

IN THE
Supreme Court of Virginia
AT RICHMOND

MAY 29 2001

RICHMOND, VIRGINIA

Record No. 010456

SHORT PUMP TOWN CENTER COMMUNITY
DEVELOPMENT AUTHORITY, et al.,

Appellants,

— v. —

ARLIE A. HAHN, JR., et al.,

Appellees.

JOINT APPENDIX-VOLUME TWO

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1 of the unique aspect of this particular
2 economic-development effort, and see if there was a
3 way in which we could --

4 Q And the date of that meeting?

5 A As I recall, it was May to June of that
6 year.

7 MR. SABOURIN: That's all the questions
8 that I have, Your Honor.

9 THE COURT: Is there any redirect?

10 MR. RAPISARDA: Just a few, Your Honor
11 please. If I could proceed, Your Honor?

12 THE COURT: Yes.

13

14 REDIRECT EXAMINATION

15 BY MR. RAPISARDA:

16 Q Mr. Hazelett, we have talked a little about
17 the ring road, and I think I heard you say at one
18 point you thought the ring road was private. I want
19 to clarify your testimony, sir. Who do you
20 understand will own the ring road?

21 A CDA, Community Development Authority.

22 Q Do you understand that the ring road,
23 however, will not be owned and operated into the
24 County road system?

25 A That's correct.

1 Q And is that the sense in which you used the
2 term "private" in that context?

3 A Caught up in the conversation, you are
4 correct. Serves a public function, owned by the
5 Community Development Authority.

6 Q And Mr. Hazelett, Mr. Spencer questioned
7 you at some length about the cost estimates that were
8 shown in these petition and ordinance documents. I
9 think you recall looking at a \$22,000,000 list and a
10 \$34,000,000 list, do you recall that?

11 A Yes, sir.

12 Q Mr. Hazelett, do the changes in those cost
13 estimates have any affect on the County's decision to
14 offer incentives in this matter?

15 A No, they do not.

16 Q And you are a registered professional
17 engineer, I think you said earlier, Mr. Hazelett?

18 A Yes, I am.

19 Q Do you expect these figures to change over
20 time? Is that customary in the trade?

21 A It is customary. At this point in time the
22 estimates are made on the units as they're available.
23 As more detailed information is available, they will
24 become more concise and in all probability, increase.

25 Q But the board's obligation is limited, as

1 you understood it, to \$22,000,000.

2 A That's correct.

3 Q Now, when Mr. Spencer asked you about the
4 options available at the end of the bond period of
5 five years, and he put to you two options, I believe
6 the CDA could keep the property or give it to the
7 developer, do you know any reason, Mr. Hazelett, the
8 CDA could not convey or sell that property to the
9 developer?

10 A None, simply an item that has not been
11 discussed at this point.

12 Q In your experience, Mr. Hazelett, in many
13 years of working with the County and being involved
14 in development, is it your experience a development
15 places burdens on the County?

16 A Yes, sir.

17 Q Is this development just another example of
18 the burdens that would be placed on various County
19 facilities and deeds?

20 A It is.

21 Q And are those the ones that we discussed in
22 your direct examination earlier this morning?

23 A They are, sir.

24 Q Mr. Sabourin asked you, and I believe you
25 admitted that this was prime real estate,

1 Mr. Hazelett. Do you know when this property will be
2 developed?

3 A I do not, sir.

4 Q Do you have any idea whether a super
5 regional shopping center will be developed if the
6 Short Pump Town Center is not developed on that
7 property?

8 A Based upon the information that I've
9 received and my knowledge of super regional malls and
10 the activities, it will not occur here if it is not
11 done in this manner. As to what else will occur
12 here, I have no idea.

13 Q But since the zoning, there's been one plan
14 of development approved for the property; is that
15 correct, sir?

16 A That's correct.

17 Q And no one has chosen to move forward with
18 that particular plan; is that accurate?

19 A That's accurate.

20 Q Mr. Hazelett, let me go back a minute to
21 the Economic Development Authority and the notion
22 that they were asked to act as a conduit. Have you
23 and the board of supervisors asked the EDA to finance
24 a major road project at eastern Henrico County that
25 would serve the Richmond Airport in that area of the

1 community?

2 A We did, sir.

3 Q How long ago was that, sir?

4 A Approximately four years ago, as I recall.

5 Q And would you tell the Court briefly what
6 project that is you're referring to?

7 A That was consideration of a public/private
8 partnership in order to construct Interstate 895
9 through eastern Henrico County.

10 Q And did you make that presentation to the
11 Economic Development Authority?

12 A I did, sir.

13 Q What was the position of the board of
14 supervisors with respect to that project?

15 A Board of supervisors passed a resolution
16 and was on public record supporting the project.

17 Q And what was the EDA's response to the
18 board's request?

19 A The EDA declined to participate. They did
20 not approve and would not approve the bond.

21 Q Mr. Hazelett, back to the criteria for
22 economic-development incentives that we have
23 discussed. In your view, would those criteria
24 prevent Henrico County from offering financial
25 assistance to Regency Square?

1 A No, sir, it would not.

2 Q And why is that?

3 A Because I had indicated to Taubman in
4 correspondence and also in conversation that the
5 criteria that we had developed was for new
6 development in Henrico County, that if Taubman wished
7 to be considered and had a proposal that they could
8 place upon the table, I would be more than happy to
9 work with them to develop criteria for the existing
10 developments in Henrico County, but I knew they could
11 not meet the new development criteria.

12 MR. RAPISARDA: Thank you. No further
13 questions.

14 THE COURT: Mr. Spencer?

15 MR. SPENCER: Just to clarify two points
16 Mr. Rapisarda made, with the Court's permission.

17 THE COURT: All right.

18 MR. SPENCER: You look so excited.

19 THE COURT: If you can do it very quickly.

20 MR. SPENCER: I can.

21 THE COURT: I'm not sure I'm going to allow
22 round-robin.

23 MR. SPENCER: I thought he changed
24 positions.

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RECROSS-EXAMINATION

BY MR. SPENCER:

Q The ring road is now, and always will be, unless these points are developed, a private road for internal circulation relating to the mall, correct?

A Without the connections on each side, yes, sir.

THE COURT: I'm sorry, what?

THE WITNESS: Without the connections on each side, yes, sir.

BY MR. SPENCER:

Q And isn't it your last, the last of your seven criteria --

THE COURT: I thought I understood it. Is it going to belong to the CDA or not?

THE WITNESS: Yes, sir, it will.

THE COURT: But only after the access roads are made?

THE WITNESS: No, sir. The CDA will own it in the beginning. Again, I'm in a court of law. I understand that. And Mr. Spencer is making his point, and I understand his point, and that is -- and I don't want to help Mr. Spencer any more than I need to.

BY MR. SPENCER:

1 Q Please do.

2 A The roads are not on either side of it at
3 this point in time, therefore it serves a private
4 function. My point is, this is an overall plan of
5 overall development in Henrico County.

6 Q Who is going to own the ring road?

7 A Community Development Authority.

8 Q Do you know that?

9 A Yes, sir.

10 Q How?

11 A That was a part of discussions that we have
12 had in consideration of the Community Development
13 Authority.

14 Q But according to Exhibit 6, the rate and
15 method of assessment, the ring road and parking are
16 part of the \$34,000,000, correct?

17 A Mr. Spencer, you are referring to a
18 document that I have indicated changes on more than
19 one occasion until all of those plans have been
20 finalized. I believe that we can participate in any
21 particular item or items on that list. As to what
22 they finally are, I cannot tell you at this point.

23 Q And that's my point, you can participate
24 with any of these items or you can choose not to
25 participate with any of them, correct?

1 A Correct.

2 Q And the ring road is one of those items,
3 correct?

4 A Yes.

5 Q And so you don't know who is going to own
6 the ring road or not, because that hasn't been
7 decided yet?

8 A But from my standpoint, Mr. Spencer, as
9 traffic engineer, it does provide a need in the area
10 of adding additional capacity to Broad Street and
11 eliminating the turning movement onto or off of Broad
12 Street.

13 Q But whether the ring road is or is not,
14 whatever its usefulness, whether it's going to be
15 funded and owned by the CDA, one of those items
16 that's funded and owned by the CDA or not, is not
17 something you know yet, correct?

18 A That is not something that is concrete, you
19 are correct.

20 Q Thank you. And the last of your criteria
21 for economic-development incentives is that this
22 project not have a substantial impact on the County
23 services, correct?

24 A Correct.

25 MR. SPENCER: Thank you. Thank you, Judge

1 Johnson.

2 THE COURT: All right. Mr. Sabourin, do
3 you have any other questions?

4 MR. SABOURIN: No, further questions, sir.

5 THE COURT: Mr. Rapisarda?

6 MR. RAPISARDA: No, sir.

7 THE COURT: Mr. Hazelett, thank you very
8 much, sir. I appreciate your testimony. You may
9 step down. Should we leave all these exhibit books?

10 MR. SPENCER: I think we should. That
11 would be a lot easier.

12 THE COURT: Thank you, Mr. Hazelett.

13 THE WITNESS: Your Honor, for clarification
14 for Mr. Spencer, how about these?

15 MR. SPENCER: I think if you leave those
16 that I handed up to you as well, that would be
17 helpful.

18 (Witness stood down)

19 THE COURT: Now, Mr. Rapisarda, what do you
20 have next?

21 MR. FOOTE: Jamie Traudt.

22 THE COURT: Mr. Traudt, will you come
23 straight ahead to the witness stand and close that
24 door behind you, if you would, and raise your
25 right-hand, please?

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JAMES M. TRAUDT,
was sworn and testified as follows:
DIRECT EXAMINATION
BY MR. FOOTE:
Q Mr. Traudt, we have learned that the
acoustics are such, if you could pull the microphone
around to you, that would be useful. Would you
please give the Court your name, sir?
A James Traudt.
Q Mr. Traudt, what do you do today?
A I'm sorry?
Q What is your employment today?
A I'm a senior vice president/manager of
public finance for Davenport and Company.
MR. FOOTE: Your Honor, we're going to
offer Mr. Traudt as an expert witness, and so I shall
proceed with his qualifications here.
BY MR. FOOTE:
Q Where did you go to school, your
undergraduate work?
A University of Nebraska.
Q When did you go there?
A 1968 to 1971.
Q Did you graduate?
A I did not.

1 Q What was your first work after you left the
2 University of Nebraska?

3 A I worked for the Nebraska Consolidated
4 Communications Corporation.

5 Q And did -- about 1971, did you begin to
6 work in the field of public utilities?

7 A I did.

8 Q What did you do, sir?

9 A I worked for the Lincoln Electric System in
10 Lincoln, Nebraska, in the financial division.

11 Q After that, did you move jobs, and if so,
12 to what, sir?

13 A In 1980 I moved to New York and went to
14 work for a financial-advisory firm, James J. Lowery
15 and Company.

16 Q What did you do for Mr. Lowery?

17 A Represented clients throughout the United
18 States as a financial advisor on financing programs.

19 Q Briefly for the benefit of the Court, what
20 does a financial advisor do?

21 A Financial advisor is retained by a
22 jurisdiction to advise them on strategic planning, on
23 potential bond issues, structure of those issues,
24 credit issues and related matters that relate to
25 borrowing money in the tax-exempt markets.

1 Q Did you rise through the ranks at Lowery?

2 A I did.

3 Q And when you left Lowery, what was your
4 position?

5 A I was executive vice president in charge of
6 the practice.

7 Q When did you leave Lowery and where did you
8 go?

9 A 1984 I left and went to work at Dylan, Reed
10 and Company, which is a New York investment banking
11 firm.

12 Q And what was your function there, sir?

13 A I served both as financial advisor and as
14 an underwriter to issuers primarily in the northeast,
15 but some accounts in other parts of the United
16 States.

17 Q Now, what was your position when you left
18 there?

19 A I was a senior vice president.

20 Q When did you leave?

21 A 1989.

22 Q And to where did you go then, sir?

23 A Richmond, Virginia.

24 Q And to what in Richmond?

25 A I joined Wheat First Securities, where I

1 worked until 1995, when I was a managing director.
2 And I was the second person in charge of the
3 practice.

4 Q You say "the practice," was there a
5 particular area of the practice that you focused on?

6 A Yes. I worked primarily in the field of
7 transportation and utility finance, although I did
8 have other clients and was responsible for oversight
9 of all of our investment-banking services to our
10 clients.

11 Q Now, when you were there at Wheat First,
12 did you work with anyone in particular? I think you
13 said you were deputy manager. Did you work with
14 anyone specific there?

15 A I worked with Walter Craigie and with Pam
16 Hagan.

17 Q And you said you left in 1995. What did
18 you do then, sir?

19 A I became a consultant to other investment
20 bankers and financial advisors in my own practice.

21 Q What kind of work did you do with those
22 people?

23 A We did quantitative analysis and credit
24 analysis on their behalf.

25 Q And would this be a circumstance in which

1 other financial advisors and other investment bankers
2 would have sought your advice?

3 A That's correct.

4 Q Now, when did you join Davenport and
5 Company?

6 A 1998.

7 Q And what was the function that you came to
8 serve?

9 A A group of professionals, in the wake of
10 one of the mergers, decided -- some former colleagues
11 in my group decided to move to Davenport and form a
12 new public-finance practice.

13 Q And is that what you have been doing since?

14 A That's correct.

15 Q Now, approximately how long have you been
16 engaged in public finance?

17 A 21 years.

18 Q And do you have any estimate as to
19 approximately how many financial transactions, public
20 finance transactions you have been involved in during
21 that period of time?

22 A I have had direct responsibility as a
23 principal with principal responsibilities for
24 approximately 100 transactions aggregating to about
25 \$8,000,000,000.

1 Q Has your practice over the years tended to
2 focus more in the public sector or the private
3 sector?

4 A Public sector.

5 Q And you suggested this before in your
6 testimony, but let me be clear about this. You
7 performed, I think, multiple functions during the
8 course of this career. I believe you said financial
9 advisor --

10 A Yes.

11 Q -- underwriter --

12 A Yes.

13 Q Would you tell the Court what an
14 underwriter does?

15 A An underwriter basically is the purchaser
16 of the bonds as an intermediary in the markets who
17 purchases municipal -- who structures municipal-bond
18 transactions so that they then can be sold directly
19 to investors.

20 Q And I take it you also have served simply
21 as a consultant to others?

22 A That's correct.

23 Q Have you had any management
24 responsibilities during this time?

25 A During six of those 21 years I have had

1 management responsibility for my firm.

2 Q And what has that experience contributed to
3 your knowledge of public finance?

4 A That has given me the opportunity to have
5 oversight responsibility for approximately an equal
6 number of transactions to those that I was personally
7 working on on a day-to-day basis.

8 Q And as manager, would you have occasion to
9 be closely involved with the principals that were
10 particularly working on this project?

11 A Yes, they would have been working directly
12 for me.

13 Q Mr. Traudt, in the public-finance work that
14 you have done, have you had any particular experience
15 with what I believe the trade calls tax-backed
16 financing?

17 A I have.

18 Q And would you please explain that?

19 A Tax-backed financing would involve any
20 financing secured by the tax base of a locality; this
21 would include general-obligation bonds. It would
22 involve what we would call special tax bonds which
23 would be secured by a particular tax stream out of
24 not the general credit of the utility or the
25 municipality, it would involve special-assessment

1 bonds, such as we're dealing with in this particular
2 case.

3 Q Have you ever worked with a Community
4 Development Authority before?

5 A Yes. In addition to the Short Pump Town
6 Center, I should point out, first of all, that in
7 Virginia, Community Development Authorities have only
8 been around for the last five years or so. At the
9 time we began this engagement, to the best of my
10 knowledge, only one financing had been completed in
11 Virginia. My colleagues were advising Loudoun County
12 with respect to that transaction. Since then I've
13 also worked with Farmville and Prince Edward County
14 for another project using a community development
15 authority down there.

16 Q That project has not actually gone to
17 financing yet?

18 A That's correct.

19 Q Can you give me some estimate of
20 approximately how many of these special-assessment
21 bonds -- you mentioned that as a form of tax-backed
22 bonds. Approximately how many special-assessment
23 bonds have you worked on?

24 A Special assessment, special tax bonds,
25 maybe half a dozen or so.

1 Q Mr. Traudt, in your experience, is there
2 anything particularly unique about a CDA financing
3 that takes it out of the range of experience that you
4 have just described?

5 A I don't believe so. CDA financing is
6 basically another chapter in a very long book titled
7 tax-backed financing.

8 Q Have you had any experience with
9 tax-increment financing?

10 A I have. In 1983 I was principal in charge
11 of what was then the largest tax-increment financing
12 ever done in the United States in the City of Tampa,
13 Florida, although tax-increment financing is not
14 involved in this particular project.

15 Q All right, sir. Now, have you had occasion
16 to work with other jurisdictions than Henrico County
17 in matters involving the use of incentives?

18 A I have.

19 Q And can you give the Court some sense of
20 that, please?

21 A We have worked with Durham County, North
22 Carolina on a project that's actively underway
23 regarding American Tobacco Company; Frederick County,
24 Maryland on a major office development project.
25 We've worked with the City of Alexandria on a

1 potential shopping-center project.

2 MR. FOOTE: Your Honor, we would offer
3 Mr. Traudt as an expert in the field of municipality
4 financing.

5 THE COURT: Are there any questions on
6 Mr. Traudt's qualifications?

7 MR. SPENCER: I have none. Mr. Buell is
8 taking this witness.

9 MR. BUELL: I have none.

10 THE COURT: Mr. Pearson?

11 MR. PEARSON: Your Honor, the opinions he's
12 going to render appear to me to go toward the area
13 strictly of -- the area of municipal finance, so I do
14 have a few questions for him in that area.

15 THE COURT: All right.

16

17 EXAMINATION

18 BY MR. PEARSON:

19 Q Good afternoon, Mr. Traudt.

20 A Good afternoon.

21 Q Mr. Traudt, do you personally have any
22 experience with Community Development Authority
23 financing that predates your involvement with the
24 Short Pump Town Center project?

25 A No.

1 Q Do you have any financing experience with
2 shopping centers?

3 A I've evaluated shopping-center projects
4 before on behalf of a client.

5 Q Who was that client and when?

6 A City of Alexandria, Virginia.

7 Q When was that work done?

8 A Sometime during the last two years.

9 Q Did the city proceed with the project?

10 A Yes.

11 Q Were incentives involved in that project?

12 A Yes.

13 Q What was the nature of the incentives?

14 A The nature of the incentives involved both
15 utilities and various public infrastructure
16 improvements that were made related to the project.

17 Q Did the city form a CDA in order to extend
18 the incentives to the shopping center?

19 A They did not.

20 Q Was a CDA ever considered in connection
21 with that project?

22 A Not to the best of my knowledge.

23 Q What was the nature of the other
24 improvements that were tendered by the city in
25 connection with that project?

1 A I don't have a specific recollection.

2 Q Did they involve shopping-center plazas?

3 A The developer had made a specific proposal
4 to the city regarding this particular shopping
5 center, and the city was considering several
6 alternatives and asked us to evaluate those
7 alternatives on their behalf. Whether or not
8 specific plazas were involved, I couldn't say.

9 Q How about parking lots, did -- was the city
10 asked to provide parking lots for that development?

11 A Did you say CDA or city?

12 Q The city, was the city asked to provide
13 parking lots?

14 A I don't believe so.

15 Q Was the city asked to provide landscaping?

16 A I don't believe they were.

17 Q Was the city asked to provide any on-site
18 improvement at all?

19 A I'm not aware of specific on-site
20 improvements, other than utilities, that may have
21 been involved.

22 Q And the city was going to do this
23 themselves, were they?

24 A Yes, sir.

25 Q Do you have any experience with the

1 department-store industry?

2 A I do not.

3 Q Any merchandising expertise?

4 A No merchandising expertise.

5 Q Any experience or expertise in the area of
6 movie theaters, restaurants?

7 A Not of the nature that you're questioning.

8 Q You don't have any professional appraisal
9 designation or certification, do you?

10 A I do not.

11 Q You have never assessed any real estate,
12 have you?

13 A I have not.

14 Q Do you have any experience or expertise in
15 determining where or why retailers locate where they
16 do?

17 A No, I do not have any expertise in that
18 area.

19 Q And you're not an economist, are you?

20 A I am not an economist.

21 Q In fact, I believe you did tell me that you
22 took an economics course, but among your other
23 undergraduate experience, were there any business
24 courses at all, accounting courses, finance courses?

25 A No.

1 MR. PEARSON: That's all I have, Your
2 Honor.

3 THE COURT: All right. Any objections to
4 Mr. Traudt being allowed to testify as an expert in
5 the field of public finance?

6 MR. PEARSON: Not in the field of public
7 finance, Your Honor, but we do believe that his
8 opinions need to be limited to that field of public
9 finance.

10 THE COURT: All right. If a question is
11 asked that you think goes outside of that expertise,
12 I'm sure you'll make the appropriate objection.

13 MR. FOOTE: Yes, sir. I'm sure Mr. Pearson
14 will. We simply represent to the Court that the
15 purpose for Mr. Traudt's work was with respect to the
16 evaluation of certain information, and I think a good
17 deal of the voir dire had to do with inquiry of
18 things that we never intended to ask.

19 THE COURT: All right.

20 BY MR. FOOTE:

21 Q Your Honor, I do think there is one
22 question that would be relevant to add to this,
23 though, and that is to ask Mr. Traudt whether, in
24 performing the kind of consulting work that you were
25 brought in by the County to do in this case, is it

1 commonplace in your practice to rely on such
2 information as property valuations, sales per square
3 foot data and economic projections that are produced
4 by others that are brought to you for evaluation and
5 analysis?

6 A Of course.

7 MR. FOOTE: Your Honor, we have offered him
8 as an expert. I take it he has been accepted?

9 THE COURT: He can testify as an expert in
10 the field of public finance.

11 MR. FOOTE: Thank you, sir.

12 BY MR. FOOTE:

13 Q Mr. Traudt, would you please tell us how it
14 was that you came to be involved with the Short Pump
15 Town Center project?

16 A Mr. Hazelett engaged me in a conversation,
17 August of 1999, informed me that the County had been
18 approached regarding providing possible incentives
19 for a retail development and asked me to meet with
20 representatives of the developer to have a briefing
21 on the project.

22 Q Had you known Mr. Hazelett for a while?

23 A Had known Mr. Hazelett for many years.

24 Q And are you familiar with Henrico County?

25 A I worked with Henrico County on a number of

1 different projects over the course of the last seven
2 or eight years.

3 Q And would you happen to know what Henrico
4 County's bond rating is?

5 A Yes. It's triple A by both of the major
6 agencies.

7 Q And would you have any idea how many
8 jurisdictions in the Commonwealth might bear that
9 rating?

10 A Three other counties and two cities.

11 Q Out of what, 100 plus jurisdictions?

12 A About 145 jurisdictions.

13 Q No, in order for a locality to obtain such
14 a rating, can you give me some idea of what the
15 locality has to demonstrate to the rating agency to
16 achieve that?

17 A Yes. You have to demonstrate excellent
18 per-capita income, strong job base, good
19 demographics, excellent debt ratios, strong
20 management and a high level of financial
21 sophistication.

22 Q Now, you said that you met with
23 Mr. Hazelett in August, 1999. What specific
24 instructions did Mr. Hazelett give you about this
25 project?

1 A None. He told me to -- he asked me to meet
2 with the developers and then to determine whether or
3 not we would be willing to provide an analysis to the
4 County with respect to this project.

5 Q And, in fact, Mr. Traudt, did you not, in
6 fact, at his request at some point actually write him
7 what you understood your undertaking to be?

8 A Yes. He would not tell me what he wanted
9 us to do. He insisted that we provide a view of what
10 an appropriate analysis would be, and that we, having
11 done that -- conveyed that into writing -- he told us
12 that we could proceed with that work.

13 Q Did Mr. Hazelett ever ask you or Davenport
14 for any specific recommendation based on your
15 analysis?

16 A He did not.

17 Q He just asked you for an analysis?

18 A He asked us for an analysis.

19 Q Now, I take it that you did, in fact, meet
20 with the developers at some point in this process?

21 A Yes, we did.

22 Q All right. What was the first thing that
23 you did in order to get your hands around the
24 analysis that you were going to do? Did you prepare
25 any particular document or analysis?

1 A Yes. We prepared what we called a
2 prototype analysis that was a draft report which was
3 prepared in September of 1999.

4 Q Now, Mr. Traudt, let me ask you to find --
5 Your Honor, may I approach the witness just so we can
6 get the right book here? That's the one. Let me ask
7 you and the Court to turn please to Exhibit Number 47
8 and ask if you would identify that.

9 A Yes. This is the draft report that we
10 prepared in September.

11 Q Now, please, as we move through this, we
12 don't want to belabor this or take too much of the
13 Court's time, but could you just give the Court an
14 overview of what this document was, what purpose it
15 served for you?

16 A The purpose of this document -- we had done
17 a preliminary analysis. The purpose of this document
18 was to show the County before we completed our work
19 the form and substance and type of information we
20 would provide to the County, so that we could get
21 their agreement before we were to engage in the
22 balance of the work to complete the effort.

23 Q Now, just so we're sure about this, and
24 it's already in evidence, but we're talking, are we
25 not, about Short Pump Town Center as the super

1 regional mall with 1.2 million square feet and four
2 major anchors; is that what you're looking at?

3 A That's correct.

4 Q And in doing this preliminary analysis, did
5 you just start with the CDA or did you do something
6 else?

7 A No. We had to look at all -- no one had
8 talked to us specifically about it. We had to
9 evaluate all of the possible financing options that
10 were reasonably possible for the County to undertake
11 as a means of providing an incentive to the
12 developer.

13 Q Now, when you -- excuse me. Let's -- bear
14 with us for a second.

15 A I will.

16 Q I notice if one turns to -- Your Honor,
17 it's easy to find these pages because they're Bates
18 stamped BOS01655, Mr. Traudt.

19 A Yes, sir.

20 Q And -- I notice there are blanks. Why in
21 the world are there blanks in this thing?

22 A Once again, this was a draft analysis,
23 although we had done a considerable amount of work,
24 we had not really finalized our work, and we
25 considered it a draft work product at this point in

1 time, so we didn't fill in all the information in it,
2 although much of it is complete.

3 Q And this was because you wanted to find out
4 if this was the kind of format and approach that
5 Mr. Hazelett wanted?

6 A That's correct. We had very limited
7 directions at this point and wanted to make sure that
8 we were doing the type of work that would be useful.

9 Q Now, I notice there seems to be a series of
10 alternatives. What did that represent?

11 A We identified the generic financial
12 alternatives that existed for Henrico County
13 potentially to undertake such an arrangement. And we
14 identified the other principal advantages and
15 disadvantages of each of those general approaches.

16 Q Now, if I can just direct you back to Bates
17 stamp 1668, captioned debt capacity credit impact,
18 did you at this time begin already to look at the
19 potential impact on the County of doing some
20 financial assistance?

21 A Yes, we did. We had to look at their
22 outstanding debt, their credit ratios, their position
23 vis-a-vis other major jurisdictions in the state in
24 order to do that analysis.

25 Q And when you took information from the

1 developer, what did you do with that information?

2 Did you just accept that information?

3 A We received information from the developer
4 regarding the project. We reviewed that information
5 in the context of other information that we had
6 regarding other malls, information gained from our
7 corporate finance practice, reviewing documents
8 related to other projects that had been financed in
9 other parts of the country and so forth.

10 Q So, if I correctly understand it, if I'm a
11 member of the board of supervisors and I pick this up
12 and look at it, it's drafted to the extent that you
13 don't have all the numbers, but you have already done
14 a preliminary analysis, I take it, of some of the
15 major policies you just articulated?

16 A Yes, that's correct.

17 Q All right, sir. Did you consider at any
18 point the possible alternative use of this property
19 for some other thing than a mall?

20 A Yes, I believe we did.

21 Q And if you could briefly find that in here,
22 to direct our attention to it?

23 A Yes, that would be Bates stamped 1667.

24 Q And why did you do that?

25 A We determined that we needed to make some

1 determination as to what the potential value of this
2 project would be to the County if it were to proceed
3 under some set of assumptions and what the
4 consequences might be if it chose not to proceed.

5 Q And what alternative use did you
6 contemplate, do you recall?

7 A This particular alternative use
8 contemplated approximately 1,000,000 square feet of
9 office space.

10 Q Did you ever consider as an alternative use
11 a smaller mall of around 900,000 square feet?

12 A We considered it, and we chose not to
13 evaluate it as a realistic alternative.

14 Q And why would that be?

15 A The general information that we had
16 suggested that because of the fact that the State was
17 in the process of negotiating with Taubman over a
18 similar mall to the Short Pump Mall, and in fact, we
19 believed that there was a strong probability that if
20 this mall was not built, that that mall would be
21 built at Stony Point, and the probability of a major
22 retail shopping center going into this location with
23 all the other development in that area was highly
24 unrealistic.

25 MR. FOOTE: Now, let me turn -- Your Honor,

1 I hate to do this, because there are still a few
2 slips in the system here, and so the order of these
3 reports unfortunately is not tabbed one after the
4 other, but they're close by. Let me turn your
5 attention to Exhibit 49, and we would move admission
6 of Plaintiff's 47.

7 THE COURT: Any objection?

8 MR. BUELL: No objection, Your Honor.

9 MR. PEARSON: No objection.

10 THE COURT: Plaintiffs' 47 is admitted.

11 MR. FOOTE: And Your Honor, trust me, we
12 will not run you through each of these things.

13 BY MR. FOOTE:

14 Q Will you please tell the Court what Exhibit
15 49 is, Mr. Traudt?

16 A 49 was our first full report to the County
17 which involved much of the same information that had
18 been prepared in September plus a more extensive
19 analysis of the financial impacts of different
20 proposals.

21 Q Now, Mr. Traudt, to cut to the chase on
22 this, because I'm familiar with the report, did you,
23 in this report or did you evaluate two possible
24 levels of County participation in the project?

25 A We did, we evaluated initial County

1 participation of \$22,000,000 as well as County
2 participation of \$30,000,000.

3 Q And why was that?

4 A It was our understanding that the County
5 would be interested in seeing some type of
6 sensitivity analysis or some type of alternative. As
7 the developer was proposing a \$30,000,000 incentive,
8 we thought it was proper to show them some
9 alternative scenario so we could see how that might
10 compare.

11 Q Did you know or were you aware at that time
12 whether Mr. Hazelett himself had determined upon what
13 he might recommend to the board?

14 A I believe at that time that Mr. Hazelett
15 had determined he was in no position to -- would make
16 no determination as to what he would recommended to
17 the board.

18 MR. FOOTE: Now, Your Honor, we would move
19 the admission of 49.

20 THE COURT: Any objection?

21 MR. BUELL: No objection.

22 MR. PEARSON: No objection.

23 THE COURT: 49 is admitted.

24 MR. FOOTE: Okay. And I'll represent to
25 the Court that we have more of these. It will take

1 more time to --

2 THE COURT: You're taking more time
3 apologizing, just go ahead and do it.

4 MR. FOOTE: I have been in court too many
5 years, I suppose.

6 BY MR. FOOTE:

7 Q What happened after October, 1999 with
8 respect to your study?

9 A Mr. Hazelett suggested that it was worth
10 taking this work to the next level and trying to
11 fine-tune some of this and turn it into a potential
12 proposal for the County's consideration, felt that we
13 needed to look more closely at a number of details.

14 Q Let me turn your attention then to Exhibit
15 Number 48 and ask you if you will identify that?

16 A Exhibit 48 is a report that was prepared in
17 December of 1999.

18 Q And I take it that it is, in fact, an
19 elaboration upon or refinement of your previous work?

20 A That's correct.

21 THE COURT: Any objection to 48?

22 MR. BUELL: No objection.

23 MR. PEARSON: No, sir.

24 THE COURT: 48 is admitted.

25 BY MR. FOOTE:

1 Q Now, Mr. Traudt, in Exhibit 48, let me turn
2 you to Bates Stamp 1770. The Court has heard a great
3 deal of discussion of these criteria. When did --
4 how did these criteria evolve in your relationship
5 with this project?

6 A At some point, I believe at the meeting
7 where we discussed the October report with
8 Mr. Hazelett or shortly thereafter, he suggested that
9 one of the tasks that we needed to undertake was to
10 provide the County with some type of criteria in
11 order to judge any type of economic development
12 project that came before the County, not just Short
13 Pump Town Center. And in addition, as we started to
14 refine our analysis in consultation with the rating
15 agencies and others, we felt it was important from a
16 financial perspective to protect the County from a
17 credit perspective to establish criteria which would
18 serve the same desired purpose.

19 Q Was it your understanding that these
20 criteria were intended to be rock hard or were these
21 intended to be guidelines?

22 A These criteria were specifically drafted to
23 be strongly suggestive guidelines, but completely
24 open-ended, that offered the County flexibility to
25 determine any meritorious type project.

1 Q Were they designed for existing
2 development, new development, a mix or what?

3 A My understanding was that we were looking
4 at any type of project which would come forward which
5 would potentially be meritorious, whether it was an
6 existing development, whether it was a new
7 development, whatever the case might be.

8 Q Now, when you were developing -- and I
9 notice, by the way, that two of these criteria are in
10 handwriting in this draft. Can you tell me why those
11 are there in handwriting?

12 A Yes. We drafted five criteria for the
13 County's consideration. Mr. Hazelett insisted that
14 there were two areas that we had not considered that
15 he thought should be considered. One was that we
16 should directly deal with the issue of no credit
17 rating impact on the County, which we believed that
18 the first five criteria indirectly addressed. And
19 secondly, he felt that projects which would place a
20 heavy demand on County services would be
21 inappropriate.

22 Q Now, during the course of the preparation
23 of these criteria and your discussions with
24 Mr. Hazelett, did you have any conversations with the
25 rating agencies which helped you form your

1 recommendation to the County with respect to the
2 evolution of criteria?

3 A Yes, we did.

4 Q Can you tell me about that, sir?

5 A Well, we -- both before these criteria were
6 drafted, before we developed the financing plan and
7 then after we had developed a financing plan, we had
8 extensive discussions with both Moody's and Standard
9 and Poor's to determine how they were going to view
10 this type of project. We determined basically that a
11 major project of this scope and magnitude is
12 something that they looked at as being positively
13 beneficial to the economics of the County. We
14 learned that they had no problem with providing
15 incentives, provided they were done the right way.
16 And we had extensive discussions about some of the
17 ways that you could mitigate potential risks and make
18 them more comfortable from a credit perspective that
19 this would serve the best interests of the County and
20 would not in any way undermine their credit rating.

21 Q Now, in the evolution of these criteria,
22 did you give consideration to Regency Mall and how it
23 might be impacted by them?

24 A I'm sorry, can you repeat the question?

25 Q Well, as you were working with these

1 criteria, did you give any consideration to their
2 application to or lack thereof with respect to
3 Regency Square Mall?

4 A Not particularly.

5 Q Were these criteria designed for a
6 particular project?

7 A These criteria were designed for Henrico
8 County to consider economic-development projects.

9 Q So they were not designed to exclude
10 Regency from consideration?

11 A I don't think any major project is excluded
12 under these criteria.

13 MR. FOOTE: Your Honor, we got up to 48?

14 THE COURT: Yes.

15 MR. FOOTE: Been admitted?

16 THE COURT: Yes.

17 BY MR. FOOTE:

18 Q Now, after the December report, what then
19 happened? Did Mr. Hazelett give you further
20 instruction after he presented the December report?

21 A Yes. After we considered the information
22 in the December report, essentially he authorized us
23 to enter into negotiations with the developer for a
24 \$22,000,000 incentive package and instructed us to
25 try to reach closure on the deal.

1 Q Did there ever come a time when you met
2 with the board of supervisors to discuss this?

3 A In February of 2000.

4 Q And do you recall how long you were there
5 with the board?

6 A It was approximately five hours.

7 Q What happened after that meeting?

8 A After that meeting, we began to put
9 together generic documents in the form of agreements
10 that would be necessary to take a formal proposal to
11 the board of supervisors for their consideration.

12 Q Would it be fair to say that that was a
13 point at which the parties began drafting what we now
14 call the organic documents?

15 A Yes.

16 Q Now, let me direct your attention to
17 Exhibit 50, Mr. Traudt, and I would observe that it's
18 dated May 16, 1999, but is that the actual day it was
19 prepared?

20 A No, it was prepared May 16, 2000.

21 Q And in fact, if I turn the page, I see the
22 correct date, correct?

23 A Yes.

24 Q And what was this?

25 A This was the last formal analysis that was

1 prepared for the County principally to address the
2 time period over which bonds would be repaid.

3 Q Now, this is slightly different from the
4 reports that were prepared. Can you please briefly
5 tell the Court what this document was intended to
6 establish?

7 A This document was intended to provide
8 information to the County as to what the impact would
9 be of paying off the bonds over varying periods of
10 time from five to 20 years, so that they could see
11 what type of impact that would have on their revenue
12 and cash flows of the project.

13 Q At that time, in May of 2000, had the board
14 actually selected some period of amortization?

15 A No.

16 Q Or was it still evaluating?

17 A The board hadn't taken any formal action on
18 the project.

19 Q All right. Now, if I flip through this, I
20 see you have analyzed years after project completion
21 in a number of different iterations; is that correct?

22 A Yes, that's correct.

23 Q And again, I won't take the Court's --

24 A This is just a summary table that shows the
25 potential benefit to the County, is affected by

1 different amortization structures.

2 Q Now, the Court has already been told that
3 we have got a five-year amortization. Let me take
4 you to page 1692 of that document and ask you if that
5 is, in fact, a financial impact analysis based on the
6 five-year amortization.

7 A Yes, this is based on a five-year
8 amortization.

9 Q You did other analyses of 10 and 15 and 20?

10 A Yes, we did.

11 MR. FOOTE: Your Honor, I would move the
12 admission of 50.

13 THE COURT: Any objection?

14 MR. BUELL: No, sir.

15 MR. PEARSON: No, sir.

16 THE COURT: 50 is admitted.

17 BY MR. FOOTE:

18 Q Now, let me turn your attention, if I can,
19 to Exhibit 46. And would you please tell the Court
20 what that is?

21 A Excuse me, it's upside down in my book.

22 Q Yes, sir, it's upside down in mine.

23 A Yes. This is a copy of the analysis that
24 was presented to the board in July and was prepared
25 again for a meeting in September that was a copy of a

1 spreadsheet that basically summarized one scenario
2 that was presented to the board that was
3 representative of Short Pump, of the potential
4 financial impact.

5 Q So after all this evaluation and analysis
6 and discussion, things had distilled themselves down
7 into the circumstances you predict here?

8 A That's correct.

9 Q Now, in this document I notice that there
10 are a bunch of assumptions that are laid out here.

11 A Yes, there were.

12 Q Can you please briefly walk the Court
13 through those assumptions and explain how you came to
14 use them?

15 A The one assumption is the value of the
16 property and the rate at which that property
17 valuation is going to change. These assumptions, I
18 believe, were initially provided to us by the
19 developer. We discussed -- we looked at these
20 internally. We had discussions with the County
21 assessor. We determined that the assumptions
22 appeared to be generally reasonable. And with many
23 assumptions where we're working within the project,
24 if we did not have significant problems with the
25 developer assumptions, we chose to utilize them

1 rather than changing them in order to -- you have to
2 really go back, because this was not really the
3 negotiation process, but we didn't want to argue any
4 more than we needed to over assumptions with the
5 developer to get closure. So where their assumptions
6 were reasonable, we tended to leave them alone. And
7 when they were not, we tended to change them.

8 The improvements related to the
9 construction that was going to take place on the
10 site, similarly with out-lot construction, furniture,
11 fixtures and equipment, most of these assumptions
12 were provided initially by the developer. Some of
13 these remained. In fact, I believe some of them have
14 changed. For example, we had a lengthy discussion
15 over whether it was appropriate to consider
16 depreciation of furniture, fixtures and equipment
17 when we expected the facilities to be refurbished
18 from time to time. So we had issues of that type.

19 Tax rates we left alone throughout the
20 forecast period of the County's existing level of
21 taxation. We felt that that was a very conservative
22 assumption. Real property tax rates, basically the
23 same. On the sales tax we included the 1 percent
24 County portion on the sales tax. We specifically
25 decided to exclude from the analysis the

1 school-aid-funding portion of the sales tax, which
2 was a very substantial sum of money. We -- square
3 footage was given to us directly by the developer.
4 Sales per square foot data, we had done some research
5 in determining what most of the major malls in
6 Virginia were basically doing on a sales per square
7 foot basis. A set of assumptions that we had
8 received from the developer early on used numbers
9 similar to these, which are much more conservative
10 than any other mall, Regency or any others in the
11 survey group. So we felt since those numbers were
12 significantly lower than what the comparable
13 facilities were generating, that they were reasonable
14 assumptions, so we left those, in fact, as well.

15 Those are the essential assumptions, other
16 than the growth rates, which were in all cases held
17 to either no growth or extremely low rate of growth
18 so as not to suggest that there be a windfall out in
19 the future. That was based on inflation.

20 Q Mr. Traudt, this shows a 25-year total. Is
21 it possible to predict with absolute accuracy what
22 the revenues of this project would be over a 25-year
23 period?

24 A Of course not.

25 Q Well, why did you do this exercise this

1 way?

2 A Well, in government you have to make
3 decisions irrespective of your ability to predict
4 things, and when you look at a project like this and
5 you're considering providing some type of incentive,
6 the question is essentially are you going to receive
7 significant value for your investment or are you not,
8 which means if you don't look at the life of the
9 project and determine what it's going to accomplish,
10 then you're not going to have a rational basis for
11 making that decision.

12 Q However, in recognizing that, are you
13 comfortable as a professional expert in public
14 financing, are you comfortable that the process you
15 have undergone is a process that someone else in your
16 position would have undertaken as well?

17 A Absolutely. We, in the course of this
18 process, we have run hundreds of analyses, and a few
19 of those appeared in the form of these books, but you
20 do a sensitivity analysis, you examine what-ifs and
21 what do you think will happen. You look at the
22 conservatism that you build into the forecast. You
23 try to make a determination as to what is a
24 reasonable set of assumptions. And if the client is
25 aware of the underlying assumptions and what has gone

1 into them, then they can place them into a proper
2 perspective and make good decisions off of it.

3 Q Is this the kind of analysis you have done
4 for other clients?

5 A Many times.

6 Q Now, Mr. Traudt, did you consider at all
7 any potential negative impact that might occur to the
8 County as a consequence of the development of this
9 mall?

10 A Yes. We considered that there would be
11 potential negative impacts. We considered that there
12 would be potential positive impacts. We evaluated
13 the potential impact on Regency, which was, which was
14 a particular concern to the County. And that was all
15 taken into account ultimately in our analysis.

16 Q Mr. Traudt, can you -- would you
17 characterize the discussions with the developer
18 between February or March of 2000 and the ultimate
19 presentation of the petition, would you characterize
20 those as contentious?

21 A Sometimes, yes.

22 Q So they weren't always fluid?

23 A No, not at all.

24 Q There was never always agreement?

25 A Quite the contrary. There were -- many

1 times there were significant disagreements.

2 MR. FOOTE: Mr. Traudt, let me ask you to
3 turn -- if I have not moved the admission of 46, Your
4 Honor, I would do so.

5 THE COURT: 46 or 45?

6 MR. FOOTE: I'm sorry, 46 is the one we
7 have been talking about here, I believe.

8 THE COURT: Your right book, upside down.
9 Any objection to 46?

10 MR. BUELL: No, sir.

11 MR. PEARSON: No, sir.

12 BY MR. FOOTE:

13 Q Mr. Traudt, let me turn your attention, if
14 I can, to Exhibit 44.

15 THE COURT: You-all just put those in here
16 to make sure I paid attention.

17 MR. FOOTE: Your Honor, we know that being
18 a judge is sedentary, and we wanted some calisthenics
19 in your day.

20 THE COURT: At least my hands are getting
21 plenty of exercise.

22 MR. FOOTE: I'm sorry, I said 46, I meant
23 44.

24 THE COURT: 44 is what you said at first.

25 THE WITNESS: This exhibit?

1 BY MR. FOOTE:

2 Q I'll cut to the chase. Is this a graphic
3 recommendation of the conclusions you just talked
4 about?

5 A Yes.

6 MR. FOOTE: Your Honor, I would move the
7 admission of 44.

8 THE COURT: Any objection?

9 MR. BUELL: No objection.

10 MR. PEARSON: No, sir.

11 THE COURT: How much longer do you think?

12 MR. FOOTE: I think 15 minutes and I'm
13 through, because I shall truncate it, because I think
14 I know how best to handle it.

15 BY MR. FOOTE:

16 Q Mr. Traudt, a question has come up I need
17 to ask you about. How were you compensated for this
18 work?

19 A Initially the County agreed to pay us \$7500
20 for the, basically the first report that we prepared.

21 Q Does that remotely relate to the number of
22 hours that you have into this project?

23 A No.

24 Q Now, what interest did you have in the
25 possibility of become an underwriter of this project?

1 A Well, one of the possible ways that we
2 could be compensated for our contribution to the work
3 effort was potentially being an underwriter somewhere
4 down the road should circumstances permit.

5 Q Did you speak to Mr. Hazelett about that?

6 A Yes, I did.

7 Q And what conversation did you have?

8 A We had a conversation February of 2000. I
9 recognized that our competitors were actively
10 soliciting this business with Mr. LaRue. We did not
11 really know who was going to be the decision makers,
12 but I knew that I could not have a conversation with
13 Mr. LaRue or anyone else in that regard without
14 Mr. Hazelett's blessing. So we had a brief
15 conversation in February of 2000, and subsequently I
16 had a brief conversation with Mr. LaRue.

17 Q And what was your view as to the status of
18 the agreement or potential agreement between the
19 developers and the County at that time?

20 A I did not raise the issue with the County
21 until we had completed negotiations with the
22 developer and the deal was in place.

23 Q By the deal in place, I realize that the
24 actual petition didn't get done until July?

25 A Correct.

1 Q Would it be your position that you believe
2 that what we have been calling the major moving parts
3 had been put into place by that time?

4 A Substantive agreement had been agreed to.
5 There was a handshake, and that agreement, in
6 substance, is intact today.

7 Q Did you ever have occasion to speak to
8 Mr. LaRue later?

9 A In September of 2000 I sent Mr. LaRue an
10 E-mail after the CDA had been formed, which I also
11 copied to Mr. Hazelett and Mr. Rapisarda, so it was
12 hardly a secret.

13 Q What affect did your interest in ultimately
14 being an underwriter in this case have on any work
15 that you might have done for Henrico County and your
16 work here?

17 A None.

18 Q In the event this had been a bad deal for
19 Henrico County, what would you have told them?

20 A If they had asked for my recommendation, I
21 would have told them not to do it.

22 Q But did you have an opinion as to whether
23 it was or was not a bad deal?

24 A Yes, I did have an opinion.

25 Q And what was it?

1 A My opinion was that it was a very good deal
2 for Henrico County, compared to many other projects
3 that we have seen where the jurisdiction basically
4 puts money up front and then hopes for a return on
5 the tail end. In fact, under this transaction, the
6 County is taking no risk. The project has to produce
7 whatever incentive is going to be required before it
8 happens, and the developers assume the full risk that
9 that doesn't happen. So from our point of view, this
10 has been structured as a transaction that's extremely
11 beneficial for the County where they have a modest
12 investment with no County tax dollars at risk and a
13 potentially very large return.

14 Q Mr. Traudt, let me ask you to turn, if you
15 would, to Exhibit 45. And once again, rather than
16 dancing around this, is this a graphic illustration
17 of the anticipated time lines for this project?

18 A It is.

19 Q And just put one point out here. I would
20 suggest the bonds are anticipated to be issued later
21 this year; is that correct?

22 A Approximately July 1.

23 MR. FOOTE: All right. Now, we will get
24 into this in just a moment perhaps, but -- no, we may
25 return to this, Your Honor, because it may help

1 explain another issue. But I would move admission of
2 Exhibit 45.

3 THE COURT: Is there any objection?

4 MR. BUELL: No objection.

5 MR. PEARSON: No, Your Honor.

6 THE COURT: Exhibit 45 is admitted.

7 BY MR. FOOTE:

8 Q Now, let me direct your attention to
9 Exhibit 43, and please tell the Court what this is.

10 A This exhibit was prepared specifically for
11 this proceeding. It is a graphic illustration of the
12 specific mechanics of the transaction.

13 MR. FOOTE: All right. Your Honor, we used
14 this in opening statement, and I would reiterate to
15 the Court, this is the same thing.

16 THE COURT: All right.

17 BY MR. FOOTE:

18 Q Mr. Traudt, we know the Court can read the
19 organic documents, but is this an exhibit which you
20 prepared for this trial?

21 A Yes.

22 Q And is this an exhibit which graphically
23 illustrates what we have called the moving parts?

24 A It is.

25 Q Can you very briefly explain to the Court

1 how this transaction functions? You're familiar with
2 the organic documents, are you not?

3 A Yes.

4 MR. FOOTE: Can you please use this
5 document to explain to the Court -- Your Honor, may
6 he approach the exhibit?

7 THE COURT: You can step down. You can't
8 go that way, you have to come forward. Just push the
9 door.

10 BY MR. FOOTE:

11 Q And frankly, Mr. Traudt, because I know you
12 understand this, will you please use this exhibit and
13 explain to the Court what I've asked you about?

14 A Certainly. Item labeled A, CDA issued
15 bonds to the investors, those bonds are secured by
16 two principal sources, first are the special
17 assessments labeled number one, which we will talk
18 about in a few moments. Second, there's a first lien
19 on the property, which is labeled B at the top, which
20 runs between the investors and the project. That is
21 a first lien on the property which is the equivalent
22 of a tax lien that comes ahead of any other
23 creditors. Item B is the first lien on the property,
24 which we talked about. Item C are the bond proceeds.
25 At the time the bonds are issued, money flows from

1 the investor and becomes available, although held by
2 a trustee, to fund the project costs authorized under
3 the statutes. Those bonds are intended to be sold
4 approximately six months into the construction of the
5 project, so that the developer would have made a
6 substantial investment in the project before the
7 bonds were actually issued and those proceeds became
8 available to them.

9 Then moving down to the line labeled item
10 one, in the lower left-hand corner, the special
11 assessments are paid by the developer in an amount
12 equal to the debt payments on the bonds. I would
13 point out that those special assessments are not tied
14 to the value.

15 THE COURT: What's the significance of the
16 letters and the numbers that you have in the circles?

17 THE WITNESS: Simply to distinguish three
18 processes.

19 THE COURT: You're not trying to show any
20 chronological order these things happen in?

21 THE WITNESS: No, sir.

22 MR. FOOTE: Because the reimbursement for
23 special assessment comes --

24 THE WITNESS: The time line deals with the
25 sequence, Your Honor. This shows the relationship

1 among the parties.

2 MR. FOOTE: Your Honor, it might be useful
3 for the Court to turn to Exhibit 45. I was going to
4 get back to that. That time line does help
5 understand how these --

6 THE WITNESS: The thing I wanted to point
7 out about the special assessment is they're not tied
8 to the values of the property, they're tied to the
9 amount of the debt paid, so if the property declines
10 in value, the assessments aren't directly adversely
11 affected. The CDA then takes -- once it receives the
12 special assessment, those moneys are used to make the
13 debt payments on the bonds.

14 THE COURT: But the reimbursement -- this
15 sounds weird, but the reimbursement for the special
16 assessment comes at or before the time of the special
17 assessment debt payments?

18 THE WITNESS: No, sir.

19 THE COURT: They don't?

20 THE WITNESS: They do not, and we will be
21 happy to deal with that. That is labeled item X.
22 The reimbursements for special assessments which have
23 been paid to fund public costs basically flow through
24 the EDA to the developer. Now, the timing of these
25 events -- and we'll come down on the time line, but

1 just to make a brief point, the special assessments
2 are paid by the developer. The reimbursements for
3 those special assessments occur approximately six
4 months after the special assessments have been paid.
5 That's an important point. So they make the special
6 assessment payment, that's the first point I wanted
7 to make with regard to item X, and that is that the
8 special assessment has to have been paid before the
9 reimbursement can occur.

10 The second point that we wish to make with
11 item X is that the project has to have generated
12 sufficient revenue above the level which it had
13 produced in the year ending December 31, 1999, about
14 \$250,000 for that reimbursement to take place. If
15 the project doesn't generate sufficient revenue for
16 the County, there is no reimbursement. So we keep
17 track of that, although the general fund of the
18 County is used to make the payments to the EDA.

19 The fourth point or the third point is that
20 these reimbursements to the developer cannot be
21 pledged to secure the bonds under any circumstances.
22 They are separate and apart from the bond transaction
23 itself. They are separate and distinct. We have
24 specifically precluded those reimbursements from
25 being pledged to the bondholders. So the bondholders

1 have no right to go back after those reimbursement
2 moneys.

3 And that ties into the fourth point, which
4 is they are subject to appropriation by the board of
5 supervisors. So first of all you have to have
6 sufficient revenue being generated by the project to
7 fund those reimbursements. The special assessments
8 have to have been funded six months previously by the
9 developer. We can't pledge them. And finally
10 they're subject to appropriation by the board. So
11 the developer assumes the risk that there will be
12 sufficient funds to make those reimbursements. And
13 if there aren't sufficient funds, he remains
14 obligated to fund his special assessments
15 irrespective of whether he is being reimbursed by the
16 board of supervisors.

17 That brings us to item Y, which is labeled
18 intercept reimbursement or the interim mechanism. At
19 the time that the EDA receives the developer
20 reimbursement, the moneys that are to go to the
21 developer for reimbursement for his special
22 assessments, the EDA is instructed to determine
23 whether or not there is a new assessment that has
24 been billed and is unpaid. If there is an assessment
25 which is billed and unpaid by the developer at this

1 time, rather than send the check to the developer,
2 those moneys are intercepted and are sent to the CDA
3 to ensure that the developer does not receive a
4 reimbursement and then turn around and fail to fund
5 the special assessment.

6 THE COURT: And the assessments are made
7 every six months?

8 THE WITNESS: That is correct.

9 THE COURT: So assuming that there are
10 sufficient revenues to generate reimbursement -- and
11 I think everybody assumes that's going to happen,
12 otherwise we wouldn't be doing this, but for the
13 first assessment, then what I said earlier is right,
14 that the reimbursement comes about the same time as
15 the assessment?

16 THE WITNESS: It was specifically designed
17 that way, yes, sir, so that he makes his payment, he
18 then is entitled to a reimbursement. And it's timed
19 to coincide with that next payment.

20 THE COURT: So the first assessment the
21 developer has to come up with.

22 THE WITNESS: Absolutely.

23 THE COURT: After that the developer can
24 just say no, you pay my assessments out of the
25 reimbursement.

1 THE WITNESS: If the developer chooses not
2 to fund that assessment by the date that's required
3 in the documents, then his reimbursement moneys will
4 flow directly over to the CDA to insure that those
5 assessments get funded, yes, sir.

6 MR. FOOTE: Your Honor, if I may ask a
7 question about that?

8 BY MR. FOOTE:

9 Q Suppose the reimbursement funds are not
10 sufficient to pay the next assessment, then what
11 happens?

12 A The developer is obligated to make the
13 special assessment, to make sure it's fully funded on
14 its due date under all circumstances.

15 Q Is it possible, Mr. Traudt, that the
16 developer could, in fact, follow the scenario that
17 Judge Johnson just suggested, which is to make the
18 first assessment and then not make any other
19 assessments and let the recapture mechanism function?

20 A It's possible.

21 Q And in your understanding, would that be in
22 any way in violation of the organic documents or the
23 understanding of the board?

24 A Not at all. That is a choice that the
25 developer has, that he has the right to make.

1 They're his funds. They're his funds. Once that
2 check is written, that money belongs to the
3 developer.

4 Q Now, you mentioned earlier, Mr. Traudt,
5 that, you said that the revenues go into the general
6 fund. Are those revenues segregated in any way as
7 they might be in a tax-increment financing scheme?

8 A No, they're not.

9 Q This is general-fund money?

10 A Right.

11 Q Is there some analogy you can use to
12 suggest what the function of that incremental
13 measurement is? I mean, what are we doing --

14 THE COURT: Do you need Mr. Traudt at
15 the --

16 MR. FOOTE: No, sir, not any longer.

17 THE COURT: I want you to come back and
18 have a seat, so counsel can have a seat.

19 THE WITNESS: Thank you. Can I have a
20 glass of water?

21 THE COURT: Yes. Why don't you give him a
22 full glass?

23 MR. SPENCER: He's not doing that well.

24 THE COURT: Mr. Spencer, that was not nice.

25 BY MR. FOOTE:

1 Q Mr. Traudt, the question I was trying to
2 ask you was -- well, it's a bad question and probably
3 isn't even factual, so don't worry about it. Let me
4 turn you to Exhibit 45 again, the time line.

5 A I think the judge may have already picked
6 up on this.

7 THE COURT: 43 I assume everybody wants
8 admitted. Any objection to 43?

9 MR. BUELL: No, sir.

10 MR. SABOURIN: No, Your Honor.

11 THE COURT: 43 is admitted.

12 MR. FOOTE: And I believe we got 45 in,
13 that's the time line?

14 THE COURT: 45 has already been admitted.

15 BY MR. FOOTE:

16 Q Briefly, since the judge can read, what
17 does the time line show here?

18 A Time line shows the sequence of payments
19 and transfer of funds that occurs over the life of
20 the agreement.

21 Q Now, the developer has funded the first
22 payment. Will there ever come a time when the
23 developer gets even that amount of money back, the
24 first assessment payment?

25 A Six months after all the assessments have

1 been paid and the bonds have been paid off, it's
2 possible he will get that money back.

3 Q So it's your understanding that the organic
4 documents, as they were adopted by the entities here,
5 had the purpose of, in effect, making the developer
6 whole for the cost of the bonds; is that right?

7 A Of course they did.

8 Q Now, were there any preconditions set in
9 these documents before the bonds would be issued at
10 all?

11 A Yes.

12 Q What were they, if you can remember?

13 A If I remember specifically, the department
14 stores had to have entered into 15-year leases, so we
15 had evidence that they were going to be around. We
16 had to be satisfied that we were going -- in each of
17 those cases of the four stores that we would be
18 dealing with first-class retail, not some lesser
19 standard. We had to have a significant investment of
20 developer funds before any moneys would come from the
21 EDA or the County, and there's one more --

22 Q Was there any -- was the County looking at
23 all to Forest City as a parent corporation for
24 anything?

25 A Yes. The parent, Forest City, had to

1 provide a corporate guarantee to assure completion of
2 the construction of the core mall.

3 Q Now, are all of the documents that are
4 associated with this transaction in their final form
5 to the best of your knowledge?

6 A No, sir.

7 Q And why is that?

8 A Until we basically have -- till we are near
9 the time that we go to market and have specific plans
10 and drawings and cost estimates and so forth and so
11 on, we won't know precisely the exact, final workings
12 of everything, but substantively they reflect the
13 nature of the transaction.

14 Q Do the documents themselves even give
15 certain authorization to the CDA and EDA with respect
16 to modification?

17 A Yes, they do. They provide that
18 modifications and something to the effect of
19 non-material respects can be made as required.

20 Q Now, there has been a great deal of
21 discussion today about shifting numbers for the total
22 cost of the improvements, a number that has shifted
23 both as to category and as to amount. What is your
24 understanding as to the total amount of money that
25 the County would be willing to put into this project?

1 A The County has agreed to fund \$22,000,000
2 of construction costs for the project plus certain
3 ancillary costs.

4 Q Now, is there a number, an estimate, as to
5 what the ultimate payout of the bonds would be?

6 A It's approximately \$30,000,000.

7 Q Will you know that before the interest rate
8 is set?

9 A No.

10 Q So that number will be finally determined
11 at the time of issuance?

12 A That's correct.

13 Q In fact, are there documents that in your
14 experience are customarily prepared at the time of
15 issuance of bonds that have not yet been prepared?

16 A Of course.

17 Q Now, are those documents that in your
18 experience, now, are those documents that are always
19 prepared at the time the bonds are authorized at
20 issuance?

21 A No, those documents are usually finished
22 very shortly before the bonds are actually sold in
23 the marketplace.

24 MR. FOOTE: Your Honor, I believe that I
25 met my commitment to the Court.

1 THE COURT: You did.

2 MR. FOOTE: I have no further questions for
3 Mr. Traudt. Thank you very much.

4 THE COURT: We will stand in recess for
5 about 15 minutes. We will stand in recess until
6 4:30. Mr. Traudt, you can step down, sir. Please
7 don't talk to any lawyers during the recess. Stand
8 in recess till 4:30.

9 (Recess taken)

10 THE COURT: Mr. Buell?

11 MR. BUELL: Thank you, Your Honor.

12

13 CROSS-EXAMINATION

14 BY MR. BUELL:

15 Q Good afternoon, Mr. Traudt.

16 A Good afternoon.

17 MR. BUELL: My name is Rob Buell. Nice to
18 see you again. Your Honor, one housekeeping matter.
19 We have a smaller version of the 100-B exhibit that
20 was referred to earlier for Your Honor.

21 THE COURT: All right. Thank you.

22 BY MR. BUELL:

23 Q Mr. Traudt, let me direct your attention to
24 Plaintiffs' Exhibit 43 and see if you and I are on
25 the same wavelength on one thing, and that is, I

1 understood you to say that the payments that are
2 being made from the County general fund to the EDA
3 are subject to appropriation, correct?

4 A Correct.

5 Q And from the moment that those funds are
6 appropriated by the County, they are the developer's
7 funds; isn't that right?

8 A Yes.

9 Q They're not EDA funds, are they?

10 A That's my understanding of the transaction.

11 Q And, in fact, the developer controls what
12 the EDA does with those funds, does he not? By that
13 I mean if the developer decides he's going to make a
14 special assessment payment, the EDA will reimburse
15 the developer directly, but if the developer decides
16 he doesn't want to make the specific assessment
17 payment, the EDA will divert the funds of the CDA?

18 A Seems reasonable.

19 Q So the choice is the developer's, not the
20 EDA's, correct?

21 A The developer, by his own actions, can
22 influence the flow of money, yes.

23 THE COURT: Excuse me, sir. You may have a
24 seat.

25 A MAN: I prefer to stand. I have a

1 nosebleed, and I may have to run out.

2 THE COURT: Okay. Go ahead.

3 BY MR. BUELL:

4 Q And I believe you said that the organic
5 documents would support a situation in which the
6 developer made his first special-assessment payment.
7 In fact, that would be one half of a year's payment,
8 correct?

9 A Correct.

10 Q The total amount of the annual assessment
11 is somewhere around \$6,000,000 annually --

12 A That's correct.

13 Q -- for five years? So he would make a
14 special assessment payment of about half that, maybe
15 3,000,000 bucks?

16 A Correct.

17 Q And then assuming the tax revenues spun off
18 by the project are sufficient, he would never have to
19 make another special-assessment payment throughout
20 the whole five-year life of the bonds, correct;
21 organic documents would permit that result?

22 A If he chooses to let his reimbursements
23 flow over to the CDA, it would have that effect,
24 sure.

25 Q Sure. And that would be perfectly fine and

1 contemplated by the organic documents?

2 A Yes.

3 Q And, in fact, under that scenario and at
4 the end of the life of the bonds, six months after
5 they were retired, he would even get the first
6 \$3,000,000 back, wouldn't he?

7 A He gets the first \$3,000,000 back six
8 months after he pays the first \$3,000,000.

9 Q But he would catch up, in other words, so
10 he would never be out-of-pocket at all?

11 A He would catch up at the very end, yes, but
12 he gets his reimbursement every six months.

13 Q All right. But at the end of this thing,
14 six months after the bonds are retired, he's not
15 out-of-pocket a penny, correct?

16 A That's the intent of the incentive program.

17 Q And indeed, that is the way that the County
18 and the developer expect that this deal will be done,
19 isn't it?

20 A I don't know what the developer expects.

21 Q Let me show you --

22 THE COURT: Let me ask you a question.

23 What happens if the revenues, say \$6,000,000

24 assessment, suppose the revenues are \$5,000,000, what
25 happens?

1 THE WITNESS: If he lets the \$5,000,000
2 flow over to the CDA, he has to write a check.

3 THE COURT: He gets whatever the revenues
4 are.

5 THE WITNESS: He has to make certain that
6 all those assessments are paid in full.

7 THE COURT: What I'm saying is we have all
8 been talking about if the revenues are sufficient to
9 make a reimbursement --

10 THE WITNESS: Right.

11 THE COURT: -- then a reimbursement is
12 made.

13 THE WITNESS: Correct.

14 THE COURT: He's paid \$6,000,000 as a
15 special assessment.

16 THE WITNESS: Uh-huh.

17 THE COURT: The revenues for the next six
18 months only come to \$5,000,000.

19 THE WITNESS: Right.

20 THE COURT: What happens? Does he get the
21 \$5,000,000?

22 THE WITNESS: He gets \$5,000,000.

23 THE COURT: Suppose the next six months he
24 makes another six --

25 THE WITNESS: Million?

1 THE COURT: -- million, the revenues are
2 \$7,000,000, does he catch up?

3 THE WITNESS: He would be entitled to catch
4 up.

5 THE COURT: He would be entitled to
6 \$7,000,000?

7 THE WITNESS: He can never get more money
8 than the tax revenue that's been generated, that's
9 correct.

10 THE COURT: So it's a running total.

11 THE WITNESS: That's correct. Yes, sir.

12 THE COURT: Sorry, Mr. Buell.

13 BY MR. BUELL:

14 Q I was asking whether or not it was the
15 expectation of the developer and the County that, in
16 fact, that's how the deal would work, that the
17 developer would make the first half of the
18 special-assessment payment and then no more, assuming
19 that your revenue projections are accurate.

20 A I don't know that the developer is going
21 to -- I don't know what the developer is going to do.

22 Q Let me show you Exhibit Number 38.

23 A Sure.

24 Q And this is Taxpayer 38.

25 MR. SPENCER: Is it TP?

1 MR. BUELL: It's not marked, but it should
2 be TP.

3 THE COURT: I need one.

4 BY MR. BUELL:

5 Q Can you mark a TP on that, TP 38?

6 A I'm sorry, TP what?

7 Q Just put a TP in front of that. Now, this
8 is a copy of an E-mail that was sent from you to
9 Mr. LaRue and Mr. McCowan, who were with Forest City
10 Enterprises, correct?

11 A Correct.

12 Q Who was the developer of this property?

13 A That's correct.

14 Q Directing your attention to the last
15 sentence of paragraph five in this E-mail, it says
16 "We must still adhere to the principle that the
17 developer is solely responsible for the bonds from a
18 credit perspective, although our expectations may be
19 that most debt service will be funded from
20 tax-increment revenue." Is that what it says?

21 A That's what it says.

22 Q All right. And indeed, what we're talking
23 about here is the tax-increment revenues that are
24 being diverted through the EDA to the CDA, correct?

25 A Well, you're taking this out of context,

1 because this memo was in response to a memo written
2 by Mr. McCowan, was attempting to clarify our
3 understanding of his understanding of the
4 transaction.

5 Q I know, but these are your words, correct?

6 A Yes.

7 Q And you say "Our expectations may be that
8 most debt service will be funded from tax-increment
9 revenue."

10 A May be.

11 THE COURT: Are you offering 38?

12 MR. BUELL: Yes, I would like to.

13 THE COURT: Any objection to TP 38?

14 MR. FOOTE: No, sir.

15 THE COURT: TP 38 is admitted.

16 BY MR. BUELL:

17 Q Now, it's your understanding, is it not,
18 that the CDA is only going to be in existence for as
19 long as these bonds are outstanding?

20 A That's my understanding.

21 Q So that at the end of five years, after the
22 mall has been -- or five years after the mall opens
23 and the bonds are retired, the CDA dissolves,
24 correct?

25 A That's my understanding.

1 Q And at that time you expect that all of the
2 improvements that are being owned by the CDA, if any,
3 are going to revert to the landowners or developers?

4 A I would assume that, but I wouldn't be the
5 determiner.

6 Q And there is no understanding at this time,
7 at least as far as you are aware, that the landowner
8 or the developer would pay the CDA anything for those
9 improvements when they revert to them, once the CDA
10 dissolves?

11 A That's correct. They have already paid for
12 them through the special assessment.

13 Q It's your understanding that the developer
14 has the responsibility of maintaining all of these
15 improvements, even those owned by the CDA, correct?

16 A That's my general expectation.

17 Q Now, Mr. Foote had asked you a couple of
18 questions about Appendix B to Exhibit 6. Do you have
19 that in front of you? That's the schedule of
20 improvements.

21 THE COURT: Which exhibit?

22 BY MR. BUELL:

23 Q This is Exhibit 6, Appendix B. This is a
24 \$34,000,000 schedule of improvements.

25 A Correct.

1 Q And I believe I understood you to say that
2 even though the cost of these improvements is
3 \$34,000,000, the County is only committed to
4 providing \$22,000,000?

5 A That's correct.

6 Q Where do you expect the other \$12,000,000
7 to come from?

8 A I would expect the developer would have to
9 fund the balance of those costs.

10 Q And do you expect that improvements on this
11 schedule that are purchased with private money
12 provided by the developer would be privately owned by
13 the developer?

14 A I have no expectation in that regard.

15 Q You don't know one way or the other?

16 A That's correct.

17 Q But you do agree with me that \$22,000,000
18 of public money isn't going to buy \$34,000,000 of
19 assets, is it?

20 A I would agree with that.

21 Q And you can't tell me today which specific
22 assets on this schedule are, in fact, going to be
23 purchased with any of the public money?

24 A I cannot tell you that.

25 MR. BUELL: Thank you, sir. Steve, you

1 want me to leave the exhibit book up here?

2 MR. PEARSON: Yes, if you would, please.

3 THE COURT: Mr. Pearson?

4

5 CROSS-EXAMINATION

6 BY MR. PEARSON:

7 Q Mr. Traudt, near the conclusion of your
8 direct examination you stated an opinion that this
9 is, in essence, a good deal for the County. I need
10 to ask you a question about that opinion. You're
11 saying that this is a good deal for the County
12 considering that the County is going to offer these
13 development incentives, and that this is a good
14 delivery mechanism for the County to use to implement
15 their decision, are you not?

16 A I think it's a good result for Henrico
17 County.

18 THE COURT: Say again?

19 THE WITNESS: I think it's a good result
20 for Henrico County.

21 BY MR. PEARSON:

22 Q Perhaps I could ask the question in a
23 different way so I can understand it a little better.

24 A Sure.

25 Q Does the scope of your opinion include that

1 it is a good idea for Henrico to offer development
2 incentives?

3 A I believe in this case it is a good idea
4 for Henrico to offer such incentives.

5 Q I didn't ask you whether you believed that,
6 I asked you whether the opinion you offered in your
7 direct testimony was related to the way in which the
8 incentives were delivered or whether it included the
9 idea that it was a good deal for the County.

10 THE COURT: I'm not sure I understand the
11 distinction. You want to know what he meant the
12 first time or what his testimony, what his opinion
13 is?

14 MR. PEARSON: I think that train has left
15 the station.

16 THE COURT: He just told us his opinion.
17 BY MR. PEARSON:

18 Q With respect to the tax-increment funds,
19 these funds, I think you've indicated, are not
20 pledged to the credit of the bonds; is that correct?

21 A That is correct.

22 Q But the County will, in fact, have a
23 contract with the developer to pay these funds, will
24 it not?

25 A Subject to annual appropriation and certain

1 other circumstances that we discussed.

2 Q But the contract is there and the County is
3 contractually obligated, correct?

4 A The County is obligated to fulfill whatever
5 it has agreed to under those conditions, under the
6 documents, yes.

7 Q Now, despite the fact that the increment
8 funds are not pledged to the credit of the bonds, is
9 there any limitation on pledging those, for example,
10 to a mortgagee?

11 A Absolutely. The understanding with the
12 developer is that those funds may not be pledged,
13 period.

14 Q Is that a written understanding?

15 A I believe that's incorporated in our
16 understanding with the developer from the outset.

17 Q Is that a part of the contract documents,
18 memorandum of understanding or the
19 economic-development agreement?

20 A It's certainly the intent that the
21 developer can in no way pledge those funds.

22 THE COURT: The only question, though, is
23 it in writing anywhere, if you know?

24 BY MR. PEARSON:

25 Q You've reviewed the documents, have you

1 not?

2 A Yes.

3 THE COURT: If he's memorized everything
4 that you-all have, you know --

5 THE WITNESS: I couldn't tell you exactly
6 where that --

7 THE COURT: Either you know that it is in
8 writing or you don't know, and sometimes the best
9 answer the witness can give is I don't know.

10 THE WITNESS: I do not know where you can
11 find that.

12 THE COURT: Next question, saves a lot of
13 time.

14 BY MR. PEARSON:

15 Q Another point with respect to this
16 reimbursement mechanism, the tax-increment note is
17 calculated based upon the second half of 1999 year
18 tax revenues, correct?

19 A I believe that's correct.

20 Q And those revenues would be \$250,000
21 annually?

22 A Approximately, yes.

23 Q Now, if the shopping center does better in
24 terms of producing tax revenues than \$250,000 but it
25 doesn't meet anything close to the projections that

1 you have outlined, they're going to get the
2 difference between the \$250,000 and whatever the
3 shopping center does produce in tax revenues?

4 A If they pay the special assessments, yes.

5 Q Or if they otherwise qualify with this
6 intercept mechanism, if they've already paid one
7 and --

8 A Yes, if they have paid assessments, they're
9 entitled to reimbursement. If there is money above
10 \$250,000 that's been generated by the project, to the
11 extent of those available funds, they would be
12 entitled to the reimbursement.

13 Q Could you turn to Exhibit TB 2, please?

14 A Would that be in this book?

15 Q That would be in the Taubman book. I
16 believe that's the Taubman book you're looking at.
17 Can you identify that document?

18 A This is TB 2. Yes, that is a memorandum
19 that I wrote to Mr. Hazelett in September of 1999.

20 Q Does that constitute the terms of your
21 employment with the County of Henrico at that time?

22 A That's essentially correct.

23 Q And have those terms pretty much carried
24 through, those terms pretty much carried through to
25 your subsequent engagement, has it not?

1 A Pretty much, although we have not been
2 directly compensated from what was laid out here.

3 Q We have been through your compensation.
4 Calling your attention to the second paragraph, would
5 you read the first -- well, would you --

6 A One with the line, whole?

7 Q Did you agree, in paragraph two, to provide
8 an independent assessment of the tangible benefits of
9 the project to the County?

10 A That's what we suggested we should provide,
11 yes.

12 Q And do you consider that having the
13 underwriting of this project in mind that you could
14 keep it independent?

15 A Yes, we do.

16 Q But you were stating at the time that you
17 were willing to work on this because you hoped --
18 without compensation, because you hoped to be
19 selected as an underwriter?

20 A I'm sorry, at the time this memo was
21 written, we had no contemplation of whether or not
22 there was even going to be a project that the County
23 would consider. That wasn't a consideration at this
24 time.

25 Q But you have just testified that you

1 continued to work after completing that initial
2 report?

3 A Correct.

4 Q Under basically the same terms,
5 compensation limited?

6 A Compensation limited, that's correct.

7 Q So what happened to your independence at
8 the time that you began to desire underwriting work?

9 A We had no conversations with anybody about
10 underwriting the bonds.

11 Q But you were hoping yourself --

12 A If something were to develop that the
13 County actually wished to move forward on, certainly.

14 Q And of course, that did happen?

15 A That did happen eventually, yes.

16 Q Now, by some time in roughly January of the
17 year 2000 a specific framework for this deal had
18 emerged, and you were authorized to negotiate the
19 subsequent agreement with the developer; is that
20 correct?

21 A Yes.

22 Q And it was at that time that you actually
23 had the explicit discussion with the County manager
24 about --

25 A It was after the deal had been struck with

1 the developer, after the terms of that transaction
2 had been agreed to.

3 Q Okay. So you did not have discussions with
4 anybody prior to the time that you had your
5 discussion?

6 A I had no discussions with the developer
7 prior to the time that we shook hands and had the
8 deal that was going to be taken to the board.

9 Q Okay. Would you turn, please, to Exhibit
10 49 in the -- this would be the CDA book. This is the
11 document that you used in connection with your
12 October, 1999 presentation to the County manager; is
13 that correct?

14 A That's correct.

15 Q I believe that your earlier testimony had
16 been that in connection with that presentation, you
17 presented a number of different alternative cases,
18 assuming a \$22,000,000 debt issuance and a
19 \$30,000,000 debt issuance?

20 A Well, assuming \$22,000,000 and \$30,000,000.

21 Q Correct. Would you turn within that
22 document to VOS 01714?

23 A 1740?

24 Q 1714.

25 A Okay.

1 Q And I believe that this document lays out
2 under the \$22,000,000 in public improvements scenario
3 an overview of the five different alternatives which
4 you examined?

5 A It provides a brief summary.

6 Q If I wanted to take a closer look at case
7 number five, would I turn to page 1720, Bates number
8 1720?

9 A You would start there, yes.

10 Q Why don't you turn to that, and let's talk
11 about that a little bit.

12 A Sure.

13 Q This is your projection based upon an
14 assumption that some type of alternative development
15 would take place on that site and the tax revenues
16 flowing from that alternative development would come
17 down to the benefit of the County; is that correct?

18 A That's correct.

19 Q Had you assumed that that would be an
20 office use?

21 A We did.

22 Q So there were no sales-tax revenues
23 included in this analysis, and you end up showing a
24 net benefit over 15 years of \$28,000,000?

25 A That's correct.

1 Q And yet at the time, wasn't there an
2 approved site plan for a 900 and some odd thousand
3 foot shopping center out on West Broad Street?

4 A There may have been.

5 Q Were you made aware of that?

6 A I don't recall whether I was aware of that
7 at the time.

8 Q If you had chosen to include sales taxes in
9 this analysis and assumed a shopping center use on
10 those premises, would the net benefit over 15 years,
11 wouldn't the net benefit have been substantially more
12 than \$28,000,000?

13 A Are we presuming that it's reasonable for
14 such a large shopping center to be built on this site
15 at that time?

16 Q Well, I think we are. I'm asking you a
17 question, how would the numbers have an effect?

18 A I don't think we believed that that was a
19 reasonable assumption. That's why we didn't evaluate
20 that specific alternative.

21 Q If you had evaluated that alternative,
22 these numbers would have changed, wouldn't they?

23 A Yes.

24 Q Would have been larger?

25 A Possibly, but it wouldn't necessarily have

1 been realistic.

2 Q Now, in this case, also assume that if a
3 regional mall was built at Stony Point, that the
4 Regency Square revenues would decrease by 50 percent,
5 correct?

6 A We did incorporate such an assumption.

7 Q And the change that would result in the, in
8 this net benefit number would move, would make the
9 net benefit number larger if you had not chosen to
10 decrease Regency Square numbers by 50 percent under
11 this scenario, wouldn't they?

12 A Yes.

13 Q Would you turn to 1717 within the same
14 exhibit, please? You should be looking at document
15 headed case three, accelerated reimbursement.

16 A Yes.

17 Q Is this the scenario that ultimately
18 developed into the deal structure that we have here
19 before us today?

20 A It is similar to the structure that is
21 developed today, yes.

22 Q Now, this number did not include any
23 assumptions about alternative use of the Short Pump
24 Town Center site, did it?

25 A No, it did not.

1 Q So the revenues from the Short Pump Town
2 Center site, as an alternative, were carried through
3 at the current level, \$250,000 a year, correct?

4 A In this particular scenario, we were
5 looking at an evaluation of what the potential
6 benefits would be from the Short Pump project based
7 upon the accelerated reimbursement, accelerated
8 retirement of the debt. We were not dealing with the
9 issue of Regency specifically.

10 Q I was not asking you about Regency. I was
11 asking you about the potential alternative uses of
12 the site, what you did in connection with this
13 document.

14 A That was not the purpose of case 3A.

15 Q What you did in connection with this
16 document -- and I will ask the question, and you can
17 answer it -- in connection with this document, was to
18 assume development of the Short Pump Town Center site
19 and then the tax revenues that would flow from the
20 Short Pump Town Center, and you subtracted from that
21 as the net benefit to the County, the current level
22 of the taxation?

23 A That's what the purpose of this analysis
24 was.

25 Q At \$250,000 a year?

1 A Yes.

2 Q So you didn't assume that if the Short Pump
3 Town Center does not develop that something else
4 would, on that site, for purposes of this
5 calculation?

6 A For purposes of this calculation, we were
7 not concerned with that, that's correct.

8 Q And for purposes of this calculation, what
9 were your assumptions about Regency Square?

10 A This particular case was one which was
11 presented in the context of nine other cases, as you
12 are aware, which had the specific purpose of
13 exploring how the difference in long-term-debt
14 repayment versus short-term-debt repayment would
15 affect the County. It was not specifically concerned
16 with the issue of Regency Square.

17 Q So is the answer to my question then that
18 you did not consider any effect?

19 A Of course we considered it. We just saw a
20 case where we considered Regency Square.

21 Q I'm asking you about case 3A.

22 A In case 3A we did not specifically show
23 information with respect to Regency Square.

24 Q Okay. Now, and I assume then that that
25 means also that you didn't consider the effect of

1 lost sales elsewhere in Henrico County, such as
2 Virginia Center Commons or Willow Lawn or any
3 merchants on Broad Street or Parham Road?

4 A Of course we considered that.

5 Q Where is that in your numbers? I'm looking
6 down at the off-site impact section under
7 adjustments, and it says NA. Doesn't that mean you
8 didn't do anything?

9 A No, that doesn't mean that at all. If you
10 look at the spreadsheet behind this analysis, which
11 will be found on --

12 Q Would that be 1748?

13 A Which will be found on 1748, yes, that's
14 correct, what you will find is that if you look at
15 the bottom of the page, four lines up from the
16 bottom, under sales tax, County portion, 1 percent,
17 you will see that we chose not to take into account
18 in this analysis the sales tax of approximately 62
19 cents per dollar that would flow to the County if
20 this project were built. In other words, we have
21 only included the 1 percent local option portion of
22 sales tax and we have not included the school-aid
23 portion, which is worth about \$70,000,000.

24 Q I thought my question was with respect --

25 A You asked me whether we considered the

1 impact on Regency, and the answer to the question is
2 we considered the impact on Regency, which we had
3 already evaluated in case five, and we concluded that
4 by eliminating from consideration the sales tax and
5 the school-funding portion generated by the project,
6 which was significantly greater, in our opinion, than
7 the impact on Regency or any other impacts that we
8 might consider, that this was a conservative analysis
9 and was a fair presentation of the probable bottom
10 line to Henrico County.

11 Q You have run awful far afield from my
12 original question, which was, in connection with case
13 3A, the accelerated reimbursement scenario --

14 A Uh-huh.

15 Q -- whether you considered, in coming to
16 your net-benefit number, the affect of opening the
17 Short Pump Town Center on sales-tax revenues from
18 other sources in the County.

19 A Mr. Pearson, in looking at this case and in
20 looking at many of these other cases, we --

21 Q I'm sorry, Mr. Traudt, I don't mean to
22 interrupt, but could I get a simple yes or no?

23 A May I answer the question? It is not a yes
24 or no question.

25 THE COURT: Let me hear the question again.

1 BY MR. PEARSON:

2 Q The question was whether he considered the
3 off-site impact of sales-tax revenues attributable to
4 the opening of the Short Pump Town Center.

5 THE COURT: And you say you cannot answer
6 that yes or no?

7 THE WITNESS: I already answered it. I
8 said yes.

9 BY MR. PEARSON:

10 Q Then in that case --

11 THE COURT: Let me interrupt you a minute.
12 Where did this -- never mind. I'm sorry, go ahead.

13 BY MR. PEARSON:

14 Q If it's your testimony that the off-site
15 effect of lost sales taxes included in case number
16 3A --

17 A That wasn't your question. You asked me if
18 we considered it.

19 THE COURT: I do need to ask you -- no, I
20 don't. Go ahead. I'm sorry. I'm trying to make
21 sense of these figures.

22 BY MR. PEARSON:

23 Q Mr. Traudt, maybe we have got a
24 misunderstanding about what the word "considered"
25 means. When I use that term, I'm referring

1 specifically to the numbers that are reported on this
2 page, 1717, case number 3A. And I would like you to
3 answer the question. I will phrase it for you one
4 more time. Did you consider and do the numbers on
5 this page reflect the affect of the Short Pump Town
6 Center development on tax, sales-tax revenues from
7 other points within the County?

8 A As stated in our memorandum to
9 Mr. Hazelett -- this is an oral briefing book. It
10 was explained when this case was discussed with the
11 County that we had explicitly excluded and
12 acknowledged excluding a significant portion of
13 sales-tax revenue because we felt that was the
14 fairest way of presenting the numbers and taking into
15 account -- we have a large source of revenue we have
16 excluded. We also have some potential alternative
17 uses and off-site impacts that could occur. And by
18 not including a specific revenue source, which we
19 felt was significantly greater than the impact on
20 Regency Square, we did not have to get into a lot of
21 hypothetical issues about the specific issues. So
22 yes, it was considered. We said up front in our memo
23 we would deal with tangible benefits, not intangible
24 theory as to what might happen, but to try to present
25 a fair presentation of the facts based upon the

1 information that we had at hand.

2 When we excluded almost 62 or almost 40
3 percent of sales tax revenues generated by this
4 project, one specific purpose, Mr. Pearson, was, in
5 fact, to give credit to these other unknown factors
6 and keep the analysis conservative as opposed to
7 attempting to go through a series of calculations
8 which we weren't prepared to undertake.

9 MR. PEARSON: Was there a yes or a no in
10 that answer? Your Honor, it seems to be a simple
11 question. Would the witness be directed to respond
12 yes or no?

13 THE COURT: Mr. Foote?

14 MR. FOOTE: Your Honor, Mr. Pearson asked a
15 question to which the answer was yes. He then asked
16 a follow-up question which demands, which begs an
17 explanation from the witness, and I think the witness
18 is just giving one, explaining why they took it into
19 consideration as they did.

20 THE COURT: I think the witness gave a fair
21 answer. Next question?

22 BY MR. PEARSON:

23 Q Mr. Traudt, what does the NA mean at the
24 bottom of that page?

25 A I'm sorry, can you give me the exhibit

1 number again?

2 Q Page 1717, same exhibit.

3 A I'm sorry, I moved my book.

4 Q I'm sorry, it's exhibit --

5 THE COURT: Back to Exhibit 49, page 1717.

6 THE WITNESS: 1717. What does the NA refer
7 to where?

8 BY MR. PEARSON:

9 Q In the adjustment box at the bottom
10 left-hand side of the page, third line down reads
11 "Off-site impact," and over on the right side of the
12 box corresponding to that line is --

13 A Means not applicable.

14 Q What does that mean?

15 A It means that it would be -- there's no
16 specific number that relates to this particular
17 analysis.

18 THE COURT: It means that the numbers are
19 zero.

20 THE WITNESS: That the numbers are zero.
21 This is not applicable.

22 MR. PEARSON: Your Honor, I thought he was
23 telling me the number was something other than zero.

24 THE COURT: Oh, no, it showed as zero on
25 the other page that you-all were looking at.

1 THE WITNESS: Correct.

2 MR. PEARSON: All right. Well, I apologize
3 to the Court.

4 THE COURT: That's why I was getting ready
5 to ask questions.

6 MR. PEARSON: Well, I apologize to the
7 Court. Maybe we have been on this too long.

8 THE COURT: Oh, no.

9 BY MR. PEARSON:

10 Q All right. Would you turn to 1714 now,
11 Mr. Traudt?

12 A Sure.

13 Q Now, this is the document you discussed
14 with the County manager at your meeting in October;
15 is it not?

16 A Yes.

17 Q And these five cases review the \$22,000,000
18 public-investment scenario?

19 A Based on September assumptions, yes.

20 Q Right. And just looking across the page,
21 the one with the margin net benefit to the County
22 would be case number four, but case number three is
23 not far behind it at almost \$86,000,000, correct?

24 A That's correct.

25 Q The lowest one on the page is the

1 alternative-use scenario, case five; is that correct?

2 A That's correct.

3 Q And yet the lowest one was calculated by
4 assuming office development at Short Pump Town Center
5 which drove down the numbers, correct?

6 A Yes.

7 Q And it also further assumed a 50 percent
8 loss of sales at Regency Square, did it not?

9 A It certainly did.

10 Q And that, again, drove down that number?

11 A Yes, it did.

12 Q And now, comparing that to case three, that
13 scenario, you're not assuming any affect on Regency
14 Square, so that pumps this number up, doesn't it?

15 A Once again, you have to recall that this is
16 in the context of a discussion where the County is
17 aware that we are not fully accounting for all
18 sales-tax revenue that we had been able to expect to
19 be generated by this project.

20 Q So you told the County that, but this is
21 the number that you recorded? This is what you wrote
22 down, correct?

23 A Correct. And we think this produces a fair
24 representation.

25 Q And, in fact, there is no off-site impact

1 in this \$84,000,000 number?

2 A If we were to include an off-site impact in
3 that particular case three that you've been talking
4 about, we would also feel compelled to revise the
5 revenue numbers upwards. That's what I have been
6 trying to explain to you.

7 Q This presentation wasn't made to the board,
8 was it?

9 A No.

10 Q Just made to the county manager?

11 A Manager and staff, yes, that's correct.

12 Q And this was the last point at which any
13 attempt was made to include an alternative use for
14 the Short-Pump site and an alternative set of
15 revenues attributable to that use in any analysis you
16 ran, wasn't it?

17 A It may have been.

18 Q And all of your future presentations were
19 calculated based upon net future tax revenues or you
20 calculated net future tax revenues by subtracting the
21 current tax revenues on vacant land from the revenues
22 generated from the Short Pump Town Center revenues,
23 correct?

24 A That's correct.

25 Q Would you turn to Exhibit 46, please? This

1 is the one that's upside down in my book. It may be
2 in yours. And we just refreshed our recollection of
3 what this document is.

4 A This document was an attachment that was --
5 I believe the same attachment was reviewed with the
6 board in July. It may have been reviewed with the
7 board in February as well. It presents a single
8 scenario that represents our view of the approximate
9 net benefit of the project to the County.

10 Q Okay. And this document doesn't reflect
11 any alternative tax revenues that might have been
12 generated?

13 A One of the things that is important to
14 understand here is that this document, which is the
15 only version of this analysis that was seen by the
16 board, explicitly left in it a reference to off-site
17 revenue impacts and alternative use impacts with
18 zeros in there, because we didn't want anyone to
19 think that we had not considered those issues, which
20 we had, but that we had chosen, once again, because
21 we left out this large piece of tax revenues, we felt
22 that we were -- if the question arose, we had
23 considered the impact of Regency, and we viewed the
24 tax revenue we had not included as being a fair
25 offset to the Regency impact that we had already

1 calculated, but had not shown on these lines. We
2 could have done it differently. We could have shown
3 larger sales tax revenue and put some specific
4 numbers in here to show Regency impacts and off-site
5 impacts, but we didn't feel that would be the
6 clearest way to express the net value of the project
7 to the County.

8 Q Okay. But you never did fill in these
9 zeros on the off-site revenue impact line or on the
10 alternative use impact line?

11 A No, and the board saw these. They knew
12 there were zeros in there. And if they chose to ask,
13 they would know exactly why.

14 Q Okay. But you have also said that there
15 were a number of other things that you considered.
16 Can you say that the net benefit to the County over
17 25 years is \$183,000,526?

18 A I think that's a reasonable valuation of
19 what the net benefit to the County is.

20 Q But you can't say that's what it is?

21 A I don't have a better crystal ball than
22 anybody else, as far as knowing exactly what the
23 future is, but I think based on --

24 THE COURT: That's a yes, I cannot say what
25 it is?

1 THE WITNESS: Yes. Thank you, Your Honor.

2 BY MR. PEARSON:

3 Q In terms of -- continuing to look at that
4 document, Exhibit 46, looking at the property
5 valuation line, down under assumptions, you assumed
6 the real property taxes were going to be based on the
7 value of the land plus the cost of the improvements,
8 did you not?

9 A That's the way the calculations were done,
10 yes.

11 Q Did you ever consider that once the
12 construction was completed, the property might not be
13 able to sell for the value of the land plus the cost
14 of the improvements?

15 A It was certainly a possibility. We
16 didn't -- I don't think we looked at it as a
17 realistic scenario.

18 Q Okay. And then you, I take it, did not
19 consider that once a shopping center has opened, the
20 primary determinate of the fair market value would be
21 income flows through that shopping center and not the
22 cost of the improvements?

23 A Would you repeat the question, please?

24 Q You didn't consider the income generated by
25 the shopping center in developing these property

1 valuation numbers that are recorded on this exhibit,
2 did you?

3 A No, we didn't take that into direct
4 consideration.

5 Q And with respect to personal-property
6 taxes, you assumed that personal-property taxes would
7 be valued at the -- at 100 percent of their cost and
8 be taxed on that amount every year, didn't you?

9 A No, we did not. We assumed that they would
10 initially be valued at 100 percent of their cost, and
11 that the renewals would approximate the value of the
12 depreciation that would occur, and therefore you
13 would have a constant, but that would be a fair
14 representation of the value of the taxation of that
15 property.

16 Q Okay. So once established, the \$40,000,000
17 or so in personal-property taxes would never change
18 or doesn't ever change in this analysis.

19 A That's correct.

20 Q Now, the construction numbers and the
21 land-valuation numbers and the inward investment in
22 personal property were all numbers that were given to
23 you by the developer?

24 A Initially, yes.

25 Q When you looked at sales per square foot

1 for most shopping centers, what level of detail did
2 you use? You just -- you considered the aggregate
3 numbers from the other shopping centers, didn't you?
4 Am I correct?

5 A Yes. We obtained the aggregate average
6 numbers from these other shopping centers, and we saw
7 that they were producing at a level that was
8 considerably higher than the numbers that we were
9 looking at. And it was our belief that this facility
10 would easily justify lower valuations that were being
11 proposed to be used, since those valuations of
12 average sales per square foot were lower than any
13 other major facility that we were able to obtain data
14 on.

15 Q And when you mentioned that a lower
16 valuation was proposed to use, that was the
17 developer's suggestion, that you use the lower
18 valuation; is that correct?

19 A The developer initially came in with a set
20 of figures which were in our view extremely
21 conservative but in comparison with other facilities
22 and other data we were able to obtain, so we were
23 very comfortable that those were reasonable
24 assumptions and conservative assumptions for this
25 analysis.

1 Q And for this analysis you used a higher
2 number than the developer sought?

3 A Which analysis?

4 Q The analysis that you recorded here on
5 Exhibit 46?

6 A What was your question?

7 Q You used a higher number on sales per
8 square foot than the developer suggested.

9 A If so, it was only slightly higher. This
10 was very, very close to the numbers that the
11 developer suggested.

12 Q Okay. And this analysis in the tax
13 category does not take any assets which may be owned
14 by the CDA out of the County tax base, does it?

15 A No, it doesn't. That would not produce a
16 significant amount of revenue.

17 Q It assumes that the \$22,000,000 in assets
18 will be taxed and that the taxes are reflected on
19 this document?

20 A Well, it assumes that the value of the
21 improvements stated is going to be taxed, let's put
22 it that way. It assumes there's an aggregate of
23 112,000,000 in improvements in year one that are
24 going to be subject to taxation.

25 Q Now, at this point, and I'm done with this

1 exhibit. At this point, given where you are with the
2 negotiations of the deal and the documents, you don't
3 know which of the assets are ultimately going to be
4 financed with taxable or tax-exempt debt, do you?

5 A No. We hope that as few as possible will
6 be financed with taxable debt, but that depends upon
7 more definitive information from the developer as to
8 the costs and the specific design and plans of the
9 facility.

10 Q Yes. And it depends on the tax analysis as
11 well, does it not?

12 A That has to be done by counsel, yes.
13 That's the most important part of the equation.

14 Q And that hasn't happened yet, has it?

15 A That has happened at various stations
16 throughout this process, yes, it did.

17 Q I was actually referring to that in both
18 the aggregate -- further information from the
19 developer and let's call it the final analysis, that
20 hasn't occurred yet?

21 A To the best -- I'm not aware that a final
22 analysis has occurred.

23 Q And you really can't say which assets will
24 be financed at all, given the fact that there will be
25 \$22,000,000 in financed assets and \$34,000,000 of

1 apparently eligible assets?

2 A We know that -- we have authorized certain
3 assets to be financed under this exhibit to the
4 petition that is the ordinance that created the CDA,
5 and that we will be limited to financing assets that
6 fall within those categories, only those things that
7 are permitted by the statutes.

8 Q Sure, I understand that there's a mechanism
9 that will be applied, but you don't know the answer
10 to that question today?

11 A If the question is which specific ones will
12 be funded and which specific ones will not be funded,
13 no, I don't know the answer to that question today.

14 Q And none of the agreements that are
15 contemplated between the developer and the CDA have
16 been entered into yet or even negotiated, for that
17 matter, have they?

18 A None of the agreements between the
19 developer and the CDA have even been negotiated?

20 Q Well, how about agreements relating to the
21 maintenance, agreements relating to ownership,
22 agreements relating to the ultimate disposition of
23 the property, the obligations of each party to each
24 other. They haven't been negotiated yet, have they?
25 The only thing in place right now is the memorandum

1 of understanding, correct?

2 A Basically, yes. That's been negotiated.

3 Q Let's talk a little bit more about the
4 issuance of debt itself. I think I'm correct in
5 saying that you would anticipate that the CDA would
6 have issued \$25,000,000 more or less in debt?

7 A Approximately.

8 Q All right. Now, of that 25 and a half
9 million, roughly \$500,000, a little bit more than
10 \$500,000 is going to be devoted to issuance costs; is
11 it not?

12 A I believe that's correct.

13 Q And the issuance costs would be more than
14 that, but the developer would fund some piece of it?

15 A Yes, developer has to fund a portion.

16 Q Okay. But that's a deduct from your funds,
17 because the bond proceeds are going to finance the
18 \$500,000, more or less, of issuance costs, correct?

19 A Correct.

20 Q Now, the bond proceeds are also going to
21 finance one year of capitalized interest, correct?

22 A That's correct.

23 Q And if this deal goes off at 7 percent,
24 that would amount to roughly a million and
25 three-quarters; is that correct?

1 A It sounds reasonable.

2 Q Okay. Bond proceeds are also going to
3 finance a reserve fund, are they not?

4 A That's correct.

5 Q Has that reserve fund been sized yet?

6 A The size of that reserve fund is
7 anticipated to be equal to one year's interest on the
8 bond.

9 Q But it might go up to 10 percent, might it
10 not?

11 A No, it might not. I don't think that's
12 possible.

13 Q Okay.

14 A The agreement is that -- the anticipation
15 is that it's equal to one year's interest. In tax
16 law, as you know, places limitations on how large a
17 reserve can be funded.

18 Q Well, whatever it is, let's just say for
19 the sake of this discussion that it is a million and
20 three-quarters, that million and three-quarters is
21 funded out of bond proceeds and the developer is
22 entitled to it, is it not?

23 A We have not assumed those levels, but I
24 think our numbers were assumed in this analysis about
25 a million and a half. But in any event, the money

1 comes out of bond proceeds, yes.

2 Q The money comes out of bond proceeds? The
3 developer is entitled to proceeds of the reserve
4 account when the reserve account is dissolved, is he
5 not?

6 A If all the assessments have been paid, yes.

7 Q So at the end of five years, a million and
8 three-quarters will go to the developer, correct?

9 A If it is a million and three quarters.

10 Q Right.

11 A Yeah.

12 Q We can assume.

13 A If everything has worked exactly as
14 intended, all the special assessments are paid,
15 everything has been taken care of and the bondholders
16 are paid off, then yes, the developer is entitled to
17 the reserve fund, that's correct.

18 Q And that money does not go through the EDA,
19 does it?

20 A I'm not certain of that.

21 Q The CDA is the issuer, so they own the bond
22 proceeds, right?

23 A CDA is the issuer of the bonds.

24 Q Don't they have entitlement to the bond
25 proceeds? Doesn't that make them the owner of the

1 bond proceeds?

2 A Under the agreement, the developer is
3 entitled to the corpus of the reserve if it exists
4 after the bonds are paid off. He would have paid
5 special assessments to pay for it.

6 Q And you don't remember whether it goes
7 through the EDA?

8 A I'm not certain whether it goes through the
9 EDA.

10 Q The developer can also take that reserve
11 fund out early, can't he?

12 A It's possible.

13 Q He could go out and get an insurance policy
14 that provided some level of risk coverage to the bond
15 holders, and then at that point, would be entitled to
16 the proceeds of the reserve account, correct?

17 A Possibly, yes.

18 Q In fact, although it might be a little
19 early for him to do so, there would be no reason why
20 the developer couldn't do that the day after the debt
21 is issued, is there?

22 A Certainly, there is.

23 Q What reason would that be?

24 A The reason would be that that would
25 require -- if what you're suggesting is true, it

1 would require a surety from a high grade insurance
2 company, and the ability of the developer to qualify
3 for that is far from a certainty.

4 Q Well, let's assume he could qualify, and
5 let's make it a more realistic assumption. The
6 developer doesn't have to pay any obligation on this
7 till the construction period is over, so let's just
8 make it a little bit more realistic and assume he not
9 only qualifies with a surety company for some form of
10 insurance to cover the bondholders, but he's going to
11 wait two years, but before -- the day before the
12 first obligation of the special-benefit assessment is
13 due, he posts that insurance policy and takes the
14 reserve account. That could happen, couldn't it?

15 A It is possible.

16 Q And he could then use the proceeds, which
17 may not fully cover his obligation, but he could at
18 least partially cover his special-assessment
19 obligation with those proceeds, correct?

20 A It is possible.

21 Q And then he would be entitled to a
22 reimbursement from the County to the extent that he
23 has used those bond proceeds to pay down debt
24 services.

25 A Excuse me, I've lost you here. Are you

1 suggesting he's going to use those moneys to prepay
2 part of the debt?

3 Q No, I wasn't suggesting prepayment. I was
4 suggesting that he could use that to pay his
5 benefit-assessment installment to the County. He
6 could do that, couldn't he?

7 A I suppose it's possible.

8 Q And the day he did that, that would qualify
9 for reimbursement from the County, just as any other
10 developer payment would, wouldn't it?

11 A If the developer makes the payment, the
12 developer makes the payment.

13 Q So whatever the amount of the five years of
14 debt service is, under this deal, that the developer
15 is entitled to, providing the fact revenue exists for
16 him to be paid, that number needs to be added,
17 whatever the amount of the reserve account, in order
18 to be able to figure out the total benefit of this
19 deal to the developer, correct?

20 A You would have to figure out when he would
21 receive the funds, what the value would be at this,
22 you know, based on present value, sure.

23 Q Okay. Would you turn please to Exhibit 48,
24 page 177? Excuse me, I think I talked to you enough
25 about that exhibit. I'm looking for criteria. Let's

1 do it without an exhibit. When you developed the
2 criteria, you developed those specifically with Short
3 Pump Town Center in mind, did you not?

4 A Page 1127, did you say?

5 Q 177, Exhibit 48, the one I'm looking at,
6 earlier version. When these were developed, you
7 developed them specifically with Short Pump Town
8 Center in mind?

9 A We considered as we were developing these
10 criteria, of course --

11 Q In fact, you never would have developed any
12 criteria that Short Pump Town Center could not
13 qualify under, would you?

14 A We developed criteria which we believed
15 would meet all of our credit concerns with respect to
16 rating agencies, Henrico County's debt capacity and
17 credit. And that, indeed, in some respects, made it
18 difficult for Short Pump Town Center to qualify.

19 Q The February 8 board meeting at which the
20 board directed you to go ahead with the negotiating
21 of a final deal was a closed meeting, was it not?

22 A The board gave me no direction at that
23 meeting.

24 Q The February 8 board meeting that you
25 attended, testified lasted five hours, resulted in

1 some type of handshake deal on this arrangement?

2 A We were told by the manager subsequent to
3 that meeting that he believe that if we flushed out
4 the proposal that was presented to the board, that
5 we -- he thought it would obtain their ultimate
6 approval and that we were to try to move forward to
7 produce the information necessary to formally take it
8 to the board.

9 Q And that was a closed meeting, was it not?

10 A It was a closed meeting, yes.

11 Q And you're not aware that any public
12 announcement was made after that meeting of this
13 occurrence, are you?

14 A I am not aware, no.

15 Q And the document that you presented at that
16 meeting to the County, your financial analysis -- do
17 you know which documents I'm referring to?

18 A Are you referring to the power-point
19 presentation?

20 Q Yes, the Davenport presentation documents.

21 A What exhibit would that be?

22 MR. PEARSON: I think it would be -- I
23 withdraw the question. I'm done with this witness.

24 THE COURT: Is there any redirect?

25 MR. FOOTE: Very briefly, Your Honor. Just

1 a couple of questions in response to Mr. Buell's
2 questions.

3

4 REDIRECT EXAMINATION

5 BY MR. FOOTE:

6 Q Mr. Traudt, you used the or you said that
7 after the board appropriates this money, they are the
8 developer's funds. And would it not be more accurate
9 to say that when the appropriation is made, it is not
10 made to the developer, but to the EDA, at which
11 point, because of agreements, they become the
12 developer's money?

13 A Yes.

14 MR. BUELL: Object to the leading, Your
15 Honor.

16 THE COURT: It really was, but it's 5:35.
17 Objection is overruled.

18 THE WITNESS: Yes. That would be more
19 accurate.

20 MR. FOOTE: Thank you, Your Honor. We have
21 been very meticulous in most cases, but we have also
22 been very generous as well.

23 BY MR. FOOTE:

24 Q What happens in the end, after all of the
25 EDA payments or special-assessment payments have been

1 made, what happens if the incremental revenues are
2 greater than those funds, than those payments?

3 A Nothing happens.

4 Q Who gets them?

5 A The County.

6 Q Is there ever a time that the developer can
7 be reimbursed more than the special-assessment
8 payments?

9 A No.

10 Q You said -- is there anything that you know
11 that requires the CDA to be dissolved at the end of
12 five years?

13 A No.

14 Q Could it, in fact, choose to stay alive?

15 A As far as I'm aware.

16 Q With respect to maintenance, is it possible
17 that the CDA could make other arrangements? You said
18 with respect to --

19 A I'm not aware that a specific agreement has
20 been entered into or that that has been finalized.

21 MR. FOOTE: Your Honor, I have no further
22 questions.

23 THE COURT: Anything else? Thank you very
24 much. Mr. Traudt, you may step down, sir. And can
25 Mr. Traudt be excused?

1 MR. FOOTE: Your Honor, I would have to
2 believe so. We have a few people that might be used
3 later, but we had not contemplated Mr. Traudt.

4 THE COURT: Mr. Traudt, you are free to
5 leave, if you would like.

6 (Witness stood down)

7 THE COURT: How long is your next witness
8 going to be, Mr. Foote?

9 MR. FOOTE: Well, Your Honor, it's
10 Mr. Rice. I would think that I could probably take
11 that through in about 30 minutes.

12 THE COURT: How long is cross-examination
13 going to be?

14 MR. BUELL: Maybe 20 minutes, Your Honor.

15 MR. PEARSON: 20 to 30 minutes.

16 THE COURT: How about your other witnesses,
17 how long are they going to be?

18 MR. FOOTE: We have two other witnesses
19 after that.

20 THE COURT: How long do you think they are
21 going to be? I would like to finish this case
22 tomorrow, and I want to know how late we need to go
23 on. If we don't finish it today, we may have to go
24 late tomorrow.

25 MR. FOOTE: Let me say that another 30

KEENAN RICE,

was sworn and testified as follows:

DIRECT EXAMINATION

THE COURT: If you swing the microphone around just a little bit -- don't put it right up to you, that's fine.

BY MR. FOOTE:

Q Your name, sir, is what?

A Keenan Rice.

Q Mr. Rice, what do you do for a living?

A I'm a public financial consultant.

Q With whom?

A Muni Financial.

Q Mr. Rice, can you tell the Court your educational background, please, sir?

A Yes. I have a bachelor's of business administration with a major in accounting from Texas Tech University, and a master's of business administration with a major in finance from the University of North Texas.

Q And when did you get your master's degree, your MBA?

A I believe it was 1984.

Q Now, what have you basically -- what has been your work situation since you left college?

1 A I have worked in the area of finance.
2 Significant -- most of that experience has been
3 assisting with the issuance of public bonds.

4 Q And for whom have you been employed? Who
5 were you first employed by?

6 A When I first graduated with my MBA I worked
7 for a company called Condell, Inc.

8 Q Were you doing the finance work for that
9 company?

10 A Yes, but now it's a public-finance company.

11 Q And for whom did you work after that?

12 A I went to work for a company called South
13 Market Corporation.

14 Q And your job at that company?

15 A I did work with the issuance of securitized
16 debt, but again, it was not public debt.

17 Q All right. And then you worked with First
18 City Properties later. When did you work with them?

19 A My recollection is I went to work for them
20 in 1989, worked there for one year.

21 Q All right. And after that, you worked
22 there for a year, and then where did you go?

23 A I went to work for a firm by the name of
24 David Tousic and Associates.

25 Q And at that -- by this time, what was the

1 focus of your practice?

2 A Public finance, issuance of bonds for new
3 development or redevelopment.

4 Q And can you say more specifically what it
5 is that you do in connection with that kind of work?

6 A Yes. I have several -- my firm or myself
7 has several, provides several services related to the
8 issuance of bonds. Primarily we prepare the
9 assessment methodology or special-tax methodology
10 that imposes assessments on the property which are
11 then used to repay the bonds. There are certain
12 financial analyses we provide relating to the
13 assessments. After bonds are issued we provide
14 certain administrative services, ongoing services
15 related to the bonds that are outstanding. And
16 because of general expertise we have in the process,
17 we serve as the financial advisor to our clients on
18 the process.

19 Q Now, when did you join --

20 MR. BUELL: Your Honor, I think we are
21 prepared to stipulate to Mr. Rice's qualifications if
22 Mr. Foote would just tell us what area he intends to
23 offer him as an expert.

24 THE COURT: Mr. Pearson, do you agree?

25 MR. PEARSON: I do.

1 MR. FOOTE: Your Honor, Mr. Rice, you will
2 learn, was the gentleman who drafted what's known as
3 the rate and method apportionment of the special
4 assessment, one of the moving parts here. And as we
5 indicated earlier, because of the complexity of these
6 documents, we would put on testimony that the Court
7 might find useful, to the extent the Court felt it
8 needs it. What I intended to do today, because of
9 Mr. Rice's experience, the next question I would ask
10 would lead to the discovery that Mr. Rice has worked
11 on virtually every CDA in Virginia. That would lead
12 to your understanding of his ability to work you
13 through. That's our purpose and our sole purpose
14 with Mr. Rice.

15 THE COURT: Is he being offered as an
16 expert or do you just want me to know that from an
17 experience standpoint or his experience in drafting
18 the documents?

19 MR. FOOTE: It is also his experience with
20 CDAs and as a public-finance expert.

21 THE COURT: And you would be offering him
22 as an expert in public finance again?

23 MR. FOOTE: Yes, sir.

24 THE COURT: Any questions on Mr. Rice's
25 qualifications?

1 MR. BUELL: No, Your Honor.

2 THE COURT: Mr. Pearson?

3 MR. PEARSON: Your Honor, I have one.

4

5 EXAMINATION

6 BY MR. PEARSON:

7 Q Mr. Rice, have you ever worked on a CDA in
8 Virginia with the type of economic-development
9 incentives wrapped around it that you find with this
10 one?

11 A Yes. I can think of one other that I have
12 worked on.

13 MR. PEARSON: Well, Your Honor, second,
14 final question?

15 BY MR. PEARSON:

16 Q Could you tell me what that one was and
17 whether it has gone to financing?

18 A Yes. It's the Harrisonburg Crossing CDA in
19 the City of Harrisonburg, Virginia. And bonds have
20 not been issued.

21 Q Has that CDA been approved?

22 A Yes, that CDA has been created.

23 THE COURT: You didn't ask permission to
24 ask the third one.

25 MR. PEARSON: I thought I had a little

1 running room there.

2 THE COURT: Mr. Rice is accepted in the
3 field of public financial consulting or public
4 finances.

5 MR. FOOTE: Yes, sir.

6 BY MR. FOOTE:

7 Q When you first began your work with respect
8 to this project, you were employed by whom?

9 A The firm at that time had the name MBIA,
10 Muni Financial.

11 Q Excuse me, not Muni Financial, your
12 employer, who were you hired by to work on this
13 project?

14 A I'm sorry, Forest City Enterprises or -- I
15 don't remember the technical name of this company,
16 but Forest City.

17 Q But you understood it to be one of the
18 developers or the developer of the Short Pump Town
19 Center Mall?

20 A That's correct.

21 Q And during the course of your work -- cut
22 to the chase here. During the course of your work,
23 were you focused particularly on what you have just
24 told us is your particular expertise on the
25 special-assessment process?

1 A I would think that's been a primary
2 responsibility of mine, yes.

3 Q Now, to your right, Mr. Rice, you will find
4 one of the many notebooks that exist in this case.
5 And let me turn you to Exhibit Number 6. Let's be
6 sure we're working with the same one. I believe
7 that's it. Excuse me, Your Honor, I approached and
8 didn't ask. All right. Is that -- I represent to
9 you, Mr. Rice, that this document has already been
10 admitted into evidence in this case and ask you to
11 turn to Bates stamped page J00112 at the bottom right
12 hand. Are you familiar with that document?

13 A Yes, I am.

14 Q What is it?

15 A This is the rate and method of
16 apportionment and special assessment for the Short
17 Pump Town Center CDA.

18 Q Now, we have promised the Court we will do
19 this with some expedition, and so rather than me
20 playing a cat and mouse game with you about this,
21 will you please explain to the Court how this process
22 works as you drafted it and as you understand the
23 board or the CDA to have adopted it?

24 A Yes. This document was adopted by
25 resolution of the board of supervisors of Henrico

1 County. This document, the rate method, does several
2 things. It imposes the assessments on the property
3 within the CDA. It specifies how those assessments
4 are collected over time. It provides provisions for
5 reducing the assessments if there are cost savings.
6 It includes provisions for the prepayment of special
7 assessments.

8 Q I'm sorry, for what?

9 A Prepayment by the owner of any parcel. It
10 includes provisions for the reallocation of the
11 special assessments if a partial is subdivided and
12 some other miscellaneous provisions. I would say the
13 most important provision is how the special
14 assessments are imposed on the property within the
15 CDA.

16 Q Let me ask you first, I will be doing a bit
17 of questioning here, because in the infamous words of
18 Brendan Sullivan, I'm not a potted plant. How do we
19 determine the varying amount of the assessment
20 itself?

21 A The special assessments are equal to the
22 amount of bonds that are issued.

23 Q Now, I cut you off as you started to talk
24 about the method of imposing the assessment, so can
25 you take it from that point and explain how that

1 occurs?

2 A Yes. The special assessments are a form of
3 repayment on the bonds. They're imposed on the
4 taxable property within the CDA. And they are
5 imposed in a manner that is reasonable. The doctrine
6 includes the provisions on how they are imposed, but
7 also evidence to support a finding that the
8 assessments are reasonable. To determine that the
9 assessments are reasonable, we look at two things.
10 First, that the procured benefit that the property
11 owners receive from the improvement is equal to or
12 greater than the amount of the special assessments
13 imposed on the property.

14 Q Let me slow you down a second as you go
15 through this. Is there any portion of this document
16 that summarizes or incapsulates what you're going to
17 tell us here? For example, if I may simply direct
18 your attention to Appendix A, which is attached to
19 it --

20 A Sure.

21 Q -- does that articulate what you're trying
22 to tell us here?

23 A It does.

24 Q And can you direct the Court specifically
25 to where, if it was inclined to look, it would look?

1 A I believe the Bates number is J00121.

2 Q All right, sir. Please go ahead.

3 A This is Appendix A to the rate method, and
4 it is evidence that -- to support the reasonable
5 basis of the assessment. That reasonable basis is
6 again based on two things. First, that the peculiar
7 benefit to the property owners is equal to or greater
8 than the amount of the special assessment, and
9 second, the special assessment that each parcel
10 within the CDA pays reflects the benefit that parcel
11 receives relative to each of the parcels. In other
12 words, each parcel is paying its fair share of the
13 assessment.

14 Q You just said there are two parts to that,
15 so take us back to the first one, peculiar benefit,
16 and tell us how this process works in that regard.

17 A Sure. If I may direct you to page A3 or
18 Bates number J00123. The discussion of peculiar
19 benefits begins on this page and continues over to
20 the next page. The basis for the peculiar benefit is
21 based on three arguments. First, a majority of the
22 property owners in the CDA petitioned a request to
23 the County to impose the assessments on them. It was
24 actually all but one of the property owners. And the
25 one property owner who did not petition is actually

1 selling its property to one of the other property
2 owners who did petition. There's a logical
3 presumption that if people are acting not under
4 duress but acting on their own free will, and they
5 request to have the assessments imposed on them,
6 there is a benefit to them. So that's a logical
7 presumption we make.

8 Second, all of the property owners in the
9 CDA who remain at the time the bonds are issued will
10 be entering into an agreement consenting to the
11 assessment on the property. Again, we can make the
12 same presumption, that the property owners are acting
13 in their own best interest, and if they are
14 consenting to the special assessment, it provides a
15 benefit to them.

16 Third, the improvements that were being
17 provided by the properties are improvements that are
18 required for the highest and best use of the
19 property. The highest and best use of the property
20 means the use of the property that is most valuable.
21 And these improvements that are being provided are
22 necessary for that highest and best use. And the
23 financing provided by the CDA is the most
24 advantageous financing available for those property
25 owners, for those improvements.

1 Q And why would that be?

2 A Well, the primary reason is because most of
3 the bonds issued by the CDA will be tax exempt, and
4 they have obviously a lower interest rate than
5 taxable. In this case there is also the benefit
6 because the CDA financing is, in effect, off-shoot
7 financing for the developer.

8 Q Now, the second part of that two-pronged
9 analysis that you talked about was the allocation of
10 the assessment of each parcel. How is that
11 accomplished?

12 A Okay, to make that allocation we looked at
13 the use each parcel within the CDA would receive on
14 the presumption that the use reflects the benefit the
15 parcels would receive from the improvement. And in
16 looking at the parcels within the CDA, we could
17 classify the use between two different types of
18 properties, what we call mall property and peripheral
19 property. The difference was that some of the
20 improvements benefit all the properties, but some of
21 the improvements primarily benefit the mall property.
22 There may be an incidental benefit to the peripheral
23 property, but the primary benefit is to the mall
24 property. So we took each improvement and determined
25 whether it served all the property, in which case we

1 allocated that cost on a per acre basis to all the
2 property or if the improvement only served the mall
3 property, we allocated the cost of that improvement
4 to the mall property on a per acre basis. Once we
5 allocated all those costs, we determined the ratio of
6 the cost between the mall property and the peripheral
7 property. That ratio is shown in Table D, page A7,
8 for Bates number J00127.

9 Q And at the bottom of Table D there is a --
10 what I take to be a defining term called
11 equivalent-use ratio. That's the ratio you just
12 described?

13 A That's right.

14 Q And how is that applied once you have
15 determined it, as you have just said?

16 A Okay. Let me turn to another page in the
17 document and show you how that is applied. If you
18 will turn back to the rate and method itself, the
19 Bates number is J00115, Section C1, "If the amount of
20 special assessment" -- the second sentence of that
21 paragraph I would like to read that, says "The total
22 of the assessment liens levied on all the parcels
23 shall not exceed the amount of bonds issued by the
24 CDA that's provided in the memorandum." Then it goes
25 on to say "The assessment lien on each parcel shall

1 be calculated in the following manner," and it goes
2 on to describe the formula.

3 If I may attempt to summarize the formula.
4 The total of the bonds issued or the total of the
5 amount of the assessment, which equals the total
6 amount of the bonds issued, is divided by the total
7 acreage as adjusted for the equivalent-use ratio. In
8 other words, the equivalent-use ratio for mall
9 property was one, if you recall from the table we
10 looked at previously. So each acre of mall property
11 is equal to one acre as adjusted by the
12 equivalent-use ratio. The equivalent-use ratio for
13 peripheral property was 1.264, so each one acre of
14 peripheral property is equal to 1.264
15 equivalent-use-ratio adjusted acres. We take the
16 total acres calculated in that manner, which you
17 might call the equivalent-use-ratio adjusted acres,
18 and we divide that into the total amount of the
19 assessment. We get the assessment per acre, the
20 equivalent-use-ratio adjusted acre, and we take --

21 Q So that ends up giving you an assessment
22 for each parcel which differs based on the
23 application of this equivalent-use ratio, which
24 itself is related to the determination as to what
25 parcel is benefitting and which parcel is benefitting

1 more?

2 A Exactly.

3 Q How are the assessments paid over time?

4 A A property owner can pay their assessments
5 at any time without penalty; however, they can also
6 pay them over time with interest. The time period
7 they can pay them over is the same period of time as
8 the bonds are issued for. And the interest that they
9 pay is the same interest rate that is paid on the
10 bonds.

11 Q And what about prepaying, did you say that
12 someone can prepay?

13 A Yes, someone can prepay, they can pay their
14 share of the special assessment at any time without
15 penalty.

16 Q Now, Mr. Rice, we have heard earlier in
17 this case that the CDA boundaries are the 147 acres,
18 but these organic documents talk about the changing
19 of the boundaries of the CDA. Can you please say
20 what that was as you understood it and how it relates
21 to the assessment process?

22 A Yes. We want the boundaries of the CDA to
23 reflect tax-parcel lines, because if a property owner
24 does not pay the assessment that's due on their
25 property, the parcel can be taken to tax sale, but

1 you wouldn't want to take half a parcel to tax sale,
 2 you want to take all of the tax parcel or none of it.
 3 The intention was to include certain property in the
 4 CDA but not include certain other property. But at
 5 this time or at the time the CDA was created, the
 6 tax-parcel lines didn't match the property that we
 7 wanted to include in the CDA. So as an
 8 administrative function, the board of supervisors
 9 determined the ultimate boundaries that they wanted
 10 for the CDA, and they delegated to the board of the
 11 CDA the ability to remove that property from the CDA
 12 that's not intended to be in the CDA, once there are
 13 parcel lines that reflect the property that should be
 14 in and should not be in, as long as that was done
 15 before the bonds were issued.

16 Q The total amount of the special assessment,
 17 however, would remain the same?

18 A That's right.

19 Q And would be allocated or reallocated, as
 20 it were, to those parcels that remain within the CDA?

21 A That's right. And when the allocation was
 22 originally done, it was based on the expectation of
 23 what property would be in the CDA once the bonds were
 24 issued.

25 Q Mr. Rice, is this a methodology that you

1 have employed in other circumstances?

2 A Yes.

3 Q In fact, is it a fairly common methodology
4 for doing what you have done?

5 A Yes, it is.

6 MR. FOOTE: Your Honor, I have no further
7 questions. We recognize that this document is
8 perhaps in some respects one of the most complex. If
9 the Court has questions --

10 THE COURT: Well, in what document will I
11 find the boundaries of the CDA?

12 MR. FOOTE: It's in the petition, Your
13 Honor.

14 THE COURT: All right.

15 MR. FOOTE: And the resolution.

16 THE COURT: Okay. Any other questions?
17 Mr. Spencer, Mr. Buell, do you-all have any
18 cross-examination?

19 MR. BUELL: I have just, I think, one
20 question, Judge.

21 THE COURT: One question?

22 MR. BUELL: Yes. It might be two.

23 THE COURT: I don't know why you-all do
24 that. It's not a requirement.

25 MR. BUELL: It depends on what answer I get

1 to the first one.

2 THE COURT: Go ahead.

3

4 CROSS-EXAMINATION

5 BY MR. BUELL:

6 Q Mr. Rice, I understand that you have been
7 involved in three previous CDA financings in Virginia
8 where bonds have actually been issued; is that
9 correct?

10 A That's correct, where the bonds have been
11 issued to date.

12 THE COURT: That's one.

13 MR. BUELL: I'm going to have to take more
14 than one.

15 BY MR. BUELL:

16 Q And isn't it true that in none of those
17 transactions was an Economic Development Authority or
18 an Industrial Development Authority used as a conduit
19 of funds the way the EDA is being used in this case?

20 A At least not at this point in time, no.

21 MR. BUELL: Thank you, sir.

22 THE COURT: Wasn't bad. Mr. Pearson?

23 MR. PEARSON: No questions.

24 THE COURT: Any redirect?

25 MR. FOOTE: No, sir.



1 THE COURT: Mr. Rice, thank you very much,
2 sir. You may step down.

3 THE WITNESS: Thank you.

4 (Witness stood down)

5 THE COURT: That didn't take the hour and
6 10 minutes that you-all predicted. Do you have
7 another one we can do or did I already tell them they
8 can go home and they've already left?

9 MR. FOOTE: Your Honor, Ms. France is still
10 here, so I think Mr. Perrow will call her.

11 THE COURT: Mr. Rice, you are free to leave
12 if you would like to leave. If you would like to
13 stay in the courtroom, you're welcome to.

14

15 BONNIE FRANCE,
16 was sworn and testified as follows:

17 DIRECT EXAMINATION

18 THE COURT: Mr. Perrow?

19 MR. PERROW: Thank you, Your Honor.

20 BY MR. PERROW:

21 Q Ms. France, please state your name and your
22 occupation.

23 A My name is Bonnie France. I'm a lawyer
24 with McGuireWoods.

25 Q And how long have you been an attorney for

1 McGuireWoods?

2 A Since 1980.

3 Q And since 1980 --

4 THE COURT: Keep your voice up just a
5 little bit.

6 BY MR. PERROW:

7 Q Since 1980, have you specialized in a
8 particular area of the law?

9 A I have specialized in public finance.

10 Q And are you -- do you belong to any
11 professional organizations particularly related to
12 your specialty in public finance?

13 A The two organizations that have the most
14 bearing on my specialty would be the National
15 Association of Bond Lawyers and the local government
16 attorneys' association.

17 Q As a bond lawyer, are you in something
18 called the Red Book?

19 A Yes.

20 Q What is that?

21 A The Red Book is a compilation that is put
22 together by a publication called the Bond Buyer, and
23 attorneys who have been -- who have rendered
24 bond-counsel opinions that have been accepted by the
25 marketplace are listed in the Red Book.

1 Q And for how long have you been giving bond
2 opinions?

3 A Since 1980.

4 Q All right. And do you know how many times
5 you have served as bond counsel giving bond opinions?

6 A There would be hundreds of them, at least
7 over 300.

8 Q And have you been retained by the CDA as
9 bond counsel for the Short Pump Town Center bond
10 issue?

11 A That's correct.

12 Q Ms. France, could you summarize your role
13 as bond counsel in this transaction, please?

14 A Bond counsel in this transaction and any
15 transaction essentially structures the issue or
16 assists the participants in structuring the issues.
17 By structuring I mean we advise the participants on
18 the federal-tax implications, assuming that it's a
19 tax-exempt-bond issue, which typically is the case.
20 We also provide advice as to various mechanisms that
21 are permitted under state law and offer advice as to
22 the most appropriate mechanisms for structuring of
23 financing. We prepare the documentation pursuant to
24 which the bonds are authorized and issued, and
25 finally, and probably our most significant role is we

1 render a legal opinion that the bonds are valid and
2 binding and that the interest on the bonds is tax
3 exempt.

4 Q When you render the opinions, is that the
5 opinion of your law firm?

6 A Yes.

7 Q And the opinion that that is a valid and
8 binding transaction, is that an opinion that complies
9 with state law?

10 A That's correct.

11 Q When you render an opinion on the
12 taxability or the tax-exempt status, you're talking
13 about the federal tax statutes?

14 A Typically yes. We also have tax exemption
15 under the Virginia statutes, but our primary role is
16 to determine that it is tax exempt under federal law.

17 Q And you said you helped document the
18 financing. What type of documents would go into a
19 bond deal?

20 A It's a wide variety of documents, depending
21 on the nature of the transaction, but almost every
22 transaction begins with a preliminary authorizing
23 resolution that is adopted by the issuer of the bond.
24 In this case that would be the CDA.

25 Q Has that happened?

1 A And that has happened here. The
2 preliminary authorizing resolution typically will set
3 forth in general terms the purpose of the issue, the
4 nature of the facilities to be financed and an
5 estimated maximum amount of the issue, the structure
6 of the issue or the credit, whether it's a
7 general-obligation pledge or revenue pledge or some
8 other special pledge. Once the preliminary,
9 authorizing resolution has been adopted, the nature
10 of the documents vary greatly. Typically in a
11 publicly sold issue, that is other than a
12 general-obligation bond, we would have a bond
13 indenture. There would be collateral documents where
14 we have real-estate-based financing like we do here.

15 Q And let's focus on this transaction.

16 A On this particular transaction, those
17 collateral documents include the memorandum of
18 understanding and the economic-development agreement,
19 which has been prepared in substantially final form.
20 There would also be a number of other documents
21 prepared as we get closer to marketing the bonds and
22 closing on the transaction. They would include the
23 trust indenture which engages a corporate-trust
24 partner of a bank to serve as trustee for the funds
25 that are raised by the sales of the CDA bonds. This

1 document, contrary to what has been, I guess, stated
2 earlier, the funds that are generated from the sale
3 of the CDA bonds will not be paid to the developer to
4 be commingled with development funds, they will be
5 paid to a corporate trustee under the trust
6 indenture. And the trustee will administer these
7 funds and disburse them for appropriate project
8 costs.

9 There would also be a bond-purchase
10 agreement pursuant to which the bonds are sold to the
11 underwriter. There would be a disclosure document
12 prepared that is typically called a limited offering
13 memorandum in this type of transaction. And that
14 would be the document that is used to disclose to
15 investors the nature of the transaction.

16 We will also have an agreement that is
17 typically called the development agreement, and the
18 development agreement is an agreement that runs
19 between the CDA and the developer. And this document
20 will answer a lot of the questions that I think have
21 been raised today governing some of the mechanics of
22 who owns the property and who develops it and who is
23 responsible for maintaining it. Those covenants will
24 be incorporated into the development agreement.
25 There will be a covenant in there that the CDA will

1 own the property funded by the CDA.

2 Q In your experience, are these documents
3 like this indenture-development agreement, the bond
4 purchase agreement, documents prepared and negotiated
5 after the offering, after the authorization
6 resolution?

7 A Precisely. They would be prepared after
8 the initial authorizing resolution and closer to bond
9 issuance.

10 Q So you would not --

11 A It would be very unusual at that point.

12 Q I'm sorry, I'm speaking while you were
13 speaking.

14 THE COURT: You-all are talking at the same
15 time.

16 MR. PERROW: We're saying the same thing.

17 BY MR. PERROW:

18 Q Those documents are not prepared ahead of
19 time prior to the authorizing resolution in your
20 experience?

21 A That's correct.

22 Q Will the CDA have the right to approve all
23 these documents in their final form before the bonds
24 are issued?

25 A The CDA will approve all of those documents

1 before the bonds are issued.

2 Q In fact, the CDA has to approve them; isn't
3 that correct?

4 A That's correct. The CDA will be party to
5 most of them.

6 Q Will the final CDA resolution approving the
7 bonds deal with such issues as bond pricing? Will it
8 deal with the bond pricing?

9 A The final resolution will either approve
10 the pricing that's presented to us by the underwriter
11 or it may be adopted in a forum that establishes
12 parameters for the pricing, but in any event, it will
13 approve the pricing of the bond.

14 Q Will it deal with the repayment terms of
15 the bonds?

16 A Yes.

17 Q And will it deal with the sales of bonds to
18 a particular underwriter?

19 A Yes.

20 Q And would these items be known typically
21 when the resolution authorizing the bonds is issued?

22 A No, you would not know this.

23 Q In fact, have you ever worked on a bond
24 deal where all the bond documents were in final form
25 before the issuing authority had issued its initial

1 resolution authorizing the bonds?

2 A Not that I can recall.

3 Q If I could direct you to the exhibit book
4 that's trial exhibit -- has 61 tabs in it, if that
5 helps you identify it. And can I direct your
6 attention and the Court's attention to Exhibit 3?

7 THE COURT: Which one?

8 MR. PERROW: Three, Your Honor.

9 MR. BUELL: Three.

10 BY MR. PERROW:

11 Q All right. I believe I directed your
12 attention to the resolution creation, this is Short
13 Pump Town Center Community Development Authority; is
14 that correct?

15 A That's correct.

16 Q And in your role as bond counsel, do you
17 have to be familiar with this document?

18 A That's correct.

19 Q All right. And this particular --
20 directing your attention to page three of that or
21 better known as J00075, paragraph seven of the
22 resolution, do you see that paragraph?

23 A Yes.

24 Q All right. Now, as bond counsel, is that
25 paragraph, does that -- excuse me. Does that

1 paragraph have any importance to you?

2 A It does. It reflects some of the statutory
3 requirements that require that these bonds not be
4 considered the debt of the County of Henrico. A
5 similar statement would also appear in our opinion.

6 Q And it also says "will not constitute a
7 pledge of failure in credit of the County."

8 A That's correct.

9 Q And does it also provide that funds will
10 not be paid, County funds, other than pursuant to
11 15.2-5158?

12 A Yes.

13 Q And in fact, as bond counsel, do you have a
14 duty to make sure the bond documents reflect this
15 understanding?

16 A That's correct.

17 Q Now, in the same document, page -- Bates
18 number J0073, which was the first page of the
19 resolution, there's some whereas clauses. The fifth
20 one from the top, are you familiar with that clause?

21 A Yes.

22 Q What does it provide?

23 A That is a finding by the board of
24 supervisors that the proposed financing complies with
25 its economic development criteria.

1 Q Now, do you, as bond counsel, do you rely
2 on that finding or do you make your own determination
3 whether that finding is correct?

4 A We rely on the board of supervisor's
5 judgment in making that determination.

6 Q Now, in this transaction, will there be
7 incremental tax revenues used?

8 A There will be incremental tax revenues that
9 will be used to fund the incentives as described
10 previously.

11 Q All right. Are those permitted under the
12 CDA statutes?

13 A The concept of incremental tax revenues
14 isn't something that is contemplated by the CDA
15 statutes, but it is permitted if the resolution
16 recites that it may be undertaken by the board, which
17 is the reason for some of the language in that -- in
18 the section that we looked at previously.

19 Q So the resolution does contain those
20 provisions?

21 A The resolution in paragraph seven does
22 contain a reference to incremental tax revenues that
23 may be used in the transaction.

24 Q Under the transaction as you understand it,
25 as bond counsel --

1 THE COURT: We have the air conditioner
2 running. Both of you need to keep your voices up.

3 BY MR. PERROW:

4 Q Let me start over. Under the transaction
5 as you understand it, are any taxes of the County of
6 Henrico, or tax revenues, I guess, of the County of
7 Henrico, being pledged to pay the bonds?

8 A No.

9 Q And, in fact, does this differ from what is
10 known as tax-incremental financing?

11 A Yes, it does.

12 Q In fact, the tax-incremental-financing
13 statutes do not apply to this transaction; is that
14 correct?

15 A That's correct.

16 Q Direct your attention to Exhibit 4. What
17 is this document as you understand it?

18 A This is what we have been calling the
19 preliminary, authorizing resolution. It is a
20 resolution of the Community Development Authority
21 that authorizes the issuance of the bonds.

22 Q And in this particular case, I believe it
23 has attached it to the MOU and the EDA agreement; is
24 that correct?

25 A That's correct. It also authorizes the CDA

1 to enter into those documents.

2 Q Now, these documents, as you understand it,
3 when adopted, were they substantially in final form?

4 A They are in substantially final form.

5 Q Does the resolution itself address what
6 kind of changes can be made to the documents?

7 A The resolution authorized the chairman or
8 the vice chairman of the Community Development
9 Authority to consent to additional changes to those
10 documents.

11 Q At this point in time, have there been any
12 substantial changes to the document?

13 A To my knowledge there have been none.

14 Q Is it usual and customary for all details
15 in agreements like the MOU and EDA to not be in final
16 form at the time of the authorizing resolution?

17 A It is customary to have these documents
18 approved in substantially final form so that minor
19 changes can be made.

20 Q Now, direct your attention to Exhibit
21 Number 5. I believe it is the resolution of the
22 Economic Development Authority of Henrico County,
23 Virginia.

24 MR. FOOTE: Your Honor, we would actually
25 ask our Brother Perrow if he would speak up, too.

1 This air-conditioning system makes it hard to hear.

2 MR. PERROW: I'll try.

3 BY MR. PERROW:

4 Q Are you familiar with Exhibit 5?

5 A That's correct, yes.

6 Q What is it, please?

7 A This is a resolution adopted by the
8 Economic Development Authority approving the
9 economic-development agreement with the CDA.

10 Q This, in fact, has with it the memorandum
11 of understanding as an exhibit; is that correct?

12 A It has the economic-development agreement
13 as an attachment. I believe they were furnished the
14 memorandum of understanding as well, but the official
15 attachment to the resolution would be the
16 economic-development agreement.

17 Q And is that in final form?

18 A That is in substantially final form.

19 Q Are you aware of any changes that need to
20 be made at this time?

21 A Only to the date of the documents. Since
22 we didn't sign it in 2000, it will be dated 2001.

23 Q Is it usual and customary to have documents
24 that have not been finalized executed at this stage
25 in the bond issue that this resolution was adopted?

1 A That's correct. Most typically the
2 documents are all finalized shortly before closing,
3 which is when they are signed.

4 Q And let me refer you to one other document,
5 Exhibit Number 7. I believe this is the ordinance
6 establishing the special assessment. Are you
7 familiar with that document?

8 A Yes.

9 Q And what does it do in your understanding?

10 A The ordinance is adopted by the board of
11 supervisors, and it establishes the special
12 assessment on real estate through the CDA in
13 accordance with the rate and method, which is
14 attached to the ordinance. The ordinance also
15 authorizes the County to enter into the memorandum of
16 understanding and the economic-development agreement.

17 Q Now, the documents that I have reviewed
18 with you, are these documents that more or less state
19 the structure of the deal as you understand it?

20 A That's correct.

21 Q And these were documents you reviewed as
22 bond counsel?

23 A That's correct. We prepared most of them.

24 Q And, in fact, you would -- you're -- all
25 the other bond documents you prepare and all your

1 other work would have to conform to the structures
2 that are set forth in these exhibits we have
3 reviewed?

4 A That's correct.

5 Q Now, will the bond documents -- I use that
6 to include all the documents that you prepare or
7 review. Will these documents contain provisions to
8 assure that all the bond proceeds will be used for
9 purposes permitted under the CDA statutes?

10 A Yes. As I mentioned earlier, the documents
11 will provide that the proceeds will be deposited with
12 a trustee, and there will be a procedure for
13 requisitioning those proceeds to be applied to
14 project costs.

15 Q And those requisitions will be for the
16 improvements that have already been authorized?

17 A That's correct, they will be for
18 improvements that will be financed by the CDA, owned
19 by the CDA and have been described in the exhibits
20 that you have referred to earlier.

21 Q Now, does the bond indenture usually
22 provide for a reserve fund?

23 A In this type of transaction, yes.

24 Q And so there will be a reserve fund in this
25 transaction?

1 A Yes.

2 Q And how will that work in your
3 understanding?

4 A When the bonds are issued, a portion of the
5 proceeds of the bonds will be deposited with the
6 trustee and will be held as a reserve. In the event
7 that assessments are made, there's a shortfall, the
8 trustee can tap the reserve fund to pay holders of
9 the bonds.

10 Q Is there a limit on the amount of the
11 reserve fund?

12 A There are tax-code limits on the amount of
13 the reserve fund when you're undertaking a
14 tax-exempt-bond issue, the amount that can be funded
15 with bond proceeds.

16 Q And you will be making that determination
17 of the amount?

18 A We will be reviewing the size of the
19 reserve fund to make sure we comply with the tax
20 regulations.

21 Q In fact, it is standard to have a
22 reserve-fund provision in these types of bonds; is it
23 not?

24 A Yes, it is.

25 Q Now, have you looked at the issue of

1 whether or not the borrower or the developer in this
2 case could obtain the reserve fund in advance of
3 payment of the bonds in full?

4 A Yes, we have, and that is also reflected in
5 the memorandum of understanding. Because the reserve
6 fund is made of bond proceeds and is treated for tax
7 purposes as bond proceeds, it cannot simply be paid
8 to the developer. It can be used for certain
9 purposes. It could be paid to the developer to fund
10 certain qualifying project costs. It could be used
11 to pay debt service on the bonds.

12 Q All right. And qualifying costs would
13 be -- what would they be?

14 A They would be the facilities that the CDA
15 has authorized to finance.

16 Q All right. So the developer is not just
17 taking that money and putting it in his pocket and
18 going somewhere else?

19 A No.

20 Q All the expenditures have to be related to
21 this particular project?

22 A That's right. The reserve fund is
23 essentially subject to the same restrictions that the
24 bond proceeds are subject to.

25 Q There's been much talk today about looking

1 at the list of public improvements that have been
2 authorized and comparing one exhibit to the other,
3 and I assume you're familiar with most of those
4 exhibits that list the nature of the public
5 improvements?

6 A Yes.

7 Q All right. How will these bond documents
8 assure that the money will go for these public
9 improvements?

10 A Both the development agreement and the
11 indenture will require that this money be spent for
12 those qualifying improvements.

13 Q And it will be your job to make sure that
14 happens?

15 A Well, it will be my job to make sure the
16 documents reflect that. After the fact, it will be
17 the trustee's job and the CDA's job to approve
18 requisitions.

19 Q Can you tell us a little bit about how the
20 bond funds would go in this case, which they have
21 been talking about which light poles will be paid
22 for, could you explain how that will work?

23 A I would be astounded if we had a situation
24 where we were financing on a light pole by light-pole
25 basis or brick by brick basis. This is a common

1 problem where a CDA has agreed to issue a certain
2 amount of bonds that they may or may not cover the
3 cost of the infrastructure that's going to be
4 provided. It is typical in the development agreement
5 for the developer to agree to pay the additional cost
6 that exceeds the CDA financing, and that is one
7 option we may employ here, when we get to a point
8 where we have \$22,000,000 in hard costs being
9 financed through the CDA, but \$34,000,000 in costs of
10 improvements. That's one option that we may consider
11 in the development agreement. It may make more sense
12 to specify certain types of improvements. That's
13 another option we can pursue.

14 Q Could you give me an example of -- if you
15 can specify -- certain types of improvements?

16 A For example, we may, when we get closer to
17 closing on the bond issue, have firmer numbers that
18 show that the entire \$22,000,000 that the CDA is
19 issuing for hard costs will not cover any of the
20 parking, and the developer may elect to simply
21 finance the parking on its own, and in that case, it
22 would not be a CDA-financed facility, and the CDA
23 would have no responsibility for financing or
24 maintaining or owning the parking.

25 Q If the CDA money or CDA financed money is

1 used for a particular public improvement, who will
2 own that public improvement?

3 A Anything that is funded by the CDA will be
4 owned by the CDA or the County or some other public
5 entity, and that would include any improvement where
6 there was a partial financing by the CDA and by the
7 developer.

8 Q And that would have to occur in order to
9 comply with Virginia law; is that right?

10 A Both Virginia and federal law.

11 Q So in the parking example, if the developer
12 chooses, because of cost overruns on constructing the
13 plaza, to bear out the entire cost of the parking,
14 then the CDA would not own the parking lot, right?

15 A That's correct. If it is not CDA financed,
16 there would be no requirement that the CDA own it.

17 Q But on the other hand, if the agreement was
18 that some of that parking would be paid for by the
19 CDA, a mechanism would be put in place for the CDA to
20 own whatever parking has been constructed with the
21 CDA funds; is that a fair statement?

22 A That's correct. If you're in a situation
23 where it doesn't make sense to split the ownership or
24 have the developer own part of it and the CDA own
25 part of it, then the part that is CDA financed,

1 including the part that may have a developed
2 contribution, would be owned by the CDA.

3 Q Now, I assume as bond counsel you have been
4 doing your due diligence?

5 A Yes.

6 Q And, in fact, the bonds will not be issued
7 unless a bond-counsel opinion is given?

8 A That's correct.

9 Q Have you reviewed the formulation of the
10 CDA?

11 A Yes.

12 Q Have you reviewed the agreements and their
13 compliance with the CDA statutes, in particular
14 sections 15.2-5125 and 15.2-5158?

15 A Yes.

16 THE COURT: Mr. Buell? Mr. Pearson?

17 MR. BUELL: That calls for a legal opinion.

18 THE COURT: Not what she has reviewed.

19 You're just anticipating that question, and you're
20 ready to object.

21 MR. PERROW: Be patient.

22 THE COURT: As soon as you ask her whether
23 these bonds comply with the law, you know what
24 they're going to do.

25 MR. PERROW: Yes, sir.

1 THE COURT: He's not going to ask that
2 question.

3 BY MR. PERROW:

4 Q Will you, in fact, review the architectural
5 and engineering drawings and determine the nature of
6 the public infrastructure improvements?

7 A Yes.

8 Q Will you review or draft all the financing
9 documents?

10 A All except those that will be drafted by
11 underwriting counsel.

12 Q And you will be obviously giving an opinion
13 on the Internal Revenue Code requirements for
14 tax-exempt funding?

15 A That's correct.

16 Q And you will be looking at the Arbitrage
17 provisions as well?

18 A That's correct.

19 THE COURT: She's going to do everything
20 she's supposed to do.

21 BY MR. PERROW:

22 Q Have you, as bond counsel, reached
23 conclusion, any conclusion as to the opinion that you
24 may give?

25 A Yes, we have.

1 THE COURT: It's going to be the best
2 opinion that she can give. I promised them that you
3 were not going to ask the question that you seem like
4 you really want to ask.

5 MR. PERROW: It's how I ask it, Your Honor.

6 MR. JOHNSON: I think that is just exactly
7 the point, Your Honor. He's getting awful close to
8 it.

9 BY MR. PERROW:

10 Q Has a determination been made on the
11 tax-exempt nature of these bonds?

12 A Yes, a preliminary determination has been
13 made.

14 Q And you said preliminary, is that subject
15 to what?

16 A Subject to additional facts surfacing that
17 would cause us to change our opinion.

18 Q Do you anticipate that these bonds will be
19 tax exempt?

20 A Yes.

21 Q Did you participate in the decision to file
22 this bond-validation suit?

23 A Yes.

24 Q And what was your recommendation?

25 A We recommended that this suit be filed.

1 Q For what purpose?

2 A Typically when a bond-validation suit is
3 filed, there are really one of two reasons why you
4 would file the suit. The first reason, which is not
5 the reason that we pursued here, was if there is some
6 novel interpretation of the law or the law is not
7 clear and we feel like we need judicial clarification
8 on an area of the law. That is not why we filed this
9 lawsuit or why we advised that this lawsuit be filed.
10 We were aware that there was a threat of litigation.
11 A bond issue cannot be marketed and sold when there
12 is a threat of litigation that challenges the
13 validity of the bond issue. So we recommended
14 instituting a validation proceeding to bring
15 certainty to that area.

16 Q So you were aware that Taubman may file
17 suit?

18 A That's correct.

19 MR. PERROW: Okay. Thank you.

20 THE COURT: Mr. Buell?

21

22 CROSS-EXAMINATION

23 BY MR. BUELL:

24 Q So you advised your client, the CDA, to
25 file this bond-validation suit?

1 A That's correct.

2 Q And it was filed back in early November of
3 this year or excuse me, November, 2000?

4 A That's my recollection.

5 Q Any reason why the development agreement
6 couldn't have been prepared between November of 2000
7 and today?

8 A Typically it is not prepared until closer
9 to bond issuance, and also --

10 Q I'm sorry, go ahead.

11 A And once there is a possibility that the
12 bonds won't be issued, we stop working.

13 Q Well, we kind of got our cart before the
14 horse, don't we? I mean, we're here trying to
15 validate the bonds, but what's going to happen
16 when --

17 A I think everyone has agreed what will
18 happen with the proceeds.

19 Q Well, let's take your example of the
20 parking lot, where the private-developer's funds
21 purchase the entire parking lot. Do you agree with
22 that example that that is a private parking lot, not
23 subject to CDA financing, right?

24 A That's correct.

25 Q All right. And we don't know whether

1 that's going to happen or not in this situation?

2 A That's correct.

3 Q Because we don't have a development
4 agreement yet?

5 A That's correct.

6 Q And we don't have a trust-indenture
7 agreement which would tell us how those funds are
8 required to be paid, the CDA funds?

9 A I'm not sure the trust indenture would
10 govern that, that that would be governed by some of
11 the documents you already have before you, such as
12 the resolution that was adopted by the board of
13 supervisors and the rate and method, which describes
14 the improvements. We all know that those are the
15 improvements that are going to be financed. Maybe
16 not all of them, but there will be nothing outside
17 the scope of what's being presented to the board of
18 supervisors.

19 Q But as of today, we have \$34,000,000 of
20 proposed improvements in terms of their cost?

21 A That's correct.

22 Q And we have only \$22,000,000 in public
23 money, correct?

24 A Correct.

25 Q And we don't know which of the improvements

1 this \$22,000,000 will buy?

2 THE COURT: We have been over that several
3 times.

4 THE WITNESS: We know it will be one of
5 those items listed.

6 THE COURT: We have been over that several
7 times.

8 BY MR. BUELL:

9 Q And one of the things the trust-indenture
10 agreement would do, as I understood you, was it would
11 obligate the trustee of the bond proceeds only for
12 purposes that are permitted by the CDA statute.

13 A That's correct.

14 Q Is there any reason why that agreement
15 could not have been prepared in the last two months?

16 A They're primarily boilerplate. I could run
17 one out in 15 minutes, but there's no reason to until
18 we finish this proceeding.

19 Q Okay. I'm not a tax lawyer, so I dare to
20 tread in this area, but I'll try anyway. Is it
21 generally true that public improvements are entitled
22 to tax-exempt financing and private improvements
23 would be taxable?

24 A That's generally true.

25 Q All right. Do you have the binder, the

1 Taubman binder of exhibits in front of you? If
2 you'll turn to Taubman Number 9. Do you recognize
3 that as a memorandum written by you and Mr. Rice to
4 Mr. Traudt?

5 A Yes.

6 Q All right. And what you were doing, it
7 appears in the memorandum, is listing the various
8 improvements and categorizing them as to whether they
9 would be tax exempt or potentially taxable; is that
10 right?

11 A That's correct.

12 Q And if you look at right near the bottom of
13 the page that's marked 2144, there's an asterisk and
14 a statement that says "The CDA's ability to finance
15 the plaza and parking areas on a tax-exempt basis
16 will depend on the nature of any agreements between
17 the CDA and the shopping developer and tenants," is
18 that what it says?

19 A That's correct.

20 Q And the agreements you are referring to
21 there are the development agreements that have not
22 yet been drafted?

23 A No.

24 Q What agreements are you referring to in
25 that statement?

1 A There could be a number of requirements
2 that are imposed on the shopping-center developer by
3 the tenants that would preclude us from undertaking
4 the tax-exempt financing. We are not aware of any at
5 this point. I don't have any reason to believe that
6 there will be any.

7 Q But none of those agreements have been
8 drafted or finalized yet?

9 A But at the time this memo was written,
10 which was in December, '99, we were very much further
11 back in our learning curve. We had incomplete cost
12 estimates and incomplete information on the nature of
13 the improvements that would be financed through the
14 CDA.

15 Q But you don't have any tenant agreements in
16 place today, do you?

17 A Not that I'm aware of at this point.

18 Q So whether or not these improvements may be
19 tax exempt, taxable, public or private, depends also
20 on these tenant agreements that have yet to be
21 negotiated?

22 A We have informed the developer of the kind
23 of things that would preclude us from tax-exempt
24 financing, and they have told us that that would not
25 be a problem.

1 Q Is that committed in writing in any kind of
2 agreement?

3 A It is not committed in writing to my
4 knowledge.

5 Q Is it your understanding that the -- let's
6 look at number 63, just for the sake of illustration.
7 Is it your understanding that the CDA is actually
8 going to own the land that underlies various
9 improvements, like the parking lot or the plaza or
10 these entrance roads?

11 A Well, I think that's a possibility, and it
12 could be structured that way. I don't expect that it
13 would, but my expectation is that the CDA would
14 acquire the fees under any improvements that it
15 finances.

16 Q Your expectation is that it would acquire
17 the fees?

18 A That's correct.

19 Q So it will own the land underneath any
20 improvements it finances?

21 A I expect so.

22 Q And how would it acquire the fee?

23 A It will purchase the fee from the developer
24 or the developer will arrange to convey it to the CDA
25 or the owners, whoever they may be.

1 Q Is that understanding committed to writing
2 in any agreement at this point?

3 A That can be committed to writing in the
4 development agreement.

5 Q So the answer is no, it is not?

6 A No.

7 Q Do you expect that the developer will
8 actually be paid for the land or will it simply be
9 ceded to the CDA?

10 A I don't know at this point.

11 Q Possible it might be just given to the CDA?

12 A It's possible.

13 Q And would it be possible that it might just
14 be given back at the end of five years, when the
15 bonds are paid back?

16 A That's possible.

17 Q And it would be given back with some pretty
18 fancy improvements on it, wouldn't it?

19 A That's possible.

20 Q We had -- when Mr. Traudt was testifying,
21 Exhibit 43, that looked at the structure of the
22 financing plan, and he explained that there's a first
23 lien on the property that's created by the special
24 assessment; is that correct?

25 A That's correct.

1 Q All right. Now, in the situation where
2 tax-increment funds are paid to the EDA and the
3 developer allows them to be diverted to the CDA to
4 take down debt services, those payments are also
5 reducing the lien on the property at the same time,
6 right?

7 A That's correct.

8 Q So that if the situation occurs that we
9 postulated earlier where the first special-assessment
10 payment is made and then tax increments finance the
11 rest of the payments for the duration of the bonds,
12 and at the end of the five-year period the developer
13 gets the land back free of any special-assessment,
14 right?

15 A If the bonds have been paid.

16 Q Right. Now, in this financing structure
17 the economic-development authority is not issuing any
18 bonds, correct?

19 A That's correct.

20 Q It's not making any loans?

21 A That's correct.

22 Q It has no interest in any of the
23 improvements that will be financed?

24 A That's correct.

25 Q It won't derive any revenues from selling

1 those improvements or leasing them or renting them?

2 A That's correct.

3 Q What is your understanding of why the EDA
4 is even in the picture?

5 A The EDA is in the picture because we
6 believe that the statutory authority for providing
7 incentives for economic development is clearest when
8 you involve the Economic Development Authority in a
9 transaction.

10 Q Is that another way of saying that it would
11 be unlawful for the County to make a direct payment
12 of \$30,000,000 to the developer?

13 A I believe the statutes have been changed
14 recently within the last three or four years that
15 would permit that. Having said that, I'm fairly
16 certain that eight, nine years ago I would not have
17 been able to point you to the statutory authority to
18 do that. It could possibly happen now.

19 Q And in that case, is there any reason that
20 you know of, from a County credit perspective, why
21 the County itself couldn't simply do the intercept
22 mechanism and take the EDA out of the picture?

23 A Theoretically we could do that, and in
24 fact, we proposed one structure where we did that.
25 The County was not comfortable with that. They have

1 been very adamant that the County tax revenues will
2 not be pledged or appear to be pledged for payment of
3 debt services. By putting the EDA in there, we have
4 an extra loop that removes the County from the
5 process.

6 Q Who insisted -- which party to this deal
7 insisted on the EDA being inserted in the scheme this
8 way?

9 A I suggested it as a good option under state
10 law, and the County insisted on it for other reasons.

11 Q And you suggested it on behalf of the
12 developer who you were representing at the time?

13 A I suggested it in my capacity as bond
14 counsel. That's one of the things that we do as bond
15 counsel in structuring a transaction, we will
16 recommend a structure that we think is the most
17 appropriate. I don't know on whose behalf that would
18 be.

19 Q Now I'm confused. Do you mean to tell me
20 you were representing the developer at the same time
21 you were also serving as bond counsel to the CDA?

22 A We were bond counsel to the CDA, but we
23 were engaged by the developer when there was no CDA
24 to assist in the creation of the CDA and to serve as
25 bond counsel to the CDA, so our role all along has

1 been as bond counsel. Whether we are bond counsel to
2 the developer or bond counsel to the CDA, I'm not
3 sure how you determine that when your initial
4 engagement is to create an entity that you will
5 subsequently become bond counsel to.

6 MR. BUELL: Ms. France, I think that's all
7 I have. Thank you very much.

8 THE COURT: All right. Mr. Pearson, how
9 long do you think you're going to be?

10 MR. PEARSON: 20 minutes, Your Honor.

11 THE COURT: Okay. We need to take -- has
12 anybody parked in the parking deck diagonally?
13 You-all need to move your cars, unless something is
14 going on at the Coliseum. They close at 7:00
15 o'clock. Once they close, you cannot get your cars
16 out.

17 MR. BUELL: Your Honor, I think I forgot to
18 admit TP 9 into evidence.

19 MR. PERROW: No objection.

20 MR. PEARSON: No objection.

21 THE COURT: That will be admitted. If
22 there is something going on at the Coliseum, keep it
23 there, because I believe if you keep it there,
24 they're probably charging something. But if nothing
25 is going on at the Coliseum, take your cars out and

1 bring them over to the public lot across from the
2 court. You don't have to put any money into the
3 meters. At this time we will stand in recess until 5
4 minutes to 7:00.

5 (Recess taken)

6 THE COURT: Mr. Pearson?

7 MR. PEARSON: Thank you for the break, Your
8 Honor. I was one of those at risk.

9 THE COURT: You have pared your 20-minute
10 examination down to five?

11 MR. PEARSON: Actually, I think that some
12 of that occurred. I will make no commitment to the
13 Court that it will be five minutes, but it will be
14 shorter than it was going to be.

15 THE COURT: All right.

16
17 CROSS-EXAMINATION

18 BY MR. PEARSON:

19 Q Good evening, Ms. France.

20 A Good evening.

21 Q Ms. France, you represented the developer
22 in this case up to a point, didn't you?

23 A We served as bond counsel engaged by the
24 developer.

25 Q And the developer was your client in that

1 matter, was it not?

2 A That's right.

3 Q But as of about the 24th of September or
4 sometime shortly after that, when the CDA was
5 actually formed, the CDA became your client?

6 A That's correct.

7 Q And you no longer represent the developer
8 then, do you?

9 A I wouldn't know how to call that one. I
10 think you could easily take the position that once
11 the CDA was formed, that became our client.

12 Q Well, now, some of these agreements that
13 you talked about, the development agreement
14 particularly, will have as parties the CDA and the
15 developer, won't it?

16 A That's correct.

17 Q And different obligations and duties will
18 be placed upon each of those parties in the
19 agreement, won't they?

20 A That's correct.

21 Q And it's entirely conceivable that the
22 developer would have duties to the CDA as a result,
23 is it not?

24 A That's correct.

25 Q And the CDA to the developer as well,

1 correct?

2 A Yes.

3 Q Have you disclosed, prior to being retained
4 by the CDA, any conflict of interest to the CDA?

5 A The CDA was aware that we were engaged by
6 Forest City to create the CDA.

7 Q Have you disclosed the possible conflict
8 in writing to the CDA?

9 A No, we did not, as we did not believe there
10 was a real conflict.

11 Q Okay. Then the CDA has not waived the
12 conflict?

13 A They have not waived anything in writing.
14 I think you can make an argument that by their course
15 of conduct and by adopting the resolution of hiring
16 us with full knowledge that we had been working for
17 the developer in the past, that they have waived any
18 potential conflict, if there is, in fact, a conflict.

19 Q I see. How about the developer, has the
20 developer waived any conflicts with respect to the
21 CDA?

22 A Since the developer engaged us to create
23 the CDA and serve as bond counsel to the CDA, I think
24 they would be hard-pressed to claim there was any
25 conflict.

1 Q Have you disclosed any respective conflicts
2 to the County?

3 A The County, again, has been aware of our
4 role in this transaction. I've never purported to
5 represent the County on the transaction.

6 Q The resolution of the Economic Development
7 Authority found at Exhibit 5, which you went through
8 in your direct testimony, could you turn to that?
9 And directing your attention to the fifth whereas
10 paragraph, which I believe your testimony was was
11 essentially the economic-development-incentive
12 criteria of the County incorporated into this
13 document --

14 A That's correct.

15 Q -- is that right? Okay. It says here that
16 "The board has determined that the financial
17 incentives made under the economic-development
18 agreement meet these five criteria." Do you intend
19 to rely upon the resolution or are you going to do
20 your own due diligence into whether the board
21 actually made that determination?

22 A I think by adopting this resolution that
23 they have made that determination.

24 Q Did you draft this resolution?

25 A Yes.

1 Q Did you simply incorporate the
2 economic-development criteria found in Exhibit 48,
3 Bates number 1770? Did you simply incorporate those
4 into this resolution?

5 A I don't remember what I used to develop
6 this resolution, but it would have been some
7 iteration of these criteria.

8 Q And you put that literally every place you
9 could, didn't you?

10 A I think it appears in at least the board
11 and the Economic Development Authority resolutions.
12 I haven't reviewed the others.

13 Q Would you turn to Exhibit 4 please, for a
14 moment? Directing your attention to paragraph two,
15 in which the EDA and the memorandum -- the
16 economic-development agreement and the memorandum of
17 understanding are approved in substantially the forms
18 and are on file with the chairman, I believe you
19 testified that minor changes could be made, under
20 direct examination, did you not?

21 A That's correct. What I should have said
22 was non-substantive changes.

23 Q Can you point to language in this paragraph
24 two that indicates that any changes which might be
25 made by the chairman would be limited to

1 non-substantive changes?

2 A When the CDA approves these documents in
3 substantially the form attached or in substantially
4 the form on file, which is, in fact, the form
5 attached to the resolution, I would take the position
6 that you can't deviate substantially from that form.

7 Q But that's not exactly what the language
8 says, is it?

9 A No. There is no qualification that says
10 minor changes in this resolution.

11 MR. PEARSON: Your Honor, if you give me a
12 moment, I can take more minutes off.

13 THE COURT: All right.

14 BY MR. PEARSON:

15 Q In connection with your testimony about the
16 reserve fund, I think you indicated that the source
17 was bond proceeds, but that the uses of it were
18 limited, correct?

19 A And I think I made some assumptions there
20 that probably weren't expressed in the question.
21 Unless that reserve fund, and maybe we all assume
22 this, but unless that reserve fund is replaced with
23 an acceptable surety, then the use of that reserve
24 fund can only be to cover shortfalls and debt-service
25 payments. There would be no circumstance under which

1 you could take money out of that reserve fund unless
2 there were an excess in the reserve fund or unless
3 you replaced the reserve fund with an acceptable
4 surety.

5 Q Yeah, I think we understood that. I think
6 you were in here when we went over that. But
7 assuming that an acceptable surety is secured and the
8 developer gets those proceeds, and I think what you
9 said is the developer could use them to pay down debt
10 service; is that correct?

11 A That would be one permissible use.

12 Q Or the developer could use them to finance
13 improvements within the center?

14 A I'm sorry?

15 Q Could use them, could he not, to finance
16 improvements within the center?

17 A To finance improvements that would qualify
18 to be financed with bond proceeds.

19 Q With respect to your comments about the
20 reason for the validation suit being filed being the
21 pendency of this litigation, you are aware, are you
22 not, that the validation suit was filed on November 6
23 of last year?

24 A That sounds right. I don't really recall
25 the exact date.

1 Q Well, you are aware that your firm drafted
2 and filed the pleadings?

3 A That's correct.

4 Q Are you aware that the Taubman suit was not
5 filed until two days later, on the 8th of November?

6 A I don't know the exact date. I know it was
7 at some point after the validation suit was filed.

8 Q Are you aware that your firm represents the
9 Taubman Company in Northern Virginia?

10 A Yes, I am.

11 Q Is that the reason that your firm withdrew
12 from this suit?

13 A Yes.

14 Q The bonds that the CDA will issue here, are
15 they tax-increment-financing bonds or are they
16 special-assessment bonds?

17 A They are special-assessment bonds.

18 Q Tell me why.

19 A Because the only legal security for these
20 bonds is special assessments.

21 MR. PEARSON: That's all I have, Your
22 Honor.

23 THE COURT: Is there any redirect?

24 MR. PERROW: Yes, Your Honor.

25

1 REDIRECT-EXAMINATION

2 BY MR. PERROW:

3 Q Going back to this discussion about tax
4 exempt and taxable, is it true that bonds that are
5 issued by a subdivision, for valid purposes, such as
6 IDA bonds, can have taxable and non -- and tax-exempt
7 portions?

8 A That's correct.

9 Q And that frequently occurs?

10 A That frequently occurs.

11 Q And the fact that there's a taxable portion
12 doesn't make the entire financing, the entire
13 project -- doesn't mean that you're not financing
14 public improvements, does it?

15 A That's correct.

16 Q So you can -- to state it differently, you
17 can finance public improvements with taxable bonds?

18 A That's correct.

19 Q And when Mr. Pearson showed you Exhibit 4
20 and he said, he pointed out that there's no provision
21 about just making minor changes to documents, I
22 believe your answer was you would take the position
23 that you can't deviate substantially?

24 A That's correct.

25 Q And that's the position you would take as

1 bond counsel?

2 A I think that's what the language of the
3 resolution requires, but yes, as bond counsel, we
4 would take that position.

5 Q And that would mean that if it did deviate
6 substantially, then there would be a risk that you
7 would not render an opinion upon?

8 A We would require that it be presented to
9 the body again to be approved.

10 Q All right. And did you note the threat of
11 litigation of Taubman existed prior to the filing of
12 the bond-validation suit?

13 A Yes.

14 MR. PERROW: That's all I have, Your Honor.

15 THE COURT: Any other questions of Ms.
16 France?

17 MR. BUELL: No, Your Honor.

18 MR. PEARSON: No, Your Honor.

19 THE COURT: Ms. France, thank you very
20 much. You may step down. Can Ms. France be excused?

21 MR. PERROW: Yes, Your Honor.

22 THE COURT: Ms. France, you don't have to
23 come back tomorrow if you don't want to, but you're
24 welcome to.

25 (Witness stood down)



VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO

SHORT PUMP TOWN CENTER,
COMMUNITY DEVELOPMENT AUTHORITY,

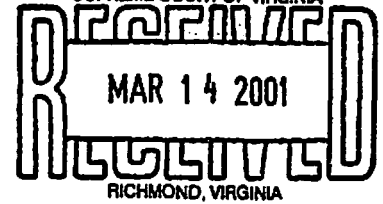
Plaintiff,

-vs-

TAXPAYERS, PROPERTY OWNERS,
et al.,

Defendants.

CLERK
SUPREME COURT OF VIRGINIA



LAW NO. CL00-1636

ORIGINAL

TRANSCRIPT OF PROCEEDINGS

BEFORE: THE HONORABLE RANDALL G. JOHNSON, JUDGE

TRIAL - DAY 2 - VOLUME II

9:00 a.m., February 1, 2001

Richmond, Virginia

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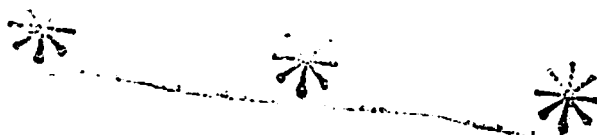
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* * * * *

I N D E X

WITNESS:	DIR	CROSS	REDIR	RECROSS
JEROME D. OSTER	5	38, 40		
KEENAN RICE		76		
✓ DAVID LARUE	105	130, 136		
✓ FREDERICK AGOSTINO	139	146, 148	150	
✓ BRUCE W. HECKMAN	151	163		

* * * * *



1 MR. PEARSON: Thank you, your Honor.

2 THE COURT: And 2 is now admitted.

3 All right. Mr. Oster, would you come up to the
4 witness stand, please.

5

6 JEROME D. OSTER,

7 was sworn and testified as follows:

8 DIRECT EXAMINATION

9 MR. FOOTE: Your Honor, at the beginning and
10 for the record this morning, I would like to
11 observe on behalf of all of the lawyers in this
12 case who aren't privileged to live in your fair
13 city that this morning on I-64 I witnessed what I
14 affirmatively recognize as rush hour traffic.

15 THE COURT: Be sure to tell that to the --
16 came before us yesterday who said we don't have
17 that.

18 MR. FOOTE: Your Honor, I have to confess it
19 was in Henrico County.

20 BY MR. FOOTE:

21 Q. Mr. Oster, would you please identify
22 yourself for the Court. And get comfortable with the
23 microphone. The acoustics are very good with the
24 microphone.

25 A. I'm Jerome D. Oster.

1 Q. Mr. Oster, what do you do for a living,
2 sir?

3 A. I have 30 years of experience in retail
4 location research. The retailers that I have worked for
5 over the past 30 years are department stores, and that
6 would include traditional department stores as well as
7 discount department stores, specialty stores of various
8 kinds including what we call today big box stores and
9 shopping center developers, regional shopping centers,
10 power centers, and the like.

11 My career basically divides up into three major
12 parts. During the 1970s I was head of location research
13 for Dayton Hudson Corporation. Dayton Hudson Corporation
14 today is known as the Target Corporation with stores
15 across much of the United States.

16 Q. Let me slow you down, sir, and say when
17 you were working for Dayton Hudson in this first chunk of
18 your career, what kind of work specifically were you doing
19 for them?

20 A. Specifically location research, studying
21 new markets and new sites for their various department
22 stores, discount stores, specialty stores, and shopping
23 centers.

24 During the 1980s I was vice president of
25 research for General Growth Companies. General Growth is

1 one of the nation's largest developers of large shopping
2 centers, regional shopping centers. And my function there
3 was to help them evaluate new locations, to perform
4 research on markets and on sites.

5 And beginning in the 1990s, I became a private
6 consultant, and again my function is basically the same.
7 I work with major retail chains and with shopping center
8 developers, and my function is basically to help them
9 evaluate new locations.

10 I perhaps should say something about what is
11 location research. I keep using that term over and over
12 again.

13 Q. Since you're anticipating my next
14 question, Mr. Oster, why don't you answer that question?

15 A. We and my professional colleagues that do
16 this kind of work, we are fond of saying that the three
17 most important success factors in retailing are location,
18 location, location. Everybody has heard of that. There's
19 some truth to that. In fact, there's a good bit of truth.
20 If you locate the same store a mile down the road this way
21 or a mile down the road this way, that same store can have
22 very different sales performance depending on the
23 specifics of the location. If a chain store locates in
24 one location rather than another, it can have very
25 different consequences in terms of sales transfer. Sales

1 transfer means taking away sales from another store, and
2 that could apply to shopping centers as well.

3 Q. Mr. Oster, let me interrupt you to say,
4 are you self-employed today?

5 A. I am self-employed, sir.

6 Q. And what do you call your business?

7 A. Oster Research Group.

8 Q. And the Oster Research Group consists
9 primarily of who?

10 A. Primarily myself.

11 Q. Based on your long years of experience?

12 A. Yes, sir.

13 Q. And I understood you to say that you have
14 worked over the years with some of the largest retailers,
15 but did I also hear you say you actually work for shopping
16 center developers?

17 A. Yes, sir.

18 Q. And what is the principal tool -- you were
19 discussing it a moment ago, was is the principal tool in
20 your industry?

21 A. It is a projecting of sales and projecting
22 of sales transfer.

23 Q. And how do you go about doing that,
24 Mr. Oster, in your profession?

25 A. The critical thing is to have a good basis

1 of information regarding the type of facility that you're
2 studying. We always gather information about existing
3 stores. Let's say if I'm working for a Kmart Corporation
4 or if I'm working for a Target, for example, we gather a
5 great deal of information about the Target store and where
6 the particular Target store draws its customers from. We
7 look at literally hundreds of existing cases of this type.
8 We study them. We, in fact, make models of how these
9 stores draw their customers. And once we have information
10 that we could express and what we call a model, we then
11 can apply that model to the new locations and project,
12 with a good degree of accuracy, the sales at that
13 location, and we can also do sales transfer from that same
14 model. And that same sort of thing is done with regard to
15 the shopping centers and such that when you have this
16 basic information, you then can predict sales.

17 Most of the people who do this kind of work,
18 most of my fellow professionals, tend to be on the staffs
19 of the retailers in particular, and that's because of the
20 need to use this proprietary information about where the
21 stores draw their business from. And there are a few
22 consultants that do this work as well. For example,
23 Thompson & Associates of Ann Arbor, Michigan, they have a
24 long and continuing relationship with Home Depot. And
25 their working relationship is very effective. They do

1 some very good projections, and that has helped Home Depot
2 over the years.

3 Q. Mr. Oster, would you say based on your
4 years of experience in the business, are there a lot of
5 people that do what you do?

6 A. Not a lot of people. It tends to be a
7 fairly small community, and we tend to know one another.

8 Q. And in determining your projections,
9 etcetera, in coming to the opinions that you give to your
10 clients, is there what I shall call an informal component
11 to that as well as your report? Do you call around and
12 talk to folks?

13 A. There's a network of people that we confer
14 regularly, and there are formal bases for doing that. The
15 International Council of Shopping Centers. And I was a
16 member of the ICSC research advisory group for a number of
17 years. But then, of course, there's an informal network
18 as well.

19 Q. And, Mr. Oster, does your work lead you to
20 the ability to make specific recommendations to your
21 clients as to where shopping centers ought to be?

22 A. Yes, sir.

23 MR. FOOTE: Your Honor, we would offer
24 Mr. Oster as an expert witness with respect to the
25 issues to which he has just testified; the

1 questions of locations of shopping centers, and
2 the questions of sales transfers that occur as a
3 consequence of the locations of businesses. I
4 believe he's testified extensively as to what he's
5 done for the last 30 years, and we would offer him
6 as an expert in the field.

7 THE COURT: Mr. Spencer?

8 MR. SPENCER: Everything he's just testified
9 to, I think, is a bit vague. But we have no
10 objection to his being received as an expert in
11 the field of location of shopping centers and
12 sales transfers.

13 THE COURT: Mr. Buell?

14 MR. BUELL: No objection.

15 THE COURT: All right. The Court will accept
16 Mr. Oster as an expert in the field of location
17 and relocation of shopping centers and sales
18 transfers.

19 BY MR. FOOTE:

20 Q. Mr. Oster, we have for the benefit of the
21 witnesses -- and you knew it was going to happen, so you
22 won't be surprised -- if you'll turn to the notebook on
23 your right, and I'd ask you to turn to Exhibit 58.

24 A. 58?

25 Q. Yes, sir, it's 58. And before we do

1 anything else with it, let me just ask you if you
2 recognize that document?

3 A. I do, sir.

4 Q. All right, sir. First off, let me ask
5 you, how did you come to work on what we now know as the
6 Short Pump Mall Center? Short Pump Town Center Mall
7 project, excuse me.

8 A. Working with Forest City Development
9 Company of Cleveland.

10 Q. You were, in fact, retained by them?

11 A. Yes, indeed.

12 Q. And that was for the purpose of doing
13 what, sir?

14 A. To prepare a study of the sales and a
15 sales transfer that emanated in the document that you
16 referred me which is labeled 58.

17 Q. Before I take you to that document, can
18 you tell this Court based on your experience what you
19 would consider a high-end mall?

20 A. The terminology in our field is not all --
21 you know, everybody doesn't use the same exact
22 terminology. But certainly as informally used, it would
23 refer to a mall of the type that Short Pump is planning to
24 be.

25 Q. And why would that be, Mr. Oster?

1 A. Because of the anchor tenants, Nordstrom
2 and Lord & Taylor in particular, plus the high proportion
3 of high-quality, fashion-oriented specialty stores that
4 are planned to go in it.

5 Q. What makes someone a high-end retailer?

6 A. The types of merchandise that are
7 provided. They tend to be ego oriented, particularly
8 apparel, and they tend to be higher price points. The
9 service levels that are provided by the store staff to
10 customers are much higher than is typically found in,
11 let's say, a traditional department store and -- or
12 value-oriented types of stores. Those would be the
13 primary.

14 Q. Have you ever heard use of the term
15 superregional mall?

16 A. Yes, sir.

17 Q. And would the Short Pump Town Center Mall
18 qualify as a superregional mall in your opinion?

19 A. Based on size, yes. That's another way of
20 classification. It's classification based on size. And
21 we typically, oh, 850,000 square feet, some people will
22 talk about 900,000 square feet, and it tends to be a
23 variable threshold, but certainly the Short Pump Town
24 Center would qualify.

25 Q. And if I understood your answer correctly,

1 it's also dependent at least to some extent on who's in it
2 as well as how large it is?

3 A. Yes, sir.

4 Q. All right. Let me ask you now to turn to
5 Exhibit 58, and would you please tell the Court what this
6 is?

7 A. It's a four-page document summarizing the
8 findings of my study.

9 Q. And what specifically were you looking at
10 in performing this study, Mr. Oster?

11 A. What I was looking at is, I think, set
12 forth in the title itself. The title reads, "Mall
13 Development at Short Pump or Stony Point." And it, for
14 the reasons that are set forth in that document itself, it
15 was expected that, one, as you call it a high-fashion mall
16 would be developed in the near term in the Richmond area,
17 and that it would go in one of two places. It would
18 either go at the Short Pump location, or if it didn't go
19 there it would go at the Stony Point location. Either of
20 the --

21 Q. Let me walk through this a little bit to
22 make it go quicker. You said either Short Pump or Stony
23 Point. Why did you conclude that it was going to be one
24 and only one of those two places?

25 A. Because of the types of stores that would

1 be in the center. These types of stores, particularly the
2 anchor stores, would not go into two locations in a
3 metropolitan area of this size. In fact, you know, this
4 is in a size range where there are not that many -- Take a
5 Nordstrom in particular. There are a few Nordstrom stores
6 in metropolitan areas with a population in the vicinity of
7 what we have in Richmond today, which is slightly under a
8 million.

9 Q. So do I take it, then, that Nordstrom, for
10 example, tends to locate in larger localities?

11 A. Yes, sir.

12 Q. Is that universally true?

13 A. It is universally true. Let's see. If
14 you take the large metropolitan areas in the country, and
15 I define large as a million and-a-half people in the metro
16 area or larger, that is basically -- Nordstrom, I don't
17 have the figures in front of me, but it's about two-thirds
18 of those large metropolitan markets that Nordstrom is in.
19 There's many more that are below that number, and
20 Nordstrom I think is in something like five or six or
21 seven, or something like that, so they tend to locate in
22 larger markets, yes, sir.

23 Q. But, if I've understood you, when Richmond
24 got to about a million people, then all of a sudden it
25 came at least on Nordstrom's radar screen?

1 A. I can't say that from internal knowledge.
2 But I can say that when a metropolitan market hits that
3 size range, it tends to be looked at by retailers of the
4 type that Nordstrom is.

5 Q. But not for more than one store?

6 A. But not for more than one store, no, sir.

7 Q. Now, you had indicated that there would
8 likely to be only one such mall, and then you suggested
9 there are only two locations. And how did you come to
10 that conclusion?

11 A. Based on my contacts in the industry and,
12 you know, the feedback that I received from my
13 professional counterparts, I knew that there were a number
14 of high-end retailers that were looking at the market, and
15 that, oh, whereas 10 years go, let's say, other locations
16 had been talked about for a new shopping center, things
17 kind of boiled down, narrowed down to two locations. And
18 one was the Taubman organization's location at Stony
19 Point, and the other was Forest City's at Short Pump.

20 Q. Had there been locations that you had
21 heard about which might be located, for example, in
22 Chesterfield County?

23 A. Yes. As I say, 10 years or more ago.

24 Q. What happened to them?

25 A. Essentially they're out of play, and

1 they're out of play for a variety of reasons. And, you
2 know, there are power center developments on some of those
3 sites today, and -- but there was also 10 years of out
4 study and evaluation of locations as well.

5 Q. Mr. Oster, have you actually seen these
6 locations?

7 A. Yes, sir.

8 Q. You've traveled over the area?

9 A. Yes.

10 Q. Did you do that back when you were
11 preparing this report?

12 A. Yes.

13 Q. Did you do it again recently at my
14 request?

15 A. Yes, I did, sir.

16 Q. Now, we were talking here about one mall
17 in only two locations. You have a description here on
18 what is marked at the bottom BOS-1887, which is the first
19 page of that report, with respect to Regency Square. What
20 did you determine about Regency Square that led you to the
21 opinions that you developed?

22 A. A lot of it was based on preexisting
23 knowledge that I had.

24 Q. Yes, sir. I'm just asking you to explain
25 to the Court what you've got here, why this is here, why

1 you're talking about this.

2 A. The Regency shopping center?

3 Q. Yes, sir.

4 A. The reason it's here is that, from my
5 knowledge, since it was the top performing mall in the
6 Richmond area, it is also the closest to Short Pump, and
7 it is the mall with the best tenanting and doing
8 exceptionally well. That would be the mall that would
9 suffer sales transfer if and when either Short Pump or
10 Stony Point opens.

11 Q. And so to sort of cut to the chase on
12 this, you then looked, I take it, at what the potential
13 impact on Regency would be in the event of a regional mall
14 at either of the other two locations?

15 A. Yes, that was a key objective of the study
16 that resulted in this document.

17 Q. All right, sir. And what did you
18 determine?

19 A. It was my knowledge as indicated -- Excuse
20 me.

21 Q. Would you like some water? I stopped you
22 as you were about to get in full flow, Mr. Oster. What
23 did you determine?

24 A. The results of my analysis was that, A, if
25 the new shopping center develops at Short Pump, Regency

1 Square would experience a 25-percent reduction of its
2 sales. We call that sales transfer. If on the other hand
3 the shopping center development occurred at Stony Point,
4 there would be a reduction of 50 percent in the sales of
5 Regency.

6 Q. Let's take it back and work it through so
7 that we can keep this information sort of collocated in
8 our minds. How did you make the determination about the
9 effect on Short Pump? What were the factors that you
10 considered?

11 A. The factors were the normal things that we
12 consider in any analysis, and that is the distance
13 separating these shopping centers, the existing and either
14 of the two planned ones. And in the one case, the
15 distance as the crow flies, straight-line distance --

16 Q. You need to tell us which case we're
17 talking about, sir.

18 A. We're talking about Short Pump, sir. The
19 distance as the crow flies from Regency Square to the
20 Short Pump site is 5 miles. The distance from Regency
21 Square to the Stony Point site is 3 and-a-half miles.
22 Now, both of these are as the crow flies, but there's a
23 significant difference in that mileage that also has to be
24 considered. In the case of Stony Point, there is
25 virtually a direct road. It winds just a tad, but it's

1 pretty well a direct course, the same road from Stony
2 Point to Regency.

3 Q. You said from Stony Point to Regency?

4 A. From Stony Point to Regency. I'm sorry.
5 It's a direct route from Stony Point to Regency. On the
6 other hand, from Regency to Short Pump there is not a
7 direct route, and you can't get directly from one to the
8 other. And to get there, to navigate there in an
9 automobile, you've got to drive down a series of different
10 roads and make your way there.

11 Q. And that makes a difference?

12 A. And that makes a real difference in the
13 world of retailing, that the -- is the location.

14 Q. All right, sir. So, but how did you come
15 to the number 25 percent? How did you make that
16 determination?

17 A. As I had indicated earlier, in the course
18 of the kind of work that I do, I acquire a good deal of
19 information about the relationship between customers and
20 the facilities that I'm studying. I have a good bit of
21 information which I have assembled together in, you know,
22 various kinds of models, different tools that I use in my
23 analysis. I basically took the information that I have in
24 my possession as a part of the work that I normally do,
25 and took that into consideration, took my experience

1 acquired over 30 years of research, and also the
2 information I gathered by extensive field work in this
3 particular area, and sort of put this all together, and
4 out of this came the estimate of 25-percent transfer for
5 Short Pump.

6 I would note that this number is a number that I
7 wouldn't -- I mean, this to me would be a reasonable
8 number. And, in fact, as I read the deposition testimony
9 from one of the Taubman representatives, there's a
10 reference to that figure as well, 25 percent.

11 Q. Now, how did you come to the conclusion,
12 however, that the impact on Regency would be the 50
13 percent that you said if the mall were built at Stony
14 Point?

15 A. There is, when you examine shopping
16 patterns associated with regional shopping centers, what
17 you see -- if I could graph it sort of in the air here --
18 that right around the shopping center there is a high
19 degree of probability of shopping at that shopping center.
20 And then it's kind of bell-shaped; it falls down and
21 generally tapers off with increasing distance. Within
22 that very close-in area, in this case we're talking 3
23 and-a-half miles, the penetration almost uniformly for
24 regional centers is high. There's a high propensity to
25 shop at that shopping center. So as you get into that

1 vicinity, the transfer is going to be very severe. That's
2 the nature of the way that shopping centers behave.

3 Q. Well, how is it possible -- Excuse me.

4 A. Yes, sir. The distance, of course, is one
5 and-a-half miles. You know, 3 and-a-half, subtract that
6 from 5. However, that's 43 percent, that particular
7 difference. And there's a difference in roadways. In one
8 case you can go directly from one location to the other,
9 and in the other case you cannot do so.

10 Q. Well, explain to me what does not
11 necessarily seem to be revealed wisdom, how can you go
12 from 3 and-a-half to 5 miles and yet see the sales
13 transfer change double?

14 A. That's a very good question. One way I
15 think I could address that is that in reviewing the
16 testimony of an expert witness for the Taubman
17 organization, Mr. Muller I believe, he indicates
18 familiarity with the gravity model. Now, the gravity
19 model is one of the models that we use to kind of model
20 that shopping pattern that I'm talking about.

21 The mathematics of that particular model,
22 distance is a key variable in that model. And distance is
23 not expressed arithmetically, it's expressed
24 geometrically. Okay? So that when you're trying to
25 assess the probability that people from a particular

1 neighborhood, which we generally refer to as census
2 tracts, will shop at one shopping center versus another,
3 distance is a key variable. And what we find works very
4 well, what is inherent in the gravity model is that
5 expression of distance geometrically. So, for example, 3
6 and-a-half miles, you square that, you get 12.25, do you
7 not?

8 Q. You're going to have to explain to me how
9 you got to 12.25 because I --

10 A. Well, 3.3 times 3.3.

11 Q. Oh, excuse me, yes.

12 A. Okay. And then if you take the 5 miles,
13 square that, you get 25, do you not? And what's the
14 relationship, then, between 12.25 and 25?

15 Q. Seems to be 2.

16 A. So we have a factor of 2. And in that
17 model that the witness for the other organization
18 indicates he's familiar with, it's -- that kind of
19 relationship is inherent. I see that all the time. I
20 don't have to refer to a gravity model. I see it from the
21 shopping patterns that I look at directly. But it is
22 common, and certainly for people who do this kind of work,
23 myself and my colleagues, it would not be unusual or
24 unexpected that --

25 Q. To make sure we didn't lose track, to say

1 it wouldn't be unexpected to see that doubling of impact
2 on what seems a short distance?

3 A. That's what I was trying to say, sir.

4 Q. Did you, in your evaluation of this, did
5 you consider the possible sales transfer impact of the
6 construction of the mall at Short Pump on any other
7 businesses in Henrico County other than Regency?

8 A. Yes. But you've got to realize that
9 essentially light retail facilities compete with light
10 retail facilities. So a regional shopping center
11 primarily will compete with another regional shopping
12 center, so that the first level of impact would be on
13 other shopping centers, on other regional shopping
14 centers, not the prior center.

15 Now, the regional shopping center that is
16 closest to Short Pump is Regency. The regional shopping
17 center that has the best sales productivity, the one
18 shopped most often is Regency. And the one that has the
19 strongest fashion component is Regency. And, therefore,
20 that's the one that gets the major impact.

21 You could go on from there and say what about
22 other regional shopping centers. For example, Virginia
23 Center Commons, a fine shopping center in the north, that
24 shopping center, again as the crow flies, is 9 and-a-half
25 miles from Short Pump. Now, in the world of retailing,

1 that's a long way.

2 To put it in a frame of reference, many
3 analysts, I believe, would look at about 8 miles in a
4 metropolitan area where you have urban development
5 throughout the interstitial area of a norm. In
6 Minneapolis-St. Paul, for example, you can go from one
7 regional center to the next, and there's an 8-mile space.
8 Even in Detroit, that 8 miles holds up fairly well. Here
9 we're talking about 9 and-a-half miles.

10 And the trade area of Virginia Center Commons is
11 different. They serve a different clientele. There's a
12 small degree of overlap, but in the main it's a different
13 trade area. It's a trade area that covers the north and
14 northeastern parts of the metropolitan area.

15 When you go down from Virginia Center Commons
16 and look at other centers, they are either further away,
17 inherently less successful, or have less of a fashion
18 component, so, you know, you might experience a very small
19 difference. But trying to measure this is difficult.
20 Then you can say what about those stores that are in the
21 immediate vicinity of, let's say, a Short Pump, you know,
22 what -- right across the street, wouldn't they be
23 impacted. And then you could get into specifics. What
24 about the Ukrop's store. Well, obviously Ukrop's sells
25 groceries and it's one of the finest grocery stores there

1 in the Short Pump area, but its sales would not be
2 impacted, nor would you find a Wal-Mart supercenter,
3 which, again, even though it's in general merchandise
4 retailing, it's in a different category of general
5 merchandise retailing catering to different consumer
6 needs, you would not find impact there. And you could go
7 through the new Best Buy, Target, etcetera.

8 Barnes and Noble, interestingly, just opened a
9 store right almost near where the Short Pump site is. And
10 that tells us something. That tells us that many of those
11 stores in the Short Pump vicinity will actually experience
12 an increase in their sales, and they will experience that
13 increase in sales simply because of the increased shopper
14 traffic that will be in the area due to that mall
15 development.

16 Q. That leads me to the next line of inquiry,
17 Mr. Oster. And that is to say, what is your experience,
18 then, with respect to the impact on new business, other
19 business that isn't here, of the location of a regional
20 mall, a superregional mall?

21 A. Well, it tends to be a node. It is one of
22 those central points in a metropolitan area that tends to
23 generate collateral development such that it becomes a
24 more attractive location not only for retailing, but for
25 office development and the like.

1 Q. All right. Are sales transfers a zero-sum
2 gain in your experience?

3 A. But it's null. And, interestingly, as I
4 look at Mr. Muller's deposition, the reference or the
5 concept there seemed to be that it was a zero-sum gain.
6 Number one, if there is empirical documentation for that,
7 I would enjoy -- I would love to see it. It would help me
8 professionally. I have not found it.

9 Secondly, it's not consistent with my
10 understanding. We're looking here at a shopping center
11 that will increase the volume of shopper traffic from
12 places outside of the Richmond metropolitan area, not only
13 Henrico County but the Richmond metropolitan area. Places
14 like Charlottesville. You will see more shoppers coming
15 from a place like Charlottesville, or Staunton, or
16 Waynesboro. Western Virginia generally will -- residents
17 of these areas will be more represented at Short Pump than
18 at other shopping -- other existing shopping centers in
19 the area today.

20 Then, secondly, there's another aspect that sort
21 of defies this zero-sum assumption, and that's the outflow
22 of shoppers that currently exist, particularly for these
23 high-fashion goods. Our surveys have shown that
24 Washington D.C., for example, among shoppers that shop
25 for -- are aware of fashion merchandising, nearly half of

1 them at some point or another have shopped in the
2 Washington D.C. area to shop in Nordstrom, to shop in Lord
3 & Taylor, to shop in stores like that. There's also a
4 high incidence of shopping in New York City. And we also
5 find, interestingly, with the new shopping center over in
6 the Norfolk area, that there's an outflow of shopping
7 dollars there. Now, that outflow --

8 THE COURT: Let me ask you just to move the
9 microphone away from you just a little bit.

10 THE WITNESS: Okay. Like this?

11 THE COURT: No, just swing it around a little
12 bit.

13 THE WITNESS: Okay. Can you hear me now?

14 THE COURT: Yes, we can hear you. We could
15 hear you a little bit too much at first.

16 THE WITNESS: I apologize. This is unusual.

17 THE COURT: Keep talking just like you were.

18 THE WITNESS: Okay. This flow of dollars to
19 communities outside of Richmond and outside of
20 Henrico County will be reduced as a result of this
21 new shopping center.

22 There's also a third factor, and it's
23 difficult to document, but, you know, over 30
24 years I think I've seen it, I haven't measured it
25 very well, and it's that when you introduce

1 something new into the retail marketplace, when
2 you introduce something new like a Nordstrom store
3 or a Lord & Taylor or some of the other fashion
4 stores that would come into the new shopping
5 center, it's a stimulus to the residents to buy
6 some things that they wouldn't otherwise buy.
7 This may cause some shifts, but it really will not
8 be a shift -- You won't spend less in Wal-Mart,
9 for example, or less in an existing store, but
10 because there's something new available in the
11 marketplace it will increase the level of
12 spending.

13 So there are at least three major reasons why
14 this is not a zero-sum gain. And those people
15 that make that assumption, I don't know why they
16 do, but it's not consistent with the world as I
17 see it.

18 BY MR. FOOTE:

19 Q. Now, Mr. Oster, let's suppose as you've
20 suggested to us today that if Regency -- I'm sorry, if
21 Stony Point is built Regency will loose 50 percent of its
22 sales, is your opinion changed at all if you know that
23 both Regency and Stony Point are owned by the same
24 company?

25 A. Certainly not. There will still be a

1 change, and the change -- I mean, I can't -- I don't know.
2 I'm not a party to decision making in another
3 organization.

4 Q. Right. That's not what I asked you.

5 A. But speaking from my experience and from
6 what I have seen, and what I would expect from what I have
7 seen over the years, and that is that one shopping center
8 basically would get the good stores, and there would be
9 some loss of the good stores, if you will, from Regency to
10 Stony Point, and there would be a transition to a
11 different kind of merchandising at Regency. That
12 transition would see more outlet type stores, value
13 oriented stores. You'd see -- What would be a good
14 example. A warehouse, a Baby Warehouse, Burlington Coat,
15 that sort of thing is what I would expect, and I would
16 expect to see a very fine, very attractive upscale large
17 regional center development with fashion stores at Stony
18 Point.

19 Q. And I take it that, in a more abbreviated
20 form, that is indeed the opinion that's set forth in your
21 Exhibit Number 50; is that correct?

22 A. In Number 59?

23 Q. I'm sorry. 58 is the one. I said 50.
24 58?

25 A. It's my four-page document which is titled

1 "Mall Development at Short Pump or Stony Point." Yes,
2 that's essentially what I say.

3 Q. And it's consistent with what you've just
4 told the Court?

5 A. That is right, sir.

6 MR. FOOTE: Your Honor, we would move the
7 introduction of Exhibit 58.

8 THE COURT: Is there any objection?

9 MR. SPENCER: No, sir.

10 MR. JOHNSON: Well, as to the date, it's not
11 dated.

12 THE COURT: I beg your pardon?

13 MR. JOHNSON: The document is not dated.

14 MR. FOOTE: It's a fair question, your Honor.

15 BY MR. FOOTE:

16 Q. Mr. Oster, when was this prepared, sir?

17 A. It was prepared about a year and-a-half
18 ago. It was simply inadvertent. A lot of things that I
19 prepare, I'm usually writing for, you know, private
20 clients, and the shelf life of what I prepare is usually
21 very short, and I'm not --

22 Q. Well, let me ask you a question that leads
23 me to. This was prepared a year and-a-half ago. Are the
24 opinions you're giving today the same? Have they changed?
25 You said shelf life was short.

1 A. Based on my survey of the area and
2 reflection on everything in this regard, if anything,
3 today my opinion is even stronger. And into that current
4 opinion are some of the statements in the Taubman
5 organization's deposition that I read, essentially
6 confirming what my understanding was, so I feel very
7 strongly that if Short Pump isn't developed today in the
8 near term, that we will see a near term development at
9 Stony Point.

10 THE COURT: Is there any objection now?

11 MR. JOHNSON: No, sir.

12 THE COURT: All right. That will be admitted
13 as Plaintiff's Exhibit 58.

14 BY MR. FOOTE:

15 Q. To handle sort of the logistics of this,
16 let me ask you to turn to 59, and ask you to identify that
17 for the Court, please?

18 A. That's another document that I prepared
19 about a year before the one we were just talking about.
20 And it's called "A Market Study, Short Pump Town Center,"
21 and that's a more general document.

22 Q. But did it contain information that you
23 used in coming to your opinion as expressed in 58?

24 A. It, you know, it was information I used,
25 some of the same data I reviewed, and yes.

1 Q. All right, sir.

2 MR. FOOTE: Your Honor, I would move the
3 introduction of Number 59.

4 THE COURT: Is there any objection?

5 MR. JOHNSON: No objection.

6 MR. SPENCER: None.

7 THE COURT: 59 is admitted.

8 BY MR. FOOTE:

9 Q. And, finally, let me ask you to turn to
10 Exhibit 60, and ask you, Mr. Oster, if you know what that
11 is?

12 A. Yes. This is a document that I prepared
13 after the four-page memo. The date is September 1999.
14 And that document summarizes the results of some consumer
15 research that was done. And my role here basically was to
16 report on data that had been collected by another party.
17 And I basically took this information and put it in the
18 report.

19 Q. Are the opinions to the extent they're
20 opinions put forth in this, are these your opinions?

21 A. It pretty much is a straight reportage of
22 data. It says the data are data this, data that. To the
23 extent that there are opinions in there, it would reflect
24 what my opinion is, right. My interpretation, let's say,
25 of what the survey data says.

1 Q. Who prepared the survey data?

2 A. It was prepared by a professor of
3 marketing at the local university, Dr. Kiecker.

4 Q. Is this the kind of information that you
5 and people in your profession would, in fact, customarily
6 rely on in coming to opinions?

7 A. Yes, a survey, consumer survey -- in this
8 case we had a telephone survey -- are commonly used in our
9 work.

10 Q. And can you briefly summarize what this
11 led you to with respect to the opinions you're giving
12 today?

13 A. Well, it primarily deals with the
14 consumers' interests in high-fashion retailing. And I
15 was, you know, frankly surprised by the high level of
16 interest that was indicated by the survey.

17 Q. High level of interest in what?

18 A. In these types of stores. That the
19 general consuming public based on the sample that we
20 surveyed, and there's about 700 people interviewed which
21 is quite a large sample, they indicated a lot of interest
22 in this type of a shopping center and the desire that one
23 would be built.

24 And I haven't looked at this document, and I
25 apologize, lately, but I think the Short Pump location was

1 mentioned in one of the questions. But there are things
2 like the out shopping. Well, out shopping is taking your
3 money -- people here are going up to Washington D.C., for
4 example -- the percentage of people that do that. And
5 that kind of information is here, and that's what I
6 earlier in my testimony and now I refer to.

7 MR. FOOTE: Your Honor, I'd like to move the
8 admission of Exhibit 60, please, sir.

9 THE COURT: Is there any objection?

10 MR. SPENCER: No objection.

11 MR. JOHNSON: Objection, your Honor.

12 THE COURT: What is the objection?

13 MR. JOHNSON: It's not a proper foundation.
14 He didn't do the study. He's not an expert in
15 telephone surveys or telephone research.

16 MR. FOOTE: He testified that this is the
17 kind of information upon which he routinely
18 relied.

19 THE COURT: I'm going to overrule the
20 objection. Plaintiff's Exhibit Number 60 will be
21 admitted.

22 BY MR. FOOTE:

23 Q. Mr. Oster, in the course of your
24 evaluation of this, did you ever give opinion to whether
25 there was likely to be a smaller mall? And let's say a

1 900,000-square foot mall. And I know you know there was a
2 plan of development for one. Did you ever give an opinion
3 as to whether that smaller mall would likely be built in
4 the event that Stony Point were built?

5 A. As I testified earlier, there is the
6 probability --

7 MR. SPENCER: I think that's beyond the scope
8 of his expertise, at least as I understand it.
9 He's talking not whether a mall should be built.
10 But where and sales transfers is the only area in
11 which he's been admitted as an expert.

12 MR. FOOTE: Your Honor, this goes straight to
13 location.

14 THE COURT: Objection is overruled.

15 MR. FOOTE: Thank you, sir. I talked myself
16 out of winning that one.

17 THE WITNESS: Could you repeat what you said?

18 BY MR. FOOTE:

19 Q. My question was: Did you give any
20 consideration to whether a smaller mall of approximately
21 900,000 square feet would be built at Short Pump if Stony
22 Point were built?

23 A. It wouldn't happen. The kind of stores
24 that we're talking about would go into one location. You
25 would not have a second high-fashion mall. It just -- The

1 anchors wouldn't be available. And if the anchors aren't
2 available, you wouldn't be able to put the -- find the
3 small tenant for such a development.

4 In the event that Short Pump is not developed as
5 currently planned, even though there's a lot of big box
6 development on Broad, I mean, that's one of the longest
7 commercial strips with big boxes, power centers, that you
8 can find anywhere, but there would still probably be
9 potential to put some more boxes on the Short Pump site.
10 And I could see a retail development along that lines.
11 And outside of retailing -- here I'll acknowledge I'm not
12 an expert so I really can't talk about the market for
13 office or so forth -- but I can see that kind of
14 potential. I could not see the potential for another
15 high-end mall. That wouldn't happen.

16 Q. In your experience, then, based on your
17 expertise, do these big boxes produce the kinds of sales
18 per square foot and thus revenues to localities as do
19 malls?

20 A. They have different sales performance
21 characteristics, and the overall level of return of sales
22 being generated would be less. But more important than
23 that, they really don't serve as nodes for development.
24 It's not a catalyst to additional development in the way
25 that a regional shopping center, let's call it, the way

1 that a superregional center and particularly a high-end
2 superregional center is. We find that these types create
3 other development around it, but a more big box
4 development, power center development at Short Pump,
5 wouldn't that effect.

6 Q. You indicated earlier that you knew the
7 people that do your kind of work, and I'm sure there are
8 other people that know something about this, but have you
9 ever heard of a gentleman by the name of Thomas Muller?

10 A. I hadn't until I looked at the deposition,
11 no, sir.

12 MR. FOOTE: Your Honor, one moment, please.

13 THE COURT: All right.

14 MR. FOOTE: Your Honor, that's all I have for
15 Mr. Oster.

16 THE COURT: All right. Mr. Spencer?

17 MR. SPENCER: Yes, sir.

18
19 CROSS-EXAMINATION

20 BY MR. SPENCER:

21 Q. Good morning, Mr. Oster. My name is Chris
22 Spencer. I'm here on behalf of the three taxpayers.

23 You may have testified to this, and I apologize
24 if you did, but you were hired by whom to perform these
25 analyses?

1 A. Forest City Development Company. And I am
2 currently a witness on behalf of the CDA.

3 Q. I see. You were asked, as I understand
4 your testimony, to gather evidence on really one question,
5 and that is whether it would be better financially for
6 Henrico County to have a mall at Short Pump than for
7 Richmond to have a mall at Stony Point?

8 A. I am not a financial expert. I'm an
9 expert on retail sales.

10 Q. And sales transfer?

11 A. And sales transfer. That's the bailiwick
12 that I and my professional colleagues deal with. You talk
13 about the different jurisdictions, the fact that different
14 jurisdictions may be involved, are not part of my study
15 directly, but I was looking at the differential sales
16 impacts on Regency of the two alternative development
17 scenarios, either Stony Point or Short Pump.

18 Q. Sure. And in terms of analyzing sales
19 transfer, the question that you were to answer is was it
20 better for Henrico to have a mall at Short Pump than for
21 Richmond to have a mall at Stony Point, from the
22 standpoint of sales transfers?

23 A. You're exactly right, sir.

24 Q. All right. And the purpose for your
25 analysis was to determine -- And I'm referring to question

1 13 of Exhibit 60. If you would turn to that, please.

2 A. Let's see.

3 MR. SPENCER: May I help him, Judge?

4 THE COURT: Yes.

5 MR. SPENCER: Actually, questions 12 and 13.

6 THE COURT: It's page 16.

7 MR. SPENCER: This is the page I'm looking at.

8 THE WITNESS: Okay. Sure.

9 THE COURT: Maybe I have the wrong page. What
10 page are you looking at?

11 MR. SPENCER: Actually, the Bates number is
12 003, your Honor.

13 THE COURT: Okay.

14 THE WITNESS: Now, what on this page are you
15 directing me to?

16 BY MR. SPENCER:

17 Q. The questions 12 and 13.

18 A. 12 and 13.

19 Q. And my question is this: The reason you
20 were asked to do the location and sales transfer analysis
21 was to answer the question whether Henrico County should
22 make a special effort to attract these businesses by
23 giving financial incentives to the developer?

24 A. That was a question that -- it certainly
25 was in the survey, yes.

1 MR. SPENCER: Thank you. No further questions.

2 THE COURT: I know they introduced you to me
3 yesterday, but --

4 MR. JOHNSON: Steve Johnson.

5 THE COURT: Okay.

6 BY MR. JOHNSON:

7 Q. Mr. Oster, it's good to see you in person.
8 I'm Steve Johnson.

9 A. Yes, sir.

10 Q. Now, am I right that the market area for
11 Regency Square is approximately 10 miles?

12 A. It will certainly serve an area of 10
13 miles, but it's larger than that in total.

14 Q. And the concentration, though, is within
15 10 miles?

16 A. What do you mean by concentration?

17 Q. The concentration of the population base
18 and the market areas within that 10 miles surrounding the
19 Regency?

20 A. The population is more concentrated in
21 that area than outside of 10 areas, but certainly we're
22 going to draw business from outlying communities that --
23 where the densities are less.

24 Q. Now, I'm talking about the Regency. Are
25 you?

1 A. Right. It's not limited to my -- I'm
2 sorry. I apologize. I thought you were talking about
3 Short Pump earlier. Let's back up to Regency, and let's
4 see if I can address your question on the trade area.

5 Q. It's a simple question.

6 A. Is it 10 miles? It is not limited to 10
7 miles, but it does serve shoppers within 10 miles. And as
8 you get closer and closer to the Regency site, the density
9 of shoppers, if you will, increases.

10 Q. Okay. So most of the shoppers that are
11 shopping at Regency are coming from Henrico County?

12 A. That's not necessarily true. There's
13 going to be shoppers from Chesterfield County, there's
14 going to be shoppers from the City of Richmond, and so
15 forth.

16 Q. Now, you testified that the impact on
17 Regency from Stony Point is approximately 50 percent?

18 A. The impact on Regency from Stony Point is
19 50 percent, that is correct.

20 Q. Okay. And you testified that the impact
21 on Regency from Short Pump is only 25 percent?

22 A. Yes, sir.

23 Q. Okay. Now, are Short Pump and Stony
24 Point, their market areas I presume are similar to
25 Regency?

1 A. Similar in what sense?

2 Q. In terms of distance and population base?

3 A. And geographic distance?

4 Q. Yeah.

5 A. Certainly there is an overlap, and there's
6 an overlap to the degree of what I estimate to be 25
7 percent transfer in the one case. And there's an overlap
8 to the extent that I calculate to be 50 percent in the
9 other case.

10 Q. Now, let me ask you to turn to Exhibit 59.
11 It's Bates stamped JO-00038.

12 MR. JOHNSON: And I'm sorry, your Honor. I
13 don't have a blowup of this.

14 BY MR. JOHNSON:

15 Q. On this -- I'll wait until you get there.

16 A. I found that page, sir.

17 Q. Okay. Now, on this map does it not show
18 that the population base is south? Is primarily south and
19 east of the Short Pump Town Center covering Regency?

20 A. I don't know if we're looking at the same
21 map. I'm looking at JO-00038, which is the regional map.
22 It's not a metropolitan area map.

23 Q. I understand. But it's Exhibit 1B, and it
24 shows a representation, does it not, of the population
25 concentration in and around Richmond?

1 A. Yes, within a radius of perhaps 50 miles.

2 Q. Okay. I understand that. But what I'm
3 looking at here, is it not the population, concentration
4 of the population for around the Short Pump Town Center,
5 includes the Regency within it? That is the Regency
6 shopping center is right in the middle of the
7 concentration of population?

8 A. It's in a very dense area. I don't know
9 if I could -- if you would say right in the middle. If
10 that refers to the centrite, I haven't calculated the
11 centrite, but it's in a very dense area, yes.

12 Q. And that's within Short Pump's market
13 area?

14 A. Yes, it is.

15 Q. And you testified that the difference
16 between the impacts from Stony Point and Short Pump are
17 because of distance primarily?

18 A. That is one reason, yes.

19 Q. Right. And you also testified that the
20 difference in one and-a-half miles could cause a hundred
21 percent difference in sales impact?

22 A. Yes, sir.

23 Q. Okay. But not all shoppers live at
24 Regency; right? I mean, the shoppers that are going to go
25 to Short Pump don't all live at Regency?

1 A. Of course not.

2 Q. Okay. So the distance between the Regency
3 and Short Pump and Regency and Stony Point really is not
4 particularly relevant, is it?

5 A. It is very relevant. Because if you have
6 two shopping centers that are so close together, it is so
7 easy to move your business to the one that is not only
8 closest but most easily accessed, because there's a direct
9 road.

10 Q. Okay. But the population area, the
11 shoppers who go to Regency, live throughout the
12 metropolitan area, don't they?

13 A. They do, yes.

14 Q. Okay. So for some of those shoppers, it's
15 going to be a lot easier to get to Short Pump than it is
16 to get to Stony Point?

17 A. For some of the shoppers, you know, a
18 small percentage, yes.

19 Q. Okay. Now, actually you believe that the
20 Short Pump Town Center is the preferable location to Stony
21 Point; isn't that right?

22 A. From the factors that myself and my
23 professional colleagues would look at these days, we would
24 look to access to freeways as to be a key consideration.
25 And in the case of Short Pump, there's two freeways that

1 come together there, as well as Broad Street which is the
2 historical major arterial street in the Richmond area, so
3 that it has excellent accessibility, whereas the Stony
4 Point lacks that kind of access. There could be other
5 reasons as well.

6 Q. Thank you. I appreciate all that you've
7 volunteered.

8 MR. JOHNSON: Your Honor, if you could instruct
9 the witness when the question calls for a yes or
10 no --

11 THE COURT: Ask your question again.

12 BY MR. JOHNSON:

13 Q. Now, isn't it true that in your report
14 that's Exhibit 58, you stated that the Short Pump Town
15 Center is preferable for shoppers and retailers alike.
16 And unfortunately I didn't highlight that. Do you recall
17 making that statement?

18 A. It sounds like a statement that I would
19 make. That is certainly my opinion.

20 Q. Okay. And again, the reason that it's
21 preferable is because of its accessibility?

22 A. That is one of the major reasons, yes.

23 Q. So for most people it's easier to get to
24 Short Pump than it is to get to Stony Point; is that
25 correct?

1 A. For most people residing where, sir?

2 Q. Most of the people that shop at Regency.
3 I mean, your opinion is based on the distance from
4 Regency, so I'm confused when you ask me where do the
5 shoppers live.

6 A. I was trying to understand your question.
7 You have to qualify your question for me to be able to
8 respond to it.

9 Q. Most of the people that shop at Regency,
10 Short Pump --

11 A. Today? Okay. Let's see if I can --

12 THE COURT: I'm not sure I understand you. Ask
13 your question so I'll know what questions you're
14 asking.

15 BY MR. JOHNSON:

16 Q. The question is: For most people that
17 shop at Regency, Short Pump is more accessible than Stony
18 Point?

19 A. For most of the people who shop at Regency
20 today, is Short Pump more accessible than Stony Point? I
21 don't think I would agree with that.

22 Q. So why is the Short Pump site preferable
23 for shoppers and retailers alike if for the people who are
24 shopping at Regency, which presumably is the large
25 population base right in the Richmond area, that it's

1 easier for them to go to Stony Point?

2 A. Let me answer that by referring you back
3 to the document that you referred me to, and that's 00038.
4 That shows a 50-mile territory, and it shows by means of
5 dots where the population is located within 50 miles. It
6 also shows the major freeways. When you're talking about
7 somebody that lives in western Virginia, for example, in
8 terms of their ability to come in and conveniently shop at
9 a shopping center such as we're talking about, it's my
10 opinion that for these people it's a more convenient
11 location.

12 Q. And have you quantified what percentage of
13 the likely shoppers at Short Pump make up those that are
14 coming from West Virginia and places --

15 A. The shoppers at where?

16 Q. At Short Pump.

17 A. At Short Pump? As part of my analysis,
18 you know, when the original studies were made, yes, there
19 would have been calculations of that nature of the amount
20 of business, potential business, in the outlying areas
21 that could be attracted. Do I have it in my notes today?
22 I do not.

23 Q. Well, do you know what -- So you don't
24 know what percentage of the shoppers are going to be
25 coming from way outside Henrico County?

1 A. I don't have a figure that I could give
2 you today that would be the same number that I had come up
3 with a year and-a-half ago, for example.

4 Q. Okay. Now, you also had said in your
5 report that it's a preferable location for shoppers and
6 retailers alike. So what about the retailers? Are they
7 more likely to move to Stony Point than they are to move
8 to Short Pump?

9 A. The chances of moving -- I've got to be
10 specific to answer your question. That's the only way I
11 can do it. If Stony Point develops, if that becomes the
12 location, since it is so close, since only a few miles are
13 involved, and the few miles is a quote from deposition of
14 the Taubman representatives, so recognize it's very, very
15 close, then I would see a major transfer of stores. And
16 I'd see a major transfer of stores because the better
17 stores in Regency today could not survive if Stony Point
18 developed as planned.

19 On the other hand, if the development occurs at
20 Short Pump, yes, there would be a draw down of some
21 business. We know that Regency's business is very good,
22 there's room for some draw down without loss of major
23 tenants, and so that's the reason I see a significant
24 difference. Does that answer your question?

25 Q. Well, it doesn't seem to me to be

1 consistent with your comment that Short Pump is preferable
2 to Stony Point for retailers. To me that means that they
3 would rather be at Short Pump than at Stony Point. Am I
4 wrong about that?

5 THE COURT: Well, what retailers are you talking
6 about? Retailers who are now at Regency? Or new
7 retailers?

8 MR. JOHNSON: I mean, his report talks
9 about --

10 THE COURT: Or just any retailer?

11 MR. JOHNSON: Well, his report talks about
12 the shift from -- Well, any retailers. But
13 presumably it includes the retailers that are at
14 Regency Square as well. I mean, if it's
15 preferable for any retailers, then it's preferable
16 for the retailers that exist currently at Regency,
17 so they are more likely to move to Short Pump than
18 they are to Stony Point.

19 THE COURT: The problem with your question
20 is, and it seems to me -- I don't know if you can
21 make a blanket statement. Maybe I should let
22 Mr. Oster testify. But, I mean, it's probably
23 preferable for some retailers. The gas station on
24 the corner across from the Short Pump development
25 is preferable for that retailer to have the site

1 located in Short Pump. The gas station across the
2 street from Stony Point is preferable for that
3 retailer to have a development at Stony Point.

4 But I really think you need to --

5 MR. JOHNSON: Okay. We'll move on.

6 THE COURT: -- narrow your question a little
7 bit.

8 BY MR. JOHNSON:

9 Q. Now, to come to the conclusions that you
10 have come to, you indicated that you relied on your 30
11 years of experience and field surveys; is that correct?

12 THE COURT: It wasn't telling you not to
13 continue that --

14 MR. JOHNSON: I'm done with that. I'll move
15 on.

16 THE WITNESS: Did I rely on my 30 years of
17 professional experience together with the field
18 surveys, etcetera? Yes, of course I did.

19 BY MR. JOHNSON:

20 Q. Okay. And what you mean by field surveys,
21 that is that you drove around and looked at neighborhoods
22 and sites, the different market areas?

23 A. Yes, and visit all of the major shopping
24 centers and --

25 Q. Did you review any published demographic

1 data at all?

2 A. Yes.

3 Q. What did you review?

4 A. I subscribe to a couple of private data
5 sources that estimate -- prepare estimates and forecasts
6 of future population. This is important during this
7 interstitial -- between the census period. It's a lot of
8 years since 1990. We don't have the 2000 data available
9 to us, so we rely on estimates that are made. I use two
10 of the major ones. One is Claritas, and the other one is
11 provided by Scan/US. I also acquire local estimates and
12 projections, and I did so in this case. Those documents,
13 unfortunately, from a year and-a-half ago, I don't have in
14 my files, but, yes, I referred to a lot of different
15 projections.

16 Q. Now, are you aware of the existence of
17 data from the State of Virginia that provides information
18 about adjusted gross income tax?

19 A. I'm aware they have a population forecast,
20 and I know sales tax data is available.

21 Q. Did you review that data?

22 A. I think I may have, but I relied more
23 heavily on published federal data. And as you may know,
24 an economic census is taken every five years. One of the
25 components of the economic census is a census of retail

1 trade, and it reports out on the sales activity, in
2 whatever unit you want, state, county, metropolitan area,
3 and the like.

4 Q. Now, did you review that information to
5 come to your opinions in your report?

6 A. The opinions on what, sir?

7 Q. The opinions that you have with respect to
8 sales shift.

9 A. I believe it would have been an ingredient
10 to some extent.

11 Q. But you don't know if you actually
12 considered it? I mean, you reviewed the data and then
13 formed your opinions on the basis acquired from that data?

14 A. The key factors are the spacial
15 relationships of the market.

16 Q. I understand that. I'm not asking --

17 A. That's the most important thing I probably
18 would have looked at, and the aggregate sales data as
19 well. The aggregate sales data either from a sales tax
20 information that you're referring to, or from the census
21 and retail trade. And I think specifically I used the
22 census retail trade.

23 Q. You say you probably did, but you don't
24 know for sure?

25 A. You're asking me what I did a year

1 and-a-half ago, and it's a little difficult. But I would
2 typically do that in this kind of analysis.

3 Q. Are you aware that Henrico County has an
4 annual comprehensive financial report?

5 A. Sitting here today, I would assume that
6 something like that exists, but I don't recall. I
7 couldn't describe it now.

8 Q. So you didn't review that for purposes of
9 making your conclusions?

10 A. As of a year and-a-half ago, I don't think
11 so. But I'm not -- You're referring to a specific
12 document. If you ask the question did I obtain some
13 population estimates from Henrico County, that would be
14 more likely that I might have got that. But I don't
15 recall the document you're talking about, sir.

16 Q. Okay. And did you look at specific sales
17 distribution data? Did you look at any sales distribution
18 data?

19 A. What do you mean by that? Whose sales
20 distribution?

21 Q. Well, to try and determine what the actual
22 sales as a percentage of total purchases in Henrico County
23 of these types of goods.

24 A. To determine sales?

25 Q. What sales are actually happening at

1 Regency as a percent of the total market, and then make a
2 determination as to what percentage of that will shift to
3 Short Pump.

4 A. Oh, I see where you're driving at. Yes.
5 The key thing was to know how much business, or make a
6 good estimate of how much business was being done at
7 Regency. That's an important part of the analysis. I
8 don't rely strictly on secondary sources of the kind
9 you're talking about in making that kind of an estimate.
10 I use a whole variety of services. But --

11 Q. Okay. So, now, going back to sales shift.
12 It's your opinion that the significant shift in retail
13 sales will be from Regency as opposed to other retail in
14 Henrico County?

15 A. That is my opinion and my testimony.

16 Q. But you also testified that only one mall
17 of this type will go into the Richmond area?

18 A. Only one mall of --

19 Q. Of this regional type.

20 A. -- the superregional and high-fashion
21 character, yes.

22 Q. Now, is that because the -- presumably
23 that's because the market area is large enough only to
24 support one of these shopping centers?

25 A. And because it is the habit or propensity

1 of the tenants that are needed for this type of a shopping
2 center to go into only one location.

3 Q. Because they need to draw, Nordstrom's in
4 particular, needs to draw from or does draw from a large
5 population base?

6 A. Yes.

7 Q. Okay. So certainly they draw beyond the
8 3.5-mile radius and beyond the 5-mile radius?

9 A. Surely.

10 Q. Now, it was also your opinion that there
11 would be virtually no impact at Virginia Center Commons;
12 is that right?

13 A. None that I could measure. There may be a
14 small impact, but it is not a significant amount.

15 Q. But isn't it correct that the Virginia
16 Center Commons is within the Short Pump Town Center's
17 projected market area?

18 A. Again, I've got to interpret what you
19 mean. If you mean would some customers, some people who
20 currently live in the vicinity of Virginia Town Center
21 shop at Short Pump, the answer is yes. But there would
22 not be a high percentage of Virginia Center Commons
23 shoppers that would come to Short Pump, but there would be
24 some.

25 Q. Do you know what anchors are out at

1 Virginia Center Commons?

2 A. Yes, sir.

3 Q. What are they?

4 A. Let me see. Hecht's, Dillard's, Sears,
5 and Penney's, I believe.

6 Q. Okay. And are you aware of what anchors
7 are proposed for Short Pump?

8 A. Yes, sir.

9 Q. And what are those?

10 A. Hecht's, Dillard's, and Nordstrom, and
11 Lord & Taylor.

12 Q. Okay. So in your opinion the fact that
13 the Virginia Center Commons and Short Pump will share two
14 of the same anchors and have some overlap in their trade
15 areas that there will be virtually no shift in sales?

16 A. I have indicated no shift in sales, but I
17 need to explain why. Because your logic that because
18 Hecht's and Dillard's are located at Virginia Center
19 Commons and the plan is to locate them at Short Pump does
20 not mean that it's the same stores. Retailers have A
21 stores, B stores, and C stores. And you do not today have
22 the major store, qualitatively or quantitatively, of
23 Dillard in this market that you will, if it materializes,
24 see at Short Pump. It's a qualitatively different type of
25 store.

1 Now, on to Hecht's. Yes, the Hecht's stores,
2 and of course as you know there are two facilities, two
3 different buildings that Hecht's occupies at Regency, is a
4 pretty good Hecht's store. But they are handicapped.
5 Because of their facilities, they can't put them together
6 in one compelling powerful presentation as they will be
7 able to do at Short Pump.

8 But there are differences within the anchor
9 stores, so that's not a reason why you would expect a huge
10 transfer to Virginia Center Commons. Does that answer
11 your question?

12 Q. I'm not sure. Do you know what percentage
13 or -- Strike that.

14 Do you know if there are shoppers who currently
15 shop at Virginia Center Commons that live closer to Short
16 Pump than do to Virginia Center Commons?

17 A. I'm sure there are some.

18 Q. Do you know what percentage that is?

19 A. I can't tell you right now what it would
20 be. But just because of the way that I know how shopping
21 centers draw their business, there would be somebody that
22 lives right next to Short Pump today that shops at
23 Virginia Center Commons. But it's not a high percentage
24 of the trade of that shopping center today.

25 Q. But you don't know that for sure?

1 A. What do you mean know for sure?

2 Q. Well, you have not quantified exactly how
3 many people or what percentage of Virginia Center Commons
4 business comes from the area around Short Pump?

5 A. When I did my analysis, I examined current
6 and expected shopping center patterns. That is, when you
7 add Short Pump into the metropolitan area, you know, it's
8 going to change. So I examined shopping patterns based on
9 the model that I use. The model is derived from many,
10 many cases of actual shopping centers, and it's applied in
11 this case. It's an estimate.

12 If you're asking me did I have data from the
13 Demarlo Simon Organization, internal data showing that
14 there is a shopper residing right next to Short Pump, no,
15 I didn't have that. In that sense, I don't know. But in
16 the sense of given the kind of analytical models I use, I
17 am confident that it's a very small percentage of Virginia
18 Center Commons' total business that currently resides very
19 close to Short Pump.

20 Q. Okay. Now, it's your view that the Short
21 Pump Town Center will draw because it's a regional mall
22 and has the anchors that it will have, and it's going to
23 draw from a very wide range; is that correct?

24 A. A wider range, I believe, than existing
25 centers in this metropolitan area, yes, sir.

1 Q. Okay. But not a substantial portion from
2 3 and-a-half miles away and virtually none 9 and-a-half
3 miles away; is that correct?

4 A. Let's see if I understand what you said.
5 You just said that no business for Short Pump will come
6 within 3 and-a-half miles? Is that what your question is?

7 Q. Yes.

8 A. No. The answer is no.

9 Q. You've said that only 25 percent of the
10 business that goes to Regency is going to come to Short
11 Pump. You've said that virtually none is going to come
12 from Virginia Center Commons. So I'm wondering where is
13 it coming from?

14 A. Do you recall my testimony relative to the
15 zero-sum assumptions, about where sales come from for a
16 shopping center?

17 Q. Refresh me again.

18 A. What I testified on was that when a new
19 center comes into an area, it doesn't have a one-for-one
20 relationship in terms of does the business to this new
21 center simply take away from the business that's being
22 done by other retail stores. And I referred to the
23 business that's coming from western Virginia, you know,
24 the outlying part of the metropolitan area. That is more
25 than is coming at the present time from these areas.

1 As a second category I referred to the outflow
2 of dollars to places like Washington D.C. That outflow of
3 dollars to shop at high-fashion stores will to a
4 significant degree be reduced. And I also talked about
5 the phenomenon whereby when you introduce a new type of
6 retailing into a market area, that induces spending that
7 wouldn't otherwise occur without that stimulus. And for
8 all of those reasons, sir, it's not a zero-sum gain.

9 Q. Now, did you quantify what that outflow
10 business is from Henrico County currently?

11 A. It was part of my analysis, yes.

12 Q. And what was the amount?

13 A. One way I could answer it is by reference
14 to the document that has been introduced into -- what do
15 you call it? The document that's here.

16 Q. Which one?

17 A. And it says that of the people that have
18 some knowledge of fashion retailing, and I think we used
19 do you know who Nordstrom is as kind of a qualifier --

20 Q. May I just interrupt? Are you referring
21 to the telephone survey?

22 A. I'm referring to the telephone survey.

23 Q. Okay.

24 A. And let's see if I can find the -- On the
25 page that is labeled JO-0005, at the top of the right-hand

1 column there is a reference to the question you just
2 asked.

3 Q. Okay. So in coming to your opinion that
4 there would be an outflow of business, you relied on
5 telephone surveys?

6 A. This telephone survey was obviously
7 done -- postdated the market study that I assume you're
8 referring to, so I didn't have this particular
9 information. But I did, you know, have -- It would have
10 been part of my assumption, given the proximity of
11 Richmond to Washington D.C. and the lack of high-end
12 retail facilities here, that there would be an outflow.
13 That is, this is not the only case of it. It would be
14 expected from the geographics and the competitive
15 situation here that you would have had an outflow. I
16 didn't have this particular survey in front of me.

17 But the survey does confirm my assumption that
18 there is a major outflow. And it says right here that we
19 found that 48 percent of all respondents say they have
20 shopped at some time in the Washington D.C. area. To me
21 that's a pretty strong figure. So we know that there is
22 an outflow of dollars from this area.

23 Q. Okay. Based on the survey of these
24 consumers that was done after your report?

25 A. That's correct.

1 Q. Okay. Now, you also indicated that there
2 would be -- one of your, I don't want to put words in your
3 mouth, but one of those criteria or elements that are --
4 Let me try to remember how you phrased it so I don't --
5 Let me just ask it this way: You said that there would be
6 an inflow of other retailers. That this would serve as a
7 node to other retailers, the Short Pump Town Center?

8 A. The answer is yes, but I've got to tell
9 you what I understand by that. That means that --

10 Q. Your answer is good enough.

11 THE COURT: You've answered the question, yes.

12 BY MR. JOHNSON:

13 Q. Now, are you aware that a Barnes & Noble
14 that was located near the Regency closed its doors and has
15 now moved out near the Short Pump Town Center?

16 A. There is -- I do -- There's another
17 bookstore. Let's see. Was that in -- There is a Barnes &
18 Noble at the corner on Broad and Short Pump, yes.

19 Q. But you weren't aware that it moved from
20 near the Regency?

21 A. I don't know if you or I or anybody could
22 say that it moved. You're telling me one closed, and I
23 don't dispute that one may have closed. I don't know that
24 for a fact, but it may have happened. And another one
25 opened out there.

1 Q. So it's not only possible that the new
2 retailing located around Short Pump will be offset by
3 similar stores that close elsewhere in Henrico County?

4 A. If that location -- 5 miles is not a bad
5 distance. I beg your pardon. There's enough room so
6 you're not going to totally, you know, take away a large
7 percentage of the stores. You know, it's possible there
8 may be some closings when Short Pump opens. But if Stony
9 Point opens, you know, all of the good stores are
10 essentially going to go because it's so much closer
11 effectively.

12 Q. Okay. We've covered that. Now, in
13 considering the benefits to Henrico County and the Short
14 Pump Town Center, other than the shift in sales from
15 Regency, what other costs did you consider?

16 A. My analysis doesn't deal with costs. It
17 deals with sales and sales transfer.

18 Q. You didn't consider lost sales, tax
19 revenue, or property tax revenue at Regency?

20 A. No, because I'm not -- that's not my area
21 of expertise.

22 Q. Okay. You didn't consider the cost of
23 incentives at Short Pump Town Center?

24 A. I'm sorry. The cost of what?

25 Q. The cost of incentives at Short Pump Town

1 Center?

2 A. That was not part of my study.

3 Q. And you didn't compare the benefits of
4 Short Pump compared to an alternative shopping mall that
5 might have gone there without incentives?

6 A. That was not part of the analysis, no.
7 And I've testified as to the likelihood of another
8 shopping center coming in there.

9 Q. Okay. So when you offered this report for
10 the County's review on the benefits of the Short Pump Town
11 Center to Henrico County, you didn't include anything
12 about what the costs were other than lost sales at
13 Regency?

14 A. I didn't include anything on cost because
15 I don't deal with costs.

16 Q. Okay.

17 MR. JOHNSON: Thank you.

18 THE COURT: Is there any redirect?

19 MR. FOOTE: No, sir.

20 THE COURT: Thank you very much, Mr. Oster. You
21 may step down. Can Mr. Oster be excused?

22 MR. FOOTE: He may be released, your Honor.

23 THE COURT: Mr. Oster, you are free to leave
24 if you would like to leave. If you would like to
25 stay in the courtroom, you're more than welcome to

1 Stony Point mall was virtually identical to the
2 projections as to the revenues which were to be generated
3 at Short Pump for the County of Henrico.

4 THE COURT: All right.

5 MR. FOOTE: Your Honor, with that I would
6 indicate that the plaintiffs close their case, sir.

7 THE COURT: All right. Plaintiffs rest.
8 Mr. Spencer, does --

9 MR. SABOURIN: Your Honor, I have one brief
10 housekeeping detail. We have Taubman Exhibit 44, which
11 was an enlarged exhibit which was admitted yesterday, and
12 I have a reduced copy for you.

13 THE COURT: Thank you very much. All right.
14 Now, Mr. Spencer, are you ready to present your evidence
15 on behalf of the three individual taxpayers?

16 MR. SPENCER: First, Judge, we have a motion.

17 THE COURT: I'll let you state on the record
18 what it is, but I think I want to hear the entire case.

19 MR. SPENCER: Understood. We would move to
20 strike the plaintiff's evidence and ask the Court to enter
21 summary judgment on behalf of the defendants on the ground
22 that the plaintiff has failed to introduce evidence
23 sufficient to meet the criteria set forth in Section 51
24 and 58 of the Water and Waste Authority's chapter in the
25 Virginia Code titled 15.2. the Court has heard the

1 evidence. The Court knows our position from opening
2 statement. And we think there is simply no evidence
3 whatsoever to show that the proposed improvements meet the
4 test of that statute.

5 THE COURT: Thank you, Mr. Spencer.
6 Mr. Johnson?

7 MR. JOHNSON: I join the taxpayers on that
8 motion, and I just want to add a little.

9 THE COURT: All right. And again, the same
10 admonition as I made to Mr. Spencer. State your objection
11 for the record, but I would like to hear the entire case.

12 MR. JOHNSON: Okay, your Honor. I'd just like
13 to submit for the Court the issue on burden of proof.
14 Your Honor, we submit that the plaintiffs have the burden
15 of the case here, that they are not entitled to any
16 legislative presumptions. Most of the actions taken by
17 the public plaintiffs are proprietary in nature. They
18 were designed to support a specific developer. They chose
19 to subsidize one developer over another, work very closely
20 with the developer in a closed section, agreed to a
21 transaction, so we submit that the activities were
22 primarily proprietary in nature.

23 We also don't believe that they're entitled to
24 presumption of any validity because of the fact that
25 they've chosen as public plaintiffs to sue the taxpayers

1 in order to make this deal work, and that in suing the
2 taxpayers they're effectively suing that very public
3 purpose which --

4 THE COURT: All right. What other grounds do
5 you have for your motion?

6 MR. JOHNSON: The other grounds I have, your
7 Honor, is they are -- instead of -- they're not defendants
8 in this case. They have decided as plaintiffs, have
9 chosen to sue the taxpayers.

10 THE COURT: I understand. And it sounds like
11 I'm cutting you off because I am. I'm going to overrule
12 both motions, but I want you to be able to state your
13 motions very quickly and just the grounds in one or two
14 sentences so that you will preserve the record.

15 MR. JOHNSON: Your Honor, on the grounds that
16 the actions they were taking are primarily proprietary
17 actions, and that they are acting in the capacity as
18 plaintiffs here, suing the taxpayers, and they're not
19 entitled to any sort of presumption of validity that the
20 actions they took are valid or served legitimate public
21 purposes.

22 THE COURT: All right. Thank you very much.
23 Both motions are overruled.

24 Mr. Spencer, do you want to -- wish to present
25 any evidence on behalf of the taxpayers?



1 on medium-term rates. So I would say, no, at this point
2 in time I have not taken that into consideration.

3 Q. All right. With respect to the reserve
4 account that we've established in this matter, do you have
5 any idea what the size of the reserves would be?

6 A. The upper limit of the reserve is set by
7 IRS regulations. The lower limits of reserve is something
8 that's negotiated with investors who will buy the bonds.
9 The maximum reserve could be, in this case, I would say
10 will probably be 10 percent of the amount of the bond
11 issue.

12 Q. Have you spoken with investors about
13 sizing the reserve account?

14 A. Yes.

15 Q. And do you have expectation of where the
16 reserve account may be established based upon those
17 conversations?

18 A. I've spoken with two investors, which are
19 not the full universe of investors we would talk with when
20 the bonds are being sold. One of those investors did say
21 they would like to see the reserve at the maximum allowed
22 by the IRS rules, which would be 10 percent.

23 Q. Once the reserve account is established,
24 do you have an understanding of who is entitled to the
25 interest proceeds earned by the reserves?

1 THE COURT: I'm not -- I want you-all to go back
2 to your tables, because I -- It always bothers me when we
3 conduct court business in private. And, Mr. Trow, I guess
4 you're siding with Mr. Foote on this issue?

5 MR. TROW: Not on the relevancy issue. I have
6 no position on the relevance.

7 THE COURT: Because it always bothers me when we
8 conduct court business in private, particularly this
9 business. This is a proceeding to determine whether a
10 government should be allowed to do something, and I don't
11 want anybody to think that any portion of that decision is
12 being made in private. The citizens have a right to know
13 why this Court is going to do what it's going to do. To
14 the extent that anyone thinks that this is relevant, I
15 think it has to be conducted in public.

16 I don't at this point, though, understand why
17 it's relevant. I have allowed you-all to put on a lot of
18 things that my gut tells me are not really relevant. The
19 only issue in this case, it seems to me, is whether the
20 County can do what the County wants to do. I'm not going
21 to second-guess the Board of Supervisors. I might have my
22 own ideas about where this development should go, but
23 that's irrelevant. And tell me why it's relevant. If I
24 come to the conclusion that the County did not need to
25 provide these incentives, so what? The County decided

1 that it was necessary.

2 MR. BUELL: I think you do need to look at,
3 though, Judge, what evidence was available to the County
4 at the time that it made its decision regarding whether or
5 not these --

6 THE COURT: Well, I'm saying suppose I hear the
7 evidence, and suppose I am firmly convinced that these
8 incentives did not need to be given. So what? The Board
9 of Supervisors determined that they did need to be given.

10 MR. BUELL: I think it goes to the issue of
11 whether these particular improvements can be financed
12 through a CDA mechanism, which is an issue that you need
13 to decide, Judge.

14 THE COURT: If the General Assembly says that
15 the County can take by eminent domain property to
16 construct a fairgrounds, period, and that's all this
17 statute says, and the County does that, does it make any
18 difference whether this Court or any Court determines that
19 the County doesn't need a fairground, or the fairground
20 shouldn't be placed here, it should be placed on the other
21 end of the county?

22 MR. BUELL: I think we're confusing two
23 different issues here, Judge. It seems to me like you're
24 talking about a motive issue of whether this was a good
25 deal for the County versus some other deal that might have

1 been struck. I'm not talking about that. What I believe
2 this is relevant to is the issue that you do have to
3 decide, which is whether or not these improvements meet
4 the six-prong test of the CDA statute, and whether the
5 County did an analysis to reach that conclusion. And what
6 I believe --

7 THE COURT: About the financial deal between the
8 developer and the department stores?

9 MR. BUELL: What I believe Mr. Hazelett
10 testified to yesterday was that there was no evidence
11 before the Board that any of these proposed improvements
12 were necessary to meet increased demands placed upon the
13 locality as a result of development. However, it was
14 their belief that they serve some public purpose, and he
15 testified as regards to the ring road and some of the
16 other improvements as to what he thought that public
17 purpose was. But the only other thing in addition to
18 that, that the County knew, was that these developers had
19 made commitments to department stores, pay them some
20 amount of money, and that was driving the decision where
21 the mall was going to be located. It was driving how much
22 incentives the County had to give to the developer to make
23 their costs work.

24 THE COURT: But so what? Going back to my
25 example, if the statute says that the County can take land

1 to construct a fairgrounds, what difference does it make
2 what the County's motives might be for taking land to
3 construct fairgrounds? The statute says it can do it.
4 What difference does it make?

5 MR. BUELL: I'm not talking about motives,
6 Judge. I'm talking about what it was that they --

7 THE COURT: I thought you said you were trying
8 to show me what was driving this deal. I interpret that
9 as being motives.

10 MR. BUELL: Maybe I used incorrect terminology.
11 What I mean to say is that what was behind the decision
12 that these improvements according to the County are things
13 that a CDA can do. And there are two things.

14 THE COURT: Again, that sounds like -- Well, it
15 doesn't make any difference what the County thinks the CDA
16 can do. That's where the Court does come in. There's a
17 very clear distinction between what the Court does and
18 what the legislature does. The legislature decides to do
19 something, and the Court determines whether it can.

20 MR. BUELL: It seems to me, then, your Honor, on
21 the basis of Mr. Hazelett's testimony --

22 THE COURT: Not whether it's wise, not whether
23 it's good for the county, but whether it's legal, whether
24 the statutes and the constitutions allow it to be done.
25 And are you saying that anything that Mr. LaRue is going

1 to tell me is going to tell me whether the statutes or the
2 constitutions tell me that this can be done?

3 MR. BUELL: Well, certainly Mr. LaRue is not
4 going to give any opinions regarding the statutes and
5 constitutions --

6 THE COURT: Well, tell me if he's going to tell
7 me something that's going to help the Court make that
8 decision.

9 MR. BUELL: I believe Mr. LaRue's testimony --
10 and there are many other areas outside of the area we were
11 discussing in front of the bench.

12 THE COURT: And I understand that the only
13 objection is to this narrow issue.

14 MR. BUELL: I think there are some points from
15 Mr. LaRue. We have not heard from anybody so far on the
16 developer's side of this deal. The testimony we've heard
17 so far has been from the County or the CDA. And Mr. LaRue
18 represents the development entity. So I do think in terms
19 of examining from the developer's perspective what the
20 understanding of the agreements are, it's relevant.

21 THE COURT: Well, is there an objection to the
22 relevance?

23 MR. FOOTE: Your Honor, you know, what we've
24 said from the outset was that our testimony was put on to
25 assist the Court in understanding the deal that is

1 referenced in the documents themselves. Mr. LaRue can --
2 I don't think it's relevant. It seems to me that what --
3 We didn't put any of the developers on because we
4 represent the public entities defending their action.

5 THE COURT: Mr. Spencer, do you want -- I'm
6 sorry. Mr. Sabourin?

7 MR. SABOURIN: Your Honor, it seems to me one of
8 the issues in this case is whether or not this serves the
9 public purpose. A lot of the testimony that came in in
10 the plaintiff's case related to that. We just heard an
11 hour and-a-half of testimony from Mr. Oster.

12 THE COURT: Of course it serves the public
13 purpose. It's our option for development and shoppers and
14 taxes. Of course it serves the public purpose. You're
15 not going to convince me that it doesn't.

16 MR. SABOURIN: It seems to me, your Honor, if
17 they're entitled to put that type of testimony on, that
18 type of testimony is relevant to the testimony that --

19 THE COURT: It serves the public purpose. And
20 again, it doesn't make any difference if I think the
21 public purpose can be better served in other ways. As
22 long as it serves a public purpose, it's up to the Board
23 of Supervisors to determine what to do. It's not up to
24 this Court.

25 MR. SABOURIN: And an issue in this case is the

1 public purpose, and I think that Mr. LaRue's testimony
2 goes to whether or not from our perspective as to --

3 THE COURT: But if the County has a good purpose
4 to do it and a bad purpose to do it, I can't say, well,
5 since you have a sinister purpose or, you know, you're
6 trying to pad somebody's pockets, even though you have a
7 good purpose, I'm going to stop you from doing it. I
8 can't do that. If you have a good purpose, it doesn't
9 make any difference what other purposes they have, does
10 it?

11 MR. SABOURIN: I would submit that the only way
12 that you can determine the public purpose of the action of
13 the Board is by seeing the facts surrounding this
14 transaction, and part of it is the amount of money that is
15 being paid by the developer to the department stores.

16 THE COURT: What difference does it make how
17 much money is being paid by the developer to the
18 department stores? Now, what difference does that make?
19 Are you also going to tell me how much the security guards
20 are going to make? How much the salesclerks in the stores
21 are going to make? What difference does any of that make?

22 MR. SABOURIN: No. We're just going to put on
23 the key aspects of the transaction which the plaintiffs
24 have spent a day testifying as to.

25 THE COURT: Most of which I probably would not

1 have allowed over objection, but nobody objected. And
2 I'll probably continue to allow it today. The only thing
3 that's making us have this conversation is that you now
4 want to have these things done in secret. And I have to
5 make a decision now whether I'm going to ban the public
6 from court proceedings or not, and so you really have to
7 convince me that it's relevant, and nobody has done it.

8 MR. BUELL: Well, on the issue of whether we're
9 going to ban the public, I think everybody --

10 THE COURT: That's what you're trying to do.
11 You're trying to ban the public.

12 MR. BUELL: Well, I understand. I'm not saying
13 I'm in favor of it. What I'm saying is, though, everybody
14 who's in here I believe is a party. We've already
15 excluded anyone who's not a party.

16 THE COURT: There are certain people who have
17 radar, and as soon as I say something about banning
18 something, there are hundreds of reporters who cover the
19 courts for the press who are all of a sudden here, and
20 Judge Johnson is trying to keep us out. And even though
21 they didn't have any interest in it at all, and then all
22 of a sudden they want to come down here.

23 MR. BUELL: I understand, your Honor. I
24 understand your point.

25 THE COURT: Give me your best shot in the next

1 two minutes as to why this is relevant.

2 MR. BUELL: First of all, the issue of public
3 purpose, and somehow we got sidetracked onto that issue,
4 maybe it was my fault, but public purpose, Mr. Hazelett
5 said --

6 THE COURT: Whenever lawyers say maybe it's my
7 fault, they're always saying, Judge, it's your fault.

8 MR. BUELL: Oh, no, it's not. I don't mean it
9 that way at all, your Honor.

10 I believe how we got off on that track was I
11 alluded to Mr. Hazelett's testimony yesterday that in his
12 view the Board believed that these improvements served a
13 public purpose. And from the taxpayers perspective,
14 whether or not the Board believes they have a public
15 purpose really doesn't make much difference. And I think
16 that's what I hear you saying as well, because from
17 analyzing the CDA statute, the CDA statute doesn't say
18 anything about whether they have a public purpose. It
19 sets forth very specific criteria, and there are six of
20 them. And Mr. Spencer enumerated in his opening statement
21 that these improvements must meet -- Public purpose, the
22 words public purpose, are nowhere in the CDA statute. So
23 I don't consider that to be the issue. Public purpose is
24 not the issue that I'm trying to get this evidence
25 regarding the development deal with the department stores

1 in on.

2 What I think that goes to is the second prong of
3 what Mr. Hazelett said, went into the determination of
4 public purpose and -- or not public purpose, but the
5 determination of why a CDA could do this, and that was
6 that they thought to get the mall in Henrico County they
7 had to do this because the developer's costs would not
8 work out any other way. If they couldn't offset the cost
9 they were obligated to pay to the developer, the mall
10 wouldn't come to Henrico, the tenants, anchor tenants
11 would go somewhere else, and so for that reason they
12 constructed this financing scheme to figure out a way to
13 do it.

14 THE COURT: Suppose somebody came to Henrico
15 County who was a dot com billionaire and said I want to
16 create -- I want to develop project X. Project X is going
17 to cost \$100 million. I have a billion dollars, I can do
18 it myself, but I'm trying to get the best deal, and I'm
19 going around all over the country trying to get somebody
20 to help me finance this project. If you-all give me \$50
21 million, I'll put it here.

22 Are you saying that the County is precluded --
23 If the law otherwise allows governments in Virginia to
24 help finance projects such as project X, are you saying
25 that the County of Henrico would be precluded from helping

1 this dot com billionaire because this dot com billionaire
2 has enough money to do it himself?

3 MR. BUELL: Oh, no, I'm not saying that. I
4 think this is --

5 THE COURT: I hate to keep interrupting your
6 argument, but I hear you saying things, and I just --

7 MR. BUELL: Let me respond to that and then make
8 one other point and I think I'll be done. The response to
9 that question is it depends on how the deal is structured.
10 If it's structured in a legal way and these --

11 THE COURT: That was my premise, if it was
12 otherwise legal.

13 MR. BUELL: And our contention here is this is
14 not a legal way, so --

15 THE COURT: But do I need to hear this evidence
16 about what moneys the developer is paying to the retail
17 establishment in order to determine whether it's being
18 done in a legal way?

19 MR. BUELL: I submit that you do, Judge, and
20 I'll cite the LaFrance Cleaners case which says that the
21 Court reviewing a legislative action must consider all
22 competent evidence educed at trial concerning facts and
23 circumstances existing at the time the legislative acts
24 were taken.

25 THE COURT: All relevant facts and

1 circumstances.

2 MR. BUELL: It didn't say that. It said
3 competent evidence.

4 THE COURT: Well, I hope it means that.

5 MR. BUELL: It says competent evidence.

6 THE COURT: I think maybe they assume that we
7 know it has to be relevant.

8 MR. BUELL: It says further if evidence of such
9 facts and circumstances is sufficient to make the
10 reasonableness of the legislative action fairly debatable,
11 then the Court has to uphold the action. And I'll submit
12 to you that this evidence could go to whether or not it's
13 fairly debatable.

14 THE COURT: Mr. Sabourin, do you want to give it
15 one more shot?

16 MR. SABOURIN: I want to adopt that standard,
17 your Honor. I mean, certainly we've got the -- we've
18 raised the constitutional issues concerning this. And
19 whether or not it is fairly debatable, you have to
20 determine the basic transaction, and this is a basic part
21 of the transaction.

22 THE COURT: Mr. Foote, 30 seconds.

23 MR. FOOTE: Very simply, your Honor, the
24 LaFrance case stands for the proposition that if the Board
25 of Supervisors was affirmatively misled by information but

1 chose to believe that which it could have believed at the
2 time and make the decision you articulate, it can do that
3 and be sustained. We submit to you, your Honor, that it
4 wasn't misled, but that even if as you postulate the
5 developer didn't need the money but the Board thought so,
6 that's legitimate and it doesn't matter how much.

7 THE COURT: Is the information that Mr. Buell
8 wants me to hear about what the developer is paying to the
9 establishments, is that relevant?

10 MR. FOOTE: No, sir, it has nothing to do with
11 it.

12 THE COURT: Thank you very much. Mr. Trow, what
13 did you want me to do?

14 MR. TROW: Well, if you rule that it's
15 irrelevant, it's not coming anyway, and then I'm done.
16 I'll sit down.

17 THE COURT: Thank you. The Court holds that
18 it's not relevant, and at least to that portion of
19 Mr. LaRue's expected testimony. The objection to
20 relevance is sustained, so there's no need to ban the
21 public. And I note your objection and Mr. Sabourin's
22 objection. Do you still want to call Mr. LaRue?

23 MR. BUELL: I do. May I make a proffer, though,
24 of the evidence in the form of his deposition testimony?

25 THE COURT: Is that something also that you want

1 under seal?

2 MR. TROW: Yes, your Honor. That's been --

3 THE COURT: The Court is not going to accept any
4 evidence under seal. And if I'm wrong about that, the
5 Supreme Court will read that I say you could not make your
6 proffer, so you're okay, and they'll allow you to make
7 your proffer to them.

8

9 DAVID LARUE,

10 was sworn and testified as follows:

11 DIRECT EXAMINATION

12 BY MR. BUELL:

13 Q. Good morning, Mr. LaRue.

14 A. Good morning.

15 Q. State your name, please.

16 A. David LaRue.

17 Q. And who are you employed by, sir?

18 A. Forest City Commercial Group, Inc.

19 Q. Forest City Commercial Group, Inc. Is my
20 understanding correct that Forest City or some Forest City
21 enterprise owns part of the land that makes up the CDA?

22 A. Yes, sir.

23 Q. And the other part of it is owned by the
24 Pruitt entity; correct?

25 A. Yes, sir.

1 Q. In the documents that we've been referring
2 to in this case as the organic documents, there's an
3 entity called Short Pump Town Center LLC that's referred
4 to as the developer. Are you familiar with that entity?

5 A. Yes, sir.

6 Q. Who are the members of Short Pump Town
7 Center LLC?

8 A. FC Short Pump Land Investments, Inc., and
9 MJGT LLC I believe is the name.

10 Q. And those two entities you've just named
11 are in these documents identified as the landowners;
12 correct?

13 A. I believe so, yes, sir.

14 Q. And in FC Short Pump, FC stands for Forest
15 City, the company you work for?

16 A. Yes, sir.

17 Q. So do I understand correctly, then, that
18 the two landowners are also the two members of the
19 development entity?

20 A. Yes, sir.

21 Q. All right. Now, what was the purpose in
22 forming Short Pump Town Center LLC?

23 A. To develop and own Short Pump Town Center
24 shopping center.

25 Q. And by that you mean the completed

1 project?

2 A. Yes, sir.

3 Q. All right. You said develop and own.
4 What assets of the completed project is Short Pump Town
5 Center going to own?

6 A. Everything on that parcel, 147 acres, that
7 it doesn't sell to somebody else.

8 THE COURT: Mr. Foote?

9 MR. FOOTE: Your Honor, Mr. Buell has had a hard
10 10 minutes, but I feel an obligation to object on
11 grounds of relevance. I don't know where this
12 could possibly be headed and how it could possibly
13 have anything to do with the transaction.

14 THE COURT: Mr. Buell?

15 MR. BUELL: Well, the Short Pump Town Center,
16 a private entity, is going to own some of these
17 assets that we've had the CDA --

18 THE COURT: Objection is overruled. Go
19 ahead.

20 BY MR. BUELL:

21 Q. All right. So you're going to own
22 everything in this 147 acres that you said you don't sell
23 to somebody else?

24 A. That is not sold or transferred to
25 somebody else.

1 Q. All right. And that would include some of
2 the improvements that are being constructed, like the
3 walkways and the plaza and so on?

4 A. Correct.

5 Q. And is that fact set forth in any
6 agreement that you know of?

7 A. Not that I know of.

8 Q. All right. So it's your understanding,
9 then, that you're going to own or Short Pump Town Center
10 is going to own everything, for example, within the inside
11 of this ring road?

12 A. And potentially outside of that ring road.

13 Q. And are the site pads for the four
14 department stores something that Short Pump Town Center is
15 going to own?

16 A. No.

17 Q. So we can exclude those?

18 A. Clearly.

19 Q. But everything else Short Pump Town Center
20 LLC will own?

21 A. That it doesn't deed to somebody else.

22 Q. Now, what things do you intend or does
23 Short Pump Town Center intend to deed to someone else?

24 A. The people who may purchase out lots along
25 the front of the project.

1 Q. All right. By out lots, you mean these
2 parcels down here?

3 A. Yes, sir.

4 Q. Short Pump Town Center LLC may sell those
5 off?

6 A. Yes. And other properties deeded to the
7 CDA, for example.

8 Q. All right. What properties do you intend
9 to deed to the CDA?

10 A. The properties that the CDA spends money
11 on improving.

12 Q. You were in the courtroom yesterday;
13 right?

14 A. Yes, sir.

15 Q. And you heard our discussion about the
16 fact that there are \$34 million of improvements scheduled,
17 and only \$22 million of funds available?

18 A. I remember that discussion.

19 Q. Is it your understanding that the Short
20 Pump Town Center LLC or the developer is going to make up
21 the difference? The \$12 million difference?

22 A. Yes.

23 Q. With private funds?

24 A. With private funds, yes.

25 Q. And is it your expectation that any assets

1 purchased with the \$12 million of private funds will be
2 owned by the developer?

3 A. If it is not owned by the CDA, yes.

4 Q. What's it going to be owned by? The
5 developer? Or the CDA?

6 A. I don't believe that's been determined.

7 Q. Has it been determined whether, for
8 example, you use your \$12 million to purchase parking, has
9 it been determined whether you're then going to deed that
10 parking over to the CDA or not?

11 A. No, it has not.

12 Q. So you may not; correct?

13 A. Correct.

14 Q. Does Short Pump Town Center LLC own any
15 assets today?

16 A. I don't believe so.

17 Q. Have there been any agreements drafted at
18 this point in time to your knowledge that would effectuate
19 the transfer of any assets, either improvements or land,
20 between Forest City and any other entity, whether it be
21 the CDA, the County, or anyone else?

22 A. Beyond the CDA and the County?

23 Q. Any entity. CDA, County, or anyone else.

24 A. The operating agreement of Short Pump Town
25 Center LLC will obligate the partners to put their land

1 into Short Pump Town Center LLC at the beginning of
2 construction.

3 Q. All right. Beyond that, though, there's
4 no agreement that's been drafted or even contemplated at
5 this point that would then require Short Pump Town Center
6 LLC to convey any of the assets it owns or improvements it
7 may purchase to anyone?

8 A. There are some draft documents regarding
9 the department stores.

10 Q. Which would mean the conveyance of these
11 four pads?

12 A. Yes, sir.

13 Q. Other than that, no other documents or
14 agreements?

15 A. Not to my knowledge.

16 Q. Summarize for me or for the Court your
17 role with respect to this transaction.

18 A. As chief operating officer of Forest City
19 Commercial Group, I am responsible first for the
20 partnership agreement or the operating agreement and the
21 LLC with our partners. I am responsible for the team of
22 people working on this development project, currently the
23 developers, the leasing people, and I also was involved in
24 the initial discussions with the County regarding the need
25 for public participation in this project.

1 Q. Is another word for public participation
2 incentives?

3 A. Could be.

4 Q. All right. This is the Exhibit 43 that
5 we've been using that outlines the basic structure of the
6 deal. And my question to you is: What do you consider to
7 be the total amount of incentives that the County is
8 providing to the developer under this scheme?

9 A. I consider the total \$22 million.

10 Q. Do you consider the \$30 million in
11 reimbursement payments that the developer either sees
12 directly or are redirected to the CDA over five years to
13 be an incentive?

14 A. No, I don't.

15 Q. What do you consider those payments to be?

16 A. A reimbursement.

17 Q. Do I understand correctly that -- again,
18 we're referring now back to Exhibit 63 -- that in addition
19 to giving the department stores these sites on which their
20 stores will be built, those pads are also going to be
21 carved out of the special assessment that is applied to
22 all the other property within the CDA?

23 A. That is my understanding.

24 Q. Why is that?

25 A. Because of the specifics related to the

1 department store deals.

2 Q. Now, one of the things you did in
3 connection with this project is evaluate the rate of
4 return the developer was expecting to receive on the cost
5 that you invested; correct?

6 A. Yes.

7 Q. And what is the total cost of your
8 investment for everything that's within inside the ring
9 road?

10 A. The total cost of the investment, I don't
11 have that breakdown inside of the ring road.

12 Q. All right. What is the total cost of the
13 investment for the whole project?

14 A. From excluding the rear parcels, our
15 current projection is approximately \$150 million.

16 Q. And did you calculate a rate of return on
17 that investment that was first done with the incentive
18 payment of \$22 million being provided by the County?

19 MR. FOOTE: Objection, your Honor, that goes, I
20 think, right where --

21 THE COURT: I can't hear you, sir.

22 MR. FOOTE: I'm sorry, sir. Objection. I
23 think that goes right to what the Court has
24 already ruled on.

25 THE COURT: Well, it probably does.

1 Mr. Buell?

2 MR. BUELL: I'll withdraw the question.

3 THE COURT: All right.

4 BY MR. BUELL:

5 Q. One of the things you did, I believe, is
6 you said you determined a necessity I think was your word
7 for incentives to be provided by the County for this
8 project; is that true?

9 A. Yes, I did.

10 Q. All right. In determining whether or
11 not -- Well, necessity from whose perspective?

12 A. From the development's perspective.

13 Q. From your business perspective?

14 A. From my business perspective.

15 Q. And in the course of determining that
16 necessity, did you run some projections on whether or not
17 you would make a positive rate of return on this project
18 without the incentives?

19 A. Explain to me positive rate of return.

20 Q. Above zero.

21 MR. FOOTE: Your Honor, I'm going to retain the
22 objection. The Court, I think, has already
23 indicated that it does not consider relevant
24 whether there was or wasn't --

25 THE COURT: Mr. Buell, why is this any

1 different than the other question that you asked?

2 MR. BUELL: What I'm trying to get, Judge,
3 the point that I'm trying to get to is the fact
4 that this project --

5 THE COURT: It's a very good deal for the
6 developer.

7 MR. BUELL: Yes, it is.

8 THE COURT: All right. Is that what you want
9 the Court to know?

10 MR. BUELL: I think the Court already knows
11 that.

12 THE COURT: Otherwise the developer would not
13 be doing it. I knew that, you know, before we
14 came in. I can't imagine a developer would have
15 filed this lawsuit and spent all the money for all
16 the lawyers they have and everything else in order
17 to consummate a bad deal.

18 BY MR. BUELL:

19 Q. You told me what you anticipate your costs
20 on the project would be?

21 A. Yes, sir.

22 Q. Would you tell me whether those included
23 the costs that the developer would be obligated to make
24 under this scheme for special assessment payments?

25 A. No, sir.

1 Q. It does not?

2 A. It does not.

3 Q. And that's because that you expect to be
4 reimbursed 100 percent for those assessment payments;
5 correct?

6 A. No.

7 Q. Why did you not include the cost of the
8 assessment payments in your cost estimates?

9 A. Because the cost estimates deal with
10 things occurring before opening of the mall.

11 Q. Let me ask you this: Did you hear the
12 testimony yesterday where we posited a situation in which
13 the first half of a special assessment payment could be
14 made and then the rest of the special assessment payments
15 would be funded through tax revenue?

16 A. I don't believe half of an assessment
17 payment can be made.

18 Q. What I mean by that is the annual
19 assessment is paid in two six-month intervals; right?

20 A. One each being a payment.

21 Q. Correct. All right. So you could make
22 the first six-month payment, which would start this
23 recycling process going, and then never have to make
24 another one for the whole life of the bonds; right?

25 A. The Short Pump Town Center owners could

1 direct the EDA to make that payment to the CDA, was my
2 understanding yesterday.

3 Q. All right. And do you agree that that is,
4 in fact, what could occur under the formation of this deal
5 the way it's structured?

6 A. I agree that that could occur.

7 Q. And do you also agree that as a rational
8 business person, smart business person, from a cash flow
9 perspective it would certainly be advantageous to the
10 developer not to have to make these special assessment
11 payments every six months?

12 A. From a strict cash flow perspective, I
13 understand that the EDA will be passing the CDA money
14 before the assessment is actually due, correct. And from
15 a pure cash flow perspective, the developer should want
16 those back.

17 Q. All right. Well, if the EDA passes the
18 payments through to the CDA, you don't have to come up
19 with, out of your pocket, with what amounts to \$3 million
20 every six months; right?

21 A. Yes, sir.

22 Q. That's correct?

23 A. Yes, sir.

24 Q. Now, there are some tax implications to
25 the developer regarding the receipts of these funds;

1 correct? The reimbursement payments?

2 A. Can you be more detailed with your
3 question?

4 Q. Yes. Let me show you TP-84. Do you
5 recognize TP-84 as being a memo from Layton McCowan to
6 yourself on or about May 31, 2000?

7 A. That's what it appears to be.

8 Q. And who is Mr. McCowan?

9 A. Layton McCowan is the chief financial
10 officer Forest City Commercial Group.

11 Q. Let me direct your attention to the
12 paragraph at the bottom of the first page that describes
13 the issue, and could you tell us in your own words what
14 you understood the issue to be that's being discussed in
15 this memo?

16 A. The issue to be discussed is the payment
17 from the EDA to the developer, or the EDA to the CDA.

18 Q. And what it's essentially saying is that
19 if a developer were to receive these payments from the
20 EDA, they would be taxable income to the developer when
21 they're received; correct?

22 A. What the memo says specifically is that
23 under either structure the accumulated taxable income,
24 whether I take the money up front or let it flow to the
25 CDA, is the same to the developer over time.

1 Q. Well, what it's really saying is we have a
2 mismatch of the money coming in and the amount of expense
3 that you're able to deduct; correct?

4 A. Well, what it says is that at the end of
5 39.5 years, cumulative taxable income, which is the
6 question you asked me, is zero. The difference between
7 the two.

8 Q. All right.

9 A. That's what you asked.

10 Q. Let's see if we can break it down. If a
11 developer were to receive every six months directly from
12 the EDA approximately \$3 million, you would have to
13 recognize that when you receive it as taxable income of
14 \$3 million?

15 A. During that period.

16 Q. Right. And in the year you receive it, it
17 would be taxable income in that year; correct?

18 A. Correct.

19 Q. All right. Now, at the same time you're
20 only able to deduct from that income the depreciation on
21 this special assessment amortized over 39 and-a-half
22 years; correct?

23 A. I'm not sure it's the special assessment
24 or the original bond amount.

25 Q. All right. But in any event, it's

1 capitalized over 39 and-a-half years?

2 A. Yes.

3 Q. So you've got five years, or four
4 and-a-half years of income, but you can only apply
5 one-thirtiyninth of the expense to that?

6 A. Correct.

7 Q. All right. Now, and from what you're
8 saying is that over 39 and-a-half years it may take a long
9 time, but eventually we'll have the same amount for the
10 expense as the income we took in in five years?

11 A. Yes. You had asked me about taxable
12 income.

13 Q. All right. And that's what you meant by
14 the cumulative taxable income being zero?

15 A. Yes. I was answering your question.

16 Q. All right. But it's only zero if you wait
17 39 and-a-half years?

18 A. It is zero.

19 Q. So, now, let's contrast that situation
20 with one in which the EDA redirects the funds to the CDA.
21 Under that scenario you don't recognize any taxable
22 income, do you?

23 A. That's what Layton McCowan had told me.

24 Q. And again, as a rational, intelligent
25 business person, you would much prefer that alternative

1 over the other alternative where you do have this
2 substantial tax income?

3 A. Taxable what?

4 Q. Income.

5 A. Again, my taxable income isn't the issue.
6 It's when I pay it.

7 Q. And you would rather defer it for as long
8 as you could?

9 A. I would rather use the IRS code to my full
10 advantage, yes.

11 Q. Let me direct your attention to, I
12 believe, it is Exhibit --

13 THE COURT: Are you asking the admission of 84?

14 MR. BUELL: Yes, I am, your Honor. I'm sorry.

15 THE COURT: Any objection to taxpayers Exhibit
16 84?

17 MR. BUELL: This would be Exhibit 7 in the
18 binder.

19 THE COURT: Wait just minute. Any objection?

20 MR. BUELL: Oh, I'm sorry.

21 MR. FOOTE: Your Honor, yes, I will just
22 object on the grounds of its relevance.

23 THE COURT: All right. Any objection,
24 Mr. Sabourin?

25 MR. SABOURIN: No, your Honor.

1 THE COURT: All right. Objection is
2 overruled. It will be admitted as taxpayers
3 Exhibit 84.

4 BY MR. BUELL:

5 Q. Can you look in the binder that has
6 Exhibit 7 in it, please?

7 THE COURT: This is the Taubman binder?

8 MR. BUELL: The Taubman binder, yes. No, excuse
9 me. The CDA binder.

10 MR. FOOTE: Your Honor, may I suggest, there
11 may be other exhibits along this line. I will not
12 keep popping up. I have made an objection on the
13 grounds of relevance. I will continue that
14 objection with respect to any document that goes
15 with these transactions, but I won't renew the
16 objection each time.

17 THE COURT: Well, no, I think you need to
18 renew your objections.

19 MR. FOOTE: I'm just trying to move it along,
20 your Honor.

21 THE COURT: Okay. I understand, but I think
22 you need to renew your objections.

23 BY MR. BUELL:

24 Q. Let me ask you to turn to the document
25 that has the Bates number on the bottom BOS-01608?

1 MR. FOOTE: I've lost what that is, Rob.

2 MR. BUELL: Exhibit 7, page 5 of the memorandum
3 of understanding.

4 THE WITNESS: Yes, sir.

5 BY MR. BUELL:

6 Q. Are you with me?

7 A. So far.

8 Q. Okay. Let me direct your attention to
9 paragraph 7, and there is a heading there that says
10 "Prerequisites to Issuance of Bonds." You were in the
11 courtroom yesterday when Mr. Hazelett testified?

12 A. I was.

13 Q. And did you hear his testimony regarding
14 some conditions that he had placed on the developer as
15 conditions to receiving these incentive payments?

16 A. Yes, I did.

17 Q. All right. And are those conditions, or
18 some of them at least, recorded there under paragraph 7?

19 A. It appears to be.

20 Q. All right. Now, the first one is a copy
21 of a reciprocal easement agreement executed by the four
22 anchor department stores. Can you tell us what a
23 reciprocal easement agreement is?

24 A. It is the contract between the department
25 stores and the owner of the shopping center regarding the

1 operations, covenants, etcetera, that will be entered into
2 effectuating how they will act, what we will maintain, a
3 very detailed contract.

4 Q. Have you obtained a reciprocal easement
5 agreement signed by the four department stores?

6 A. No, we haven't.

7 Q. The second condition is evidence
8 satisfactory to the County that Hecht's and Dillard's will
9 be operated as flagship stores, and that Lord & Taylor
10 will be operated as first-class department stores. What
11 evidence has the developer submitted to the County on that
12 item?

13 A. Whatever evidence they deem satisfactory.

14 Q. Well, you don't know what they deem
15 satisfactory, do you?

16 A. That's right, I don't.

17 Q. So what evidence have you provided?

18 A. We have provided descriptions of what
19 flagship means in terms of Hecht's and Dillard's, and we
20 have provided discussion regarding the operation of a
21 Nordstrom and Lord & Taylor, which again I think is
22 confirmed by Mr. Heckman's deposition from the Taubman
23 Company about the quality of those stores.

24 Q. So from the standpoint of Hecht's and
25 Dillard's, you provided some information that described

1 what flagship means?

2 A. Yes.

3 Q. What was that information?

4 A. Flagship in my understanding is a
5 description of size of the store and offering of broader
6 lines of merchandise to serve the public who is shopping
7 at the center.

8 Q. All right. So you told them how big the
9 stores were going to be and what kinds of things they were
10 going to sell?

11 A. Right.

12 Q. And then as to Lord & Taylor and
13 Nordstrom, what evidence did you provide that they were
14 going to be operated as first-class stores?

15 A. Discussions of the types of operations
16 which they are.

17 Q. Basically their reputation as being fine
18 department stores?

19 A. You asked me for my discussions, yes.

20 Q. All right. Number three, a guarantee by
21 Forest City Enterprises in form and substance satisfactory
22 to the County that construction of the non-anchor portion
23 of the center will be completed. Tell us what the
24 non-anchor portion of the center includes on this diagram
25 63.

1 A. Everything outside of the four department
2 stores.

3 Q. All right. Everything but these four
4 department store pads that are in orange?

5 A. Yes, sir.

6 Q. Have you provided or has Forest City
7 provided that guarantee to the County?

8 A. Not at this time.

9 Q. Number four is evidence satisfactory to
10 County that developer has obtained commitments for
11 financing in amount sufficient to complete the
12 construction of the non-anchor portion. What evidence
13 have you provided to the County of that?

14 A. None.

15 Q. And number five is evidence that the
16 developer has spent at least \$10 million of its own money
17 towards the payment of costs; right?

18 A. Yes, sir.

19 Q. What evidence have you provided of that to
20 the County?

21 A. None.

22 Q. What is your understanding, sir, of why
23 the Economic Development Authority was included in this
24 financing scheme?

25 A. I think when you had asked me that during

1 my deposition I really didn't understand that. I gained
2 knowledge yesterday through sitting in the court.

3 Q. All right. So before yesterday you didn't
4 know?

5 A. I didn't specifically know, yes.

6 Q. Do you know at whose insistence it was put
7 in there?

8 A. No.

9 Q. The developer didn't insist on it being in
10 there?

11 A. Not to my knowledge. I did not insist on
12 that.

13 Q. When the developer first presented to the
14 County the concept of a mall at Short Pump, were you
15 asking for incentives from the County at that time?

16 A. Are you asking me about the approved POD?

17 Q. We've heard that there was a POD initially
18 for a center of about 924,000 square feet, and shortly
19 after that I assumed is when you approached the County
20 about a mall? Or shortly before that, excuse me.

21 A. During the POD that has been approved,
22 there was no discussions about incentives for that
23 particular shopping center.

24 Q. All right. And what I want to know is,
25 what changed between then and now, or between then and

1 when you did go to the County and ask for an incentive?

2 A. The type of shopping center being
3 constructed.

4 Q. Got bigger and better?

5 A. It got bigger and the shift went towards a
6 more upper level shopping center.

7 Q. By upper level, you don't mean two levels,
8 you just mean fancier?

9 A. I mean better quality.

10 Q. All right. And did it also -- the tenants
11 or the anchor tenants that were proposed initially in the
12 mall also change between the time that you were not asking
13 for incentives and the time you began asking for
14 incentives?

15 A. Yes.

16 Q. And did the commitments that you had to
17 make to the department stores in order to get them to
18 locate in Henrico County also increase between the time
19 when you were not asking for incentives and the time that
20 you began asking?

21 A. Yes.

22 Q. Now, we were talking earlier about the
23 structure of the payments and the flow of money, the
24 projections for the mall in terms of its incremental tax
25 revenue, the money that's going spin off, contemplate that

1 there will be enough money to pay to the EDA such that you
2 would never have to make another special assessment
3 payment after the first one; correct?

4 A. No, again -- Yes, that the tax increment,
5 the tax money flowing from that project to the County,
6 should be adequate to cover an assessment payment.

7 Q. So if all goes according to plan --

8 THE COURT: I've heard this several times,
9 Mr. Buell, and obviously that's what the parties
10 intended.

11 BY MR. BUELL:

12 Q. Who do you understand is obligated to
13 maintain the improvements that are constructed with the
14 CDA money?

15 A. Those obligations have not been finalized.

16 Q. Do you expect that the developer will be
17 maintaining all of the improvements at the site including
18 CDA improvements?

19 A. The physical maintenance of them I would
20 at this time believe that.

21 Q. And, in fact, that's customary in your
22 industry, is it not, that all of the improvements that
23 comprise a mall are typically maintained and operated by
24 the developer?

25 A. From the deals I've been involved in, that

1 has been -- the maintenance has been handled by the
2 development.

3 Q. Did I hear you to say that there's no
4 maintenance contract or agreement at this point, but your
5 indication is that you -- the developer would probably be
6 doing it; is that correct?

7 A. The physical maintenance is what you've
8 asked me?

9 Q. Yes.

10 A. Yes, the physical maintenance.

11 Q. Do you expect to be compensated by the CDA
12 for any maintenance you may do of CDA's facilities?

13 A. I have not determined that yet.

14 MR. BUELL: I believe that's all I have, Judge.

15 THE COURT: All right. Mr. Sabourin, do you
16 have any cross-examination?

17 MR. SABOURIN: Yes, your Honor.

18

19 CROSS-EXAMINATION

20 BY MR. SABOURIN:

21 Q. Good afternoon, Mr. LaRue. I'm John
22 Sabourin. I represent the Taubman Company. Would you
23 take a look in the Taubman exhibit book at TB-12? This is
24 a document that says "Proposed Ownership Structure for the
25 Short Pump Town Center LLC." Have you seen this document

1 before?

2 A. Not to my knowledge.

3 Q. You described briefly the ownership
4 structure earlier today. This is consistent with what you
5 described; correct?

6 A. Very close.

7 Q. Is there any difference in there?

8 A. I'm not sure if Forest City Rental
9 Properties or Forest City Commercial Group is in that
10 intermediary role between Enterprises and FC Short Pump.

11 MR. SABOURIN: We move the admission of this
12 exhibit.

13 THE COURT: Any there any objections to
14 Taubman 12?

15 MR. FOOTE: We adhere to our objection on
16 relevance grounds, your Honor.

17 THE COURT: All right. The objection is on
18 relevance grounds. The objection is overruled.

19 BY MR. SABOURIN:

20 Q. You were asked some questions about the
21 initial POD. In that initial POD, the plan was to put in
22 two department stores; is that correct?

23 A. Yes, sir.

24 Q. And to put in two or three big boxes?

25 A. That was the plan.

1 Q. And none of the department stores that are
2 going to go in under the revised PD were going to go in
3 under the original PD; correct?

4 A. That's my understanding.

5 Q. And as the initial POD was being prepared,
6 proformas or projections were done on that development,
7 weren't they?

8 A. I assume so.

9 Q. And would it be fair to say that those
10 projections showed that this could be a good business
11 transaction?

12 A. I would assume that.

13 Q. And, in fact, you saw some of those
14 projections, didn't you?

15 A. I'm not sure I saw the projections that
16 were prepared at the time the initial POD was being
17 prepared.

18 Q. But the conclusion of those proformas was
19 that this would be a profitable venture for Forest City?

20 THE COURT: I thought we already decided that.

21 MR. SABOURIN: Not the initial POD, your Honor.

22 THE COURT: All right.

23 THE WITNESS: I assume so.

24 BY MR. SABOURIN:

25 Q. You discussed -- or the possibility of

1 Mr. Davenport serving as underwriter for the bonds was
2 discussed in early 2000 with Forest City, wasn't it?

3 A. I don't believe I know a Mr. Davenport.

4 Q. Excuse me. With Mr. Traudt who is with
5 Davenport.

6 A. That's what Mr. Traudt testified to
7 yesterday.

8 Q. The question is: You were aware of the
9 fact that he wanted to serve as bond council in early
10 2000; correct?

11 A. I personally was not aware of that.

12 Q. Okay. Would you take a look at TB-10?
13 This is a memorandum dated January 11, 2000?

14 A. Yes.

15 Q. From Bill Axselle to yourself? Do you
16 have the right document?

17 A. I'm looking at 10. Okay. Yes.

18 Q. You received this document at or around
19 January 11th, 2000, didn't you?

20 A. If that's what it's dated, it appears to
21 be.

22 Q. Do you recall receiving this?

23 A. No, I don't.

24 Q. You have no recollection of receiving
25 this?

1 A. Not this specific document.

2 Q. Would you take a look at the last
3 paragraph on page 3? Do you see that?

4 A. Yes, sir.

5 Q. Mr. Axselle was suggesting in there that
6 Mr. Traudt had contacted him and asked that both the
7 County and Forest City considered him to possibly to be
8 the underwriter for the bonds for the CDA?

9 A. That's what that says.

10 Q. And this memo was sent to you; correct?

11 A. As I said, it appears to have been sent to
12 me.

13 Q. Okay. And there's a note in there that
14 there was a recognition by Mr. Traudt that a conflict must
15 be cleared with both --

16 THE COURT: Are you leading to something that
17 Mr. Buell has not already covered? Didn't
18 Mr. Buell already cover this?

19 MR. SABOURIN: I don't think he did, your
20 Honor.

21 THE COURT: I know I've seen it before, and I
22 know you've talked about it. In fact --

23 MR. SABOURIN: I think it was covered with
24 Mr. Rice.

25 THE COURT: Oh, you want to get a different

1 answer? Go ahead.

2 BY MR. SABOURIN:

3 Q. There was an issue of getting a conflict
4 waiver from Forest City and Pruitt. Do you see that?

5 A. Yes, I do.

6 Q. Were you involved in discussions about
7 getting a conflict or providing a conflict waiver to
8 Mr. Traudt in January?

9 A. Not that I recall in January.

10 Q. Do you recall having those conversations
11 at some other time?

12 A. As I told you, and during my deposition I
13 believe, later in the year I do recall discussions that we
14 had had -- I had had, I think, specifically with Layton
15 McCowan regarding Mr. Traudt's interest in serving as
16 underwriter.

17 Q. Okay. Mr. McCowan serves in what position
18 with your organization?

19 A. Layton McCowan. He is the CFO of Forest
20 City Commercial Group.

21 Q. And do you know if a conflict waiver was
22 provided?

23 A. I don't believe there's a -- No, I'm not
24 aware of any.

25 Q. Okay. You were asked some questions about

1 the involvement of the EDA. With regard to this
2 transaction, there is no loan that is going to be made
3 from the EDA to any of the developer entities, is there?

4 A. Not that I'm aware of.

5 MR. SABOURIN: That's all the questions I have,
6 your Honor.

7 THE COURT: Is there any cross-examination by
8 the plaintiffs?

9 MR. FOOTE: I believe I have but one
10 question.

11 THE COURT: One question. All right

12

13 CROSS-EXAMINATION

14 BY MR. FOOTE:

15 Q. Mr. LaRue, would Forest City construct the
16 900,000-square-foot mall shown on the initial POD in the
17 event that the current proposal being considered is
18 disapproved by the Court?

19 A. I didn't understand the question.

20 Q. In the event that the funding structure
21 that we've been talking about, in the event that the bonds
22 are not validated and the agreements that have been
23 reached are invalid, or for any reason, would Forest City
24 go forward with the 900,000-square-foot mall?

25 A. No, we wouldn't.

1 Q. Why?

2 A. We understand that there is going to be a
3 superregional shopping center in the Richmond MSA. There
4 are two sites that we understand are going to have that
5 facility, one being Short Pump and one being Stony Point.
6 That mall will land in Stony Point. And in our opinion,
7 in my opinion, a 900,000-square-foot retail shopping
8 center will not be a viable investment for us to
9 participate in.

10 Q. Can I ask you to turn to Exhibit 61 in the
11 book to your right and ask you if you recognize it?

12 A. That is a memo from Bill Seller to the
13 owners of Short Pump Town Center LLC.

14 Q. And you saw this?

15 A. I recall seeing this.

16 Q. And it is, I take it, nothing more than an
17 outline of certain other incentives that have been used
18 elsewhere in the Commonwealth?

19 A. Yes, sir.

20 MR. FOOTE: Your Honor, we would move the
21 admission of Exhibit 61.

22 THE COURT: Any objection?

23 MR. BUELL: Yes, Judge. It seems to me
24 what's good for the goose is good for the gander.
25 If we're going to put in evidence about incentives

1 that are being offered at other malls, to other
2 shopping centers, then I think I should have been
3 able to inquire about that from Mr. LaRue.

4 MR. FOOTE: Your Honor, we have never
5 contested that.

6 THE COURT: Any objection to that by Taubman?

7 MR. SABOURIN: No objection, your Honor.

8 THE COURT: Objection is overruled.

9 MR. FOOTE: Your Honor, I have nothing
10 further.

11 THE COURT: Any redirect? Mr. Buell?

12 MR. BUELL: No.

13 THE COURT: Thank you very much, Mr. LaRue.
14 You may step down, Mr. LaRue. You are free to
15 leave if you would like to leave. If you would
16 like to remain in the courtroom, you're welcome to
17 stay.

18 (Witness Stood Aside)

19 THE COURT: Next witness.

20 MR. SPENCER: Mr. Hahn, Mr. Gresham, and
21 Mr. Anderson rest.

22 THE COURT: Taxpayers rest. Mr. Sabourin?

23 MR. SABOURIN: We'd call Mr. Agostino.

24 THE COURT: How long do you think that's
25 going to take?

1 MR. SABOURIN: Fairly brief, your Honor. 15
2 minutes.

3 THE COURT: All right.

4
5 FREDERICK AGOSTINO,
6 was sworn and testified as follows:

7 DIRECT EXAMINATION

8 BY MR. SABOURIN.

9 Q. Good morning, Mr. Agostino. Please state
10 your name and address.

11 A. Frederick Agostino.

12 THE COURT: Spell your last name for me.

13 THE WITNESS: A-G-O-S-T-I-N-O. 9508 Lakewater
14 Court, Richmond, Virginia.

15 BY MR. SABOURIN:

16 Q. Where are you employed?

17 A. Henrico County's Economic Development
18 Authority.

19 Q. Could you speak up a little so people
20 can --

21 A. Henrico County's Economic Development
22 Authority.

23 Q. And your position?

24 A. Executive director.

25 Q. And how long have you held that position?

1 A. Since 1985.

2 Q. When did you first become aware of the
3 EDA's involvement in the Short Pump Town Center financing?

4 A. Probably at 60 to 90 days before our July
5 meeting of '99.

6 Q. And who told you about it?

7 A. The county manager Mr. Hazelett.

8 Q. When was the first time the Board
9 considered any action or considered -- When was the first
10 time the Board was advised of potential involvement by
11 the EDA in this transaction?

12 A. If I recall correctly, it was in July at
13 their July meeting when we distributed a press release and
14 attachments that detailed the proposal.

15 Q. Would you take a look at TB-17, which
16 should be in the book -- That's the correct one, I
17 believe.

18 A. Yes, this is it.

19 Q. And this was the first time it was raised
20 with the Board?

21 A. Yes, sir.

22 Q. And the press release is attached to these
23 Board minutes?

24 A. Yes, sir.

25 Q. There's an indication in there that the

1 Authority was asked to serve as a conduit for a portion of
2 the complex financial plan; is that correct?

3 A. That's correct.

4 Q. And is that what you stated to the Board?

5 A. Probably. I don't recall exactly what I
6 stated.

7 Q. And where did you -- or how did you find
8 out that the EDA was to serve as a conduit?

9 A. Again, in conversations with the County
10 manager.

11 Q. So Mr. Hazelett told you that?

12 A. Yes. That we would be asked to serve as a
13 conduit.

14 Q. And this is just an informational aspect
15 advising the Board at this July meeting; is that correct?

16 A. Yes, it was a precursor to what we thought
17 were other things to come.

18 Q. Now, would you take a look at TB-22?

19 THE COURT: Do you want 17 as an exhibit?

20 MR. SABOURIN: Yes, your Honor.

21 THE COURT: All right. Is there any objection
22 to Taubman 17?

23 MR. FOOTE: No, sir. Actually, we thought it
24 was already in, but no, sir, none.

25 MR. SABOURIN: I think it may be in as one of

1 your exhibits.

2 THE COURT: It will be admitted if it's not
3 already admitted.

4 BY MR. SABOURIN:

5 Q. Can you identify TB Exhibit 22?

6 A. These are the minutes of the September 21,
7 2000, EDA regular meeting.

8 Q. And at this meeting did Mr. Hamlet and
9 Mr. Leon Johnson, the deputy county manager, discuss the
10 Short Pump Town Center?

11 A. Yes, sir.

12 Q. No action was taken at that meeting, was
13 there?

14 A. No, sir.

15 Q. And the Board's function in this, as
16 discussed at that meeting, was to serve as a conduit?

17 A. That's correct.

18 Q. Would you take a look at TB-28?

19 THE COURT: TB-22 may be in, but do you want it
20 in if it's not in?

21 MR. SABOURIN: I'd move it in, your Honor.

22 MR. FOOTE: No objection, your Honor.

23 THE COURT: Mr. Buell?

24 MR. BUELL: No objection, Judge.

25 THE COURT: All right. It will be admitted.

1 And the next one is 28?

2 MR. SABOURIN: Yes.

3 BY MR. SABOURIN:

4 Q. Would you tell us what this is?

5 A. This is the minutes of the November 16,
6 2000, EDA regular meeting.

7 Q. And at this meeting a resolution was
8 passed approving the economic development agreement?

9 A. Approving the Authority's participation as
10 a conduit, yes.

11 Q. Now, was there a presentation made at that
12 Board meeting?

13 A. There was a presentation by our counsel
14 and by Ms. France.

15 Q. And your counsel is Mr. Knight?

16 A. Correct.

17 Q. And he's the assistant county attorney?

18 A. Correct. Deputy county attorney,
19 actually.

20 Q. And following this presentation the
21 resolution passed?

22 A. Yes, sir.

23 Q. Was there any discussion at this meeting
24 as to why the EDA would serve as a conduit?

25 A. As to why?

1 Q. Yes.

2 A. Specific details, no.

3 Q. Now, at the time this resolution was
4 passed, had you read the economic development agreement?

5 A. At the meeting, I believe, yeah.

6 Q. Had you read it before the meeting?

7 A. Not that I recall.

8 Q. And is it your understanding that the
9 Economic Development Authority is simply going to receive
10 funds from the County and write checks either to the CDA
11 or to the developer?

12 A. Acting as a conduit, that's my
13 understanding.

14 Q. Okay. And the EDA is not making any loans
15 in connection with this transaction, is it?

16 A. Not to my knowledge.

17 Q. And it's not issuing any bonds in
18 connection with this transaction?

19 A. No, sir.

20 MR. RAPISARDA: Excuse me, your Honor, haven't
21 we been over all this yesterday? We would object.

22 THE COURT: Mr. Sabourin?

23 MR. SABOURIN: Well, I don't think we've
24 gotten it from the EDA, your Honor.

25 THE COURT: I understand. But, I mean, you

1 don't have to get the same thing from every
2 witness, do you? Unless you don't think that
3 that's already been established. It's been
4 established no matter who it's been established
5 by.

6 MR. SABOURIN: I don't think it has been
7 specifically established that they're not going to
8 be constructing any improvements, all of which
9 could go to the statutory issue that --

10 THE COURT: I haven't heard that they will
11 be.

12 MR. SABOURIN: Well, I want to affirm that,
13 establish that they would.

14 THE COURT: Go ahead. But do it very
15 quickly, though.

16 BY MR. SABOURIN:

17 Q. The EDA is not going to be constructing
18 any improvements, is it?

19 THE COURT: The EDA is only going to serve as a
20 conduit; is that right?

21 THE WITNESS: That's correct.

22 THE COURT: They're not going to going to do
23 anything else in the world?

24 MR. SABOURIN: No.

25 THE COURT: So he's already told you all of

1 the -- in the world that can be done.

2 BY MR. SABOURIN:

3 Q. In your 15 years that you've been at the
4 EDA, have you ever had a situation where the EDA has acted
5 as a conduit?

6 A. We've never had a situation similar to
7 this one. I think all industrial revenue bonds there's a
8 conduit process that's involved.

9 Q. But you've never acted as a conduit such
10 as you're doing in this case, have you?

11 A. No.

12 MR. SABOURIN: That's all the questions I have.

13 THE COURT: Mr. Rapisarda?

14 MR. RAPISARDA: No questions, your Honor.

15 MR. BUELL: I just have one and I really mean
16 one.

17 THE COURT: And you really mean one.

18

19 CROSS-EXAMINATION

20 BY MR. BUELL:

21 Q. Mr. Agostino, the EDA never determined
22 that it was necessary in order to further economic
23 development to pay incentives to the developer, did it?

24 A. Necessary?

25 Q. You never made a determination that it was

1 necessary to further the purposes of the economic
2 development to pay these incentives to the developer?

3 A. I'm not quite sure I understand the
4 question. There probably isn't any one single thing that
5 we can name that's necessary to further economic
6 development in Henrico. Our economic development will go
7 on.

8 Q. Do you recall that I took your deposition
9 on January the 16th, 2001?

10 A. Yes.

11 Q. Here is a copy of the deposition. Let me
12 ask you to turn to page 24, line 3.

13 THE COURT: You can just read the question.

14 THE WITNESS: 24, line 3.

15 BY MR. BUELL:

16 Q. And I asked you, "Did the Economic
17 Development Authority ever make a determination that it
18 was necessary in order to further economic development to
19 make economic incentive payments to the developer of Short
20 Pump Town Center."

21 A. I don't recall that ever being discussed.

22 Q. And your answer was, "I don't recall that
23 ever being discussed." Correct?

24 A. That's correct.

25 Q. Thank you, sir.

1 THE COURT: All right. Now, Mr. Rapisarda, do
2 you have any questions?

3 MR. RAPISARDA: Just one question. Might be
4 two.

5

6 CROSS-EXAMINATION

7 BY MR. RAPISARDA:

8 Q. Mr. Agostino, let me ask you to take a
9 look at Exhibit 5, please.

10 MR. RAPISARDA: Which will be the Plaintiff's
11 Exhibit, your Honor.

12 THE COURT: I think that's the book to your
13 right.

14 THE WITNESS: All right.

15 BY MR. RAPISARDA:

16 Q. Do you recognize what this is,
17 Mr. Agostino?

18 THE COURT: Make sure that he's in the right
19 book. I'm not sure we're all --

20 THE WITNESS: November 16th, 2000, Minutes of
21 the Economic Development Authority?

22 BY MR. RAPISARDA:

23 Q. Correct. And would you turn,
24 Mr. Agostino, to page -- if you see in the right-hand
25 corner there's a number EDA-00101, which is a resolution,

1 the Economic Development Authority?

2 A. Yes, sir.

3 Q. And do you see the resolution, sir?

4 A. Yes, sir.

5 Q. And can you read into the record the
6 fourth whereas clause of that resolution?

7 A. "Whereas, assisting in the development of
8 the Short Pump Town Center will promote economic
9 development in Henrico County, Virginia, the County, and
10 will benefit the citizens of the county by providing
11 increased employment opportunities, a strengthened
12 economic base, an increased tax revenue, and additional
13 retail opportunities not currently available in the local
14 area."

15 Q. And was that not, sir, a determination in
16 the EDA Board's resolution?

17 A. Yes, it was.

18 Q. And a finding of the Board?

19 A. Yes, sir.

20 MR. RAPISARDA: Thank you, sir.

21 THE COURT: I think that was about four
22 questions. Mr. Sabourin?

23 MR. SABOURIN: Just one question.

24 THE COURT: Now, why do you-all do that?
25 Before you ask that one question, do you want

1 TB-28 admitted?

2 MR. SABOURIN: Yes.

3 THE COURT: TB-28 any objection? That's the
4 resolution that Mr. Agostino was asked about on
5 direct examination.

6 MR. RAPISARDA: No objection.

7 THE COURT: All right. That will be
8 admitted.

9

10 REDIRECT EXAMINATION

11 BY MR. SABOURIN:

12 Q. Did the EDA Board make any finding of the
13 economic benefits of the Short Pump Town Center to the
14 Commonwealth of Virginia?

15 A. To the Commonwealth of Virginia?

16 Q. Yes.

17 A. We didn't make any findings that aren't
18 included in the whereas clauses, no, sir.

19 Q. So if there's not one in there, you didn't
20 make one, did you?

21 A. We concern ourselves with Henrico County,
22 yes, sir.

23 MR. SABOURIN: Thank you.

24 THE COURT: Anything else? Mr. Agostino, thank
25 you very much, sir. You may step down. You are

1 excused. If you would like to stay in the
2 courtroom, you're welcome to stay.

3 (Witness Stood Aside)

4 THE COURT: Mr. Sabourin?

5 MR. SABOURIN: We'd call Mr. Heckman.

6

7 BRUCE W. HECKMAN,
8 was sworn and testified as follows:

9 DIRECT EXAMINATION

10 BY MR. SABOURIN:

11 Q. Please state your name and address.

12 A. My name is Bruce Wilson Heckman. My home
13 address is 2725 Creek Bend Drive in Troy, Michigan.

14 Q. Who are you employed by?

15 A. The Taubman Company.

16 Q. And how long have you been with them?

17 A. Approximately 14 years.

18 Q. And what position do you hold with them?

19 A. I'm vice president of development.

20 Q. Is there a relationship between the
21 Taubman Company and the entity that owns Regency Square
22 shopping center?

23 A. Yes, there is.

24 Q. And is there a relationship between the
25 Taubman Company and the entity that holds an option on

1 Stony Point?

2 A. Yes, there is.

3 Q. Did you have responsibilities concerning
4 Regency Square in 1997?

5 A. Yes, I did.

6 Q. And what were your responsibilities then?

7 A. Well, we had purchased the shopping center
8 in 1997, and so my responsibilities were related to any
9 redevelopment of that shopping center.

10 Q. Did you have conversations with
11 representatives of Henrico County about redevelopment?

12 A. Yes, I did.

13 Q. And when were those?

14 A. I believe we started the first
15 conversation in the fall, October of 1997.

16 Q. Who were the conversations with?

17 A. At that time it was a group of several
18 representatives from Henrico County including the planning
19 director, and Mr. Harvey Hinson who was, I believe, an
20 assistant manager, and two or three other staff people
21 with the county.

22 Q. As these discussions went on, did Taubman
23 make certain proposals concerning redevelopment of that
24 shopping center to Henrico County?

25 A. Yes. We did not make any proposals in the

1 October meeting, but in subsequent meetings there were a
2 series of proposals that were made to Henrico County
3 representatives.

4 Q. And generally what were those proposals?

5 A. Well, to add a Nordstrom store to the
6 center, and to add a Lord & Taylor store to the center,
7 and some of the proposals also included the addition of a
8 Dillard's store to that center.

9 Q. Now, are there problems -- or what are the
10 difficulties that a developer has in redeveloping an
11 existing shopping center?

12 A. Well, there are numerous difficulties at
13 this particular center because it has a small site size
14 necessitating that any parking that we add would have to
15 be decked parking. And obviously because this is a
16 redevelopment project, we'd have to enhance the structural
17 capabilities of the building, tear down portions of the
18 existing area. In fact, we would probably have to tear
19 down some of the existing parking structures and rebuild
20 them, relocate utilities. It would be a complicated
21 process.

22 Q. Would it be an expensive process?

23 A. Yes, it would.

24 Q. Did you take certain staff from Henrico
25 County to another project of yours to show how this could

1 be done?

2 A. Yes, we did.

3 Q. And when was that?

4 A. That was in 1998, I believe, at the end of
5 May or beginning of June of 1998.

6 Q. And who went on that excursion?

7 A. Mr. Hazelett, the county manager;
8 Mr. Hinson, the assistant manager; Ms. O'Bannon, who was a
9 County council person, and I can't remember the other
10 gentleman. He was then the chairman of the County
11 council. Dave -- It begins with a K. I can't remember
12 his last name.

13 Q. Kaechele?

14 A. Yes, that's right.

15 Q. Or Cakely (phonetic) I think it's
16 pronounced?

17 A. Right.

18 Q. And how long a trip was this?

19 A. I think two days. We got there part of
20 one day, stayed overnight, and were there a second day.

21 Q. And did you have discussions with regard
22 to what was to be done at Regency while you were in New
23 Jersey?

24 A. Yes, we discussed various proposals for
25 Regency and how it related to the New Jersey mall that we

1 were looking into.

2 Q. Were there discussions during this time
3 about the plans of Taubman for Stony Point?

4 A. Yes. Just very briefly, but, yes.

5 Q. And what was Henrico told about Taubman's
6 position on Stony Point?

7 A. Well, what we had said is, is that because
8 we had a letter of intent from the Nordstrom Company and
9 because we had the same effect of that from Lord & Taylor,
10 that it was our intent to try and bring those stores to
11 Regency Square, that we really wanted to make Regency
12 Square the superregional mall for the area. That left a
13 question of what we would do with Stony Point. And we
14 indicated to the County all along from the first meeting
15 that if we could successfully redevelop Regency Square, we
16 would abandon Stony Point, and that was our position.

17 Q. Did you have discussions about specific
18 types of financing that could be done in this June time
19 frame 1998?

20 A. Yes, we did.

21 Q. And what were the specific structures that
22 were discussed?

23 A. Well, I think we tried to have, in
24 essence, a brainstorming session to explore all the
25 various types of assistance that would be available

1 through Henrico County, so we discussed things such as
2 industrial revenue bonds, tax increment financing, special
3 improvement districts, business improvement districts,
4 anything that could be made available.

5 Q. Did Taubman have concern about Regency
6 Mall declining at or around that time?

7 A. Well, we certainly wanted to make sure
8 that Regency Mall was the premier mall in the area, and we
9 knew that we needed to make improvements to keep it that
10 way, yes.

11 Q. And to make those improvements, were
12 incentives required?

13 A. Yes.

14 Q. And you made that clear to Henrico County?

15 A. Yes.

16 Q. Now, was there a particular game plan or
17 process that Taubman and the County were going to go
18 forward with in the latter half of 1998 and 1999
19 concerning the redevelopment of Regency Mall?

20 A. That was my understanding, yes.

21 Q. And what was that game plan?

22 A. Well, the County had made it clear to us
23 from the beginning that they had no precedent for
24 providing incentives for this type of a thing, so we
25 indicated that we would need to work together mutually to

1 try to come up with something that was successful. The
2 County's actions on that part were to try and identify the
3 appropriate mechanisms that could make assistance
4 available, and our part on that was to come up with a
5 matching development plan from the various scenarios that
6 we had presented to the County that would fit the level of
7 assistance that was available from the County.

8 We both agreed that it would be inappropriate
9 for us to publicly propose a development that couldn't be
10 carried out or to mention a level of assistance that was
11 unrealistic and politically unviable for the County, so we
12 were to work together with the lead being taken by Henrico
13 County to identify the appropriate funding mechanism.

14 Q. And who at Henrico County was taking that
15 lead?

16 A. Well, Harvey Hinson was designated to me
17 as the contact person.

18 Q. What did Taubman do as far as developing a
19 plan for the redevelopment of the mall?

20 A. Well, as I said earlier, we prepared, I
21 believe, approximately six different plans which showed
22 the different department store configurations, and where a
23 range of improvement from simply adding one or more stores
24 or converting one store and adding a new store in the
25 project, to more ambitious plans that even involved

1 relocating Quioccasin Road and other roads that were quite
2 ambitious.

3 Q. And physically how did you present these
4 plans to Henrico County?

5 A. We brought those plans to meetings
6 initially with Mr. Hazelett and Mr. Hinson, and then
7 ultimately these plans were also shown to certain members
8 of the County Board.

9 Q. What did you understand that Mr. Hinson
10 was doing in terms of identifying a funding mechanism?

11 A. His charge, as I understood it as given to
12 him by Mr. Hazelett, was to scour all the resources to
13 come up with some type of a mechanism. He was just coming
14 off of the efforts for White Oak where they had been
15 successful, and he was to look for the same type of
16 creativity to assist us.

17 That became more specific when we had the
18 meeting in Short Hills. And after discussing all the
19 various alternatives associated with Short Hills, it was
20 determined that the most likely prospect was a
21 modification to the state statute regarding tax increment
22 financing to provide some sort of, well, first of all, the
23 ability to capture increments other than the real property
24 tax such as the sale tax, and to provide some protections
25 for the County with respect to their bond rating, which

1 was a concern expressed by the County at that time.

2 Q. Did you have continuing contact with Mr.
3 Hinson to find out what was happening?

4 A. Yes, I did.

5 Q. And what type of regularity did you
6 contact him?

7 A. Well, I think in the -- after that meeting
8 I probably called him once a week for the first month or
9 so, and then the contacts began to taper off, and maybe
10 once a month or so for a couple months. And every time
11 the answer was the same that there simply were no
12 resources available from the County to provide financial
13 assistance to our project.

14 Q. Were you ever told the results of attempts
15 to obtain legislation to enable the County to make some of
16 this financing?

17 A. I was told, you know, initially they were
18 working on those attempts, and then later told that it was
19 decided not to move forward with a legislative amendment.

20 Q. Now, in 1998 and 1999 what was happening
21 at Stony Point?

22 A. In 1988 and '99 Stony Point --

23 Q. '98 and '99, I'm sorry.

24 A. The project was essentially just laying
25 there. Our efforts were fully devoted towards the

1 redevelopment of Regency through -- certainly through '98.
2 In '99 as it became apparent that the County would provide
3 no assistance to us with Regency, we then began to
4 re-examine our options associated with Stony Point.

5 Q. In going to Henrico County, did you ever
6 advise them of the fact that you were having conversations
7 with the City officials concerning Stony Point?

8 A. Yes. At the very first meeting, we
9 advised them that the City of Richmond had assisted us or
10 had offered financial assistance to us with Stony Point.
11 We also proffered at that time that we would not play the
12 two jurisdictions off on each other, and, in fact,
13 Mr. Hazelett was emphatic that he wouldn't allow the two
14 jurisdictions to be played off on each other, and we had
15 no further contact with the City about -- the City of
16 Richmond about any financial assistance until we were
17 certain by the representations made to us by Henrico
18 County that no assistance was available from Henrico
19 County.

20 Q. Now, in 1998 and 1999 were you familiar
21 with what was happening at Short Pump Town Center?

22 A. I was aware that there had been an initial
23 project approved at the Short Pump area, and then we began
24 to pick up rumors in the industry that the people in the
25 Short Pump area were considering changing their -- the

1 configuration and character of their shopping center.

2 Q. And where did you obtain the information
3 about the initial configuration of it?

4 A. Can I be excused for just a second? Can I
5 get a glass of water?

6 THE COURT: Yes, sir, certainly.

7 THE WITNESS: We have regular conversations and
8 communications with people in the industry, both
9 with the department stores and other developers,
10 and also we monitor what -- we all monitor each
11 other at the national convention of the
12 International Council of Shopping Centers which is
13 held annually in Las Vegas.

14 BY MR. SABOURIN:

15 Q. Did there come a point in time at which
16 you found out that there were public incentives being
17 given by Henrico County for that development?

18 A. Yes. It was -- Well, it was rumored that,
19 in fact, incentives were being made available to Henrico
20 County I think in -- Well, basically, we would have picked
21 that up in the spring of '99.

22 Q. Now, there's been discussion about the
23 seven criteria for development in Henrico County. You've
24 heard that in the testimony yesterday; correct?

25 A. Yes.

1 Q. Did you have any discussions with anyone
2 at Henrico County concerning that criteria?

3 A. No.

4 Q. Now, did there come a point in time in
5 1999 when you gave up responsibility for Regency and Stony
6 Point?

7 A. Yes.

8 Q. And when was that?

9 A. Well, I think it was about the time of the
10 ICSC conference which would have been April, May of that
11 year.

12 Q. And who did you turn responsibility over
13 to?

14 A. Steven Kieras.

15 Q. And he is in what position?

16 A. He is also a vice president of development
17 like I am.

18 MR. SABOURIN: Just a moment, your Honor.

19 THE COURT: All right.

20 MR. SABOURIN: That's all my direct, your Honor.

21 THE COURT: Mr. Buell and Mr. Spencer, any
22 cross-examination?

23 MR. BUELL: No questions.

24 THE COURT: Mr. Foote? Mr. Rapisarda?
25 Mr. Perrow?

1 MR. RAPISARDA: Thank you.

2 THE COURT: I know. One question.

3 MR. RAPISARDA: There won't be many, your Honor,
4 but I don't want to make a promise I can't keep.
5 But I've learned my lesson.

6 THE COURT: That's what I meant. You said
7 that before and --

8 MR. RAPISARDA: It won't be 10.

9

10 CROSS-EXAMINATION

11 BY MR. RAPISARDA:

12 Q. Mr. Heckman, would you agree with me that
13 Regency Square is the premier mall in Henrico County?

14 A. Now, yes.

15 Q. Yes, sir, right now. And, in fact, that
16 mall has been in the county for 25 years?

17 A. Approximately, yes, sir.

18 MR. RAPISARDA: Thank you. No further
19 questions.

20 THE COURT: Any redirect?

21 MR. SABOURIN: No, your Honor.

22 THE COURT: Thank you very much, Mr. Heckman.
23 You may step down, sir. You are free to leave if
24 you would like to leave. If you would like to
25 stay in the courtroom, you're welcome to stay.

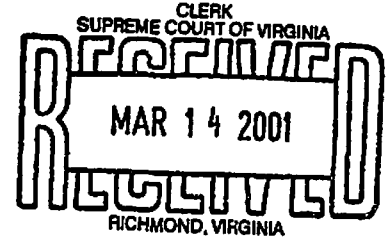


010456

VIRGINIA:

IN THE CIRCUIT COURT OF HENRICO COUNTY

SHORT PUMP TOWN CENTER
COMMUNITY DEVELOPMENT AUTHORITY,



Plaintiff,

v.

Law No: CL00-1636

TAXPAYERS, PROPERTY OWNERS, et al.,

Defendants.

Before: HONORABLE RANDALL G. JOHNSON

Trial - Day II - Afternoon session

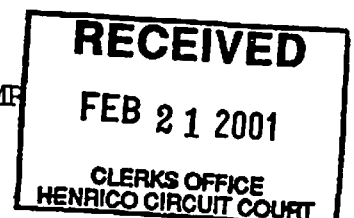
February 1, 2001
Richmond, Virginia

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Reporter by: Gilbert Frank Halasz, RMP



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1 A The most recent revised POD was filed on
2 January 11 of this year.

3 Q And has that POD been approved?

4 A That POD has not been approved. A revised
5 POD has not been approved by the commission.

6 Q Okay. Is it possible that the County might
7 require changes to that plan before approval?

8 A Yes, it is.

9 Q Is it possible that the County might require
10 changes to the so-called infrastructure
11 improvements to that plan, that is, the lights,
12 roads?

13 A It is possible. However, I am not sure,
14 because I have not personally reviewed the plan or
15 reviewed comments from the various review agencies
16 in the County.

17 Q But it is possible?

18 A It is possible, yes, sir.

19 Q Thank you.

20 THE COURT: Mr. Spencer, any cross
21 examination?

22 MR. SPENCER: No questions.

23 THE COURT: Mr. Foote, Mr. Rapisarda?

24 MR. RAPISARDA: No questions, Your Honor.

25 THE COURT: Thank you very much. You may



1 found no gross benefit to the County. And once
2 you look at alternatives over a ten-year period,
3 the County would gain about \$30 million by having
4 a small shopping mall. So I don't believe that
5 criteria is met.

6 Q Okay. Number four?

7 A Number four, I already stated that incentives
8 are greater than incremental County revenue by 12
9 or so million dollars.

10 Q Lastly, number five related to debt limits.

11 A Number five, we have the same situation as I
12 indicated in number three. In other words, I
13 believe from the data I have given here, and I
14 checked it against other sources, that the mall
15 value is in the, you know, 160 to 180 million
16 dollar range. The debt plus interest is million
17 dollars. The debt itself is 22 plus million
18 dollars. So, I don't believe the ten percent test
19 is being met in this instance.

20 Q Now, in your opinion, under what
21 circumstances are incentive for economic
22 development justified?

23 A Well, they are justified when a community can
24 indicate that it is to its economic and financial
25 benefit to have such an investment.

1 Q In what circumstances would there be a
2 benefit?

3 A Well, I have seen such benefit, for example,
4 in older cities. Burlington, Vermont; Washington,
5 D. C. There are other cities which have a loss of
6 economic activity. I studied Richmond, and I have
7 a report on Richmond published, that was in 1978,
8 that showed the loss of retail trade from
9 Richmond. I projected -- I predicted the city,
10 which in fact developed, in Richmond in the early
11 1970s that you would have movement of retail
12 activity outside. Richmond right now is an
13 example as a loss of retail sales over several
14 hundred million dollars. The point being, that
15 is, older cities, because they have a loss of
16 retail trade, because they have a loss of
17 commercial activity because of market forces which
18 are pushing economic activity from the urban core
19 outward -- this is not unique to Richmond, it is
20 not unique to Washington, it is in fact happening
21 in every American city and it is a subject I have
22 written on extensively -- I believe older cities
23 in fact do have a rational, but I do think they
24 have to demonstrate that there is a net economic
25 benefit.

1 If, for example, a project is developed in a
2 city where the offset of economic activity in
3 other parts of the city would drain away, it would
4 not make sense to make an investment.

5 **Q** Are there any circumstances under which
6 incentive would be justified in urban areas that
7 are experiencing the economic expansion?

8 **A** Much less so. I am sure there is
9 circumstance under which one could come up with a
10 scenario to do this. But in Henrico County it is
11 already the center of economic activity. Henrico
12 sales amount to 50 percent of all, what are called
13 shoppers' goods sales. Those are the kinds of
14 goods which shopping malls, department stores,
15 sell.

16 Their income and population accounts for only
17 35 percent of the area. That means they have a
18 net in-flow already of about three or four
19 hundred, I believe about \$400 million in retail
20 trade. There is already an in-flow in to Henrico
21 County from surrounding jurisdictions, so in that
22 instance it would make less sense.

23 **Q** Are there any kinds of development in
24 suburban areas that might make sense for economic
25 incentive?

1 A Oh, yes. Certainly an investment that would
2 bring about high payrolls. In other words,
3 attract income groups, high income groups to the
4 community than the community average does make
5 sense.

6 But, of course, new development means people.
7 That has its own economic effect. But, yes,
8 although typically a community such as Fairfax
9 County, provide no tax incentives.

10 Q What about a shopping center? It brings in
11 employment and new jobs, doesn't it?

12 A Well, first of all, most shopping centers are
13 second jobs or part-time jobs. There is very
14 little net. We looked at employment. There is
15 very little net change in employment when you open
16 a new shopping center because other businesses
17 have reductions in employment. So you are
18 shifting retail employment from location A to
19 location B. If location A is an existing shopping
20 mall and loses half its sales, it is very little
21 difference to work in place B. So you have a
22 redistribution of jobs. Retail trade doesn't
23 create jobs per say. People do not buy more
24 because there is a new store in town. Their
25 consumption levels nationally are fairly stable.

1 What you have is a situation where you
2 redistribute jobs. So the concept -- jobs do not
3 know political boundaries. People don't say, I am
4 going to work in Richmond or in Hanover County
5 because that is where I live. I will take a job
6 where there is a job. So there is no relationship
7 between labor market areas and political
8 boundaries.

9 Q What about the fact that a shopping mall
10 might bring in or attract other businesses, hotels
11 and the like? In your experience has that
12 happened?

13 A I have not seen any particular instance where
14 a shopping mall would bring about a location of a
15 corporation or a major business. I have seen, you
16 know, a gas station or a fast food place locate
17 near a shopping center to carry the traffic. But
18 in terms of attracting an economic development
19 people consider to be attractive projects, no,
20 they are not. IBM won't locate in a community, or
21 Microsoft, because there is a shopping mall there.
22 There are shopping malls everywhere in the United
23 States.

24 Q Okay. In your view do these incentives
25 result or promote economic development in Henrico

1 County?

2 A I don't believe this particular development
3 would. I understand there will be some high end
4 retail trade, in other words, more expensive
5 stores, which, of course Henrico County already is
6 the center of. It is those kinds of stores are
7 centered now in Henrico County. There may be some
8 beneficiaries. May be some high income people in
9 Henrico County that may benefit in the sense they
10 can now shop in another expensive store, but I
11 don't believe those residents, you know, comprise
12 the vast majority of taxpayers in Henrico County.
13 So I would not consider that benefit to a small
14 group of shoppers to be a representative of the
15 taxpayers of Henrico County.

16 Q Well, does -- do these incentives result in
17 economic development in the Commonwealth of
18 Virginia?

19 A Not really. Because the level, level of
20 sales in the Commonwealth of Virginia represents a
21 certain percentage of gross disposable income. We
22 have -- those numbers they are published. Whether
23 I shop in Fairfax County, Henrico County, in
24 Hanover County, in Halifax County, although there
25 is not much shopping in Halifax County, regardless

1 of not location, that same sales dollar remains
2 within the Commonwealth. And I do not believe,
3 and I don't know any one economic development,
4 certainly not people I speak to in Loudoun County,
5 ever believe that location of a shopping mall is
6 going to attract major businesses to their
7 community.

8 Q Okay. So do you have an opinion whether the
9 use of incentives here is reasonable from an
10 economic perspective?

11 A This particular incentive, given alternative
12 locations or given alternatives for the same site,
13 which may not require an incentive, and given the
14 fact that the community or the County in computing
15 the economic benefits or financial benefits did
16 not take into account any offsets in revenue from
17 other locations of the County, I would not
18 consider that to be a proper or at least a good
19 use. I cannot declare proper, because I am sure
20 that is a legal term. I would not consider
21 economic perspective to be a most productive use.

22 Q So these incentives don't provide benefit to
23 Henrico County?

24 A You are talking about any incentive, or a
25 specific?

1 Q Well, incentives for Short Pump don't provide
2 a benefit?

3 A I don't believe they provide a net benefit to
4 the taxpayers, no.

5 Q And, Mr. Muller, Dr. Muller, have you ever
6 been retained by or consulted with Taubman before
7 this case?

8 A No, sir, never met anyone from Taubman
9 Corporation.

10 Q That is all.

11 THE COURT: Mr. Spencer, Mr. Buell, any
12 questions?

13 MR. BUELL: No questions, Judge.

14 THE COURT: Mr. Rapisarda?

15 MR. RAPISARDA: Thank you.

16 THE COURT: You won't tell me one question?

17 MR. RAPISARDA: No, sir.

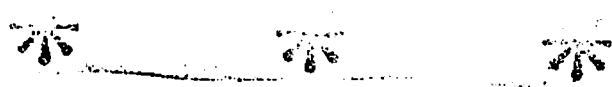
18 THE COURT: I thought not.

19 MR. RAPISARDA: But I won't be lengthy.

20 CROSS EXAMINATION

21 BY MR. RAPISARDA:

22 Q Dr. Muller, as I was listening, I think you
23 said one of your criticisms of the Davenport
24 analysis was that Mr. Traudt ignored the effect of
25 offsets from other retail stores; is that correct?



1 At the beginning, sir, I have spoken to
2 Mr. Spencer, and he has asked, and we concur, we
3 would like to thank The Court for the time and
4 attention it has paid to us. We know you cleared
5 your schedule and have been --

6 **THE COURT:** I appreciate that, but I suggest
7 you don't use any of the 30 minutes to do that.

8 **MR. FOOTE:** Your Honor, I appreciate that.

9 **MR. PEARSON:** Sure it is an error of
10 omission, but we concur.

11 **THE COURT:** All right.

12 **MR. FOOTE:** And, as Miss Moss said, be
13 charming, she said. So, Your Honor, what I am
14 going to do in order to use my time the most
15 efficiently, I will focus on these things as best
16 I can tell from the comments The Court made are of
17 concern to The Court.

18 **THE COURT:** Let's get right to the thing that
19 mostly is of concern to The Court, that is the
20 statute that Mr. Spencer handed up at the
21 beginning of the case. 15.2-5158. And you can
22 spend as much time as you want talking about other
23 things, but I certainly would like you to spend
24 some time talking about that.

25 **MR. FOOTE:** That was the first thing on my

1 list.

2 THE COURT: Good.

3 MR. FOOTE: It is worthwhile, I think as a --
4 I recognize, because of The Court's experience I
5 don't need to teach you about the world of bond
6 validation suits, the general principles. I won't
7 even articulate them except to recognize, contrary
8 to what has been suggested by the motion to
9 strike, we are dealing with legislative action
10 that is presumed valid, and therefore it is really
11 not our burden to sustain these bonds, it is in
12 fact the opponent's burden to overcome, because
13 The Court's obligation under both the statutes and
14 the case law is to validate these bonds if they
15 can be validated. I don't think I overstated the
16 case, but you won't validate them if it, if it is
17 inconsistent with the law of Virginia. So the
18 issue Mr. Spencer raised at the beginning has to
19 do with the Development Authority Act which says,
20 as you know, we may do these things with the CDA
21 as necessary to meet the increased demands placed
22 upon a locality as a result of development within
23 the district.

24 I think this goes back to the point that I
25 made at the very beginning, which is the argument

1 that somehow they are going to try to kill these
2 bonds by death of a thousand cuts, because I think
3 that what the opponents are trying to do, what the
4 defendants are trying to do, is to suggest to this
5 court that somehow it must take what we would
6 assert to you is a pinched and narrow view of the
7 meaning of that language, and what it means in the
8 context of this overall statute.

9 First of all, I repeat, they have you start
10 with the general assumption that they are going to
11 be presumed valid. All legislative action is.
12 You add to that in this circumstance that both the
13 Water and Waste Authorities Act and Industrial
14 Development Bond Revenue Act -- I can never get
15 the name right -- both of them are two of the few
16 statutes in Virginia which expressly say they are
17 to be liberally construed. Both of them say that.

18 It is section 5100 with respect to this
19 statute, and to the Water Waste Authorities Act.
20 And at some point in the notes I have the citation
21 to the Industrial Development Authority Act. But
22 both of them say that, I am sure The Court knows
23 what that means, what the General Assembly means,
24 and what The Court has done with, our court has
25 done with it is to say what we are going to do is

1 take a little pressure off the neck. We mean for
2 the things to be liberally construed in order to
3 effect the purpose of the act, does what it does.
4 It means the General Assembly has done what it did
5 was, quite simply, it authorized counties such as
6 Henrico to in fact engage in public private
7 partnerships that arguably it could not previously
8 have engaged in, to do precisely what it did here,
9 which is to assist in mitigating the impact of the
10 development that occurred within that history.

11 Now, we spent some time -- and perhaps we
12 even may have done our own bit of misdirection
13 here -- we spent time attempting to demonstrate to
14 this court the larger public interest purpose of
15 each of the pieces of infrastructure set forth in
16 that petition. And the section of the petition
17 which is the \$22 million worth of expenses.

18 Now, we did that, and I am sure The Court
19 recognizes why, because we couldn't know at that
20 time that The Court would find what we think, and
21 readily find, there is public purpose for what the
22 County did. Because, as you know, the
23 constitutional issues that are present in these
24 cases are that a public purpose has to be
25 established.

1 So it was a concern to us that we in fact
2 make an effort to demonstrate to The Court that in
3 fact that test had been met. All of the stuff
4 will be owned by the public, all of the stuff is
5 going to be owned to the public.

6 **THE COURT:** Wait a minute. Is it going to be
7 owned by the public? It is going to be owned, one
8 witness said three different things, and other
9 witnesses all say different things. I thought I
10 heard all say in the five years it all goes to the
11 developer.

12 **MR. FOOTE:** No, sir. The testimony you heard
13 was that decision had not been entirely made. The
14 law does not require it remain in the hands of the
15 CDA. In fact, the statute does not --

16 **THE COURT:** I thought CDA was going to cease
17 to exist.

18 **MR. FOOTE:** No, sir, no testimony that is the
19 case. That is one thing that can occur, but no
20 testimony it will cease to exist from anyone that
21 knows anything about it.

22 **THE COURT:** There was testimony it will cease
23 to exist.

24 **MR. FOOTE:** CDA might have been, sir, but I
25 would say, for example, Miss France, the person

1 principally responsible for draftsmanship of the
2 documents, did not say that. And so what I would
3 suggest to you is that --

4 THE COURT: I heard a lot. I heard a lot of
5 testimony that at the end of five years everything
6 would belong to the developer. The developer
7 certainly thinks that is going to happen.

8 MR. FOOTE: Developer can think what they
9 might think. I represent to The Court it is what
10 we believe that the person with the best knowledge
11 of that, Miss France, would tell you, the CDA made
12 no decision about that.

13 THE COURT: Isn't that a problem, though, if
14 you are asking The Court for approval of something
15 that has not been finally decided?

16 MR. FOOTE: I am going to address what I call
17 the loose ends issue in a moment, if I might.

18 What I was addressing at this point was this
19 issue of whether it is necessary to meet the
20 increased burden. I repeat that in effect what
21 the General Assembly has done is not to set a test
22 that the board must meet in that circumstance.
23 But in fact to say that this is what we are doing
24 it for, and you can spend the money for the things
25 we go ahead to list here. Among the things that

1 the General Assembly has said that the CDA can
2 spend money on is not the roads and the parking
3 facilities that you have heard about, it is -- CDA
4 is authorized to spend money on gutter, Your
5 Honor, it can spend money on gutters. And explain
6 to me, sir, now how one could say we have a big
7 public gutter system, and therefore because we are
8 part of public gutter system with some impact on
9 public gutter system only then can we meet
10 increased demand. No, sir. That is, the General
11 Assembly's position is CDA can be sent to mitigate
12 any impact the development has on the locality as
13 a consequence of the development within the
14 district.

15 Well, in this in case, for example, the roads
16 surrounding it, the roads surrounding it are
17 obviously designed to help get the people, even if
18 you don't -- even if you didn't accept the
19 proposition that that is going to serve the
20 releaver function that it ultimately will serve,
21 and we know development roads come in segments --
22 even if you don't accept it is going to serve that
23 larger public good, that the county manger
24 himself, and the traffic computer tells you it
25 would, what it will do is it will take the traffic

1 from the development and move it efficiently.
2 That is sufficient under this statute, because it
3 assists the locality in meeting increased demands
4 on it. Wouldn't have to do more than that. In
5 fact to the extent that we have to do anything,
6 the board of supervisors has affirmatively found
7 in its regulations that it does so. And, you
8 know, the Supreme Court has said that while that
9 is not conclusive, it is entitled to great weight.
10 The very finding of it.

11 My worthy colleagues would suggest, well,
12 somebody else wrote that document, and they didn't
13 think about it. But, you know, as I know, that in
14 the process of, processes of government there is a
15 mystical, magical, certainly legal moment when
16 that vote is cast, that that document ceases to be
17 what it was before, and becomes an articulation of
18 the will of the people. Once it becomes the
19 articulation of the will of the people, The
20 Court's role with respect to it changes.

21 Here we have a situation in which we suggest
22 to you the purpose of this act was to permit this
23 kind of participation to assist in the mitigation
24 of impact, to create the very public private
25 partnerships that you are witnessing in this case.

1 **THE COURT:** There must be some things in the
2 world that a County and a CDA cannot do.

3 **MR. FOOTE:** I would suggest that the County
4 and CDA can't do things that are outside the
5 district. But the statute by its own terms says
6 it may spend money for these specific things, and
7 if you look at what it specifically says, it is
8 extraordinarily broad.

9 Now, for example --

10 **THE COURT:** Well, if I want to build a two
11 story house in Henrico County for my personal
12 residence, but I don't have enough money to build
13 the staircase from the first floor to the second
14 floor, can the County say, well, because Judge
15 Johnson is building a house in Henrico County that
16 is going to increase the need for him to get from
17 the first floor to the second floor in Henrico,
18 therefore we can pay, we, the County, can pay for
19 his staircase?

20 **MR. FOOTE:** Two observations. The first of
21 which is, because of the predicates for
22 establishment of the CDA itself, which are set
23 forth in earlier sections of the code, the answer
24 to that would be, first of all, you probably could
25 never create a district. But the second answer

1 would be that if you could create that district,
2 then if in fact the construction of that house
3 were to create an increased, were to justify any
4 one of these things to mitigate that development,
5 then I know of no theoretical reason it couldn't
6 be done. As a matter of law the General Assembly
7 didn't establish those limitations. If in fact
8 there is increased, if in fact there is
9 development mitigation that is to occur, the
10 General Assembly has said it can be done.

11 Now, I am sure you posed me a hypothetical.
12 I know you know I am answering a hypothetical,
13 that is, that is not what we are faced with here.
14 It is a major shopping development. The question
15 is, did the General Assembly mean they can
16 participate, meaning mitigation, and that is what
17 the language means. And I think the answer is
18 clearly, it is. When this court is constrained to
19 liberally construe the statute to effect the
20 purposes of the act. So we would suggest to you
21 that the two things. First of which is that in
22 effect that is almost an expression of purpose as
23 opposed to a required finding. Secondly, the
24 board has made the finding it occurs. And third,
25 the evidence before The Court is that it mitigates

1 development. I know they will stand up and say
2 Hazelett says there was no evidence in September
3 of this mitigation. Hazelett then said later, he
4 is an engineer, not a lawyer, then said later,
5 we -- every development has impact, and we know
6 every development requires mitigation of impact.
7 So what we are saying here is that is sufficient
8 for the purpose of this legislative determination
9 and for this court's consideration.

10 Another observation is, you may quibble with
11 whether, with whether the ring road forms the
12 larger public function that Mr. Hazelett said it
13 does. The County manager says the board of
14 supervisors believed it. And I don't know that
15 The Court needs to second guess that, because it
16 fits into that larger concept. There is a road
17 nearby that performs a similar function that is a
18 private road. So what we suggest is there is in
19 fact ample evidence before you with respect to
20 that. There is not even a dispute with respect to
21 the sewer and water lines. Those things that they
22 would have you accept as traditional public
23 infrastructure. But, Your Honor, the General
24 Assembly didn't limit us to that. If you look in
25 here, we can put additional security facilities;

1 fencing and landscaping. We can provide special
2 services; garbage and trash removal, street
3 cleaning, snow removal, extra security personnel.
4 The General Assembly said we can do that. They
5 can only mean that if what we are doing is
6 mitigating the development impact in the district.
7 In fact, if you look at the language itself, it
8 says, as necessary to meet the increased demands
9 placed upon the locality as a result of the
10 development within the district. The impact upon
11 the location that is referred to here isn't the
12 impact upon the public infrastructure system, it
13 is a more global concept of impact of a common
14 locality having a development occur. So the
15 General Assembly by saying where we know it is
16 coming, we are going to create a mechanism whereby
17 localities can participate in this to mitigate
18 that impact. In fact, in this circumstance, it
19 also assists us, the statute also assists us in
20 abusing the development and letting us help
21 mitigate because we recognize their economic
22 benefit to the locality from doing so.

23 So we would submit to you that the
24 constrained, narrow, kind of gardener Dillon rule
25 kind of argument all local government lawyers live

1 with throughout their careers isn't what is before
2 this court.

3 THE COURT: I guess the other question is,
4 are these demands that are placed upon the
5 locality placed upon Henrico County, or are they
6 demands placed upon this particular development?

7 MR. FOOTE: Placed upon the County.

8 THE COURT: Or does it make a difference?

9 MR. FOOTE: I think it does. Well, restate
10 that.

11 If I am correct in my reading, and if the
12 breadth of the statute is, as I say it should be
13 read because of the liberally construed language,
14 then perhaps you don't even have to prove it is
15 actually an impact on the locality.

16 But you heard Mr. Hazelett say that one of
17 the reasons for lighting is security. One of the
18 reasons for the parking is so these people can
19 come to the mall, have some place to park. You
20 don't have people who are going to come to
21 cultural events and not shop. That is the effect
22 on the locality. The locality doesn't have to sit
23 there and say to you, well, this is going to take
24 12 percent of the traffic off West Broad and ship
25 it somewhere else. Wouldn't that be nice.

1 Because what we are doing is we are dealing with
2 the impact of that development on the locality
3 because it all spills off of this site. All of
4 it. Even these esthetic things spill off. And
5 the board could make that determination.

6 So to say that this constrained Dillon rule,
7 let's parse the statute and look at it one
8 sentence after the other, is to miss the whole
9 point of what the statute is attempting to do,
10 which is, permit that kind of participation. If
11 that weren't true, Your Honor, we couldn't make
12 security services. Tell me where the impact upon
13 the location is from increased demand if it is not
14 to protect the facility itself. The security
15 services are going to only be good on the site,
16 but it's a fact on that site that we as a locality
17 can look at, we can mitigate. The General
18 Assembly, bless its sweet soul, has made that
19 finding. And what can't I do? Excuse me, Your
20 Honor, it says here, as necessary to meet these
21 increased demands, we can do these things
22 including, but not limited to. We may identify
23 impacts that are, will spill off the site and do
24 something about this, about them, with CDA funds.

25 So is that the proposition that somehow the

1 board is obligated to go out and to quantify, to
2 specifically identify what the increased need on
3 the locality is for some extra fencing? It makes
4 the argument absurd. It only makes sense. The
5 General Assembly says, it can only make sense only
6 if it meant what I say it means. Fencing
7 throughout the project. But suppose we are
8 concerned about people in a nearby neighborhood.
9 And we want to fence that away from this thing.
10 It says, fencing throughout the district. Parks
11 and facilities for indoor, outdoor, recreational
12 activities. Your Honor, our worthy colleagues may
13 have a constrained view of what an urban mall
14 would be, but you have heard that is what this is
15 contemplated to be. And the County can make that
16 determination. Does that mean there is impact on
17 the locality that requires urban mall, that is a
18 decision for the board to make, that this does
19 assist in mitigating impact by creating in
20 addition to the development itself, a place for
21 people to go.

22 Well, that is an impact of the development
23 that is on the locality which we are meeting here.
24 That is a mitigation. So, Your Honor, if you read
25 those statutes together, they liberally construed

1 the language with this, and with The Court's role
2 in a bond validation proceeding, I submit to you
3 it is satisfied.

4 Your Honor, rather than dilating at length on
5 things you don't care about, I would be happy to
6 specifically address any issue that The Court may
7 in fact have.

8 THE COURT: You have addressed the issue that
9 I am concerned with. I am sure that your
10 opponents are going to raise other issues, they
11 might not, than the issue I need to hear about.
12 You may you have 12 minutes left if you would like
13 to reserve to respond.

14 MR. FOOTE: We are pleased we anticipated the
15 question you might have, and want -- and I reserve
16 my time.

17 THE COURT: Thank you very much.

18 Mr. Buell? Before you begin, Mr. Buell.

19 (Discussion off the record)

20 MR. BUELL: Good afternoon, Judge.

21 THE COURT: Mr. Buell.

22 MR. BUELL: Judge, the plaintiffs are asking
23 you to validate the basic outline of a business
24 deal that is still a moving target. The so-called
25 organic documents have not been executed. The

1 agreements that will determine which of the
2 proposed improvements are going to be purchased
3 with CDA money have not been drafted. There is no
4 consensus among the parties to the deal regarding
5 who is going to own and maintain these
6 improvements. There is no agreement as to what
7 will happen to the improvements at the end of five
8 years when, as Mr. Traudt said, he actually fully
9 expects the CDA to fold. It is entirely probable
10 under this scenario, Judge, that at the end of
11 five years all of these fancy improvements will
12 revert to the developers, who by virtue of some
13 financing scheme have not paid a single penny for
14 them. And that they will maintain and operate
15 those improvements from the day it is open and
16 running and continue to do so as their own once
17 the five years are up.

18 There has been much talk about whatever one
19 thinks may happen, and there has been much
20 discussion about documents that are going to be
21 drafted, like a development agreement and trust
22 indenture, and how those are intended to be picked
23 up by Mrs. France and other people responsible for
24 preparing them.

25 But what the plaintiffs are asking you to do

1 is validate their good intention, and the good
2 intention of Miss France and this unknown bond
3 trustee. And this The Court cannot do.

4 I would like to spend some time talking about
5 what I think is the issue that is most concerning
6 Your Honor, and it is the nature of these
7 improvements and whether or not they meet the CDA
8 statute.

9 As Mr. Spencer said in his opening, this is a
10 six-part test. The infrastructure improvements
11 must be enumerated in the ordinance or resolution
12 that establishes the CDA. They are to be
13 necessary to meet increased demands placed upon
14 the locality as a result of the development.

15 Now, Mr. Foote said that the board made a
16 legislative finding that all of these improvements
17 met this test. I submit to you that there is no
18 legislative finding to that effect. And if you
19 look at the resolution creating the Short Pump
20 Town Center, this is exhibit 3, you will not find
21 any legislative finding that uses those words.

22 What you will find instead is a finding that
23 the proposed development will have only limited
24 requirements for County services. It will not
25 create increased demands, only create limited

1 demands.

2 THE COURT: Now, but they will increase.
3 They will create demand that was not otherwise
4 there. It doesn't say it has to meet a
5 significant increased demand. It says any
6 increased demand.

7 MR. BUELL: What I would like to do is take
8 you down the list of improvements that was
9 appended, and I think the document is TB 112,
10 because it shows a comparison of what was in the
11 petition with what went into the rate and method
12 of assessment, the \$34 million.

13 THE COURT: All right.

14 MR. BUELL: Now, if you look at TB 112,
15 Judge, the first thing off the bat is you see that
16 between the date of the petition creating the CDA
17 and the date of the rate and method of assessment,
18 which is about a month later, they have added
19 sidewalks and canopies to the tune of about ten
20 million dollars, and they have added a
21 miscellaneous category of improvements of about a
22 million seven. Those things are out right away
23 because they are not enumerated in the ordinance
24 establishing the CDA. They are just not there.

25 Now, if you go to the list of the actual

1 items on appendix B, let's start with the
2 extension of the sewer line and water line.
3 Mr. Foote says there is no dispute about that.
4 Well, Judge, I didn't hear any evidence about what
5 they are. Is it an extension up to the property
6 line of the CDA, which may be okay. Or are we
7 taking a line across private property and running
8 it up to the front door of Nordstrom? I submit
9 that that is not okay. What that does is meet the
10 demands of the development. It doesn't meet the
11 demands placed on the County by virtue of the
12 development.

13 Same thing with the storm water management
14 facility. We didn't hear a single bit of
15 testimony about what that is, what it is supposed
16 to do, where it is going to be located, what
17 property it will serve. They are asking you to
18 take their word for it, and there is no evidence.
19 Now, next thing is roads abutting the CDA. There
20 is a left-turn light and traffic signal.

21 Now, I will concede, Judge, that roads by the
22 CDA, if they are serving the county, can be
23 properly financed by CDA funds. They have to be
24 either within the district or serving the
25 district. And if the left-turn lane on Broad, and

1 traffic light there is serving the district, then
2 that may be proper. Everything else on the list
3 from there down, that is, ring road, entrance
4 roads, lighting, landscaping, the plaza, parking,
5 excavation, miscellaneous and soft costs, there
6 has been absolutely no evidence that any of that
7 is necessary to meet increased demands placed upon
8 the locality as a result of the development.
9 Rather, those things are the development. That is
10 what this money is paying for. The development
11 itself.

12 In addition to that, Judge, under the zoning
13 laws in Henrico County and the proffers that were
14 made when this property was rezoned, the developer
15 committed to making these improvements, just like
16 every other developer in Henrico County has made
17 improvements on its commercial property for
18 parking lots and lights and landscaping and those
19 sorts of things. And that exhibit, Judge, was TB
20 1, the zoning approval.

21 These are not County infrastructure. These
22 are Pruitt Forest is the infrastructure.

23 Let me take some specific examples. The
24 plaza that Mr. Hazelett talked about he described
25 as a public park. And what he said was, that the

1 reason they needed that park was because the
2 population in Henrico County was expanding and
3 they needed to provide recreational outlets for
4 their citizens. That was a need that was already
5 there. It was not a need that was generated as a
6 result of this development.

7 The ring road, Mr. Hazelett called it a
8 private ring road. It encircled the parking lot.
9 And says it serves some public purpose because it
10 encourages people to cut through the parking lot
11 in order to take a short cut.

12 THE COURT: He didn't say cut through the
13 parking lot, he said use the ring road to get from
14 one major road to another.

15 MR. BUELL: The primary purpose, as we know,
16 is to allow people to get in and out of the
17 shopping mall. It serves the shopping mall. It
18 doesn't serve increased demands placed upon the
19 County as a result of the development.

20 THE COURT: But if the developer simply built
21 the mall, the stores and a parking lot, and that
22 was it, wouldn't the County have to do something
23 to get people out of the parking lot back to Broad
24 Street or on to 64?

25 MR. BUELL: What they can do, Judge, is using

1 the CDA they can finance and construct roads
2 abutting the CDA serving the CDA. That would
3 allow, for example, this little split here that
4 connects the parking lot to the rest of the public
5 road system. Or maybe this little split over
6 here. But as we heard, these are not proposed.
7 This one may be under construction, I think
8 Mr. Hazelett said, but not within the CDA being
9 built by the County, I guess. I don't know.

10 **THE COURT:** Is there anything in this statute
11 that, or any other statute, or rule of law that
12 prevents the County from putting improvements
13 within the CDA itself? Within the district
14 itself?

15 **MR. BUELL:** Well, let me address what I think
16 you are asking. That is, if for example the list
17 that is in the statute that Mr. Foote was
18 referring to that lists all of these things, if
19 those things were inside the development itself
20 could the CDA do it? My answer is, if it meets
21 these six prongs. The list in the statute is not
22 a list that says you can do all of these things if
23 you want.

24 **THE COURT:** Can the County decide, we need a
25 road to get people to and from this new

1 development, that we are not going to have
2 anything to do with it? We need to get people to
3 and from there, and the best way is to have part
4 of those roads on the development itself, or
5 within the district itself?

6 MR. BUELL: I think the CDA could properly do
7 that. I don't think that is what has been done
8 here. But I think the CDA statute if properly
9 followed would permit a CDA to construct a road
10 that alleviated demands placed upon the locality
11 as a result of the development.

12 THE COURT: Why isn't that the ring road?

13 MR. BUELL: Because the ring road has no
14 other purpose in this case but to service the
15 development. It is the development. It is part
16 of the development.

17 THE COURT: It is also servicing the people
18 of Henrico County because the people of Henrico
19 are going to be using the development.

20 MR. BUELL: The people of Henrico County are
21 going to be using the department stores, too,
22 Judge, but that doesn't make that public
23 improvements.

24 THE COURT: I would build my analogy on up.
25 I mean, if, for example, if somebody builds a new

1 XYZ store in the County and the County doesn't
2 have anything at all to do with that, but for
3 whatever reason people who are walking on the
4 other side of the street, public road, continue to
5 be assaulted by people who are hiding in the
6 shadows of XYZ store, they say, we need to put
7 lighting around here, and the best place to put
8 this light is on top of XYZ store, on their
9 property, and it benefits XYZ because it makes
10 everybody look at their store, are they precluded
11 from doing that because it is helping XYZ store
12 and it is on their property?

13 MR. BUELL: I don't think so, Judge. If they
14 made a legislative finding it meets these six
15 prongs of the test -- and that has not been done
16 in this case -- and I submit many of the
17 improvements don't meet the six prong test.

18 THE COURT: All right.

19 MR. BUELL: Now --

20 THE COURT: I don't know how you and Taubman
21 attorneys divided your time. You used about 12
22 minutes. Assuming you have divided 50/50, you
23 have three minutes left. I don't know how you
24 divided it.

25 MR. BUELL: May I use my three minutes to

1 direct my comments to this part of the financing
2 claim of EDA?

3 The plaintiff contends that EDA is authorized
4 to make these payments under section, subsection
5 13 of 4905. And by the way, I have statutes here
6 that are highlighted if you like.

7 THE COURT: All right.

8 And if you look at subsection 13 of that
9 statute, Judge, what it says is that economic
10 development authority may make grants or payments
11 from revenues of the authority. Only from
12 revenues of the authority.

13 And these particular --

14 THE COURT: They are not really making a
15 grant or loan, are they? They are serving as a
16 conduit.

17 MR. BUELL: Exactly right. They are not
18 making any grants, they are not making any loans.
19 And these payments are not revenues of the EDA.

20 They are the developer's money, as Mr. Traudt
21 said, from the moment it is appropriated by the
22 County. And the revenue -- the definition of
23 revenues of the EDA, Judge, is found in two
24 places. Found first in 3902, the definition
25 section of the Industrial Revenue Bond Act. It is

1 found again, though, in subsection 13, which I was
2 just referring to, and it says there that the term
3 "revenue" may also include contributions, grants,
4 or other financial assistance that are set out in
5 subsection 12 of that statute. Now, that section
6 dictates what the EDA can receive from the County.

7 THE COURT: What section is that?

8 MR. BUELL: 12 of 4905. What it says is EDA
9 can receive money for three purposes, for or aid
10 in construction, ownership, maintenance, or repair
11 of authority's facilities. Well, none of these
12 facilities are going to be the authority's
13 facilities of EDA. The EDA won't construct,
14 acquire, or own anything.

15 They can receive payments for the payment of
16 principal of any bond of the authority, interest
17 or the cost incident thereto. EDA is not issuing
18 any bonds here. So the money is not for that
19 purpose. Or in order to make loans of the money,
20 contribution, or grants or other financial
21 assistance. They are not making any loans.

22 So I submit to you that under subsection 12
23 they can't receive these grants. They are not
24 authorized to receive them. And under subsection
25 13, not authorized to pay them out either to the

1 CDA or developer because they are not revenues of
2 the authority as that term --

3 THE COURT: What is the definition of
4 properties and facilities in subsection 6? Same
5 statute.

6 MR. BUELL: Subsection 6, authority,
7 facilities, is defined in subsection 4902, and it
8 basically says two things, Judge. The term
9 authority, number one, is defined as an authority
10 organized and operated under the provision of the
11 Industrial Revenue Bond Act. So it would exclude
12 an authority like the CDA. And in terms of
13 what --

14 THE COURT: No, no. Are we talking about EDA
15 or CDA?

16 MR. BUELL: I am still looking at 4905.
17 Asking what the term facilities means.
18 Essentially I am telling you 4902, there is a
19 definition for authority, facility or facilities.
20 And the definition --

21 THE COURT: What is meant by the facilities
22 in subsection 6?

23 MR. BUELL: 4905?

24 THE COURT: 4905.

25 MR. BUELL: EDA facilities. Facilities --

1 **THE COURT:** Talking about the physical plant
2 or facilities are things that it does, or --

3 **MR. BUELL:** There is a long list in 4905.

4 **THE COURT:** 4902.

5 **MR. BUELL:** Yes, sir, very long list. But in
6 any event subsection 6 says sell, exchange, donate
7 convey any or all of its facilities, meaning EDA
8 facilities, and that is not what it is doing in
9 this scenario.

10 **THE COURT:** Okay.

11 **MR. BUELL:** I am going to leave the rest of
12 the time to Mr. Pearson.

13 **THE COURT:** Thank you very much.

14 **MR. BUELL:** Thank you very much.

15 **THE COURT:** I appreciate your argument.

16 **MR. PEARSON:** Your Honor, I know he went over
17 a little bit, but he was saying exactly what I was
18 going to say.

19 So I was quiet.

20 **THE COURT:** Does that mean you don't need any
21 time at all?

22 **MR. PEARSON:** There are probably things I
23 could talk about, sir.

24 I do want to start by noting that Mr. Foote
25 claimed we had the burden of proof in this case.

1 It is normal in these litigated matters that the
2 party with the burden of proof is the party with
3 the opportunity to begin, and the party with the
4 opportunity to rebut. Just an observation.

5 Your Honor, from my first involvement in this
6 case it has been promoted as a community
7 development authority. And I understand the
8 community development authority statutes. I have
9 had a lot of interaction with them over the years,
10 and I understand them. I know them pretty well, I
11 think.

12 This is not a community development authority
13 problem at its core.

14 I believe that there is a lot of
15 Constitutional issues that are set up with
16 financing, this set of infrastructure through CDA.
17 I believe that maybe the assessment mechanism
18 itself would be unconstitutionally applied in this
19 case, and I do believe and want to add, adopt Mr.
20 Buell's arguments concerning the County's failure
21 of the infrastructure they want to finance, or the
22 improvements they want to finance to conform with
23 these six requirements of the CDA act.

24 I don't believe they are necessary. And I
25 believe at the bottom of the line, at the end of

1 the day, they are private improvements.

2 But Taub couldn't be here if this was simply
3 a CDA case. This is not a simply a CDA case. And
4 if the CDA had the latitude that Mr. Foote says
5 that the CDA has, to go out and not only finance
6 these improvements but then essentially to give
7 them away to the developer, which is actually in
8 substance what is going on here, you would not
9 have this Rube Goldberg arrangement. You would
10 have something with one box up here for the
11 developer, one box up here for the County, and one
12 box down here for the shopping center. And
13 another one for the CDA, I suppose, or an issue.
14 But you are not going to have all of these
15 different colored boxes with all of these areas on
16 them pointing in every different directions, and
17 two days of pure confusion in this courtroom about
18 what the documents are going to say when they
19 haven't been drafted, where bond counsel might go,
20 and what advice bond counsel might give to
21 somebody who wanted to depart from the terms of
22 the document. Whether they would have to go back
23 to the board of supervisors. Whether bond counsel
24 is going to have an opinion of this court in
25 connection with a validation of the bonds that she

1 has got to then comply with. You wouldn't have
2 all that, because it would have been a much more
3 straight forward treatment in the statute by the
4 General Assembly. Wouldn't be confusing at all.
5 This is too cute by half.

6 A couple of the things I think are wrong with
7 the CDA aspects of the transaction itself. We
8 have already said, Mr. Buell has said, I believe,
9 that the EDA can't receive the money, and the EDA
10 can't spend this money. There are certain things
11 that the CDA is going to be asked to do in
12 connection with this transaction that it can't do.
13 For example, the reserve fund that is established
14 goes to the development. We have heard testimony
15 that is the developer's money. There is no
16 language in the CDA statute that allows CDA to
17 give money to a developer. CDA has very limited
18 purposes. It can't finance infrastructure. It
19 can collect special assessments from counties or
20 cities. It can under certain circumstances get
21 alternative sources of revenue from special taxes,
22 or perhaps elsewhere, and it can use those to
23 retire its debt service. It cannot make gifts to
24 developers.

25 There is nothing in the CDA statute that

1 allows a CDA board to change its own boundaries.
2 To create out of 147 acres of property that
3 supports it and create a doughnut hole here and a
4 doughnut hole here, and another and one here, and
5 ultimately one here. And I couldn't see it when
6 they were doing it, but I assumed all of these
7 yellow things will be doughnut holes as well.

8 What authority does the CDA board have under
9 the Code of Virginia when it is required that the
10 County board can only create it upon receipt of a
11 developer petition that it may not create it in
12 any material way that departs from the terms of
13 the developer petition, and if the CDA board can
14 only be created by the County board, how can a
15 County board delegate that power which is in
16 effect a power of creation to the CDA board to
17 remove parcels of property from them? This is
18 still something that goes to the prematurity
19 aspect of this, too. They just don't know where
20 they are going with this. And yet here they are
21 asking you to validate the bonds.

22 These tax increment payments, clearly, are
23 not contemplated by the CDA statute. You look at
24 section 5158. It is not there. And CDAs are
25 subsets of the Water and Waste Authorities Act.

1 They are bound in some respects by the provisions
2 of the Water and Waste Act that are found outside
3 of the scope of article 6.

4 And there are two particular statutes I want
5 to call your attention to. One is section 5125.
6 And I should have underlined it, but what that
7 section says is that Water and Waste Authorities
8 CDAs may use only the funds provided for in this
9 chapter for resolution of their obligations. And
10 there --

11 THE COURT: You say 51.5. Must be 15.2
12 something.

13 MR. PEARSON: Yes 15.2. I am sorry.

14 THE COURT: Don't worry. I will find it.

15 MR. PEARSON: 5125. The other statute is
16 15.2-5131 A.

17 Now, 5131 A says the issuance of revenue
18 bonds under the provisions of this chapter shall
19 not directly or indirectly or contingently
20 obligate the Commonwealth or any political
21 subdivision to levy any taxes or make any
22 appropriation for their payment except from funds
23 pledged under the terms of under the provisions of
24 this chapter.

25 Now, you have heard person after person,

1 several witnesses come in. These two funds are
2 not going to be pledged. We are not pledging the
3 TIFF funds. Heard from half a dozen witnesses, I
4 think.

5 And indeed, I believe the TIFF funds will not
6 be pledged. So they don't come within the
7 inferential exception you have here, and can't be
8 used by the CDA.

9 Excuse me. I misspoke. The County will have
10 a contract with the EDA and the CDA. And under
11 the terms of that contract the County is
12 essentially morally obligated subject to
13 appropriation to take these TIFF funds and move
14 them to the EDA, and then they would go to the
15 CDA. That sets up a transaction that under this
16 sentence can't occur.

17 **THE COURT:** I am not sure I follow you. 51.

18 **MR. PEARSON:** 31 A.

19 **THE COURT:** What you are saying that prevents
20 the County from doing that, you think they are
21 trying to do?

22 **MR. PEARSON:** I believe it does. They have
23 not pledged these tax increment funds to anybody.

24 **THE COURT:** They are not supposed to, are
25 they?

1 MR. PEARSON: That's right. Under this
2 sentence.

3 THE COURT: Well, I am still not sure the
4 County has not pledged them.

5 MR. PEARSON: Correct.

6 THE COURT: This says the County shall not
7 pledge them.

8 MR. PEARSON: But the County has
9 contractually obligated to, or will when it signs
10 the agreements to transfer these funds to the EDA,
11 and then to the CDA. These are the tax increment
12 funds that will be paid out.

13 THE COURT: This is talking about the
14 County's 's faith and credit being pledged, isn't
15 it?

16 MR. PEARSON: It does. Up at the first
17 sentence. Deals with the notions that these are
18 revenue bonds, and they are not a pledge in faith
19 and credit of any issuer. Not a pledge of any
20 issuer --

21 THE COURT: That is talking about to the
22 investor, isn't it?

23 MR. PEARSON: That does deal with the nature
24 of the investment relationship. But this second
25 sentence, or the last sentence says, all bonds

1 will contain statement of fair faith substantially
2 to the effect that credit isn't pledged. The last
3 sentence is a mandate. The last sentence says the
4 issuance --

5 THE COURT: But the EDA is not -- the EDA is
6 getting funds from the property. They are not
7 getting funds from the bond, are they? I don't
8 want to spend a lot of time on it, but I am not
9 sure that -- I don't think that is going to be
10 your strongest argument.

11 MR. PEARSON: Okay. We will move on. I
12 still like it.

13 Now, Judge, let me suggest to you alternative
14 uses of the CDA that I think actually does fit the
15 mold.

16 If I were, if I were a developer and I had
17 three or four hundred acres of property and I
18 wanted to put some housing on that property, it is
19 vacant land right now, maybe some trees like
20 Mr. Pruitt's property had two weeks ago, maybe I
21 would look at the financing of that transaction
22 and find it difficult to do. Banks don't want to
23 lend money on raw land. It is going to be hard to
24 finance it. But if you can go out and you can
25 create a partnership with a local government that

1 will help you get that land in a fit capacity for
2 a subdivision, that is to say, extend utilities,
3 extend streets, extend curb and gutter, get the
4 property in such a state that it can, it is
5 improved, and lots can be sold and homes
6 developed, that is the type of thing that a CDA is
7 actually designed to do. And I would submit to
8 you that in that role it fills a very meaningful
9 public policy position because it helps
10 developers, it helps local governments, and it
11 doesn't hurt the ultimate buyers of the homes and
12 may in fact reduce their prices. The key thing is
13 though all of this infrastructure that is
14 developed, the curbs and gutters, the landscaping,
15 the landscaping goes along the roads, the roads
16 are dedicated to the community. And if it would
17 be a community in Henrico, Henrico would take
18 those roads in to the Henrico road network, their
19 secondary roads. If it were in another county,
20 the county would take those roads in to the
21 network and then they would transfer them to
22 whoever runs the secondary roads.

23 In this instance you have a ring road and
24 entrance roads that they are calling public roads,
25 but the sole indication that they are public roads

1 is that they are owned by the CDA. Henrico is not
2 taking those in to their own road network,
3 although they do maintain their own records.
4 Don't want to do it. They don't want to take over
5 those maintenance obligations. Let the CDA do it.
6 Let the developer do it.

7 **THE COURT:** About two minutes left.

8 **MR. PEARSON:** Okay.

9 Your Honor, I just, I think we have raised
10 some Constitutional issues as well. I want to
11 take two minutes and tell you why -- I know what
12 you have told us, what you think about public
13 purpose, so I am going to try not to address at
14 least the lending credit. I think, though, that
15 your articulation of public purpose may very well
16 start with article ten section ten of the
17 constitution, which is a prohibition of lending of
18 public credit for private purposes. And that is
19 analyzed under what is called the animated public
20 purpose test, and incidental private benefit under
21 that article ten test is just fine, but that is
22 article ten section ten.

23 We are making other claims as well. Article
24 ten section three doesn't deal with public
25 purpose. Article ten section three deals with

1 local public improvements. And what it says is
2 that the General Assembly may by general law
3 authorize any county, city or town or regional
4 government to improve these easements upon
5 abutting property owners for such local public
6 improvements as may be designated by the Generally
7 Assembly though these improvements not only need
8 to pass this six-part test, as set out in the
9 statute, they have also got to be local and
10 public.

11 And in this case, they are clearly not public
12 improvements, and it is a Constitutional test.
13 They don't meet it. Not a public purpose. It is
14 public improvement.

15 Your Honor, I also want to quickly say that I
16 think that this agreement amounts to taxation by
17 agreement. And under the Chesapeake versus
18 Sothers case it is clearly illegal. Non uniform
19 taxation. It is article one, excuse me, article
20 ten section one of the constitution, taxation by
21 agreement. Taubman in this case has been paying
22 taxes which go to support not only the CDA
23 improvements, but the maintenance, potentially, of
24 the CDA improvements.

25 THE COURT: Thank you very much, sir. Your

1 time is up.

2 MR. PEARSON: Thank you, Your Honor.

3 THE COURT: I think you said you had 13
4 minutes left when you sat down.

5 MR. FOOTE: Your Honor, in somewhat reverse
6 order here, I will touch on a couple points.
7 First of which is this local special assessment
8 Constitutional issue. It says special assessments
9 for local public improvements, it says, designated
10 by the General Assembly. I think you are aware
11 that the CDA statutes expressly authorizes the
12 special assessment purpose, special assessment
13 process in connection with the CDA bonds. We also
14 believe there is no question with regard to what
15 "local" means, but I think what it means in that
16 context is, quite simply, we can't put a special
17 assessment on property here to fix something in
18 Dinwiddie County, or in the other parts of Henrico
19 County.

20 What I would like to do is to also go back to
21 Mr. Buell's comments and suggestion to you that
22 with respect to their chart about the statute. I
23 won't reiterate that argument except to say his
24 argument amends the statute, and we don't think
25 that is appropriate.

1 I want to trace the money here for a second
2 because the question that their, what they are
3 saying is that somehow this money can't flow the
4 way we say it can flow. The board appropriates
5 the money, the statutes that let this work are
6 simple. Section 15.2-953 authorizes the County to
7 make gifts and donation of property, real or
8 personal, or money, for any number of reasons,
9 including to industrial development authorities,
10 for the purposes of promoting economic
11 development. That is what it is.

12 Can it not be implied that becomes a revenue
13 of the Industrial Development Authority which, as
14 you know in Henrico is called an EDA? Section
15 15.2-120 is a, says, a governing body may give
16 funds in to any authority created by it in any
17 manner it choses. Says that industrial
18 development authority can't use the money and
19 accept it for purposes of the statute, subsection
20 13. That is absurd. It is another statute that
21 is to be liberally construed. EDA has all powers
22 stated, and incidental thereto, or necessary for
23 the performance of its power in addition to the
24 assertion the statute is to be liberally
25 construed, virtually a necessary and proper clause

1 for the EDA.

2 So the board, which is, from the evidence
3 that we have put in the documents, show the board
4 of supervisors of Henrico have made its EDA, the
5 economic development agency in Henrico County, and
6 it can give any amount of money it wants to for
7 the EDA for purpose of promoting economic
8 development. And what they are suggesting is you
9 can't use it for economic development. I don't
10 believe that is the case.

11 Now, can the EDA make the payments to the
12 developer proposed here? The answer is 2.49-0513
13 says it can make payments for any purpose for
14 economic development purposes. The chain is so
15 logically clear it does not even develop a
16 problem. The board can give it, they can spend
17 it. The language in 13 is not constrained by the
18 authority facilities language, even though there
19 is argument to be made these are -- that nothing
20 in the statute requires an authority facility be
21 owned by EDA. There is argument you can make that
22 this is in fact an authority facility. But for
23 the purposes of my argument today, we don't even
24 make that. It is there, it says for any purpose,
25 and it is not so constrained. You touched on

1 49056. 49056 says basically the EDA can give away
2 its property for economic development purposes.
3 The last I checked the statute doesn't define what
4 property is. The last I checked, money can be
5 property. So, the EDA can give away its
6 facilities. I have no doubt that is in a concrete
7 sense, but property isn't defined, and EDA under
8 six can give away its property for purpose of
9 effecting economic development. And I don't think
10 there is any doubt that the purpose was undertaken
11 here was in fact to spend this money for the
12 purpose of, and incident to, economic development.

13 This court knows, and this court has said it
14 won't second guess the broad judgment about
15 whether that is what it was doing here, that was
16 its purpose.

17 Defendants don't like it because they don't
18 like what they see as give away. But that is a
19 political argument, and not a legal argument
20 fundamentally.

21 I want to touch on what all of us have called
22 the loose ends argument. The loose ends argument
23 is an absolute red herring. I will tell you the
24 reason it is an absolute red herring. It derives
25 directly from the statute. Section 15.2-2651, a

1 portion of the Public Finance Act, authorizes the
2 CDA to bring an action in this court at any time.
3 And indeed, is the fact that the dissenters must
4 move with dispatch, because you have, all you have
5 to do is trigger the requirement for the, for them
6 to file is file. Not a full bond package with
7 everything resolved, but what in fact what
8 triggers the filing is the filing of the
9 resolution or ordinance authorizing issuance of
10 the bonds. It is not -- the statute makes a
11 distinction between authorization of bonds and
12 actual issuance. You can see it time after time
13 in these statutes. There is authorization of the
14 bond, there is ultimate issuance. The things that
15 Miss France told you ultimately were done, all due
16 diligence, all disclosures, but it is not
17 necessary by any rule of law in the Commonwealth
18 for authorization of those bonds. The board and
19 the CDA in this circumstance took the steps
20 necessary to authorize those bonds. So what you
21 are looking at in effect is what I would consider
22 like an authorizing resolution from Congress. We
23 intend to issue bonds for the purposes which are
24 set out here, and those purposes, you test to see
25 if they are all lawful. And I concede the statute

1 kicks in at that point. But you don't have to
2 clean all the other stuff for issuance, else wise
3 why would the General Assembly say the resolution
4 with the authority -- I am sorry -- authorizing
5 resolution be filed and then require dissenters to
6 come in to court within 30 days?

7 The CDA can file, yes, the CDA can wait and
8 file at end of the process if that is what it
9 chooses to do. But the statute says it may file at
10 any time after that authorization has occurred.

11 That is true. I would point out whether one
12 is proceeding under the Public Finance Act or
13 proceeding under Virginia Waste Water Authority
14 Act's validation procedure known as the back door
15 validation proceeding. In both circumstances they
16 have got to act within 30 days of the authorizing
17 resolution. So I submit to you, Your Honor, that
18 the questions about there being loose ends is
19 really a red herring, because if the supposed
20 board had done nothing from this point,
21 authorizing resolution, and said, we are going to
22 come see Judge Johnson and find out whether the
23 authorizing resolution gets us where we need to
24 be, the code is clear that is, that could be done.
25 Nothing else need to be done to get to this

1 courthouse. So don't talk to me about the, about
2 what hasn't been done.

3 Then I would address to The Court section
4 15-2660 of the code. 15-2660 of the code, which
5 is the provision that said that the authorization
6 and issuance of bonds under the chapter shall not
7 be dependent or affected in any way by proceeding
8 under contracts made or acts performed in
9 connection with or in the furtherance of the
10 project undertaken by the locality authorizing
11 issuing is the bond.

12 And so, indeed, much of what you have heard
13 there is so concerned about are development
14 agreements, yes, related to the issuance of the
15 bond, but directly related to the project itself,
16 and the statute says that is not relevant to the
17 question of their validity.

18 So if you add those two things together, Your
19 Honor, we start with the proposition that we have
20 this authorizing resolution. We are Congress. We
21 shall pass a resolution that says we may now
22 appropriate so much money at a subsequent time.
23 What you are considering in this court is the
24 authorization of these bonds. And that is all
25 that we as the CDA need to bring to this court.

1 Your Honor, I would also touch just for a
2 moment about the suggestion that somehow the CDA
3 is being misused. This Court has obviously
4 learned there is not only respect, but a good deal
5 of affection between counsel in this case. And
6 Mr. Pearson and I have known each other many
7 years, and I know his role in connection with the
8 CDA. And I know how many times with the statutes
9 in which I have been involved there is a
10 perception that what they created, what we went to
11 create, and somehow when it says one thing when
12 presented to other people in other circumstances
13 in other courts, it doesn't get read that way
14 because it actually has the legal effect of saying
15 otherwise. The implication of his argument was
16 the CDA was created so you could fund creation of
17 only public infrastructure, the roads to be taken
18 into the state system. Perhaps VDOT would take
19 over maintenance. You would parse the statute in
20 vain for what agency will take over the security
21 facilities. You will parse it in vain for what
22 agency takes over fencing throughout, or
23 landscaping and what not. CDA does, CDA does what
24 we suggest it does. And so we would tell you
25 while he doesn't like it, while my friend thinks

1 this is a give away of public money, the fact is
2 that the board of supervisors, the CDA and EDA,
3 Henrico County, can make the political judgment to
4 do as they did, because the moving parts do
5 function.

6 THE COURT: Thank you very much, sir. I
7 appreciate your argument. I appreciate everyone's
8 argument.

9 I told Mr. Foote not to use any of his time
10 thanking The Court. But since I am not under any
11 time limit, I can use my time thanking counsel. I
12 know you did supremely large amounts of work in a
13 fairly short amount of time. That was a complex
14 case, and has a lot of issues. I want to commend
15 all of you for the way in which you presented it.
16 It makes my job easier. And also want to echo
17 something I think you said at the beginning. You
18 seem to get along well. I wish all counsel did in
19 all cases I have. I know you are under extreme
20 constraints. I will tell you, though, I am on
21 motions next week, so I won't give you a decision
22 next week. I will try to give you a decision
23 within two weeks from tomorrow. Anything else?
24 Thank you very much.

25 HEARING ADJOURNED



PETITION
FOR THE CREATION OF
THE SHORT PUMP TOWN CENTER
COMMUNITY DEVELOPMENT AUTHORITY

HENRICO COUNTY, VIRGINIA
July 14, 2000

Submitted
1/31/01

WHEREAS, MJGT Associates, LLC and Forest City Enterprises, Inc. (the "Petitioners") are the owners of over fifty-one percent of the land area and assessed value of certain contiguous parcels of land in Henrico County, Virginia, (the "County") containing in the aggregate approximately 147 acres of commercial property, located on the northern line of West Broad Street (U.S. Route 250) near its intersection with Lauderdale Drive as more particularly described on Exhibit A attached hereto (the "Property"); and

WHEREAS, Petitioners desire to develop the Property as commercial property consisting of a first-class retail center to be known as the Short Pump Town Center which would provide retail opportunities for the citizens of the County not otherwise available in the County and which would expand the County's tax base; and

WHEREAS, the Petitioners believe and respectfully represent to the Board of Supervisors of Henrico County (the "Board") that it would be in the best interests of the citizens of the County to create a Community Development Authority as permitted under Virginia Code Sections 15.2-5152, et seq., and other applicable provisions of Title 15.2 of the Virginia Code of 1950, as amended (the "Act") to provide financing for certain infrastructure necessary for the coordinated and expeditious development of the Short Pump Town Center;

NOW, THEREFORE, Petitioners respectfully request that the Board adopt an ordinance or a resolution creating the Short Pump Town Center Community Development Authority

pursuant to the provisions of the Act and for the purposes set forth in this Petition. In support of such request, Petitioners represent and state as follows:

1. Standing and Jurisdiction. Petitioners are the owners of over fifty-one percent of the land area and assessed value of the Property which is located wholly within Henrico County, Virginia as required in the first paragraph of Virginia Code Section 15.2-5153. The proposed community development authority district contains at least 100 acres of commercial property as required by the last paragraph of Virginia Code Section 15.2-5153. However, Petitioners expect that certain portions of the real estate within the proposed district consisting of the anchor department store properties and potentially certain other parcels will be excluded from the district as described below and Petitioners request the Board to modify the minimum acreage limit to 50 acres in accordance with Virginia Code Section 15.2-5153.

2. Name and Boundaries of the Proposed District. Petitioners request that the Board create the Short Pump Town Center Community Development Authority (the "CDA") pursuant to the authority granted in the Act. The boundaries of the CDA district would be initially the boundaries of the Property as described on Exhibit A attached hereto and incorporated herein (the "District"). Thereafter the boundaries of the District may be modified by the Board or the CDA upon request of the Petitioners or their successors. The District would be entitled the Short Pump Town Center Community Development Authority District. Petitioners expect and intend that certain portions of the Property will be excluded in the future from the District. Those portions of the Property to be excluded from the CDA District will consist of the real estate to be conveyed or leased to the four anchor department stores and may also include certain other portions of the Property to permit conveyance of such real estate to other businesses free of any special assessment lien. Those portions of the Property to be excluded cannot be specifically

described at this time, but are expected to be the department store pad sites labeled A, B, C and D, generally as shown on Site Plan dated May 15, 2000, a copy of which is attached hereto and incorporated herein as Exhibit B, as well as Out Parcels 1, 8, 9, 10, 11 and 12 and the parcels containing BMP areas E through J. Petitioners request that the Board authorize the CDA to exclude or release from the District such parcels or portions of the Property as the Petitioners or their successors may request, even if the property remaining in the District is less than 100 acres, provided that such exclusions or releases are consistent with the purposes for which the CDA is established.

3. Services and Facilities to be Undertaken by the CDA. The CDA would undertake to finance and construct certain public improvements within the District as more particularly described on Exhibit C attached hereto and incorporated herein (the "Improvements"). All Improvements would be constructed in accordance with applicable governmental standards after obtaining all necessary permits and approvals therefor.

4. Proposed Plan for Providing and Financing the Improvements.

A. The Petitioners (i) propose that the CDA request the Board of Supervisors to establish a special assessment upon the property within the District to finance the Improvements as provided in Virginia Code Section 15.2-5158(A)(5) and (ii) request the Board of Supervisors to enter into an agreement with the Economic Development Authority of Henrico County, Virginia, to make certain incentive payments from incremental tax revenues generated within the Property.

B. The CDA will issue bonds to finance the Improvements under the authority of Virginia Code Section 15.2-5158 and 15.2-5125 as those Sections may be amended.

C. The CDA will arrange for the construction of the Improvements and will be responsible for the operation and maintenance of the Improvements until such time as they are dedicated and accepted by the applicable governmental entity or until such time as the responsibility for operation and maintenance is assumed by another entity in accordance with applicable laws and regulations.

5. Benefits from CDA Construction of Facilities. Petitioners represent that the following benefits would be derived from the construction of the Improvements by the CDA:

A. The proposed Improvements would be in accordance with the County's comprehensive land use plan, would facilitate the development of the Short Pump Town Center, and would promote economic development in the County by creating new jobs and attracting retail establishments that would generate substantial tax revenues for the County.

B. The proposed improvements and the retail development associated therewith are expected to substantially increase the County's tax base and create surplus tax revenues that would be available for funding other public projects.

6. CDA Board Members. The members of the Board of the CDA shall be selected under the applicable provisions of Virginia Code Section 15.2-5113.


Respectfully submitted,

PETITIONERS:

MJGT Associates, LLC

By: _____

Its: _____


Manager

Forest City Enterprises, Inc.

By: *James J. [Signature]*
Its: *E. J. [Signature]*

11WMC0118VPHILROM0602179.07

DATE	1/15/78
BY	W. J. HARRIS
PROJECT	SHORT PUMP TOWN CENTER
SHEET	1 OF 1

SHORT PUMP TOWN CENTER
RICHMOND
VIRGINIA

DESIGNED BY
W. J. HARRIS & ASSOCIATES
PLANNING & ARCHITECTS

NO.	AREA	AREA	AREA	AREA	AREA	AREA	AREA	AREA	AREA
1	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF
2	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF
3	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF
4	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF
5	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF
6	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF
7	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF
8	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF
9	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF
10	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF	100,000 SF

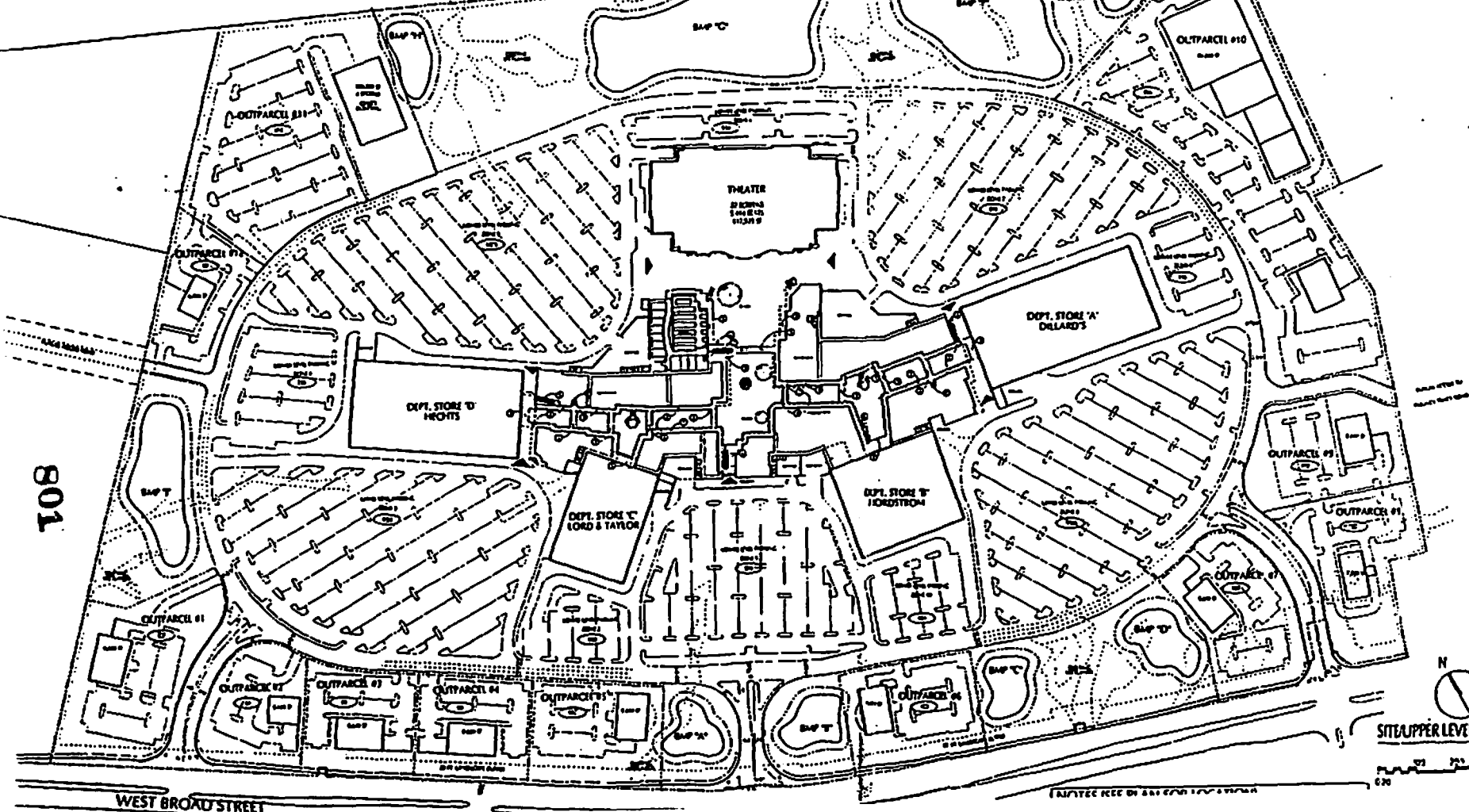


Exhibit A

All those certain pieces and parcels of land containing in the aggregate 147.186 acres, more or less, as described on that certain plat dated December 19, 1997, revised September 3, 1998, prepared by Timmons and entitled "Plat Showing 147.186 Acres of Land Lying on the North Line of U.S. Route 250 – West Broad Street" and being comprised of the following tax parcels: 36-A-13, 36-A-15, 36-A-26, 36-A-27, 36-A-28, 36-A-29, 36-A-30, 36-A-31, 36-A-32, 36-A-34A, 36-A-35A, 36-A-36, 36-A-37 and 36-A-38.

Exhibit C

[Description of Public Improvements]

Extension of sewer trunk line	\$ 509,359
Extension of water main line	\$ 1,167,632
Storm water management facilities	\$ 1,556,310
Roads abutting the CDA:	
Left turn lane	\$ 57,000
Traffic signal	\$ 142,500
Ring road	\$ 3,021,000
Entrance roads	\$ 855,000
Lighting	\$ 1,091,550
Landscaping	\$ 2,525,593
Plaza	\$ 3,990,000
Parking	\$ 3,712,316
Excavation related to the improvements	\$ 1,952,939
Soft costs and contingency	<u>\$ 1,418,801</u>
Total	<u>\$22,000,000</u>

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Exhibit A

All those certain pieces and parcels of land containing in the aggregate 147.186 acres, more or less, as described on that certain plat dated December 19, 1997, revised September 3, 1998, prepared by Timmons and entitled "Plat Showing 147.186 Acres of Land Lying on the North Line of U.S. Route 250 - West Broad Street" and being comprised of the following tax parcels: 36-A-13, ~~36-A-15~~ (in part), 36-A-26, 36-A-27, 36-A-28, 36-A-29, 36-A-30, 36-A-31, 36-A-32, 36-A-34A, 36-A-35A, 36-A-36 36A, 36-A-37 and 36-A-38.