q. That there would be no construction then after that?
21. A. Right. Until you released us.
22. MR. POFF: We have no further questions.
23. COURT: Mr. Robey, do you have anything
24. further for Mr. Rogers?

1. Re-Cross Examination by Mr. Robey:
2. Q. This transmitter building that you put out there now,
3. what color is this, Mr. Rogers?
4. A. It's red barn color. It's a . . . it seems to be a com-
5. patible . . . We chose it for that reason.
6. Q. What color is it?
7. A. Red barn, with white trim. It's a miniature little barn--
8. you've seen them around.
9. COURT: With a figure of a horse on it?
10. A. Right. In fact, we bought it from Sears and Roebuck in
11. Lexington. We tried to patronize local business. And
12. since you've opened the avenue for me, Mr. Robey, the
13. name of the building is Lexington Number Four.
14. Q. Mr. Rogers, I'm certainly impressed with what you have
15. to say; but our people have a lot of problems about
16. what you're doing. And that's the reason we're here
17. today.
18. A. Mr. Robey, I appreciate it, but, as you have pointed
19. out, it's got to go somewhere. And we were deflected
20. here--that is the explanation of the point, Your Honor,
21. that Mr. Robey raised, although this is really Rock-
22. bridge's problem and not ours--we're together in this.
23. There is no practical way to move that tower around on
24. the present site, and an adverse decision here would freeze

1. that station to that site; and, as you heard from Mr.
2. Costello, as a practical matter on the Court's mandate,
3. he feels they can't keep it there.
4. COURT: This case, of course, will be
5. decided on the law, and . . .
6. A. I know, sir.
7. Q. Just one last question: Did you sign any affidavit,
8. when you applied for your building permit; and, if so,
9. where is it?
10. A. You know, Mr. Robey, that I didn't.
11. Q. And Mr. Agnor did not sign one, did he?
12. A. We were . . .
13. Q. An affidavit . . . just answer my question for one time.
14. A. The answer is no.
15. Q. Thank you sir, for answering the question once.
16. (Recess.)
17.
18. WITNESS - LYLE KOOGLER
19. Direct Examination by Mr. Franklin:
20. Q. For purposes of the record, would you state your full
21. name, please?
22. A. Lyle Koogler.
23. Q. And your address?
24. A. Fairfield, Virginia.

1. Q. How long have you been a resident of Fairfield, Virginia,
2. Mr. Koogler?
3. A. Since 1947.
4. Q. Have you been continuously a resident of Fairfield since
5. 1947?
6. A. Yes, sir.
7. Q. And Fairfield, Virginia, is located in what county?
8. A. Rockbridge County.
9. Q. During the period of time that you have been a resident
10. of Fairfield, Virginia, would you tell the Court, please,
11. whether or not you have had an occasion to serve on both
12. the Planning Commission and the Board of Supervisors for
13. the County of Rockbridge?
14. A. Yes, sir. I served on the Board of Supervisors two
15. terms, ending December of '71. And I served on the Planning
16. Commission, as a representative of the Board of Super-
17. visors, during the first term.
18. Q. You may have stated it in the record, and I may have been
19. thinking about something else--what span of time did your
20. term on the Board of Supervisors cover?
21. A. 1964 through '71, I believe.
22. Q. 1964 through 1971?
23. A. Yes, sir.
24. Q. Now, during that period of time, would you state for the

1. record please whether . . . what the history of the Board
2. of Supervisors legislation has been with regard to a
3. zoning ordinance or ordinances?
4. A. During my first term, an ordinance was enacted in July,
5. I believe, of 1964. And due to severe criticism--or
6. objection, I should say, I guess--from the residents of
7. Rockbridge County, due to the strictness of it, it was
8. repealed after about three months, I believe. I don't
9. know the exact time.
10. Q. Do you recall the date of the Supervisors meeting, or the
11. year in which the original Zoning Ordinance that you have
12. described as being too severe was repealed?
13. A. Not the exact date. If I remember correctly, it was
14. about three months after it was enacted.
15. MR. ROBEY: What's this?
16. MR. FRANKLIN: This is a certified copy of the
17. Board of Supervisors minutes,
18. repealing the first Zoning Ordinance.
19. MR. ROBEY: What's it for?
20. MR. FRANKLIN: To show the legislative history of
21. this Zoning Ordinance, that at one
22. time there was a very severe, extremely
23. restrictive zoning ordinance, which,
24. in response to petitions, and

1. petitioners represented by counsel,
2. Mr. Gunn, the Board of Supervisors,
3. under pressure from the County
4. residents, repealed this extremely
5. restrictive zoning ordinance, to
6. provide the County with more flexi-
7. bility.
8. COURT: Well, there's no issue in this
9. case but that this area is residen-
10. tial, is there?
11. MR. FRANKLIN: No, sir, Your Honor; but it goes,
12. if the Court please, it goes to the
13. question, again, of whether Mr.
14. Miller acted properly in issuing
15. this permit; and I think the history
16. of zoning legislation in the County
17. of Rockbridge, moving from a severely
18. restrictive and confining zoning
19. ordinance into a more flexible zoning
20. ordinance, as Mr. Koogler is testi-
21. fying to, shows even clearer that
22. there was not an abuse of discretion
23. on the part of Mr. Miller, and that
24. his decision was, in fact, not

1. plainly wrong.
2. COURT: Well, wasn't his conduct controlled
3. by the existing Ordinance, at the
4. time that he . . .
5. MR. FRANKLIN: Yes, sir, it was. But I think . . .
6. again, not to belabor the point,
7. Your Honor please--I think that, while
8. his conduct was governed by the
9. existing permit, I think it would
10. be permissible to show the legisla-
11. tive history, to show that this
12. ordinance was, in fact, less restric-
13. tive, and it was, in fact, the intent
14. of the Board of Supervisors to create
15. a piece of legislation which, in
16. fact, was less restrictive.
17. COURT: Well, if Mr. Robey has no objection
18. to it . . .
19. MR. ROBEY: Judge, I'm just wondering when this
20. situation is going to stop--when
21. I'm going to feel compelled to just
22. absolutely and unequivocally object
23. to all of this irrelevant testimony.
24. I've done it as a matter of courtesy,

1. because I had nothing to hide. But
2. here we are back eventually to this
3. one thing, and that is the Zoning
4. Ordinance that is in existence now.
5. And the Mormon v. Young case, it
6. tells the Court how it is to read a
7. zoning ordinance, and look at the
8. words, and interpret its meaning.
9. And I have objection, if the Court
10. is going to put any weight to it--
11. but if you want to let them go
12. through the formalities of it . . .
13. COURT: No, no. If you . . . I think you
14. should object whenever you think
15. it's proper to object; and I will
16. rule accordingly. If you object to
17. it, I'll sustain the objection.
18. MR. ROBEY: I object, sir.
19. COURT: I don't see where it has any--serves
20. any useful purpose.
21. MR. FRANKLIN: If Your Honor please, we would like
22. to tender, for the purposes of the
23. record . . . and save our point . . .
24. COURT: You can tender it, but I'm not going

1. to admit it into the evidence.
2. MR. FRANKLIN: All right. Well, the record would
3. show, then, for the reasons previously
4. stated, we would tender a duly
5. attested and certified copy of the
6. Board of Supervisors--the minutes
7. of the Board of Supervisors of
8. Rockbridge County of September the
9. fourteenth, 1964, repealing the Zoning
10. Ordinance which preceded the present
11. one.
12. COURT: Well, also state for the record why
13. you are tendering it.
14. MR. FRANKLIN: We, if Your Honor please, we would
15. tender it because a portion of the
16. minutes reflects the following: a
17. request from the citizens of Rock-
18. bridge County, and the Board of
19. Supervisors requested, that the
20. Planning Commission rework the
21. ordinance to provide minimal control
22. for planning the future growth of
23. Rockbridge County, and that they
24. return to the Board of Supervisors

1. within six months for the body's
2. consideration or re-adoption,
3. rework--to show the legislative
4. history of the zoning in the County
5. of Rockbridge, moving from an
6. extremely restrictive zoning ordinance
7. to a more flexible one.
8. Q. Now, Mr. Koogler, were you also on the Board of Super-
9. visors in 1971, when the present Zoning Ordinance was
10. enacted?
11. A. Yes, sir.
12. Q. The present Zoning Ordinance . . . or the Zoning Ordinance
13. enacted at that time is the Zoning Ordinance we have at
14. present; is that correct?
15. A. With, I believe, some minor changes that have been made,
16. yes.
17. Q. And this was done at the May twelfth, 1971, meeting; is
18. that correct?
19. A. I wouldn't know the exact date.
20. MR. FRANKLIN: We also have a certified copy of
21. these minutes, Judge, that we would
22. tender.
23. COURT: Is there any attack on the validity
24. of the Ordinance?

1. MR. FRANKLIN: No, sir. No, sir. None whatsoever.
2. MR. ROBEY: Well, I don't know what you're
3. asking Mr. Koogler about; it shows
4. on here: Absent, Mr. Koogler. It
5. shows he wasn't even there. How can
6. you ask him about it, when he was
7. absent.
8. MR. FRANKLIN: I can ask him whether he was on the
9. Board of Supervisors, and whether it
10. was enacted, Mr. Robey.
11. MR. ROBEY: Well, if he wasn't there, I don't
12. see how he could say. The record
13. there says he wouldn't know; it
14. says he was absent.
15. MR. FRANKLIN: Will you stipulate that this is a
16. verified copy of the record?
17. MR. ROBEY: Do you still attempt to submit it
18. through Mr. Koogler, when he was
19. absent?
20. MR. FRANKLIN: We'll put it in through Mr. Austin;
21. it makes no difference.
22. Q. Mr. Koogler, during the period of time that you served
23. either on the Board of Supervisors, or . . . well, during
24. the period of time that you served on the Board of

1. Supervisors, and also as their representative on the
2. Planning Commission, was there any question or any dis-
3. cussion concerning radio antennas?
4. A. There was . . . it was discussed at great length by the
5. Planning Commission. And the final analysis was--and
6. the reason it was placed in each section of the Ordinance--
7. was that due to the terrain of Rockbridge County, it would
8. be necessary not to limit the height of antennas of any
9. type. That was discussed there. Because if we did,
10. it would be areas of Rockbridge County that could not be
11. covered by either radio or television.
12. MR. FRANKLIN: Your witness.
13.
14. Cross Examination by Mr. Robey:
15. Q. Mr. Koogler, I know it was a difficult time for you,
16. serving on the Board of Supervisors--any job like that's
17. difficult; and I know that you-all probably gave quite a
18. bit of consideration to the establishment of your residen-
19. tial areas, did you not?
20. A. We gave quite a bit of consideration to it all, yes, sir.
21. Q. And you adopted, did you not, that your purpose in estab-
22. lishing a residential area was to promote and encourage a
23. suitable environment for family life, and to prohibit all
24. activities of a commercial nature? Did you-all mean

1. those words as they were written?
2. A. We meant what is in the Ordinance.
3. Q. You meant what you said there?
4. A. Yes, sir.
5. Q. And when you talked in terms of public utilities under
6. Section 4-1-10, you talked in terms of public utilities
7. necessary in the area, for the maintenance of the property.
8. Did you mean necessary, when you said "necessary?"
9. A. Yes, sir; and I think a radio station is necessary in
10. Rockbridge County.
11. Q. Where do you live, Mr. Koogler?
12. A. I live in Fairfield.
13. Q. What's it zoned out there?
14. A. Where I live is zoned agricultural.
15. Q. It's zoned agricultural?
16. A. Our home is an agricultural area, yes, sir. I live on a
17. farm.
18. Q. Are you saying--when you say that you think a radio
19. station is necessary to a . . . or your Board thought it
20. was necessary--are you saying that it's necessary to have
21. a radio tower in a residential area in order to have a
22. radio station in Rockbridge County?
23. A. No, sir; I did not say that.
24. Q. So you are saying that you think it would be good to have

1. the radio station, but you're not saying that it's
2. necessary to have the tower stuck beside somebody's house?
3. A. All I'm saying is it's necessary to have a radio station.
4. Q. But not necessary to have it in a residential area?
5. A. No, it's not necessary at any particular location, as
6. long as it can meet the requirements.
7. Q. Thank you, Mr. Koogler.
8. MR. READ: I have no questions.
9.
10. WITNESS - DONALD G. AUSTIN
11. Direct Examination by Mr. Poff:
12. Q. Mr. Austin, would you state your full name, please, sir?
13. A. Donald G. Austin.
14. Q. Mr. Austin, I believe you have previously been identified
15. by other witnesses as the County Administrator; is that
16. right, sir?
17. A. Yes, sir.
18. Q. And I take it that, in that capacity, that you have
19. occasion to supervise the activies of Mr. Miller, who is
20. the Building . . . the Zoning Administrator?
21. A. Indirectly. Mr. Miller, of course, is in charge of
22. the building and zoning department. He does work under
23. my office.
24. Q. Now, Mr. Austin, I believe also that in your capacity as

1. County Administrator you keep the minutes of the meetings
2. of the Board of Supervisors, do you not?
3. A. Yes, sir; that's correct.
4. Q. And I believe at our request, sir, you have provided us
5. with certain attested copies of various meetings of the
6. Board of Supervisors, have you not?
7. A. Yes. I believe they are photostatic copies from the
8. Minute Book.
9. Q. Now, I believe--let me get the record straight, sir; I'm
10. not sure which ones were . . . one was tendered; and I
11. believe they were received for the record, if not
12. received into the evidence.
13. MR. POFF: Was it the Court's ruling, on the
14. September fourteenth, 1964, that we
15. were permitted to tender it for the
16. record, but . . .
17. COURT: But it was not admitted into the
18. evidence.
19. MR. POFF: All right. Well, we would proffer
20. it for the record.
21. Q. Do you recall, sir, when this particular Ordinance was
22. adopted--this particular Zoning Ordinance?
23. A. The Zoning Ordinance that is now in effect?
24. Q. Yes, sir.

1. A. I believe that was adopted at a meeting on May twelfth,
2. 1971, and was to go into effect at twelve-oh-one a.m. on
3. May thirteenth, 1971.
4. Q. Now, without getting into the details of the prior sit-
5. uation--and you are aware that there had been an earlier
6. ordinance, that had been revoked under public protest?
7. A. I was aware of it, although I was not with the County
8. at that time.
9. Q. Now, I show you, sir, what has been . . . Well, do you
10. know--let me ask you this question--do you know whether
11. the 1971 Ordinance as adopted was more stringent with
12. regard to zoning requirements or less stringent, than
13. the 1964 law which was later revoked or repealed?
14. A. I've never compared the two, and I have no idea.
15. Q. Now, I believe, sir, you mentioned May the twelfth, 1971,
16. as the date that this Ordinance was adopted. I show you
17. what I think are the Minutes of that meeting, and ask
18. you if that is a true copy of that?
19. A. Yes, sir.
20. MR. POFF: Your Honor please, I recognize that
21. the Ordinance has been admitted, but
22. to the extent that they reflect the
23. legislative . . .
24. COURT: That's on the existing Ordinance?

1. MR. POFF: That's correct, sir.
2. MR. ROBEY: I have no objection to that.
3. COURT: All right. That will be Respondents'
4. Exhibit Five, will it not? I will
5. identify it as Exhibit Five.
6. Q. I believe Mr. Austin, you are aware of the controversy
7. surrounding the construction of this radio antenna which
8. has become the subject of this litigation?
9. A. I am.
10. Q. Were you present, sir, on or about June the fourteenth,
11. 1976, when the parties involved in this litigation
12. appeared before the Board of Supervisors in regard to
13. this matter?
14. A. Yes.
15. Q. And was it not true, sir, that the Petitioners in this
16. case at that time asked the Board of Supervisors to
17. revoke the permit that had previously been issued?
18. A. I believe that's correct, yes.
19. COURT: What was that date?
20. MR. POFF: June the fourteenth, 1976.
21. Q. And isn't it true that Mr. Robey, counsel for the
22. Complainants, was present at that time?
23. A. Yes.
24. Q. And Mr. Houff, one of the principal Petitioners was

1. present?
2. A. Yes.
3. Q. And Mr. Franklin, one of the counsel here was present?
4. A. Yes.
5. Q. And Mr. Rogers?
6. A. Yes.
7. Q. And I believe also Mr. John Read, the Commonwealth's
8. Attorney, was present, was he not?
9. A. Yes, he was.
10. Q. And was not this entire matter discussed rather fully
11. before the Board on that occasion?
12. A. If memory serves me correctly, I believe it was dis-
13. cussed . . . I believe the Chairman of the Board allowed
14. the parties involved, both parties, to enter into the
15. discussion involving the situation. And I also believe
16. that our Commonwealth's Attorney entered briefly into the
17. discussion. Again, from memory, I don't think the Board
18. of Supervisors took any position at that time.
19. Q. All right. The Board of Supervisors at that time had
20. been, as I believe you have stated--had been asked to
21. revoke the permit that had previously been issued for the
22. construction of this radio tower?
23. A. I believe that Mr. Robey asked that the Board give due
24. consideration to it.

1. Q. And did the Board revoke . . .
2. MR. ROBEY: Let him answer the question.
3. MR. POFF: I'm sorry; I thought he had answered
4. it.
5. Q. Did you . . . Had you finished your answer?
6. A. Well, I meant to say that I believe Mr. Robey asked
7. for the Board's consideration in trying to treat his
8. clients fairly. I would assume he was asking for the
9. permit to be revoked.
10. Q. Did you keep the minutes of that meeting, sir?
11. A. Yes.
12. Q. And was any action taken by the Board of Supervisors on
13. June fourteenth, 1976, as a result of that airing of this
14. matter, to revoke the permit that had been issued?
15. A. No, sir.
16. Q. I show you, sir, what has been marked--and I think you
17. prepared it--a certified copy of the minutes of the meeting
18. of June fourteenth, 1976, and ask you if you can identify
19. that for the Court as being a true copy of the minutes of
20. that meeting?
21. A. Yes, sir.
22. MR. POFF: Your Honor please, I would respect-
23. fully tender the minutes of the
24. June fourteenth, 1976, meeting into

1. evidence as the Respondents' Exhibit
2. next in order.
3. COURT: Any objection, Mr. Robey?
4. MR. ROBEY: No, sir.
5. COURT: It is identified as Respondents'
6. Exhibit Number Six.
7. Q. Mr. Austin, based upon your memory of having been there,
8. and to whatever degree you would refresh it from the
9. minutes, were the Board members--the members of the Board
10. of Supervisors--actually polled on that occasion as to
11. what action, if any, they wanted to take?
12. A. (No response.)
13. Q. Would it help you if you reviewed your minutes on that?
14. A. It probably would.
15. * * *
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8. Q. Mr. Austin, have you had occasion to listen to the actual
9. tape of that meeting?
10. A. Yes, sir.
11. Q. And can you remember from that tape--since we can't
12. locate it in the minutes very readily--whether there was
13. any polling of the Board on what action was taken?
14. A. It seems to me that there was an informal poll taken by
15. the Chairman, to see if the Board wished to take any
16. action on it; and I believe they decided that they did
17. not want to take any action.
18. Q. Moving on to another matter, sir, there was reference
19. by Mr. Rogers in earlier testimony that at some time he
20. called you, in the absence of Mr. Miller, to advise you
21. that he was beginning to do some work out there, in the
22. construction of this radio antenna. Do you recall any
23. such discussion?
24. A. I have had several telephone conversations with Mr. Rogers

1. over the past few months. I cannot specifically recall
2. that he indicated that he was going to start building;
3. but he could very well have told me that. I don't
4. remember. I do remember discussing with him, and informing
5. him of, the five-foot minimum setback for an accessory
6. building.
7. Q. And that was one of several inquiries he had made to you
8. in the various contacts he has had about this matter?
9. A. Yes, sir.
10. Q. And he has talked to you as well as Mr. Miller about the
11. strictures that are involved in the construction of this
12. site, of this tower?
13. A. Right.
14. Q. Now, Mr. Austin, to close by moving backward in time just
15. a minute, you are aware, are you not, sir, that there had
16. been an earlier application by Mr. Harry Peyton, I
17. believe, for a similar type of construction in a residen-
18. tial area?
19. A. Yes.
20. Q. And I show you, sir, what has been marked--or what I would
21. ask to be marked, if you will, sir--as Respondents'
22. Exhibit Number Seven, or the next in order; I think it's
23. Number Seven.
24. COURT: Have you seen this, Mr. Robey?

1. MR. ROBEY: No, sir.
2. MR. POFF: I think Mr. Robey is familiar with
3. it.
4. MR. ROBEY: Well, I may be, but I don't know
5. if . . .
6. COURT: That would be Number Seven.
7. MR. POFF: All right, sir.
8. Q. Mr. Austin, can you identify this document which appears
9. to be on the County of Rockbridge stationery, and bears
10. the date of September fourth, 1974; is that correct?
11. A. Yes, sir.
12. Q. And what is that? Is that a document that you prepared,
13. sir?
14. A. Yes, it is.
15. Q. And can you tell us just why you issued it, and to whom
16. you issued it, and what it says?
17. A. Mr. Peyton, at the time in question, had applied, I
18. believe, for a permit to construct a radio tower. At
19. that time, we examined the Ordinance; and after consider-
20. ation, it was finally determined that we felt it was
21. a permitted use. And this was the reason for having this
22. written.
23. Q. He needed that, did he not, sir, for an FCC application?
24. A. Yes, I believe that's correct.

1. Q. And so you issued this to him for that purpose, indicating
2. that you would issue a permit for the construction of this
3. tower?
4. A. Yes, that's the reason for this.
5. COURT: Who is Mr. Peyton?
6. MR. POFF: Peyton, sir, having been, I think,
7. under the evidence, agreed that he
8. was a previous potential purchaser of
9. WREL, as I understand it. He made
10. application for the construction
11. of a radio tower.
12. COURT: I know his name was mentioned a while
13. back.
14. MR. ROBEY: He is the one who Mr. Rogers was
15. making reference to in the newspaper
16. article that was introduced by us,
17. when Mr. Peyton was wanting to do the
18. same thing.
19. COURT: All right.
20. Q. All right, Mr. Austin; thank you, sir. I have no further
21. questions.
22.
23. Cross Examination by Mr. Robey:
24. Q. Mr. Austin, referring to the last paragraph of the minutes

1. of the meeting that--well, a number of us attended it--
2. and to which your attention was called here on direct
3. examination . . . it says here: after further discussion
4. of the matter, the Board decided to follow the advice of
5. the Commonwealth's Attorney and not get involved in the
6. matter at this time. Is that a fair statement of the
7. decision or action of the Board of Supervisors--and that
8. was, not to get involved at this time?
9. A. I believe that's correct.
10. Q. And is it true, as the minutes at the top of the page
11. reflect, that the Commonwealth's Attorney advised the
12. Board not to get involved at this time, because litigation
13. was imminent?
14. A. That's correct.
15. Q. And it's true that they did not get involved?
16. A. That's correct.
17. Q. Now, Mr. Austin . . .
18. MR. ROBEY: Before I ask him these questions, I
19. feel compelled to state that--or to
20. remind everyone here that--there is
21. a proceeding between these Petitioners
22. and the Rockbridge County Zoning
23. Administrator, for the purpose of
24. mandating his due performance,

1. withdrawing the illegally issued
2. permit, and so forth. So I want to
3. start to ask these questions in the
4. context of our case against the
5. Rockbridge County Zoning Administrator.
6. Q. Mr. Austin, has your office, as Executive Secretary of
7. Rockbridge County, and the Zoning Administrator, conferred
8. openly, and so forth, and very generally, with the Com-
9. monwealth's Attorney in regard to the legality and the
10. validity of this present permit, sir?
11. A. We have--Mr. Miller, the Building Inspector, and myself--
12. have conferred with the . . .
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4. Q. Mr. Austin, after consultation and further consideration,
5. and discussions with the Commonwealth's Attorney, the
6. public official who is the legal representative of this
7. County, did your office and the Commonwealth's Attorney's
8. office make a determination as to the stand you would
9. take about this issuance of this permit and whether it's
10. valid?
11. A. Well, of course, as you are aware, Mr. Read asked for an
12. opinion from the Attorney General. I believe I am
13. correct now in saying that the Attorney General replied
14. indicating that he would not issue an opinion since it
15. was in litigation.
16. Q. Did Mr. Read not have his own opinion, which was furnished
17. to your office?
18. A. I understand that he did render an opinion, or . . . well,
19. I believe it was submitted to the Attorney General, in a
20. memorandum of law--if that's the correct term--which I
21. did not see.
22. Q. Well, what did . . . you've never seen that?
23. A. I did not see that.
24. Q. Have you never seen it?

1. A. No.
2. Q. But you've had discussions with Mr. Read about the
3. legality of this permit, have you not?
4. A. Yes, I have.
5. Q. And the discussions have resulted with what conclusion
6. between you and Mr. Read?
7. A. Well, I don't know that we drew a conclusion; but we were
8. hoping--or I'm hoping . . . I shouldn't say "we"--I'm
9. hoping that, you know, we'll get an answer out of this
10. hearing here, one way or the other. I don't know if
11. that's really what's before us or not, but, anyway, that's
12. what I'm hoping for. But, you know, Mr. Read, I believe,
13. felt that, at the time, before he'd written the Attorney
14. General, that possibly the permit should not have been
15. issued.
16. Q. And you say you weren't furnished with a copy of that
17. opinion?
18. A. Well, I don't know that it was an opinion as much as it
19. was a memorandum of law that went to the Attorney General,
20. setting out Mr. Read's case.
21. Q. Do you tell the Zoning Administrator what to do, or does
22. he act on his own volition?
23. A. The Zoning Administrator . . . well, I don't like to say
24. I tell him what to do. We try to work together, in

1. effect.
2. Q. But if he makes a decision as a Zoning Administrator,
3. in his legal capacity as Zoning Administrator, you don't
4. purport to have the authority to overrule him, or speak
5. for him, do you?
6. A. No, sir; I do not speak for him or try to.
7. Q. And if the Building Inspector . . . that's the same
8. situation?
9. A. That's correct.
10. Q. And notices and other things that have to be done in
11. regard to--or affidavits, or whatever, that are supposed
12. to be done by the Zoning Administrator, or the Building
13. Inspector--and not you?
14. A. That's correct.
15. Q. Thank you.
16.
17. Re-Direct Examination by Mr. Poff:
18. Q. Mr. Austin, just a couple more matters, sir. If I under-
19. stand correctly, you know, as a fact, that Mr. Read's
20. memorandum, which we had some discussion about this
21. morning and put into the record--was a memo that was sent
22. to the Attorney General requesting an opinion?
23. A. That's what I've been told. I don't know for a fact.
24. Q. Do you know for a fact that . . .

1. MR. ROBEY: I object. This is his witness,
2. called as his witness. And I would
3. ask that the questions be asked in
4. the proper form, on direct examin-
5. ation.
6. MR POFF: I apologize, Mr. Robey.
7. COURT: All right.
8. Q. Mr. Austin, let me ask you this, sir: To your knowledge,
9. did . . . Well, let me back up and ask it another way.
10. Did Mr. Read, or did he not, ever provide an opinion, a
11. written opinion, to the Board of Supervisors on this
12. question?
13. A. A written opinion stating whether or not he felt . . .
14. Q. Yes, sir.
15. A. How the decision should be made?
16. Q. Are you aware of any such opinion?
17. A. I don't recall, no.
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8. MR. POFF: They're the ones that we discussed
9. this morning--the one from Mr. Sisler
10. to Mr. Austin . . .
11. COURT: And also a letter addressed to Mr.
12. Rogers?
13. MR. POFF: Yes, sir--from Mr. Sisler to Mr.
14. Rogers. And these are the ones we
15. discussed this morning. I'd just
16. like to tender them for the record.
17. COURT: Have you read this one to Mr. Rogers?
18. MR. ROBEY: Yes, sir.
19. COURT: All right. I think they both can
20. be properly admitted into the evi-
21. dence. This will be Exhibit Eight,
22. and Exhibit Nine.
23. MR. POFF: We have nothing further of this
24. witness.

1. Cross Examination by Mr. Read:
2. Q. Mr. Austin, I'd like to ask you if your office relied
3. upon those two letters in the issuance of the permit . . .
4. A. Which two letters?
5. Q. . . . to WANV. The two letters just introduced into the
6. evidence.
7. A. Yes, sir.
8. Q. That's all I have.
9. MR. POFF: Your Honor please, we'd like to
10. recall Mr. Miller. I suppose, in
11. light of his position, we'll call
12. him as an adverse witness--for just
13. a couple of questions.
14. MR. ROBEY: How can you call him as an
15. adverse . . . What's adverse about
16. him?
17. MR. POFF: Well, I don't know if he's adverse--
18. I don't believe he is. Which way
19. do you want me to call him, Mr.
20. Robey? We'll just call him as a
21. witness.
22. COURT: All right.
23.
24.

1. WITNESS - RICHARD MILLER, recalled

2. Direct Examination by Mr. Poff:

3. Q. Mr. Miller, you have previously testified you are the
4. Zoning Administrator; right?
5. A. Yes, sir.
6. Q. Now, do you remember, sir, that you received an applica-
7. tion which has been admitted into evidence as Respondents'
8. Exhibit One, from Mr. Rogers, on December sixteenth, 1975,
9. applying for this permit?
10. A. That's correct.
11. Q. And you have had occasion, have you, sir, to refresh your
12. memory as to whether Mr. Rogers, in this application,
13. revealed the fact that he was leasing these premises under
14. a lease option agreement, with the right to buy?
15. A. Yes, sir.
16. Q. So he revealed his proper connection . . .
17. A. By the letter, yes, sir.
18. Q. He did not represent himself to be the sole owner of the
19. premises?
20. A. No, sir.
21. Q. Now, then, as a result of that, sir, did you make any
22. effort in the obtaining, the granting, of the permit, to
23. require him to submit any affidavit in connection with
24. the application?

1. A. No, sir, I didn't.
2. Q. Thank you.
3.
4. Cross Examination by Mr. Robey:
5. Q. Mr. Miller, have you read the law of Rockbridge County
6. which says that where a building permit is issued under
7. these circumstances, there must be an affidavit filed?
8. Have you read that?
9. A. Yes, sir.
10. Q. I gather, then, it was a mistake on . . . an oversight on
11. your part, that you didn't require the affidavit as the
12. law provides?
13. A. Well, I haven't required it on any of them, really.
14. Q. Well, you don't often get a situation where a man is
15. coming in, where he doesn't really own the property--but
16. he just is kind of exploring the situation at that point--
17. do you?
18. A. Well, I'd say fifty to seventy-five percent of the permits
19. are issued to either a contractor or a brother or sister,
20. or someone comes in. The owner . . . sometimes the owner
21. comes in.
22. Q. But it's . . .
23. A. I have not made it a habit, you know, to ask for the
24. affidavit.

1. Q. And you did not ask for an affidavit, and did not require
2. one, when you issued this permit?
3. A. That's correct.
4. Q. Has the Commonwealth's Attorney of Rockbridge County
5. presented to you an opinion that he thought the building
6. permit that you issued was illegal and invalid--hasn't
7. he?
8. A. I have not seen it.
9. Q. You have not seen the opinion?
10. A. It was not sent to me.
11. Q. Have you discussed it with him?
12. A. I have discussed some with him, yes.
13. Q. And he's told you that it's his opinion that the permit
14. is invalid, hasn't he?
15. MR. POFF: Your Honor please, I would object,
16. on the grounds that, number one, it
17. exceeds the scope of my direct exam-
18. ination; and, number two, it dupli-
19. cates testimony that we've gone over
20. many times.
21. COURT: Well, if he exceeds the scope of
22. your direct examination, the witness
23. becomes his witness. Isn't that the
24. way the other territory is explored?

1. Can't he call him as his witness?
2. MR. POFF: I think he can call him as his wit-
3. ness if he desires.
4. COURT: Yes, I think he can.
5. Q. Mr. Miller, I am going to ask you whether, or whether
6. not, the Commonwealth's Attorney for Rockbridge County
7. has told you, in your capacity as Zoning Administrator,
8. that this building permit is illegal and invalid, and
9. violates the Zoning Ordinance--or any one of the three?
10. A. Not really.
11. Q. What do you mean by "not really"?
12. A. Well, he just never has told me in those words or any-
13. thing, that it is invalid.
14. Q. In what words has he told you?
15. A. Well, I don't know that he has really told me. I know
16. he sent for an opinion from the Attorney General; but as
17. far as his making an opinion of his own on it, I'm not
18. really aware of it.
19. Q. That's all I have right now. Thank you.
20.
21. WITNESS - DOUGLAS DeLAWDER
22. Direct Examination by Mr. Franklin:
23. Q. Would you state your name, please?
24. A. Douglas DeLawder.

1. Q. And your residence?
2. A. My residence is Maryland.
3. Q. All right, sir. And your occupation?
4. A. I am a consulting engineer.
5. Q. Would you state for the Court, please, your qualifications
6. in this respect?
7. A. I worked for eighteen years with the consulting engineering
8. firm of Silliman, Moffet and Kowalski.
9. Q. I see, sir. And are you currently a member of this firm?
10. A. Yes, I am, sir.
11. Q. Did you have, in your position with this firm--cause to
12. be prepared as a part of the engineering application to
13. the Federal Communications Commission a site map?
14. A. Yes.
15. Q. Would you, if you would, sir, explain to the Court, please,
16. exactly the significance of the site location map?
17. A. Yes. The FCC has requirements on a radio station, as to
18. what signal intensity it will place over the entire city,
19. and also over certain other areas, like the main business
20. area of the city. And they also have requirements of
21. interference situations--this is talking about on the
22. same frequency, or the immediate adjacent frequencies of
23. that particular operating station or proposed station, as
24. the case might be. And taking these conditions into

1. account, we constructed this particular map, which has
2. a reference of figure number "3" in our exhibit for Mr.
3. Rogers, to use in determining site selection areas.
4. Q. And was, in fact, this site selection map made a part
5. of the FCC application?
6. A. It wasn't made a part of the initial application; it was
7. made a part of a further request by the FCC.
8. Q. The FCC has given approval to the map as presented
9. therein?
10. A. Yes--the FCC raised no questions with this map.
11. MR. FRANKLIN: Your Honor please, we would offer
12. this map as the next Respondents'
13. Exhibit.
14. COURT: Any objection, Mr. Robey?
15. MR. ROBEY: No, sir.
16. COURT: I believe that would be Exhibit
17. Nine. (Reporter's Note: Previous
18. exhibit was also marked Nine.)
19. Q. Now, some question arose in Mr. Rogers's testimony, I
20. think earlier, in response to some of the Court's inquiry.
21. I wonder if you would explain what, if any, effect, a
22. radio aerial such as this, for AM broadcasting, would
23. have on TV reception, and the like?
24. A. I thought Mr. Rogers did a very good job in explaining

1. the situation. But just to sort of recap--the WREL
2. frequency is 1460 kilocycles, and the TV band starts in
3. the megacycles, as Mr. Rogers said. This 1460 kilocycles
4. can be converted to megacycles; it's just merely changing
5. it by a thousand--so, thereby, we are talking in the same
6. relationship, and the 1460 becomes 1.46. The low part
7. of the TV band starts around 44 megacycles. So you've
8. got a separation of from 1.46 to 44; and with this separ-
9. ation, there is just no problem of interference to tele-
10. vision stations--or television reception, excuse me.
11. MR. FRANKLIN: Your witness.
12.
13. Cross Examination by Mr. Robey:
14. Q. What does that half circle, or half moon, indicate?
15. A. What does it indicate?
16. Q. Well, let's put it another way--does it indicate the area
17. in which the FCC would approve the tower as being?
18. A. It's the area in which the FCC would approve the tower as
19. proposed by Mr. Rogers, yes.
20. Q. Which would include all of Route 60, halfway between
21. Buena Vista--I mean halfway between Lexington, going
22. toward the interchange at 81? Going east on Route 60, it
23. would include that commercial area out there? Would the
24. FCC approve that?

1. A. It includes the area as you have described it. I'm not
2. familiar with the area as to whether it's commercial or
3. not.
4. Q. I see. But all of that area in that circle is acceptable
5. by the FCC to put up the tower?
6. A. Yes, sir.
7. Q. How many square miles does that area cover, sir?
8. A. I don't know right off; but we've got a scale at the
9. bottom of it--you can square it up. Two square miles,
10. maybe.
11. Q. Did you check that very closely?
12. A. Well, yes . . .
13. Q. It includes the biggest part of the City of Lexington,
14. in addition to everything around it.
15. A. Well, but . . . there's the scale at the bottom. There's
16. the total length, two miles, and . . .
17. Q. Well, it's more than two miles across the middle of it,
18. isn't it?
19. A. Okay. And it's about a mile wide, so one times two is
20. two.
21. Q. But it's much more than a mile wide; it's about two miles
22. wide, isn't it? Scale it there. Look at your scale.
23. See, that's two miles at the bottom, sir. What is the
24. scale? An inch to a mile?

1. A. No, sir, it's been reduced; and I have no real reference
2. so it's just . . . At its widest point, it's about one
3. point eight miles wide. But, of course, you've got a
4. circle--an arc of a circle--so it's not that wide all the
5. way across. If we averaged it at one point five, let's
6. say--one and a half . . . one and a half times two would
7. give us, what, three square miles?
8. Q. How many acres in three square miles?
9. A. I don't know at this point. It could be figured.
10. Q. Have you personally gone upon the site which is the
11. subject matter of this proceeding?
12. A. No, sir.
13. Q. Does the lay of the land affect how the waves will be . . .
14. when the waves come down from the tower and hit the ground,
15. does the lay of the land have some effect as to how those
16. waves come up?
17. A. Not the minimal change around a site like that. The
18. reason I qualify that is, of course, the lay of the land
19. has an effect, if you go out as far as the mountains are
20. concerned.
21. Q. Well, if this tower site was on sloping land--steeply
22. sloping land, or even slightly steep--would it have an
23. effect on the way in which the waves are deflected when
24. they go down and hit this copper circle thing that you

1. put in the ground under it?
2. A. It depends on what you mean by slightly steep.
3. Q. Well, what would you consider slightly steep?
4. A. As long as it doesn't cut up directly behind the tower,
5. within a matter of feet, and exceed, say, half of the
6. tower would be a rough idea . . . I certainly wouldn't
7. want to see a tower put on a piece of property such as
8. that. But a gently sloping terrain has no problems at
9. all, and it's been done many times before.
10. Q. All right. Well, then, you are saying that it really
11. doesn't matter too much how the land lays, or slopes,
12. where you put your tower? I mean, that isn't . . .
13. A. It isn't a crucial problem.
14. Q. . . . a crucial problem? Thank you, sir.
15. MR. READ: I have no questions for this
16. witness.
17.
18. Examination by the Court:
19. Q. I'd like to ask a few questions. In your field, how much
20. experience have you had in the construction of just a
21. tower similar to the one that's in litigation here?
22. A. When you say construction, sir, are you talking about the
23. physical erection of the tower?
24. Q. No--I meant what is your knowledge . . . What I'm driving

1. at, these people are complaining about this tower being
2. in the near vicinity of their homes; and they are com-
3. plaining, I presume, because it might be hazardous, or
4. it might interfere with radio or television reception,
5. or . . . Are you acquainted with the possibility of
6. a hazard created by these towers?
7. A. Am I acquainted with the possibility?
8. Q. Yes.
9. A. I'm acquainted with the fact that we haven't run into
10. any such problem, yes.
11. Q. Your testimony in chief is that it would not be an inter-
12. ference to TV reception; is that . . .
13. A. I see no way that it can be an interference problem with
14. TV reception.
15. Q. All right. That's all.
16.
17. Re-Direct Examination by Mr. Franklin:
18. Q. I think I understood you, but just so we're perfectly
19. clear, it is your testimony that the tower and the tower
20. operation creates no physical hazard; is that . . .
21. A. That's correct.
22. Q. That's correct?
23. MR. ROBEY: What do you mean by "physical
24. hazard"?

1. MR. FRANKLIN: The wires, the current . . .
2. MR. ROBEY: Well, is he going to testify . . .
3. who's going to testify now?
4.
5. Re-Cross Examination by Mr. Robey:
6. Q. What do you mean by "physical hazard"? What did you
7. understand "physical hazard" to mean?
8. A. That the tower, and the operation of the radio station
9. as it is located there, would have no detrimental effect
10. to the surrounding area--the houses, the people . . .
11. Q. Okay. If a child goes over and climbs up it, and falls
12. down--falls off the tower--would you consider that as a
13. hazard?
14. A. Of course. But he can climb up on the roof of his
15. house and fall off, also--that he lives in.
16. Q. It would be just one . . . you're saying it's as easy
17. to get up on your roof as it is to get up on these towers?
18. A. Well, I should think that it should be constructed that
19. way. And that's one of the requirements in constructing
20. it, that you do not make it easy to get to the base of
21. these towers. For instance, there should be a fence
22. built around the base of this tower, and I assume Mr.
23. Rogers is going to do something along these lines.
24. Q. There should be a fence built around it? Have you seen

1. the design submitted, which shows there is no fence?
2. A. This is . . . No, I haven't seen the design submitted
3. to the . . .
4. Q. Thank you, sir.
5.
6. WITNESS - RUTH AGNOR HERRING
7. Direct Examination by Mr. Franklin:
8. Q. For purposes of the record, would you state your full
9. name, please?
10. A. Ruth Agnor Herring.
11. Q. And your residence?
12. A. Lexington, Virginia.
13. Q. And your occupation?
14. A. I am a realtor.
15. Q. In your professional capacity as a realtor, Mrs. Herring,
16. have you had occasion to deal with WANV?
17. A. Yes, sir, I have.
18. Q. What has been the extent of your dealings with WANV?
19. A. Mr. Rogers called me one day and told me he was looking
20. for a site for a radio tower, and I proceeded to help him
21. find a site.
22. Q. Now, when he called you and asked you about a site for
23. the radio tower, did he provide you with a map similar
24. to the one that has been introduced here as a site

1. selection map?
2. A. Yes, sir, he did.
3. Q. And did you conduct your hunting--in the loose sense of
4. the word--prospecting, for sites, based on this site
5. selection map, or one similar to it?
6. A. Yes, sir, I did.
7. Q. And would you tell the Court, please, for the record,
8. what, if any, locations you found to be available within
9. this area as shown on the map for the tower?
10. A. Well, available for purchase none. There were many that
11. I called the owners about--but as far as available for
12. purchase, no, sir.
13. Q. You found none, other than the one that . . .
14. A. There was one, that the owner considered, and then decided
15. that no, he would not sell.
16. Q. Now, the only one that you found to be available--would
17. you identify that one for the Court, just so that the
18. record is completely clear on that, please?
19. A. Yes, sir. It's east of the City, on Route 60, approxi-
20. mately a mile, a mile and a half. It is a hill, a high
21. hill. The owner wanted a hundred and fifty thousand
22. dollars ($150,000.00) for three acres at that site.
23. Q. Did you, in fact, ultimately acquire a site?
24. A. Yes, sir.

1. Q. And would you tell the Court, please, for the purpose of
2. the record, where that site is?
3. A. It is property belonging to Mr. William Agnor.
4. Q. And is that, in fact, the property in question here?
5. A. Yes, sir.
6. Q. And this ultimately ended up being the only available
7. site . . .
8. A. Yes, sir.
9. Q. . . . in the area. Thank you.
10.
11. Cross Examination by Mr. Robey:
12. Q. Mrs. Herring, how many advertisements did you run in the
13. newspaper seeking, in these three square miles, this
14. area, seeking property owners to possibly come in and
15. sell their property for a radio station or tower?
16. A. It's not my policy to generally advertise for any one
17. specific site for any one specific customer.
18. Q. So you have done no advertising . . .
19. A. No, sir, not specifically.
20. Q. . . . to determine, in all of this area, whether somebody
21. is willing to sell?
22. A. No, sir.
23. Q. And I assume that you don't represent to the Court by
24. any stretch of the imagination that you contacted all of

1. the people who owned land in that three square mile . . .
2. A. Not the owner of each registered tract, no. But I cer-
3. tainly called a quantity of people, and I think you should
4. say word of mouth certainly helped spread the fact that
5. there was a purchaser interested in buying a site for
6. a radio tower.
7. Q. But you can't tell the Court that this is the only avail-
8. able site?
9. A. It's the only available site that I was able to find, in
10. my search for a site.
11. Q. Do you know of any other real estate agent that Mr. Rogers
12. dealt with in trying to find a site, other than you?
13. A. I think he talked to some people before he happened to
14. get to me, but I really don't know, Mr. Robey.
15. Q. When did you start looking for the site?
16. A. When he called me--and I'm sorry, I don't remember the
17. exact date. It was sometime in the summer of '75.
18. Q. And it's true, is it not, that since the filing of this
19. suit, and as late as just the last couple of weeks, you
20. and Mr. Rogers have continued to be out looking for sites?
21. A. No, sir.
22. Q. You have not?
23. A. Oh, absolutely not.
24. Q. Not at all?

1. A. No, sir.
2. Q. What have you-all been out looking at, going out that way?
3. A. We were out looking at the Columbia Gas tower, with
4. reference to the property near by it--the older houses,
5. and the houses that have been constructed since the
6. Columbia Gas tower was erected. We were looking at the
7. site from each house to the tower; we were trying to see
8. the effect--the visible effect . . .
9. Q. Do you have a real estate commission involved in this
10. proceeding?
11. A. Oh, certainly.
12. Q. And if this proceeding fails, you won't get a real estate
13. commission?
14. A. No, sir, I do not.
15. Q. And, now--let's talk in terms of the people that you
16. attempted to find that . . . and you said that there was
17. none available for sale. It would be a fair statement
18. that there was property available for sale, but not at a
19. price that Mr. Rogers was wanting to pay?
20. A. Well, I think based on the population and the business
21. of the Rockbridge County-Lexington area, I do not see how
22. a radio station could pay a prohibitive amount of money
23. for a site and then avoid bankruptcy, Mr. Robey.
24. Q. Are you holding yourself out as an expert in the area of

1. cost factors in operating a radio station? Do you
2. know the cost factors of . . .
3. A. I am not an expert. But I have done a little research
4. into it, after Mr. Rogers contacted me.
5. Q. Research into how much cost a radio station can stand
6. for land, compared to volume of business?
7. A. Yes, sir--and volume of business, etcetera . . . yes, sir.
8. Q. And where did you do this research?
9. A. I had a young salesman who was employed as a radio
10. announcer; and he got this information for me from some
11. source--I'm sorry, I do not know what it was. But it
12. was charts with reference to volume of business and costs,
13. etcetera, etcetera--and net profits, if any.
14. Q. So it was from somebody that was working for you, that
15. got some . . .
16. A. A realtor . . . a young man who was a real estate sales-
17. man, who had been a radio announcer for some time.
18. Q. And you don't know who wrote this literature?
19. A. He got . . It was in a set of statistics gathered by
20. some national organization. I'm sorry, I didn't think
21. at the time to even see what book it was from. But
22. these statistics are pretty much generally available in
23. libraries and other places, if you wish to look them up.
24. Q. Now, going back to the question I asked you: Is it a

1. fair statement to say--and you weren't going to . . .
2. My question to you is: There is land available for sale,
3. three-acre tracts available in that area right there,
4. available for sale--but it doesn't suit Mr. Rogers's
5. pocketbook, or . . .
6. A. Some of them may be . . . There may be three-acre sites
7. that would not be high enough, that would not comply with
8. the FCC regulations. Those are the kinds of things that
9. you don't even look for, when you know the requirements
10. of the FCC itself.
11. Q. Now, would you answer my question?
12. A. Would you like to state it again, please?
13. Q. Well, this will be the third time. I'll ask it again.
14. There were sites available for sale, that did not suit
15. Mr. Rogers's pocketbook; is that correct?
16. A. Certainly.
17. Q. So you can't . . . you would, then, retract your statement
18. to the Court, that this was the only available site?
19. A. This was the only available site that suited Mr. Rogers.
20. Q. That suited Mr. Rogers?
21. A. Yes, sir.
22. Q. That's getting . . . that's a lot of difference . . .
23. A. Certainly. I agree.
24. Q. . . . between the only available site, and the only site

1. that suited Mr. Rogers?
2. A. Well, even the WREL site was available--but that did not
3. suit, either Mr. Rogers or the trustees.
4. Q. Well, it suited the trustees if Mr. Rogers would pay the
5. price?
6. A. Well, again, I go back to my statement about the financial
7. end of this.
8. Q. But you were able to go into a residential area, get out
9. of the commercial area and go over into around people's
10. homes, and find a three-acre tract that suited his
11. price; is that right?
12. A. When I first thought of that site, and took him there,
13. I had a Rockbridge County map filled in with the zoning
14. areas. It was difficult to tell whether we were in the
15. residential district, or whether we were actually in
16. agricultural general. And when we were looking at the
17. site the first time, we did not know . . . and we came
18. to the Zoning Map in the County Administrator's Office;
19. and, again, it was a little difficult to be sure how many
20. feet we might be close to the border there, of the resi-
21. dential and agricultural general.
22. Q. Well, ultimately, and before you signed any agreement . . .
23. A. Certainly.
24. Q. . . . you found out that it was in a residential?

1. A. We certainly did.
2. Q. And you knew it was in a residential before y'all signed
3. any agreements or entered into any options?
4. A. Oh, yes.
5. Q. And that knowledge was known to Mr. Rogers, was it not?
6. A. Yes.
7. Q. Now, this is the last question. You said that you
8. hunted around, and you couldn't find . . . now you say
9. you couldn't find something available that suited Mr.
10. Rogers to buy. Now, what about property to lease?
11. A. I don't remember that the question ever came up.
12. Q. You didn't go out and see if there was property available
13. to lease then?
14. A. No. As well as I remember, it was always a discussion
15. of purchase.
16. Q. So you are not in . . .
17. A. Again, the primary thought was a site suitable for the
18. FCC's regulations.
19. Q. Did you give any concern to the residents of the residential
20. area in which you were looking for it?
21. A. Certainly. But I told you that when we first went there,
22. I did not know in which district this was.
23. Q. You went there by . . .
24. A. Because I knew it was land that could be purchased. I had

1. shown it previously, and I knew it was a site that could
2. be purchased for something.
3. Q. But you didn't know it was residential when you went
4. there?
5. A. No. No, I did not.
6. Q. And I must assume from that that, had you known that, you
7. would not have gone there?
8. A. No. No, I didn't say that. I just didn't know what it
9. was. Mr. Rogers asked me, and I didn't know.
10. Q. And you say you had not thoroughly explored the leasing
11. of property for the purpose of this thing?
12. A. No. Because it never came up. The subject never came up.
13. Q. You didn't give it any consideration?
14. A. Mr. Rogers never brought it up.
15. Q. And you never brought it up?
16. A. No. It really didn't cross my mind.
17. Q. Did you do any study in land costs from the standpoint
18. of leasing a site, and what would be feasible?
19. A. No. The subject just did not come up.
20. Q. Thank you, Mrs. Herring.
21. MR. READ: I have no questions of this
22. witness.
23. Re-Direct Examination by Mr. Franklin:
24. Q. Mrs. Herring, you are the Chairman of the Chamber of

1. Commerce?
2. A. Yes, sir. I am President. I am serving my second term
3. as President of the Lexington-Rockbridge County Chamber
4. of Commerce.
5. Q. You have been present throughout today?
6. A. Yes.
7. Q. And you heard the testimony that there is a possibility
8. that this radio station might go off the air? What, if
9. any, effect do you think that would have on Rockbridge
10. County?
11. A. Well, I believe it would have a most detrimental effect.
12. It's a well established fact that our area had one of
13. the highest . . .
14. MR. ROBEY: I have got to object, Judge, as
15. being totally irrelevant to whether
16. or not these people are barging into
17. a residential area and putting up a
18. tower where it's not supposed to be.
19. You can't justify violating the law
20. because it would be nice to have
21. something. And it's totally irrele-
22. vant to stand here and say we ought
23. to have a radio . . . we need a radio
24. station here in Rockbridge County,

1. so let's go out here and do it at
2. the expense of all these people. I
3. object. And they know it's irrele-
4. vant, too.
5. COURT: Well, technically, I think it is. But
6. I think we all recognize the importance
7. of a radio station.
8. MR. ROBEY: And we all recognize the importance
9. of this law.
10. A. Would you like for me to finish my answer, Judge?
11. COURT: No; it was objected to.
12. MR. FRANKLIN: We have no further questions. Your
13. Honor, we rest.
14. COURT: All right. Would you gentlemen have
15. any objection to the Court recalling
16. Mr. Houff? I'd like to ask Mr. Houff
17. a few questions.
18. MR. FRANKLIN: All right.
19. COURT: Mr. Robey, do you have any objection?
20. MR. ROBEY: No, sir.
21. COURT: Mr. Houff, would you come up here,
22. please? Gentlemen, I might state
23. for the record that yesterday evening,
24. late yesterday evening, I, without

1. anybody accompanying me--I wasn't
2. acquainted with the site--I drove in
3. my automobile up there and took a
4. personal view, without anybody with
5. me. And I wanted to acquaint myself
6. with the physical aspects of the
7. case. And I parked my automobile in
8. Mr. Houff's driveway, and his son
9. obligingly opened the gate leading
10. down to where this is. So I want
11. you all to know that I was up there
12. without anybody's solicitation, or
13. invitation, or suggestion.
14.
15. WITNESS - E. F. HOUFF, JR., recalled
16. Examination by the Court:
17. Q. Mr. Houff, how far is your house from where this tower,
18. if erected, would be?
19. A. Well, Your Honor, since the land is posted, I can't
20. measure from my property line to the base of the tower;
21. I just have to estimate it.
22. Q. What would you estimate it to be, just for the record.
23. I want this in the record, please.
24. A. I would estimate from my house--not my property line, but

1. from my house--between a hundred and fifty and a hundred
2. and seventy-five feet. It's a little bit on a downgrade,
3. as you noticed . . .
4. Q. Right.
5. A. . . . and it's sort of hard to judge distances.
6. Q. And then from your house, your house itself, to where
7. this shed is--what would be your approximated distance
8. for that?
9. A. Oh, fifty . . . forty or fifty feet.
10. Q. Now, what is the other nearest house to the location?
11. And again I am speaking of where this proposed tower
12. would stand, if erected. Now, what is the nearest house?
13. A. Next to mine?
14. Q. Yes, next to yours?
15. A. Well, I would think Mr. Hickman's house--or Mr. Moore's,
16. or . . .
17. Q. They're down over the hill?
18. A. They're down over the hill, but they're probably equi-
19. distant as far as the straight out measurement would go.
20. Q. And then next to your house, as you're approaching your
21. house, is Mr. Archie Childress's house?
22. A. Right.
23. Q. And how far would you say his house is?
24. A. Well, there's a small lot in between my property and his,

1. so I guess from his house to the tower would be in the
2. neighborhood of possibly two-fifty, or three hundred
3. feet--something like that.
4. COURT: Gentlemen, I want those distances in
5. the record, so . . .
6. A. That's just a wild guess, Your Honor.
7. Q. I understand. Sure.
8. COURT: Any questions, gentlemen?
9.
10. Cross Examination by Mr. Poff:
11. MR. POFF: Your Honor please, since this was
12. brought up, we'd like to ask about
13. some of these other Complainants,
14. and where they live.
15. Q. Of course, Judge Holstein has asked you about yourself;
16. now, Mr. and Mrs. George S. Whitney are the listed
17. Petitioners next on this list. Do you know where they
18. live?
19. A. They're on Thorn Hill Road, also--which . . . they look
20. right at the tower site.
21. Q. I beg your pardon?
22. A. They're on Thorn Hill Road, as was Mr. Topping, and
23. they look directly at the site.
24. Q. Do they live in Rockbridge County?

1. A. In the City of Lexington.
2. Q. They live in the City of Lexington, don't they?
3. A. Yes.
4. Q. And Mr. and Mrs. S. E. Hickman?
5. A. Mr. Hickman is still here. He lives in Rockbridge
6. County.
7. Q. Well, without recalling him, how far does he live from
8. the scene of this tower?
9. A. Approximately . . . as I said, the land is posted, and
10. we can't get on there and measure it, but . . .
11. Q. Well, you've been given . . .
12. A. But I just gave the Judge my estimate of the distance.
13. Perhaps Mr. Hickman can give a better estimate.
14. Q. Well, did you estimate--perhaps I was . . . Did you
15. estimate Mr. Hickman's distance?
16. A. Yes. Probably equidistant as my . . .
17. Q. But he lives in Rockbridge County?
18. A. Yes.
19. Q. All right. And then there's Mr. and Mrs. Archie
20. Childress, Grandview Drive?
21. A. My next-door neighbor--they live in Rockbridge County.
22. Q. And they live a little further away from the tower than
23. you, I guess?
24. A. Yes--as the houses go on down the hill.

1. Q. And then there's Mr. and Mrs. Walter P. Massie, Grand-
2. view Drive, next on the list.
3. A. Yes--the next house down.
4. Q. And Mr. and Mrs. E. Wayne Straub, 650 Waddell Street; is
5. that in the City of Lexington?
6. A. That would be in the City of Lexington; but he's right
7. at the bottom of the hill. And he's interested because
8. of, I think, well, both his business and his property
9. being affected.
10. Q. And then Mr. and Mrs. George Warden--are they . . . that's
11. RFD 4.
12. A. Residents of Rockbridge County.
13. Q. And how far do they live from the site of the construction?
14. A. As the crow flies, I suppose half a mile.
15. Q. And then there is Mr. and Mrs. O. T. Engleman, Jr., of
16. Grandview; how far do they live from the construction
17. site?
18. A. Just down the hill from me.
19. Q. Are they in Rockbridge County?
20. A. Yes, sir.
21. Q. And Mr. and Mrs. Stanley D. Mays, RFD 4--do they live in
22. the County?
23. A. Yes, sir.
24. Q. And how far do they live from the site?

1. A. Just down the hill from me. They're one of the houses
2. that--as you come up the hill . . .
3. Q. A hundred yards? Five hundred feet? Two hundred yards?
4. A. Oh, I'm no judge at guessing distances; and these, the
5. hill drops down as you go, and it's very hard to estimate
6. these things. And I just wouldn't want to hazard a guess
7. until I got a measurement on it.
8. Q. All right, sir. And then--let's see, Mr. and Mrs. Orville
9. W. Smith, RFD 4. Is that in Rockbridge County?
10. A. Yes, sir.
11. Q. And how far is that from the site?
12. A. They're on the other side of the road from the other
13. houses, but they also--the site looks down on them, or
14. they can look up, you might say.
15. Q. Well, is it a half a mile, or a quarter of a mile . . .
16. A. Oh, no. No, not a half mile. No. Now . . .
17. Q. A quarter mile?
18. A. Probably not a quarter mile.
19. Q. All right. Mr. and Mrs.--or Mrs. Mabel McKemy . . .
20. A. That's my mother-in-law. She lives in a dwelling on my
21. property, and her . . . the distance from her house would
22. be increased by . . . Well, I stated the distance between
23. my house and the tower, my estimate would be a hundred and
24. fifty to a hundred and seventy-five feet; so hers would

1. be probably two hundred feet.
2. Q. All right. And then Mr. and Mrs. Calvin Cummings, on
3. Shenandoah Road. Is that in the County?
4. A. As far as I know, it is. That's just directly across
5. on the other hill, and they would face exactly into the
6. tower.
7. Q. And that's how many feet--do you have any idea?
8. A. As the crow flies, that's another straight line . . .
9. Q. Well, all right, sir. How about Mr. and Mrs. Andrew
10. Moore, Route 11 South?
11. A. Next-door neighbors to Mr. Hickman, and they're probably
12. equidistant from the tower, like I am.
13. Q. All right. Mr. and Mrs. Edward Mohler, RFD 4; is that
14. in the County?
15. A. In the County.
16. Q. How far is that from the site?
17. A. It's one or two hills over, but still they're in sight
18. of it.
19. Q. Mr. and Mrs. Boyd Stuart, 8 Junkin Place--I believe that's
20. in the City of Lexington?
21. A. Yes, sir. But that's . . .
22. Q. That's quite some distance?
23. A. No. That is immediately behind Thorn Hill Road, and
24. they look out their window right at the site.

1. Q. All right. Mr. and Mrs. Wayne Burks, RFD 4; that's in
2. the County, I suppose, about where these other people
3. on RFD 4 live?
4. A. Yes.
5. Q. Mr. Topping, I believe he has already testified, he
6. lives in the City of Lexington?
7. A. Right. But he would see the tower, were it up there.
8. Q. He's within sight distance?
9. A. Yes, sir.
10. Q. Mr. and Mrs. Fred Sensabaugh, 829 Thorn Hill Road; is
11. that in the City of Lexington?
12. A. He's easily within sight. They would look right out their
13. front window, and there it would be.
14. Q. Okay. They could see it. Is that in the City of Lexing-
15. ton?
16. A. Yes, sir.
17. Q. Mr. Fred Schwab on Shenandoah Road; is that in the County
18. or the City of Lexington?
19. A. That's a new development. I honestly am not sure whether
20. that has been taken into the City limits, or whether it's
21. still in the County.
22. Q. All right. Mrs. Bert Cupp, Thorn Hill Road?
23. A. She's another one--a next-door neighbor to Mr. Whitney,
24. who . . . all these houses are bunched together--would

1. be looking right at it.
2. Q. All right. And Mr. and Mrs. Snyder--they also live on
3. Thorn Hill Road?
4. A. Right.
5. Q. I have nothing further.
6.
7. Cross Examination by Mr. Robey:
8. Q. Just tell His Honor, very briefly, about the other two
9. subdivisions out there, Taylor Woody, or the American
10. Federal Savings and Loan--and how close those new sub-
11. divisions are to the development of this tower site.
12. A. Where Mr. Bruce Morrison's farm used to be--that has been
13. divided up, and that's being developed as the
14. Shenandoah . . .
15. COURT: I am acquainted with it.
16. A. . . . subdivision. As soon as those houses are sold, and
17. more are built and sold, then that will come on up around
18. the hill, which is immediately across the road, Route 11,
19. from us. And they--this is where Calvin Cummings lives--
20. has a very nice house over there. And this whole top of
21. that hill is scheduled for development--rather high-
22. powered development, I might . . . I've been told. The
23. parent company developing that is the American Federal
24. Savings and Loan. They are the parent company, and they

1. are developing that. And, as I say, that's--I've been
2. told by their representatives that it's going to be quite
3. a nice development and quite an expensive development.
4.
5. Examination by the Court:
6. Q. I believe you testified this morning that you had been
7. in the employ of WREL for nineteen years?
8. A. Approximately, yes, sir.
9. Q. Are you acquainted with one of these towers, that is the
10. subject of this litigation?
11. A. Well, I . . .
12. Q. Are you acquainted with the . . .
13. A. I . . . you can't help but be acquainted with one, when
14. you're working right under it.
15. Q. Well, is it noiseless--or does it carry any noise?
16. A. Normally it doesn't carry any noise. When it attracts
17. lightning, naturally it does. That's what the ground
18. plane, I assume, is for, to . . . although there are
19. fail-safe mechanisms on transmitters to--not just to chew
20. them up, but we have had this happen, where they melted
21. tube housings into powder, and melted the Pyrex-type
22. main drive tubes, heat-resistant tubes, to where we had
23. to chip it out with a . . .
24. Q. I certainly am not unmindful of the complaints that you

1. people are registering, and you're in Court, and I feel
2. like you should be heard on the reason for your complaints.
3. In addition to the fact that you have this tower in the
4. area, and you folks live in this area--what other objections
5. would you have?
6. A. Your Honor, my main objection is that I feel that, first--
7. and I must take a selfish stand on this--that everything
8. that I have worked for, and tried to build up, along with
9. the other neighbors, would practically go down the drain.
10. This is my opinion, that as far as property values, it
11. would be very difficult to sell, and if we did sell we'd
12. have to take a tremendous loss. We don't want to sell;
13. we don't want to move; we don't want to get out of Rock-
14. bridge County. I left one time for a year, and came
15. back. But further than that, I hate to see the Zoning
16. Ordinance of Rockbridge County--the law of the land, as
17. it is written, as I see it--be misused, because of the
18. not . . . I can leave. I'd have to take a loss and leave--
19. I've stated this position before--I wouldn't want to.
20. Because the very land that I am living on now belonged
21. at one time to my ancestors; and I have been in and out
22. of Rockbridge County since I was four years old. And
23. my one thought, when I was in school and in the service,
24. was to get situated here sometime or other and put roots

1. down. But, as I say, the legal--or the future ramifi-
2. cations of the destruction of the Zoning Ordinance . . .
3. and this is the way I feel--this is my opinion--I think
4. that this precedent would be set, and . . .
5. Q. Of course, you realize the responsibility of this Court,
6. too, that . . .
7. A. Oh, yes, sir.
8. Q. . . . my decision is completely controlled by the law
9. in this case.
10. A. Oh, I understand, yes, sir.
11. Q. I'm not prepared to render any judgment at this time,
12. but I think everybody in the Courtroom realizes that what-
13. ever the judgment is that I render, it will be according
14. to the law as I see it.
15. A. I understand that. We're fully prepared, and I think
16. everybody is fully prepared to abide by that.
17. Q. Thank you very much, Mr. Houff. I appreciate it.
18. MR. FRANKLIN: Your Honor please, I don't know
19. whether the Court wants to . . . or
20. whether it's time consuming, but we
21. could recall Mr. Rogers for the
22. purpose of giving, almost to the
23. exact foot, the distance of the
24. tower to Mr. Houff's house. I don't

1. know if the Court wants to hear that.
2. COURT: That would be all right, for the
3. record.
4.
5. WITNESS - M. ROBERT ROGERS, recalled
6. Direct Examination by Mr. Franklin:
7. Q. Mr. Rogers, you have, of course, been previously sworn,
8. have you not?
9. A. Yes.
10. Q. As a part, again, of the FCC engineering application, to
11. file with the FCC, was there done a radius of the area
12. around the tower, as it touches the property lines?
13. A. Yes, there was, and that in turn was based on the plat
14. provided by Mr. Clark, the surveyor. And the distance
15. of the base of the tower from the Houff property line is
16. one hundred and seventy-one feet.
17. Q. That's to the line--not to the house?
18. A. To the fence. To the fence. And I myself estimate that
19. Mr. Houff's residence would be expected about thirty feet
20. from that fence line. I would like to say, for the
21. record, Your Honor, that these things were taken into
22. consideration. These matters weren't raised when Mrs.
23. Herring was on the stand, but she was instructed that I
24. am aware of the fact that some householders have the

1. impression--it is not a correct one, but they still have
2. it--that a tower could fall on their house, and that,
3. therefore, you should be at least the height of the tower
4. away from the house. Actually, very few radio towers
5. fall down, as you well know. You've got one here that's
6. been here for thirty years; and that's a much taller one.
7. But, in the event that a disaster should occur, a
8. guide tower--meaning one supported by lines, the wire
9. lines, cables, we've been talking about--does not fall
10. flat. It crumples from the top, and folds over. So
11. that if that risk is one of the things that was on the
12. Court's mind, I thought I should explain that.
13. COURT: Well, I just wanted to hear from
14. these people, and see what their
15. principal complaints were.
16. A. Right. But we did take that into consideration, because
17. I've been a broadcaster--which wasn't brought out here--
18. since 1948; and I am well aware of what I said to the
19. Court earlier--that it would be delightful if we could
20. all live our lives without any change whatsoever.
21. COURT: Well, I'm acquainted with these
22. people, and they're good citizens,
23. and certainly we want to do what is
24. right; we're all controlled by the

1. law.

2. A. I admire the citizens. I'm a resident, as the Court

3. possibly knows, of Augusta County, and we all like to

4. live in peace.

5. - - - - - -

6. * * *

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24.

[PETITIONERS' EXHIBIT 1]
Filed October 21, 1976

ZONING
Residential

COUNTY OF ROCKBRIDGE
ZONING AND BUILDING PERMIT

Permit No. 1253

Application for Permit to Build, Alter, Add To or Repair
December 17, 1975

REAL ESTATE DIVISION Buffalo DISTRICT

MAP REFERENCE				SUB-DIVISION	ACRES	STATE REGISTRATION	ESTIMATED COST	CONTRACT PRICE
MAP	LOT	BLOCK	SECTION					
					3		$4,000	

Name of Owner WANV, Inc. Address Lexington, Va.

Location: N E S W _____ Side of Road No. _____ about .3 miles from southeast Int. Rt. 11 & Rt11a

Or: _____ side of _____ Street, between _____ and _____

Property Owner Jan. 1 William M. Agnor, Jr.

Yard Requirements: Front Setback _____ Side _____ Rear _____

USE		CONSTRUCTION		EXTERIOR WALLS		INTERIOR WALLS		ROOFING		GENERAL FEATURES	
Dwelling		Wood Frame		Wood Siding		Plaster		Metal		No. Stories	
Apartment		Steel Frame		Wood Shingles		Dry Wall		Slate		No. Rooms	
Store		Brick		Asbestos Shingles		Celetex		Comp. Shingle		Floors	
Garage		Cinder Block		Asphalt Siding		Pine Ceil		Asbestos Shingle		No Basement	
Service Station		Mill		Brick		Paneled		Tar-Gravel		Pt. Bsmt. ¼ ½ ¾	
		Solid Masonry		Cinder Block				Comp. Roll		Full Basements	
PLUMBING				HEATING				SEWAGE		WATER	
No. Baths		Basin		Hot Water		Air Cond.		Public		Public	
Tile		Shower		Electric		Fireplace		Private		Private	
Water Closet				Hot Air		Stove		Septic Tank		Well	
Bath Tub				Floor Furnace							

If for Alterations or Repairs, State Nature: 200 feet Erect radio tower & utility building

TYPE	NAME AND ADDRESS OF CONTRACTORS	STATE REG. NO.
General	Ace High Tower Company, Greenville, North Carolina	
Heating		
Plumbing		
Electrical		
Excavation		
Plaster		
Masonry		
Steel		
Frame		
Tile		
Architect		

Application is hereby made for Permit - - - - - - in accordance with the description and for the purpose herein set forth. This application is made subject to all County and State laws and ordinances and which are hereby agreed to by the undersigned and which shall be deemed a condition entering into the exercise of this permit.

I hereby certify that I have the authority to make the foregoing application, that the information given is correct and that the construction will conform with the regulations of private building restrictions, if any, which may be imposed upon the above property by deed and the Rockbridge County Zoning Ordinance.

Signature of Owner or Authorized Agent M. Robert Rogers PRESIDENT

Address P. O. Box 97, Waynesboro, Va. Telephone No. 703-942-1153

Based on the above information, Building Permit is hereby granted this 17th day of December 19 75

_____
Director of Finance

By Richard C. Miller
ZONING ADMINISTRATOR

HEALTH DEPARTMENT APPROVAL

Type of Facilities: _____ Approved: _____
Sanitarian

APPLICANT'S COPY

Date: _____

[PETITIONERS' EXHIBIT 2]
Filed October 21, 1976

Radio Towers May Rise Without Hearing

Radio transmission towers of unlimited height may be put up in any residential zone of Rockbridge County without the requirement of a zoning hearing, applicants for a new radio station here have been advised.

A ruling along these lines has been forwarded to the Federal Communications Commission (FCC) in Washington, D. C., by Harry Peyton, who is one of two applicants desiring to construct a standard radio broadcast station licensed to Buena Vista.

The other applicant is M. R. Rogers of Radio Station WANV of Waynesboro.

Peyton's presently proposed tower, rising 165 feet, would be on residential land along Rt. 745 near Green Hill Cemetery. However, the interpretation of the county's zoning ordinance which Peyton obtained apparently makes it possible to put up radio or TV towers of any height in any residential zone of Rockbridge County, Rogers advised The News-Gazette this week.

The interpretation also apparently permits the construction, without prior public hearing, of the transmitter building. However, radio studios and offices would not be permitted in residential zones.

Station WANV had earlier considered the Rt. 745 site and had discussed the matter with county administrator Don Austin who stated he did not believe a radio broadcasting tower could be erected in a residential zone unless an exception from the zoning ordinance were obtained.

Austin said this week that when he was approached with a similar proposal by Peyton, who is associated with Roanoke station WKBA, he stated the same view, but said he was not prepared to make a ruling on the matter.

Austin made a request in writing to Commonwealth's Attorney Eric L. Sisler for an interpretation of the pertinent section of the zoning ordinance.

In his opinion, Sisler said "It would appear that a public utility pole such as this one (the radio tower) would be permitted under the guise of 4-110 of Article IV" of the ordinance.

This section grants an exception for "public utilities" in residential zones to permit them to erect poles, lines, distribution transformers, pipes, meters, and-or other facilities necessary for the provision and maintenance" of the utility.

Communications Authorities, including the FCC do not consider broadcast stations to be public utilities and they are not regulated by the Virginia State Corporation Commission which has jurisdiction over bona fide utilities, Rogers stated.

Zoning authorities, he claimed, know of no other community which permits radio broadcast towers in a residential zone as a matter of right without at least a special use permit requiring a public hearing. As a rule, he said, such towers are restricted to industrial, commercial and rural zones, and even there a conditional use permit is usually required.

Radio station installations of four or more towers, each 300 to 400 feet high, are not uncommon, Rogers points out. Some TV transmission towers go up 100 or more feet. Tall towers are painted bright orange and white and must carry flashing beacons and red side light

WANV has indicated pl to place its tower on an dustrial site in the City Buena Vista.

[PETITIONERS' EXHIBIT 3]
~~Filed October~~ 21, 1976

ARTICLE 4. RESIDENTIAL, GENERAL

Statement of Intent

This district is composed of certain quiet, low-density residential areas plus certain open areas where similar residential development appears likely to occur. The regulations for this district are designed to stabilize and protect the essential characteristics of the district, to promote and encourage a suitable environment for family life where there are children, and to prohibit all activities of a commercial nature. To these ends, development is limited to relatively low concentration and permitted uses are limited basically to dwellings providing homes for the residents plus certain additional uses, such as schools, parks, churches, and certain public facilities that serve the residents of the district.

4-1. USE REGULATIONS

In Residential, General, structures to be erected or land to be used, shall be for one or more of the following uses:

4-1-1. Single-family dwellings.

4-1-2. Two-family dwellings.

4-1-3. Multi-family dwellings.

4-1-4. Schools.

4-1-5. Churches.

4-1-6. Parks and playgrounds.

4-1-7. Home occupations as defined conducted by occupant.

4-1-8. Off-street parking as required by this ordinance.

4-1-9. Accessory buildings as defined, however, garages or other accessory buildings, such as carports, porches and stoops [illegible] the main building shall be considered part of the main building [illegible] accessory building may be closer than five (5) feet to a [illegible] line.

4-1-10. Public utilities such as poles, lines, distribution [illegible], wires, pipes, meters, and/or other facilities necessary for the provision and maintenance, including water and sewerage facilities.

4-1-11. Signs as permitted in Sections 4-2, 4-3, 4-4, 4-5, 4-6, 4-7, and 4-8.

4-1-12. Mobile home with a conditional use permit renewed on an annual basis and with the mobile home to be in accordance with special provisions contained in the Trailer Ordinance.

[RESPONDENT'S EXHIBIT 1]
Filed October 21, 1976

WANV BOX 97 WAYNESBORO, VIRGINIA 22980 • 703/942-1153 OR 703/885-2455
WAYNESBORO STAUNTON

THE POWER TOWERS OF THE SHENANDOAH VALLEY · 97 ON THE DIAL · 5,000 WATTS

December 16, 1975

County of Rockbridge
Lexington, Virginia 24450

Gentlemen:

WANV, Inc. applies for a permit to construct a public utility pole for radio broadcast transmissions and associated utility building on the property of William M. Agnor, Jr., situated in Rockbridge County about .3 miles southeast of the junction of Route U.S. 11 and Route U.S. 11A. Said property of about three acres is under lease to WANV, Inc., with option to buy. Said site will be at approximately latitude 37-45-57 and longitude 79-26-42, and is bounded to the northeast by the properties of E. F. Houff, Jr., A. G. Childress, et al; and to the southeast by the property of M. O. Smith; and to the southwest by the property of A. D. Moore and S. E. Hickman; and to the northwest by the remainder of the property of William M. Agnor, Jr.

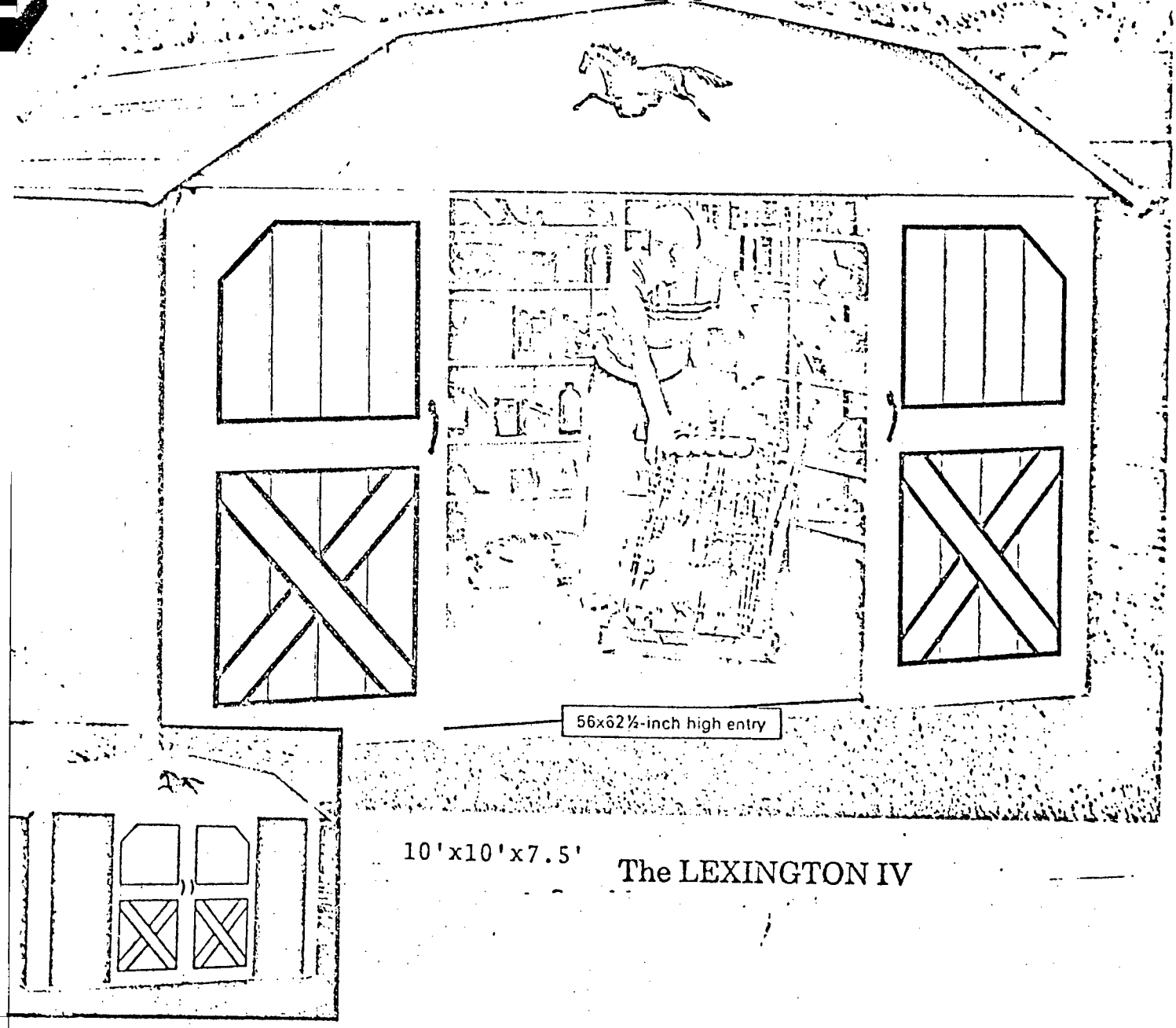
The said utility pole will be about 206 feet in height including its foundation, as depicted in the attached sketch. The utility building will be a single story structure 10 feet by 10 feet of a type approved for all zones in the county, (see attached sketch) and will be erected on a concrete slab in proximity to the said pole. The building will be used solely for housing transmitting equipment associated with the pole or tower, and will not be used for any studio or commercial purpose, nor will it be occupied by persons except for occasional inspections and maintenance. The land will be kept open for agricultural purposes.

This application is made pursuant to the ruling made by Eric Lee Sisler, Commonwealth's Attorney, as an interpretation of Section 4-1-10 of Article IV of the Zoning Ordinance of Rockbridge County. The proposed use is to serve as a new transmitter site for Radio Station WREL which is under contract of sale to the undersigned.

Sincerely,

WANV, Inc.

M. Robert Rogers
President



10'x10'x7.5'

The LEXINGTON IV

[RESPONDENT'S EXHIBIT 2]
Filed October 21, 1976

NO. 1253

ROCKBRIDGE COUNTY

BUILDING PERMIT

NAME of Owner W.A.N.V. Inc.

ADDRESS Lexington, Va.

DATE 12-17-75

DISTRICT Buffalo

CONTRACTOR Acc High Tower Co.

R. C. Miller
County Building Inspector

NOTICE

This permit must be posted on or near front of building, protected from the weather, and must not be removed until building is complete.

James Allen Printing, Buena Vista, Va.

* * * * *

[RESPONDENTS EXHIBIT 5 - Filed October 21, 1976]

AT A CONTINUED MEETING OF THE BOARD OF SUPERVISORS OF ROCKBRIDGE COUNTY, VIRGINIA, HELD AT THE COURT HOUSE ON MAY 12, 1971 AT 7:30 P. M.

PRESENT: C. F. CAMPBELL, VICE CHAIRMAN

SUPERVISORS: H. C. SLUSSER, JR., D. G. MCCRAY, C. B. LEECH III

CLERK OF THE BOARD: G. T. UMBARGER

ABSENT: L. E. KOOGLER

* * * * *

The meeting was called to order by Vice-Chairman, Campbell.

* * * * *

On motion of Supervisor Leech and seconded by Supervisor Slusser, the Board granted Mrs. Elizibeth Brown a temporary trailer permit for one year until another site can be found on which the trailer can be located. If a suitable site cannot be found the Board will give permanent approval of Mrs. Brown's trailer application.

* * * * *

The Executive Secretary read a letter from B.A.R.C. stating that an increase in rates will soon be sought from the State Corporation Commission.

* * * * *

On motion of Supervisor Slusser and seconded by Supervisor McCray, the Board approved waiving the tax on the Carnival to be held at Lexington, Virginia.

* * * * *

On motion of Supervisor Slusser and seconded by Supervisor McCray, the Board gave the Executive Secretary the power to transfer funds for the following:

APPROPRIATION RESOLUTION

BE IT RESOLVED: By the Board of Supervisors of Rockbridge County, Virginia, that the following appropriation be, and the same hereby is made, for the period ending June 30, 1971, from the EXCESS REVENUE of the GENERAL REVENUE FUND to be transferred to the General Operating Fund and expended as follow:

Institutional Care - Board & Care of Inmates at District Home (11-083-203).... $457.05

* * * * *

On motion of Supervisor Slusser and seconded by Supervisor Leech, the Board agreed to advertise for a public hearing on the proposed Budget for Rockbridge County on June 2, 1971 at 8:00 P.M.

* * * * *

On motion of Supervisor Slusser and seconded by Supervisor Leech the Board approved by recorded vote the Rockbridge County Zoning Ordinance to become effective after 12:01 A. M., May 13, 1971.

Recorded Vote
Slusser - aye
Leech - aye
McCray - aye
Campbell- aye
Koogler - Absent

The Board appointed Donald G. Austin to serve as zoning Administrator.

* * * * *

On motion of Supervisor Leech and seconded by Supervisor Slusser, the Board directed the Executive Secretary to write a letter to Mayor Richard Farrier of Staunton who is the Chairman of the Central Shenandoah Planning District Commission to urge him to sign the Contract with L B C and W Associates concerning the comprehensive water and sewer study for the district.

* * * * *

There being no further business, the meeting was adjourned to be continued on May 24, 1971 at 2:00 P.M.

* * * * *

L. E. Koogler
Chairman

Attest: G. T. Umbarger
Executive Secretary

* * * * *

September 14, 1964

AT A REGULAR MEETING OF THE BOARD OF SUPERVISORS OF ROCKBRIDGE COUNTY, VIRGINIA, HELD AT THE COURT HOUSE THEREOF, MONDAY, SEPTEMBER 14, 1964

PRESENT: CHAIRMAN W. A. WILSON
SUPERVISORS: H. B. CHITTUM, C. F. CAMPBELL, L. E. KOOGLER
R. G. MOORE and D. G. McCRAY
COMMONWEALTH ATTORNEY: C. H. DAVIDSON, JR.

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The meeting was called to order and opened with prayer by Chairman Wilson. Minutes of the last meeting were approved as read.

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Mr. W. E. Tilson presented to the Board a petition and related letter dated August 10, 1964 requesting improvement of Secondary Road 675 as follows:

"WHEREAS, there is a definite need for improvement of Secondary Route 675, extending from Route 251 to 674, approximately one mile southwest of the intersection of 251 and 675 by widening, easing the curves, cutting down steep hills and black topping, and

WHEREAS, the said section of road extends along or through or over lands owned by the parties hereto:

NOW, THEREFORE, for and in consideration of the benefits accruing or to accrue to the undersigned landowners, said landowners do hereby signify their willingness to donate, without compensation, each as to the lands by him owned, an easement and right of way for said road along, through or over said lands, said easements and right of way to be 50 feet in width, together with such additional widths as may be necessary for the extension and maintenance of road slopes and/or ditches and all necessary drainage facilities, with the following understanding;

Where any buildings are located on this proposed right of way, we will be compensated in an amount mutually agreed upon, for the loss of such buildings, and also;

In regard to fencing it is understood that where no fence is existent, no fence will be provided. If the present fence is in a condition to be and reset, this shall be done, and the Commonwealth shall furnish such new materials as are necessary to replace the fence inits present condition. If the present fence is in such a condition that it cannot be moved, the State will erect new fence (with the exception of Board fence) provided the property owner furnishes the wire, posts, etc."

"As a supplement to the enclosed petition which is respectfully submitted by the land owners on Secondary Road 675 I wish to point out the following facts for your added consideration.

1. This is a mail route.
2. This is a school bus route.
3. Approximately 500 steers are trucked in and out over this road each year.
4. During approximately 6 months of the year some ten to 20 horses are brought in and out by truck or trailer from Rockbridge County, Roanoke, Hillsville, Mt. Airy, N.C., Lynchburg and Staunton for the foxhunts on Wednesdays and Saturdays conducted by the hunt which is one of the recognized 101 hunts in the United States and Canada. Unless the highways electric count was conducted on the weekend it would not be at all accurate as many cars will accompany the horses on Saturdays.
5. After Highway 675 is hard surfaced much of the present traffic over 674 will use 675 instead."

On motion of Supervisor Campbell, duly seconded by Supervisor Chittum, the Board approved the petition and directed that it be turned over to the Virginia Department of Highwaysto see if this work could be scheduled in the next year's budget.

* * * * * * * * * * * * * * *

At the request of Mr. W. E. Tilson, and on motion of Supervisor Campbell, duly seconded by Supervisor Koogler, the Board directed the Executive Secretary to write the Kappa Alpha Fraternity and welcome this organization to Lexington and Rockbridge County.

* * * * * * * * * * * * * * *

A large delegation of citizens protesting the restrictions of the recently adopted zoning ordinance were present for the Board meeting this date. Mr. C. W. Gunn, Jr., attorney representing several members of the group, spoke for repeal of the ordinance, stating that the ordinance was not in accord with the wishes or needs of a majority of the Rockbridge County citizens. Mr. Gunn further stated that at least 90 petitions in opposition to the ordinance were being circulated throughout the county at the present time. (No petitions were presented to the Board at this time). At the request of Mr. Gunn, 18 persons in the audience stood in favor of repeal of the ordinance.

Mr. W. M. Leech, Jr., Chairman of the Rockbridge County Planning Commission, spoke to the Board in support of the ordinance and asked that the Supervisors give it a chance to operate.

ormed the citizens present that both the Supervisors and the Planning Commission were sted only in the development of the county and he felt that zoning was one of the tools for this purpose.

fter further discussion of the matter by the Board the following motion was made by isor Koogler and duly seconded by Supervisor Moore:

ue to the opposition from the affected citizens of Rockbridge County to the Zoning Ord- which was adopted effective July 10, 1964 by the Rockbridge County Board of Supervisors, that the effective date of this ordinance be rescinded and that the ordinance be turned o the Rockbridge County Planning Commission with the request that they rework said ord- to what they would consider the minimum controls for planning the future growth of idge County and that they return it to the Rockbridge County Board of Supervisors within ns for this body's consideration of re-adoption after the required two public hearings.

ne recorded vote was as follows:

Supervisor Chittum - Yes
Supervisor McCray - No
Supervisor Campbell - No
Supervisor Koogler - Yes
Supervisor Moore - Yes
Supervisor Wilson - No

e resolution was then ordered sent to the tie-breaker, Mr. D. Allen Penick, who indi- hat it would take him at least a week or ten days to cast his vote.

* * * * * * * * * * * * * * *

August 26, 1974

Don G. Austin, Esquire
County Administrator
Court House Square
Lexington, Virginia 24450

Dear Don:

Mr. Eric Peytun has requested permission to install a transmitting tower approximately 165 feet in heighthin a residential area here in the County for the purpose of a proposed radio station.

The transmitter and actual main studio location itself will not be there, but rather in the City of Buena Vista, and he is requesting permission only to erect a pole and other utility lines in conjunction thereto to transmit reception back to the main studio in Buena Vista.

In reading Article IV of our Zoning Ordinance it would appear that a public utility pole such as the one he is requesting would be permitted under the guise of 4-110 of Article IV.

With kind regards to you, I remain

Very truly yours,

Eric Lee Sisler

ELS/emw

[RESPONDENTS EXHIBIT 9 - Filed October 21, 1976]

ERIC LEE SISLER
COMMONWEALTH'S ATTORNEY
FOR CITY OF LEXINGTON
AND ROCKBRIDGE COUNTY

OFFICE OF THE
COMMONWEALTH'S ATTORNEY
3 SOUTH JEFFERSON ST.
LEXINGTON, VIRGINIA 24450

TELEPHONE 463-7788

September 16, 1974

M. Robert Rogers, President
WANV
Box 97
Waynesboro, Virginia 22980

Dear Mr. Rogers:

I received a copy of your letter dated September 10, 1974 directed to Mr. Donald G. Austin, County Administrator of Rockbridge County, requesting an interpretation of our Zoning Ordinance with respect to those matters raised therein.

Initially, I am enclosing herewith a copy of my letter to Mr. Austin with reference to placing a tower in a residential area and as you can see I felt that the same was permissible under 4-1-10 of our Zoning Ordinance which provides that public utilities such as poles, lines, distribution transformers and/or other facilities necessary for their provision and maintenance be permitted.

Studios and offices for commercial purposes as such are not permitted within a residential zone nor would it be permissible to have such activities in a residential zone within a mobile home.

If you have any further questions regarding this matter please do not hesitate to call upon me. With kind regards, I remain

Very truly yours,

Eric Lee Sisler

ELS/emw

Cc: Don G. Austin

[MEMORANDUM OF LAW OF ROCKBRIDGE COUNTY COMMONWEALTH ATTORNEY - Stipulated October 21, 1976]

MEMORANDUM OF LAW

QUESTION: Is a radio tower a public utility within the meaning of Section 4-1-10 of the Rockbridge County Zoning Ordinance? That provision states as follows: Applicable Statute Section 4-1-10.

CONCLUSION: A radio tower is not a public utility within the meaning of Section 4-1-10.

DISCUSSION: When a word is left undefined in a zoning ordinance it must be defined by its common everyday meaning. This is the teaching of McClung v. Henrico County, 200 Va. 870, 875, 108 S.E. 2d 513, 516 (1959) where the Virginia Supreme Court said, "In the field of zoning law, interpretation of a zoning ordinance is controlled by the principle that words in common use must be given their plain and natural meaning in absence of any showing that such words were used in any other than their usual and ordinary sense."

Thus, it must be determined whether a public utility, as commonly defined, is considered to include radio broadcasting apparatus. Many sources say that it does not. This is summed up in Moser and Vavino, Radio and the Law, 118 (1947), where it is said, "A radio station is not a public utility." See C. J. S., Telephone and Telegraph, Section 10.4-9.

One court in the state of Washington has held that a radio broadcasting station is a public utility within the meaning of a local zoning ordinance. State of Washington v. Redman, 374 P. 2d 1002 (1962). However, the holding of the court makes the ruling inapplicable to Virginia law. The court said, "It is clear that although a radio broadcasting station

does not constitute a public utility in the ordinary sense, it is, nevertheless, a public utility in a limited sense impressed with a public interest." So, under Hallung v. Henrico County, the Washington court's statement precludes a radio station from being a public utility because it is not one in the "ordinary sense."

For these reasons, in my opinion, a radio tower is not a public utility within the meaning of Section 4-1-14 of the Rockbridge County Zoning Ordinance.

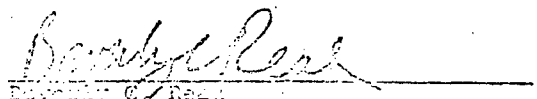
QUESTION: If a radio tower is not a public utility, what actions should be taken by the zoning administrator?

CONCLUSION: The zoning administrator should rescind the building permit issued WAMV, Inc., and issue the denial of the permit.

DISCUSSION: Any permit allowing a radio tower under Section 4-1-1 is void since a radio tower, according to the statute, as interpreted, is not a public utility. Section 20-1 of the Zoning Code states that "any... permit, if issued in conflict with the provisions of this ordinance, shall be null and void." It follows that if a permit is void it should be withdrawn, and the Virginia Supreme Court has said that a municipality has the power to do so in Segaloff v. City of Newport News, 209 Va. 259, 261, 163 S.E. 2d 125, 127 (1968). "It is well established that a municipality, under valid zoning ordinances, may require that permits be obtained from designated public officials as a prerequisite to the erection of buildings or similar structures. When a municipality grants such a permit, it is acting in its governmental and not proprietary capacity and is not stopped as the result of its acts or those of its agents or employees."

Thus, in my opinion, the zoning administrator should withdraw the building permit and issue a denial of such permit.

RESPECTFULLY SUBMITTED,



Beverly C. Reed
Commonwealth's Attorney
for Pocahontas County

[LETTER FROM COMMONWEALTH ATTORNEY ROCKBRIDGE COUNTY - Stipulated October 21, 1976]

BEVERLY C. READ
MONWEALTH'S ATTORNEY
ROCKBRIDGE COUNTY
D CITY OF LEXINGTON

OFFICE OF THE
COMMONWEALTH'S ATTORNEY
2 E WASHINGTON STREET
LEXINGTON, VIRGINIA 24450

AREA CODE 703
TELEPHONE 463-7664

June 4, 1976

Humes J. Franklin, Jr.
Franklin and Franklin
P. O. Box Drawer 1140
Waynesboro, Virginia 22980

W. T. Robey, III
144 West 20th Street
Buena Vista, Virginia 24416

Gentlemen:

Enclosed you will find a photo copy of a letter dated May 26, 1976 from the Office of the Attorney General stating that no opinion will be rendered on this subject in as much as litigation appears imminent in this case. Accordingly, the County of Rockbridge zoning and building permit issued on December 17, 1975 to WANV, Inc. to erect a radio tower and utility building will remain as issued.

This office will render no further opinion on this subject in as much as litigation is imminent in this case.

With kindest regards, I am

Sincerely yours,

Beverly C. Read

Beverly C. "John" Read

Enclosure

cc: Mr. Donald G. Austin
County Administrator
County of Rockbridge
Court House Square
Lexington, Virginia 24450

FOR MORE INFORMATION

ARTICLE 13

PRECAUTIONS DURING BUILDING OPERATIONS

Section 1300.0 Scope

The provisions of this article shall apply to all construction operations in connection with the erection, alteration, repair, removal or demolition of buildings and structures. The execution of the detail requirements shall be regulated by the approved rules and the safety code for building construction listed in appendix B.

1300.1 Other Laws: Nothing herein contained shall be construed to nullify any rules, regulations or statutes of state agencies governing the protection of the public or workmen from health or other hazards involved in manufacturing, mining and other processes and operations which generate toxic gases, dust or other elements dangerous to the respiratory system, eyesight or health.

1300.2 Combustible and Explosive Hazards: The provisions of the Basic Code which apply to the storage, use or transportation of explosives, highly flammable and combustible substances, gases and chemicals shall be construed as supplemental to the requirements of the federal laws, the regulations of the Interstate Commerce Commission and the rules and regulations of the municipality.

Section 1301.0 Definitions

Construction equipment: the construction machinery, tools, derricks, hoists, scaffolds, platforms, runways, ladders and all material handling equipment safeguards and protective devices used in construction operations.

Construction operation: the erection, alteration, repair, renovation, demolition or removal of any building or structure; and the excavation, filling, grading and regulation of lots in connection therewith.

Material platform hoist: a power or manually operated suspended platform conveyance operating in guide rails for the exclusive raising or lowering of materials, which is operated and controlled from a point outside the conveyance.

Runway: any aisle or walkway constructed or maintained as a temporary passageway for pedestrians or vehicles.

Scaffold: any elevated platform which is used for supporting workmen, materials or both.

'he Board moved back into session.

* * * * *

Mr. Sid Hickman, Mr. Skipp Houff and Pete Robey, who is their attorney, were in attendance ndowners objecting to the erection of a radio tower by WANV radio station in Waynesboro. The Commonwealth's Attorney, John Read, brought the Board up to date on this matter and d that the Attorney General would not render an opinion since he had determined that this r would be headed for probable litigation.

The Commonwealth's Attorney recommended that the Board not get involved in the matter since lding permit had been issued for the tower and the attorney general had not rendered an on.

Mr. Robey spoke briefly saying that the Board of Supervisors should not stay away from this r because of the pending litigation and called for their support.

Mr. Humes Franklin, and Mr. Robert Rogers, who is the owner of the WANV radio station, in attendance and also spoke on the matter.

Mr. Rogers spoke regarding an article which had been published in the local newspaper.

After further discussion of the matter the Board decided to follow the advice of the onwealth's Attorney and not get involved in the matter at this time.

* * * * *

On motion of Supervisor Dixon with second by Supervisor Whitesell, the Board unanimously ed to move into Executive Session pursuant to Section 2.1-344, Part I of the Code of Virginia , as amended.

* * * * *

The Board moved into Executive Session.

* * * * *

The Board moved back to Regular Session.

* * * * *

There being no further business, the meeting was adjourned subject to the call of the irman.

M. R. Reynolds
Chairman

est: D. G. Austin
County Administrator