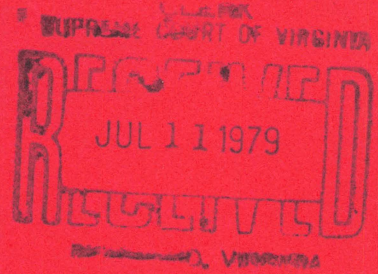


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IN THE
SUPREME COURT OF VIRGINIA

Record No. 781808

STATE HIGHWAY AND TRANSPORTATION
COMMISSIONER OF VIRGINIA

Appellant,

v.

ELMER L. DONELSON and
JANET D. DONELSON

Appellees.

APPENDIX

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PETITION

Filed: October 4, 1976

Your Petitioner, State Highway Commissioner of Virginia, files this Petition in accordance with Title 25, Chapter 1.1 and Title 33.1, Chapter 1, Article VII of the Code of Virginia (1950), as amended, and such general laws as are applicable for the purpose of condemning the land hereinafter described alleges as follows:

(1) John S. Bundy is the duly authorized agent and attorney for the State Highway Commissioner of Virginia, for the purposes of instituting this condemnation proceeding as is shown by a signed declaration hereto attached, marked Exhibit A, and asked to be read as a part of this Petition and John S. Bundy is authorized to file this proceeding in the name and on behalf of the State Highway Commissioner of Virginia.

(2) Real estate which is affected in this proceeding lies in the Lebanon Magisterial District of Russell County, Virginia, and is further described as follows:

Being as shown on Sheet 8 of the plans for Route Alt. 58, State Highway Project 7058-083-102, RW-202, and 7058-097-105, RW-201, and lying on the south (left) side of and adjacent to the south property line of the lands of Edgar Leroy Lowe and Flossie Lowe from the lands of Janie M. Willis opposite approximate Station 13+25 to the lands of the Commonwealth opposite approximate Station 14+45 and containing 0.13 acre, more or less, land.

This property is also shown on the plans on file in the central office of the State Highway Department, Richmond, Virginia, identified as Project No. 7058-083-102, RW-202, a copy of which plan is being hereto attached, marked Exhibit B and prayed to be read as a part of this Petition.

(3) The right and property taken and intended to be compensated for in this proceeding is the fee simple ownership to the land shown within red lines on the aforesaid plans along with such easements as are needed, all of which is described and set forth in Exhibit B and described in detail in Paragraph 2 of this Petition.

(4) The aforesaid land and easements are necessary for the construction, reconstruction, alteration, maintenance and repair of State Highway System known as Route 58, Russell County, Virginia, all of which property is declared in Exhibit A attached hereto.

(5) This project is for the improvement of a section of arterial network Highway System Route 58 between the Wise County line and 1.125 miles EWCL St. Paul (St. Paul Bypass) and will include the right to construct, reconstruct, repair, improve, alter and maintain the said Route 58 in accordance with the attached plans marked Exhibit B. It also includes the right to utilize the land in the future (1) for construction, reconstruction, alteration, improvement, repair and maintenance of the said Route, (2) for all other Highway purposes, and (3) in accordance with all the right and incidents normally acquired in the property by fee simple, easements, etc.

(6) Your Petitioner has made a bona fide but ineffectual effort to purchase said real estate and easements from the owners thereof and has been unable to do so because of inability to agree upon the purchase price.

(7) On or about the 19th day of May, 1976, the Petitioner

caused to be recorded in the office of the Clerk of your honor's Court in Deed Book 260, page 391, Certificate No. C-26467, as provided by Title 33.1, Chapter 1, Article VII, Code of Virginia (1950) as amended.

(8) Thereupon pursuant to the provision of the aforesaid Title 33.1, Chapter 1, Article VII of the Code of Virginia (1950) as amended, title to the land described in Paragraph 2 is vested in the Commonwealth of Virginia.

(9) Your Petitioner is of the opinion that the only persons who are entitled to an interest in the compensation to be ascertained by this proceeding are Elmer L. Donelson and Janet D. Donelson, his wife, as disclosed by a title examination of the above-described land.

WHEREFORE, your Petitioner respectfully prays to this honorable Court in accordance with provision of Title 25, Chapter 1.1 of the Code of Virginia (1950), as amended, that the Commissioners may be summoned and appointed to ascertain and report the value of the land taken (including easements and including the easement for the relocation of utilities if such relocation is required) and damages, if any, which may accrue on the residue beyond the enhancement and value, if any, to such residue, by the reason of the taking; that this Court be directed to confirm the vested title in the Commonwealth as aforesaid and take all such other steps to carry out the intents of Title 25, Chapter 1.1, and Title 33.1, Chapter 1, Article VII of the Code of Virginia (1950), as amended, as may be necessary; and that your Petitioner may have such other and general relief as the nature of this cause may require.

WRITTEN EXCEPTIONS TO THE COMMISSIONERS' REPORT

Filed: December 27, 1977

Now comes the state highway commissioner by counsel and files written exceptions to the commissioners' report filed herein on the 19th of December 1977.

- (1) Court erred in allowing the defendant to testify to his gross sales. Gross sales as well as net profits are speculative and the evidence should have been excluded.
- (2) That the landowner Elmer Donelson, and Robert Huff his witnesses testified and their appraisals were made based on the amount of gross sales made by the landowners business during 1975, which method of appraisal is improper.
- (3) That the only matter to be determined by the condemnation proceeding was the fair market value of the land with improvements at the time of the taking and the gross sales is purely personal in nature and cannot be considered as an element in arriving at the fair market value of a land or improvements taken.
- (4) That the introduction of evidence in regard to gross sales placed before the commission evidence which allowed the commission to speculate as to the value of the property.
- (5) That the award of the commissioners should be set aside as it bears no relationship to the value of

the land or improvements taken.

- (6) That the landowner's testimony used no recognized method of appraisal in establishing value to the land or improvements taken.

ORDER CONFIRMING
COMMISSIONERS' REPORT

Entered: September 21, 1978

This day came the State Highway Commissioner, by his attorney, and it appearing to the Court that the report of the commissioners hereinbefore appointed with the certificate of the Judge of this Court administering the oath to the said commissioners, was on the 19th day of December, 1977, duly returned to and filed by the Court herein, and that written exceptions were timely filed herein by the State Highway Commissioner and the written exceptions to the Commissioner's Report were heard in open Court on June 9, 1978, and the Court doth Order and Adjudge as follows:

1. That the Report of Commissioners returned herein fixed the value of the land taken at \$50,000.00 and damage to the residue was \$0.00 and it appearing to the Court that the said report should be confirmed. The Court doth approve, ratify, and confirm said report in all particulars and doth confirm unto the Commonwealth of Virginia fee simple title to the following property:

Being as shown on Sheet 8 of the plans for Route Alt. 58, State Highway Project 7058-083-103, RW-202, and 7058-097-105, RW-201, and lying on the south (left) side of and adjacent to the south property line of the lands of Edgar Leroy Lowe and Flossie Lowe from the lands of Janie M. Willis opposite approximate Station 13+25 to the lands of the Commonwealth opposite approximate Station 14+45 and containing 0.13 acre, more or less, land.

It further appearing to the Court that the defendants have heretofore obtained the sum of \$22,422.00 pursuant to Section

33.1-124 of the Code of Virginia (1950), as amended. The only sums remaining to be disbursed are the funds in excess of the Certificate. The Court doth further and adjudge that the State Highway Commissioner shall pay to the Clerk of this Court the benefit of Elmer L. Donelson and Janet D. Donelson the sum of \$27,578.00 with interest at a rate of six (6%) percent on said sum from May 19, 1976, the date on which the above mentioned Certificate was duly recorded in the Clerk's Office until the date upon which the principal sum was paid into Court.

The Court doth further Order that the Commonwealth of Virginia be released from any liability by virtue of the recordation of the Certificate aforesaid; and that the proceedings herein be recorded and indexed as provided by Section 25-46.27 of the Code of Virginia (1950), as amended, with reference to be made showing the book and page number of such recordation on the margin of the page where the said Certificate of Deposit No. C-26467 is spread.

The Court further orders the Clerk of this Court upon receipt of receiving the aforesaid sum of money to deliver the same to the defendants or their attorney without further order of this Court.

It is further ordered that the necessary cost of this proceeding be taxed by the Clerk of this Court and paid by the State Highway Commissioner.

It is further ordered that the interest of the defendants in the property shall terminate and all liens by ways of deeds of trust, judgment, or otherwise shall be transferred to the funds so paid into Court.

Nothing further remaining to be done, this action is ordered dismissed from the docket of this Court.

TO ALL OF WHICH, COUNSEL FOR THE PLAINTIFF EXCEPTS.

Thereupon, counsel for the State Highway Commission indicated a desire to petition the Supreme Court of Appeals of Virginia for a writ of error. It is therefore ORDERED that execution be withheld for a period of thirty days and longer, if plaintiff's Petition for Writ of Error is granted, or until other action by the Supreme Court of Appeals of Virginia is ordered.

Counsel for plaintiff has indicated that the transcript of this proceeding will be ordered from the court reporter, and the accurate transcript of this proceedings is made a part of the record.

NOTICE OF APPEAL

Filed: September 26, 1978

Plaintiff, State Highway Commissioner of Virginia, by counsel hereby gives Notice of Appeal from the Final Order entered in this case on 21 September 1978.

It appears from the record herein that the Court has ordered that the transcript of this proceeding be made a part of the record.

INSTRUCTION I

The Court instructs the Commission that loss of prospective profits in this business is not an element for consideration in determining the fair market value. However, if you believe from the evidence that there is no market then the Commission may consider the gross profits to show the productivity of the property, which is analogously to an evaluation by capitalization of rents or profits based on prior experience.

ASSIGNMENTS OF ERROR

1. The court erred in denying the Commissioner's motion to restrict from the Landowners' evidence any reference to gross sales of the subject business.

2. The court erred in admitting evidence of the gross sales of the Landowners' business.

3. The court erred in granting Instruction I.

4. The court erred in prohibiting counsel for the Commissioner from arguing on closing argument that the commissioners could not consider the gross sales of the business.

TRANSCRIPT OF PROCEEDINGS

December 19, 1977

3

The following cause came on to be heard on this the 19th day of December, 1977, before the Honorable Glyn R. Phillips, Judge of the Circuit Court of Russell County, sitting at Lebanon, Virginia, and a commission of five.

Mrs. Ruth Jones Greiner, Certified Shorthand Reporter and Registered Professional Reporter, was duly sworn.

The panel of commissioners was duly sworn.

THE COURT: Gentlemen of the commission, you you are about to hear what is known as a highway condemnation case by a petition filed by the Highway Commissioner of the State of Virginia against Elmer L. Donalson, by which the highway department is seeking to acquire certain property which is located just barely in Russell County, just before you get to the Clinch River Bridge going into St. Paul.

Are any of you related by blood or marriage to the landowner, Mr. Elmer L. Donalson, who is seated to your right, with Mr. Hugh Cline, his attorney?

Are you an employee or do you have any connection with the State Highway Department? Have any of you gentlemen been requested to go upon the property and make an appraisal, either for the highway department or for the landowner?

Have any of you discussed this case with the

landowner or with a representative of the highway department? Are any of you aware of any bias or prejudice?

Are all of you over the age of eighteen and are you landowners here in Russell County? Or landowners in Virginia? Do you know of any reason why you cannot hear the evidence of the landowner and the highway department, view the property, hear the evidence of the landowner and the highway department and return a verdict according to the law and evidence?

Any questions, Mr. Bundy?

MR. BUNDY: Just one or two, if your Honor please.

Gentlemen, you are going to have to excuse me. I am a little under the weather. I have a hard time talking.

Have any of you all ever worked with Mr. Donelson? He had a business, I believe, called the Frostie Bossie. Have you ever been an employee or worked with him or sold him goods while he was in that business?

How many of you gentlemen personally know Mr. Donelson? (Show of one hand.)

MR. BUNDY: Your name?

1
2 COMMISSIONER: Buck Hilan.

3 MR. BUNDY: Are you in any clubs, such as the
4 Lions Club or Moose or Masonic Lodge or anything of
5 that nature with Mr. Donelson?

6 I believe that is all.

7 THE COURT: Mr. Cline.

8 MR. CLINE: If it please the Court and gentlemen
9 of the Commission, some of you may or may not be
10 familiar with highway cases. In this case you can
11 expect an expert witness to testify in behalf of the
12 highway department who has been to school, has
13 credentials and a briefcase and so forth. I will ask
14 you the mere fact that he is an expert and says he is
15 and also comparing that with the landowner who owns
16 land, if his evidence is just as credible in your
17 opinion as his, an expert, would you let that in-
18 fluence you in taking away the judgment of the land-
19 owner? I take it you would not. Thank you.

20 THE COURT: All right, you may take the strikes.

21 . . . Thereupon, the strikes were made and a
22 commission of five were duly sworn to ascertain the
23 value of the land and the damages to the residue . . .

24 THE COURT: Mr. Bundy, do you have a plat you
25 want to give to the commissioners?
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MR. BUNDY: Yes, sir.

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THE COURT: Mr. Cline.

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Gentlemen, this is a sketch of the property that is being acquired. As said to you previous, it is the Frostie Bossie, going across the bridge into St. Paul. It is an entire taking. In other words, we took all the property Mr. Donelson owned at this location.

As Mr. Cline said, some of you gentlemen have set on commissions before and some you haven't. You will be hearing evidence from the State Highway Commissioner as to the value we have placed on the land, and, of course, the landowner has an opportunity to put evidence on the stand indicating what he thinks the fair market value of the property is.

After you have heard the evidence, the Court will give you certain instructions and you will retire to the jury room to make a determination as to what you feel from the evidence presented here and the law that the Court has given you, what will be the fair market value of the property taken.

MR. CLINE: If it please the Court and gentlemen of the Commission, your Honor will tell you at the conclusion of the evidence what your duties are. Your duty is to compensate the landowner where he will be

1
2 put in as good a shape pecuniarily or financially as
3 he would have been if his land would not have been
4 taken.

5 Our evidence in this case is going to be that
6 the value of this land taken is \$100,000. He could
7 have said \$300,000, could have said half a million,
8 but his bona fide evidence, and without any tongue-
9 in-cheek, he has been damaged \$100,000 by reason of
10 them taking this entire business property.

11 A lot of elements are involved in determining the
12 market value of a piece of property. When you go down
13 there, unfortunately, you will not see anything there
14 except a vacant lot. This is a piece of property that
15 some of you may remember.

16 I have a cold also. We all do probably.

17 Has a business history of the old Pennington
18 Restaurant. It all started back there in the early
19 30s, this location, for fifty years has been a going
20 restaurant spot. That is what they took down there
21 at the bridge.

22 The evidence will be that the market value of
23 that land is extremely high. The building was not a big
24 building, but the area is what was important. The
25 evidence will further be that such a piece of

2 property such as that over here on Fincastle may be
3 worth two or three thousand dollars, but down there
4 where it was it might be worth \$75,000. It is the
5 idea of the location.

6 I think you must get in this case, in order to
7 give justice to this man over here -- it is not what
8 it may be worth up in the Sahara Desert, it is what
9 it is worth right where it was, right there at that
10 bridge.

11 Also the gross sales are very material in
12 determining the market value. You will find from the
13 evidence in this case that was a high income-producing
14 property and they took it away from him without his
15 consent. They put him out of business. It is your
16 job to put him back as good as he was. That is what
17 his Honor will tell you.

18 THE COURT: Gentlemen of the Commission, you
19 will be taken to the scene and view the property.
20 Now while you are viewing the property, I do not want
21 you to hear any evidence with reference to value. You
22 may look at anything you desire to look at.

23 Counsel for the highway department or a repre-
24 sentative of the highway department will point out
25 anything that is pertinent with reference to the

boundaries. Mr. Cline on behalf of the landowner may point out anything he thinks is important, but you will not hear any evidence there at the property with reference to the value.

After you have viewed the property, you will return here to the courtroom. Then you will hear from the witness stand the testimony of the witnesses with reference to the fair market value of the land taken in this case.

All right, Mr. Sheriff, are you ready to take them?

All right, you go with the sheriff.

. . . Thereupon, the Commissioners left to view the property at 9:50 a.m. and returned to the open courtroom at 11:25 a.m. . . .

. . . Counsel and the Court retired to chambers where the following proceedings were had in the absence of the Commission . . .

MR. BUNDY: Your Honor, I would like to make a motion that the defendant's evidence be restricted to not allow any reference to any gross sales or net profits in the case, as that is an improper method of appraisal.

. . . Discussion off the record . . .

MR. BUNDY: Let me go ahead for the record.

There are three methods of appraisal that are recognized I think in the State of Virginia, and that is certainly not one of them, to make an appraisal or a valuation based on gross sales and net profit, as it is purely speculative, depending upon the individual who is running a store and the type of business and the economy and everything else in one particular year, and any evidence would be purely speculative.

MR. CLINE: If it please the Court, I agree in part and disagree in part. In determining market value, there are three methods: One of them is comparable sales. There will be none involved in this case. Another way is substitute. There is no substitute available for this location. The third, if not, then you go into the rental value and you go into gross sales, not profits, gross sales of the business in determining the rental value in order to come up with a market value. This is the same method that he objected was used exclusively in Wise County Circuit Court two weeks ago in the case of St. Paul Building & Supply, when they took all of that business. I agree that the law is that gross profits are too speculative, because you have got your management

2 involved in this, that and the other, but your gross
3 sales are admissible.

4 THE COURT: Do you have some authority there?

5 MR. CLINE: Yes, sir.

6 . . . Discussion off the record . . .

7 . . . Thereupon, counsel argued the motion . .

8 THE COURT: I think I will permit you to show
9 the gross sales, and show his exception, but not
10 profits.

11 . . . Discussion off the record . . .

12 . . . Thereupon, the Court and counsel returned
13 to the open courtroom where the following proceedings
14 were had in the presence of the Commission . . .

15 MR. BUNDY: Could we have the rule.

16 THE COURT: Let's get all the witnesses and then
17 we will ask for the rule.

18 All the witnesses who expect to testify in the
19 case of the State Highway Commissioner versus Elmer
20 L. Donelson and others, please stand and be sworn.

21 . . . Thereupon, the witnesses were duly sworn

22 . . .

23 THE COURT: The rule has been requested. Would
24 you two gentlemen just go outside and you will be
25 called.

2 MR. BUNDY: I am going to call him as my first
3 witness

4 THE COURT: All right.

5 . . . Thereupon, the witnesses were excluded
6 under the rule . . .

7 MR. BUNDY: If this could be introduced.

8 THE COURT: It will be admitted in evidence as
9 Plaintiff's Exhibit No. 1.

10 MR. CLINE: Is that to scale?

11 MR. BUNDY: It is a sketch.

12 MR. CLINE: It is not according to scale.

13 MR. BUNDY: Yes.

14 THE COURT: Plaintiff's Exhibit No. 1 will be
15 admitted in evidence.

16 (PLAINTIFF'S EXHIBIT NO. 1
17 was marked for identification
18 and filed.)

19 FRED WAGNER
20 having been duly sworn, was examined and testified as follows:

21 DIRECT EXAMINATION

22 BY MR. BUNDY:

23 Q State your name.

24 A I am Fred Wagner.

25 Q Are you employed by the Virginia Department

2 of Highways and Transportation?

3 A Yes, I am.

4 Q In what capacity?

5 A I am presently employed as right-of-way engineer
6 in the central office in Richmond. Prior to that I was
7 employed in the Bristol district as an appraiser.

8 Q How long have you been employed with the
9 Department?

10 A Approximately eleven years.

11 Q In what capacity, please, sir.

12 A The entire time has been either in the making
13 of appraisals or the review of appraisals for the highway
14 department.

15 Q What counties have you appraised property in,
16 please, sir?

17 A All the counties in the Bristol district. I think
18 three or four counties in the Salem district, two counties in
19 the Richmond district.

20 Q What special training have you had in your
21 present field?

22 A Other than the experience I have, which I think
23 is valuable in the making of appraisals, I have attended the
24 University of Virginia on two different occasions, courses
25 given by the Institute of Real Estate Appraisers. The first

2 course dealt with the basic appraisal principles. The
3 second course dealt with the appraisal of income properties.
4 I have also completed three courses given by the Society of
5 Real Estate Appraisers, the first one dealing with basics,
6 the second with income properties, and the third one with
7 preparation of the appraisal itself.

8 I might also point out that the two leading
9 appraisal institutes in the United States is the Society of
10 Real Estate Appraisers and the Institute.

11 I have also other training given by the highway
12 department in the making of special type appraisals.

13 Q Have you done any teaching on the college level
14 concerning real estate?

15 A Yes, sir, I have taught Course One, which is
16 basic real estate appraisal and the appraisal of residential
17 properties in Abingdon at the Highlands Community College. I
18 did this on two different occasions, two different semesters.

19 Q You are now in the Richmond office, is that
20 correct?

21 A Yes, sir, that is correct.

22 Q When you say you appraised properties in the
23 Bristol district, how many counties does that include?

24 A I think there are thirteen counties in the
25 Bristol district.

2 Q Did you have occasion to appraise the property
3 owned by Mr. Donelson right as you go on the bridge at St.
4 Paul?

5 A Yes, sir, I did have occasion to appraise that
6 property, along with all the other properties on the St. Paul
7 By-Pass.

8 Q What day was your appraisal effective from,
9 please, sir?

10 A The date of the evaluation for this appraisal
11 is May 19, 1976.

12 MR. BUNDY: Your Honor, that is the date that
13 the highway acquired title to the property.

14 THE COURT: All right.

15 BY MR. BUNDY:

16 Q How did you go about appraising this property,
17 Mr. Wagner?

18 A I contacted Mr. Donelson and his wife. I viewed
19 the property with them. I collected information as to the
20 size of the property, the way it is constructed, measured
21 the building and got information as to what was located upon
22 the property, which is one thing that is necessary. The
23 second thing that was done is that the real estate market in
24 the area was observed closely, transfers of any property that
25 we knew about of that anyone could tell us about was secured,

2 the information as to the consideration, date, size of sale,
3 this type of information, was collected so that I might be
4 able to know what the value of the property is per square
5 foot or per acre or however we were appraising, would be
6 worth.

7 Q Do you have any pictures of the subject property?

8 A Yes, sir, I do.

9 MR. BUNDY: If there is no objection --

10 THE COURT: It will be admitted in evidence as
11 Plaintiff's Exhibit No. 2 and 3.

12 (PLAINTIFF'S EXHIBITS NO. 2
13 and 3 were marked for
14 for identification and filed.)

15 BY MR. BUNDY:

16 Q Mr. Wagner, I believe there is .13 acres taken,
17 is that correct?

18 A Yes, 5,635 square feet or thirteen hundreths
19 of an acre.

20 Q Would you explain why this property was taken,
21 please, sir.

22 A Yes, sir. The Virginia Department of Highways
23 and Transportation is in the process of building what is known
24 what is known as the St. Paul By-Pass. It is Project No.
25 7058, or better known as Route 58 to the people there. The

2 particular taking is the result of a road which will go down
3 the river, which will go under the main line.

4 Q And this acquisition was necessary in order to
5 connect that road?

6 A Yes, sir, this acquisition was necessary for
7 access to the several houses which are located down the river.

8 Q This was an entire taking, was it not?

9 A Yes, sir, that is correct.

10 Q Now how did you go about making an appraisal,
11 please, sir?

12 A There are three different methods of making an
13 appraisal of property. We have, as I said, three different
14 methods of making the appraisal. We have the cost approach,
15 which is the valuation of the land. Then you value the
16 building and add the two together, less depreciation of the
17 building.

18 You have the market approach, which is the
19 comparison of other businesses of this type, which were sold
20 recently, in an effort to find out what the market is doing.

21 You have the third approach, which is the income
22 approach. This is based on the rent of property, capitalized
23 at a rate, which is taken from bankers and from the real
24 estate market itself.

25

In the case of the subject property, Mr. Donelson's

2 property, the cost approach was used for several reasons.
3 There are no sales of this type of property in the area,
4 therefore there isn't a market approach.

5 We felt like that we could value the land and
6 build a new building and depreciate it and arrive at the
7 value for this property, and that is the process which I
8 have used to evaluate Mr. Donelson's property.

9 Q Would you go forward. What value or what method
10 did you use in arriving at the value of the land taken,
11 5,675 square feet?

12 A The land has been valued by using comparable
13 sales. There are three properties in St. Paul, in downtown
14 St. Paul, that I felt would indicate what this property would
15 be worth per square foot. There are some outlying properties
16 that further support the value that I put on this property per
17 square foot.

18 Q What value did you place on this property per
19 square foot?

20 A I put \$2.20 per square foot.

21 Q And that would be 5,675 feet?

22 A Yes, sir, that would give me a value of
23 \$12,485 for the land.

24 Q Your value, how much was it?

25 A \$2.20.

2 Q What would that work out to on a per acre cost,
3 please?

4 A That would be approximately \$87,000 an acre.

5 Q What sales did you use in arriving at this
6 value, please?

7 A Probably the best sale that we had that would
8 indicate a value for this property is the property which now
9 belongs to Pauline Young. I think there is a printing
10 business for the St. Paul paper or some newspaper there. She
11 bought this property in 1975. It is about the same size.
12 She paid \$2.80 a square foot. This property has sidewalks.
13 It has curb and guttering. It is located right in the down-
14 town portion of St. Paul, an area which I feel like is a
15 little more desirable than the location of the subject
16 property.

17 On the sale which I have considered is the
18 Southwest Bank of Virginia properties, which is also located
19 in the downtown portion of St. Paul. This property was
20 purchased by a bank, and I feel like they pay a little bit
21 more for properties than the ordinary purchaser. They paid
22 \$2.86 for their property.

23 The third property in St. Paul which I have
24 considered is the property which Piggly Wiggly purchased from
25 the N & W Railway. This property is located east of the

2 Piggly Wiggly store.

3 MR. CLINE: When was that?

4 THE WITNESS: That was in 1973 and it sold for
5 \$2.47 a square foot. Again, I felt like this property,
6 being in the downtown area and having the facilities
7 that it had was a small percentage superior to that
8 other property which we are considering today.

9 BY MR. BUNDY:

10 Q Mr. Wagner, was the subject property subject to
11 flooding?

12 A Yes, sir, it was subject to flooding.

13 Q Would you go forward and tell us how you arrived
14 at a value on the buildings that were located on the subject
15 property.

16 A Yes, sir, I will be glad to. The building has
17 on the first floor area, which is the area where the
18 restaurant is located, 660 square feet, more or less. a
19 square foot or two, and there is 280 square feet in a base-
20 ment which is under the back portion of the building.

21 There is a cinderblock or concrete block type
22 structure with concrete floors and a flat built up paper
23 roof. The building is several years old. However, they have
24 maintained the building and it appears to be in good condition.
25 Considering \$17.80 for the two-story area and \$14.79 for the

2 one-story area, and applying 20 percent depreciation, because
3 of the age and because of some of the deterioration, I
4 arrived at a value of \$8,505 for the value of the building.

5 This does not include the paving, which there
6 is quite a bit of paving. In fact, the entire front portion
7 is paved. I allowed \$932 for the paving.

8 There is a septic system on the property, which
9 that is a thousand to nine hundred gallon tank, ten by fifty
10 field lines, \$500, making the other consideration, the other
11 improvements at \$1,432.

12 Q What would be the total of your land and all the
13 improvements taken?

14 A \$22,422 on the entire property.

15 Q Mr. Wagner, there were no fixtures taken inside,
16 I mean restaurant equipment?

17 A There was approximately thirty pieces of
18 restaurant equipment in the building. I have included a
19 sink and two bath fixtures and the fluorscent lighting in
20 the take. In other words, I just considered the four walls,
21 the roof and those three fixtures in the taking.

22 Q Mr. Donelson was allowed to remove his equipment?

23 A That is correct.

24 Q I believe you considered that personal property
25 in making your appraisal?

2 A Yes, that is considered personal property.

3 MR. BUNDY: That is all the questions I have.

4 CROSS EXAMINATION

5 BY MR. CLINE:

6 Q Mr. Wagner, is it your understanding that you
7 are giving figures to the Commission here that could compen-
8 sate Mr. Donelson in just as good a shape as he would have
9 been if the land had not been taken, is that your understanding?

10 A Yes, sir, that is correct.

11 Q Do you know of any place in that area that as
12 of May 1976 where he could purchase any similar place that
13 could produce that much business?

14 A I don't know of any sale in the St. Paul area
15 of any restaurant business in the last five years, therefore,
16 I would have no way of comparing it to a business of this
17 type, as far as the market is concerned.

18 Q In other words, the best way, if you can make
19 a market, is to ascertain, is to find a piece of property
20 that is similar in most every aspect, isn't that true?

21 A That is one approach, sir.

22 Q That is one of the best approaches, isn't it?

23 A Yes, sir. As I stated, there is no market in
24 St. Paul. This type business has just not been on the market.
25 It would be nice if it had been.

2 Q That is true, but as we say, if you have got
3 two houses side by side on a given street and both of them
4 built similar and about alike and one of them worth X number
5 of dollars, you can say the other one is worth about the same?

6 A Yes, sir, that is right.

7 Q Do you recognize that this particular business
8 that Mr. Donelson had, the Frostie-Bossie, was an excellent
9 business site and location?

10 A I recognize that it is a good site. I recognize
11 that also Mr. Donelson did have a good business.

12 Q Yes, sir. Do you know what the gross sales were
13 for 1975?

14 MR. BUNDY: Again, I want to object to any
15 reference to gross sales.

16 THE COURT: Objection overruled.

17 BY MR. CLINE:

18 Q Do you know what the gross sales were for 1975,
19 that business?

20 A I understand from Mr. Donelson, I think it was
21 approximately \$40,000.

22 Q The gross sales?

23 A Yes, sir, I am not sure of the gross sales.

24 Q Do you know the gross sales?

25 A No, sir. I recall him giving me that figure,

2 but I am not sure.

3 Q You are not sure what that figure represents?

4 A No, I don't think that is a factor in the value
5 of the property.

6 Q I will ask you this: There are several methods
7 of getting market value, as we have established. One of them
8 is like property or comparable property. So we ruled that
9 out. Then you have another method as you used, instead of
10 the income producing approach, didn't you?

11 A Yes.

12 Q You did not use the income approach, did you?

13 A No, sir, I used the cost approach. The cost
14 approach is what, if I was going to put this business up or
15 if I could buy one, I would go out and see what a piece of
16 land would cost and I would get somebody to build me a building
17 and that would be what the building is worth.

18 Q Are you telling this Commission that that
19 Frostie-Bossie would have been just as good if it had been
20 located up there where this newspaper office is? Are you
21 telling the Commission that?

22 A Well, that is --

23 Q Are you or are you not?

24 A I am telling you that is in the hundred percent
25 area of St. Paul, with curbs, gutters, sidewalks, this type

2 of thing.

3 Q I understand that. I am asking you though, are
4 you telling this Commission that if that Frostie-Bossie would
5 be moved up there inside of St. Paul, up there where this
6 Young property is concerned, there would be just as much
7 business up there as it would have done down at the bridge?
8 Are you telling the Commission that or not?

9 A I would tell the Commission, I wouldn't want to
10 be downtown, I would want to be on the outskirts.

11 Q I am not asking you that. You based the value
12 of the land as I understood you -- are you telling this
13 Commission that that Frostie-Bossie will be just as valuable,
14 the real estate just as valuable up there where that news-
15 paper, the Young property is, as it would have been down
16 there where it was? Are you or are you not?

17 A What I said was I made a location adjustment
18 on the land in my cost approach, because I know the land in
19 St. Paul was better than this site. I am not saying, I am
20 not referring to the business, I am referring to the site,
21 the physical property.

22 Q You used that in order to get a value of that
23 business, didn't you?

24 A Yes, sir, that is correct.

25 Q All right, I will ask you again, are you telling

2 this Commission that that Frostie-Bossie would be just as
3 valuable, worth as much money market value-wise if it had
4 been up there where the newspaper office is now located as
5 being down there where it was at the river? Is it or is it
6 not?

7 A I am saying that the land in St. Paul is more
8 valuable than the land where the Frostie-Bossie is.

9 Q I didn't ask you that. Didn't you use that land
10 for a method of trying to ascertain the value of that land
11 down there at the river?

12 A Yes, sir, I did.

13 Q Was worth \$12,485?

14 A Yes.

15 Q Are you telling the Commission now that the
16 Frostie-Bossie, if they were located up there at the newspaper
17 office, would be just as valuable, worth as much money up
18 there business-wise as it would have been down at the river?
19 Are you or are you not?

20 A I am not appraising the business, I am appraising
21 the physical piece of property, the building and piece of land,
22 and I have made the land comparison as I have previously
23 stated.

24 Q Don't you admit, Mr. Wagner, that the Frostie-
25 Bossie was located in the most advantageous position that

2 a business of that type could possibly have been located?

3 A I have previously stated it is in a good location.

4 Q I didn't ask you that. I am asking could you
5 think of a better place in St. Paul or in Russell County,
6 right there where it was, that it could be located than where
7 it was for income business-producing purposes?

8 A Considering the size of his present tract and
9 the fact that he only had twelve parking spaces on his own
10 property, I would have just as soon been in the area of
11 Ma and Pa's, which I am sure you know, as here.

12 Q Are you saying then that it would be just as well
13 off to have it up there in town?

14 A Sir, we are talking about the business part of
15 it.

16 Q I am talking about the value of that real estate.

17 A I am not appraising Mr. Donelson's business.
18 I am appraising his building and his land.

19 Q Are you telling this Commission that it makes
20 no difference to you whether that business has been located
21 there at the river or been out here on the Fincastle Road?

22 A I would appraise this property, regardless of
23 whether it had been a clothing business there or a restaurant
24 business or what have you, at this value, because I think
25 the physical building, plus the land, is worth this amount

2 of money.

3 Q And it is your job as an appraiser to give a
4 figure that would give him sufficient amount of money to go
5 out on the free market and buy a place worth as much as the
6 one you took?

7 A Yes, sir, that is correct.

8 Q Now where could he take \$22,000 and buy a place
9 that would be worth as much as the one you took? Do you know
10 of one?

11 A There is none for sale in the St. Paul area.
12 What he would have to do is buy a piece of land in the area,
13 in my opinion, if he wants to continue in business, in the
14 area of Ma and Pa's, and restaurants do better when they are
15 closer together, and construct him a building. I am sure he
16 wouldn't construct the one he has, but the one he has in my
17 opinion is worth the \$18,500.

18 Q Don't you recognize we are talking about the
19 value of location more than anything else in this case?

20 A I have considered location. I can't consider
21 Mr. Donelson's ability to run a business.

22 Q I didn't ask you that. Aren't you in your value,
23 aren't you considering the location as the prime factor in
24 dollars and cents? Are you or are you not?

25 A I considered, as I previously stated, his

2 location with reference to location of sales in St. Paul.

3 Q What you did, you used a theory, in order to
4 find out what the Frostie-Bossie is worth down the river,
5 you used land that the N & W sold Piggly Wiggly in 1973, you
6 used that, didn't you?

7 A Yes.

8 Q That is not a fast food service property, is it?

9 A No, but it is highly desirable business property
10 for downtown St. Paul.

11 Q Do you know of a more highly desirable business
12 property for a Frostie-Bossie than what he had down at that
13 river?

14 A Yes, sir, any of this property in St. Paul is
15 more desirable because it is not subject to flood.

16 Q You mean it would produce the income?

17 A Well, sir, Piggly Wiggly is evidently producing
18 income or they wouldn't be in business.

19 Q Sir, as a fast food service, do you know of any
20 better location?

21 MR. BUNDY: I object to repeating. He has asked
22 that question many times.

23 MR. CLINE: I haven't got any answer.

24 THE COURT: Go ahead. Objection overruled.

25 BY MR. CLINE:

2 Q Do you know of any better location for a fast
3 food service of the type that he had than where it was? If
4 so, tell me.

5 A As I previously stated, I think the area of
6 Ma and Pa's would be a superior location than what he has
7 for several reasons. He doesn't have adequate parking.

8 Q He has gotten by?

9 A He has gotten by. I am taking what he only owns,
10 not what he was using.

11 Q Aren't you supposed to appraise what he has and
12 facilities on hand?

13 A Yes, sir.

14 Q That is right. If you have got a business beside
15 of a main highway or secondary highway, he doesn't own the
16 highway, does he, but it makes his land valuable?

17 A That is correct, yes, sir.

18 Q That is correct. Now, Mr. Wagner, you say this
19 sketch is according to scale, is that correct?

20 A Yes, sir, I think it is pretty close.

21 Q Look at the court record here and see if your
22 scale is the same as this here in the record. This is the
23 court record, is it not? You made that first?

24 A Yes, that is the court record.

25 Q Where is the one that has been introduced?

2 THE COURT: Mr. Sheriff, give him this.

3 BY MR. CLINE:

4 Q Now is yours the same? This is what we are
5 going by in this case, isn't it, right here?

6 A Yes, sir.

7 Q Is yours the same as this?

8 A It appears to be from all indications.

9 Q Look at the building on there.

10 A The building, according to this, is closer to
11 the existing right-of-way. The building is eight feet from
12 the existing right-of-way.

13 Q I am asking you if they are the same. I want to
14 know why they are not the same.

15 A Sir, I don't prepare the sketches. I made an
16 appraisal of the property as shown on this sketch here.

17 Q Did you prepare this sketch?

18 A No, it was our technicians who prepared it for
19 us.

20 Q Now, Mr. Wagner, you don't own property, except
21 the house in which you live?

22 A In Russell County?

23 Q Yes.

24 A I don't own any property in Russell County. I
25 did own other property in Washington County, other than where

2 I live.

3 Q Do you know of any similar place of the Frostie-
4 Bossie that could be bought for \$100,000 in this area?

5 MR. BUNDY: I object.

6 THE COURT: I sustain the objection. You may
7 ask about similar properties.

8 BY MR. CLINE:

9 Q How does the income approach work?

10 A All right. As I previously attempted to tell
11 the Commission, the income approach deals with the rent of
12 property. If you have a business and you have an owner and you
13 are renting this business from, this building from an owner,
14 you rent per month, like you would if you rent a house, you
15 would pay \$150 or \$200, whatever is required. All right, this
16 rent per year is capitalized at a rate which is determined
17 by the interest in banks, plus what people expect to get on
18 their own investment. Several factors, with depreciation
19 considered or appreciation also considered in this factor.
20 And this is the income approach as it has been taught, as it
21 has been used throughout the state and the country.

22 Q Let me give you this hypothetical question.
23 Assume this business would have gross sales of approximately
24 \$175,000 annually --

25 MR. BUNDY: I want to object.

2 THE COURT: Overrule the objection with
3 reference to the hypothetical situation, with the
4 understanding that the Commissioners will understand
5 this --

6 BY MR. CLINE:

7 Q Assume the business had gross sales in 1975 of
8 approximately \$175,000 and that the annual bank interest
9 return would be eight percent.

10 MR. BUNDY: Your Honor, this is totally contrary
11 to what Mr. Wagner testified. For reasons stated in
12 chambers, I object to any reference to gross revenue.
13 That is not what Mr. Wagner testified to. If he wants
14 to give a hypothetical based on rental value of the
15 property, that is fair, that is what Mr. Wagner
16 testified to.

17 THE COURT: I sustain the objection as the
18 question is asked. The Court is not ruling out the
19 gross sales.

20 BY MR. CLINE:

21 Q Money-wise, value-wise, is Ma and Pa's similar
22 to this property?

23 A Yes, sir, they have a little more parking.
24 Quite a bit superior building. It is a modern building,
25 a glass front, this type of thing, adequate facilities.

2 Q In regard to placing the value of real estate,
3 is it important in your consideration as to what the property
4 is being used for and what revenue that property is earning
5 for that owner, is that important?

6 A No, sir, it is important only as far as rent
7 is concerned. I would like to give an example. Let's suppose
8 we had two restaurants side by side, Ma and Pa's and another
9 one, right identical building, identical property. You had
10 one doing a present income or producing a tremendous growth
11 and one right beside of it producing only a fraction. If you
12 were asked to appraise those properties, you would by all
13 procedures have come up with the same amount of money on
14 both properties, which to me is saying that we are appraising
15 physical building and land and not the ability of one tenant
16 to make money over the other.

17 MR. CLINE: Your Honor, I didn't go into the
18 profits. He is bringing that up, not me.

19 THE COURT: Go ahead.

20 BY MR. CLINE:

21 Q All right. Now it is important though to consider
22 the gross income, not the profits, of this property in regard
23 to the income approach, isn't that true?

24 A No, sir, it is not important.

25 Q Not important to you?

2 A Not important to --

3 Q In other words, are you telling this Commission,
4 when you come here and tell this Commission how much this man
5 is entitled to, it doesn't make any difference to you what
6 that property is being used for in the past or how much
7 revenue it has capability of producing? It doesn't make any
8 difference to you?

9 A Sir, I have appraised property all over the
10 state.

11 Q I am asking if it makes any difference.

12 MR. BUNDY: Let him answer the question.

13 THE COURT: Go ahead.

14 A I have appraised property all over the state and
15 I find no appraisal I have ever seen or appraised where this
16 item --

17 BY MR. CLINE:

18 Q I am asking about him, not other people.

19 A And this property also, where this is a factor
20 in the value of that property.

21 Q So I take it your answer is no? It makes no
22 difference to you when you put the market value on a parcel
23 of land taken, it makes no difference to you as to what the
24 capabilities of that property is in regard to producing
25 income, it makes no difference, is that true?

2 A Tha capability of the property as opposed to
3 the capability of --

4 Q I said property.

5 MR. BUNDY: Let him answer the question.

6 THE COURT: Go ahead.

7 A The capability of the property as opposed to
8 the capability of an owner to run a business is two different
9 things. I appraised the property on its capabilities as far
10 as location and the physical structure, not on Mr. Donelson's
11 ability to run a business.

12 BY MR. CLINE:

13 Q Thank you. So it is important then in your
14 thinking to consider the capabilities of the property producing
15 income?

16 A Yes, sir, as I appraised the land value on this
17 property, I did consider it.

18 MR. CLINE: You can step aside.

19 REDIRECT EXAMINATION

20 BY MR. BUNDY:

21 Q One further question. Did you do the income
22 approach as explained on this property?

23 A No, sir, I did not. I did make an effort to
24 arrive at some rent. There are no restaurants of this type
25 in St. Paul rented, therefore, I don't know what the rent

2 in St. Paul would be.

3 Q Did you check other places in regard to it?

4 A Yes.

5 Q What did you find out?

6 A I checked other restaurants such as the Big Tee,
7 which is a chain, and does rather well in this area. They
8 rent from \$325 up to \$600. This is for a new modern building.

9 MR. CLINE: I want to say he opened up a new
10 area. I want to delve into it, the gross of these
11 restaurants.

12 MR. BUNDY: The whole purpose --

13 MR. CLINE: What does Big Tee have to do with
14 this case?

15 MR. BUNDY: If Mr. Cline will hush until I get
16 my statement into the record -- he just stated that
17 in making an appraisal, gross sales have nothing to
18 do with determining the fair market value of that
19 particular property and Mr. Cline keeps trying to
20 throw in gross sales.

21 MR. CLINE: I am not doing that.

22 MR. BUNDY: I would like Mr. Wagner to explain
23 what he did. He checked with other people to try to
24 explain how he arrived and why he arrived at his
25 figure.

2 THE COURT: I will sustain the objection.

3 MR. BUNDY: If Mr. Cline will be quiet until we
4 finish.

5 THE COURT: I will sustain the objection with
6 reference to Big Tee. The Court will take judicial
7 notice that restaurant is some several miles distant
8 from the location of the property here in question.

9 BY MR. BUNDY:

10 Q Did you make an examination of the income
11 approach and try to determine the market data to do an
12 analysis of the appraisal based on the income approach?

13 A Yes, sir, and as I have said, the income that
14 was available to me was in other areas. It was of businesses
15 which were not comparable to this business. Therefore, I had
16 no way in arriving at the proper rent for this property. To
17 use the income approach, I need to have the proper income
18 rent, capitalize it at a rate which is taken from the market
19 which is the banks and which considers depreciation and equity
20 in this type of thing.

21 Q To your knowledge, Mr. Wagner, you have stated
22 that there are only three methods of appraisal recognized,
23 is that correct?

24 A That is correct.

25 Q One is market sales, is that correct?

1

2

A That is correct.

3

4

Q One of them is cost new less depreciation, is that correct?

5

A With the land value added in.

6

7

Q The other is income approach as you have explained it, is that correct?

8

A Yes.

9

10

Q Based on capitalization of rental and income property?

11

A Yes.

12

13

14

Q Is that the only three methods of appraisal that you know about that is recognized in the appraisal field anywhere in the United States?

15

16

17

A That is the only three methods at this point that are used by any appraiser anywhere in the United States.

18

MR. BUNDY: I believe that is all.

19

BY MR. CLINE:

20

21

22

Q I understand that you did not get the figures from him, didn't know what his business was, the gross sales and so forth, am I correct on that?

23

24

A Gross sales and gross rent are two different things.

25

Q I understand you did not get into that with

2 him, didn't ask him?

3 A I don't think that is a factor. He is not
4 renting his business.

5 Q I understand you did not obtain his figures?

6 A That is right.

7 MR. BUNDY: That is improper recross.

8 THE COURT: Go ahead.

9 BY MR. CLINE:

10 Q You knew if you did obtain it, it would put
11 that figure higher than you wanted?

12 A No, sir, it doesn't have any effect on the value
13 of that property.

14 Q What you are saying he can find, take the
15 \$22,000 and go out and buy the same type of property, is that
16 what you told the Commission?

17 A Yes, I think he could go out in the area like
18 Ma and Pa's and buy a lot.

19 Q I am talking about doing as much business.

20 A He is running the business there. He could
21 probably run one out there just as well.

22 Q You don't mind condemning people and let them
23 go and start over?

24 MR. BUNDY: I object to that line of questioning.

25 THE COURT: I sustain the objection.

2 MR. BUNDY: One further question.

3 REDIRECT EXAMINATION

4 BY MR. BUNDY:

5 Q You said about other property located in the
6 St. Paul area. Is one of your sales the bank sale out there?

7 A There is a bank sale out there, which I have the
8 information on. This property was sold by the Banner people
9 to the People's Bank. There is one acre at \$25,000. This is
10 fifty-nine cents a square foot. I feel like the subject
11 property was quite a bit better than this and that is why
12 I haven't really put too much emphasis on this sale.

13 Q Your appraisal was approximately \$88,000 an
14 acre on the similar property?

15 A Yes, \$88,000 as opposed to \$25,000 per acre on
16 the Peoples Bank.

17 Q And the Peoples Bank is located toward Castlewood
18 from the subject property, is that correct?

19 A Yes, that is a very nice location. It would
20 probably have been a nice restaurant location.

21 MR. BUNDY: All right, I believe that is all.

22 RECROSS EXAMINATION

23 BY MR. CLINE:

24 Q About the bank, don't you know Mr. Donelson tried
25 to buy some property behind the bank and the only thing he

could buy was behind the bank and they wanted --

MR. BUNDY: I object to that.

THE COURT: I sustain the objection.

MR. CLINE: He went into the bank property.

THE COURT: I know, but what I am sustaining is what he personally tried to do.

MR. CLINE: That is all.

MR. BUNDY: That is all we have.

(Witness excused.)

THE COURT: Gentlemen of the Commission, I don't think we can finish without letting you have something to eat. We are going to adjourn for one hour. If you will be back at 1:30, we will go ahead and complete the case.

During this recess do not discuss the case with anyone or permit anyone to talk to you about the case.

The court is in recess for one hour, until 1:30.

. . . Thereupon, the court recessed at 12:25 p.m. to reconvene at 1:30 p.m. . . .

2

AFTERNOON SESSION

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. . . Thereupon, court reconvened at 1:30 p.m., and the following proceedings were had in the presence of the Commission . . .

THE COURT: Call your first witness, Mr. Cline.

MR. CLINE: Call Robert Huff.

Have him wait just a minute. You better take the stand.

ELMER L. DONELSON

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

DIRECT EXAMINATION

BY MR. CLINE:

Q Mr. Donelson, where were you born?

A Scott County.

Q Do you have a business in Russell County?

A Yes, I have had a business there for approximately twenty years.

Q Have you had any business background, doing business in Wise County, Russell County, Southwest Virginia?

A Yes, sir, I have had a small drive-in there in Coeburn, similar to the one I had in Russell County.

Q After you finished high school, I mean finished your schooling in Scott County, at that time were you a high school graduate?

2 A At that time I did go to high school.

3 Q When did you go to high school and finish?

4 A I had been in the service and got back.

5 Q You came back after the service and went back
6 and got your high school diploma?

7 A Yes.

8 Q What other schooling did you have?

9 A I went to the National Business College in
10 Knoxville, Tennessee.

11 Q After you went to school down there, did you do
12 any work in Knoxville?

13 A Well, I worked about a year with the Knoxville
14 News Sentinel, then I was transferred to Wise County.

15 Q What was your position with the Knoxville
16 Sentinel?

17 A I was in the circulation department, circulation
18 manager.

19 Q Circulation manager. Then I believe you came
20 back and you worked a similar job for the Bristol Herald
21 Courier, did you not?

22 A Yes.

23 Q When did you become engaged in business for
24 yourself in the restaurant business?

25 A First was in Coeburn. I don't remember the date,

2 but approximately -- let's see, approximately five years
3 earlier.

4 Q Approximately twenty-five years?

5 A Yes.

6 Q Of course, you are the owner of the Frostie-
7 Bossie, the restaurant down there at St. Paul that they took,
8 is that correct?

9 A Yes.

10 Q I show you --

11 MR. BUNDY: When was this taken?

12 MR. CLINE: About two years ago, while it was
13 still operating.

14 BY MR. CLINE:

15 Q This is a picture of your business as it existed
16 when they -- except for the snow -- when they took it in
17 1976?

18 A Yes, sir, that is it.

19 MR. CLINE: We desire to introduce this as
20 Landowner's Exhibit No. 1.

21 THE COURT: Let it be entered as Landowner
22 Exhibit No. 1.

23 (LANDOWNER EXHIBIT NO. 1 was
24 marked for identification
25 and filed.)

2 BY MR. CLINE:

3 Q Of course, this picture shows some snow on the
4 ground, does it not?

5 A Yes.

6 . . . Photograph passed to jury . . .

7 Q That picture shows some snow on the ground?

8 A Yes, sir.

9 Q I will ask you, Mr. Donelson, whether or not
10 that parcel of real estate with the building situated thereon
11 is good commercial property?

12 A Yes, sir, it is.

13 Q Have you been able to find any, as of May of '77,
14 '76, was there any comparable property or any like property
15 of that type for sale in and around St. Paul?

16 A No, sir, not that I could find.

17 Q Did you look for property of that sort?

18 A Yes.

19 MR. BUNDY: I want to object to that line of
20 questioning. That is not material.

21 MR. CLINE: It shows the availability.

22 THE COURT: Objection overruled.

23 BY MR. CLINE:

24 Q Mr. Donelson, in the year 1975, what were the
25 gross sales that were conducted on this particular property?

2 MR. BUNDY: Again, I want to renew my objections,
3 as stated before in chambers, this is totally irrelevant
4 and improper to determine the market value of the
5 property. I seriously object to it going in the record.

6 THE COURT: All right, the objection is overruled.
7 BY MR. CLINE:

8 Q What were the gross sales derived at this
9 particular location in 1975?

10 A I could give you the exact.

11 Q I want the exact.

12 A \$174,715.14.

13 Q Was all of that sales derived from this particular
14 location?

15 A Yes, sir.

16 Q Mr. Donelson, they took the property in May of
17 1976. How would you compare the sales from January 1, 1976
18 up to May 19, I believe it was?

19 MR. BUNDY: I again object. This is totally
20 speculative as stated before.

21 THE COURT: In other words, he may make the
22 comparison, without giving any figures.

23 MR. CLINE: Yes, sir.

24 THE COURT: All right, go ahead. Objection
25 overruled.

2 BY MR. CLINE:

3 Q Up to May of 1976, the gross sales, would it be
4 on this same keel or less or more?

5 A It would be approximately 10 percent more.

6 Q Mr. Donelson, aside from being a landowner, are
7 you generally familiar with real estate prices in and around
8 Wise County, Russell County and the Town of St. Paul?

9 A Well, to some degree. I have tried to buy some.
10 I own some property out in the country, sold it some time back,
11 and I bought a place there in Coeburn.

12 Q In your opinion, what would be the fair market
13 value of this parcel of real estate, together with the building
14 on it, when the highway took it in May of 1976?

15 A Well, I think at least \$100,000.

16 Q Why do you say that?

17 A Because of its location and its potential to
18 produce income.

19 Q I will ask you in your opinion did that property
20 have a rental value as of May of '76?

21 A Well, I didn't rent it.

22 Q I know it, but as a businessman, as owner, would
23 you say that property could have been rented for so many
24 dollars per month?

25 A Yes.

2 MR. BUNDY: I want to object unless he shows
3 that he is qualified and dealt in leases.

4 MR. CLINE: He is a landowner.

5 MR. BUNDY: He can testify as to the value of
6 his property, but not the other aspect.

7 THE COURT: I think I will sustain the objection,
8 unless he is familiar with rental property. He has
9 the right to say what the fair market value of the
10 property is, but as to rental property, I think you
11 would have to qualify him.

12 BY MR. CLINE:

13 Q Are you familiar with the drive-in restaurant
14 being rented in the Castlewood area?

15 A Well --

16 Q Do you have knowledge?

17 A Yes, sir, I understand the one up the road about
18 three miles is rented.

19 Q Ma and Pa's?

20 A Ma and Pa's.

21 MR. BUNDY: Unless he stated he is, I would have
22 to object.

23 THE COURT: Unless he has some knowledge.

24 MR. CLINE: We will substantiate that with the
25 other witness.

2 BY MR. CLINE:

3 Q Mr. Donelson, were you able to find any comparable
4 property that would put you back in the condition as you were
5 before?

6 A No, sir.

7 MR. BUNDY: I object.

8 THE COURT: I will sustain the objection because
9 it would be repetitious.

10 MR. CLINE: You may ask him.

11 CROSS EXAMINATION

12 BY MR. BUNDY:

13 Q Mr. Donelson, you had approximately 660 square
14 feet in the building, is that correct?

15 A I suppose so.

16 Q It was all a carry-out business?

17 A Yes.

18 Q You didn't have any seats to sit in, is that
19 right?

20 A Yes.

21 Q You and your wife are the owners of this property,
22 is that right?

23 A Yes, sir.

24 MR. BUNDY: That is all the questions.

25

2 REDIRECT EXAMINATION

3 BY MR. CLINE:

4 Q You said you had a carry-out business. How many
5 employees ordinarily worked this property?6 A Well, it varied a little for the different
7 seasons.8 Q Give the summer season and give the winter
9 season.10 A We had as many as twelve during the summer
11 season.

12 Q At one shift?

13 A No, sir.

14 Q How many on one shift?

15 A Well, we had them overlap some and we had what
16 you call a middle shift. We have had as many as six at a
17 time.18 Q Six at a time. That would be in your rush
19 season, is that correct?

20 A Yes, sir.

21 Q What would be your mediocre season, in between
22 rush and in between slow?23 A Well, we got down, in the winter time we would
24 have about -- well, we run two on each shift and the middle
25 shift would have three in the winter time.

2 Q I see. Was it a year-round business?

3 A Yes, sir.

4 Q So I take it that you and your wife were the
5 managers and had these people that worked for you as operating,
6 actually doing work in the place, is that correct?

7 A Yes.

8 MR. CLINE: That is all.

9 (Witness excused.)

10 MR. CLINE: Call Robert Huff.

11 ROBERT HUFF

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

13 DIRECT EXAMINATION

14 BY MR. CLINE:

15 Q You are Robert Huff?

16 A Yes, sir.

17 Q Do you have a middle initial?

18 A Earl.

19 Q Robert Earl Huff. Mr. Huff, where do you
20 presently live and what business do you presently operate
21 in Russell County?

22 A I live up on 19 above Lebanon here. I have the
23 Ma and Pa's Drive-in and Huff's Sewing Center here in Russell
24 County.

25 Q For the past six or ten years, what types

2 business have you been directly connected with?

3 A With the drive-in restaurants.

4 Q What about the sewing center?

5 A And the sewing center.

6 Q What centers have you been connected with in
7 what cities or towns?

8 A Well, I have got one in Abingdon, Washington
9 County, and I have got one in Tazewell, in Tazewell County.

10 Q Where else have you had them in the past?

11 A We have got one in Marion, too, in Smyth County.

12 Q One in Marion and Smyth County. That was a
13 little Singer sewing machine center, is that correct?

14 A Yes.

15 Q You have the franchise of Singer machines?

16 A Yes.

17 Q Now the one in Abingdon is operated by you, is
18 it not?

19 A That is right.

20 Q Do you own the building there?

21 A Yes.

22 Q Do you own the property up at Ma and Pa's No. 2?

23 A Yes.

24 Q Have you been directly connected with the
25 operation of Ma and Pa's No. 1 over at Castlewood?

2 A Well, in the sense of taking care of the book
3 work ever since it was first started.

4 Q Have you been directly connected with it pre-
5 viously?

6 A No, other than just keeping the books.

7 Q I believe your father occupied that himself?

8 A That is right.

9 Q As the manager?

10 A That is right.

11 Q Are you familiar with the business that Mr.
12 Donelson had there at the St. Paul bridge?

13 A Oh, yes.

14 Q The Frostie-Bossie?

15 A Yes, several years.

16 Q How long have you known the type of business
17 that he has had?

18 A Well, for about fifteen years.

19 Q Are you generally familiar with the actual
20 operation of his business?

21 A Yes.

22 Q You have passed it many, many times, I presume?

23 A Stopped there plenty of times.

24 Q Would it be fair to say he is one of your
25 competitors?

2 A Well, to the Castlewood Restaurant.

3 Q A friendly competitor?

4 A Yes, they get along good together.

5 Q Sir?

6 A They got along good, they worked back and forth
7 with each other.

8 Q As far as the real estate market in and around
9 Castlewood and this area, are you generally familiar with
10 market values of property, much as we talked about here, the
11 Frostie-Bossie and other real estate?

12 A Yes, I know what I have been connected with,
13 what it is worth and what it has cost.

14 Q That is one of your specialties, drive-in food
15 places?

16 A That is right.

17 Q I will ask you in your opinion what you think
18 would be a fair market value of the Frostie-Bossie as of
19 May of 1976.

20 MR. BUNDY: I want to object. I don't think
21 this man has been properly qualified as an expert.

22 THE COURT: Have you bought and sold real estate
23 in this area?

24 THE WITNESS: Yes.

25 THE COURT: And you own real estate in this area?

2 THE WITNESS: Yes, I own real estate here in
3 Russell County and Washington County, too.

4 THE COURT: Go ahead. Objection overruled.
5 You may answer.

6 BY MR. CLINE:

7 Q What is your opinion?

8 A Well, from the restaurant standpoint --

9 Q Market value.

10 A Market value, I would say between \$90,000 and
11 \$95,000.

12 Q Do you know, as of May of 1976, do you know of
13 any places of this sort that were for sale, have this type
14 of location?

15 A No.

16 Q I will ask you whether or not it makes any
17 particular difference, as far as the value of the property
18 is concerned, as to where it is located.

19 A Well, its real location, it is between two
20 communities. It is on an awful busy highway, plenty of
21 traffic. Really, if they didn't have, as far as the restau-
22 rant is concerned, there is not but three restaurants down
23 there and it is really a worthwhile location for that type
24 of business.

25 Q Do the drive-in restaurants such as one like

2 Frostie-Bossie have a potential insofar as being valuable
3 commercial property, to make a return on the property?

4 A Well, it should be, because that is how a person
5 makes a living, from his income.

6 Q Assuming that the gross receipts now I said,
7 this property in 1975 was approximately \$174,000 --

8 MR. BUNDY: Again, I want to object to any
9 reference about gross receipts.

10 THE COURT: Objection overruled.

11 BY MR. CLINE:

12 Q And further assuming that factor and with your
13 testimony that you have given that you are familiar with
14 the property, would you have an opinion as to what property
15 of this sort could rent for?

16 A Well, I know for one piece of property --

17 MR. BUNDY: Again, I want to object.

18 THE COURT: If it is comparable, you would have
19 to show it is comparable property before he can
20 answer the question.

21 BY MR. CLINE:

22 Q On the Ma and Pa's No. 1, as far as the value
23 of the property for commercial use, how would you compare
24 that with the Frostie-Bossie?

25 A Well, it is as good a location as the

2 Frostie-Bossie.

3 Q What about income-producing property, how would
4 you compare it with regard to income-producing?

5 A It would be about the same.

6 Q About the same. All right. Do you know whether
7 or not the Ma and Pa No. 1, whether or not that property is
8 under a rental arrangement?

9 A It is under a lease arrangement.

10 Q Under a lease arrangement. What are the terms
11 of the lease?

12 A It is \$1,500 a month.

13 Q \$1,500 a month?

14 A That is right.

15 Q What would you think would be the fair market
16 value --

17 MR. BUNDY: I want to object.

18 THE COURT: I will sustain the objection to
19 that question unless it is broken down. In other
20 words, what the Court would state, if he is leasing
21 equipment, and \$1,500 covers something other than the
22 building and the land, then the Court would exclude
23 his testimony.

24 BY MR. CLINE:

25 Q Do you know what the terms of his lease are?

2 A It is the building and equipment.

3 Q Would you please --

4 MR. BUNDY: I want to object.

5 THE COURT: I am going to sustain the objection,
6 because he has given a figure.

7 MR. BUNDY: He hasn't even shown there comparable
8 min size or anything else...

9 THE COURT: I will sustain the objection on the
10 basis that he has given a figure which includes
11 equipment and the only thing this Commission may
12 consider is what is the fair market value of the land
13 and the improvements thereon at the time of the taking
14 in May of 1976.

15 MR. CLINE: You may ask him.

16 CROSS EXAMINATION

17 BY MR. BUNDY:

18 Q Mr. Donelson, what size is the Ma and Pa's --
19 I mean Mr. Huff?

20 A It is approximately 200 by 110.

21 Q How many square feet?

22 A It would be about 20,000, I would say.

23 Q About a half acre?

24 A About a half acre.

25 Q How new is the building located there? Describe

2 the building.

3 A Well, the building that is there has been there
4 about thirteen years.

5 Q What kind of structure? Is it a brick structure?

6 A Frame and brick.

7 Q Frame and brick. How many square feet in the
8 business?

9 A It is about, well, since the front has been
10 added on, it is about 1500.

11 Q Does that include your seating area?

12 A Yes.

13 Q That is located back up toward Castlewood?

14 A That is on the left of 19.

15 Q You have recently had a case against the State
16 Highway Commissioner, too, haven't you?

17 A Oh, back about eight or nine months ago.

18 MR. BUNDY: I believe that is all.

19 REDIRECT EXAMINATION

20 BY MR. CLINE:

21 Q Mr. Huff, the fact that it would be less land
22 than you told him, say it would .13 acres, I show you a plat
23 here, would that make any difference of what your statement
24 is as to market value of that property?

25 A Not really, because on account of your volume

2 of the business standpoint, the more goes out the door, you
3 can get as much from a small location as you can a large, as
4 long as you have a good turnover.

5 MR. BUNDY: Again, I want to object to this
6 whole line of questioning. As the Court states, it is
7 the fair market value of the building and improvements
8 and has nothing to do with gross receipts. That is
9 obviously what this witness --

10 THE COURT: Of course, the Court is admitting
11 the element of gross receipts, gross sales, and will
12 give instructions to the Commission with reference to
13 that phase of the evidence. Of course, I think the
14 Court is obligated and will so give instruction at a
15 later time that you may not consider prospective future
16 profits.

17 MR. CLINE: That is true. That is all.

18 MR. BUNDY: No further questions.

19 (Witness excused.)

20 MR. CLINE: We rest.

21 THE COURT: Anything further?

22 MR. CLINE: No, sir, I rest.

23 THE COURT: All right, gentlemen of the
24 Commission, we will take about a ten minute recess,
25 and then the Court will give you the instructions

which constitute the law of the case, after which you will hear argument and decide the case.

. . . Thereupon, the Court and counsel retired to chambers, where the following proceedings were had in the absence of the Commission . . .

. . . Discussion off the record . . .

THE COURT: The Court is granting Instruction No. 1 and 2 as offered by the defendant.

The Court is granting Instructions A, B, C, D, E, F, G and H for the highway department as offered, and the Court is going to give an instruction pertaining to guide lines for the Commission with reference to the evidence which has been introduced as to the gross sales, which basically states that the Commission may not consider prospective future profits, but may consider gross sales where there is no market for the particular property involved, for the purpose of showing its productivity.

The Court is relying on a case which arose in Dickenson County, Virginia, and later was decided by the Fourth Circuit Court of Appeals and is styled United States v Atomic Fuel Coal Company, 383 Fed. 2d, Fourth Circuit Court, 1967, and the citation for the Western District of Virginia is 253 Fed. Sup. 208, 1966.

1
2 MR. BUNDY: The granting of that instruction,
3 along with the admissibility of the evidence as to
4 gross revenues or gross receipts, the highway depart-
5 ment objects on the basis that it allows the Commission
6 testimony where they can speculate and guess as to
7 what profits are or might have been. Gross sales, as
8 far as the highway commission is concerned, is more
9 speculative than net profits.

10 THE COURT: The Court is giving I, over the
11 objection of counsel for the highway department.

12 MR. BUNDY: I object to this. Again, I don't
13 think the capitalization of rent is a proper method
14 of appraising property. Capitalization of income on
15 profit and gross revenues is not a proper method
16 recognized by the State of Virginia in appraising
17 property.

18 . . . Thereupon, the Court and counsel returned
19 to the open courtroom where the following proceedings
20 were had in the presence of the Commission . . .

21 THE COURT: Gentlemen of the Commission, the
22 Court is going to read you the instructions which
23 constitute the law of this case, after which you will
24 hear argument, ten minutes to the side.

25 . . . Thereupon, the Court read to the Commission

1
2 instructions A, B, C, D, E, F, G, H, I, 2 and I, after
3 which counsel presented their argument to the Commission,
4 during which the following objections were made . . .

5 MR. BUNDY: ***A man can have two million
6 dollars in gross profits and lose \$20,000. So I ask
7 you gentlemen not to consider that. You heard no
8 evidence. The Court ruled that there could be no
9 evidence as to net profits, and I think that is the
10 correct statement of the law, but gross profits --

11 THE COURT: Gross sales.

12 MR. BUNDY: Gross sales is something that cannot
13 be considered by you.

14 MR. CLINE: I object. He is arguing contrary
15 to the Court's instruction.

16 THE COURT: I sustain the objection. It can be
17 considered only for the purposes set out in the
18 instruction which has been given to the Commission.
19 Go ahead.

20 MR. BUNDY: Again, I point out to you the Court
21 has an instruction in regard to gross profits.

22 THE COURT: Gross sales.

23 MR. BUNDY: Gross sales. I ask you to look at
24 our testimony for what the state has offered for a
25 small parcel, .13 acres of land, and a cinderblock

1
2 building that is 660 square feet.

3 The instructions of the Court, the Court has
4 instructed you that the State of Virginia is to pay
5 Mr. Donelson for the fair market value of his property,
6 and I submit to you that the fair market value of his
7 property can only be determined the way the state
8 determined it, was to arrive at a value for the land
9 that was there and a value to replace the building.

10 Now Mr. Cline is going to argue that the state
11 should put him back in business in the same way that
12 he was before. That would be nice if we could do that,
13 but I am not sure that there is a same lot, exactly
14 the same size and everything else of that nature. We
15 have made an appraisal to pay Mr. Donelson for what
16 he had there, that he can go and he can use and place
17 another business or whatever he wants to. This is no
18 give-away program. You are not to be unfair to Mr.
19 Donelson. You are not to be unfair to the state. We
20 are here simply because we can't agree.

21 That is no sign for you to increase or to de-
22 creast any offers or any amount of money that you have
23 heard here today. I simply ask --

24 MR. CLINE: That is improper argument and I
25 object to it.

THE COURT: Objection overruled. We are not talking about offers.

MR. CLINE: He is talking about offers.

THE COURT: I will sustain it as to offers, but as to any evidence --

. . . Thereupon, Mr. Bundy concluded his argument, after which Mr. Cline presented his argument to the Commission, during which the following objections were made . . .

MR. CLINE: ***It would be comparable -- sure, it would be fair to use it, but there wasn't any. If he tried to use the land up there at the printing shop and call that comparable land for dollars and cents -- for example, down on Holland Street and Flagler, Miami Beach, a business corner down there, a little fruit stand six by six, back in 1943, was renting for \$45,000 a year.

MR. BUNDY: I would object to this.

THE COURT: I sustain the objection on the grounds that there isn't any evidence.

. . . Thereupon, counsel continued argument . . .

THE COURT: Gentlemen of the Commission, you may go to your room. When you arrive at a verdict, fill in the blank. If all of you agree, all the

2 commissioners, and if the majority agree, the majority
3 of you sign.

4 I am striking out the damage to the residue
5 because in this case there isn't any damage to the
6 residue. The only thing is the take.

7 You may go to your room and knock on the door
8 when you arrive at an award.

9 . . . Thereupon, the Commission retired from
10 the open courtroom at 2:40 p.m. and returned to the
11 open courtroom at 3:03 p.m. . . .

12 THE COURT: Gentlemen of the Commission, have
13 you arrived at an award?

14 THE COMMISSION: Yes.

15 THE COURT: All right. State Highway Commissioner
16 versus Elmer L. Donelson, upon such evidence as was
17 before us we fix the value of the aforesaid land.
18 taken by the Highway Commissioner at \$50,000, signed
19 by L. T. Phillips and E. W. Hale and E. H. Gillenwater.
20 It is signed by the three Commissioners.

21 All right, gentlemen of the Commission, that is
22 the only case you have. Some of you may be summonsed
23 back tomorrow.

24 You are now released.

25 Anything further from the Commission?

2

MR. BUNDY: Nothing, your Honor.

3

THE COURT: All right, you are now excused.

4

Thank you very much.

5

. . . Thereupon, the Commission was excused . . .

6

THE COURT: Either party, do you have any

7

motions with reference to the award of the

8

Commissioners?

9

MR. BUNDY: Your Honor, I will probably make

10

some motion with regard to written exceptions.

11

THE COURT: Of course, you may file the written

12

exceptions. You are given the usual time, and if you

13

need any additional time, the Court will get in touch.

14

Let the Court know.

15

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THESE WERE ALL THE PROCEEDINGS HAD AND
EVIDENCE INTRODUCED IN THE TRIAL OF
THIS CAUSE.

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