214 Va. 83

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CLERK
SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE SUPREME COURT OF VIRGINIA

AT RICHMOND

Record No. 8119

Substituted in lieu of original

JOHN MARSH and
HAZEL MARSH

Appellants

vs.

GAINESVILLE-HAYMARKET
SANITARY DISTRICT

Appellees

APPENDIX TO APPELLANT'S OPENING BRIEF

Appendix No. 1: Petition of Voters to Enlarge Sanitary District.

Appendix No. 2: Petition of Board of Supervisors to Enlarge Sanitary District.

Appendix No. 3: Resolution of the Town of Haymarket.

Appendix No. 4: Answer of John D. Marsh and Hazel B. Marsh.

Appendix No. 5: Opinion letter of Judge Percy Thornton dated February 7, 1972.

Appendix No. 6: Order Enlarging District.

Appendix No. 7: Notice of Appeal and Assignments of Error.

Appendix No. 8: Testimony of Witnesses.

Appendix No. 9: Page 4 of Exhibit I.

APPENDIX NO. 1

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

IN THE MATTER OF

THE ENLARGEMENT OF GAINESVILLE-
HAYMARKET SANITARY DISTRICT OF
PRINCE WILLIAM COUNTY, VIRGINIA

TO THE HONORABLE JUDGES OF THE CIRCUIT COURT
OF PRINCE WILLIAM COUNTY, VIRGINIA

P E T I T I O N

The undersigned qualified voters of and residents within the area proposed to be added to Gainesville-Haymarket Sanitary District hereby respectfully petition the Circuit Court of Prince William County, Virginia, and the judges thereof to make an order, pursuant to Chapter 2 of Title 21 of the Code of Virginia, 1950, as amended, extending and enlarging Gainesville-Haymarket Sanitary District which was created by an order entered by the Circuit Court of Prince William County on May 15, 1967, by adding thereto the following described territory, constituting the incorporated Town of Haymarket:

Beginning in the center of John Marshall Highway (Virginia State Route 55) a distance of 2,241.57 feet northwesterly from a pipe driven into the

said highway where it intersects Carolina Road (State Route 625); thence North 35 degrees 21 minutes 25 seconds East, with Peters, 1,800 feet (passing through a concrete marker at 40.07 feet) to a concrete marker; thence, with Peters, Robinson (or Robertson), Thomas, King, and Jordan, South 57 degrees 31 minutes 39 seconds East, 4,474.04 feet crossing Carolina Road (Virginia State Route 625) and passing through concrete markers at 1,855.82 feet and 1,892.42 feet respectively, to a concrete marker; thence, with Jordan, Prince William County School Board and Stanton, South 35 degrees 21 minutes 25 seconds West, a distance of 3,500 feet crossing John

Marshall Highway (Virginia State Route 55) and passing through concrete markers at 1,599.78 feet and 1,680.22 feet respectively to a concrete marker just southwesterly from the Southern Railway Company's right-of-way; thence, with Stanton, Bleight, Tyler, and Rust, South 58 degrees 09 minutes 59 seconds West, 4,476.84 feet crossing Carolina Road (Virginia State Route 625) just northeasterly from a bridge and passing through concrete markers at 1,671.11 feet and 1,711.61 feet, respectively, to a concrete marker, and thence with Rust and Fletcher (following the old Clarkson line) North 35 degrees 21 minutes 25 seconds East, a distance of 1,750 feet crossing the Southern Railway Company's right-of-way at about 800 feet and passing through a concrete marker at 1,709.93 feet to the place of beginning, containing 361.59288 acres, more or less, according to a survey based on true bearings made by R. J. Ratcliffe, Surveyor of Prince William County, Virginia, the foregoing constituting the corporate limits as contained in the charter of the Town of Haymarket, Chapter 540, Acts of 1950.

It is understood that the Town of Haymarket will participate in the sanitary district for the purposes of providing water and

sewer only and will in no way relinquish any of its rights to provide other services to its citizens.

WITNESS the following signatures:

NAME	ADDRESS
[illegible]	Haymarket Va
Geneva L. Jordan	Haymarket, Va.
Richard T. King	Haymarket VA.
Marjie L. King	Haymarket, VA
Ellen C. Gossom	Haymarket, Va
Jos. D. Gossom	Hay Market Va
Norah E. Gossom	Haymarket, Va
Gertrude Brown	Haymarket, Virginia
Irma C. Roland	Haymarket, Va.
Arnold L. Lindley	Haymarket, Va.

L#5473

VIRGINIA:

APPENDIX NO. 2

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

IN THE MATTER OF

THE ENLARGEMENT OF GAINESVILLE-
HAYMARKET SANITARY DISTRICT OF
PRINCE WILLIAM COUNTY, VIRGINIA

TO THE HONORABLE JUDGES OF THE CIRCUIT
COURT OF PRINCE WILLIAM COUNTY, VIRGINIA

P E T I T I O N

The undersigned, being not less than a majority of the seven members of the Board of Supervisors of Prince William County, Virginia, hereby respectfully petition the Circuit Court of Prince William County and the judges thereof to enter an order pursuant to Chapter 2, Title 21, Code of Virginia of 1950, as amended, extending and enlarging Gainesville-Haymarket Sanitary District, which was created by order entered by such court on May 15, 1967, by adding thereto the following described territory, constituting the incorporated Town of Haymarket:

> Beginning in the center of John Marshall Highway (Virginia State Route 55) a distance of 2,241.57 feet northwesterly from a pipe driven into the said highway where it intersects Carolina Road

(State Route 625); thence North 35 degrees 21 minutes 25 seconds East, with Peters, 1,800 feet (passing through a concrete marker at 40.07 feet) to a concrete marker; thence, with Peters, Robinson (or Robertson), Thomas, King, and Jordan, South 57 degrees 31 minutes 39 seconds East, 4,474.04 feet crossing Carolina Road (Virginia State Route 625) and passing through concrete markers at 1,855.82 feet and 1,892.42 feet respectively, to a concrete marker; thence, with Jordan, Prince William County School Board and Stanton, South 35 degrees 21 minutes 25 seconds West, a distance of 3,500 feet crossing John

Marshall Highway (Virginia State Route 55) and passing through concrete markers at 1,599.78 feet and 1,680.22 feet respectively to a concrete marker just southwesterly from the Southern Railway Company's right-of-way; thence, with Stanton, Bleight, Tyler, and Rust, South 58 degrees 09 minutes 59 seconds West, 4,476.84 feet crossing Carolina Road (Virginia State Route 625) just northeasterly from a bridge and passing through concrete markers at 1,671.11 feet and 1,711.61 feet, respectively to a concrete marker, and thence with Rust and Fletcher (following the old Clarkson line) North 35 degrees 21 minutes 25 seconds East, a distance of 1,750 feet crossing the Southern Railway Company's right-of-way at about 800 feet and passing through a concrete marker at 1,709.93 feet to the place of beginning, containing 361.59288 acres, more or less, according to a survey based on true bearings made by R. J. Ratcliffe, Surveyor of Prince William County, Virginia, the foregoing constituting the corporate limits as contained in the charter of the Town of Haymarket, Chapter 540, Acts of 1950.

This petition shall constitute the approval of the Board of Supervisors required by Section 21-113, Code of

Virginia of 1950, as amended, for the inclusion of the Town of Haymarket within Gainesville-Haymarket Sanitary District. Attached hereto is a certified copy of a resolution of the Town Council of the Town of Haymarket evidencing the approval of the Town Council to the inclusion of the Town within the sanitary district, also as required by such Section 21-113.

WITNESS the signatures of the undersigned members of the Board of Supervisors of Prince William County, Virginia, this 22ND day of November, 1971.

Joseph B. Bolton

Andrew J. Manuelli

Mandujano

APPENDIX NO. 3

COPY

At a Special Called meeting of the Town Council of the Town of Haymarket, Virginia, held on the 22nd day of October, 1971,

PRESENT: Alan Gossom, Joe Bailey, Teal Queen, Fewell Melton, Hugh Orndoff, and Mayor Pickett

ABSENT: Frank Owens

The following resolution was adopted by the following roll call vote and recorded in the minutes of the meeting;

Yes: Alan Gossom, Joe Bailey, Teal Queen, Fewell Melton, Hugh Orndoff

Nays: None

BE IT RESOLVED BY THE TOWN COUNCIL OF THE TOWN OF HAYMARKET, VIRGINIA:

Acting pursuant to Section 21-113, Code of Virginia of 1950 as amended, the Town Council hereby approves the proposed enlargement of Gainesville-Haymarket Sanitary District to include the Town of Haymarket within the boundaries of the sanitary district.

All resolutions adopted by the Town Council dealing with the situation in the Town, including the resolutions adopted on July 19 and 27, 1971, are hereby repealed to the extent that any of such resolutions may be inconsistent herewith. It is further understood the above action does not relinquish any sovereign rights except sewer

and water of the Town of Haymarket.

The undersigned Clerk of the Town Council of the Town of Haymarket, Virginia, hereby certifies that the foregoing constitutes a true and correct extract from the minutes of a Special Called meeting of the Town Council held on the 22nd day of October, 1971, being of the whole thereof so far as applicable to the matters referred to in such extract.

WITNESS my hand and the seal of the Town of Haymarket, Virginia, this 25th day of October, 1971.

s/ Alan Gossom
Sec.-Clerk of "Special Called Meeting"

s/ Mason Pickett
Mayor, Town Council of the Town of Haymarket, Virginia

Town Council of the Town of Haymarket, Va.

(SEAL)

State of Virginia

County of Prince William, to-wit;

I, M. Fewell Melton a Notary Public in and for the State of Virginia at large, whose commission expires Sept. 30th 1974 do hereby certify that Mayor Mason Picket and Alan Gossom whose names are signed to the above, foregoing and hereunto annexed writing bearing date of 22nd October, 1971 have acknowledged the same before me in my

State aforesaid.

Given under my hand this 25th day of October 1971.

s/ M. Fewell Melton

NOTARY PUBLIC

APPENDIX NO. 4

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

IN THE MATTER OF

THE ENLARGEMENT OF GAINESVILLE-HAYMARKET SANITARY DISTRICT OF PRINCE WILLIAM COUNTY, VIRGINIA.

LAW NO. 5473

ANSWER OF
JOHN D. MARSH AND HAZEL B. MARSH

TO THE HONORABLE JUDGES OF SAID COURT:

Your respondents, John D. Marsh and Hazel B. Marsh, his wife, being owners of improved real property located within the Gainesville-Haymarket Sanitary District referred to in the Petition, appear herein by counsel and respectfully represent unto this Honorable Court as follows:

1. They file this, their answer and defense, pursuant to the provisions of Section 21-115 of the Va. Code as interested persons and pray that they be made parties to this proceeding.

2. Your respondents believe and, therefore, aver that the governing body of the Town of Haymarket and the Petition filed by certain qualified voters of and residents within the Town of Haymarket have, jointly and severally, diminished and restricted the full powers granted by statute to the Board of Supervisors of Prince William County for the administration of the proposed enlarged Sanitary District by reserving all powers to the governing body of the Town of Haymarket excepting those concerning water and

sewer service. Said reservation, embodied in the Resolution purportedly attempting to place the Town of Haymarket within the proposed enlarged Sanitary District, does not constitute the consent contemplated by Section 21-113 of the Code of Virginia (1971 Supplement).

3. Your respondents believe and, therefore, aver that the restrictions and qualified consent described above and set forth in the Petition filed herein invalidate the proceedings herein, affect the validity and/or marketability of any revenue bonds which might subsequently be issued, and otherwise constitute an illegal restriction on the proper administration of the proposed enlarged Sanitary District.

4. In the alternative, your respondents aver that pursuant to Section 21-118. 4 of the Code of Virginia (1971 Supplement) that the restrictions and qualified consent described above are void and of no force and effect.

5. Your respondents believe and, therefore, aver that this Honorable Court should take no further action in these proceedings until the Court determines the validity of the proposed limitations of power and authority being reserved by the Town of Haymarket and its petitioning residents and qualified voters. Only in this manner may a proper determination be made that any property within the proposed enlarged District will be benefitted by its enlargement.

WHEREFORE, your respondents pray that the Petition heretofore

exhibited against them be dismissed and that they recover their costs expended.

JOHN D. MARSH
HAZEL B. MARSH

By: _____
A. Hugo Blankingship, Jr.
Counsel

BOOTHE, PRICHARD & DUDLEY
P.O. BOX 338
4085 University Drive
Fairfax, Virginia 22030

By: _____
A. Hugo Blankingship, Jr.

CERTITICATE OF SERVICE

I hereby certify that I have mailed a copy of the foregoing Answer, postage prepaid, to Paul B. Ebert, Esquire, 9304 Peabody Street, Manassas, Virginia 22110, counsel for the Board of Supervisors of Prince William County, and to E. Ralph Coon, Esquire, Box 245, Manassas, Virginia 22110, counsel for certain qualified voters of and residents within the proposed Sanitary District, this 13th day of December, 1971, and Turner T. Smith, Counsel to the Town of Haymarket.

_____
A. Hugo Blankingship, Jr.

APPENDIX NO. 5

SIXTEENTH JUDICIAL CIRCUIT OF VIRGINIA

PRINCE WILLIAM COUNTY FAIRFAX COUNTY ALEXANDRIA CITY

ARTHUR W. SINCLAIR
BARNARD F. JENNINGS
JAMES KEITH
WILLIAM G. PLUMMER
LEWIS D. MORRIS
PERCY THORNTON, JR.
BURCH MILLSAP
JAMES C. CACHERIS
JUDGES

9302 Peabody Street
Manassas, Virginia 22110
February 7, 1972

HARRY FRAZIER, III, Esquire
Hunton, Williams, Gay & Gibson, Attorneys
700 East Main Street
Richmond, Virginia 23219

A. HUGO BLANKINGSHIP, JR., Esquire
Boothe, Prichard & Dudley, Attorneys
P. O. Box 338
Fairfax, Virginia 22030

RE: Enlargement of Gainesville-Haymarket Sanitary District

Gentlemen:

It is my decision to grant the petition for enlargement of Gainesville-Haymarket Sanitary District to include the Town of Haymarket, Virginia.

I find the resolution adopted by the Town Council of the Town of Haymarket, Virginia, on October 22, 1971, to be valid notwithstanding the absence of Councilman Frank Owens; a quorum was present with unanimous adoption of the resolution. I also find the call of the meeting to be in order; special meetings may be called by the Clerk at the instance of the Mayor or any two or more councilmen in writing. The fact that two or more councilmen did not request the meeting in writing would not invalidate the call, as the Mayor did in fact have the Clerk call the meeting.

I also find that a town may be included in a sanitary district for only sewer and water pursuant to Section 21-113 of the Code of Virginia, as amended. It is recognized that a sanitary district has powers other than providing sewer and water pursuant to Section 21-118 of the Code of Virginia, as amended; the exercise of any power thereunder is not compulsory, but rests within the discretion of the governing body of the district. As a practical matter, the exercise of any power thereunder necessitates the cooperative efforts of the citizens of the district through favorable actions on bond referendums or direct taxation through elected representatives. It would indeed be an incongruity for the governing body of a sanitary

district to install power and gas systems in the district or any area thereof when such power and gas were in fact being provided by franchised public utility companies; the same would apply to any other power specified under Section 118.

The thrust for creation, as well as enlargement, of a sanitary district is to provide sewer and water to a particular area where warranted and demanded by the population thereof in promotion of health and general welfare of the respective community.

Further, there is an analogy between a sanitary district contracting with a municipality to provide any one or more of the enumerated systems (Section 118(8)) and a municipality becoming a party of the district for only sewer and water. The 1970 amendment to Section 21-113 enables two political subdivisions to come together in one entity for their mutual interests and benefits respective of any one or more of the enumerated powers, as determined by them.

Mr. Frazier is requested to prepare an order granting the petition for such enlargement.

Sincerely yours,

Percy Thornton, Jr.

PERCY THORNTON, JR.

PTJr.:d
cc: E. Ralph Coon, Jr., Esquire
cc: The Honorable Paul B. Ebert

APPENDIX NO. 6

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

IN THE MATTER OF

THE ENLARGEMENT OF GAINESVILLE-HAYMARKET SANITARY DISTRICT OF PRINCE WILLIAM COUNTY, VIRGINIA

L-5473

ORDER ENLARGING DISTRICT

This matter came on December 29, 1971 to be heard upon the papers formerly read, upon the affidavit of the Editor-Manager of The Potomac News, a newspaper of general circulation in Prince William County, showing that the order entered herein on November 23, 1971 calling a public hearing to be held on December 29, 1971 on the question of enlarging Gainesville-Haymarket Sanitary District was published on November 24, 1971 and December 1 and 8, 1971, upon the answer of John D. Marsh and Hazel B. Marsh objecting to the proposed enlargement, and was called on the docket in open court, and the Court proceeded to hear evidence both for and against the proposed enlargement.

It appearing to the Court that a petition of the Board of Supervisors of Prince William County seeking the enlargement of the Sanitary District has been filed with the Court, that a petition of certain qualified voters seeking such enlargement has been filed with the Court, that such petition includes more than 25% of the qualified voters residing within the limits of the territory proposed to be added to the Sanitary District on the date of institution of this proceeding, that notice of the public hearing was published once a week for three consecutive weeks in a newspaper of general circulation within Prince William County and that ten days elapsed between the completion of such publication and the date of the public hearing, the Court hereby finds and determines that this proceeding has been instituted and the public hearing held in accordance with law.

Upon the consideration whereof, including particularly the approvals of the Council of the Town of Haymarket and the Board of Supervisors of Prince William County to the inclusion of the Town in the Sanitary District, the evidence heard by the Court on December 29, 1971, the exhibits filed therewith and the memoranda of law thereafter submitted by counsel, the Court hereby further finds and determines as follows:

1. The special meeting of the Council of the Town of Haymarket held on October 22, 1971 was properly called and held and the resolution adopted at such meeting approving the enlargement of the District to include the Town was validly adopted and is in full force and effect.

2. The provision of such resolution limiting the inclusion of the Town in the Sanitary District for the purposes of water and sewer only does not contravene any provision of the Sanitary District Law (Chapter 2 of Title 21 of the Code of Virginia) or any other provision of the statutes or constitutions of Virginia or the United States.

3. The Board of Supervisors of Prince William County and the Council of the Town of Haymarket have given their approval to the proposed inclusion of the Town in the Sanitary District in the manner required by Section 21-113, as amended, of the Code of Virginia.

4. Section 21-113, as amended, of the Code of Virginia providing for the inclusion of a town or any part thereof within a sanitary district is valid and does not contravene any provision of the statutes or constitutions of Virginia or the United States.

5. The territory described below and in the petitions

will be benefited by being included within the Sanitary District.

It is hereby ADJUDGED, ORDERED and DECREED as follows:

1. Gainesville-Haymarket Sanitary District of Prince William County, Virginia, is hereby enlarged by adding thereto the territory described as follows:

> Beginning in the center of John Marshall Highway (Virginia State Route 55) a distance of 2,241.57 feet northwesterly from a pipe driven into the said highway where it intersects Carolina Road (State Route 625); thence North 35 degrees 21 minutes 25 seconds East, with Peters, 1,800 feet (passing through a concrete marker at 40.07 feet) to a concrete marker; thence, with Peters, Robinson (or Robertson), Thomas, King, and Jordan, South 57 degrees 31 minutes 39 seconds East, 4,474.04 feet crossing Carolina Road (Virginia State Route 625) and passing through concrete markers at 1,855.82 feet and 1,892.42 feet respectively, to a concrete marker; thence, with Jordan, Prince William County School Board and Stanton, South 35 degrees 21 minutes 25 seconds West, a distance of 3,500 feet crossing John
>
> Marshall Highway (Virginia State Route 55) and passing through concrete markers at 1,599.78 feet and 1,680.22 feet respectively to a concrete marker just southwesterly from the Southern Railway Company's right-of-way; thence, with Stanton, Bleight, Tyler, and Rust, South 58 degrees 09 minutes 59 seconds West, 4,476.84 feet crossing Carolina Road (Virginia State Route 625) just northeasterly from a bridge and passing through concrete markers at 1,671.11 feet and 1,711.61 feet, respectively, to a concrete marker, and thence with Rust and Fletcher

(following the old Clarkson line) North 35 degrees 21 minutes 25 seconds East, a distance of 1,750 feet crossing the Southern Railway Company's right-of-way at about 800 feet and passing through a concrete marker at 1,709.93 feet to the place of beginning, containing 361.59288 acres, more or less, according to a survey based on true bearings made by R. J. Ratcliffe, Surveyor of Prince William County, Virginia, the foregoing constituting the corporate limits as contained in the charter of the Town of Haymarket, Chapter 540, Acts of 1950.

2. The territory described above shall be included within the Sanitary District solely for the purpose of providing water and/or sewer services. The governing body of the Sanitary District shall not exercise within such territory any powers provided by the Sanitary District Law other than those relating to water and sewer services.

3. Any special tax levied or to be levied in the Sanitary District for water and/or sewer purposes shall be levied and collected in the territory hereby added to the Sanitary District as well as in the Sanitary District as heretofore existing.

4. The net operating revenue derived in the territory hereby added to the Sanitary District for the operation of any water and/or sewer system or systems established under the provisions of Section 21-118 of the Code of Virginia shall be set apart to pay the interest on and retire at maturity the principal of any bonds heretofore issued in connection with such system or systems.

5. The enlargement of the Sanitary District as provided herein shall in no way limit or adversely affect the rights and interests of any holder of bonds heretofore issued by the Sanitary District, which rights and interests are hereby expressly preserved and protected.

6. This order is objected to by counsel for John D. Marsh and Hazel B. Marsh as being contrary to the law and evidence.

ENTER:

_____
Judge

We ask for this:

_____

_____
Counsel for Gainesville-
Haymarket Sanitary District

Seen and objected to:

_____

_____
Counsel for John D. Marsh
and Hazel B. Marsh

APPENDIX NO. 7

V I R G I N I A

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

IN THE MATTER OF THE ENLARGEMENT OF GAINESVILLE-HAYMARKET SANITARY DISTRICT OF PRINCE WILLIAM COUNTY, VIRGINIA	LAW NO. 5473

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

TO: The Honorable L. E. Athey, Clerk
Circuit Court of Prince William County:

Respondents, John Marsh and Hazel Marsh, by counsel, hereby give notice of appeal from a final judgment entered herein on March 24, 1972.

The said John Marsh and Hazel Marsh, Respondents in the above-styled action, will apply for a writ of error to said judgment and set forth the following assignments of error:

1. The Court erred in ruling that the resolution adopted by the Town of Haymarket was validly approved.

2. The Court erred in ruling that a Town may be included in a sanitary district for limited purposes only.

3. The Court erred in ruling that the resolution passed by the Town of Haymarket does not contravene provisions of the sanitary district law (Chapter 2 of Title 21 of the Virginia Code).

4. The Court erred in ruling that the resolution adopted by the Town of Haymarket does not contravene the Constitution of Virginia.

5. The Court erred in ruling that the resolution adopted by the Town of Haymarket does not contravene the United States Constitution.

6. The Court erred in ruling that §21-113 of the Virginia Code does not contravene the Constitution of Virginia or the United States Constitution.

7. The Court erred in ruling that the Town of Haymarket shall be included within the enlarged Gainesville-Haymarket Sanitary District.

8. The transcript of the hearing of this cause will be filed herein.

JOHN D. MARSH
HAZEL B. MARSH

By A. Hugo Blankingship, Jr., Counsel

BOOTHE, PRICHARD & DUDLEY
4085 University Drive, Fairfax, Virginia

By Terrence Ney
R. Terrence Ney

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Appeal and Assignments of Error was mailed, postage prepaid, to Harry Frazier, III, Esq., Counsel for Gainesville-Haymarket Sanitary District, Hunton, Williams, Gay & Gibson, P. O. Box 1535, Richmond, Virginia 23212, and to Floyd C. Bagley, Esq., County Attorney, Prince William County, Manassas, Virginia 22110, this 21st day of April, 1972.

Terrence Ney
R. Terrence Ney

[Excerpts from Transcript of Proceedings]

Page 21 by Mr. Blankingship.

Q. When does the Town Council ordinarily meet?

A. On the third Monday of each month.

Q. Was October 22nd the third Monday of the month?

A. No; I don't believe it was. That was a special, called meeting.

Q. All right now. When you called that meeting, this

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special, called meeting, who did the calling?

A. I believe Mr. Gossom did.

Q. Mr. Gossom?

A. Yes.

Q. Was there some prior agreement by any of you to do it? Whose decision was it to call the meeting?

A. We talked about we needed to have a meeting, so we decided to have a meeting.

Q. You don't recall who decided to call the meeting?

A. Well, I called the meeting myself after, but I don't recall actually how it came about,that the meeting was called.

Q. All right. Now, when you called - I believe you were saying earlier that you called by telephone? Is that correct?

A. I believe that is how he tried to locate them, but I didn't.

Q. You didn't do the calling?

A. Not to my recollection. I believe Mr. Gossom did the calling during that meeting.

TESTIMONY OF MAYOR MASON PICKETT

Page 31 by Mr. Blankingship.

Q. When you told Mr. Gossom to call this meeting, did you tell him when to call it?

A. Yes, sir; at eight o'clock.

Q. And how did you tell him eight o'clock?

Did you call him up on the telephone?

Page 32

A. I called him up by phone.

Q. By phone; and told him to go and call the meeting?

A. Yes, sir; get in touch with them.

* * * * *

By Mr. Frazier:

Q. Were any other parties called?

A. That I called?

Q. The decision to call the meeting was yours alone, or yours and Mr. Gossom's, or yours and two or three other Councilmen, or what?

A. Well, they wanted to have a meeting, and I understand it is the Mayor's duty to call the meetings, so I decided to call a meetin [sic], a special meeting.

Page 24 by Mr. Blankingship.

Q. All right, sir; fine. Now, was there somebody on the Council not present at the meeting?

A. Yes, sir. One member.

Q. Who sas that that was missing?

A. Mr. Frank Owens.

Q. Did you try to reach Mr. Owens?

A. No? I did not call him, sir.

Q. Well, I understand that he has an unlisted telephone number.

A. That is what I've been told.

1 to have all of the rights, privileges, powers, duties and obligations of
2 councilman even when performing the duties of mayor during the absence
3 or disability of the mayor of the town.

4 (10) The council shall, by ordinance, fix the time for their regular
5 meetings, which shall be held at least once a month. Special meetings
6 may be called by the clerk at the instance of the mayor or any two members
7 of the council in writing; and no other business shall be transacted at a
8 special meeting except that stated in the call, unless all members be present
9 and consent to the transaction of such other business. The meetings of the
10 council shall be open to the public except when in the judgment of the
11 council the public welfare shall require executive meetings.

12 (11) The council shall keep a minute book, in which the clerk shall
13 note the proceedings of the council, and shall record proceedings at large
14 on the minute book and keep the same properly indexed.

15 (12) The council may adopt rules for regulating its proceedings, but
16 no tax shall be levied, corporate debt contracted, or appropriation of money
17 exceeding the sum of one hundred dollars be made, except by a recorded
18 affirmative vote of a majority of all the members elected to the council.

19 (13) There shall be appointed by the council at its first meeting in
20 September, or as soon as practicable thereafter, a treasurer, who shall
21 hold office for a term of two years. The council may provide a salary for
22 the treasurer. He shall give such bond, with surety and in such penalty
23 as the council prescribes. He shall receive all money belonging to the town,
24 and keep correct accounts of all receipts from all sources and of all ex-
25 penditures of all departments. He shall be responsible for the collection
26 of all taxes, license fees, levies and charges due to the town, and shall
27 disburse the moneys of the town in the manner prescribed by the council
28 as it may by ordinance direct.

29 (14) The treasurer shall make such reports and at such time as the
30 council may prescribe. The books and accounts of the treasurer shall be
31 examined and audited at least once during the term for which he is elected
32 by a competent accountant selected by the council, such examination and
33 audit to be reported to the council.

34 (15) The council may in its discretion designate the place of deposit
35 of all town funds, which shall be kept by the treasurer separate and apart
36 from his personal funds.

37 (16) There shall be appointed by the council, at its first regular meet-

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IN THE

Supreme Court

of

Virginia

RICHMOND

ROBERT H. FONES, JR. and DOROTHY FONES,	)	
Appellants,	)	
vs.	)	APPENDIX
ALLAN R. FAGAN and DOROTHY ANN FAGAN,	)	
Appellees	)	

Myron C. Smith, Esq.
Fitzgerald and Smith
10560 Main Street
Fairfax, Virginia

Counsel for Appellants

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Filed April 22, 1970

* * * * * * * * * *

BILL OF COMPLAINT

Your complainants respectfully represent unto this Honorable Court as follows:

1. That your complainants sue for injuctive relief and damages, and the real estate which is the subject matter of this action is located entirely within the County of Fairfax.

2. That on October 29, 1965, B & K Corporation conveyed an unimproved piece of realty known as Lot 20-A, Kemper Park, Section 1-A, a Resubdivision of Lots 16, 18, 19 and 20, Kemper Park, Section 1, Fairfax County, to William T. Champion and Mary K. Champion, his wife.

3. That at the time of the aforesaid conveyance, B & K Corporation owned Lot 19-A, which abutted the said conveyed property, and which was improved by a dwelling house.

4. That prior to and at the time of the aforesaid conveyance, B & K Corporation had use of a narrow portion of Lot 20-A, which portion abutts the entire northern boundary of Lot 19-A, for the purpose of entry into the garage which was built into the dwelling house on Lot 19-A, and also for the purpose of going to and from Hunter Mill Road, which is a major thoroughfare abutting the western boundary of Lot 19-A.

5. That as a result of the use of the said narrow portion of Lot 20-A by B & K Corporation for the above purposes prior to and at the time of its conveyance of Lot 20-A to William and Mary Champion, an easement was retained by B & K Corporation over Lot 20-A by implication.

6. That the said easement over Lot 20-A for the purpose of entry into the garage in the dwelling house of Lot 19-A and going to and from Hunter Mill Road, in addition to being created by implication from its pre-existing use, was also strictly and reasonable necessary for the reasonable enjoyment and use of Lot 19-A by B & K Corporation at the time of its conveyance of the adjoining Lot 20-A as aforesaid, and it was intended by the parties to said conveyance that the grantor, B & K Corporation, retain the use of the narrow strip adjacent to the western boundary of Lot 19-A for the aforesaid purposes.

7. That the said easement, by way of necessity and pre-existing use as aforesaid, was appurtenant to Lot 19-A and as such ran with the said lot against Lot 20-A.

8. That on June 29, 1967, B & K Corporation conveyed Lot 19-A to the complainants, Allan R. Fagan and Dorothy Ann Fagan, his wife, and the complainants thereafter made use of the easement over Lot 20-A for the purposes of going to and from Hunter Mill Road, as well as entry into their garage.

9. That on October 20, 1967, William and Mary Champion conveyed Lot 20-A to the defendant, Robert H. Fones, Jr.

10. That on or about November, 1969, defendant, Robert H. Fones, Jr., materially impaired, interfered with, and obstructed the aforesaid easement which was appurtenant to Lot 19-A, then owned by the complainants, by upgrading the path of the easement as well as blocking the path of the easement with a fence, and thus preventing the complainants from entering their garage.

11. That despite repeated demands by the complainants, the defendants have failed and refused to remove the barriers which they have placed on the path of the complainants' easement.

12. That the obstruction by the defendants of the complainants' easement, as aforesaid, has caused, and will continue to cause irreparable injury to the complainants, in that they are effectively prevented from entering and using their garage and the parking area in front of their garage, as well as prevented from having direct access to and from Hunter Mill Road.

13. That the complainants have no adequate remedy at law, and therefore, seek injunctive relief.

14. That the defendants' actions as aforesaid, violates the public policy of the State of Virginia, and County of Fairfax to the effect that land should not be rendered unfit for occupancy.

WHEREFORE, the complainants pray as follows:

1. That the defendants be enjoined, pendente lite and permanently, from obstructing in any way the use by the complainants, or any subsequent owners of Lot 19-A, of that portion of Lot 20-A which is reasonably necessary for the purpose of going to and from Hunter Mill Road and entering into and leaving the complainants' garage, or parking in front of their garage.

2. That an order be entered compelling the defendants to remove the obstruction to the complainants' easement, and to make all repairs necessary to restore the easement of its original condition prior to the defendants' encroachment thereon.

3. That the complainants be awarded damages equal to the costs of bringing and prosecuting this action, including reasonable attorney's fees.

4. That for such other relief as to the Court seems just and proper.

/s/ Allan R. Fagan
ALLAN R. FAGAN, Complainant

/s/ Dorothy Ann Fagan
DOROTHY ANN FAGAN, Complainant

/s/ David Machanic
DAVID MACHANIC
Counsel for Complainants
1804 Windmill Lane
Alexandria, Virginia

/s/ Robert C. Watson
ROBERT C. WATSON
Counsel for Complainants
4085 Chain Bridge Road, Suite 303
Fairfax, Virginia

SIXTEENTH JUDICIAL CIRCUIT OF VIRGINIA
PRINCE WILLIAM COUNTY FAIRFAX COUNTY ALEXANDRIA CITY

ARTHUR W. SINCLAIR
ALBERT V. BRYAN, JR.
BARNARD F. JENNINGS
JAMES KEITH
WILLIAM G. PLUMMER
LEWIS D. MORRIS
PERCY THORNTON, JR.
BURCH MILLSAP
JUDGES

4000 Chain Bridge Road
Fairfax, Virginia 22030

November 6, 1970

Mr. Robert C. Watson
4085 Chain Bridge Road
Fairfax, Virginia 22030

Mr. David Machanic
1807 Windmill Lane
Alexandria, Virginia 22314

Mr. Myron C. Smith
10560 Main Street
Fairfax, Virginia 22030

Re: Fagan et al vs. Fones, et al
Chancery No. 31300

Gentlemen:

I have reviewed the authorities cited by counsel and numerous other cases.

It was obvious upon the view of the premises that for Mr. and Mrs. Fagan to construct a driveway in such a manner that they could use their garage would entail great expense. It appeared that in putting in a driveway it would be necessary to do grading, to remove a number of trees and the retaining wall. However, the Court has no evidence to show how great an expense would be involved. The Court, on its own motion, will reopen the case to allow the parties to offer evidence concerning the probable cost of building a driveway to the garage and/or the fair market value of the house and lot with a new driveway compared to the fair market value in using the Lot 20A driveway.

As soon as counsel have prepared this additional evidence, I will reschedule the case for further hearing.

Very truly yours,

William G. Plummer

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ALLAN R. FAGAN, et al	*	
	*	
Complainants	*	
	*	
vs	*	IN CHANCERY NO. 31300
	*	
ROBERT H. FONES, JR., et al	*	
	*	
Defendants	*	

FINAL DECREE

On February 23, 1972, ~~THIS DAY~~ came the Complainants and the Defendants herein, with their respective counsel;

WHEREUPON the Court after hearing the evidence presented by both the Complainants and the Defendants herein; and after argument of counsel herein, it is the

OPINION OF THE COURT that the Complainants have established an easement on the pipe stem driveway of Lot 20-A by virtue of preexisting use by the Complainants during the fee simple ownership by the owner Defendants herein and also the previous owners of Lot 20-A, Section 1-A, Kemper Park, Fairfax County, Virginia; and that since the Complainants have established said easement by preexisting use that they shall have an easement along the driveway and pipe stem on Lot 20-A from Hunter Mill Road to the garage in the Complainants house on Lot 19-A; that said easement shall be only for ingress and egress to and from the Complainants garage on Lot 19-A; and that the Defendants having previously blocked said ingress and egress by the Com-

plainants to the garage that they shall restore said easement to its former condition and remove any and all obstructions; and that said easement having been established by the Complainants herein that any maintenance costs for the driveway from Hunter Mill Road to the point of access to the Complainants garage shall be shared equally by the Complainants and the Defendants now and in the future;

IT APPEARING TO THE COURT that the Defendants herein object to the entry of said Decree and have moved the Court for a stay of execution of the judgment by the Court for a period of sixty (60) days, it is therefore

ADJUDGED, ORDERED and DECREED that the Complainants herein, the owners of Lot 19-A, Section 1-A, Kemper Park, Fairfax County, Virginia, and any subsequant fee simple owner shall have a driveway easement only for the right of ingress and egress along the pipe stem located on Lot 20-A, Section 1-A, Kemper Park, Fairfax County, Virginia, to the Complainants garage, said easement to run from the Hunter Mill Road along the pipe stem driveway to the garage of the house located on Lot 19-A, it is further

ADJUDGED, ORDERED and DECREED that the Defendants herein shall restore the easement to its former condition by removing and correcting any obstructions that they made to block ingress and egress from the driveway to the garage on Lot 19-A, it is further

ADJUDGED, ORDERED and DECREED that the Complainants and the Defendants herein shall share any maintenance costs equally for the maintenance of said driveway on the pipe stem of

Lot 20-A, said costs for maintenance shall run from Hunter Mill Road to the enterence of the driveway to the garage on Lot 19-A, it is further

ADJUDGED, ORDERED and DECREED that the execution of this Decree shall be stayed for a period of sixty (60) days to permit the Defendants herein to seek an appeal to the Supreme Court of Appeals of Virginia, it is further

ADJUDGED, ORDERED and DECREED that the Defendants shall post a Five Hundred Dollar ($500.00) suspending bond to cover costs in any said appeal if perfected by the Defendants.

ENTERED this 9th day of May, 1972.

JUDGE

I ask for this:

ROBERT C. WATSON
Counsel for Complainants
4085 Chain Bridge Road
Fairfax, Virginia 22030

DAVID MACHANIC
Counsel for Complainants
1000 Ring Building
Washington, D. C.

Seen and Objected to:

MYRON C. SMITH
Counsel for Defendants
10560 Main Street
Fairfax, Virginia 22030

Entered in Chancery
Order Book No. 181 at
page 713 and Seq.

A COPY TESTE:
W. FRANKLIN GOODING, CLERK
By: Jessie M Clarke
Deputy Clerk

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ALLAN R. FAGAN, et al,	)	
Complainants	)	
vs.	)	IN CHANCERY NO. 31300
ROBERT H. FONES, JR., et al,	)	
Defendants	)	

* * * * * * * * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

Robert H. Fones, Jr. and Dorothy A. Fones, his wife, the Defendants herein hereby give notice that they will appeal from the Final Order entered in this cause on the 5th day of May, 1972. The transcript, and a statement of facts and testimony and incidents of the trial will hereinafter be filed pursuant to the terms of Rule 5-9 of the Rules of the Supreme Court of Virginia.

ASSIGNMENTS OF ERROR

Robert H. Fones, Jr. and Dorothy A. Fones, his wife, the Defendants herein, assign as error the following:

1. The Court erred in granting to the Complainants an easement over the driveway of the Defendants herein by virtue of pre-existing use and/or of necessity.

ROBERT H. FONES, JR.
DOROTHY A. FONES

By /S/ Myron C. Smith
Counsel

FITZGERALD, SMITH & DAVIS

By /s/ Myron C. Smith
Myron C. Smith
Counsel for Defendants

Certificate

I hereby certify that I have this 31st day of May, 1972, mailed a true copy of the foregoing Notice of Appeal and Assignments of Error, postage prepaid, to Robert C. Watson, 4085 Chain Bridge Road, Fairfax, Virginia 22030, Counsel for Complainants.

/s/ Myron C. Smith
MYRON C. SMITH

COPY

LAW OFFICES
FITZGERALD, SMITH
& DAVIS
SUITE 510, THE MOSBY
10560 MAIN STREET
FAIRFAX, VIRGINIA
22030

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ALLAN R. FAGAN, et al,	)	
Complainants	)	
vs.	)	IN CHANCERY NO. 31300
ROBERT H. FONES, JR., et al,	)	
Defendants	)	

AMENDMENT TO CERTIFICATE OF THE TRIAL JUDGE
FILED ON THE 31st DAY OF MAY, 1972

Be it remembered that the above-styled Chancery cause, wherein the Complainants sought to impose an easement over the property of the Defendants, was heard in part ore tenus before me, the undersigned Trial Judge, presiding at said trial on the 27th day of October, 1970, and February 23, 1972 upon the Bill of Complaint previously filed and the Answer filed thereto.

And, at the hearing on the 27th day of October, 1970, no court reporter being present at the said hearing, the following evidence was introduced:

Allan R. Fagan, the Complainant, testified that he was the owner of Lot 19-A of the Kemper Park Subdivision of Fairfax County, Virginia. He and his wife, Dorothy Ann Fagan, purchased the said lot on June 29, 1967 from the developer, the B & K Corporation. He stated that at that time, Lot 20-A, located immediately to the rear of his lot, was owned by one Champion and that he (Fagan) used the said one-half pipestem shaped driveway which was owned by Champion as a means of ingress and egress to his garage located to the northwest side of his home. Al G. Nolan, an Arlington attorney, was the closing attorney when Fagan purchased his lot and Nolan at the time of the settlement advised Fagan that he had an easement for ingress and egress to his garage, on the portion of the pipestem subsequently purchased by Fones. He stated that in November

C O P Y

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1969, the Defendant, Robert Fones, placed six railroad ties across the driveway blocking his entrance and egress from the driveway to the garage area. Fones had purchased Lot 20-A from Champion in November, 1967. It was at this time that Fones informed Fagan that he did not have an easement over the Fones driveway. Fagan ascertained after Fones told him he had no easement that he only had an easement for ingress and egress over the other half of the pipestem, but could not cross Fones' half of the pipestem driveway to get into his garage. Fagan further testified that he had substantial access to Hunter Mill Road, a State highway improved by blacktop which runs by the entire front of his lot, and that he had considered putting a circular driveway from Hunter Mill Road to the front of his house but that this would not give him access to his garage and also his septic field was located in the front area of his house. He stated that after Fones blocked the driveway that he was unable to use his garage and that it would be extremely expensive for him to cut a new driveway from Hunter Mill Road across his lot to the garage because he would have to remove eleven trees, move some dirt, and remove a four-foot retaining wall. He admitted that he had adequate ample access and frontage of his lot along Hunter Mill Road, but that Hunter Mill Road was only two lanes and he or his family could not park on Hunter Mill Road.

Kemper Beard testified on behalf of the Complainant stating that he was an electrical contractor, and was formerly a vice-president of the B & K Corporation, the developers of Kemper Park Subdivision and the grantors from whom Fagan purchased Lot 19-A. He testified that B & K Corporation had conveyed Lot 20-A to Champion prior to conveying Lot 19-A to Fagan. Beard stated that during the construction of the subdivision that the construction trucks used the driveway of

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Lot 20-A for access and delivery of materials to all of the four lots adjacent to it. Beard testified that he had some difficulty in the construction of the subdivision since he was operating under a brand new ordinance permitting cluster-type development, and that it was his intention for Lot 19-A to have an easement for ingress and egress. Beard stated that he had initially rented Lot 19-A to one Col. Sparr for a period of nine months and during that time, Sparr used the driveway in question as a means of ingress and egress to the garage from Hunter Mill Road. The lot was sold to Fagan the same day Sparr moved out.

The Defendant, Robert Fones, testified that he purchased Lot 20-A from Champion in November, 1967 and took up residency on the property at that time. He stated that he was advised by the attorney who handled the settlement of his contract to purchase Lot 20-A, one William Hix, that Fagan had no easement across his driveway and that he should block it off once a year if he chose to do so since Fagan had no right of way. Fones testified that his property was located to the rear of the Fagan property, and in the Spring of 1968, Fagan put a split-rail fence at the rear corner of Fagan's lot which caused some difficulty in Fones getting access to his (Fones) driveway. He testified that this section of fence was the only portion of the Fagan lot which contained fence. Fones further testified that Fagan had ample access to Hunter Mill Road and could construct his own driveway to his garage at a moderate cost. He further stated that visitors to the Fagan home frequently parked in the driveway making it difficult or impossible for him to get in and out from his home to Hunter Mill Road, which was denied by Fagan.

CERTIFICATE OF COUNSEL

I, the undersigned, Myron C. Smith, counsel for the Defendant hereby certify that the foregoing testimony is a correct statemen

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of facts and testimony of the hearing aforementioned.

Given under my hand this _____ day of July, 1972.

/s/ Myron C. Smith
Myron C. Smith
Counsel for Defendants

/s/ Robert C. Watson
Robert C. Watson
Counsel for Complainants

CERTIFICATE OF TRIAL JUDGE

The undersigned, William G. Plummer, Judge of the Circuit Court of Fairfax, who presided over the trial of Fagan vs. Fones on the 27th day of October, 1970, pursuant to Rule 5:9 (b) and (c), hereby affixes his signature to the foregoing statement of facts, testimony and other incidents of trial which were tendered to him within sixty (60) days after final judgment was rendered on May 5, 1972, and his signature within seventy (70) days after the date of this judgment this _____ day of July, 1972.

/s/ William G. Plummer
William G. Plummer

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C O N T E N T S

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
Alfred Heck	4	12		
Allan R. Fagan	21	29		
Robert H. Fones, Jr.	30	34		

E X H I B I T S

	For Identification	In evidence
Complainant's Exhibit 1	7	7
Complainant's Exhibit 2	8	8
Complainant's Exhibit 3	20	20

AUDREY J. RUDIGER
CERTIFIED VERBATIM REPORTER
1212 RIVERVIEW DRIVE
WOODBRIDGE, VIRGINIA 22191
TELEPHONE: 690-1574 494-2733

1 P R O C E E D I N G S

2 (The court reporter was sworn.)

3 THE COURT: This is the case of Fagen, et al vs.
4 Fones, et al, Chancery number 31300. The case comes on
5 today for receipt of further evidence pursuant to the
6 Court's letter to counsel of November the 6th, 1970.
7 Do you wish to make an opening statement concern-
8 ing your evidence today?
9 MR. WATSON: Briefly Your Honor, we will say this.
10 Subsequent to your letter, we had two appraisals, not
11 appraisals, but proposals made regarding the cost of the
12 installation of the driveway on the subject property which
13 Mr. Smith and I have agreed to stipulate. Also, we have
14 an approved appraiser who has been qualified before this
15 Court. We would have his testimony in regards to the issue
16 raised by Your Honor.
17 THE COURT: Do you have an opening statement?
18 MR. SMITH: No, sir.
19 THE COURT: Call your witness
20
21
22
23

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1 Whereupon

2 ALFRED HECK

3 a witness, was called for examination by counsel for the

4 complainants, and, after having been first duly sworn

5 was examined and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. WATSON:

8 Q. State your name and occupation if you will to the

9 Court?

10 A. Alfred Heck, I am a real estate appraiser.

11 Q. How long have you been engaged in the business

12 of real estate appraisal?

13 A. I have been engaged in the real estate, in the

14 appraisal business since 1959.

15 Q. Since that period to the present date what, if

16 any, government agencies have you been approved by to

17 perform appraisals?

18 A. I have done appraisals for Federal Housing

19 Administrations, for Veterans Administrations.

20 Q. What lending institutions, if any, in the Northern

21 Virginia area have you performed residentional appraisals?

22 A. I perform appraisals for banks and savings and

23 loan, Security Savings and Loan, the Alexandria National

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1 Bank, City Bank and Trust.

2 Q. During this period that you have worked as an

3 appraiser, Mr. Heck, have you ever been certified to

4 testify as an expert before for the Court of Fairfax County?

5 A. I have.

6 Q. How many occasions?

7 A. ON three occasions.

8 MR. WATSON: I wonder if he has any questions

9 about his qualifications?

10 MR. SMITH: At this time I have no questions

11 about the gentleman's qualifications, but I would object

12 to this line of testimony dealing with the value of the

13 home on the grounds that it is irrelevant and immaterial

14 to the issues at hand here. This being whether or not

15 there is an easement by necessity or description.

16 And authority for that statement are three

17 cases which clearly outline the law of easement by

18 necessity in Virginia. First is Jennings vs. Lineberry,

19 that is in 180 Virginia 44; second is Hartsock vs. Powell

20 a 1957 case in 199 Virginia 320 and the third is Chaiken

21 vs. O'Meara Tile Company, Inc., November 1971, a decision

22 from the Circuit Court of Fairfax, in 212 Virginia 510.

23 All of these are cases that hold that there are

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1 no easements by necessity when there is other access to the
2 property. It was clearly pointed out that documentary
3 evidence put into evidence in the prior hearing of this
4 case of a 115 foot of frontage of the Fagan lot to Hunter
5 Mill Road, the main access road.
6 This certainly is a matter of law. The defense
7 feels it should be construed as access to the property,
8 therefore, eliminating any possibility of an easement by
9 necessity across the property. I will proceed to say at
10 this point that easements arise two other ways expressed
11 grant or deed or other documents.
12 This is not the case here as evidenced by the
13 prior hearing.
14 THE COURT: Objection is overruled.
15 BY MR. WATSON:
16 Q. Now, Mr. Heck, did there come a time that at my
17 request you had occasion to visit the premises involved
18 in this suit owned by the Fagans and also to make an
19 apprasial?
20 A. Yes.
21 MR. WATSON: Your Honor, we have reached a
22 stiuplation as to this apprasial, as to the evulation of
23 the proposal, but not as to the necessity of the proposal.

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1 THE COURT: The proposal -- I can't read the
2 gentleman's name, the proposal regarding an estimate of the
3 cost of $3,855 to be received as Complainant's Number 1.
4 I understand the defendant is agreeing that is not
5 necessarily relevent to the issue at hand, but stipulating
6 if that person would come hear that would be that person's
7 testimony.
8 (The document referred to
9 above was marked Complainant's
Exhibit 1 for identification
and received into evidence.)
10
BY MR. WATSON:
11
Q. Mr. Heck, as a result of my request did you
12
perform this professional apprasial regarding the Fagan's
13
home, did there come a time that you requested and obtained
14
a certified survey of the location of the house from
15
Berry Engineers?
16
A. Yes.
17
Q. I ask you to identify this, sir?
18
A. This is one of two that I used.
19
MR. WATSON: Do you have any objection?
20
MR. SMITH: For what purpose?
21
MR. WATSON: I want to show the location of the
22
house and the distance of the house from the edge of the
23
property.

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MR. SMITH: All right.

THE COURT: No objection. Defendant's number 2.

(The document referred to above was marked Complainant's Exhibit number 2 and received into evidence.)

BY MR. WATSON:

Q. Would you relate to the Court, in your professional opinion, what the appraised value would be of the house on lot 20-A with the use of the present driveway?

A. My opinion the value of the property with the use of the driveway on 20-A. I would place the value of the property at $57,500.

Q. What would be your professional opinion as to value of the Fagan house lot 19-A, without using the driveway on 20-A?

A. I feel in my opinion that the value would be $50,750.

Q. I show you a document and ask you to identify this for me if you will?

A. This is my apprasial report that I did and submitted to you.

Q. Would you relate to the Court your conclusions as a professional appraiser on reaching your figure and what

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affect the driveway would have on the property?

A. The market expects a garage in this price range and location. It also expects a driveway from the street to the house. The market can penalize the property monetary by the condition existing, not using the driveway on lot 20-A.

The condition that exist by not being able to use the driveway on lot 20-A is that the house is 18 and one-half feet at one opening from the driveway and the other opening is 21 and one-half feet. Checking with automobile manufacturers a full sized automobile runs from 17 and one-half to 18 and one-half.

MR. SMITH: I object to that. He is not an expert on automobiles.

THE COURT: He said he checked, I think anybody can do that. Overruled.

THE WITNESS: In arriving at the cost of securing the driveway situation, I used an estimate furnished by Mr. Watson from J. H. and O. V. Carper.

BY MR. WATSON:

Q. May I interject another thing, Mr. Carper, the other estimate is not in evidence, so do not refer to that estimate.

AUDREY J. RUDIGER
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1 A. Then the driveway situation would be $3,865.

2 Q. Now, Mr. Heck, assuming that the use of lot 19-a

3 if Mr. Fagan had to expend a sum of money to replace the

4 driveway on his own property for ingress and egress to the

5 garage, what effect would that expense of money have on

6 the evaluation of this house?

7 A. If he expended the money for the driveway it

8 would -- the property would be increased by the amount of

9 $3855 to put that driveway in.

10 Q. What would that leave if he had the driveway on

11 his own property, what would be your opinion as to the

12 evaluation of the house if he had to put it on his own

13 lot?

14 A. In that particular case, I made a rather

15 extensive investigation of the market. I determined that

16 the market would penalize the house by 20 percent for the

17 conditions still existing concerning the garage, the

18 extreme inconvience or possible total loss of the use of

19 the garage, as a garage.

20 So, the sum of $2800 when I use the market value

21 approach in the appraisal of a loss of $2875 from the

22 $57,550 --

23 THE COURT: What did you end up with?

AUDREY J. RUDIGER
CERTIFIED VERBATIM REPORTER
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1 THE WITNESS: I would have to make a quick
2 calculation on that, Your Honor. The value of the property
3 with a new drivewav would be $54,625.
4 BY MR. WATSON:
5 Q. In relation to your apprasial and your observation
6 of the premises, what would be your opinion as to the
7 possibility of having a driveway on Mr. Fagan's property
8 itself and not using the other?
9 A. Well, the utility of the driveway -- well, I
10 mean, of course, to bring his cars up the house, but still
11 in my opinion deny him the use of the garage.
12 Q. Why is that?
13 A. You just can not maneuver a 17 and one-half foot
14 automobile into that garage with the space between the
15 garage opening and the wooden retaining wall behind the
16 garage. It is just not enough to maneuver that car in and
17 out of the garage in my opinion.
18 MR. WATSON: Your Honor, I would like to move
19 the original apprasial into evidence.
20 THE COURT: Any objection?
21 MR. SMITH: I haven't had time to read it,
22 Your Honor.
23 MR. WATSON: I have no further direct at this

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1 time, Your Honor.

2 THE COURT: We will take a break after the

3 testimony and then you can read it.

4 CROSS EXAMINATION

5 BY MR. SMITH:

6 Q. Mr. Heck, have you ever appraised a situation

7 exactly like this before?

8 A. Exactly like this -- no, I have not.

9 Q. This is the first one you have seen like this?

10 A. Exactly like this, it is the first one.

11 Q. In preparing for your appraisal did you make

12 an investigation as to the Fagan property?

13 A. Yes, I did.

14 Q. What did you determine that Mr. Fagan paid for

15 that property?

16 A. What he paid for it?

17 Q. Yes.

18 A. I did not ask. It has no bearing on the value

19 today. It has no meaning to me at all.

20 Q. Does the location of this house comply with the

21 setback requirements of Fairfax County Zoning Ordinance

22 from the next property?

23 A. It varies from the zoning ordinance in relation

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1 to its proximity to the lot line.

2 Q. How does it vary?

2 3 A. There is a minimum set forth in the Code.

4 Q. What is the mimimum set forth in the Code?

5 A. I would have to testify from my memory. I don't

6 recall the exact footage. I did determine that the setback

7 was less than the building code requires.

8 Q. Could it be 25 feet?

9 A. It is either 20 or 25 feet.

10 Q. The closest according to this survey used in your

11 apprasial is 13.2 foot?

12 A. That is correct.

13 Q. Your investigation of the Fagan property, did

14 you determine whether allowances were made to Mr. Fagan --

15 in other words, did he pay less when he purchased the

16 house because that situation existed?

17 A. No, I did not look into that situation.

18 Q. Would that not normally be something that you

19 would investigate in arriving at these values?

20 A. No, it would not. I am interested in the value

21 of the property today, as it exist with or without the

22 driveway.

23 Q. Your testimony is, as I understand it, to reach

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1 the maxium market value, Mr. Fagan has to use Mr. Fones'
2 property?
3 A. In my opinion, yes, that is true.
4 Q. Did you determine how much that would substract
5 from the value of Mr. Fones' property?
6 A. I did not investigate Mr. Fones' property at all.
7 Q. Do you agree that it would detract from the
8 value of Mr. Fones' property?
9 A. THE COURT: Are we assuming that the retaining
10 wall would be removed and the driveway put back down to
11 its formal profile?
12 MR. SMITH: No, sir, I will get to tthat.
13 THE COURT: I guess you will have to.
14 MR. SMITH: I would think so, yes, sir.
15 THE COURT: I think you should assume that in the
16 questions.
17 BY MR. SMITH:
18 Q. Assuming a certain construction would be done
19 by somebody to layer the grade between the two properties?
20 A. I would have to say, I don't believe granting
21 Mr. Fagan access to his garage would detract from the value
22 of Mr. Fones' property.
23 Q. Are you saying an easement across Mr. Fones'

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1 property would be worth nothing to the Fones?

2 A. No, I don't say that. I would not say there

3 isn't some monetary value that Mr. Fones could expect for

4 the use of an easement.

5 Q. That would be a detriment to his property, wouldn't

6 it, Mr. Heck?

7 A. Not necessarily, there are some cases where it

8 might be, but I don't think in this case it would be.

9 Q. In this case it would cause less access to his

10 property, wouldn't it?

11 A. It would not cause less access, no, sir.

12 Q. Where would Mr. Fagan's guest park if he had

13 people come to his house?

14 A. A. They would have to either park in the driveway

15 to one side or over to the side of Hunter Mill Road, which

16 is rather dangerous. If the guest did park along side of

17 the driveway, which is the easement on lot 20-A in

18 question, access is still available to go by those cars.

19 That driveway is wide enough for a car to pass.

20 THE COURT: Are you saying if the Fagans had

21 guest?

22 MR. SMITH: Yes, sir.

23 THE COURT: I don't understand even if there is

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1 an easement, it would be an easement to park.

2 MR. SMITH: That's why I asked if it would deny

3 Mr. Fones access.

4 THE COURT: That would be violation of the

5 easement, even if you assume an easement. I don't think

6 the easement would be for parking. It would be merely

7 ingress and egress.

8 BY MR. SMITH:

9 Q. You stated in answer to counsel's question that

10 if Mr. Fagan paid $3855 and put in his own driveway, his

11 property at that point, would not be worth your appraised

12 value of $57,500; would you explain that statement for me?

13 A. Yes. In my opinion, with the driveway put on

14 lot 19-A, there would still be the condition existing --

15 Q. 19-A is Mr. Fagan?

16 A. Mr. Fagan's lot, right. The condition would still

17 exist, where you would have a garage that would either be

18 extremely difficult to get in and use as a garage for a

19 full size automobile. The market would penalize the

20 property for that condition.

21 Q. Where did you get the $57,500 figure from?

22 A. I used the cost value of $19 per square foot

23 for the unfinished basement, first floor and the roof and

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1 used a figure of $7 a square foot for the finishing of the
2 basement, which figure came to $47,268.
3 I used a depreciation of a total of five percent
4 for $2360, leaving a subtotal of $44,905. I added $1000
5 for the air conditioner, making a value of $45,905 and land
6 value at $12,000, for a total of $57,905.
7 I then used three comparable properties, coming
8 up with a value of $57,500 and relying more heavily on
9 the market value.
10 Q. Your $19 a square foot for building cost, isn't
11 that a low figure? Isn't that closer to $24 or $25 on
12 todays market?
13 A. No, it is not. The figure that I used comes
14 from the Stephens Cost Manuel and from information supplied
15 by the Society of Real Estate Appraisers. It is a fairly
16 accurate figure. I believe the highest you could use
17 would be $21. I used $19 based upon the property, condition
18 and location.
19 Q. Your $7 a square foot is a relatively low
20 figure?
21 A. This is for the part of the basement that is
22 finished.
23 Q. I believe you have a comparable sale in here;

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1 is that correct?

2 A. Yes.

3 Q. What is the access to the Beekay Court property?

4 A. All the comparables used have access to the

5 road.

6 Q. Beekay Court is a road that runs back into the

7 subdivision?

8 A. Back into Kemper Park, yes.

9 Q. That is in the State Highway system?

10 A. Beekay Court?

11 Q. Yes.

12 A. It is public -- no: it may not be in the state

13 highway system.

14 Q. But it is different than the Fones' property;

15 isn't it?

16 A. It is different that the Fones property.

17 Q. Did you consider in your figures whether or not

18 Mr. Fagan built his own driveway and had that for his

19 guest to park rather than a dangerous Hunter Mill Road,

20 as you stated would effect the value of his property?

21 A. Yes, of course.

22 Q. It would make it greater than you stated

23 figure, would it not?

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A. No.

Q. MR. SMITH: That's all.

THE COURT: When was it that you made these appraisals?

THE WITNESS: The appraisals were made as of yesterday's date, February the 22nd. I have done work over the past eight months on this, because it was unusual and took quite a bit of time to investigate it in the market.

THE COURT: Just so the record might be more complete the evidence disclosed that the easement was, in effect, that the use of the driveway was terminated in the fall of 1969. Now, if you backed up on these figures approximately what percentage less of the present value would there be as of the fall, 1969?

THE WITNESS: Well, your Honor, in this particular case there are two properties that stick in my mind that did sell, if my memory serves me, in last '69 or early '70, which would indicate a value at the time at $54,000 -- that is the figure in my mind at that time. If I may further answer the cost of the driveway would remain the same probably. Your five percent factor would be slightly altered by five percent of $3,500.

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1 THE COURT: What would the house have been
2 worth in the fall of '69, the fair market value of the
3 house with the driveway?
4 THE WITNESS: $54,000.
5 THE COURT: Any further questions?
6 MR. WATSON: We have none.
7 MR. SMITH: I would like to put on the record
8 my objection to the testimony in this document on the
9 grounds previously stated.
10 THE COURT: Do you object on any other grounds?
11 MR. SMITH: No, sir.
12 THE COURT: Objection is overruled and it will
13 be received.
14 MR. WATSON: Your Honor, if we could I would
15 like to have Mr. Heck excused, because he has another
16 appointment.
17 THE COURT: Any objections?
18 MR. SMITH: No, sir.
19 THE COURT: The written appraisal will be
20 received as Complainant's number three.
21 (The document referred to above
22 was marked Complainant's number
3 for identification and received
23 into evidence.)

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1

2 THE COURT: Do you have any other evidence,

3 sir?

4 MR. WATSON: No, sir, that is all we have.

5 THE COURT: Do you have any evidence?

6 MR. SMITH: I would like to call Mr. Fagan.

7

8 Whereupon

9 ALLAN R. FAGAN

10 a complainant, was called for examination by counsel for

11 the defenant, and, after having been first duly sworn

12 was examined and testified as follows:

13

14 DIRECT EXAMINATION

15

16 BY MR. SMITH:

17 Q. Would you state your name, please?

18 A. Allan R. Fagan.

19

20

21

22

23

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1

2 Q. When did you buy that house?

3 A. June of 1967.

4 Q. And it is true you have approximately 115 foot

5 of frontage on Hunter Mill Road?

6 A. Yes.

7 Q. What did you pay for the house?

8 A. 41,500.

9 Q. $41,500?

10 A. (Nodding head.)

11 Q. At the time you purchased it, it is true allow-

12 -ance was made to you because of the problem with the

13 access to the garage?

14 A. No, it is not true.

15 Q. Is is not true?

16 A. No, it is not true because the lawyers told

17 us we did have.

18 Q. Was it pointed out to you that the location

19 of that home did not comply to the setback requirement

20 of the County Zoning Ordinance?

21 A. No.

22 Q. It was not pointed out to you at that time?

23

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1 A. (Shaking head.)

2 Q. Is it also true that you procured an estimate

3 from O. V. Carper stating that it would be necessary

4 to remove the 11 trees to put in the driveway? Have

5 you seen this document, sir?

6 A. Yes.

7 Q. Is it true that some of those trees are

8 located on State Highway Department's property?

9 A. Two of those trees are on Highway property

10 but would have to be removed.

11 Q. This document states that the driveway would

12 be a length of 150 feet and 12 inches wide. Is that a

13 misprint? Does it mean four feet?

14 A. Well, it must mean 12 feet wide.

15 Q. Do you know how wide Mr. Fones' driveway is?

16 A. The driveway is 10 feet.

17 Q. Ten feet?

18 A. Yes.

19 Q. What was the reason for yours being made 12

20 feet?

21 A. For the ease of getting in and out and more

22 maneuverability.

23 Q. For your convenience?

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1 A. Yes.

2 Q. If you are given an easement of right-of-way

3 across the Fones property, where would your guests

4 park when they came to your home?

5 A. Well, they park now on the grass on the front

6 lawn.

7 Q. Is that where they would continue to park?

8 A. Well, there really isn't no other place;

9 since it's even with the driveway, we can park one car,

10 one in the garage, and one on the approach to the

11 garage and that's all the room there is. Just two cars.

12 Q. If you built your own driveway and had 150 feet

13 of it there would be a lot of places for them to park?

14 A. In the same place they would be right now.

15 Q. I didn't hear you?

16 A. By parking on the front lawn on the grass.

17 Q. Where you and your guests are parking now is

18 on property that you own; is that not true?

19 A. Well, yes.

20 Q. And they have access to that property from

21 Hunter Mill Road, do they not?

22 A. No, we have to cross over. The few times that

23 we do have people in they do cross over and park on the

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1 front lawn with Mr. Fones permission.

2 Q. They cross Mr. Fones' property?

3 A. Well, in order to park on the front lawn on

4 the grassy portion of the front near the driveway they

5 have to cross ten foot to get in onto the grass.

6 Q. I'm sorry, I don't quite understand. Maybe

7 you can point out on this.

8 THE COURT: Am I incorrect of the recollection

9 of the property that there is a drainage ditch running

10 along the front?

11 THE WITNESS: The roadside?

12 THE COURT: Yes, adjacent to the road?

13 THE WITNESS: Yes.

14 THE COURT: Which would prevent direct travel

15 across into the property?

16 THE WITNESS: Yes.

17 BY MR. SMITH:

18 Q. Where do you park your car now?

19 A. I park it in behind the mailboxes.

20 Q. Would you make a mark there?

21 A. It is actually down here (indicating).

22 Q. What's this, Hunter Mill Road?

23 A. If this is my property, right. This portion,

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1 Hunter Mill Road, is over here someplace and there's
2 20 feet between the road.
3 Q. Isn't this your lot line here?
4 A. Yes, it is.
5 Q. Don't you park on your own lot?
6 A. No.
7 Q. Where do you park?
8 A. I have to park since I can't cross this,
9 right in here behind the mailboxes.
10 Q. Whose property is that?
11 A. It's the road. The State or whoever owns it.
12 Q. The State right-of-way?
13 A. The State or the County, whoever owns the
14 road.
15 THE COURT: Excuse me for interrupting again.
16 You remember when I was out there, there was a car
17 parked at or near the northwest corner of the property
18 but east of the drainage ditch line; is that what you
19 are referring to?
20 THE WITNESS: Yes. Like the mailboxes are here
21 and I pull right in behind the mailboxes.
22 THE COURT: I think there was a vehicle when
23 I was there.

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1 THE WITNESS: There's room for one car there.
2 THE COURT: Somewhat in the trees?
3 THE WITNESS: Yes, Your Honor.
4 BY MR. SMITH:
5 Q. From there, you can easily park on your own
6 property can you not?
7 A. With taking down a couple more trees and
8 graded so you can get out in inclement weather.
9 Q. Are these trees in the State right-of-way?
10 A. There are two trees down here that on the
11 State. The rest along here are on this property.
12 Q. Is this also where your guests park, up in
13 this area here?
14 A. When they come, they have to cross over and
15 park on the grass here.
16 Q. They cross Mr. Fones' driveway and park in
17 the grass?
18 A. With his permission.
19 Q. With his permission?
20 A. Yes.
21 Q. When did he give you his permission?
22 A. It wasn't given to me. It was given to one
23 of the guests that instead of parking on the driveway

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1 to pull over on the grass.

2 Q. When was that, do you recall?

3 A. Specifically, last summer.

4 Q. If you had a right-of-way across Mr. Fones

5 property where would your guests park?

6 A. Well, we don't have too many in the first

7 place. We would have to find -- Beekay Court is down

8 here and we sometimes park down there too and walk up.

9 Q. They park in this driveway?

10 A. No, I wouldn't want parking privileges. All

11 I want is in and out of the garage.

12 Q. They park on your front lawn?

13 A. Well, they can't because of the ditch along

14 here and the septic field in this area and this would

15 have to be --

16 Q. There's no septic field in here, is there?

17 A. No, but then you would have to have culverts

18 or access or graded so that they could.

19 Q. You maintain that you don't have access to

20 Hunter Mill Road?

21 A. Not from my garage, of course not.

22 Q. From your property?

23 A. Well, I have this 150 feet here, but not to my

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1 garage.

2 THE COURT: Any other questions?

3 MR. SMITH: That's all

4 CROSS EXAMINATION

5 BY MR. MACHANIC:

6 Q. You were asked the question as to whether

7 or not any allowances were made to you with respect

8 to the purchase price for your property because of

9 easement situations. You told about your access to

10 the garage.

11 A. We were told that we did have an easement

12 to go from the garage to the main highway.

13 Q. By whom were you told that?

14 MR. SMITH: I object to this hearsay.

15 THE COURT: I think it's already in evidence

16 before at the prior hearing.

17 MR. MACHANIC: I think it was too but that

18 subject came up again.

19 THE COURT: In the body of cross examination

20 on October 27th, 1970 my notes disclose that Mr. Nolan

21 handled my settlement. I discussed the deed with Mr.

22 Nolan and discussed whether there was a driveway easement.

23 He said we had an easement on driveway for ingress and

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1 egress. It's already in evidence.

2 MR. MACHANIC: Your notes have answered my

3 question. That's all.

4 (Witness excused.)

5 Whereupon

6 ROBERT H. FONES, JR.

7 the defendant, was called for examination by counsel on

8 behalf of the defendant, and after having been previously

9 duly sworn, was examined and testified as follows:

10 DIRECT EXAMINATION

11 BY MR. SMITH:

12 Q. Tell the Court your name?

13 A. Robert Fones.

14 Q. Are you the defendant in this case?

15 A. Yes I am.

16 Q. And you are the owner of lot 20-A in Kemper

17 Park Subdivision?

18 A. That's correct.

19 Q. Now your driveway, Mr. Fones, is owned entirely

20 by you, is it not?

21 A. Yes, it is.

22 Q. And it's been termed a pipe stem piece of

23 land giving you access to Hunter Mill Road?

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1 A. That's right.

2 Q. According to an exhibit that's been put in

3 evidence here this morning, it shows that your driveway

4 is immediately next to the property of Mr. Fagan; is that

5 true?

6 A. That is right.

7 Q. What are the physical characteristics of this

8 property in respect to access to and from Hunter Mill

9 Road?

10 A. The pipe stemDrive is on a high point along

11 Hunter Mill Road so it is not necessary to put a drain

12 underneath the driveway. It is just necessary to put

13 blue stone so you can drive from the road to the

14 driveway.

15 Q. Is that the situation that exists with your

16 driveway?

17 A. It's with mine and with the one next to me and

18 by Mr. Forney.

19 THE COURT: That would be north?

20 THE WITNESS: That's correct.

21 BY MR. SMITH:

22 Q. And yours is immediately adjacent to Fagen

23 property?

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1 A. Yes, it is.

2 Q. Is there any drainage ditch or anything to

3 prevent access to Fagen's property from Hunter Mill Road

4 at that point on his property?

5 A. None.

6 Q. As a matter of fact, isn't it true the same

7 type of construction --

8 MR. MACHANIC: Your Honor, I think he is

9 leading the witness.

10 THE COURT: Sustained.

11 BY MR. SMITH:

12 Q. How could access easily be attained to Hunter

13 Mill Road from Mr. Fagen or does he have it now?

14 A. He actually has it. He drives, he makes the

15 turn in on public property, the State road, and then cuts

16 up onto land immediately in front of his house. So, he

17 actually in a sense has access to Hunter Mill Road.

18 However, there is still no reason why he couldn't put

19 blue stone in the so-called drainage ditch, which is only

20 a very narrow and very shallow ditch by the road to

21 get access to his property the way the others have.

22 MR. MACHANIC: If Your Honor please, I think

23 this testimony is somewhat irrelevant because the issue

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1 at hand is getting in and out of the garage.

2

3 THE COURT: It's an issue in the case. One

4 of the major points raised by Mr. Smith is that the law

5 in his opinion would have access to the property and

6 there is no necessity and this would eliminate the

7 complainant's case. Objection overruled. I think

8 within that is the ease of accessibility.

9 BY MR. SMITH:

10 Q. Where do Mr. Fagan's guests park now if you

11 know?

12 A. They park in various places. They park

13 sometimes in my drive, sometimes blocking me in, sometimes

14 partly on Fagan's property sticking out onto my drive.

15 Usually on Fagan's lawn, after crossing my property in

16 at least three points.

17 Q. Have you given them permission to do this?

18 A. No, I've never given him permission. However,

19 I have made an issue of it now, while this thing has

20 been in litigation.

21 Q. Who constructed your driveway, Mr. Fones?

22 A. I did most of the labor, and with the aid of

23 my neighbor to the north, Mr. Forney.

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1 Q. Is this Mr. Forney here?

2 A. That's correct.

3 Q. How much did yours cost you?

4 A. I think, $1107 on my driveway.

5 Q. When did you put it in, sir?

6 A. During the summer of '70. Summer and fall of

7 '70. I also contributed my own time, 240 hours of labor.

8 THE COURT: What was the cash cost?

9 THE WITNESS: $1,107.

10 BY MR. SMITH:

11 Q. Are there certain trees that you feel are on

12 the State right-of-way in front of Mr. Fagan's property

13 among the 11 that he considered in this easement?

14 A. Yes, I counted three.

15 Q. Are those large or small size trees?

16 A. They are all oak trees about 30 feet high or

17 less.

18 Q. Would the State remove those, do you know?

19 A. Yes, they will.

20 MR. SMITH: That's all.

21 CROSS EXAMINATION

22 BY MR. MACHANIC:

23 Q. You asked about the cost of building a driveway.

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1 Just what driveway are you describing, sir?

2 A. My driveway.

3 Q. From where does it go and where does it end?

4 A. It goes from Hunter Mill Road to my house.

5 Q. What was there when you moved in?

6 A. I think we covered that in previous hearings.

7 It was a swale in which a low point where the easement

8 was cut away so that a car could not move up and down

9 it. The blue stone is very firm. There were several

10 trees in the lane which had to be removed. There was

11 no turnaround space. It was several different levels

12 which necessitated grading.

13 MR. MACHANIC: That's all.

14 MR. SMITH: That's all.

15 THE COURT: You may step down, sir.

16 (Witness excused.)

17 MR. SMITH: That's the defendant's evidence.

4 18 THE COURT: Any evidence in rebuttal?

19 MR. MACHANIC: No, sir.

20 THE COURT: Counsel, I would like to make that

21 understood and if you wish to give me further advice

22 as to what you believe the law is, I will be glad to

23 receive that. After receiving your authority subsequent

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1 to the last hearing, I researched those. The possibility
2 of this falling in the area, I found in Miners Real
3 Property, Section 102, seemed to be a possibility and
4 I saw the case of Scott versus Moore, which I believe
5 is a landmark case and by implication found in 98 Virginia
6 668, 1900 case.
7 It speaks of that type of easement and further
8 goes on to speak of necessity as not absolute necessity.
9 I'll give you I believe a quote. When property is
10 conveyed everything which belonged to it or used with it
11 and which is reasonably essential to its enjoyment as
12 incident to the principal thing or is a part of it.
13 Another quotation from the case. It was
14 generally held however that the creation of an easement
15 by implication from the pre-existing use does not require
16 an absolute, but only a reasonable necessity, such as
17 will contribute to the convenience and enjoyment of the
18 property other than a mere temporary convenience. That's
19 the main reason I asked for this additional evidence
20 to determine -- So that I will be able to determine
21 whether or not this is a mere temporary convenience to
22 use this or whether it would be a reasonable necessity
23 attributing to the convenience and enjoyment of the

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1 property. That is the reason I called for this
2 information. I think the fact of the fair market value,
3 the cost of trying to use 19-A strip of land along the
4 northern border of the driveway are relevant to the
5 overall issue of necessity.
6 Does counsel wish to provide me with further
7 authorities on the question in order to resolve the
8 decision?
9 MR. MACHANIC: If Your Honor please, we would
10 rest on the authorities we have given.
11 MR. SMITH: As I stated earlier, Your Honor,
12 I feel that the cases that I mentioned previously clearly
13 outlines the law of easements by necessity in Virginia.
14 The most recent case from this circuit last fall and I
15 would stand on the law as quoted by the Court of Appeals
16 in those cases.
17 THE COURT: Do you wish to submit any further
18 authorities?
19 MR. SMITH: No, sir.
20 (Closing arguments.)
21 THE COURT: I fully appreciate the position
22 taken by both sides in the case. I don't believe that
23 I have found any case directly in point. I'm sure if

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1 counsel had they would tell me.

2 I am going to rule in favor of the Complainants

3 in this case. I may be plowing new ground, I may be

4 plowing new ground that shouldn't be plowed. I feel that

5 an easement exist on the place and preexisted, that the use

6 of it is reasonably necessary for the enjoyment and a part

7 of 19-A, that being the garage.

8 I find from the facts in the case that the garage

9 is rendered merely unusable. Earlier some testimony was

10 that it was used for garden equipment and things of that

11 nature. I admit many times that garages are used for that

12 rather than housing automobiles, but the usual use of

13 the garage is for an automobile.

14 The lack of the use of the availability of 20-A

15 rendered the garage merely unusable. I would say unusable

16 for its primary purpose.

17 I fully understand the position you take, Mr.

18 Smith, concerning access to the property. I think this

19 is within the general field of law subsection, any

20 reasonable use of the easement to enjoy an incident to

21 the property, rather than the entire property itself, the

22 incident being the garage.

23

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1 I'm relying to a great extent on the case of
2 Scott versus Moore, where I stated earlier acquired
3 properties conveyed other than which belongs to it and is
4 used with it and which is reasonably essential to its
5 enjoyment.
6 I feel that having access to this garage falls
7 within that. The Court will therefore enter an order that
8 the defendants to restore the easement to its condition
9 prior to blocking the entrance. The court will further
10 order that in the future the reasonable cost of maintenance
11 and that section of the driveway of 20-A from Hunter Mill
12 Road up to the entrance to the garage on 19-A be shared
13 equally by the parties using it, whether it needs repair,
14 reasonable cost will have to be borne by both.
15 MR. SMITH: Will Your Honor consider a motion
16 to suspend execution of the decision pending further
17 actions for a period of sixty days.
18 THE COURT: I will grant the motion. I will
19 grant the stay of the execution of the injunction with
20 reference to the restoration of that portion of the
21 driveway for a period of sixty days -- I guess really it
22 would be done from the entry of the decree.
23 The order does not take effect until the order

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1 is entered, but it will include in the final decree the
2 stay of execution of the decree or that portion of it that
3 is mandatory for a period of sixty days and such time
4 thereafter to allow counsel to seek an appeal to the
5 Supreme Court of Appeals of Virginia.
6 I don't see a necessity of a bond with reference
7 to that stay, gentlemen, other than the normal suspending
8 bond, if you wish to agree on the amount of the cost of
9 the bond.
10 MR. WATSON: $500.
11 THE COURT: I think that is fairly standard.
12 The suspending bond will be $500 with reference to cost.
13 Will you prepare the order, please?
14 MR. WATSON: Yes, I will.
15 THE COURT: Note objections of the defendant.
16 MR. WATSON: Yes, Your Honor.
17 (Whereupon, the Court was adjourned at 11:50 a.m.)
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1 CERTIFICATE OF REPORTER

2 I, Linda C. Miller, do hereby certify that I
3 took the stenographic notes of the foregoing testimony and
4 the same was reduced to writing under my direction; that
5 the foregoing is a true record of the testimony given by
6 said witnesses, that I am neither related to nor employed
7 by any attorney or counsel employed by the parties hereto,
8 nor financially interested in theaction.
9
10
11 Linda C. Miller
Court Reporter
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