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Clerk, Supreme Court of Appeals
Richmond, Va.

214 Va. 201

IN THE

Supreme Court of Virginia

AT RICHMOND

Record No. 8172

GREENCO CORPORATION,

Appellant,

v.

CITY OF VIRGINIA BEACH,

Appellee.

JOINT APPENDIX

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MOTION FOR DECLARATORY JUDGMENT
AND INJUNCTION

Plaintiff moves the Court for declaratory judgment, declaring its right, title and interest in and to that real property lying immediately adjacent and to the east of plaintiff's property known as Lots 1, 2, and the southernmost one-half of Lot 3 in Block 74 on a certain plat entitled "Property of Virginia Beach Development Company," which plat is recorded in Map Book 3, page 177, of the Clerk's Office of the Curcuit Court of the City of Virginia Beach, Virginia.

Plaintiff further moves the Court to restrain and enjoin defendant permanently from threatening to remove and from removing the improvements maintained by plaintiff in that area adjacent to and to the east of the above-mentioned property and from other wise interfering with plaintiff's lawful use and enjoyment of said property.

And in support of these motions, plaintiff says as follows:

1. By deed dated July 25, 1900, duly recorded in the Clerk's Office of the Curcuit Court of the City of Virginia Beach, Virginia, in Deed Book 69 at page 493 Alfred N. Chandler and Arthur S. Chandler conveyed to the Virginia Beach Development Company certain lands containing about 1,200 acres and fronting on the Atlantic Ocean, reference to which deed is specifically made. Among other

things, said deed recites that said acreage is conveyed "together, also, with all the ways, waters, water-courses, riparian rights, privileges and appurtenances to the same belonging or in any wise appertaining...."

2. By deed dated May 1, 1911, recorded in said Clerk's Office in Deed Book 86, page 388, (as corrected in deed dated June 1, 1911, of record in said Clerk's Office in Deed Book 86 at page 454) Virginia Beach Development Company conveyed to Norfolk Southern Railroad Company a portion of said 1,200 acres, including property specifically referred to in said deed as Lots 1 through 6 in Block 74 on said plat.

3. By deed dated August 12, 1919, recorded in said Clerk's Office in Deed Book 104, page 500, said Norfolk Southern Railroad Company conveyed to Sea Pines Improvement Company the said lots in Block 74.

4. By deed dated January 3, 1944, recorded in said Clerk's Office in Deed Book 220, page 559, Sea Pines Improvement Company conveyed to Greenco Corporation, plaintiff herein, certain property, including the said lots in Block 74.

5. The deed described in Paragraph 4 above conveys, by express terms, in addition to the realty specifically described, all riparian and waterfront rights which each grantor had by nature of its title to the above-described property and all right, title and interest in and to the

streets and alleys binding the property which each grantor had by nature of its use of and title to the above-mentioned property.

6. As will appear from the said plat recorded in Map Book 3, page 177, in the Clerk's Office aforesaid, by reference to which plat plaintiff acquired title to, inter alia, Lots 1, 2 and the southernmost one-half of Lot 3 in Block 74 by said mesne conveyances, the said lots in said Block 74 are bounded on the west by Atlantic Avenue, on the north by other lots in said block, on the south by 31st Street, and on the east by what appears to be an area of land between the eastern edge of said block and the Atlantic Ocean, which area of land is irregular in shape, but is denominated on said plat as "Atlantic Boulevard."

7. Plaintiff owns and maintains in said area adjacent to and to the east of said lots in Block 74 a wooden platform. Said platform stands in the area denominated on said plat as "Atlantic Boulevard." Plaintiff has since 1944, and its predecessors in title did continuously since 1911, maintain on said area denominated as "Atlantic Boulevard" various buildings, walkways, pavements, electric light posts, picnic buildings, sub-ground-level passageways, salt water pumps, and other improvements adjacent to and to the east of said Block 74.

8. Plaintiff has always exercised exclusive dominion and control of that area of land lying adjacent to and to

the east of the eastern edge of said Block 74, and its predecessors in title did so all the way from 1911 to 1944; so that for a period in excess of fifty years the fee simple owners of said property have exercised ownership, dominion and control over said property, and the City of Virginia Beach has in no way exercised dominion and control over said area during that time. The City of Virginia Beach has not taken any steps or course of action to acquire, accept, or in any way gain jurisdiction and control over that portion of the land denominated on said plat as "Atlantic Boulevard," other than the construction in Approximately 1927 of a concrete bulkhead sea wall and pedestrain walkway, known as the "Boardwalk."

9. Under date of January 2, 1970, the defendant, acting through its building inspector, advised the plaintiff's tenant that it was required to remove said platform from the said area denominated "Atlantic Boulevard" for the reason that it was allegedly on property of the defendant. Also on January 2, 1970, defendant caused a "stop work" order to be attached to said platform. Plaintiff has declined to remove said platform and has notified the defendant that (1) said platform is located on property over which plaintiff has custody and control, as well as legal ownership; and (2) that the City of Virginia Beach has no standing in any event to require plaintiff to remove said platform.

10. Plaintiff alleges that, in view of the foregoing, an actual controversy exists between the parties in accordance with the provisions of Chapter 25 of Title 8, Code of Virginia, 1950, as amended, entitling plaintiff to declaratory relief. Plaintiff further alleges that the removal by defendant of plaintiff's platform, or the threat of removal, will cause plaintiff irreparable injury, thus entitling plaintiff to an injunction against defendant.

WHEREFORE, plaintiff prays the Court for declaratory judgment and injunction as aforesaid.

Filed January 12, 1970

ANSWERS TO INTERROGATORIES

Defendant, the City of Virginia Beach, by its counsel makes answer to interrogatories propounded as follows:

* * *

2. The Defendant claims the interest of a municipality in a dedicated right of way within its boundaries.

3. The source of the City's claim is this map found in Map Book 3, page 177, in the Office of the Clerk of the Circuit Court of the City of Virginia Beach together with the plat recorded with a certain deed recorded in Deed Book 69, at page 490, in the same office.

4. The parcel is shown as a part of "Ocean Boulevard", a part of a public way on the map of streets of Virginia Beach Borough, originally prepared approximately 1938, and is currently revised in the Office of the City Engineer.

* * *

6. The City has constructed concrete bulkheads to protect from erosion and storm damage, and has constructed a walkway known as "The Boardwalk" in a portion of the dedicated right of way.

7. The City, or its governmental predecessor has granted a franchise for gas transmission lines and has installed underground utilities in said parcel.

Filed March 12, 1970

OPINION

In this declaratory judgment suit the plaintiff seeks a determination of its right, title and interest in a certain parcel of real property 125' x 52' immediately adjoining the eastern boundary of Lots 1, 2 and the southern one-half of Lot 3, in Block 74, on a certain plat entitled "Property of Virginia Beach Development Company," recorded in Map Book 3, at page 177, in the Clerk's Office of this court on March 16, 1908. (Pl. Exh. 1) It also prays for injunctive relief against the defendant city causing the removal of a "platform" located on the parcel.

The plaintiff and its predecessor in title have for many years operated an amusement park known as Seaside Park. It owns a number of lots north and south of 31st Street between Atlantic Avenue and Ocean Avenue, including the first two and one-half lots located north of 31st Street, to which lots the parcel herein claimed is contiguous.

The defendant, City of Virginia Beach, is the successor to all powers, rights and interests of the former City of Virginia Beach and County of Princess Anne, which were consolidated on January 1, 1963, by an Act of the General Assembly.

The parcel in question is a portion of that area designated on the plat as "Atlantic Boulevard". The plat,

according to the plaintiff's deed, dated January 3, 1944, recorded in Deed Book 220, at page 559, was "substituted for a part of the plat annexed to a deed dated July 23, 1900," entitled "Map Virginia Beach Owned by Norfolk and Virginia Beach Railroad and Improvement Company," recorded in Map Book 1, page 23A. Defendant's Exhibit 2.

Because neither the original plat nor the substitute plat met statutory requirements for a complete dedication of the public ways shown thereon at the time they were recorded, their recordation amounted to only a common law offer of dedication requiring acceptance in one of the modes recognized by law to complete the dedication.

On the original plat "Atlantic Boulevard" is designated as "Ocean Avenue," and will be so referred to hereinafter.

An examination of the two plats shows that "Ocean Avenue" consists of the entire strand or strip of property between the eastern boundary lines of the easternmost lots and the edge of the Atlantic Ocean. The strand extends some twenty-six (26) blocks along the ocean, as laid out on the original plat.

The original plat from 1st Street just south of Rudee Inlet to its northernmost boundary is essentially the old City of Virginia Beach prior to its consolidation with Princess Anne County in 1963.

The eastern boundary of this strand meanders as the margin of the sea. It is not clearly delineated by dis-

tinct straight lines as are the streets on the plat.

On the original plat the words "Ocean Avenue" are written in large script in two places along the strip. In one place the letters cover the entire area between the easternmost lot lines and the shore line of the Atlantic Ocean. In the other, the letters cover what appears to be a grassy area immediately adjacent to the easternmost lot lines.

It is essential in determining the nature and extent of a dedication by map or plat to examine all lines, letters, symbols and other characteristics used thereon. The principle is stated in 23 Am. Jur. 2d, Dedication, §26

> "The purpose of the interpretation or consturction of a map or plat by which a dedication is apparently made is to determine the intention of the dedicator. A plat or map must be fairly and reasonably construed in accordance with the general rules pertaining to the construction of deeds or other instruments granting or pertaining to real property. It must be construed as a whole; all lines, figures, letters, and records used thereon must be considered. In short, no part of a plat or map is to be rejected as superfluous or meaningless, if it can be avoided."

It seems manifest that it was the intent of the Norfolk and Virginia Beach Railroad and Improvement Company in having its plat made and the intent of its grantees, Alfred N. Chandler and Arthur S. Chandler, in recording the plat to dedicate this unique strip bordering the Atlantic Ocean not simply as a street in its usual sense, but as

a public right-of-way to be used as a beach, a place to experience all of the grandeurs of the sea, an area for relaxation and recreation, - in short, a seaside recreation area to attract and be enjoyed by the public.

Plaintiff's Exhibit 12 is a photograph, a part of which shows the area in question in this case. It also shows the Atlantic Ocean, the beach area, a concrete bulkhead and walkway with railings and lights, the grass area, the walkway immediately adjacent to the plaintiff's property, all as it existed in July, 1938. It bears eloquent testimony as to the purpose for which this area, designated on the original plat as "Ocean Avenue," was intended to be used by its dedicators. The photograph shows scores of people bathing in the Atlantic Ocean, sunbathing on the beach, sitting on benches, relaxing and sunning in the grassy area, and children using playground equipment placed in the grassy area by the plaintiff's predecessor who operated "Seaside Park" at the time. It illustrates and establishes that the intent of the original dedicator of the area that it be used in its entirety by the public as a seashore recreation area was at that time, and had been for many years before, an accomplished fact, as further reflected by similar photographs taken in 1926. Plaintiff's Exhibits 9 and 10.

It is the contention of the plaintiff that the placing on the lawn area between their building line and the con-

crete "boardwalk" from time to time various attractions for public use and enjoyment including a structure referred to as a game building erected about 1945 which was destroyed by fire in 1955 and was not replaced, amounted to a withdrawal of the offer to dedicate this lawn area for public use before it was accepted.

The plaintiff relies on the case of May v. Whitlow, 201 Va. 533, to support their contention that acceptance of a part of an offer of dedication does not constitute acceptance of the whole. We find the facts of that case readily distinguishable from the situation presented in the case before us.

The subject of controversy in the May case was a county road, known as Court House Road, with a width of 30 feet which had existed for many years prior to 1909. Two plats, called the Bragg plats, made in 1909 and 1910, subdividing property along the road were recorded. The old Court House Road was renamed Court Street and was shown as having a 60 foot width. The plats failed to comply with the formal requisites for a complete statutory dedication of the road, but were sufficient to constitute a common law dedication, or offer of dedication of an additional 30 feet of right-of-way to that which already existed.

From 1910 to 1957 the property owners along old Court House Road built homes, erected fences, planted hedges, trees, ornamental shrubbery, leaving no land available for

highway purposes beyond the original 30 foot easement. They held undisputed possession continuously until 1957, when the State Highway Commission first asserted claim to a 60 foot wide right-of-way for the purpose of constructing a new highway.

Thus,we see in the May case there was no acceptance of the offer of dedication of any part of the additional 30 foot right-of-way shown on the 1909 and 1910 plats in any manner recognized by law for some 47 years. Quite the contrary, the property owners occupied and held undisputed possession of the entire additional 30 foot right-of-way with no part thereof being used in any manner whatsoever by the public. There being no evidence of any acts of acceptance of the 1909-10 offer of Bragg to dedicate the additional 30 foot right-of-way under the facts as the trial court found them to be, it was held that there had been a non-acceptance and that the property owners by their conduct withdrew and revoked the offer of dedication.

We find in the case before us a number of acts showing acceptance by the governing bodies concerned, the public in general, utility companies, the conduct of the plaintiff and its predecessors in title themselves, and other circumstances peculiar to the unique nature of the right-of-way in issue here, all of which will be more particularly mentioned hereinafter.

The City relies substantially on the case of Virginia

Hot Springs Company v. Lowman, 126 va. 424, as authority for its position that acceptance of the whole dedication is sufficiently evidenced by the use of a part thereof, and the remainder may be used as needed. The principle is stated at page 434:

> "... But the acceptance need not follow the offer of dedication at once. It is suvvicient if made within a reasonable time and before the withdrawal of the offer. ... It is not necessary that the acceptance should be evidenced by an immediate use and occupation of the whole of the land dedicated, but if a part of it is so used and occupied, with no indication of an intention to refuse or to abandon the residue, the use and occupation of such residue may be postponed until the public necessity or convenience requires its use."

We do not perceive that May v. Whitlow repudiates the doctrine of partial acceptance as recognized in Virginia Hot Springs Company v. Lowman which follows the general rule as stated in 23 Am. Jur. 2d; Dedication, §46:

> "An offer of dedication need not be accepted in its entirety; the property offered for dedication may be accepted in part and the remainder rejected. The public is not compelled to assume the burdens imposed by accepting every part of the offered dedication. However, acceptance of a part of a tract offered for dedication may be of such a nature as to indicate an intention ultimately to use the whole for public purposes. This must necessarily be a question of fact to be determined in view of the circumstances of each case, such as the nature of the use made of part and the condition and location of other parts."

The area claimed by the plaintiff in this case, is part of the ocean-front area which may be quite accurately described as the economic life line of the resort community of the City of Virginia Beach. There can be no question as to its value not only to the owners of the various lots shown on the original plat but also to the general public who come to Virginia Beach to enjoy its seashore and all of the attractive features which it offers. For many years, tourism has been, and still is, the largest single industry of the city.

"Acceptance of a dedication will generally be presumed where use of the dedicated property is shown to be beneficial to the public." 23 Am. Jur. 2d, §74. "Where a dedication is beneficial to a donee without imposing any burden, acceptance will be presumed as of the date of dedication." Id. Footnote 13. "On the issue of whether there has been a dedication, the intent, purpose, and importance of the dedication to the public may be considered, as well as the conduct of the public authorities subsequent to the purported dedication." Id. §76.

The mere sale of lots by reference to a plat by an owner who has sub-divided his property may alone be sufficient to effect a completed dedication of streets, parks, and other places designated on the plat for public use. The following statement of the law is found in an annotation

in 63 ALR, beginning at page 671:

> "There are numerous cases illustrative of the general rule that a defective statutory dedication, or an ineffectual attempt to make a statutory dedication, will, when rights are acquired thereunder by third persons, operate as a Common Law dedication.
>
> "Thus, in Maywood Co. v. Maywood (1886) 118 Ill. 61, 6 NE 866, where an attempt to make a statutory dedication of land for park purposes did not comply with the statute because the plat did not give the length and width of the streets and blocks, it was held that the acts of the owning corporation in selling lots by reference to such plat were sufficient to constitute a Common Law dedication of the park.
>
> "In Marsh v. Fairburry (1896) 163 Ill. 401, ..., it was held that though a plat was ineffectual as a statutory dedication of a public square marked thereon, because it had not been acknowledged before the officer designated by the statute, it was nevertheless effective as a Common Law dedication, the owner having sold lots with reference to the plat."

The concept is expressed thusly in 23 Am. Jur. 2d. Dedication. §25, at page 22:

> "The doctrine of dedication by plat or map is frequently connected with the sale of lots shown on a plat or map. By making such a sale, the owner of a tract of land manifests an intent to dedicate the streets, alleys, parks, squares, or other places designated on the plat or map for public use, unless a contrary intent is shown, ..."

Expressing the same principle, we find in the 1971 Supplement to the authority cited immediately above the following:

> "It is well settled that when a plat is recorded with streets delineated thereon and lots sold with reference to the plat there is,

so far as the public is concerned, an incipient dedication of such streets. Volpe v. Marina Parks, Inc., 101 RI 80, 220 A2d 525."

Since lots have been sold by reference to the original map or enlarged substitutes thereof, and, as we have found, the strip described on the plat as "Ocean Avenue" is vitally essential to the value, use and enjoyment of the owners of lots shown on the map and the public as a seashore recreational area, a complete common law dedication of the entire strip as a public right-of-way for such purposes has long since been effected.

As previously indicated, the evidence shows acceptance of the offer of dedication in a number of other ways by events which occurred throughout the years.

These will be enumerated in chronological order:

1. On April 16, 1906, the Town Council of Virginia Beach voted that certain streets "be adopted" including "Ocean Avenue" from "Hall's Line north". "Hall's Line" begins at a point on "Ocean Boulevard" (Ocean Avenue) approximately two blocks north of"Lake Rudee" and runs in a generally southwestwardly direction. The northern boundary of the town of Virginia Beach at that time was stipulated by counsel to be 26th Street, and did not include the area in dispute here. See Defendant's Exhibit 9.

2. On June 27, 1921, the Board of Supervisors of Princess Anne County, in which the parcel in issue lay at the time, entered into an agreement with the Norfolk and

Southern Railway Company authorizing the railway company to erect poles and string wires in roads and streets enumerated and shown in red on a blueprint attached to the agreement. The agreement is recorded in Deed Book 110, at page 218, in the Clerk's Office of this court. A copy was introduced in evidence as Defendant's Exhibit 11. The original blueprint referred to was received in evidence as Defendant's Exhibit 13. The first item listed in the agreement is "Atlantic Blvd. (Ocean Avenue) from 26th Street north to 40th Street". The blueprint shows a red line to the east and actually touching the easternmost boundary line of the plaintiff's property along its complete frontage including the parcel here in issue.

3. About 1927, the Town of Virginia Beach constructed a concrete bulkhead and walkway in front of the plaintiff's property and extending many blocks to the north and the south. Although the plaintiff, by counsel, has stated that it makes no claim to the boardwalk or beach area "at this time," both the boardwalk and beach area are located within the strip designated as "Ocean Avenue" on the original plat.

4. By agreement dated August 19, 1930, the Town of Virginia Beach contracted with the Virginia Electric and Power Company for the Power Company to furnish the entire municipal light and power purposes of the town. Defendant's Exhibit 10. This agreement refers to another agreement between the Town and the Norfolk Southern Railroad Company,

dated July 20,1927, by which the Town conveyed to the Railroad Company the street lighting system "for Ocean Boardwalk between 5th and 35th Streets, in said Town". It is clear that the Town had previously erected and maintained the lighting system for the boardwalk portion of "Ocean Avenue". The power company agreed to furnish, maintain and operate street lights of the type and capacity specified on a map schedule attached to the agreement and marked "Exhibit A". The map schedule shows lighting fixtures directly to the east and in front of the plaintiff's property on a center line located, by scale, approximately 45 feet from the plaintiff's eastern boundary line.

Maxton S. Gray, Line Foreman for the Virginia Electric and Power Company, testified that light fixtures were erected within a ten foot easement west of the boardwalk curb in front of the plaintiff's property. He stated that he had been upon the property many times to make repairs and changes. He recalled that in 1948 new and improved poles replaced the old ones. According to this witness the poles are actually erected on an apron extending 3 feet out from the walkway. Repairs were again necessary following the March 7, 1962, storm. Plans for repairs were submitted to and approved by the City Engineer.

5. Robert Hofheimer, manager of Seaside Amusement Park for Seapines Amusement Corporation, the plaintiff's immediate predecessor in title, from 1936 until the property

was purchased by the plaintiff in 1943 (the plaintiff's deed bears date of January 3, 1944), testified that while he was manager temporary displays and attractions were set up from time to time, that there was a bandstand there at one time, but that the lawn was "a gray area as far as we were concerned". He testified that he was hesitant to put permanent things on it.

6. By a contract dated December 30, 1946, the Town of Virginia Beach granted a franchise to the Virginia Beach Gas Corporation to furnish gas to the "population" of the town as a public utility company for profit pursuant to an ordinance which had been adopted August 5, 1946. Under the ordinance an exclusive franchise was granted to the Virginia Beach Gas Corporation to lay, construct and maintain gas pipe lines and facilities in the streets, avenues, alleys, lanes and public places within the Town of Virginia Beach for a period of 30 years. Defendant's Exhibit 1.

William R. Benkert, a gas construction foreman with the Virginia Electric and Power Company, stated that in 1946, he was employed by the Virginia Beach Gas Corporation as a construction supervisor. Under the franchise grant of the Town of Virginia Beach the gas company commenced laying lines in 1947. He testified that he supervised the underground installation of gas mains 39 feet inside the parcel which the plaintiff claims, and the mains are still in place where originally installed.

7. The plaintiff acquired title to the Seaside Amusement Park property by a deed dated January 3, 1944, from Sea Pines Improvement Corporation for a stated consideration of $275,000.00 Plaintiff's Exhibit 6. As far as the evidence discloses the first indication of any claim to any part of "Ocean Avenue" is found in a letter dated June 21, 1960, addressed to Mr. Roy Smith, who was City Attorney at the time, from L. L. Underwood, Jr., attorney for Seaside Park, Incorporated, and Greenco Corporation. The two corporations are treated as one and the same entity in this proceeding inasmuch as the owners and officers of the two corporations are identical.

The letter was introduced in evidence and marked Complainant's Exhibit 21. It refers to a written complaint received from city officials of Virginia Beach in a letter dated June 16, 1960. After saying that "it is not the desire of my clients to litigate the rights of any party in and to Atlantic Boulevard (Ocean Avenue) at this time," counsel stated that it was agreeable to his clients "to remove from the parcel of property which appears to be Atlantic Boulevard (Ocean Avenue) the concession which is now being operated by the subject corporation and known as the 'basket ball game' if this concession is objectionable." The letter referred to a certain outdoor platform which "has been for many years past and for the present summer season used for free entertainment to patrons of Seaside

Park and Virginia Beach in general... " It expressed the hope of the operators of Seaside Park that they "may continue to use the area as in the past by special permission of the City authorities."

The letter further stated "(t)he objections complained of are of a temporary nature, and are only used during the summer season. Free entertainment of this nature is beneficial to both the patrons of Seaside Park and the guests of the Virginia Beach area."

8. With reference to rebuilding a stage in the "lawn area" (a portion of Ocean Avenue), after its destruction in the March 1962 storm, Joel B. Cooper, Attorney at Law and son of one of its principal stock holders, addressed a letter, dated April 3, 1962, to the Attorney for the City of Virginia Beach. The letter stated that Seaside Park, Incorporated, had extended its liability insurance to include the City of Virginia Beach and that "Seaside Park, Inc., stipulates that the stage is considered a temporary structure, removable at the will of the City Council or others duly authorized to order its removal." Defendant's Exhibit 2.

9. This letter complied with a resolution adopted by the Council of the City of Virginia Beach on April 30, 1962, whereby a permit was granted to Dudley Cooper, President Seaside Park, Inc., to construct and maintain a temporary stage "on the ocean front at 31st Street" subject to cer-

tain conditions including approval of the plans and specifications by the City Engineer, to be used for free entertainment only, an agreement to save the City harmless from any liability, and that the permit was "revocable at the will of the City Council and that upon revocation Seaside Park, Inc., agrees to remove said stage and restore the City property." Defendant's Exhibit 4.

10. On January 2, 1970, the Building Inspector of the City of Virginia Beach gave notice to "Seaside Amusement Park, Mr. Dudley Cooper, Owner, that the stage located at Ocean Front (Ocean Avenue) and 31st Street must be removed within ten days as it is on city property." Plaintiff's Exhibit 11.

In addition to a number of court sessions devoted to the presentation of evidence and argument of counsel from May 21, 1970, to January 20, 1972, the court, with counsel and parties in interest, visited Seaside Park. The parcel in issue and the surrounding area was observed. The plaintiff's permanent structures appeared to be in line with the buildings of other property owners in both directions along the ocean front. The stage and a few portable bleachers were found within the 125' x 52' parcel claimed by the plaintiff. The stage was approximately 20 feet square and consisted of a plywood platform about one foot off the ground with lights strung on wooden poles around the perimeter. It could be readily dismantled.

No other structures of any type were found within the lawn area in front of the plaintiff's property or in the lawn area in front of the property of others to both the north and the south as far as could be seen.

The location of the gas lines installed in 1956 pursuant to a franchise granted by the city was indicated as being 7 feet from the plaintiff's eastern property line and within the parcel claimed by the plaintiff.

In summary, we find that all of "Ocean Avenue," as it has been hereinbefore described, was dedicated as a seashore recreational area for the benefit of owners of the lots shown on the original plat and the public in general; that because its purpose was and is beneficial to the public, its acceptance is presumed as of the date of dedication, July 23, 1900; that the sale of lots by reference to the original plat created a complete dedication of all of "Ocean Avenue"; that use by the public of the beach, boardwalk, and lawn portions of "Ocean Avenue," as shown by the plaintiff's own evidence, that acts of the governing authority in installing lights, granting electric power and gas franchises, constructing seawalls and boardwalks and maintaining the beach portions of "Ocean Avenue" clearly show an acceptance and completed dedication of all of "Ocean Avenue," many decades before the plaintiff's claim of a withdrawal of the offer of dedication.

"As distinguished from a mere revocable license and an unaccepted offer to dedicate, a dedication once completed is in its nature irrevocable. The dedicator cannot resume control of or convey the land free from the public easement; he or his successor can reclaim the use of the property only when the object and purpose of making the dedication have completely failed. Even though a common-law dedication does not pass the legal title to the land out of the party making it, it is sufficient to defeat an action for the recovery of the possession of the property as against those who are using it in accordance with the purpose and object for which it was dedicated. No obstruction of the subject of dedication or encroachment on it by the dedicator or by anyone else will affect the dedication or impair the right of the public to its benefits, unless the land so dedicated has been abandoned by the public or by the proper authority, or the highway has been vacated in due course of law.

" An attempted revocation after the dedication has been accepted is ineffective; such an attempt is merely a trespass, that is, a wrong against the right of public user." 23 Am. Jur. 2d, Dedication, §60.

Furthermore, we find the use made of the lawn area by the plaintiff and its predecessors has been entirely consistent with the purpose for which it was intended. Free entertainment was provided for the general public by special permission of the city. Such use and limited purpose was expressed in unmistakable terms by the plaintiff in the letter written on its behalf by its attorney on June 21, 1960, to the City Attorney. Plaintiff's Exhibit 21.

Still later, by letter of April 3, 1962, its attorney wrote the attorney for the city that the stage, which is now and has been for over ten years the only structure of

any kind on the lawn area adjacent to Seaside Park, "is considered a temporary structure, removable at the will of the City Council or others duly authorized to order its removal."

On the basis of these representations the city granted the special permission requested by the plaintiff in 1960 and 1962. The plaintiff is now estopped to make a claim inconsistent and completely repugnant to the position it expressed and which was relied upon by the city.

With reference to the "game building" erected about 1945, and destroyed by fire in 1955, it would appear that this structure extended about 20 feet from the plaintiff's east property line and was about 100 feet long. The fact that it was not rebuilt and considering the plaintiff's position as later stated in its aforementioned letters in 1960 and 1962, the plaintiff must have recognized that it constituted an encroachment, which, in our view, it did.

For the reasons stated the court is of the opinion that the plaintiff has failed to show that it or its predecessors in title withdrew the offer of dedication of any part of "Ocean Avenue" before the dedication was consummated by acceptance as to all portions of it.

Therefore, it is the conclusion of this court that the right to use all of "Ocean Avenue," from the easternmost boundaries of the ocean front lots to the edge of the Atlantic Ocean, as a public seashore recreational area and all

purposes incident thereto is vested in the City of Virginia Beach for the benefit of the general public. The title and interest of the plaintiff is subservient to the free and unrestricted exercise of this right.

> "By a common-law dedication the fee does not pass; the public acquires only an easement in the land designated for its use, or such an interest in the land as is necessary for its enjoyment of the use. The fee ordinarily remains in the proprietor with the public holding the easement in trust." 23 Am. Jur. 2d., Dedication, §57, p. 50.

By a common-law dedication of land, the municipality acquires not only the easement of passage, but also the right to grade and improve the surface, and to lay sewers, drains and pipes for various utilities beneath and above the surface. The municipality has authority to make or contract for such improvements in the property as will make it reasonably fit for the purpose of its dedication, provided that the reasonably convenient use thereof by any abutting property owner is not materially affected. See 23 Am. Jur. 2d, Dedication, §57, p. 51.

Accordingly, the plaintiff's prayer for an injunction against the City of Virginia Beach causing the removal of the platform or stage from its location should be denied.

Filed May 4, 1972

ORDER

This matter came before the court upon the plaintiff's petition for declaratory judgment and injunctive relief to determine its right, title and interest in a certain parcel of real property 125' x 52' immediately adjoining the eastern boundary of lots 1, 2 and the southern one-half of lot 3, in block 74, on a certain plat entitled, "Property of Virginia Beach Development Company," recorded in Map Book 3, at page 177, in the Clerk's Office of this court, said parcel being a part of "Ocean Avenue" on the orignial plat, and the responsive pleadings filed in answer to said petition for declaratory judgment and injunctive relief; upon testimony and exhibits presented in ore tenus hearings on divers days in 1970, 1971, and 1972, a view of the property, arguments and briefs of counsel.

Upon consideration of which the court rendered a written opinion dated and filed herein on May 4, 1972, particular reference to which is made as to the reasons for the court's decision.

And it appearing to the court that all of "Ocean Aveune" as it has been described, including the parcel here in controversy, was dedicated as a seashore recreational area for the benefit of owners of the lots shown on the original plat and to the public in general and its acceptance is presumed as of the date of dedication, July 23, 1900; and that the sale of lots by reference to the original plat

created a complete dedication of all of "Ocean Avenue"; and that use by the public of the beach, boardwalk, and lawn portions of "Ocean Avenue" as shown by the plaintiff's own evidence, the acts of the governing authority in installing lights, granting electric power and gas franchises, constructing sea walls, and boardwalks and maintaining the beach portions of "Ocean Avenue" clearly show an acceptance and completed dedication of all of "Ocean Avenue" before the plaintiff's claim of a withdrawal of the offer of dedication, all as more particularly set forth in the court's opinion of May 4, 1972, which is incorporated herein by reference.

Therefore, it is ADJUDGED, ORDERED and DECREED that the offer to dedicate that portion of "Ocean Avenue" claimed by the plaintiff as described above was accepted by the governing authority, thereby effecting a complete dedication, before withdrawal of the offer by the palintiff or its predecessors in title; and that the right to use all of "Ocean Avenue" from the easternmost boundaries of the ocean front lots to the Atlantic Ocean as a public seashore recreational area and all purposes incident thereto is vested in the City of Virginia Beach for the benefit of the general public, the title and interest of the plaintiff being subservient to the free and unrestricted exercise of such right.

It is further ADJUDGED, ORDERED and DECREED that the

injunction prayed for against the City of Virginia Beach causing the removal of the platform or stage from its location is denied.

Counsel for the plaintiff has duly noted its objection and exception to the ruling of the court.

Filed June 21, 1972

ASSIGNMENTS OF ERROR

1. The Court erred in rendering judgment against plaintiff by its decree of June 21, 1972.

2. The Court erred in admitting into evidence defendant's Exhibit No. 7, being the minutes of a meeting of the town council of Virginia Beach on April 16, 1906.

3. The Court erred in admitting into evidence defendant's Exhibit No. 8, being the Hughes map of Virginia Beach.

4. The Court erred in admitting any evidence of events occurring after June 21, 1960, to-wit:

(a) Defendant's Exhibit No. 2, being a letter of April 3, 1962;

(b) Defendant's Exhibit No. 3, being a letter of May 2, 1962;

(c) Defendant's Exhibit No. 4, being minutes of meeting of Town of Virginia Beach on April 30, 1962;

(d) Defendant's Exhibit No. 5, being resolution of City of Virginia Beach Council of September 12, 1966;

(e) Defendant's Exhibit No. 6, being an undated drawing;

(f) Defendant's Exhibit No. 14, being an ordinance of the City of Virginia Beach dated May 27, 1963; and

(g) Testimony of witness M. S. Gray as to activities and easements of Virginia Electric and Power Company in 1962 and before.

5. The Court erred in admitting into evidence defendant's Exhibit No. 1, being a City of Virginia Beach franchise agreement with Virginia Beach Gas Corporation.

6. The Court erred in admitting into evidence the testimony of witness W. R. Benkert as to the laying of gas mains about 1955.

7. The Court erred in admitting into evidence the testimony of witness Robert Hofheimer as to the claim of ownership of plaintiff's predecessor in title.

Filed July 19, 1972

STATEMENT OF COUNSEL FOR APPELLANT

[TR. I, page 11]

The City is claiming that this is a public street, having been duly dedicated as such, and the plaintiff is claiming that it was never dedicated and that at most there was an offer of dedication which was withdrawn.

* * * * *

COLLOQUY BETWEEN COURT AND COUNSEL FOR APPELLEE

[TR. I, page 12]

THE COURT: This was the law applicable to dedication of streets, I take it, at the time this plat was put to record on March 16, 1908. Is that correct, Mr. Marshall?

MR. MARSHALL: Sir? Yes, sir.

THE COURT: You do not contest this is the applicable law?

MR. MARSHALL: I do not contest this.

* * * * *

STATEMENT OF COUNSEL FOR APPELLANT

[TR. I, page 19 to page 20]

The accurate statement in the motion for judgment should read that the deed described in paragraph 4 conveys by express terms riparian rights.

THE COURT: You wish to amend your motion for declaratory judgment?

MR. WORTHINGTON: Yes, sir, we wish to amend that.

THE COURT: Any objection, Mr. Marshall?

MR. MARSHALL: No, sir.

* * * * *

[TR. I, page 21 to page 22]

Now, we get then to what constitutes acceptance of a dedication of a public street. And one of the most important things in resolving that question factually, Your Honor, is the time element, and we expect to show and have shown by the stipulation of the admissibility of Plaintiff's Exhibit 1 that the plat was recorded in 1908, and the evidence we expect to show will be that so far as the City is concerned nothing was done

as to any of the area platted as to -- as Atlantic Boulevard for nineteen years, and the evidence will show that in 1927, which is nineteen years after the plat was offered, that the City came along on the eastern boundary of the portion of Plaintiff's Exhibit 1 platted as Atlantic Boulevard and took over an existing wooden walkway there that the plaintiff's predecessor in title had erected, and replaced it with a concrete so-called boardwalk which runs for many, many blocks or miles up and down the oceanfront in Virginia Beach, and that this boardwalk is somewhere between fifteen and twenty feet wide, and left after its construction the fifty-two feet wide that we have in dispute here, so that the boardwalk area, having been erected in 1927, is not in dispute.

* * * * *

[TR. I, page 35 to page 36]

MR. WORTHINGTON: We are claiming the rights to the boardwalk and we are claiming the riparian rights, but we don't expect that affects this particular strip. I think our people that come there to bathe have certain riparian rights to go down to the shore.

THE COURT: To the exclusion of others?

MR. WORTHINGTON: I don't want to create an issue on that. I don't know. It is not before Your Honor.

* * * * *

STATEMENT OF APPELLANT'S COUNSEL

[TR. I, page 36]

I am authorized to say they don't ever expect to claim to exclude others from the beach.

* * * * *

EXCERPTS FROM THE TESTIMONY OF THE WITNESS EDWARD H. CHURCH

[TR. I, page 44]

Q Would you state how long you have resided in Virginia Beach?

A Past twenty-five years.

Q And are you familiar with the area of Virginia Beach where the Seaside Park is located?

A Yes, I am.

* * * * *

[TR. I, page 45]

Q All right, sir. Within the last eighteen years have you had any occasion to see Seaside Park area with any frequency?

A Oh, five or six times a month.

Q What has your occasion been to observe the park?

A Well, I'm chairman of the erosion commission and I inspect the condition of the beach from 7th Street to 35th Street, oh, sometimes two or three times a week, sometimes once or twice a month. But I have been doing it ever since the commission was started in 1952.

* * * * *

[TR. I, page 46]

Based on your observation of this area over the period you have described, can you tell us what activities you have observed on the lawn area I have designated and also from 30th to 33rd by the park?

A Well, as I recall, from 30th to 31st Street there's nothing of any permanent nature ever been. There is a bandstand or exhibition stand -- I don't know what you would call it -- just north of 31st Street that sits on that lawn area. And also I have observed some aerial acts there where they have had poles and tied down and where they would perform on trapeze and so forth.

* * * * *

[TR. I, page 47 to page 48]

Q You have noticed an aerial act there and a bandstand or stage?

A The aerial act would not be a permanent thing. It would depend on whatever free acts the park was putting on at that time. But I have noticed many aerial acts out there during the summer season.

Q On the lawn area?

A On the lawn area.

Q All right. Can you recall any other acts or structures, either permanent or temporary, from your observation?

A As I stated before, the only permanent structure I have seen there was that -- I don't know whether you call it a bandstand, but I think you-all know what I am talking about. There's a built-up platform there and it looks to be of a permanent nature to me.

Q I see. And to your observation over that period of time was the area we have described ever used as a street or a public thoroughfare?

A Not to my knowledge, other than the people going across it to get to the boardwalk or to the beach.

* * * * *

EXCERPTS FROM THE TESTIMONY OF THE WITNESS H. B. KELLAM

[TR. I, page 50]

Q All right, sir. Well, can you state approximately what year your recollection of the park and its activities goes back to?

A I suppose I would say from recollection from the standpoint of the early '20s.

* * * * *

[TR. I, page 51 to page 53]

Mr. Kellam, could you state for me what acts or activity on this lawn area that we have described that you have observed from time to time over this period that you have been familiar with Seaside Park?

A Well, I remember in particular the --

THE COURT: Mr. Kellam, the area that's in issue here is from the western edge of the concrete walk --

THE WITNESS: Yes, sir.

THE COURT: -- the boardwalk, as you refer to it, and extending approximately fifty-two feet to the east, and abutting the lots that are shown there.

BY MR. TURNER:

Q All right, sir.

A I remember a band shell which I refer to as a band shell, and it was a permanent type of what we used to call a summerhouse, but it was used as a band shell and musical renditions there in the evenings.

Q Do you recall approximately when that structure was in existence?

A. Well, my recollection was in the early or the middle '20s that I remember the first one there.

MR. MARSHALL: The court would note my objection to this testimony. I won't restate it each time.

MR. TURNER: You mean the whole testimony about anything on this area?

MR. MARSHALL: Yes, sir.

BY MR. TURNER:

Q All right, sir. In addition to that structure what acts, if any, or performances do you recall being conducted on the lawn area?

A Well, I recall a number of entertainment-type of acts. To my recollection there was a high wire act and there was a diving pole, a man diving into a small container of water, as it appeared to me in those days anyhow. There was to my recollection a weight chair where -- scales where a man guessed your weight, things of that nature.

Q All right, sir. Can you state whether or not in your own memory you can recall any fireworks displays being conducted --

A Yes, sir.

Q -- on this lawn area?

A Quite often.

Q Can you recall the approximate period of time when these displays were conducted?

A Well, that goes back a number of years also, but since I was a child I could and when I had the opportunity to go to Virginia Beach, which wasn't as often as a child does today, but it was something that was quite unusual and very thrilling to a child.

Q All right, sir. And within your memory has this lawn area we have described ever been used as a public street?

A Not to my knowledge.

* * * * *

[TR. I, page 57]

Q With respect to Plaintiff's Exhibit No. 9, which you have just identified, can you state the distance from the edge of the boardwalk any of these buildings were located?

A No, sir. No, sir, I couldn't.

Q Would your answer be the same with respect to the other one?

A Yes, sir. Never had any idea.

* * * * *

EXCERPTS FROM THE TESTIMONY OF THE WITNESS H. L. GALLOP

[TR. I, page 62 to page 67]

Q Mr. Gallop, I'd like to point out to you the area. The precise area that's in dispute in this case is just to the east of lots 1, 2, and 3 as shown in block 74 on Plaintiff's Exhibit 1, and it is the area between those lots and the boardwalk north of 31st Street.

Have you at my request measured the distance between the existing buildings on lots 1, 2, and the southern half of 3 and the western edge of the concrete boardwalk?

A Yes, sir.

Q All right, sir. And what did you find that measurement to be?

A Fifty-two foot.

Q All right, sir.

THE COURT: Mr. Gallop, are all the buildings the same distance?

MR. TURNER: Are all what?

THE COURT: All the buildings the same distance from the boardwalk? They are all built on the same line?

MR. TURNER: They are to my observation. You want me to prove that with the witness?

THE COURT: If you can answer that question. Are all the buildings on the same line?

THE WITNESS: Yes.

THE COURT: All right. Thank you.

BY MR. TURNER:

Q Do I accurately understand from your testimony, Mr. Gallop, that you have resided at the park year round since 1947?

A Yes.

Q All right. Now, will you state for me what -- within that period of time, from 1947 until the present, what activities you have observed on this lawn area?

A We have had stages for free acts, had free acts out there and had a train that run up and down the boardwalk there on the front, had games all out there on the front and had rides down on the front.

Q Can you state whether or not there were ever any concession stands on that area to you memory?

A Concession stands all in the side there on the back of the beach, facing the beach.

Q Can you state whether or not within your memory there has ever been any structure, either permanent or temporary, on this land area that I have outlined for you?

A Nothing but where we have free acts and all like that. We got a stage there now.

Q Before -- between 1947 and 1955 to your memory was there ever any structure on that area that you can recall?

A Yeah. We had a hoist ride there one time.

Q A what, sir?

A A hoist ride, right at 31st Street.

THE COURT: Would you describe what that is, sir?

THE WITNESS: Where you get to knock the ball up and rings a bell and you give cigars away.

THE COURT: Was this just amusement facilities?

THE WITNESS: Yes.

THE COURT: Was it movable?

THE WITNESS: No, it had a wire fence around it.

THE COURT: Had a wire fence around it.

THE WITNESS: Yes, sir.

THE COURT: How long was that there?

THE WITNESS: I guess around seven or eight years.

BY MR. TURNER:

Q Can you state whether or not that in 1955 there was any occurrence at the park which caused some destruction to buildings?

A That's when we had the fire, in '55.

Q There was a fire in 1955?

A Yes. Burnt it all down. We had to build over.

Q State whether or not to your memory structures at the park before the fire were closer to the boardwalk --

A Yes, sir.

Q -- than the existing structures are?

A Yes, sir.

Q All right. To your memory how much closer were they?

A I'd say about twenty foot closer.

Q Closer to the --

A To the boardwalk.

Q -- boardwalk?

A Than they are now.

Q To your knowledge since 1947 has this lawn area we have described ever been used as a street?

A No, sir.

Q Who has maintained that lawn area, Mr. Gallop?

A We kept it up till about two years ago. The City started cutting it about two years ago.

Q You mean from 1947 until two years ago?

A Yes.

Q What did you do in the way of keeping it up?

A Well, we cut the grass, filled the holes up, kept it fixed up.

Q And until two years ago was there any assistance or any offer of assistance --

A No.

Q -- from the City?

A No.

* * * * *

[TR. I, page 69 to page 70]

Q But it is your testimony, Mr. Gallop, that the City is currently maintaining that green area?

A It is. They are cutting it now. They are taking care of it.

Q You don't object to it, do you?

A No, sir.

* * * * *

EXCERPTS FROM THE TESTIMONY OF THE WITNESS H. S. SPENCER

[TR. I, page 71]

Q What is your occupation, Mr. Spencer?

A Roofer.

Q And in that occupation have you ever had any connection with Seaside Amusement Park?

A Yes.

Q And what did you do for Seaside?

A I was I guess you would call it maintenanceman there for a few years.

Q What years were they?

A Around '50 until about '54 or '55.

Q And what did you do in your capacity of maintenance work?

A Well, general repairs to roofs.

* * * * *

[TR. I, page 77 to page 78]

THE COURT: How large was this structure that extended twenty feet towards the boardwalk, if you can recall?

THE WITNESS: Twenty feet towards the boardwalk.

THE COURT: All right, sir, and if it is that wide, how far did it extend in a north-south direction?

THE WITNESS: That was a hundred-some feet. Now, exactly I can't tell you. There was a building up here. I had to come into this one here.

THE COURT: Did you build that roof?

THE WITNESS: No, I am a roofer.

THE COURT: Did you put the roof on this structure?

THE WITNESS: I covered it once or twice, but I had to come in way up here, 31st Street I think it is, and come up on this till I got up here.

THE COURT: And when was that structure there? Do you know what year?

THE WITNESS: When was it put there?

THE COURT: No, sir.

THE WITNESS: No, I don't know. I started working there in 1950.

THE COURT: You didn't put the roof on when it was new?

THE WITNESS: Not the original.

THE COURT: I see. But it was there when you came there in when?

THE WITNESS: When I came there in 1950.

* * * * *

[TR. I, page 82]

Q Mr. Spencer, during the period 1950 to 1955 when you performed some maintenance work at the park were you actually an employe of Seaside Park?

A Well, now, I don't know how to answer that other than to say to you I considered myself an employe of Dr. Cooper, because I would get my orders mostly from uptown.

* * * * *

EXCERPTS FROM THE TESTIMONY OF THE WITNESS W. E. KLINEFELTER

[TR. I, page 83 to page 86]

Q All right, sir. And are you generally familiar with Seaside Amusement Park?

A More or less.

Q All right, sir. And for what period of time have you been more or less familiar with it?

A From '45, I imagine, on till today.

Q Till today.

Can you state generally with what frequency you have seen the park during that period of time?

A I'm not quite with you.

Q With what frequency? How often generally speaking --

A Three or four times a year.

Q And I point out for you on this plat that the area in dispute is the so-called lawn area to the east of lots 1, 2, and half of 3 as shown on -- in block 74 of Plaintiff's Exhibit 1, running north of 31st Street between those lots and the concrete boardwalk. And can you describe for me what, if any, activities you have observed in that area during the period that you have mentioned from 1944 to the present?

A Well, the free act stage has been on there. At one time there was a train ride run up and down through there. Along with the high wire acts or trapeze acts. And the games that used to be along there before the fire were built out on about half of that.

Q When did this fire occur that you mentioned?

A 1955.

Q Was that the year that you purchased some concession --

A I purchased the merchandise from this man just before the fire.

Q Now, I show you a photograph which is labelled Plaintiff's Exhibit 12-A and ask you if you recognize the structures shown on there?

A I recognize the structure, but the swimming pool wasn't there. That had been filled in. There was buildings built all up through here.

Q Was the building just to the right of that punched hole there at the time?

A Yes, they were built out in front of that and up I guess where this walkway here is now.

Q You mean there was an additional structure not shown on there?

A Yes, sir.

Q And how far -- was it at this building with the holes punched?

A Started here and came this way.

THE COURT: When you say this way you mean towards the --

A Towards the north. And it also went towards the ocean.

BY MR. TURNER:

Q How far did it extend from that building towards the ocean?

A Twenty feet. They were twenty feet deep and a hundred eighty foot long.

MR. TURNER: Would you please answer Mr. Marshall's questions?

MR. MARSHALL: No questions.

THE COURT: What type of structure was it, Mr. Klinefelter? Would you describe it?

THE WITNESS: Well, they were wooden structures. They had I think around nine different games at that time in them.

THE COURT: Was the structure enclosed on all four sides?

THE WITNESS: Yes, sir, it was enclosed on all four sides. The front opened up with panels when they opened for business.

THE COURT: But could be closed?

THE WITNESS: Yes, sir.

* * * * *

EXCERPTS FROM THE TESTIMONY OF THE WITNESS R. HOFHEIMER

[TR. I, page 88 to page 90]

Q Mr. Hofheimer, when was your first connection with Seaside Park? When did you first observe the park?

A Well, all my life. I was in the management department during '39 and '40.

Q Had you been --

A It might have been '40 and '41; I don't remember.

Q Had you been at the amusement park before 1930?

A Yes. My family had an interest in the amusement park from the time that I was a youngster.

Q Would that period have covered 1938?

A Yes.

Q Then I ask you do you recognize this picture as being part of the amusement park in 1938?

A I do.

MR. TURNER: Okay, sir.

MR. WORTHINGTON: What are you referring to?

BY MR. TURNER:

Q The photograph that I am showing you is Plaintiff's Exhibit 12-A.

THE COURT: 12-A for identification.

BY MR. TURNER:

Q Mr. Hofheimer, referring to this photograph, can you show me approximately where 31st Street extended would have been on the photograph?

A I believe this photograph is facing south, and I would say 31st Street is just on the other side of that building. Would have been.

* * * * *

[TR. I, page 91 to page 92]

Q Can you state what use was made of that lawn area I have outlined on the plat during the summer that you had a management position there?

A If you remember, that was right prior to the war, and there were lots and lots of servicemen milling around. I believe that there were -- if my memory serves me correctly, there was a mind-reading concession in a trailer at the foot of 31st Street --

Q All right.

A -- on that area. He was in a trailer with his car and he had a loudspeaker set up there.

Q Do you remember any other activity or acts or stands of that nature on the lawn area?

A I believe they set up temporary displays and entertainment things to go off and on.

* * * * *

[TR. I, page 93]

Q Concerning other parts of this lawn area between the buildings and the boardwalk, do you remember any other structures or activities on other parts of it?

A You know, it is hard to pinpoint the years that these things took place when you have been going down there for many years, and since too. It seems to me there was a bandstand there at one time. That's all.

Q Anything else you recall?

A (No reply)

* * * * *

[TR. II, page 40 to page 46]

Q Mr. Hofheimer, you have previously testified that in the period prior to 1942 you were, I believe, an officer of Sea Pines?

A Not an officer, but I was affiliated very closely with them.

Q You worked with --

A With them.

Q And you have also testified that you were familiar with the use made by the company of the area to the east of the property line?

A I did.

Q I ask you what was the opinion or the attitude of the company with respect to ownership of that land east of the property line, if you know?

MR. WORTHINGTON: Your Honor, we object to what was the opinion or attitude of the predecessor in title on the ground that this is hearsay and that the question at issue is not what an individual member of the public's attitude was but whether the public was using it.

THE COURT: I sustain the objection. You may ask him what the reputation of the area, whether it was reputed to --

MR. MARSHALL: This is what I am coming to next, Your Honor.

THE COURT: With respect to the rights or ownership, of the reputation in this area.

MR. MARSHALL: This was my next question.

MR. WORTHINGTON: Your Honor, in the earlier question I think Your Honor has ruled previously that reputation would not come in in the 1930s and '40s, because it is not ancient enough, and we make that point.

THE COURT: The older we get the more ancient we become.

MR. WORTHINGTON: I think the principle is clear. But I think -- we have got the authorities here on the admissibility. It has to be shown -- it must relate to ancient matters as to which direct evidence is not available -- presumably not available. The reputation in question must be that of a past generation and the declaration relied upon to show the reputation must be made by one now dead, and we submit it doesn't fulfill any of those tests; whereas our offer of proof did.

THE COURT: Are they in the conjunctive? they must show all this?

MR. WORTHINGTON: Yes. I am quoting from American Jurisprudence evidence section -- volume 29, American Jurisprudence second section 506 under reputation evidence.

THE COURT: All right. I think you are right.

MR. WORTHINGTON: And these people are alive and we have brought the live people here and he's cross-examined them about what the facts were, not what the reputation was.

THE COURT: I sustain the objection.

Mr. Hofheimer, what was your connection with the Sea Pines, Incorporated? Was that the name?

THE WITNESS: Sea Pines Improvement Corporation.

THE COURT: Improvement Corporation. What was your connection with that concern? Let me ask you this: Did you have any ownership interest in it?

THE WITNESS: My mother had ownership in it.

THE COURT: But you did not yourself?

THE WITNESS: No.

THE COURT: Were you an officer or director of the corporation?

THE WITNESS: No, I wasn't. At that time I was rather young. It was right before World War II when I was killing time and I spent two summers down there and one winter.

THE COURT: Is your mother still living?

THE WITNESS: Yes.

MR. MARSHALL: Couldn't get her as a witness, Your Honor.

THE WITNESS: No.

THE COURT: Is she incapacitated?

THE WITNESS: Well, don't embarrass me.

THE COURT: I mean is she unable to come to court physically?

THE WITNESS: Yes, and she wouldn't know.

BY MR. MARSHALL:

Q She's had some memory failures I believe, hasn't she?

A Plus the fact my brother and I handle it for her all the time.

THE COURT: Were you handling the property for her at that time?

THE WITNESS: Well, it was a corporation. We were minority stockholders. And we did handle it for her.

THE COURT: Did you handle all of her business interests in this corporation?

THE WITNESS: Yes.

THE COURT: You may proceed to ask him.

MR. WORTHINGTON: We save the point.

THE COURT: Yes, sir. He only can testify --

MR. WORTHINGTON: What's the question he's supposed to be answering now?

THE COURT: You re-ask the question, Mr. Marshall. Give Mr. Worthington --

MR. MARSHALL: I have been around so many times I will back up and stop.

THE COURT: The position of the court is Mr. Hofheimer testified he was agent and a part owner of the property.

MR. MARSHALL: Yes, sir.

THE COURT: And as such an owner may testify as to what interest they had in the property.

MR. WORTHINGTON: All right. We make an additional objection on that, because I don't think that question has been put.

THE COURT: Well, it has not.

MR. WORTHINGTON: Let him rephrase the question and we will see.

BY MR. MARSHALL:

Q Do you know what ownership interest was claimed by Sea Pines Improvement Company in the area to the east of the property line as shown on the plat?

MR. WORTHINGTON: Now, we would object to that, Your Honor, because this is a violation of the parol evidence rule, the title being evidenced by deeds of record, which I think have been introduced in evidence here, so the ownership is a matter of law, and the --

THE COURT: Well, ask the question, what ownership or right -- other incidences of rights of ownership in this particular property which is in contest here today.

And you are going to except?

MR. WORTHINGTON: We save the point, Your Honor.

THE WITNESS: Your Honor, it was a gray area as far as my thinking was concerned. We were hesitant to put permanent buildings there. But we did utilize it.

* * * * *

EXCERPTS FROM THE TESTIMONY OF THE WITNESS MRS. E. M. DUQUET

[TR. I, page 95]

Q So have you been at the park as an employe since 1944?

A Since 1944.

Q And what months of the year were you there?

A Since around May 1st to practically -- well, two weeks after Labor Day, sometimes three weeks after Labor Day.

* * * * *

[TR. I, page 96]

Q To your knowledge has that area ever been used as a public street since 1944?

A Not that I know of.

Q To the best of your memory what use has been made of that lawn area?

A Well, it's been made use for many things. There were rides out there. We had a little what they call an auto-train that ran all along.

* * * * *

[TR. I, page 97 to page 98]

Q What period of time does this represent, Mrs. Duquet?

A That's after '44 and prior to the fire in '55. These things might have changed a little, but there was this train in here that used to go down, make a loop near where the bathhouse was, come back over the lawn and back to the train station.

Q Okay.

A Now, the free act stage was out front here.

THE COURT: Louder, please.

A The free act stage was out front. And also on the lawn -- when they had the high acts it would be out on the lawn here.

* * * * *

Q Do you recall how far this edge of the outdoor stage closest to the boardwalk was from the boardwalk?

A From the boardwalk it was a very short distance. It was almost on it.

THE COURT: Can you give us an estimate?

THE WITNESS: Maybe two or three feet from the boardwalk.

THE COURT: Now, what was that, a band stage, did you say?

THE WITNESS: That was a stage for the free acts to perform on. One week we might have a stage act, the next week a high act. And then the high act would be on the grass area.

* * * * *

[TR. I, page 100 to page 102]

MR. MARSHALL: I would like to know if she can tell me where the eastern lot line is of lots 1, 2, and half of 3?

THE WITNESS: This is 31st, this is 31st Street right here. Now, let's see.

MR. TURNER: If she's not a surveyor I don't know whether she'd be qualified to locate the lot line for you. She can locate it with respect to the edge of the boardwalk. The lot line's not shown on there.

THE WITNESS: Well, to my estimation it would probably be around in this section here.

MR. MARSHALL: I mean the eastern lot line would be running in this direction, the eastern edge of each of these lots.

THE WITNESS: You mean this way, east and west?

MR. MARSHALL: Yes.

THE WITNESS: Oh, I see what you mean now.

THE COURT: This line here, Mrs. Duquet, referring to the Plaintiff's Exhibit No. 1. This is the front of these lot lines as shown on this plat right here.

THE WITNESS: 31st Street. This is 31st Street here.

THE COURT: I don't believe Mrs. Duquet knows where they are.

* * * * *

[TR. I, page 107 to page 108]

Q These structures that you have shown on this sketch, was their position constant or were they shifted in location from time to time?

A Those were constant.

Q All of them?

A Those were constant, all those -- you mean all these different structures I showed?

Q You show games, and games --

A Outdoor stage.

Q How about the games? They always stay in the same place?

A Most of the time. They would change

around from year to year. Sometimes they were in different places. Like they might move something another year to another end of the park.

Q They were not always all of them were constant -- they were not all constant?

A You mean these games?

Q This layout that you show here.

A That's the way I remember at first in '44.

Q But the layout did change?

A It did change from year to year, but we had --

Q Now, this is open to the public, isn't it, Miss --

A Yes.

Q Anybody walking down the boardwalk can come in; in fact, you like to have them there?

A We'd love to have them all come in.

Q No effort made to exclude them, obviously, then?

A No.

* * * * *

[TR. II, page 64]

Q Now, have you ever been contacted by anyone from the Virginia Beach Gas Corporation --

A Yes.

Q Excuse me -- concerning installation of a line on the lawn area?

A I remember a call about the gas line. I don't know just when.

Q Approximately when were you --

A I don't know just when. It was in the '50s.

Q Can you pin it down just as --

A It was in the '50s somewhere. I don't remember just when.

Q Okay. And could you tell us about the nature of the call?

A Well, it was in regard to putting in the natural gas line, the Virginia Beach gas line. Then I referred it back to the owners and let them take care of it because I had nothing to do with it.

Q Can you state whether it was a request for permission or a notice that they were coming or --

A They wanted to know if they would like to have it put in, a request for to put in a new gas line.

* * * * *

EXCERPTS FROM THE TESTIMONY OF THE WITNESS D. COOPER

[TR. I, page 111]

Q And how long has your acquaintance with the situation of the buildings and structures and the land at Seaside Park extended?

A I was in close contact with the operation.

Q And how far back does your knowledge of it go?

A Since the -- the park you mean? You mean of our operation?

Q I mean of anybody's operation how far back does it go?

A Oh, I used to go to Seaside Park as a young man eighteen years old to dance at the then Peacock Ballroom.

Q And what year would that be?

A That would be 1918. I was born in 1899. I was eighteen years old in 1918.

* * * * *

[TR. I, page 113]

Q Can you tell the court what the length of that walkway was and who built it and maintained it?

A That was the walkway of Seaside Park. There were two of them. There was one on the outside, too. They ran from the end of the picnic area, which was 33rd Street, down to 30th Street.

Q Now, did these walkways extend off of the property of Seaside Park in any way?

A Off?

Q Off of the property or were they on the property?

A They were on the property or a part of it.

Q Did they extend beyond the limits of the property?

A No. They went from 33rd to 30th Street. They didn't go beyond that. That was the confines of the park, of the amusement park, as I recall it.

* * * * *

[TR. I, page 114 to page 119]

Passing then to Exhibit 12, there is in the center of that picture a building which extends from the right of the picture to the left of the picture and it's got a hole punched in the end of the picture near the end of the roof.

A Yes, sir.

Q Can you identify that building?

A Yes, sir. That was at that time when this was in existence a maintenance and repair shop. We had materials in there. Later on we built onto it for a concession man named Louis Wish. I have a record of it in my ledger here. He rented nine games from us. We call them hanky-panks. They are games that are played for ten cents and they get a prize, and he had his choice of varying the games as he liked as long as they were legitimate. They were played with skill. They were either dart games or ball games of some kind.

Q All right. Now, what structures, if any, existed between the end of this A-roof where the hole is pointed and the boardwalk at any time?

A There was a concession stand, permanent in nature, that was made --

Q What were the nature of the --

A All game stands have a depth of twenty feet. So they were about twenty feet deep beginning at the face of that building, which was used then as a stockroom, and extending out into the water, which is east, a distance of twenty feet, and north and south they were about -- for nine games they would have to be around a hundred and ten feet or so.

Q All right. Now, what was the distance between the eastern edge of this concession building and the western edge of the boardwalk?

A Show me what you are talking about.

Q I believe you testified that there was a line of concession stands --

A That's right.

Q -- beyond the A-roof. And here is the boardwalk?

A Yeah.

Q What would be the distance between the concession building and the boardwalk?

A Twenty feet.

Q The building came within twenty feet of the boardwalk?

A That's right.

Q And how long did that building remain there?

A That building was there around '49 to '55, until the time we had the fire. We leased it to

this man Louis Wish, and I'll show you the record in my book if you want to see it.

Q Now, I show you --

THE COURT: That was from 1949 to '55, you say, Dr. Cooper?

THE WITNESS: Roughly. It could have been 1950, Your Honor. About five years.

THE COURT: Until the fire.

BY MR. WORTHINGTON:

Q Until the fire?

A Yes, sir. The fire destroyed it.

Q I show you Plaintiff's Exhibit 10, which has in the foreground above the legend "Seaside Park, Virginia Beach, Virginia," a place that -- in the ground that appears to be depressed.

A Yes, sir.

Q And ask you how long that depression in the ground was there?

A That was there from my earliest recollection, 1918 until we took possession, and tore it down in 19 -- we tore the building down in 1947. And 1947 I sold it.

Q What was the purpose of that depressed area there?

A There was a subterranean -- an underground bathhouse that ran from Atlantic Avenue, where the entrance was, and discharged the patrons. They undressed there and walked to the beach. They had stairways to get up to the beach. And there was a pump -- this is a pump house here to pump the water, right here.

Q All right. Now, with reference to the present city constructed boardwalk, how close to that boardwalk would that depressed area come?

A The depressed area was right at the boardwalk.

Q But is the present boardwalk in the same location or not --

A Approximately.

Q -- as the boardwalk shown here?

A This is the boardwalk that the City later converted to its own use. And you say it is our -- we had stairways that led right up to get onto the boardwalk to go down to the beach, and this was about -- that pump was about twelve or fifteen feet away from the edge.

THE COURT: Let the record show that the witness is referring to Plaintiff's Exhibit 10.

BY MR. WORTHINGTON:

Q All right. Now, on Plaintiff's Exhibit 10 will you take this pen and punch through the pump house with this pen and draw a circle on the back and put the word -- the letter P there, if you will.

A P?

Q Right.

A (Did so)

Q And it is your testimony then that the distance from the hole -- the structure which is punched through with P to the boardwalk would be about ten feet. Is that right?

A That's right.

* * * * *

[TR. I, page 126 to page 128]

Q Now, starting in 1918 and down to the present what knowledge have you had that this lawn area was used as a street by the public?

A Come over closer. Say it again.

Q Since 1918 what use has been made of the lawn area that we are concerned with here as a street?

A None.

Q By the public?

A None. The amusement park used it for its use.

Q During that period at any time has that area been paved as a street?

A Paved by whom?

Q By any municipal authority?

A None.

Q All right. Now, who has maintained the grounds in this area?

A Seaside Park has.

Q And what has this maintenance consisted of?

A Well, we took care of the lawn. We

fill in holes as they develop. We had a stage on there and other activities. We have walkways that we constructed up from the boardwalk into the park so people could come in handily.

Q Has this area between the lot lines and the boardwalk or between the lot lines and the ocean ever had any name as a street to your knowledge?

A No, not at all.

Q Any street numbers?

A No, sir.

Q Any garbage pickup on that side?

A No. We service all of our own garbage.

Q How about trash pickup?

A The City has given us no service there at all.

Q How about cleaning facilities on the lawn area?

A We do it all.

Q All right, sir. Now, what sort of police protection or other guards has the municipality furnished to you during this period, or furnished to anyone during this period?

A We have our own special police that stay on the grounds to maintain order.

Q How about the City? Does it have any

police?

A The City occasionally comes on call.

Q All right. Is there any police patrol along the lawn area or has there ever been?

A No. They police on the boardwalk. They run a patrol car up and down north and south. But they never come into my park, unless we summon them.

* * * * *

[TR. II, page 11]

Q All right, sir. Do you know with reference to the location of the present City-owned concrete boardwalk where this area which is marked C lies?

A That's exactly the same area, the same walkway.

Q All right. Is it a fact then --

A Except it is now concreted.

Q The City-owned boardwalk came along and replaced this in 1927?

A That's correct.

* * * * *

[TR. II, page 12 to page 19]

Q What knowledge, if any, do you have as to what use was made of this brick walkway which is shown on Plaintiff's Exhibit 10 and marked C?

A It was a thoroughfare used by the public going north and south.

Q All right. Do you know that of your own knowledge?

A Yes.

Q Did you observe it with your own eyes?

A Yes.

MR. WORTHINGTON: Any objection to that?

THE COURT: What are you talking about now?

MR. WORTHINGTON: Talking about this boardwalk, this old boardwalk, brick one.

MR. MARSHALL: Which one you talking about, Bill?

MR. WORTHINGTON: Talking about this one.

BY MR. WORTHINGTON:

Q Do you know from your own knowledge how long a use by the public as a thoroughfare this area had?

A I have been going to Virginia Beach, and Seaside Park specifically, since I was eighteen years old, 1918.

Q Now, don't answer this question until the court has ruled on it.

By reputation in the community do you know what use was made of that area prior to 1918?

MR. MARSHALL: I don't think he's qualified to answer that on reputation prior to 1918.

THE COURT: You are dealing in title of land at issue. I think if he knows what the reputation was I think that's an exception to the hearsay evidence rule, accepted to establish boundary lines, but it is the use to which property has been put to and I think reputation is an exception to the hearsay evidence rule.

MR. MARSHALL: Note my exception.

THE COURT: We are going back a good many years. You probably wouldn't find many

who were around in those days.

BY MR. WORTHINGTON:

Q All right, the question is do you know what use by the public was made of this boardwalk before 1918?

A Yes, I do.

Q What was its reputation as to the use?

A It was used by the public as a thoroughfare going north and south.

THE COURT: Going where, Dr. Cooper?

THE WITNESS: Going north and south.

BY MR. WORTHINGTON:

Q Now, how far back does your knowledge go as to this use by the public?

A From my discussions with people who did know that it went back to around 1900.

Q All right, sir. Now, what occasion, if any, did you have, particularly, to discuss by reputation the use of this as a public walkway?

A Well, in the early 1930 --

THE COURT: May I ask you a question, Dr. Cooper? Is the present concrete boardwalk in the same place that this brick boardwalk was?

THE WITNESS: Relatively, yes, sir.

THE COURT: But you are not claiming any of that?

THE WITNESS: No, sir.

THE COURT: Is this material, Mr. Worthington?

MR. WORTHINGTON: Yes, sir, it is material in this way: that the City is claiming under the authorities that we rely on, the case of May against Whitlow, which I would remind Your Honor of, that because before the recordation of the plat in May against Whitlow there was an existing public way, then in May against Whitlow there was a recordation of a plat which included the existing public way and expanded it; that that case would not control the issue before Your Honor because of the existence of the previous public way over part of the platted way. We are attempting to show by this evidence that we are in the same --

THE COURT: You may proceed.

MR. WORTHINGTON: -- same ball park with May against Whitlow.

BY MR. WORTHINGTON:

Q All right. What occasion did you have to discuss the reputation as to the use of this as a public way?

A Well, during the early 1930s a group of Portsmouth people, including myself, owned three cottages at Cape Henry. That was Mr. Frank D. Lawrence, former president of the American National Bank of Portsmouth; and Sol Fass of Fass Brothers -- of Isaac Fass Fish Company; and myself. We owned three cottages there, and frequently we walked down between Rudee Inlet and Fort Story, and we observed various things that were happening at Virginia Beach, such as new buildings, new commercial enterprises, and so on, and we discussed the changes and olden times concerning Virginia Beach, and we discussed the thoroughfare in question and --

Q How did it happen to come up as a topic of conversation as to whether there was a thoroughfare all the entire length of the beach?

A We observed that there was a question of ownership of the Cavalier Hotel, rumor that they owned part of the beach, that they could prevent people from walking across, and it came up in that discussion. Then we observed that that was the only place on the beach that wasn't -- that it was not obstructed. Every

other part we could walk through.

MR. WORTHINGTON: Answer Mr. Marshall then.

THE COURT: Mr. Marshall, let me ask Dr. Cooper a question while it is fresh in my mind.

Dr. Cooper, was there a boardwalk to the north and south of this brick boardwalk shown in the photograph?

THE WITNESS: There was no boardwalk. There was a thoroughfare walkway.

THE COURT: Was it paved or was there any type of --

THE WITNESS: It was a beach.

THE COURT: -- improvement there? Or just beach?

THE WITNESS: It was beach.

THE COURT: There was nothing to the north and south of it by way of improving that thoroughfare?

THE WITNESS: No, not that I call.

THE COURT: As of what date?

THE WITNESS: My knowledge goes back to 1918.

THE COURT: Yes, sir. Beginning in 1918, but when was --

THE WITNESS: You could walk on the beach.

THE COURT: -- was a boardwalk adjacent to this brick walkway shown in the picture constructed?

THE WITNESS: 1927.

THE COURT: In 1927.

MR. WORTHINGTON: I would like to add one more question if I may, since --

THE COURT: What type of walkway is that, sir? Was it a concrete walk?

THE WITNESS: At that time?

THE COURT: Yes, sir, 1927.

THE WITNESS: At 1927 they began to install concrete. They replaced the brick walk with concrete, which is presently there now.

THE COURT: No, my question is when was the first time that any walkway, any improvement for pedestrian traffic, such as a boardwalk of any kind or planks were put in place either to the north or the south of the Seaside Park brick walkway out in front there?

THE WITNESS: It was after '26. It was beginning with 1927 the City installed the concrete boardwalk.

THE COURT: That was the first time there had been any improvement out there?

THE WITNESS: Yes, sir.

BY MR. WORTHINGTON:

Q Now, Dr. Cooper, one more question. Referring again to Plaintiff's Exhibit 10 and the area to the right of the part that you have marked with the C bearing the legend Seaside Park, Virginia Beach, and showing a grassy area, according to your knowledge, has any of the grassy area been used as a public walkway at any time?

A It was not used. There were other things used by Seaside Park on that lawn during that time and pedestrians did not go there as a thoroughfare.

* * * * *

[TR. II, page 20 to page 22]

Q In your earlier testimony you mentioned some rides that have been installed in the grassy area?

A We have installed -- we installed a basketball court game, but no rides. We have never put -- there was rides there in early years, back -- not when I owned the park.

* * * * *

Q Now, in speaking -- answering Mr. Worthington just a few minutes ago you said that your knowledge of the reputation for public use went back how far? I didn't hear the answer, sir.

A It went back to the turn of the century, 1900. These two gentlemen I spoke of, Mr. Lawrence and Mr. Fass, were some years my senior. They are both deceased now. But we discussed Virginia Beach in general.

Q But, in other words, your testimony would be that the use began sometime around 1900?

A That's right, I mean as a thoroughfare.

Q Yes, sir.

A To their knowledge. It was always open as a thoroughfare.

Q Now, these games that you put on the grassy area after you bought the property, what sort of structures with respect to permanence were used by you?

A You mean -- the games that we constructed on the lawn were wooden structures.

Q Temporary in nature?

A No, permanent in nature.

Q With foundations?

A Of a character, yes. They had to have some support.

Q At the time --

A Excuse me. They must have had, because it was a permanent building. It was stands, and we had a built-up roof. You heard the roofer testify, if you recall, that they had a built-up roof.

Q I believe you bought the property about 1943, wasn't it, sir?

A That's right, '43 -- '42 - '43. We began operating in '43.

Q Were any representations as to ownership of that grassy strip made to you by the people that sold it to you?

A We understood at the time that we had riparian rights to the property.

Q I'm speaking of ownership of that grassy strip, Dr. Cooper.

A Well, we had down -- according to the representation, we had rights down to the water edge except where the boardwalk was established. But we are not claiming that now. We are not claiming the beach. We claim the lawn only. That was part of the representation to us.

* * * * *

STATEMENT OF APPELLEE'S COUNSEL

[TR. II, page 51]

THE COURT: Mr. Marshall?

MR. MARSHALL: I'm not aware of such an agreement, Your Honor.

THE COURT: It is an issue of fact. I think it is admissible, and the agreement will be marked Exhibit 1 and will be received in evidence.

* * * * *

EXCERPTS FROM THE TESTIMONY OF THE WITNESS D. COOPER

[TR. II, page 65 to page 66]

Q Dr. Cooper, would you state whether you have ever been contacted by anyone with the Virginia Beach Gas Corporation concerning installation of a gas line on the lawn area?

A I was contacted by Mr. Clark, who owned the Virginia Beach Gas Company. He had asked for permission -- up to this time we had been using bottle gas for our cooking facilities, and he asked us permission to put in the gas line with laterals going to our plant.

Q And about what time was that?

A Sometime in the early '50s.

Q Okay.

A If I recall.

Q Did Mr. -- Mr. Clark contacted you personally?

A He was referred to me by Mr. Greenspoon, my then associate.

Q Right.

A And Mr. Greenspoon told him to call me because I made the decisions concerning that. I told him it was all right, and gave him permission.

Q Permission to install the main and the laterals?

A Laterals.

Q Can you state whether or not any part of these gas lines was laid on property other than the lawn area?

A Yes.

Q In that vicinity?

A Yes. It came on the lawn area and then extended into our restaurants a distance of about, oh, seventy-five or a hundred feet from the installation on the lawn.

* * * * *

[TR. IV, page 122 to page 125]

Q In the spring of 1962 were you an officer in Seaside Park, Inc.?

A Yes, sir.

Q What was your office?

A President.

Q And were you an officer in Greenco Corporation?

A Yes, sir. I was president of that.

Q All right, sir. Would you state what, if anything, occurred to a band stand on the Seaside Park lawn area in the spring of 1962?

A Well, Seaside Park, Incorporated, rents the Seaside Park -- Seaside Park Amusement Park from Greenco Corporation, which owns the property. The Ash Wednesday storm of 1962 -- I think it was March -- washed out our stage.

Q All right, sir. Where was that stage located with respect to 31st Street?

A It was south -- on the lawn south of 31st Street.

Q Okay, sir. And I believe you testified that the Ash Wednesday storm --

A Washed it out.

Q -- destroyed -- washed it out?

A Yes, sir.

Q All right, sir. What steps, if any, did you take --

THE COURT: Just a minute. This refers to a stage. You say a bandstand. You say a bandstand.

THE WITNESS: It was a stage.

THE COURT: A stage?

THE WITNESS: Yes, sir. We gave our free act performances there and any other --

THE COURT: I just wanted to know the word "stage."

BY MR. TURNER:

Q Did you take steps to secure a building permit in order to reconstruct that stage?

A Yes, sir. I asked the city engineer -- I don't remember his name -- for a permit to rebuild it, and he at that time refused it. And subsequently we were tendered a meeting -- we were asked to attend a meeting of some members of council, not the full membership.

Q You mean the city council?

A City council. It was sort of a rump session. About three of the councilmen were there and Mr. Vakos was there.

Q Do you remember the approximate date of that session?

A It was shortly after the storm. Maybe within two weeks, because we were concerned about re-erecting the stage, because we had our acts booked for the coming season.

Q Right, sir. What occurred at this rump session you referred to?

A Well, they plied me with questions about how high the stage would be and construction of it and whether I would agree to remove it if they requested.

And of course being under pressure at the time and not owning Seaside Park, which I rented at that meeting, Seaside Park, Incorporated, which applied for the permit, said that it would remove it should the occasion require it.

Q But did that session which you attended take any action on your request?

A Did they take --

Q Did you get any ruling from them?

A They said they would give me a permit, and a permit was accordingly issued to me by the public works office.

* * * * *

Q Okay, sir. You may have observed on that exhibit, Defendant's Exhibit 4, a line for the signature of the president of Seaside Park, Inc. Did you ever sign --

A No, sir.

Q -- a copy of those minutes?

A I did not.

* * * * *

[TR: IV, page 126 to page 127]

Q Don't say what he told you. But your testimony is you did not sign --

A Did not sign any papers with the City.

Q -- that resolution.

Would you state whether or not you did rebuild --

A Yes, I did.

Q -- that stage?

A I was given a permit to rebuild.

Q And when did you rebuild?

A Immediately. Right within a few days after the session that I attended of the rump session.

Q All right, sir. And where did you rebuild?

A I rebuilt it south of 31st Street in the area where the original washed-out stage was.

Q I would like to refer you now to Plaintiff's Exhibit Number 21. I believe that's it. I believe you'll observe that it's a letter dated June 22, 1960, from Lance Underwood, whose letterhead indicates he is an attorney, to Mr. Roy Smith. It's been previously stipulated that Mr. Roy Smith was the city attorney of

the City of Virginia Beach at that time.

You will notice, Dr. Cooper, that the exhibit purports to be on behalf of both Seaside Park, Inc., and Greenco Corporation?

A Yes, sir, I noticed it.

Q My question is was that -- did Mr. Underwood represent you --

A Yes, sir.

Q -- in writing the letter?

A Represented both companies at that time.

Q And did you authorize the sending of that letter --

A Yes, I did.

Q -- to the City?

A Yes, sir.

* * * * *

[TR. IV, page 128 to page 129]

Q Then you did agree voluntarily? You said "pressure" there a minute ago. There was no pressure from the city council; you just wanted to have the stage rebuilt?

A Well, three men there let me know they weren't going to give me the permit unless I committed as a temporary location.

Q But you voluntarily agreed to remove the structure from this area?

A What would you have done if you had all your acts booked?

Q Allow me to ask the question, Dr. Cooper.

A I was under duress. I considered there was pressure at the time.

Q But you did it voluntarily?

A Verbally.

* * * * *

OBJECTION TO ADMISSIBILITY OF APPELLEE'S EXHIBIT

[TR. II, page 50 to page 51]

All right, sir. Your Honor, Defendant's Exhibit 1-a purports to be an agreement between the City and the Virginia Beach Gas Corporation relating to the use of the Virginia Beach Gas Corporation of the streets of the City for laying gas mains, and we submit at this time that there's no evidence that the City or the Virginia Beach Gas Company contemplated the laying of any gas mains in the --

THE COURT: Atlantic Boulevard.

MR. WORTHINGTON: -- strip which is -- in this portion of Atlantic Boulevard. I believe the evidence will be that they did lay some mains in the paper street to the north of us, but not in this area. So we object to the admissibility of any such agreement unless the mains were -- I may be mistaken. Maybe they did pass through this area.

THE COURT: Mr. Marshall, what's the situation?

MR. MARSHALL: Passed through the area is my understanding, Your Honor.

MR. WORTHINGTON: I'm mistaken in my representation of facts, and I apologize to the court. I believe that the gas mains were laid by the City of -- by Virginia Beach Gas Corporation, but they were put in the grass area that is --

THE COURT: Outside the area you claim?

MR. WORTHINGTON: No, they were put -- the portion of it went through the strip in controversy in this case was done with the permission of the representatives of Greenco Company rather than in reliance on this agreement.

* * * * *

EXCERPTS FROM THE TESTIMONY OF THE WITNESS W. R. BENKERT

[TR. II, page 52 to page 58]

Q Will you state your name and occupation, please, sir?

A I'm a -- my name is William Roy Benkert; I am a foreman of gas construction for VEPCO.

Q Going back to the period of 1946, by whom were you employed at that time?

A Virginia Beach Gas Corporation.

Q And what was your capacity with them at that time?

A Supervisor. Construction supervisor.

Q Did you participate in the laying of any gas mains in the area known as Ocean Avenue or the boardwalk area?

A We started laying gas mains in the boardwalk area in 1947, May.

Q Now, I'll refer you to one of the plaintiff's exhibits -- I think this one will do it here, sir.

MR. MARSHALL: Is this your Exhibit 1?

MR. WORTHINGTON: I think it is.

MR. TURNER: Yes.

BY MR. MARSHALL:

Q I refer you to Plaintiff's Exhibit 1 and you will see an area marked in red which lies to the east of block 74, and I ask you were any gas mains laid in that area?

A Not in 1947.

Q Were they laid there at any other time?

A That section there was put in there about 1955.

Q Were you then at that time superintendent of construction, again?

A (Indicated yes)

Q Can you --

THE COURT: What was the answer?

A Yes, sir.

BY MR. MARSHALL:

Q With respect to the western edge of the boardwalk, what is the location of the gas main, if you know?

A That section there it is thirty-nine feet west of the west curbline of the boardwalk.

Q At the time you laid the gas main in that particular area did you request permission from anyone to lay it there?

A I couldn't tell you on that. That was under Mr. Marshall, president of the company.

Q Is that gas main still there, or do you --

A Yes, sir.

Q Mr. Benkert, how long have you lived in the Virginia Beach area?

A Since 1921.

Q How old are you now, sir, if I may ask?

A Fifty-four.

Q Mr. Benkert, I show you Defendant's Exhibit No. 1. Is the company named in this exhibit the company for which you work?

MR. TURNER: Excuse me. Which exhibit is that, please, sir?

MR. MARSHALL: That's Defendant's Exhibit No. 1.

A I did work for the Virginia Beach Gas Corporation, if that's what you are asking.

BY MR. MARSHALL:

Q I mean you were working for that company --

A At that time.

Q -- from 1946 until 1954?

A Until the last year, when they sold out.

MR. MARSHALL: I believe you stipulated, Mr. Worthington, that Virginia Beach Gas was a public utility company licensed by the State Corporation Commission?

MR. WORTHINGTON: Right. We'll stipulate that.

MR. MARSHALL: I have no further questions of Mr. Benkert.

MR. TURNER: May I have just a moment, Your Honor?

MR. MARSHALL: Excuse me. I have one more question, if you don't mind, I would like to ask.

MR. TURNER: Sure.

BY MR. MARSHALL:

Q Mr. Benkert, did you participate in the laying of most of the gas lines of the company?

A Yes, sir, I was in charge of laying them all.

Q In your layouts of gas lines did you use private easements or did you follow streets?

MR. TURNER: Objection, Your Honor. I'm not sure that this gentleman's in position to know. I understand he was the construction supervisor of the company. In addition, Your Honor, I think it is a statement of a legal conclusion whether they were private easements or public franchise.

THE COURT: Do you know where the mains were laid for the most part?

THE WITNESS: Most of them in the streets.

THE COURT: And there were others laid?

THE WITNESS: We had a few easements.

THE COURT: Had a few easements.

MR. MARSHALL: Just for the record --

THE COURT: Do you know whether or not you had any other authority other than the contract which has been introduced as Defendant's Exhibit 1 for the purpose of laying the gas line in the area here in controversy?

THE WITNESS: No, sir.

THE COURT: You did or did not?

THE WITNESS: Did not.

THE COURT: To your knowledge?

THE WITNESS: To my knowledge.

THE COURT: Do you know whether you had any easement or any other authority other than that contract between the Virginia Beach Gas Corporation and the City?

THE WITNESS: Not that I know of, sir.

MR. MARSHALL: I think the court's asked the question that I was going to ask, Your Honor. I have no further questions.

CROSS-EXAMINATION

BY MR. TURNER:

Q Sir, were you an officer of Virginia Beach Gas Corporation?

A (Indicated no)

Q Were you a shareholder in Virginia Beach Gas Corporation?

A No, sir.

Q Were you a director of Virginia Beach Gas Corporation?

A No, sir.

Q Was it any part of your job to negotiate easements?

A No, sir.

Q All right, sir. And isn't it true that Virginia Beach Gas Corporation was a private company as opposed to a department in the City of Virginia Beach?

A It was stockholders owned it.

* * * * *

EXCERPTS FROM THE TESTIMONY OF THE WITNESS W. T. CLARK

[TR. II, page 71 to page 76]

Q Mr. Clark, referring to the period from 1946 to October of 1969, with what company were you affiliated?

A Virginia Beach Gas Company.

Q In what capacity did you serve in that company, sir?

A Well, originally I was vice president and then I was later president of the company.

Q In your capacity as a corporation officer did you have any knowledge of the manner in which permission to lay gas lines was obtained?

A Yes, sir. I supervised most of that.

Q Now, with respect to a particular piece of property -- and I don't know whether you can see this well enough, sir, or not. I refer to Plaintiff's Exhibit 1, and this is 31st Street and this is the area where the boardwalk is located.

A Is this the oceanfront here?

Q Yes, sir, here is the ocean out here. And this area in red. Do you recall the gas line being laid by your company in the area outlined in red?

A Well, Mr. Marshall, there's a two-inch line laid from 7th Street all the way up to 45th Street. At 34th Street we broke and came back on Atlantic Avenue.

Q Yes, sir.

A And this piece of property had to be passed in order for us to do it.

Q Now, how did you get permission to lay the line in that particular area?

A Well, we had a franchise from the City to lay the lines in the public streets.

Q Yes, sir.

A And we were -- we had been advised that --

MR. WORTHINGTON: Now, Your Honor, we object to his saying any hearsay as to how he had been advised unless there was some official action connected with this advice. I think we got to know -- it is hearsay otherwise.

THE COURT: Sustain the objection.

A Well, the line was laid and the only property that we came across that they claim that there were any riparian rights was at 25th Street where the Princess Anne Inn is today. They claimed the riparian rights, but it was later shown that they did not have riparian rights.

MR. WORTHINGTON: Now, Your Honor, we object to any line of testimony about other pieces of property than the property in issue.

He was brought here at the request of the court to testify as to whether he had a phone conversation or other communication with Mr. Dudley Cooper.

THE COURT: I think we can get to the point.

Mr. Clark, do you recall having any conversation with Dr. Dudley Cooper with reference to laying the main?

THE WITNESS: I talked with Mr. Jack Greenspoon.

THE COURT: Did you talk to Dr. Dudley Cooper to your recollection?

THE WITNESS: Not that I can recollect, no, sir. It would have been quite sometime ago, you know.

THE COURT: Did you obtain any permission from Mr. --

THE WITNESS: Greenspoon?

THE COURT: -- Greenspoon?

THE WITNESS: Yes, sir.

THE COURT: To go across his property?

THE WITNESS: Yes, sir.

THE COURT: Was that for the main?

THE WITNESS: Yes, sir. We also got permission to run gas in the property there for his various requirements on the property, for his restaurants and hot dog stands and things of that sort.

THE COURT: Why was it necessary for you to obtain permission to take the -- put the main across?

MR. WORTHINGTON: Now, Your Honor, we object to the evidence along this line as being irrelevant, and we also submit that this is an adversary proceeding, and we think that the city attorney is the proper one to question the witness. We do not consent to his being the court's witness.

THE COURT: The court called him.

MR. WORTHINGTON: All right, sir. Well, we save the point.

THE COURT: All right, sir.

THE WITNESS: Well, it's been quite some time ago and I just don't recall just what the proceedings were. But we obtained permission to go across there.

THE COURT: And this is with the main?

THE WITNESS: Yes, sir, that's right. Now, that was either in 1948 or sometime -- some date like that. And that's been some twenty-two years ago now.

The only other time we ever asked Dr. Cooper to do anything was to allow us to run a three-quarter-inch main to service the Forbes Candies right across the street from the Ocean Ranch, and we agreed to --

THE COURT: Well, I don't think that's in issue here.

Where was this main laid in the area that we are talking about, namely, just north of 31st Street?

THE WITNESS: Well, it was laid on the ocean side at what we thought or considered seven feet off of the property line. That was the requirement, that was our set schedule for the full length of the boardwalk, seven feet off the existing property line.

* * * * *

THE COURT: When you say seven feet off the property line, what property line are you speaking of?

* * * * *

[TR. II, page 77 to page 79]

THE WITNESS: We made it a point to locate the property line along that boardwalk, and after we located those property lines we came seven feet off of that property line so if anything -- any of the owners of the property needed to put a sidewalk or anything of that sort on it the gas line would not be under it. And that's the existence -- that's the way the whole thing exists from 7th Street all the way up to 34th Street.

As far as -- as well as I can recall -- I can't recall too vividly just what happened. But I remember having a conversation with Mr. Greenspoon and he came back and said, all right, let's go ahead, because there was some question about the riparian rights in there if I remember. I just can't remember too well. It's been of twenty-two years standing now, so --

THE COURT: The property line that you speak of, how was it established? By reference to what?

THE WITNESS: By survey pins of people whose property had been surveyed and they had the property stakes out at the various --

THE COURT: But you didn't conduct any independent survey?

THE WITNESS: No, sir.

* * * * *

Q Mr. Clark, in cases where you were going across private property what was your -- was it your practice to do it in writing, get permission in writing?

A If we got an easement to go across that was in writing.

MR. MARSHALL: I have no further questions.

A That was -- that was what I was referring to when I said about running the service line to Charlie Forbes's across the doctor's property on the west side of Atlantic Avenue. And we agreed with anybody that we asked for the easement that we would remove it at any time that they needed it to be removed.

THE COURT: Mr. Clark, did you have a written easement agreement with Mr. Greenspoon or Dr. Cooper's company?

THE WITNESS: No, sir.

THE COURT: About the main I am talking about.

THE WITNESS: No, sir, we didn't have it.

* * * * *

[TR. II, page 83 to page 84]

THE COURT: An exception will be made to reopening the evidence, but there was one question I wanted to ask you. You have testified that your memory is not too clear about exactly what the situation was. Do you remember whether or not this pipeline was run under any existing structure? The main line I am talking about along there.

MR. CLARK: No, sir.

THE COURT: It was outside of a main structure?

MR. CLARK: The only thing we went under was the walks that went down to the boardwalk.

THE COURT: All right, sir.

MR. CLARK: I don't recall any other structures that we had to go through.

* * * * *

[TR. II, page 80 to page 81]

THE COURT: If not, by following suggestion of counsel, which the court is in complete accord with, I would suggest you submit briefs on the issue whether or not there has been an acceptance by Virginia Beach of the street which is referred to on the plat as Atlantic Boulevard, I believe --

MR. WORTHINGTON: Boulevard, right.

THE COURT: -- by any of the methods which are recognized by the law. I guess -- are we agreed that that is the issue that is here or not? Maybe --

MR. WORTHINGTON: I don't think there is any other.

THE COURT: Maybe I am trying to oversimplify it.

MR. WORTHINGTON: We don't think there is any other issue in the case, Your Honor, on behalf of the plaintiff.

THE COURT: Mr. Marshall, any other facets of the issue other than the one mentioned by the court?

MR. MARSHALL: Why, I think the other facet would be the question of whether there's a partial -- whether a partial dedication or

acceptance can exist.

THE COURT: This is part of the general question whether there's an acceptance of the whole.

* * * * *

STATEMENT OF COUNSEL FOR APPELLANT
AND OBJECTIONS TO APPELLEE'S EXHIBITS

[TR. III, page 6 to page 11]

MR. WORTHINGTON: Your Honor, as a preliminary matter we would like to state for the record, inasmuch as there was no court stenographer present at the May 27, 1971, hearing, our objection to the reopening of the case at this time.

THE COURT: The order that was entered by the court specifically says that -- notes the exception or the objection of the plaintiff to it.

MR. WORTHINGTON: I would like to state very briefly my reasons so we may not have waived any reasons we submitted to the court.

THE COURT: Yes.

MR. WORTHINGTON: As we see it, this action was instituted in suit in January 1970; that the first day of trial of it took place on May 21, 1970; the second trial, a year less one day from today, which was July 16, 1970; that briefs were submitted after the closing of the evidence in September and October of 1970; that oral argument of the case took place on December 17, 1970, at which time it was submitted

to the court for decision; that subsequently the court asked for a view of the premises, which took place in March of 1970.

MR. TURNER: '71.

MR. WORTHINGTON: 1971, correction, and that not until May of 1971, which was almost a year after the evidence had been completed did the City ask for permission to put on evidence of a nature which is not in the category of newly discovered evidence, and which in the main is objectionable per se as not being admissible, and that there is an attempt in this evidence to relitigate a matter which was previously the subject of litigation between the parties involving an adjoining piece of land which was settled by compromise, as we expect to show. So those are our objections to the hearing at all.

Now, then, by way of opening statement, in taking the evidence which the City proposes to introduce, I would suggest to the court that the council minutes of 1962 are inadmissible by reason of the fact that a controversy over this land existed between the City and Seaside Park, Incorporated, and Greenco Corporation,

both of which at that time the principal stockholder was Dr. Dudley Cooper, and on June 21, 1960, counsel for Seaside Park, Incorporated, and Greenco Corporation wrote the city attorney of Virginia Beach, Virginia, reciting a previous telephone conversation and saying in the second paragraph: On behalf of Dudley Cooper, one of the principals of the subject corporation, operating Seaside Park Casino at Virginia Beach, Virginia, and without prejudice to the rights of any parties involved, including the City of Virginia Beach, I wish to advise that it is not the desire of my clients to litigate the rights of any party in and to Atlantic Boulevard at this time. So that in June of 1960 we have a statement from the plaintiff's counsel that there is a controversy with the City, but that there would -- that the matter would not be litigated at that time. It has subsequently been litigated by this litigation and a prior piece of litigation as to two of the parcels involved in the recital of plaintiff's counsel at that time. And he expressly put the City on notice that dealings from that moment forward with reference to Atlantic Boulevard were without

prejudice, and we expect that there would be no evidence to show that what took place in 1962 was anything but "without prejudice," and the City was on notice so that anything that the City tries to show by way of a recognition of ownership by the plaintiff or an acceptance by council action less than two years later would be inadmissible as violative of the agreement that existed between them that they were dealing with this property without prejudice, and we would object to the hearing and the admission of that evidence on that grounds.

Now, such evidence as the City may have about VEPCO placing power lines in the street we would object to, because it is in violation of the interrogatories and answers thereto, which we filed, and the City has already gone into this matter as within the purview of its answers.

Now, the interrogatory which we asked which deals with this particular subject is interrogatory number 6: State what actions, if any, the City or its governmental predecessors has ever taken to maintain or preserve said parcel? Meaning the parcel in issue. And the

answer to interrogatory 6 was: The City has constructed concrete bulkheads to protect from erosion and storm damage and has constructed a walkway known as the Boardwalk in a portion of the dedicated right-of-way.

Now, Your Honor will recall that we made no objection to any evidence about the City having improved the boardwalk, which took place sometime in the twenties, so that the answer which they gave to interrogatory 6 was met by some proof at the trial, as to which we made no objection.

Now, question 7, which relates back -- refers back to question 6, says: If not supplied in answer to the preceding interrogatory state what action, if any, the City or its governmental predecessors has taken since July 25, 1900, in the exercise of dominion or control over said parcel. And the answer to that interrogatory was: The City or its governmental predecessor has granted a franchise for gas transmission lines and has installed underground utilities in said parcel.

Now, Your Honor will recall that the City or the court brought here a witness, Wallace Clarke, who testified about the installation of

gas transmission lines in this parcel, and I think Your Honor will recall that he testified that he got permission from Dr. Cooper before he put them on this parcel. The City now proposes to show not that it put underground utilities other than gas transmission lines under the ground, but that some third party, Virginia Electric and Power Company, did.

Now, we asked them particularly what their proof would be on that so that we could prepare for it, and they gave us an answer and we submit that under the rules of procedure of this court that they should not be allowed to go into a question of what some third party did when they had said that the only proof they had in that realm was the gas company and something the City itself had done and not the power company.

* * * * *

COLLOQUY BETWEEN COURT AND COUNSEL

[TR. III, page 12 to page 15]

With reference to the grounds stated by counsel for objecting to the reopening of the evidence, the court remarked when the motion was heard on May 27th, that this is not a motion to reopen the case and hear additional evidence after the matter has been litigated and a final judgment and decree of the court entered. This matter is still in the -- under consideration by the court, and the court's understanding is that this is entirely discretionary with the court to the end that full justice might be done under all of the circumstances of the case as a matter of utmost importance to the parties involved here, and it is the feeling of the court that we should have all of the facts that are available. And it is on that basis that the court took favorable action on the motion to hear further evidence.

Now, as to -- I might add, this is not an attempt to relitigate any matter which has been adjudicated on the ground of after-

discovered evidence. This is not a relitigation, because litigation had never been completed by final judgment decree from which either party could appeal.

As to the objections to the admission of evidence as to the right-of-way maintained by VEPCO over the property in dispute here, this was anticipated by the court at the time the motion to reopen was granted, and the court specifically instructed counsel for the City to inform counsel for the complainants in this case that as to just exactly what new evidence would be sought to be entered, and that in order that the defendant -- pardon me, the complainant would not be caught unapprised and would have an opportunity to rebut and refute any such evidence. And this is in the nature of an additional bill of particulars, so to speak, so I don't think any party is caught by surprise, and of course feel very strongly in all cases as a matter of policy and function of the court that all matters should be adjudicated on the basis of the merits and that technicalities should not preclude the admissibility of any evidence which would enlighten the factual situation.

As to the objection to the admission of the minutes of the council meeting, Mr. Bimson said something about stipulating that the -- a stipulation that these were minutes of the council without proving this by --

MR. BIMSON: I believe counsel agreed to that.

THE COURT: -- by whoever the city clerk was at the time.

MR. WORTHINGTON: We stipulate the authenticity of the document.

* * * * *

OBJECTIONS TO APPELLEE'S EXHIBITS

[TR. III, page 18 to page 20]

MR. BIMSON: Letter from Mr. Joel B. Cooper to Mr. George Vakos, then city attorney, dated April 3, 1962.

MR. WORTHINGTON: Your Honor, we object to that and we will state all the objections along at the same time. But this is before the resolution of the council, and if the resolution of the council is admissible at all, it is admissible as a document which is an entire agreement as such between the parties relating to this, and therefore any prior evidence, in writing or otherwise, would be inadmissible under the parol evidence rule. And we have other objections to the whole bit of this evidence which we would be glad to state if Your Honor would care to hear us.

THE COURT: All right, sir.

MR. WORTHINGTON: All right, sir. We repeat our objection that this action taken by the council was taken within a reasonably short time relating to the same matter as to which plaintiff's counsel had put the City on notice that anything done with reference to this property was without prejudice, and --

THE COURT: What is the date of the

letter?

MR. WORTHINGTON: The date of that letter is June 21, 1960, and it relates to a platform, which is exactly what this matter relates to, an outdoor platform.

THE COURT: Would you give me that date? June what?

MR. WORTHINGTON: June 21, 1960.

THE COURT: 1960?

MR. WORTHINGTON: Yes, sir. And it recites further on in the letter, which Your Honor probably should see, that there had been a course of dealing about this in the past and implies that this would be the course of dealing but it would be without prejudice, and concludes in the next to last paragraph saying: Therefore, since we on behalf of our clients do not wish to contest the legality of the rights of anyone in and to Atlantic Boulevard at this time request that the City officials grant special permission to our clients to continue using an area adjacent to Seaside Park Casino, as has been used in past years.

So it expressly twice says that this is not any settlement of the ownership but is

merely a temporarily convenient method of continuing.

Now, the City comes along and attempts, by an action taken with reference to this very same subject matter less than two years later, to prejudice the rights after they have been put on notice of no prejudice. And we submit that parties can't negotiate with each other that way about a dispute. If we are going to say no prejudice and then it is used against them to their prejudice relating to the same subject matter a relatively short time thereafter --

THE COURT: Well, I think that your argument though is not to the admissibility of these documents so much as to the weight and the interpretation which might be placed upon them, and the court is of the opinion that they should be admitted in evidence.

MR. WORTHINGTON: All right, sir.

THE COURT: And whatever exceptions may be noted -- you wish to note will be.

* * * * *

[TR.III, page 22]

MR. WORTHINGTON: That letter, then, Your Honor, would be Plaintiff's Exhibit 21.

THE COURT: Complainant's Exhibit 21. This is a letter addressed to Mr. Roy Smith, attorney at law, and I think we can stipulate at the time he was probably attorney for the City of Virginia Beach.

MR. WORTHINGTON: He was city attorney at that time. I think you will stipulate.

MR. BIMSON: Yes, we will stipulate.

* * * * *

OBJECTIONS TO APPELLEE'S EXHIBIT

[TR. III, page 26 to page 30]

But there are other reasons, Your Honor, why this evidence is not admissible, and that is that all of these documents introduced by the City relate to a different piece of land from that in issue here before the court. The property in issue -- that property was brought in issue in the first case, which was brought in 1967. The present case was not brought until 1970, and it involves land lying south of 31st Street in the lawn area. The case at bar involves land lying north of 31st Street, so that the only probative effect of the evidence that the city council in 1962 gave one of these corporations permission to use that land and erect a structure on it would be as to land which is not involved in this case, and it is therefore not material, because that land is not in issue here, and the only legal basis on which it would have any relevancy is that if Your Honor accepts that evidence as showing that the City fifty-five years after the plat was recorded accepted dedication to this land south of 31st Street --

now, you will recall that the plat, as my memory serves me, upon which the City relies was recorded in 1907. The first official action they have as to anything in the lawn area, according to this document now tendered, occurred fifty-five years later in 1962, and relates to a part of the lawn area which is not in issue in the case at bar.

Now, the doctrine of May against Whitlow, which the plaintiff has relied on in this case, and frankly, the doctrine on which the plaintiff must either stand or fall, says that an acceptance of part of a dedication is not acceptance of the balance, so that to admit this evidence that they had accepted land in the lawn area south of 31st Street under the doctrine of May against Whitlow is irrelevant, is immaterial, because it does not show acceptance of the piece that we are dealing with here. And therefore the evidence dealing with separate land in the lawn area is inadmissible for that additional ground.

Further, the documents tendered today were owned by a different applicant. Now, I want to be clear to the court that the difference in ownership is a technical difference, but it is still a different owner, so that they are

trying to show against a different owner an act of acceptance by the City and admission by the owner of the City's ownership. The owner in the documents that are attempted to be introduced today is Seaside Park, which is a lessee and held a leasehold interest in this property and applied to the City we say without prejudice, and the owner of the reversion was at that time Greenco, which is the plaintiff here, so that whatever Seaside Park as lessee did would not be in any way binding on Greenco, the reversionary owner.

Now, I think it is also fair to say to the court that Seaside Park as owner of the leasehold estate was also owned by the same stockholders as the owner of the reversionary interest, so that our argument about separate ownership is technical to that extent, that there were two different corporations. We call this to Your Honor's attention as additional reason why this evidence should not be admitted, and if admitted, should not be given any weight.

Another item that we suggest makes it inadmissible is that the parcel that these documents tendered today relate to being south

of 31st Street comes from a different chain or title from the -- than the property which is in issue in the case at bar.

We also submit to the court that the City ought not to be allowed to introduce this evidence, because at an earlier stage of this trial a similar type of evidence was offered and withdrawn. We objected and the court asked that the matter be briefed and the City said, well, we won't go into this type of other property. It related to the same property south of 31st Street, and they withdrew the offer. And we submit that under the doctrine of Gray Street Arcade against Birsch that they are taking an inconsistent position, having said in an earlier stage of the trial that this did not bear on this case and they didn't rely on it, then they come back a year later and say, oh, yes, we do want to show something about this land south of 31st Street.

And the last ground of objections as to the particular document which are the council minutes of April 30, '62, which I believe is Defendant's Exhibit Ho. 2. We say that under the point raised by the court that the resolution is

operative only when signed and accepted by Seaside Park, which event, under the evidence as we expect it to be, never took place, it was never signed and accepted by Seaside Park, so it is inadmissible on those grounds.

I'm sorry. That's Defendant's 4, Your Honor.

* * * * *

EXCERPTS FROM THE TESTIMONY OF THE WITNESS CHARLES KILEY

[TR. III, page 46]

Q State your name and occupation for the court?

A Charles Kiley. I work the department of community services, City of Virginia Beach.

Q What was your position in 1962, Mr. Kiley?

A City engineer, City of Virginia Beach.

[TR. III, page 47]

Q I call your attention to the boardwalk located within the city of Virginia Beach. Do you have knowledge of any location of utility easements in the area east of the constructed boardwalk, Mr. Kiley?

MR. WORTHINGTON: Now, Your Honor -- east of the boardwalk. I'm sorry.

BY MR. BIMSON:

Q Beg your pardon, west of the boardwalk.

MR. WORTHINGTON: We object, Your Honor, and call for the best evidence.

A Yes, I do.

* * * * *

[TR. III, page 48]

Q I call your attention to this plat, Mr. Kiley, which I believe is from your files.

A VEPCO file.

Q VEPCO files?

A Right.

Q Can you locate --

THE COURT: Whose files?

THE WITNESS: VEPCO.

MR. WORTHINGTON: Now, Your Honor, we object to that. They are not his files.

THE COURT: Are they recorded in the clerk's office of this court?

* * * * *

COLLOQUY BETWEEN COURT AND COUNSEL

[TR. III, page 49 to page 52]

MR. BIMSON: Your Honor, there is nothing of record. The City's position is that these lines were installed pursuant to the franchise agreement granted to the Virginia Electric and Power by the City, a second-class city, and by the first-class city of Virginia Beach, and the purpose of having the witnesses testify is to locate the lines within the franchise agreement within the dedicated streets which have been presented by prior evidence.

THE COURT: And there is no --

MR. BIMSON: Recordation.

THE COURT: There's no recorded deed of easement or --

MR. BIMSON: No, sir, no more than the --

THE COURT: Plat.

MR. BIMSON: -- rights of the municipalities to grant franchises to public utility corporations, which VEPCO is qualified. And the purpose of any testimony as to the place where the lines were placed within the dedicated street --

THE COURT: And who granted this right?

MR. BIMSON: The City of Virginia Beach.

THE COURT: In what manner?

MR. BIMSON: By passage of an ordinance.

THE COURT: Do you have a copy of the ordinance?

MR. BIMSON: Yes, sir. I have a copy of the ordinance of the first-class city -- Mr. Worthington hasn't seen it -- which is dated --

MR. WORTHINGTON: This is just generally the streets and alleys and so forth?

MR. BIMSON: Right. It is dated May 27, 1963. That's when it was approved prior to becoming a first-class city.

MR. WORTHINGTON: Your Honor, I think we could stipulate the content of that rather than put him to the trouble of putting it in. But we object to the admissibility of it. I think Mr. Bimson would agree this is an ordinance granting a general franchise to the power company to use the streets and alleys wherever they may be in the City to lay its lines, and we will stipulate the authenticity and existence of such an ordinance, but submit its immateriality to this controversy.

THE COURT: All right, sir. Give me the ordinance of the City -- passed when?

MR. BIMSON: Yes, sir. May 27, 1963.

MR. WORTHINGTON: Well, Your Honor, we would also have the additional objection, of course, that this happened after we had put the City on notice that anything done would be without prejudice.

THE COURT: All right. Passed May 27, '63, granting Virginia Electric and Power Company --

MR. BIMSON: Yes, sir.

THE COURT: -- right to use the streets of the City.

MR. BIMSON: Yes, sir.

THE COURT: For installation --

MR. BIMSON: -- of their lines.

THE COURT: What type of lines?

MR. BIMSON: Power lines and transmission lines.

MR. WORTHINGTON: And this ordinance did not specify any specific streets or any specific alleys?

MR. BIMSON: No.

MR. WORTHINGTON: Right. I think the pertinent language says streets, alleys, and other public places of the City of Virginia Beach.

THE COURT: All right, sir. The ordinance is stipulated.

MR. WORTHINGTON: And we object to the admissibility of it for the grounds previously stated.

THE COURT: All right, sir. Its authenticity is stipulated.

MR. WORTHINGTON: Authenticity stipulated.

* * * * *

EXCERPTS FROM THE TESTIMONY OF THE WITNESS M. S. GRAY

[TR. IV, page 9 to page 10]

Q I see. And you are employed by whom, sir?

A Virginia Electric and Power Company.

Q And how long have you been so employed?

A Twenty-five years.

Q What is your position with Vepco at this particular time?

A Line foreman.

* * * * *

Q Mr. Gray, I show you this exhibit just presented to opposing counsel. Can you identify it for me at this particular time?

A This is a copy of an estimated job that was given to me in '62, 8th month of '62. After the boardwalk or that section had washed out we replaced the cables and light fixtures behind the boardwalk.

Q This was after the so-called March storm?

A Yes, sir.

THE COURT: March of what year?

THE WITNESS: '62.

THE COURT: '62?

THE WITNESS: Yes, sir.

BY MR. BIMSON:

Q Where is this particular document filed, Mr. Gray?

A A copy is filed in our office and also the permanent copy is filed in Richmond.

Q In your office here at Virginia Beach?

A Yes, sir. Our records department.

Q What is the purpose of this particular exhibit as far as your company is concerned?

A It is drawn to give us an estimated cost and also layout as to where we'd have to locate and position cables and poles.

* * * * *

[TR. IV, page 15 to page 18-A]

Q Mr. Gray, taking you back, you say this is on record with your office here and with your office in Richmond, the permanent copy?

A Yes, sir.

Q Is that true, sir?

Can you tell the court what is done with this particular exhibit as far as the -- in its relation to the City of Virginia Beach?

A Well, the City initiated the first request for the company to install lights or replacement lights.

MR. TURNER: Judge, I object to this as hearsay.

THE COURT: How do you know this, Mr. Gray?

THE WITNESS: This is a matter of procedure and company policy. We only install lights at the City's request and their location. They point out the location. Our engineering department draws plats designating what lines we have to have to feed these lights. The City approves the plats and returns it to us and we proceed with the job.

THE COURT: That's the procedure?

THE WITNESS: Yes.

THE COURT: Do you know that's what was done in this particular case?

THE WITNESS: Yes, sir. This particular case had quite a lot of washout around the March storm.

MR. TURNER: Does he have personal knowledge of that?

THE COURT: Objection overruled.

MR. TURNER: Save the point.

BY MR. BIMSON:

Q You have personal knowledge as to -- do you have personal knowledge, Mr. Gray, that this particular plat in question was submitted to the City of Virginia Beach? And to whom was it submitted, if so?

A The person it was submitted to, it would be through the engineering --

Q Yes, sir.

A City of Virginia Beach engineering.

Q Do you remember who that particular person was at the time?

A Mr. Charlie Kiley was in charge of the engineering at that time.

MR. BIMSON: The City would move that this be admitted as an exhibit at this time, your honor.

THE COURT: Who prepared this? Is it a plat or a plan?

THE WITNESS: It is a plat drawn by our engineering department, and then it is approved through various departments and is returned to the construction department. I know this is the plat because at that time I made notes on it as

I was in charge of the construction, and my notes are here and initialled. I made those notes at that time.

THE COURT: All right, sir.

BY MR. BIMSON:

Q Those are your initials on the particular plat?

A Yes, sir.

THE COURT: You wish to tender the plat in evidence at this time, Mr. Bimson?

MR. BIMSON: Yes, sir.

THE COURT: Any objection?

MR. TURNER: Yes, sir, we do object to the introduction of this for the reasons stated in objection to this testimony: It is a plat prepared by a private company and this has no relevancy to the facts of this case.

We have one other objection we would like to state in the record, your honor. This insofar as the City is trying to introduce it to show some act of acceptance on its part is in violation of this 1960 exhibit which is -- or this 1960 letter, which is Plaintiff's Exhibit 21, which

stated that any further dealings between the City and the corporation that's mentioned in that letter would be without prejudice.

THE COURT: Well, I think that your objection is more properly addressed to the weight to be given to the exhibit as evidence than as to its admissibility. I think it is material and relevant to the issue. It will be received in evidence, and your objection will be noted.

MR. TURNER: All right, sir.

THE COURT: This will be Defendant's Exhibit 5.

MR. BIMSON: I believe that would be 6, your honor, if we are following the numbering --

THE COURT: Yes, sir. I'm sorry. I looked at my notes and I did not look at the record. 6, excuse me. It will be received in evidence and marked Defendant's Exhibit 6.

(So marked by the court.)

BY MR. BIMSON:

Q Now, Mr. Gray, I call your attention back to the exhibit which has been introduced into evidence. Can you pinpoint or identify where 31st Street would be on that particular exhibit?

A Right here in this position here, 31st. Here is 30th Street, and this would be -- 31st would come in here about the middle of the page. There's no actual 31st Street --

MR. TURNER: Right.

A -- there, but -- on the ocean front. But this is 30th and this is 33rd.

BY MR. BIMSON:

Q Right. Can you give us a close proximity where 31st Street would be?

A Yes, sir. It would be midway.

Q Would you mark that particular point at --

* * * * *

[TR. IV, page 26 to page 28]

Q Mr. Gray, are you familiar with the property in question in being that of the -- in dispute here today, that of the property in front of what is now Seaside Park, which is north of 31st Street?

A You mean do I have familiarity?

Q Have personal knowledge?

A Yes, sir.

Q Have you been on the premises?

A Yes, sir, many times.

Q All right, sir. Could you from that plat indicate the lawn areas that are in close proximity to that property?

A The lawn areas?

Q Yes, sir, which is west of the boardwalk.

A The lawn area extends from the curbing of the boardwalk back to the structures -- building structures of Seaside Park quite a distance from the curb area, the grass part.

Q Can you pinpoint on there the structures, the poles, or the easements where these poles of Vepco's are located?

A Yes, sir.

Q Would you do that for the court, please?

A They are indicated here by round circle and the --

Q Now, I'm talking about in front of the property in question.

A Yes, sir. From this street here it begins, and the property in question would be this light, these lights in particular here.

Q I see.

A Then from --

MR. BIMSON: I would like the record to indicate that he has pointed out four such poles as indicated on the property in question.

THE WITNESS: I believe it is.

MR. TURNER: Could we let the record be clear that by "property in question" he means the lawn area?

* * * * *

[TR. IV, page 31 to page 34]

Q Mr. Gray, you have taken us back as far as '62, as far as the March storm goes --

A Yes, sir.

Q -- as to the existence of the lines being installed in this particular area. Is that correct, sir?

A Yes, sir.

* * * * *

Q Mr. Gray, do you have personal knowledge of your company, Vepco, doing work in this particular area in question prior to 1962?

MR. TURNER: Your honor, the same objection.

THE COURT: Overruled.

MR. TURNER: Could I state it for the record, sir, please?

THE COURT: Yes, sir.

MR. TURNER: If a private company goes on a man's property and does some work, that has no relevancy as to whether or not a muncipality has an easement over it. And that's essentially what he's been asked to testify to. He says my private company went in here -- I assume that's what he is going to bring out.

MR. BIMSON: No, sir, that's not --

MR. TURNER: Excuse me.

MR. BIMSON: No, sir, I must disagree. I don't think that's the particular law.

MR. TURNER: That's the grounds of my objection to this man.

THE COURT: Objection overruled.

BY MR. BIMSON:

Q Would you answer the question, Mr. Gray, or would you like it read back to you?

A Yes, sir. Many times we have been on the property in front in question and have replaced, relocated, or repaired cables that were installed there. Prior to '62 --

Q Yes, sir.

A -- these lights --

THE COURT: Mr. Gray, would you be more specific?

BY MR. BIMSON:

Q What type of work have you done in this particular area?

THE COURT: What have you done? I think the question was, prior to 1962?

THE WITNESS: Yes, sir.

THE COURT: Is that what your answer refers to?

A 1948 or '49 we changed the street light brackets or fixtures from the low brackets to the high brackets on thirty-foot poles.

BY MR. BIMSON:

Q What was in there prior to that?

A Low eighteen-foot concrete poles.

Q So you installed new poles --

A Yes, sir.

Q -- up to thirty-foot?

A Yes.

Q And put new brackets on the lights?

A Yes.

Q Was this within this area that you identified as ten foot west of the curb line of the boardwalk?

A This ten foot that I spoke of --

Q Yes, sir.

A -- was only designated to clear us or keep us from other utilities or other things in the area.

Q Yes, sir. But the question was the work that you did, the installation of the poles, was that within the ten foot that you identified?

A Yes, to the best of my knowledge.

Q To your knowledge, Mr. Gray, did anyone ever object to you doing this particular work?

A No, sir.

Q No one stated you had no authority or no right to be on the premises?

* * * * *

A No, sir.

BY MR. BIMSON:

Q Your answer was no, sir?

A No, sir.

* * * * *

Q Mr. Gray, I ask you to look at this plat which is Defendant's Exhibit Number 6, again. You testified that prior to '62 you had replaced the poles and brackets on poles --

A Yes, sir.

Q -- on lights.

Aren't those poles indicated on this plat?

A This is the ones that were replaced on this particular job.

Q But the location of those poles is shown on this plat?

A Yes.

Q Could you identify with a mark -- where were those poles in relationship to the boardwalk, the concrete boardwalk?

A These poles were set behind the boardwalk.

Q They were immediately adjacent to the boardwalk, were they not?

A They were attached --

MR. BIMSON: I object to that question. I don't believe that was the witness's answer.

MR. TURNER: This is cross-examination.

THE COURT: Objection overruled.

A They were behind the boardwalk in the grassy portion.

BY MR. TURNER:

Q By behind, you mean on the western side?

A Western side.

Q And were they not immediately adjacent to the concrete boardwalk?

A They were within three foot.

Q Weren't they immediately adjacent?

A Yes, that would be adjacent.

Q They were immediately adjacent?

A Yes, sir.

Q All right.

THE COURT: Now --

MR. BIMSON: That's my objection, your honor.

THE COURT: Which do you mean, Mr. Gray? Immediately adjacent, did they touch the boardwalk?

THE WITNESS: They had a concrete apron poured around the light to hold it rigid to keep it from swaying in the wind, and this apron was three foot square, the majority of them, and this apron went from the boardwalk to behind the light.

BY MR. TURNER:

Q That apron touched the boardwalk, did it not?

A Yes, sir.

Q All right, sir. You testified that you had been on the area in question -- I believe that was your language -- on many occasions. What do you mean by "the area in question"? What did you mean by that in your testimony?

A Well, he asked me had I been on the area in front of the properties -- the City area, what we call the grassy plot, and we had been there many times.

Q What did you understand the question -- what property did you understand the question to be referring to?

A The property in front of Seaside Park.

Q All along Seaside Park?

A Well, the grassy portion. He asked me had I been there.

* * * * *

OBJECTION TO TESTIMONY OF M. S. GRAY

[TR. IV, page 10 to page 11]

MR. TURNER: Judge, we would like to state our objection to all this testimony so far and the line of it in that we don't see how it has any relevancy to the City's doing anything to accept this area they claim they accepted as dedicated street.

* * * * *

OBJECTION TO ADMISSIBILITY OF APPELLEE'S EXHIBIT

[TR. IV, page 19 to page 20]

MR. TURNER: Judge, I would like to object to it being marked for this reason: The witness testifies that it is midway, and I think it would mar this exhibit in a prejudicial way if a street is drawn on there which very clearly is not on that plat at all.

THE COURT: Well --

MR. TURNER: Wouldn't the testimony that it is midway identify it for anyone in the future?

THE COURT: First, would you -- so we can orient ourselves, I presume that the left-hand side is north. Is that correct?

THE WITNESS: Yes.

THE COURT: There's your arrow. I see. Mr. Gray, what is this?

THE WITNESS: This designates the location and the lines that we installed, underground cable.

THE COURT: Then there's an area in the close proximity of the place that you have indicated where there is no line. Is that correct?

MR. TURNER: Right.

THE WITNESS: Well, the reason for that

is because it is the feed or the source comes from this direction and feeds several lights. And the source for this group comes from this direction.

MR. TURNER: But, your honor, the thing is, 31st Street just is not shown on there. Now, there are other exhibits, including Plaintiff's Exhibit Number 1, that show the exact relation of 31st Street to 30th and 33rd.

For this man just by guess to draw this approximately where that street is is not necessary and would quite obviously be prejudical.

THE COURT: Well, I think that it is material, but I think that it is necessary that it be accurately done and not just by an estimate.

* * * * *

STATEMENTS OF COUNSEL

[TR. IV, page 41]

MR. WORTHINGTON: We have already stipulated by letter the authenticity of all of the exhibits except the one which was just admitted, so there's no -- we do have some reservations on the authenticity of one agreement which refers back to a previous agreement which is not available, but other than that exception, we stipulate the authenticity of all the exhibits on both sides. But we object to the admissibility of every last one of them. We say they are authentic pieces of paper, but we say that they are pieces of paper that have no place in this case.

* * * * *

COLLOQUY BETWEEN COURT AND COUNSEL AND OBJECTION TO ADMISSIBILITY OF APPELLEE'S EXHIBIT

[TR. IV, page 47 to page 48]

THE COURT: All right, sir. When was the annexation beyond 26th Street?

MR. TURNER: In May of 1923.

THE COURT: 1923. All right, sir.

MR. BIMSON: Which included this area, I believe we stipulated.

MR. TURNER: Yes, sir.

THE COURT: The minutes of the town council meeting of the city -- of the town of Virginia Beach of April 16, 1906, will be received in evidence and marked the Defendant's Exhibit 7, and the objection and exception of counsel for the complainant will be noted for the reasons stated.

* * * * *

COLLOQUY BETWEEN COURT AND COUNSEL

[TR. IV, page 50 to page 52]

THE COURT: Gentlemen, correct me if I'm in error. During the recess I think that we have agreed to stipulate that copy of this map entitled Virginia Beach owned by Norfolk and Virginia Beach Railroad Improvement Company, Marshall Parks, president, as recorded in deed book 41 -- ?

MR. TURNER: Deed book 59.

MR. BIMSON: 59.

THE COURT: -- 59 at page --

MR. BIMSON: Page 115.

THE COURT: Page 115.

MR. TURNER: The plat is at another page.

THE COURT: And recorded --

MR. TURNER: The plat is at page 119.

THE COURT: -- is known as the Hughes map or plat -- which does it say in the case?

MR. BIMSON: Hughes map, I believe.

THE COURT: Hughes map.

MR. BIMSON: In the Supreme Court case?

THE COURT: Yes, and has been held by the Supreme Court to be the official map of the Town of Virginia Beach?

MR. BIMSON: Yes, unincorporated Town of Virginia Beach.

THE COURT: Unincorporated Town of Virginia Beach. Is that correct, gentlemen?

MR. WORTHINGTON: Your honor, subject to the limitation that the --

THE COURT: Yes, with the exception that the lot numbers that are in red on the plat that is now recorded were not on the plat as late as 1926, and also the words "Ocean Avenue" -- is that correct?

MR. WORTHINGTON: Yes, sir.

THE COURT: -- which appears in an area which is indicated as being grassy between 18th and 20th -- I'm sorry, between 18th and 22nd Street.

MR. WORTHINGTON: There is another legend on there, too, I think.

THE COURT: Yes, and also the same "Ocean Avenue" words also appear in a comparable area between 25th and 40th Street. With that exception.

MR. WORTHINGTON: I think the stipulation ought also be subject, your honor, to the qualification that this Hughes map was an official map of the Town of Virginia Beach so

far as its boundries extended at the time the case of Virginia Beach against Oboe was decided in 1917. We would be unwilling to stipulate that the map was a map of the town beyond the town limits.

THE COURT: All right, sir. Give me the date again when the case of City versus Oboe was decided.

MR. BIMSON: March 15, 1917, your honor.

THE COURT: It was sometime after 1926, is that correct, that those red numerals and lettering were penciled in?

MR. WORTHINGTON: Yeah.

* * * * *

STATEMENT OF COUNSEL AND OBJECTION TO ADMISSIBILITY OF APPELLEE'S EXHIBIT AND REMARKS OF THE COURT

[TR. IV, page 53 to page 55]

MR. BIMSON: Yes, sir. One further exhibit, being mapbook 2 page 31, which shows -- which is titled Plan of Chautauqua by the Sea, which shows the Hall line, which I believe has been stipulated to.

MR. TURNER: The authenticity of this has been stipulated to.

We again have the objection that it is immaterial in this case, because it is introduced to go with the 1906 town council resolution, and this property simply wasn't in the town of Virginia Beach at that time.

THE COURT: Will you inform the court as to what you consider the relevancy of this map?

MR. BIMSON: Going back to the 1906 minutes, your honor, they referred to the Hughes map -- 1906, they referred to Ocean Avenue being accepted from Hall's line north, and this indicates where Hall's line would be.

THE COURT: Is Ocean Avenue shown on that plat?

MR. BIMSON: Yes, sir, Ocean Boulevard.

THE COURT: Does it show Hall's line?

MR. BIMSON: Yes, sir.

MR. TURNER: Ocean Boulevard south of Rudy Inlet on that map.

THE COURT: Gentlemen, this will be received in evidence and marked Defendant's Exhibit 8, and if counsel has no objection I'm going to underscore in heavy black pencil Hall's line.

MR. WORTHINGTON: Wouldn't that be 9, your honor?

THE COURT: Sir?

MR. TURNER: Wasn't the Hughes map number 8?

THE COURT: Yes, sir. This will be Defendant's Exhibit 9.

* * * * *

THE COURT: This map entitled Plan of the Property Belonging to the Chautauqua by the Sea Assembly, Virginia Beach, Virginia, recorded in clerk's office on the 11th day of March 1904 has been received in evidence marked Defendant's Exhibit 9, and it shows Hall's line referred to in the minutes of the meeting of the Town of Virginia Beach on April 16, 1906.

* * * * *

STATEMENT OF COUNSEL FOR APPELLANT

[TR. IV, page 114]

One part we wanted to introduce to make it quite clear that an area north of 26th Street was not part of the town of Virginia Beach until this 1923 annexation suit. I think that's now been stipulated.

* * * * *

STIPULATION

[TR. IV, page 115]

MR. TURNER: The other thing we wanted to show from this file is a copy of the Hughes plat introduced as an exhibit which does not have the writing which shows in red on the recorded plat.

THE COURT: Hasn't it been stipulated --

MR. TURNER: It has been stipulated.

THE COURT: -- that was put on there sometime subsequent to 1926?

MR. WORTHINGTON: Right. That's been stipulated.

* * * * *

OBJECTION TO ADMISSIBILITY OF APPELLEE'S EXHIBIT

[TR. V, page 12]

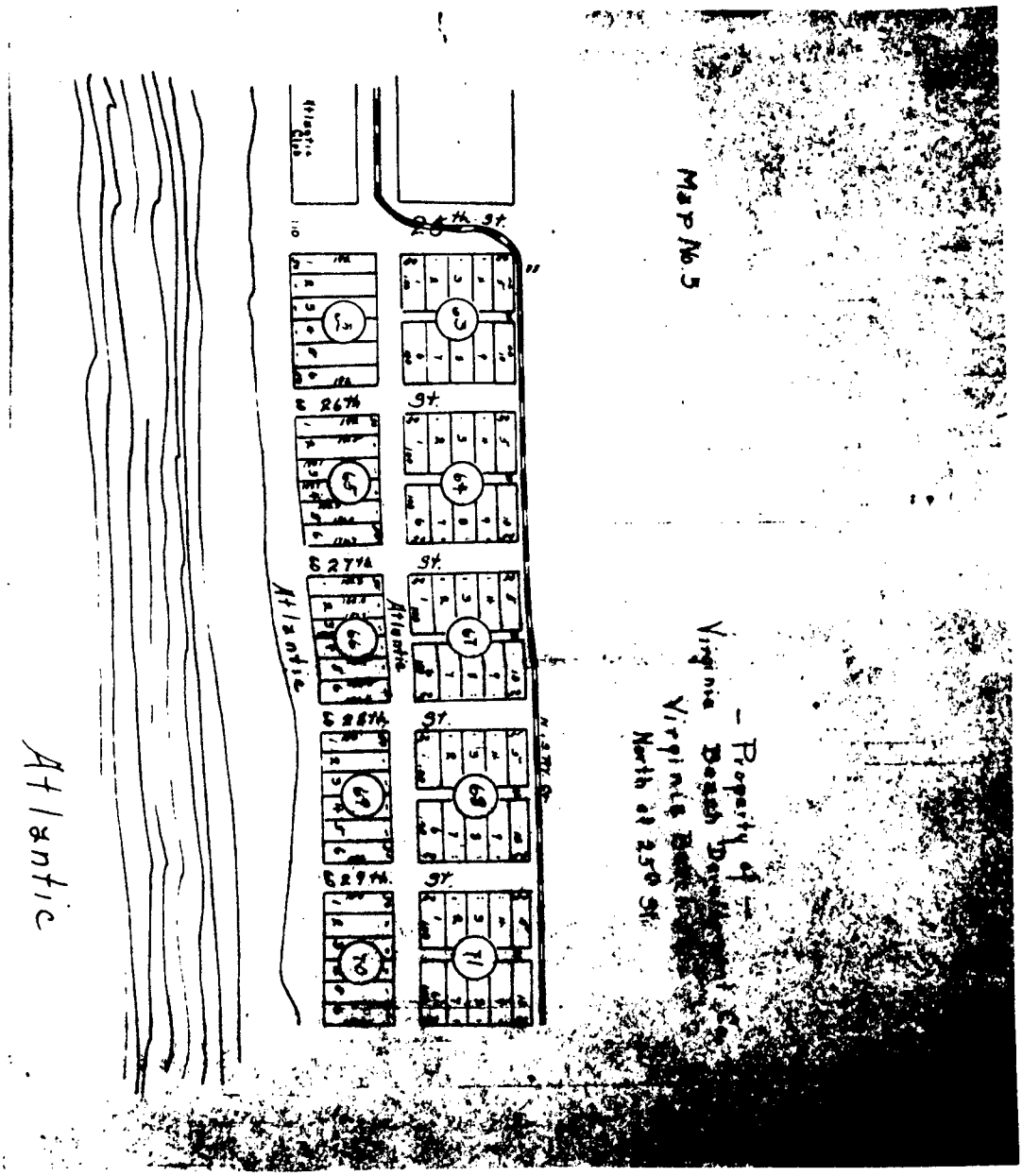
THE COURT: It will be received in evidence and marked Defendant's Exhibit 14.

MR. WORTHINGTON: Your Honor, we renew our previously stated objection to the admissibility of that exhibit, but stipulate its authenticity.

* * * * *

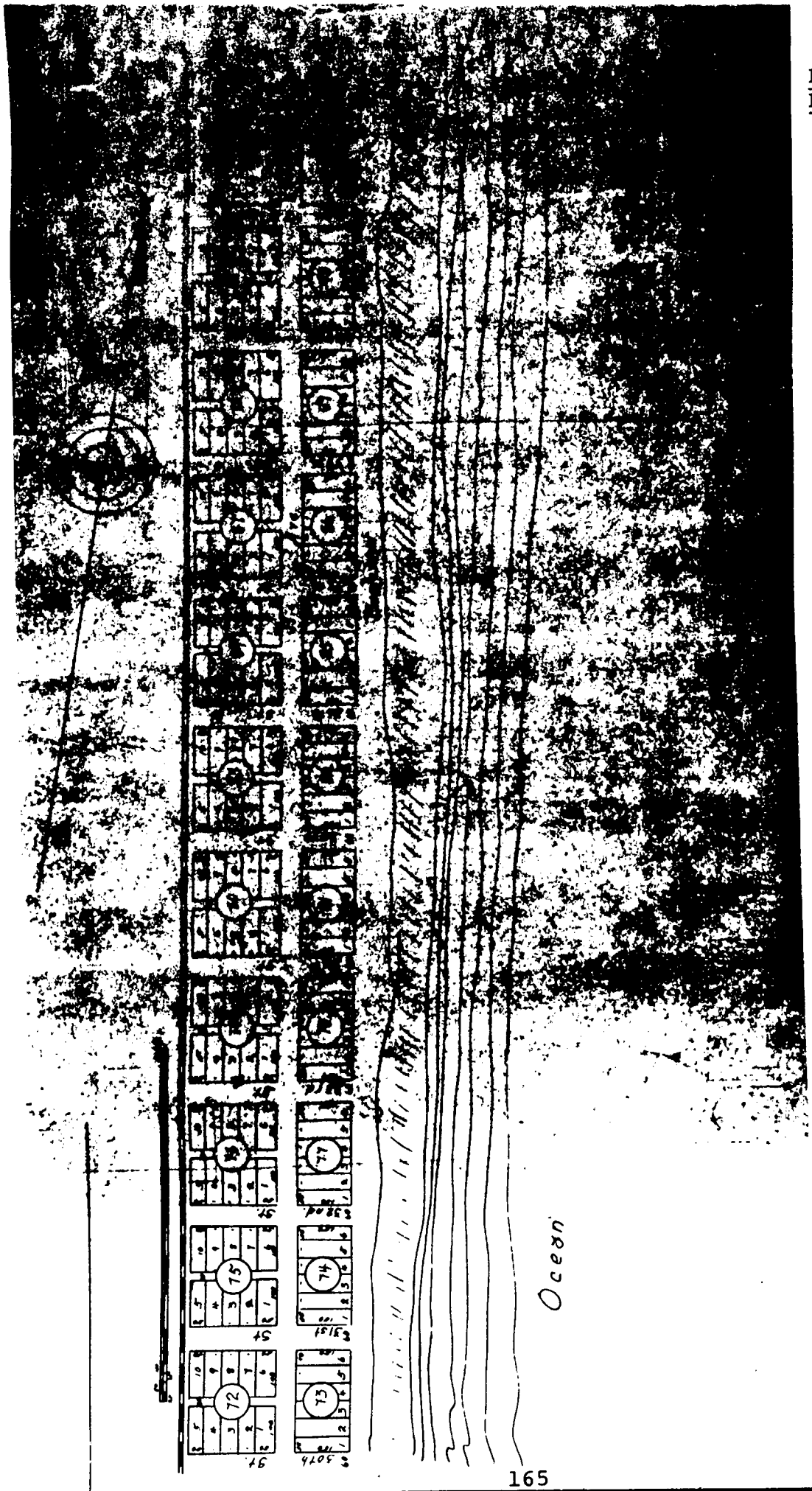
Plaintiff's Exhibit No. 1

Map of Property of Virginia Beach Development Company, recorded March 16, 1908, in Map Book 3, pages 176 and 177



Plaintiff's
Exhibit No. 1

(continued)



Portion of Plaintiff's Exhibit No. 6

Deed form Sea Pines Improvement Corporation to Greenco Corporation, dated January 3, 1944, from beginning of deed through the words "A. N. Chandler and Company" in paragraph I (1) of said deed

THIS DEED, Made this 3rd day of January, 1944, between SEA PINES IMPROVEMENT CORPORATION, a corporation duly organized and existing under the laws of the State of Virginia, with its principal office in the city of Norfolk, Virginia, Party of the First Part, and GREENCO CORPORATION, a corporation duly organized and existing under the laws of the State of Virginia, with its principal office in the city of Norfolk, Virginia, Part of the Second Part:

WITNESSETH: THAT for and in consideration of the sum of TWO HUNDRED AND SEVENTY-FIVE THOUSAND DOLLARS ($275, 000.00), FIFTY THOUSAND DOLLARS ($50.000.00) of which is being paid in cash simultaneously with the execution and delivery hereof, and the balance of which is being secured by a first-lien purchase-price deed of trust to be recorded simultaneously herewith as part and parcel of the same transaction, reference to which is hereby made for a more particular description thereof, the said party of the first part does hereby grant and convey unto the said party of the second part, the following property, to-wit:

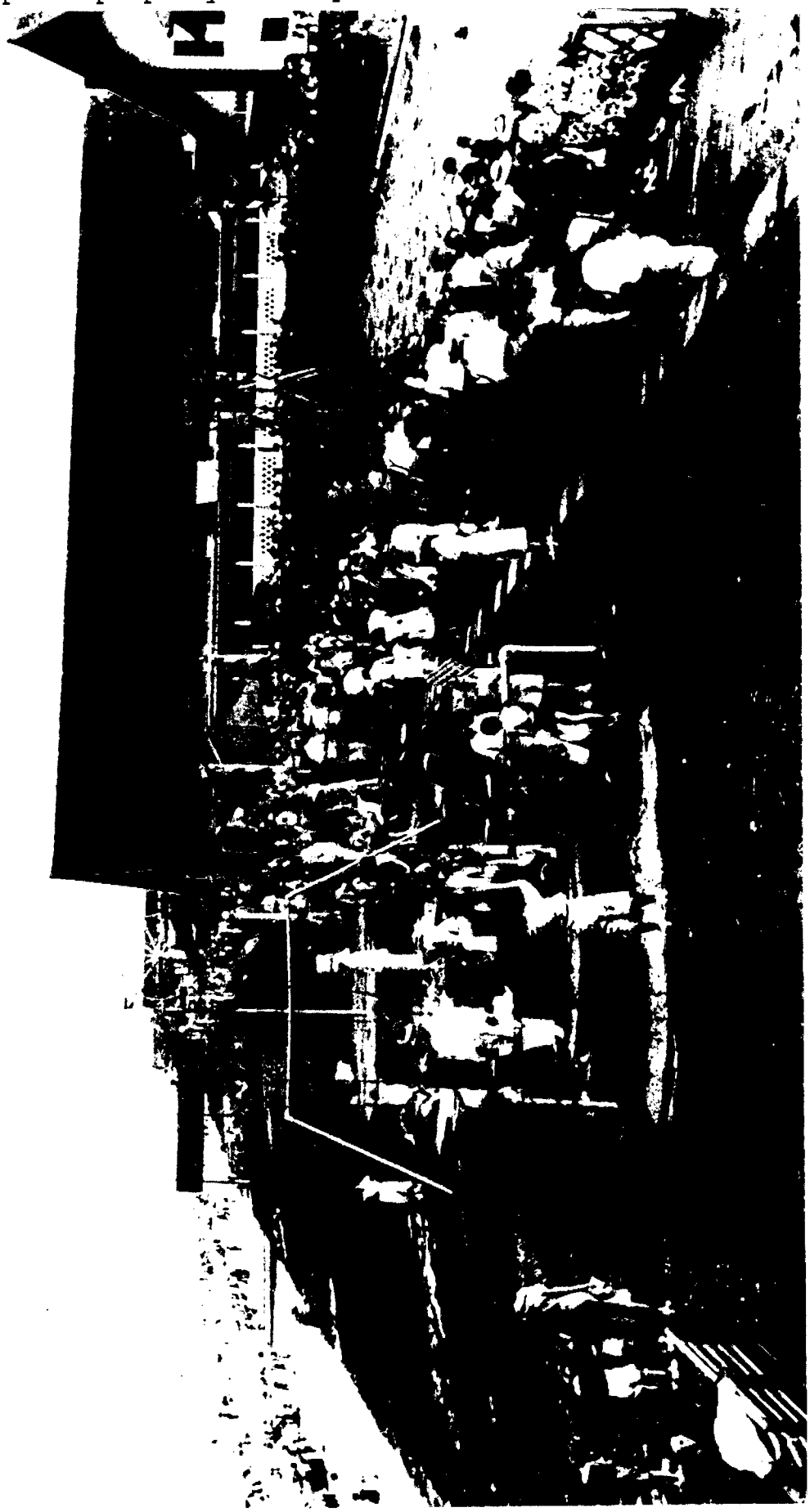
I. All those certain lots, pieces or parcels of land,

lying, being and situate in the Town of Virginia Beach, County of Princess Anne, State of Virginia, together with all of the buildings and improvements thereon and appurtenances thereto belonging and any riparian rights and waterfront rights, privileges and appurtenances although not embraced within the metes and bounds hereinbelow given which the party of the first part may have by virtue of its use of and title to the hereinafter described property, and any right, title and interest to the streets and alleys binding the property which the party of the first part may have by virtue of its use of and title to the hereinafter described property, which property is particularly bounded and described as follows:

(1) Lots Nos. 1, 2, 3, 4, 5, and 6 in Block No. 74; Lots Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 in Block No. 75; Lots Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 in Block No. 76; and Lots Nos. 1, 2, 3, 4, 5, and 6 in Block No. 77; on Plat No.3 of a part of the property of the Virginia Beach Development Company, at Virginia Beach, in Princess Anne County, Virginia, which said plat is duly of record in the office of the Clerk of the Circuit Court of the County of Princess Anne, Virginia, in Map Book No. 3, pages 176 and 177, said plat having been substituted for a part of the plat annexed to a deed dated July 23rd, 1900, from the Norfolk, Virginia Beach and Southern Railroad Company to A. N. Chandler and A. S. Chandler, partners, trading as "A. N. Chandler and Company";

Plaintiff's Exhibit No. 12

Photograph of property in dispute taken in 1938



Complainant's Exhibit No. 12

Plaintiff's Exhibit No. 21

Letter dated June 21, 1960, from L. L. Underwood, Jr., counsel for appellant, to Roy Smith, Virginia Beach City Attorney, regarding use and ownership of "Atlantic Boulevard"

In furtherance of our telephone conversation of June 21, 1960, relative to the complaint by the City Officials of Virginia Beach set out in your letter of June 16, 1960, I wish to advise as follows.

On behalf of Dudley Cooper, one of the principals of the subject corporations operating Seaside Park Casino at Virginia Beach, Virginia, and without prejudice to the rights of any parties involved including the City of Virginia Beach, I wish to advise that it is not the desire of my clients to litigate the rights of any party in and to Atlantic Boulevard at this time.

It is agreeable to my clients to remove from the parcel of property which appears to be Atlantic Boulevard the concession which is now being operated by the subject corporations and known as the "Basketball Game" if this concession is objectionable.

It is our belief that the additional objection concerns a certain outdoor platform which has been for many years past and for the present summer season used for free entertainment to patrons of Seaside Park and Virginia Beach in general, and the operators of Seaside Park, without waiving any claim that they may have or alienating any claim that the City may have to Atlantic Boulevard, may continue to use the area as in

the past by special permission of the City authorities.

Our clients have contracted for the summer season several special attractions which will be free to the patrons of Seaside Park and to Virginia Beach. It would cost thousands of dollars to terminate these contracts, and the summer guests of Virginia Beach and patrons of Seaside Park would be deprived of this free entertainment.

The objections complained of are of a temporary nature, and are only used during the summer season. Free entertainment of this nature is beneficial to both the patrons of Seaside Park and guests of the Virginia Beach area. Therefore, since we, in behalf of our clients, do not wish to contest the legality of the rights of anyone in and to Atlantic Boulevard at this time request that the City Officials grant special permission to our clients to continue using the area adjacent to Seaside Park Casino as it has been used in past years.

Thanking you for giving this matter your immediate attention, and trusting that all parties may work out an amicable agreement of usage, we remain Very truly yours,

Defendant's Exhibit No. 1

Contract dated December 30, 1946, between the Town of Virginia Beach and the Virginia Beach Gas Corporation, granting a franchise for laying of gas mains and other papers related thereto

THIS CONTRACT, made this 30th day of December in the year 1946, by and between the TOWN OF VIRGINIA BEACH, a municipal corporation, party of the first part, and VIRGINIA BEACH GAS CORPORATION, a corporation chartered and duly existing under the laws of the State of Virginia, party of the second part.

WHEREAS, the Council of the Town of Virginia Beach did on the 5th day of August, 1946, adopt an ordinance proposing to grant a franchise, a copy of which franchise is attached hereto and incorporated herein as part of this contract; and

WHEREAS, on September 9th, 1946, the Virginia Beach Gas Corporation submitted the following bid:

"September 5th, 1946.

TO THE TOWN COUNCIL OF VIRGINIA BEACH
Virginia Beach, Virginia

Gentlemen:

A corporation now being chartered to be known as Virginia Beach Gas Corporation herewith submits its proposal for the franchise rights to install gas mains and laterals in the Town of Virginia Beach, to furnish to the population of the Town, piped gas. Attached hereto is cash for $1,000.00 in compliance with the terms of the ordinance.

1. The corporation proposes to furnish gas to the residents of the town through gas mains and lateral lines, from some central manufacturing or storage points, in accordance with the provisions of the ordinance.

2. The corporation will pay to the Town of Virginia Beach for the privileges of this franchise grant ten per cent of the annual net receipts of the corporation as determined by the corporation books.

3. In addition to the above payment, the corporation agrees that it will offer for sale to the Town of Virginia Beach at the expiration of this franchise grant all of its entire plant and facilities used in and about the manufacture and distribution of gas, at fifty (50%) per cent of its appraised value; the value to be fixed by three appraisers, one selected by the Town Council, one selected by the corporation, and the third to be selected by the two above mentioned appraisers.

VIRGINIA BEACH GAS CORPORATION

By (Raymond A. Cassett)
President".

WHEREAS, the said Council of the Town of Virginia Beach did by unanimous vote accept the bid of the Virginia Beach Gas Corporation upon the terms and conditions of the proposed gas franchise, a copy of which is attached hereto;

NOW, THEREFORE, WITNESSETH, that for and in consideration of the premises and the mutual covenants herein contained, the said Town of Virginia Beach and said Virginia Beach Gas Corporation do hereby covenant and agree that the Town of Virginia Beach does hereby grant unto the Virginia Beach Gas Corporation the franchise as set out and described in the said proposed gas franchise upon the terms and conditions set out therein, and the Virginia Beach Gas Corporation does hereby accept the said franchise and does agree and covenant to carry out and perform all terms and conditions as stipulated in the said franchise and does further agree to execute a bond with good and sufficient security, payable to the Town of Virginia Beach, in the principal sum of Twenty Thousand ($20,000.00) Dollars conditioned upon its compliance with the terms of said franchise, and to begin the construction of the necessary mains and lines incident thereto within four (4) months from the signing and sealing of this contract.

It is further agreed, however, by and between the parties hereto that the said party of the first part may require the party of the second part to pay one-half (1/2) of one per cent (1%) of the annual gross receipts of the said party of the second part in lieu of ten per cent (10%) of the annual net receipts as set out in the bid above copied herein.

IN WITNESS WHEREOF, the Town of Virginia Beach has caused this contract to be executed in its name and on its behalf by H. W. Leeke, its Mayor, and its corporate seal to be hereto affixed and attested by R. A. Jones, its Town Clerk pursuant to resolution adopted by its Council on October 14th, 1946; and the Virgin Beach Gas Corporation has caused the same to be executed in its name and on its behalf by Raymond A. Cassett, its President, and its corporate seal to be hereto affixed and attested by Richard B. Kellam, its Secretary and Treasurer, pursuant to resolution adopted by its stockholders on the 24th day of December, 1946.

TOWN OF VIRGINIA BEACH

By _____
Mayor

ATTEST:

_____
Town Clerk

VIRGINIA BEACH GAS CORPORATION

By Raymond A. Cassett
President

ATTEST:

Secretary and Treasurer

approved as to form.
Roy Smith
Atty for Town of Virginia Beach

AN ORDINANCE TO CONFIRM THE FRANCHISE GRANT AND THE CONTRACT AND BOND BETWEEN TOWN OF VIRGINIA BEACH AND VIRGINIA BEACH GAS CORPORATION

BE IT ORDAINED, that Virginia Beach Gas Corporation has complied with the requirements of the franchise grant given it by Town of Virginia Beach for the establishment of gas mains and lateral lines to furnish gas to the population of the Town as a public utility company for profit, and the terms of the contract dated December 30, 1946 evidencing said franchise grant, and has posted the bond required by said franchise grant and contract, which bond is dated January 17, 1947, and is now approved and confirmed; and said Virginia Beach Gas Corporation has commenced construction of its gas mains ans lateral lines within the time required, and said franchise privileges are now declared to be in full force and effect, and in good standing in accordance with the terms of said grant and contract.

Approved

H. Warfield Leake
Mayor

A Copy Test:

Clerk

AN ORDINANCE PROPOSING TO GRANT A FRANCHISE FOR THE USE OF THE STREETS, AVENUES, LANES, ALLEYS AND PUBLIC PLACES WITHIN THE TOWN OF VIRGINIA BEACH FOR A PERIOD OF THIRTY YEARS FOR THE LAYING, CONSTRUCTING, MAINTAINING, EXTENDING AND REPARING GAS MAINS AND LINES, INCLUDING LATERAL LINES, FOR THE MAKING, GENERATING, PRODUCING, SELLING, DISTRIBUTING AND SUPPLYING GAS FOR LIGHTING, HEATING, COOKING, MANUFACTURING OR MECHANICAL PURPOSES, TO THE POPULATION OF THE TOWN; PRESCRIBING THE LIMITATIONS OF THE USE OF SAID STREETS, AVENUES, LANES, ALLEYS AND PUBLIC PLACES UPON THE GRANT OF SAID FRANCHISE AND THE CONDITIONS OBLIGATORY UPON THE HOLDER THEREOF; AND TO INVITE PROPOSALS OR BIDS FOR THE GRANT OR EXTENSION OF SAID FRANCHISE.

BE IT ORDAINED BY THE COUNCIL OF THE TOWN OF VIRGINIA BEACH:

ARTICLE I

That there shall be granted in the mode prescribed by law for franchis grants, and upon the conditions hereinafter specified, the rights and privileges of exclusive franchise to lay, construct and maintain gas pipes and lines, including lateral lines, and to repair the same in the streets, avenues, alleys, lanes and public places within the Town of Virginia Beach for a period of thirty years for the conveyance and marketing of gas for lighting, heating, cooking and mechanical purpos as embodied in the following draft of an ordinance entitled -

"An Ordinance to grant to _____ his/its successors and assigns, the rights and exclusive privileges, for the term and upon the conditions herein stated, for an exclusive franchise to lay, construct and maintain gas pipes and lines, including lateral lines, and to repair the same, in the streets, avenues, alleys, lanes and public places within the Town of Virginia Beach for a period of thirty years for the conveyance and marketing of gas for lighting, heating, cooking and mechanical purposes."

BE IT ORDAINED BY THE COUNCIL OF THE TOWN OF VIRGINIA BEACH:

Section 1.

The right is hereby granted unto _____, hereinafter referred to as the "Grantee", his/its successors and assigns, for the term and subject to the conditions and limitations hereinafter stated, for an exclusive franchise to lay, construct and maintain gas pipes and lines, including lateral line and to repair the same, in the streets, avenues, alleys, lanes and public places wit the Town of Virginia Beach for a period of thirty years for the conveyance and marke of gas for lighting, heating, cooking and mechanical purposes.

Section 2.

The purchaser of said franchise must commence the construction of the necessary mains and lines incident thereto within four months and must complete such portions of said mains and lines as will make gas available for distribution to one half of the population of the Town within two years from said grant, excepting acts of God, strikes and conditions beyond control of the Grantee.

Section 3.

The mains, pipes and lines so constructed in the streets, avenues, alleys, lanes and public places within the Town shall be located therein in such portions thereof as the Supervising Engineer of the Town may designate, and such mains, pipes and lines shall be of sufficient size and capacity to insure an adequa supply of gas for the population to be served and shall be of a standard material a type of construction satisfactory to the said Supervising Engineer and sufficient t insure the public safety.

Section 4.

The rates to be charged for the commodity marketed by the holder of th grant shall be not greater than is reasonable and proper and shall be such as the State Corporation Commission of Virginia may from time to time prescribe.

Section 5.

The property of the holder of the grant shall, during the entire peric thereof, be kept and maintained in good order upon penalty of the forfeiture of the grant at any time fixed by a board of five members created for the purpose, two of whom shall be selected by the Council of the Town, two by the holder of the franchis and one by the four so selected; or if they shall fail to agree on the fifth member within sixty days he is to be named by the Chairman of the State Corporation Commissi and the decision of any three of whom shall control if property is, in their opinion, improperly maintained. Then, upon forfeiture of such franchise so granted, all mains pipes and lines connected under the franchise shall be offered to the Town at a fair valuation fixed by the decision of no less than three of the five members above mentioned. Should the Town elect not to purchase said properties, the holder of the franchise shall be entitled to advertise for bids and sell said properties to persons so approved by the Council of the Town.

Section 6.

Before any franchise, right or privilege is granted, the person, firm or corporation who is declared by the Council of the Town to be the successful bidd therefor, shall execute a bond with good and sufficient security, payable to the To of Virginia Beach, in the principal sum of Twenty Thousand ($20,000.00) Dollars, co ditioned upon the compliance with the terms of said grant, the full amount of which bond shall be collectible as liquidated damages for any failure on the part of the holder thereof to comply with the terms of said grant.

Section 7.

The said grantee agrees, and binds himself/itself by the acceptance o this ordinance, to indemnify and hold the Town of Virginia Beach free and harmless from liability on account of injury or damage to person or property growing out of the operation of said business within the said Town and, in the event that suit sha be brought against the Town of Virginia Beach, either independently or jointly with said grantee or others on account thereof, the said grantee, upon notice to him/it the Town, will defend the Town in any such suit at the cost of the said grantee and the event of a final judgment against the Town of Virginia Beach, either independent or jointly with said grantee or others, the said grantee will pay said judgment with all costs and hold the Town harmless; but nothing herein contained shall be constru to hold said grantee liable for the negligence of the Town of Virginia Beach, or its agents or employees.

Section 8.

This ordinance shall be in effect and force from its passage.

Defendant's Exhibit No. 2

Letter dated April 3, 1962, from Joel B. Cooper, Attorney for Seaside Park, Inc., to George W. Vakos, Virginia Beach City Attorney, regarding building of stage destroyed by storm

As you know, at its meeting held on April 2, 1962, the City Council of Virginia Beach gave Seaside Park, Inc. permission to rebuild a stage at the park for free attractions. The original stage was destroyed by the storm of March 7, 1962. Seaside Park, Inc. has today notified its insurance carrier to extend its liability insurance to include the City of Virginia Beach, in the amounts of $50,000/$100,000, for the stage and lawn area.

The rebuilt stage contemplated by Seaside Park, Inc. will be made of cinder block, installed on footings, and will be above the ground approximately three to four feet. While this attractive stage will be attached in a secure manner, Seaside Park, Inc. stipulates that the stage is considered a temporary structure, removable at the will of the City Council or others duly authorized to order its removal. When you have prepared such papers as you may deem necessary in this matter, I would appreciate being notified.

Defendant's Exhibit No. 3

Letter dated May 2, 1962, from George W. Vakos, Virginia Beach City Attorney, to Dr. Dudley Cooper, regarding minutes of meeting of City Council of Virginia Beach

At the request of the Virginia Beach City Council, I am enclosing excerpts of their April 30, 1962, meeting concerning the stage you propose to maintain on City property in front of Seaside Park. Included in these minutes is a resolution adopted by the Council which sets forth the conditions which will apply to this stage.

As you will note from these minutes, there were objections to both the present location of this stage and its elevation.

I would suggest that you get in touch with our City Engineer in order to determine what will be required.

Defendant's Exhibit No. 4

Excerpt of minutes of meeting of City Council of Virginia Beach of April 30, 1962;

Council discussed a request of Dudley Cooper, President, Seaside Park, Inc. to maintain a stage on the ocean front at 31st Street. This requested stage was to be placed on City property east of the Seaside Park. Councilman McCombs stated that on April 9, 1962, when Dr. Cooper requested permission to rebuild the stage destroyed by the March 6th storm, he was under the impression that it was to be located in the same place as the one destroyed. It was brought to Council's attention that the new stage was placed within 24 inches of the boardwalk and was in excess of 6 feet higher

than the boardwalk elevation which was objectionable because it would obstruct the view of the beach front and boardwalk.

On motion made by Mr. McCombs, seconded by Mr. Tarrall and by unanimous vote, the following resolution was adopted.

BE IT RESOLVED by the City Council of the City of Virginia Beach that on application of Dudley Cooper, President, Seaside Park, Inc., a permit is hereby granted allowing Seaside Park, Inc. to construct and maintain a temporary stage on the oceanfront at 31st Street subject to the following:

1. That the proposed stage shall be considered a temporary structure and constructed in accordance with plans and specifications to be approved by the City Engineer.

2. That the east elevation of the proposed stage shall not exceed three (3) feet above the elevation of the concrete boardwalk.

3. That the proposed stage shall be used for free entertainment only.

4. That the Seaside Park, Inc. agree to hold the City of Virginia Beach free from any liability due to the existance or operation of said stage and to furnish the City a policy of insurance with some insurance company acceptable to the city to insure the city against any such liability.

5. That this permit is revocable at the will of the City Council and that upon revocation Seaside Park, Inc.

agree to remove said stage and restore the city property.

6. That a copy of this resolution be signed as accepted by Seaside Park, Inc. and placed on file with the Clerk of the Council.

Accepted this ____ day of May, 1962.

SEASIDE PARK, INC.

By [unsigned]

President

Defendant's Exhibit No. 5

Copy of resolution of September 12, 1966, of City Council of Virginia Beach;

WHEREAS, the Council of the City of Virginia Beach granted Seaside Park, Inc., a permit to construct a stage at the Oceanfront and 31st Street; and

WHEREAS, item 6 of said grant provided that upon revocation of said grant, the corporation, permittee, would remove said stage and restore the City property; and

WHEREAS, it is now the wish of Council that this stage be removed.

NOW, THEREFORE, BE IT RESOLVED by the Council of the City of Virginia Beach, Virginia:

That the permit heretofore granted Seaside Park, Inc., to construct a temporary stage at Oceanfront and 31st Street

is hereby revoked, and the City Manager is directed to obtain forthwith its removal in accordance with the terms of the original permit.

Defendant's Exhibit No. 7

Excerpt of minutes of meeting of April 16, 1906, of town council of Virginia Beach regarding adoption of streets

At 8:45 a quorum not being present the following members were recorded as absent--Mr. Groves, Payne and Keefe. At 9:30 p.m. Mr. Groves came in, creating a quorum and the roll was called with Mr. Ashburn, Jones, Groves, Holland and Wright present.

A question of adopting streets was taken up and Mr. Ashburn, chairman of the street committee, submitted a list of the streets to be adopted which were as follows:

Ocean Avenue from Hall's line north.

Atlantic Avenue from Hall's line north.

10th Street between Holly Avenue and the ocean.

12th Street between Lake Holly and the ocean.

17th Street or South Carolina Avenue as shown on the Virginia Beach Development Company's map from the western boundary of the town limits through to the ocean.

16th Street between Holly Avenue and the ocean.

24th Street between Holly Avenue and the ocean.

Cypress Avenue between 17th and 20th Streets as shown on the Hughes map.

The recorded vote on the adoption of these streets was as follows: Mr. Groves, Jones, Ashburn, Wright and Holland.

The following motion made by Mr. Groves was unanimously adopted: "Whereas 10th Street, 12th Street, 16th and 24th as shown on the Hughes map are only 60 feet wide and whereas the Virginia Beach Development Company have donated 20 feet of their land to the public, making these streets 80 feet wide as shown on the map of the said Development Company, now therefore be it resolved that the town council accept as 80 feet instead of 60 feet as shown on the Hughes map, the streets above mentioned."

The motion was unanimously adopted. The meeting adjourned to Saturday night the 21st.

Defendant's Exhibit No. 10

Agreement between the City of Virginia Beach and Virginia Electric and Power Company, dated August 19, 1930

THIS AGREEMENT, Made this 19th day of August, 1930, between the TOWN OF VIRGINIA BEACH, a municipal corporation of the State of Virginia (hereinafter called "Town"), party of the first part, and VIRGINIA ELECTRIC AND POWER COMPANY, a corporation (hereinafter called "Power Company"), party of the second part.

WHEREAS, the Norfolk Southern Railroad Company (hereinafter called "Railroad Company"), heretofore furnished to the Town its electric light and power service, including street lighting service; and

WHEREAS, the Town and the Railroad Company entered into a certain agreement dated May 25, 1926, by which the Town conveyed to the Railroad Company the street lighting system for Atlantic Avenue between Eleventh and Thirty Fifth Streets and for Seventeenth Street between Atlantic Avenue and Caspian (formerly Cypress) Avenue all within the corporate limits of the Town, (which street lighting system is herein designated as "Street Lighting System No. 1") under the terms of which contract the Railroad Company was to pay the purchase price by permitting certain deductions to be made from its bills for service to the Town; and

WHEREAS, the Town and the Railroad Company entered into a certain other agreement dated July 20, 1927, by which the Town conveyed to the Railroad Company the street lighting system (hereinafter called "Street Lighting System No. 2") for Ocean Broad Walk Between Fifth and Thirty Fifth Streets, in said Town, under the terms of which contract the Railroad Company was to pay the purchase price by permitting certain deductions to be made from its bills for service to said Town; and

WHEREAS, the Railroad Company has offered to pay and the Town has agreed to accept certain stipulated monthly pay-

ments until the entire purchase price for both of said street lighting systems has been fully paid, which payments are in substitution for and in lieu of the deductions provided for by said agreements; and

WHEREAS, both of said contracts impose upon the Town the burden of bearing and paying the expense of renewals of glass ware enclosing the lamps in said street lighting systems as well as the expense of repairing any breakage or damages to any part of the street lighting systems caused by automobile or other vehicular traffic or by vandalism; and

WHEREAS, there are approximately nine (9) street lights (hereinafter called "Cavalier Shores Lighting System") in the land development known as Cavalier Shores, the maintenance cost of which has heretofore been borne by the Town; ~~the ownership of which street lights has been transferred by the Town to the Railroad Company,~~ and

WHEREAS, there are approximately thirty (30) street lights (hereinafter called "Neighborhood Street Lighting System"), as to which the Town pays only for current consumed by the lamps; and

WHEREAS, by an indenture dated the first day of March, the Railroad Company did lease, demise and let to the Power Company for the term of ninety nine (99) years all the property, equipment and facilities theretofore used by the Railroad Company for the transmission and distribution of electrical energy for

commercial light, heat and power purposes in the Town of Virginia Beach and the Counties of Norfolk and Princess Anne, together with the Railroad Company's electric light, heat and power business and the Railroad has discontinued the business of distributing electricity for commercial light, heat and power purposes; and

WHEREAS, it is deemed desirable that the Town obtain from the Power Company electric current for all its municipal light and power purposes, including street lighting and relieve itself from the burden and obligation of paying the cost of renewals of glass ware and repairs to and maintenance of the street lighting systems; and

WHEREAS, the Power Company is willing to enter into a contract to maintain and operate the said street lighting systems, including the renewals of all glassware and repairs to said systems whether due to breakages or damages caused by automobile or other vehicular traffic or vandalism or any other cause (exclusive of any damage or breakage which may be caused by the negligence of the Town, or its officers, agents or employes) and to furnish electric current for the street lighting and other light and power purposes of the Town at the rates and upon the terms, conditions and limitations hereinafter set forth.

NOW, THEREFORE, THIS AGREEMENT WITNESSETH: That for and in consideration of the sum of One ($1.00) Dollar paid by each of the parties hereto to the other and of the mutual covenants

and agreements herein contained, and subject to the terms, conditions and limitations, and in accordance with the rates and schedules hereinafter set forth and during the term of this contract and any and all renewals hereof, the Power Company covenants and agrees that it will furnish to the Town, and the Town covenants and agrees that it will purchase from the Power Company, electric current to supply the entire municipal light and power purposes of the Town.

I.

STREET LIGHTING:

First: The Power Company covenants and agrees that it will at its own cost and expense furnish and install to the extent that the same may not be now installed and in operation, all lamps, wires and fixtures for the maintenance and operation of street lights of the type, character and capacity and at the locations specified on the map schedule attached hereto marked "Exhibit A" and hereby made a part hereof, and that it will, subject to terms, conditions and limitations herein stated, furnish and install any and all additional lamps, wires and fixtures at such points in the Town streets as may be requested and designated by the Town, and will supply the necessary electric current for the operation of the lamps, and will operate, maintain, keep clean and renew the same throughout the term of this contract and any and all renewals hereof, all upon the terms and subject to the conditions and limitations herein set forth.

Second: The Town covenants and agrees that its minimum street lighting requirements throughout the term of this contract and any and all renewals hereof shall be as to numbers, type, character and capacity not less than those specified on the schedule "Exhibit A".

Third: The rates and prices to be charged by the Power Company and paid by the Town for the lamps of the various types and capacities and for the various street lighting purposes of the Town shall be as follows:

Schedule I. OVERHEAD STREET LIGHTING SYSTEM. The rates for the overhead street lighting system (by which term is meant all street lights served and fed exclusively by overhead wires) shall be:

(a) ALL NIGHT LIGHTING.

Series Mazda incandescent lamps, commercially known and designated as 600 c.p. series lamps, each lamp per year	$58.00
Series Mazda incandescent lamps, commercially known and designated as 400 c.p. series lamps, each lamp per year	48.00
Series Mazda incandescent lamps, commercially known and designated as 250 c.p. series lamps, each lamp per year	$38.00
Series Mazda incandescent lamps, commercially known and designated as 100 c.p. series lamps, each lamp per year	$22.00
Multiple Mazda incandescent lamps, commercially known and designated as 100 watt multiple lamps, each lamp per year	$28.00

(b) MIDNIGHT LIGHTING.

Series Mazda incandescent lamps, commercially known and designated as 600 c.p. series lamps, each lamp per year	$30.00

Series Mazda incandescent lamps, commercially known and designated as 400 c. p. series lamps, each lamp per year $25.00

Series Mazda incandescent lamps, commercially known and designated as 250 c. p. series lamps, each lamp per year $20.00

Schedule 2: UNDERGROUND STREET LIGHTING SYSTEM.

The rates for the underground street lighting system (by which term is meant all street lights served or fed by underground cables and circuits or by a combination of overhead and underground wires, cables, and circuits), except as hereinafter otherwise provided, shall be:

(a) ALL NIGHT LIGHTING:

Series Mazda incandescent lamps commercially known and designated as 600 c. p. series lamps, each lamp per year $70.00

Series Mazda incandescent lamps, commercially known and designated as 400 c. p. series lamps, each lamp per year $60.00

Series Mazda incandescent lamps, commercially known and designated as 250 c. p. series lamps, each lamp per year $50.00

Series Mazda incandescent lamps, commercially known and designated as 100 c.p. series lamps, each lamp per year $34.00

(b) MIDNIGHT LIGHTING:

Series Mazda incandescent lamps, commercially known and designated as 600 c. p. series lamps, each lamp per year $42.00

Series Mazda incandescent lamps, commercially known and designated as 400 c. p. series lamps, each lamp per year $37.00

Series Mazda incandescent lamps, commercially known and designated as 250 c. p. series lamps, each lamp per year $32.00

EXCEPTIONS:

PRESENT UNDERGROUND LIGHTING SYSTEM.

(c) The lamps existing on June 1, 1930, and constituting parts of the above mentioned Street Lighting Systems Nos. 1 and 2 and the Cavalier Shores Street Lighting System, as shown on the map Schedule Exhibit A. notwithstanding the same are served and fed from underground cables and circuits shall be charged and paid for at the rates prescribed by Schedule 1 for the Overhead Street Lighting System, but any additions or extensions shall be subject to the rates prescribed by clauses (a) and (b) of this Schedule 2.

(d) Seasonal Service. Provided, however, that as to the present lamps of Street Lighting System No. 1 shown on the Map Schedule Exhibit A. as midnight service lamps (not to exceed in number 47 lamps), and as to the present lamps of Street Lighting System No. 2 shown on Exhibit A. as midnight service lamps (not to exceed in number 45 lamps), the Town may curtail the term of annual service to not less than four (4) months and the rate and charge for each month or any fraction thereof shall be $2.50 for each series incandescent 600 c. p. lamp and $2.10 for each series incandescent 400 c. p. lamp, plus a charge of $1.50 per lamp each time the lamps are ordered out of service (this charge to cover the expense of the disconnection and the later connection when the lamps are again ordered in service.)

Schedule 3: TRAFFIC OFFICER'S LIGHTING:

The rates for traffic officers lighting used by Traffic Officers for the purpose of controlling traffic shall be

Series Mazda incandescent lamps, commercially known and designated as 200 c. p. series lamps, served and fed by overhead wires, burning only at such times as Traffic Officer is on duty at night directing and controlling traffic, each lamp per year ..... $12.00.

Third: The lamps to be furnished under this contract shall, except as expressly hereinafter otherwise provided as to midnight service, burn, under normal conditions, for the several

types of service herein mentioned as follows:

(a) ALL NIGHT LIGHTING - each and every night during each year from dusk to dawn, or approximately 4000 hours each year.

(b) MIDNIGHT LIGHTING - each and every night during each year from dusk to twelve o'clock midnight.

(c) TRAFFIC OFFICER'S LIGHTING - each and every night during each year only at such times as a Traffic Officer is on duty at that point and directing and controlling traffic.

The terms "dusk" and "Dawn" as used herein, shall mean half an hour after sunset and half an hour before sunrise, respectively, as given in the Port Calendar for the United States Navy Yard at Norfolk, Virginia, for sunset and sunrise.

Fourth: The Power Company covenants and agrees that it will, at its own cost, during the term of this contract, and any and all renewals hereof, furnish, erect, install and maintain such and so many poles, wires, conduits, cables, lamps and fixtures in addition to those shown on the blue print map schedule Exhibit A. as may be required by the Town for its street lighting purposes, and will operate, maintain and renew when and as necessary to renew the same all poles, wires, conduits, cables, lamps and fixutres used in said street lighting service, and render efficient street lighting service at the rates and upon the terms and conditions herein specified.

PROVIDED, HOWEVER, THAT:

(a) The Power Company shall not be required to supply ornamental standards for street lights except in connection with

the underground lighting system and, unless a different type of standard be agreed upon by the Town and the Power Company, it, said Power Company, shall not be required to furnish any different type or character of ornamental standard than those now in use in street lighting systems Nos. 1 and 2.

(b) The Power Company shall not be required to extend its lines a greater distance than five hundred (500) feet to furnish any one lamp, or an average distance of more than five hundred (500) feet per lamp where more than one lamp is ordered at the same time, unless the Town shall pay to and reimburse the Power Company the cost of such installation in excess of the above limits. Nor shall the Power Company be required to make any extensions of its lines for this purpose until the Town has furnished and delivered to the Power Company, free of cost, all necessary authority, easements and rights of way for the erection of the necessary poles and wires and any and all necessary consents and permits of property owners, except that where the Power Company owns or controls a right of way which could reasonably be used to make such extension or extensions, the same shall be used for such purpose so long as the Power Company shall continue to have the right to use the same.

(c) The Power Company shall not be required to furnish and install any additional street lighting facilities within one year next preceding the date of the expiration of this contract, or any renewal thereof except upon the following terms and conditions.

(c1) In event the Town shall order any street lighting facilities to be installed during the year next preceding the date of the expiration of this contract or any renewal thereof, the Power Company shall keep an accurate account of the cost of installation of such facilities and shall render to the Town in duplicate a bill or bills for the entire cost of such installation, and the Town shall cause the said bill to be checked, and if found to be correct, one copy thereof shall be approved by the Town and returned to the Power Company.

(c2) In event this contract is renewed, as hereinafter provided, or in event a new contract upon terms mutually agreeable to the Town and the Power Company is executed by them, then all bills for the cost of installation of additional street lighting facilities within the last year of this contract or any renewal hereof shall be cancelled and the Town shall be ipso facto released and discharged of any obligation to pay said bills.

(c3) In the event there is no such renewal, and no new contract upon terms mutually agreeable to the Town and the Power Company is executed by them, the Town covenants and agrees that it will, within fifteen (15) days from the expiration of this contract or any renewal hereof, pay to the Power Company all of the bills for the cost of installation of such street lighting facilities during the last year of the period that this contract or any renewal hereof was in force and effect.

Fifth: The Town shall cause its police or other proper authorities to report to the Power Company as promptly as

possible any and all lights that are out or not burning properly, and if the lights so reported shall not be repaired and relighted within twelve (12) hours from the time such report is received by the Company, then the Town may make a deduction from the payment for the current month during which said lamp is out; the period during which any of the lamps shall temporarily fail to burn is designated as "outage" and an accurate account of outages shall be kept by the Town and the Power Company, and any differences between the two accounts shall be equitably adjusted.

PROVIDED, HOWEVER, THAT:

(a) There shall be no deduction for any outage due to any order of any Town official or to other governmental authority.

(b) There shall be no deduction for any outage caused by act of God, or the public enemy, sleets, storms or unavoidable accidents, or by strikes among the employees of the Power Company, or by any other cause beyond its control, unless the Power Company shall fail to make the necessary repairs or replacements and restore the service within a reasonable time after the cessation of any such cause or causes.

(b 1) If, however, any such interruptions shall continue for more than three (3) consecutive days after the cessation of such cause or causes, such time in excess of three (3)

days shall be considered as a total outage (herein called "excess outage"), and the Town shall have the right to deduct from the rates and charges herein specified the pro rata price for such excess outage as the period of such excess outage shall bear to the period during which the lamps are required to be lighted.

Sixth: The parties hereto covenant and agree that the rating and capacity of lamps herein specified for the respective lamps to be furnished under this contract is the trade rating of said lamps, respectively, and if the Power Company shall supply said lamps during the time they are to be operated or burned with the amperes of current equal to ninety six (96%) per cent of that specified as the rated capacity, it shall be deemed a fulfillment of and compliance with this contract, but the Power Company shall at all times, at its own cost, upon notice from the duly authorized representative of the Town remove or repair any lamp deemed below the said standard, and, if removed, replace the same with a lamp of the same type, which shall conform to the said standard. The Town shall have the right at any and all times to make separate and independent tests of any lamp and for this purpose the duly authorized representatives of the Town shall have the right of access to any and all lamps, appliances, fixtures and property of the Power Company which the Town may find necessary to make such tests.

Seventh: In order that the Town may be in a position to avail itself of the benefits of any and all improvements in electric lamps or appliances during the term of this contract, and any and all renewals hereof, it is covenanted and agreed that the Town may at any time require the Power Company to install, in lieu of the lamps and fixtures then installed and used, other lamps and fixtures which will not consume a greater amount of current per hour of use, but the Town covenants and agrees that, in event it exercises its right to require such substitution, it will pay to and reimburse the Power Company the entire cost and expense thereof, including any excess of purchase price of such new lamps over the purchase price of the lamps to be installed under this contract.

Eighth: The entire cost and expense of maintenance and repair and renewal of all street lighting facilities to be supplied under this contract due to whatsoever cause, except the negligence of the Town, its officers, agents and employees, and except such substitutions as may be required by the Town under the next preceding section hereof, shall be borne by the Power Company, but the Town shall pay to the Power Company the cost of any repairs or replacements which may be necessary on account of breakages or damages occasioned by the Town, or its officers, agents and employees.

Ninth: All payments to be made by the Town to the Power Company for service under this contract for street lighting service shall be made monthly at the net rates hereinabove set forth, payable on or before the fifteenth day of each month for the service rendered during the calendar month next preceding the date upon which such payment is to be made, and without deduction except for outages as hereinabove provided for.

II

OTHER MUNICIPAL LIGHT AND POWER REQUIREMENTS.

First: It is mutually covenanted and agreed by the parties hereto that, during the term of this contract and any and all renewals hereof, the Power Company shall supply to the Town, and the Town shall purchase from the Power Company, electrical energy for all other municipal light and Power requirements of the Town.

Second: The Town shall execute the Power Company's standard form of application and contract applicable to the service or services to be rendered, which shall be accepted by the Power Company.

Third: The electrical energy shall be supplied and purchased at the rates and upon the terms and conditions and subject to the rules and regulations of the Power Company's standard contract and filing with the State Corporation Commission of Virginia, effective as to the City of Norfolk and applicable

to the service to be rendered, as the same may be modified and changed by the said Commission or otherwise altered according to law.

III

DURATION OF CONTRACT.

First: It is mutually covenanted and agreed that this contract shall continue in full force and effect and be binding and obligatory upon the respective parties hereto, and their successors and assigns, for the term of ten (10) years from and after the first day of June, 1930.

Second: It is mutually covenanted and agreed that unless written notice of its intention to terminate the same is given by either party hereto to the other at least six (6) months prior to the expiration of this contract, the same shall ipso facto stand renewed for another period of ten (10) years and so on automatically renewed from term to term until the same be finally terminated by either party giving to the other written notice of the intention to terminate the same at least six (6) months prior to expiration of the contract or any renewal thereof, unless the right of the Power Company to conduct the light and power business in Virginia Beach should at any time cease and determine, in which event this contract and any renewal thereof shall ipso facto likewise cease and determine.

IN WITNESS WHEREOF the Town of Virginia Beach has caused this contract to be executed in its name and on its be-

half by its Mayor and has caused its corporate seal to be hereto affixed duly attested by its Town Clerk, all done pursuant to a resolution of the Council adopted on the 18th day of August 1930, and approved by the Mayor on the 19th day of August, 1930, and the Virginia Electric and Power Company has caused these presents to be executed in its name by its President or Vice President and its corporate seal to be hereto affixed and attested by its Secretary or Assistant Secretary.

TOWN OF VIRGINIA BEACH,

By _____
Mayor

ATTEST:

_____
Town Clerk.

VIRGINIA ELECTRIC AND POWER COMPANY

By _____
Vice President.

ATTEST:

_____
Assistant Secretary.

A RESOLUTION TO CONTRACT WITH THE VIRGINIA ELECTRIC AND POWER COMPANY FOR THE PURCHASE BY THE TOWN OF VIRGINIA BEACH FROM SAID COMPANY OF ELECTRICAL ENERGY FOR THE MUNICIPAL LIGHT AND POWER PURPOSES OF THE TOWN (INCLUDING STREET LIGHTING FACILITIES) AND TO AUTHORIZE AND DIRECT THE EXECUTION ON BEHALF OF THE TOWN OF THE CONTRACT FOR SUCH SERVICE.

WHEREAS, the Town of Virginia Beach has heretofore obtained from the Norfolk Southern Railroad Company electrical energy for the Town's municipal light and power requirements, including street lighting facilities; and

WHEREAS, by indenture dated March 1, 1930, the Norfolk Southern Railroad Company leased, demised and let to the Power Company for the term of ninety nine (99) years all of the property, equipment and facilities theretofore used by the Norfolk Southern Railroad Company for the transmission and distribution of electrical energy for commercial light, heat and power purposes in the Town of Virginia Beach and the Counties of Norfolk and Princess Anne, together with its electric light, heat and power business, and has discontinued the business of distributing electricity for commercial heat, light and power purposes; and

WHEREAS, it is deemed desirable that the said Town obtain from the Virginia Electric and Power Company electric current for all of its municipal heat, light and power purposes, including street lighting facilities.

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE TOWN OF VIRGINIA BEACH:

Section 1: That the Town of Virginia Beach contract with the Virginia Electric and Power Company to purchase from said Company electrical energy for all of the municipal heat, light and power purposes for the Town use including street

lighting facilities at the rates and upon the terms and conditions set forth in the form of contract hereto attached and made a part hereof.

Section 2: That the Mayor of the Town of Virginia Beach be and he is hereby authorized and directed to execute in the name and on behalf of the Town of Virginia Beach the form of said contract hereto attached; that the Town Clerk be and he is hereby authorized and directed to affix the corporate seal of the Town to said contract and to attest the same.

Defendant's Exhibit No. 10-A

Plat showing location of light poles

(See page 203)

EXHIBIT - A

SHEET 3

Defendant's Exhibit No. 11

Agreement between Princess Anne County Board of Supervisors and Norfolk Southern Railway Company, dated June 27, 1921, recorded in Deed Book 110, at Page 218, and plat attached thereto

THIS AGREEMENT, made and entered into this 27th day of June, 1921, by and between Board of Supervisors of Princess Anne County, Virginia, as parties of the first part, and Norfolk Southern Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Virginia, as party of the second part.

WITNESSETH, THAT, WHEREAS, Norfolk Southern Railroad Company operates a part of its line of railroad between Norfolk, Virginia and Virginia Beach, Virginia and Cape Henry, Virginia by electricity, which passes through Princess Anne County, Virginia, at or near the Township of Virginia Beach, Virginia; and

WHEREAS, the residents of Princess Ann County, Virginia residing near the Township of Virginia Beach have requested Norfolk Southern Railroad Company to furnish them with extra or surplus electric power to be used for lighting purposes; and

WHEREAS, in order to furnish the residents of Princess Anne County, Virginia, residing near the Township of Virginia Beach with electric current for lighting purposes, it is necessary for Norfolk Southern Railroad Company to erect poles and string wires therefrom on certain roads in Princess Anne

County near the Township of Virginia Beach; and

WHEREAS, the Board of Supervisors of Princess Anne County, Virginia, by resolution adopted at a duly organized meeting has authorized Norfolk Southern Railroad Company to erect poles and string wires therefrom on the following roads and streets in Princess Anne County, Virginia, near the Township of Virginia Beach:

Atlantic Blvd.	from	26th Street	North	to	40th Street.		
Atlantic Ave.	"	"	"	"	"	"	"
Holly Avenue	"	"	"	"	"	"	"
Artic Avenue	"	"	"	"	"	35th	"
Baltic Avenue	"	"	"	"	"	Holly Road.	
Mediteranean Ave.	"	"	"	"	"	"	"
Holly Road	"	"	"	"	"	Point North of 40th St.	
26th Street	"	Atlantic Blvd.	West	to	Holly Road		
27th Street	"	"	"	"	"	"	"
28th Street	"	"	"	"	"	"	"
29th Street	"	"	"	"	"	"	"
30th Street	"	"	"	"	"	"	"
31st Street	"	"	"	"	"	"	"
32nd Street	"	Holly Avenue		"	"	"	"
33rd Street	"	Atlantic Blvd.		"	"	"	"
34th Street	"	"	"	"	"	"	"
35th Street	"	"	"	"	"	"	"
36th Street	"	"	"	"	"	"	"
37th Street	"	"	"	"	"	Holly Avenue	

38th Street	from	Atlantic	Blvd.	West	to	Holly Avenue and continuing along Road to intersection of Holly Road	
39th Street	"	"	"	West	to	Holly Avenue	
40th Street	"	"	"	"	"	"	"

NOW, THEREFORE, this contract witnesseth, that the said parties of the first part, in consideration of the premises and of the sum of $5.00, cash in hand paid, the receipt whereof is hereby duly acknowledged and released, do hereby grant unto Norfolk Southern Railroad Company the right to erect poles and string wires therefrom for the purpose of furnishing electric current for lighting purposes to the residents of Princess Anne County (and among others those residing near the Township of Virginia Beach, Virginia,) on the following roads and Streets in said Princess Anne County, Virginia, near the Township of Virginia Beach, Va.

Atlantic Blvd.	from	26th	Street	North	to	40th	Street.
Atlantic Ave.	"	"	"	"	"	"	"
Holly Avenue	"	"	"	"	"	"	"
Artic Avenue	"	"	"	"	"	35th	"
Baltic Avenue	"	"	"	"	"	Holly	Road
Mediteranean Ave.	"	"	"	"	"	"	"
Holly Road	"	"	"	"	"	Point north of 40th St.	
26th Street	"	Atlantic	Blvd.	West	"	Holly	Road
27th Street	"	"	"	"	"	"	"
28th Street	"	"	"	"	"	"	"
29th Street	"	"	"	"	"	"	"
30th Street	"	"	"	"	"	"	"

31st Street	from	Atlantic Blvd.	West	to	Holly	Road	
32nd Street	"	Holly Avenue	"	"	"	"	
33rd Street	"	Atlantic Blvd.	"	"	"	"	
34th Street	"	"	"	"	"	"	"
35th Street	"	"	"	"	"	"	"
36th Street	"	"	"	"	"	"	"
37th Street	"	"	"	"	"	Holly Ave.	
38th Street	"	"	"	"	"	"	" and continuing along Road to intersection of Holly Road
39th Street	"	"	"	West	to	Holly	Avenue
40th Street	"	"	"	"	"	"	"

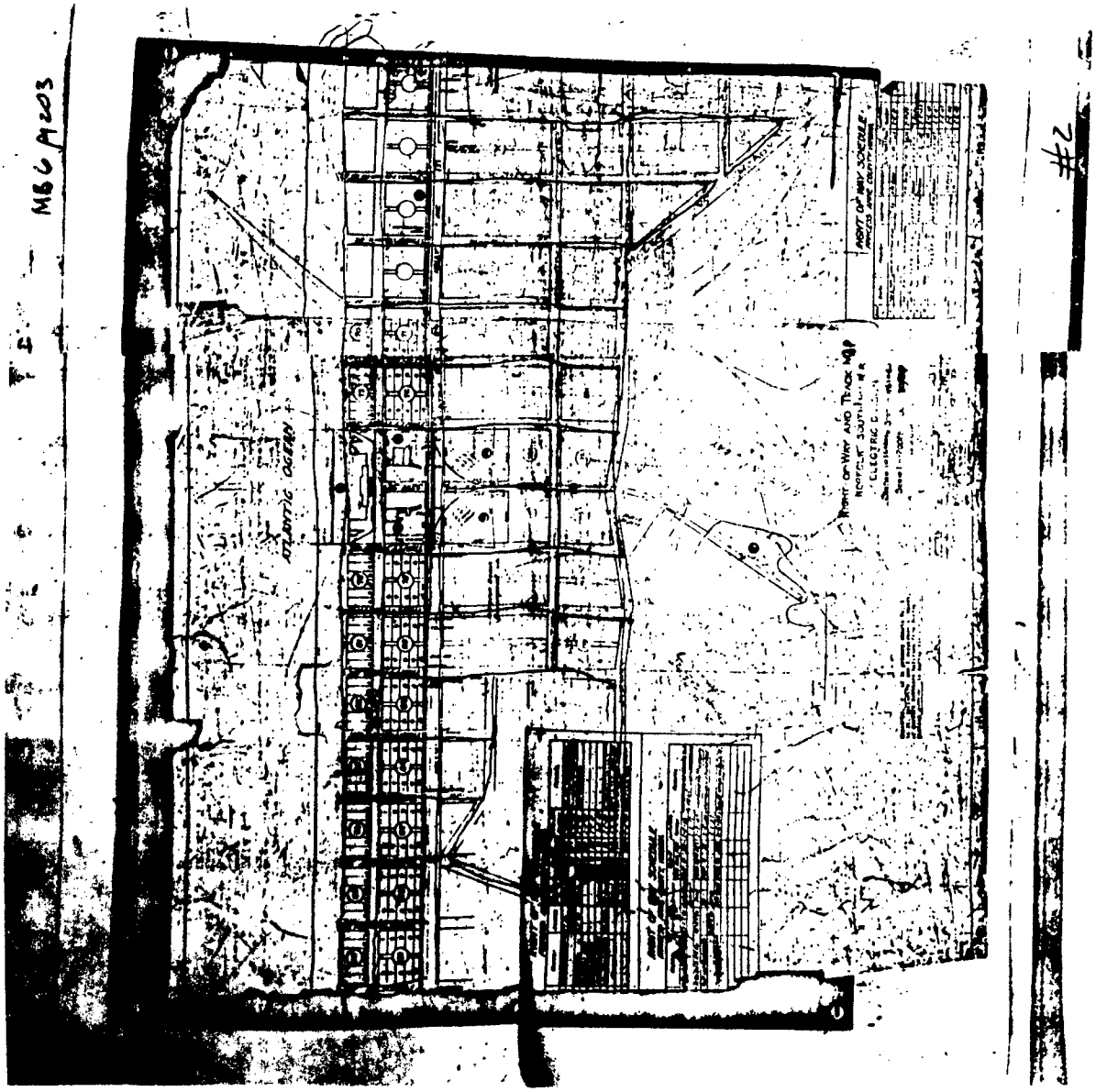
The same being shown in Red on the blue print hereto attached as a part hereof. The poles to be erected on the said roads or streets shall be placed on curb lines where the streets are laid out, or along the property lines and boundaries of the roads as laid out, and cross arms placed on said poles from which to string said wires shall be placed at a height of not less than 20 feet above all road crossings, and at a height of not less than 23 feet above all railroad crossings. IN WITNESS WHEREOF, said Board of Supervisors have caused these presents to be executed by its Chairman, and its duly adopted seal to be affixed and attested by the Clerk, all to duplicate orignials the day and year first above written.

Defendant's Exhibit D-13

Blueprint attached to Exhibit D-11 with area outlined in red thereon

(See page 208)

Defendant's Exhibit D-13



Defendant's Exhibit No. D-14

Ordinance No. 57 of the City of Virginia Beach, Virginia, adopted May 27, 1963

ORDINANCE NO. 57

AN ORDINANCE TO GRANT TO VIRGINIA ELECTRIC AND POWER COMPANY, ITS SUCCESSORS AND ASSIGNS THE FRANCHISE RIGHT AND PRIVILEGE UPON CERTAIN CONDITIONS TO USE THE STREETS, ALLEYS AND OTHER PUBLIC PLACES OF THE CITY OF VIRGINIA BEACH, VIRGINIA, WITHIN ITS CORPORATE LIMITS, AS THE SAME NOW EXIST OR MAY BE HEREAFTER EXTENDED OR ALTERED, FOR THE PURPOSE OF DISTRIBUTING AND TRANSMITTING ELECTRIC CURRENT FOR LIGHT, HEAT AND POWER AND OF SUPPLYING AND SELLING ELECTRIC CURRENT FOR LIGHT, HEAT AND POWER WITHIN SAID CORPORATE LIMITS, AND TO ACQUIRE, ERECT, MAINTAIN, AND USE, AND IF NOW CONSTRUCTED, TO MAINTAIN AND USE POLES, TOWERS, WIRES, CONDUITS, SUBWAYS, LINES, MANHOLES, CABLES, EQUIPMENT AND APPLIANCES IN, UNDER, OVER AND ALONG SUCH STREETS, ALLEYS, AND OTHER PUBLIC PLACES FOR THE AFORESAID PURPOSE.

WHEREAS, the Clerk has laid before the Council of the City of Virginia Beach, Virginia, at the first regular session held after the completion of the publication thereof, an ordinance approved April 22, 1963, entitled, "An ordinance to grant to The Virginia Electric & Power Company its successors and assigns the franchise right and privilege upon certain

conditions to use the streets, alleys and other public places of the City of Virginia Beach, Virginia, within its corporate limits, as the same now exist or may be hereafter extended or altered, for the purpose of distributing and transmitting electric current for light, heat and power and of supplying and selling electric current for light, heat and power within said corporate limits, and to acquire, erect, maintain, and use, and if now constructed, to maintain and use poles, towers, wires, conduits, subways, lines, manholes, cables, equipment and appliances in, under, over and along such streets, alleys, and other public places for the aforesaid purpose," together with a certificate of due publication of the same once a week for four successive weeks, in a newspaper of general circulation in the City of Virginia Beach, Virginia, said advertisement commencing on April 25, 1963, and terminating on the 16th day of May, 1963; and

WHEREAS, the presiding officer of the Council of the City thereupon invited bids for said franchise, rights and privileges, as required by law; and

WHEREAS, the Virginia Electric and Power Company submitted in writing a bid in the sum of One Thousand Dollars ($1,000) for the franchise, rights and privileges contained

in said ordinance, accompanied by a certified check for the said sum of One Thousand Dollars ($1,000), payable to the city, which bid was delivered on the day and hour named in the advertisement to the presiding officer of the Council of the city, in open session and was read aloud; and

WHEREAS, the presiding officer then and there inquired for any further bids and no further bids were submitted; and

WHEREAS, in the opinion of the Council of the city it is expedient and to the best interests of the city that the said franchise, rights and privileges should be granted to the Virginia Electric and Power Company: NOW, THEREFORE,

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF VIRGINIA BEACH, VIRGINIA:

1. That the bid of the Virginia Electric and Power Company be accepted and that the rights and privileges proposed to be granted by the said ordinance be and the same are hereby granted to the said Virginia Electric and Power Company, upon the condition that the said Virginia Electric and Power Company shall first execute a bond with good and sufficient security in the penal sum of One Thousand Dollars ($1,000), with surety satisfactory to the city, to be conditioned as provided by law and as prescribed in Section 19 of said ordinance that the

Grantee will construct and maintain, and if constructed, will maintain, the plant or plants provided fortherein or reasonably necessary for the exercise of the rights and privileges granted in and by said ordinance, and will exercise the rights and privileges granted by said ordinance upon and subject to the terms, provisions, conditions and limitations set forth therein.

2. That the name of said Virginia Electric and Power Company shall be inserted in the said ordinance which was approved April 22, 1963, and that the same, with this insertion, be and is hereby enacted and reordained in the words and figures following:

AN ORDINANCE TO GRANT TO VIRGINIA ELECTRIC AND POWER COMPANY, ITS SUCCESSORS, AND ASSIGNS THE FRANCHISE, RIGHT AND PRIVILEGE UPON CERTAIN CONDITIONS TO USE THE STREETS, ALLEYS AND OTHER PUBLIC PLACES OF THE CITY OF VIRGINIA BEACH, VIRGINIA, WITHIN ITS CORPORATE LIMITS, AS THE SAME NOW EXIST OR MAY BE HEREAFTER EXTENDED OR ALTERED, FOR THE PURPOSE OF DISTRIBUTING AND TRANSMITTING ELECTRIC CURRENT FOR LIGHT, HEAT AND POWER WITHIN SAID CORPORATE LIMITS, AND TO ACQUIRE, ERECT, MAINTAIN, AND USE, AND IF NOW CONSTRUCTED, TO MAINTAIN AND USE POLES, TOWERS, WIRES, CONDUITS, SUBWAYS, LINES, MANHOLES, CABLES, EQUIPMENT AND APPLIANCES IN, UNDER, OVER AND ALONG SUCH STREETS, ALLEYS AND OTHER PUBLIC PLACES FOR THE AFORESAID PURPOSE.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF VIRGINIA BEACH, VIRGINIA:

SECTION 1. The right is hereby granted unto Virginia Electric & Power Co. hereinafter referred to as "Grantee," its successors and assign for the term and subject to the terms, provisions, conditions and limitations hereinafter stated, to use the streets, alleys and other public places of the City of Virginia Beach, hereinafter referred to as "City," and to acquire, erect, maintain and use, and if now erected or installed, to maintain and use poles, towers, wires, equipment and appliances in, under, over and along, and to acquire, install, maintain and use, and if now installed, to maintain and use conduits, lines, or subways, including necessary manholes, and to run cables and wires in, under, over and along the streets, alleys and public places of the City for the purpose of distributing and transmitting electric current for light, heat and power, and to supply and sell electric current for light, heat and power at any point within the corporate limits of the City as the same now exist or may be hereafter extended or altered.

SECTION 2. The Grantee shall have the right to use, maintain and operate, subject to the provisions, terms, conditions and limitations prescribed in this franchise and subject to the lawful exercise of the police power of the City, the poles, towers, wires, appliances, conduits, subways, lines, manholes, cables and equipment erected, maintained and used in, under, over and along the streets, alleys and other public places of the City on the day this franchise becomes in force and effect for the purpose of so distributing and transmitting electric current for light, heat and power and for so supplying and selling electric current therefor.

SECTION 3. The Grantee shall have the right to erect, maintain and use such poles, towers, wires, appliances, conduits, subways, lines, manholes, cables and equipment in, under, over and along the streets, alleys and other public places of the City at such locations as are reasonably suitable and convenient for the purposes of the Grantee and the City subject to the terms, provisions, conditions and limitations hereinafter stated and, the lawful exercise of the police power of the City.

SECTION 4. The Grantee shall not erect or install, move, alter or change the location of any pole, tower, wire, conduit, subway, line, manhole, cable or equipment in any street, alley or other public place of the City or dig, cut or disturb any street, alley or other public place of the City unless prior written notice of its intention so to

do is given to such department or agency of the City as shall have been or may be designated by the City Manager or the Council of the City and permission in writing so to do is granted by such department or agency or such requirement is waived by such department or agency. Such permission shall be conditioned upon compliance with the terms, conditions, provisions and limitations of this franchise and with such other terms, provisions, conditions and limitations as will preserve, protect and promote the safety of the public using the streets, alleys, and other public places of the City and as will prevent interference with or obstruction of the use of streets, alleys and other public places by the City or by any other public utility or public service corporation for their respective purposes and functions. Such permission shall also be conditioned upon such other terms, provisions, conditions and limitations as will preserve, protect and promote the health, safety and general welfare of the City and its citizens subject to the lawful exercise of the police power.

SECTION 5. In the event the relocation, construction, reconstruction, maintenance or repair by the City of any of its facilities or services now or hereafter acquired, and including but not limited to any street, alley or other public place, sewer, electric, water, fire alarm, police communication or traffic control facilities or any part thereof, or in the event access to any street, alley or other public place to or from any property of the City is required, and it is necessary to move, alter or relocate, either permanently or temporarily, any of the Grantee's poles, towers, wires, appliances, conduits, subways, lines, manholes, cables or equipment or any part thereof, in order for the City to relocate, construct, reconstruct, maintain or repair any such facility, service, street, alley or other public place or any such sewer or electric, water, fire alarm, police communication or traffic control facility, or any part thereof, or to obtain access to or from such property, upon notice from the City, the Grantee will move, alter, or relocate such pole, tower, appliance, conduit, subway, line, manhole, cable or equipment or part thereof, at its own cost and expense; and should the Grantee fail, refuse or neglect to comply with such notice, such pole, tower, wire, appliance, conduit, subway, line, manhole, cable or equipment or part thereof may be removed, altered or relocated by the City at the cost of the Grantee and the City shall not be liable to the Grantee for damages resulting from such removal, alteration or relocation.

SECTION 6. The Grantee shall at no cost to the City erect, install and maintain on any of its poles, towers, wires, appliances, conduits, subways, lines, manholes, cables or equipment in or near the streets, alleys and other public places of the City such reasonable devices to appraise or warn persons using the streets, alleys and other public places of the existence of such poles, towers, wires, appliances, conduits, subways, manholes, lines, cables or equipment as shall be from time to time reasonably prescribed or approved for purposes of public safety by such department or agency of the City as shall have been or may be designated for the purpose by the City Manager or Council of the City.

SECTION 7. The Grantee shall have the right to remove, trim, cut and keep clear of its poles, towers, wires and other overhead appliances and equipment the trees in and along the streets, alleys and other public places of the City, provided it first obtain a written permit from the City so to do, except in cases of emergency and further provided that in the exercise of such right, the Grantee shall not cut, remove, trim or otherwise injure such trees to any greater extent that is reasonably necessary for the installation, maintenance and use of such poles, towers, wires and other overhead appliances.

SECTION 8. The Grantee in the exercise of any right granted to it by this franchise, shall at no cost to the City promptly reconstruct, replace, restore or repair any facility or service of the City, now or hereafter acquired, including but not limited to any street, alley or other public place, sewer, electric, water, fire alarm, police communication or traffic control facility or any part thereof which may be damaged, disturbed, or destroyed by the exercise of any such right, in a manner, with such materials and to the satisfaction of such department or agency as shall have been or may be designated by the City Manager or Council of the City.

SECTION 9. The City reserves and shall have the right to require the Grantee to obtain the specific permission of the City to locate, construct or erect poles, towers, wires, lines, cables, conduits, subways, manholes, equipment and appliances for the purpose of high voltage transmission on, above or along the streets, alleys and other public places of the City and the City further reserves and shall have the right to attach reasonable conditions to the granting of any such specific permission. The City further reserves the full scope of

its power to require by ordinance substitution of underground service for overhead service, or the transfer of overhead service from the front to the rear of property whenever reasonable in all areas in the City at such contributions or rates and charges as may be approved by the rate-making authority. The City further reserves the full scope of its police power to require by ordinance the location, construction and maintenance of overhead service at the rear of property or underground service, where ever reasonable in all new service installations in the City at such contributions or rates and charges as may be approved by the rate-making authority.

SECTION 10. The City reserves and shall have the right to continue to use, maintain, replace, repair and operate its existing traffic control, fire alarm, and police communication facilities, equipment and appurtenances on the existing poles and towers and in the existing conduits, subways, manholes or other structures of the Grantee for the exclusive use of the City and the performance of its functions and exercise of its powers without the payment of compensation therefore; provided that the Grantee shall have the right to remove or replace its equipment so long as it furnishes an equivalent facility for the City; and further provided that, the City shall indemnify, keep and hold the Grantee harmless from any and all loss, damage, cost or expense to, or which may be incurred by the Grantee, or to which it may be subjected by reason or as a result of such use of the Grantee's poles, towers, conduits, subways, manholes and structures.

SECTION 11. The City reserves, and shall have the right to use the poles, towers, conduits, subways, lines, manholes or other structures of the Grantee, along, under or overground without the payment of compensation for the erection and installation thereon and use and operation of traffic control, fire alarm and police communication facilities, equipment and appurtenances which are necessary for the exclusive use of the City and the performance of its functions and exercise of its powers; provided such use by the City of such poles, towers, conduits, lines, subways, manholes and structures shall not interfere with the proper use thereof by the Grantee for its purposes or in the exercise of its rights granted to it by this franchise; and provided further that the location on such poles and towers and in such conduits, subways, lines, manholes and structures and the character of such traffic control, fire alarm and police communication facilities, equipment and appurtenances shall be subject to the prior approval of the Grantee, which right of approval shall not be arbitrarily exercised; and provided, further, that the City shall indemnify, keep and hold the Grantee harmless from any and all loss, damage, cost or expense to, or which may be incurred by the Grantee, or to which it may be subjected by reason or as a result of such use of the Grantee's poles, towers, conduits, subways, lines, manholes and structures.

SECTION 12. Nothing contained in this franchise shall be construed to exempt the Grantee from any tax, levy or assessment which is not or which may be hereafter authorized by law.

SECTION 13. The Grantee shall render to the public in the City at all times during the term of this franchise efficient light, heat and power service at reasonable rates, which rates shall be prescribed by the State Corporation Commission so long as jurisdiction so to do is vested in the Commission; otherwise, such rates shall be prescribed by the Council of the City. The Grantee shall render to the City at all times during the term of this franchise efficient light, heat and power service at reasonable rates, which rates shall be such as may from time to time be agreed upon by the Grantee and the City subject to the jurisdiction of the State Corporation Commission. The Grantee will maintain its poles, towers, wires, appliances, conduits, subways, lines, manholes, cables, fixtures, facilities and equipment within the City in good order and operating condition throughout the term of this franchise, and the Grantee by accepting this franchise, agrees that the State Corporation Commission has jurisdiction to the full extent and in the manner now or hereafter provided by law, during the term of this franchise, to require the Grantee to render efficient light, heat and power service at reasonable rates, and that the Circuit Court of the City has jurisdiction to enforce compliance with all the terms, provisions, conditions and limitations of this franchise to the full extent and in the manner now or hereafter provided by law, during the term of this franchise.

SECTION 14. The Grantee agrees and binds itself to indemnify, keep and hold the City free and harmless from liability on account of injury or damage to persons, firms or corporations or property growing out of or directly or indirectly resulting from such use of the streets, alleys and other public places of the City, the acquisition, erection, installation, maintenance, repair, operation and use of such poles, towers, wires, appliances, conduits, subways, lines, manholes, cables, fixtures, facilities and equipment, or the exercise of any right granted by or under this franchise or the failure, refusal or neglect of the Grantee to perform any duty imposed upon or assumed by the Grantee by or under this franchise; and in the event that any suit or proceeding shall be brought against the City, at law or in equity, either independently or jointly with the Grantee on account thereof, the Grantee will defend the City in any such suit or proceeding at the cost of the Grantee; and in the event of a final judgment or decree being obtained against the City, either independently or jointly with

the Grantee, then the Grantee will pay such judgment or comply with such decree with all costs and expenses of whatsoever nature and hold the City harmless therefrom; but nothing herein contained shall be construed to render the Grantee liable for the negligence of the City or of its agents or employees, or for that of any other person, firm or corporation.

SECTION 15. The rights granted to the Grantee by this franchise may be exercised by any successor or successors, assignee or assignees of the Grantee, but such successor or successors, assignee or assignees shall be subject to and bound by all of the provisions, terms, conditions, and limitations prescribed in this franchise.

SECTION 16. The rights and privileges granted by this franchise shall continue for a term of thirty (30) years from and after the final passage of this ordinance unless sooner voluntarily surrendered by the Grantee, with the consent of the Council of the City, or forfeited as provided by law. Upon the expiration of the term of this franchise or surrender or forfeiture of the rights and privileges granted by this franchise, the Grantee shall remove all of its poles, towers, wires, appliances, conduits, subways, manholes, cables and equipment from the streets, alleys and other public places of the City and shall repair, restore or replace any street, alley or other public place and any sewer or water, electric, fire alarm, police communication or traffic control facility or tree, or any part thereof, which may be damaged, disturbed or destroyed by or as a direct or indirect result of the removal of such property, in a manner, with such materials and to the satisfaction of the City Manager of the City at the cost and expense of the Grantee within a reasonable time thereafter, which reasonable time shall be prescribed by the Council of the City. Upon the refusal, failure or neglect of the Grantee to so remove such property from the streets, alleys and other public places, or to repair, restore or replace any such street, alley, public place, sewer, water or electric, fire alarm, police communication or traffic control facility or tree in a manner, with such materials and to the satisfaction of such department or agency of the City as shall be designated by the City Manager or Council of the City, the City may remove such property from the streets, alleys and other public places of the City and repair, restore or replace any such street, alley, public place, sewer, water, electric, fire alarm, police communication or traffic control facility or tree at the cost of the Grantee and the City shall not be liable to the Grantee for damages resulting from such removal.

SECTION 17. This franchise is granted pursuant to Section 124 and Section 125 of the Constitution of the Commonwealth of Virginia and Article 2 of Charpter 22 of Title 15 of the Code of Virginia, and is subject to all franchises and permits heretofore granted by the Council or the Council of the former City of Virginia Beach to use the streets, alleys and public places of the City by other public utility or public service corporations. It is not intended by the grant of this franchise to abridge the exercise of the police power heretofore or hereafter granted to the City by the General Assembly. The grant of this franchise is subject to all ordinances and resolutions of the Council of the City as the same now exist or may be hereafter amended, revised or codified, in the lawful exercise of the police power or in the lawful exercise of any other power granted to the City by the General Assembly.

SECTION 18. That this franchise and the right and privileges granted thereby are not exclusive and nothing in this ordinance shall be construed to prevent a grant by the City of a similar franchise and rights and privileges to other persons or corporations.

SECTION 19. This ordinance shall be in force on the date of its passage and shall become effective when the Grantee (a) accepts this franchise and agrees to exercise the rights and privileges granted by this franchise upon and subject to the terms, provisions, conditions and limitations set forth in this franchise, which acceptance and agreement shall be in writing and shall be filed in the office of the City Clerk of the City, and (b) at the same time filed in such office a bond in the amount of $1,000.00, with surety approved by the City Manager of the city, conditioned that the Grantee will exercise the rights and privileges granted by this franchise upon and subject to such terms, provisions, conditions and limitations.