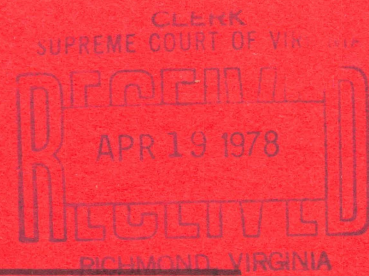


220VA135



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IN THE  
**Supreme Court of Virginia**  
AT RICHMOND

---

RECORD NO. 771276

---

RICHMOND SHOPPING CENTER, INCORPORATED,

.....Appellant

v.

WILEY N. JACKSON COMPANY, E.G. BOWLES  
COMPANY, E. G. BOWLES, and THE CON-  
TINENTAL INSURANCE COMPANY,

.....Appellees

---

JOINT APPENDIX

---

John W. Pearsall, Esq.  
McCaul, Grigsby & Pearsall  
Post Office Box 558  
Richmond, Virginia 23204

Counsel for Appellant

Archibald Wallace, III, Esq.  
Sands, Anderson, Marks & Miller  
Post Office Box 1998  
Richmond, Virginia 23216

Counsel for Appellees



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MOTION FOR JUDGMENT

1. Wiley N. Jackson Company and E. G. Bowles Company, as joint venturers and prime contractors, entered into a contract with the Virginia Department of Highways relating to the construction of Interstate Highway No. 195 [known by Project Nos: 0195-127-101, G301; F.H.W.A. 1-195-6(3)84; from 0.212 Mi. S. Cary St. Rd. to 0.283 Mi. N. Broad St., City of Richmond, Virginia], in the vicinity of the lands of Richmond Shopping Center, Incorporated.

2. The Continental Insurance Company became surety on the performance bond given by the joint venturers as principals covering the performance of their contract.

3. Among the obligations the performance of which said principals and surety assumed was the following responsibility imposed under the provisions of Section 107.12 of the Road and Bridge Specifications:

"Sec. 107.12 Protection and Restoration of Property and Landscape - The Contractor shall be responsible for the preservation of all property along the line of and adjacent to the work, the removal or destruction of which is not called for by the plans. He shall use suitable precaution to prevent damage to all such property.

When the Contractor finds it necessary for any reason to enter upon private property for the prosecution of his work, the storage of materials or any other purpose, he shall secure from the owner or lessee of such property, written permission for such entry prior to moving thereon. An executed copy of this permission shall be furnished the Engineer.

The Contractor shall be responsible for all damage or injury to property of any character during the prosecution of the work resulting from any act, omission, neglect or misconduct in his method of executing the work or at any time due to defective work or materials, and this responsibility shall not be released until the project has been completed and accepted.

When any direct or indirect damage or injury is done to any public or private property by or on account of any act, omission, neglect or misconduct in the method of executing the work or in consequence of the nonexecution thereof on the part of the Contractor, he shall restore such property to a condition similar or equal to that existing before such damage or injury was done by repairing, rebuilding or restoring, as may be directed, or make settlement with the owner of the property so injured or damaged

and secure from him a release from any claim against the Department, without additional compensation therefor. A copy of this release shall be furnished the Engineer."

4. In clear disregard of said obligation and for the savings they could effect in the cost to them of performing their remaining obligations to the Virginia Department of Highways, the joint venturers did utilize without permission temporary construction easements across the lands of Richmond Shopping Center, Incorporated, interfering with the conduct of the business of Richmond Shopping Center, Incorporated and inflicting severe damage on its property, by the repeated traverse across the same of heavy equipment, damage to a cinder block wall, damage to the asphalt surface of the customer parking lot, destruction of the gravelled surface and bumper logs on the employee parking lot, and termination of the employee practice of parking in the area designated for their use.

5. Richmond Shopping Center, Incorporated is a third party creditor beneficiary of the principals' contract with the Virginia Department of Highways, and in particular Section 107.12 of the Road and Bridge Specifications, and of the surety's obligation to indemnify for non-performance of the joint venturers' obligations.

6. By virtue of the defendants' failure to perform said obligations of which the plaintiff is third party creditor beneficiary, the plaintiff suffered the following losses and damages:

(a) The minimum value of the temporary construction easement utilized for traverse of heavy equipment, \$10,000.00.

(b) Repair of wall used as loading dock, \$20.00.

(c) Repair of asphalt surface broken up, \$2,400.00.

(d) Replacing of gravelled surface and bumper logs on employee parking lot, \$1,000.00.



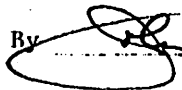
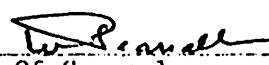
(e) Time, effort and expense to call on all employers and to follow with letters and with printed windshield cards to reestablish employee parking in designated area terminated by interference from temporary easement usage, \$220.00.

(f) Interest on \$10,000.00 from September 17, 1971 and on \$2,400.00 from February 13, 1973.

7. Despite the joint venturers' acknowledgement that the aforesaid break-up of the paved surface of the customer parking lot was effected by the unauthorized use of a temporary construction easement and traverse of heavy equipment in performance of their said contract with the Department of Highways, the defendants have failed and refused, despite repeated demand, to perform the aforesaid provision 107.12 of which the plaintiff is third party creditor beneficiary.

WHEREFORE, plaintiff moves for judgment against the defendants and each of them in the amount of \$13,640.00, together with interest on \$10,000.00 from September 17, 1971 and on \$2,400.00 from February 13, 1973, until paid, and the costs of this proceeding.

RICHMOND SHOPPING CENTER, INCORPORATED

By    
Of Counsel

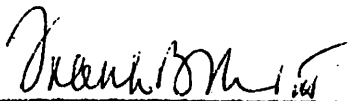
McCaul, Grigsby and Pearsall  
1005 United Virginia Bank Building  
Richmond, Virginia 23219  
Counsel for Richmond Shopping Center, Incorporated

DEMURRER

Defendants, by counsel for their Demurrer to the Motion for Judgment filed herein, comes and state that same is not sufficient in law.

WILEY N. JACKSON COMPANY and  
E. G. BOWLES COMPANY, Joint  
Venturers and THE CONTINENTAL  
INSURANCE COMPANY

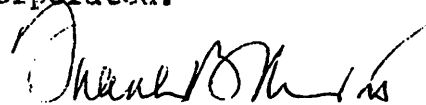
By Counsel



Frank B. Miller, III  
Sands, Anderson, Marks & Clarke  
1420 Fidelity Building  
Richmond, Virginia

CERTIFICATE

I hereby certify that a true copy of the foregoing Demurrer was mailed this 13 day of September, 1974, postage fully pre-paid to John W. Pearsall, McCaul, Griesby and Pearsall, 1005 United Virginia Bank Building, Richmond, Virginia, 23219, counsel for Richmond Shopping Center, Incorporated.





GROUNDS OF DEMURRER

Defendants, for their Grounds of Demurrer previously filed herein, come and state the following:

1. They deny that plaintiff has any right to maintain this action as third party creditor beneficiary of any contract or bond these defendants may have had with the Commonwealth of Virginia.

2. They deny that plaintiff has any rights whatsoever under the contract and/or bond referred to in paragraphs numbered one and two of the Motion for Judgment.

Wherefore, defendants move the Court for judgment in their behalf with their costs expended herein.

WILEY N. JACKSON and E. G.  
BOWLES COMPANY, JOINT VENTURERS  
and THE CONTINENTAL INSURANCE  
COMPANY

Frank B. Miller III By Counsel

Frank B. Miller, III  
Sands, Anderson, Marks & Clarke *zks*  
P. O. Box 1998  
Richmond, Virginia 23216

I hereby certify that a true copy of the foregoing pleading was mailed this 30th day of September, 1974, to John W. Pearsall, Esquire, 1005 United Virginia Bank Building, Richmond, Virginia 23219, counsel for Plaintiff.

*Walter Pearsall*

ORDER

This day came the parties on the defendants' Demurrer, which was argued by counsel. On consideration whereof the Court doth overrule said Demurrer.

And it being revealed in the course of argument that a third participant in the joint venture was E. G. Bowles, Contractor, and there being no objection thereto by counsel for the joint venture and its surety, the pleadings are hereby deemed amended by the addition of E. G. Bowles, Contractor, to the list of heretofore named joint venture defendants.

ENTER Nunc Pro Tunc 10/23/74

---

Judge



## GROUND OF DEFENSE

This day comes the defendant, The Continental Insurance Company, by counsel, and for and as its Grounds of Defense to the Motion for Judgment filed herein against it does hereby state as follows:

1. It admits the Virginia Department of Highways did let a contract relative to the construction of Interstate Highway No. 195 as further designated in Paragraph 1 of plaintiff's Motion for Judgment, but it denies the remaining allegations of said Paragraph 1 and calls for strict proof thereof.

2. It admits the allegations of Paragraph 2 of plaintiff's Motion for Judgment insofar as the same relates to The Continental Insurance Company being a surety on the performance bond for the contract described in Paragraph 1, but it denies the remaining allegations thereof and calls for strict proof thereof.

3. As to Paragraph 3 of plaintiff's Motion for Judgment, it admits that Section 107.12 of the Road and Bridge Specifications would be included in a contract set forth in Paragraph 1 of plaintiff's Motion for Judgment but it neither admits nor denies the remaining allegations of said Paragraph 3 and calls for strict proof thereof.

4. It denies the allegations of Paragraph 4 of plaintiff's Motion for Judgment.

5. This defendant denies the allegations of Paragraph 5 of plaintiff's Motion for Judgment, and as an affirmative defense states that a performance bond between a surety and a principal such as herein involved and the Virginia Depart-

ment of Highways does not create any third party creditor beneficiaries as alleged by the plaintiff, and this defendant further states that the sole purpose of a performance bond is to assure and guarantee the performance of the principal in and to the contract, and further this defendant states and avers that the only insurance coverage afforded or available to this plaintiff is that belonging to the liability carrier of the named principals and not this defendant.

6. It denies the allegations of Paragraph 6 of plaintiff's Motion for Judgment in its entirety and states that the plaintiff suffered no losses or damages.

7. It denies the allegations of Paragraph 7 of plaintiff's Motion for Judgment and denies further that it is in any way liable or responsible to the plaintiff for any of those things alleged in plaintiff's Motion for Judgment.

WHEREFORE, this defendant asks that the Motion for Judgment filed herein against it be dismissed with its costs heretofore expended.

THE CONTINENTAL INSURANCE COMPANY  
By Counsel



Archibald Wallace, III  
Sands, Anderson & Marks  
1420 Fidelity Building  
Ninth and Main Streets  
Richmond, Virginia



## GROUND OF DEFENSE

This day come the defendants, Wiley N. Jackson Company and E. G. Bowles Company, by counsel, and for and as their Grounds of Defense to the Motion for Judgment filed herein against them do state as follows:

1. They admit the Virginia Department of Highways did let a contract relative to the construction of Interstate Highway No. 195 as further designated in Paragraph 1 of plaintiff's Motion for Judgment, but they deny the remaining allegations of said Paragraph 1 and call for strict proof thereof.

2. They admit the allegations of Paragraph 2 of plaintiff's Motion for Judgment insofar as the same relates to The Continental Insurance Company being a surety on the performance bond for the contract described in Paragraph 1, but they deny the remaining allegations thereof and call for strict proof thereof.

3. As to Paragraph 3 of plaintiff's Motion for Judgment, they admit that Section 107.12 of the Road and Bridge Specifications would be included in a contract set forth in Paragraph 1 of Plaintiff's Motion for Judgment but they neither admit nor deny the remaining allegations of said Paragraph 3 and call for strict proof thereof.

4. They deny the allegations of Paragraph 4 of plaintiff's Motion for Judgment.

5. They deny the allegations of Paragraph 5 of plaintiff's Motion for Judgment.

6. They deny the allegations of Paragraph 6 of plaintiff's Motion for Judgment in its entirety and state that the plain-

tiff suffered no losses or damages.

7. They deny the allegations of Paragraph 7 of plaintiff's Motion for Judgment and deny further that they are in any-way liable or responsible to the plaintiff for any of those things alleged in plaintiff's Motion for Judgment.

WHEREFORE, these defendants ask that the Motion for Judgment filed herein against them be dismissed with their costs heretofore expended.

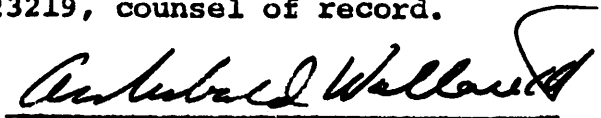
WILEY N. JACKSON COMPANY and  
E. G. BOWLES COMPANY, Joint Venturers  
By Counsel



Archibald Wallace, III  
Sands, Anderson & Marks  
1420 Fidelity Building  
Ninth and Main Streets  
Richmond, Virginia

CERTIFICATE

I certify that on the 28 day of January, 1975, I mailed a true copy of the foregoing to John W. Pearsall, Esquire, 1005 United Virginia Bank Building, 9th and Main Streets, Richmond, Virginia 23219, counsel of record.





O R D E R

THIS CAUSE came on December 12, 1975, and then came the plaintiff, in person, and by counsel and came also the defendants, in person and by counsel, and neither party demanding a jury for the trial of this case, but both agreeing that all matters of law and fact might be heard and determined and judgment rendered by the Court without the intervention of a jury, and the Court having fully heard the evidence took the matter under advisement for the preparation and submission of memorandum of law and argument. The Court now having reviewed the record, the memorandum of law and argument submitted by counsel and after independent research by the Court, it is

Upon due consideration ORDERED by the Court that the plaintiff recover judgment of the defendants, Wiley N. Jackson, E.G. Bowles Company, The Continental Insurance Company, Canada Contracting Company and Intercounty Construction Company, judgment for the sum of \$3,875.50, apportioned, as far as interest, as follows: judgment against the defendants for \$2,400.00 plus interest at the rate of 8% per annum from the date of judgment, and judgment against the named defendants for the sum of \$1,474.50 plus interest at the rate of 6% per annum from June 1, 1971, until paid.

To all of which action by the Court, which is adverse to their respective interests, the plaintiff and the defendant duly objected and excepted.

A certified copy of this Order is to be mailed to all counsel of record and the date of mailing noted in the margin hereof.

Nothing remaining to be done, it is ORDERED that this cause be stricken from the docket and placed among the ended causes of this Court.

A Copy,

**11**      Teste: EDWARD G. KIDD, Clerk

Circuit Court  
OF THE  
City of Richmond

June 27, 1977

JAMES EDWARD SHEFFIELD  
JUDGE

RECEIVED

JUN 28 1977

McCaul, Grigsby  
& Pearsall

JOHN MARSHALL COURTS BUILDING  
800 EAST MARSHALL STREET  
RICHMOND, VIRGINIA 23219

John W. Pearsall, Esq.  
McCaul, Grigsby and Pearsall  
1005 United Virginia Bank Building  
Ninth and Main Streets  
Richmond, VA 23219

Frank B. Miller, III, Esq.  
Archibald Wallace, III, Esq.  
Sands, Anderson, Marks & Clarke  
1420 Fidelity Building  
Ninth and Main Streets  
Richmond, VA 23219

William B. Kerkam, III, Esq.  
C. Braxton Valentine, Jr., Esq.  
Bremner, Byrne, Baber & Janus  
Suite 1500  
7th and Franklin Building  
P. O. Box 826  
Richmond, VA 23207

Harley W. Duane, III, Esq.  
May, Miller and Parsons  
Suite 800  
700 Building  
Seventh and Main Streets  
Richmond, VA 23219

Re: Case No. 7295  
Richmond Shopping Center, Incorporated  
v.  
Wiley N. Jackson Company and  
E. G. Bowles Company and  
The Continental Insurance Company  
v.  
Canada Contracting Company and  
Intercounty Construction Company

Gentlemen:

This matter is before the Court for its decision on the merits, evidence having been taken, ore tenus, memorandum of law and argument having been filed and the matter was argued.

June 27, 1977  
Page 2

The essential facts are well stated in the memorandum of law and argument filed by counsel of record and will not therefore be recounted here.

It is the decision of this Court that based upon the evidence established by a preponderance in the record, the plaintiff is entitled to the following amounts:

- |     |  |                  |
|-----|--|------------------|
| (1) | For the expenditure made by The Shopping Center for repair of the asphalt surface, which repair the joint venture had previously agreed to pay for       | \$2,400.00       |
| (2) | Expenses testified by Ruffin R. Bailey in connection with re-establishing the employee parking   | 220.00           |
| (3) | Expenses testified to by N. W. McDaniel for restoring the employee parking lot to its former condition and the repair of the wall used as a loading dock | 1,254.50         |
|     |  | <hr/> \$3,874.50 |

As to the plaintiff's claim for damages pertaining to the temporary construction easement over a portion of its parking lot, it is noted that the plaintiff's Motion for Judgment alleges that it was a third party beneficiary of the joint venture's contract with the Virginia Highway Department. That pursuant to that contract, the joint venture was required to negotiate and pay for a temporary construction easement in order to make the utilization of the plaintiff's land that the joint venture made and to restore the plaintiff's land.

The record does not establish that there were any negotiations between the joint venture and the plaintiff for a temporary construction easement nor any written or oral agreement pertaining to such easement.

The plaintiff, therefore, is here necessarily seeking damages occasioned by the joint venture's failure to negotiate and pay for the temporary construction easement which it alleges the joint venture ultimately took in plaintiff's land.

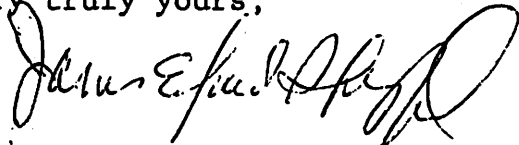
June 27, 1977  
Page 3

While previous decisions of the Court have recognized the right of the plaintiff to recover for the value of a temporary construction easement and the cost of restoration of its property, if it can establish such an easement, the court finds here that plaintiff's proof of its damages does not amount to a preponderance and therefore plaintiff's claims pertaining to the joint venture's failure to comply with the provisions of the contract pursuant to which plaintiff sues as a third party beneficiary must fail.

Without restating the evidence, while there is proof that the joint venture utilized various portions of the property over which the temporary construction easement is sought to be established by the plaintiff, along with others, at various times, over a considerable time span, the Court must, upon all of the evidence in the record, speculate as to the exact location of the easement. Likewise, while there is some proof in the transcript of testimony taken at trial that the joint venture's trucks did some damage to the parking lot where the easement is sought to be established, there is not established in this record, by a preponderance, the value of the land over which the easement was taken which would necessarily be the value of the temporary construction easement itself.

Accordingly, this Court has this day entered the attached Order awarding the plaintiff judgment against the defendant in the amount of \$3,874.50, plus interest as described in the Order.

Very truly yours,



James Edward Sheffield

js  
Enclosure

O R D E R

This cause came again on today's date upon the court's motion, and it is ORDERED that the cause be reinstated on the docket.

It is ORDERED that this court's order of June 27, 1977, is amended to delete so much of the order as reads Canada Contracting Company and Intercounty Construction Company. Further, as the said order reads ". . . judgment for the sum of \$3,875.50 . . . ," is amended to read ". . . judgment for the sum of \$3,874.50 . . . ."

In all other respects the order of June 27, 1977, remains in full force and effect and is hereby affirmed and ratified.

A certified copy of this order shall be mailed to all counsel of record and the date of mailing noted in the margin hereof.

It is FURTHER ORDERED that the transcript of the trial of this matter when properly filed with the Clerk of this Court, upon filing, shall be made a part of the record herein.

Nothing further remaining to be done, it is ORDERED that this matter be stricken from the docket and placed among the ended causes.

A Copy,

WILLIAM C. KIDD, Clerk

*Andrew J. Kipper*

RECEIVED  
JUL 5 1977  
McCall, Grigby  
& Penhall



# VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the  
City of Richmond on Friday the 10th day of March, 1978.*

Richmond Shopping Center, Incorporated,

Appellant,

against

Record No. 771276

Circuit Court No. 7295

Wiley N. Jackson Company, et al.,

Appellees.

From the Circuit Court of the City of Richmond, Division I

Upon the petition of Richmond Shopping Center, Incorporated, an appeal is awarded it from judgments rendered by the Circuit Court of the City of Richmond, Division I, on June 27, 1977, and June 28, 1977, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Wiley N. Jackson Company and others were defendants; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said court below in the penalty of \$500, with condition as the law directs.

This appeal, however, is limited to the consideration of assignments of error Nos. 1 through 5 which read as follows:

1. While allowing plaintiff contract recovery of the cost of restoring its property that was necessitated by the defendants' temporary utilization during construction, the court erred in making no allowance to the plaintiff for contract omission to negotiate and pay for such utilization.

2. The court erred in apparently conditioning a reasonable allowance for the defendants' omission to negotiate and pay for this temporary utilization of the plaintiff's property during construction on precise proof as to that location and compensation upon which the parties

would have agreed had the defendants discharged their contract obligation to negotiate and pay for such utilization before entry.

3. After allowing the plaintiff contract recovery of its cost of restoring specific areas to their condition prior to the defendants' temporary utilization thereof during its construction, the court erred in

# VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the  
City of Richmond on                      the                      day of*

Richmond Shopping Center, Incorporated,

Appellant,

against

Record No. 771276

Circuit Court No. 7295

Wiley N. Jackson Company, et al.,

Appellees.

apparently concluding that it was forced to speculate as to the exact location of the area utilized and that this rendered the plaintiff's proof inadequate.

4. The court erred in apparently concluding that the value of the land so utilized was not established by preponderance of the evidence, when the expert valuation testimony was both uncontradicted and inherently reasonable.

5. The court erred in apparently failing to understand the relationship of fair market value of the land utilized to the amount which the defendants should have paid for such utilization in discharge of their contract obligation.

On further consideration whereof, it is ordered that the parts of the record to be printed or reproduced in the appendix are to be limited to those parts of the record germane to assignments of error Nos. 1 through 5, and the briefs to be filed shall be limited to such discussion as is relevant to the assignments of error upon which this appeal is awarded.

The petition for appeal is refused as to assignment of error  
No. 6.

A Copy,

Teste:

18

*Allen L. Lucy*  
Clerk

## CROSS ASSIGNMENTS OF ERROR

1. The Court erred in its interpretation and application of the law of Virginia regarding easements.
2. The Court erred in overruling the demurrer.
3. The Court erred in ruling that the language of the contract provided or intended to provide for claims based on a third party beneficiary theory.
4. The Court erred in ruling that the language of the contract provided or intended to provide for easements of any type.
5. The Court erred in not admitting evidence of language in the contract specifically disclaiming any intention to create in non-parties thereto status as third party beneficiaries.
6. The Court erred in admitting evidence of damages which went beyond restoration costs or settlement in lieu of restoration.
7. The Court erred in admitting hearsay testimony to establish the 1973 cost of delivery of gravel to use in repairing Richmond's graveled lot, as a basis of Richmond's claim for damages to said lot.

## FACTS

The State entered into a contract with the joint venturers for the construction of a segment of I-195. Incorporated by reference into the terms of this contract are the Road and Bridge Specifications of July 1, 1970 (specifications). The joint venturers are principals on a performance bond, upon which Continental is surety, guaranteeing their performance of the terms of the contract.

MCCAUL, GRIGSBY AND PEARSALL

ATTORNEYS AT LAW

EUGENE W. MCCAUL  
JOHN T. GRIGSBY  
JOHN W. PEARSALL  
BLACKWELL N. SHELLEY  
FRANCIS C. LEE  
RICHARD H. C. TAYLOR  
MELVIN R. MANNING  
JOHN W. PEARSALL, III  
JAMES D. DAVIS

August 23, 1973

1005 UNITED VIRGINIA BANK BUILDING  
9TH AND MAIN STREETS  
RICHMOND, VIRGINIA 23219  
804 / 644-5491

file copy

Mr. C. E. Owen, Jr.  
Virginia Department of Highways  
1221 East Broad Street  
Richmond, Virginia 23219

Re: Richmond Shopping Center Condemnation Route 195,  
Parcels 012, 013, 014, 140 and 153

Dear Mr. Owen:

At the suggestion of Senator Wicker, I am furnishing you dollar amounts claimed by Richmond Shopping Center in connection with the temporary easements utilized over the Richmond Shopping Center property and damages to such property not covered by the pending condemnation proceedings. These were qualitatively discussed with representatives of the Highway Department in Senator Wicker's office on July 19, and with you and Senator Wicker and another at the site on August 15.

Temporary easement utilized for approximately  
12 to 18 months for traverse by trucks, cranes  
and other heavy equipment in extensive cubic  
yard excavation and placement of heavy timbers  
along western line of property. . . . . \$10,000.00

Repair wall used as loading dock. . . . . 20.00

Repair of asphalt surface broken-up . . . . . 2,400.00

Replacing of graveled surface and bumper logs on  
employee parking lot. . . . . 1,000.00

Time, effort and expense to call on all em-  
ployers and to follow with letters and with  
printed windshield cards, to re-establish em-  
ployee parking in designated area terminated  
by interference from temporary easement  
usage . . . . . 220.00



Mr. C. E. Owen, Jr.

Page 2

August 23, 1973

No dollar amount can be assigned at this time for the value of the temporary easement involved in closing the western driveway of the Citgo Station and occupying the two-foot strip along West Cary Street, as agreement has been reached through the informal exercise of lease reserved purchase option that Citgo would establish the amount of and prosecute this claim.

To the extent that the ultimate position of the State will be that the Highway Department contracts called on contractors to obtain temporary easements and to avoid damages to private owners, we make formal request that a copy of the contracts so providing be made available to us for our proceeding thereon, if ultimately necessary, as third party beneficiary; that any retainage from contractors involved herein be held for the purpose of settlement of these claims; and that claim be filed under the contractors' performance bonds (copies of which are hereby requested) for payment to our client as beneficiary thereof.

The remaining items we discussed appear to have involved exclusively Highway Department personnel, without participation by any contractor, and await your further inquiry into the underlying facts.

Cordially,

John W. Pearsall

JWP/lug

cc: Senator John J. Wicker, Jr.

Bailey & Childress, Inc.

VI B 7.1682

# McCAUL, GRIGSBY AND PEARSALL

ATTORNEYS AT LAW

EDWARD W. McCAUL  
JOHN C. GRIGSBY  
JOHN W. PEARSALL  
DEACON W. W. SHELLEY  
FRANK P. G. LEE  
CLAYTON C. LEE  
LESLIE H. McCAUL  
JOHN W. McCAUL, III  
DAVID C. McCAUL

August 23, 1973

1005 UNITED VIRGINIA BANK BUILDING  
9TH AND MAIN STREETS  
RICHMOND, VIRGINIA 23219

404 / 444-5491

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Mr. C. E. Owen, Jr.  
Virginia Department of Highways  
1221 East Broad Street  
Richmond, Virginia

Re: Richmond Shopping Center Condemnation Route 195,  
Parcels 012, 013, 014, 140 and 153

Dear Mr. Owen:

At the suggestion of Senator Wicker, I am furnishing you dollar amounts claimed by Richmond Shopping Center in connection with the temporary easements utilized over the Richmond Shopping Center property and damages to such property not covered by the pending condemnation proceedings. These were qualitatively discussed with representatives of the Highway Department in Senator Wicker's office on July 19, and with you and Senator Wicker and another at the site on August 15.

Temporary easement utilized for approximately  
12 to 18 months for traverse by trucks, cranes  
and other heavy equipment in extensive cubic  
yard excavation and placement of heavy timbers  
along western line of property. . . . . \$10,000.00

Repair wall used as loading dock. . . . . 20.00

Repair of asphalt surface broken-up . . . . . 2,400.00

Replacing of graveled surface and bumper logs on  
employee parking lot. . . . . 1,000.00

Time, effort and expense to call on all em-  
ployers and to follow with letters and with  
printed windshield cards, to re-establish em-  
ployee parking in designated area terminated  
by interference from temporary easement  
usage . . . . . 220.00

Mr. C. E. Owen, Jr.

Page 2

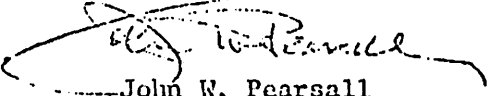
August 23, 1973

No dollar amount can be assigned at this time for the value of the temporary easement involved in closing the western driveway of the Citgo Station and occupying the two-foot strip along West Cary Street, as agreement has been reached through the informal exercise of lease reserved purchase option that Citgo would establish the amount of and prosecute this claim.

To the extent that the ultimate position of the State will be that the Highway Department contracts called on contractors to obtain temporary easements and to avoid damages to private owners, we make formal request that a copy of the contracts so providing be made available to us for our proceeding thereon, if ultimately necessary, as third party beneficiary; that any retainage from contractors involved herein be held for the purpose of settlement of these claims; and that claim be filed under the contractors' performance bonds (copies of which are hereby requested) for payment to our client as beneficiary thereof.

The remaining items we discussed appear to have involved exclusively Highway Department personnel, without participation by any contractor, and await your further inquiry into the underlying facts.

Cordially,



John W. Pearsall

JWP/lug

cc: Senator John J. Wicker, Jr.  
Bailey & Childress, Inc.

VI B 7.1682

AUG 24 1973

*Law Offices*  
*Wicker, Goddin & Duling*

*Mutual Building*

*Richmond, Virginia 23219*

*John J. Wicker, Jr.*

*C. Hobson Goddin*

*Robert W. Duling*

*John Allen Fox*

*Telephone (703) 643-3506*

August 24, 1973

Mr. John W. Pearsall, Esq.  
1005 United Virginia Bank Building  
9th and Main Streets  
Richmond, Virginia 23219

Re: Richmond Shopping Center Condemnation  
Route 195, Parcels 012, 013, 014,  
140 and 153

Dear Mr. Pearsall:

We phoned you on Wednesday morning, the 22nd, to inform you that whatever claim your client had concerning encroachment upon, damage to, and unauthorized use of the parking lot in connection with the above property should be presented, without delay, and served upon the contractors involved, namely, Wiley Jackson and E. G. Bowles Company. I further pointed out what you already knew from statements made to you at our conference at the site on the 15th, that these were matters for which the Department of Highways completely disclaimed any and all liability or responsibility.

I further pointed out to you that a copy of your bills and demands against these contractors should be sent to the Department of Highways and a copy to Mr. Owen. But, I did not suggest or imply, either directly or indirectly, that your claim be presented to or against the Department of Highways.

In view of the foregoing, you can really understand that I was surprised, -- not to say shocked, -- by your writing direct to Mr. Owen and presenting in your letter details of your claim in this regard as though your claim was being made against the Department of Highways, with no reference to any claim whatever being made against the contractors (whose names I had furnished you). I do not believe that your letter of the 23rd to Mr. Owen forms any justification whatever for withholding payment of whatever balance may be due the above mentioned contractors. As I told you plainly in our telephone conversation, nothing like this could be done unless and until you sent copy thereof to the Department.

Very truly yours,  
WICKER, GODDIN & DULING

By:

*John J. Wicker, Jr.*  
John J. Wicker, Jr.

JJW/jmw

cc: Mr. Charles E. Owen, Jr.  
Hon. Francis A. Cherry, Jr.

McCAUL, GRIGSBY AND PEARSALL

ATTORNEYS AT LAW

August 24, 1973

EUGENE W. McCAUL  
JOHN T. GRIGSBY  
JOHN W. PEARSALL  
BLACKWELL N. SHELLEY  
FRANCIS C. LES  
RICHARD H. C. TAYLOR  
MELVIN R. MANNING  
JOHN W. PEARSALL, III  
JAMES D. DAVIS

1005 UNITED VIRGINIA BANK BUILDING  
9TH AND MAIN STREETS  
RICHMOND, VIRGINIA 23219  
804 / 644-5491

file copy

Wiley N. Jackson Construction Company  
Hamilton Street  
Richmond, Virginia

E. Grady Bowles Company  
Deep Water Terminal Road  
Richmond, Virginia

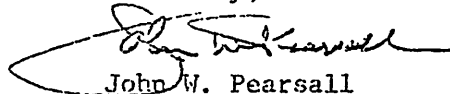
Gentlemen:

Kindly find enclosed herewith a letter dated August 23, 1973 addressed to the Virginia Department of Highways itemizing dollar amounts claimed by Richmond Shopping Center in connection with temporary easements utilized over its property and damages to such property not covered by pending condemnation proceedings.

We are informed by the Department of Highways that you were the co-contractors involved in utilizing these easements in the extensive cubic yard excavation and placement of heavy timbers along the western line of the property of the shopping center. We regard the Center as third party beneficiary of your contracts with the Highway Department requiring you to obtain temporary easements and to avoid damages to private owners in the execution of such contracts and we regard the Center as protected by your contractors' performance bonds, including the contractor obligation to obtain temporary easements and to avoid damages to private owners.

Demand is hereby made on you for payment of these claims. Copy is being sent to the Department of Highways which is requested to hold any retainages due to you for the purpose of settlement of these claims. As soon as the surety on your performance bonds is ascertained, copies of these claims will be filed with such surety.

Cordially,



John W. Pearsall

JWP/lug

cc: Senator John J. Wicker, Jr.  
Bailey & Childress, Inc.  
Mr. Charles E. Owen, Jr.  
Honorable Francis A. Cherry, Jr.

VI B 1.1682



# COMMONWEALTH OF VIRGINIA



SEP 13 1973

DOUGLAS B. FUGATE, COMMISSIONER  
MORRILL M. CROWE, RICHMOND, VA.  
LE ROY EAKIN, JR., McLEAN, VA.  
EARL A. FITZPATRICK, ROANOKE, VA.  
THOMAS R. GLASS, LYNCHBURG, VA.  
LEONARD R. HALL, BRISTOL, VA.  
DOUGLAS G. JARNEY, FREDERICKSBURG, VA.  
ROBERT S. LANDES, STAUNTON, VA.  
WILLIAM T. ROOS, YORKTOWN, VA.

JOHN E. HARWOOD,  
DEPUTY COMMISSIONER & CHIEF ENGINEER

W. S. G. BRITTON,  
DIRECTOR OF ADMINISTRATION

A. K. HUNSBERGER, DIRECTOR OF ENGINEERING

H. GORDON BLUNDON,  
DIRECTOR OF PROGRAMMING AND PLANNING

J. M. WRAY, JR., DIRECTOR OF OPERATIONS

## DEPARTMENT OF HIGHWAYS 1221 EAST BROAD STREET RICHMOND, VA. 23219

Sandston, Virginia 23150  
September 12, 1973

OFFICE OF DISTRICT ENGINEER  
PETERSBURG, VIRGINIA 23303

L. R. TREAT, JR.  
DISTRICT ENGINEER

Proj: 0195-127-101, G301  
F.H.M.A. No: 1-195-6 (3) 84  
From: 0.212 Mi. S. Cary St. Road  
To: 0.283 Mi. N. Broad Street  
City of Richmond

Mr. John W. Pearsall, Attorney  
1005 United Virginia Bank Building  
9th and Main Streets  
Richmond, Virginia 23219

Dear Mr. Pearsall:

Reference is made to your letter of Claim dated August 23, 1973 to Mr. C. E. Owen, Jr., pertaining to various damages which have occurred to the Richmond Shopping Center Incorporated (Parcels 012, 013, 014, 140 and 153) along the subject project.

This is to advise that your complaint or claim has been referred to Wiley H. Jackson and E. C. Bowles, Prime Contractors on the subject project. We are attaching for your information a copy of this letter dated September 12, 1973.

If we can be of any further help, please let us know.

Very truly yours,

J. G. Browder, Jr.  
Resident Engineer

CFM:dg  
Att.

CC: Mr. L. R. Treat, Jr.  
Mr. L. A. Jackson  
Mr. W. E. Winfree  
Mr. C. E. Owen, Jr.  
Mr. F. A. Cherry, Jr.

By:

*C. F. Wallace*  
C. F. Wallace  
Assistant Resident Engineer

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF HIGHWAYS

Sandston, Virginia 23150  
September 12, 1973

Proj: 0195-127-101, G301  
F.H.W.A. No: 1-195-6 (3) 84  
From: 0.212 Mi. S. Cary St. Road  
To: 0.203 Mi. N. Broad Street  
City of Richmond

Wiley H. Jackson Company  
E. G. Bowles Company  
P. O. Box 2R  
Richmond, Virginia 23204

Dear Sirs:

We are attaching a copy of claim dated August 23, 1973 from Mr. John W. Pearsall, Attorney for Richmond Shopping Center (Parcels 012, 013, 014, 140 and 153) to Mr. C. F. Owen, Jr., the Department's Engineer with reference to claims which have occurred to the shopping center during the construction of Route 195 by your company.

This is to advise that it is your responsibility for settlement of this claim as specified under the Provisions of Section 107.14 of the Road and Bridge Specifications. It is further requested that you keep this office apprised of the disposition of the claim.

Very truly yours,

J. G. Broader, Jr.  
Resident Engineer

cc:

*C. F. Wallace*

C. F. Wallace  
Assistant Resident Engineer

CF:dg  
att.

cc: Mr. L. R. Trent, Jr.  
Mr. L. A. Jackson  
Mr. W. E. Winfrey  
Mr. C. E. Owen, Jr.  
Mr. F. A. Cherry, Jr.  
Mr. John W. Pearsall, Attorney - Richmond Shopping Center ✓

McCAUL, GRIGSBY AND PEARSALL

ATTORNEYS AT LAW

EUSENE W. McCAUL  
JOHN T. GRIGSBY  
JOHN W. PEARSALL  
BLACKWELL N. SHELLEY  
FRANCIS C. LEE  
RICHARD H. C. TAYLOR  
MELVIN R. MANNING  
JOHN W. PEARSALL, III  
JAMES D. DAVIS

September 26, 1973

1005 UNITED VIRGINIA BANK BUILDING  
9TH AND MAIN STREETS  
RICHMOND, VIRGINIA 23219  
804 / 644-5491

file copy

Senator John J. Wicker, Jr.  
Wicker, Goddin & Duling  
Mutual Building  
Richmond, Virginia 23219

Re: Proj: 0195-127-101, G301  
F.H.W.A. No: 1-195-6 (3) 84  
From: 0.212 Mi. S. Cary St. Road  
To: 0.283 Mi. N. Broad Street  
City of Richmond

Dear Senator Wicker:

This will acknowledge and thank you for your telephone response to my letter of September 21, 1973, by call to my home this morning before resumption of a jury trial in which you have been engaged, advising that the attention of Lane Construction Corporation had been drawn to its contract obligation to confine its activities to land included within the taking. At your earliest convenience, you would send me confirmation of this along with the contract provision involved.

As promised, I have inquired into the relationship between the recorded deed from E. Carlton Wilton to Clifton P. Lusko in 1946, which you had just read in the Chancery Court Record Room, and the impression expressed by Mr. Bailey that our office had reported to him that the 20 foot alleyway at the rear of 3601 and 3603 Floyd Avenue was a private alley. Today, I have verified that at the time of acquisition of 3601 and 3603 Floyd by Richmond Shopping Center, Inc. [thereby completing its ownership of all the land contiguous to this alleyway parcel] our office had reported that the offer of dedication of this alleyway for public use did not seem to have been accepted on behalf of the public by the City of Richmond. This is entirely understandable, as the alley would in no way serve the public and obviously afforded only a convenience to the occupants of 3601 and 3603, terminating at the western line of 3603.

On the basis of this, the interests of the former owners of these two parcels in the alleyway parcel were specifically included in the deeds to Richmond Shopping Center [thereby transferring to Richmond Shopping Center

Senator John J. Wicker, Jr.  
Page 2  
September 26, 1973

the residual interests of Carlton Wilton and successors in title, on the basis of the principle of Cogito v. Dart, 33 S.E. 2d 759]. In connection with these acquisitions, Lawyers Title Insurance Corporation agreed with Richmond Shopping Center that it would insure the fee simple in this alleyway parcel in Richmond Shopping Center upon future conveyance of contiguous property, subject only to there not having been established in the interim by evidence then unknown, that the City had accepted and assumed the burden of maintaining for public use this parcel. On reinspection today, I remain confident that no such evidence exists.

Accordingly, Richmond Shopping Center, Inc. reasserts that it has the fee simple to this parcel subject to no rights of use in others and that it is free to close this alleyway at will.

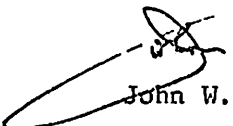
In the course of this inspection, I looked at the work in progress at the corner of Floyd and Cary, where limited access taking had apparently been at one time contemplated but had not been consummated. At this time, this corner is actually fenced off. From the temporary nature of the fencing, I surmised that it is a safety precaution against the abrupt change in grade that has been created.

It would be very helpful to know whether the Highway Department intends to proceed with a limited access taking or is willing to adjust this abrupt change in grade incident to its street widening.

As another point of information previously requested, and without posing as a traffic engineer, I repeat my puzzlement at the abrupt lane termination on Thompson Street created by the very prominent spur apparently being left opposite Ellwood Avenue. You can understand the natural interest of the shopping center in knowing whether a traffic hazard or any obstruction to the free flow of traffic will result.

For your further information, we have not been approached by any of the contractors whom you put upon terms to make their peace with us for invasion of our property rights. We understand that settlement with these contractors is being deferred until this is done. We shall keep you posted.

Cordially,



John W. Pearsall

JWP/lug  
cc: Bailey & Childress, Inc.  
VI B 7.1682

*Law Offices*  
**Wicker, Goddin & Duling**

*Mutual Building*  
Richmond, Virginia 23219

September 27, 1973

*John J. Wicker, Jr.*  
*C. Hobson Goddin*  
*Robert W. Duling*  
*John Allen Fox*

**RECEIVED**  
SEP 27 1973

McCAUL, GRIGSBY & PEARSALL

Telephone (804) 643-3506

John W. Pearsall, Esq.  
United Virginia Bank Bldg.  
Richmond, Va.

Re: State Highway - BS  
Richmond Shopping Center  
Route 195 - Alley in rear of 3601-3603  
Floyd Avenue

Dear John:

Confirming our telephone conversation, we find that the 20 foot alleyway in question was conveyed by E. Carlton Wilton to Clifton P. Lusko etc., September 27, 1946 recorded by deed recorded in Richmond Chancery Deed Book 486B, page 443.

This deed described the Floyd Avenue property and recited it as extending southward "to an alley 20 feet wide, which alley the party of the first part hereby establishes and dedicates for public use for alley purposes".

Recorded along with this deed (or with the deed to Poindexter) is a copy of a plat of survey made by Charles H. Fleet, (CCE) showing the Floyd Avenue properties and the alley in the rear.

As the record shows, this alley has been opened to the public for more than 20 years.

With regard to alleged infractions and trespasses on Richmond Shopping Center property by the contractor or some sub-contractors or employees of either or both, it has previously been pointed out to you that the State Highway Department does not have any responsibility or liability for misdeeds (such as these) by the contractor or any of his employees.

September 27, 1973  
Mr. John W. Pearsall

Page 2

The contractor has been furnished with detailed plans showing the exact location of the properties which the State has taken (either in easement or fee) and has been cautioned not to infringe upon or trespass upon the other property of the landowner, or to interfere in any way with the landowner's use of the remainder of his property and it has been pointed out to him that it is his responsibility to deal with the landowner to obtain proper permission for any such use of the landowner's remaining property.

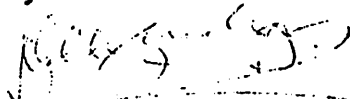
Enclosed herewith is a reprint of a portion of the standard State Highway contract which governs the contractor, your attention is invited especially to Sec. 107.12 dealing with the contractor's duties and obligations in case he finds it necessary "for any reason to enter upon private property for the prosecution of his work".

Our best suggestion to you would be for you to directly contact the contractor, or his top man on the job, or his attorney (if he has one here). We believe this would be productive of much better results than can be expected if Mr. Bailey himself goes out to the project and undertakes to argue with some of the workmen (especially an "unidentified worker").

With best wishes -

Very truly yours,

WICKER, GODDIN & DULING

By:   
John J. Wicker, Jr.

JJWjr:jmb

Enclosure



The Contractor shall notify each utility owner having structures or other installations above or below ground in proximity to the site of the work of his intention to use explosives, and such notice shall be given sufficiently in advance to enable the utility owners to take such steps as they may deem necessary to protect their property from injury. Such notice shall not relieve the Contractor of responsibility for damage resulting from his blasting operations.

**Sec. 107.12 Protection and Restoration of Property and Landscape—**The Contractor shall be responsible for the preservation of all property along the line of and adjacent to the work, the removal or destruction of which is not called for by the plans. He shall use suitable precaution to prevent damage to all such property.

When the Contractor finds it necessary for any reason to enter upon private property for the prosecution of his work, the storage of materials or any other purpose, he shall secure from the owner or lessee of such property, written permission for such entry prior to moving thereon. An executed copy of this permission shall be furnished the Engineer.

The Contractor shall be responsible for all damage or injury to property of any character during the prosecution of the work resulting from any act, omission, neglect or misconduct in his method of executing the work or at any time due to defective work or materials, and this responsibility shall not be released until the project has been completed and accepted.

When any direct or indirect damage or injury is done to any public or private property by or on account of any act, omission, neglect or misconduct in the method of executing the work or in consequence of the nonexecution thereof on the part of the Contractor, he shall restore such property to a condition similar or equal to that existing before such damage or injury was done by repairing, rebuilding or restoring, as may be directed, or make settlement with the owner of the property so injured or damaged and secure from him a release from any claim against the Department, without additional compensation therefor. A copy of this release shall be furnished the Engineer.

**Sec. 107.13 Noise Control and Protection of Rivers, Streams, Impoundments, Forests and Archeological and Paleontological Findings—**

- (a) **Noise Control:** The Department reserves the right to prohibit, or restrict to certain portions of the project, any work which produces objectionable noise during normal

McCAUL, GRIGSBY AND PEARSALL

ATTORNEYS AT LAW

October 11, 1973

EUGENE W. McCAUL  
JOHN T. GRIGSBY  
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FRANCIS C. LEE  
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1005 UNITED VIRGINIA BANK BUILDING  
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RICHMOND, VIRGINIA 23219  
804 / 644-5491

Hon. John J. Wicker, Jr.  
Wicker, Goddin & Duling  
Mutual Building  
Richmond, Virginia 23219

Re: Richmond Shopping Center Route 195, Parcels 012,  
013, 014, 140 and 153

Dear Senator Wicker:

This will acknowledge your letter of October 5, 1973 in which you advise of your opinion that whatever complaint the Richmond Shopping Center has is "solely between you and your client on the one hand and the contractor, on the other hand" and conclude with the advice "we see no basis whatever for any action by the State Highway Commission other than that already taken.". Intending to reflect no animus against anyone, in exercising a reasonable effort at objectivity, I am still compelled to express surprise at what comes through as a "cavalier" dismissal of a friendly and conscientious attempt at establishing communication as a basis of resolving what seemed to be unnecessary differences.

This reaction is probably best understood in light of this brief history.

Despite repeated protestations by our long-term client, Richmond Shopping Center, Incorporated, that it needed professional assistance in dealing with the Department of Highways as to events and circumstances surrounding the extension of Route 195 past its property, we carefully explained the very proper policy of the Attorney General's office that attorneys representing the Highway Department in one locality should not oppose the Department in others, and urged our client to continue its efforts at establishing communication. This situation extended from 1971 through July 19, 1973 when the Attorney General took cognizance, by making formal exception to his policy in this case, that no direct conflict of interest was involved, that this office was completely powerless ethically to decline further representation of either the Attorney General or

Hon. John J. Wicker, Jr.

Page 2

October 11, 1973

Richmond Shopping Center, Inc. as there were pending important matters for each client required to be concluded by this office which has represented both clients for a great number of years, and that demand for representation by Richmond Shopping Center had become so insistent as to work a hardship on our firm.

In this context, and fully explaining our desire under these circumstances quickly to establish full communication upon which fairly to resolve past differences without resort to formal proceeding, if at all possible, we met with you and representatives of the Highway Department in your office on July 19, 1973 and again on the site on August 15, 1973.

As a result of these conferences, our client's complaints fell into three categories for further processing. Those relating to interference with the Citgo Service Station operation, although qualitatively articulated to the best of our ability, could not be translated quantitatively into any dollar figures as this right had been reserved to Citgo under a lease option and negotiations in respect thereof then extant.

Those relating to future action by the Highway Department we understood Mr. Owen would inquire into and pursue. We invited his attention to several areas of apparent equivocation or lack of clear expression of Highway Department intent. Although the plats indicated certain limited access intentions, the certificate filed on September 17, 1971 made no provision for such taking. In this connection, as late as my letter to you of September 26, 1973 access from 3603 Floyd Avenue to Floyd Avenue was still effectively blocked and sensible planning in connection therewith suspended by the presence of a temporary fence, a sharp differential in grade between the private property and the improvement of Floyd Avenue and the intimation from prior negotiations that the Department might amend its certificate to include limited access taking.

Similarly we protested the treating as public property the 20' private alleyway at the rear of 3601-03 Floyd Avenue. Although this was expressly omitted from the certificate of taking, the Department [according to the contractor and supported by reasonable inference] directed the contractor to go upon and make improvements on this land as though it were public land. We have invited your attention to the fatal defect in this being public land of any omission of acceptance of a former offer of dedication by or on behalf of the public. With all due respect, we must disagree with your recent suggestion that there has been any long use by the public as to render exclusion of the public unjust and improper. As stated by us, there is neither evidence of any such long use by the public or even any occasion for such use, as the alleyway obviously has never

Hon. John J. Wicker, Jr.  
Page 3  
October 11, 1973

served anything but the convenience of the occupants of 3601 and 3603 Floyd Avenue.

Regardless of the soundness of the view expressed by either of us, if the matter has to be litigated, I invite your comment as to whether the Department shall observe the injunction of §25-248(h) of the Code of Virginia that "no agency shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property." If the Department does not intend to reveal either in informal discussion or in legal proceedings instituted by it any evidence that it has of public acceptance, our client will probably have to proceed under §25-251 of the Code by declaratory judgment, seeking full reimbursement for all expenses in connection therewith.

Although I know of no compulsion that the Department share with an affected landowner the rationale of improvements contiguous to its land, I still think it is not an unreasonable request to be asked to be furnished the thinking behind the leaving of a very prominent spur opposite Elwood Avenue on Thompson Street, abruptly terminating a lane at the point of entry to the shopping center property.

The remaining matters as to which the Department clearly had the initiative related to compensation deposited for various takings. We had made clear our desire to negotiate in good faith for settlement of differences as to value, without necessity for legal proceedings and resort to the discovery permitted by §25-46.4:2 of the Code. In this spirit we invited the attention of Highway Department representatives to the following matters. Exactly the same money was deposited for a permanent easement on parcel .012 as had been offered for a temporary easement. The Department advised that the basis of its offer as to parcel .140 that the sole damage to the residue would be the building cost of placing inward and confining the interior dimensions of the High's store [manifestly an absurd measure of damages to the residue], and then aggravated the insult by depositing the same amount for the taking of the entire building. The \$10,514 said to be deposited for the land and the house as to parcel .153 clearly did not represent the fair market value of the sound brick structure so taken nor the damages to the residue in eliminating the planned connection of this structure with the adjoining one for duplication of the physician office arrangement that had developed as a pattern in the immediate neighborhood.

Reasonable inference from the concluding paragraph in your October 5 letter is that these matters will not be voluntarily addressed by the Department.

Hon. John J. Wicker, Jr.

Page 4

October 11, 1973

In view of the disparity between the interest allowed by §§33.1-128 and 6.1-318 [i.e. six percent] and the interest commanded by any available monies today, this is to advise that unless good faith negotiations relative to resolving differences as to these valuations are commenced at once, the interest of our client demand that we resort to §33.1-132 of the Code to compel the determination of these values in formal proceeding.

In the third category for further processing of our claims fell those which you have contended represented invasions of our property rights by contractors with the Department. We have not agreed with your disclaimer of any responsibility by the Department for these invasions. We do not believe it to be the public policy of this State as a condition of effecting public improvements to put its taxpayers at the mercy of multiple contractors, some of whom are without base of responsibility in this State, leaving its taxpayers to fend for themselves against intrusions by such contractors able to effect substantial savings by engaging in such intrusions. The exact contrary policy would seem to be reflected in the practice of the State to enter into third-party beneficiary contracts protecting the private interest of its taxpayers and the State's practice in requiring performance bonds affording similar protection and the State's practice in withholding payment until obligations arising under these protective measures are satisfied.

Accordingly we have requested the State's assistance and have made formal request that a copy of the contracts so providing be made available to us for our proceeding thereon, if ultimately necessary, as third-party beneficiary; that any retainage from contractors involved herein be held for the purpose of settlement of these claims; and that claim be filed under contractors' performance bond (copies of which were thereby requested) for payments to our client as beneficiary thereof. Partial responses to these formal requests have been sufficient to induce us to rely on the efficacy of the measures impliedly taken by the State, but full performance and complete confirmation that the State is actively protecting our interest are still wanting. For example we have not been told that the State has either requested or been furnished an executed copy of permission to invade our property rights or a release for having effected such invasion, which writings appear to be required by §107.12 of the Standard State Highway Contract which you furnished to me.

I trust that you will take the length of this letter and understand that its detail is intended as one last effort at communication and amicable


Hon. John J. Wicker, Jr.

Page 5

October 11, 1973

disposition of differences between the Virginia Department of Highways and Richmond Shopping Center, Inc. The directness of my observations have the sole purpose of clarifying the problem before us and I sincerely hope that in view of the warm relations that always have and should characterize our practices that you will not infer any unintended suggestion of bellicoseness. I just remain unconvinced that we cannot establish communication and settle these matters in a responsible and amicable fashion.

Most cordially,

A handwritten signature in dark ink, appearing to be "John W. Pearsall", written over a circular stamp or seal.

John W. Pearsall

JWP/kbr

VI B 7.1682

cc: Bailey & Childress, Inc.

McCAUL, GRIGSBY AND PEARSALL

ATTORNEYS AT LAW

November 27, 1973

EUGENE W. McCAUL  
JOHN T. GRIGSBY  
JOHN W. PEARSALL  
BLACKWELL N. SHELLEY  
FRANCIS C. LEE  
RICHARD H. C. TAYLOR  
MELVIN R. MANNING  
JOHN W. PEARSALL, III  
JAMES D. DAVIS

1005 UNITED VIRGINIA BANK BUILDING  
9TH AND MAIN STREETS  
RICHMOND, VIRGINIA 23219  
804 / 644-5491

Honorable John J. Wicker, Jr.  
Wicker, Goddin & Duling  
Mutual Building  
Richmond, Virginia 23219

Re: Richmond Shopping Center Route 195  
Parcels 012, 013, 014, 140 and 153

Dear Senator Wicker:

Thank you again for meeting with me at the site yesterday afternoon. This meeting seemed to produce the following results.

(1) You said you would have the right-of-way department review again the compensation deposited for various takings. As promised, I enclose herewith copies of two papers previously furnished bearing on this. The one totaling \$51,593.00 is the breakdown which Mr. Manahan furnished Mr. Bailey on September 16, 1971, and which Mr. Maddox in his letter of that date to Mr. Bailey said represented the breakdown of the amount deposited. The second is Mr. Bailey's resume of the amount which he considers is still owing. I also quote the following paragraph from my letter of October 11 dealing with this:

"The remaining matters as to which the Department clearly had the initiative related to compensation deposited for various takings. We had made clear our desire to negotiate in good faith for settlement of differences as to value, without necessity for legal proceedings and resort to the discovery permitted by §25-46.4:2 of the Code. In this spirit we invited the attention of Highway Department representatives to the following matters. Exactly the same money was deposited for a permanent easement on parcel .012 as had been offered for a temporary easement. The Department advised that the basis of its offer as to parcel .140 that the sole damage to the residue would be the building cost of placing inward and confining the interior dimensions of the High's store [manifestly an absurd measure of damages to the residue], and then aggravated the insult by depositing the same amount for the taking of the entire building. The \$10,514 said to be deposited for the land and the house as to parcel .153 clearly did not represent the fair market value of the sound brick structure so taken nor the damage to the residue in eliminating the planned connection of this structure with the adjoining one for duplication of the physician office arrangement that had developed as a pattern in the immediate neighborhood."

Honorable John J. Wicker, Jr.

Page 2

November 27, 1973

Since we, as attorneys, have to rely on our real estate experts to tell us whether and what litigation has to be conducted as to value, and since as is true in any area of opinion, each expert will have greater confidence in his own opinion as a result of free exchange with an opposing expert on the same subject, I strongly urge you to obtain authorization for your right-of-way people to deal directly with Mr. Bailey at once, rather than go through the motions of transmitting some offer, only to still have to either take the step I proposed or do it the more expensive way in court.

(2) You noted that you would obtain advice right away whether the department intends to pursue the proposed limited access along Floyd Avenue just west of Thompson. If it does, there will be a revision in the certificate of taking and compensation. If it does not, there will be the matter of change of grade with which to deal. Meanwhile, the access continues limited and no circumspect planning can be done for use of this parcel without knowing what access it will enjoy.

(3) As to our differences in view as to ownership of the 20 foot alley, there is really only one point of factual difference. We both agree that an offer of dedication, however explicit, does not suffice to transfer land to the public domain unless there "has been acceptance by competent authority, or such long use by the public as to render its reclamation unjust and improper." We have stated that "there is neither evidence of any such long use by the public or even any occasion for such use, as the alleyway obviously has never served anything but the convenience of the occupants of 3601 and 3603 Floyd Avenue." We have urged you to come forward with any evidence you have of actual appropriation by the public of this land to the public, so as to make unjust and improper its reclamation from the public. Obviously a mere ability of the public to have entered the land is not the appropriation by actual use to which the case law refers. We have advised that Lawyers Title Insurance Corporation shares our view and has committed to insure.

With all deference to your view, because you say you entertain it seriously, I can only repeat the conclusions stated in my October 11 letter as follows: "If the Department does not intend to reveal either in informal discussion or in legal proceedings instituted by it any evidence that it has of public acceptance, our client will probably have to proceed under §25-251 of the Code by declaratory judgment, seeking full reimbursement for all expenses in connection therewith."

(4) I was happy to hear you say that the department had made it perfectly clear to Jackson and to Bowles that they had a responsibility to settle with Richmond Shopping Center. I shall pursue your suggestion that



Honorable John J. Wicker, Jr.

Page 3

November 27, 1973

Mr. Chandler of Lane Construction has always appeared approachable in the past. Meanwhile, I would very much like to have copies of the bonds given by Jackson, by Bowles, and by Lane, covering the performance of their work.

Cordially,

John W. Pearsall

JWP/lug

VI B 7.1682

DOUGLAS B. FURST, COMMISSIONER  
 ROBERT M. FURST, DEPUTY COMMISSIONER  
 LEROY E. FURST, JR., DEPUTY COMMISSIONER  
 L. R. A. FITZPATRICK, ROADSIDE, VA.  
 THOMAS R. GLASS, FREDERICKSBURG, VA.  
 LEONARD H. HALL, BRISTOL, VA.  
 ROBERT S. JAMES, FREDERICKSBURG, VA.  
 ROBERT S. JAMES, FREDERICKSBURG, VA.  
 WILLIAM T. HOUS, YORKTOWN, VA.

JOHN I. HARRISON,  
 DEPUTY COMMISSIONER & CHIEF ENGINEER  
 W. S. G. BRITTON,  
 DIRECTOR OF ADMINISTRATION  
 A. K. HUNTERBERGER, DIRECTOR OF ENGINEERING  
 H. GORDON BLUNDON,  
 DIRECTOR OF PROGRAMMING AND PLANNING  
 J. M. WRAY, JR., DIRECTOR OF OPERATIONS

DEPARTMENT OF HIGHWAYS  
 1221 EAST BROAD STREET  
 RICHMOND, VA. 23219

T. B. OMOHUNDRO, JR.  
 HIGHWAY FISCAL MANAGER

January 14, 1974

IN REPLY PLEASE REFER TO

FAP: I-195-6(3)84  
 0195-127-101, G301  
 City of Richmond

The Continental Insurance Company  
 80 Maiden Lane  
 New York, New York 10038

50%

AND

The Employers Commercial Union Insurance Co. 50%  
 110 Milk Street  
 Boston, Massachusetts 02107

Bond # 182 49 78

Gentlemen:

The work under contract on the subject project, for which you executed surety bond, has been accepted and the final estimate was vouchered for payment on December 21, 1973 as follows:

Total Work Performed	\$11,946,015.02
Less Liquidated Damages	132,000.00
Less amount held pending resolution of claims	50,000.00 X for claims (outstanding)
Amount Paid Contractor	\$11,764,015.02

Very truly yours,

T. B. Omohundro, Jr.  
 T. B. Omohundro, Jr.  
 Fiscal Manager

st  
 cc:

Wiley N. Jackson Co. &  
 E. G. Bowles Co. &  
 E. G. Bowles, Contractor  
 P. O. Box 1371  
 Roanoke, Virginia 24007

Mr. L. R. Treat, Jr., District Engineer, Petersburg  
 Attention: Mr. E. G. Hanzlik

Mr. E. L. Covington, Resident Engineer, Bon Air

McCAUL, GRIGSBY AND PEARSALL

ATTORNEYS AT LAW

September 17, 1974

EUGENE W. McCAUL  
JOHN T. GRIGSBY  
JOHN W. PEARSALL  
BLACKWELL N. SHELLEY  
FRANCIS C. LEE  
RICHARD H. C. TAYLOR  
MELVIN R. MANNING  
JOHN W. PEARSALL, III  
JAMES D. DAVIS

1005 UNITED VIRGINIA BANK BUILDING  
9TH AND MAIN STREETS  
RICHMOND, VIRGINIA 23219  
804 / 644-5491

John J. Wicker, Jr., Esquire  
Suite 706, Mutual Building  
Richmond, Virginia 23219

Re: Richmond Shopping Center, Inc.

v.

State Highway Route 195, Parcels 12, 13, 14, 140 and 153

Dear Senator Wicker:

Today I was furnished by counsel for Wiley N. Jackson and E. G. Bowles Company, joint venturers, and The Continental Insurance Company, performance bond surety, the enclosed copy of a release by the Department of Highways on the subject project. He expressed the opinion that the \$50,000.00 held pending resolution of claims did not embrace the claim of Richmond Shopping Center, Inc. This I find hard to believe in view of the following which appear in my files.

Under date of August 24, 1973, the joint venturers were confronted with itemized formal demand of the claim of Richmond Shopping Center, Inc., including a copy of the letter to Mr. Owen making formal request for a copy of the Highway Department contract calling on contractors to obtain temporary easements and to avoid damages to private owners, so that if necessary, we could proceed as third party beneficiary thereof; and further requesting that any retainage from contractors involved be held for the purpose of settlement of these claims; and that claim be filed under the contractors' performance bonds (copies of which were also requested) for payment to our client as beneficiary of such bond.

Under date of September 12, I received a copy of a letter over the signature of the Assistant Resident Engineer transmitting those claims to the joint venturers, advising of their responsibility for settlement as provided in the contract and further requesting that the Highway Department be apprised of disposition of the claim. This was transmitted by a cover letter to me indicating full cooperation.

John J. Wicker, Jr., Esquire  
Page 2  
September 17, 1974

In my letter to you of September 26, 1973, I concluded: "For your further information, we have not been approached by any of the contractors whom you put upon terms to make their peace with us for invasion of our property rights. We understand that settlement with these contractors is being deferred until this is done. We shall keep you posted." Under date of September 27, 1973 (by letter which apparently crossed with this in the mail) you enclosed a reprint of what I took to be the pertinent portion of the Highway contract, Section 107.12.


In my October 11, 1973 letter to you, I reviewed our prior request for the Highway Department cooperation and further observed: "Partial responses to these formal requests have been sufficient to induce us to rely on the efficacy of the measures impliedly taken by the State, but full performance and complete confirmation that the State is actively protecting our interests are still wanting. For example, we have not been told that the State has either requested or been furnished an executed copy of permission to invade our property rights or a release of having effected such evasion, which writings appear to be required by Section 107.12 of the Standard State Highway Contract which you furnished to me."

In my letter to you of November 27, 1973 I observed: "I was happy to hear you say that the Department had made it perfectly clear to Jackson and to Bowles that they had a responsibility to settle with Richmond Shopping Center. \*\*\* Meanwhile, I would very much like to have copies of the bonds given by Jackson, by Bowles, and by Lane, covering performance of their work."

Shortly thereafter, a representative of the bonding company contacted me about these claims and we engaged in exchanges with the joint venturers through this representative that finally resulted in the appearance that there was no other course open except litigation. By way of keeping you posted, I sent you a copy of the Motion for Judgment filed against the joint venturers and their performance bond surety.

Would you therefore kindly have the Department of Highways confirm that Richmond Shopping Center's claim was included in the \$50,000.00 held pending resolution of claims.

Cordially,

  
John W. Pearsall

JWP/lug  
Enclosure  
cc: Richmond Shopping Center, Inc.  
VI B 7.1682

TLP 7.168~

Law Offices  
*Wicker & White*

Suite 706 - Mutual Building  
Richmond, Virginia 23219

RECEIVED  
SEP 18 1974

John J. Wicker, Jr.  
David Meade White

~~John Allen Fox~~  
~~Willis Franklin Hutchens~~  
~~Joseph E. Blackburn, Jr.~~

McCAUL, GRIGSBY & PEARSALL

September 18, 1974

Telephone (804) 643-3506

Mr. Charles E. Owen  
Department of Highways  
1401 E. Broad St.  
Richmond, VA 23219

Re: Richmond Shopping Center, Inc.  
vs.  
State Highway Route 195  
Parcels 12, 13, 14, 140 and 153

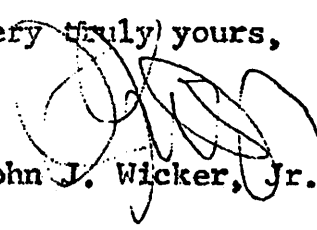
Dear Mr. Owen:

Attached is self-explanatory letter of September 17th  
from Attorney Pearsall concerning Richmond Shopping Center's  
claim against Wiley N. Jackson and E. G. Bowles Company, etc.

Will you please reply to the final paragraph in Mr.  
Pearsall's letter?

Best wishes--

Very truly yours,

  
John J. Wicker, Jr.

JJWjr:msl

cc: John W. Pearsall, Esq.

**MCCAUL, GRIGSBY AND PEARSALL**

**ATTORNEYS AT LAW**

October 3, 1974

EUGENE W. MCCAUL  
JOHN T. GRIGSBY  
JOHN W. PEARSALL  
BLACKWELL N. SHELLEY  
FRANCIS C. LEE  
RICHARD M. C. TAYLOR  
MELVIN R. MANNING  
JOHN W. PEARSALL, III  
JAMES D. DAVIS

1005 UNITED VIRGINIA BANK BUILDING  
9TH AND MAIN STREETS  
RICHMOND, VIRGINIA 23219  
804 / 644-5481

Senator John J. Wicker, Jr.  
Wicker & White  
Mutual Building  
Richmond, Virginia 23219

Dear Senator Wicker:

This will confirm my request by telephone for an authenticated copy of the contract between the State Highway Commissioner and the joint venture of Wiley N. Jackson and E. G. Bowles Company, together with an authenticated copy of the performance bond for this contract.

The basis of this request is that the joint venture and the surety on the bond have challenged its Motion for Judgment of Richmond Shopping Center, Inc. against them on the ground that it is not a third party creditor beneficiary of either the contract or of the bond and was not intended to be protected by either.

Cordially,



John W. Pearsall

JWP/lug

VI B 7.1682

VTB 7/10  
J. J. Jackson

# COMMONWEALTH OF VIRGINIA



DOUGLAS B. FUGATE, COMMISSIONER  
MORRILL M. CROWE, RICHMOND, VA.  
LE ROY EAKIN, JR., McLEAN, VA.  
HORACE G. FRALIN, ROANOKE, VA.  
THOMAS R. GLASS, LYNCHBURG, VA.  
LEONARD R. HALL, BRISTOL, VA.  
DOUGLAS G. JANNEY, FREDERICKSBURG, VA.  
ROBERT S. LANDES, STAUNTON, VA.  
WILLIAM T. ROOS, YORKTOWN, VA.

October 4, 1974

DEPARTMENT OF HIGHWAYS  
1221 EAST BROAD STREET  
RICHMOND, VA. 23219

JOHN E. HARWOOD,  
DEPUTY COMMISSIONER & CHIEF ENGINEER

W. S. G. BRITTON,  
DIRECTOR OF ADMINISTRATION

A. K. HUNSBERGER, DIRECTOR OF ENGINEERING

H. GORDON BLUNDON,  
DIRECTOR OF PROGRAMMING AND PLANNING

J. M. WRAY, JR., DIRECTOR OF OPERATIONS

IN REPLY PLEASE REFER TO

Route 195 Project 0195-127-101, RW-201  
City of Richmond

RIGHT OF WAY - Property of Richmond Shopping Center Incorporated  
Parcel 153

Mr. John W. Pearsall  
McCaul, Grigsby and Pearsall  
Attorneys at Law  
1005 United Virginia Bank Building  
9th and Main Streets  
Richmond, Virginia 23219

Dear Mr. Pearsall:

Senator Wicker has asked that I reply to the last paragraph of your letter to him of September 17.

Please be advised that the claim of the Richmond Shopping Center is one of those still outstanding for which \$50,000 has been withheld by this Department.

With kind regards, I am

Sincerely yours,

*Charles E. Owen, Jr.*

Charles E. Owen, Jr.  
Special Right of Way Engineer

CEOjr/nhw

CC: Senator John J. Wicker, Jr.

RECEIVED

OCT 7 1974

McCAUL, GRIGSBY & PEARSALL

VIB 7/1682  
To denture John

RECEIVED

OCT 7 1974

Law Offices  
**Wicker & White**

Suite 706 - Mutual Building  
Richmond, Virginia 23219

McCAUL, GRIGSBY & PEARSALL

John J. Wicker, Jr.  
David Meade White  
John Allen Fox  
Willis Franklin Hutchens  
Joseph E. Blackburn, Jr.

October 4, 1974

Telephone (804) 643-3506

C Mr. Charles E. Owen, Jr.  
Special Right of Way, Engr.  
Virginia Department of Highways  
1401 E. Broad St.  
Richmond, VA 23219

Re: Richmond Shopping Center  
(Landowner's Action against Contractors)

O Dear Mr. Owen:

Attached is copy of self-explanatory letter from Richmond Shopping Center's Attorney Pearsall.

P So far as our rights in the pending condemnation proceedings are concerned, I see no objection to granting Attorney Pearsall's request.

Very truly yours,

  
John J. Wicker, Jr.

Y  
JJWjr:msl



DOUGLAS B. FUGATE, COMMISSIONER  
MORRILL M. CROWE, RICHMOND  
LE ROY EAKIN, JR., McLEAN  
HORACE G. FRALIN, ROANOKE  
THOMAS R. GLASS, LYNCHBURG  
LEONARD R. HALL, BRISTOL  
DOUGLAS G. JANNEY, FREDERICKSBURG  
ROBERT S. LANDES, STAUNTON  
WILLIAM T. ROOS, YORKTOWN

# COMMONWEALTH OF VIRGINIA



## DEPARTMENT OF HIGHWAYS & TRANSPORTATION

1221 EAST BROAD STREET  
RICHMOND 23219

October 11, 1974

JOHN E. HARWOOD  
DEPUTY COMMISSIONER & CHIEF ENGINEER

W. S. G. BRITTON  
DIRECTOR OF ADMINISTRATION

H. GORDON BLUNDON  
DIRECTOR OF PROGRAM MANAGEMENT

J. M. WRAY, JR. DIRECTOR OF OPERATIONS

J. P. ROYER, JR.  
DIRECTOR OF PLANNING

P. B. COLDIRON, DIRECTOR OF ENGINEERING

IN REPLY PLEASE REFER TO

Route 195 - City of Richmond  
Project 0195-127-101,G301

Request for Contract

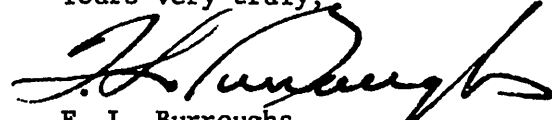
McCaul, Grigsby and Pearsall  
Attorneys at Law  
1005 United Virginia Bank Building  
9th and Main Streets  
Richmond, Virginia 23219

Attention: Mr. John W. Pearsall

Dear Sir:

Enclosed herewith is an authenticated copy of the contract for which you requested from Senator John J. Wicker, Jr., in your letter dated October 3, 1974.

Yours very truly,

  
F. L. Burroughs  
Construction Engineer

RECEIVED

OCT 14 1974

McCAUL, GRIGSBY & PEARSALL

July 31, 1975

Mr. Hilton W. Goodwyn, Jr.  
609 East Main Street  
Richmond, Virginia 23219

Re: Route 195 Project 0195-127-101, RW-201  
City of Richmond  
Right of Way - Property of Richmond Shopping Center, Inc.

Dear Hilton:

Although the form of letter enclosed with Mr. Owen's letter to you of July 29 affords protection to the Highway Department without the usual safeguards of limiting the time and scope of interference, in the spirit of cooperation and to try to conclude this troublesome matter as soon as possible, I suggest that you go on and sign the letter and mail it back to Mr. Owen upon his understanding that the contract between the Department and the contractor will provide for the minimum interference compatible with expeditious execution of the project. Everyone recognizes that this is the principal entrance utilized by patrons of the bulk of the stores and this portion of the shopping center. This letter will serve as a request that a copy of such limitations to be included in the contract be furnished to us.

I take it that we will be furnished a copy of the plans by which this project will be executed, so as to avoid any misunderstanding as to exactly what is to be done. While it is your belief from a conference on the site with Mr. Owen that you have a meeting of the minds as to what is to be done, I'm not aware of this being memorialized in any way for future reference.

You should proceed with getting the three bids for relocation of the A & P sign at the Highway Department's expense and submit them to Mr. Owen as soon as possible.

Cordially,

JWP/lug

John W. Pearsall

cc: Mr. Charles E. Owen, Jr.

Honorable John J. Wicker, Jr., Esq.

VI B 7.1682

Mr. John W. Pearsall

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF HIGHWAYS

August 5, 1975

Route 195 Project 0195-127-101, RW-201  
City of Richmond

RIGHT OF WAY - Property of Richmond Shopping Center Inc.

Mr. Hilton W. Goodwyn, Jr.  
609 East Main Street  
Richmond, Virginia 23219

Dear Mr. Goodwyn:

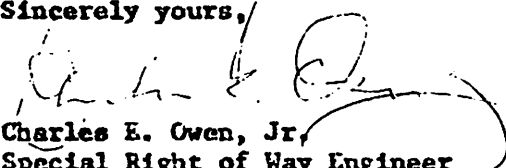
I have received a copy of Mr. Pearsall's letter to you of July 31, 1975.

The proposed work on the entrance is not to be a new contract but instead will be part of the existing contract for the construction of I-195. The contractor is required to abide by all of those portions of our Road and Bridge Specifications of July 1, 1974 that are applicable to his work. A copy of § 104.04(f) is attached. I am sure our engineers and the contractor will work with you in every way possible to see that as little interference is created to your traffic as possibly can be managed.

I also enclose a print of Sheet 6 of our plans on which details of the proposed entrance are given. However, I "memorialized" the proposed shift in the entrance in my letter of July 29, 1975 when I told you that it would be shifted a distance of 5.3 feet south of the previously proposed location, which previously proposed location is now painted on the ground.

Please let me know whenever I can be of further service to you.

Sincerely yours,

  
Charles E. Owen, Jr.  
Special Right of Way Engineer

CEOjr/nhw

cc: Mr. John W. Pearsall  
Honorable John J. Wicker, Jr.

providing of such detours and the marking of alternate routes shall not be construed as relieving the Contractor of his responsibility for the safety of the public using the project or from any provisions of these specifications affecting the right of the public hereunder, including lights and barricades as hereinafter set forth. Maintenance of all other detours will be the responsibility of the Contractor, unless otherwise specified.

The use of all detours, whether furnished in accordance with plans, specifications, or established by the Engineer, shall be discontinued as directed. A detour may be closed by the Engineer when the new facility is sufficiently complete to safely accommodate traffic.

- (b) **Special Detours:** When the proposal contains an item for "Maintenance of Traffic," payment for such item will be in accordance with Section 514. Right-of-way for temporary highways or bridges called for under this provision will be furnished by the Department.
- (c) **Maintenance of Traffic During Suspension of Work:** During any suspension, the Contractor shall open to traffic such portions of the project and temporary roadways or portions thereof as may be agreed upon between the Contractor and Engineer for the temporary accommodation of necessary traffic during the anticipated period of suspension.
- (d) **Flagging Traffic:** Competent, courteous and neat flagmen shall be provided in sufficient number to orderly control and, if necessary, to stop traffic, advise the public concerning the delays and the manner in which they should proceed, and to keep traffic in their respective lanes along the project. The flagmen shall use either flags or sign paddles to regulate traffic; however, the use of both flags and sign paddles on the same project will not be allowed.

Flags shall be red, at least 24 by 24 inches in size, made of a good grade of bright red material secured to a staff approximately 36 inches in length. The free edge shall be weighted to insure that the flag will hang vertically, even in high wind. Sign paddles bearing the regulatory message "Stop" or "Slow" shall be fabricated from sheet metal or other light semirigid material. They shall be at least 24 inches in diameter and mounted on a rigid handle at least 10 inches long. The lettering on the paddles shall be 6 inch series C letters (MUTCD). The background of the "Stop" face of the combination sign paddle shall be red and oc-

tagon shaped with white letters and border. The background of the "Slow" face shall be orange and diamond shaped with black letters and border. When used at night the "Stop" face shall be reflectorized red with white reflectorized letter and border, and the "Slow" face shall be reflectorized orange with black letters and border.

Written instructions for flagmen will be furnished by the Department and flagging shall be performed in accordance with the provisions contained therein in addition to the provisions of these specifications.

- (e) **Delays:** Two-way traffic shall be maintained at all times, unless otherwise approved. The Contractor shall not stop traffic without permission.

When one-way traffic is approved, the Contractor shall provide the necessary flagmen to direct such traffic. When specified in the contract as a pay item, pilot vehicles shall be furnished by the Contractor in accordance with Section 514. Upon request from the Contractor and where deemed appropriate by the Department, the Department will install traffic signals which may be used for the control of one-way traffic. The Contractor will be required to pay the cost of installation, removal when no longer needed, electric current, all maintenance or repair work and a predetermined rental charge per day for the use of the signals.

- (f) **Connections and Entrances:** All connections with other roads, and public and private entrances shall be kept in a reasonably smooth condition for the safe passage of traffic at all times. Connections or entrances shall not be disturbed by the Contractor until necessary. Once connections or entrances have been disturbed, they shall be maintained and completed as follows:

1. **Connections —** Connections which had an original paved surface shall be brought to final grade through the intersection, and a minimum of two lanes shall be paved with the required or a temporary pavement as soon as possible after they are disturbed. All other connections shall be brought to final grade through the intersection and the required material or a temporary aggregate stabilization course placed as soon as possible after they are disturbed.

In the event there are delays in the prosecution of the work on connections, those which were originally paved shall have a minimum of two lanes maintained with a temporary paved surface. Those which were not origi-

nally paved shall be maintained with a temporary aggregate stabilization course.

2. **Entrances** — Entrances shall be graded concurrently with the roadway with which they intersect. Once an entrance has been disturbed, it shall be completed as soon as practicable including the placement of the required base and surface course or stabilization. In the event, the entrance must be constructed in stages (as in the case where there is a substantial change in the elevation of the roadway with which it intersects), the surface shall be covered with a temporary aggregate stabilization course or other material salvaged from the entrance or project until the entrance can be completed and the required base and surface or stabilization course placed.

Stabilization and/or surfacing material shall be applied to connections and entrances whenever directed by the Engineer. Such stabilization and/or surfacing material, when provided for in the contract, will be paid for at the contract unit price therefor. In the absence of such price, the cost shall be included in other pay items of the contract.

The Contractor shall schedule his construction operations so that approved continuous access is provided to all property adjacent to his construction when such property is shown on the plans to require access. When frontage roads are shown on the plans, they shall be constructed prior to closing any access routes, unless other approved access is provided and is acceptable to the property owner.

- (g) **Grading Operations:** When new and old roads intersect or coincide, the grading shall be performed only over a part of the existing road. Cuts shall be removed or embankments constructed in layers on alternate sides of the road. The graded road shall be maintained in a passable condition, free from ruts, irregularities and any hazards to traffic.

Where noted on the plans or in the special provisions, the Contractor shall be required to salvage materials in the old pavements and use them for the maintenance of traffic.

When a road is widened, rough and fine grading operations shall be conducted in such a manner as to provide maximum safety for the traffic using the roadway. When the Contractor elects to complete his rough grading operations for the entire project or to exceed the length of one full day's surfacing operations, the rough grade shall be

machined to a true slope from the top edge of the existing pavement to the ditch line.

Grading operations shall be conducted in a manner which will permit the accommodation of two-way traffic, unless otherwise authorized. When the surface is to be widened on both sides of the existing pavement, construction operations involving either grading or paving shall not be conducted simultaneously on sections directly opposite each other unless specifically authorized in advance.

The existing surface of the pavement shall be kept free of earth and other materials which might be hazardous to traffic. Prior to the opening of the new pavement to traffic, the Contractor shall roughly dress the shoulders for a distance of 3 feet from the edge of the paved surface.

- (h) **Patching Operations:** Where existing bituminous or portland cement concrete pavement is to be patched, the operation of breaking and excavating old pavements shall not extend for a distance of more than 2 miles. Patching shall be coordinated with the excavation so that not more than 1/2-mile area in which excavated patches are located shall be left at the end of any day's work. The necessary precautions shall be taken to protect traffic during the performance of patching operations.

- (i) **Temporary Structures:** The Contractor shall be required to construct, maintain and remove all temporary structures, together with approaches necessary for the use of traffic. The cost of constructing, maintaining and removing temporary structures and approaches thereto shall be included in the pay items for the new structure, unless otherwise specified in the contract. After new structures are opened to traffic, temporary structures and approaches shall be dismantled and removed and the materials contained therein shall remain the property of the Contractor.

The proposed design of temporary structures shall be submitted to the Engineer in accordance with Section 105.02 prior to beginning construction.

- (j) **Failure to Maintain Roadway or Structure:** Failure on the part of the Contractor at any time to comply with these provisions will result in the Engineer notifying the Contractor to comply with the required maintenance provisions and, in the event the Contractor fails to remedy unsatisfactory maintenance immediately after receipt of such notice, the Engineer may proceed with adequate forces, equipment and material to maintain the project and the entire cost of

AERIAL PHOTOGRAPH MARKED AS PLAINTIFF'S  
EXHIBIT 30.

PRINTERS NOTE

THIS PHOTO CAN NOT BE REASONABLY REPRODUCED

CONTRACT BETWEEN THE COMMONWEALTH OF  
VIRGINIA, WILEY N. JACKSON CO., AND  
E.G. BOWLES CO. FOR PROJECT NO. 0195-  
127-101, G 301

PRINTERS NOTE

THIS DOCUMENT CAN NOT BE REASONABLY REPRODUCED

DRAWING BY RUFFIN R. BAILEY MARKED AS  
DEFENDANT'S EXHIBIT I.

PRINTERS NOTE

THIS DOCUMENT CAN NOT BE REASONABLY REPRODUCED



SECTION 107 OF THE VIRGINIA DEPARTMENT OF  
HIGHWAYS ROAD AND BRIDGE SPECIFICATIONS.

PRINTERS NOTE

THIS DOCUMENT CAN NOT BE REASONABLY REPRODUCED

1 M. L. BLANKENSHIP, being first duly sworn,  
2 testified as follows:

3 DIRECT EXAMINATION

4 BY MR. PEARSALL:

5 Q Will you state your name, age and occupation?

6 A Melvin L. Blankenship, 29, and I am Superinten-  
7 dent of E. G. Bowles.

8 Q You are familiar with the controversy that  
9 this litigation is about, are you not?

10 A Yes, sir.

11 Q At the time that the incident arose over which  
12 the controversy exists, what were your duties with E. G.  
13 Bowles?

14 A I was a project clerk, kept the records for  
15 the joint venture on that project.

16 Q Does that mean that you had charge of all  
17 the records that related to this project as it was being  
18 performed by the joint venture?

19 A Yes, sir.

20 Q It was officially your responsibility to receive  
21 them and to keep them intact?

22 A That is correct.

23 Q I hand you a copy of a proposal contract and  
24 bond that is certified by a highway construction engineer

1           A       Yes, this appears to be one of the sectional  
2 plans.

3           THE COURT: One of the sectional plans?

4           A       One of the sheets of the plan.

5           THE COURT: That is not responsive.

6 BY MR. PEARSALL:

7           Q       Is this the sheet that shows the Richmond  
8 Shopping Center property?

9           A       Yes, sir, it is.

10          MR. PEARSALL: I would like to have this  
11 marked as Plaintiff's Exhibit No. 3.

12          THE COURT: Let Mr. Wallace make his objection.

13          MR. WALLACE: If it is a statement that it  
14 shows where the right of way and the shopping center  
15 property are, it is no more than to show locations  
16 and to identify one or the other. I have no objection  
17 but if it is offered for the purpose of showing  
18 dimensions, accuracies that a surveyor should testify  
19 about, I have objection.

20          MR. PEARSALL: I have no objection. I have  
21 no intentions of getting into that. If so, your  
22 right of objection is reserved.

23          THE COURT: It is offered and accepted, not  
24 to show the exact dimensions or any survey language

1 or anything of that nature. It is admitted into  
2 evidence as Plaintiff's Exhibit No. 3. That is  
3 the Right of Way Plans, Block Nos. W-1767 and so forth,  
4 and, also, this is Sheet No. 3.

5 (The right of way plan, Sheet No. 3, was  
6 marked and filed as Plaintiff's Exhibit No. 3.)

7 BY MR. PEARSALL:

8 Q In your responsibility as records clerk or  
9 supervisor, you became familiar with the rather substantial  
10 role of sheets of plans calling for the execution of the  
11 work, did you not?

12 A That is correct.

13 Q Would you look at these two sheets which I  
14 believe are Sheet 5 and 6, from those, and identify whether  
15 they are identified as Sheets 5 and 6 from those plans  
16 showing work to be done adjacent to the property of the  
17 Richmond Shopping Center.

18 A Yes, it is.

19 MR. PEARSALL: I would like to offer these as  
20 Plaintiff's Exhibit.

21 THE COURT: Any objection, Mr. Wallace?

22 MR. WALLACE: No, sir.

23 THE COURT: The sheets that the witness has  
24 just identified will be entered into evidence as

1 Plaintiff's Exhibit No. 4.

2 (The said Sheets 5 and 6 were marked and  
3 filed as Plaintiff's Exhibit No. 4.)

4 MR. WALLACE: When I say "no, sir," the  
5 dimensions, layout and so on, I think it falls back  
6 on the surveyor.

7 THE COURT: The objection is well taken. The  
8 Court sustains it as to that. This exhibit is  
9 entitled "Interstate Route 195, Payment plan, Sheet  
10 5 and Sheet 6," scotchtaped together.

11 BY MR. PEARSALL:

12 Q Mr. Blankenship, I hand you a Xerox of a  
13 portion of the sheets you have just identified on which I  
14 have placed in red my understanding of the limits of access --

15 MR. WALLACE: Your Honor, before he does that,  
16 I would object to his saying what he has placed there  
17 and what it is for. I think he should ask him can he  
18 identify it and say what the red and yellow lines as  
19 drawn on there by Mr. Pearsall do indicate.

20 MR. PEARSALL: I will be happy to do it that way.  
21 May I have the last exhibit, Your Honor?

22 THE COURT: Objection sustained.

23 BY MR. PEARSALL:

24 Q Will you compare the full sheet that you

1 identified as being a part of the sheets furnished you by  
2 the Highway Department and this Xerox of a portion of it  
3 and satisfy yourself that it is a Xerox of a portion of it?

4 A Yes, sir, it appears to be the same.

5 Q Will you, on the big sheet, locate the limits  
6 of construction lines on the big sheet and see if they are  
7 the same that are outlined in red on the Xerox sheet?

8 A Yes, they appear to be.

9 MR. WALLACE: For the record, the big sheet  
10 has already been introduced as Plaintiff's Exhibit 4.

11 MR. PEARSALL: I would like to leave with the  
12 Court, with the witness and opposing counsel a copy  
13 of this Xerox for further interrogation of the witness.

14 THE COURT: Will that be admitted into evidence?

15 MR. PEARSALL: I wish to have admitted into  
16 evidence --

17 MR. WALLACE: I have no objection if we have  
18 one without the yellow line because there has been  
19 no explanation of what the yellow line purports to  
20 show. Might I ask him quickly what the yellow line  
21 purports to show?

22 BY MR. PEARSALL:

23 Q What does the yellow line purport to show?

24 THE COURT: If he knows.

1 as an adverse witness and any further testimony that  
2 he gives, I am examining him as an adverse witness.

3 MR. WALLACE: Judge, can you change in the  
4 middle of the stream once you start out without that,  
5 in the absence of showing that he has been hostile?

6 MR. PEARSALL: He has stated that he is the  
7 representative of the defendants in the case, Your  
8 Honor.

9 THE COURT: All right, I will allow it. Treat  
10 him as a hostile witness.

11 MR. PEARSALL: I am not suggesting hostility  
12 or lack of cooperation; I am merely suggesting that he  
13 is an adverse witness and, therefore, I am not bound  
14 by his future testimony. I am bound by his past  
15 testimony until the time I stated that to the Court.

16 BY MR. PEARSALL:

17 Q Now, Mr. Blankenship, the joint venture was to  
18 perform certain excavation on both sides of the railroad,  
19 wasn't it?

20 A That is correct.

21 Q Basically, it had to work on each side separately,  
22 did it not?

23 A That is right.

24 Q And is the yellow line down the center of the

1 railroad?

2 A Yes, the center of the railroad, that is  
3 correct.

4 Q Then does it not continue to the limits of  
5 construction?

6 A That is right.

7 Q Does it not actually enclose the area of  
8 construction by the joint venture in the vicinity of the  
9 property of the Richmond Shopping Center?

10 A Yes, it does.

11 MR. PEARSALL: I would like to have this  
12 marked as Exhibit No. 5.

13 THE COURT: The next is Plaintiff's Exhibit  
14 No. 5 and this is, for the record, a copy of a  
15 print showing red and yellow coloring on it, Plain-  
16 tiff's Exhibit No. 5.

17 (The said document was marked and filed as  
18 Plaintiff's Exhibit No. 5.)

19 MR. PEARSALL: May it please the Court, since  
20 we don't have a jury here, I had summoned Senator  
21 Wicker to have him identify either his origination  
22 or receipt of certain letters and Mr. Wallace said  
23 that he couldn't stipulate that origination and  
24 receipt until today, until he decided whether he had



1           any need to examine Senator Wicker other than as the  
2           person who sent or received these and I interrupt at  
3           this point only because the Senator has appeared in  
4           response to the subpoena and, as a busy lawyer, I  
5           would like to have him excused if there is no  
6           necessity for him to stay around here to identify  
7           these, and these are the papers. Are you prepared to  
8           take a position on that, Mr. Wallace?

9           MR. WALLACE: This is the first time I have  
10          ever seen the papers.

11          MR. PEARSALL: The papers were tendered to  
12          you on day before yesterday and you said you couldn't  
13          make a decision until today, until the day of trial.

14          THE COURT: Do you need some time to look at  
15          those?

16          SENATOR WICKER: Pardon me, if it will help,  
17          they are waiting for me over there and I will only be  
18          ten minutes. Shall I go and come back in ten minutes?

19          MR. PEARSALL: Yes, sir.

20          MR. WALLACE: I don't see any need for us to  
21          stop. We can go on. I will look at them as we go.

22          THE COURT: Thank you, Mr. Wallace.

23          BY MR. PEARSALL:

24          Q           Mr. Blankenship, do you recognize what this

1 is?

2 A Yes, sir, it is the center of the railroad.

3 Q Is it a profile sheet?

4 A Yes, sir.

5 Q Is it prepared by the Department of Highways  
6 for the joint venture's execution of this job?

7 A Yes.

8 Q And it shows what stations?

9 A 208 through 211.

10 Q And would the beginning of this yellow work  
11 area be in the vicinity of 209.50?

12 A Yes.

13 Q And the ending in the vicinity of 218.50?

14 A Yes, it would.

15 Q So that the beginning of this is a profile  
16 somewhat between 209 and 210?

17 A Yes, that is correct.

18 Q Are you familiar with the profiles of the  
19 project as it relates to the area in the vicinity of Richmond  
20 Shopping Center?

21 A Yes.

22 Q I hand you what purports to be a Xerox of  
23 208 to a portion of 210 of this sheet that you have in  
24 front of you and which you have identified.

1 MR. PEARSALL: Let me have the sheet offered  
2 as an exhibit.

3 THE COURT: Let the record indicate that the  
4 exhibit has a series of numbers running 1 through 8  
5 along the right-hand margin when you are looking  
6 directly at the exhibit, and this exhibit is now  
7 admitted into evidence as Plaintiff's Exhibit No. 6.

8 MR. WALLACE: I have no objection.

9 (The Xerox of Profile 208-210 was marked and  
10 filed as Plaintiff's Exhibit No. 6.)

11 BY MR. PEARSALL:

12 Q Looking at Plaintiff's Exhibit No. 6, will you  
13 say whether or not this is a Xerox of the profile or cross  
14 section of 208 and a portion through 209 and a portion of  
15 210?

16 A Yes, it is.

17 Q Now do you recognize these additional profile  
18 sheets?

19 MR. WALLACE: Judge, for the sake of speed I  
20 will stipulate that they are the profile sheets and  
21 may be introduced.

22 BY MR. PEARSALL:

23 Q Rather than introducing all of the profile  
24 sheets I would like to have him further stipulate that this

1 is a Xerox showing Station 218 --

2 A Yes, sir.

3 Q -- on the one hand, on the one side, and 217  
4 on the other and 219 on the other.

5 MR. WALLACE: Do you want to ask about the  
6 yellow marking?

7 BY MR. PEARSALL:

8 Q Will you state what the yellow markings are  
9 on those Xeroxes?

10 A That is your area of excavation.

11 Q So that you have there on one Xerox an area  
12 of excavation in the vicinity of 209.50 and the area of  
13 excavation in the vicinity of 218.50?

14 A That is correct.

15 Q And that is colored in yellow in each instance?

16 A Yes, sir.

17 Q Would the general area indicated by these  
18 portions colored in yellow be a reasonable estimate of the  
19 cross section for the full distance from 209.50 to 218.50?

20 A Yes, sir.

21 MR. PEARSALL: I would like to have these  
22 marked as one exhibit, Your Honor, 7-a and b.

23 THE COURT: The two exhibits that the witness  
24 just identified, the first will be admitted into

1 evidence as 7-a; this is an exhibit that has no  
2 legend on it but it shows three profiles on the sheet,  
3 that is 7-a; the next exhibit has three profiles also  
4 but only one of the profiles shows yellow coloring  
5 and that would be 7-b.

6 (The said profiles were marked and filed as  
7 Plaintiff's Exhibit 7a and 7b.)

8 THE COURT: Mr. Pearsall, these are blown up?

9 MR. PEARSALL: No, sir, they are Xeroxes; they  
10 are not blown up, they are more manageable than these  
11 large sheets. 7-a is a Xerox of a portion of 6 at  
12 the beginning of the project and 7-b is a Xerox at the  
13 station in the vicinity of 218.50, so actually 217,  
14 218 and 219.

15 BY MR. PEARSALL:

16 Q Mr. Blankenship, do you recall what the dis-  
17 tance in feet there is between -- from Station 218 to 219,  
18 for instance?

19 A A hundred feet.

20 Q So when we are talking about the project in  
21 the vicinity of the Richmond Shopping Center from 209.50  
22 to 218.50 we are talking about approximately nine stations  
23 and approximately 900 feet?

24 A Yes, that is correct.

1 Q Do you recall or can you tell by looking what  
2 is the vertical scale on these profile sheets?

3 MR. WALLACE: Does the sheet show it?

4 MR. PEARSALL: I don't know. He will have to  
5 tell me.

6 A Each of these little blocks should be  
7 approximately a foot so it should be ten feet in the larger  
8 blocks. Here is your elevations here and each -- I guess  
9 220; this one here should be 230. It doesn't go all the way  
10 up like that. That is your elevation for that station right  
11 there. See, this is for different stations.

12 Q It is your belief, then, that the scale of  
13 this drawing, the vertical scale, is one foot to a small  
14 square?

15 A That is correct.

16 Q And the horizontal scale is the same way?

17 A That is also a foot to the small block.

18 Q Would you look at these Exhibits No. 7-a and b,  
19 at the top of the trapezoid and at the bottom of the  
20 trapezoid on which the notation has been made, beginning at  
21 58 feet and going to 110 feet and verify that that is a  
22 reasonable interpretation of a horizontal scale there?

23 A This shows 110 feet from right here --

24 Q No, 110 feet from the center line. Take your

1 time to determine your answer. All I am trying to find out  
2 from you is a rough order of magnitude of the width and  
3 depth of the excavation over this 900 feet.

4 MR. WALLACE: If that is a question, Your  
5 Honor, I think the documents speak for themselves,  
6 showing exactly what the excavation was at each  
7 station as we go along. If you have to come back and  
8 give the magnitude of it, in general terms I think  
9 you are asking for something that the documents show  
10 much better and I object to that kind of question.

11 THE COURT: The only problem I see is that when  
12 the Court looks at it in the coolness of the evening  
13 it doesn't mean anything to me unless he explains it.

14 MR. WALLACE: What I think he is saying is  
15 that the line is shaded at the point of the excavation  
16 to the center line of the railroad to the edge of  
17 the right of way and anything in color is what is to  
18 be excavated. It is shown on each of these profiles  
19 again in these lines what is to be excavated in each  
20 station. He asked the overall question "what is the  
21 magnitude;" it speaks for itself.

22 THE COURT: It does speak for itself.

23 MR. PEARSALL: In view of the objection, I  
24 ask that these be marked as Exhibit 8.

1 THE COURT: Do you want all of these to come  
2 in as Exhibit 8? There are four documents which  
3 will come in as 8-a, b, c and d.

4 (The said documents were marked and filed as  
5 Plaintiff's Exhibits 8-a, b, c, and d.)

6 BY MR. PEARSALL:

7 Q Mr. Blankenship, I hand you a set of plans,  
8 together with a statement by representatives of the Highway  
9 Department and ask you -- not a set of plans, a set of  
10 aerial photographs, and ask you to look at those and see if  
11 they reflect the situation at the time stated, being before  
12 the project started and stopped; August, 1972, the course  
13 of the project, and July, 1973, after the project stopped.  
14 The dates are on the reverse side.

15 MR. WALLACE: Your Honor, for the record I  
16 would object to the use of these photographs, per se,  
17 unless Mr. Blankenship can say "yes, they look like  
18 photographs of when the project was in progress ,"  
19 or he can identify them, absent the presence of  
20 whoever took them, describing the time he took them  
21 and how, under the circumstances, and can be available  
22 for cross examination, and also as to how they were  
23 developed or were they retouched. Maybe Mr. Blanken-  
24 ship can identify one showing construction underway;



1           if he can, he can, but as to the authenticity of the  
2           photographs, when they were taken, I would object to  
3           their admission for those purposes.

4           THE COURT: Let's see what his answer is.

5           He may say no, he can't and that is the end of it.

6           A        You want to know if there was a photograph  
7           taken during construction? Is that what you want?

8           BY MR. PEARSALL:

9           Q        Let me ask you a question first; were you not  
10          on the job site on a number of occasions?

11          A        Yes, that is correct.

12          Q        I ask you if these photographs, and the source  
13          of them you can tell from what you have in front of you,  
14          in your opinion, reflect the situation in the vicinity of  
15          the Richmond Shopping Center property before the project  
16          started, during the project and after the project ended,  
17          as far as your joint venture was concerned, and that means  
18          that the first one, which is April of 1969 was before the  
19          project started.

20          MR. WALLACE: If Your Honor please, without  
21          proper foundation as to whether or not he knew or had  
22          reason to know how it looked in 1969, I object to  
23          that.

1 BY MR. PEARSALL:

2 Q Did you ever go on the site before the actual  
3 work started?

4 A Yes, I guess so, but I didn't pay a whole  
5 lot of attention to it before we were there.

6 Q Were you there when it started?

7 A I got there a little after it started.

8 Q When did you get there?

9 A I got there around the latter part of June.  
10 It started somewhere about the middle of June, I think.

11 Q So, except for a matter of 10 or 15 days,  
12 you were there the whole time?

13 A Yes, basically.

14 Q Did you not, while you were there, maintain  
15 daily logs of everything that went on?

16 A Yes, that is correct.

17 Q That you thought significant?

18 A Yes.

19 Q Are these the logs?

20 A Well, these are load count books where we kept  
21 count of the trucks and so on. They are not actually diaries,  
22 they are load counts.

23 THE COURT: Are you abandoning your identifica-  
24 tion of this picture?

1 MR. PEARSALL: No, I am trying to establish  
2 that this witness does, in fact, know what this  
3 situation was.

4 THE COURT: I am not trying to tell you how to  
5 try your case but you may show it by simply asking  
6 him does that picture, as you started to do --

7 MR. PEARSALL: He indicated some equivocation  
8 about what he knew about it at the time and I am  
9 trying to demonstrate that he did know. I have here  
10 the certification from the photogrammetric engineer  
11 assistant employed by the Virginia Department of  
12 Highways that these are enlargements from the following  
13 negatives as indicated on the reverse side, the dates  
14 they were taken, which negatives were taken by the  
15 Highway. I can produce the pilot and the photographer,  
16 if necessary, to show that these are, in fact, aerial  
17 photos of what was going on. I am simply trying to  
18 show to the Court the general nature of the project  
19 so he can understand the later testimony. If I am  
20 going to have the technical objection that although  
21 this is certified by the Highway Department as coming  
22 from its files maintained for its own business  
23 purposes which has the authenticity of business  
24 records as an exemption to the hearsay rule, if I am

1 still going to have to prove it under the hearsay  
2 rule, that these photographs were taken by Joe Jones  
3 in a plane piloted by Abe Smith, I will do it. It  
4 seems unnecessary. I am not trying to take advantage  
5 of a man who, by his own record, was there daily.

6 THE COURT: Let's get an answer to this  
7 question. Can you answer the question?

8 BY MR. PEARSALL:

9 Q Does this reflect the property at or about  
10 the time that the project started?

11 A Let me see where I am.

12 MR. WALLACE: It was taken two years before  
13 they went on the job.

14 THE COURT: That is a matter of cross examina-  
15 tion. If he knows, he can look at this picture and  
16 say "yes, that fairly depicts the situation."

17 MR. WALLACE: I have no objection to the 1969  
18 picture, although the second one showing the work in  
19 progress; I have no objection to the third one.

20 THE COURT: You want to admit it?

21 MR. PEARSALL: Yes, sir.

22 THE COURT: Let me have the first two he had  
23 no objection to.

24 MR. PEARSALL: These I would like to have

1 admitted as the next plaintiff's exhibit.

2 THE COURT: For the record, the first photograph,  
3 Mr. Pearsall, is supposed to depict what?

4 MR. PEARSALL: The first photograph is  
5 supposed to depict the situation prior to the  
6 commencement of the project, taken in April, 1969.

7 THE COURT: All right, April, 1969, that  
8 exhibit is now Plaintiff's Exhibit No. 9.

9 (The said photograph was marked and filed as  
10 Plaintiff's Exhibit No. 9.)

11 THE COURT: Let's take the second picture.  
12 What is that supposed to depict?

13 MR. PEARSALL: The next two pictures are  
14 small scale and blow-up taken August 22, 1972 in  
15 the course of the execution of the joint venture  
16 project.

17 THE COURT: That exhibit is now Plaintiff's  
18 Exhibit No. 10; two pictures, the first is 10-a and  
19 the second is 10-b.

20 (The said photographs were marked and filed  
21 as Plaintiff's Exhibits 10-a and 10-b.)

22 BY MR. PEARSALL:

23 Q Mr. Blankenship, did you stay with this  
24 project until the joint venture stopped?

1           A       That is correct.

2           Q       When was that?

3           A       I think it was around May of 1973.

4                   (Senator Wicker returned to the court room.)

5           THE COURT: Do you need Senator Wicker?

6           MR. WALLACE: If he is going to testify, if  
7 they are coming in.

8           SENATOR WICKER: The only thing I am going to  
9 testify to or am prepared to testify to is simply  
10 the authenticity of these.

11          MR. WALLACE: That you either got them or sent  
12 them?

13          SENATOR WICKER: That is right.

14          THE COURT: Have you looked at all of those?

15          SENATOR WICKER: Yes, sir, I saw them yesterday.

16          THE COURT: Why don't we put him under oath,  
17 or do you want to stipulate that?

18          MR. WALLACE: As to the authenticity that he  
19 either got or received them or sent them, I am willing  
20 to stipulate to that, but as to their use and  
21 materiality in the trial --

22          THE COURT: Let the record indicate there is  
23 a stipulation that Mr. Wicker either received or  
24 got them some kind of way, a group of letters which

1 the Court, for identification only, is marking as  
2 Plaintiff's Exhibit 11 for identification only.

3 (The said letters were marked for identification  
4 as Plaintiff's Exhibit No. 11.)

5 BY MR. PEARSALL:

6 Q I believe you had just testified that the  
7 project, as far as the joint venture was concerned, was  
8 terminated in May of 1973?

9 A Yes.

10 Q If I said to you that I had read an entry in  
11 a log book that put that about May 22 or thereabouts, in  
12 1973, would that be something --

13 A I believe that is -- I believe they accepted  
14 the job May 22.

15 Q Would you look at the large scale aerial  
16 photograph that has on the reverse it was taken on July 6,  
17 1973 and state in what particulars it reflects a situation  
18 different on July 6, than obtained on May 22, 1973?

19 MR. WALLACE: Your Honor, this is the one I  
20 do object to. It is taken subsequent to the time  
21 that their part of the job was over. There were  
22 still other constructions underway by Lane at the  
23 time. There is still other construction underway on  
24 the RMA project 200 feet away from the shopping

1 center, just on the other side of Cary Street, and I  
2 think it is prejudicial to our case to allow this to  
3 come in, absent somebody taking a picture in May  
4 showing the actual conditions at the time they left  
5 the job. This is six, seven weeks later.

6 THE COURT: It shows work done by others after?

7 MR. WALLACE: In May, and I don't want to  
8 put Mr. Blankenship in the spot of saying whether it  
9 does or doesn't, unless he is qualified as an expert  
10 to say he made aerial surveys on May 22 and compared  
11 them with what he sees here.

12 THE COURT: How can I exclude it on something  
13 that it may show?

14 MR. WALLACE: He is being asked as of July,  
15 does this purport to show what was there in May, and  
16 it is an aerial photo and unless you have an aerial  
17 photo in May, there is no way he can do that. It  
18 comes after they left the job, at the time others  
19 were involved in the constructions in the same area.

20 THE COURT: Ask him if he can tell us that  
21 without telling us what it is.

22 BY MR. PEARSALL:

23 Q When you left the job do you know what the  
24 condition was of the paved area in front of the A&P store?



1           A           It should have been -- it was in right good  
2 condition, best I can remember.

3                   THE COURT: The question is do you know what  
4 it was?

5 BY MR. PEARSALL:

6           Q           Had it been recently repaved?

7           A           It was repaved while we were on the job, yes,  
8 that is correct.

9           Q           How about the area to the rear of the A&P store,  
10 do you know what that condition was?

11                   MR. WALLACE: As of when?

12                   MR. PEARSALL: When he left the job?

13           A           Well, I don't really remember right offhand.  
14 I couldn't very well tell you.

15                   THE COURT: He doesn't remember, Mr. Pearsall.

16                   MR. PEARSALL: I will get the pilot and the  
17 photographer over here.

18 BY MR. PEARSALL:

19           Q           You identified these books as contractor's  
20 load counts 2, 3 and 4, but not as the diaries that you  
21 prepared?

22           A           No.

23                   MR. PEARSALL: I would like to have these  
24 identified as an exhibit, Your Honor.

1 MR. WALLACE: I have no objection.

2 THE COURT: They are identified as an exhibit.

3 MR. PEARSALL: Introduced as an exhibit.

4 THE COURT: Admitted as Plaintiff's Exhibit 12a,  
5 b and c. It seems to be three books entitled  
6 Commonwealth of Virginia, Contractor's Load Counts  
7 2, 3 and 4.

8 (The said load count books were marked and  
9 filed as Plaintiff's Exhibits 12-a, b, and c.)

10 BY MR. PEARSALL:

11 Q Were they prepared by you on the job and they  
12 purport to record the movement of materials via truck?

13 A That is correct.

14 Q In connection with the performance of the  
15 joint venture, I hand you Xeroxes of photographs that were  
16 made from your files and ask you if you recognize them?

17 A I didn't find these particular photos; they  
18 appear to be. I know we took several of them and when you  
19 looked in the records, everything was pretty much in one  
20 box, in one file, and since then we used the file elsewhere  
21 and they have kind of been scattered out but they appear to  
22 be the same handwriting and so on of the man that took the  
23 pictures; I will say they probably are.

24 Q You think these are photographs from your file

1 taken for your business purposes?

2 A Yes, that is correct.

3 Q One being taken from the southeast side of  
4 Floyd detour bridge, looking south toward Cary and the other  
5 going in the other direction, taken from the northwest end  
6 of Cary detour bridge?

7 A Yes.

8 MR. PEARSALL: I would like to have these  
9 introduced as exhibits and marked with one number,  
10 a, b, c, and d.

11 MR. WALLACE: No objection.

12 THE COURT: They will come in as Plaintiff's  
13 Exhibits 13-a, b, c, and d and appear to be photographs  
14 -- there are only two photographs. You have a legend  
15 attached to each one?

16 MR. PEARSALL: That is right, Your Honor.

17 THE COURT: The legend and the photographs?

18 MR. PEARSALL: And it was his testimony that  
19 the legend was in the handwriting of the person who  
20 made the other photographs.

21 THE COURT: For the record let me clear that up;  
22 legends and pictures will be 13-a, a picture dated  
23 11-14-72; and the legend says, "Picture taken southeast  
24 side of Floyd; and the next exhibit will be 13-b and

1           that is a picture and legend and says, "Picture taken  
2           from northwest end of Cary Street, et cetera."

3                   (The said photographs and legends were marked  
4           and filed as Plaintiff's Exhibits 13-a and 13-b.)

5 BY MR. PEARSALL:

6           Q       Had you not been served with a subpoena duces  
7           tecum to bring with you all photographs in the files of  
8           the joint venture relating to this work?

9           A       That is correct.

10          Q       And you did not bring these photographs of  
11          which these are Xeroxes?

12          A       These two you have -- no, I could not find  
13          them.

14          Q       I call upon you to produce those under the  
15          subpoena duces tecum in order that the Court can get the full  
16          benefit of the original photographs which do not come through  
17          too well on Xerox. What was the principal type of truck  
18          that was used by the joint venture in moving the regular  
19          excavation and the undercut excavation from the site?

20          A       What type truck?

21          Q       Yes.

22          A       It was a tandem dump truck.

23          Q       What is the gross loaded weight of one of  
24          those trucks?

1           A       Well, all of them, they vary; some of them are  
2           licensed different but I would say around 50,000, something  
3           like that.

4           Q       What is the maximum weight permitted to Grey  
5           Bowles and other such persons in the use of such trucks for  
6           moving excavation?

7           A       Somewhere in that area, about 55,000, somewhere  
8           in that area.

9           Q       As a practical matter, don't they load them  
10          as heavily as they can load them under the Statute?

11          A       They try to load them pretty close to the  
12          limit.

13          Q       Did you not record basically that they would  
14          carry about eight cubic yards per truck?

15          A       Yes, we figure approximately eight cubic yards,  
16          somewhere in that area.

17          Q       You are paid on the basis of eight cubic yards,  
18          charge on the basis of eight cubic yards?

19          A       Yes, on estimates -- yes, they are based on  
20          cross sections but as a monthly estimate they are based on  
21          eight cubic yards.

22          Q       Without taking the time now to check as to  
23          whether these particular letters were stipulated -- I believe  
24          they all were -- I am going to hand you a group of letters

1 relating to equipment on the site and ask you to identify  
2 those as letters from the files of the joint venture. I  
3 hand you a group of letters that opposing counsel has agreed  
4 are included in the stipulation except for one dated  
5 September 9 and he has no objection to that, and ask you to  
6 quickly look at those letters and tell the Court the type  
7 of equipment referred to there, and for your convenience  
8 I believe I used a yellow underscoring pen.

9 A You mean the type equipment in this letter?

10 Q Yes, the type of equipment that they relate  
11 to about brining on the job site.

12 A Well, this particular one is a pile hammer that  
13 they usually drive wooden piling for temporary bridges.

14 Q What is the next one? How about calling the  
15 date of the letter, please?

16 A The first was June 22; this is July, 1971 and  
17 this refers to a type of hammer for driving piles for the  
18 bridges and so on.

19 Q The next one, what date?

20 A July 21, this is the same, also a hammer for  
21 driving piling.

22 Q What is next?

23 A July 22, same thing, it is a hammer for driving  
24 piling.

1 Q What is next?

2 A August 4, 1971, same thing, hammer for driving  
3 piling; September 9, 1971, same thing.

4 Q Neither the Court nor I are in the construction  
5 business and you are; would you state to the Court generally  
6 the nature of a hammer for driving piling? Describe it as  
7 a piece of equipment, not in great detail.

8 A Well, it is just a hammer that is attached  
9 to a crane that we use for driving piling.

10 Q Do they use it also for driving sheeting?

11 A Somewhat; it would be similar to that nature  
12 also.

13 MR. PEARSALL: This ties in with the witness'  
14 testimony; I would like to have this batch of papers  
15 marked.

16 MR. WALLACE: I haven't objected to them. I  
17 don't think they are material to what is going on  
18 but I don't object.

19 THE COURT: There are six letters; that will  
20 come in as Plaintiff's Exhibit 14.

21 (The said six letters were marked and filed as  
22 Plaintiff's Exhibit No. 14.)

23 BY MR. PEARSALL:

24 Q Mr. Blankenship, I would ask you to describe

1 to the Court the nature of the work that was to be performed  
2 by each participant in the joint venture, talking to us as  
3 laymen, now, not familiar with construction, telling us  
4 generally the nature of the work that was to be done by each  
5 participant and for that purpose make your comments orderly  
6 and you might want to refer to the exhibit which shows the  
7 work area and the limits of construction; state the type of  
8 work that was to be done.

9 A Not necessarily by the joint venture and the  
10 subcontractors but also Lane and several that came in?

11 Q I am interested only in what the joint venture  
12 was to accomplish, either as employees of Bowles, Bowles  
13 contractor or Wiley N. Jackson, or as subcontractors under  
14 the joint venture. I want you to describe to the Court what  
15 work was to be done by the joint venture.

16 A As far as Wiley N. Jackson is concerned, he  
17 basically had to install the temporary bridges and the interior  
18 retaining walls and to remove the old bridges.

19 Q The temporary bridges were to be at Floyd  
20 Avenue and at Cary Street, is that correct?

21 A Yes, in that area, yes.

22 Q And the bridges to be destroyed in the vicinity  
23 of the Richmond Shopping Center was the old Cary Street  
24 Bridge?



1           A       That is correct.

2           Q       Now the retaining walls, are they, for instance,  
3 what is marked on there as Wall No. 4?

4           A       Yes, Wall No. 4 was part of the wall in that  
5 area.

6           Q       How tall would wall No. 4 be, for instance,  
7 roughly? How high out of the ground or how deep into the  
8 ground?

9           A       I don't know, they vary.

10          Q       I am not trying to get precise measurements,  
11 I am trying to get a mental image.

12          A       I would say about ten feet. The profile will  
13 show more exactly, but approximately eight to ten feet or  
14 so above the ground, and so on.

15          Q       How would such a wall be built? Of what  
16 material is it?

17          A       Concrete.

18          Q       And would it be built with forms?

19          A       Yes, that is correct.

20          Q       About how big would the forms be that were  
21 used?

22          A       What do you mean? The height of them?

23          Q       The dimensions of them?

24          A       I would say about 15 feet or so in height, and

1 most of them were just wooden forms.

2 Q But they would be re-used as you went along  
3 the wall?

4 A Yes.

5 Q Would they be prefabricated and brought to  
6 the site in many instances?

7 A Yes.

8 Q So they are about 15 feet high?

9 A Roughly.

10 Q And about how long?

11 A Well, they are -- they run -- I don't know  
12 exactly; one sheet would be -- I don't know, I would say  
13 roughly about ten, fifteen feet.

14 Q So you had roughly a 15 by 15 foot form?

15 A Something in that area. I am not familiar  
16 with it, but , basically, somewhere about like that. Some  
17 of them were, I would say, fabricated and brought to the job  
18 and some were fabricated on the site at the wall itself.

19 Q And the concrete trucks would come to that  
20 point and the pour would be made between the forms?

21 A Yes.

22 Q And prior to that, all excavation would have  
23 been made?

24 A Yes.

1                   Q       And the excavation would be hauled away by  
2 truck?

3                   A       Yes, sir.

4                   Q       And they were these tandem trucks?

5                   A       Yes.

6                   Q       That is the work of Wiley N. Jackson?   Now  
7 what was the work that Grey Bowles, these two, in his two  
8 legal forms, did?

9                   A       E. G. Bowles had the clearing and excavation,  
10 undercutting, placing of stone and so on in these areas.

11                  Q       And the excavation would have consisted of  
12 removal of the dirt shown in the profile for the approximate  
13 900 feet?

14                  A       That is correct.

15                  Q       Did the joint venture have anything to do  
16 relative to the railway tracks?

17                  A       Yes, we had the temporary shoofly which was the  
18 temporary track, the installation of the temporary shoofly,  
19 and that was done by subcontractor, Atlas Railroad.

20                  Q       Did you have anything to do with the storm  
21 sewers along the way?

22                  A       Yes, Intercounty, another subcontractor, had  
23 installation of the storm sewers.

24                  Q       What type of equipment did Wiley N. Jackson use

1 other than the pile drivers that you are referring to?

2 A Well, they had backhoes and cranes, loaders  
3 and so on; basically, what they used in the walls; and  
4 demolition, and so on.

5 Q Was sheeting used? Is there any difference  
6 between sheeting and piling?

7 A Well, piling is used more or less for support  
8 for the structure. A sheeting is where you don't have  
9 enough room to open and cut for excavation.

10 Q What is the pile driver used for? Both piles  
11 and sheeting?

12 A I believe so, I am not sure.

13 Q So the sheeting would be for the retaining  
14 wall in a difficult excavation area?

15 A That is correct.

16 Q And the piles would be for the temporary  
17 bridges?

18 A Yes, piling for the -- I think the retaining  
19 walls also had piling but they were for support of the  
20 bridges and structure itself.

21 Q What generally would be the length of the  
22 piles?

23 A The wooden pile, the best I can remember, is  
24 somewhere around, I guess, around 30 feet, 40 feet, 30, 40

1 feet, something like that.

2 Q How about the sheeting?

3 A Well, sheeting, that would vary; I would say  
4 probably about 30 feet.

5 Q And would that be wood or metal?

6 A Well, sometimes use wood and sometimes metal;  
7 use both, really.

8 Q All equipment and all material that was used  
9 had to get to the place it was going to be used, of course?

10 A Yes.

11 Q What was the access to the area outlined in  
12 yellow in the vicinity of the railroad track? How did the  
13 joint venture and the subcontractors get all this equipment  
14 and material to this area in which they were working?

15 A Had ramps at Cary Street and also at Floyd.

16 Q You had a ramp here on the northern end of  
17 the project and you had one south of the temporary bridge?

18 A Yes.

19 Q Could you use the one south of the temporary  
20 bridge in connection with this work when the temporary bridge  
21 was being erected?

22 A Well, I believe we had one on the north end  
23 of the bridge, too, I believe. I think we made a ramp there.

24 Q Between the temporary bridge and the existing

1 bridge?

2 A No; well, let's see, it came up right beside  
3 the existing bridge.

4 Q Would it help you any if I were to show you  
5 the aerial which has not been admitted in evidence but does  
6 give you an overview?

7 A It might.

8 MR. WALLACE: The one during construction has  
9 been admitted, in August, 1972, at the time the  
10 construction was going on.

11 MR. PEARSALL: Maybe it is too small a scale,  
12 we will see.

13 MR. WALLACE: Is it not Plaintiff's Exhibit  
14 No. 2?

15 THE COURT: You asked him about the yellow  
16 that appeared on a document and there was no identifi-  
17 cation on the record as to what document you were  
18 talking about.

19 MR. PEARSALL: Plaintiff's 5, Your Honor.  
20 (Showing document to witness.)

21 A I believe we had a ramp on both sides. I  
22 believe there was a ramp coming up beside that old bridge.

23 THE COURT: That testimony isn't going to mean  
24 anything on record, unless you spell it out.

1 MR. PEARSALL: I am trying to let the witness  
2 orient himself, Your Honor.

3 MR. WALLACE: If Your Honor please, he is  
4 looking at Plaintiff's 10-a and indicating on both  
5 sides of the bridge crossing the right of way con-  
6 struction ramp. That would be Cary Street which was  
7 relocated to go over the bridge.

8 THE COURT: Let him mark it with a pencil or  
9 something.

10 A This is the temporary bridge right here.

11 (Indicating)

12 MR. WALLACE: The Judge will never know.

13 A (Continuing) To the best of my knowledge, I  
14 think it was a ramp on both sides of the existing bridge.

15 THE COURT: Is it important to your case that  
16 the location is important?

17 MR. PEARSALL: I want him to describe the  
18 access to the site, Your Honor.

19 THE COURT: There ought to be some indication  
20 on that.

21 MR. PEARSALL: I don't want it marked.

22 THE COURT: Describe verbally what he is talking  
23 about.

24 MR. PEARSALL: I want the witness to testify.

1 BY MR. PEARSALL:

2 Q Looking at the aerial photograph that was made  
3 August 22, 1972, in the progress of the work, I want you to  
4 describe to me what the access was to the work area in the  
5 vicinity of the old or temporary Cary Street bridge.

6 A To the best of my knowledge, while the old  
7 bridge was there, the existing bridge, we had a ramp just  
8 north that came up right at the edge of the bridge and --

9 Q Mr. Blankenship, before you settle on that  
10 testimony too firmly, I would like for you to take, I believe  
11 the first exhibit, Your Honor -- no, I am mistaken, it was  
12 the first plat.

13 MR. WALLACE: Mr. Pearsall, when he points to  
14 north, he is on the east side of the right of way?

15 MR. PEARSALL: Yes, we are talking about the  
16 work on the eastern side of the center line of the  
17 railroad.

18 BY MR. PEARSALL:

19 Q Now looking at Plaintiff's Exhibit No. 3, would  
20 you find out where the property is that was not taken,  
21 as it abuts Cary Street Road?

22 A Here is the limit of construction, this line  
23 right here.

24 Q And that merged with the solid line to that



1 point right here at Cary Street Road and the Richmond  
2 Shopping Center property?

3 A That is correct.

4 Q Relative to that, which shows the existing  
5 Cary Street bridge, will you point out how and where this  
6 ramp that you thought existed was utilized?

7 A This ramp came right adjacent, just as close to  
8 the bridge as you could get.

9 Q So it passed under the bridge?

10 A Well, I think it had an access under the bridge  
11 but it also was access coming up by the bridge there also.

12 Q As you came up by the bridge, I want you to  
13 explain to me how a tandem truck can pass between the  
14 property adjacent to Cary Street, and Cary Street.

15 A Would you repeat that? You said how the  
16 traffic --

17 Q I want you to, with your finger, trace out  
18 and then we will have it described in the record; how, with  
19 Cary Street bridge still intact, a ramp came from the work  
20 area into Cary Street?

21 A Just came right up beside the bridge there,  
22 right up in this area here.

23 Q Before the bridge actually started?

24 A Before the bridge was taken out.

1 Q And before the bridge was a bridge, while it  
2 was still Cary Street Road?

3 A Yes -- it was while the existing bridge was  
4 there. The temporary bridge was south of there.

5 Q How could you get up on an existing bridge from  
6 down below the bridge?

7 A I said they had a ramp coming up right up to  
8 the edge of the bridge.

9 Q So it was coming up to the ground support  
10 before the bridge took over?

11 A That is correct.

12 Q Now during the period that the bridge was  
13 being demolished could that ramp be used for the passage of  
14 big tandem trucks?

15 A I don't think so, I think we had to keep on  
16 going on down, under the bridge.

17 Q And while the new bridge just to the south of  
18 that was being constructed, could you pass under the new  
19 bridge area?

20 A You could get under the new bridge, yes.

21 Q After it was erected, but while it was being  
22 erected, you had pile drivers driving piles supporting the  
23 new bridge and still have big tandem trucks working under it?

24 A I will say they went through there some, whether

1 constantly, I don't know.

2 Q Isn't it a fact that the principal access to  
3 this property was at the northern end by Floyd Avenue?

4 A Yes, there was access, I would say, probably.  
5 I don't know whether one was used more than the other or  
6 not but it was access there also.

7 Q Then for excavation that was being hauled out  
8 of the work area to the Luck quarry pit, would you describe  
9 for me the haul road, how did you leave? Say that you were  
10 down at the railroad track or in that vicinity or up on the  
11 hill, wherever you were excavating, where would be the  
12 haul road to the Luck quarry pit?

13 A From this point of excavation, adjacent to  
14 where the temporary shoofly went, we came up one of those  
15 ramps, either at Cary Street or Floyd, and then proceeded to  
16 the Luck quarry.

17 Q You would get to Floyd or Cary via the ramp  
18 and then proceed to the Luck quarry?

19 A That is correct.

20 Q Where was the Luck quarry pit?

21 A Well, I can't think of the name of that road.

22 Q Portland Place?

23 A Yes.

24 Q At the edge of Windsor Farms?

1 A Yes.

2 Q On the opposite side of the railroad track?

3 A On the opposite side of the railroad track.

4 Q Now when you started out, the red line on this  
5 Plaintiff's Exhibit 5 was the limit of the area where you  
6 could go to perform your work, was it not?

7 A That is correct.

8 Q Did you thereafter get any relief from that  
9 situation?

10 A I don't know, to tell you the truth.

11 Q Let me see if I can help refresh your recollec-  
12 tion on that. Mr. Blankenship, I have handed you a group of  
13 letters that relate to stockpiling of excavation at certain  
14 points and ask you if looking at these letters refresh your  
15 memory as to whether you obtained permission to utilize any  
16 area beyond the construction limits shown in red on Plaintiff's  
17 Exhibit 5?

18 A It appears they did give us some extra area.

19 Q They allowed you to stockpile in the area  
20 between the red line of the limits of construction under the  
21 contract and the limited access line of Richmond Shopping  
22 Center that was not being taken, is that correct?

23 A I think that is correct.

24 Q And that was for the stockpiling of material.

1 salvaged to be later used?

2 A Yes.

3 Q Was the material so stockpiled?

4 A I believe it was. My information on some of  
5 the stuff is sparing because I wasn't outside that much,  
6 but I believe it was stockpiled.

7 Q Did you not keep a daily diary?

8 A Yes, I did. I could probably go back and see  
9 but right offhand I don't recall it.

10 Q You just don't recall it?

11 MR. PEARSALL: We would like this group of  
12 letters introduced.

13 THE COURT: Any objection?

14 MR. WALLACE: On one ground; in light of  
15 evidence, in the absence of the people who wrote them,  
16 composed them, not being here, the evidence being  
17 clear that they did require additional rights, I would  
18 object to them as being material, frankly, because I  
19 am not so sure what all this has to be -- has to do  
20 with the easement that is the essence of the case.

21 THE COURT: I will submit them subject to  
22 him establishing what the reference is. They will  
23 come in as Plaintiff's Exhibit 15. How many letters  
24 are there?

1 MR. PEARSALL: Six letters.

2 THE COURT: Are these letters written to him?

3 MR. PEARSALL: Let me ask the witness.

4 BY MR. PEARSALL:

5 Q Are these letters from the file of the joint  
6 venture?

7 A That is correct.

8 THE COURT: He kept the records?

9 BY MR. PEARSALL:

10 Q And you kept the records?

11 A Yes.

12 THE COURT: I will admit it, subject to your  
13 showing the relevance.

14 (The six letters were marked and filed as  
15 Plaintiff's Exhibit No. 15.)

16 MR. PEARSALL: I am trying to reconstruct what  
17 was the conduct of the work in the vicinity of the  
18 Richmond Shopping Center by the joint venture.

19 BY MR. PEARSALL:

20 Q As the custodian of the records, did you become  
21 aware of the fact that the Highway Department was impatient  
22 with the progress of the work by the joint venture?

23 A That is correct.

24 Q And that is part of the reason why several of

1 those letters dealt with getting an extension of time for  
2 the fact that until this additional area was made available  
3 for stockpiling, the work had to be done by loader and truck  
4 rather than by dragging?

5 A That is right.

6 Q I ask you to look at these letters and state  
7 to me whether they are from the files of the joint venture  
8 and relate to the urging by the Highway Department to the  
9 joint venture to move the project along?

10 THE COURT: Same objection, Mr. Wallace?

11 MR. WALLACE: Yes, sir.

12 THE COURT: Objection noted. It is submitted,  
13 subject to the relevancy if the witness can identify  
14 them.

15 A Yes, that is correct.

16 MR. PEARSALL: I ask that these be so marked.

17 THE COURT: There are five letters admitted into  
18 evidence as Plaintiff's Exhibit No. 16, subject to  
19 Mr. Wallace's objection as to relevancy.

20 (The five letters were marked and filed as  
21 Plaintiff's Exhibit No. 16.)

22 BY MR. PEARSALL:

23 Q Mr. Blankenship, you were asked by subpoena  
24 duces tecum to bring with you the diaries that you kept of

1 the progress of the work and do you not have those diaries  
2 with you?

3 A Yes, they are over there.

4 Q May I see those? These were prepared by you  
5 personally as a part of your responsibility relative to  
6 record keeping on the joint venture job?

7 A That is correct.

8 Q I notice that they are numbered 1 through 4  
9 consecutively and then there is a gap of 5 and then 6 and 7;  
10 do you have an explanation of that?

11 A We are missing one of them. I don't know how  
12 it got lost. In fact, it is probably around the office  
13 somewhere but over a period of time it has been misplaced.

14 Q I ask that you look for it and if you do find  
15 it, produce it.

16 MR. PEARSALL: I ask that these be admitted  
17 into evidence.

18 THE COURT: Any objection?

19 MR. WALLACE: I am sure Mr. Pearsall wouldn't  
20 object; he has made photostats of the pages of these.  
21 I don't know what their requirements are for keeping  
22 their records. Could we substitute the photos for  
23 what is inside?

24 THE COURT: Is there any objection to doing



1                   that?

2                   MR. PEARSALL: I have no objection, Your Honor,  
3                   to a Xerox, clearer Xerox being substituted.

4                   THE COURT: It will be done; admitted into  
5                   evidence as Plaintiff's Exhibit No. 17.

6                   (The said diaries were marked and filed as  
7                   Plaintiff's Exhibit No. 17.)

8                   MR. PEARSALL: But I am not asking that all  
9                   of this be reproduced because it is too bulky.

10                  THE COURT: There are seven books, they show  
11                  Diary, 1, 2, 3, 4, 6 and 7.

12                  BY MR. PEARSALL:

13                  Q       Mr. Blankenship, here are Xeroxes, portions of  
14                  pages that seem to deal with the portion of this project  
15                  in the vicinity of the Richmond Shopping Center and that  
16                  portion is underscored in yellow; I ask you to look at that  
17                  and see if that is basically what that is. Some of them are  
18                  not very clear.

19                  A       This would be in the area of work in that  
20                  area.

21                  Q       Would you look at the back part and see if it  
22                  doesn't continue right on to the last pages?

23                  A       Yes.

24                  Q       And these excerpts from the diary show that as

1 early as June 24, 1971 and as late as May 8, 1973, work was  
2 being done by the joint venture on that portion of the  
3 project in the vicinity of the Richmond Shopping Center?

4 A Yes.

5 MR. PEARSALL: I would like these marked.

6 THE COURT: Any objection?

7 MR. WALLACE: No, sir.

8 MR. PEARSALL: Your Honor, relative to our  
9 prior agreement, so long as there is a legible copy  
10 of each sheet here I have no desire that any other  
11 copy be made from the diaries. The originals can be  
12 returned.

13 THE COURT: What is this exhibit?

14 MR. PEARSALL: Xeroxes of the pages of the  
15 diaries that relate to work done between June 24,  
16 1971 and May 8, 1973 in the vicinity of the Richmond  
17 Shopping Center.

18 THE COURT: Those documents will be admitted  
19 into evidence as Plaintiff's Exhibit No. 18.

20 (The said documents were marked and filed as  
21 Plaintiff's Exhibit No. 18.)

22 BY MR. PEARSALL:

23 Q You were asked to bring with you, asked by  
24 subpoena duces tecum, to bring with you your records of the

1 truck and the amount of excavation and the area hauled to  
2 and from; did you bring that with you?

3 A Yes, in those load count books.

4 Q This is the only form you brought it? Did you  
5 bring it in any other form?

6 A Well, the diaries take in those and I don't  
7 think it is in anything else.

8 Q I hand you Xeroxes of records and ask you if  
9 they are records under your control?

10 A Yes, that is right, these are in another book.

11 Q Which you did not bring with you?

12 A I did not bring them with me.

13 MR. PEARSALL: I would like these offered as  
14 an exhibit.

15 MR. WALLACE: No objection.

16 THE COURT: Identified as Plaintiff's Exhibit 19,  
17 sheets from the load book.

18 (The said sheets from the load count books  
19 were marked and filed as Plaintiff's Exhibit No. 19.)

20 BY MR. PEARSALL:

21 Q Recapitulation, is it not?

22 A Similar to the load book, it is more combined  
23 form.

24 THE COURT: It would be from the load book?

1           A       Yes.

2       BY MR. PEARSALL:

3           Q       I hand you another set of records and ask you  
4       if they are copies, Xeroxes of your records?

5           A       Yes, that is the same, combined form of the  
6       load count.

7           Q       For another purpose -- this is for the purpose  
8       of billing monthly for regular excavation?

9           A       For keeping account on the excavation, with  
10      the State, for their quantities.

11           THE COURT: Is this cumulative?

12           MR. PEARSALL: I am trying to establish the  
13      order of magnitude of the moving; I tried to get it  
14      done beforehand. This is as far as I can get.

15           THE COURT: We have the load book and a recap  
16      of what is in the load book; is this cumulative?

17           MR. PEARSALL: If he can answer the final  
18      question. I offer this as an exhibit, Your Honor.

19           THE COURT: What is this, now?

20           A       That is a summary of the excavation that took  
21      place on the job. It should be, like I say, it is a combined  
22      form of the load count. It might be a few things in there  
23      that is not in the load count. The load count books were  
24      for E. G. Bowles' use only while that would take loads by

1 Intercounty and some of the other contractors also that went  
2 to the Luck Quarry.

3 THE COURT: You want this one admitted?

4 MR. PEARSALL: Yes, sir.

5 MR. WALLACE: Objection -- no objection.

6 (The said documents were marked and filed as  
7 Plaintiff's Exhibit No. 20.)

8 BY MR. PEARSALL:

9 Q Mr. Blankenship, I hand you a Xerox of another  
10 record from your files and ask you what that is.

11 A This is a summary sheet of the excavation in  
12 various areas, broken down in various areas throughout the  
13 project.

14 Q So this is the recap or summary made at a  
15 later time which should reflect the excavation by area in  
16 which done, is that correct?

17 A That is correct.

18 Q Would that be all types of excavation? Would  
19 it be undercut excavation? Would it be excavation of --

20 MR. WALLACE: If Your Honor please, may he  
21 answer the first question?

22 A This is basically regular excavation and also  
23 structure excavation for the walls. It might take into  
24 consideration some of the undercut if it was on the plans;

1 if it was added undercut, then it was not.

2 Q So it could be excavation not added here?

3 A It is not shown on the plans if it was, and  
4 would not be included in those totals.

5 Q Do you have the original record of this tape  
6 with you?

7 A No, I do not.

8 Q It was the subject of the subpoena duces tecum  
9 but you do not have it with you?

10 A No, I do not.

11 Q Is it fair to say, from looking at this, that  
12 the portions marked in yellow represent excavation that you  
13 billed the Highway Department for doing in the vicinity of  
14 the Richmond Shopping Center project, including retaining  
15 wall excavation and excluding by inadvertent marking of  
16 retaining wall No. 3 which I have marked out again? In  
17 other words, retaining wall No. 3 was not adjacent to the  
18 Richmond Shopping Center?

19 A It was on the opposite side.

20 Q Would you say the portions that have been  
21 underscored represent what you billed the Highway -- the  
22 joint venture billed the Highway Department for in excavation?

23 A Yes, basically. It is a plan quantity job and  
24 it is a breakdown of those areas.

1           Q       That would not include any that you moved that  
2 you didn't bill the Highway Department because they weren't  
3 shown on the plans to be --

4           A       Well, it wouldn't -- that wouldn't include any-  
5 thing that was not shown on the plans. Any added undercuts  
6 or anything that was extra, that would be plan quantity.

7           Q       And would it show any rehandling from excavation  
8 to stockpile and from stockpile elsewhere?

9           A       No.

10          Q       So it wouldn't show all the dirt moved but  
11 would show the quantities of dirt moved that you were being  
12 paid for on plan quantities?

13          A       Yes.

14          Q       Would there be any other sheets that you don't  
15 have the originals with you other than the ones that I have  
16 handed to you to show the planned quantity excavation in  
17 the vicinity of Richmond Shopping Center, and to answer that  
18 question I invite your attention to the fact that I have  
19 underscored in the vicinity of 209, 210, 216.50, 218.50;  
20 the railroad cut at 197.95 to 217, the retaining wall 4;  
21 would there be any other than this that would be applicable  
22 to the project in the vicinity of Richmond Shopping Center?

23          A       Well, your plans, but I don't think you would  
24 have anything broken down in detail like you do in these

1 stations here. It might give you a larger area. This is  
2 a more detailed breakdown here.

3 Q On the detailed breakdown I marked, have I  
4 marked all the excavation that was billed to the Highway  
5 Department in the vicinity of the Richmond Shopping Center?

6 A Yes, I think so, with the exception like it  
7 is added undercut or something.

8 Q But you wouldn't have billed the Highway  
9 Department for that?

10 A We got paid for it, yes.

11 Q But it wouldn't have been in the original  
12 contract?

13 A It wouldn't have been in the original contract,  
14 it was a condition.

15 Q Do you have any idea what the magnitude of  
16 that is?

17 A I am not sure whether there was any added  
18 undercut in the area or not.

19 MR. PEARSALL: I would like that offered as  
20 an exhibit.

21 MR. WALLACE: No objection.

22 (The said summary sheet of excavation was  
23 marked and filed as Plaintiff's Exhibit No. 21.)  
24



AFTERNOON SESSION

MR. PEARSALL: May it please the Court, in the luncheon adjournment I was able to have a subpoena served on the pilot to identify the photographs, and as a minimum of inconvenience to the general public, I would like to put him on at this moment.

MR. WALLACE: Have you finished with Mr. Blankenship?

MR. PEARSALL: Just about. I want Mr. Blankenship on the stand right after this so if he wants to say anything about this, he can. I just want to interrupt Mr. Blankenship just long enough to have the pilot identify this photograph; and the acceptance of the subpoena to go among the Court papers.

WILLIAM W. BUTLER, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PEARSALL:

Q Will you state your name, age and occupation?

A William W. Butler, pilot, aerial photographer for the Virginia Department of Highways.

Q You have with you a contact print of a certain section of an aerial photograph, do you not?

1                   A       This is a contact print of the aerial photo-  
2 graph.

3                   Q       On what date was it taken?

4                   A       July 6, 1973.

5                   Q       By you?

6                   A       Yes, sir.

7                   Q       Is this an enlargement of a portion of that?

8                   A       Yes, it is, and according to our records it  
9 was done from the negative without any tampering of any  
10 kind.

11                           MR. PEARSALL: I offer the contact print and  
12 the enlargement, Your Honor.

13                   THE COURT: Mr. Wallace, any objection?

14                   MR. WALLACE: No, sir.

15                   THE COURT: Admitted in evidence as Plaintiff's  
16 Exhibit 30.

17                           (The contact print and enlargement were marked  
18 and filed as Plaintiff's Exhibit No. 30.)

19                           CROSS EXAMINATION

20                   BY MR. WALLACE:

21                   Q       Mr. Butler, was anybody with you in the plane  
22 at the time?

23                   A       Yes, sir, a crew of three.

24                   Q       Who was doing the actual flying?

1 BY MR. PEARSALL:

2 Q Mr. Blankenship, take whatever time is  
3 necessary, a day or two, if necessary, to look at that aerial  
4 photograph and relying on your familiarity with the site,  
5 see if you can tell me what is in the center of the enlarge-  
6 ment. Orient it in any way that is helpful to you.

7 A This is the area at the Richmond Shopping  
8 Center. This was the area of construction by the Shopping  
9 Center.

10 Q Now this photograph was taken on July 6,  
11 according to the testimony of the photographer, and I believe  
12 your testimony was that on or about May 22 of 1973, the same  
13 year, that the joint ventures were terminated; now can you  
14 tell me any difference that you are aware of in the condition  
15 of the work when you left on May 22 and the appearance given  
16 by this photograph taken approximately two months later?

17 A Well, I don't recall exactly because I didn't  
18 pay that much attention to it when we left. It has been  
19 several years ago but it basically looks the same, the best  
20 I can remember.

21 MR. PEARSALL: Witness with you.

22 CROSS EXAMINATION

23 BY MR. WALLACE:

24 Q While we have got this exhibit before us,

1 Mr. Blankenship, Exhibit 30 with the attachment, prior to  
2 May 22, 1973, the date of your company's leaving the job,  
3 had you ever seen with your own eyes an aerial shot of this  
4 area?

5 A No.

6 Q Either photograph or actuality?

7 A No.

8 Q So when you say it looks the same, you really  
9 don't have anything to compare it to from the air, do you?

10 A Not really. It is just to the best of my  
11 knowledge what I can remember about it; it is basically the  
12 same.

13 Q Were there any other contracting companies  
14 working at or about the locations shown in Exhibit 30,  
15 that is in the vicinity of Richmond Shopping Center at the  
16 time Bowles and the joint venture left the job?

17 A Yes, both Lane was working in the same -- over  
18 the same area where we were; in fact, he came in about a  
19 year after we did but was working in these areas at the same  
20 time and D. W. Winkelman was working south of Cary Street  
21 bridge.

22 Q When did the joint venture start the job, if  
23 you recall?

24 A About the middle of June, 1971.

1 Q When did Lane come onto the job?

2 A I don't know exactly but it was approximately  
3 a year after we began.

4 Q Was Lane working in the same exact area that  
5 you were?

6 A He worked in the identical areas where we  
7 worked in. We had the first phase of the job and he had  
8 the second, and his work began before we were anywhere near  
9 complete ours.

10 Q Was Lane in any way contractually tied into  
11 the joint venture?

12 A You mean with Jackson and Bowles?

13 Q Yes, sir.

14 A No.

15 Q He had a separate and independent contract?

16 A He had a separate contract of his own.

17 Q How about Winkelman, was he a part of the  
18 joint venture?

19 A No, he had a contract with the Richmond Metro-  
20 politan Authority.

21 Q And Winkelman was then doing the construction  
22 for them?

23 A For them, that is correct.

24 Q And at the point where the two bridges were

1 shown, the old bridge and the temporary bridge, is that at  
2 about a point where the two jobs, the RMA job and the work  
3 you were working, came together?

4 A Just about. Both jobs were tied right in.  
5 I guess it is a hundred feet, 200 feet or so south of the  
6 bridge is where ours ended and his began, although there was  
7 some overlapping also.

8 Q Did Lane do any work using tandem trucks on  
9 the right of way, as far as you know?

10 A Yes, he did. That is basically how he moved  
11 all of his dirt, by truck, same as we did.

12 Q What dirt was Lane moving?

13 A Well, it was excavation in the same areas,  
14 basically, where we were. He had to lay the slopes back,  
15 grade the slopes and exterior wall excavation and so on,  
16 where the slopes could not be laid back they had to put  
17 exterior walls in to hold the embankments.

18 Q You testified earlier in regard to a note,  
19 memorandum in your diary, Plaintiff's Exhibit No. 17, the  
20 job diary and the specific note referred to was that dealing  
21 with June 27, 1972 in which Mr. Pearsall called your attention  
22 to remarks that you had put in your diary. The remarks  
23 state, in essence, that you met with Mr. Bailey on the job.  
24 Do you recall that meeting?

1                   A       Yes. Well, Mr. Turner met with Mr. Bailey  
2 concerning this.

3                   Q       Were you present?

4                   A       No.

5                   Q       You were not present?

6                   A       No.

7                   Q       So whatever is written in this document is  
8 something Mr. Turner told to you?

9                   A       That is correct.

10                  Q       Did you at any time have any dealings  
11 personally or with the claim made by Richmond Shopping Center?

12                  A       Yes. Well, I wrote some of the letters and  
13 I talked to, I think, Mr. Bailey once or so on the phone  
14 concerning the same.

15                  Q       What prompted you to write the letters?

16                  A       Well, we had gotten a complaint from him  
17 concerning some of the trucks crossing and had agreed to  
18 certain obligations, and it was concerning those.

19                  Q       Did he tell you what trucks were crossing  
20 and when?

21                  A       I don't recall whether he pointed out anything  
22 specifically or not. I don't remember whether anything was  
23 specific or if he pointed out exactly the ones or not.

24                  Q       Did he tell you where the trucks were crossing

1           that he was complaining about?

2           A       Well, they come across the parking lot, was  
3           the basic complaint that he had.

4           Q       Did he complain about anything else other  
5           than crossing the parking lot to you?

6           A       No.

7           Q       When was the first time you learned that he  
8           might have claim for other damage to the parking lot?

9           A       When we got the letter. I don't remember the  
10          date on it, when it listed other items other than the parking  
11          area and totalling somewhere around \$13,900, something like  
12          that.

13          Q       Was the receipt of that letter subsequent in  
14          time to your other conversations with Mr. Bailey?

15          A       No, we didn't have any mention of anything  
16          other than the parking area, other than that.

17          Q       How long a period of time after was it?

18          A       I am guessing around a year or so, I really  
19          don't know.

20                   MR. WALLACE: Might I take a moment to look  
21                   at the exhibit?

22          BY MR. WALLACE:

23          Q       Mr. Blankenship, I refer you to Plaintiff's  
24          Exhibit 28 previously entered, that being a letter from you



1 to Mr. Browder of the Highway Department. Does this refresh  
2 your recollection about the date of the additional information  
3 about the claim of Richmond Shopping Center for being more  
4 than just damages to the property?

5 A Yes.

6 Q What date is indicated in that letter?

7 A The letter we got from the Highway Department  
8 was -- this letter was September 12, 1973; this letter is  
9 October 30, 1973.

10 Q I refer you to the second letter in that same  
11 exhibit, Exhibit 28, dated December 26, 1973; it is from  
12 you to Mr. Browder again. Mr. Pearsall has marked the second  
13 paragraph in yellow. Could you explain to me what that  
14 paragraph is all about?

15 A Well, when Mr. Turner and Mr. Bailey met  
16 concerning the parking area we did commit ourselves to  
17 several obligations and repairing of certain parts of the  
18 lot and that was about at the time of the flood and everything  
19 was pushed and it got around so that we never did get around  
20 to repairing the lot so the Richmond Shopping Center contracted  
21 Dillard Paving to fix certain areas and repave the entire  
22 lot and so on and it was \$2400 was the amount of the cost  
23 for that.

24 Q Had the joint venture agreed prior to the

1 actual repaving to repave it?

2 A Yes, we agreed to make several -- repair  
3 certain areas and repave the lot.

4 Q I believe one of the sentences here, "Although  
5 we could have repaired this with our forces for approximately  
6 half, we agree to absorb the entire \$2400," does that mean  
7 that Bowles and the joint venture is willing to pay that  
8 \$2400?

9 MR. PEARSALL: Let's don't have the witness  
10 led. Let's don't lead him.

11 THE COURT: I don't know whether he is his  
12 witness at this moment or not.

13 MR. WALLACE: I haven't gone into things  
14 beyond what was brought out by you.

15 THE COURT: I will sustain the objection. He  
16 is not your witness.

17 BY MR. WALLACE:

18 Q Do you know of your own knowledge if the \$2400  
19 was paid by Bowles to Richmond Shopping Center?

20 A Yes, it was, paid by the joint venture.

21 MR. PEARSALL: Your Honor, this is a question  
22 eliciting an answer which is contrary to the facts  
23 and I would certainly have thought was known by counsel  
24 to be contrary to the facts.

1 MR. WALLACE: The fact is you still owe the  
2 check; you may not have cashed it.

3 THE COURT: The objection is overruled. It  
4 is a proper question. Maybe you fellows have some  
5 independent knowledge that the Court doesn't have.  
6 I think it is a proper subject for cross examination,  
7 Mr. Pearsall. I don't think it is an objectionable  
8 question at this time.

9 MR. PEARSALL: Well, the objection, Your Honor,  
10 is that it was tendered in offered compromise and,  
11 therefore, has not been paid because the compromise  
12 offer was not accepted.

13 MR. WALLACE: I think that is something that  
14 can come out from Mr. Bailey or you.

15 MR. PEARSALL: I would think offers in  
16 compromise are not admissible in evidence.

17 MR. WALLACE: They are not in compromise.  
18 Your own demand was \$2400 and that has been paid.

19 THE COURT: Read back his last question.

20 (The previous question was read.)

21 THE COURT: What is the relevancy of this  
22 question?

23 MR. WALLACE: Sometime in this case we will have  
24 to get to the question of damages. As far as my client's

1 attached to cashing it.

2 MR. WALLACE: I am not offering this for  
3 satisfaction at this point, I am offering it purely  
4 for the purpose to show that, one, the claim  
5 Mr. Bailey raised was for damages and it came to  
6 \$2400 and here is all the evidence surrounding that  
7 claim; whether it be paid or not it is a matter to  
8 be decided later.

9 MR. PEARSALL: But the payment was made to me  
10 as counsel.

11 MR. WALLACE: I still contend I don't owe  
12 him any money.

13 THE COURT: I will sustain the objection.

14 BY MR. WALLACE:

15 Q Mr. Blankenship, did you have conversations  
16 with Mr. Bailey about the amount of the claim he was making?

17 A You mean other than the \$2400 for the paving,  
18 or are you talking about the entire --

19 Q I am asking did you have any conversations  
20 with Mr. Bailey in which he said, "The amount of my claim  
21 is X dollars?"

22 A The letter we got from him where they requested  
23 -- that Dillard had done the work and they requested we pay  
24 \$2400 --

1 THE COURT: He said did you have any conversa-  
2 tions with him?

3 A I don't know. When I talked to him on the  
4 phone, the only time I remember talking to him is concerning  
5 that we were going to do the work, repair the lot; as far as  
6 any money mentioned, I don't. After that I don't recall any  
7 conversation concerning the same.

8 BY MR. WALLACE:

9 Q So the only information you would have would  
10 be what is in these letters?

11 A That is correct.

12 Q How often did you go onto the job site?

13 A You mean on the project where the work was  
14 going on itself?

15 Q Yes, sir.

16 A Well, basically, my work was inside. I don't  
17 know, not every day; I wouldn't actually work there every day  
18 because I was tied down inside the majority of the time.

19 Q Who would know what had gone on generally out-  
20 side or at or near the Richmond Shopping Center?

21 A Well, Mr. Turner was the project manager. He  
22 was outside the majority of the time.

23 Q And he would be in position to know?

24 A Yes, I would say so.

1 Q Did you ever see any trucks in the Richmond  
2 Shopping Center yourself?

3 A I have seen them in there at lunch time,  
4 that is the only time I have seen them in there.

5 Q What were they doing when you saw them?

6 A Usually they like to congregate there for  
7 lunch and went into the A&P, and so on.

8 Q Did you see them over there at any time other  
9 than lunch, that is, in the shopping center parking lot?

10 A Well, I have seen them in there, you know,  
11 maybe stop together in there to get something to eat or  
12 something in the mornings or afternoon, but that is about  
13 all.

14 Q Did you see any trucks in there at any time  
15 while you were associated with the project that were not  
16 joint venture trucks?

17 A Yes, well -- I don't know how many trucks  
18 there were on the job, probably 50 of them all together, and  
19 at various times they were working for Bowles or Jackson or  
20 Intercounty or Lane or whoever needed the trucks. A lot of  
21 our trucks that the joint venture used were also used by  
22 other contractors other than the joint venture and their  
23 subcontractors.

24 MR. WALLACE: Judge, as to cross examination,

1 I would like to stop now but reserve the right to  
2 call him as my own witness at a later time.

3 THE COURT: Is there anything on rebuttal,  
4 on redirect?

5 REDIRECT EXAMINATION

6 BY MR. PEARSALL:

7 Q Mr. Blankenship, you said that Lane worked in  
8 the second phase behind the joint venture?

9 A That is correct.

10 Q In the second phase, behind the joint venture?  
11 The major excavation had taken place, had it not?

12 A Well, it was still a lot of excavation left.  
13 I don't know exactly what was on their phase of it but,  
14 although we had done the majority of it, there was still a  
15 whole lot left behind.

16 Q What was Lane's contract to do excavation  
17 work that was different from your contract to do excavation  
18 work? What was Lane there for?

19 A Lane, he was there to install the actual  
20 roadway itself, basically, and some of the slopes that were  
21 cut back he had to lay some of the slopes back steeper than  
22 we did and in some cases every slope was cut entirely off  
23 where the exterior walls were put in.

24 Q Now you are talking about the slope after your

1 excavation had taken place?

2 A Yes.

3 Q In other words, he might, as you say, lay the  
4 slope back more? In other words, create a more gradual  
5 drop?

6 A That is correct.

7 Q But, basically, the deep cut from the level  
8 of the shopping center line to the railroad level had been  
9 executed by you all before Lane came in there to do that?

10 A That is correct.

11 Q So he was basically operating down in the ditch?

12 A Well, he did, yes. He was operating in the  
13 ditch after we got through, although some of his, like the  
14 top of the slope, his limits of the top of the slope were  
15 laid by -- further than where we laid, but he was working in-  
16 side the excavation where we were.

17 Q Now, would you look at this aerial photograph  
18 which is marked as Plaintiff's Exhibit 30 and tell me what  
19 retaining walls as contrasted with slopes were involved  
20 opposite the Richmond Shopping Center that Lane was working  
21 on, as contrasted with the joint venture?

22 A Well, it doesn't look like it is any exterior  
23 walls there that I can see. I don't know whether the slope  
24 was laid back in that particular section or not.



1                   Q       So you were talking generally about the overall  
2 contract?

3                   A       Project.

4                   Q       Which was about a two mile contract?

5                   A       About a mile and a half, but as far as -- I  
6 don't know exactly whether the slopes were ever laid back  
7 further than we did in that section or not. Someone working  
8 outside could possibly tell you.

9                   Q       According to this aerial photograph it would  
10 have been down in the ditch here where you got all the white  
11 area showing that the excavation had taken place?

12                  A       Yes, that is where we excavated.

13                  Q       And Lane followed behind you, after you had  
14 done this excavating?

15                  A       We had done this excavating here and put in  
16 the stone and, you know, and so on, for the temporary shooflies  
17 and Lane had -- well, this is part of ours but they ended up  
18 doing part of it because we were cramped working on top of  
19 each other so they did actually install the mainline track  
20 itself.

21                  Q       You are now pointing to the center line track?

22                  A       Center of the railroad.

23                  Q       So that is where Lane was operating?

24                  A       He was operating all over.

1           Q       Why was he operating all over? I am trying  
2 to follow your conversation. What was he doing all over?

3           A       He was moving dirt; he had to lay the slopes  
4 back. I am not saying he was working in this area because  
5 I don't know. You will have to ask someone outside.

6           Q       Then if you don't know, you don't mean to  
7 suggest to the Court that in the area we are talking about  
8 he was laying slopes back?

9           A       I didn't say he was laying slopes back, working  
10 in the area, laying slopes back.

11           MR. PEARSALL: That is the only thing that is  
12 pertinent. No further questions.

13                   (The witness stood aside.)

14           MR. PEARSALL: I think we have to take the  
15 absentee witness, Senator Wicker, who appeared to  
16 testify that he either sent or received these papers  
17 right here that have been exhibited to opposing  
18 counsel and marked as Plaintiff's exhibit for identifi-  
19 cation No. 11, and on the basis of the stipulation  
20 that they were either sent or received by Senator  
21 Wicker, I offer them in evidence.

22           MR. WALLACE: I object to them on the grounds  
23 that they are not material or relevant to this case,  
24 that they deal with conversations with people not here

1 me get back at it. How can he come in and show the  
2 reason he won? Will there ever be a time he is  
3 stopped? Yes, I think you have third party benefi-  
4 ciary rights; who is Senator Wicker, anyway?

5 THE COURT: The Court sustains you on your  
6 demurrer. I sustained you today on your demurrer.  
7 I see no reason to open up the whole demurrer situa-  
8 tion. If I let this in, he has a right to come in  
9 with some other proof on the demurrer. These documents  
10 should have been introduced in the demurrer proceeding.  
11 His argument should have been introduced in the  
12 demurrer proceeding. I don't see how else you can  
13 get it in on the demurrer at this point. That  
14 question is foreclosed and I agreed with you when you  
15 argued that it was foreclosed.

16 MR. WALLACE: I am going to withdraw my  
17 objection if we can reopen that, Your Honor.

18 THE COURT: I am not going to litigate the  
19 demurrer today. Judge Williams ruled on it and I  
20 think that ruling is a good ruling. I will note your  
21 objection. The proper thing to do, Mr. Pearsall --  
22 I am not trying to tell you how to try your case --  
23 is offer those, and I will mark rejected on them and  
24 they will be in the record. If you go up on appeal

1           they are in your record. Let the record indicate he  
2           has offered a number of letters, number of documents,  
3           beginning with one from Mr. Owen to Mr. Goodwin,  
4           dated August 5, 1975 and ending with a letter from  
5           Mr. Pearsall to Mr. Owen dated August 23, 1973, and  
6           they are Plaintiff's Exhibits for identification  
7           No. 11, which is rejected and we will note Mr. Pear-  
8           sall's objection on the record. It came in as  
9           Plaintiff's Exhibit 11. He is offering it now as  
10          Exhibit 11, which is rejected.

11                   (The said letters which were previously marked  
12           for identification as Plaintiff's Exhibit No. 11,  
13           were offered and rejected as Plaintiff's Exhibit  
14           No. 11.)

15                   RUFFIN R. BAILEY, being first duly sworn,  
16           testified as follows:

17                   DIRECT EXAMINATION

18           BY MR. PEARSALL:

19           Q       State your name, age and occupation.

20           A       My name is Ruffin R. Bailey, I am 58 years old.  
21           My occupation is realtor and I am the President of Bailey  
22           and Childress, Incorporated.

23           Q       What was your connection with Richmond Shopping  
24           Center at the time of the incidents claimed in this litigation?

1 A Bailey and Childress was the rental agency.

2 Q Do you still represent Richmond Shopping  
3 Center?

4 A No, I do not.

5 Q What brought about that change?

6 A Well, it was by mutual consent. The account  
7 was sold to the owner's son.

8 Q Did you furnish me, as counsel for Richmond  
9 Shopping Center, Inc., the facts upon which this action is  
10 based?

11 A Yes, I did.

12 Q You have personal knowledge of the facts  
13 underlying the claims asserted?

14 A Yes, I do.

15 Q Would you state generally what are the claims  
16 asserted by Richmond Shopping Center, Inc?

17 A The claims asserted are for two easements,  
18 for a total rental for two easements, for a total of \$10,000;  
19 \$20 for repairing a broken wall; \$1,000 for repairing a  
20 gravel parking area to the north of the A&P store; \$2,400  
21 for repairing the macadam part in front of the A&P; \$220  
22 for -- we lost our employee parking lot and we lost our  
23 employee's cars back over to the macadam parking area and  
24 to get it back we considered it would cost us \$220 to do

1           that, and I believe that is it.

2           Q       You have the personal knowledge of the basis  
3 of these claims, do you?

4           A       Yes, sir.

5           Q       Do you recall approximately when you first  
6 became aware of the effect of the trucks utilizing this,  
7 these easements you refer to?

8           MR. WALLACE: If Your Honor please, I object  
9 to leading the witness.

10          THE COURT: Objection sustained.

11 BY MR. PEARSALL:

12          Q       Will you amplify what you are saying about  
13 the easements?

14          A       Well, I assume you want me to answer that  
15 question you asked?

16          THE COURT: He wants you to answer the one we  
17 just got through rejecting. That is a proper question.

18          A       In September of 1971 -- let me orient this  
19 thing. (Indicating)

20          MR. WALLACE: "This thing" for the record is  
21 P-30.

22          MR. PEARSALL: May it please the Court, I  
23 believe that it would shorten the examination and  
24 avoid the necessity for objections to leading questions

1 and such as that if the witness could use Plaintiff's  
2 Exhibit 30 as the largest scale aerial photograph  
3 we have and state to the Court, possibly with the  
4 Court's indulgence in looking at the exhibit at the  
5 same time he does, as to where he is pointing.

6 THE COURT: As long as in some kind of way  
7 you preserve for the record where he is pointing so  
8 when she fixes it up it is meaningful to us.

9 BY MR. PEARSALL:

10 Q Bearing that in mind, Mr. Bailey, would you  
11 point out and describe at the same time you are pointing where  
12 there occurred the incidents you say form the basis of the  
13 claim; you are not only demonstrating to the Court what  
14 happened but you are putting on the record what happened  
15 and you will have to make some reference to some place on  
16 this Plaintiff's Exhibit 30 where it happened so the record  
17 will also reflect that.

18 A Yes, sir. This section of the Richmond  
19 Shopping Center is on the west side of Thompson Street and  
20 extended from Cary to Floyd and to a line west of Thompson  
21 Street, an average of 200 feet in depth. For instance, the  
22 Floyd Avenue side was 235 and some tenths feet, and the Citgo  
23 or Cary Street side was less in depth. I think you wanted to  
24 know when I first observed trucks crossing our parking area?

1           Q       I think at this point that I am going to ask  
2           you to relate to the Court the incidents that formed the  
3           basis of the claim so we get a general orientation, then  
4           we can go back and take it up in greater detail.

5           A       Of course, the Highway had taken the High's  
6           building and we were in the midst of building a new High's  
7           building. For the record, the High's building was the small  
8           building next to the A&P, east of the A&P, and the High's  
9           building sided on Thompson Street.

10          Q       Is A&P the large building shown in the photo-  
11          graph?

12          A       This is correct. Ellwood Avenue ends at the  
13          shopping center, approximately in the middle, and if you  
14          continued on you would go right by the front of A&P. The  
15          A&P extending northward from that point.

16          Q       To make sure the Court is oriented, would you  
17          point out Ellwood and A&P?

18          A       This is Ellwood Avenue; this is Thompson;  
19          this is Thompson Street as a "T" and this large building  
20          is the A&P.

21          Q       Where was the High's building relative to  
22          that?

23          A       These three small buildings east of the  
24          A&P, the High's building was the one next to Thompson Street



1 and in widening Thompson Street they took the High's building.  
2 As such, we made a new agreement with Mayberry, who then  
3 owned High's, and with Mr. Gregory, who is the President of  
4 High's, to build a new building across the parking lot, which  
5 is a macadam parking lot, which is in front of A&P on a  
6 vacant lot that was not included in any other place in the  
7 shopping center. This building is just north of the Citgo  
8 service station which is on the northwest corner of Thompson  
9 and Cary Street.

10 Q Does it appear roughly as a "Y" on this  
11 Plaintiff's Exhibit 30, that is, the Citgo station?

12 A Yes, sir, the Citgo Station, we were using  
13 Mr. Gregory's contractor, a man named Puckett, and he was  
14 in the midst of digging his foundation and pouring his footings  
15 when I noticed that an area to the north of him was beginning  
16 to disintegrate. Now this was in September of 1971. Prior  
17 to that we knew the work was going on. We have been in  
18 negotiations with the Highway on numerous times. We knew  
19 roughly what they were planning to do. We really thought  
20 that I-195 would be an asset to the shopping center and  
21 even at this date I am not sure whether it is or isn't, the  
22 way the traffic pattern has developed, but, in the meantime,  
23 you must understand that I live in the -- at 4914 Cary Street  
24 Road; I work at 600 East Main Street; I go to work down Cary

1 Street, going east, and I go home up Ellwood Avenue to  
2 Thompson Street right at this shopping center, turn left and  
3 turn right on Cary and go home. In those days I went home  
4 for lunch practically every day and I have seen the trucks  
5 -- this again is at lunch time when I have seen the trucks  
6 in the earlier time other than September, but it didn't  
7 particularly bother me until all of a sudden I noticed -- and  
8 this is in checking the building that was being built by  
9 Mr. Puckett for High's -- I noticed the macadam just north of  
10 him disintegrating and I accused him of doing it and he said  
11 "If you will just wait here for a few minutes I will show  
12 you who is doing it," so I waited about 30 minutes until the  
13 lunch hour was over and a long stream of heavily laden trucks  
14 came right across it. Now they came from the area that is  
15 west of the shopping center and I am pointing to the middle  
16 of the area from Cary to Floyd and close to the railroad  
17 tracks. These trucks came from that area. They were being  
18 loaded by a dragline crane. This particular cliff is some  
19 30, 40 feet deep, I am not sure, but the profiles will show  
20 it, and these trucks were entering and leaving by both  
21 entrances and one entrance is right at the extension of  
22 Ellwood Avenue going west; the other entrance is south of  
23 that and would be next to and north of the new High's building.  
24 I stopped one of the trucks and said, "Look, you can't do this."

1 He was attempting to enter unloaded at the southern driveway.

2 He said "That is --

3 MR. WALLACE: I object to what he said.

4 A (Continuing) He did this. (Indicating)

5 MR. PEARSALL: We have an admission here.

6 THE COURT: Objection sustained.

7 A (Continuing) He backed up, drove down to the  
8 next driveway and turned left and went across in front of the  
9 A&P and went over and got loaded again. I then stopped another  
10 truck and asked the driver for whom did he work.

11 MR. WALLACE: Object to anything he might have  
12 said.

13 THE COURT: You can't refer to anything he  
14 might have said.

15 MR. PEARSALL: If we have here a driver of the  
16 joint venture and he so admits --

17 MR. WALLACE: He didn't say that. He is trying  
18 to say what the man said. He just said it was a truck.

19 THE COURT: Even if he is, how is the truck  
20 driver's statement going to be an admission by the  
21 party?

22 MR. PEARSALL: Well, we will see if it is  
23 necessary. Go ahead with your story.

24 A (Continuing) It is going to be hard for me to

1 get to Mr. Blankenship if I can't say what the driver said.

2 THE COURT: You can't say what the driver said.

3 A (Continuing) I stopped the next truck and  
4 attempted to learn for whom he worked and where was his  
5 foreman.

6 THE COURT: Let me clear up one point. You  
7 can testify to what Mr. Blankenship said but not  
8 what the truck driver said.

9 A (Continuing) I think I have gotten beyond  
10 that point. I hope I have, so I can get to him. Directly  
11 west of the Citgo station and not shown on this aerial photo,  
12 but I am sure it is shown on the early ones, was a building  
13 that was previously occupied by a florist, Williams and  
14 Harvey, I believe, so I went around that particular day to  
15 the building and standing outside was a young man the age  
16 of my son, approximately 25 years old, and this amazed me  
17 that Mr. Blankenship -- I introduced myself to him and he  
18 said his name was Melvin Blankenship, and he is sitting right  
19 here and I introduced myself to him and I was amazed that a  
20 man my son's age was in charge of this project. However, he  
21 seemed to be doing a good job. Anyway, I explained the  
22 difficulty to him. He agreed in a very nice way that he  
23 would do the best he could to have it discontinued. In later  
24 conversations with Mr. Turner, Mr. Blankenship, I was told

1 that there are quite a number of subcontractors -- by that  
2 I mean truck drivers -- they came from everywhere, Rockville,  
3 Glen Allen, some had three trucks, some had five trucks, and  
4 these were what he said were 55,000 pounds. It looked more  
5 like 75,000 pound tandem trucks to me, and I was told that  
6 it is impossible to control them. I can agree with them  
7 after the experience I have had, it is impossible to control  
8 independent truck drivers. In any case, it continued. The  
9 macadam had to be fixed. Mr. Turner, in a conversation, and  
10 another with him, agreed that he would fix it. He agreed that  
11 he had done the damage, and we waited.

12 Q Before you go that deeply into it, I was trying  
13 to get you to summarize for the Court, by use of this aerial  
14 photo, where the various incidents occurred that you are  
15 complaining of. Now without my leading you, will you tell me  
16 what the incidents were, what was done in front of the A&P,  
17 between the A&P and the new High's store you were complaining  
18 of?

19 A Well, what was done between the A&P and the  
20 High's store in the macadam parking lot was hauling and  
21 empty trucks were turning back and forth across this property  
22 by both driveways, through both driveways, and on the western  
23 side were two large signs and the entrances and exits onto  
24 the property acquired by the Highway were on both sides of

1 these signs. Then as you move northward along the property  
2 line, the western property line of the Richmond Shopping  
3 Center, you come to a concrete block wall. It starts out  
4 very low and ends up approximately four feet high, at the  
5 rear of the A&P, which is the northern side of the A&P, and  
6 makes a right-hand turn and comes back toward Thompson Street,  
7 with three steps down which makes it beginning four feet then  
8 approximately three feet, then approximately two feet. During  
9 this period, the entire period I am talking about, this wall  
10 was used constantly by the joint venture to unload pilings,  
11 forming material. I think I stated in my letter that these  
12 pallets or forming material were 16 by 16. I noticed  
13 Mr. Blankenship said 15 by 15. The pilings that I saw  
14 unloaded were wooden pilings and they were about 14 inches  
15 square. They were generally used for bracing rather than  
16 pilings, as such. They were anything from 4 feet long to  
17 16 feet long, and they were unloaded on the wall. Well, it  
18 broke one section of our wall and that is what one of the  
19 prices I gave you was for. Then we continue north and having  
20 passed the A&P and continuing north along Thompson Street,  
21 the area from the driveway behind the A&P to Floyd Avenue,  
22 is an area owned by the Richmond Shopping Center but it had  
23 on it two residential properties, also owned by the Richmond  
24 Shopping Center, and as this is a congested area, Richmond

1 Shopping Center also owns the property across Thompson to  
2 the east, clean to Nansemond Street, and from Ellwood to Cary.  
3 This is a congested area and, as such, we were attempting to  
4 relieve the parking areas of employee parking. By that, I  
5 mean tenant employee parking. We had this area graded,  
6 graveled and bumper logs; these are telephone poles, actually,  
7 were installed, then we contacted all tenants of the shopping  
8 center and asked them to please have their employees park in  
9 this graveled area --

10 Q I interrupt your narrative at this point to  
11 ask you what this is. (Indicating)

12 A What you have given me is a bill for \$1,540  
13 from N. W. McDaniel and Company, dated November 7, 1968 for  
14 the work I just explained to this area. It also states that  
15 it is for -- "Install clothesline --" they actually moved  
16 a clothesline. It says "Lot at corner of Thompson and Floyd,  
17 remove trees, shed and debris, grade it and cover with 220 tons  
18 of crushed stone," and then written in handwriting is "abate-  
19 ment of rent"-- this is a bill we paid for the work done.

20 Q For preparing the employee parking lot?

21 A Yes, sir.

22 MR. PEARSALL: I ask that that be offered.

23 MR. WALLACE: What is the materiality of what  
24 it cost to repair initially, before anything ever began.

1 at the time of the loss, through Mr. Bailey, or  
2 is some other witness going to testify to that?

3 MR. PEARSALL: Through Mr. Bailey. I am having  
4 him testify to the course of getting it into the  
5 shape of an employee parking lot and then I will have  
6 him testify to the cost of the restoration, and the  
7 cost of the restoration bears a direct relationship to  
8 the cost of getting it done.

9 BY MR. PEARSALL:

10 Q Will you continue to say how this was gotten  
11 into as an employee parking lot?

12 A I was talking about the tickets placed on cars  
13 in the shopping center. It says, "Cars parked longer than  
14 five hours will be considered as trespassing," and after a  
15 number of days -- and I don't know how many days -- we placed  
16 these on the cars and we also paid a young man to do it, too.  
17 We finally got the gravel parking area practically full of  
18 employees' cars. Of course we did explain to the owners of  
19 the stores what the story was and they requested that their  
20 employees park there. When this work started, and, of course,  
21 this -- if I can see the other map I am sure they show the  
22 same thing, but it is an obvious situation of the trucks  
23 going across this particular lot and you don't run a 70,000  
24 pound truck by many parked cars before they leave and within



1 30 days these people had moved back onto the Richmond  
2 Shopping Center public parking areas.

3 Q To make sure that the record shows, where was  
4 the employee parking area that you are talking about?

5 A Employee parking area, as I explained before,  
6 was to the north of the rear end of the A&P, and extended to  
7 Floyd Avenue. It extended from Thompson Street to the  
8 property line to the west, which is closer to the railroad  
9 track, and we even shortened down the area to be used by  
10 the two residential properties to approximately 25 feet.  
11 That was a line of trees there and we shortened it down to  
12 that line of trees so they would have some area, but the  
13 rest would be for employee parking.

14 MR. PEARSALL: Before we leave this, I would  
15 like to have this ticket which he testified to marked  
16 as an exhibit.

17 MR. WALLACE: I don't mind cluttering up the  
18 record, but that is all it is. I object to its  
19 relevance and materiality in this case. If he  
20 testified it was a parking lot, it is a parking lot.

21 MR. PEARSALL: He testified to this as an  
22 item of expense getting it done.

23 THE COURT: He didn't testify to any amount.  
24 What does this add to the equation as to damages?

1 MR. PEARSALL: I can't have him say everything  
2 at once. I will have him, before he gets through  
3 testifying.

4 THE COURT: At this juncture it is not relevant;  
5 if you want to get more testimony on it.

6 BY MR. PEARSALL:

7 Q Will you look at Plaintiff's Exhibit 9,  
8 being an aerial photograph dated April 25, 1969, and state  
9 whether or not that reflects the situation in the vicinity of  
10 the Richmond Shopping Center prior to the commencement of the  
11 work by the joint venture?

12 THE COURT: The only thing that keeps this  
13 parking ticket from coming into the record now is  
14 that there is no testimony as to the expense of the  
15 matter.

16 MR. PEARSALL: I will put it to one side.  
17 I am trying to get him to tell the whole story but  
18 in some fashion that will be intelligent.

19 BY MR. PEARSALL:

20 Q I ask you to look at this Plaintiff's Exhibit  
21 No. 9 and say whether it correctly reflects the shopping  
22 center property prior to the commencement of the joint  
23 venture operation? In what respect does it not, if it does  
24 not?

1           A           I don't know that it does not; it looks that  
2 way to me, and not to prolong this thing, but the gravel  
3 parking area we were discussing is plainly shown as being  
4 freshly graveled.

5           Q           And was the gravel surface of the parking  
6 area in good condition or bad condition at the time that  
7 the joint venture started?

8           A           It was in roughly the same condition here.  
9 I don't see the bumper logs. These bumper logs had been  
10 placed in different places. This is the wall, of course,  
11 pointing to the rear of the A&P, but along Floyd Avenue we  
12 placed bumper logs.

13          Q           While we are looking at aerial photographs  
14 would you look at the one marked 10-a and 10-b, an enlarge-  
15 ment thereof, and state whether it reflected the condition  
16 during the course of the operation on August 22, 1973?

17          A           Well, of course, I can't tell that as of this  
18 date that is it. I assume he took it on that date and as of  
19 that, August of 1972, he took it on that date. Of course,  
20 they had put in the Floyd Avenue wooden bridge, the temporary  
21 bridge. They had put in the temporary bridge on Cary Street.

22          Q           I am asking about the shopping center property,  
23 is that the way the shopping center property looked at that  
24 time?

1           A       Roughly, yes, in August, 1972 this is just  
2 about what it was.

3           Q       What was the condition of the employee parking  
4 lot at that time?

5           A       Well, it shows distinctly two driveways coming  
6 from the property belonging to the Highway, which is west  
7 of the parking lot and to the railroad; now I am talking  
8 about the gravel parking area. It shows distinctly two  
9 well-worn trails by trucks from that area to the driveway  
10 to Thompson Street which is the northern driveway. That is  
11 the driveway which is the northern driveway, then we have  
12 two more, one here and one here; this is the one at the end  
13 of Ellwood and this is the southern one, and then, of course,  
14 this is a service station. There was no curbing at Berrington  
15 Street. Berrington Street is a street that runs north from  
16 Floyd Avenue and on the south side of Floyd Avenue which  
17 stopped at that point. There is no curbing there and,  
18 actually, although it was three or four feet higher than the  
19 street level, you could drive up on it with a car.

20           THE COURT: Where was Floyd Avenue?

21           A       This is Berrington Street here and I am  
22 pointing from Grove to Floyd and parallel to the railroad  
23 track and Berrington Street stopped here at Floyd and Floyd  
24 stopped at the other side of Berrington Street. This is a

1 temporary bridge and, of course, they have since taken that  
2 down, and a ramp comes around here at present. That was the  
3 end of Floyd Avenue which stopped at the end of Richmond  
4 Shopping Center property. These are truck paths, I am sorry;  
5 that is what they are.

6 THE COURT: The truck paths are where?

7 A This light spot.

8 THE COURT: Right behind the A&P?

9 A Yes, sir. If you will bear with me a moment,  
10 this is the parking area that we arranged for the employee  
11 parking, then as time went by it ended up in this condition  
12 with bushes growing up and with the definite trails of  
13 trucks. This is mud; this is no longer gravel parking, this  
14 is mud, and at times they couldn't get these trucks through  
15 here and they had to go out on Floyd Avenue and make it. This  
16 is the new bridge. This is a retaining wall now. I am  
17 pointing to the new bridge on Cary Street.

18 BY MR. PEARSALL:

19 Q Did you have any occasion to observe the move-  
20 ment of these trucks in the performance of the joint venture  
21 contract?

22 A Mr. Pearsall, I observed them everyday I  
23 worked -- while they worked. I explained that to you. I  
24 went home for lunch.

1           Q       Will you explain to the Court what movement  
2 of the trucks that you observed as they relate to the  
3 Richmond Shopping Center property?

4           A       Well, again starting in September of 1971 --  
5 it is hard to explain -- many, many trucks that went across  
6 this property, it is unbelievable, even if I tried to explain  
7 it.

8           THE COURT: Mr. Bailey, I think we should stick  
9 with his question. He says which of the joint venture  
10 trucks did you observe?

11          A       I am explaining, Your Honor, about the joint  
12 venture trucks. I am talking about trucks that had E. G.  
13 Bowles name written on it. I am talking about trucks that  
14 -- I can't say what the truck driver said -- I am talking  
15 about trucks that I stopped that --

16          MR. PEARSALL: May it please the Court, I  
17 think that is -- I think that as long as a truck is  
18 operating as an agent, truck operator driving is an  
19 agent of the joint venture, that his statement that  
20 he is operating as an agent of the joint venture is  
21 an admission and if he goes further in that statement,  
22 then that constitutes an admission of the joint  
23 venture. I have tried not to pursue the matter further  
24 until it becomes obvious that this witness is finding

1           himself handicapped under the Court's prior ruling  
2           as he understood it.

3           THE COURT: I think he has some trucks going  
4           across there with E. G. Bowles on it. That may be  
5           sufficient but I don't think the mere fact that a  
6           man is a truck driver makes him an agent through which  
7           we can get an admission in court.

8           MR. PEARSALL: If the truck driver says he is  
9           driving for E. G. Bowles, that is all I am saying,  
10          that that is a statement --

11          THE COURT: That is a hearsay statement. The  
12          only way it can come in is through some exception to  
13          the hearsay rule.

14          A       Your Honor, and Mr. Pearsall, could I bring  
15          it in in this fashion? Mr. Jim Turner, who is sitting in  
16          this court room, told me they were their trucks, the joint  
17          venture trucks. He told me that. Mr. Blankenship told me --  
18          Melvin Blankenship told me that; Mr. Turner put it in a  
19          letter and you have a copy. I don't have it with me but you  
20          have a copy in a letter in which he admitted it. I don't  
21          know what else to say except I was trying to get this point  
22          across that the huge amount of dirt that had to be removed  
23          from Floyd Avenue to Cary Street was tremendous.  
24

1 BY MR. PEARSALL:

2 Q Will you try now to tell the Court what was  
3 the movement of the trucks in the removal of that dirt,  
4 the responsibilities for which was the joint venture.

5 THE COURT: I think he has told us that. I  
6 clearly think I understand what it was, unless he has  
7 something new to add. He saw them at noontime, various  
8 other times. Once he was there with Mr. Puckett and  
9 he saw them. Is there something other than that?

10 A Yes, Your Honor, just in my mind it is. It  
11 got to the point, of course, I couldn't get the surface  
12 repaired. Mr. Turner, who is as nice as can be, and we are  
13 long-time friends, agreed he would repair it.

14 THE COURT: That goes far afield of your  
15 question. He asked you about movement of the trucks.  
16 Is there any other movement of trucks you want to talk  
17 about?

18 A I was trying to talk about stopping of movement  
19 of trucks, and I thought I needed to lead up to it, but the  
20 trucks continued. I imposed upon the Highway to install a  
21 temporary fence, which they did. They installed a temporary  
22 fence from Cary Street to the wall just west of the front  
23 of the A&P. Now for the record, the front of the A&P faces  
24 Cary Street, not Thompson.



1 BY MR. PEARSALL:

2 Q Did that stop the movement of the trucks?

3 A No, it did not. Of course, the loading and  
4 unloading continued to the wall which meant that he had to  
5 cross the property. The truck traffic continued on the  
6 gravel lot and so I asked them to please extend the fence.  
7 On this particular time they had broken the wall and I asked  
8 them, "For goodness sake, let's cut this out," so they  
9 extended the fence down the length of wall. In another  
10 telephone call I said -- and I, of course, know Owen, and  
11 I know Randy Owen, the other one, and in calling these men  
12 I asked "For goodness sakes, let's extend the fence clean  
13 to Floyd Avenue so we can cut this out." They came back,  
14 and all this takes time, and they came back and extended the  
15 fence. The fence installers came back. This is a farm type  
16 woven wire fence; they installed it for a distance of about  
17 15 feet and then cut directly across and to the east, easterly  
18 direction of the gravel parking lot, and the reason for that  
19 was that there was a ramp coming from the railroad area up,  
20 which is the present ramp, in the general location of the  
21 present ramp of I-195, and these trucks were attempting to  
22 haul dirt from the bridge at Cary Street Road or the embank-  
23 ment at the bridge at Cary Street Road. By this time there  
24 was no way to make that turn unless they came over onto the

1 Richmond Shopping Center property and, as such, they took a  
2 bulldozer, and I was there when they did it, and this is  
3 the joint venture's bulldozer, took a bulldozer and bulldozed  
4 an area. The Richmond Shopping Center line, western line,  
5 runs right along as you can see here, and it came out here.

6 BY MR. PEARSALL:

7 Q Came out to Floyd Avenue?

8 A That is correct. That was the original  
9 situation. They then took -- they condemned this part right  
10 here where someone has drawn a line.

11 Q That is the fence?

12 A Anyway, they condemned this section of it,  
13 leaving us this section. Now the wall stops right here and  
14 they ran the fence to approximately this point and then cut  
15 it back and tied it in right there and bulldozed this down  
16 because it was a hump in it, and bulldozed this down so that  
17 this truck could make this turn and go down this line to  
18 pick up this dirt. I am sorry, I have got you a little  
19 confused on that but in making the turn he is coming from  
20 the ramp up to Floyd Avenue, turning sharp to the right and  
21 going south to Cary Street along the western line of the  
22 Richmond Shopping Center property, picking up their load and  
23 returning to Floyd Avenue and to the Luck quarry, from there  
24 to the Luck quarry, so I had to call again. Do you mind if I

1 explain why I did all of this?

2 Q So long as you don't quote anybody.

3 A I am going to quote you; you are here. We  
4 wanted an attorney and we begged the counsel of Richmond  
5 Shopping Center to please represent us and we went through  
6 that almost from the beginning but for some reason, which he  
7 can explain to you, he could not represent Richmond Shopping  
8 Center against the Highway Department and it was the Highway  
9 Department that I thought was the responsible party and,  
10 finally, in desperation I told him that we had to have an  
11 attorney and he got special dispensation, as I understand,  
12 to represent us and that is when I got out of it but, in the  
13 meantime, my instructions were that the only way you are going  
14 to get anything done and cease this is to harrass these people  
15 unmercifully and, unfortunately, that is what I did. I wrote  
16 letters, I called, I did everything I could and I never got  
17 anything done except that fence.

18 Q Did you make any contemporaneous notes whatsoever  
19 about any of the situation at the time?

20 A Yes, sir, I made numerous ones.

21 Q I hand you some papers and ask you what that is?

22 A When they condemned 3601 Floyd Avenue, which was  
23 a residential property, we thought the award was unfair on the  
24 property and when the tenants moved out I went by and made

1 notes as to the condition of the property from one end to  
2 the other and I did that on December 1, 1971.

3 Q What is the last entry on that? Is that a  
4 memorandum?

5 A This is a memorandum of the condition of the  
6 property and at the very end I wrote -- I instructed to be  
7 written -- I had a party with me that took these down,  
8 "Construction workers constantly using employee parking area,  
9 ruining gravel base and causing employees to park in Richmond  
10 Shopping Center."

11 MR. PEARSALL: I offer this as an exhibit.

12 THE COURT: Any objection?

13 MR. WALLACE: Yes, sir, I have no objection to  
14 his testifying or refreshing himself on the notes;  
15 how do I know they are not made yesterday or day before?  
16 But to help his memory, that is fine. If he is  
17 introducing them in evidence to prove that what he is  
18 saying is true, is purely self-serving, and I object.

19 MR. PEARSALL: The witness testified this is  
20 a contemporaneous memorandum made at the time of his  
21 inspection of this condition.

22 THE COURT: What purpose do they serve? He has  
23 testified that this was what he thought at that time  
24 and this is what he said at that time.

1 MR. PEARSALL: Here is 28, it is not in that  
2 batch.

3 THE COURT: This will come in as Plaintiff's  
4 Exhibit 32, letter from Mr. Bailey to Mr. Balch  
5 dated May 18, 1972.

6 (The said letter was marked and filed as  
7 Plaintiff's Exhibit No. 32.)

8 BY MR. PEARSALL:

9 Q Will you state what the next letter is that  
10 you have in your hand?

11 A It is a letter from James P. Dillard, con-  
12 tractor, giving us an estimate --

13 MR. WALLACE: From Dillard to whom?

14 A To Bailey & Childress, Inc., giving us an  
15 estimate for repairing the damaged area of the asphalt paving.  
16 It amounts to \$2,400. It is dated May 18, 1972.

17 MR. PEARSALL: I offer this as a quotation.

18 THE COURT: Any objection to this document?

19 MR. WALLACE: No, sir.

20 THE COURT: The letter is admitted as Plaintiff's  
21 Exhibit 33.

22 (The said letter was marked and filed as  
23 Plaintiff's Exhibit No. 33.)  
24

1 MR. WALLACE: If Your Honor please, might he  
2 just say on June 7, 1972 what happened or what he saw  
3 or what he did?

4 THE COURT: Please tell us, Mr. Bailey.

5 MR. PEARSALL: I want him to say not only what  
6 happened but that he told Mr. Van that.

7 A On June 7, 1972 I went by the parking area,  
8 the gravel parking area, and found two large trucks belonging  
9 to E. G. Bowles. One was a water truck parked in the gravel  
10 parking area. Now I had been told that they were not parking  
11 there, "We will not park there." I was told that by Mr.  
12 Turner, and I took pictures and sent it to them showing that  
13 they did park there. The second paragraph was that I said --

14 THE COURT: Tell us what is the second thing  
15 you did.

16 A I said that Mr. Bowles was supposed to be  
17 controlling the numerous subcontractors and if he couldn't  
18 control his own vehicles, I didn't see how he could control  
19 others. The third paragraph states --

20 MR. WALLACE: May I just say have him say what  
21 he did and who he communicated with.

22 MR. PEARSALL: This witness is doing his best  
23 to conform to the rules of the court and in interro-  
24 gating him I am trying to do the same thing. I am

1           entitled to have this witness say what happened on  
2           certain occasions.

3           THE COURT: That is all we want him to do,  
4           just that he did it.

5           A        I explained to Mr. Van that the winter coming  
6           on, the freezing action would cause us to replace the entire  
7           blacktop.

8           BY MR. PEARSALL:

9           Q        Will you look at the next writing and say what  
10          that is?

11          A        This is a letter to Mr. A. C. Summerville, who  
12          is the District Manager for A&P, dated July 11, 1972.

13          Q        Did you write it to him?

14          A        Yes.

15          Q        Was it based on information in your possession  
16          at that time?

17          A        Yes, sir.

18          Q        Did it reflect information in your possession  
19          at that time?

20          A        Yes, sir.

21          THE COURT: Any objection?

22          MR. WALLACE: No. Your Honor, I think he can  
23          relate by his own testimony he wrote a letter to  
24          Mr. Summerville saying "Stick with me while we try to

1           get the problem straightened up." I would like to  
2           hear it from him that he did so. He said he wrote  
3           the letter. I can't object except that it is self-  
4           serving.

5       BY MR. PEARSALL:

6           Q       Was A&P one of the tenants?

7           A       It was a major tenant in this section.

8           Q       Was the breakup in front of the A&P store?

9           A       Yes, sir.

10          Q       Did you report to A&P that you were trying to  
11       get the breakup cured?

12          A       Several times.

13          Q       When you were talking to Mr. Turner was it  
14       your authority and purpose to effect a settlement with the  
15       joint venture?

16          A       When I was talking to Mr. Turner I was simply  
17       after cooperation and Mr. Turner constantly informed me that  
18       he would cooperate and I think he tried to cooperate. He  
19       didn't have just one flood, he had two floods and each time  
20       it flooded out his asphalt plant and it delayed the matter.  
21       I don't know whether I have answered your question or not.

22          Q       What cooperation were you trying to get from  
23       Mr. Turner that you were talking to Mr. Summerville about?

24          A       Get the blacktop repaired and get the trucks



1 off of it so it wouldn't continue to happen.

2 MR. PEARSALL: I offer this, Your Honor.

3 THE COURT: I think it is objectionable as  
4 being self-serving. He testified to the substance of  
5 the letter. Do you want me to mark it rejected?

6 MR. PEARSALL: No, that is all right.

7 BY MR. PEARSALL:

8 Q What is the next memorandum?

9 A The next memorandum is dated 11-15-72 and it  
10 is simply a memorandum to myself that Jim Turner said --

11 MR. WALLACE: This is solely his handwriting.  
12 If it refreshes his memory, I have no objection to his  
13 testifying, but it is self-serving as it is.

14 MR. PEARSALL: May it please the Court, I don't  
15 understand why something that tends to prove your case  
16 is objectionable if it is a contemporaneous memorandum  
17 and he states what the nature of it is.

18 MR. WALLACE: Where is the original? I object  
19 that it is not an original.

20 MR. PEARSALL: I request that we have an  
21 adjournment long enough for us to find the original.  
22 These matters have been in his possession for two years.

23 MR. WALLACE: It is a note to himself.

24 MR. PEARSALL: It is nothing wrong with a note

1                   can keep them in under the technical aspect.

2                   (The motion was argued.)

3                   THE COURT: Motion overruled.

4                   NEWTON W. McDANIEL, being first duly sworn,  
5 testified in behalf of the plaintiff, as follows:

6                   DIRECT EXAMINATION

7 BY MR. PEARSALL:

8                   Q       Would you state your name, age and work,  
9 occupation?

10                  A       Newton W. McDaniel, general contractor,  
11 age 54.

12                  Q       How long have you been in the general  
13 contracting business?

14                  A       Twenty years for myself..

15                  Q       What types of work does that general contracting  
16 business cover?

17                  A       I do a general line of work; you name it, I  
18 have probably done it.

19                  Q       Were you the general contractor who repaired  
20 the employees parking lot in the rear of the A&P store in  
21 the Richmond Shopping Center in late 1968?

22                  A       Yes, sir.

23                  Q       Did you receive a call from me last evening  
24 asking if you had given a verbal quotation to Mr. Bailey for

1 restoring that parking lot?

2 A Yes, sir.

3 Q What was your response?

4 A We were talking off the cuff in the neighborhood  
5 of about a thousand dollars.

6 Q Did I ask you to go to the parking lot this  
7 morning for the purpose of testifying today as to the May,  
8 1973 cost of restoring the parking lot?

9 A Yes, sir.

10 Q Did you see any differences in the parking lot  
11 today from what you saw when you gave the quote earlier?

12 A I don't think so; possibly some growth and  
13 maybe some more debris, maybe.

14 Q Would any difference in height of growth  
15 or the possible great amount of debris have made any  
16 difference in the May, 1973 price you were going to quote to  
17 me?

18 A I don't think it would make a great deal of  
19 difference.

20 Q When you give me the price you indicate any  
21 difference you think it would have been. Did I give you the  
22 following parameters for the quotation --

23 MR. WALLACE: If Your Honor please, I object  
24 to the form of the question as leading. I think he

1           can ask what he was asked to do.

2           THE COURT:  Objection sustained.

3           MR. WALLACE:  Or "what did you do in regard  
4           to the cost?"

5       BY MR. PEARSALL:

6           Q       What were you asked to do?

7           A       What was I asked to do in regard to this?

8           Q       Right, what were you asked to do in forming an  
9       estimate?

10          A       I was asked to go by and check the lot, as I  
11       had checked it in 1973, and make an estimate of what had to  
12       be done in replacing what had already been done in 1969 --  
13       maybe I am wrong, in 1969 -- 1969, previously, when I first  
14       did it, and I was asked to go over the entire lot and make  
15       a fair appraisal of what had to be done to put it back.

16          Q       What were the outside boundaries of the area  
17       you were asked to include in your estimate?

18          A       I was asked to check everything from Thompson  
19       Street to the fence to Floyd Avenue back to the alley, the  
20       driveway alley part between the A&P store, the same area we  
21       worked on before, other than the area where the two houses  
22       were located which I didn't bother with that.  It was the  
23       area where they had two houses on the corner and I didn't  
24       even figure anything in regard to that.

1                   Q       They weren't included in your previous work,  
2 were they?

3                   A       No, sir.

4                   Q       What were you asked to estimate relative to  
5 the area that you have just described?

6                   A       I was asked to estimate grading the lot,  
7 clearing the lot and grading it, leveling it, graveling the  
8 same area that was graveled before, putting these butt logs  
9 back where they -- where we had them across the front behind  
10 the two houses and then across the top of the lot, not to  
11 the fence but to the driveway, to the walk.

12                  Q       Do you have with you your computations on  
13 which you reached a May, 1973 estimate?

14                  A       Yes, sir.

15                  Q       1973 cost estimate?

16                  A       Yes, sir, we had an area of approximately  
17 10,000 square feet to gravel.

18                  Q       Is that the same area that you graveled previous-  
19 ly?

20                  A       That was it, less the same area that we graveled  
21 before. Do you want this broken down? Do you want the total  
22 amount or break it down?

23                  Q       Break it down and give all the details.

24                  A       The placement of the gravel, it took 130 tons

1 of gravel.

2 Q Would that be the same depth you placed it  
3 before?

4 A Yes, sir, that is two inches. Back in 1973 it  
5 was \$3 a ton delivered; it is more than that now. That came  
6 to \$390. We shored approximately five telephone size logs;  
7 they are two still there.

8 Q What were the logs there for?

9 A They were there as butts, bumpers for the cars,  
10 where they had to stop, and we figured on replacing those  
11 logs, if I can replace them, at \$25 apiece. I figured the  
12 labor on it at \$430. I figured we got a week's labor for  
13 three men and a supervisor. In getting the lot cleared,  
14 graded and leveled, installing the gravel, of course, we have  
15 to rake it and level it and get it to the right depth, digging,  
16 and putting the logs in place in a trench, staking them and  
17 clearing up, and that came to \$430. The total amount of the  
18 material and labor cost came to \$945. We have a 30 percent  
19 profit and overhead, 15 percent profit and 15 percent overhead,  
20 which went to 30 percent, which comes to \$283.50. That makes  
21 it a total of \$1,228.50.

22 Q Does that include the procurement of the tele-  
23 phone log bumpers that are missing?

24 A We are hoping we can replace them for that.

1           Q       Are you in a position to say that they will --  
2           that it will cost you at least that?

3           A       At least this amount of money.

4           Q       Are you willing to enter into a firm contract  
5           on the basis of that?

6           A       I think so.

7           Q       Did you, at my request, also look at the wall  
8           just to the south of the employee parking lot?

9           A       Yes, sir.

10          Q       Did you form an estimate of the 1973 cost of  
11          repairing the wall?

12          A       Yes, sir, we had a three-foot wall there, 12  
13          inches wide, three-foot wall, two feet high, with a four-inch  
14          concrete top, and I estimated, since I was there, I could do  
15          it for \$25.

16          Q       Is that a 1973 cost?

17          A       Yes, sir. I could have done it, I should have  
18          said.

19          Q       What you are saying is if you had the whole  
20          job you could do that portion of the job for \$25?

21          A       Yes, sir.

22                   MR. PEARSALL: Witness with you.

23

24

CROSS EXAMINATION

BY MR. WALLACE:

Q Mr. McDaniel, what was the condition of the parking lot in 1973 when you were asked to make an estimate?

A Well, the logs were dismantled. I don't know just how many were there, but they were torn loose and not in place. The gravel was dug out and torn and spun around and it wasn't in place, some dirt on the gravel; it was debris on there, which is still on there, concrete, raw concrete poured there and a piece of railroad tie, some blacktop, and what not. I would say generally it was in about the same, probably the same condition today.

Q I am going to hand you an exhibit which has previously been marked as Plaintiff's Exhibit No. 9, a photograph dated April 25, 1969 and ask if you can locate the parking lot to which you are making reference?

A This is facing on Cary Street; am I looking at it right there? Where is Thompson Street?

MR. PEARSALL: Mr. Wallace, I have no objection to your helping him get oriented.

BY MR. WALLACE:

Q This is Cary Street west and east; here is Thompson Street running north and south; here is Ellwood running into the "T."



1           A           Here we are right here. (Indicating) It is  
2 this area in here; this blacked out area here is the area  
3 where they had the two bungalows and this area here, coming  
4 from this point here, actually clean up to this wall here  
5 and across and down.

6           Q           Could you just, for the purposes of this  
7 testimony, put a circle around the area you are talking  
8 about with this pencil, on Exhibit No. 9?

9           MR. PEARSALL: May it please the Court, I  
10 don't want any detail of the aerial photograph excluded.  
11 I am happy to have him take a non-point on a pencil  
12 and point it out to Mr. Wallace so he can interrogate  
13 him.

14           MR. WALLACE: It won't be in the record.

15           MR. PEARSALL: I want him to describe in the  
16 record what it is, and he can have your assistance.  
17 I don't want any portion of the aerial photograph  
18 obliterated by a marker.

19           MR. WALLACE: I have a right to have marked  
20 what he is making reference to.

21           MR. PEARSALL: Because the aerial photograph  
22 is put in for the purpose of showing all that it  
23 represents, and I don't want any of that obliterated.  
24 It is a possibility that this view-through pen I have

1           will allow that to be done and I will try that in a  
2           corner that has nothing to do with the area we are  
3           talking about. I think that will be all right.

4           A       This area that we are talking about now is not  
5           the same area. There have been some changes made in this  
6           thing here since we first did the work, in the circle.

7           BY MR. WALLACE:

8           Q       I was asking you now about the first work you  
9           did.

10          A       The first work we took it over to the corner,  
11          see.

12          Q       Would you draw with the yellow pencil exactly  
13          where the first work is that you did?

14          A       The first work would start right here. (Indicating)  
15          You want me to mark it? Start right here and go down to this  
16          alley which was a parking lot there then, of course, and then  
17          you had an open area here right on up to a wall right there,  
18          right at that point there.

19          Q       This point you say "wall," is that the wall  
20          that was broken?

21          A       Yes, right there, and then it came on down to  
22          this point right here and then right on down to the line of  
23          this second house from the corner and then back over to here,  
24          and, of course, down.

1 Q And this in 1969 would be roughly the condition  
2 it was when you finished the job early in late 1968?

3 A Repeat that, will you?

4 Q What you have outlined shows to us the work,  
5 the parameters of the work, in 1968 and indicates roughly  
6 where you placed the gravel and did the work?

7 A Yes, sir -- no, I am not figuring the gravel  
8 to this whole area.

9 Q I am talking about 1968?

10 A I didn't fix the gravel in 1968 on the whole  
11 thing.

12 Q I am not worried about that. Now, sir, I am  
13 going to show you, secondly, a picture dated August 22, 1972,  
14 marked as Plaintiff's Exhibit 10-a and ask if you can orient  
15 yourself again and point out the location of the parking lot.  
16 If Mr. Pearsall has no objection, I will point out Cary Street  
17 being here running west to east; Thompson Street as being here  
18 running south and north; Ellwood here running east to west  
19 and the "T" at Ellwood.

20 MR. PEARSALL: And Floyd.

21 A This is Thompson here?

22 MR. PEARSALL: Point out Floyd Avenue.

23 BY MR. WALLACE:

24 Q Floyd Avenue is right here. (Indicating)

1           A       This is Floyd Avenue, this is Thompson Street,  
2                   this is Cary and this is a dead end back there where the wall  
3                   was, the area we worked on here --

4           Q       Hold on, I want you to point out where it is  
5                   to me.

6           A       This would be it.

7           Q       Parking lot?

8           A       In this area right here. Right here, this  
9                   would be the A&P and as near as I can determine, this would  
10                  be the High's store on the corner, whatever it was changed  
11                  to; this would be -- this was the lot behind it and this was  
12                  the whole area here.

13          Q       The previous photograph you looked at, Exhibit  
14                  9, indicated a clear area all in the area that you worked on  
15                  in 1969?

16          A       Yes, sir.

17          Q       What you are pointing to now has both clear  
18                  area and dark area; can you explain what the darkened area  
19                  might be? Is it the brush and undergrowth that you found  
20                  there?

21          A       I can't explain what it is. It is no buildings  
22                  back there, no trees back there. This corner at one time,  
23                  before they tore this house down, there were two houses in  
24                  this corner; I can't tell you what the dark area is for.

1           Q       Let me show you a third photograph; this one  
2 is marked Plaintiff's Exhibit 30, it is a photograph dated  
3 July 6, 1973 and again I am going to help you a moment. Here  
4 is Cary Street going from west to east; here is Ellwood coming  
5 into Thompson and this is Thompson Street running north and  
6 south and Floyd is showing the new bridge. Now I ask you  
7 can you locate on that, on this particular one, where the  
8 parking lot is that you are making reference to?

9           A       It is in this area right here. It starts here  
10 and goes up to this wall here. Of course, the whole thing  
11 is actually parking here; it is a turn-in here now with that  
12 fence, but it is the area from here to here and over to this  
13 turn here and down to these two houses on the corner, in this  
14 area right here. (Indicating)

15          Q       Could you mark that with the yellow pen that  
16 shows the parameters on the outside of the parking lot you  
17 are making reference to?

18          A       You are thinking about the whole parking area  
19 or the parking area that was graveled?

20          Q       The parking area you graveled in 1968.

21               MR. PEARSALL: You previously told him you  
22 did not want that now. Do you want the graveled area  
23 or the area he testified to?

24               MR. WALLACE: Are they not one and the same?

1           A       No, the graveled area doesn't cover the entire  
2 area.

3 BY MR. WALLACE:

4           Q       Let's go back again just so I am not confused.  
5 On Plaintiff's Exhibit 9 you outlined for me that parking lot?

6           A       Yes, sir.

7           Q       Is this the same parking lot that you see now  
8 on Exhibit 30, Plaintiff's Exhibit 30?

9           A       The same area.

10          Q       Will you outline for me on Exhibit 30 exactly  
11 the same parking lot that you outlined on Exhibit 9?

12          A       The entire parking lot?

13          Q       Yes, sir. Again, you are using a yellow pen.

14          A       Let's do it this way, first. I have to come  
15 in, leaving the area for these two houses - I don't want  
16 to be confused -- that looks like the area to me; that is  
17 the A&P store here and this would be the corner building and  
18 this would be the lot here and this area would be the parking  
19 area. Go over to here, over to that point there and would  
20 come back up to here, possibly to this place right here, and  
21 then it would go -- the whole area would go on up to here  
22 and come right on across to here and down to where these two  
23 houses were located and back across this. (Indicating exhibit)

24          Q       Now you have drawn with the yellow line the

1 limits of the parking lot, the boundary limits that conform  
2 generally to the same ones you drew on Exhibit 9; you have  
3 now placed them on Exhibit 30?

4 A Yes, sir.

5 Q What is on Exhibit 30, this area that you  
6 were asked in 1973 to give an estimate of repair and restora-  
7 tion to, the area inside the yellow line?

8 A This much area there?

9 Q Yes.

10 A I don't know whether that -- I don't remember  
11 whether all of that area was there or not. I checked this  
12 for the --

13 Q What did you make your estimate on?

14 A I made my estimate mostly on this gravel area  
15 and placing logs around here.

16 Q Show me where the graveled area is that you  
17 made your estimate on.

18 A The graveled area would come up to this point  
19 and go from here over to here and up to that point here and  
20 over to here and down to there, and that is where the logs  
21 were and that is where the gravel was.

22 Q Now you have indicated an area rectangular in  
23 shape --

24 A No -- well, possibly, yes.

1                   Q       -- in shape, generally, inside the limits of  
2       the parking lot that you had already indicated previously  
3       on Exhibit 9 and 30 and it is located generally in the  
4       southeast corner, is that correct?

5                   A       Southeast corner? Yes, southeast corner, yes,  
6       sir.

7                   Q       It is this area in the southeast corner that  
8       you made your estimate on that you are testifying about  
9       today?

10                  A       Yes, sir.

11                   THE COURT: What exhibit is that?

12                   MR. WALLACE: Exhibit 30.

13       BY MR. WALLACE:

14                   Q       In doing your work in 1968 or 1969, as shown  
15       on Exhibit 9, did you provide gravel and all of the work  
16       to set up the entire parking lot as shown there, inside your  
17       yellow lines?

18                   A       I furnished the labor and the gravel and  
19       everything except the logs, they were on the job, and we  
20       cleared this whole entire area here and we leveled the whole  
21       area and cleared it. We leveled this area here, particularly,  
22       and graveled it and we put bumper logs from this point over  
23       to this point here.

24                   Q       What you are saying is you did the entire work



1           inside the yellow line as shown on Exhibit 9?

2           A           Yes, sir.

3           Q           When you came to Exhibit 30 in 1973 you were  
4           not asked to do as much work, were you?

5           A           I was asked to figure on what had to be done  
6           to put it back like it was in 1969.

7           Q           But you did not make any computations, as I  
8           understand it, for the years outside of this yellow rectangle  
9           here but still within the parameters of what you have done  
10          before?

11          A           No, sir, I didn't.

12          Q           Why did you not do that?

13          A           Well, they wasn't using all of this particular  
14          area for parking at the time but it was cleared and all and  
15          I was to put, as I understand it, the primary parking area  
16          which is the area that had the gravel on it, back in shape  
17          with the bumper logs.

18          Q           Do you see any vehicles on the 1969 exhibit,  
19          Exhibit No. 9, plat? Do you see any vehicles located there?

20                   MR. PEARSALL: Let the exhibit speak for  
21                   itself. This witness has seen it for the first time.

22                   MR. WALLACE: I am asking what he sees.

23                   MR. PEARSALL: This witness is not called upon  
24                   to interpret an aerial photograph. He has cooperated

1                   fully.

2                   THE COURT: Sustained.

3 BY MR. WALLACE:

4                   Q       When you were there in 19 -- strike that.  
5 When did you go there in 1973 to make your estimate?

6                   A       I am speaking from recollection; I say somewhere  
7 in May, April, May.

8                   Q       In 1973?

9                   A       Of course, that is roughly; I didn't make a  
10 written estimate on it. We looked at it, we were talking  
11 about a rough estimate, what we were talking about and what  
12 would be roughly any ballpark, off the cuff, and there was  
13 nothing put in writing about it.

14                  Q       Did you make any notes about what you saw?

15                  A       No, sir. I just looked at it and determined  
16 by the size of the area. I remembered it before and deter-  
17 mined in my own mind how much we had to cover.

18                  Q       Had any part of that area you made an estimate  
19 on suffered undergrowth or bushes or grass growing up through  
20 where the gravel had been before?

21                  A       I don't think it is a great deal of growth  
22 in that particular area, no, sir.

23                  Q       But there was some, was there not?

24                  A       Yes, sir, there is going to be some where dirt

1 is showing; there will be some growth, yes, sir.

2 Q When you went out there in 1973, either April  
3 or May, how many times did you go?

4 A Once.

5 Q Did you see any cars parked there?

6 A I wasn't looking for cars, you know. I am  
7 running all the time and I just -- I didn't pay any attention  
8 to whether any cars were on the lot or not.

9 Q Did you render at that time a written estimate  
10 of what it would take to do the work?

11 MR. PEARSALL: He said he did not.

12 A No, sir.

13 BY MR. WALLACE:

14 Q Why did you not render it in writing?

15 A Well, I had done work, this type of work, and  
16 I guess in this field of work, done work for Mr. Bailey --  
17 I reckon I did a quarter of a mile work for him and never  
18 gave him a contract for anything I ever did.

19 Q Were you asked to do the work in 1973?

20 A Asked me to check it.

21 Q I didn't ask you that, I said were you asked  
22 to go ahead and do the work, based on your verbal statement --  
23 on your verbal estimate?

24 A No, sir.

1 Q Did you check back with Mr. Bailey to find  
2 out why?

3 A No, sir.

4 Q When did you prepare the estimate that you  
5 testified about here today?

6 A This morning.

7 Q You went out and looked at it last night?

8 A This morning at 6:30.

9 Q How many times have you seen the property  
10 since April and May of 1973 until this morning?

11 A Five or six times.

12 Q For what purpose?

13 A Painted the front of the A&' store, I painted  
14 it, roof on top; I was two trips there doing that and I have  
15 been up there several times, at least twice, in regard to  
16 those two jobs and figuring what it might be to do what had  
17 to be done.

18 Q You have testified that it would take 130 tons  
19 of gravel to restore it to a two-inch depth inside this  
20 rectangle; do you recall how much gravel it took initially  
21 to do the whole project?

22 A No, sir.

23 MR. WALLACE: Do you have his bill that you  
24 had before?

1 MR. PEARSALL: I think it is his rejected  
2 exhibit, is it not?

3 THE COURT: You mean the 1968 one?

4 MR. WALLACE: Yes, sir.

5 THE COURT: Here it is.

6 BY MR. WALLACE:

7 Q How much is gravel per ton at this time?

8 A Delivered?

9 Q Delivered?

10 A It will run about \$3.30 or \$3.40 per ton  
11 delivered, depending on where you get it.

12 Q How did you make an estimate that 130 tons  
13 would be necessary, what computations did you make?

14 A I figured I had 10,000 square feet to cover,  
15 two inches.

16 Q How did you make a computation of 10,000 square  
17 feet?

18 A I called Tidewater Gravel Corporation; I  
19 asked them how much would I need to cover that area two  
20 inches deep.

21 MR. WALLACE: I would object to anything they  
22 told you.

23 BY MR. WALLACE:

24 Q Did you make the computation yourself as to

1           how much would be needed?

2           A           No, it was easier for me to call them.

3           MR. WALLACE: Your Honor, I move to strike  
4           any evidence in regard to this particular thing,  
5           that is, the amount of tonnage needed since it is  
6           not his own evidence but hearsay from somebody else.

7           THE COURT: Objection sustained.

8           BY MR. WALLACE:

9           Q           As to the 10,000 square feet, how did you  
10          compute that you had 10,000 square feet to restore?

11          A           I measured it off with a 100 foot tape measure  
12          and multiplied the length by the depth.

13          Q           Do you have any computations with you?

14          A           I got 92 feet. If you want to figure this,  
15          you got 92 feet going from the alley to where the gravel  
16          stops behind the second bungalow, 92 linear feet.

17          Q           On Exhibit 30 where you marked I would take it  
18          to be this line right here which would be --

19          A           No, 92 feet here. (Indicating)

20          Q           Then it would be the line along Thompson Street  
21          is 92 feet from start to finish; now what would be the  
22          length of that line away from Thompson Street?

23          A           It is over a hundred feet.

24          Q           How many feet is it on your notes?

1           A       Here is what I arrived at, 9600 square feet.

2           THE COURT: What was your answer?

3           MR. WALLACE: He said he rounded it to 9600  
4           but I asked him what was the length of it the time  
5           that he measured from Thompson Street back to the  
6           depth of the parking lot.

7           A       I copied this over on a pad. I had one of  
8           these big pads I measured on, you lay it down and it doesn't  
9           get dirty, 92 feet here and I measured a hundred feet here  
10          and as far as I could determine it was 35 or 40 feet from  
11          this hundred foot point from here to here.

12          Q       Did you measure it?

13          A       Yes, but I didn't put it on here.

14          Q       So you are talking 135 feet, 140 feet deep?

15          A       Possibly. It is hard to tell where I stopped  
16          it all together because it has been dismantled and dug up  
17          but I know I went over to that wall with it.

18          Q       You went to the edge of the wall ?

19          A       I went as far as I thought it would be, the  
20          area where it had been covered before, and without overdoing  
21          it, and also giving the measurement the benefit of the doubt.

22          Q       Then you multiplied, as I understand, your  
23          computations, the length times the width and came to a  
24          square footage?

1                   A       Yes, sir.

2                   Q       And then from then on you relied on Tidewater  
3 to give you an estimate of the tonnage?

4                   A       I didn't have any time. When I went there  
5 this morning and checked it, I called and got the recent  
6 price on the gravel, the 1973 price, and we figured it right  
7 there on the phone.

8                   Q       Now as to these bumper logs, you estimate  
9 that there are five missing; I take it that is what you  
10 found missing this morning?

11                  A       I would say it was five. It is about 250  
12 feet area there we had logs in.

13                  Q       Do you recall how many were missing in May,  
14 1973 when you were there?

15                  A       No, sir.

16                  Q       Do you know whether any more are now missing  
17 than were missing in 1973, of your own personal knowledge?

18                  A       I really don't know.

19                  Q       So you can't really say, then, how many were  
20 missing in 1973?

21                  A       No, I can't say -- I know they are missing now,  
22 and I didn't count the logs when I was there and I took a  
23 rough glance at it and give him a rough off-the-cuff estimate  
24 of what I thought it might take to put it back.



1 Q Do you dwell <sup>deal</sup> in bumper logs on a regular basis?

2 A No, sir.

3 Q Did you have to call somebody to get a price?

4 A I base six logs at about \$25 apiece. I don't  
5 think you can buy them cheaper than that, 30 foot logs;  
6 some they have was 12 inches at butt.

7 Q When is the last bumper log you bought?

8 A I don't know. I didn't buy those, I didn't  
9 check the price and I don't know if I can get taem.

10 Q So when you tell me you are short five bumper  
11 logs, about \$75, you are not really sure whether that is the  
12 price or not?

13 A I would be reasonably satisfied that you can't  
14 buy them any cheaper than this estimate I have here, six logs,  
15 \$25 apiece.

16 Q Now the next item you talked about was labor.  
17 You estimated it to be \$430 for one week's work to restore  
18 this particular part of that parking lot which would include  
19 three men and one supervisor; is that as I understand your  
20 testimony?

21 A Yes, sir.

22 Q What hourly rate are you charging for each man?

23 A \$4.50 an hour and \$8 for a supervisor.

24 Q What is the hourly rate today for these men?

1           A       That type of supervisor will run about \$9.50  
2 or \$10 an hour and about the cheapest labor that knows  
3 anything is about \$5.50, \$5.75.

4           Q       Did you go back and look at your own records  
5 to determine the 1973 prices for labor, that is, for these  
6 men and supervisor?

7           A       I determined by the increase in my payroll,  
8 what I have had over the last year or two.

9           Q       I asked did you go back and check to see what  
10 the labor costs were?

11          A       No, sir, I didn't, but I know it has been  
12 increased, and I know I haven't had anybody on the payroll  
13 that I paid any less than that.

14          Q       And you have a factor added once you come up  
15 with a total, you have a factor added to it of profit and  
16 overhead?

17          A       I have to have a factor added to it of profit  
18 and overhead, which amounts to about 15 percent overhead  
19 and 15 percent profit.

20          Q       What is the total amount of your estimate?

21          A       You want the total amount with the overhead?

22          Q       Yes, sir.

23          A       And with the wall, the end wall?

24          Q       I am not talking about the wall.

1           A       \$1,254.50.

2           Q       Of that, \$289.50 is overhead and profit?

3           A       That is right.

4           Q       Was that your overhead and profit factor in  
5       1973?

6           A       I have always had to make that to stay in  
7       business.

8           Q       You are reading from your own notes showing  
9       the figures \$390, \$430, \$25 and \$120?

10          A       That \$25 carried the price of that wall.

11                 THE COURT: \$390 includes it? \$390 includes  
12       the wall?

13          A       No, sir, \$390 for the gravel, delivered;  
14       \$430 for the labor; \$120 for the logs, and \$25 for the wall.  
15       BY MR. WALLACE:

16          Q       That totals \$965 and you have an overhead  
17       and profit factor of \$289.50 added to it to make the total  
18       of \$1,254.50, is that correct?

19          A       Yes, sir.

20          Q       One other thing; you have testified you have  
21       been there some five or six times to this particular site,  
22       did you not?

23          A       I have been there checking the store and the  
24       area.

1  
2 Q You are familiar with this parking lot that  
3 we are talking about?

4 A I think I am pretty familiar with it.

5 Q Have you ever seen any cars or vehicles  
6 of any kind parked in it?

7 A Yes. I don't know how many; there were one  
8 or two parked there this morning and I was there at 6:30 or  
9 quarter of 7:00.

10 Q Do you recall seeing any in 1973?

11 A I wasn't looking for cars. If I told you,  
12 I would be telling you something I couldn't remember.

13 MR. WALLACE: I don't have any other questions.

14 REDIRECT EXAMINATION

15 BY MR. PEARSALL:

16 Q Mr. McDaniel, when you are working up a  
17 quotation or estimate on the basis of which you are willing  
18 to contract, do you generally follow the same procedure  
19 relative to stone quantities that you used this morning?

20 A Yes, sir, that is right.

21 Q That is, you furnish to the stone supplier  
22 the square feet and the depth and as a service to customers  
23 the stone supplier gives you the computation to that and  
24 tells you how many tons you need, and the price?

1           A       Yes. All he has to do is look at the chart  
2 and give it to me.

3           Q       That is your standard operating procedure?

4           A       Yes, sir.

5           Q       When he gives you that price do you regard  
6 it, and does he regard it, as a quotation of the charge  
7 which he will make to you for delivering the stone if you  
8 say "send it out?"

9           A       Yes, sir.

10          Q       You don't know what profit he is getting in  
11 it?

12          A       No, sir.

13          Q       You don't know what other people's prices are  
14 in talking to him?

15          A       No, sir.

16          Q       But this is a quotation to you of what he will  
17 charge for furnishing you this much stone?

18          A       Yes, sir.

19               MR. PEARSALL: May it please the Court, I  
20 didn't want to interrupt the other interrogation  
21 because I realize that these questions would be neces-  
22 sary for me to reopen the matter. I respectfully  
23 observe to Your Honor and urge upon Your Honor that  
24 the quotation by Tidewater Stone is not offered for

1 the purpose of showing the truth or falsity of it  
2 but as a verbal act, but that this is a quotation  
3 and represents what they will deliver for, regardless  
4 of how true it is to their cost or untrue to their  
5 cost and it is a verbal act that is an exception to  
6 the hearsay rule. It is a standard operating procedure  
7 for contractors.

8 THE COURT: It is not in evidence, though.  
9 That is not in evidence.

10 MR. PEARSALL: What is not in evidence?

11 THE COURT: That it is a standard operating  
12 procedure for contractors.

13 MR. PEARSALL: To receive quotations?

14 THE COURT: Yes, sir. It is his standard  
15 operation; that is the evidence.

16 MR. PEARSALL: May I ask a few more questions,  
17 then?

18 BY MR. PEARSALL:

19 Q Mr. McDaniel, you said you had been operating  
20 as a general contractor for how long?

21 A Twenty years.

22 Q Are you familiar with the operations of your  
23 competition?

24 A I think I am.

1           Q       Is it your belief that to order crushed stone  
2 from any of the suppliers that any general contractor requires  
3 that the quotation be in writing?

4           A       Not as I know of.

5           Q       Is it your belief, with the knowledge of  
6 operations of the general contracting business, and your  
7 competitors, that in the purchase of crushed stone they  
8 call for the quote on that day for the crushed stone?

9           A       Rephrase it again, please, Mr. Pearsall.

10          Q       In your knowledge of your own operation and  
11 that of your competitors, when it becomes necessary for  
12 crushed stone to be used on a job, is it your belief that  
13 it is standard operating procedure for the contractor who  
14 needs the crushed stone to call the crushed stone supplier  
15 and ask what the crushed stone would cost delivered per ton?

16          A       I think so.

17          Q       From your knowledge of your own operations  
18 and that of your competitors is it your belief that these  
19 charts which you say the suppliers have of crushed stone --  
20 which the suppliers of crushed stone have to make a quick  
21 computation of square feet and depth, are charts that con-  
22 tractors such as you use or rely upon in ordering crushed  
23 stone?

24          A       Yes, sir.

1           Q       Is it your testimony, then, that the procedure  
2       that you used this morning was the standard operating  
3       procedure among general contractors doing the type of work  
4       that you are engaged in?

5           A       I would say so.

6           MR. PEARSALL: I respectfully submit, Your  
7       Honor, that here we have the testimony of an experienced  
8       contractor following general operating procedures for  
9       contractors of his type of operation. We are not  
10      talking about contractors working on an international  
11      scale having groups of estimators and having to do  
12      everything on formal bid; we are talking about small  
13      jobs in general contracting and that he has followed  
14      these standard operating procedure for that and that  
15      his estimate is a valid estimate made by a person  
16      competent to give it.

17          THE COURT: What is your position, Mr. Wallace?

18          MR. WALLACE: Judge, even though all of that  
19      may be true, we are dealing with a 1973 price which  
20      is something given to him on the telephone and I think  
21      absent better evidence, it is hearsay and ought to  
22      be excluded, regardless of methods by which it was  
23      secured. This is calling up and saying "what was  
24      your price two years ago?" and I move that it be



1 excluded; it ought to be.

2 THE COURT: As I understand, what he has  
3 testified to, he checked the prices this morning  
4 as to what it would cost to do the work.

5 MR. PEARSALL: He checked the prices this  
6 morning for the 1973 cost of stone, Your Honor.  
7 It was a verbal act by the stone company in saying  
8 what the 1973 price for stone was.

9 THE COURT: Mr. Pearsall, I believe you have  
10 established the custom and usage in this industry  
11 and I rule that it is admissible. I note your  
12 exception, Mr. Wallace.

13 MR. PEARSALL: No further questions.

14 (Witness excused.)

15 MR. PEARSALL: I recall Mr. Bailey.

16 RUFFIN R. BAILEY, being previously sworn,  
17 resumed the stand and further testified as follows:

18 DIRECT EXAMINATION (Continued)

19 BY MR. PEARSALL:

20 Q Mr. Bailey, on adjournment yesterday there was  
21 colloquy as to any conversation that might occur between me,  
22 as counsel for the plaintiff, and you, as a witness for the  
23 plaintiff, during the adjournment. Has any conversat on  
24 whatsoever occurred between you and me relating to this

1           A       Yes, Your Honor, and I was trying to explain  
2           the time that it takes, that actually the work was done in  
3           1968 and the picture was taken in 1969 and there is not  
4           one single car on it. It took us almost a year to get them  
5           on there.

6                   THE COURT: What would you have to do now?

7           A       Same thing we did then; that is what I was  
8           trying to explain, what we did then, we would have to do  
9           again. It is just a natural habit of an employee to park  
10          directly in front of his place of business, if he can.

11          BY MR. PEARSALL:

12          Q       And at my request did you form an estimate of  
13          what it would cost to do those same things again?

14          A       Yes, sir.

15          Q       And have you been asked to form that estimate  
16          as of May, 1973?

17          A       Yes, sir.

18          Q       What is that estimate?

19          A       \$220.

20          Q       Were the trucks performing the joint venture,  
21          that you have testified were crossing the Richmond Shopping  
22          Center, loaded or unloaded?

23          A       Both.

24          Q       Was the breakup that you have testified to in

1 the Richmond Shopping Center uniform in the entire area  
2 between the A&P and High's store?

3 MR. WALLACE: I object to the form of the  
4 question as leading.

5 THE COURT: Objection sustained.

6 BY MR. PEARSALL:

7 Q What was the condition? Where was the  
8 breakup located?

9 A As I testified, the first thing that I noticed  
10 was the disintegration of the macadam parking lot between  
11 the A&P and the new High's building. It was closer to the  
12 High's building; it was on a diagonal, leading directly  
13 from the signs on the west side, or from the side of the  
14 signs on the west side, to the driveway exit, and it was  
15 approximately twenty feet wide, and I would say approximately  
16 fifty feet long. Now what happens in a thing of this sort  
17 is that you have a smooth surface which is painted for car  
18 spaces, and then as the macadam begins to disintegrate you  
19 get what we term or I term as an elephant hide cracking --

20 THE COURT: Mr. Bailey, excuse me; I realize  
21 what you are saying is probably very important to  
22 you but his question was "where was the breakup?"  
23 not how it came about. Is there anything further on  
24 that point? Were there other places that there were

1                   breakups?

2                   A           When we term it as breakup, yes, sir, there  
3                   were numerous places that had begun to give us the elephant  
4                   hide appearance; however, the complete breakup -- by that,  
5                   breakup down to the base to where chunks of macadam had  
6                   come loose and were anywhere, that was in the area that I  
7                   outlined.

8                   BY MR. PEARSALL:

9                   Q           Have you ever had any experience, Mr. Bailey,  
10                   in your years of property management, in the installation,  
11                   maintenance and replacement of macadam surfaces?

12                   A           Mr. Pearsall, and Your Honor, I didn't mean to  
13                   be facetious yesterday when I named you as the only one;  
14                   we represent Groome Transportation in their parking lot  
15                   near the Coliseum; the Trailways, Rudisill, yourself; we  
16                   represent Grace Street, Adams Street, so many I can't name  
17                   them, but I want to get that in because we do represent and  
18                   have represented many, most of which we developed ourselves.  
19                   We demolished the houses, we graveled first in order to get  
20                   a sound base, and you go back and regravels and then you place  
21                   your macadam. Yes, sir, I have done quite a bit of it.

22                   Q           Has it been your responsibility to observe  
23                   the macadam and maintain it and replace it where it is  
24                   weakening?

1 back of the A&P, seems to be a great deal stronger to carry  
2 much heavier loads and maybe this had been required.

3 MR. WALLACE: Your Honor, when he starts saying  
4 "maybe," I object to that testimony.

5 MR. PEARSALL: Confine yourself to what you  
6 observed.

7 THE COURT: Just a minute, your objection is  
8 sustained.

9 BY MR. PEARSALL:

10 Q Confine your testimony to what you observed  
11 about the thickness or condition of the pavement.

12 A On observation it was apparent that the base  
13 and the macadam was of a much stronger quality in the  
14 immediate vicinity of the A&P supermarket than it was at  
15 the other limits or the southern limits of this parking lot.

16 Q You testified yesterday to trucks going from  
17 Floyd Avenue toward Cary and returning; why would they do  
18 that?

19 THE COURT: Objection sustained, it is calling  
20 for a conclusion on the part of this witness.

21 BY MR. PEARSALL:

22 Q Mr. Bailey, did you observe the operations,  
23 the truck movements?

24 A Yes.

1                   Q       Was there a ramp at Cary Street that they  
2       could go out?

3                   A       There at the beginning there was a ramp that  
4       came up to the side of the temporary bridge on Floyd Avenue  
5       that came up from the railroad, to the side of the temporary  
6       bridge at Floyd Avenue, made a turn and went toward the  
7       building of Williams and Harvey on Cary Street and there was  
8       a small area that they could exit at that point. However,  
9       this was closed very shortly because of the demolition of  
10      the Cary Street bridge and the only ramp in this particular  
11      area, and I am talking about the area that is west of the  
12      Richmond Shopping Center property, was the ramp that came up  
13      from the railroad to Floyd Avenue. If I may point out, at  
14      one time there was a ramp underneath the bridges, at both  
15      the old bridge and temporary bridge at Cary Street that  
16      came up to the same level on the southern side of Cary Street,  
17      not on the Richmond Shopping Center side.

18                  Q       But this particular operation, was there a  
19      ramp they could use?

20                  A       Yes, there was a ramp on Floyd Avenue, into  
21      Floyd Avenue.

22                  Q       Now using Plaintiff's Exhibit 32, rejected  
23      Exhibit No. 35, Plaintiff's Exhibit 36, Plaintiff's Exhibit  
24      34 for such assistance as they might be for you in refreshing

1                   Q       Was there a ramp at Cary Street that they  
2       could go out?

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4       came up to the side of the temporary bridge on Floyd Avenue  
5       that came up from the railroad, to the side of the temporary  
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11      area, and I am talking about the area that is west of the  
12      Richmond Shopping Center property, was the ramp that came up  
13      from the railroad to Floyd Avenue. If I may point out, at  
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21      Floyd Avenue.

22                  Q       Now using Plaintiff's Exhibit 32, rejected  
23      Exhibit No. 35, Plaintiff's Exhibit 36, Plaintiff's Exhibit  
24      34 for such assistance as they might be for you in refreshing

1 venture ceased in May of 1973. It was in early 1973 they  
2 were still using it.

3 Q Mr. Bailey, do you make appraisals professionally?

4 A Yes, sir.

5 Q Are you an MAI?

6 A No, sir.

7 Q Why do you not have that designation?

8 A I have been appraising for a long time and  
9 the normal appraisal that I make is a letter type appraisal.  
10 If you become an MAI you agree to make only narrative type  
11 appraisals and charge accordingly.

12 Q What is the difference between a letter  
13 appraisal and narrative type appraisal?

14 A The letter type appraisal, the difference is  
15 the price. A letter type appraisal is a short description  
16 of the property and your estimate of value. A narrative  
17 type appraisal is everything from the history of Richmond,  
18 if it is in Richmond, histories of the area and the growth  
19 and factors pertaining to the area or the city, comparisons  
20 within the past year, full and complete description of the  
21 property, the three separate approaches to the appraising,  
22 and this type of thing, it is a lengthy deal and they charge  
23 you accordingly. It is designed so that a man in St. Louis  
24 can understand what a property in Richmond is worth.



1           Q       Do lending institutions in Richmond rely on  
2 your letter type appraisals?

3           A       Yes, sir, banks -- I hadn't completed the  
4 answer to the question you asked originally but I was an  
5 FHA appraiser at the time I was asked to apply for membership  
6 in the MAI; member of the Appraisal Institute. I was an  
7 FHA appraiser, appraised for banking and lending institu-  
8 tions and all on the basis of a short form appraisal. I  
9 did not want to give it up.

10          Q       Do you have any basis for an informed opinion  
11 as to the value of land in the Richmond Shopping Center?

12          A       Well, as of what date?

13          Q       As of mid 1973?

14               THE COURT: Which land are you talking about?

15               Some land in the shopping center has buildings on it,  
16 some is vacant.

17 BY MR. PEARSALL:

18          Q       I am talking about raw land.

19          A       I have to assume you are talking about the land  
20 in the area in which we have been discussing.

21          Q       Between Cary and Floyd, Thompson and the  
22 railroad track.

23          A       Yes, sir, I have an opinion as of 1973.

24          Q       Have you negotiated any sales or leases of

1           this land and in the time frame of mid 1973?

2           A       Yes, I have two.

3           Q       Did you negotiate with the Highway Department  
4           relative to --

5           MR. WALLACE: If Your Honor please, I have  
6           allowed him to lead in hopes we can move on but I  
7           rather he did not lead the witness.

8           THE COURT: Do you have any objection to his  
9           testifying as to the appraised value of property in  
10          that area, his qualifications to do it?

11          MR. WALLACE: As to his qualifications?

12          THE COURT: Yes.

13          MR. WALLACE: Judge, I am not sure that this  
14          is material or relevant to this case.

15          THE COURT: I don't know where he is going  
16          but the matter of qualifications, do you object to  
17          that?

18          MR. WALLACE: I do not stipulate he is an  
19          expert because he is not a member of the Society  
20          MAI.

21          THE COURT: You may continue, Mr. Pearsall.

22          BY MR. PEARSALL.

23          Q       With what frequency do you do appraisals?

24          A       Sometimes daily but mostly weekly.

1 Q And for what period of time is that extended?

2 A 25 years.

3 Q Have you negotiated leases with full authority  
4 to make the contract relative to properties in this part  
5 of the shopping center, as well as the other part of the  
6 shopping center?

7 A Yes, sir.

8 MR. PEARSALL: May it please the Court, I  
9 offer this man as an expert qualified to give real  
10 estate values.

11 THE COURT: What say you, Mr. Wallace?

12 MR. WALLACE: I still object. I know he has  
13 had experience but the fact that you have had some  
14 experience doesn't qualify you and I think the real  
15 estate profession recognizes there are two agencies,  
16 two national professional societies, either MAI or  
17 SRA, which are recognized as national appraisal  
18 units. He says he is not in those, chose not to be  
19 in those and that is his own choosing. If, in fact,  
20 that is correct, I would not stipulate he is an  
21 expert even though he may have been doing it for 25  
22 years.

23 THE COURT: I don't believe that the law  
24 requires that he have that membership. I feel he is

1           qualified, based on that experience. I will let  
2           him testify. I think it goes to the weight as to  
3           whether or not he is a member of those societies  
4           rather than the admissibility of it.

5       BY MR. PEARSALL:

6           Q       Other than these two sales or leases which  
7           you have mentioned have you conducted any other negotiations  
8           for use of land in the shopping center as it originally  
9           stood prior to any acquisition by the Highway Department?

10          A       Would you repeat that?

11                   (The previous question was read.)

12          A       Yes, I thought there was another one and this  
13           was after -- yes, one.

14          Q       With whom?

15          A       With the Highway Department.

16          Q       And on what basis was that negotiation?

17          A       The Highway Department, instead of condemning  
18           the property, wanted to lease a corner, triangular portion  
19           of the property on Floyd Avenue at the western --

20                   MR. WALLACE: If Your Honor please, I object  
21           to the materiality or relevance of this, as to  
22           negotiations with the Highway Department that land  
23           they may or may not be taking; we are talking about  
24           another kind of case.

1 MR. PEARSALL: I will show the relevance of  
2 this before I get through. I am attempting to  
3 establish what was the understanding reached relative  
4 to the use of land by the Highway Department on a  
5 temporary easement. If that isn't germane and  
6 relevant to the value of a temporary easement, I  
7 don't know what could be.

8 MR. WALLACE: If Your Honor please, I would  
9 like at this point to make a motion to exclude all  
10 testimony relating to the value of easements because  
11 of the provisions of Section 107.12 which is already  
12 in evidence, specifications under which Mr. Bailey  
13 and the Richmond Shopping Center are bringing suit.  
14 It specifically states in that section that they may  
15 bring actions, since the Court has ruled that way,  
16 that they may bring action for damages or injuries  
17 to any public or private property based on restoration  
18 cost and that it does not refer to the ability to  
19 say "you took an easement;" that is another creature;  
20 it is not covered by this section and I don't think  
21 we should have any evidence based on it, this section  
22 based on the value or non-value of temporary con-  
23 struction easements, if there is such an animal, and  
24 I believe there is no such.

1 MR. PEARSALL: In response thereto I am  
2 advised that a certain portion of 107.12 is brought  
3 to the attention of Your Honor.

4 (The motion was argued.)

5 MR. PEARSALL: They are the two portions of  
6 107.12 we are suing on and I was asking this witness  
7 about agreements reached with the Highway Department  
8 for a temporary construction easement and since  
9 opposing counsel says there isn't any such animal,  
10 I would like permission from the Court to continue  
11 with this witness to get established what is a  
12 temporary construction easement.

13 THE COURT: The Court has been sitting since  
14 early this morning. It is about five minutes of 12:00.  
15 Let's take our noon recess and begin at 1:15 and I  
16 will look these documents over.

17 MR. WALLACE: This is what is in evidence,  
18 Your Honor.

19 THE COURT: We will pick up at 1:15.

20 MR. PEARSALL: For your convenience, 107.12  
21 is quoted in full in the complaint, in the Motion for  
22 Judgment.

23 THE COURT: Thank you, Mr. Pearsall.

24 (Luncheon recess.)

1 THE COURT: I believe, Mr. Wallace, you were  
2 making a motion the last time we were together.

3 MR. WALLACE: The motion for Judgment filed  
4 by the plaintiff in this case alleges that it is  
5 entitled to third party beneficiary relief because of  
6 the breach of the contract, in particular, Section  
7 107.12 of the Virginia Department of Highways Road  
8 and Bridge Specifications, and that section is set  
9 forth in the pleading. Under Section 107.12 it is  
10 required that the contractor be responsible for  
11 preservation of the property and if, for any reason,  
12 it says in the last paragraph, "It is either direct  
13 or indirect damage or injury done to such property  
14 on account of any act or omission, negligence or  
15 misconduct in the method of executing the work or  
16 in the consequence of the non-execution, then, one,  
17 either shall restore the property to the condition it  
18 was before by either repairing, rebuilding or  
19 restoring as directed, or, two, he must make settle-  
20 ment. He has an option, restore or settle. We are  
21 speaking here of damages, direct or indirect, or  
22 injuries occasioned by failure to protect or do the  
23 contract in a manner in which the contract is called  
24 for, that is, going onto adjacent property. It is

1 nothing in this section that authorizes or makes  
2 mention of an easement or creation of an easement  
3 or the taking of an easement. It is, in its essence,  
4 a statute regarding trespass or, I should say,  
5 contract section regarding trespass and not one  
6 regarding retractable obligations that can be  
7 entered into such as a temporary easement. I think  
8 it would be improper for any evidence to come forth  
9 at this time in regard to an easement when such is  
10 not permitted by a section upon which the plaintiff  
11 sues, damages, yes, sir; injuries, yes, sir; taking  
12 of an easement, no, sir. If he has an action for  
13 that, which I say that he does not, it is under  
14 some other provision and if it is under some other  
15 provision, then I am entitled to raise my third  
16 party beneficiary defenses that I have tried to  
17 raise and everybody overruled.

18 MR. PEARSALL: May it please the Court, this  
19 is just an attempt one more time to re-open and  
20 re-argue the demurrer. The Section 107.12 not only  
21 includes that to which he referred but it includes  
22 a contractual obligation of the contractor when he  
23 is going to the land of another to get written  
24 permission to do so and file it with the engineer.



1           The pleadings say that in clear disregard of said  
2           obligation the joint venture did utilize, without  
3           permission, temporary construction easement across  
4           the land and failed to restore and the action was on  
5           that basis, it was argued on that basis. The  
6           demurrer was sustained on that basis.

7                     (The motion was argued.)

8           THE COURT: The difference is trying to decide  
9           whether there is one in this case, whether there was  
10          a temporary construction easement.

11          MR. PEARSALL: I have an expert witness and  
12          an eyewitness and I am in the process of putting him  
13          on and showing that there was such a use.

14          THE COURT: As I understand Mr. Wallace's  
15          argument is that you brought a third party beneficiary  
16          action, too, so you are bound by this contract. If  
17          you look at this contractual provision 107.12,  
18          according to his theory there is no temporary  
19          construction easement providing for in this contract,  
20          as I understand his argument.

21          MR. WALLACE: That is correct.

22          THE COURT: We are not talking about what is  
23          the nature of the easement. He is saying that you  
24          don't have one, anyway, when you look at this contract,

1           that all you have here is an action for damages,  
2           damages done to the land.

3           MR. PEARSALL: May it please the Court, we  
4           don't have to call it "temporary construction  
5           easement" or "lease for interim period" or anything  
6           in the world, but what it says here, "written  
7           permission for entry prior to moving thereon."  
8           Now he didn't obtain written permission to enter  
9           prior to moving thereon. To obtain such written  
10          permission he would have to pay for it. Whether you  
11          call it temporary construction easement or not, that  
12          is what the Court understood it to be and that is  
13          the way the Court sustained it.

14                 (The motion was further argued.)

15          MR. PEARSALL: The obligation here is that  
16          you have to negotiate for and obtain permission prior  
17          to moving on the property to use it, and, in addition  
18          to that, if you have residual injury inflicted on  
19          the property, you have to restore it.

20          THE COURT: Why do we get involved in easements  
21          in the first place in a simple case that deals with  
22          damage to land?

23          MR. PEARSALL: I am suing for the value of the  
24          use of the land and for the cost of restoring it and

1           that is my contract action. I am not bringing a  
2           tort action, I have never brought a tort action.  
3           I have resisted all efforts to characterize it as  
4           a tort action.

5                     (The motion was further argued.)

6           THE COURT: I will overrule your objection,  
7           Mr. Wallace.

8           MR. WALLACE: Please note my exception.

9           THE COURT: Is Mr. Bailey still testifying?

10          MR. PEARSALL: We have one little housekeeping  
11          matter before Mr. Bailey. I would like permission  
12          orally to amend the pleading to conform to the  
13          proof as to the claim for damages for restoration of  
14          the wall inasmuch as the witness testifying gave a  
15          higher figure than the thousand dollars in the Motion  
16          for Judgment, and I believe that that is, under the  
17          rules, a privilege freely granted in order not to have  
18          the judgment upset for failure of the pleading to  
19          conform to the proof and the Court is fully aware of  
20          how the proof came out and how the defendants  
21          actually pushed me to this proof.

22          THE COURT: So it is clearly stated on the  
23          record, you want to amend the pleadings to go to  
24          \$1,254.50?

1 MR. PEARSALL: I believe that was the figure,  
2 Your Honor.

3 THE COURT: All right. Mr. Wallace?

4 MR. WALLACE: I don't think it will make any  
5 difference, Your Honor. I would object for the  
6 record.

7 THE COURT: Your permission is granted;  
8 objection is noted.

9 MR. WALLACE: I heard a couple of things there;  
10 one was the driveway and one was the wall. I think  
11 he said \$25 for the wall?

12 THE COURT: The figures he gave were \$390 for  
13 gravel, \$430 for labor, \$120 for logs, \$25 for the  
14 wall.

15 MR. WALLACE: That is the one I was talking  
16 about, the wall; I have no objection.

17 THE COURT: Then \$284 for overhead and profit.

18 BY MR PEARSALL:

19 Q The Court qualified you as an expert for the  
20 purpose of giving appraisals testimony, observing, upon the  
21 objection of opposing counsel, that your non-membership in --

22 MR. WALLACE: If Your Honor please, is  
23 Mr. Pearsall testifying? If he is, I object without  
24 his being sworn. If he has a question to ask --

1 MR. PEARSALL: I have a perfect right to  
2 orient the witness.

3 THE COURT: Objection overruled. Let the  
4 record indicate we have just come back from a recess  
5 and this witness was testifying before the recess and  
6 counsel is orienting him as to the Court's last  
7 ruling.

8 BY MR. PEARSALL:

9 Q Will you assist the Court in such way as you  
10 can, from your own knowledge and experience, to determine  
11 whether your membership in the American Institute of  
12 Appraisers, your lack of membership, in any way detracts  
13 from your qualifications as an appraiser?

14 THE COURT: Mr. Pearsall, that is an objection-  
15 able question. This witness is not going to help  
16 this Court in that kind of testimony.

17 MR. PEARSALL: May it please the Court, I  
18 respectfully submit that the Court itself observed  
19 that the lack of membership went to the weight of  
20 the testimony and I feel like the Court ought to  
21 have the benefit of this witness' knowledge as to  
22 how it does bear on the weight of the testimony.

23 THE COURT: The Court would certainly like to  
24 have that come from another witness but you are

1 asking a witness to sit here and pull himself up by  
2 his own bootstraps.

3 MR. PEARSALL: I say this with utmost respect  
4 in an attempt to conform with the Court's observation  
5 and ruling, I believe it is customary that an expert  
6 witness, in the course of his being qualified and  
7 as preliminary to his examination going to the weight  
8 and sufficiency of his testimony, to ask him for his  
9 qualifications, what his memberships are and what  
10 he has done. I didn't conceive that to be necessary  
11 to go into in any greater depth than I had until the  
12 Court made the observation it goes to the weight  
13 of the testimony. I would like to ask him what  
14 memberships he has, such things as that.

15 THE COURT: Go ahead.

16 BY MR. PEARSALL:

17 Q Will you state what memberships you have in  
18 professional societies other than the American Institute of  
19 Appraisers?

20 A I am a member of the National Association of  
21 Real Estate Boards, now known as the National Association of  
22 Realtors; I am a member of the State Association of Realtors,  
23 the local association, Richmond Association of Realtors.

24 Q Have you obtained any recognition of any type

1 beyond membership?

2 A I hadn't completed the other one. I belong  
3 to the National Institute of Real Estate Brokers, and in  
4 this year I was awarded a membership in the Realtors  
5 National Marketing Institute and it says, "In recognition of  
6 dedication to the increase of knowledge and advancement of  
7 professionalism in real estate." In 1971 I was given an  
8 award by the National Institute of Real Estate Brokers in  
9 recognition of dedication to the increase of knowledge and  
10 professionalism in the residential division and also in the  
11 commercial development division. Just one other thing, I  
12 think the true granddaddys or deans of appraisers in the  
13 City of Richmond, Frank <sup>Waind</sup>Carneal and Guthrie & Smith of  
14 Elam & Funsten, and neither of them are MAI's or SIA's.

15 Q As a realtor and appraiser, are you familiar  
16 with the term "temporary construction easement?"

17 A Yes, sir.

18 Q What does the term "temporary construction  
19 easement" mean as it is used in real estate dealings?

20 A Well, it means that they are allowed the use  
21 of it, normally exclusively but not always, and, of course,  
22 they are expected to pay for it. I am talking about the  
23 party to whom the temporary easement is granted, expects to  
24 pay the owner or landlord a fee for the use of it. It is

1 normally based on 10 percent of its value for one year and  
2 that is the normal operation unless it is a temporary ease-  
3 ment for a period of years and extends for many years, like  
4 99 years.

5 Q In your professional opinion did the joint  
6 venture cross and make use of the property of the Richmond  
7 Shopping Center, to be permitted only by the paying for a  
8 temporary construction easement?

9 MR. WALLACE: If Your Honor please, he is  
10 leading the witness and I object to the form of the  
11 question.

12 THE COURT: Objection sustained.

13 BY MR. PEARSALL:

14 Q As manager of the Richmond Shopping Center  
15 would you permit the use made by the joint venture of the  
16 Richmond Shopping Center property? Was that payment for a  
17 temporary construction easement?

18 MR. WALLACE: If Your Honor please, he is  
19 leading him again. I think he might ask did he permit  
20 it or not but I think the form of the question is  
21 objectionable and leading again.

22 THE COURT: Sustained.

23 BY MR. PEARSALL:

24 Q Would you permit the use that was made of



1 the Richmond Shopping Center land?

2 A No, sir.

3 MR. WALLACE: I object to what he would have  
4 done. Ask what he did.

5 BY MR. PEARSALL:

6 Q Did you grant any permission to use the  
7 Richmond Shopping Center land in the manner you have  
8 testified it was used by the joint venture?

9 MR. WALLACE: It is the same question again;  
10 it is leading the witness.

11 THE COURT: He says did he do it.

12 MR. WALLACE: Then he ends it up "used by the  
13 joint venture."

14 MR. PEARSALL: This witness testified to what  
15 use the joint venture made.

16 THE COURT: Objection overruled. I note your  
17 objection, Mr. Wallace. Do you remember the question?

18 A No, sir, I did not.

19 BY MR. PEARSALL:

20 Q At my request did you form a professional  
21 opinion of the price or value of permission to use the land  
22 in the manner that the joint venture used it?

23 THE COURT: Just a minute, before you answer  
24 that question. I have a problem. I don't know whether

1 Mr. Wallace has one or not. The Court has ruled that  
2 this gentleman is a qualified appraiser of real  
3 estate values and I don't know whether that covers,  
4 Mr. Pearsall, the use of land. Has he been qualified  
5 as to the use of land?

6 MR. PEARSALL: I will try to qualify him,  
7 Your Honor. I think he has, but I will try to relieve  
8 Your Honor of any reservations.

9 THE COURT: Is there a difference between the  
10 land value itself and the use of the land?

11 MR. PEARSALL: May it please the Court, I will  
12 attempt to develop that and I recognize that Your  
13 Honor is attempting to be very careful to observe all  
14 the rules of evidence and allow only such testimony  
15 that is admissible and I don't resist that at all.  
16 I will do my best to have this witness state.

17 THE COURT: As far as appraising, ask him the  
18 question is there a difference.

19 BY MR. PEARSALL:

20 Q Do you negotiate less than sales of land,  
21 that is, uses of land?

22 A I think I could shorten this down, if you  
23 would allow me to answer this question that has been raised.  
24 In yesterday's testimony I thought that I was recognized as

1 an expert property manager and, as such, this is the manage-  
2 ment of land such as parking lots and so forth and the  
3 management of improved property.

4 Q Does appraisal cover not only the value of  
5 fee simple interests but of leasehold interests and temporary  
6 construction easements?

7 A Yes, sir.

8 THE COURT: I am satisfied, Mr. Pearsall.

9 BY MR. PEARSALL:

10 Q At my request did you give your professional  
11 opinion as an appraiser of the value of the use of the land  
12 made by the joint venture that would be charged as a condition  
13 of permission being granted to make that use?

14 MR. WALLACE: If Your Honor please, before he  
15 answers I would object again. Because I have been  
16 silent through this whole line of questions I would  
17 not like to have it deemed waived because my motion  
18 is overruled. I would like to reassert that, but,  
19 secondly, I would object to his expertise in this area  
20 without a better foundation.

21 BY MR. PEARSALL:

22 Q Did you negotiate with the Highway Department  
23 a temporary construction easement relative to part of this  
24 land?

1           A       Yes, sir.

2           Q       What is that, Mr. Bailey?

3           A       This is a Xerox copy of a map given to me by  
4 a gentleman named Jones, representing the Highway Department.

5           Q       What was the purpose of your having it?

6           MR. WALLACE: If Your Honor please, as to  
7 valuations or negotiations with the Highway Department  
8 for the taking of any other land for any other purpose,  
9 I do not see that it is relevant or material to the  
10 issues in this case and I object to its coming in.

11           MR. PEARSALL: May it please the Court, if  
12 the witness will just be allowed to testify, he will  
13 testify that this is a temporary construction easement  
14 on the very land we are talking about.

15           MR. WALLACE: You are testifying for him, Mr.  
16 Pearsall.

17           THE COURT: Let the witness answer the question.  
18 I will rule on the relevance.

19 BY MR. PEARSALL:

20           Q       What use did you make of this plat that you  
21 have in front of you?

22           A       The plat that I have in front of me was given  
23 to me by a Mr. Jones representing the Highway Department in  
24 a negotiation for a temporary easement across our land to

1 build a temporary bridge from Floyd Avenue to the western  
2 side of the railroad tracks.

3 Q What was the agreed basis of that temporary  
4 easement?

5 A The value of the land agreed upon was \$15 per  
6 square foot.

7 Q How did that relate to the value of the  
8 easement?

9 A It related to the value of the easement from  
10 the value of the land. From the value of the land we arrived  
11 at the value of the rental that would be paid for the ease-  
12 ment.

13 Q How did you arrive at that?

14 A We arrived at it at 10 percent per year and  
15 you have another thing, I think it was 1500 square feet,  
16 and they agreed to pay \$3,750.

17 Q Will you explain to the Court and to all of  
18 us, as laymen in this field, how you take a fee simple  
19 value of land and arrive at a value of a temporary easement  
20 across the land?

21 A Well, you take the value of the land, this is  
22 the normal operation with property managers, that you take  
23 the value of the land and assuming that the value of the  
24 land is \$15 per square foot, you multiply 15 times the amount

1 of square footage and then for the use of the land where  
2 they are going to restore it to its present condition, the  
3 normal situation is 10 percent of that amount per year as  
4 rental in which the property owner continues to pay taxes  
5 on it but the lessee has control of the land.

6 Q You use the expression "lessee," do you mean  
7 a lessee of a normal lease or the grantee of a temporary  
8 construction easement?

9 A The grantee of a temporary construction  
10 easement would be, in my mind, the lessor and the person --

11 Q No --

12 THE COURT: You can't direct his testimony.

13 MR. WALLACE: You can't contradict your own  
14 witness.

15 MR. PEARSALL: I invite the attention of the  
16 witness to a possible slip of the tongue and ask that  
17 it be read back to him.

18 A I understand what he means. May I correct my  
19 statement?

20 THE COURT: Start again.

21 MR. PEARSALL: If a man says red, when he  
22 means orange you can get him to testify.

23 A (Continuing) I mean the grantor is a lessor  
24 and the one receiving or using the temporary easement being

1 the grantee is the lessee in my mind. Please pardon me.

2 BY MR. PEARSALL:

3 Q Did you have any other basis for arriving at  
4 the value of permission to make use of the land that was  
5 actually made by the joint venture?

6 A In this area it is extremely difficult to  
7 obtain comparable properties and the value of comparable  
8 properties in the immediate area. There has been very little  
9 movement in this area and the thing I rely on, No. 1, is  
10 the negotiation with the Highway Department; No. 2, we  
11 negotiated a lease with Mayberry, or through Mr. Gregory,  
12 President of High's, and we quoted him the same \$15 per  
13 square foot as being the value of the land, not only the  
14 land upon which his building was built but the number of  
15 square feet it took to support it for parking, and because of  
16 some negotiation, using his own contractor, Mr. Puckett,  
17 he doing part of the work, we reduced that figure to \$13.57  
18 per square foot and that was an arms length transaction  
19 between the two of us. Then in another instance, with the  
20 Alcoholic Beverage Control Board or the Commonwealth of  
21 Virginia, we negotiated the same situation for a building and  
22 parking and we used the figure \$15 per square foot which they  
23 were satisfied with and we were satisfied with and we made  
24 the lease on that basis, all within the same time frame of

1       what we are talking about.

2               Q       Then what is the professional opinion that you  
3       furnished as to the value in this time frame of permission  
4       to use the land in the manner in which it was used that you  
5       have testified it was used by the joint venture?

6               MR. WALLACE:  If Your Honor please, I renew  
7       my objections.  In all the evidence that has gone as  
8       to that point I think we are dealing with valuation  
9       of land and buildings.  We are dealing with valuation  
10      of parking to support land and buildings, with High's  
11      and ABC, and Highway Department taking it for another  
12      purpose.  I don't think it is germane or relevant or  
13      anything other than prejudicial to this case.

14              THE COURT:  I understand the objection.

15              MR. WALLACE:  It is not the proper way to  
16      measure damages.

17              THE COURT:  Objection overruled, exception  
18      noted.

19      BY MR. PEARSALL:

20              Q       Will you answer the question?

21              A       The only way I can answer your present question  
22      is to state that my opinion is \$15 per square foot.

23              Q       That is the land value you used?

24              A       Yes.



1           Q       Translate that land value into value of  
2 permission to use it in the manner in which they used it?

3           A       Well, that is a little difficult. Now if we  
4 had to grant an area in which they could cross and use to  
5 the exclusion of all others, then we would boil it down to  
6 some areas that were, say, 20 feet wide, allowing two  
7 trucks to pass, and in a location that would not disturb  
8 the general operation of the shopping center and having been  
9 requested by you to do so quite some time ago I did exactly  
10 this; there were two areas that were used constantly and  
11 not in a 20 foot strip but all over. I reduced it down to  
12 a 20 foot strip, had they asked me for an easement or had  
13 been willing to pay for it; this is what we would have done.  
14 I reduced it to a 20 foot strip approximately 200 feet long,  
15 one in the rear. By that I mean the Floyd Avenue area, the  
16 gravel parking area and one in the macadam parking area on  
17 the southern exit, on the southern exit, and by multiplying  
18 15 times the square foot of this we arrived at the valuation  
19 of it. I think you have my figures on it.

20                   MR. PEARSALL: I don't know what the witness  
21 is referring to.

22           A       If you will give me the folder behind you, sir.

23                   MR. PEARSALL: During the interval, Your Honor,  
24 I would like to have this marked as an exhibit that

1           he was testifying to.

2           THE COURT: What is it?

3           MR. PEARSALL: That was the paper he testified  
4           to representing the area that the State negotiated  
5           with him for.

6           THE COURT: You do have an objection? I note  
7           your objection, Mr. Wallace.

8           (The said document was marked and filed as  
9           Plaintiff's Exhibit No. 40.)

10          A       (Continuing) I said that generally 20 feet by  
11       generally 200 feet and there are two of them, so you are  
12       talking about 40 feet by generally 200 feet. In the gravel  
13       parking area it is approximately 200 feet and you get to the  
14       southern end, it is shorter, the depth of the land is not  
15       quite as great. However, if you take the 40 by 200 feet,  
16       the end result is 8,000 square feet and multiply by 15, you  
17       get \$120,000 as being the value of the land. In the negotia-  
18       tions I would have negotiated on that basis for \$10,000 for  
19       a year's use, which is 10 percent of a hundred thousand  
20       dollars. This is the same method which we used with Mayberry  
21       or High's. We arrived at one thing and then we rounded it  
22       off to a figure and this would have been done in this case  
23       and this is exactly, had we been asked, this is exactly what  
24       I would have charged them.

1                   Q       Now you are giving that statement as what you  
2 would have done as property manager or is that your profession-  
3 al opinion as to the value of the permission?

4                   A       Mr. Pearsall, it is both. As manager of the  
5 property I would have done exactly that and if I had to  
6 appraise it for some other party, I would have done exactly  
7 that.

8                   Q       Do you feel competent to have made an appraisal  
9 for a third party?

10                  A       Yes, sir.

11                  Q       And would your lack of the MAI designation have  
12 in any way hampered you in making that appraisal?

13                  A       Mr. Pearsall, I protest. I have taken --

14                         MR. WALLACE: Haven't we been down this road  
15 before, Your Honor?

16                         MR. PEARSALL: You objected most vigorously  
17 that he had to have an MAI designation or he wasn't  
18 any good. If you want to withdraw that objection,  
19 then we won't go over it anymore.

20                         THE COURT: Let the witness answer.

21                  A       I have taken all the appraisal courses that  
22 practically every MAI in the city has taken except, possibly,  
23 in recent years. They are getting harder as you go along.  
24 I have not only taken the courses, I have taught them. I

1 feel I am on as high a plane as an appraiser as any MAI  
2 in this city.

3 THE COURT: Thank you, Mr. Bailey.

4 MR. PEARSALL: Witness with you.

5 CROSS EXAMINATION

6 BY MR. WALLACE:

7 Q Mr. Bailey, when you were talking a moment  
8 ago about the negotiation with High's you talked about a  
9 \$15 per square foot charge plus a number of square feet in  
10 addition to the building necessary to support it for  
11 parking. Do I understand that when you rent to High's, that  
12 you rent them the space on which the building is located,  
13 plus you charge them a certain amount for necessary parking  
14 for their ice cream store?

15 A Yes, sir.

16 Q Do you recall how many square feet of parking  
17 that was included in the High's lease?

18 A No, sir; the figure at 250 square feet per  
19 car per requirement of the City Zoning Board -- Building  
20 Inspector, excuse me.

21 Q When High's built the building there did they  
22 own the building?

23 A No, sir. I stated that High's built the  
24 building, they used their contractor; we paid for the --

1 Richmond Shopping Center, Inc., paid for the building and  
2 the building is owned by Richmond Shopping Center, Inc.

3 Q Would I be correct in presuming that based on  
4 your arrangements with High's that your arrangement with  
5 The Hall Tree, A&P and other tenants of the shopping center  
6 is the same and that you have a rent for the building and  
7 an additional rent to cover whatever parking is assigned to  
8 them?

9 A Generally, you are correct but not exactly.  
10 In working out any arrangements in a shopping center within  
11 a city or any shopping center, for that matter, you must  
12 consider the use of the building and a number of parking  
13 spaces necessary to support that use or especially required  
14 by the city to support that use and, as such, you determine  
15 the amount of square foot of land they are going to use and  
16 the rent is based accordingly. Now, in theory, you rent  
17 them the building for so much money and the use of the parking  
18 lot, in general, but, as such, with this particular building,  
19 you establish so many square feet. For instance, an office  
20 is based on 400 square feet for one car where a supermarket  
21 is 100 square feet per car and it uses up quite a bit of  
22 land.

23 Q Were any spaces designated for either High's  
24 or Hall Tree or A&P or whatever else is in that center area?

1                   A       No, sir.

2                   Q       But their lease was computed as if they had  
3 certain areas assigned or square footages assigned?

4                   A       Yes, sir, and, in addition, we must set aside,  
5 according to the requirements of the City, that many square  
6 -- that many parking spaces, according to their square  
7 footage, within this area and we can't exceed it. By that,  
8 when we run out of land we can't build any more buildings.

9                   Q       Have any of these tenants of the shopping  
10 center brought an action against the shopping center for  
11 loss of space because of what this complaint is all about?

12                  A       No, sir.

13                  Q       Did you, in determining valuation, appraise  
14 the shopping center, this part of the shopping center as  
15 to ground value, absent buildings, under any of the three  
16 standard methods of costs, comparative or income?

17                  A       Well, you do this mentally in every case. I  
18 explained earlier that to find comparable values in this  
19 particular or immediate area is a difficult thing to do.

20                  Q       I didn't ask you that, I asked you did you  
21 make an appraisal of the value of the ground, excluding  
22 the buildings, of this portion of the shopping center, using  
23 any of the three acceptable or standard methods?

24                  A       Yes, sir.

1 Q When did you do that?

2 A When Mr. Jones from the Highway Department  
3 approached us.

4 Q When did he approach you?

5 A It was early in the negotiations, prior to  
6 the joint venture ever starting in this particular area and  
7 I really don't know, it could have been 1967 or 1968.

8 Q Did you come to an appraised value of the  
9 ground in 1967 or 1968?

10 A Not only came to an appraised value, we came  
11 to an agreed value between the two of us.

12 Q I am asking you did you come to an appraised  
13 value?

14 A Yes, sir.

15 Q What was the value of the ground of the  
16 shopping center? This is this piece of it west of Thompson  
17 and in-between Cary and Floyd?

18 A I don't know how you can pick out a piece of  
19 a shopping center.

20 Q I am doing all of it on that side, not a piece;  
21 I am asking the ground value of everything west of Thompson?

22 A \$15 per square foot.

23 Q How did you determine that?

24 A Well, there are many approaches to it and one

1 is the Citgo Service Station entered into a lease 15 years  
2 prior to that. They entered into it and in it was a clause  
3 which stated they could purchase the property for \$7.50  
4 a square foot; this is 15 years prior to the time we are  
5 talking about. Now I think any real estate appraiser would  
6 recognize that the value had to be at least doubled by this  
7 time. They would also recognize that in building a service  
8 station it is a special use building and at the end of  
9 15 years it is normally demolished, which is exactly what  
10 happened to the Citgo Service Station. In the middle of  
11 the time period of which we are talking, the Citgo picked up  
12 their option and in talking to them I explained to them  
13 that they had made themselves a good deal at the time --

14 MR. WALLACE: If Your Honor please, I asked  
15 him how he determined it, not a discourse.

16 MR. PEARSALL: The witness is trying to tell  
17 you.

18 THE COURT: Objection sustained.

19 BY MR. WALLACE:

20 Q All I asked was how did you determine it,  
21 not all the people and things you went through.

22 A This is how I determined it, by general  
23 information, by former knowledge, by an educated guess and  
24 whatever else appraisers do.



1 Q When did you make that appraisal?

2 A Again, this was either 1967 or 1968. I don't  
3 have the papers before me, but I made notations at the time.  
4 Mr. Pearsall has them.

5 Q Mr. Bailey, do you recall that you and I were  
6 in deposition together February 27, 1975 and you were asked  
7 the question --

8 MR. PEARSALL: If he intends to contradict  
9 the witness by prior inconsistent statement, he  
10 should read it to him exactly.

11 MR. WALLACE: I am going to. The question is  
12 Page 59, "Again I am not trying to hold you to any-  
13 thing specific; do you know, as an appraiser and  
14 expert in this field, do you have an opinion as to  
15 the value of all of that property?" And the answer  
16 is, "I have never made any attempt to appraise it."  
17 You are now telling the Court that that answer is  
18 incorrect?

19 MR. PEARSALL: May it please the Court, the  
20 context if read in its entirety shows it is relating  
21 to the entire shopping center property as improved.

22 THE COURT: He can explain that. The question  
23 now is did he make that statement?  
24

1 to cure him on redirect examination --

2 THE COURT: You are both right. You can't  
3 walk all over him, but you can't take advantage of  
4 a witness by asking something out of context. It  
5 puts him in a box.

6 MR. WALLACE: His own counsel can take him  
7 out of the box.

8 THE COURT: Just a minute, Mr. Bailey, you may  
9 explain your answer in any way you want to explain it  
10 at this juncture.

11 A The answer to his question is "yes, I did make  
12 that statement," and if you will let me read the three lines  
13 above it, the question by Mr. Wallace was, "Do you know as  
14 an appraiser and expert in this field, do you have an opinion  
15 as to the value of all of that property?" We were discussing  
16 the shopping center, and I answered, "I have never made an  
17 attempt to appraise it."

18 BY MR. WALLACE:

19 Q Did you ever make an attempt to appraise the  
20 property and when I say "the property," I mean all of the  
21 property west of Thompson Street between Cary and Floyd?

22 A No, sir.

23 Q Did you ever make an appraisal as to the ground  
24 value of that piece of property?

1           A       Yes, sir. When I say "appraisal," I think you  
2 possibly mean a written narrative type appraisal. I make  
3 a mental appraisal many times, and I did so in this case  
4 and adjusted it as the years went by.

5           Q       Can you and I agree that that appraisal is  
6 an opinion of value?

7           A       Yes.

8           Q       All right. How many square feet of ground are  
9 in this particular part of the shopping center west of  
10 Thompson and between Cary and Floyd, if you know?

11           MR. PEARSALL: May it please the Court, we  
12 have got a matter here from which that calculation can  
13 be made.

14           MR. WALLACE: I asked him if he knew, Mr.  
15 Pearsall.

16           THE COURT: Objection overruled.

17           A       In round figures, 150,000 square feet.

18           Q       If there are 150,000 square feet, then we are  
19 talking of a value of two and a quarter million dollars for  
20 the land itself, based on your \$15 a square foot?

21           A       Yes, sir, if that is what it works out to be.

22           Q       Do you know what the city's assessment of the  
23 land value is for that part of the property?

24           A       No, sir.

1 Q Have you ever compared the two?

2 A Not in years, no, sir.

3 Q Have you made an appraisal of all of the  
4 property west of Thompson bounded by Cary and Floyd subsequent  
5 to the joint venture leaving the job?

6 A No, sir.

7 Q Have you made an appraisal of the ground  
8 around it?

9 A No, sir.

10 Q Now as to the Highway Department negotiation  
11 at \$15 a square foot, do I understand your testimony to be  
12 that that value was arrived at based on negotiations between  
13 you and members of the Highway Department?

14 A Yes, sir.

15 Q And that dealt with the taking of a little  
16 sliver of the shopping center at the northwest corner of it  
17 at the back?

18 A How about the southeast corner?

19 Q I will buy that, let's look at the plat.

20 MK. PEARSALL: I think it was the last exhibit.  
21 Before we get into a hassle as to what the witness  
22 said, his testimony was not taking but temporary  
23 construction easement.

24 THE COURT: You are correct.

1 BY MR. WALLACE:

2 Q Where on this plat is this area subject to  
3 that contract and negotiation? Where is that in relation to  
4 the shopping center?

5 A This is north; this is north, this is Berington  
6 Street; this is Floyd Avenue and it is on the south -- it is  
7 the southwest corner. This is the southwest corner of this  
8 property.

9 Q When you say "this property," is this property  
10 the shopping center?

11 A The shopping center, that is west of Thompson.

12 Q And the north end of the shopping center?

13 A Yes, sir.

14 Q West side?

15 A Yes, sir.

16 Q So when I asked you if it was the northwest  
17 corner, the answer is yes it is the northwest corner of the  
18 shopping center?

19 A Yes, sir.

20 Q Was that contract negotiated in the final form,  
21 executed?

22 A No, sir.

23 Q Why not?

24 A They condemned the larger portion.

1 Q How much did they pay you for it?

2 A They haven't paid us. They awarded us some,  
3 I have forgotten the exact amount but that is in contention.

4 Q So when you say \$15 a square foot for land  
5 we were negotiating, that is something you were hoping to  
6 get but never got in a contract, isn't that correct?

7 A It was never under contract, that is correct.

8 Q Now as to the High's valuation, that was based,  
9 as I understand your testimony of a few moments ago, was  
10 based on rental of a building plus the necessary parking  
11 attendant thereto?

12 A Yes, sir.

13 Q And if I understand your testimony earlier  
14 about the ABC store, it was the same way, rental of a  
15 building with the necessary parking attendant thereto?

16 A Yes, sir.

17 Q Both of those were at \$15 a square foot but  
18 High's was negotiated a little lower because they used their  
19 own contractor?

20 A And paid for some of their own work.

21 Q Is there anyone to whom the shopping center is  
22 leasing land, pure land without a building on it at this  
23 time?

24 A I wouldn't know. Prior to March the answer is

1 no. The C&P Telephone Company made some overtures but it  
2 was never reduced to a lease, et cetera.

3 Q I take it that same answer would hold true  
4 back to the time of the joint venture?

5 A Back to the time? I was under the impression --

6 Q That is what I was asking.

7 A Back to the time, from the -- from 1969 to  
8 March of this year I don't know of any land that is used  
9 except for one small portion and that land is leased to  
10 Easco, which is a film developing company. They have a land  
11 lease on the portion that is east of Thompson Street.

12 Q That is not in this part of the shopping  
13 center, then, is it, if it is east of Thompson?

14 A It is the Richmond Shopping Center but it is  
15 not in the part west of Thompson Street. There is no land  
16 leased west of Thompson Street and, to my knowledge, since  
17 1962 there hasn't been a land lease in that area.

18 Q Now you have spoken of temporary construction  
19 easement which you reduced to a 20 foot strip, 200 feet long.  
20 Using Plaintiff's Exhibit 30, which is the large blown-up  
21 plat, I am sorry, photograph, can you show me generally,  
22 trace with your finger, where these two construction easements  
23 are?

24 A One here, and I am pointing to the gravel

1 parking area and I am pointing in a diagonal manner across  
2 the gravel parking area from the west side to the driveway  
3 on Thompson Street. One other, in the southern parking lot  
4 which is in front of the A&P, in a diagonal manner from the  
5 southern side of the two signs to the southern exit. That,  
6 sir, and that. (Indicating)

7 MR. WALLACE: I know Mr. Pearsall has objec-  
8 tions to marking this document but I ask the Court  
9 that he be allowed to mark it in some way.

10 THE COURT: He can use Mr. Pearsall's same  
11 pen.

12 MR. PEARSALL: The problem, Your Honor, is that  
13 in the employee parking we are getting into --

14 THE COURT: He should have a right to put  
15 some kind of mark on it.

16 MR. PEARSALL: He should have a right to put  
17 his evidence in but not destroy my evidence in the  
18 course of doing it, if I might state my difference  
19 with his position. I believe that possibly a pencil --  
20 A I could mark it with an arrow.

21 MR. PEARSALL: I think a soft pencil, Your  
22 Honor, might indicate, and if he did, in fact,  
23 obliterate something, it could be erased.

24 A You want me to draw the 20 foot strip --



1 MR. PEARSALL: Freehand.

2 MR. WALLACE: Outline where you say the 20 foot  
3 easement was. You have used a pencil.

4 MR. PEARSALL: I object to the form of the  
5 question where the 20 foot easement was. He didn't  
6 state there was an easement, he stated that this was  
7 what he used in his valuation.

8 THE COURT: Objection sustained.

9 BY MR. WALLACE:

10 Q You have marked two lines behind the A&P store  
11 in pencil, going from Thompson to the western property  
12 limits of Richmond Shopping Center; what do those two black  
13 lines purport to show?

14 A Just what you asked me, the temporary easement  
15 that would or could have been granted to the joint venture  
16 had they asked. This is an easement that is roughly 20 feet  
17 by 200 feet; one is a little longer than the other, as you  
18 can see.

19 Q And you have drawn two other pencil lines --

20 A This is a sign, you can see it over the top of  
21 the cars, and at the edge of the sign to the driveway and  
22 then 20 feet over to the driveway.

23 Q Those two signs are in front of the High's  
24 store, going from the entrance nearest the High's store on

1 Thompson, to the western limit of the shopping center?

2 A That is correct.

3 Q Mr. Bailey, were you ever at the shopping  
4 center at night?

5 A Yes, sir.

6 Q Did you see any trucks in the shopping center  
7 at night?

8 A What time at night?

9 Q After dark?

10 A What time are we talking about?

11 Q Any time after dark, to sunrise?

12 A Frankly, I don't recall seeing any trucks  
13 after dark. I recall that they worked late hours but I don't  
14 recall any trucks after dark, no, sir. I don't recall even  
15 looking for them after dark.

16 Q Did anybody else use, to your knowledge, these  
17 two areas that you have marked off as representing the  
18 construction easements, and by "anybody else," I mean the  
19 public or employees of these stores?

20 MR. PEARSALL: May it please the Court, the  
21 form of the question is objectionable. This is a  
22 hypothetical location of two easements to take the  
23 place of the use that was made of the entire area.

24 THE COURT: I believe his objection is well

1           taken. He hasn't testified those were actually  
2           easements. These are the areas he would have set off  
3           as an easement had they reached some agreement.

4       BY MR. WALLACE:

5           Q       In reference to that, Mr. Bailey, why did you  
6           choose these two areas?

7           A       I chose these two areas because these were the  
8           most used areas of the entire shopping center and, as such,  
9           you must understand these trucks went all over the entire  
10          area on the west side and the attempt was to boil it down to  
11          a 20 foot strip that two trucks could pass each other, one  
12          in the north side and one on the south side.

13          Q       Was that use continuous, to your knowledge?

14          A       It was continuous until we finally got the  
15          fence up and even then we had problems.

16          Q       Was that use exclusive by the joint venture?

17          A       May I put it this way, Mr. Wallace, that even  
18          the macadam parking area, where the southern exit is, when a  
19          70,000 pound truck comes rolling by, one right after another,  
20          believe me, it is an exclusive use for a period of time.  
21          No one dares park in it.

22          Q       I wasn't asking if it was exclusive at the  
23          moment the trucks rolled by, I am asking was the shopping  
24          center parking lot, both front and back, continued to be used

1 by the public?

2 A Let's take the rear one, the one -- I mean the  
3 gravel parking area; when those trucks were rolling through  
4 there day after day, and not for any moment, but for the  
5 period of work time, they took that property over exclusively.  
6 I don't believe you would have parked your car in that area  
7 at the time. The minute you found it out, you would have  
8 moved it.

9 Q How many people parked in the back on a regular  
10 basis?

11 A We had anywhere from 35 to 50, at least, using  
12 it. In fact, we had it practically full but we had no spaces  
13 marked out, they parked anywhere to suit themselves, but it  
14 was well used there at one time.

15 Q Yet on July 6, 1973 that parking lot is empty,  
16 is it not?

17 A If you will look at the markings on it you  
18 will understand why it is empty.

19 Q And I call your attention also to the parking  
20 lot as shown in the picture, April 25, 1969, Plaintiff's  
21 Exhibit 9; there are no cars in it there?

22 A There is not one single car in it. I attempted  
23 to explain, if you will look at these areas, these areas are  
24 owned by the same people. Look at the crowded condition. We

1 were attempting to get these employees -- that is a bank, and  
2 all of these cars belong -- I don't say all of them, but  
3 that is the general run of things, belong to the employees in  
4 this bank; same thing around this store and this store. We  
5 worked extremely hard after doing this to get these people  
6 over there and we got them over there, I can assure you of  
7 that.

8 Q Do you have photographs showing them over  
9 there?

10 A No, sir.

11 Q Do you know when the joint venture started the  
12 job?

13 A I do now because of the testimony.

14 Q Did you know at the time all of this was going  
15 on?

16 A If you mean the exact date, no, sir.

17 Q Do you have an idea in your mind?

18 A I have, yes, sir.

19 Q When was that?

20 A In the middle of the summer.

21 Q Of what year?

22 A 1971.

23 Q Do you know when the joint venture left the job?

24 A Roughly.

1 Q Of your own knowledge?

2 A Of my own knowledge, and I am not sure whether  
3 it is in here or not, but of my own knowledge, and I stated  
4 on a number of occasions, it was the early part of 1973.

5 Q Do you know if any other contractors were doing  
6 work for the State Highway Department under a separate  
7 contract in that area during these times?

8 A Yes, sir, a number.

9 Q Who were they?

10 A Well, Inter-County was one and Lane Construction  
11 Company was one. Lane Construction Company was working in  
12 the area of Citgo when we had a number of problems with them,  
13 my protest of Mr. White who operated the Citgo Station; I  
14 was there numerous times and discussed it numerous times with  
15 the representatives of Lane Construction Company.

16 Q What trucks did you see in the parking lot?

17 A Well, as I have testified before, I saw trucks  
18 that are green with the name E. G. Bowles on it; not one,  
19 but numerous, and I also saw so many others, and they have  
20 -- like I said, Rockville, Glen Allen, the names of the  
21 owners. They were independent truck drivers, as I understood,  
22 that were employed by the joint venture.

23 Q What is the basis of your understanding?

24 A Mr. Blankenship and Mr. Turner.

1 Q Did you ever see any trucks with Lane on them?

2 A I saw cranes with Lane on them.

3 Q Did you ever see any trucks with Canada Con-  
4 struction on them?

5 A No, sir, and I never heard of Canada until a  
6 few months ago.

7 Q Did you ever see any trucks or vehicles with  
8 Inter-County on them?

9 A No, sir, I saw foremen with hard hats with  
10 Inter-County, with the tape across the hard hat.

11 Q What was the date that you saw these trucks  
12 on the parking lot?

13 A I saw them before September.

14 Q What year?

15 A 1971. I didn't pay any attention to them.

16 It really didn't concern me until all of a sudden I recognized  
17 how the macadam was breaking up and when I did that, of  
18 course, Mr. Puckett pointed out exactly what was happening  
19 and I stayed there, I stood there for well over an hour, and  
20 from that day on -- this is in the early part of September --  
21 from that day on I watched the operation daily.

22 Q Did you ever see any trucks of Bowles in the  
23 parking lot at lunch where there were no drivers in the  
24 trucks, and the trucks were parked?

1           A       No, sir. When you say "in the parking lot,"  
2 of course, I have got a bunch of parking lots to reckon with.

3           Q       In-between the A&P and the High's, in that  
4 paved parking lot, did you ever see any Bowles trucks, during  
5 this time you are complaining about, park there while their  
6 people were not in the trucks?

7           A       There were some trucks parked there from time  
8 to time, not congregating in that category. I don't recall  
9 seeing one of Mr. Turner's green trucks. I recall seeing  
10 trucks and I assume they were employed by the joint venture.  
11 I assumed then and I assume now. They were requested not to  
12 park there and eventually they didn't park in that area. They  
13 parked on the gravel parking area.

14          Q       Did Richmond Shopping Center object to the  
15 trucks coming into the parking lot and going into the stores,  
16 the occupants going into the stores to get food for lunch  
17 or other food?

18          A       Yes, sir.

19          Q       It did object?

20          A       Yes, sir.

21          Q       To whom did it make that objection?

22          A       To the Highway, to Mr. Turner.

23          Q       Now, Mr. Bailey, you brought a proliferation of  
24 letters through your counsel today; can you refer me to one



1 of these letters anywhere where you objected to their going  
2 to lunch in your parking lot?

3 A Wait a moment. You say object to them going  
4 to lunch? I have no objection to any driver going to lunch.  
5 There are 1, 2, 3 restaurants in the area. I have no objec-  
6 tion to drivers going to lunch in the parking area.

7 Q Did you object to their bringing their trucks  
8 in and parking them and going into the stores?

9 A Fully loaded, yes, sir.

10 Q Did you object to them coming in empty and  
11 going into the stores?

12 A Yes, sir.

13 Q Where, then, is a copy of a letter that you  
14 say you sent to the Highway Department making such objection?

15 A I do not have it with me.

16 Q In spite of bringing all this other prolifera-  
17 tion of letters about everything under the sun --

18 MR. PEARSALL: I object to the form of the  
19 question. He isn't counsel in the case. He is a  
20 witness.

21 THE COURT: Objection sustained. Further,  
22 Mr. Wallace, you objected to him using some of his  
23 letters as being self-serving.

24 MR. WALLACE: Yes, sir, in that sense they are,

1 but this is the first time he mentioned that he  
2 objected to them coming in at lunch. It is not in  
3 any of the letters in evidence and I think we are  
4 contending and we will put on evidence that sometimes  
5 the truckers did go in there at lunch and were welcomed  
6 for lunch. Now we learn for the first time they  
7 are not.

8 MR. PEARSALL: I object to the remark of  
9 counsel that this is the first time. He is familiar  
10 with the file.

11 THE COURT: Let's try the case and not each  
12 other.

13 A If he will allow me, I can explain.

14 THE COURT: That is all right, Mr. Bailey.  
15 I know you would like to.

16 BY MR. WALLACE:

17 Q Mr. Bailey, as to the broken wall did you see  
18 the wall actually broken, when it was broken?

19 A No, sir.

20 Q Do you have anybody who did see it broken?

21 A No, sir.

22 Q Did not the A&P and other tenants have trucks  
23 coming into their stores and off-loading at the back where  
24 that brick wall was?

1                   A       They didn't off-load on the wall, no, sir.

2                   Q       I asked you if the A&P and other tenants did  
3 not have trucks coming in the back and off-loading their  
4 goods into the stores?

5                   A       They have loading docks, yes, and they did  
6 use them.

7                   Q       What is the width of the alley at the back of  
8 the store?

9                   A       I do not know.

10                  Q       Twenty feet wide?

11                  A       At least.

12                  Q       Thirty feet wide?

13                  A       In that area, yes. In certain areas it is  
14 wider and certain areas it is less.

15                  Q       Does not A&P, in their deliveries, use long  
16 tractor-trailers, standard road size?

17                  A       Yes, sir.

18                  Q       And they are longer than 30 feet?

19                  A       Some of them.

20                  Q       They would have to maneuver somewhere near  
21 this wall to get back and forth?

22                  A       Plenty of room to maneuver, yes, sir.

23                  Q       How can you be sure that the joint venture  
24 trucks broke your wall down if you didn't see it and didn't

1 have anybody else who did and other trucks had access?

2 A I saw trucks sitting on it, and the wall --

3 I saw equipment sitting on it and the wall was broken.

4 Q But the wall was broken when you saw the  
5 equipment sitting on it?

6 A Yes, sir.

7 Q And you didn't see it break?

8 A Of course not.

9 Q Have you repaired that wall yet?

10 A No, sir.

11 Q And it has suffered additional damage since  
12 then, has it not?

13 A Not -- excuse me, the corner on the other side  
14 this is the corner of the wall that extends from the western  
15 line, eastward, in the back of the A&P; the very corner has  
16 been damaged, yes, sir.

17 Q Mr. Bailey, going back to something else,  
18 this parking lot behind the A&P, I notice from the photo-  
19 graphs that it has appeared to grow up in some part with  
20 bush, brush and grass; is that not correct?

21 A Yes, that is correct.

22 Q I take it that it did so because of non-use?

23 A That is correct.

24 Q You testified earlier about this parking lot

1 and the cost effort that would be incurred in trying to get  
2 the employees back to it; have you made efforts yet to get  
3 the employees back to it?

4 A I no longer handle the property.

5 Q As of March of this year when you left the  
6 property, had that been undertaken?

7 A No, sir.

8 Q So you don't know whether any cost has been  
9 incurred in that regard or not, do you?

10 MR. PEARSALL: He didn't testify that any  
11 cost had been incurred, Your Honor.

12 THE COURT: He didn't testify that any cost  
13 had been incurred. Objection sustained.

14 BY MR. WALLACE:

15 Q Do you know of your own knowledge as of today  
16 whether or not the shopping center is making an effort to  
17 get the people back or not?

18 A Since March I am not sure. I do know that they  
19 have blacktopped a small portion right at the exit and I  
20 am sure this is at the request of the ABC store because  
21 their supervisor made that request prior to March, that until  
22 the property was used for some other purpose would we repair  
23 it so their customers could use it, and I know this has been  
24 done.

1           Q       Do you know from March of 1975 whether or not  
2 the shopping center is attempting to get the employees back  
3 to that place or not?

4           A       No, sir, I do not.

5           Q       So when you testified about the cost efforts,  
6 that it would cost to get it back, you don't know whether  
7 they are going to try or not, do you?

8           A       I don't know what they are planning to do at  
9 this stage, Mr. Wallace.

10          Q       You testified about a meeting with Mr. Turner  
11 where he agreed to pay for the damages. When was that meeting?

12          A       I don't know, sir.

13          Q       Do you know the year?

14          A       I met on the jobsite with Mr. Turner on two  
15 occasions, other than that you must understand that Mr. Turner  
16 and I are good friends, I have talked to him on the telephone  
17 on numerous occasions and we also wrote letters. I do not  
18 remember the first meeting. However, in the first meeting  
19 it was a question -- I believe Mr. Blankenship was there,  
20 too -- it was a question that he would see and get back with  
21 me. He then agreed that he would fix it. I don't know  
22 whether it is in evidence or not.

23          Q       May I ask you a question there?

24          A       Please.

1 Q Had you finished?

2 A I will answer your next question.

3 Q When you say that he agreed to fix it, what  
4 do you mean by "it?"

5 A The macadam that disintegrated. Mr. Turner  
6 is capable of doing it, they have an asphalt plant and they  
7 do it all day long. They do this type work and, as such,  
8 he agreed he would repair it.

9 Q What else did you talk about in those meetings?

10 A About his daughter and wife, and I don't mean  
11 to be facetious, but we talked about a lot of things; we  
12 are friends. I really don't know.

13 Q Now about the fence that you talked about  
14 on a couple of occasions, do you know who installed that  
15 fence?

16 A I knew at the time, and I wrote it down but  
17 at this moment I do not know, no, sir.

18 Q Do you know whether any dirt or earth was  
19 stockpiled on the east side of the highway work, adjacent to  
20 your property?

21 A In the early stages I think, along the bank,  
22 they were stockpiling some dirt, yes, sir.

23 Q At a location next to your shopping center?

24 A No, sir, away from it, the western side of the

1 land that was condemned.

2 MR. WALLACE: I have nothing further, Your Honor.

3 MR. PEARSALL: Just a few questions on redirect,  
4 Your Honor.

5 REDIRECT EXAMINATION

6 BY MR. PEARSALL:

7 Q Did you have any tenants complain about the  
8 actions of the joint venture in the shopping center?

9 A Yes, sir; not only from the tenants in this  
10 particular area but from the tenants in the other area.

11 Q Where is the Citgo station as to which you  
12 had the trouble with Lane?

13 A Cary Street.

14 Q Outside of the area that you are complaining  
15 of the actions of the joint venture?

16 A Yes, sir. May I explain briefly?

17 Q Whatever you think is responsive to the question.

18 A What brought this on and what caused me to ask  
19 for the fences, they put up a temporary fence, farm type  
20 woven fence, and put it several feet onto the Citgo property,  
21 drilled holes in the concrete and blocked two driveways.

22 Q That is totally outside of the area we are  
23 talking about?

24 A Yes, sir. This was my discussion with Lane



1           Q       I see. Did you see trucks belonging to any  
2 other persons other than the trucks that you say were inde-  
3 pendent contractors and the Bowles trucks in either of the  
4 parking lots?

5           A       Your Honor, you must understand that I don't  
6 know which truck belonged to subcontractors of the joint  
7 venture or Lane or Inter-County or what. If they had the  
8 individual name written on the side --

9           Q       Did you see any trucks that had individual  
10 names written on the side?

11          A       Quite a number, yes, sir.

12          Q       Can you remember any of those?

13          A       I can remember.

14          Q       Places where they lived?

15          A       Rockville was one, and Greendale and --

16          Q       And you saw these in both parking lots,  
17 employee lots, and the other one?

18          A       I stopped these trucks and asked "who is your  
19 foreman and who are you working for?"

20 BY MR. PEARSALL:

21          Q       And were these trucks, that you were told by  
22 Mr. Blankenship and Mr. Turner, hauling for the joint venture?

23          A       Yes, sir.

24               THE COURT: Any other questions of this witness?

1 MR. WALLACE: No, sir.

2 (The witness stood aside.)

3 THE COURT: Is there any further evidence for  
4 the plaintiff?

5 MR. PEARSALL: The plaintiff rests, Your Honor.

6 THE COURT: Any motions for the plaintiff?  
7 Any evidence for the defense?

8 MR. WALLACE: Judge, before the evidence, I  
9 would like permission to reserve any motions until  
10 after my evidence. I would like to call Mr. Turner.

11 JAMES N. TURNER, was sworn and testified in  
12 behalf of the defendant, as follows:

13 DIRECT EXAMINATION

14 BY MR. WALLACE:

15 Q Mr. Turner, would you state your full name?

16 A James N. Turner, General Superintendent for  
17 E. G. Bowles Company.

18 Q Were you a general superintendent in 1971?

19 A Yes, I was.

20 Q Through 1973?

21 A Yes.

22 Q Were you in any way involved with the Bowles  
23 Contractor, or joint venture contract with I-195?

24 A Yes, sir, I was project manager.

1 Q As project manager were you on the job site?

2 A Yes, I was.

3 Q How often?

4 A At all times.

5 Q Did you have a trailer on the job site?

6 A Yes, we did.

7 Q Where was it located?

8 A It was located on Hamilton Street, just one  
9 block from Broad Street.

10 Q You have heard the testimony earlier; what  
11 generally was the joint venture supposed to do on this project?

12 A They had to do the general excavation along the  
13 railroad tracks and they had certain pipe to lay, drainage  
14 systems, temporary bridges to build; they had interior walls,  
15 that is the walls paralleling the railroad, and other inciden-  
16 tal work.

17 Q In doing this work did the joint venture have  
18 to use vehicles of any kind?

19 A Yes.

20 Q What kind did they use?

21 A They used tandem dump trucks, pickup trucks,  
22 flatbed trucks.

23 Q Did they use only their own trucks or those of  
24 others?

1           A       No, we hired other trucks.

2           Q       For what period of time did Bowles hire other  
3 trucks?

4           A       Well, I believe the job started about, roughly  
5 June of 1971 and we hired trucks for the duration of the  
6 excavation which, I am not exactly sure right now, it was  
7 sometime in the latter part of 1972 and early 1973.

8           Q       Were there any other general contractors  
9 operating in the same area during the same period?

10          A       Yes. When we first started Winkelman was  
11 operating several hundred feet south of Cary Street, and  
12 approximately a year after we started our work Lane Construc-  
13 tion moved in with a separate contract with the Highway Depart-  
14 ment.

15          Q       Where did Lane undertake to do the work?

16          A       Lane started in several areas and they started  
17 -- I am not exactly sure, but sometime, roughly, after they  
18 moved in, in the Cary Street and Floyd Street area.

19          Q       What was Lane doing in the Cary Street-Floyd  
20 area?

21          A       They were beginning excavation and bridge  
22 building and other things such as that.

23          Q       Did Lane use its own trucks in this excavation?

24          A       To my knowledge, they hired trucks, to the best

1 of my knowledge.

2 Q Where would you hire trucks?

3 A Well, you have certain parties that you can  
4 call and they have trucks to rent and you rent them right  
5 out.

6 Q Are these independent contractors?

7 A They are independent truck drivers. Some of  
8 them are independent owners, anywhere from one truck to  
9 several.

10 Q Did Bowles hire trucks in this same manner?

11 A Yes, that is the way we hire our trucks.

12 Q Did Lane ever hire any of Bowles trucks?

13 A Not to my knowledge. They did hire trucks  
14 that we were using, that we used, but they were not connected  
15 with us at that time.

16 Q Was Lane on the job working when you left,  
17 when the joint venture left?

18 A Yes, they were.

19 Q Do you recall any conversations with Mr.  
20 Bailey about the shopping center, per se?

21 A Yes, I do.

22 Q When were those conversations?

23 A I am trying to think. I am not exactly sure  
24 but I met with Mr. Bailey on the shopping center property

1 and he said that trucks were going across and causing damage  
2 to his lot and he pointed out that some of them were E. G.  
3 Bowles trucks and we discussed it and looked at the areas  
4 and at one section I saw where some asphalt was being broken  
5 up and when he said it was our trucks, I knew that they  
6 possibly were coming through there but unauthorized by us.  
7 We had tried to make every effort to keep them off.

8 Q What else did you talk about about the  
9 potential damage?

10 A Well, we looked at several areas, we looked at  
11 the area beside the new High's store; at the area in the  
12 parking area itself and also the area in the alley behind the  
13 A&P.

14 Q Was any discussion about calling on Bowles to  
15 repair that?

16 A Yes, it was, and I agreed that we would repair  
17 the damage and at that time it appeared it would require  
18 approximately 75 tons of asphalt and cost approximately  
19 \$1200, and we agreed to do that.

20 Q Did you do it, actually?

21 A No, sir.

22 Q Why not?

23 A Well, at the time we had floods and one right  
24 after the other and our plant was tied up to the point that

1 we just could not operate so we were holding off as long as  
2 we could in order to do it with our own forces.

3 Q Do you know of your own knowledge whether or  
4 not the asphalt was repaired?

5 A Yes, I saw it, it was repaired.

6 Q But not by Bowles?

7 A Not by Bowles.

8 Q Did Mr. Bailey point out any other damages  
9 to you at your meeting?

10 A I believe he pointed out to me that a crane,  
11 some equipment was unloading beside the wall and I told him  
12 at the time I didn't know who it could be and I am not  
13 sure whether he said he knew or not. We just let it go at  
14 that.

15 Q What was he pointing out about the wall?

16 A It was a wall that was parallel to the west side  
17 of the shopping center right near the rear of the A&P.

18 Q Was that wall damaged?

19 A I am not sure right now, I just cannot remember.

20 Q In meeting with Mr. Bailey, you say you met  
21 with him one time on the job site or on the shopping center  
22 site?

23 A Well, it possibly could have been twice, I am  
24 not sure. We talked quite a bit and had right many letters

1 and I am not sure now.

2 Q During any of these conversations or letters  
3 did Mr. Bailey ever advise you that trucks other than those  
4 with Bowles' name were crossing the shopping center?

5 A Yes, he said there were other hired type trucks  
6 crossing.

7 Q Did you advise him they were your trucks?

8 A Yes, I did; at that time we were hiring trucks.

9 Q Did you suggest to him that it might also  
10 be somebody else's trucks?

11 MR. PEARSALL: May it please the Court, this  
12 is not cross examination; this is his witness.

13 THE COURT: Objection sustained.

14 MR. PEARSALL: I object to his leading.

15 BY MR. WALLACE:

16 Q Did you have discussions with Mr. Bailey about  
17 anybody else's trucks at that time?

18 A At this time I cannot remember.

19 Q Did you ever see any Bowles trucks in the  
20 shopping center lot yourself?

21 A Yes, I saw some in there. I encountered some  
22 and stopped them and turned them around.

23 Q Did you ever see any in there at lunch time?

24 A Yes, I have seen trucks in there at lunch time.



1 Q What were they doing?

2 MR. PEARSALL: May it please the Court, this  
3 witness is being led along to say exactly what he  
4 wants; this is his witness.

5 THE COURT: He asked what were the trucks doing.  
6 That is not leading.

7 MR. PEARSALL: He asked him if they were there  
8 at lunch time, which, obviously, suggests an answer.

9 THE COURT: Objection sustained as to the  
10 lunch time; sustained as to lunch time.

11 BY MR. WALLACE:

12 Q What were the trucks doing that you saw?

13 A During the noon hour, I presume they stopped to  
14 make purchases. I didn't stop and ask them.

15 Q Did Mr. Bailey ever complain to you about  
16 trucks being there at noontime?

17 A Not that I can recall.

18 Q What did you do in response to Mr. Bailey's  
19 request to stop the trucks?

20 A Well, we made every effort to stop them. We  
21 called all of our subcontractors and notified everyone in  
22 connection with the joint venture that they should not cross  
23 that parking lot in any manner and if we saw one coming across,  
24 we would certainly stop it.

1 Q Did you receive any more complaints from  
2 Mr. Bailey following that?

3 A Yes, we did.

4 Q When did you receive those?

5 A It was sometime after but I am not exactly --  
6 I am not exact on the date.

7 Q What was the nature of that complaint?

8 A Well, it was just that the trucks were still  
9 coming across and had not stopped and we again made every  
10 effort to stop them.

11 Q Did Mr. Bailey ever talk with you about a  
12 temporary construction easement?

13 A No, sir, he did not.

14 Q When was the first time you learned of a  
15 claim for that?

16 A Well, it was sometime after -- almost we time  
17 we finished the job. I am not exactly sure of the date.

18 Q What year would that have been?

19 A I assume that would have been 1973.

20 Q From whom did you learn about that?

21 A I learned it from our -- I believe from our  
22 insurance company and also from letters received -- I am not  
23 exactly sure how it came about.

24 Q Did E. G. Bowles, as a joint venture, erect any

1 fences along the right of way?

2 A No, sir, we did not, not in that area. We  
3 did in some areas but not that area.

4 Q Do you know whether or not a fence was erected  
5 next to the shopping center property?

6 A Yes, there was.

7 MR. PEARSALL: He can ask him if there were  
8 fences but to tell him where they were erected, it is  
9 leading.

10 THE COURT: Overruled.

11 BY MR. WALLACE:

12 Q I didn't hear his answer.

13 A Yes, there were fences installed along the  
14 right of way.

15 Q Do you know who put those fences up?

16 A Not definitely. I know we did not, but I am  
17 not sure who did.

18 Q Did you ever receive any request to put up any  
19 such fences?

20 A Not that I can remember.

21 Q What would be the purpose of such a fence?

22 THE COURT: Objection sustained. If he didn't  
23 put them up, you are asking him what was in somebody  
24 else's mind.

1 BY MR. WALLACE:

2 Q Where was this fence located that you saw in  
3 this area?

4 A I am not exactly sure. I assume it was along  
5 the right of way but I never made an attempt to determine that.

6 Q I didn't mean that; where did it start and  
7 where did it end?

8 A As near as I remember, it started near the  
9 brick building at Cary Street and ended approximately at  
10 Floyd Avenue.

11 Q Do you recall what kind of fence it was?

12 A I believe it was just a farm fence.

13 MR. WALLACE: I don't have any further  
14 questions.

15 CROSS EXAMINATION

16 BY MR. PEARSALL:

17 Q Mr. Turner, the bridge work, bridge building  
18 that Lane was going to do, was not the temporary bridge at  
19 Floyd, was it?

20 A No, sir, they did not build any temporary  
21 bridges.

22 Q There wasn't any permanent bridge built at  
23 Floyd?

24 A That is right.

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MR. PEARSALL: No further questions.

THE COURT: Is there anything on redirect?

REDIRECT EXAMINATION

BY MR. WALLACE:

Q Mr. Turner, in response to Mr. Pearsall's question, you answered about the joint venture's responsibility to direct; what directions were given by the joint venture to these truck drivers?

A Well, they would report to a certain area and we would direct them to the area we wanted them to work for that particular day or we would tell them the night before exactly where we wanted them to report the next day.

Q Once they reported there what directions were they given?

A They were given directions what dump or what area to haul to. Usually it was always the Luck Quarry dump; some areas we hauled on the job for backfill.

Q Where was the Luck Quarry dump?

A It was down on Portland Place, down below Windsor Farms, almost at the end of Portland Place.

Q In relation to the shopping center and the work adjacent thereto, was it north or south?

A It was south.

MR. WALLACE: That is all.

RECROSS EXAMINATION

BY MR. PEARSALL:

Q Mr. Turner, as far as the State of Virginia with whom the joint venture had a contract, was there any difference between your trucks and your hired trucks and the trucks of your subcontractors as far as your responsibility for the conduct of the work?

MR. WALLACE: I would object to his answer to that question. It calls for a legal conclusion which is beyond the capability of this witness.

MR. PEARSALL: I will rephrase the question.

THE COURT: Sustained.

BY MR. PEARSALL:

Q How long have you been in the contracting business?

A Approximately 30 years.

Q And, as such, have you been in charge of projects of this magnitude?

A Yes, I have, just about that size; that was about the largest, I believe.

Q Have you been in charge of the performance for the State of Virginia?

A Yes, I have.

Q And as the project manager do you think you

1 understand the obligations of the contract to the State of  
2 Virginia?

3 A I feel like I do, yes.

4 Q And in your understanding of your obligations  
5 to the contract to the State of Virginia, do you think that  
6 you are responsible for the work contracted to be made regard-  
7 less of by whom it is done?

8 MR. WALLACE: If Your Honor please, again it  
9 is calling for a legal conclusion.

10 MR. PEARSALL: You qualified this witness as  
11 knowing what his responsibilities are and I am asking  
12 if this is what he understands to be his responsi-  
13 bility.

14 THE COURT: Objection sustained. You don't need  
15 a legal expert here. The Court is supposed to be  
16 able to draw those kinds of conclusions.

17 BY MR. PEARSALL:

18 Q Did you consider it your responsibility?

19 THE COURT: That is a good question.

20 MR. PEARSALL: I thought that was the question  
21 I was asking.

22 BY MR. PEARSALL:

23 Q Do you consider it your responsibility to cause  
24 the work, whether it was done by your own employees or by

1 hired trucks or by subcontractors or by hired trucks of  
2 subcontractors, to be done strictly in accordance to the  
3 contract?

4 A Well, with hired trucks, actually working on  
5 the project, yes.

6 Q I am not talking about Saturday nights, I am  
7 talking about in doing the work?

8 A I would like to clarify it.

9 Q Anyway you want to.

10 A On hired trucks, if they do any damage, if  
11 they cause anything else, they are responsible for that part  
12 but we are responsible to show them where to work and where  
13 to go with their load, let's put it that way.

14 Q You mean their insurance takes care of any  
15 accidents they have?

16 A That is correct, or public liability.

17 Q As far as getting the work done is it their  
18 responsibility to read the contract and find out what work  
19 is to be done?

20 A No, sir.

21 Q Is it their responsibility to find out what  
22 area they are to work?

23 A No, sir.

24 Q Is it their responsibility to find out what area



1 they can go?

2 A Well, in some instances, yes, I would say that.

3 Q The independent truck driver from Glen Allen,  
4 Virginia is supposed to read the contract and find out in what  
5 areas he can work?

6 MR. WALLACE: He testified they weren't supposed  
7 to read the contract.

8 MR. PEARSALL: I thought he said they were.

9 MR. WALLACE: You asked him about where they  
10 could go.

11 BY MR. PEARSALL:

12 Q Let's go back, maybe he misunderstood the  
13 question. As project manager is it your opinion or your  
14 belief that it is the responsibility of the truck driver who  
15 owns his own truck, comes from Glen Allen or anywhere, to  
16 read the contract and find out in what areas he can drive that  
17 truck?

18 MR. WALLACE: If Your Honor please, before he  
19 answers, he asked for an opinion. I object to his  
20 opinion.

21 MR. PEARSALL: I asked for his opinion as  
22 project manager.

23 MR. WALLACE: He might ask them what they do,  
24 but not what they are supposed to do.

1 THE COURT: I will overrule the objection.

2 He is qualified -- he has qualified him for having a  
3 number of years experience in this area. I will allow  
4 the question.

5 BY MR. PEARSALL:

6 Q Is it your opinion, Mr. Turner, as project  
7 manager, that it is up to the truck driver that you hire to  
8 haul for you to read the contract to find out in what areas  
9 he can operate?

10 A No, it is not.

11 Q Is it your responsibility as project manager  
12 to keep him out of areas he is not permitted to go into?

13 A Yes.

14 MR. PEARSALL: No further questions.

15 THE COURT: Let me ask a question.

16 BY THE COURT:

17 Q On this job, if you hired Cosby to do some  
18 hauling for you, would you tell him what route to take when  
19 he left the site?

20 A No, sir, not route; we would tell him where to  
21 load and where to take the load.

22 Q Once he left your job, the route that he took  
23 to get to the site or dump, who would choose that?

24 A The truck driver himself chooses that unless we

1 direct otherwise.

2 Q Did you direct these drivers as to what route  
3 to take once they left your job site?

4 A The only thing we directed is that they should  
5 go down Portland Place to the dump. They could take any of  
6 several streets to get to that area.

7 BY MR. PEARSALL:

8 Q Did you consider it your responsibility as  
9 project manager to keep the drivers off of any area that you  
10 didn't have a right to enter under the contract?

11 A If we saw them on there, yes, we should.

12 Q But if anybody told them they were on there,  
13 whether you saw them or not, did you consider it your  
14 responsibility to keep them off?

15 A Yes.

16 MR. PEARSALL: No further questions.

17 BY THE COURT:

18 Q You were over at the shopping center on a  
19 number of occasions?

20 A Yes, sir.

21 Q Did you see any trucks over there that did not  
22 either belong to you or had not been hired by your company,  
23 tandem trucks?

24 A I am not sure. I am sure they were, but I

1 cannot point out any instances.

2 BY MR. PEARSALL:

3 Q Mr. Turner, I believe you said that the  
4 construction shack, or the trailer, was in -- was on  
5 Hamilton?

6 A On Hamilton, yes, sir, about one block south  
7 of Broad.

8 Q Did you spend most of your time there?

9 A No, sir, I spent part of my time there but the  
10 majority of the time was over the entire project.

11 Q And would you have any estimate of the time  
12 that you spent in the vicinity of the shopping center, that  
13 is, between Cary and Floyd?

14 A I would say it was divided between the other  
15 areas; once or twice a day, maybe more often than that.

16 Q So you would sort of cruise the project?

17 A That is correct.

18 Q And you might be at this location a couple of  
19 times a day?

20 A That is right.

21 Q Or you would be at other locations if more  
22 work was going on at other locations?

23 A Usually where the majority of the work was  
24 going on is where we would be. If it was going on at Cary

1 and Floyd, I would be there.

2 Q Wasn't much work going on for most of the  
3 project area most of the time?

4 A Yes, it was going on from Westwood Avenue to  
5 south of Cary.

6 Q As project manager, you would cruise that  
7 entire area and you might be in this vicinity once or twice  
8 a day?

9 A That is correct.

10 MR. PEARSALL: No further questions.

11 (The witness stood aside.)

12 M. I. BLANKENSHIP, being previously sworn,  
13 testified in behalf of the defendant, as follows:

14 DIRECT EXAMINATION

15 BY MR. WALLACE:

16 Q Mr. Blankenship, you have been previously  
17 sworn. Did you ever meet with Mr. Bailey at the job site?

18 A Not to my knowledge, that I can remember.  
19 He testified I did but I can't remember that I did.

20 Q You deny that you did or you just don't  
21 remember?

22 A Well, to the best of my knowledge, I didn't.  
23 Of course, any testimony I make is to the best of my  
24 knowledge, so to the best of my knowledge I can't remember

1 if I met him.

2 Q Did you talk to Mr. Bailey on the telephone  
3 at any time?

4 A Yes, I did.

5 Q In what regard?

6 A To trucks using the parking lot and so on,  
7 and also that we were, you know, had planned to make certain  
8 repairs to the lot.

9 Q Did you personally ever go to the parking lot?

10 A Well, I went up there at lunch time some, you  
11 know, certain instances, in that case.

12 Q Did you see any trucks there when you were  
13 there?

14 A Yes, sir, I have seen on several occasions at  
15 lunch time, not -- I can't remember any other time other than  
16 lunch time that I did see any crossing that lot.

17 Q Can you identify the ownership of the trucks?

18 A Well, some belonged to Bowles and, like they  
19 were numerous hired trucks on the project, sometimes they  
20 were employed by the joint venture and other times they were  
21 employed by Lane Construction.

22 Q Did you ever see any trucks of any kind  
23 crossing that property?

24 A No, I didn't. The only time I saw them was at

1 lunch time.

2 Q Did you personally receive any complaints about  
3 trucks crossing the shopping center by naming the trucks?

4 A Well, I think some of the correspondence  
5 revealed some of them were Bowles.

6 MR. PEARSALL: May it please the Court, I  
7 object to reference to correspondence, in general.  
8 If he wants to tell of his personal knowledge, in  
9 response to the question, that is another story, but  
10 I do object to a generalized reference to some  
11 exchanges when we have had such a real tight session  
12 here as to what exchanges can come in.

13 THE COURT: Objection sustained as to the  
14 form of the question, dealing with correspondence.

15 BY MR. WALLACE:

16 Q Did it come to your attention that trucks with  
17 specific names were crossing or on the shopping center  
18 property at any time?

19 A Well, it did, in one letter, list specific  
20 names, which was the Richmond Shopping Center, but it was  
21 the shopping center on the east side of Thompson Street.

22 Q In any of your conversations with Mr. Bailey --  
23 strike that. In your conversations with Mr. Bailey what did  
24 you talk about in regard to the shopping center and damages?

1           A       Well, my dealings with that is when we had  
2           agreed -- Mr. Turner met with Mr. Bailey and agreed we would  
3           make several repairs and so on to the parking area, the  
4           blacktop area, and that we were having difficulty with the  
5           asphalt plant at the time of the flood and so on, and that  
6           we were going to make every effort to take care of this.

7           MR. WALLACE: That is all I have.

8           MR. PEARSALL: No questions.

9           (The witness stood aside.)

10          THE COURT: Is there any argument for the  
11          plaintiff, or motions?

12          MR. WALLACE: Judge, I renew at this time my  
13          motion as to the value of the temporary construction  
14          easement on two grounds; one, that the Code Section  
15          or Statutory Section of the Specifications, Highway  
16          Road and Bridge Specifications, does not provide for  
17          that type of coverage but, second, and more importantly,  
18          the plaintiff has failed to prove his damages in that  
19          regard in that he based the valuation on a contract  
20          negotiation which never came to fruition and on  
21          actual leases with two tenants for buildings and rents  
22          associated thereto. I don't think he has borne the  
23          burden of showing the value of the land or of the  
24          use, per se, other than to pull a figure out of the



PROCEEDINGS

(Pursuant to agreement, the case was tried without a jury; the court reporter was sworn and the witnesses were sworn and not excluded.)

(The motion to quash the subpoena duces tecum, made by counsel for the defendants, was argued.)

THE COURT: I won't rule on it since the plaintiff is not requesting that the Court rule at this time, which I think is a very wise posture for us to take at this point. Is there an opening statement by the plaintiff?

MR. PEARSALL: Probably some little degree of orientation is in order, Your Honor. The plaintiff here is Richmond Shopping Center, Incorporated which owns shopping center properties between Nansemond and Thompson, which are not involved in this litigation, and shopping center properties to the west of Thompson between Thompson and what used to be the Williams and Harvey Nursery, going toward the Belt Line railroad, which is the subject of this controversy. We are talking about the Richmond Shopping Center properties between Cary and Broad, two city blocks, between west of Thompson and toward the railroad tracks, approximate depth of a couple of hundred feet. The defendants

1 are the joint venture of Wiley N. Jackson Company,  
2 a Roanoke firm; E. G. Bowles, Inc., I believe, and  
3 E. G. Bowles Contractor, the three of them signing,  
4 as joint ventures, a contract with the Highway  
5 Department to do the work generally of an excavation  
6 nature adjacent to the shopping center property in  
7 the putting in of I-95 in the Seaboard Coast Line  
8 ditch. The other defendant is the Surety Company  
9 on the performance bond of the joint venture. The  
10 Surety Company, although it also happens to write  
11 insurance, as well as bonds, is not sued as an  
12 insurance carrier; it is sued as the maker of the  
13 performance bond for the performance of the contract  
14 with the Highway Department.

15 The project, I believe, will become more  
16 evident to the court in the course of orderly examina-  
17 tion of the witnesses and I won't go into great  
18 detail about it now. We are seeking here the value  
19 of a temporary construction easement used without  
20 payment and the cost of restoration of the injury to  
21 our property. Now as Your Honor knows, a temporary  
22 construction easement is a privilege of crossing and  
23 working from land generally adjacent to or in the  
24 vicinity of other work, that is, permanent work, that

1 is used for the convenience and in performing the  
2 other work, and, of course, it is customarily paid  
3 for.

4 Now we believe the evidence will show that  
5 the joint venture entered into a contract <sup>and</sup> in the  
6 bonding -- and the bonding company entered into a  
7 performance bond that included the negotiation in  
8 advance for permission to cross or work from the  
9 Richmond Shopping Center, company property. The  
10 evidence will show that despite repeated protests,  
11 that the joint venture did work on the property  
12 without paying privilege and the evidence will show  
13 that the contract with the Highway Department and the  
14 performance bond for performance of that contract  
15 included the obligation to restore the property of  
16 the Richmond Shopping Center, that they did not restore  
17 it, that there was approximately \$2,400 worth of  
18 broken pavement in the portion in front of the A&P  
19 store and the total appropriation in the gravel  
20 parking lot in the rear of the A&P store.

21 On the basis of the Court's action on the  
22 demurrer which said we had no right to sue as third  
23 party beneficiary under that contract, the law of  
24 this case is that the Richmond Shopping Center was

1 an intended beneficiary which may sue under such  
2 contract for the value of the privilege that was  
3 actually exercised without permission and for the  
4 cost of restoration. The evidence will further show  
5 that the Highway Department said that under this  
6 contract we were to sue directly the contractor and  
7 his bondsman and we are here today trying to get  
8 judgment against the joint venture and its performance  
9 bondsman for the reasonable value that would have been  
10 paid in advance for the privilege which they exercised  
11 without paying for it, and without getting it , and  
12 for the cost of restoration of the former condition.

13 It is a third party beneficiary contract  
14 obligation to do two things, to negotiate for and  
15 obtain permission to cross and work from and to restore  
16 the property to its former condition. As Your Honor  
17 knows, the Highway Department obtains such temporary  
18 construction easements and did in this instance, as  
19 it believes are essential to the progress of the work,  
20 and the two components of those are the payment in  
21 advance for the privilege of using it and crossing it  
22 and, coupled with it, an obligation to restore it to  
23 its former condition. We are suing as third parties,  
24 suing both the contracting parties and the performance

1                   bondsmen for those two items.

2                   THE COURT:   Maybe Mr. Wallace will clear it up  
3                   as to which matters are not controverted and which  
4                   matters are; perhaps he will clear it up.

5                   MR. WALLACE:   Just as an adjunct or addition,  
6                   and I won't go back over a great deal of what he  
7                   said, but the only real factual dispute in the case  
8                   is narrowed down to who did the actual crossing across  
9                   this particular parking lot and who did the damage  
10                  that is being sought for here; that is the only factual  
11                  issue.

12                 THE COURT:   Is the amount of the damage  
13                  contested?

14                 MR. WALLACE:   Yes, sir, that is the second  
15                  factual issue and the third issue, and this is really,  
16                  as I see it, one of the key issues here, is the  
17                  plaintiff entitled to third party beneficiary relief  
18                  or is there some other relief he ought to be suing  
19                  under and that is where the case must rest, in my  
20                  opinion, by virtue of the contract between the State  
21                  of Virginia, Commonwealth of Virginia, and the joint  
22                  venture --

23                 THE COURT:   Wasn't that on the demurrer?

24                 MR. WALLACE:   No, sir, I don't think it was,

1                   and I reserve, and want to restate it here --

2                   MR. PEARSALL: May it please the Court, I  
3                   don't want to interrupt but the law of this case is  
4                   that a demurrer was filed raising this precise question.  
5                   The demurrer was overruled. If we are going to,  
6                   before we get into the case, have to reargue the  
7                   demurrer and have this Court -- Judge Williams did  
8                   it in that instance -- join with Judge Williams in  
9                   that or change the law of the case, then I reckon  
10                  we will have to do it but it is unusual that on the  
11                  day of trial that we have any such position as this.  
12                  I had always understood that they didn't agree with  
13                  Judge Williams and intended to take me up whether I  
14                  got 10 cents or \$10,000, but that has nothing to do  
15                  with changing the law of this case which is that we  
16                  may sue as third party beneficiaries on this contract  
17                  and bond.

18                  MR. WALLACE: May I talk for a few moments  
19                  without the interruption?

20                  MR. PEARSALL: I apologize for the interruption.

21                  MR. WALLACE: Under the theory of Mr. Pearsall  
22                  he is suing in this case under Section 107.12, saying  
23                  that under this Virginia Department of Highway, Road  
24                  and Bridge Specification Paragraph, he is entitled to

1 third party beneficiary rights. Section 107.12, on  
2 its face, and that is what the demurrer says, the  
3 things you plead are insufficient, as a matter of  
4 law. The Court overruled our objection to the  
5 demurrer, saying there is no such thing as a third  
6 party beneficiary suit on this type of thing and  
7 these types of contracts but the only section in  
8 issue was 107.12 --

9 THE COURT: Did Judge Williams rule on that  
10 matter in the demurrer?

11 MR. WALLACE: Yes, sir, but I think it is pled  
12 it is sufficient as a matter of law if there is no  
13 other defense; that is what I want to talk about.

14 Section 107 of these Specifications say what  
15 are the legal relations between these parties, the  
16 contractors and what is his responsibility to the  
17 public, and then there are many sub-sections. Sub-  
18 section 12 requires, as Mr. Pearsall corrected stated,  
19 "You must protect and restore the property and  
20 landscape of the right of way of adjacent property  
21 owners." That is part of the contract between the  
22 State and the contractor, but he does not bring to  
23 the Court, nor does the Court consider, and we can  
24 do this in this case because under demurrer you are

1 considering only the pleadings, but under 107.14,  
2 two sections later, under this same statement of  
3 responsibility, is the effective language and I will  
4 quote it, "It is not intended by any of the provisions  
5 of any part of the contract to create the public or  
6 any member thereof as a third party beneficiary here-  
7 under or authorize anyone not a party to this contract  
8 to maintain a suit for personal injuries or property  
9 damage pursuant to the terms of the provisions of the  
10 contract." I think in this case since we are dealing  
11 with the real issue of the case and we are not dealing  
12 with demurrers that we can bring in all sections of the  
13 contract to show that under the law of Virginia you  
14 must show that a third party beneficiary is one named  
15 and /or intended to be covered in the contract. The  
16 specific term of the contract says no, it is not to  
17 be covered. We are excluded from this kind of action.  
18 Mr. Pearsall has probably another action for his  
19 alleged injury here but not third party beneficiary  
20 action.

21 THE COURT: Are you saying to me, so that I  
22 clearly understand you, that it is possible in a con-  
23 tract between the Highway Department and this joint  
24 venture, to exclude a landowner's right to sue under a



1 statute of the Commonwealth of Virginia?

2 MR. WALLACE: I am not saying that because the  
3 statute of Virginia as interpreted by the cases is  
4 the statute saying there are third party beneficiary  
5 rights. The Statute says it must benefit him in whole  
6 or in part and it must show that he is intended to be  
7 included and there are cases we say when you exclude  
8 that party and the most telling one is this newspaper  
9 case in Newport News. That says in the case where  
10 a party is not named and apparently he is not intended  
11 as a beneficiary, then he can be excluded and the  
12 contract permits exclusions if the contract calls for  
13 it. He may have another action but he does not have  
14 this action as a matter of law and that is really the  
15 essence of the case. If we get by that, then I think  
16 the question of damages and who did it is material.  
17 Up to that point I don't think it is material on a  
18 demurrer, as he suggested, and on its face the pleading  
19 does not -- on its face the pleading does state a  
20 cause of action but the pleading does not take into  
21 account the effect of Section 107.14 which is also  
22 a part of the responsibility to the public and must be  
23 included and thought of in the case at law and the  
24 demurrer you are stuck with just what is pled. You

1           can't bring in all these good outside things you  
2           would like to bring in. That is basically my  
3           opening statement. Obviously, I disagree with the  
4           damage theory and, obviously disagree that we were  
5           the ones crossing and causing all the damage and I  
6           think that is a matter of proof.

7           MR. PEARSALL: May it please the Court, the  
8           demurrer disposed of this matter. This was something  
9           that they were privy to at the time. They didn't  
10          raise it, they could have raised it, it is part and  
11          parcel of the contract. If the contract was not  
12          in its entirety attached to the pleading, they could  
13          have gotten it before the court and disposed of it  
14          at that time. This action was instituted at least  
15          two years ago; to drift along from then until now,  
16          and on the morning of the trial, and, thank goodness  
17          a jury isn't here, to certainly change the law of the  
18          case is absolutely unthinkable. Had it not been  
19          covered by demurrer and being confronted with the  
20          Court having said a cause of action is stated and we  
21          will proceed to trial on that, they should have,  
22          by some other pleading, if they thought the demurrer  
23          didn't sufficiently settle the matter, brought it to  
24          the Court's attention and have the Court rule on it,

1           so we think this comes entirely too late and should  
2           not be considered by this Court. The law of this  
3           case, as the Court sat down today, is that the  
4           pleadings stated a cause of action on third party  
5           credit to beneficiary theory. If they had anything  
6           to get rid of that theory and try this case solely  
7           as a matter of law, they could have utilized any of  
8           the numerous pleadings, positions, that are available  
9           under our very liberal pleadings rules and have the  
10          matter disposed of before now, and the interpretation  
11          which he puts on 107.14 is not a sound interpretation,  
12          anyway, and I am prepared, if the Court feels like it  
13          must now reexamine the law of the case, I am prepared  
14          to go into why this reading of 107.14 does not  
15          prohibit this action but we are saying, first, that it  
16          was handled by the demurrer and if for any technical  
17          reason whatsoever they felt like they had another  
18          bite at the cherry, they should have done so before  
19          now.

20                 It is untimely to come in on the morning of  
21                 trial when we were about to have a jury empaneled and  
22                 make the statement that the law of the case is  
23                 different from that which the parties treated it as  
24                 being because of something they failed to bring to

1 the attention of the Court. If the Court doesn't  
2 feel it can rule on the basis of that, I am prepared  
3 to go forward and argue this matter.

4 THE COURT: Is there anything else on this  
5 point, Mr. Wallace?

6 MR. WALLACE: Only speaking to the lateness of  
7 the issue, Mr. Pearsall is aware of this Section and  
8 had been for some time. We have talked in my office  
9 one day --

10 MR. PEARSALL: November 26, 1975.

11 MR. WALLACE: -- and you have known all along  
12 we were going to raise this issue.

13 MR. PEARSALL: No, I did not, not until  
14 November 26, and on the 26th you said, "What about this,  
15 Mr. Pearsall?" "It may not mean anything."

16 THE COURT: In view of Judge Williams' ruling  
17 on the demurrer, the Court will rule that is res  
18 judicata, on the theory of the case. I note your  
19 exception to the Court's ruling. Why don't we take  
20 a recess now until quarter after 11:00.

21 (A short recess was taken.)

22 THE COURT: Are you ready to proceed?

23 MR. PEARSALL: Yes, Your Honor. I call Mr.  
24 M. L. Blankenship.