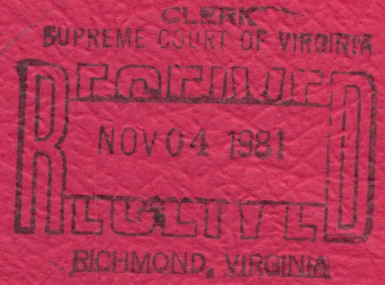


226 VA125



• IN THE SUPREME COURT OF VIRGINIA

ALFRED BROWN, ET. AL., ²²⁶
V. _{va. 125}

THE TAZEWELL COUNTY WATER AND SEWAGE
AUTHORITY

APPENDIX I

SUPREME COURT OF VIRGINIA

ALFRED BROWN, CLYDE B. RATLIFF,
JOHN DOE and JANE DOE, along with
other residents of College View
Addition, Wardell, Virginia, Appellants,
against Record No. 801634
Circuit Court No. C-40-7864
Tazewell County Water and Sewerage
Authority, Appellee.

CONTENTS OF APPENDIX

VOLUME I

Appendix A: Original Bill of Complaint and Supporting Memo

Appendix B: Temporary Restraining Order

Appendix C: Memorandum in Opposition to any preventive Injunctive
Action

Appendix D: Transcript of Hearing, 26 of June 1980, Circuit Court
Of Tazewell County

VOLUME II

Appendix E1: Exhibits filed at Hearing (Tazewell Subdivision
Ordinance) Restrictive Covenants

Appendix E2: Exhibits filed at Hearing, Relevant Deeds

Appendix E3: Exhibits filed at Hearing, Relevant Deeds. HORNE TO HORTON

Appendix E4: Exhibits filed at Hearing, Relevant Deeds. HORNE TO
ABSHER

Appendix E5: Exhibits filed at Hearing, Relevant Deeds. HORNE TO
BURKE

Appendix E6: Exhibits filed at Hearing, Relevant Deeds. HORNE TO
RATLIFF

S. STROTHER SMITH, III

ATTORNEY AT LAW

P. O. BOX 1204

117 W. MAIN STREET

ABINGDON, VIRGINIA 24210

1 Appendix E7: Exhibits filed at Hearing, Relevant Deeds. HORNE TO
2 RICHARDSON

3 Appendix F: Order for Permanent Injunction

4 Appendix G: Petition for Reconsideration and State of Execution

5 Appendix H: Notice of Appeal and Assignment of Error

6 Appendix I: Certificate Granting Appeal and Appeal Bond
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SUPREME COURT of VIRGINIA

Alfred Brown, Clyde B. Ratliff,
John Doe and Jane Doe, along with
other residents of College View
Addition, Wardell, Virginia,

Appellants,

against Record No. 801634
 Circuit Court No. C-40-7864

Tazewell County Water and Sewerage
Authority,

Appellee.

APPELLANTS APPENDIX A
ORIGINAL BILL of COMPLAINT
and
SUPPORTING MEMO

1 COMMONWEALTH of VIRGINIA
2 IN THE CIRCUIT COURT OF THE COUNTY OF TAZEWELL
3
4

5 SUBPOENA IN CHANCERY
6
7
8
9

10 The party upon whom this writ and the attached paper are served
11 is hereby notified that unless within twenty-one (21) days after
12 such service, response is made by filing in the Clerk's Office of
13 this court a pleading in writing, in proper legal form, the allega-
14 tions and charges may be taken as admitted and the court may enter
15 a decree against such party, either by default or after hearing
16 evidence.

17 Appearance in person is not required by this subpoena.
18

19 Done in the name of the Commonwealth of Virginia, this 6th
20 day of June, 1980.
21

22 RHEA F. MOORE, JR., CLERK
23

24 s/ Susie B. Hackworth, DEPUTY CLERK
25

s/ Roger W. Mullins, p.q.
Tazewell, Va.

(Office Address)

Appellants Appendix A
Page 1.

1 VIRGINIA: IN THE CIRCUIT COURT OF TAZEWELL COUNTY

2 TAZEWELL COUNTY WATER AND SEWERAGE AUTHORITY,
3 a political subdivision of the Commonwealth
4 of Virginia,

COMPLAINANT

5 VS X BILL OF COMPLAINT and
6 DECLARATORY JUDGMENT

7 ALFRED BROWN,
8 College View Addition
9 Wardell, Virginia,

10 CLYDE B. RATLIFF
11 College View Addition
12 Wardell, Virginia

13 JOHN DOE and JANE DOE, along with other
14 residents of College View Addition
15 Wardell, Virginia,

DEFENDANTS.

16 TO THE HONORABLE ROBERT L. POWELL, JUDGE OF SAID COURT:

17 Now comes the Tazewell County Water and Sewerage Authority,
18 a political subdivision of the Commonwealth of Virginia and moves
19 this Honorable Court for relief in the form of a temporary
20 restraining order against the defendants, residents of College View
21 Addition, Wardell, Virginia, and further for a Declaratory Judgment
22 as to the rights and liabilities of the parties in regard to the
23 subject matter of this suit, and in support thereof alleges as follows:

24 1. That on the 1st day of February, 1971, the Board of
25 Supervisors of Tazewell County adopted a subdivision ordinance pur-
suant to Section 15.1-465 of Chapter 11, Title 15.1 of the Code of
Virginia, 1950, as amended.

2. That on the 11th day of April, 1974, a plat of the

Appellants Appendix A
Page 2.

1 subdivision of what is now known as College View Addition was filed
2 for recordation in the Clerk's Office of the Circuit Court of
3 Tazewell County in Deed Book 392, page 171.
4
5
6

7 Filed in the Clerk's Office the 6th day of June, 1980 12:17 p.m.

8 Wat Tax \$_____ Teste:
9 Fee _____
10 Deposit _____ s/ Rhea F. Moore Jr., Clerk
11 Total Paid \$_____ s/ Susie B. Blackworth D.C.
12
13

14 3. Access to the tracts of land shown on the aforesaid
15 plat is provided by a street forty (40) feet in width, to be used in
16 common by all owners therein.

17 4. Pursuant to Section 15.1-478 of the Code of Virginia,
18 1950, as amended, the recordation of a plat of a subdivision
19 operates by law as a transfer, in fee simple, to the County of
20 Tazewell that portion of the plat set apart for alleys, streets
21 or other public use and also transfers to such county any easement
22 indicated on such plat to create a public right of passage over the
23 same.

24 5. On the 5th day of June, 1980, the defendants acting in
25 concert did obstruct the passage of the employees and/or sub-
contractors of R & G Construction Company, Inc., agent of the

Appellants Appendix A
Page 3.

1 complainant in its efforts to construct a water and/or sewer line
2 along the public right of way as shown on the aforesaid plat.

3 6. That the defendants maintain that they are the sole
4 owners of said forty (40) foot right of way and that said right of
5 way or street is not a public street.

6 7. That complainants maintain that said forty (40) foot
7 street is a public right of way pursuant to Section 15.1-478 of the
8 Code of Virginia, 1950, as amended.

9 8. That complainants have further obtained a written
10 easement from the owner of Tract No. 7 as shown on the aforesaid plat
11 to construct said water and/or sewer line from State Route 603 to
12 Tract No. 7.

13 9. That all deeds of conveyance by the owner and/or
14 developer of the aforesaid subdivision reserved to the grantors and
15 all lot owners within said subdivision easements over and across all
16 properties within said subdivision for the purpose of construction,
17 operation, and maintenance of water and/or sewer lines.

18 10. That by virtue of the state law and by virtue of the
19 easements heretofore validly obtained, complainants have the
20 absolute right to enter upon the forty (40) foot street as shown on
21 the aforesaid plat for the purpose of construction, installation,
22 operation and maintenance of any public water and/or sewer system.

23 WHEREFORE, complainants pray to this Honorable Court for
24 relief in the form of a temporary restraining order to restrain the
25 defendants and all other persons similarly situated from further

Appellants Appendix A
Page 4.

1 interference or harrassment and obstruction by the complainant or
2 its designated agents in the lawful construction, installation,
3 operation, and maintenance of a water and/or sewer system over,
4 along or adjacent to the forty (40) foot street as shown on the plat
5 of record in the Clerk's Office of the Circuit Court of Tazewell
6 County in plat book 8, at page 109; that the temporary restraining
7 order heretofore prayed for be made a temporary injunction after
8 hearing to be merged into a mandatory permanent injunction upon
9 proper evidence to be presented at a proper hearing; and further
10 the complainant prays for a declaratory judgment adjudicating its
11 rights and liabilities in connection with the subject matter of this
12 suit and for its costs and expenses in this cause; and your comp-
13 lainant prays for such other special or general relief as to this
14 Court may seem meet.

15
16 TAZEWELL COUNTY WATER AND SEWERAGE
17 AUTHORITY

18 s/ ROGER W. MULLINS, Of Counsel

19
20 Roger W. Mullins, Esq.
21 P. O. Box 843
22 Tazewell, VA 24651

23 A COPY, TESTE:
24 RHEA F. MOORE, JR., CLERK OF THE
25 CIRCUIT COURT OF TAZEWELL COUNTY
s/ Susie B. Hackworth
DEPUTY CLERK

Appellants Appendix A
Page 5.

1 VIRGINIA: IN THE CIRCUIT COURT OF TAZEWELL COUNTY

2 TAZEWELL COUNTY WATER & SEWERAGE AUTHORITY,

COMPLAINANT

3 VS X NOTICE

4 ALFRED BROWN, ET ALS,

DEFENDANTS.

5 TO: ALFRED BROWN, College View Addition, Wardell, Virginia
6 CLYDE B. RATLIFF, College View Addition, Wardell, Virginia

7 TAKE NOTICE: That on the 9th day of June, 1980, at
8 9:30 o'clock a.m., at the Circuit Court of Tazewell County,
9 Virginia, at Pearisburg, Virginia, I will petition the Court for the
10 entry of a temporary restraining order on the suit filed in the
11 Clerk's Office of the Circuit Court on June 6th, 1980. You may
12 appear at that time to protect your interest.

13
14 TAZEWELL COUNTY WATER AND
SEWERAGE AUTHORITY

15
16
17
18 s/ Roger W. Mullins
Of Counsel

19
20 Roger W. Mullins, Esq.
P. O. Box 843
21 Tazewell, Virginia 24651

22
23
24
25 Appellants Appendix A
Page 6.

1 VIRGINIA: IN THE CIRCUIT COURT OF TAZEWELL COUNTY
2 TAZEWELL COUNTY WATER AND SEWERAGE AUTHORITY, COMPLAINANT,
3 VS X
4 ALFRED BROWN, et als, DEFENDANTS.
5

6 MEMORANDUM IN SUPPORT OF
7 PREVENTIVE INJUNCTION ACTION

8 The complainant submits the following Memorandum in support
9 of their suit seeking a temporary injunction and declaratory
10 judgment against the defendants.

11 FACTS

12 The Board of Supervisors of Tazewell County adopted a
13 subdivision ordinance on the 1st day of February, 1971. A plat of
14 a subdivision known as the Horne Estate and hereinafter referred to
15 as "College View Addition" was recorded in the Clerk's Office of the
16 Circuit Court of Tazewell County on the 11th day of April, 1974, in
17 Plat Book 8, at page 109. The developer subsequently conveyed the
18 seven tracts of land, as shown on the plat, by six separate deeds of
19 conveyance, which have been offered as evidence in this case. The
20 plat as recorded includes various streets which opened and paved by
21 the developer and are currently in use. On or about the 1st day of
22 May, 1980, the agent of complainant entered upon the forty (40)
23 foot street designated on the aforesaid plat, for the purpose of
24 construction of public water and sewerage lines. On that and
25 several subsequent occasions defendants physically interrupted and

Appellants Appendix A
Page 7.

1 and interfered with the agent of complainant in the construction of
2 the water and sewerage lines. The suit was instituted seeking
3 injunctive relief and declaratory judgment as to the rights of the
4 parties in and to the public streets as shown on the subdivision
5 plats.

6
7 ARGUMENT

8 I. Dedication of Public Streets by Recordation of Subdivision Plat.

9 Complainant maintains that the streets of a subdivision as
10 shown upon a plat of lots become public streets by the recordation
11 of such plat and conveyance of lots in accordance with such plat.

12 By statute the legislature has provided:

13 "The recordation of such plat shall operate to transfer,
14 in fee simple, to the respective counties...such portion
15 of the premises platted as is on such plat set apart
for streets, alleys, or other public use..."

16 Section 15.1-478, Code of Virginia, 1950, as amended.

17 Only one condition precedent is required for the statute to
18 become effective; the county shall have first adopted a subdivision
19 ordinance. Section 15.1-473, Code of Virginia, 1950, as amended. The
20 evidence in this case is that such an ordinance was duly adopted on
21 February 1, 1971 and the subdivision plat was recorded on April 11,
22 1974.

23 The law is clear that no affirmative act is required by the
24 public body to accept the dedication of streets for public use which
25 are shown on a duly recorded map indicating lots and streets.

Kelly v. City of Marlin, 340 S.W. 2d 507 (Tx. Civ. App. 1960);

APPELLANT'S APPENDIX A page 8

1 Ruminer v. Quanilty, 179 p. 2d 164 (Okla. 1947). Furthermore, a
2 developer and all subsequent purchasers of lots will be deemed to
3 irrevorably dedicate streets and alleys to public use where the plat is
4 unathorized and patently invalid if they convey the property by
5 reference to the plat which is recorded upon the proper public record.
6 Such reference constitutes an adoption of the plat so far as to
7 constitute a dedication to the public of streets and alleys. Hall v.
8 Breyfogle, 162 Inc. 494, 70 N.E. 883 (1904); Steele v. Fowler, III
9 Ind. App. 364, 41 N.E. 2d 678 (1942).

10 Notwithstanding the statutory dedication, at common law, the
11 division of land into lots and streets followed by the recordation of a
12 map containing such lots and streets constituted an offer of dedication.
13 5B M.J. Dedication Section 16 (1976); Payne v. Godwin, 147 Va. 1019,
14 1024, 133 S.E. 481, 482 (1926); Ocean Island Inn v. City of Virginia
15 Beach, 216 Va. 474, , 200 S.E. 2d 247, 250 (1975). Because a com-
16 pleted dedication operates to impose duties and responsibilities upon
17 the public, an offer of dedication does not become a completed dedication
18 unless and until there is a manifested intent to accept on the part of
19 the public. Ocean Island Inn, supra, at p. 250.

20 The Virginia courts have declared that intent to accept such
21 a dedication may be manifested in a variety of ways. In all cases, the
22 subdivision streets become public property. Ocean Island Inn, supra,
23 (the installation of water, sewer, gas, telephone, and electric lines);
24 Greenco Corp. v. City of Virginia Beach, 214 Va. 201 198 S.E. 2d 496
25 (1973), (the installation or franchising of public utility lines in or

1 across a street); Stanton v. Augusta Corporation, 169 Va. 424, 436, 19
2 S.E. 695, 699 (1937), (the exercise of jurisdiction and dominion over
3 the streets by the public authority); City of Richmond v. Gallego Mills
4 Co., 102 Va. 165, 45 S.E. 877 (1903), (the extension, repair and
5 collection of fees for the use of a sewage culvert). Furthermore,
6 other courts have held that no affirmative act is necessary to accept
7 the dedication of streets where a plat is recorded in the proper public
8 place. Kelly, supra; Ruminer, supra; Hall, supra; and, Steele, supra.

9 Although the Virginia Supreme Court has not decided the precise
10 effect of Section 15.1-478, it is reasonable to assume that their
11 decision in Ocean Island Inn, supra, would be further solidified if
12 the plat in that case has been recorded subsequent to the statute.
13 Furthermore, it is reasonable to construe Section 15.1-478 as a statutory
14 acceptance for limited purposes of any and all streets, alleys and public
15 use designations as shown on a plat recorded by the owner of the
16 lands. This view is strengthened by the conveyance by the owner of
17 the designated lots in accordance with the plat. 5B M.J. Dedication,
18 Section 16, at p. 595 (1976); Mayo v. Murchie, 17 Va. (3 Munf.) 358
19 (1811); Taylor v. Comm., 70 Va. (29 Gratt) 780 (178); Norfolk v.
20 Nottingham, 96 Va. 34. 30 S.E. 444 (1898); Newport News v. Lake. 101 Va.
21 334, 42 S.E. 566 (1903); Norfolk v. Meredith, 204 Va. 485, 132 S.E. 2d
22 431 (1963).

23 Complainant further maintains defendants are estopped to deny
24 the dedication of the streets to public use. The defendants admit that
25 on several occasions the landowners within the subdivision have

APPELLANT'S APPENDIX A page 10

1 petitioned the county to repair and maintain the streets, to provide
2 public transportation for public schools, and to provide public
3 transportation for public schools, and to provide public water and
4 sewer. Although the Virginia courts have said that acceptance by the
5 exercise of dominion and control over a portion of subdivision
6 streets will constitute acceptance of the whole scheme of streets as
7 shown on the subdivision, the legislature provided that dedication
8 by recordation of a plat under Section 15.1-478 does not obligate the
9 county to pay for grading or paving, or for sidewalks, sewers, curb
10 and guttering improvements or construction. Section 15.1-479, Code
11 of Virginia, 1950, as amended.

12 Finally, in support of the effect of Section 15.1-478 as a
13 statutory acceptance of dedication of streets as shown on a recorded
14 subdivision plat, complainant submits that the legislative intent
15 is demonstrated by the required agreement of the governing body to
16 vacate a plat. Sections 15.1-481, 482. Furthermore, the effect of
17 vacation is limited so as to preserve in the public utility install-
18 ations which have been constructed thereon. Section 15.1-483.

19 In conclusion, the recordation of a plat and subsequent
20 conveyance of land in accordance therewith operates as a dedication by
21 the developer and no acceptance is necessary as it is implied by
22 statute. Section 15.1-478. Furthermore, the affirmative action by
23 the complainant to construct, install, operate and maintain public
24 water and sewer lines constitutes an acceptance of the dedication and
25 the exercise of dominion, jurisdiction and control over said streets.
Finally, by their own action of petitioning the county to repair and

APPELLANTS APPENDIX A, Page 11

1 maintain the streets, defendants are estopped to deny the dedication
2 of the subdivision streets as public property.

3 II. Easement for Construction of Public Water and Sewer.

4 Complainant's position is further fortified in this suit by
5 the duly executed easement conveying the right to construct, operate
6 and maintain a public water and sewer system for the benefit of a lot
7 owner in the subdivision. It seems inconceivable that defendants
8 have standing to object to the validity of the easement since each
9 deed of conveyance specifically and in unambiguous terms reserved
10 such a right for the benefit of each and every landowner in the
11 subdivision. It is beyond my comprehension that the defendants can
12 maintain or that the Court could find as a matter of law that the
13 easement placed in evidence in this case does not authorize the
14 complainant to enter upon the forty (40) foot street and construct
15 water and sewer lines to Tract 7 as shown on the recorded plat.

16 Respectfully submitted,

17 TAZEWELL COUNTY WATER AND
18 SEWERAGE AUTHORITY

19 s/ Roger W. Mullins, Of Counsel

20 Roger W. Mullins, Esq.
21 P. O. Box 843
22 Tazewell, VA 24651

23 CERTIFICATE OF MAILING

24 I, Roger W. Mullins, do hereby certify that I have this 7th
25 day of July, 1980, mailed a true and correct copy of the foregoing

APPELLANTS APPENDIX A, Page 12

1 Memorandum in Support of Preventive Injunction Action to S. Strother
2 Smith, III, Esq., at his address in Abingdon, Virginia, counsel of
3 record for the defendants.
4
5

6 s/ Roger W. Mullins
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APPELLANTS APPENDIX A, Page 13

SUPREME COURT of VIRGINIA

ALFRED BROWN, CLYDE B. RATLIFT,
JOHN DOE and JANE DOE, along with
other residents of College View
Addition, Wardell, Virginia,

Appellants,

against Record No. 801634
 Circuit Court No. C-40-7864

Tazewell County Water and Sewerage
Authority,

Appellee.

APPELLANTS APPENDIX B

TEMPORARY RESTRAINING ORDER

1 VIRGINIA:

2 IN THE CIRCUIT COURT OF TAZEWELL COUNTY

3
4 TAZEWELL COUNTY WATER AND SEWERAGE AUTHORITY
5 COMPLAINTANT

6 VS. ORDER CHANCERY NO. 40-7864

7 ALFRED BROWN
8 College View Addition
9 Wardell, Virginia

10 CLYDE B. RATLIFF
11 College View Addition
12 Wardell, Virginia

13 JOHN DOE AND JANE DOE; ETAL

14 This day came the Tazewell County Water and Sewerage Authority,
15 (hereinafter the Authority), by Counsel, upon complaint filed herein
16 on the 6th day of June, 1980; upon Notice filed herein and upon service
17 of process filed herein on the 9th day of June, 1980 upon each of the
18 named defendants; and was argued by counsel.

19 It appearing to the Court that the named defendants have
20 physically interrupted, interfered with and disrupted the construction
21 of water and/or sewage lines, by the Authority and its designated
22 agent, R & G Construction Company, Inc.; and it further appearing to
23 the Court that further interference by the defendants may result in
24 bodily harm or injury to one or more persons or property damage.

25 It is therefore ORDERED and DECREED that the named defendants
be and the same hereby are restrained from interference with, interruption
or disruption of the construction by the Authority or its agents of
water and sewer lines on the forty foot (40') right of way as shown on

APPELLANTS APPENDIX B, page 1

1 a plat of the subdivision now known as College View Addition of
2 record in the Clerk's Office of the Circuit Court of Tazewell County
3 in Deed Book 392 at page 171.

4 It is further ADJUDGED, ORDERED and DECREED that a hearing
5 to determine the merits of continuance of this Order and the merits
6 of granting a temporary injunction against these defendants shall be
7 held in the Circuit Court of Giles County, Pearisburg, Virginia on
8 the 18th day of June, 1980 at 3:00 o'clock P.M.

9 The Clerk is hereby requested to serve upon each of the
10 named defendants herein a copy teste of this Order.

11 And this Cause is continued.

12 REQUESTED:

13 TAZEVELL COUNTY WATER AND SEWERAGE AUTHORITY
14

15 s/ Roger W. Mullins, OF COUNSEL
16

17
18 ENTER THIS THE 9th day of June, 1980

19 /s/ Robert L. Powell
20 Robert L. Powell, Judge

21
22
23 A COPY, TESTE:
24 RHEA F. MOORE, JR., CLERK OF THE
25 CIRCUIT COURT OF TAZEVELL COUNTY

/s/ Susie B. Hackworth
DEPUTY CLERK

APPELLANTS APPENDIX B, page 2

SUPREME COURT OF VIRGINIA

ALFRED BROWN, CLYDE B. RATLIFF,
JOHN DOE and JANE DOE, along with
other residents of College View
Addition, Wardell, Virginia,

Appellants,

against Record No. 801634
 Circuit Court No. C-40-7864

Tazewell County Water and Sewerage
Authority,

Appellee.

APPELLANTS APPENDIX C

MEMORANDUM IN OPPOSITION TO
TO ANY PREVENTIVE INJUNCTIVE ACTION

1 VIRGINIA:

2 IN THE CIRCUIT COURT OF TAZEWELL COUNTY

3 TAZEWELL COUNTY WATER AND)
4 SEWERAGE AUTHORITY,)

5 Complainant)

6 v.)

7 ALFRED BROWN, ET AL.)

8 Defendants)

9 MEMORANDUM IN OPPOSITION TO
10 TO ANY PREVENTIVE INJUNCTIVE ACTION

11 The defendants submit the following memoranda in opposition
12 to the Complainant's suit seeking temporary injunctive and declarative
13 injunctive relief against the defendants on the following grounds:

14
15 I - FACTS

16 For the facts in regards to this memorandum, the defendants
17 adopt the facts as alleged by the plaintiffs in their memorandum in
18 support of their injunctive request with the following exceptions:

19 1. The defendants deny that the streets were opened and
20 paved by the developer, but they admit that they were marked on the
21 plat and were graded by the developer.

22 2. That in regard to the plat which was recorded, there
23 were certain matters which made that plat something other than the
24 plat described in §§15.1-466; 15.1-476; §15.1-478 of the 1950 Code
25 of Virginia as amended (hereinafter known as V.C.A.). Specifically

APPELLANTS APPENDIX C, page 1

1 the plat did not meet the definition of a plat as set forth in those
2 Code Sections because of the following:

3 A. It was not drawn by a certified engineer nor was it
4 it certified as being accurate;

5 B. It was never specifically approved and/or accepted by
6 the Board of Supervisors of Tazewell County or any appropriate
7 governmental agency;

8 C. It did not show who drew it or who did the engineering
9 work; it was not endorsed by the professional engineer with a
10 certificate setting forth the source of title of the owner of
11 the land subdivided and the place of record of the last instrument
12 in the chain of title as is required by §15.1-476 of the Code;

13 D. It does not show the correct description of the land
14 subdivided nor does it show that it is with the free consent and
15 in accordance with the desire of the undersigned owners, pro-
16 prietors or trustees, nor is it signed before an officer authorized
17 to take the acknowledgment of deeds, all as required under
18 §15.1-477 V.C.A.

19 3. In addition to the foregoing, it should be noted that it
20 was uncontroverted testimony in the trial; that the residents of the
21 subdivision had on numerous occasions gone to the Board of Supervisors
22 asking them to accept the street and to take it into the state system
23 for maintenance, snow scraping, ect., which the Board of Supervisors
24 had continually refused to do.

25 In addition, it should be further noted that the Tazewell

APPELLANTS APPENDIX C, page 2

1 County school system refuses to drive up the road to pick up children
2 in the subdivision because it is not considered to be a public road,
3 and there was uncontroverted evidence to this fact at the hearing.

4 It is the defendants' contention that the fee simple to
5 the land in the road was in the original subdividers up until May of
6 1980 at which time the fee simple interest in that land (subject only
7 to the easement deeded to the individual owners in the subdivision
8 with the conveyance thereto) was conveyed from the original subdivision
9 owners to Mr. & Mrs. Clyde B. Ratliff, which deed was included in the
10 record of the trial. Thus, it is the contention of the defendants
11 Ratliff that they own the road in fee simple and that they certainly
12 own all rights beneath the surface of the road. The deed to them
13 did not grant anyone else any easements under that particular strip
14 of land. All of this is the uncontroverted evidence in the case.

15 II - THE LAW INVOLVED

16 The specific statutory sections involved herein are the
17 following:

18 15.1-466 (V.C.A.) "Provisions of subdivision ordinances"
19 [emphasis supplied]

20 A subdivision or ordinance may include, among other things,
reasonable regulations and provisions that apply to or provide:

21 (a) for size, scale and other plat details;

22 (f) for the acceptance of dedication of public use of any
right of way located within any subdivision which has
constructed therein or proposed to be constructed therein,
23 any street, curb, gutter, sidewalk financed or to
be financed in whole or in part by private funds only if
24 the owner or developer (one certifies to the governing
body that the construction costs have been paid to the
25 person constructing such facilities; or (2) furnishes to

APPELLANTS APPENDIX C, page 3

1 the governing body a certified check in the amount of the
2 estimated cost of construction or a bond, with surety
3 satisfactory to the governing body, in an amount sufficient
4 for and conditioned upon the construction of such facilities,
5 or a contract for the construction of such facilities and
6 the contractors bond, with like surety, in the amount and
7 so conditioned.

8 (h) that unless a plat be filed for recordation within
9 a reasonable time after final approval thereof, such
10 approval shall be withdrawn and the plat marked void and
11 returned to the approval official;

12 §15.1-475 (V.C.A.) "Plat of proposed subdivision to be
13 submitted for approval" [Emphasis supplied]

14 Whenever the owner or proprietor of any tract of land
15 located within any territory to which a subdivision or-
16 dinance applies desires to subdivide the same, he shall
17 submit a plat of the proposed subdivision to the local
18 commission of the county or municipality

19 §15.1-476 (V.C.A.) "Requisites of plat" [emphasis supp.]

20 Every subdivision plat which is intended for recording
21 shall be prepared by a certified professional engineer
22 or land surveyor who shall endorse upon each such plat
23 a certificate signed by him setting forth the source
24 of title of the owner of the land subdivided and the
25 place of record of the last instrument in the chain of
title:

§15.1-477 (V.C.A.) "Statement of consent to subdivision
execution, acknowledgment and recordation -- "
[emphasis supplied]

Every such plat or deed of dedication to which the plat
is attached, shall contain in addition to the profes-
sional engineer or land certifiers certificate or
statements as follows the platting or dedication of the
following described land . . . is with the free consent
and in accordance with the desire of the undersigned
owners, proprietors and trustees, if any. The statement
shall be signed by such persons and duly acknowledged
before some officer authorized to take acknowledgment of
deeds. When thus executed and acknowledged, the plat,
subject to the provisions herein, shall be filed and
recorded in the office of the clerk of court where deeds

1 are admitted to record to the lands contained in the
2 plat and indexed in the general index to deeds under the
3 names of the owners of lands signing such statement
4 and under the name of the subdivision.

5 §15.1-478 (V.C.A.) "Recordation of plat as transfer of
6 streets" [emphasis supplied]

7 The recordation of such plat shall operate to transfer
8 in fee simple to the respective counties and municipali-
9 ties in which the land lies, such portion of the premises
10 platted as is on such plat set apart for streets, allies,
11 or other public use and to transfer to such county or
12 municipality any easement indicated on such plat to create
13 a public right of passage over the same; but nothing
14 contained in this article shall affect any right of the
15 subdivider of land heretofore validly reserved.

16 III - ARGUMENT

17 (I) By the recordation of this particular subdivision
18 plat, there is not dedication of the public streets in this
19 particular subdivision.

20 Throughout their arguments in this case, the complainant
21 has maintained that the streets of the subdivision as shown upon a
22 plat of lots become public streets by the recordation.

23 In that regard, they refer specifically to §15.1-478
24 (see above). While they cite part of that statute, they do not
25 cite the important part of the statute which specifically states
26 "but nothing contained in this article shall affect any right of
27 a subdivider of land heretofore validly reserved." It is respect-
28 fully submitted that this language specifically shows that the
29 recordation of subdivision streets does not automatically convey
30 fee simple interest to the Commonwealth or to any agency thereof
31 since the subdivider may reserve any rights that he wants. Further
32 it is clear that from his sale of his interest in this land to one

APPELLANTS APPENDIX C, page 5

1 of the defendants herein, the subdivider did not intend to transfer
2 such streets to the Commonwealth nor to Tazewell County.

3 In addition, the fact that absolutely no effort was made
4 to comply with the statutory requirements defining the plats
5 referred to in §15.1-478 further indicate that he never had any
6 intent to transfer these roads to Tazewell County or to the Common-
7 wealth of Virginia. Furthermore, the fact that the Tazewell County
8 Board of Supervisors specifically refused to take the streets into
9 the State system or to allow for public maintenance of the streets
10 and the fact that the School Board of Tazewell County has consistently
11 refused to have public school buses drive up the roads because they
12 are not public roads further indicates that the understanding of all
13 parties up until the time that the Tazewell County Water Authority
14 wanted to put pipes up this street was that these were privately
15 owned lands and that the rights of way over them were private
16 easements and not public easements.

17 In his argument, Mr. Mullins states that "only one
18 condition precedent is required for the statute to become effective;
19 the County shall have first adopted a subdivision ordinance." It
20 is respectfully submitted that a thorough review of the statutory
21 scheme belies this statement completely since the plats which
22 are referred to by the word "such a plat" in §15.1-478 of the
23 Code (V.C.A.) are very strictly drawn in prior sections and require
24 certain very definite standards to be met. Those standards are
25 set forth in the Code sections quoted above and absolutely none

APPELLANTS APPENDIX C. page 6

1 of these preconditions were met in the recording of this particular
2 plat.

3 While Mr. Mullins cites Oklahoma cases and Texas cases
4 as well as Indiana cases, he states that "the law is clear that
5 no affirmative act is required by the public body to accept the
6 dedication of streets for public use which are shown on a duly
7 recorded map indicating lots and streets," it is respectfully
8 submitted by the defendants that, while that may be the law in
9 Texas, Oklahoma, and Indiana, it certainly is not the law in Virginia,
10 since the Virginia statutory scheme specifically requires that
11 the plat meet certain prerequisites and specifically one of those
12 prerequisites being that the plats must be approved by the local
13 governing agency (i.e., the roads must be accepted and the local
14 governing agency must be able to see exactly what it is accepting
15 through the proper standards of platting and in addition, there
16 must be a specific statement of consent to the subdivision and
17 to the roads in it. See V.C.A. §15.1-476 and V.C.A. §15.1-477
18 as quoted.) It is respectfully submitted that the Virginia legis-
19 lature specifically did not want any automatic dedication to occur
20 but wanted to make sure that all parties knew exactly what they
21 were doing by requiring as a part of the plat the statement
22 attached to the plat that the dedication of the land is with the
23 "preconsent and in accordance with the desire of the undersigned
24 owners, proprietors and trustees" Thus, the Virginia
25 law is absolutely clear; that only those plats which have in them
a statement of dedication with the free consent of the owners

APPELLANTS APPENDIX C, page 7

1 have that effect. It should be pointed out that if common law
2 ever allowed for dedication by act, that §15.1-477 requiring the
3 statement of free consent or in effect a conveyance and written
4 dedication which is duly notarized and made of record shows the
5 clear intent of the Virginia Legislature to abrogate any such
6 common law and to make the requirement that the owners know what they
7 are doing and that they freely and voluntarily consent to the
8 transfer and that they fully intend that there be a transfer to the
9 public. In their memorandum, the Complainants' cite Payne v. Godwin
10 at 133 Southeast 481 and Ocean Island Inn v. the City of Virginia
11 Beach at 200 Southeast 2d 247. In checking these cases, we found
12 that the case which is at 133 was a 1926 case which occurred consider-
13 ably prior to the specific statutory enactment found at §15.1-478
14 which was first put in the Code in 1950. Since this statute came
15 considerably after the Supreme Court decision in the Payne v. Godwin
16 case, it must be, in accordance with all legislative interpretation
17 and Virginia and American Jurisprudence, presumed that the legislature
18 knew what the common law in Virginia was. Under Payne v. Godwin, the
19 common law in Virginia at the time was that the mere recording or
20 a plat had the effect of dedicating the streets, allies and roads
21 to the public. By putting in the specific provisions of §15.1-478
22 and the other statutory sections defining the plat, and especially
23 §15.1-477 and §15.1-476, it is clear that the legislature intended
24 to change the common law of the Commonwealth of Virginia so that
25 there would not be such automatic dedication without the clear

APPELLANTS APPENDIX C, page 8

1 knowledge and understanding of the developer of the land and there
2 would be no public easements for which the public would be liable
3 without the public having accepted the land.

4 It is further respectfully submitted in this regard, that
5 the State common law was even more clearly and deliberately over-
6 ruled by the State legislature when it passed §15.1-477 when it
7 required the positive and specific act of the owner to put on the
8 plat that it was with the free consent of the owner and in accordance
9 with the desire of the owners that the land should be dedicated
10 for public streets, easements, rights of way, etc. Thus, it is
11 respectfully submitted that the citation of Payne v. Godwin is
12 irrelevant to this case, but to the extent that it is relevant that
13 it clearly shows what the state of the law was prior to the enactment
14 of the statutory scheme cited above and that because of that case,
15 it is absolutely clear that the intent of the legislature was to
16 prevent any dedications that were not clearly understood and desired
17 not only by the developer of the subdivision but also by the local
18 governing agency.

19 In regard to the citation of the Ocean Island Inn v. City
20 of Virginia Beach, in searching the Southeastern Reporter 2d, we
21 find that the case which is cited at 200 Southeast 2d 247 is State
22 v. Gerald, which is a decision of the Supreme Court of South
23 Carolina. In the hopes that maybe this was simply a typographical
24 error, we searched through all of the Southeastern Reports for 1975
25 Virginia cases and all other cases in the case index and could not

APPELLANTS APPENDIX C, page 9

1 any mention of the Ocean Island Inn v. City of Virginia Beach case.
2 Not being able to find the case makes it rather difficult to discuss.
3 However, from the complainants' own brief, the following note should
4 be mentioned: there the complainants state "because a completed
5 dedication operates to impose duties and responsibilities upon
6 the public, an offer of dedication does not become a completed
7 dedication unless and until there is a manifest intent to accept
8 on part of the public." [Emphasis supplied] Certainly, the
9 complainant cannot arise above his own allegations, and we would
10 certainly agree with this statement. As a matter of fact, the entire
11 point of our argument is that there never was a manifest intent to
12 accept on the part of the public because the plat never did meet
13 any of the standards required either by a State statute or by the
14 Tazewell County Subdivision ordinance. Furthermore, the evidence
15 is that the local residents asked the local governing body to accept
16 the streets as public thoroughfares and they were specifically
17 turned down. Furthermore, the evidence specifically shows that
18 they asked the local governing agency to accept the streets enough
19 so that public school buses could run over them and they refused.
20 Thus, the evidence in the case at bar is clear that there has never
21 been a manifest intent to accept on the part of the public in this
22 case, nor has there ever been a manifest intent to convey on the
23 part of the subdivision developers or owners; and in fact, the
24 evidence is that there has been a manifest intent by the part of
25 the public not to accept.

APPELLANTS APPENDIX C, page10

1 We further note from the Complainants' own memorandum that
2 the Ocean Island Inn case apparently involved dedications of rights
3 of way for water, sewer, gas, telephone and electric lines which
4 are not involved here since there was no dedication for any such
5 lines in the case at bar and since there are absolutely no easements
6 for any water, utility or gas lines shown in even the plat that was
7 recorded. In this regard, the only way that the complainants can
8 possibly succeed in the case at bar is to show that they obtained
9 fee simple ownership of the street which we would respectfully
10 submit was not involved in the Ocean Island Inn case from their own
11 memorandum and which they cannot show in any other way.

12 The next section cited specifically in the brief of the
13 Complainants is the case of Greenco Corporation v. The City of
14 Virginia Beach cited at 214 Virginia 201, 198 Southeast 2d 496 1973.
15 In reading that case, we find that in the first place, the dedication
16 involved there, occurred prior to the enactment of §15.1-476, -477,
17 and -478 (i.e., July 25, 1900). Thus, that case would not be
18 specifically controlling in the case at bar. However, what is very
19 important is that, according to the State Supreme Court, "neither
20 the 1900 nor the 1908 subdivision plats met the statutory requirements
21 for a dedication of the public way shown thereon, and their recordation
22 amounted to only a common-law offer of dedication which required an
23 acceptance to be completed." [emphasis supplied] In the instant
24 case, we obviously have a situation where the subdivision plats do not
25 meet the statutory requirements for dedication. We know that

APPELLANTS APPENDIX C, page 11

1 §15.1-476 and -477 had not been adopted in 1900 or 1908, but
2 nevertheless, the Supreme Court found that even so, the recordation
3 of the plats involved therein amounted "only to a common-law offer
4 of dedication which required an acceptance to be completed." In
5 the Greenco case, there was clear evidence that the City of Virginia
6 Beach had accepted the dedication by the construction of a boardwalk
7 along the strip with public dominion exercised by the City of Virginia
8 Beach.

9 In the instant case, there has been absolutely no such
10 acceptance by public authority, and in fact, there has been speci-
11 fic rejection of the offer (if indeed) such recording of such a
12 plat after the enactment of §15.1-476, -477 and -478 serves to
13 create an offer of dedication.

14 In fact, in the case at bar, the supervisors of Tazewell
15 County were specifically asked to accept the road and to take it
16 into the system for public maintenance which they refused to do and
17 furthermore, they refused to provide public school transportation
18 up that road which was in effect a specific rejection of any claim
19 by public authorities to any right of dominion over the road.

20 In addition, however, even if the Greenco Corporation
21 case serves as any precedent in this case to state that there was
22 a dedication involved, that dedication was only, at the most, to
23 a surface right of way for ingress and egress and certainly was
24 not the fee simple dedication which is set forth in §15.1-478.
25 If we were arguing over the question of whether there was a public

APPELLANT'S APPENDIX C, page 12

1 right of way to go over that street, then the defendants' case
2 might be on somewhat shakier ground (though it would be our con-
3 tention that the public does not even have an easement for ingress
4 and egress). However, in the instant case, the County is trying
5 to claim a right below the surface which was never shown on the
6 plat and unless the County can clearly come under §15.1-478, the
7 County has absolutely no claim to at all. Thus, while the Greenco
8 case might possibly be a basis for the school board to put its
9 school buses over the road and for the County to send police cars
10 and rescue units, etc. over the road, there never was any offer
11 of below-surface rights, so there never could be any acceptance
12 under the common-law procedures. The only possible offer that was
13 made was to the surface only. If the plat had shown an easement
14 for water lines going along the road, that might show a different
15 case altogether. However, here we are talking only about the
16 common-law offer of a surface easement and whether or not it was
17 accepted by the County. It is respectfully submitted that under
18 the Greenco Corporation case and all other Virginia law (if there
19 is any such thing as a common-law act of dedication since the
20 passage of §15.1-476 and -477 into the Virginia Code) there never
21 was any offer of any subsurface rights nor was there any possibility
22 of any acceptance of any subsurface rights. Thus, any idea of
23 a common law act of dedication of an easement for a pipeline under
24 the road cannot be applicable in this case whatsoever.

25 Then looking at the case cited by the Complainants'

APPELLANTS APPENDIX C, page 13

1 under the citation Staunton v. Augusta Corporation. 169 Virginia
2 424, 193 Southeast 695, 1937, we find that this was an owner
3 suit against a municipality to title to a strip of land which was
4 paved uniformly with sidewalk in front of the set-back buildings.
5 The evidence did not show that the strip was a part of the street
6 or that the steps located on the strip encroached upon the side-
7 walk and it was held that this evidence did not establish that the
8 whole strip belonged to the municipality as against the contention
9 that the true property was fixed by the front line of the set-back
10 building. What is important in this particular case is the state-
11 ment by the Supreme Court that "a dedication requires that there
12 be an intention to appropriate the lands for use and benefit of
13 the public and the acts and declarations of the landowner indicating
14 such an intention must be "unmistakable in their purpose and
15 decisive in their character." [emphasis supplied]

16 Thus, it is absolutely clear once again that the Supreme
17 Court of Virginia requires that in order for there to be a
18 dedication, there must be an intent which has been approved by
19 both parties for a specific purpose. In the instant case, there
20 was never any offer to dedicate any subsurface lands whatsoever
21 unless the complainant can go under title 15.1-478 which it cannot
22 do, and there was never any acceptance of even a surface right of
23 way. Once again, we would respectfully submit that the case cited
24 by the Complainants in the City of Staunton v. Augusta Corporation
25 actually upholds the position of the defendants in this case.

APPELLANTS APPENDIX C, page 14

1 Though on page 4 of their Memorandum, the Complainants
2 state that the owner conveyed the land in accordance with the plat.
3 It should be noted that the conveyances were actually by metes and
4 bounds and that any reference to the plat was mere surplusage
5 since the deeds could have been fully effective and the description
6 of the land was full and complete without any reference to the
7 plat whatsoever.

8 While the defendants readily admit that they have asked the
9 County to repair and maintain the streets and to provide public
10 transportation for public schools over the streets, this was in
11 their act to offer to dedicate the surface of the streets for public
12 ingress and egress. The complainant clearly states that the County
13 specifically refused to do this, and since it specifically refused
14 to do this, it refused to accept the streets or any offer of
15 dedication of rights to the surface for ingress and egress. It is
16 specifically denied that the facts in any way, shape, or form,
17 show that the defendants herein requested the County to provide
18 public water and sewerage, but rather would state that they, very
19 vociferously were opposed to it, but stated that if it was to be
20 taken to one of the lot owners as was shown in the evidence in
21 this case, that it should be taken to all of them rather than
22 discriminate against the rest of them.

23 In reference to the question of vacating a plat, it is
24 respectfully submitted that that is relevant only where the plat
25 has fully and completely complied with §15.1-478 and since this plat

APPELLANTS APPENDIX C, page 15

1 specifically does not comply with that section, any reference to
2 vacating a plat is totally irrelevant herein. The only possible
3 relevance that it might have is to further show the intent of the
4 legislature that the full intent of the parties must be understood
5 and acknowledged in all instances in regard to any dedication of
6 such rights of way and such streets and roads.

7
8 II. The easement for construction of public water and
9 sewer.

10 The Complainant in this case takes the position that it
11 has been deeded an easement to construct public water and sewer
12 systems to the benefit of a lot owner in the subdivision based
13 upon the fact that all of the lot owners in the subdivisions had
14 mutually binding easements across their own property to put in
15 their own water systems.

16 It is respectfully submitted that this is a matter which
17 goes with the land and cannot be separated from the land. Thus,
18 the deeding or conveyance of any easement ot the Tazewell County
19 Water Authority by one of the lot owners for public sewer and
20 water is totally and completely void. The only way that the County
21 could possibly could get this right to put water into lot #7 would
22 be for the County to own lot #7. If the County wishes to use
23 public taxpayers funds to buy lot #7, they certainly have a right
24 to do so though it is respectfully submitted that this would be
25 highly irregular and questionable use of taxpayers funds. The
defendants claim to have the right to object to anyone other than

APPELLANTS APPENDIX C, page 16

1 lot owners exercising the easement for public sewer and water that
2 is given to each one of them individually as lot owners. This is
3 because as lot owners, each of them has a direct stake in the way
4 and manner in which the water and sewerage is put into the property
5 and across the property whereas there is no such direct stake by
6 some outside contractor being called in by some government agency.
7 Furthermore, the easement for water and sewerage is not an easement
8 for public water and sewerage and it does not go on the street
9 whatsoever, but goes across the property of the individual owners.
10 There is no easement whatsoever for a pipeline to go down the street
11 or allies in this subdivision.

12 IV - CONCLUSION

13 In conclusion, your Defendants would respectfully submit
14 that there is no possible way that the County can claim a fee simple
15 right to any of the streets or allies in this subdivision because
16 the plat does not in any way, shape or form meet the requirements
17 of the statutory scheme.

18 Not being able to make a claim under §15.1-478 giving it
19 fee simple rights to the streets and allies, the County must fall
20 back upon a common law act of dedication. It is clear from the
21 Complainants' own cases that in order to effectuate a common
22 law act of dedication, there must be two things:

- 23 1. A clear offer to dedicate, and
- 24 2. a clear acceptance.

25 In the instant case, while there was a clear offer to dedicate the
surface of the streets and alley-ways by the lot owners own request

1 for public maintenance and public transportation if nothing else,
2 there was never any acceptance by the County, and in fact, there
3 was an absolute rejection on more than one occasion by the County.
4 Once a rejection has been made of an offer under all contract law,
5 then there must be a new offer made before there can be a binding
6 acceptance. In each case where the lot owners have asked for
7 public school transportation up the road, the County School Board
8 has refused. In each case where the lot owners have asked for
9 public maintenance, the County has refused. Under these circumstances,
10 it is clear that the County, each time it has been given a specific
11 and outright chance to accept the dedication, rejected the same.
12 The County cannot now come in and accept something after it has
13 already rejected it.

14 Furthermore, even if the County were able to accept the
15 offer of dedication under common law principles, the only offer
16 of dedication was for a surface right to ingress and egress to the
17 street. There was never any offer of dedication by the lot owners
18 or the subdivision owner to the subsurface of the street. Thus,
19 there could never have been any acceptance of an easement for
20 pipelines under the subsurface.

21 Under these circumstances, it is respectfully submitted
22 that Tazewell County Water Authority and Tazewell County have
23 absolutely no claim to this street or to an easement to put in
24 water and pipelines under the road, and it is respectfully
25 requested that the matter be dismissed with costs being allowed

APPELLANTS APPENDIX C, page 18

1 to the defendants.

2 Respectfully submitted,

3 ALFRED BROWN, ET AL.

4 By Counsel

5 S. Strother Smith, III
6 P. O. Box 1204
7 117 West Main Street
8 Abingdon, VA 24210

9 /s/ S. Strother Smith, III

10 CERTIFICATE OF SERVICE

11 I hereby certify that I mailed a true copy of the
12 foregoing to Roger Mullins, Esq., Attorney at Law, Tazewell,
13 Virginia 24651 on this the 14th date of July, 1980.

14
15 /s/ S. Strother Smith, III
16 S. Strother Smith, III
17
18
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21
22
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25

APPELLANTS APPENDIX C, page 19

SUPREME COURT of VIRGINIA

ALFRED BROWN, CLYDE B. RATLIFF,
JOHN DOE and JANE DOE, along with
other residents of College View
Addition, Wardell, Virginia,

Appellants,

against Record No. 801634
 Circuit Court No. C-40-7864

Tazewell County Water and Sewerage
Authority,

Appellee.

APPELLANTS APPENDIX D

TRANSCRIPT OF HEARING

26 of June 1980

CIRCUIT COURT OF TAZEWEEL COUNTY

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TAZEWELL COUNTY WATER : COMPLAINTANT
AND SEWER AUTHORITY :
VERSUS :
ALFRED BROWN, et al : DEFENDANT

VIRGINIA:
IN THE CIRCUIT COURT OF TAZEWELL COUNTY

APPEARANCES:

ROGER W. MULLINS, ESQUIRE
P. O. BOX 843
Tazewell, Virginia 24651
(Counsel for the Authority)

S. STROTHER SMITH, III, ESQUIRE
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117 West Main Street
Abingdon, Virginia 24210
(Counsel for Alfred Brown)

HEARING HELD ON THE 26th day of June, 1980, before
the Honorable Robert L. Powell, Judge of the Circuit
Court of Tazewell County, Virginia.

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INDEX

2

Witness

John S. Butler, Jr.	Mr. Mullins	8 - 11
	Mr. Smith	12 - 25
	Mr. Mullins	25
	Mr. Smith	25 - 28
Judy Taylor	Mr. Mullins	28 - 31
	Mr. Smith	31 - 36
	Mr. Mullins	36
Dan Danko	Mr. Mullins	36 - 39
	Mr. Smith	39 - 49
William A. Brown	Mr. Smith	55 - 67
	Mr. Mullins	67 - 73
	Mr. Smith	73
	Mr. Mullins	74
Randall C. Rasnake	Mr. Smith	74 - 76
	Mr. Mullins	76 - 77
	Mr. Smith	77

ARGUMENT

Mr. Smith	78 - 81
Mr. Mullins	81 - 82
Mr. Smith	82 - 83

CERTIFICATION

84

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The following is a record of the matter that came on to be heard, on this the 26th day of June, 1980, before the Honorable Robert L. Powell, Judge of the Circuit Court of Tazewell County, Virginia.

THE COURT REPORTER WAS DULY SWORN AT 4:03 P. M.

THE COURT: Gentlemen, I understand, that you have certain matters in this cause that can be stipulated, and that you wish to take a little bit of evidence on someother matters, and then we'll discuss some procedural matters, is that correct?

MR. SMITH: That's correct, sir.

THE COURT: You might make such stipulation as you wish.

MR. SMITH: Your Honor, I have these written down, I think we've gone over them, and Mr. Mullins can correct me..

MR. MULLINS: What are we going to do?

MR. SMITH: The stipulation, that we did agree to?

MR. MULLINS: No. No. No. Not if we can't agree.

MR. SMITH: We'll just put everything on.

THE COURT: Alright, everyone who is to testify, can stand up and I'll swear you in.

THE WITNESSES WERE SWORN.

MR. SMITH: Your Honor, I'd like the Rule, if I may.

THE COURT: Alright, let the witnesses be separated, by Complainant and Defendant.

1
2 MR. SMITH: Your Honor, I would like to ask.. this
3 is alleged to be against Alfred Brown, Clyde B. Ratliff,
4 John Doe and Jane Doe. Now, I have several resident's
5 of the College View Addition, who are here, and what
6 I'm asking - Are they the John Doe and Jane Doe?

7 MR. MULLINS: Resident's of the sub-division, who-
8 ver they are.

9 THE COURT: If so, they would be parties to it and
10 can come up here, and they can stay.

11 MR. MULLINS: May it please the Court, the Tazewell
12 County Water and Sewage Authority is bringing this
13 action to restrain the named defendant's, and land
14 owners's, in what is now known as the College View
15 Addition, from interference with the construction of
16 a water and sewage line; that is to be constructed from
17 Route 603 to Tract Number 7, located in that sub-division,
18 along a forty foot right-of-way; that is shown on a plat.
19 We intend to show, that the forty foot right-of-way is
20 a public right-of-way; and, interference by the land
21 owner's is in violation of the law.

22 I would like to initially submit, to the Court, as
23 an Exhibit, a Sub-Division Ordinance, duly attested,
24 showing; that an Ordinance was passed by the County of
25 Tazewell, to take effect on the first day of February,
1971, at 12:01 P. M. At this time I would like to
submit that as an Exhibit Number 1.

1
2 MR. SMITH: Your Honor, we're not going to agree
3 to this unless Mr. Mullins can state exactly what
4 procedures were used in the adoption of this sub-division
5 Ordinance; what public hearings were held. We want to
6 know, whether the proper procedure was held for adopting
7 this, because in at least one instance, in this County,
8 was know of an Ordinance which has gone up, where there
9 are very severe questions about whether it was properly
10 adopted.

11 So, I have not had an opportunity to see this
12 Ordinance... Is this my copy?

13 MR. MULLINS: Yes.

14 MR. SMITH: But, we would object, unless and until
15 Mr. Mullins can put on witnesses to show, that the
16 Ordinance was properly adopted.

17 THE COURT: I think there is a presumption; that
18 the Ordinance was properly adopted; and, unless you can
19 show that there was some impropriety, or irregularity
20 in the adoption of the Ordinance...

21 MR. SMITH: Your Honor, this - as I understand it -
22 is for a Temporary Restraining Order, and this doesn't
23 show, that it was...

24 MR. MULLINS: On the last page, where the attestation
25 is, has the general information concerning the passing.

MR. SMITH: Excuse me just a minute, Your Honor;
if I may just review the Ordinance for just a minute.

Your Honor, for purposes of this hearing only, and

2 not for any permanent injunction hearing, but for
3 the purpose of this hearing, only, I will withdraw
4 objection to it - this Ordinance.

5 MR. MULLINS: Secondly, we'd like to offer as
6 Exhibit Number 2, a deed dated the 11th of April,
7 1974, which is a conveyance from Beverly Horne and
8 Emma K. Horne to David Samuel Horton and Brenda Ellen
9 Horton, indicating a transfer of Tract Number 6, in
10 the sub-division, and on the recordation of their deed
there was attached a plat.

11 As Exhibit Number 3, I'd like to offer the plat,
12 that was recorded simultaneously, with the deed.

13 THE COURT: The deed will be Exhibit 2, and the
14 plat, Exhibit 3.

15 MR. SMITH: Are you talking about the deed? No
16 objection, Your Honor.

17 Your Honor, I have no objection to what is being
18 offered here as a plat. I will, in evidence..I will
19 have something to say, as to whether it is a plat or
20 not, but I certainly have no objection to the sheet of
21 paper, that was copied from a plat, or from the record
22 in the Clerk's Office, of the Circuit Court of Tazewell
County.

23 THE COURT: Alright.

24 MR. MULLINS: Your Honor, the next item I would
25 like to submit as evidence, are the various deed's
from the developer, Beverly Horne, and wife, Emma K.

Horne, to various purchaser's of the property in the sub-division. There are five documents, which I believe should be numbered consecutively, from 4 through 8, and I'll just present them, hopefully, in chronological order.

The First deed will be from the Horne's to James A. and Ruth Horn, dated the 10th of July, 1973.

THE COURT: Can't you put these together?

MR. SMITH: Possibly make it Exhibit: 4 - A, B, C, D...

MR. MULLINS: Horne to Absher, Horne to Ratliff, Horne to Ratliff and Horne to Richardson. I'd like to submit, as Exhibit Number 5, an Easement executed by Western Coal Corporation, to the Tazewell County Water and Sewage Authority, dated the 2nd day of June, 1980.

MR. SMITH: Your Honor, we would object to the introduction of this Easement, on the grounds..two grounds. Number One, on the specific grounds, that it was executed specifically for the sole purpose of providing evidence for this case; and, Secondly, on the ground, that Western Coal Corporation had no authority to grant any easement in property, that it only had an easement which ran with the ownership of the land. If it had sold the land to the Tazewell County Water and Sewer Authority, we would admit that the easement would go with the land, but as far as

1
2 assigning an easement, without selling the land, the
3 easement is hereditament of the land, it goes with the
4 land, and cannot be assigned without the land; it is
5 only to the land owner's.

6 THE COURT: We'll enter this as Exhibit 5, subject
7 to that objection, and we can argue that at a later
8 time.

9 MR. MULLINS: I now call John Butler.

10 JOHN S. BUTLER, JR.

11 having first been duly sworn, was examined,
12 and testified as follows:

13 DIRECT EXAMINATION

14 By Mr. Mullins:

15 Q. State your name, please.

16 A. John S. Butler, Jr.

17 Q. How are you employed?

18 A. Vice-President of R & G Construction Company.

19 Q. Would you explain, to the Court, what R & G
20 Construction Company is?

21 A. R & G Construction Company is a general
22 contractor, contracted with the Tazewell County Water
23 and Sewage Authority, to install sewer and water lines
24 under contract to..

25 Q. Alright. Where is R & G incorporated?

A. North Carolina. Charlotte, North Carolina.

Q. Is it authorized to do business in Virginia?

A. Yes, it is.

2

Q. I hand you an item, and ask if you can identify that?

3

4

A. Yes, this is the..

5

Q. Certificate of Authority?

6

A. Certificate to do business in Virginia.

7

Q. I'd like to offer that as an Exhibit.

8

REPORTER NOTE: Exhibit was marked as Exhibit Number 6.

9

Q. When did you enter into a contract with the Tazewell County Water and Sewer Authority?

10

A. Approximately June 2nd, I believe, of 1979.

11

Q. And, what was your contract obligation?

12

A. We had approximately fifty-five thousand lineal feet of water and sewer.

13

14

Q. And, were you working under contract, on the 5th day of June, 1980?

15

A. Yes, I was.

16

Q. Were you present, and on the job, on that day?

17

A. Yes, I was.

18

Q. Did you have an occasion to go on the property right-of-way - forty foot right-of-way - known as College View Addition?

20

21

A. Yes, we went up there to install a casing.

22

Q. Would you tell the Court what happened on that day?

23

24

A. Yes. We were putting the casing in..We had already installed it, and were back filling it, when

25

Mrs...I guess it's Mrs. Ratliff came out and told us we

2 couldn't be there, we were trespassing. Of course,
3 I had told her, that we were under contract, and had
4 a right to be there, and she left. Shortly afterwards,
5 her husband, Mr. Ratliff, returned, told us to stop,
6 and he actually climbed up on the loader I was operating
7 at the time, and told me if I moved he was going to drag
8 me off, and beat me up.

9 Q. Did anyone else, besides Mr. Ratliff, come to the
10 site and discuss this matter with you?

11 A. Mr. Brown.

12 Q. Is he present in the Courtroom?

13 A. Yes, he's the man, right over here.

14 Q. Is he sitting at Counsel Table, to the right of
15 Counsel?

16 A. Yes.

17 Q. Did Mr. Brown have any advice for you, at that
18 time?

19 A. Yes, he told me, that that would be the most
20 expensive hole we ever dug; We'd have to go to Federal
21 Court to get our equipment out there. They blocked
22 our equipment in, with cars.

23 Q. What was the status of the work, that you had
24 done, when they stopped the work? What had you done?

25 A. We had installed the casing, were back filling
it, and were putting the gravel in it, for the base of
the road, at the point when we stopped.

2

Q. When you were confronted with these two land owners, what did you do?

3

4

A. We stopped.

5

Q. And, did you leave the site?

6

7

8

9

A. Yes. I tried to talk them into letting me finish back filling it, but they didn't want to let me do that, so I left, and called you, and we called the Sheriff, and the Sheriff's Deputy come up and talked with them.

10

Q. What happened to your equipment?

11

12

13

A. We left it there for..until about the following Tuesday, I believe. We needed it, so we just went back and got it, and took it away.

14

15

Q. That was after the Order had been entered by this Court? The Tuesday, after the 5th?

16

A. Yes, sir.

17

18

19

Q. Did you, at that time, see anyother person than Mrs. Ratliff, Mr. Ratliff, and Mr. Brown?

20

21

22

A. Yes, there were several other people there, but...

23

24

25

Q. Can you look over there and see, if you recognize any of those people? (Indicating at Counsel Table with Mr. Smith)

A. I'm really not sure. The only two people I'm sure of is Mr. Brown and Mr. Ratliff and his wife.

Q. What is the estimated date of completion of your contract with the Tazewell County Water and Sewer

Authority?

A. Approximately October 18th, 1980.

Q. Is there a penalty clause in your contract?

MR. SMITH: Your Honor, I object. The Tazewell County Water and Sewer Authority is the Plaintiff in this case; they are not going to be hurt by any penalty clause, whether there is or isn't one. I think it's totally irrelevant to this case.

THE COURT: I'll sustain the objection.

Q. Just go ahead.

A. Well, the disruption...

MR. SMITH: I object to his leading the witness.

Q. Will the disruption, in anyway, delay the project?

A. Yes, it can, and there are liquidated damages on our contract.

MR. MULLINS: You may ask...Excuse me, one more question. Is this the only disruption, that you have encountered in this area?

A. No, sir, there were two other instances, where our men were told to leave, but I'm not sure what the dates were.

Q. But, no action was taken, at that time - on your part?

A. Not on our part, No.

MR. MULLINS: You may ask.

2

CROSS EXAMINATION

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By Mr. Smith:

4

Q. What is your name, again?

5

A. John S. Butler, Jr.

6

7

Q. Mr. Butler, you say that R & G Construction Company is certified to do business in Virginia. Who is your Registered Agent?

8

9

A. I'm not really sure. I'd have to research the files, in the office.

10

Q. You don't know who your Agent, in Virginia, is?

11

A. Not for R & G Corporation.

12

13

Q. Why do you say, "Not for the R & G Corporation"? Are there other corporations involved?

14

A. Well, to answer your question, No, I do not know the name of the Agent.

15

16

17

18

19

Q. Alright, sir. You said, that they came down - just out of the blue - and threatened you, and Mr. Brown said, "It would be the most expensive hole you'd ever dug"? This is just totally out of the blue, nothing had gone before?

20

21

A. Well, there were two other instances, Yes. We received a letter from Mr. Brown.

22

23

Q. Didn't that letter inform you, that it was private property, and that you had no right on it?

24

25

A. The letter did say that. We brought this information to the Tazewell County Water and Sewer Authority.

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Q. Did you make any effort..did you or the Tazewell County Water and Sewer Authority take any effort, whatsoever, to have the Declaratory Judgement rendered to determine whose land it was, before you went in and dug your holes on it?

A. We had a meeting with the Tazewell County Sewer and Water Authority.

Q. You didn't file any suit to determine..to provide these people with a due process hearing, before you went on their property, or what they claimed to be their property, before you tore it up, did you?

MR. MULLINS: May it please the Court...

MR. SMITH: Your Honor, I'm just asking a fact, now.

MR. MULLINS: For him to speak to what was done, after he took it to the Attorney, I think is improper in view of the fact, that the Attorney knows, that he and I discussed this matter. You know, I think it's misleading for Mr. Smith to ask..

THE COURT: This witness may not know, from the legal standpoint, what might be due process.

Q. Let me simply ask you this: Have you appeared in Court over this matter, in anyway, shape, or form, before today?

A. We appeared Tuesday, in Abingdon.

Q. Over this same instance, is that right?

A. Yes, on a suit that was filed against the Tazewell County .. myself, and Atlantic Coast Contractors.

2

Q. But, by the land owners for going on their property, is that right?

3

4

A. Yes.

5

6

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Q. Now, prior to this instance, where you were not treated real gently by the land owners, isn't it true; that you had dumped several tons of gravel on property, that didn't belong to you; and, that you had absolutely no right to trespass on; that gravel still being there?

9

10

A. I don't think that gravel is off the right-of-way; it's just...

11

Q. Have you measured it, sir?

12

A. It's just off the edge of the road.

13

14

Q. Do you know where the right-of-way lines go, have you surveyed them, sir?

15

A. I have not surveyed them.

16

Q. So, you don't know where that gravel is, do you?

17

A. I could take you and show you where it is.

18

Q. It's plain for anybody to see; it's a big pile of gravels, isn't it? A very big pile of gravels?

19

A. Yes.

20

21

Q. You don't know whether that's on..You have been told, that is on the private residential property of at least one of these land owners haven't you?

22

23

A. I think that letter stated that.

24

25

Q. Yes, sir. And, you were told by this same land owner, before you were ever threatened; that you were trespassing on his property; and, that you were not

2

welcome, weren't you?

3

A. Yes.

4

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Q. So, you knew that they were claiming the right to this property, and you knew that they had said you had dumped this gravel on their property, and nevertheless, without taking any action to try to clear up the matter, you went on and started digging a hole across their road?

9

A. No, sir.

10

11

MR. MULLINS: I object to his question. He did take action. He went to an Attorney.

12

A. We did take action.

13

Q. You never took any Court action, did you, sir?

14

A. Whether the Attorney did, or not, I don't know.

15

16

Q. So, these persons were never afforded any due process hearing, were they - to your knowledge?

17

A. I object, that's a legal question.

18

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Q. Alright, going on. In addition to dumping gravel all over their property, you had, also, without any notice to them, and knowing they claimed the property to be their's, and that you had no right on there, you had also gone and drilled a large number of holes for blasting purposes, hadn't you?

23

A. We had to drill the holes on the pipe line - center line.

24

25

Q. But, you had drilled some holes for blasting, had you not?

2 A. Yes, sir, we had.

3 Q. In fact, the bedrock there below that soil is
4 less than two feet below the surface, isn't it?

5 A. I can't answer that question.

6 Q. You don't have to drill through topsoil, do you?

7 A. We have an employee, that does the drilling.
8 I can't answer that question.

9 Q. You know, that you had some drilling done,
10 don't you?

11 A. Yes, we did.

12 Q. You knew, that it was through very hard rock,
13 don't you?

14 A. It was rock of..How hard, I don't know.

15 Q. But, you know you had to drill, because you
16 couldn't dig the ditch line, you had to blast the ditch
17 line?

18 A. We haven't blasted the ditch line.

19 Q. You have not done any blasting yet?

20 A. No, we haven't.

21 Q. But, when you do dig the ditch line, for that
22 water line to go up there, if you put it up there, you're
23 going to have to blast, aren't you?

24 A. Yes, we will.

25 Q. And, you know that there are very expensive
residential houses in that area, aren't there?

A. Yes, sir.

2

Q. From eighty thousand, up to a quarter of a million?

3

4

A. (Witness nodded his head in the affirmative)
Yes, sir..I mean, I don't know what the value of the houses are.

5

6

7

Q. But, you know that they are very nice, expensive houses, don't you?

8

9

10

A. There are houses up there.

11

12

Q. You know, that they are very nice, expensive houses, don't you?

13

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A. I don't know how nice, or expensive the houses are.

Q. Alright, sir. Do you own a house?

A. Yes, I do.

MR. MULLINS: I object, Your Honor. I think...

THE COURT: I'll sustain the objection.

Q. At any rate, at the time of this confrontation you knew, that the land owners there were very upset, and very opposed to your going up there, and were claiming that they owned that roadway, didn't you?

A. I didn't know, that they owned the roadway.

Q. You knew they were claiming..

A. I knew, that they claimed that.

Q. Let me go back, one step. That road is paved, is it not?

A. Yes, it is.

Q. And, you knew, at the time that you dug that

2

ditch line across it, that you were drilling on it, that it was paved and paid for by these land owners, didn't you?

3

4

5

A. I didn't know who paved it, or who paid for it.

6

7

Q. The land owners had told you, that they had paved it, and paid for it, didn't they?

8

9

A. I don't remember that.

10

11

12

13

Q. Alright, sir. Now, when you did your blasting, there would not have been anyway, in doing that blasting, that you could have prevented serious damage to that paved roadway, right there within four feet of the blast holes, was there?

14

15

A. It's hard to tell what type of damage it would do.

16

17

Q. You can't tell what type of damage blasting is going to do, can you, especially through dolomite rock?

18

19

20

21

A. (No response from the witness)

22

23

24

25

Q. Has R & G Construction Company had any complaints from other people, where it has done construction work, in connection with this Water and Sewer Authority?

A. The only substantial complaint, that I can recall, is we had an incident where someone said our blasting operations caused their well to muddy up, and there was an insurance claim, and it was settled by our insurance company.

2

Q. You haven't had any complaints about your failure to repair roadways, and houses after you have damaged them by your construction process?

3

4

A. Not to me.

5

Q. Has your company, to your knowledge?

6

A. Well, I don't recall.

7

Q. Well, let me ask you something, sir: How much.. Are you under a Bond, any amount of Bond to protect land owners against damage - your company?

8

9

10

A. We are insured by an insurance company.

11

Q. Do you know what the limitations of your insurance is?

12

13

A. I'd have to look at the insurance certificates. I can't tell you.

14

15

Q. Is it in excess of a million dollars?

16

A. I would think so, Yes.

17

Q. You don't know the name of the insurance company?

18

A. Not right off. I'd have to go to the files and research that. I don't know.

19

20

Q. Would it possibly be Royal Insurance Company?

21

A. The name doesn't sound familiar.

22

Q. Alright. Will you make a copy of that insurance policy available to me?

23

MR. MULLINS: I object to that, it may not be necessary.

24

MR. SMITH: It may not be, but to protect my client's I think it is, and it ought to be made available to the

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Court; so the Court can understand the full significance of what they're doing here.

MR. MULLINS: The insurance policy has nothing to do with this action, Your Honor.

MR. SMITH: Your Honor, it certainly does. If this Court grants an injunction, and they go up there and blast, and blast down houses worth a quarter of a million dollars, it makes a whole lot of difference.

THE COURT: The Court may consider the type of operation in fixing a Bond.

MR. SMITH: That's fine, Your Honor.

THE COURT: The insurance may enter into it then, but I think your question on insurance would be objectionable.

MR. SMITH: That's fine, as long as there will be something to protect the people, if there is any blasting up there.

MR. MULLINS: At this point, I'd like to point out, that under the Statute - The Court indicated it may consider that in setting a Bond - the Statute provides, that there shall be no Bond for public sub-division.. a political sub-division. There is a Statute, in Virginia, that says that. If the Court is making it's ruling based on that, I'd like to bring that to the Court's attention; it would be our position, under the Statute, that no Bond shall be required in injunctions for public bodies.

2

MR. SMITH: Your Honor...

3

MR. MULLINS: ..For public bodies, for injunctions.

4

THE COURT: You mean, independent contractors who are working..

5

6

MR. MULLINS: You may do it for an independent contractor.

7

THE COURT: This would be an independent...

8

9

MR. MULLINS: You may place him under some amount of Bond, but they are not a part of this action.

10

11

12

MR. SMITH: They are going to be the beneficial parties of this action, because they are going to be the ones that go up there and work on it.

13

MR. MULLINS: They are an agent, under contract.

14

THE COURT: We'll consider this.

15

MR. MULLINS: I just want to bring that to the Court's attention.

16

17

THE COURT: I understand that. We're talking about this company.

18

19

20

Q. Do you know anything about the blasting operations that you will perform to dig this ditch line for the pipe?

21

A. Do I know anything?

22

Q. Yes, sir.

23

24

25

Q. There is some rock on the very lower end of it. I'm not sure how many lineal feet is involved, but after you get up the road a little bit, I don't think there is any rock being encountered.

2 Q. Sir, has there been a geological survey of
3 this property done, to determine what the strata is,
4 more than a foot below the surface?

5 A. Not by our company.

6 Q. Do you know..Have you seen any results of any
7 geological survey, or any geological studies?

8 A. No, I haven't.

9 Q. Alright, sir, so you don't know what the rock
10 strata is up under there, do you?

11 A. There is..just based on my experience - from
12 looking at the terrain.

13 Q. Now, do you have a degree, as a geologist, sir?

14 A. No, I do not.

15 Q. As a geological engineer?

16 A. No.

17 Q. Are you a certified blaster?

18 A. I'm not, No, sir.

19 Q. Is the man who is doing it, certified?

20 A. Yes.

21 Q. By whom?

22 A. By the State of Virginia.

23 Q. What is his name, sir?

24 A. Hoyt McClaughlin.

25 Q. Do you know what his address is?

A. I do not.

Q. And, you don't know anything about the standards,
or safeguards, or anything else, that would be used in

blasting your way up this road?

A. Yes, I have a familiarity about it.

Q. Alright, can you tell me what kind of powder you are going to use?

A. Dynamite.

Q. What kind of caps are you going to use? What are you going to use to set the dynamite off?

A. Blasting caps.

Q. Do you know what kind of delays they are going to have?

A. That's not my job.

Q. You know, that the delays can have a great deal to do with the amount of damage in out lying areas, caused by blasting, don't you?

A. I say again, that's not my job. We have a man employed to do that.

Q. So you..Is he here, today?

A. No, he is not.

Q. So, neither you nor anyone who is here today, can tell this Court anything about the conditions under which this extensive blasting is going to be done?

A. It's a matter of opinion, as to how extensive it would be.

Q. But, you don't have anybody who can say, that we've done the core drillings; we know exactly how much rock has to be blasted; where, and what kind of rock; and, what kind of powder has to be used, and what kind of

caps, and what kind of delays?

A. No one is here today, that can tell you that.

MR. SMITH: That will be all, Your Honor.

REDIRECT EXAMINATION

By Mr. Mullins:

Q. Mr. Butler, have you - on your contract with the Water and Sewer Authority - encountered the necessity to blast, in other areas?

A. Yes, the whole project has been that way.

Q. How much of the project is now completed?

A. Approximately, sixty to sixty-five percent.

Q. Was any of this blasting as near to residence's, as this blasting will be to the residence's in this sub-division?

A. Some of it's closer.

Q. How many complaints have you had, concerning the blasting?

A. Just the one where we had the problem with the well. The insurance company settled it.

MR. MULLINS: I believe that's all.

THE COURT: Alright, sir.

MR. SMITH: Mr. Butler, I have just a couple more questions.

RE CROSS EXAMINATION

By Mr. Smith:

Q. You know, that the Rasnake residence would be within thirty-five feet of the blasting, that you are

2 going to be doing, don't you?

3 A. I wouldn't know where the residence would be.

4 Q. So, you don't know, that the blasting that
5 you've already done is closer than what's going to be
6 done here, do you?

7 A. I know where the lines lay, and where the
8 housing structures are, but who they belong to, I do
9 not know.

10 Q. You know, that one of the houses up there is
11 within thirty-five feet of where you had a blasting hole,
12 isn't it?

13 A. We had some other houses, on the lower end of
14 the project, where we probably blasted within twenty feet.

15 Q. Do you know what kind of rock it was in the
16 lower end of the project, that you were blasting on?

17 A. Yes, sir, it was a limestone.

18 Q. Do you know, that it's the same kind of rock
19 that's up there?

20 A. I'm not a geologist.

21 Q. Okay. And, you didn't have a geologist check
22 either of them, did you?

23 A. (Witness nodded his head in a negative response)

24 Q. And, furthermore, when you did blasting before,
25 did it tear up the pavement of the road, that you were
26 doing the blasting near, or next to?

A. In some places, Yes.

2

Q. But, this was all public road, is that right?

3

A. Yes, we repaved the road.

4

Q. And, you have repaved all of it; it's been done?

5

A. Well, the parts that were damaged last year have been repaired.

7

Q. What about the parts that were damaged this year?

8

A. Well, we really haven't been involved in any pavement damage, to amount to more than just the casing we put in up there, and a few other places where we've patched them back.

10

11

12

Q. You didn't patch these holes, that you drilled along this road back, did you?

13

14

A. I'm not sure.. I think those holes that we were drilling, were along the edge of the road.

15

16

Q. But, you didn't patch them up, did you?

17

A. The drill holes?

18

Q. Yes, sir.

19

A. It would be foolish to do that before you dig the ditch.

20

Q. Excuse me, just a minute. Are you familiar with the road in front of Donald Smith's residence, sir? Here in Tazewell County?

21

22

A. Is it 609?

23

24

Q. Yeah, it's on Route 609, where you had the problem with the creek.

25

1
2 A. Yes, I'm familiar with that.

3 Q. Has that road been repaired?

4 A. That road has been repaired.

5 Q. And, you'd be willing to drive a car at thirty-
6 five miles an hour over that road, at that point?

7 A. I have.

8 Q. You didn't bust any springs?

9 A. No, sir.

10 MR. SMITH: That will be all.

11 MR. MULLINS: That's all, Mr. Butler. Mrs. Taylor.

12 JUDY TAYLOR

13 having first been duly sworn, was examined,
14 and testified as follows:

15 DIRECT EXAMINATION

16 By Mr. Mullins:

17 Q. State your name, please Ma'am?

18 A. Judy Taylor.

19 Q. Where do you live, Judy?

20 A. In Richlands.

21 Q. How are you employed?

22 A. I'm the Vice-President of the real estate
23 division of Western Coal Corporation.

24 Q. Does Western Coal Corporation own property
25 in the College View Addition?

A. Yes, they do.

Q. Do you know what tract number it is?

A. No, I'm sorry, I don't.

2

Q. Do you know from whom you purchased that property?

3

4

A. Yes.

5

Q. Who was it?

6

A. Dowell Richardson.

7

Q. Do you know the amount of acreage contained in the tract, owned by Western Coal Corporation?

8

A. I think it's close to five point five acres.

9

Q. What is located on that property?

10

A. A trailer court.

11

Q. And, who is the manager of that trailer court?

12

A. I am.

13

Q. How is that trailer court served with water and sewage?

14

A. We have a well, and we have a septic tank - tub.

15

16

Q. What is the current condition of the sewage situation?

17

A. It's a failing system .

18

Q. How do you know it's a failing system?

19

A. The health department has checked it.

20

Q. What are you intending to do about that?

21

A. There is nothing that we can do. The land is just..there is just no more land to work with. We would have to have public sewage.

22

23

Q. Have you requested public sewage and water, from the Water and Sewage Authority?

24

A. We have.

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Q. At the time that you purchased that property, were you aware of the reservations in the deed, concerning water and sewage?

A. No.

Q. Were you connected with the company, at the time that you purchased that property?

A. I think I was working for them at that time.

Q. Do you recall when that purchase was made?

A. Not exactly, No.

Q. Can you approximate it?

A. I think, close to six or seven years ago.

Q. Did you, and your company, provide the Tazewell County Water and Sewage Authority with an easement, for the construction of water and sewage?

A. We did.

MR. SMITH: We'll stipulate that they did. We say, that it's invalid, but we'll stipulate that they attempted to do so.

Q. I ask you to identify that document, and state whether or not that is the easement, that was executed by your corporation?

A. It is.

Q. Do you recall when you first requested the Water and Sewage Authority to bring water and sewage to your property?

A. I think it was a year ago. It was over a year ago, I know that.

2

Q. It was only recently, that we formalized the easement?

3

4

A. Yes.

5

Q. What will you do, if public water and sewage is not made available to that trailer park?

6

7

A. We haven't decided on that.

8

Q. Has the health department given you any indication as to what must be done?

9

10

A. We would have to put a totally new system in, but they really don't know what we would do..they haven't given us any plans; it's not really feasible to put another system in.

11

12

13

Q. How many persons live on that piece of property?

14

15

A. We have seven trailers on it now. All of them are families, with children.

16

17

Q. If you had public water and sewage, how many would you have on there?

18

19

A. We hope to have at least twenty-five families. We were going to extend the trailer court, on to the land that we owned.

20

MR. MULLINS: You may ask.

21

CROSS EXAMINATION

22

By Mr. Smith:

23

24

Q. Now, in regard to this easement. When was the first time, that anybody mentioned anything about an easement to you?

25

A. Well, when we asked for the water and sewer I

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signed, at that time - over a year ago, I think it was - I signed sometype of easement, then.

3

4

Q. This is not the easement, that is shown as Exhibit Number 5, is it?

5

6

A. No.

7

Q. You don't know what you signed back then?

8

A. Yeah, I signed an easement, then. I signed a want for the water and sewer, at that time.

9

10

Q. You signed an application for water and sewer?

11

A. I guess.

12

Q. You don't know whether that was an easement, or not?

13

A. No.

14

Q. The first thing that you know to be an easement was not signed until the 2nd day of June, 1980, was it?

15

A. Yes.

16

MR. MULLINS: We'll clear that up, in a moment.

17

Q. You all know, that you're the only one's - the only land owners, in that entire sub-division - who have asked for public water and sewage, don't you?

18

19

A. I'm not certain, No.

20

Q. As far as you know, you're the only one's?

21

A. Yes.

22

Q. A large number of the land owners, if not every single one of them except you all, are very much opposed to public water and sewage, aren't they?

23

24

A. Yes, from the indications I've seen.

25

Q. And, you also know, that you all can..that if you wanted to do so, at your own expense, put in a water and sewage treatment plant, couldn't you? For a trailer court, it's done all the time, all over the county, isn't it?

A. I don't know.

Q. You don't have anyother trailer courts around, besides this one?

A. We have one other, but it's on the Town of Richlands.

Q. Now, when you bought this you knew, that there was no public water and sewage to it, didn't you?

A. Yes.

Q. And, you knew, that if you had a problem with water and sewage, that you might very well have to put in a private water and sewage treatment plant, didn't you?

A. I don't guess we gave it any thought.

Q. Now, you make a profit off of the rent of these trailers, don't you?

A. Not really.

Q. You don't make a profit?

A. Not with the size of it now, we're down so low in trailers.

Q. But, you bought it to make a profit out of it, didn't you?

A. Yes.

2 Q. Now, where is Western Realty? What state is
3 it incorporated in?

4 A. Virginia.

5 Q. Is it incorporated in Virginia?

6 A. Yes.

7 Q. Can you tell me, Ma'am, why it is, that the
8 headquarters of the company is in Kentucky?

9 A. It is a branch of Western Coal Corporation.

10 Q. And, where is Western Coal Corporation located?

11 A. In Paintsville, Kentucky.

12 Q. Were you aware, that Western Coal Corporation
13 had made an offer to these land owners, to sell this
14 land to them?

15 A. Yes, I am.

16 Q. Do you know how much you bought that land for?

17 A. No, I do not.

18 Q. You didn't pay over about ten thousand dollars,
19 did you?

20 A. I do not have any ideal.

21 Q. Do you think, that's worth two hundred thousand
22 dollars?

23 A. I'm not a real estate broker.

24 Q. Do you know, that your company has said, in
25 effect, to these land owners: Either you buy the land
from us for two hundred thousand dollars, or we're
going to bring in all these trailers, and bring in all
this blasting, and put in...

2

MR. MULLINS: I object, about the trailers and all that.

3

4

THE COURT: I'll sustain the objection.

5

Q. Mrs. Taylor, this sewer that is failing, was actually put in by your company, wasn't it?

6

A. No, it wasn't.

7

Q. It was not?

8

A. No, it wasn't.

9

Q. Why is it failing, Ma'am?

10

A. I really don't know why it's failing. The sewage..they say, that it was water logged during the winter time..I really don't know.

12

13

Q. And, how far is your trailer court, from the public road?

14

A. It adjoins it...The public road?

15

Q. Yes.

16

A. I don't really know.

17

Q. A thousand feet?

18

A. I guess.

19

Q. And, right now you only have seven families up there?

20

21

A. Uh huh.

22

Q. And, none of them own, they just rent from you?

23

A. Yes.

24

Q. And, you say that you don't know, if public water and sewage is not made available to you all, then you all will either just sell out that trailer court, or

25

put in your own private water and sewer system, won't you?

A. I don't make those decisions.

Q. But, you have to do one of the two, don't you?

A. I suppose so, Yes.

Q. And, the reason that you want to put in the public water and sewage, so that you can make a profit off of this, by putting in up to twenty-five trailers in that area?

A. Yes.

MR. SMITH: That's all, Thank you.

REDIRECT EXAMINATION

By Mr. Mullins:

Q. Isn't it also true, that you have a current health hazard?

MR. SMITH: I object to the leading question.

MR. MULLINS: I'll withdraw the question.

THE COURT: I'll sustain the objection.

MR. MULLINS: Mr. Danko.

DAN DANKO

having first been duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

By Mr. Mullins:

Q. State your name, please?

A. Dan Danko.

Q. And, how are you employed, Mr. Danko?

2

A. I'm employed as the business manager, at the Tazewell County Water and Sewage Authority.

3

4

Q. Have you been connected with the construction of the water and sewage system, known as the Claypool Hill System, down at Wardell?

5

6

A. Yes, I have.

7

Q. Are you familiar with the College View Addition?

8

A. Yes, sir.

9

Q. Are you familiar with any particular request of land owners, in the area, to supply water and sewage to their property?

11

12

A. Yes, sir.

13

14

Q. Can you state whether or not there is any person in the area adjacent to College View Addition, that has requested water and sewage?

15

16

17

A. Yes. There was a Jack Owens, from Vansant, that had some property there, that has requested that we run the lines beyond College Addition Trailer Park.

18

19

Q. In order to get to his property, what would be the route that you would take?

20

21

22

A. You'd have to..I don't know what Route that is - off 603 - up by College Estate Addition, is about three tenths of a mile passed the College Trailer Park.

23

24

MR. SMITH: Is Jack Owens in the Courtroom? Is he in the Courtroom, or available?

25

MR. MULLINS: No.

MR. SMITH: I'd object to that, on the grounds that it

is hearsay. We can't cross examine Mr. Owens. I have some very severe doubts, as to whether such a thing has occurred.

THE COURT: What has Mr. Owens said?

MR. MULLINS: He's requested water and sewage to his property, that's adjacent..

A. If I may, he asked me if we had intentions of running the water lines past the trailer park; that he understood, at that time, when he purchased the property, that water and sewage would be there; and, he said, he understood it was going to stop at the trailer park, so he requested that we extend those lines, and I asked him if he would put it in writing, you know, and we'd take it under consideration, when we looked at any additional lines in the area.

THE COURT: Alright.

Q. Did he put it in writing?

A. Yes.

Q. Do you have that letter with you?

A. I do not.

Q. When is the water system scheduled to go into operation?

A. We are in preparation of testing the treatment plant, approximately the middle of July. I would think, that we could start providing services sometime in August, if no great complications occur.

Q. When is the sewage system scheduled to be complete?

A. September.

MR. MULLINS: I believe that's all. You may ask.

CROSS EXAMINATION

By Mr. Smith:

Q. Mr. Danko, in regards to this so called application, by Jack Owens, the fact of the matter is, that you have no plans on taking that water beyond the trailer court, do you?

A. Not at this time.

Q. So, Mr. Jack Owens has applied for public water, but you're not going to give it to him, but you're going to give it to this trailer court?

A. No, sir, I didn't say we wouldn't give it to him. I told him, that we would take it into consideration, because we had to delete a few lines, and if we had to put that money back into the same area, then we would take it into consideration.

Q. But, you don't have any definite plan to give it to him?

A. No, sir.

Q. But, is there any difference between Mr. Jack Owens, and the corporation that is asking for it, for seven trailers?

A. Yes, there is. The Corporation was in the original design of the project, and Mr. Owens was not.

Q. When was the project originally designed, sir?

A. I honestly can't answer that, because I was not

2

working for the Water and Sewer Authority when the design was first made.

3

4

Q. Well, can you give us a date before, what time it was designed? When did you start working for the Water and Sewer Authority?

5

6

A. June of 1979.

7

8

Q. You know, from the plans, when the plans were finalized, don't you?

9

A. I know it went to bid, in the Spring of '79.

10

Q. It went to bid, in the Spring of '79?

11

A. Right.

12

Q. Those plans have been in effect, since 1977, haven't they?

13

A. It's a good possibility, Yes, sir.

14

15

Q. Water and Sewer Authority has been in litigation since '78, hasn't it?

16

A. I can't answer that, I don't know.

17

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Q. Would you please tell me, sir, exactly what problems..what irreparable damage the Tazewell County Water and Sewer Authority will have, if they don't put this water line up to this trailer court?

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A. I don't know the damage will be directly at the Water and Sewer, but it could be some damage to the other users. I would say, that if this line is not constructed that there will be some down time, which the contractors will be looking at the Tazewell County Water and Sewer Authority for reimbursement for that down time, and...

2

Q. Suppose, sir, that this...

3

MR. MULLINS: Will you let him answer. I don't think he's...

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Q. I thought he'd finished.

5

A. No, sir. Any additional costs.. The money we get from not running the line.. We'll have to redesign - if we put it in another area - and, we'll probably have to rebid it, which at the rate of inflation, construction costs will probably go over the amount of money that was originally in that line; and, if it does go over that, the user charge will probably increase.

11

12

Q. First..Let's be sure about this. First, there will be no direct harm to the Tazewell County Water and Sewer Authority..

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MR. MULLINS: That's not what he said.

15

Q. I believe that's what he said, I'm asking..

16

17

A. I said, I didn't know whether it would be directly toward the Water and Sewage Authority, but it would be to other users.

18

19

Q. You don't know of any direct damage to the Tazewell County Water and Sewer Authority, if this line doesn't go up to the trailer court?

21

22

A. I don't.

23

24

Q. You cannot testify, that there will be direct damage to the Tazewell County Water and Sewer Authority, is that correct?

25

A. Of course, it's going to delete lines. Yes..Well

1
2 in one sense it will be. Customers that we are depending
3 on.. We have to have a certain amount of customers on
4 our system, in order for it to pay for itself, and those
5 were in the original design, and if that line is
6 deleted, then that will be that many customers, that
7 we'll have to pick up somewhere else. It may affect
8 us immediately, but we may be able to do something with
it later, I don't know.

9 Q. Let's go into that, just a minute. Will seven
10 users, at the minimum rate, affect the Tazewell County
11 Water and Sewer Authority if they aren't on it?

12 A. We have to have a certain number of users on
13 our system.

14 Q. I asked, will the loss of seven users affect you?

15 A. If we need three hundred, and we only have two
16 hundred and ninety-three, Yes, sir, it will affect us.

17 Q. How is that, sir?

18 A. Because we have to have a certain amount of
users, in order to have a pay back for FHA.

19 Q. Alright, sir. Now, how many users do you have
20 to have, to have your pay back from FHA?

21 A. I'm not sure what it is in the Claypool System.

22 Q. So, you can't testify, that the loss of these
23 seven will cause you any problem at all, can you?

24 A. No, sir.

25 Q. Okay. Now, in regard to the question about the
seven users. Before you get to these seven users you

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have to lay a thousand feet of pipe line, don't you?

3

A. Approximately, I'd say.

4

Q. And the minimum cost of laying that thousand feet of pipe line is going to be approximately fifty thousand dollars, or more, is it not?

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A. I think it's right around fifty thousand.

7

Q. Fifty thousand dollars?

8

A. Yes, sir.

9

Q. Now, your minimum user fee is how much?

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A. It will be approximately fifteen dollars for water and sewer.

11

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Q. Fifteen dollars for water and sewer, per every two months, or every month?

13

A. Per month.

14

15

Q. Alright, so you're talking then.. that's per month, you said?

16

A. Yes, sir.

17

18

Q. So, you're talking about a total income from these seven users of twelve hundred and sixty dollars a month, if they use the minimum amount, which trailer court users would be expected to use?

19

20

A. Would you refigure that, please?

21

22

Q. Fifteen, per month?

23

A. Right.

24

Q. Times seven users?

25

A. Okay.

Q. Times twelve months?

2

A. Alright.

3

Q. That's twelve hundred and sixty dollars.

4

A. For a year?

5

Q. Per year.

6

A. Okay.

7

Q. Not including anything further, interest involved in the construction costs. You're talking about...

8

MR. MULLINS: I don't know, that Mr. Smith ought to be testifying.

10

Q. You're talking about thirty-nine years for the pay out of the construction of this water line?

11

12

A. Yes, sir, that's what the loan is on - forty years.

13

14

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16

Q. Thirty-nine years. Alright, sir. Actually, thirty-nine and a half years, and that's just for the construction cost, not allowing for any interest, at all, is that right?

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A. We're looking at this project overall. I don't think we're, you know, basing it on just each line.

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Q. I'm talking about the harm to the water line of these seven. You're talking about thirty-nine years away, just to pay the capital cost of putting the line in with no interest, whatsoever.

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MR. MULLINS: Your Honor, I believe the testimony here, is that as soon as the water and sewer goes up there, there will be twenty-five instead of seven. So, all of these calculations really are of no importance.

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Q. There may or may not be twenty-five. All of that is very speculative. All we can count on, right now, is seven, because we may have a suit against Western Realty to stop them from putting anybody else up there. We might survive in that suit, or succeed.

THE COURT: I don't know about that, but I don't know whether we need to get into this proceeding, at this time, on whether or not this is a feasible idea.

MR. SMITH: What we're talking about is the damage the irreparable harm, and what this is indicated to prove, is that it might be by far in the best interests of the Water and Sewer Authority not to spend that fifty thousand dollars to build that pipe line going up there; that's going to take thirty-nine and a half years...

THE COURT: I think that is a decision for them to make, and not for the Court; that's their decision.

MR. SMITH: I understand that it's their decision, Your Honor. The question is, in order to get an injunction they've got to show irreparable harm, by not being able to do what they're asking to do. What I'm saying is, that they can't show irreparable harm, when they're going to spend fifty thousand dollars, for a twelve hundred dollar gross return.

MR. MULLINS: May it please the Court...

MR. SMITH: That doesn't take care of the water.. providing the water processing and sewage.

MR. MULLINS: May it please the Court. There is

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already evidence, that there is a health hazard there, and I think the fact that there is a health hazard has to be corrected; it's sufficient irreparable harm to meet the test under the injunction.

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MR. SMITH: Your Honor

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THE COURT: I don't think the Court is going to consider whether or not this is practical to have it put in, or not, whether it's a good financial investment or anything like that; that's not for the Court to decide.

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MR. SMITH: I understand that, but it's for the Court to decide...

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THE COURT: He's answered your question, that he doesn't know if there is going to be any harm.

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Q. Alright, sir. Mr. Danko, you are aware that there have been tremendous problems, by residents and citizens of Tazewell County, about getting the various contractors, of Tazewell County Water and Sewage Authority, to come back and repair damage that they've caused to roads, to streets, to houses, and so forth, aren't you?

20

A. I think most of that has been corrected.

21

22

Q. Yes, sir, but you know that it took a very long time for it to get corrected, don't you?

23

24

A. I think in just one area, Yes, sir. But, that was because the contractor's were gone for three months.

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Q. Which area are you talking about? Which of the several areas are you talking about?

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A. We've not had very much.. We've had three contracts on this job, and of course, I think that the contractor in Cedar Land Farms has done exceptionally well in taking care of the problems in that area. The other contract on 460.. on 19, I've had very few complaints about his work; and, I think the only problem we've had was down at Paint Lick.

Q. Mr. Danko, don't you remember Wade Horton, and that group of several people - well in excess of a score, maybe close to a hundred - coming up to the Water and Sewer Authority, complaining about the lack .. about the damage to roads around Route 19, by the contractor who was doing the work on Route 19; and, the fact that the school bus couldn't safely traverse the road because it was so torn up, and had not been repaired?

A. You're speaking of Route 19?

Q. On the roads feeding into Route 19.

A. You'll have to.. I don't know what roads you're talking about.

Q. Excuse me a second... You know the area where you turn off 19, at Wardell?

A. Are you speaking of 609?

Q. Yes. Do you remember any problems up there?

A. Yes, sir.

Q. That was with the contractor who was doing Route 19, wasn't it?

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A. No, sir. Part of it, up to where the water treatment plant was, it was.

3

4

Q. Okay. So, you had problems with him, didn't you?

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6

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A. I'm not aware of as many problems.. We've had a few problems in that area, but I'm not so sure if you're speaking of passed the water plant, or.. The two contractor's split, at where the water treatment plant is being built.

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Q. And the one, that is on up at the upper end, is the one that we're dealing with today, isn't it?

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A. There will be two contractor's - they've sublet to another contractor. That was in the Cedar Land Farms sub-division, that we've never had any problems with.

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Q. Now, Cedar Land sub-division, let's go to that. Do you remember complaints from the citizens up there in Cedar Land's, about the contractor leaving holes seven feet deep in their front yard, with no restraints, nothing to keep three and four and five year old children from falling into pools of water, that deep?

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A. No, sir, I'm not aware of that.

MR. MULLINS: I'm not sure of the relevance of this.

MR. SMITH: We'll put on evidence of this, to show a balance, when we talk about injunctions. Do you remember.. You don't remember any of those complaints?

MR. MULLINS: I'd like to make an objection. I don't believe the information, that he's trying to

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elicit, has any bearing on whether or not we have the right to go in this sub-division or not. We're talking about a public right-of-way versus a private right-of-way, and he's going back up to Claypool Hill.

THE COURT: I think, that we're spreading out a little bit to far.

MR. SMITH: Your Honor, I won't ask anymore questions because we can put on separate evidence of that, but..

THE COURT: Your land owners might testify. You're getting into an argument with this witness..

MR. SMITH: That's all I'll ask of this witness.

MR. MULLINS: That's all the evidence we have, Your Honor.

MR. SMITH: You all rest? Your Honor, I'd like to first make a bit of an opening statement, so the Court understands what our position is, and then I'll call some witnesses, if I have your permission.

THE COURT: It's getting late. We may have to adjourn. How many witnesses do you anticipate?

MR. SMITH: I have one or two, Your Honor, and that will not take a long time. But, I do want to get on the record.. I'd like to refer the Court, specifically, to State Statutes, but I'm also going to have the Court look at the Sub-Division Ordinance, of Tazewell County.

In regards to the position of the County, that they have a right to go up the road, shown on Exhibit Number 3 - which was the plat - the question is: Whether

2 or not the plat, that they presented as Exhibit 3, is
3 such a plat as is referred to in Section 15.1-478,
4 and is referred to in Tazewell Counties own Sub-division
5 Ordinance.

6 Now, you can have plats, and you can have plats,
7 and the question is: Whether this piece of paper -
8 this plat, Number 3.. Exhibit Number 3 - is the same
9 thing as was referred to by the Virginia Legislature,
10 and by the Board of Supervisor's of Tazewell County,
11 when they passed their sub-division ordinance. And, if
12 it doesn't meet the definition of a plat, as set forth
13 in the State Statute and in the Ordinance, then it is
14 not such a plat as would transfer ownership of a road
15 to public ownership. Now, that's the Defendant's posi-
16 tion herein; and, in regard to that I would refer the
17 Court, not only to Section 15.1-478, but also to Section
18 15.1-475, of the Code of Virginia, which says: "...That
19 such a plat.." - using the same language as in 15.1-478 -
20 it doesn't say anyplace, "a plat", it says, "such a
21 plat". Now, what do we mean, when we talk about "such
22 a plat", and it's defined in Section 15.1-475; and,
23 there, "such a plat must be one which has been submitted
24 for approval by the local government". Furthermore,
25 Section 15.1-476, of the State Code, requires that:
"Such a plat must be certified by a professional
engineer". But, let's get into the Sub-division Ordi-
nance, because that affects Tazewell County directly,

2 and whether or not this plat is "such a plat", as would
3 be referred to in Section 15.1-478; and, as would -
4 in effect - transfer title to the County. I would
5 refer the Court to the Tazewell County Sub-Division
6 Ordinance, and I'm going to count back the pages, because
7 they don't appear to be numbered.

8 MR. MULLINS: Top of the page.

9 MR. SMITH: Excuse me. I first refer the Court to
10 page 3, at the bottom. We're talking about definitions,
11 and things that must be done in the sub-division in
12 order for it to be qualified as a sub-division, where
13 the streets are dedicated to the County. I'm referring
14 specifically to sub-section, little "v", and it says:
15 that for the plat to be such a plat - that is, we're
16 talking about the side lines of the lot shall be
17 approximately at right angles to the street or radial
18 to the street line. Now, all the Court has to do is
19 to look at the plat, that we have recorded here, and we
20 find that tract number 7, which is the tract that we're
21 specifically talking about, has no tract lines, that are
22 at right angles to the street. So, this tract..this
23 plat does not meet that qualification of Tazewell Counties
24 own Ordinance, and certainly, Your Honor, we would submit,
25 that Tazewell County is bound by its own Ordinance.

Then, under "b2" Business or Industrial. Now, what
we're talking about is the business and industrial use
of tract 7, because it is a trailer court, operated for

2 and whether or not this plat is "such a plat", as would
3 be referred to in Section 15.1-478; and, as would -
4 in effect - transfer title to the County. I would
5 refer the Court to the Tazewell County Sub-Division
6 Ordinance, and I'm going to count back the pages, because
7 they don't appear to be numbered.

8 MR. MULLINS: Top of the page.

9 MR. SMITH: Excuse me. I first refer the Court to
10 page 3, at the bottom. We're talking about definitions,
11 and things that must be done in the sub-division in
12 order for it to be qualified as a sub-division, where
13 the streets are dedicated to the County. I'm referring
14 specifically to sub-section, little "v", and it says:
15 that for the plat to be such a plat - that is, we're
16 talking about the side lines of the lot shall be
17 approximately at right angles to the street or radial
18 to the street line. Now, all the Court has to do is
19 to look at the plat, that we have recorded here, and we
20 find that tract number 7, which is the tract that we're
21 specifically talking about, has no tract lines, that are
22 at right angles to the street. So, this tract..this
23 plat does not meet that qualification of Tazewell Counties
24 own Ordinance, and certainly, Your Honor, we would submit,
25 that Tazewell County is bound by its own Ordinance.

Then, under "b2" Business or Industrial. Now, what
we're talking about is the business and industrial use
of tract 7, because it is a trailer court, operated for

1
2 profit, by Western Realty Corporation; and, it says:
3 "Lots intended for business or industrial use shall be
4 designed specifically for such purposes with adequate
5 space set aside for off-street parking and delivery
6 services and facilities". There is absolutely no
7 designation, on this plat, saying that this is to be
8 used, or may be used for business purposes. So, either
9 the trailer court is illegal, which we contend that it
10 is - and, we'll talk about in Court at a later action -
11 or the plat is wrong, and either way there is no way
12 the County can have any reason for going up there. The
13 trailer court is illegal.. The County says, that they
14 don't want to go up there, anyway, except to serve the
15 trailer court, but let's go a little bit further in this
16 same Sub-Division Ordinance, looking at page 4.

17 Looking at "b" Final Plat. This is what the final
18 plat has to have, and Your Honor, I respectfully submit,
19 that what we have here I hope is the final plat; it's
20 the only one I've seen; and, I assume, that Mr. Mullins
21 would not put a not final plat before the Court, as an
22 Exhibit. It says, on "b..The subdivision plats submitted
23 for final approval by the governing body .." there it is,
24 it must be submitted for final approval by the governing
25 body, and this plat was never submitted for final approval
by the governing body, even though throughout the time,
that this was being plated, and being set up, the Tazewell
County Board of Supervisor's regularly met, and regularly

1
2 discussed new sub-divisions and acceptance of plats,
3 but this one was never brought before them, and they
4 never accepted it..excuse me; it was later brought before
5 them, but they never accepted it. It says: "The
6 subdivision plats submitted for final approval by the
7 governing body and subsequent recording shall be clearly
8 drawn in ink at a scale of one hundred (100) feet to
9 the inch"; and, if Your Honor will look at this plat,
10 it's not one hundred feet to the inch, it's two hundred
11 feet to the inch, over half the scale that is required
12 by the Subdivision Ordinance for it to be such a plat,
13 as is mentioned in the Sub-Division Ordinance. Then,
14 it says: "..sheets having a size of 17 3/4 x 21 inches.."
15 Your Honor, you may measure this, but I think the Court
16 can take Judicial Notice, that this is not 17 1/2 x
17 21 inches. Going further, however, under 1 (b), below
18 that...

17 MR. MULLINS: Your Honor, we will stipulate that
18 this sub-division did not comply with the Sub-Division
19 Ordinance; it does not mean, that we stipulate that it
20 did not have to comply; and, the law that requires the
21 streets to become dedicated does not apply, but we will
22 stipulate, that this plat violated various provisions
23 of the Sub-Division Ordinance - If that will help.

24 THE COURT: That's very apparent.

25 MR. SMITH: There are a couple of other things,
for the record, that I would like to very simply point

1
2 out. One, is that it doesn't have the blank oblong
3 space reserved for the approving authority, to show
4 its approval. Clearly the intent is, that there be
5 an approval before any streets be accepted by the
6 County.

7 Secondly, "Certificates signed by the surveyor or
8 engineer setting the source of title by the owners of
9 the land subdivided and the place of record of the last
10 instrument in the chain of title", that's not there;
11 that fits right in with the State Code, which says:
12 "Such a plat must be signed by a certified engineer"...

13 MR. MULLINS: We're trying to speed this up, by
14 my stipulating that it doesn't meet the requirements
15 of the Sub-Division Ordinance. You don't have to read
16 them all.

17 THE COURT: We can readily see, the plat will speak
18 for itself; it doesn't comply with the technical things,
19 but I don't think that you can take the position, that
20 the land owners don't have title to the property..

21 MR. SMITH: I'm not saying that. What I'm saying is,
22 the land owners were deeded the property by specific
23 deeds, which has already been introduced into the Court
24 record, but the County was never deeded the property by
25 anything, unless you say it was deeded it by a plat, and
if it was deeded it by a plat, then it had to be a valid
plat, and this can't be a valid plat. Now, the land
owners land...

2

THE COURT: Let's hear your evidence, and then you can argue all you want.

3

4

MR. SMITH: I'd like to call Mr. Brown.

5

THE COURT: The day is wearing on..

6

WILLIAM A. BROWN

7

having first been duly sworn, was examined, and testified as follows:

8

DIRECT EXAMINATION

9

By Mr. Smith:

10

Q. Mr. Brown, would you please state your name and address, for the record?

11

12

A. William Alfred Brown, Cedar Bluff, Virginia.

13

14

Q. Mr. Brown..First, to your knowledge, has anybody other than the business interest which own tract 7, in this plat, desire, need or want public water or sewage?

15

16

A. Not to my knowledge.

17

18

Q. Now, secondly, do you have any - to your knowledge - has anyone other than the trailer court have any problem with any sewage, or with any contamination of their water systems?

19

20

A. Not to my knowledge there isn't. Of course, we have the other land owner there, and you might ask them.

21

22

23

Q. As far as you're concerned, you have no problems drinking your water everyday?

24

25

A. No, sir.

Q. Alright, sir. Now, you were present when the company that went up there, or the contracting company.. Would you tell the Court what happened the first time they went up there?

A. The first time they come up I went down and talked to the man who was in charge, and I believe it was a Mr. David Ostrander, with the Engineering Firm of Dewberry, Nealon & Davis, who was with these construction people; and, I told the people that we considered this to be a private road, and asked them if they would please leave their equipment..or take their equipment out, and stop their drilling operation, because we didn't want them drilling and shooting, and tearing up the road. I also asked Mr. Ostrander, if he would be concerned with how I got back and forth to my house, after they finished their project and left, and he said: "No, it wouldn't make any special difference to him"; and, I asked him - I said: Are you aware, that these people have torn up roads before, and different sewer contractors have torn up streets, and have walked away and left them, and left them in dangerous conditions..And, I know this from personal experience, and I can relate it to the Court, if they so desire to hear it, but this is history and we can bring it in as a direct bearing on this...

Q. Tell the Court about the problems you've had with the Water and Sewer Authority about the same type

of thing.

A. When this sewer system was constructed in Raven, Your Honor, I was privileged....

MR. MULLINS: When was this? When did this happen?

A. When the sewer system was constructed in Raven.

MR. MULLINS: What year?

A. Well, I couldn't tell you exactly what year it was, but it was about seven or eight years ago. You should have records of it - You're the Sewer Authority.

MR. MULLINS: Wasn't the sewer built there in 1968 - '69?

A. It could have been. I didn't state an exact date, and I don't think it makes any difference.

MR. MULLINS: I think it's kind of remote from this situation, Your Honor. I don't even know what he's going to testify to.

THE COURT: I'll sustain the objection.

Q. Just tell the Court, whether you know of serious difficulties, that adjacent land owners have had, because of the contractor's for the Water and Sewer Authority failing to provide for safety, and soforth, in regard to their construction project?

A. I do.

Q. Now, when they came upon your property this first time, did they leave anything there?

A. The first time they came up.. One of the fellows, who was here today, that was working for the Water and

Sewer Authority, asked me if I would mind if he worked on his equipment. I said, No, go ahead, work on it, but we want it moved off here. But, Mr. Jerry Brown, who is not present- hasn't shown up around here today - brought a crew of men back to start drilling that afternoon, and that's when we contacted you.

Q. Did you let them know, that you were opposed to the drilling?

A. I did.

Q. Now, what time, or did they in the course of doing this - before getting any permission to do so - leave, dump gravel on private property?

A. They did.

Q. What did they do, tell the Court about that, please.

A. They dumped gravel on private property. And, of course, since this plat was not prepared by a certified engineer, it would be doubtful whether it's accurate, but from the fence - where we assume the line is - this gravel was dumped more than forty feet - and, forty feet is the only right-of-way, that goes up in there; and, which would have been dumped over on property that was .. You'd probably have to have it surveyed to find out if it belonged to me, or Clyde B. Ratliff.

Q. It was either on you, or Clyde Ratliff's property?

A. It was.

Q. Is that gravel still there?

A. It is.

Q. About how much gravel is involved?

A. I would estimate, that it was about four or five truck loads; and, probably these people haul about ten tons to the load.

Q. You're talking about forty or fifty tons?

A. Somewhere in that neighborhood.

Q. In order to build a pipe line up there.. Are you involved in construction work?

A. I have been. I'm not at present.

Q. Have you been involved in construction work, in this part of the country?

A. Oh, Yeah.

Q. Have you had to do blasting, and soforth, to do construction?

A. Yes, sir.

Q. Are you familiar with the conditions, that they would be faced with, in putting the pipe line up that road?

A. Yes, sir.

Q. What would they have to do, sir?

A. Well, first off: If this sewer line goes in accordance to the specifications...

MR. MULLINS: Are you a certified blaster?

A. Yes, sir, you want to see my card?

MR. MULLINS: I think we ought to.

2

MR. SMITH: Let's see your card.

3

A. Certified by the State of Virginia.

4

MR. MULLINS: This is mine related blasting?

5

A. Mine related blasting, Surface and Underground;
and, I'm also a certified instructor in that field. I
work for the Southwest Virginia Community College.

6

7

MR. SMITH: Do you want to examine him, as to his
expertise? Go ahead, please.

8

9

A. They would have to put in at least.. I think
there is no problem, no question about this: There is
eight man holes, and the Court probably knows the size
of one of these concrete man holes, that's inserted in
the ground; and, naturally you've got to shoot a hole
bigger than that thing is; and, when you start shooting
those holes - anywhere from three to five feet from the
edge of the road - you're going to take in some of the
road in the blasting process. And, if you're shooting
on each side of the road, you don't bring rock up
through the same size hole that the rock is, you've
got to shoot a bigger one.

10

11

12

13

14

15

16

17

18

19

20

Q. Did you hear the gentleman talk about using
dynamite?

21

22

A. I did.

23

Q. Is that the type of blasting, that you would
normally expect to use in something of that sort?

24

25

A. Either a dynamite, or a powder especially made
for blasting rock.

2

3

4

Q. Is the powder especially made for blasting rock the type that would cause less damage than dynamite, to surrounding structures?

5

6

A. It would be depending upon whether or not.. on the type of rock that you were blasting.

7

8

Q. Now, does it make a difference as to the time delays on the blasting, as to the amount of damage that is caused?

9

10

A. Oh, yes.

11

12

Q. Does it make a difference as to the type of blasting caps, as to the amount of damage that is caused?

13

14

A. Yes, sir.

15

16

Q. All of those are important things, that had to be understood?

17

18

A. Yes, sir.

19

20

Q. Have you seen any indication, whatsoever, that these people have any understanding of that?

21

22

A. I have never observed these people doing any blasting, and I've never questioned them.

23

24

Q. Now, in regard to that particular area - I believe there is one home within thirty-five feet of the road?

25

A. Yes.

Q. How far was that from the nearest blasting hole that they drilled?

A. Being about thirty-five feet from the road, I'd say, about twenty-five. Now, they didn't drill the hole

there, but the pipe line comes up by this house.

Q. So, there would have to be some holes drilled up there?

A. If there is rock, that would definitely have to be drilled and blasted.

Q. Do you know what kind of rock is there, sir?

A. Dolomite.

Q. What kind of properties does dolomite have? Is it harder than limestone?

A. Dolomite is what we normally call flint, and it is very hard.

Q. Does it take a heavy charge to blast it out?

A. It does, to bring it out; It takes a fairly heavy charge.

Q. In your blasting experience, have you seen that this type of blasting can cause serious damage to structures, such as the houses up there?

A. If it's not done right it can cause very serious damage.

Q. Now, what kind of houses are up there, besides this trailer court?

A. They are all private residences, and were you referring to the value of the houses?

Q. Yes, sir.

A. I would say, that the average value is eighty thousand dollars, or above. I believe they are assessed at about that.

2

Q. What would be the highest value, up in that area?

3

4

A. Probably, two hundred thousand - close.

5

6

Q. Now, in regard to the blasting - especially in dolomite strata - does that have the effect of causing people to lose wells?

7

8

A. Dolomite, being such a hard rock, it can split very easily, and no one knows the extent of the splitting.

9

10

Q. So, what is the effect of that, sir?

11

12

13

A. Normally, in explosions, it takes the route of least resistance, but in a case like this the dolomite - the strata - being in layers could split most any direction.

14

Q. So, what would be the effect on the wells?

15

16

A. If a well was very close to it, it possibly might even break the casing on the upper part, or cause the water to be muddy in the well.

17

18

19

Q. Do you know, whether or not the Water Authority was going to put water to anybody besides this little favored trailer court?

20

21

A. To my knowledge, that's the only place it's going.

22

23

Q. Do you remember anything about a letter, or did at one time, C. R. Bolling represent you?

24

A. No.

25

Q. Do you know whether he represented..or, does Mr. Jerry Maggard and Ben Ratliff - do they live up in

2

this sub-division with you?

3

A. They do.

4

Q. Is Larry Smith available?

5

MR. MULLINS: Yes.

6

Q. I'll hold that off - do that later. So, if they did cause any damage to the wells..they'd be going up there, and causing damage to your wells, and not giving you water - at the sametime - for your understanding, is that right?

10

A. If it caused damage to the wells they weren't supplying water to, they certainly would.

12

Q. About that road. Who built the road, sir?

13

A. I understand, that Mr. Beverly Horne built the road before he sold the property.

14

Q. And, who has maintained the road?

15

A. We have. Part of the land owners, some of them have never helped on it.

17

Q. Have the people, who owned that trailer court, ever paid a dime towards the maintenance of that road?

18

19

A. Not to my knowledge.

20

Q. Have you?

21

A. I have.

22

Q. Substantial amounts of money?

23

A. I paid five hundred dollars, at one time.

24

Q. That was in conjunction with the other land owners, up in that sub-division?

25

A. Yes, sir.

2

Q. Is that road paved?

3

A. Yes, it is.

4

Q. I believe it's a forty foot roadway, is that correct?

5

6

A. Forty foot right-of-way, and the roadway is about..the actual pavement is about ten feet wide.

7

8

Q. Do you know whether or not the Horne's deeded property to the..or deeded the roadway - fee simple interest in the roadway - to Ben Ratliff?

9

10

A. To my knowledge he did.

11

12

Q. Alright, sir. So, you all have a right-of-way over the surface, and the Ratliff's - Ben Ratliff - has a fee simple interest in the road, is that correct, to your knowledge?

13

14

A. That's my understanding.

15

16

Q. Yes, sir, alright. Did you ever have any understanding, that this road was a public road, or what was your understanding as to what the road was?

17

18

A. My understanding was: According to the deed, this road was for the use of the land owners, only.

19

20

Q. Alright, sir, is that the way you've always treated it?

21

22

A. Yes, sir.

23

24

Q. Now, sir, have you ever tried to get the County to take..the County or the State to take some responsibility, in connection with this road?

25

A. I haven't directly, myself, but Mr. Stuart Cole

2

spearheaded a drive to get the County, or the State, to take this road over and maintain it, but he failed.

3

4

Q. And, so the County has absolutely refused to take any responsibility for this road, over the years?

5

6

A. They haven't volunteered to take any.

7

Q. Have they ever had any County maintenance trucks up there, or State maintenance trucks?

8

A. No. No, sir.

9

Q. Does the school bus go up that road?

10

A. No, sir.

11

Q. Because it's a private road, is that right?

12

A. Yes, sir.

13

Q. Do you have children up there?

14

A. We do have.

15

Q. And, they have to walk down to the end of the road, to the public road, to catch the school bus?

16

A. Either that, or we take them down.

17

Q. Alright, sir, is that a pretty good walk for some of them kids?

18

19

A. It's close to a mile - I'd say, nine-tenths.

20

Q. How many kids are there up there?

21

A. Around..Besides the people in the trailer court..I'd say, close to fifteen, besides the one's that live in the trailer court.

22

23

Q. So, almost half a bus load of kids live up that road?

24

25

A. Yes, sir.

2 Q. And yet, the school bus won't go up it?

3 A. No.

4 Q. Because it's not a public road?

5 A. Right.

6 Q. How long has this been going on, that the
7 Tazewell County School System has refused to send its
8 bus up that road?

9 A. The two ladies there asked if they could get
10 bus service up there, I believe about four years ago -
11 the best of my knowledge.

12 Q. They were refused?

13 A. Yes.

14 Q. Why?

15 A. From what I understood, they told them; that
16 they only traveled on public roads.

17 MR. MULLINS: I object, that's hearsay.

18 Q. Nevertheless, the school bus doesn't go up
19 that road?

20 A. That's right.

21 MR. SMITH: That will be all, Your Honor.

22 CROSS EXAMINATION

23 By Mr. Mullins:

24 Q. Isn't it true, Mr. Brown, that the gravel you
25 spoke about was dumped beside the road?

26 A. It's true, just exactly what I told you, Mr.
27 Mullins. The gravel was dumped, and it was pushed over
28 on our property, more than forty feet away from the fence.

2

which we considered and understood to be the line.

3

4

Q. I'll ask you to take a look at that photograph, and see if you can see the gravel on the left portion?

5

6

A. I can, and if you'll notice you can see it clear over into the ditch.

7

8

Q. Is that what you're talking about? Does that accurately show the gravel, that we're talking about?

9

10

A. Yeah. To the best of my knowledge, that's the gravel pile.

11

Q. How wide is that road?

12

A. The road is about ten feet wide.

13

Q. And, the right-of-way is?

14

A. Forty feet.

15

Q. So, if the road is ten feet...

16

A. If it's in the center.

17

Q. You've got fifteen feet, on each side of the road?

18

MR. SMITH: Your Honor, I object. It's not been shown, that the center of the right-of-way, is the center of the road.

19

20

Q. I can ask this question.

21

22

MR. SMITH: You can't ask a hypothetical question, unless you lay some groundwork for it, and there has been no ground work, showing that it's in the center.

23

24

THE COURT: He may know whether or not it's in the center.

25

MR. SMITH: He can ask that question.

2

THE COURT: He may know where the property line...

3

Q. Is the road in the center of the right-of-way?

4

A. I doubt it's in the center of it.

5

Q. What makes you say that?

6

A. If we are assuming, that Mr. Clarence Whitt's fence is on the line, which we've been led to believe, then the road is definitely not in the center of the right-of-way.

9

Q. Well, is Mr. Whitt's fence near this area?

10

A. Yes, it's over here.

11

Q. Is the road closer to his line, then it should be?

12

A. No.

13

Q. Is it further away from his line?

14

A. Yes.

15

Q. Do you know, that the right-of-way goes all the way up to the edge of the property line, there, next to Mr. Whitt's line?

17

A. I don't know, and since it has not been done by a certified engineer, neither do you, nor does anybody else know.

20

Q. Is it shown that way on the plat?

21

A. To be competent..this fellow might not be competent.

22

Q. Is it shown that way on the plat?

23

A. You can accept that plat, if you wish.

24

Q. I'm asking you: Are you familiar with the plat?

25

A. I'm looking at the plat.

Q. Is it shown that way on the plat?

A. The only thing this here shows, is a forty foot right-of-way, and to my knowledge there is no relation to Clarence Whitt's line here.

MR. MULLINS: Your Honor, I would like to introduce this as Exhibit Number 7, to show the gravel that has been testified to.

MR. SMITH: Your Honor, I would object to that - showing about it - because: In the first place, nobody knows where the right-of-way is, and certainly they can't say it was not on my client's property, if they don't know where the right-of-way is. Secondly, that's a further reason for the objection for them dumping anything, until they can ascertain where the road, that they claim to exist, is.

THE COURT: We have to assume, that they built a road up there, and would put it inside of the right-of-way.

MR. SMITH: I think that might be true. The plat shows the right-of-way going right along that fence line, for forty feet over from the fence line. The picture shows the road being built and extensive distance over away from the fence line. So, the road could be within the forty feet, and the gravel on my client's property.

THE COURT: For whatever it's worth..

Q. You have two concerns, that you've expressed about the blasting: First, that the blasting damaged the road?

A. Yes, sir.

Q. And, you have five hundred dollars invested in that road?

A. I have five hundred dollars, and part of the price that I invested in this property was for the right to travel over that road; and of course, if I maintain it, for it to be that I could travel it safely.

Q. How long have you lived up there, Mr. Brown?

A. I lived up there five years.

Q. And, the second concern is, that the blasting if not done right could cause extensive damage?

A. Oh, yes.

Q. Isn't it true, that if the blasting is done right, it would not cause extensive damage?

A. No, because you can't shoot that close to the road without breaking the surface of that roadway.

Q. Besides the road damage, beside the road itself..

A. Beside the road itself, well there is not a lot between there..between Clarence Whitt's house and his barn, that you're going to damage..

Q. If it's done right?

A. If it's done right.

Q. And, you know what I mean by being done right - all precautions taken. Isn't it true, that there is

very little likelihood of any damage occurring to anything?

A. Anytime that you are blasting rock..rock strata changes from one - Say, in a ten foot distance - your rock strata may change, and you think you're doing it right, but you are never absolutely positive.

Q. Isn't it true, that land owners from your sub-division, came to the County asking that the State Highway Department take over that road, for maintenance purposes?

A. They did.

Q. Isn't it true, that the reason it was refused is because you first have to give a forty foot right-of-way, and bring the road up to standards?

A. No, that part was never mentioned. The thing that was mentioned..Mr. Les Ballard, of your Board of Supervisor's here, told Stuart Cole, that the first thing we would have to do was to give the State a deed to this road, and we would have to sign an agreement to that effect, and then if the State considered it, they might take the road over.

Q. Wasn't he talking about the additional ten foot easement, that they required?

A. No, he was talking about the forty foot.

Q. Isn't it true, that the reason the school bus does not go up in there, is because it's not a State Maintained Road?

2

A. I would assume that's true; that's the excuse they have.

3

4

Q. Okay, that's not a State Maintained Road..

5

A. Because it's not a public road.

6

Q. I think it's because it's not a State Maintained Road.

7

8

A. Well, that would be a difference of opinion, between me and you.

9

MR. MULLINS: That's all I have.

10

REDIRECT EXAMINATION

11

By Mr. Smith:

12

13

14

15

16

17

18

Q. One final question, sir. In connection with your blasting, you were talking about you could never be sure. In order to even have an inkling of what effect blasting might do, and the proper method of doing blasting, isn't it true; that you've got to do a considerable amount of core drilling; so, that you know what the rock strata is within a given radius of your blasting?

19

A. There should be some core drilling done.

20

21

Q. Is there any evidence, that such a thing has been done?

22

A. No.

23

MR. SMITH: That's all.

24

RECROSS EXAMINATION

25

By Mr. Mullins:

Q. Haven't you, in fact, told them not to do any drilling up there, Mr. Brown?

A. I did, after they came up...

Q. That's what I think...

MR. SMITH: Let him finish his answer.

Q. Finish.

A. If you don't mind. I told them, after they came up, and just walked in, and started drilling, and there was nothing we could talk to them about; and then when Ben Ratliff called you, you told him: "Yeah, we're going to go ahead and build the sewer line anyway", from what I understood from him; and, they were not doing any core drilling. I think the evidence is very plain, down Route 19, where they shot along side of the road, and you can see the humps sticking there, today. They've not been fixed.

MR. MULLINS: We have no more questions.

THE COURT: Alright, sir, you may stand aside.

MR. SMITH: Randall Rasnake.

RANDALL C. RASNAKE

having first been duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

By Mr. Smith:

Q. Please state your name, for the record.

A. Randall Clyde Rasnake.

Q. Mr. Rasnake, are you a land owner, and resident in this sub-division?

A. Yes, I am. I'm the one, that lives approximately thirty-five foot from the road.

Q. Alright, sir. I don't want you to repeat any testimony, that has already gone on, but do you have anything to tell the Court about the way these people have trespassed on your property, and the way they've come up there, and what they've done?

A. Yes, sir. When they came onto the road with their drill, instead of taking regard for our interests and the interests of the road, they brought the drill right up the middle of the road, with cleats on it; they had no belt on it, no boards or anything under the cleats; they didn't try to protect the road, in any way. Those holes were drilled approximately two foot from the road, and I don't know of anyway, that you could blast that close to the road without tearing it up.

Q. Do you know whether the holes were actually drilled on the right-of-way, or on private property - assuming that the right-of-way is not private property, for the purpose of this question?

A. I assume, that the holes were probably drilled on the right-of-way.

Q. I believe, that you are involved in the construction business - water lines - yourself, are you not?

A. No, sir, I'm not. I'm in the mining business, but I am certified to blast underground. It's not the same as above ground, and I'll state that, but I do know a little bit about what blasting is. Those holes are drilled only two foot from the pavement - approximately two foot from the pavement, and I can see no way, that they could blast those holes - even if it was just dirt - I don't see how they could blast those holes out, that close to the pavement without disturbing it.

Q. Are you concerned about damage to your house?

A. Yes, sir, I am; and, I have a small child, and I'm concerned about holes being left and that child wandering into them...Holes being left, filled up with water, and a child wandering into them. I've seen damage done in other areas, such as approximately two miles, on Route 609, where deep holes were left, filled with water in a field, which any kid could have wandered into - possibly drowned.

Q. Anykind of restraint, or warning?

A. None, whatsoever.

MR. SMITH: That will be all.

CROSS EXAMINATION

By Mr. Mullins:

Q. Where was this?

A. Approximately two miles, off Route 19 on 609.

Q. Up in the Wardell area, towards Paint Lick?

A. Yes, sir.

2

Q. Which side of the road is it on?

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A. Right side of the road in the field, just across from..there's a small body shop on the left side of the road.

5

Q. Do you know where the sewage plant is?

6

A. Yes, sir, I do.

7

Q. Is it above, or below it?

8

A. Above it. In fact...

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MR. MULLINS: We have no more questions.

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REDIRECT EXAMINATION

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By Mr. Smith:

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Q. So, it's the same contractor...

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MR. MULLINS: There are two contractor's.

14

A. I don't know if it's the same one, or not.

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MR. MULLINS: There are two contractor's.

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MR. SMITH: That will be all, Thank you. I'd like to call Larry Smith to the stand, as an adverse witness.

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MR. MULLINS: Go ahead and admit it. I have no objection.

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MR. SMITH: Then, without calling him I would like to admit this letter of October 1, 1979, from Randy Bolling, in which he talks about this situation. He says, very clearly, in paragraph 4: "...that his client's would obviously prefer, that the water and sewer lines not be constructed to the trailer park, but what is good for the goose is good for the gander. If you're going to put it to the trailer park, you ought to be made to

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2 put it through the entire sub-division". The point
3 I'm making is the fact, that this letter speaks, for
4 Number 1: That my client's have continuously objected
5 to having the water lines put up..water and sewer put
6 up there at all; Number 2, that there has never been
7 any planning to put this water to anybody but this
8 trailer park; and we respectfully submit, that that is
9 a misuse.. a total misuse of public funds to put water
10 up for private person to make a profit off of, at the
11 expense and damage of other private persons, and then
12 not, at least, make it available to everyone else up
13 there. So, I'd like to have this filed as Defendant's
14 Exhibit 1, please. Excuse me, just a minute...

14 THE COURT: Is that all?

15 MR. SMITH: With that, we'll rest. Your Honor,
16 I'd like to make a couple of closing remarks.

17 MR. MULLINS: I submit it, Your Honor.

18 MR. SMITH: The only thing I'd like to say, Your
19 Honor, is twofold: Number 1, the Water Authority is
20 asking for an injunction. As the Court knows, it's
21 "horn-book law", the most basic law passed down for
22 the last thousand years, that in order to get an injunc-
23 tion, the party that is seeking the injunction must have
24 clean hands. In reference to the party..they are seeking
25 the injunction against, we respectfully submit, that
these parties have not had clean hands. They have
trespassed on my client's property. They have dumped

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2 gravel on my client's property. They have gone up on
3 a road, that my client's built; that they knew that they
4 built, torn it up without so much as a bye your leave,
5 and without any attempt to get the right to do so.
6 So, they don't have clean hands.

7 Secondly, the evidence - their own evidence - that
8 they don't have any irreparable damage by not putting
9 it up there; and, based on those two facts alone, an
10 injunction is not available to them from this Court,
11 or anyother Court - at Common Law, or anyother way.

12 Secondly, we would submit, Your Honor, if they are
13 going to go up there at all, they have to go up only
14 after condemning a right-of-way for the pipeline, up
15 that road, because all of the parties - as far as the
16 road is concerned - the only thing the parties have is
17 a surface right-of-way; and, so no one can deed anything
18 except a surface right-of-way to anybody, except Ben
19 Ratliff, who has not deeded anything to anybody; and,
20 there is a claim, that this trailer park..these people
21 have deeded or assigned to the Tazewell County Water
22 and Sewer Authority an easement to build the sewer and
23 water line up to them.. to assign an easement that they
24 had. We respectfully submit, two things: One, the
25 easement's are not shown on the plat, and under Tazewell
Counties own Sub-Division Ordinance, the easements are
not valid unless they are shown on the plat. So, that
easement is an invalid.. Secondly, based on Tazewell

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2 County Law, their own Ordinance which they have intro-
3 duced.. Secondly, as far as the easement is concerned,
4 the easement is across the private property, not up
5 the right-of-way. So, they can't put it up the right-
6 of-way, anyway; and, Thirdly, they cannot assign that
7 easement, because that easement is peculiarly for the
8 benefit of the owners of the land, and for residential
9 housing purposes, not for business purposes, but for
10 residential purposes. And, we would respectfully
11 submit, that the Tazewell Water and Sewer Authority
12 cannot possibly have clean hands, when it is taking over,
13 and in effect doing a job for free, for somebody..one
14 private land owner, at a cost of fifty thousand dollars
15 for that one private land owner. If the easement were
16 Tazewell County Water Authorities, they could do so,
17 but they don't have it. The mobile home court has it..
18 the mobile home court can build a water line, and they
19 can pay for the water line, if they want to have the
20 water line; that's what that easement is for; it's not
21 to allow them to go out and give any Tom, Dick and Harry,
22 who wants to build a water line up there, the right to
23 build a water line; and, we think it's a misuse of
24 public funds. We think it's a gross injustice, not
25 only to my client's, but to the taxpayers of Tazewell
County to have fifty thousand dollars spent for one
residence, one land owner, who is making a profit off
of it in the first place, and who could go in very...

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2 easily go in and put in his own private water and
3 sewer system. And, if he's going to make a profit
4 off of him, let the free enterprise system work, and
5 let him build his own water and sewer system, just
6 like everybody else up there has done, and is very
7 well satisfied.

8 MR. MULLINS: May it please the Court. Can I
9 respond by saying, it is not my decision; I don't
10 believe, in this hearing, it is the Court's decision
11 to determine whether or not the project is a proper
12 project; whether or not it's feasible, economically,
13 or whatever. I don't think that is a matter that
14 ought to be considered in this injunction. The right
15 to relief has been demonstrated, by the moving party
16 in this case, by showing injury to property. In
17 Thompson v Smith, a 1930 Virginia Case, 155 Va. 367,
18 an injunction is an appropriate remedy to resist an
19 invasion, or an interference with the right to travel
20 a public highway. There is an inadequate legal remedy;
21 there were a multiplicity of suits, if we are required
22 to go into Court everytime the employee's are accosted
23 by the land owner's; and, that is supported by legal
24 history from 1816 to as late as 1974, in Seventeen
25 versus Pilot, 215 Va. 74. The Defendant's have asserted
the doctrine of comparative convenience, and I submit,
that under the doctrine of Hart versus Mountain Court
limited, a person invoking that doctrine has the burden

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2 to prove his equity; and, I submit, that they have not
3 done so in this case. There is irreparable injury;
4 there is a delay of the project, which increases the
5 cost to the taxpayer; there is a delay of the project,
6 which increases the risk of drought in the Claypool
7 Hill area; there is a delay of the project, which
8 increases the risk of health hazards, and the project -
9 if constructed - would alleviate a known health hazard.

10 Finally, prevention of illegal acts which result
11 in property damage, is a proper subject of injunctive
12 relief, and it will avoid the necessity of multiplicity
13 of prosecution; and, this is supported by decisions from
14 1918 to 1967, the latest of which is: Thomas versus The
15 City of Danville, 207 Va. 656.

16 We submit, that the prohibitory injunction sought
17 by the Tazewell County Water and Sewage Authority is
18 warranted, and necessary, to proceed with this project.

19 MR. SMITH: Your Honor, could I respectfully mention
20 one further thing with the Court. I think that equity
21 requires treatment of all parties equally. The Court
22 has seen, through the evidence, uncontroverted evidence
23 where the contractor here, who is the agent..admitted
24 agent of the Tazewell Water and Sewer Authority, has
25 gone on my client's property; has trespassed on it.

Now, let's forget about the road, whether that's
public or not. Right now the whole case is, whether
that is a public road or not. If the Court finds, that

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2 it is a public road, then..and should say, Okay, since
3 it's a public road, then we're going to grant the
4 injunction; then, Your Honor, I would respectfully
5 submit, and move orally at this time, to have the Order
6 include an injunction against the Tazewell County Water
7 and Sewer Authority, enjoining them from trespassing
8 on my client's property, in any way, shape, or form;
9 for putting so much as one foot on my client's property,
10 because they are opposed to it; and, from causing any
11 damage, whatsoever to my client's, and require them to
12 post a bond of at least one million dollars to cover
13 any damages, that they may cause by this blast. I
14 think, that is the only fair way of doing it.

15 THE COURT: Alright, sir. There was some indication,
16 that Counsel wanted to talk with the Court about some
17 procedural matter. I'll talk to you, in Chamber's.

18 The Hearing concluded at 5:53 P. M.
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CERTIFICATION

STATE OF VIRGINIA)
:
COUNTY OF TAZEWELL)

I, Gerald L. McCall, a Notary Public for the State of Virginia at Large and Court Reporter, do hereby certify, that the foregoing hearing was duly taken and sworn to at the time and place, and for the purpose in the caption mentioned; that the hearing was recorded by me with a stenomask, and onto a mechanical recorder, and later reduced to typewriting by me, personally; and, that the foregoing transcript is true and correct to the best of my ability.

Given under my hand and seal, on this the 15th day of July, 1980.

Notary Public

My Commission expires February 13th, 1983.