

In The
Supreme Court of Virginia

RECORD NO. 020801

SHOOTING POINT, L.L.C.,
SHOOTING POINT PROPERTY OWNERS' ASSOCIATION, INC.,

Appellants,

v.

JOHN W. WESCOAT,

Appellee.

RECORD NO. 020803

JOHN W. WESCOAT,

Appellant,

v.

SHOOTING POINT, L.L.C.,
SHOOTING POINT PROPERTY OWNERS' ASSOCIATION, INC.,

Appellees.

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(Pages 663-941)

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A-17. Colored Photograph of New Stakes	1952
A-18. Colored Photograph of New Stakes	1953

Respondent’s, Shooting Point, L.L.C,
Memorandum In Support of Respondent’s Motion to
Enforce the Final Decree, In Part, and
To Stay The Final Decree, In Part
Chancery Nos. CH01-02, CH00-14
With Exhibits,
filed March 13, 2002, continued:

Exhibits:

B. Certification of Tree Boring
dated October 12, 2001 1954

C. Colored Photograph 1955

Assignments of Error
(020801) 1956

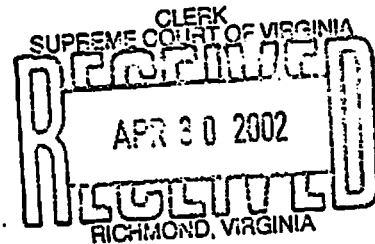
Assignment of Error
(020803) 1957

VIRGINIA:

IN THE CIRCUIT COURT OF NORTHAMPTON COUNTY

MARGARET WESCOAT and JOHN WESCOAT,)
 Plaintiffs,)
 v.) CHANCERY NO. 01-02
 SHOOTING POINT PROPERTY OWNERS)
 ASSOCIATION, INC., et al,)
 Defendants.)

MARGARET WESCOAT and JOHN WESCOAT,)
 Plaintiffs,)
 v.) CHANCERY NO. 00-14
 SHOOTING POINT PROPERTY OWNERS)
 ASSOCIATION, INC., and SHOOTING)
 POINT LLC, and COMMONWEALTH)
 TRANSPORTATION BOARD, and THE)
 HONORABLE CHARLES W. NOTTINGHAM,)
 Defendants.)



TRIAL TRANSCRIPT

VOLUME III

Before: THE HONORABLE FREDERICK B. LOWE

June 4, 2001

Northampton County, Virginia

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02
 Filed
 Teste
 Clerk
 NORTHAMPTON COUNTY CIRCUIT COURT

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TRIAL TRANSCRIPT

(The court reporter was duly sworn.)

THE COURT: All right. Who was questioning Mr. Cumming?

MR. MCFARLAND: I think I was going to start, Your Honor.

THE COURT: All right.

MR. MCFARLAND: I think Mr. LePage had just finished.

THE COURT: Okay.

WILLIAM CUMMING, JR., called as a witness by and on behalf of the Plaintiff's, being previously duly sworn, testified as follows:

CROSS-EXAMINATION

BY MR. MCFARLAND:

Q. Good morning, Mr. Cumming.

A. Good morning.

Q. Mr. Cumming, you testified on Thursday that before January of 2000, sometimes Northampton County zoning would provide permits to VDOT for review, but not all time, correct, for private subdivision entrances?

A. The plat for subdivisions, not the permit themselves.

1 Q. The plats. I'm sorry.

2 A. They would let us know about them
3 sometimes, and sometimes they did not.

4 Q. Sometimes they did not.

5 In fact, it would be even more accurate
6 to say that before the Shooting Point issue arose, really
7 the county was not providing VDOT subdivision plats for
8 review if they involved an existing entrance for a private
9 subdivision road, correct?

10 A. As I understand it, what they weren't
11 providing us was those that were not considered
12 subdivisions by their ordinance.

13 Q. Right. In other words, by their
14 ordinance meaning that they were exempt?

15 A. They were exempt by their ordinance.

16 Q. Right.

17 A. And not considered subdivisions, as I
18 understand it, so we did not get those.

19 Q. Okay. And, in fact, it's this Shooting
20 Point entrance permit that triggered a review by both your
21 office and the county so that from then on VDOT would
22 receive the plats for exempt private subdivisions,
23 correct?

24 A. That's correct.

25 Q. So Shooting Point is really the first

1 subdivision development which uses an existing entranceway
2 for what the county terms an exempt permit that your
3 office has reviewed in the past five years?

4 A. We have looked at some in Accomac County
5 I know.

6 Q. I'm talking about Northampton County.

7 A. Okay. In Northampton County, I don't
8 believe that we had seen any others. I can't be a hundred
9 percent sure, but I don't think we had in the previous
10 five years.

11 Q. Okay. And we also heard mention on
12 Thursday, Mr. Cumming, about a 1992 entrance permit that
13 involved the Crees for a subdivision?

14 A. That's correct.

15 Q. Okay. Now, you haven't been able to
16 locate the actual letter that was sent to the Crees in
17 1992, correct?

18 A. We did at that -- we found it, and sent
19 copies to both -- as I understand it from my assistant, to
20 both Mr. Poulson and to secondary roads office in
21 Richmond.

22 We cannot locate it in our files. We've
23 been through all of the various files, the file that it
24 came out of, and the other files. We don't know where
25 that is. And Richmond cannot find their copy. We've

1 called them looking for their copy. So we don't know what
2 happened to the letter. But, yes, we did find the letter.

3 Q. And Mr. Poulson, I'm sure, would produce
4 it to us if he had it.

5 But you do remember that this 1992
6 subdivision, and this entrance permit in issue there
7 involved a new road for that subdivision, correct?

8 A. I believe it did.

9 Q. Not an existing road as we're dealing
10 with here?

11 A. I believe that's correct. I'm sure.

12 Q. Okay. And also, that road, which was
13 going to be a new road, the plan was that that road would
14 eventually become part of the state's secondary road
15 system, correct?

16 A. I did not think that that was the case.
17 In that particular subdivision, they were designing it for
18 a private road subdivision, and I am not sure, but I
19 believe that the plan was it didn't meet our standards,
20 and they didn't want to build it to our standards, so it
21 was going to remain a private road.

22 Q. Okay. If the intention was for that
23 road to become part of the state system, then it would
24 have to meet the state's standards, correct?

25 A. That's true.

1 Q. And wasn't there an issue about whether
2 parabolic swells would help define the radius?

3 A. That was an issue for a number of them
4 along about that time. That may have been one of them.
5 Again, I'm not a hundred percent sure, but that was an
6 issue for some of the developers wanting the swells
7 instead of shoulders and ditches.

8 Q. Okay. And my point -- and I don't mean
9 to belabor this, but my point is the '92 is dealing with
10 an entirely different type of entrance road than we've got
11 with the Shooting Point subdivision?

12 Shooting Point you've got an existing
13 road. 622 is the state road, and an existing right-of-way
14 that's been used for well over twenty-five years, correct?

15 A. The difference, as I see it, is the
16 other one was a private road subdivision that the entrance
17 and everything was designed, and the right-of-way platted
18 out. It wasn't using the easement, and it was, as I
19 recall, it was a new connection.

20 But it wasn't altogether different in
21 that both of them, as I understand it, come under the same
22 private road permit requirement from VDOT as far as the
23 permit that they have to get.

24 Q. Okay. And, in fact, with respect to
25 that private road requirement, the regulations specifies

1 that anytime you've got two or more residences using the
2 same right-of-way, you need approval, correct?

3 A. I believe that's what the regulation
4 says.

5 Q. Okay. You have interpreted that on the
6 Eastern Shore to mean more than two, correct?

7 A. That's correct.

8 Q. And, in fact, prior to January 1st of
9 2000, there were technically three properties that were
10 using the existing easement that is an issue in this case,
11 correct?

12 You've got the Meekins property which he
13 purchased around 1979, you had the two folks, Martin and
14 Dall, who purchased the property back in 1974. They had
15 separate lots, correct?

16 A. I guess that is the case.

17 Q. Okay.

18 A. When we look at it, we look at generally
19 the potential dwelling, and if there were three potential
20 lots down there -- and again, I know we were split off and
21 so forth, but I don't know exactly what it looked like
22 before.

23 Q. All right. Now, let's talk about the
24 permit itself, Mr. Cumming. Mr. Poulson, at the beginning
25 of his examination of you on Thursday, read a number of

1 excerpts from your testimony at the hearing in March of
2 2000.

3 But the truth is, sir, at the time you
4 testified in the hearing in March of 2000, you had only
5 been out to the property one time, correct?

6 A. I know I had been out there at least
7 once. I may have been out there a second time. I can't
8 say that. I don't remember.

9 Q. Your testimony at the hearing was that
10 you had seen it once.

11 A. Okay, then I had seen it once.

12 Q. Okay. And certainly no application had
13 been submitted at that time?

14 A. That is correct.

15 Q. Okay. And you hadn't conducted any
16 review of the vehicle count on Route 622 at the time you
17 testified on March 23rd of 2000, had you, sir?

18 A. I don't believe I checked that.

19 Q. Okay. And you hadn't even specifically
20 measured Route 622 at the time you testified at the
21 hearing in March of 2000, had you?

22 A. That's correct.

23 Q. And you certainly hadn't reviewed
24 anything with the Traffic Safety Department about this
25 entrance back in March of 2000?

1 A. No, I had not.

2 Q. And, in fact, you really hadn't
3 thoroughly studied whether an entrance permit could be
4 issued at the time you testified at the hearing in March
5 of 2000, had you?

6 A. I looked at it, but I hadn't done as
7 thorough a study as I did later on.

8 Q. Okay. After that hearing,
9 representatives of my client, including Mr. Hodge, met
10 with you, correct?

11 A. Mr. Hodge met with me.

12 Q. And you discussed whether a permit could
13 be issued for this entrance with VDOT's Traffic Safety
14 Division, correct?

15 A. The Suffolk Hampton Roads District
16 Traffic Engineering Section.

17 Q. In other words, what you did is -- as
18 the resident engineer, you generally issue permits on the
19 Eastern Shore, correct, sir?

20 A. That's correct.

21 Q. Okay. But in this case, in order to
22 make sure that this could be a safe entrance, you
23 consulted with people whose very function is to examine
24 safety issues for VDOT, correct?

25 A. That's correct.

1 Q. Okay. And you also went back to
2 Shooting Point and examined the entrance in more detail,
3 didn't you, Mr. Cumming?

4 A. Yes, I did.

5 Q. And you reviewed the visibility for
6 vehicles entering and exiting the entrance, correct?

7 A. That's correct.

8 Q. And you would agree with me that the
9 visibility for a vehicle exiting the right-of-way is very
10 good in all directions?

11 A. Yes, along both lines of sight along the
12 road is very good.

13 Q. Okay.

14 A. It exceeds our minimal standards.

15 Q. And, in fact, to the right as one is
16 coming out of the right-of-way, the only residential or
17 business that is anywhere to the right is Mr. Wescoat's
18 home?

19 A. Yes.

20 Q. Which is approximately a half a mile
21 down the road?

22 A. You can see that.

23 Q. Right. And 622 dead-ends at
24 Mr. Wescoat's home?

25 A. That's correct.

1 Q. And that is, in fact, the only residence
2 on Route 622, isn't it, sir?

3 A. Well, I guess Mr. Meekins has a
4 residence back there. I guess he would be considered
5 coming out on that road.

6 Q. He comes out, but he's off 622. Okay.

7 And you also had the opportunity to
8 review the statistics for the number of vehicles that
9 travel 622 per day, correct?

10 A. Yes.

11 Q. And it's less than thirty per day that
12 travel 622?

13 A. In 1999, the count was thirty. In 2000,
14 the count, which has not been published, according to
15 Jerry Pauley in our traffic engineering section in
16 Suffolk, the 2000 count is twenty-eight.

17 Q. Okay. So it's either thirty or
18 twenty-eight depending on which year you use?

19 A. That's correct.

20 Q. Okay. And even if we assume an average
21 of ten trips per day for the Shooting Point subdivision,
22 once it's built, based on eighteen lots, that would give
23 us a hundred and eighty trips on the right-of-way at 622,
24 correct?

25 A. Yes.

1 Q. That gives us a total of two hundred and
2 ten trips over a day?

3 A. That's correct.

4 Q. Still a very small number of trips,
5 correct?

6 A. Well, I don't know if I'd use very
7 small. That's light traffic. As far as we go on our
8 standards for subdivisions, and pavements, and so forth,
9 we go from zero to two-fifty as the very smallest
10 category, so that's within that category.

11 Q. That's within the very smallest
12 category?

13 A. That's correct.

14 Q. And I think you may have mentioned on
15 direct examination peak hour would be eleven percent of
16 that two hundred and ten trips total per day, correct?

17 A. Correct.

18 Q. Which is slightly more than -- and my
19 math isn't always the best, but it's slightly about twenty
20 something trips in the peak hour?

21 A. That's correct.

22 Q. That's one every three minutes,
23 approximately, in the peak hour?

24 A. A little more than that.

25 Q. But basically it's one every three

1 minutes for an easement that is three-tenths of a mile
2 long, correct?

3 A. I don't know how long the easement is.
4 I have not measured the easement itself.

5 Q. Okay. And you examined the radius with
6 respect to this entranceway?

7 A. Yes, I did.

8 Q. Okay. The radius worked fine?

9 A. The radius coming in is good.

10 Q. Okay. And when we use the term
11 "radius," Mr. Cumming, what are we referring to?

12 A. As you come into an entrance, you have
13 the radius that you put your pavement on so the cars can
14 make the turn into the site. Because of the geometrics,
15 this one is -- the road is in a curve there, and this is
16 coming right off the curve, then the turn in is basically
17 staying straight. So you can make the shot in without a
18 problem.

19 If it happened that the easement
20 happened to get somewhere else, it would not work very
21 good. If it came in at ninety to the roadway, there would
22 be serious problems with a fifteen doing that.

23 Q. Okay. But it works fine as configured,
24 correct?

25 A. We believe it will, yes, sir.

1 Q. Okay. And with respect to the right
2 side, as one is coming out of the easement, there is
3 really no reason for vehicles exiting the right-of-way to
4 go to the right unless it happened to be Mr. Wescoat, or
5 someone from his family?

6 A. Or someone wanting to go visit the
7 property.

8 Q. But certainly traffic to the right is
9 going to be minimal?

10 A. We believe so.

11 Q. Okay. Now, with respect to vehicles
12 entering and exiting the right-of-way, you will agree with
13 me, sir, that two regular-sized vehicles can pass at the
14 entrance?

15 MR. POULSON: I'm going to object unless
16 regular is defined a little better. I don't know what
17 regular is.

18 MR. MCFARLAND: I'll rephrase.

19 BY MR. MCFARLAND:

20 Q. Standard sedans?

21 A. I believe two standard sedans can get by
22 each other.

23 Q. Okay. To the extent that you've got one
24 larger vehicle, and by that I mean a truck, a
25 tractor-trailer, something with, let's say, an eight-foot

1 width, then it may be that that vehicle will wait for the
2 vehicle exiting to complete its exit on 622, correct?

3 MR. POULSON: It appears to be
4 speculation.

5 THE COURT: Well, it is speculation.
6 Sustain the objection.

7 BY MR. MCFARLAND:

8 Q. Let me see if I can rephrase,
9 Mr. Cumming.

10 You have a lot of entrances on the
11 Eastern Shore that won't sustain two large vehicles
12 exiting and entering at the same time?

13 MR. POULSON: We would object to that.
14 I think we're dealing with this case and not other
15 entrances they have on the Eastern Shore.

16 THE COURT: Overruled.

17 THE WITNESS: We do have some other
18 entrances that are narrower than standard on the Eastern
19 Shore, and I'm not aware of any accidents, serious
20 accidents at the majority of those.

21 BY MR. MCFARLAND:

22 Q. Okay. And with respect to Route 622 and
23 the right-of-way at issue here, is it not true that, in
24 fact, part of the permit application as it was applied
25 for, and it was approved, calls for the installation of a

1 fifteen-mile-per-hour speed-limit sign right as one would
2 be entering the curve at 622, before the entranceway?

3 A. Just before you enter the curve, yes, it
4 does.

5 Q. And the purpose of that was so that
6 vehicles would slow down as they are going down 622 and
7 approaching the curve, and that would help in the event
8 that there was a vehicle waiting outside the entranceway
9 on 622?

10 A. It would be a warning sign that would
11 warn motorists. It's not a speed-limit sign, but a
12 warning sign to warn the motorists of the situation ahead.

13 Q. And you've got a fairly significant
14 curve there on 622, correct, before the entrance at issue?

15 A. Yes, we do.

16 Q. Okay. And, Mr. Cumming, the overall
17 consideration when you and your department review an
18 entrance application is what, sir?

19 A. Safety is our primary concern.

20 Q. And as you sit here today, you have no
21 doubt that this entrance can function safely, correct,
22 sir?

23 A. I believe that it will function safely
24 like it is.

25 Q. And no one pressured, or forced you to

1 issue this permit for this entrance, did they,
2 Mr. Cumming?

3 A. The decision to issue this permit was my
4 decision.

5 Q. It was your decision, and you made it of
6 your own volition after you reviewed all of the factors,
7 correct, Mr. Cumming?

8 A. That is correct.

9 Q. Okay. And as the resident engineer on
10 the Eastern Shore, is it your job to review and, if
11 appropriate, issue entrance permits?

12 A. That is one of my duties, as I
13 understand it, yes, sir.

14 Q. Now, a lot has been made about
15 Mr. Hodge. And he was a consultant for the Shooting Point
16 folks, correct?

17 A. Yes, sir.

18 Q. Okay. You obviously had some
19 familiarity with him from his past tenure with VDOT?

20 A. Yes, I did.

21 Q. Okay. And do I understand that
22 Mr. Hodge came out and actually met with you at the site?

23 A. Yes, he did.

24 Q. Okay. And you had a discussion with
25 Mr. Hodge about the application, and how the entrance was

1 configured, and whether it was safe, correct?

2 A. Yes, sir, I did.

3 Q. Okay. Now, Mr. Hodge wanted you to
4 issue the permit on the day that he was out there,
5 correct?

6 A. That is correct.

7 Q. You didn't do that, did you,
8 Mr. Cumming?

9 A. I did not.

10 Q. Because at that point, you weren't
11 satisfied about all of the characteristics of the permit
12 application, correct?

13 A. That's correct.

14 Q. You waited until the traffic safety
15 folks that you consulted in the Hampton Roads District
16 Office reviewed it, and agreed that it was safe, correct?

17 A. That's correct.

18 Q. Okay. So you certainly didn't come to
19 any hasty, or snap judgments as to this permit, did you,
20 Mr. Cumming?

21 A. No, sir.

22 Q. There's also been a lot of discussion
23 about the measuring parallel to the pavement, correct?

24 A. Yes, sir.

25 Q. Okay. That is not a deviation from

1 standard practice to measure parallel to the pavement, is
2 it, Mr. Cumming?

3 A. No, it's not.

4 Q. Okay. And the fact is, what you've got
5 here is you've got an entrance permit application in which
6 you've got to take into consideration the fact of the road
7 curving as it joins with the entrance, correct?

8 A. Yes, sir.

9 Q. Okay. There also was some talk on
10 Thursday about another permit application that was
11 submitted by Mr. Tavi. Are you familiar with that?

12 A. Yes.

13 Q. That's a totally different application,
14 isn't it, Mr. Cumming?

15 A. I believe so.

16 Q. My client's permit application was not
17 linked with Mr. Tavi's application, was it?

18 A. No, sir.

19 Q. There were no conditions linking the
20 two; one was required, or one wasn't, or something like
21 that, correct?

22 A. No, sir.

23 Q. And there was also much mention made on
24 Thursday on Mr. Poulson's examination of who at VDOT was
25 involved in the permit application, or consulted about it,

1 and with respect to political pressures.

2 Let's go back to how this first arose,
3 Mr. Cumming. You first learned of the Shooting Point
4 entrance issue from who?

5 A. Mrs. Wescoat.

6 Q. Okay. Mrs. Wescoat?

7 A. Yes.

8 Q. Now, the normal way you learn about an
9 entrance permit issue is either the landowner developer
10 consults with you, or the county consults with you,
11 correct?

12 A. Most of the time, yes.

13 Q. Okay. That's not what happened here, is
14 it?

15 A. No, sir.

16 Q. This is an adjoining landowner who
17 called you up about this entrance?

18 A. That's correct.

19 Q. In fact, called you up because they had
20 learned that Shooting Point had purchased the property
21 next to them, correct?

22 A. I can't say why they called.

23 Q. Well, you were advised that there were
24 plans for a subdivision next to the Wescoat property,
25 correct?

1 A. That's correct.

2 Q. Okay. Had Mrs. Wescoat ever called you
3 up before late December of 1999 or January of 2000 to
4 discuss private entrance permits?

5 A. If she had, I don't remember. I
6 wouldn't say for sure. I had a lot of dealings with
7 Mrs. Wescoat over the years.

8 Q. But as you sit here today in court, you
9 don't have any recollection of her calling to discuss the
10 issuance of permit applications for other private
11 subdivisions, do you, sir?

12 A. I don't remember.

13 Q. And I take it you have known
14 Mrs. Wescoat for a number of years?

15 A. Yes, sir.

16 Q. And in your capacity as the resident
17 engineer for VDOT for the Eastern Shore, you appear
18 regularly before the board of supervisors in Northampton
19 County?

20 A. I try to attend all of the regular
21 monthly meetings.

22 Q. And am I correct that you are on a
23 number of committees that deal with transportation issues
24 for the Eastern Shore?

25 A. That's correct.

1 Q. And on some of those committees,
2 Mrs. Wescoat is also a member?

3 A. On at least one of them that I can think
4 of.

5 Q. Now, when you called Mrs. Wescoat on
6 August 17, 2000, you advised her that the permit had been
7 issued for Shooting Point, correct?

8 A. The day, I can't swear to, but I believe
9 that's what happened.

10 Q. That wasn't the only thing, however,
11 that you were calling her about that day, was it?

12 A. Not as I recall.

13 Q. Okay. There were a number of
14 transportation issues that you left her a voice mail
15 message about on her recorder, correct?

16 A. At least one other that I can remember.

17 Q. And, in fact, you were calling her in
18 part as a courtesy to her, given her obvious interest in
19 this matter, and her position?

20 A. I was calling her as a courtesy, yes,
21 sir.

22 Q. And when you spoke with her on August
23 the 21st, this was after some other type of meeting, I
24 take it?

25 A. I don't remember the date, but I did

1 speak with her, I think, after another meeting.

2 Q. And, in effect, you were sort of
3 apologizing for issuing this permit, weren't you,
4 Mr. Cumming, because you knew it was going to disturb
5 Mrs. Wescoat?

6 A. Yes. I knew what the Wescoats were
7 wanting, and so, I guess in a way I was apologizing.

8 Q. And the truth is, what you were telling
9 her is, Hey, we looked at this real closely from every
10 angle. I even consulted with my people in the Hampton
11 Roads Safety Division. There is no reason we can't issue
12 this permit?

13 MR. POULSON: Your Honor, I'm going to
14 object to this question. He hasn't even indicated he said
15 anything like that, and now counsel is trying to say,
16 Well, this is what you really meant.

17 THE COURT: He can ask him if he recalls
18 making that statement. I don't know if he does.

19 THE WITNESS: I don't recall making a
20 statement exactly like that, but --

21 BY MR. MCFARLAND:

22 Q. I mean, you-all looked at this permit
23 application very intensely, Mr. Cumming, correct?

24 MR. POULSON: Judge, it's been asked and
25 answered several times.

1 THE COURT: Sustained. It has been.

2 BY MR. MCFARLAND:

3 Q. We've heard some testimony about the
4 VDOT regulations, Mr. Cumming?

5 A. Yes.

6 Q. Okay. The primary purpose of the
7 regulations is to ensure safety, correct?

8 A. To ensure safety, and good traffic flow.

9 Q. All right. And both of those
10 requirements are met with this entrance?

11 A. We believe that it will function safely.

12 Q. And it's not that the regulations are
13 wholly inflexible, correct, Mr. Cumming? You have to take
14 the regulations and apply them to the situation before
15 you?

16 A. Yes, we do.

17 Q. Okay. And you would agree with me, sir,
18 that the drawing on page 29 of the VDOT regulations is not
19 the only way that an entranceway permit can be configured,
20 correct?

21 A. There are some other ways that they can
22 be configured. Those are the minimum standards that we
23 would like to see.

24 MR. MCFARLAND: If I can have this
25 application, Your Honor.

1 BY MR. MCFARLAND:

2 Q. Let me hand you what's been marked as
3 Plaintiff's Exhibit 28, Mr. Cumming.

4 That is the application and the
5 amendments for issuance of the entrance, correct, sir?

6 A. Yes, sir.

7 Q. You had a chance to review it at the
8 time it was submitted at the end of July, 2000, correct?

9 A. Yes, sir.

10 Q. Okay. And you've had a chance to review
11 it since then?

12 A. You said July? It was -- if I remember
13 it right, it was submitted in August, not July.

14 Q. All right. The beginning of August
15 2000?

16 A. I believe that's when it was.

17 Q. Okay. And when it was submitted at the
18 beginning of August, 2000, you examined what is identified
19 as Plan A, correct, the diagram?

20 A. Yes, I did.

21 Q. Okay. And you satisfied yourself in
22 conjunction with your personal trips to the entrance, your
23 consultations with the traffic safety engineering
24 department, and your review of this application that the
25 application properly depicted a safe and usable entrance

1 for the intersection of this right-of-way and Route 622,
2 correct, sir?

3 A. Looking at it, we believe that if the
4 entrance were built as shown on this plan, or sketch, it
5 would function safely.

6 Q. Okay. And I take it this is the term
7 you just used, a sketch, correct? It's a drawing?

8 A. It's a drawing.

9 Q. Okay. It doesn't provide metes and
10 bounds descriptions of the entranceway?

11 A. No, it does not.

12 Q. And that's not required in an
13 application, is it, Mr. Cumming?

14 A. No, it's not.

15 Q. In fact, this is a more detailed
16 application than is typically submitted for an entrance
17 permit, correct?

18 MR. POULSON: I would object to that
19 question. It's awful general.

20 THE COURT: Overruled. It's a fair
21 question, I suppose.

22 THE WITNESS: We get some entrance
23 permit applications that are completely engineer and more
24 detailed than this. We get some others that are much more
25 sketchy than this, and I'm not real sure where the

1 percentage lies for the most.

2 But, you know, they come in all shapes,
3 and sizes, I guess you could say.

4 Q. Okay. But you've issued permits for
5 applications that were even more sketchy than this?

6 A. Much more sketchy than this.

7 Q. Okay. And this application which you
8 reviewed meets the requirements for the entrance, correct,
9 as you saw it necessary?

10 A. Looking at it, we believed that this
11 entrance, as shown, will function safely at this location.

12 MR. MCFARLAND: All right. Just a
13 moment, Your Honor. I think I'm about done. I think
14 that's all the questions I have.

15 THE COURT: Any redirect?

16 MR. POULSON: Yes, Your Honor.

17

18 REDIRECT EXAMINATION

19 BY MR. POULSON:

20 Q. Mr. Cumming, as far as Mrs. Wescoat's
21 involvement, Mrs. Wescoat called you one time; is that
22 correct, late December, early January?

23 A. I believe.

24 Q. And basically only asked you if there
25 were regulations, or whatever, that controlled entrances?

1 A. She asked me -- and I don't remember
2 exactly. She asked me about the entrance, and so forth,
3 and if there were some regulations that controlled such
4 things.

5 Q. And you gave her some code sections and
6 regulation sections?

7 A. I think I explained the process to her.
8 I may have given her some code sections as well.

9 Q. And basically from that point in time,
10 she never bothered you, or talked to you again until you
11 initiated the conversation on August the 17th and August
12 the 21st? Is that a fair statement?

13 A. I talked with her in-between then, and I
14 talked with her some about this. I don't know that she
15 called, or I called, or we were at meetings, or what it
16 was.

17 Q. But she at no point ever pressured you
18 about this entrance, did she, sir?

19 A. I don't believe so. No, sir.

20 Q. Okay. Thank you.

21 Now, you had looked at the entrance
22 prior to March the 23rd?

23 THE COURT: What year?

24 MR. POULSON: Of 2000.

25 THE WITNESS: That was the Court date

1 here?

2 BY MR. POULSON:

3 Q. Yes, that was the Court date.

4 A. Yes, sir.

5 Q. And you had been down, and all the
6 things that you now find satisfactory, basically you found
7 objectionable at that time, did you not, sir?

8 MR. MCFARLAND: I'm going to object to
9 that characterization, Your Honor. There are certain of
10 those things that weren't even discussed in his testimony.

11 THE COURT: Overrule the objection.

12 BY MR. POULSON:

13 Q. So basically all of the things that you
14 now find favorable you found objectionable at that time,
15 did you not, sir?

16 A. I don't know that all of the things that
17 I found --

18 Q. Well, you talked about traffic counts.
19 You said traffic count was immaterial because there wasn't
20 any subdivision down there at that point. Do you recall
21 that?

22 And I'm not going back through the
23 transcript.

24 A. I may have said that. I don't know.

25 Q. And the visibility hadn't changed one

1 way or the other, has it?

2 A. No, it has not.

3 Q. But you felt comfortable enough to come
4 into this court, and under oath, and state emphatically in
5 no uncertain terms that in no way could this entrance
6 qualify under the minimum standards because it was only a
7 fifteen-foot roadway, did you not, sir?

8 MR. MCFARLAND: I'm going to object to
9 that characterization. His testimony is what his
10 testimony was, and the transcript says what his transcript
11 was. I think that's --

12 THE COURT: Overruled.

13 THE WITNESS: If that's what the
14 transcript said, that's what I said.

15 BY MR. POULSON:

16 Q. You felt comfortable enough coming into
17 this court and saying that without any qualification?

18 A. If I said it -- I try not to say things
19 that I don't feel comfortable about.

20 Q. The 622 does have shoulders, correct?

21 A. Yes, it does have some shoulders.

22 Q. And the Tavi permit, basically that went
23 back to a lack of required width for the entrance
24 likewise, did it not? That was the issue on that?

25 A. The Tavi permit, as I recall, was not

1 as -- it was wider than this one, but not --

2 Q. Not wide enough?

3 A. Not -- if I remember right, the radiuses
4 were the problem on that one.

5 Q. And wasn't the width somewhere like
6 twenty-six to twenty-eight feet instead of the required
7 thirty?

8 A. I believe the width was -- and I don't
9 remember the details on that one. I would have to look at
10 the permit.

11 Q. But it did not comply with the drawings
12 as shown in the minimum standards?

13 A. It did not exactly match the drawings.

14 Q. And the regulations, they are minimum
15 standards, are they not, as we said?

16 A. The regulations in the book are shown as
17 minimum standards.

18 Q. And any application that you get, you
19 require at least distances to be spelled out, do you not,
20 like twenty-four, or thirty, or whatever for a width? You
21 just don't take a drawing without any measurements on it?

22 A. Generally, we need the measurements on
23 the drawing, yes, sir.

24 Q. Now, do you recall ever making the
25 statement, sir, and looking at Plan A, July 28th, part of

1 Exhibit 28, do you ever recall making the statement
2 relative to the tractor and trailer sitting on there with
3 a designated width of eight times sixty-five length, and a
4 sports utility of six foot nine width times seventy-nine
5 inches length?

6 Do you ever recall making the statement
7 that the only way it would ever fit on there was without
8 any mirrors, and laughing when you said it?

9 MR. MCFARLAND: Your Honor, that needs
10 to be put in some kind of context. When was it made? Who
11 was present? Is this a statement that is supposedly made
12 to Mr. Poulson so he's in effect testifying? I mean, we
13 need some kind of context.

14 BY MR. POULSON:

15 Q. After the permit was issued, and you
16 were shown the drawing, Mr. Cumming?

17 THE COURT: Overrule the objection.

18 BY MR. POULSON:

19 Q. Did you ever make that statement right
20 in your office?

21 A. I may have. I may have. I don't recall
22 for sure.

23 Q. Okay. We talked about traffic flow. In
24 that drawing, assuming -- and, of course, as you well
25 know, a tractor and trailer is wider than eight feet with

1 truck mirrors, is it not?

2 A. The mirrors extend beyond the eight
3 feet, I believe, yes, sir.

4 Q. And, of course, one of your requirements
5 in your April 4 letter was that the two vehicles be able
6 to enter and exit simultaneously, traffic flow, I believe,
7 as you referred to it?

8 A. I believe that was in my letter, yes,
9 sir. I'm not a hundred percent sure the date on the
10 letter.

11 Q. It is part of the permit, if you would
12 like to look at it.

13 A. Yes, sir.

14 Q. Is that one of your requirements?

15 A. That is one of the things we were
16 looking for at that time.

17 Q. And you were insisting that no vehicle
18 be able to wait out on the highway waiting for another
19 vehicle to come out, correct?

20 A. That is what we were looking for at that
21 time, yes, sir.

22 Q. Now, let's talk about traffic flow a
23 little bit. Let's even assume that this tractor and
24 trailer does not have any mirrors on it, and the SUV does
25 not have any mirrors on it, so we are working with eight

1 feet and six feet nine inches, okay? That leaves us three
2 inches, correct?

3 A. Yes, sir.

4 Q. Now, Mr. Cumming, as an engineer, and as
5 a graduate of VMI, are you telling this Court, sir, that
6 three inches tolerance, whether you put one inch on one
7 side, one inch on the outside of the other vehicle, and
8 one inch in the middle, is sufficient separation for safe
9 traffic flow in this entrance, sir?

10 Are you telling this Court that? I
11 mean, something that we'll all be able to rely on in the
12 future?

13 MR. MCFARLAND: I'm going to object to
14 that characterization and comment, Your Honor. It's
15 clearly argumentative.

16 THE COURT: The second part of the
17 question, the objection is sustained, but the first
18 question he can answer.

19 THE WITNESS: Could you repeat the first
20 question?

21 BY MR. POULSON:

22 Q. Okay. Are you telling this Court, sir,
23 as an engineer, and as a graduate of VMI, that three
24 inches tolerance or separation distance here, whether you
25 put it one inch on the outside of the tractor and trailer,

1 one inch on the outside of the SUV, and one inch in the
2 middle, are you telling this Court that that is sufficient
3 for safe traffic flow in this entrance, sir?

4 A. I don't think that those vehicles would
5 try to go by each other.

6 Q. What would they do?

7 A. I think one of them will end up waiting.
8 I think the one coming in, more than likely, will wait out
9 on the highway where there is good sight distance there.
10 I don't think with only the -- and design in the highest
11 hour twenty-three vehicles in an hour of twenty something,
12 the likelihood of a tractor-trailer and another vehicle is
13 going to be fairly rare.

14 And that if one of them does wait, you
15 do have good sight distance with the warning signs that
16 are up there. People will know what is coming up ahead.
17 And that if that situation does occur, that it will not be
18 what we would like to see, but we do believe that it will
19 function safely.

20 Q. Mr. Cumming, let me get back to the
21 question, sir. We're not assuming one is going to wait at
22 the entrance. And, apparently, you are saying one will
23 have to wait at the entrance?

24 A. Most people do not feel like that three
25 inches is enough clearance to get by. Most people will

1 look at that and think that their vehicle won't fit in
2 three inches.

3 Q. Mr. Cumming, in any other situation VDOT
4 would be saying it was ludicrous, would it not, sir, for
5 three inches?

6 MR. MCFARLAND: Objection.

7 MR. LePAGE: Objection to that
8 characterization.

9 THE COURT: Well, you might want to
10 rephrase the question.

11 BY MR. POULSON:

12 Q. Sir, would you not agree that three
13 inches total in no way, shape, or form would satisfy
14 VDOT's requirements for good, safe flow in the entrance,
15 sir?

16 A. Three inches is very tight.

17 Q. Very tight?

18 A. And VDOT tries to have standards for the
19 average motorist.

20 Q. For average motorists?

21 A. And most motorists will not try, in my
22 opinion, to go in a hole that is only three inches wider
23 than their vehicle.

24 Q. But part of your minimum standards is to
25 ensure a sufficient width in the entrance for one vehicle

1 to enter and not have to stay on the state road, and
2 another to come out simultaneously? That is one of the
3 principle underlying facets of the minimum standards, is
4 it not, Mr. Cumming?

5 A. That is one of the things that we try to
6 have happen is to keep the vehicles from having to wait
7 out on the roadway.

8 Q. Mr. Cumming, let me get back to my
9 question. Isn't that one of the underlying standards or
10 principles of the minimum standards, sir, which you
11 mentioned on the stand fifteen minutes ago?

12 A. I believe it is.

13 Q. If I may, please, show you the drawing
14 on page 29 of the minimum standards. If you will look at
15 that, please, sir.

16 Now, if you will, if you will take that
17 minimum standard, and assume that you have a roadway, an
18 easement, or a roadway, either one, fee simple, assume
19 that that roadway is only fifteen-foot wide, and it's
20 intersecting the state highway just as shown in the
21 minimum standards, okay? Are we straight on this
22 assumption?

23 That would not satisfy the minimum
24 standards because it would be too narrow by nine feet; is
25 that correct, sir?

1 A. If it came in at ninety degrees like
2 this does, then the minimum standards would say that the
3 pavement needs to be twenty-four feet.

4 Q. So your answer is it would not satisfy
5 the minimum standards, correct?

6 A. That is correct.

7 Q. Now, VDOT does not like private roads
8 coming in on corners because corners are -- there's a lot
9 going on on corners with the public on a state highway
10 with corners, is it not?

11 MR. MCFARLAND: I would object. The
12 question has got to be put in a better context.

13 THE COURT: Well, I think that you
14 probably mean curve as opposed to corner.

15 BY MR. POULSON:

16 Q. Okay. Let's talk about a curve then.

17 VDOT does not like a private entrance or
18 roadway intersecting a state highway on a curve, does it,
19 sir, as a general principle?

20 A. Each entrance permit, each time you come
21 in, you need to look at where you are and what you are
22 dealing with. In the case that we are talking about, if
23 you got away from the curve, you probably would not have
24 adequate sight distance, if you got too far away from the
25 curve in the roadway.

1 Q. Mr. Cumming, let me go back to my
2 question, please, sir, if I may.

3 MR. LePAGE: Your Honor, I'm going to
4 object. I think he should be given an opportunity to
5 answer the question.

6 THE COURT: He can answer the question
7 first, and then explain. Go ahead.

8 BY MR. POULSON:

9 Q. As a general rule, VDOT does not like
10 private entrances or roadways coming and intersecting the
11 state highway at a curve, sir? Isn't that a correct
12 statement?

13 A. I don't think that's -- roadway
14 engineering, highway engineering and generalizations don't
15 lend themselves very well to each other. I think that
16 when you say as a general rule, there are always -- each
17 instance has to be looked at on its own merit, and we have
18 many entrances coming in on curves on brand-new highways
19 designed that way, because if you are on the outside of
20 the curve as in the case of the Shooting Point entrance,
21 you won't have excellent sight distance.

22 If you were coming in from the inside of
23 the curve, you will probably have very lousy sight
24 distance where you couldn't see the vehicles coming in
25 from either direction.

1 So sometimes, because of the geometrics
2 of the roadway, coming in on a curve, on the outside of
3 the curve is the best location to come in so that the
4 sight distance is extremely important.

5 Q. Okay. So --

6 A. And being able to see that entrance, or
7 the vehicles coming out, or the vehicle coming out being
8 able to see both directions is very important for safety
9 and function of that entrance.

10 Q. So you're saying simply because the
11 sight distance is okay?

12 A. I'm saying that your question was about
13 generally, and I don't know that I can say generally. We
14 don't like them to come in because if that is where, you
15 know -- there's many times we've designed them that way to
16 come in on the outside of the curve so they will have good
17 sight distance.

18 Q. You would agree, would you not, that on
19 a curve, a motorist on a state highway basically has more
20 functions and attention to give than someone traveling
21 down a straight stretch of highway?

22 A. You've got to turn the steering wheel
23 and stuff.

24 Q. And make your curve, and so forth?

25 A. Yes, sir.

1 Q. Now, if you should have a vehicle
2 waiting there on a curve to get into an entrance, it
3 further complicates the situation, does it not?

4 A. Anytime you have anybody coming in, if
5 the driver has to think, and has something else to -- the
6 driver of the roadway has something else to be considered
7 as he's driving that road.

8 Q. Now, looking at the permit, and the
9 manner in which Mr. Hodge drew the twenty-four feet, or
10 ascertained twenty-four feet, which by drawing a line from
11 the curvature of the asphalt surface on up, and making an
12 arch, and then drawing a straight line across it, and, of
13 course, you're aware of what he did, and this was his
14 comments, correct?

15 A. That's correct.

16 Q. Now, sir, in your professional opinion,
17 again, as an engineer and as a graduate of VMI, is that a
18 reasonable way --

19 MR. LePAGE: Your Honor, I'm going to
20 object. He's not offered as an expert witness. He's here
21 as a representative of VDOT to testify about the issuance
22 of the permit.

23 THE COURT: I think he's using the term
24 "expert" in a general sense, and the fact that he is an
25 engineer. Go ahead.

1 BY MR. POULSON:

2 Q. Do you believe that is a reasonable way
3 in which to determine the width of the -- to draw a
4 private roadway under the regulations, sir?

5 A. Could you restate your question, please?

6 Q. The method in which Mr. Hodge, or the
7 method that he utilized to get his twenty-four-foot width
8 by drawing a line from the arch, because it happened to be
9 in a curve, up, and then going across the corresponding
10 parallel part with a straight line like he's done there --
11 you understand this drawing?

12 A. Yes, sir.

13 Q. Okay. Do you really believe that is a
14 reasonable way to determine the width of that entrance,
15 sir?

16 You really don't, do you, Mr. Cumming,
17 in the final analysis?

18 A. I'm trying to figure out how to answer
19 your question. It is a way of measuring, but generally
20 most entrances are measured parallel to the edge of the
21 pavement, if they're going to intersect. This one is
22 measured that way.

23 Q. Of course, you've already told us that
24 there is nothing in the regulation that says that that is
25 how you measure?

1 MR. MCFARLAND: He was talking, and
2 Mr. Poulson is interrupting him.

3 MR. LePAGE: Your Honor, I don't think
4 Mr. Poulson likes his answer.

5 THE COURT: Let him answer. Go ahead.

6 THE WITNESS: We generally measure
7 parallel to the edge of pavement, which we did in this
8 case. That twenty-four feet is not -- and I don't know
9 how to -- the twenty-four feet is not the width that two
10 vehicles are trying to pass each other would have to use,
11 of course, as they go in because the width of the easement
12 is only fifteen feet.

13 BY MR. POULSON:

14 Q. So it's really not a reasonable way, is
15 it, under the regulations?

16 MR. MCFARLAND: I'm going to object,
17 Your Honor. That's a mischaracterization.

18 THE COURT: Overruled.

19 BY MR. POULSON:

20 Q. That's really not a reasonable way, is
21 it, Mr. Cumming?

22 A. I don't know if I can say it's not a
23 reasonable way.

24 THE COURT: He's answered the best he
25 could, Mr. Poulson.

1 BY MR. POULSON:

2 Q. Now, sir, the -- let me see that.

3 How much sight distance do you need for
4 an entrance?

5 A. The minimum sight distance, as I recall,
6 and I don't have the book in front of me, but as I recall,
7 the speed limit on this roadway would be fifty-five miles
8 per hour, and so you would need a minimum of five hundred
9 and fifty feet, if my memory serves me right.

10 Q. Even taking into consideration the
11 nature of this roadway?

12 A. I don't understand what you mean by the
13 nature of the roadway.

14 Q. The fact that it's a narrow roadway, and
15 has a curve, a very significant curve right there at the
16 entrance?

17 A. The speed at which the vehicles will be
18 using the roadway will be significantly less than the
19 posted speed of fifty-five miles per hour, I believe,
20 and --

21 Q. Do you take that into consideration?

22 MR. MCFARLAND: Can he finish his
23 answer? Mr. Poulson keeps cutting him off. Let the
24 witness -- I strongly urge that the Court let the witness
25 finish.

1 THE COURT: Is that an objection,
2 Mr. McFarland?

3 MR. MCFARLAND: Yes, it is, Your Honor.
4 I'll rephrase. I'm sorry. I object to Mr. Poulson
5 cutting off the witness.

6 THE COURT: Sustain the objection.

7 THE WITNESS: The speed at which the
8 vehicles use the roadway can be taken into consideration.
9 As we look at the sight distance that we require, we
10 generally, in most cases, like to see the speed limit for
11 the posted speed on roads such as this because of the
12 curve, the speed at which the vehicles will be approaching
13 that curve will be slower than fifty-five so that people
14 will have more time to respond.

15 And, so, the sight distance is well
16 beyond the five hundred and fifty minimum that's required,
17 and so that in this location it's well beyond the --
18 people will be using the road slower, in my opinion.

19 Again, my driving the roadway, I didn't
20 even approach fifty-five, I don't think, on any section of
21 the roadway as I was approaching it trying to see how fast
22 I thought I could use it comfortably.

23 And, so, I believe that the sight
24 distance here is excellent as far as that entrance goes.

25 Q. All right. Now, if you will, please,

1 Mr. Cumming, with this same drawing here, and we are
2 looking at 28A, Plan A, for the record, if we've got the
3 same fifteen-foot roadway here, okay, and let's assume
4 that it stops, say, fifty feet back from the highway
5 right-of-way, and then it angles to what would be the
6 southwest, and hits this curve perpendicular instead of
7 intersecting as it does here.

8 Understand my hypothetical?

9 A. Yes, sir.

10 Q. If you hit that curve perpendicular at a
11 ninety-degree angle, and the easement was fifteen-foot
12 wide, it wouldn't comply with the minimum standards under
13 the computing method, would it, sir?

14 A. No, it would not. As far as the -- it
15 would not meet the twenty-four foot criteria if it came in
16 at ninety degrees to that curve.

17 Q. And if we move this up to a straight
18 stretch of highway even --

19 MR. MCFARLAND: Can I come around here
20 so I can see what Mr. Poulson is pointing to?

21 THE COURT: Yes.

22 BY MR. POULSON:

23 Q. And if we moved it up to a straight
24 stretch of highway without any curve whatsoever in there,
25 and let's say five hundred and fifty feet from the curve,

1 and it was fifteen-foot wide and came in perpendicular
2 just like the drawing on page 29, and it was fifteen-foot
3 wide, it would not comply with minimum standards, would
4 it, sir?

5 A. No, sir, it would not.

6 MR. POULSON: Thank you.

7 THE COURT: Is that it, Mr. Poulson?

8 MR. POULSON: Yes, sir.

9 THE COURT: Any other questions?

10 MR. LePAGE: Yes, sir.

11

12 RECROSS-EXAMINATION

13 BY MR. LePAGE:

14 Q. Mr. Cumming, a lot was made by
15 Mr. Poulson of the three-inch clearance at the entrance
16 between a tractor-trailer and a six-foot nine-inch wide
17 SUV. What is the width of Route 622 at the entrance?

18 A. The width right at the entrance is -- I
19 believe we measured that at fifteen feet right at the
20 center of the entrance.

21 Q. So at the -- on Route 622 at the
22 entrance, those vehicles would have the same amount of
23 clearance, would they not?

24 A. That's the pavement. There are some
25 shoulders on 622, so they can move over and use the

1 shoulder to get by each other, which they wouldn't have in
2 this case.

3 Q. Okay. And let me ask you this: The
4 peak hour traffic flow you testified was twenty-three cars
5 per hour?

6 A. Yes.

7 Q. And you have over six hundred feet sight
8 distance?

9 A. Yes, sir.

10 Q. So if one vehicle had to stop and let
11 one clear, the likelihood of it meeting another large
12 vehicle is relatively small, is it not?

13 A. Yes, sir.

14 Q. And you were asked about whether or not
15 the entrance would meet the minimum standards if the road
16 had come in at a ninety-degree angle as opposed to the
17 angle that this particular entrance meets 622; is that
18 correct?

19 A. Yes, sir.

20 Q. And you testified that if it was at a
21 ninety-degree angle, it would not meet the minimum
22 standards; is that correct?

23 A. That's correct.

24 Q. Is there any authority in the minimum
25 standards to lessen the standards, or to waive, or reduce

1 standards?

2 A. I believe there is.

3 Q. Well, I would particularly direct your
4 attention to page Roman numeral six of the introduction of
5 the standards.

6 MR. MCFARLAND: I'm sorry. Which page?

7 MR. LePAGE: Roman numeral six to the
8 introduction.

9 BY MR. LePAGE:

10 Q. Does not the second or third paragraph
11 in there indicate that the authority to reduce the
12 standards is subject to the approval of the district
13 administrator or engineer?

14 A. I'll read that second paragraph on that
15 page. "This manual should facilitate the design for an
16 entrance exit layout which provides satisfactory access.
17 Any alteration that would reduce the standards set forth
18 in the manual should be subject to approval by the
19 district administrator or engineer."

20 Q. Now, the district administrator in this
21 case would be Mr. Cleveland, the district administrator of
22 the Hampton Roads District of Virginia Department of
23 Transportation; is that correct?

24 A. That's correct.

25 Q. Is the engineer you?

1 A. I consider myself the engineer.

2 Q. When the manual says engineer, it's
3 referring to the resident engineer, isn't it?

4 A. I believe it is.

5 Q. And isn't that the regular nomenclature
6 of VDOT when any standard that VDOT has when they're
7 talking about engineer they're talking about the resident
8 engineer?

9 A. Most of the time.

10 Q. So you would, in fact, have the
11 authority to reduce the standards if it met the traffic
12 conditions; is that correct?

13 A. That's my understanding.

14 Q. Okay. And in this particular case, you
15 have looked at the entrance, and based upon the light
16 traffic, the sight distance, you've concluded, as an
17 engineer and graduate of VMI, have you not, that this
18 entrance can function safely?

19 A. Yes, sir, I have.

20 Q. And you have concluded that it could
21 maintain the traffic flow of twenty-eight cars per day on
22 Route 622, have you not?

23 A. Yes, sir.

24 MR. LePAGE: Thank you.

25 MR. POULSON: May I see what you're

1 reading from, Mr. Cumming?

2 THE COURT: Just for sake of
3 clarification, and the record, while he's looking, I think
4 he said twenty-eight cars per day, not twenty-eight cars
5 per hour.

6 MR. LePAGE: No, sir. I meant
7 twenty-eight cars per day is the current traffic count on
8 Route 622.

9 THE COURT: The current traffic count.

10 MR. LePAGE: Actually, the projected
11 traffic count, if the subdivision goes down there.

12 THE COURT: The traffic count is
13 twenty-eight cars per hour?

14 MR. MCFARLAND: Peak. That's one hour,
15 Your Honor. That's the highest hour.

16

17 FURTHER REDIRECT EXAMINATION

18 BY MR. POULSON:

19 Q. Mr. Cumming, the statement that you're
20 reading is from the introduction to the manual, is it not?

21 A. Yes, sir.

22 Q. Now, there is nothing in the regulations
23 themselves beginning with the regulations on page 1,
24 chapter 71, that is the law that authorizes any deviation
25 or alteration of the minimum standards, is there, sir?

1 A. I don't remember seeing anything
2 anywhere else in the book.

3 MR. POULSON: All right. Thank you.

4 MR. MCFARLAND: Just a little, Your
5 Honor. This is in response to Mr. Poulson's.

6 THE COURT: Okay. We'll try to move it
7 along. We've just about exhausted any --

8 MR. MCFARLAND: I just want to be clear
9 on something.

10

11 FURTHER RECROSS-EXAMINATION

12 BY MR. MCFARLAND:

13 Q. The permit requires the passage of two
14 vehicles, Mr. Cumming, correct, at the entranceway?

15 A. The permit shows two vehicles getting by
16 each other.

17 Q. Okay. It doesn't specify that the
18 entrance has to provide for the passing of a
19 tractor-trailer and another vehicle, correct?

20 A. The permit itself shows a
21 tractor-trailer and an SUV.

22 Q. On the drawing there was a
23 tractor-trailer drawn in, but the language of the permit
24 simply says two vehicles? It references two vehicles,
25 correct?

1 A. I believe that's what it says.

2 Q. Okay. And, in fact, admittedly, it's
3 tight?

4 THE COURT: I assume this is offered
5 to -- you've seen it, Mr. Poulson?

6 MR. POULSON: Yes, sir, I have.

7 THE COURT: Are you willing to stipulate
8 that that is, in fact, an entrance to the easement in
9 question of a red dump truck, and a Jeep Cherokee in two
10 of the photos, and a red dumb truck and a red sedan in the
11 other photo?

12 MR. POULSON: Let me take a look at them
13 again, Judge, if I may, please.

14 THE COURT: Where are we on defense
15 exhibits? Defendant's Number 6.

16 (Photographs were marked Defendant's
17 Exhibit 6 for identification.)

18 BY MR. MCFARLAND:

19 Q. Let me hand you what's been marked
20 Defendant's Exhibit 6, Mr. Cumming. Look at these photos
21 for a moment, if you would.

22 Do you recognize the entrance at issue
23 in those photographs?

24 A. Yes, sir.

25 Q. And they depict a red dump truck in two

1 of the photographs, what appears to be a Cherokee-type
2 vehicle, Jeep?

3 A. Yes, sir.

4 Q. And a passenger car at the bottom of the
5 second page, correct?

6 A. Yes, sir.

7 Q. And they are able to pass side by side,
8 correct?

9 A. Yes, sir.

10 Q. The shoulders on Route 622 in front of
11 the easement are what, Mr. Cumming?

12 A. I have not measured the shoulder
13 exactly. They vary along the edge of the roadway from
14 very little to maybe three or four feet at the most.

15 Q. Well, in fact, you have to look hard to
16 find them, don't you? I mean, they are covered by grass?

17 A. Yes, sir. We have not mowed that
18 section yet.

19 Q. Okay. And the area right in front of
20 the entrance itself is fifteen feet, do I understand, on
21 Route 622, the pavement?

22 A. Yes, sir.

23 Q. And it goes to fourteen feet where, sir?

24 A. On either side of the entrance. It goes
25 just beyond it towards the Wescoats, it's sixteen, and

1 then beyond that goes fourteen, and it's fourteen
2 before -- I believe we measured it in two or three places.

3 MR. MCFARLAND: That's all I have.

4 MR. POULSON: Judge, let me make three
5 quick questions.

6 THE COURT: This is the last three quick
7 questions.

8 MR. LePAGE: May I have one about the
9 standards when he's finished that's he's brought up?

10

11 FURTHER REDIRECT EXAMINATION

12 BY MR. POULSON:

13 Q. Now, you say that these pictures show
14 that these vehicles can pass safely, Mr. Cumming?

15 THE COURT: I don't think he said
16 safely. I think he said they showed that they can pass.

17 THE WITNESS: I believe that's what I
18 said. They are passing.

19 BY MR. POULSON:

20 Q. All right. Let's take the first one.
21 Actually, the Jeep on the right-hand side is actually
22 outside the fifteen foot, is it not?

23 You see its mirror, and see its wheel,
24 right front wheel?

25 MR. MCFARLAND: May I come around here,

1 Your Honor, so I can see what Mr. Poulson is referring to?

2 THE WITNESS: I don't know if the
3 picture was taken exactly. It depends on where the camera
4 is setting whether it is or not. It appears that it's
5 sitting very close on that side.

6 BY MR. POULSON:

7 Q. And as far as the truck, we can't tell
8 anything about the front of the truck, the angle in which
9 the front of truck is sitting, do you, relative to the
10 fifteen foot?

11 A. It looks like it is from this picture,
12 but I couldn't --

13 Q. You really can't tell? Okay.

14 And on the second sheet, number one, the
15 Jeep coming out, we can't even see the back pole or the
16 pole behind the Jeep that designates the fifteen-foot
17 right-of-way, can we?

18 A. I cannot see it, no, sir.

19 Q. And on the bottom picture, clearly the
20 sedan right there at the entrance has already turned
21 outside of the fifteen foot?

22 A. It appears so.

23 MR. POULSON: Thank you. That's all.

24 THE WITNESS: That's in the right-of-way
25 of the roadway.

1 MR. POULSON: That's in the
2 right-of-way.

3 THE COURT: Mr. LePage, you have one
4 question?

5 MR. LePAGE: May I ask from here, Your
6 Honor?

7 THE COURT: Sure.

8

9 FURTHER CROSS-EXAMINATION

10 BY MR. LePAGE:

11 Q. Mr. Cumming, the introduction which is
12 part of the standards has been approved and is
13 incorporated as part of the standards by the Commonwealth
14 Transportation Board, has it not?

15 A. Yes, sir.

16 MR. POULSON: I'm going to object to
17 that. The regulations are what is the law. Because VDOT
18 wants to make some sort of policy statement, that cannot
19 deviate the law, sir. What is passed is a lawful
20 regulation.

21 THE COURT: I think it's a fair
22 question. Go ahead.

23 MR. LePAGE: I would like to say for the
24 record, Your Honor, the Commonwealth Transportation Board
25 pursuant to 33.1-12, paragraph 3, of the Code of Virginia,

1 has the authority to make traffic regulations, and has
2 done so in these standards. Thank you.

3 THE COURT: All right. Now, since
4 you-all have been asking all of these questions, I have
5 just two questions that's some point of concern for the
6 Court.

7
8 EXAMINATION

9 BY THE COURT:

10 Q. Mr. Cumming, we've talked about, what
11 seems like forever, the hypothetical that's being used of
12 a sports utility vehicle six-foot nine-inches wide, and a
13 tractor-trailer eight-feet wide both trying to use this
14 particular entrance.

15 And at some point in time there was a
16 discussion, at least I think I understood you correctly,
17 that it was anticipated if this particular scenario should
18 come to pass that it was your feeling that at least the
19 one trying to come in would basically wait there until the
20 other one came out? Is that pretty much a fair statement?

21 A. Yes, sir.

22 Q. Let's take it one step further. Let's
23 suppose that the vehicle going in is the eight-foot
24 tractor-trailer, and the vehicle coming out is the
25 six-foot nine-inch SUV, and let's suppose the

1 tractor-trailer has already turned into the entrance, and
2 assuming it's fifty-five feet long, and fifty-four feet of
3 it is already in the entrance, and here comes the other
4 vehicle coming out, and I'm sure you must have thought of
5 this scenario. What would you anticipate would happen at
6 that time?

7 A. I would anticipate that the SUV is going
8 to have to back up.

9 Q. All the way back to the entrance to the
10 subdivision, which I think we've all agreed is
11 three-tenths of a mile?

12 A. Yes, sir. That's the first place where
13 it's wide enough for the two of them to get by.

14 Q. And that would be preferable, at least
15 in your mind, I take it, to the tractor-trailer backing
16 out onto 622?

17 A. Yes, sir.

18 Q. The other question that the Court had is
19 concerning the fact that this is a dead-end road. Route
20 622 is a dead-end road?

21 A. Yes, sir.

22 Q. Did that fact, or was that fact taken
23 into consideration in your review and so forth of this
24 permit application?

25 A. Yes, sir, the fact that it's a dead-end

1 road, and all the property is owned by the Wescoats --

2 Q. All right.

3 A. -- was a factor in my consideration.

4 Q. From a safety standpoint, assume with me
5 for a moment if a vehicle unfamiliar with the area were
6 trying to enter the easement and ultimately get back to
7 the proposed subdivision, and but for whatever reason
8 missed the turn into the easement, where would that
9 vehicle turn around to come back?

10 A. There are a couple of farm entrances
11 beyond here that you can turn around in.

12 Q. I guess my question -- maybe I didn't
13 make it clear. I guess my question is, is there any place
14 to turn around other than on private property?

15 A. At the end of the roadway, it's a flat
16 area. At the dead-end of the roadway, there is a flat
17 area that we use, and everybody uses to turn around, and
18 we consider that -- we have a thirty-foot prescriptive
19 right-of-way I think we've been using, and most folks who
20 come around there, most folks go up to that point and turn
21 around, and that's where I generally turn around when I go
22 in there, and I believe most of my trucks and other
23 vehicles too when they go in to push snow, or for whatever
24 reason to go up there.

25 And whether or not it's private

1 property, or not, I --

2 Q. You don't know?

3 A. I don't know, sir.

4 Q. And one final question. Assuming,
5 again, whoever this driver is does miss the entrance to
6 the easement, turns around, comes back, at which point
7 then that driver would have to be turning left into the
8 easement from what you previously described as the inside
9 of the curve as opposed the outside of the curve, how is
10 the sight distance for a vehicle turning left into that
11 entrance as opposed to what obviously would normally
12 happen to one turning right?

13 A. I believe that you can pull up far
14 enough to see adequately down the -- what I would call the
15 southern leg of 622. If you figure that it comes in from
16 the south and goes west towards the Wescoats, you've got
17 basically a ninety-degree turn there.

18 I believe that where the entrance is you
19 could see adequately. You could pull up far enough before
20 you started to turn to see down that southern leg to have
21 that sight distance. I have not measured that in
22 particular.

23 THE COURT: All right. That's all the
24 questions I have. Any questions?

25 All right. Thank you, Mr. Cumming. You

1 may step down.

2 Let's see. Whom do you anticipate
3 calling next, Mr. Poulson?

4 MR. POULSON: Suzanne Wescoat, Judge.

5 THE COURT: Why don't we take a short
6 recess.

7 (Brief recess.)

8 THE COURT: All right. Whom do we have
9 next, Mr. Poulson?

10 MR. POULSON: Suzanne Wescoat, Judge.

11 THE COURT: All right.

12

13 SUZANNE WESCOAT, called as a witness by
14 and on behalf of the Plaintiff's, being first duly sworn,
15 testified as follows:

16

17 DIRECT EXAMINATION

18 BY MR. POULSON:

19 Q. Mrs. Wescoat, state your name, please.

20 A. Suzanne Wescoat.

21 Q. And you're married to John Wescoat; is
22 that correct?

23 A. Yes.

24 Q. And what is your occupation, ma'am?

25 A. I'm a farmer.

1 Q. And you have two children, I believe?

2 A. Yes.

3 Q. Where is your home situated?

4 A. 8473 Glebe Road.

5 Q. Now, adjacent to your home on the east,
6 does your husband own a farm?

7 A. Yes.

8 Q. And was that the original part of the
9 Shooting Point farm years ago?

10 A. Yes.

11 Q. And are you aware of the Shooting Point
12 farm, the subdivision portion?

13 A. Yes.

14 Q. And in general, where is that located?

15 A. To the northeast of our house.

16 Q. And are you aware of the right-of-way
17 that passes over your husband's farm that goes to the
18 Shooting Point subdivision?

19 A. Yes.

20 Q. How long have you lived at the site?

21 A. Twenty-five years this month.

22 Q. Are you familiar with Shooting Point as
23 a result?

24 A. Yes.

25 Q. Were you familiar with Shooting Point

1 prior to that, prior to moving down to the Glebe?

2 A. Yes, I was aware of it, but I wasn't
3 as -- I had not been on it physically, I don't think.

4 Q. Over the years, as it embraces your
5 knowledge of Shooting Point, what has been its use?

6 A. Agriculture.

7 Q. Has there been any hunting or fishing on
8 the farm?

9 A. Yes.

10 Q. Has anyone lived on the farm in your
11 memory?

12 A. No.

13 Q. Now, as far as Mr. Meekins, what is
14 Mr. Meekins' ingress and egress from his house?

15 A. He presently uses our dock road as a
16 means of ingress and egress.

17 Q. What is the general course of the
18 right-of-way back to Shooting Point?

19 A. It goes north, and then west with two
20 fairly definite right-angle turns. It's bartered on the
21 west and northwest, I guess. I mean, the east -- I'm
22 sorry -- east by woods, and then on the other side of the
23 right-of-way is field. It's just a dirt road.

24 Q. Now, some months ago, did you
25 participate in erecting some fence posts along the

1 roadway?

2 A. Yes, I did.

3 Q. And what was the purpose?

4 A. To delineate exactly where the
5 right-of-way went, and we put the posts on the outside
6 edge of the survey markers.

7 Q. And at that time, how did the roadway
8 and what was within the posts compare with the roadway on
9 the grind?

10 A. I'm sorry. Repeat the question.

11 Q. When the posts went up, how did the area
12 within the posts compare with the roadway on the grind?

13 A. Do you mean the specific tracks, because
14 that's basically all it is?

15 Q. Yes.

16 A. The tracks were to the field side of the
17 fifteen-foot area which we delineated with posts. They
18 were not dead center of that.

19 Q. Now, since the Crees, or Shooting Point
20 L.L.C., purchased in late 1999, early January 2000, what
21 has occurred relative to the tracks?

22 A. I think that since there's been a lot
23 more traffic going out, the track has swung out somewhat,
24 particularly on one turn where there's a large mud hole.

25 Q. Okay. Prior to the Crees closing on the

1 property, or Shooting Point, L.L.C., was there any
2 equipment, construction equipment, or similar type
3 equipment using the right-of-way going to Shooting Point?

4 A. I believe they took some heavy equipment
5 in there doing something. I have not gone on the property
6 since I was aware of the Crees buying it, so -- but I saw
7 heavy equipment going in there.

8 Q. Now, relative to the -- there's been
9 testimony that there is another entrance to the farm
10 tracks up what in your orchard?

11 A. In my vineyard.

12 Q. In your vineyard. I'm sorry. Is that
13 correct?

14 A. Yes.

15 Q. Are there certain times that that access
16 is closed?

17 A. There certain times when probably it
18 should not be used because I do, unfortunately, spray some
19 fairly toxic chemicals at times, and there is a reentry
20 period. I have sprayed one product, which I hope I won't
21 have to spray again, which has a three-week reentry
22 period.

23 There is another product I use regularly
24 that has a four-day reentry period.

25 Q. From the point of the fifteen-foot

1 entrance to Shooting Point, you are aware of that location
2 there by the curve?

3 A. Uh-huh.

4 Q. Are there any ditches along the road
5 from that point up towards the vineyards?

6 A. Yes. The ditch barbers the road until
7 the road ends at our front yard.

8 Q. Now, prior to the litigation in this
9 matter, did you have occasion to contact Mr. Will Cumming,
10 the resident engineer?

11 A. Yes.

12 Q. And what were the circumstances and your
13 purpose?

14 A. I contacted him in January after the
15 subdivision had gone to record and asked him -- and I did
16 that at my husband's request because he frequently asked
17 me to do that kind thing for him.

18 And I asked Mr. Cumming what the
19 regulations were that would govern an entrance to a
20 subdivision that only had a fifteen-foot right-of-way.

21 Q. And did he provide you certain
22 information at that time?

23 A. Yes, he did.

24 Q. From that time up until August the 17th,
25 did you have anymore conversations with Mr. Cumming, to

1 the best of your knowledge, about the --

2 THE COURT: Just for the record, we're
3 talk about 2000?

4 MR. POULSON: Yes, sir. I'm sorry.

5 BY MR. POULSON:

6 Q. To the best of your knowledge, did you
7 have anymore conversations with Mr. Cumming between that
8 period of time?

9 A. Not about the right-of-way.

10 Q. Now, on or about August the 17th of
11 2000, did you have a conversation with Mr. Cumming?

12 A. Yes.

13 Q. And can you detail that conversation,
14 please?

15 A. We had been away on vacation, and when I
16 got home, there were four or five voice mail messages for
17 me from Mr. Cumming asking me to return his call, and I
18 did so.

19 And he related to me a problem with the
20 Bayford Road, which was a part of the six-year plan.
21 There was some difficulty about that going forward, and
22 then he also told me that the entrance permit to Shooting
23 Point had been granted.

24 Q. Did that mean anything to you at that
25 point in time?

1 A. It meant -- I wasn't sure what it meant.
2 I was a little bit taken aback because we had had an
3 earlier case about that, but I wasn't exactly sure what it
4 meant, and I just thank him, and hung up.

5 Q. Now, moving to August 21st, a Monday
6 night, did you have occasion to be present at a meeting
7 where Mr. Cumming was?

8 A. Yes.

9 Q. And what was the meeting?

10 A. It was a meeting on the -- a bi-county
11 committee to evaluate the impacts of a change, or a
12 commuter toll that would be implemented by the Chesapeake
13 Bay Bridge Tunnel. It was actually in the afternoon, not
14 evening.

15 Q. And where was that meeting?

16 A. It was at the A & PDC offices in
17 Accomac.

18 Q. And after the meeting, what, if
19 anything, happened relative to Mr. Cumming?

20 A. Mr. Cumming sort of motioned me aside,
21 and said, I want to say something to you. And it's my
22 recollection that we stepped back into Greg Manter's
23 office, which was empty at the time.

24 Q. And who was Greg Manter?

25 A. Greg Manter is the director of economic

1 development at the A & PDC.

2 Q. And what, if anything, was the
3 conversation?

4 A. My recollection is that Mr. Cumming said
5 to me that the decision had been -- about the Shooting
6 Point permit had been made higher up, and that he had no
7 choice but to go along with it, and that -- his tone, I
8 thought, was apologetic, and that he said to me, I want to
9 keep my job.

10 Q. Are you a notetaker?

11 A. Yes, I am.

12 Q. Okay. Did you keep notes of the matter
13 beginning on your initial phone call on Monday, January
14 the 10th, 2000?

15 A. I did.

16 Q. And did you keep a memorandum, or note
17 of the August 17th conversation?

18 A. I did.

19 Q. And did you keep a memorandum or note of
20 the Monday, August 21st conversation?

21 A. I did. I would like to say, I didn't do
22 it with the purpose of having it submitted as court
23 evidence. I use this book as a day planner, and I write a
24 lot of things in it.

25 Q. Okay. If you will, please, will you

1 just hold up your book and illustrate it to the Judge?
2 Just open it and show the Court some of the things that
3 you make a note on.

4 A. Well, it's my to-do list, my goals.
5 Sometimes I write down definitions of words, lots of
6 things.

7 MR. POULSON: Exhibit 39, three pages,
8 memorandums of the three days in question.

9 BY MR. POULSON:

10 Q. Are these copies of those original
11 pages?

12 A. Let me look and be sure.

13 Yes.

14 MR. POULSON: Judge, we'd offer this.

15 THE COURT: Any objection?

16 MR. MCFARLAND: Well, Your Honor, it's a
17 self-serving document created by essentially a party to
18 the litigation. I recognize we're sitting here without a
19 jury, and I guess the Court can consider it as it will,
20 but --

21 THE COURT: Okay. Absent any objection,
22 it will be Plaintiff's Exhibit 39.

23 (Three-page memorandum was marked
24 Plaintiff's Exhibit 39 for identification.)

25 BY MR. POULSON:

1 Q. I note, Mrs. Wescoat, that you put
2 quotes around the words, "wanted to keep his job," end
3 quote?

4 A. I did.

5 Q. That was your intention?

6 A. I did that on August 21st, almost a year
7 ago. I can't tell you why I put the quotes. That's the
8 recollection -- I do recall that he said those words. I
9 feel like I can picture him saying them.

10 MR. POULSON: Okay. Answer counsel,
11 please.

12

13 CROSS-EXAMINATION

14 BY MR. MCFARLAND:

15 Q. Good morning, Mrs. Wescoat.

16 A. Good morning.

17 Q. With respect to the right-of-way that is
18 the subject of this litigation, ma'am, do I understand
19 that that was the use before 1974?

20 A. It's been in use as long as -- it's been
21 a field road ever since I can remember. Is that the
22 question you're asking?

23 Q. Yes. Okay.

24 In other words, your husband's -- I
25 guess it's his aunt, Elizabeth Jones, when she owned the

1 property, that right-of-way was in use then, correct?

2 A. Yes.

3 Q. Okay. And as we're sitting here in
4 court today, you're not able to tell the Court exactly
5 where that field road was located in 1974, are you, ma'am?

6 A. I'm able to say that it always went
7 between the woods and the field.

8 Q. Right. Exactly where it went between
9 the woods and the field, you wouldn't be able to state
10 with specificity?

11 A. I didn't have a survey.

12 Q. Right. And that field road has always
13 been used by farm equipment, correct?

14 A. Yes.

15 Q. Including combines?

16 A. Yes.

17 Q. And do I understand, ma'am, that you and
18 your husband refurbished the house that you are presently
19 living in?

20 A. Yes.

21 Q. And moved there in approximately in the
22 mid 1970's?

23 A. I think it will be twenty-five years
24 this June.

25 Q. Okay. And in that twenty-five years,

1 neither Mr. Curtis Jones or any of his employees, nor
2 Mr. Kellam, or any of his employees ever complained about
3 their inability to use that dirt road, correct?

4 A. No.

5 Q. Okay. And they never told you that they
6 were having trouble making the turns in that dirt road,
7 correct?

8 A. No.

9 Q. It's your understanding, ma'am, that the
10 fence posts that were put up at the beginning of this year
11 were put up to delineate where the surveyors had marked
12 the fifteen-foot right-of-way?

13 A. Yes.

14 Q. And any one who desired to traverse the
15 right-of-way in a motor vehicle had to go between where
16 the posts were put up, correct?

17 A. One would have hoped they would. They
18 did not always.

19 Q. And before the posts were put up last
20 January, you and your son put some stakes at the entrance
21 of the property?

22 A. Yes.

23 Q. Okay. And a sign that said, "begin
24 fifteen-foot right-of-way"?

25 A. Yes.

1 Q. And, again, a vehicle entering the
2 right-of-way at that point had to go between the two
3 stakes that were placed in the ground?

4 A. Those two stakes were on either side of
5 the track, and the woods and a ditch, they would have had
6 no choice but to go between them.

7 Q. You don't regularly traverse the
8 right-of-way, I take it, in a motor vehicle?

9 A. No, not in a motor vehicle. I have
10 walked it.

11 Q. And, in fact, do I understand that since
12 Shooting Point has purchased the property, you have not
13 traversed it at all in a motor vehicle?

14 A. Oh, sure, I have traversed it in a motor
15 vehicle. I have not gone on the actual Shooting Point
16 property. My husband and I used to -- when I used to run,
17 which was a while back, there is a way that you go from
18 our property over a dam, over the Shooting Point property,
19 and back down that road in a circle and back to our house.

20 And I have certainly walked that. I
21 have not walked that or run that since Shooting Point,
22 since the Crees bought the property.

23 Q. And my question was you also haven't
24 traversed it, been on it in a motor vehicle?

25 A. I haven't made a circle in a motor

1 vehicle. I have been on the road in a motor vehicle.

2 Q. To go down the dock road?

3 A. No. I have gone down the road to the
4 Shooting Point property in a motor vehicle.

5 Q. Would I be correct then that you don't
6 do it often?

7 A. I don't do it often. I have no purpose
8 to do it often in a motor vehicle.

9 Q. Now, ma'am, you testified that you
10 called Mr. Cumming in January of 2000?

11 A. Yes.

12 Q. After you learned of the subdivision
13 plat being recorded?

14 A. Yes.

15 Q. Okay. And I think you said that that
16 was at your husband's request?

17 A. Yes.

18 Q. Okay. Now, you are the one who is the
19 member of the board of supervisors for Northampton County,
20 correct?

21 A. Yes.

22 Q. You, I understand, have a vineyard that
23 you -- of your family. You are really the one who is in
24 charge of that?

25 A. Yes.

1 Q. But you don't practice law?

2 A. No, absolutely not.

3 Q. And, in fact, ma'am, back in January of
4 2000, Mr. Cumming wasn't the only public official that you
5 contacted, correct, about this issue?

6 A. I don't recall contacting any other
7 public official. I don't know who I would have contacted.

8 Q. Well, you made an initial call to Sandra
9 Benson, correct, ma'am?

10 A. About this?

11 Q. Yes, ma'am.

12 A. I don't believe so. I'm pretty certain.
13 I did not.

14 Q. Did not. All right. Well, look at your
15 January 10th note that I think is the first page of 39.

16 A. Uh-huh. Yes, apparently I talked to her
17 about the plans for the courthouse complex. We were in
18 the process, and I think I called her and asked her for an
19 update on the courthouse complex?

20 Q. Okay. And there is a reference, Sandra
21 should never have allowed subdivision, correct?

22 A. Yes.

23 Q. Okay. And you were aware that the
24 subdivision plat had already been recorded at the time
25 that you called Mr. Cumming?

1 A. Uh-huh.

2 Q. And that that action was taken by
3 Ms. Benson?

4 A. I think that the words that I wrote
5 down, "Sandra should never have allowed a subdivision,"
6 again I'm speaking from a time distance, but I believe I
7 wrote that down following my conversation with
8 Mr. Cumming.

9 Q. But you were aware that Ms. Benson had
10 recorded the subdivision plat?

11 A. Of course. I was aware when the
12 subdivision plat went to record.

13 Q. Yes. Okay.

14 And didn't you call Ms. Benson to
15 discuss this issue as well?

16 A. I did not. I called her to talk about
17 the courthouse complex.

18 Q. And Ms. Benson --

19 A. And judging from my notes, I imagine
20 that I talked to Mrs. Benson before I talked to
21 Mr. Cumming.

22 Q. So you talked to her before you talked
23 to Mr. Cumming?

24 A. Or I don't -- I mean, I can't even say
25 that I talked to her. When I use this in this particular

1 way, on that side of the page, it's a two-page deal. On
2 the left I write down what my tasks are for the day, and
3 on the right, if I'm going to talk to somebody, I
4 frequently write down there their name, and what I want to
5 talk to them about.

6 And frequently, I think maybe on some of
7 those other notes, I have a name with several different
8 issues that I wanted to discuss with them.

9 Q. But my point is, ma'am, there is a
10 specific reference in your January 10th note, "Sandra
11 should never have allowed subdivision."

12 A. Yes.

13 Q. That's a reference to Sandra Benson?

14 A. Yes.

15 Q. The director of planning and zoning for
16 Northampton County?

17 A. Yes.

18 Q. And in her position as director of
19 zoning for Northampton County, she reports to the board of
20 supervisors?

21 A. Yes, but I believe --

22 Q. And she was hired by the board of
23 supervisors?

24 A. I explained this all to you in the
25 deposition. It's complicated. Half of Sandra is hired by

1 the board of supervisors. You seemed to understand that
2 at the point of deposition.

3 And I would like to make clear that the
4 words, "Sandra should never have allowed the subdivision,"
5 I wrote down prior -- following my conversation with
6 Mr. Cumming, and apparently -- that had nothing to do with
7 my call to Sandra.

8 Q. Well, it was written down in conjunction
9 with the call to Ms. Benson, correct, Mrs. Wescoat?

10 A. Absolutely not. Would you look at the
11 page again. I'm sorry --

12 Q. Well, you just testified on direct
13 examination with some detail what you discussed with
14 Mr. Cumming in the initial conversation of January 10th.

15 At no point in your direct testimony did
16 you say that Mr. Cumming mentioned Sandra should have
17 never allowed that subdivision.

18 A. I did not mention it, and I would have
19 preferred not to mention it at all, but I certainly did
20 not discuss it with Sandra Benson.

21 Q. Now, then, ma'am, I understand that
22 Mr. Cumming left you a message on August the 17th?

23 A. Yes.

24 Q. Of 2000?

25 A. Yes.

1 Q. And in that he was referencing another
2 development I guess on the Eastern Shore in Northampton
3 County, the Bayford Road?

4 A. Yes.

5 Q. And he also indicated to you that the
6 entrance permit had been granted?

7 A. Yes.

8 Q. For Shooting Point?

9 A. Yes.

10 Q. Which I take it gave you some concern?

11 A. I think that I was taken aback because I
12 thought that that issue had been decided, and I didn't
13 really realize how serious it was until I talked to my
14 husband.

15 Q. Now --

16 A. I didn't know exactly what it meant that
17 the thing had been done.

18 Q. All right. And then on August the 21st,
19 Mr. Cumming spoke with you up at Accomac County, correct?

20 A. Yes.

21 Q. Okay. And he indicated to you that they
22 issued the entrance permit for Shooting Point, their
23 design was approved by the traffic engineering, according
24 to your own notes, correct, ma'am?

25 A. That's what -- no. You're on the wrong

1 page. You want to play with my notes.

2 Q. No, ma'am. I'm looking at your note of
3 August 17th.

4 A. I thought you were referring to August
5 21st.

6 Q. No, ma'am. I'm sorry. You are right.
7 My apology.

8 So it's the August 17th conversation
9 that I guess a message from Mr. Cumming, and he says their
10 design was approved by traffic engineering?

11 A. Yes.

12 Q. That's the message he leaves on your --

13 A. No, that's the message when I returned
14 his voice mail.

15 Q. Did you actually speak with him?

16 A. I actually spoke to him on the 17th.

17 Q. Oh, all right.

18 A. If you will recall in my testimony, I
19 said --

20 Q. No, I'm not interest in your prior
21 testimony. We're in court today before the Judge. He
22 hasn't had the benefit of your deposition.

23 A. I think just recently I said that we
24 returned from vacation, and he had several messages on my
25 voice mail asking me to return his call.

1 Q. All right. I misunderstood. I'm sorry.

2 So you returned his call, and he tells
3 you that the design for Shooting Point was approved by
4 traffic engineering?

5 A. Yes.

6 Q. Okay. Then he speaks with you on August
7 21st up in Accomac?

8 A. Uh-huh.

9 Q. Okay. And you say he basically
10 apologize, I think is your testimony and what's reflected
11 in your notes of August 21st?

12 A. Yes, I would say absolutely that I
13 interpreted his tone to be apologetic.

14 Q. And if I followed your testimony on
15 direct examination, he told you he really had no choice
16 but to go along with issuing the permit?

17 A. Yes.

18 Q. In other words, he would have liked to
19 have helped you if he could?

20 A. I think.

21 Q. But he didn't have a choice?

22 A. I think perhaps you're putting words in
23 his mouth.

24 MR. POULSON: He's trying to interpret
25 what Mr. Cumming said.

1 THE COURT: Sustain the objection.

2 MR. MCFARLAND: Okay.

3 THE COURT: Proceed.

4 BY MR. MCFARLAND:

5 Q. After the August 21st conversation, you
6 didn't speak with anyone else in the Virginia Department
7 of Transportation, did you, ma'am?

8 A. Not about this.

9 Q. Right.

10 MR. MCFARLAND: One second, Your Honor.
11 I think I'm done.

12 THE COURT: While he's thinking, any
13 others?

14 MR. LePAGE: No, sir.

15 MR. MORRIS: No, Your Honor.

16 THE COURT: Any redirect, Mr. Poulson?

17 MR. POULSON: One short question, if I
18 may.

19

20 REDIRECT EXAMINATION

21 BY MR. POULSON:

22 Q. Look at your note of August the 17th,
23 Mrs. Wescoat.

24 The Bayford matter, did that have
25 anything to do with the subdivision?

1 A. No.

2 Q. What was it?

3 A. It was a road that is approximately four
4 or five miles north of where we live, and there was some
5 discussion whether or not it would be pulled form the
6 six-year plan.

7 Q. This is a state road?

8 A. It is a state road that was scheduled to
9 be improved in the very near future.

10 MR. POULSON: All right. Thank you.

11 THE COURT: Anything else?

12 MR. MCFARLAND: No, Your Honor.

13 THE COURT: Thank you, ma'am. You may
14 step down.

15 Who do you have next, Mr. Poulson?

16 MR. POULSON: Mr. Spady, please, sir.

17 THE COURT: Come up and be sworn,
18 please.

19 (The witness was duly sworn.)

20 THE COURT: Have a seat right over here,
21 if you would, please.

22

23

24

25

1 DENARD C. SPADY, called as a witness by
2 and on behalf of the Plaintiff's, being first duly sworn,
3 testified as follows:
4

5 DIRECT EXAMINATION

6 BY MR. POULSON:

7 Q. Mr. Spady, state your name, please.

8 A. My name is Denard Charles Spady.

9 Q. And where do you live?

10 A. I live in Kiptopeke area near the bridge
11 tunnel.

12 Q. And what is your occupation?

13 A. I currently manage a small non-profit
14 organization office here in Eastville.

15 Q. And how long have you been so employed?

16 A. Approximately six years. This summer
17 will be six years.

18 Q. And prior to that, what was your
19 occupation?

20 A. I was a farmer.

21 Q. Do you know Curtis Jones?

22 A. Yes.

23 Q. Are you familiar with Curtis Jones's
24 farming equipment?

25 A. Yes.

1 Q. Within your farming occupation, did you
2 use similar equipment as Mr. Jones?

3 A. I believe so, yes, sir.

4 Q. And tell me this, if I may, please, is
5 one able to back up this equipment when it is attached by
6 a draw bar?

7 A. Well, if you are referring to --

8 MR. MCFARLAND: Your Honor, I would
9 object. We're way off.

10 THE COURT: Well, maybe you'd better
11 identify the type of equipment. Some of it you can, and
12 some of it you can't.

13 BY MR. POULSON:

14 Q. For example, a disk harrow?

15 A. Well, a disk harrow attached to a draw
16 bar would be difficult to back up for any distance, yes,
17 sir.

18 Q. Other equipment attached to the draw
19 bar, what would be the difficulty in backing up?

20 A. I would say the same thing really
21 because it's just not made to be backed up.

22 Q. Okay. Now, are you a member of any
23 boards, or commissions for Northampton County, or the
24 Commonwealth of Virginia? And if not now, have you been
25 in the past?

1 A. Yes, sir, I am now, and I have been on
2 boards in the past.

3 Q. What is that, sir?

4 A. I am currently a member of the Eastern
5 Shore Soil and Water Conservation Districts Board.

6 Q. And have you had other services on
7 various government commissions?

8 A. Yes.

9 Q. What was that?

10 A. Well, I served on the Northampton County
11 joint local planning commission for a number of years, and
12 I also served prior to that on the Northampton County
13 Board of Equalization in its 1984 term, I believe.

14 Q. Now, Mr. Spady, if I may, please,
15 directing your attention to the period summer, fall of
16 2000, were you and your family involved with a situation
17 relative to a developer named Mr. Tavi and a proposed
18 subdivision?

19 A. Yes. It began just a little bit earlier
20 than the summer. But, yes.

21 Q. And if you will, please, in a few short
22 words, what was the situation or the problem?

23 A. Mr. Tavi was the perspective purchaser
24 of a piece of property, the access for which had to cross
25 over my family's land in order to connect with the public

1 roadways, and he approached us in the spring of 2000
2 asking if we would grant him an additional amount of
3 right-of-way.

4 Q. And did that ever occur?

5 A. No.

6 Q. Okay. And was there ever any agreement
7 between two of you reached as to any matter relative to
8 the right-of-way?

9 A. No formal agreement, no, sir.

10 Q. Okay. Did he secure an entrance permit
11 from VDOT?

12 A. Yes, he did.

13 Q. Did you have occasion to call Will
14 Cumming, the resident engineer?

15 A. Yes.

16 Q. Did you know Mr. Cumming?

17 A. Yes.

18 Q. And what was your purpose in calling
19 him?

20 A. Well, I had been advised that the permit
21 was a public document, and I wanted a copy of the permit,
22 and so I called Mr. Cumming asking for a copy of that
23 permit.

24 Q. Were you generally aware of the Shooting
25 Point situation at that time?

1 A. I was aware of it, yes, sir.

2 Q. And did you reach Mr. Cumming?

3 A. I did.

4 Q. And what was the discussion with
5 Mr. Cumming at that time?

6 MR. LePAGE: Your Honor, I'm going to
7 object on the grounds of relevancy.

8 MR. POULSON: It ties them together,
9 Judge.

10 THE COURT: Overruled. Go ahead.

11 THE WITNESS: Would you repeat the
12 question, sir?

13 BY MR. POULSON:

14 Q. What was the discussion at that time
15 with Mr. Cumming?

16 A. Well, I --

17 Q. Do you have notes, by the way?

18 A. I do, yes.

19 Q. Did you keep contemporaneous notes at
20 the time?

21 A. Yes.

22 Q. Okay.

23 A. I reached Mr. Cumming after trying
24 several telephone numbers. I told the secretary what I
25 wanted. She brought Mr. Cumming to the phone, and we

1 talked for several minutes.

2 I asked him if the permit, the entrance
3 permit was, in fact, a public document, and I believe he
4 responded that it was. I asked if I could get a copy of
5 that permit, and he said that I could.

6 We talked for a few more minutes, and he
7 said to me that he wished that he would have done more to
8 help out with the situation, that VDOT did not used to be
9 this way, but that a retired chief engineer of VDOT had
10 become involved in the situation, and that he had had to
11 authorize issuing the permit.

12 Q. And if you will, will you look at your
13 contemporaneous notes?

14 A. Yes, sir.

15 Q. And do your notes accurately reflect --

16 MR. MCFARLAND: Your Honor, I'm going to
17 object. The witness can testify based on his
18 recollection. There's no need for him to refer to his
19 notes, and to read into the record hearsay notes is
20 improper. You don't get --

21 MR. POULSON: One, they're not hearsay.
22 Number two, they're contemporaneous notes. The notes
23 themselves are admissible.

24 THE COURT: No, they're not. I think
25 the only -- he can use them to refresh his memory, if he

1 wants to. If he can't recall, he can use them to refresh
2 his memory.

3 BY MR. POULSON:

4 Q. All right. Look at your notes, if you
5 will, Mr. Spady, and do your notes refresh your memory as
6 to the full details of the conversation?

7 A. Well, yes.

8 Q. Okay. And tell us again what
9 Mr. Cumming said.

10 MR. MCFARLAND: Your Honor, he hasn't
11 shown that he can't recall what Mr. Cumming said. Now
12 he's just --

13 THE COURT: Well, is there anything
14 different than what you just testified to?

15 THE WITNESS: Well, sir, a little bit
16 more perhaps, a little bit more detailed.

17 THE COURT: Well, look at your notes,
18 and then if you have more detail, then you can answer
19 that.

20 BY MR. POULSON:

21 Q. Did Mr. Cumming make any statement as to
22 whether the matter had gone over his head or not within
23 VDOT?

24 A. Yes, he did.

25 Q. And what specifically did he say?

1 A. He said that, This didn't stop with me.
2 It went over my head, and I issued a permit.

3 Q. And what, if anything, did he say about
4 who the Tavi permit, and the other permit complied with
5 the regulations or the drawings?

6 MR. MCFARLAND: Well, I'm going to
7 object, Your Honor. There's been no foundation that they
8 had any discussion whatsoever to Shooting Point permit
9 which is in part why I think this entire testimony is
10 irrélevant.

11 MR. POULSON: Number one, there's been
12 testimony that Jack Hodge, the ex-chief highway engineer
13 only worked on two projects, Shooting Point and Tavi.

14 THE COURT: Overrule the objection. Go
15 ahead.

16 THE WITNESS: The question, sir?

17 BY MR. POULSON:

18 Q. What, if anything, was said by
19 Mr. Cumming as to whether the permits issued complied with
20 the regulations or with the drawings?

21 A. He told me that there had been two
22 permits issued which are not what the drawing requires, in
23 my words. And that this permit, the one involving my
24 family, was one of them.

25 Q. And what, if anything, did he say about

1 the ex-chief engineer?

2 A. He said that VDOT didn't used to be like
3 this, but that an ex-chief engineer got involved in this
4 situation, and he had to issue the permit.

5 Q. All right.

6 MR. POULSON: Judge, we're going to
7 offer this as Exhibit 39.

8 THE COURT: I think you already have a
9 39.

10 MR. POULSON: All right. It would be
11 40. And the basis of the submission, as I understand the
12 law of evidence, a contemporaneous note itself is
13 admissible, and can carry a greater admissibility than
14 simply one refreshing their recollection, but if it's made
15 contemporaneously at the time, it is admissible in itself.

16 For example, if one came in here and
17 said, I don't remember the conversation at all, but I did
18 make some notes at the time, it would be admissible as a
19 document in and of itself, sir.

20 THE COURT: Court I think the issue,
21 though, is he did remember the conversation, and I think
22 it becomes basically just --

23 MR. POULSON: Well, I think it gives the
24 conversation --

25 THE COURT: Well, let's see what the

1 other side wants to say. Any objection?

2 MR. MCFARLAND: Yes, Your Honor. The
3 law of evidence, as I understand, is not in any way that a
4 witness gets to offer an alleged contemporaneous document
5 as long as he the can testify from his memory about the
6 details of the conversation.

7 This is simply an attempt to try to boot
8 strap the testimony in court with a document supposedly
9 made at the time of the conversation, and it's --

10 THE COURT: Let me see the exhibit. I'm
11 going to go ahead and mark it, Mr. Poulson.

12 Is this a copy of your original note
13 that you have in your hand, Mr. Spady?

14 THE WITNESS: Yes, sir.

15 THE COURT: All right. We'll mark it
16 for identification purposes as Plaintiff's Exhibit Number
17 40. It will not be admitted into evidence.

18 (Spady notes were marked as Plaintiff's
19 Exhibit 40 for identification.)

20 MR. POULSON: Answer counsel, please.

21

22 CROSS-EXAMINATION

23 BY MR. MCFARLAND:

24 Q. Good morning, Mr. Spady. My name is
25 Robert McFarland. I represent Shooting Point, L.L.C. in

1 this lawsuit.

2 Do I understand that you own property
3 adjoining where Mr. Tavi purchased some property?

4 A. Yes.

5 Q. Okay. And do I understand that
6 apparently there was an issue with his entrance in an
7 easement?

8 A. Yes.

9 Q. Okay. Do you know, was it Mr. Tavi's
10 plan to put in a subdivision for this property?

11 A. That was my understanding, yes, sir.

12 Q. Okay. And was the subdivision plat
13 recorded?

14 A. Yes.

15 Q. Okay. And then I understand after the
16 subdivision plat was recorded, Mr. Tavi came to you and
17 indicated that he wanted to speak with you about perhaps
18 using a little bit of your property on this easement that
19 you owned?

20 A. I don't believe that's correct, sir,
21 although -- well, my understanding was that the plat had
22 not been recorded when Mr. Tavi came to me. He did show
23 me a drawing at that time, and I understood that a plat
24 was recorded later.

25 Q. All right. When you say a plat was

1 recorded later, you're talking about with Northampton
2 County Board of Zoning and Planning?

3 A. An official plat of record with the
4 clerk of the court.

5 Q. Now, do I understand that there was a
6 meeting that actually took place with Mr. Tavi, his
7 counsel, you, your sister, and your counsel?

8 A. The first meeting did not include any
9 counsel for my family.

10 Q. Okay. There was a subsequent meeting
11 that did include counsel?

12 A. We never met all together.

13 Q. You did retain counsel in this, correct,
14 Mr. Spady?

15 A. Yes.

16 Q. And the counsel that you retained is
17 Mr. Wescoat?

18 A. Yes.

19 Q. The complainant in this action?

20 A. Yes.

21 Q. Okay. And how much property was it that
22 Mr. Tavi was requesting from you, sir, for his entrance
23 permit?

24 A. Something over six hundred square feet.

25 Q. In fact, wasn't it about a hundred

1 square feet?

2 A. That's not my recollection, no, sir.

3 Q. That's not your recollection?

4 A. No, sir.

5 Q. Do you have any notes that would clarify
6 this that you brought to court here today?

7 A. I do, but I didn't bring them to court.

8 Q. Okay. So you just brought the note of
9 the one conversation with Mr. Cumming, but you didn't
10 bring any of your other notes form any other aspect of
11 this matter?

12 A. That's correct.

13 Q. Well, in fact, whether it was a hundred
14 or six hundred square feet, we're talking about a fairly
15 small piece of property, correct?

16 MR. POULSON: Judge, I don't know what
17 the materiality of whether it's a hundred or six hundred,
18 just the fact that it was a problem.

19 THE COURT: Where are you going with
20 this, Mr. McFarland?

21 MR. MCFARLAND: Pardon?

22 THE COURT: Where are you going?

23 MR. MCFARLAND: My next question, I
24 think, will show.

25 THE COURT: Okay.

1 BY MR. MCFARLAND:

2 Q. And, in fact, didn't you demand in order
3 for Mr. Tavi to have use of a small portion of your
4 entrance payment by him of five hundred thousand dollars,
5 Mr. Spady?

6 A. What we asked for was --

7 Q. Is that a correct statement, Mr. Spady?
8 Did you not ask Mr. Tavi to pay you five hundred thousand
9 dollars?

10 A. That request was not made by me
11 personally, no. I'm -- I am not aware of whether my
12 counsel may have used that figure or not.

13 Q. You don't -- you didn't authorize your
14 counsel to make a demand, Mr. Spady? Is that what you're
15 telling this court? That your counsel unilaterally made a
16 demand upon Mr. Tavi without your authority?

17 A. No, sir. I'm not telling you that.

18 Q. And, in fact, your counsel made a demand
19 for half a million dollars for the use of a small piece of
20 property either a hundred feet, as I believe the evidence
21 will show, or six hundred feet at maximum, correct,
22 Mr. Spady?

23 A. I don't know what my counsel said to the
24 other counsel, sir.

25 Q. You don't know what --

1 A. I wasn't present when those discussions
2 took place.

3 Q. And there weren't --

4 A. And the principal element that my family
5 was looking for was unrelated really to the additional
6 square footage for the easement.

7 Q. Well, in part what your family was
8 looking for was payment of a large sum of money for
9 Mr. Tavi to have use of a small piece of property for his
10 entrance, correct, Mr. Spady?

11 A. We were looking for a road maintenance
12 agreement primarily that would manage the use of
13 six-tenths of a mile of dirt road over our property.

14 Q. And Mr. Tavi was willing to give you a
15 written maintenance agreement, correct?

16 A. He gave us a draft of such agreement,
17 but it did not deal with the questions that we had raised.

18 Q. And there was also a demand by your
19 family, Mr. Spady, for payment of a sum of money, correct?

20 A. Mr. Tavi offered us a sum of money.

21 Q. And it wasn't enough. You wanted a
22 larger sum of money, correct, Mr. Spady?

23 A. Sir, Mr. Tavi did not deal with the
24 principal elements of our request.

25 Q. That isn't my question, Mr. Spady.

1 There was --

2 THE COURT: I think you made your point,
3 Mr. McFarland. Let's move on. We are getting a little
4 bit far afield here. I realize there is some indication
5 that there may be some relevance, I suppose, to the two
6 permits, but I don't know that we need to go quite so far
7 into it as we are going now.

8 Any other questions?

9 MR. MORRIS: Yes, Your Honor. May I
10 address the witness from this position?

11 THE COURT: Yes.

12

13 CROSS-EXAMINATION

14 BY MR. MORRIS:

15 Q. Mr. Spady, I represent the property
16 owners association for Shooting Point, and I have one
17 quick question for you.

18 In your particular family situation, was
19 there a written grant of easement delineating that
20 particular easement which is the subject of this whole
21 conversation?

22 A. The easement that existed before the
23 long-term presence of the easement you're referring to.

24 Q. I'm talking about was there a grant from
25 your family to any person, persons, or entity to use that

1 easement?

2 A. Well, sir, I'm not certain that I
3 understand precisely what you're asking.

4 Q. Let me make it clear for you. Were
5 there terms that were written out on a piece of paper that
6 indicated what the use of the easement was, what the
7 restrictions of those uses were, and the particular spot
8 where that easement existed put onto paper?

9 A. Are you asking now about our discussion
10 with Mr. Tavi, or the historical situation?

11 Q. I'm talking about the easement
12 historically, the easement that is the whole subject of
13 this whole testimony today.

14 Was there a written grant of easement?

15 A. To the best of my knowledge, my family
16 has never made such a grant.

17 Q. And there has never been a written grant
18 of easement that was signed and recorded in the
19 courthouse, was there?

20 A. Not to my knowledge.

21 Q. So the terms then of this particular
22 easement are really up to the uses over the many years; is
23 that correct?

24 MR. POULSON: Judge, I would object to
25 this. I have no idea what the materiality of the terms of

1 easement has got to do with this at all. The only
2 materiality here is the conversation with Mr. Cumming is
3 there was a problem, as Mr. Cumming indicated wasn't
4 enough land for the entrance, and something happened.

5 Then we have an explanation from
6 Mr. Cumming as to why it happened.

7 MR. MORRIS: If I may respond, Your
8 Honor, I believe that they are trying to draw a
9 distinction or a similarity of these two particular
10 situations, and I believe that there is a distinction.

11 THE COURT: Well, I think the only
12 similarity attempted to be drawn is the width of the
13 easement, whether it's by grant, or otherwise, as it
14 connects to the state road. I assume that's the only
15 thing.

16 MR. MORRIS: In terms of just the
17 permit?

18 THE COURT: That's my understanding.

19 MR. MORRIS: If that's the Court's
20 understanding, then that's all the questions I have, Your
21 Honor.

22 THE COURT: Anything else?

23 MR. LePAGE: No, sir.

24 THE COURT: Who do you have next,
25 Mr. Poulson?

1 MR. POULSON: Judge, we've got several
2 witnesses which are going to start getting long. I have
3 told most of them to be here at one o'clock, and maybe if
4 we can break for lunch now.

5 THE COURT: Have you got anybody out
6 there now?

7 MR. POULSON: Ms. Benson is out there.

8 THE COURT: All right. Well, let's go
9 ahead with that. We can get started anyway.

10
11 SANDRA BENSON, called as a witness by
12 and on behalf of the Plaintiff's, being first duly sworn,
13 testified as follows:

14
15 DIRECT EXAMINATION

16 BY MR. POULSON:

17 Q. Ms. Benson, state your name, please.

18 A. Sandra Benson.

19 Q. And where do you reside?

20 A. In Cheriton, Virginia.

21 Q. And what is your position?

22 A. I'm the director of planning and zoning
23 for Northampton County.

24 Q. And how long have you been so employed?

25 A. About two and a half years.

1 Q. Ms. Benson, if I may, please, the plat
2 of Shooting Point, are you familiar with that plat?

3 A. Yes, sir.

4 Q. And what was the circumstance on you
5 seeing that plat?

6 A. It was presented to me for, I guess,
7 basically administerial review for the lots for zoning
8 approval.

9 Q. And what, if anything, did you have to
10 do relative to the plat?

11 A. I checked the lots for width in the area
12 for compliance with the zoning ordinance.

13 Q. And anything else?

14 A. No, sir.

15 Q. What, if anything, relative to the
16 subdivision ordinance?

17 A. Because of the size of the lots, it was
18 determined that it was exempt from our subdivision
19 ordinance, so there was no subdivision review required.

20 Q. Did you make any determinations in
21 looking at that plat as to merits of the subdivision,
22 adequacy of roads, or anything of that nature?

23 A. No, sir.

24 Q. Did you sign off on it, so to speak?

25 A. I signed it for recordation by the

1 clerk's office, which is our customary procedure.

2 Q. And you say that's your customary
3 procedure?

4 A. Yes. I mean, whether a plat is actually
5 a subdivision plat or not, we sign off on all plats before
6 the clerk's office records it.

7 Q. Okay. And is your sole function,
8 official function relative to that plat?

9 A. Yes.

10 Q. Now, what is your education, ma'am?

11 A. I have a BA in related studies from the
12 University of Virginia, 1980. Master of urban and
13 regional planning for Virginia Commonwealth University in
14 1989.

15 Q. And what has been your job experience in
16 the way of planning and land use?

17 A. When I came to the shore in 1991, I was
18 employed by the Accomac Board of Hampton Planning District
19 Commission to work with the incorporated towns to achieve
20 compliance with the Chesapeake Bay Preservation Act.

21 In doing that, we did -- well, we had to
22 constitute planning commissions for some of the towns,
23 develop town comprehensive plans, and town zoning
24 ordinances which would be consistent with the Bay Act.

25 Following that, I came to work for

1 Northampton County as assistant planner in February of
2 1995. My main responsibility was to implement and enforce
3 the county's Chesapeake Bay Preservation Area
4 Requirements.

5 I was promoted to director of planning
6 and zoning in February of 1999.

7 Q. Are you a certified land planner?

8 A. Yes, I am.

9 Q. And is that a professional designation?

10 A. Yes.

11 Q. And what does it entail?

12 A. The American Institute of Certified
13 Planners which is a division of the American Planning
14 Association gives an examination yearly.

15 In order to take that examination, you
16 have to have a certain amount of experience. I guess they
17 consider it to be a fairly rigorous examination of your
18 knowledge of general planning knowledge, and techniques.

19 Q. And can you tell the Court approximately
20 how many certified land planners there are in the United
21 States?

22 A. As of this past -- the examination is
23 given in May. As of this past examination, there are
24 thirteen thousand five hundred in the country.

25 Q. Okay. And you're one of thirteen

1 thousand five hundred in the entire United States?

2 A. Yes, sir.

3 MR. POULSON: Judge, we would offer
4 Ms. Benson as an expert in the field of land planning.

5 THE COURT: Any questions with regard to
6 that?

7 MR. MCFARLAND: Not as to land planning,
8 Your Honor. Whether it's relevant to this proceeding,
9 we'll reserve.

10 THE COURT: All right.

11 BY MR. POULSON:

12 Q. Are you being compensated for your
13 appearance and your testimony?

14 A. No.

15 Q. Okay. Now, have you had occasion to
16 review the plat of Shooting Point, the declaration of
17 covenants, and the easement, and have you visited the
18 property?

19 A. Yes.

20 Q. And the easement connects the property
21 to State Route 622; is that correct?

22 A. Yes.

23 Q. Will you generally describe the
24 easement?

25 A. The easement is approximately

1 three-tenths of a mile long, fifteen feet in width. There
2 are three basically ninety degree bends between 622 and
3 the property.

4 Q. Okay. And how wide is the easement?

5 A. Fifteen feet.

6 Q. Okay. Now, Ms. Benson, I'm going to ask
7 you a question, but before giving your answer, I want to
8 give you certain assumptions or considerations to make,
9 okay, if I may, please.

10 And the question is going to be this:
11 Giving consideration to the nature and characteristics of
12 the easement that serves Shooting Point, is a use of
13 Shooting Point as a subdivision with -- and let's assume
14 eighteen lots of single-family residences, homes of a
15 minimum of 2000 square foot heated spaces, and at this
16 point in time, I ma not going to ask you to assume that
17 there are guest cottages on each parcel, or that there is
18 a bed and bed breakfast, or that there may be a
19 ten-bedroom country inn, both the bed and breakfast and
20 the country inn for transients.

21 I want you to assume that the there will
22 be joint use with the Wescoat track which is used
23 agriculturally, as well as recreational use.

24 I want you to assume that vehicles on
25 the easement from the Shooting Point will vary depending

1 on the number of houses built, and the number of times the
2 houses may be used.

3 I want you to assume as far as
4 recreational use at Shooting Point that that will vary
5 with the time of year, and what the users may want to
6 utilize.

7 I want you to assume that the farming on
8 Shooting Point of some fifty acres will vary with the
9 crops and the time of season.

10 And I want you to take the question that
11 I pose to you, and I will give you the question in another
12 form, too. And look at it from the perspective of giving
13 consideration to the nature and characteristic of the
14 easement that serves Shooting Point.

15 Is the use of Shooting Point as a
16 subdivision a reasonable use of the property, or
17 alternatively is the easement for Shooting Point, will it
18 safely and efficiently support the uses of such a
19 subdivision in conjunction with the Wescoat uses of the
20 fifteen-foot road?

21 MR. MCFARLAND: I'm going to object,
22 Your Honor. I think the hypothetical is put to her asking
23 her for an opinion on something that's really not germane
24 to this case.

25 The issue in the case is whether my

1 clients already approved lawful use of their property will
2 overburden the easement, and overburden the easement as to
3 the Wescoats, not whether --

4 THE COURT: Well, to the extent that the
5 question affects the use of the easement, I think it's a
6 fair hypothetical. Anything having to do with whether or
7 not the land perse would make a good subdivision or not, I
8 think your objection is well taken.

9 But to the extent that it affects the
10 use of the easement, I think that that's appropriate. Go
11 ahead.

12 MR. POULSON: May I be heard very
13 briefly by the court to that very issue, sir?

14 THE COURT: Sure.

15 MR. POULSON: In looking at the case
16 law, I think the case law is very clear, and I don't want
17 to take the time to simply read to the Court.

18 The case law starts of with a
19 proposition that the first thing that must be found is
20 number one that there is a reasonable use of the land,
21 that is the dominant track. That is the first
22 prerequisite --

23 MR. MCFARLAND: Your Honor, I don't mean
24 to interject, but maybe this conversation shouldn't be
25 held in front of a witness.

1 THE COURT: Well, I think I understand
2 it, and maybe you misunderstood what I was saying.

3 I think that that is correct. The
4 reasonable use of the land as it affects the easement,
5 which is what I indicated that I thought you were asking
6 in your hypothetical question, and I think that that is
7 appropriate.

8 Whether or not the track of land itself
9 taking away the issue of the easement would or would not
10 make a nice subdivision, I don't think is appropriate.
11 But to the extent that the use of the land is appropriate
12 taking into account the easement that exists, I think your
13 question is fine.

14 MR. POULSON: That's my point exactly,
15 sir.

16 THE COURT: All right.

17 BY MR. POULSON:

18 Q. Do you understand the question?

19 A. I'm not sure I do now.

20 Q. I don't want to repeat it, Ms. Benson.

21 THE COURT: Let me try to explain it to
22 her, and I don't want to get off track here.

23 The way you posed the hypothetical, she
24 could theoretically say, Oh, this pies of property would
25 make the most beautiful subdivision in the world, or this

1 piece of property would make a horrible subdivision
2 forgetting about how you get in and out of it.

3 So the issue is the use of the property
4 as it affects the right-of-way coming in and out of the
5 property. That is the issue.

6 Now, go ahead.

7 BY MR. POULSON:

8 Q. WHAT IS your opinion on that issue?

9 A. My opinion is that due to the
10 characteristics of the easement, there would be a great
11 deal of conflict between the residential uses of the
12 property with the agricultural uses of the property.

13 And not only that, I mean, there would
14 be some conflict among the residential users, I believe,
15 in using the easement.

16 Q. Okay.

17 MR. MCFARLAND: I move to strike.
18 That's absolutely irrelevant to the issues in this case.
19 That opinion has nothing to do with given what the Court's
20 just even framed the issues for.

21 THE COURT: Well, I don't know exactly
22 what she means by the term "conflict," but --

23 BY MR. POULSON:

24 Q. Ms. Benson, do you have a professional
25 opinion as to whether this easement will support the uses

1 of a subdivision as well as the uses of the Wescoat
2 parcel?

3 MR. MCFARLAND: That's irrelevant.
4 That's not the issue.

5 MR. POULSON: That's overburdening.

6 THE COURT: Overrule the objection. I
7 think that's what he's asking. Go ahead.

8 THE WITNESS: I'm sorry. Would you
9 repeat the question, the simple question one more time?

10 BY MR. POULSON:

11 Q. Do you have a professional opinion as to
12 the whether the uses of the subdivision, its intended
13 uses, whether the easement can safely and efficiently be
14 used for the uses of the subdivision in conjunction with
15 the uses on the Wescoat parcel?

16 A. I don't believe that it can safely and
17 efficiently be used.

18 Q. And tell us why.

19 A. Planners are generalists, I mean, just
20 by the nature of our work, and what is involved is
21 gathering data, knowing where to look to see what other
22 localities are doing, and who to talk to and whatnot.

23 Then applying some common sense to see
24 what is appropriate in any given situation in your own
25 area.

1 Based on the sources that I have
2 consulted, and other planners that I have talked with,
3 based on my own observations since I have lived here on
4 the Shore about just driving behavior, recreational use,
5 the size of farming vehicles.

6 Based on those things, I don't believe
7 that a fifteen-foot easement could accommodate all of that
8 use in an efficient and safe way.

9 MR. MCFARLAND: Your Honor, I'm going to
10 renew my objection now. There's absolutely no basis for
11 her opinion that's just been rendered.

12 THE COURT: Overrule your objection. Go
13 ahead.

14 BY MR. POULSON:

15 Q. Ms. Benson, looking at just the uses of
16 Shooting Point itself, forgetting the Wescoat uses, will
17 this fifteen-foot easement in and of itself looking at its
18 width, length, the three ninety-degree curves, or anything
19 else that you may want to look as you may consider
20 factors, would that easement even in and of itself in your
21 professional opinion support the uses of a subdivision of
22 that size?

23 A. I don't believe that it would. I mean,
24 you assume eighteen or nineteen homes, the standards that
25 are generally applied in those situations are ten

1 round-trips per day per unit.

2 With that number of vehicles on the
3 road, and also have to consider safety, so hopefully it
4 wouldn't happen very often, but the ability of emergency
5 vehicles to negotiate that length and those turns, I think
6 that it would not support it.

7 MR. MCFARLAND: Your Honor, I move to
8 strike that. That's not the issue before this Court. The
9 subdivision plat has already been approved. The
10 subdivision plat has been approved, it's been recorded,
11 and whether or not the easement is sufficient for it is
12 absolutely irrelevant.

13 THE COURT: Well, I don't think it's
14 been approved by anybody. It's been recorded.
15 Apparently, it didn't have to be approved, from my
16 understanding.

17 MR. POULSON: Counsel well knows that
18 the only purpose of her signature was that it was exempt,
19 and the plat said so, and counsel knows that.

20 THE COURT: Overruled. Go ahead.

21 BY MR. POULSON:

22 Q. What significance, if any, does the
23 three ninety-degree turns have in this matter?

24 A. Well, based on the width of emergency
25 vehicles, which is usually based on my conversations with

1 the Nassawattax Fire and Rescue, between nine and ten feet
2 wide, I think that a vehicle like that would have a hard
3 time negotiating a ninety-degree turn.

4 I don't know about a Pickup truck
5 pulling a boat trailer. I mean, I know that would vary,
6 and we can't assume that there would be that kind of
7 traffic going up. But if there were to be, I think that
8 anything being pulled by a vehicle, I think is going to
9 have some difficulty if there are no shoulder areas.

10 Q. Okay. And what is the line of sight on
11 these turns?

12 A. Two of them are blind, as I recall.

13 MR. MCFARLAND: I'm sorry. I can't hear
14 you, Ms. Benson.

15 THE WITNESS: I said two of them are
16 blind turns, as I recall.

17 BY MR. POULSON:

18 Q. Ms. Benson, if you add some additional
19 factors in, namely that the eighteen lots each can have a
20 guest cottage for use in conjunction with the property,
21 not rentable to outsiders, but to domestic help.

22 If you further assume that on one of lot
23 there can be a bed and breakfast with four bedrooms for
24 transients, and assume further, if you will, please, that
25 on that same lot alternatively there could be a country

1 inn with as many as ten bedrooms for transients, meals
2 being served on both the bed and breakfast and the country
3 inn.

4 What affect, if any, does that have on
5 your opinion that you previously stated?

6 A. If you assume guest cottages on each
7 lot, that effectively doubles, or potentially doubles the
8 amount of traffic.

9 The bed and breakfast or country inn use
10 would be considered commercial uses, not allowed by right,
11 but nevertheless, commercial uses which would put further
12 additional traffic on the easement.

13 Q. And the country inn?

14 A. And the country inn, yes, sir.

15 Q. Are guest cottages permitted as a matter
16 of right under the present county ordinance, by the way?

17 A. Yes, they are.

18 Q. Now, were you provided some information
19 recently as to certain assumptions on the traffic use of
20 the subdivision and the kinds of vehicles that were going
21 to use it? Did I provide you a sheet?

22 A. Yes.

23 Q. Will you read that, please?

24 A. The question?

25 Q. Yes.

1 A. State the number and kinds of --

2 MR. MCFARLAND: Before the witness
3 reads, can I see what she's reading? I have no idea what
4 she's reading.

5 MR. POULSON: She's reading from your
6 discovery response number four, when I proposed to you
7 that the number and kinds of vehicles that you contemplate
8 would use the right-of-way.

9 BY MR. POULSON:

10 Q. And read the question and read the
11 response.

12 A. State the number and kinds of vehicles
13 that you contemplate will utilize the right-of-way or
14 easement on a daily and/or seasonal basis.

15 The answer -- do you want the whole
16 entire thing?

17 Q. Yes, I guess you'd better the whole.

18 A. Respondent objects to this interrogatory
19 on the grounds it seeks irrelevant information which will
20 not lead to the discovery of admissible evidence.

21 Without waiving its objection,
22 respondent states that it expects farm vehicles, cars,
23 trucks, motorized, and non-motorized trucks will use the
24 easement.

25 Farm use will vary with season and crops

1 cultivated on approximately fifty acres. Vehicular
2 traffic generated by residential use will vary with the
3 number and use of homes built and occupied. Recreational
4 use will vary with owners interests in utilizing the
5 property for same.

6 Q. In your review of the restrictions, the
7 declaration, Ms. Benson, is there anything in the
8 declaration that restricts the sell or use of these homes
9 as retirement homes?

10 A. I didn't see anything.

11 MR. POULSON: All right. Answer
12 counsel, please.

13 THE COURT: Any questions?

14 MR. MCFARLAND: Yes, Your Honor.

15
16 CROSS-EXAMINATION

17 BY MR. MCFARLAND:

18 Q. Ms. Benson, let's go back. You are the
19 director of planning and zoning for Northampton County?

20 A. Yes.

21 Q. And you took over that position when,
22 ma'am?

23 A. In February of 1999.

24 Q. All right. And you succeeded Mr. John
25 Humphrey?

1 A. Yes.

2 Q. Who retired at that point?

3 A. Yes.

4 Q. And prior to that you were the assistant
5 director of planning and zoning?

6 A. Assistant planner.

7 Q. And when Mr. Humphrey retired, you were
8 appointed by the board of supervisors at that point?

9 A. Yes, sir.

10 Q. And you are an at-will employee?

11 A. I believe so.

12 Q. No employment contract?

13 A. Right.

14 Q. And your understanding is you could be
15 terminated by the board of supervisors?

16 A. I believe so.

17 Q. Now, the Shooting Point property at
18 issue here, it's designated as, I guess, an AR, an Ar
19 zoning; is that correct?

20 A. It was at the time this plat was
21 presented.

22 Q. Okay. And AR means agricultural
23 residential?

24 A. Yes.

25 Q. Okay. And I take it that's agriculture

1 and/or residential?

2 A. Yes.

3 Q. And this plat was presented to you when,
4 ma'am, for Shooting Point, originally?

5 A. I believe I probably first saw it in
6 October of 1999.

7 Q. All right.

8 A. Sometime prior to November 1st because I
9 wrote a letter to -- there was an inquiry about the
10 property in November of that year.

11 Q. And on November 1st of 1999, you wrote a
12 letter to a representative of Shooting Point approving
13 indicating that you would approve the plat for
14 recordation?

15 A. For recordation, finding that it was
16 exempt from subdivision requirements.

17 Q. And in order to find that it was exempt
18 from the subdivision requirements, you had to review it?

19 A. Yes.

20 Q. And confirm that all of the lots were
21 greater than five acres?

22 A. Right.

23 Q. Correct. And that they each contained
24 three hundred feet in width at the seventy-five-foot road
25 setback?

1 materiality in any issue here.

2 THE COURT: I think obviously that's the
3 case. It's not what happens, but suppose it doesn't make
4 any difference.

5 MR. MCFARLAND: Well, to the extent that
6 this woman has talked about giving opinions about the
7 allegedly unsafe aspect of Shooting Point with the
8 easement --

9 THE COURT: Well, I assume that her
10 testimony, Mr. McFarland, would be if they had gone with
11 thirty-two lots, it would have been twice as unsafe. I
12 don't know. I don't know that we're going to necessarily
13 get very far with that. But anyway.

14 BY MR. MCFARLAND:

15 Q. There could have been up to thirty-two
16 or thirty-five lots correct, ma'am, and still be exempt?

17 A. Yes.

18 Q. All right.

19 THE COURT: What do you have there,
20 Mr. McFarland?

21 MR. MCFARLAND: Letter of November 1st,
22 1999.

23 THE COURT: Her letter?

24 MR. MCFARLAND: Employer.

25 THE COURT: What number are we on?

1 MR. MCFARLAND: 7, I believe, for
2 defendants.

3 THE COURT: Defendant's Number 7. Any
4 objection?

5 MR. POULSON: Judge, it's nothing more
6 than what she's already testified to, and on that basis, I
7 would.

8 THE COURT: Exhibit Number 7, it speaks
9 for itself, will be admitted into evidence.

10 (Letter was marked and admitted into
11 evidence as Defendant's Exhibit 7.)

12 THE COURT: What do you need to do with
13 it, Mr. McFarland?

14 MR. MCFARLAND: Let me just see it for a
15 second, Your Honor.

16 THE COURT: Okay.

17 BY MR. MCFARLAND:

18 Q. Now, ma'am, when the Shooting Point
19 subdivision plat was submitted to you, you did not consult
20 with the VDOT, correct?

21 A. That's correct.

22 Q. Okay. And, in fact, and that was
23 because it was an exempt --

24 A. That's correct.

25 Q. -- residential subdivision?

1 A. Yes.

2 Q. And that had been your practice since --
3 that had been the practice since you had come to
4 Northampton County?

5 A. As far as I know. I mean, I can't say
6 exactly what John Humphrey had done, but it had been my
7 understanding that exempt subdivisions were not forwarded
8 to VDOT.

9 Q. Okay. You say --

10 A. Or exempt divisions of land.

11 Q. And you worked under John Humphrey,
12 ma'am, correct?

13 A. Yes, I did.

14 Q. And you certainly found him to be a
15 competent administrator?

16 A. Yes.

17 Q. Okay. So you didn't send t his
18 subdivision plat to Mr. Cumming for review?

19 A. No, I did not.

20 Q. Okay. And, in fact, the first you
21 learned that there might be an issue as to the entrance,
22 requirement for an entrance permit was how, Ms. Benson?

23 A. Will Cumming called our office in
24 January of 2000 and asked for a copy of the plat.

25 Q. And at that point, ma'am, you did what?

1 A. Presented him a copy.

2 Q. Okay. And then you subsequently sent --
3 did you subsequently have any correspondence with VDOT
4 about this issue?

5 A. I know that I did have a conversation
6 with Will Cumming, and in January, later on in January
7 indicated that I did want to talk to him about what their
8 requirements were.

9 I think we did look at the plat together
10 briefly. Subsequent to that, I did have a conversation
11 with our county attorney indicating that we needed to
12 correspond with the developer concerning the fact that I
13 did not send it to the Department of Transportation, and I
14 did copy Mr. Cumming on that letter.

15 THE COURT: I take it this is the letter
16 she just referred to? You've seen it, Mr. Poulson?

17 MR. POULSON: Yes, sir. It's already
18 entered as plaintiff's exhibit.

19 MR. MCFARLAND: It's already in?

20 MR. POULSON: Yes, Exhibit 29, I
21 believe, the January letter.

22 MR. MCFARLAND: All right. No need to
23 introduce it twice, Your Honor, if it's already in. Let
24 me see if I can find it.

25 THE COURT: January 14 letter.

1 MR. POULSON: Is that February or
2 January?

3 MR. MCFARLAND: January 14th.

4 MR. POULSON: January 14th?

5 MR. MCFARLAND: Plaintiff's Exhibit 29.
6 I'll use that, Your Honor.

7 BY MR. MCFARLAND:

8 Q. Ms. Benson, let me hand you what's been
9 marked as Plaintiff's Exhibit 29. Do you recognize that,
10 ma'am?

11 A. Yes, sir.

12 Q. Is that the letter that you were
13 referring to, the correspondence you were referring to a
14 moment ago?

15 A. No, I was referring to correspondence
16 that I wrote. I did not see this one in my file when I
17 was leafing through.

18 Q. This is a letter to you from Mr. Wright
19 from the VDOT? And Mr. Wright obviously works under
20 Mr. Cumming?

21 A. Uh-huh.

22 Q. Okay. And this is Mr. Wright advising
23 you of the entrance permit requirement, correct?

24 A. Yes.

25 Q. Okay. Prior to receipt of that letter,

1 A. Yes, sir.

2 Q. Okay. You were contacted, you say,
3 in -- exact month, ma'am?

4 A. I don't recall, and I don't believe I
5 made a note at the time. It was February or March, I
6 believe.

7 Q. Of this year?

8 A. Of this year.

9 Q. Okay. And did you at that point consult
10 with anyone in the attorney general's office about whether
11 there was a conflict of interest in your serving as an
12 expert witness for a private litigant in a matter in which
13 you had approved the subdivision plat?

14 MR. POULSON: Number one, I'm going to
15 object to this whole line of questioning. Number one, I
16 don't think there's any necessity of her consulting with
17 the attorney general. It is a county matter.

18 THE COURT: Sustain the objection.
19 Let's not go there, Mr. McFarland.

20 BY MR. MCFARLAND:

21 Q. Did you consult with the county attorney
22 at that time, ma'am?

23 A. Not at that time, no.

24 Q. Okay. And I take it that you were
25 willing to serve as an expert witness for Mr. Wescoat at

1 that time in March of 2001, correct?

2 A. I was willing to testify, yes.

3 Q. At that point, ma'am, you hadn't even
4 seen Shooting Point's entrance in the easement, had you?

5 A. I hadn't seen it physically. Of course,
6 I had seen what was represented on the plat, which I
7 assumed to be correct.

8 Q. But you had never been to the property
9 at all, had you, ma'am?

10 A. No, I had not.

11 Q. So notwithstanding that you hadn't even
12 seen the property, the sight lines, et cetera, you were
13 willing to serve as an expert witness at that point in
14 time?

15 A. Yes, sir.

16 Q. Based on what Mr. Poulson represented to
17 you?

18 A. Yes, sir.

19 Q. And ma'am, do I understand that in your
20 capacity as an expert witness you haven't yourself done
21 any type of studies as to the traffic count on Route 622?

22 A. I have not done a study.

23 MR. POULSON: Judge, I think we're
24 pretty well bound by their answer to the interrogatories.
25 They set out what the use is going to be and so forth.

1 THE COURT: Overrule the objection.

2 That's a fair question.

3 BY MR. MCFARLAND:

4 Q. You haven't done any kind of study as to
5 the traffic count on Route 622?

6 A. I haven't studied it personally. I know
7 that the last 1999 VDOT traffic count was thirty vehicles
8 per day on that section of 622.

9 Q. Correct, thirty vehicles per day?

10 A. Yes.

11 Q. And I think you've stated that you are
12 assuming ten trips per day per household in a subdivision?

13 A. Yes, sir.

14 Q. Okay. So that would get us a hundred
15 and eighty?

16 A. Yes.

17 Q. From the subdivision you were giving us
18 a total of the hundred and ten?

19 A. Uh-huh.

20 Q. Two hundred and ten trips better day,
21 ma'am, for use of that easement and entrance still puts us
22 in the lowest category for usage, correct, of roads?

23 A. I don't know.

24 Q. You don't know?

25 MR. POULSON: Judge, you know, part of

1 the assumption there has got to be the fact that it is not
2 an exclusive easement for Shooting Point. There is a
3 joint use with the Wescoat track.

4 THE COURT: Her answer was she didn't
5 know.

6 BY MR. MCFARLAND:

7 Q. Did you consult any studies or surveys,
8 ma'am, as to what constitutes heavy, minimal, or light
9 usage?

10 A. No, sir. I considered the types of
11 traffic, the types of vehicles that would be using the
12 easement.

13 Q. Okay. Well, in terms of types, ma'am,
14 Mr. Poulson read you an interrogatory answer that my
15 clients had provided. Would you look at that again,
16 please?

17 A. Yes.

18 Q. That interrogatory answer doesn't give
19 any reference whatsoever as to how much vehicular traffic
20 will be on the easement, does it?

21 A. No, sir, it doesn't.

22 Q. Okay. And, ma'am, really, if I
23 understand your testimony, what you're concerned with is
24 the possibility of vehicles meeting each other on the
25 easement, correct?

1 A. That is a major part of it, yes.

2 Q. You haven't done any surveys, or studies
3 to determine what would be the probability of a vehicle
4 meeting at the entrance, or on the easement with another
5 vehicle, have you, ma'am?

6 A. No, I haven't.

7 Q. And as you sit here today, you have no
8 foundation as to how often one vehicle may be called upon
9 to pass another on the easement, do you, ma'am?

10 A. I'm not able to give a number of
11 probability, no.

12 Q. Okay. And, in fact, ma'am, I guess in
13 conjunction with your serving as an expert witness in
14 this, you reviewed some treatises?

15 A. Yes.

16 Q. On the width of roads for subdivisions,
17 correct?

18 A. Yes.

19 Q. And am I not correct, ma'am, that the
20 primary treatise that you reviewed showed that for this
21 type of subdivision, a small, large lot subdivision with
22 off-street parking, and ingress and egress width of
23 sixteen feet would be adequate, correct, ma'am?

24 A. For the cartway, yes, the travel way.

25 Q. Yes, sixteen feet. So your opinions

1 now, I take it, ma'am, are based on the fact that the
2 easement that my clients and their homeowners will use is
3 fifteen feet versus the sixteen feet that your treatise
4 says is acceptable?

5 You're telling this Court that one
6 foot --

7 THE COURT: Wait a minute. She didn't
8 answer the question.

9 MR. MCFARLAND: I apologize, Your Honor.

10 THE WITNESS: I'm sorry. Repeat the
11 question.

12 BY MR. MCFARLAND:

13 Q. Sure, ma'am.

14 Your treatise that you consulted because
15 you didn't have any independent knowledge as to this
16 before Mr. Poulson called you, right?

17 THE COURT: Wait a minute. You've got
18 to ask the question. You're asking another question now.

19 BY MR. MCFARLAND:

20 Q. You consulted an independent treatise
21 correct, ma'am?

22 A. Several, yes.

23 Q. Those independent treatises said that
24 for a rural, residential subdivision where there is going
25 to be off-street parking, large lot homes, sixteen feet is

1 an adequate ingress and egress route, correct?

2 A. One of them did say that as far as the
3 paved portion, or cartway, travel way.

4 Q. Right. Sixteen feet.

5 And you understand that right-of-way
6 that my clients and their homeowners will have use to is
7 fifteen feet?

8 A. I do understand that.

9 Q. Okay. And are you telling this Court
10 that the difference between sixteen feet and fifteen feet
11 is what causes you to find that the easement may be
12 overburdened by this subdivision?

13 A. The difference between sixteen feet with
14 shoulders, and fifteen feet, a strict fifteen feet, I
15 think that does make a significant difference.

16 Q. All right, ma'am.

17 Well, with respect to shoulders, the
18 treatise that you relied upon that mentioned sixteen feet
19 was what, ma'am? What was the name of it?

20 Maybe I can help you. Was it Rural
21 Design by Randal Arendt?

22 A. Yes, it was.

23 Q. Okay. And you can pull it out, ma'am,
24 and I want you to point to me where in Mr. Arendt's book
25 it says sixteen feet plus shoulders.

1 A. You are correct, it does not. But may I
2 say something?

3 Q. Does it?

4 A. No, it does not.

5 Q. It says sixteen feet? Simply sixteen
6 feet?

7 A. It says that there are a number of roads
8 that are comfortably serving, I believe it has sixteen
9 feet, or sixteen foot roads serving residential areas.

10 Q. Right.

11 A. Since the time of my deposition, I did
12 take it upon myself to call Bucks County Planning
13 Commission.

14 MR. MCFARLAND: Well, I'm going to
15 object.

16 MR. POULSON: Let's let her answer the
17 question.

18 MR. MCFARLAND: No. I am entitled to
19 rely on the opinion that she gave when I deposed her.

20 MR. POULSON: That is not true. She's
21 testifying in court today, counsel.

22 THE COURT: I suspect that you're
23 probably going to ask her on redirect, Mr. Poulson. Go
24 ahead.

25 MR. MCFARLAND: Well, I'm going to

1 object to anything that Bucks County subdivision told her.

2 MR. POULSON: Well, he asked for her
3 experts, who she's consulted. He's opened it up.

4 BY MR. MCFARLAND:

5 Q. Let's talk about what's written, ma'am,
6 in the treatises that you relied upon. It says sixteen
7 feet, and it doesn't make reference one to shoulders, does
8 it?

9 A. No, it doesn't.

10 Q. Okay. Thank you.

11 You are well aware, ma'am, that this
12 isn't the only entrance and egress right-of-way on the
13 Eastern Shore that's fifteen feet, correct? There are
14 other subdivisions that are served by a roadway of this
15 width or less?

16 MR. POULSON: I don't think that's
17 material, Judge.

18 MR. MCFARLAND: I disagree, Your Honor.
19 This woman has now testified that it's her opinion that
20 the easement isn't safe.

21 THE COURT: Overrule the objection.

22 THE WITNESS: I don't know whether there
23 are any that are less than that or not. I believe that
24 there are probably others that are similar to this one.

25 BY MR. MCFARLAND:

1 Q. Yes. Fifteen feet or thereabouts,
2 correct?

3 A. I believe that's correct.

4 Q. Okay. Has your office taken any action
5 to try to correct that, or shut down those subdivisions,
6 Ms. Benson?

7 MR. POULSON: I'm going to object to
8 that. There is no indication that they have any authority
9 to shut them down.

10 THE COURT: Sustain the objection.

11 BY MR. MCFARLAND:

12 Q. Has your office taken any action
13 whatsoever with respect to any other subdivision that has
14 an ingress, egress route of fifteen feet?

15 A. I'm not -- well, no.

16 Q. Okay. Now with respect to these
17 repeated references to a B and B, and a country inn, the
18 fact, ma'am, if my clients wanted to put in a country inn,
19 they would have to apply for further zoning variance,
20 correct?

21 A. For a country inn, that would require a
22 zoning text amendment to add it to the zoning ordinance for
23 that district, as well as I presume probably a special use
24 permit.

25 Q. Okay. We would be getting into

1 commercial --

2 A. Yes.

3 Q. -- use of the property then, correct?

4 A. Correct.

5 MR. MCFARLAND: Anything while he's
6 looking? Either of defense counsel have any questions?

7 MR. LePAGE: No, sir.

8 MR. MORRIS: No.

9 THE COURT: Any redirect, Mr. Poulson?

10 MR. POULSON: Very little.

11

12 REDIRECT EXAMINATION

13 BY MR. POULSON:

14 Q. Ms. Benson, let me hit a couple of
15 point, if I may, please.

16 Within your opinion, what affect, if
17 any, does the corners that you testified to have, and what
18 affect, if any, does the three-tenth of a mile length
19 have?

20 A. Could you clarify when you say what
21 affect?

22 Q. Are they factors in your decision?

23 A. Yes.

24 Q. Okay. And further with the issue of the
25 treatise, did you investigate that treatise further?

1 A. Yes, I did. I talked with David
2 Johnson, the transportation planner with the Bucks County
3 Planning Commission, and he indicated that he --

4 MR. MCFARLAND: I'm going to objects to
5 what he indicated. I can't cross-examine David Johnson,
6 Your Honor. That is pure hearsay.

7 MR. POULSON: Well, it's part of the
8 treatise examination.

9 MR. MCFARLAND: No, it's not part of the
10 treatise. The treatise is written. I can look at the
11 treatise.

12 THE COURT: He's right, Mr. Poulson.

13 BY MR. POULSON:

14 Q. Let me rephrase the question.

15 The treatises that you reviewed, what,
16 if anything, did they say about the sixteen foot and the
17 presence of shoulders?

18 A. That particular document that
19 Mr. McFarland referenced doesn't really discuss shoulders.
20 There were several others that do clearly contemplate
21 shoulders, and others that recommend minimum cartway of
22 eighteen feet.

23 Q. So the other documents indicated sixteen
24 feet plus shoulders?

25 A. Yes.

1 Q. This one is silent on it?

2 A. Yes.

3 Q. Okay. Did that study come out of Bucks
4 County, the first one?

5 A. No, it was written by Randall Arendt,
6 who is a planner.

7 Q. Okay. Why did you consult Bucks County?

8 MR. LePAGE: Your Honor, I'm going to
9 object at this point on relevancy.

10 THE COURT: Overruled.

11 THE WITNESS: The Bucks County, there is
12 a transportation document that the Bucks County Planning
13 Commission had done at some time in the past that's
14 referenced in several of these documents that discussed
15 development practices.

16 So that was why I called Bucks County to
17 find out what the situation actually is there. My
18 understanding is that none of those municipalities and
19 townships which make up the county now have a standard
20 for -- currently have a standard for a sixteen-foot
21 cartway.

22 Q. Okay. And have you consulted other
23 authorities preliminarily to your testimony here today
24 that entered into your opinion?

25 A. As I said, I spoke with a couple of

1 colleagues who have some experience with planning, or
2 transportation planning, and with local government
3 planning.

4 Q. Okay. Insofar as Mr. McFarland asked
5 you a question about -- that I'm not sure you finished
6 your answer on -- taking any action against any other
7 subdivisions with fifteen-foot roads --

8 THE COURT: Let's try to put that all to
9 rest. I understand it, and I think you-all will all agree
10 there is nothing she can do about it.

11 MR. POULSON: That's exactly.

12 THE COURT: Do you agree with that,
13 Mr. McFarland?

14 MR. MCFARLAND: I don't know that if I
15 agree with it quite the way the Court has phrased it, no.

16 THE COURT: Well, tell me how you agree
17 with it.

18 MR. MCFARLAND: I think she can
19 certainly give indication that she believes the county has
20 a concern with the entrance of other subdivisions.

21 THE COURT: Other than the fact that she
22 or the county may have personal concerns, she can't go out
23 there and shut it down, as I understand it, as long it
24 fits into this AR zoning. If all the lots over five
25 acres, then she could be concerned all she wanted to.

1 MR. MCFARLAND: Well, I think if the
2 county had a concern that there was a safety condition in
3 one of these other subdivisions, the county can take
4 certain actions.

5 THE COURT: She could change the zoning
6 ordinance, but where we stand right now, I don't think
7 there's anything she can do or anybody else can do.

8 MR. MCFARLAND: I'm not going to belabor
9 it, Your Honor. I just had a question.

10 THE COURT: Anything else?

11 MR. POULSON: One question.

12 BY MR. POULSON:

13 Q. During this entire situation, have you
14 ever had any conversation with Mrs. Wescoat about this
15 issue?

16 A. No, I have not.

17 MR. POULSON: Thank you, ma'am.

18 THE COURT: All right. Anything else of
19 this witness?

20
21 RECCROSS-EXAMINATION

22 BY MR. MCFARLAND:

23 Q. Ma'am, with respect to it a B and B --

24 THE COURT: Let's get off the B and B,
25 and the country inn. I mean, you know --

1 MR. MCFARLAND: I just don't want
2 there --

3 THE COURT: Don't worry. You did
4 enough.

5 THE WITNESS: Judge, may I say one thing
6 in response to his question about shutting down
7 subdivisions?

8 THE COURT: Well, sure. Go ahead.

9 THE WITNESS: We did subsequent to this
10 actually in May of last year change -- the county did
11 change the subdivision ordinance so that now any division
12 of land regardless of the size of the parcels is subject
13 to a subdivision review.

14 THE COURT: Okay.

15 BY MR. MCFARLAND:

16 Q. You're familiar with the Wescoat house
17 subdivision, ma'am?

18 A. No, I'm not.

19 Q. In Northampton County?

20 THE COURT: Let's not go there. I'm
21 sure that Mr. Poulson is going to say that the horse is
22 already out of the barn, or too little, too late, or
23 whatever his attitude is, so we'll go from there.

24 Anything else as far as this lady is
25 concern? Okay.

1 Thank you, ma'am. You may be excused.

2 Now, for planning purposes, Mr. Poulson,
3 where are we at this point?

4 MR. POULSON: Judge, I have --

5 THE COURT: Let's talk about who you've
6 got and what they are going to talk about.

7 MR. POULSON: I have a surveyor, I have
8 an expert in fire protection.

9 THE COURT: Who is the surveyor?

10 MR. POULSON: The surveyor is George E.
11 Walters.

12 THE COURT: All right. And who now?

13 MR. POULSON: Fire protection, B. W.
14 James. I have an engineer, Chuck Cooley. And I have
15 about three questions of their subpoenaed witness, Jim
16 Latimer, who I've tried to get up with this morning, and
17 asked to be here at one o'clock so I can get him on, and
18 get him off so it doesn't hold him up.

19 THE COURT: Is that it? Walter, James,
20 Cooley, and Latimer?

21 MR. POULSON: Sir?

22 THE COURT: Is that it?

23 MR. POULSON: Yes, that's it.

24 THE COURT: Maybe with a little luck, we
25 can finish yours today, maybe.

1 What you might want to do on the -- I
2 mean, you've gotten your hypothetical questions for the
3 experts pretty well down, but -- and I understand, you
4 know, that you-all need and want to make a record.

5 I mean, we can all stand here right now,
6 and I can tell you probably word for word what every one
7 of these people are going to say, but be that as it may,
8 but let's try if you can to phrase the hypothetical, you
9 know, so that they can understand it, and say whatever
10 they have to say.

11 All right. Okay. We'll take up where
12 we're going to go after that later on this afternoon.
13 We'll recess for approximately one hour.

14 (Lunch recess.)

15 THE COURT: All right. Who do you have
16 next, Mr. Poulson?

17 MR. POULSON: B. W. James, sir.

18 THE COURT: All right.

19 B. W. JAMES, called as a witness by and
20 on behalf of the Plaintiff's, being first duly sworn,
21 testified as follows:

22

23 DIRECT EXAMINATION

24 BY MR. POULSON:

25 Q. Mr. James, I'm going to fairly rapidly

1 take you through this, if I may, please.

2 What is your name, sir?

3 A. B. W. James.

4 Q. And your age?

5 A. Forty-seven.

6 Q. And your residence?

7 A. 4 Frances Street, Hancock, Virginia.

8 Q. What is your occupation?

9 A. I work for Verizon. I was just recently
10 promoted to local manager construction.

11 Q. And how long have you worked for
12 Verizon?

13 A. Since January 1979.

14 Q. And what is your education?

15 A. High school diploma. Completed one year
16 of college.

17 Q. If you will, please, starting from the
18 beginning, give us your experience, training, and
19 education in the field of fire fighting and emergency
20 services, including emergency medical treatment.

21 A. Okay. I basically grew up around in the
22 Hancock volunteer fire station. My grandfather was
23 involved. My father was a life member. I am a life
24 member of the Hancock Fire Department.

25 I joined officially at eighteen years

1 old in 1971. I progressed through the years with a
2 considerable amount of training through the Commonwealth
3 of Virginia Department of Fire Programs, trained at the
4 University of Maryland.

5 Continued my training through the years
6 in the fire side to officer level one, and fire instructor
7 level two through the Department of Fire Programs of the
8 Commonwealth of Virginia.

9 And on the medical service side, I
10 started out back in the days of first aid, went to
11 emergency medical technician, shock trauma technician,
12 which is the first level of advanced life support, and was
13 also an EMT lay instructor.

14 Q. Have you ever served as a professional
15 fire fighter?

16 A. Yes, sir, I have. I had two different
17 occasions that I did that back in the early '70s. I was a
18 contract fire fighter for Continental Service Company
19 providing fire rescue, emergency services at NASA Wallops
20 Island, and I was also the first paid EMT fire fighter for
21 Accomac County when they started their program back in the
22 late '70s, and worked for them until I went to work for --
23 I was at C & P Telephone in January of 1979.

24 Q. Have you ever served as a fire chief?

25 A. Yes, sir, I have. I have experience as

1 chief of the Hancock Volunteer Fire Department for a total
2 of -- non-consecutive years for a total of about eight
3 years during my twenty-seven years active service.

4 Q. As a fire chief, what are the duties of
5 a fire chief as opposed to the president of a fire
6 company?

7 A. In our particular organization, the
8 chief was responsible for the operations and of the
9 department, that's readying the personnel, apparatus,
10 building, everything pertaining and providing the fire and
11 emergency medical services, responding to calls, dealing
12 with the public, seeing that the fire fighters are
13 trained, continually taking training, seeing that
14 apparatus and are in a ready status, and keeping records
15 on all of that, plus writing specifications to order, and
16 replace both fire and fire apparatus, and ambulances
17 through the years.

18 Q. Within your own company in Hancock, how
19 many vehicles would have been under your supervision?

20 A. As many as seven. The fleet grew as
21 time went by.

22 Q. Now, is the field of fire protection and
23 emergency services on the Eastern Shore of Virginia
24 including Northampton County performed by volunteers, or
25 performed by paid personnel?

1 A. It is a volunteer-based program in both
2 counties.

3 Q. What did duties does a chief place in a
4 response?

5 A. The chief is basically the incident
6 commander. He will prepare for that incident from the
7 time he or she hears the first alarm, as far as thinking
8 where it is, what it is, time of day, day of week,
9 availability of personnel, responding volunteers, any
10 hazards, anything that might be involved in dealing with
11 the initial strategy and tactics of dealing with that
12 particular incident.

13 Q. In a normal structure fire, how many
14 companies will be called, by the way?

15 A. On the Eastern Shore, and the whole
16 Eastern Shore both Accomac and Northampton County work
17 through the Eastern Shore 911 Commission, which the
18 dispatch center is in Accomac County, but both counties
19 work from that dispatch center, and the guidelines are any
20 reported structure fire, the three nearest companies.

21 Q. And who will be the on-scene commander?

22 A. In most cases, it's the first arriving
23 engine company officer. Now, as the incident escalates,
24 it could go to a higher ranking officer. Most of the time
25 in a volunteer ranks, you get a chief from one of the

1 departments.

2 Q. Mr. James, can you give the Court some
3 idea of the number of fires that you have been the on-site
4 commander.

5 A. I'm going to put it probably one to two
6 hundred over the years that I have been involved, because,
7 like I say, you don't have to be a chief to be an incident
8 commander, so the one with the most training, the highest
9 training, because I had other ranks as I came through the
10 years before I reached chief, and that's normal and
11 customary in your volunteer service.

12 Q. And I believe you've indicated that
13 you've been at this some twenty-seven years?

14 A. Yes, sir, roughly twenty-seven years
15 before I gave up my active status.

16 Q. You are an emergency medical personnel
17 qualified, also?

18 A. I was. Since I have stopped actively
19 running, some of my medical certifications has run out.
20 My fire certification has remained because of the way that
21 it is structured.

22 Q. Are you a certified fire instructor?

23 A. Yes, sir.

24 Q. Have you had training insofar as the
25 operation of the vehicles?

1 A. Yes, sir. The training is set up, and
2 it kind of mirrors the National Fire Academy. The State
3 of Virginia follows their guidelines with your fire
4 fighters level one, level two, and the officer programs.

5 They also have a program called driver
6 pump operator, which I have successfully completed that
7 course, and I have also taken part in helping instruct
8 that course.

9 Q. Have you had courses from the National
10 Fire Academy?

11 A. Yes, sir. Like I said, they kind of set
12 the guidelines that at state can mirror, but I also
13 attended the National Fire Academy sponsored volunteer
14 fire and rescue management course.

15 Q. You are a lifetime member, I believe, of
16 the Hancock Volunteer Fire Company?

17 A. Yes, sir.

18 Q. In your emergency medical and response
19 background, is that controlled basically by the chief of
20 the company?

21 A. In most companies, yes. There are some
22 departments where fire and emergency medical services are
23 divided within the organization, and in the Hancock
24 organization, the chief was the chief operational officer
25 of both fire and emergency medical services.

1 Q. Is there a bi-county association on the
2 Eastern Shore in fire companies?

3 A. Yes. There is an Accomac Northampton
4 Firemen's Association which the departments, both fire and
5 rescue squads participate in, both Accomac and Northampton
6 County.

7 Q. Is there an organization of state fire
8 chiefs?

9 A. Yes.

10 Q. Are you a member of that organization?

11 A. Yes, sir, I was. I didn't keep it
12 current in the last couple of years.

13 Q. Are you familiar with the operation of
14 companies on the Eastern Shore including Northampton
15 County?

16 A. Yes, sir.

17 MR. POULSON: Judge, we'd ask that
18 Mr. James be recognized as an expert in the field of fire
19 protection and emergency medical responses.

20 THE COURT: Any questions?

21 MR. MCFARLAND: No questions, Your
22 Honor.

23 BY MR. POULSON:

24 Q. Mr. James, if you will, please, I want
25 you to give the Court a quick overview, and just assume a

1 factual situation of a fire in, let's say, Northampton
2 County down in one of these necks on Bayside at
3 approximately five o'clock on a Friday afternoon.

4 What happens?

5 A. Basically, someone would call 911
6 center, and report a fire. At that particular time, the
7 information is taken, the computerized dispatch system
8 will tell the dispatcher where the nearest company is for
9 that particular incident, and they will dispatch those
10 departments by both pager and some house sirens. Some
11 departments use house sirens, and some don't, but a large
12 majority of alert is by pager.

13 Upon hearing the alarm, the volunteers
14 that are near their stations will respond to the station
15 to don their protective gear, man the apparatus and
16 respond.

17 Again, on the Eastern Shore where we
18 have a volunteer-based system with --in Accomac County you
19 do have some career fire fighters. In Northampton County
20 they have the emergency medical service personnel on
21 staff.

22 They start to respond to the area in
23 their own personal vehicles, those that aren't close
24 enough to the station to make it in a timely manner to
25 ride the apparatus, and they keep their protective

1 clothing with them in their personal vehicle, and they
2 will respond to the scene also.

3 So there's kind of a progression of both
4 personnel vehicles, public emergency apparatus responding
5 to the area in question.

6 Q. Do police authorities get involved?

7 A. Yes, sir, police in many cases if
8 officers are nearby they will respond both as a courtesy,
9 and in some areas it requested that the police officers
10 respond with the fire and emergency medical services
11 people.

12 Q. What do you normally do as far as water
13 supply?

14 A. Water supply is one of the big
15 challenges in a rural setting. We tank water with
16 tankers. The engines carry a small amount of water, and
17 the rest of the water comes by tanker.

18 Q. And, if I might ask, what are the
19 emotions during such a response?

20 A. Well, they will run considerably high
21 for several reasons. Number one, different areas the
22 frequency of the number of responses vary. You know, the
23 more you respond, the more it's kind of second nature.

24 If you've been a month or so and haven't
25 run a fire, and the pager goes off, and especially if

1 you've got the glow in the ski, the Adrenalin is pumping.

2 Q. Are you familiar with the location of
3 Shooting Point, the proposed subdivision?

4 A. Yes, sir.

5 Q. And are familiar with State Route 622
6 leading down to the entrance on the easement road in the
7 Shooting Point?

8 A. Yes, sir.

9 Q. And what is the location generally?

10 A. It's in the Church Neck area of
11 Northampton County.

12 Q. Is it served by an easement road?

13 A. Yes, sir. An easement comes off of
14 State Route 622. It's roughly three-tenths of a mile,
15 fifteen-foot easement with three ninety-degree turns which
16 are blind turns.

17 Q. And what is on the left side as you go
18 to the north on the easement?

19 A. Farm land.

20 Q. And on what would be the east side?

21 A. That's woods land currently.

22 Q. Are you aware that there are other uses
23 by the Wescoats themselves of this fifteen-foot roadway?

24 A. It's my understanding there is a tenant
25 farmer that tends the property, the farm land that I

1 observed there.

2 Q. Okay. Now, Mr. James, I am going to ask
3 you to assume certain things, if I may, please.

4 Assume that there are either eighteen or
5 nineteen lots of single-family residences in this
6 subdivision. Assume, if you will, please, that the houses
7 are required to have at least 2000 square feet of heated
8 spaces exclusive of porches and other areas that would not
9 be heated.

10 Assume that the track is some hundred
11 and seventy to a hundred and eighty acres of open area.
12 Assume that farming is permitted on lot seventeen of
13 approximately a fifty-acre track.

14 I'm going to ask you to assume at point
15 some variables; for example, that the lots may be nineteen
16 instead of eighteen. I'm going to ask you to assume at
17 some point that one lot instead of a house, a
18 single-family residence, there's a four-bedroom bed and
19 breakfast, or alternatively, a ten-bedroom country inn,
20 all for transients.

21 I'm going to ask you to assume at some
22 point that there's guest cottages on each of the eighteen
23 lots. Assume that home occupations are permitted. Assume
24 there is a dry hydrant and a pond on the premises.

25 I'm going to ask you to assume insofar

1 as the traffic on the roadway from the subdivision that
2 the traffic will be motorized vehicles, non-motorized
3 vehicles, cars, and trucks, and that it will vary with the
4 number of houses built at any point in time, and the uses
5 made by the residence of those houses.

6 That the recreational use of the
7 subdivision will depend on whatever uses the owners make.
8 That insofar as the farming parcel on the subdivision, the
9 fifty acres use will vary with whatever crops happen to be
10 planted and the time of the season.

11 Now, let me start at that point: In the
12 event of a structure fire on Shooting Point, is there any
13 protocol or procedure in place for the number of companies
14 that would respond?

15 A. Yes, sir.

16 Q. And which companies would that be?

17 A. On a basic structure, reported structure
18 fire, that would be Nassawatux, Exmoor, and Eastville.

19 Q. Now, fire engines. We all know they
20 cost a lot of money; is that correct?

21 A. Yes, sir.

22 Q. What dictates the size of a fire engine,
23 sir?

24 A. The National Fire Protection Association
25 standards in the 1900 series, 1901 which is basically for

1 pumpers, basically says what the apparatus must do, and
2 that basically dictates the size.

3 For an example, a fire apparatus now
4 have large enclosed cabs with four doors totally enclosed.
5 A lot of them are air-conditioned, and set up that way to
6 accommodate the fire fighter, both and temperatures, and
7 they must have a seat, that they can totally be secured in
8 and safety belt, and their breathing apparatus that they
9 must don right in the seat.

10 The requirements are basically
11 predicated the size into today's standards.

12 Q. Not because you guys like big fire
13 engines, right?

14 A. No, sir.

15 Q. Now, if we may, please, take for example
16 the Nassawatux engines, which is one of the first response
17 companies. What is the width and length of that engine?

18 A. The length of Nassawatux engine is
19 thirty-three feet six inches overall.

20 Q. And it's width?

21 A. It's width for the truck itself is eight
22 feet six inches, and with the mirrors in the normal
23 position as they drive down the road would be ten feet two
24 inches.

25 Q. Are the mirrors standard equipment on

1 this truck?

2 A. Yes, sir.

3 Q. The overhangs?

4 A. Eight feet on the front end, and nine
5 feet over the rear end.

6 Q. And what would this truck weigh in at?

7 A. Over forty thousand pounds.

8 Q. The Eastville tanker, the length of that
9 vehicle?

10 A. Thirty-one feet eight inches.

11 Q. And its width with and without the
12 mirrors?

13 A. With the mirrors, it's nine feet one
14 inch. The basic truck itself, the body is eight feet
15 three inches.

16 Q. And the weight of that particular truck?

17 A. That truck is over fifty thousand
18 pounds.

19 Q. How does the Exmoor equipment compare to
20 the two engines that you have measured and described?

21 A. Comparable. Exmoor's engine is very
22 similar in size and shape as the Nassawatux one. Exmoor's
23 tanker is a little smaller than Eastville.

24 Q. In the event of a structure fire, what
25 are the odds of getting a second alarm and additional

1 companies responding?

2 A. It's very likely for a lot of reasons.

3 Q. And who would be the fourth company to
4 respond?

5 A. Cheriton.

6 Q. And what kind of tanker does Cheriton
7 have?

8 A. Cheriton has an R series mack,
9 five-thousand-gallon tractor, drawn trailer.

10 Q. And what is the length of that rig?

11 A. That truck is forty feet nine inches.

12 Q. And in your professional career, have
13 you driven a tractor-trailer tanker unit?

14 A. Yes, I did, when I was at NASA Wallops.
15 WE had a five thousand gallon runway foamer that was also
16 used as a mutual aid off the base.

17 Q. Would this particular tractor-trailer be
18 able to negotiate into Shooting Point?

19 MR. MCFARLAND: I'm sorry. Which one?

20 MR. POULSON: The tractor-trailer.

21 MR. MCFARLAND: Which tractor-trailer?
22 The one that he drove back in the early '70s when he was
23 at Nassawatux, or the one that Cheriton's got? It's a
24 huge difference, Your Honor.

25 MR. POULSON: The Cheriton.

1 MR. MCFARLAND: There's got to be a
2 foundation in order for him to drive the Cheriton one.
3 And maybe it's there, but it hasn't been laid yet.

4 THE COURT: Overruled. Go ahead.

5 THE WITNESS: In my opinion, due to the
6 length and the overhang, the Cheriton truck probably would
7 not go in Shooting Point.

8 BY MR. POULSON:

9 Q. How about ambulance sizes, Mr. James?
10 How wide are they these days?

11 A. They are within several inches of eight
12 feet depending on the manufacturer, because an ambulance
13 is pretty much a custom piece of apparatus, and depending
14 on the different department's needs with the way they want
15 the patient compartment, or storage on the body, the
16 manufacturer will build to spec.

17 But an average ambulance is roughly, the
18 body itself, right around eight feet.

19 Q. Okay. Now, can a Nassawatux and
20 Eastville trucks traverse a foot-fifteen road in Shooting
21 Point?

22 A. Yes, sir.

23 Q. On April 29th, did you have occasion to
24 observe Shooting Point and the fifteen-foot easement
25 across Mr. Wescoat's property running from 622?

1 A. Yes, sir, I did.

2 Q. And at that time, did you secure any
3 fire department vehicles to observe on that easement?

4 A. Yes, sir. We had Nassawatux, engine
5 164, and Eastville's tanker 177.

6 Q. And who was operating those vehicles?

7 A. Chief Jim LeKata was operating
8 Nassawatux engine, and Tim Ballast was operating
9 Eastville's tanker.

10 Q. From your observation and knowledge, are
11 these experienced drivers?

12 A. Yes, sir, they are.

13 Q. And that portion was videoed?

14 A. Yes, sir, it was.

15 MR. POULSON: Mr. Robins, if you would
16 show that to Mr. James.

17 BY MR. POULSON:

18 Q. I would like for you TO briefly narrate
19 what is shown in the video, please.

20 (Videotape was played.)

21 BY MR. POULSON:

22 Q. What is taking place here?

23 A. Basically, that was the Eastville tanker
24 entering the road with a Ford Expedition coming out of the
25 road, and visually looking at the wooden stakes which are

1 beside the surveyor posts basically showing that the
2 fifteen-foot easement would not accommodate two-way
3 traffic of a piece of fire apparatus, and a personal
4 vehicle.

5 That mirrors and the width of the bodies
6 totally take up the whole fifteen feet.

7 You can see there, the left front fender
8 of that side of the Eastville tanker is beyond the left
9 side of the driver side of the Ford Expedition, and you
10 can see if you line up the wooden stakes, as you pass back
11 to the right, you see the mirror of the Expedition still
12 past the wooden stakes.

13 Okay. Basically, what we asked of the
14 two drivers of the piece of apparatus was not to be
15 cowboys, but basically come into the road as they normally
16 would under normal circumstances.

17 This is the Eastville tanker coming in.

18 Q. What do you mean "normal circumstances"?

19 A. What's normal and prudent for the
20 conditions of the driver to operate the apparatus.

21 Q. During a response?

22 A. During a response. Now, for this we
23 didn't have lights and sirens on, but he's basically
24 coming in as he feels comfortable with coming up the
25 length, coming up the easement.

1 You can see he's approaching the first
2 ninety-degree turn, and he almost came to a complete stop.
3 He did a mirror check, and as he got through the turn, you
4 see at that point once he saw it was clear, the driver is
5 doing this on his own. Nobody is bothering him, or
6 talking to him, or asking him anything. He's looking and
7 checking to see how close he is to the wooden stakes.
8 Once he gets past this turn, you can see him accelerate.

9 Now he's approaching the other
10 ninety-degree turn. It's not a blind turn. Same thing.
11 The driver is using due caution there, negotiating the
12 turn, during the mirror checks. And once he gets through
13 this, you will see him accelerate again, try to get back
14 up to the best speed he can use for the type of road he is
15 on.

16 Again, as he approaches the
17 ninety-degree turn to the right, basically the same
18 maneuver. Just about to a standstill. Doing his mirror
19 check. And he's heading on to the end. This is just a
20 picture of a return trip coming out.

21 Up closely and in the video beside the
22 wooden stakes, you can see the surveyor's marks outside
23 the wooden stakes.

24 Q. Did you check the width of that parcel
25 for yourself?

1 A. Yes, sir, I did, and they're exactly
2 fifteen feet.

3 Q. Is this a mack?

4 A. Yes, sir.

5 Q. Does Hancock have a mack?

6 A. Yes, sir.

7 Q. Is there any particular problem with
8 this kind of mack cab insofar as its maneuverability?

9 A. I'm afraid there is. They make
10 excellent fire apparatuses, but they have a characteristic
11 on R series that they do not turn as sharp to the right as
12 they do to the left. That's the way the truck is
13 manufactured.

14 When Hancock bought theirs, we thought
15 it was a problem, and the chief engineer that we had at
16 the time talked with the people from Mack, and they said
17 that was characteristic of that particular truck.

18 MR. MCFARLAND: But that's not a Hancock
19 which you're showing? Which one is this? Which
20 jurisdiction?

21 THE WITNESS: Excuse me? That's
22 Eastville.

23 This is engine 164 Nassawatux engine.
24 The engine is a little more maneuverable than the tanker.
25 He's coming in at a fairly good gait, and he gets down to

1 the first turn, and he is doing the mirror checks.

2 Now he's accelerating again, going
3 toward the next turn, and he has decelerated a tremendous
4 amount, doing his mirror checks, looking at the wooden
5 posts, basically handling the apparatus the same way the
6 driver did of the Eastville tanker, accelerating in the
7 straight stretches, and slowing down to almost a stop on
8 the ninety-degree turns, because of the width and the
9 blind turns.

10 This is basically the -- you should see
11 coming up basically the return trip of engine 164 from
12 Nassawatux coming back out of the easement.

13 Q. At that point the truck is stopped for
14 still photographs?

15 A. Yes, sir, that's what they were doing
16 there.

17 Q. Okay. You can be seated.

18 Now, Mr. James, if you please, do you
19 have a professional opinion --

20 MR. MCFARLAND: Your Honor, before we
21 ask the hypothetical question, I would move to strike all
22 of the testimony that has to do with the depiction of the
23 fire trucks going down the easement, and to the extent
24 that that's being offered as an exhibit, it's absolutely
25 irrelevant to the issues in this case.

1 This case is not about whether a fire
2 truck can traverse the easement, or how difficult it is
3 for a fire truck to traverse the easement, because this
4 case is not about whether the easement is safe for the
5 Shooting Point subdivision, which is the only purpose of
6 showing that video and the testimony about it.

7 THE COURT: We'll take it up in a
8 minute. Go ahead and finish your question.

9 BY MR. POULSON:

10 Q. Mr. James, do you have a professional
11 opinion, sir, based on your education, training, and
12 experience that you detailed to the Court as to whether --
13 and I will put it two ways -- that this fifteen-foot road
14 or easement is sufficient to sustain the burden of
15 providing timely and effective fire protection to Shooting
16 Point, or conversely stated another way, utilizing the
17 fifteen-foot easement can timely and efficient fire
18 protection and emergency medical services be provided to
19 the inhabitants of Shooting Point subdivision?

20 MR. MCFARLAND: I'm going to object,
21 Your Honor.

22 THE COURT: Let him answer it.

23 THE WITNESS: In my opinion, it's very
24 difficult to do that because of the width of the easement,
25 the potential of meeting oncoming traffic as they try to

1 enter or exit the fifteen-foot easement.

2 Q. And let me stop you there for a minute.

3 As to fires, do you get curiosity seekers?

4 A. Yes, sir.

5 Q. Do you get concerned people?

6 A. Absolutely.

7 Q. What kind of role do they play?

8 A. In many cases they just get in the way
9 and block the roads, whether it's an easement like we're
10 talk about at Shooting Point, or two-, or four-lane
11 highway.

12 Q. Okay. Continue on, please.

13 A. But basically due to the width of the
14 easement, and the width and the size of the emergency
15 apparatus, in my opinion it looks very difficult for
16 two-way traffic to occur, period, whether it's an
17 emergency apparatus, or certain size vehicles, with the
18 size of the vehicles today.

19 But definitely on the emergency
20 apparatus or fire apparatus and ambulances, it's obvious
21 that there will not be a two-way passing over a
22 fifteen-foot easement. It will be very difficult to
23 provide a safe -- and you have to think of the safety of
24 responding personnel also meeting someone on one of those
25 blind turns in the middle of the night, bad weather, rain,

1 things of that nature all add to concerns of access in
2 there.

3 Q. How about the size of the structures?
4 What role, if any, does that play, the planted structures?

5 A. The fire load is based on the size of
6 the structure. And I'm going to use the term up-scale
7 development. You're talking two thousand square feet
8 minimum. In the heated space or living space, you're
9 talking about a considerable fire load due to the size of
10 the structure, and a high dollar value also.

11 Q. And do these, as you refer, up-scale
12 homes, do they present any unique problems insofar as
13 controlling a fire?

14 A. Yes, sir. Anytime the structure gets
15 larger, and you get a lot of architectural features, you
16 know, you take a house and it has wings, or high ceilings,
17 cathedral ceilings, high-pitch roofs, dormers, and all of
18 the things when you look into the architecture that goes
19 into an up-scale dwelling, it's a lot different than your
20 basic ranch-type home, or even some of your basic salt-box
21 two-story farmhouses. It's considerably different.

22 Q. In an area this far away from the
23 firehouses, what role does that play? What kind of fire
24 do you have when you get there normally?

25 A. You would have a considerable amount of

1 involvement, a high percentage of the structure due to,
2 you know, all of the factors when you consider.

3 Q. Does that present any problems?

4 A. Yes, sir, it does. The first thing,
5 your main concern, of course, is search and rescue. Your
6 life hazard is your first concern.

7 Then you've got to deal with the amount
8 of the fire that you have and hope that it doesn't spread
9 to any adjoining structures on that lot, or any adjoining
10 structures period.

11 Q. How about your water supply?

12 A. Water supply in a rural area, as I
13 stated earlier, is basically done by tanker. Bringing
14 water with you, or you tank it from another source.

15 Q. And how do you get water?

16 A. Many different ways. You fill a tanker
17 in a municipal water system such as going back to the
18 nearest town that has a water system. You can go to a
19 pond. You can go to a creek. Anywhere there's an
20 adequate water supply that you can use a pumper, and draft
21 water, and fill the tanker out in rural area.

22 Q. Where are the water supplies for that
23 area of the Northampton County?

24 A. In that particular area, there is a pond
25 at the Kellam farm that has a dry hydrant, and that's on

1 the way in to Church Neck. That would be one of the water
2 supplies for that area.

3 Q. What is a tanker shuttle?

4 A. A tanker shuttle is one scenario used in
5 a fire service where the gallons flow on a fire is equal
6 to the number of tankers and how much water they can bring
7 you.

8 It's not like a static deal where
9 everything sits there and just pumps their water. You can
10 increase your fire flow by these tankers movement. That's
11 what increases your efficiency.

12 So you have one, more fill sites where
13 you fill tankers, and the tankers go to the fire scene,
14 and either dump in a portable tank, leave their water, and
15 go back to a fill site, or they can pump into a nurse
16 tanker, which is not quite as efficient, but it still
17 works, because the key to rural water supplies is the
18 tankers moving.

19 Q. Would it be necessary for these tankers
20 to be traversing back and forth to Shooting Point Road in
21 order to get sufficient water to a scene?

22 A. Yes, sir.

23 Q. Now, there has been some discussions or
24 some proposal in the last week or two to put a dry hydrant
25 at Shooting Point. Are you aware of that?

1 A. Yes, sir.

2 Q. And tell us what affect, if any, would
3 that have on the overall situation, specifically whether
4 it would solve the problems with tankers having to go back
5 and forth over the road.

6 A. Any water supply closer to any area of
7 course is an asset, but it's not the cure-all. Several
8 reasons. One, with a dry pipe in any development most
9 pumpers are required by the NAPA standards to carry a
10 minimum of a thousand feet of supply hose.

11 so with a dry pipe, you have to have an
12 engine drafting from the dry pipe at the water supply, and
13 then have you to have at least one engine attack and fire.
14 So in that scenario, you have two engines with of a
15 thousand feet of hose on the ground, if it's within a
16 thousand feet.

17 If it's not within a thousand feet, then
18 you're back to the rural water supply concept where you
19 are filling your tankers at the water supply, or dry
20 hydrant, or at a pond, and they are still traveling and
21 dumping at the fire scene.

22 Now, the larger the fire, the elements
23 involved in your fire flow on the fire is based on the
24 amount of water that you can get which is based on the
25 number of tankers in the shuttle, and the number of fill

1 sites that you're using.

2 Q. Have you personally participated,
3 organized and run studies as to rural water shuttles?

4 A. Yes, sir, I've done them in training
5 evolutions. I have taken the classes. I have
6 participated in teaching the classes, and we have used it
7 in actual fire situations.

8 Q. And how many gallons per minute are you
9 supposed to be able to put on a fire?

10 A. The fire protection handbook calls an
11 adequate fire flow, or reference of an adequate fire flow
12 about a thousand gallons a minute.

13 Q. And what is the most you've been able to
14 sustain as far as gallons per minute from a single source
15 water supply?

16 A. Six to seven hundred a gallons a minute
17 has been my experience of both in training and in an
18 actual fire scene.

19 Q. So what do you do to get up to a
20 thousand or more?

21 A. You locate and set up additional fill
22 sites, and then get additional tankers to transport the
23 water.

24 Q. And on a structure fire, how many
25 tankers will you all have running at one time?

1 A. In a rural area like the Eastern Shore,
2 a high percentage of the fire departments have both
3 engines and tankers, so in a three-company alert, you
4 would probably get three pumpers and three tankers, if
5 manpower would allow that type of response.

6 Q. What affect, if any, does it have that
7 some of this land will be open with perhaps crops, and
8 brush, and bushes, and things of that nature?

9 A. Well, any of that is an additional fuel.
10 In the event of a large structure fire, the branch can
11 drop into the standing crops, dry timber, dry grass. It
12 would just allow for additional fire spreading and
13 response.

14 Q. You've indicated that you are aware that
15 this road is not exclusively just for Shooting Point?

16 A. Yes, sir.

17 Q. What affect, if any, would it have on
18 others as to the use of the roadway; for example,
19 Mr. Wescoat's tenant farmer doing any kind of response?

20 MR. MCFARLAND: I'm going to object,
21 Your Honor. I thought he was here in a fire capacity.
22 I'm not -- this question to this witness --

23 THE COURT: Where are you going?

24 MR. POULSON: I'm just showing that
25 basically a tenant farmer would not be able to get on the

1 road with all of this fire equipment going back and forth
2 with the volunteers responding with the tankers having to
3 go back and load.

4 THE COURT: Well, I mean, I don't know
5 that he's in a better position to know that than anybody
6 else.

7 MR. MCFARLAND: I certainly wouldn't
8 think Mr. Jones would want to interfere with the fighting
9 of a fire.

10 MR. POULSON: It's not a question of
11 interfering. He may be coming out.

12 THE COURT: Sustain the objection.

13 BY MR. POULSON:

14 Q. Can any vehicles pass if a fire truck is
15 utilizing the road?

16 A. Not based on what I observed on my visit
17 at Shooting Point.

18 Q. Now, it's been suggested at least in
19 depositions that the fire truck could simply pull into the
20 field. Do you have any comments on that?

21 A. Well, in extreme if you do basically
22 whatever is safe and prudent. Moving this apparatus
23 between forty and fifty thousand pounds, and looking at
24 the height of the tankers, and the weight shifting, trying
25 to drive one of those, and you've got all types of other

1 variables, weather conditions, time of day, daylight,
2 night, that type of thing, getting one of these vehicles
3 off the road and getting stuck is going to -- and plus the
4 possibility of it rolling over and shift weight, and
5 change in elevations, probably would just make the
6 situation extremely worse.

7 I think if something came up, I think
8 that from what I observed there, and if I was an instant
9 commander, or something, I would probably have the
10 apparatus back out to clear the way for whatever had to,
11 you know -- especially if it's two pieces of fire
12 apparatuses, one coming in, and one leaving to go get
13 water, we would have to have one of them back out.

14 Q. How would that work with a three-tenths
15 of a mile long roadway?

16 A. It would be extremely difficult, and
17 cost a considerable amount of time because, again, safety
18 standards insist that you have a backup also, or look at
19 it so someone would have to watch that tanker back up as
20 you back.

21 Q. Does preplanning correct the situation?

22 A. It doesn't correct. Preplanning always
23 is a help, but it's not the fix-all. It certainly, from
24 my perspective as a fire officer, anytime -- and whether
25 you're talking about a development like Shooting Point, or

1 a shopping center, or anything, certainly being familiar
2 with it before the time of an emergency is a help, but
3 it's not the fix-all.

4 Q. These drivers on these two trucks that
5 were shown in the video, were they shown the easement and
6 the course of the easement before they drove it?

7 A. Yes, sir, they were.

8 Q. Now, let me add in some variables
9 insofar as how it may affect your answer.

10 Assume there are guest cottages on each
11 parcel of the eighteen parcels, not for rental to
12 outsiders, but just for use on the domestics and people of
13 that nature on the property?

14 A. It just increases the fire load and the
15 life hazard. Like I say, first priority in fire service
16 is search and rescue.

17 Q. And the situation with a four-bedroom --

18 MR. MCFARLAND: I just want to note my
19 objection. It's irrelevant.

20 THE COURT: Overruled. Go ahead.

21 BY MR. POULSON:

22 Q. A four-bedroom bed and breakfast?

23 A. That adds to the circumstances with,
24 again, you've got transient people, you've got to do a
25 search, you have to have head count, and that can be very

1 dynamic, people visiting the area, traveling in and out,
2 socializing, you don't know any hour of the day or night,
3 you know, how many people are in that.

4 So, again, your fire suppression efforts
5 are somewhat delayed because search and rescue is your
6 first priority. So you've to do a thorough search, make
7 sure everybody is accounted for, everybody is out, and you
8 go into your suppression mode which again you're looking
9 at more fire load with larger buildings.

10 Q. And I assume your answer would likewise
11 be the same with a ten-bedroom country inn?

12 A. Yes, sir. In any institutional type
13 situation when the alarm went in the computer, the
14 dispatch system should recognize that as an institution,
15 and send additional companies on the first alarm so you
16 have additional apparatus and hopefully additional
17 manpower responding.

18 MR. MCFARLAND: For the record, Your
19 Honor, I would move to strike. There is absolutely no
20 evidence -- Ms. Benson has testified the zoning would have
21 to be changed for there to be a country inn or a B & B
22 back there.

23 This is pure speculation. This is not
24 relevant to the situation before this Court at this time.

25 THE COURT: I'll take it into

1 consideration. Go ahead.

2 MR. POULSON: All right. Answer
3 counsel, please.

4

5 CROSS-EXAMINATION

6 BY MR. MCFARLAND:

7 Q. Good afternoon, Mr. James.

8 THE COURT: Do you make your motion to
9 strike his?

10 MR. MCFARLAND: Yes, I do move to strike
11 his testimony entirely, Your Honor. It's irrelevant to
12 the issues before this Court.

13 THE COURT: Mr. Poulson, I assume that
14 he's going to tell me the argument is that the only issue
15 before this Court is to whether or not the use of the
16 easement by the dominant estate are best to servient
17 estate to the extent it ought not be allowed, and I
18 shouldn't concern myself if there's a fire back there or
19 not.

20 MR. POULSON: Well, what I would say,
21 Judge, and if I may, please, a look quickly at Cushman,
22 and also even move to Hayes versus Aqua Marina, and I will
23 read quickly to the Court.

24 When a right-of-way is granted over
25 land, the servient estate for the benefit of other land

1 the dominant estate, or the instrument creating the
2 easement does not limit the use to be made thereof.

3 It may be used for any purpose for which
4 the dominant estate may then or in the future reasonably
5 be devoted. This rule is subject to the qualification
6 that no use may be made of the right-of-way different from
7 that established at the time of its creation which imposes
8 an additional burden upon the servient estate.

9 Now, that same rule was repeated in
10 Hayes versus Aqua Marina, except with the corollary there
11 that they note was established in that case that you may
12 have to same use, but it may increase to a degree that it
13 becomes a burden.

14 And our point here, sir, is the first
15 issue that you have to look at is whether it's a
16 reasonable use of the dominant estate, and what we would
17 say to the Court here, this is a burden that the
18 respondents basically have to prove, and our point here is
19 we are not dealing with a subdivision with a fifty-foot
20 road.

21 The point here to be made is that this
22 is not a reasonable use of the Shooting Point track giving
23 that it is served by a fifteen-foot easement that has
24 three ninety-degree turns, and two of which are blind.

25 THE COURT: Don't you have to take those

1 things together? In other words, in determining a
2 reasonable use so as not to overburden the subservient
3 estate. I can't just sit up here and say whether or not I
4 think it's a reasonable use, period, can I?

5 MR. POULSON: No, I don't think you can.
6 I think you have to look at the facts, which is what we're
7 trying to say to the Court. You know, you can't take
8 every piece of land and say, Hey, it can be used for a
9 manufacturing site, it can be used for a subdivision.

10 You have to look at the facts, and
11 that's what we're trying to show here. Purely here
12 because of the nature of the easement, it cannot be
13 reasonably used as a subdivision.

14 You turn the coin over, and I think it
15 comes down to kind of the same question when you look at
16 it. What's going to be the affect on this fifteen-foot
17 easement of trying to provide among other things fire
18 protection into this subdivision.

19 THE COURT: Well, it's kind of a
20 stretch. I mean, suppose Mr. McFarland says to me,
21 Look -- I'm not suggesting he's going to say this, so
22 don't get me wrong.

23 Just suppose he said, Yes, we are going
24 to have eighteen houses back there, and if every one of
25 them burned to the ground, it wouldn't hurt your client

1 one iota because it wouldn't do anything at all to
2 overburden his property.

3 MR. POULSON: Except to that fact that
4 the law says it has to be a reasonable use, and it goes
5 back to the point again that it is not a reasonable use of
6 the land when people can't even been provided efficient
7 and timely fire fighting and emergency rescue service.

8 THE COURT: Well, you're arguing to me,
9 I think now you're arguing the zoning and not the
10 easement.

11 MR. POULSON: I'm not arguing zoning.
12 The road has nothing to do with the zoning. It comes down
13 to use, and then I don't think it's a much different
14 question when we point out here the tremendous burden that
15 is going to be placed on this easement in the event of
16 emergency or fire fighting services.

17 You know, among the many things that go
18 to a subdivision, not only do you have milk men, and paper
19 men --

20 THE COURT: I understand all of that,
21 but the issue is not the burden of the easement, is it?
22 The issue is the burden to the subservient estate.

23 MR. MCFARLAND: That's correct.

24 MR. POULSON: Exactly.

25 MR. MCFARLAND: That's correct.

1 MR. POULSON: That's the second issue,
2 Your Honor.

3 THE COURT: Theoretically, you could can
4 have a thousand cars a day going in and out of there as
5 long as it didn't bother your client, it wouldn't be a
6 problem, would it? As long as it didn't overburden your
7 client's estate.

8 MR. POULSON: I don't know I would
9 disagree with that. If you had a thousand cars a day
10 going in and out of there, obviously it's going to affect
11 the use of the easement by the Wescoat tenant farmer and
12 Wescoat.

13 THE COURT: Exactly. So the issue now
14 in this case is is the use of the easement going to affect
15 the subservient estate in the use of the easement.

16 MR. POULSON: Which we think is the
17 second question, frankly. I think you've got to get by
18 the first issue first. There's one case, I think a
19 federal case, basically dealt with the easement had been
20 used for agricultural purposes, and then they wanted to
21 start strip mine.

22 And in that case, they said that is not
23 a reasonable use of the land, strip mine with this little
24 over-the-mountain type road that existed in that case,
25 sir.

1 So I think there's two issues that have
2 to be addressed.

3 THE COURT: All right. I think that --
4 I understand your objection, Mr. McFarland, and I think
5 what I'm going to do under the circumstances is to simply
6 say that in the absence of any jury, that I'm going to
7 determine that it goes to the weight to be given to the
8 testimony, and not to the admissibility.

9 And I suppose you could stretch it to
10 some extent to determine that it may have some impact upon
11 the potential to overburden the subservient estate, and I
12 will leave it at that. All right. Go ahead.

13 MR. MCFARLAND: I understand the Court's
14 ruling. If the Court would note our exception.

15 THE COURT: Right.

16 BY MR. MCFARLAND:

17 Q. Mr. James, let me go back, sir. You
18 were contacted in this matter in either February or early
19 March of 2001, sir, for the first time to serve as an
20 expert witness by Mr. Poulson?

21 A. I was initially contacted sometime in
22 February of 20001.

23 Q. Okay. And this videotape that we've
24 seen was made April 29th of 2001, correct, sir?

25 A. Yes, sir.

1 Q. Okay. And that was your first visit to
2 Shooting Point farm?

3 A. Physically there, yes, sir.

4 Q. Okay. And you would agree with me that
5 before you went out to the property and did this
6 experiment, or demonstration with respect to bringing the
7 fire trucks down the easement, you hadn't seen Shooting
8 Point farm, and didn't know its capacity with respect to
9 the traversing of fire trucks down that easement, correct?

10 A. My final opinion was based on after that
11 visit, yes, sir.

12 Q. Right. That's when you went out there?
13 On April 29th, that is when you were able to render your
14 opinions for this matter?

15 A. My final, you know, confirm my opinion.
16 I had what I used the term concern which basically an
17 opinion early on from hearing the information that was
18 being provided about what some of the circumstances were,
19 some of the covenants, and the width of the easement, and
20 that's what led us to asking the fire departments to bring
21 their apparatus down there to physically see it.

22 Q. Okay. But to go back to my question,
23 you needed to go on-site and see the easement, and see the
24 entrance, and put the vehicles on it before you could
25 render your opinion?

1 A. My final opinion, yes, sir.

2 Q. Okay. You're aware that you were
3 designated as an expert witness in this case on --

4 MR. MCFARLAND: For the record, Your
5 Honor --

6 THE COURT: Maybe Mr. Poulson is willing
7 to take a chance. Go ahead.

8 MR. MCFARLAND: February 20th of 2001.

9 MR. POULSON: I tried to timely respond
10 to interrogatories.

11 THE COURT: Go ahead.

12 MR. MCFARLAND: Okay.

13 BY MR. MCFARLAND:

14 Q. Now, Mr. James, if I'm understanding
15 your concern, it's that emergency vehicles responding to
16 the Shooting Point subdivision may have difficulty
17 traversing the easement as other vehicles are attempting
18 to use it, correct? Is that your primary concern?

19 A. Both with or without other vehicles. We
20 saw that on the video. The fire apparatus almost stopped
21 on every turn, which, you know, slows the response.

22 Q. Okay. But when you say stopped by every
23 turn, the only location you know of the easement is what
24 you saw that day on April 29th, 2001, correct, sir?

25 A. Repeat the question, please.

1 Q. Sure. The only location that you know
2 for this fifteen foot right-of-way is what you saw on
3 April the 29th of 2001?

4 A. The only location for the easement from
5 State Route 622 to the Shooting Point property.

6 Q. Was how it was posted -- it was posted
7 when you went out there that day, correct?

8 A. Yes, sir, the surveyor stakes and the
9 wooden fence posts.

10 Q. That's what the location of the easement
11 was that day pursuant to the posts that had been put in
12 the ground, correct?

13 A. Uh-huh.

14 Q. The fire truck had to follow the posts?

15 A. Uh-huh.

16 Q. You don't know what the location of that
17 right-of-way was at the time the easement was granted in
18 1974, do you, Mr. James?

19 A. No, sir.

20 Q. You don't know how that easement was
21 used in December of 1999 before the survey plat was
22 recorded, do you, sir?

23 A. No, sir.

24 Q. And you don't know how the easement was
25 staked out by the Wescoats in January and February of

1 2000, do you, sir?

2 A. How it was staked out?

3 THE COURT: Let's -- can we all agree
4 that he is assuming that the area between the posts that
5 he saw was, in fact, the easement? Is that fair?

6 MR. MCFARLAND: Okay.

7 BY MR. MCFARLAND:

8 Q. So the ninety-degree turns that you kept
9 referencing in your testimony may not be ninety degrees at
10 all; sir, if the easement was staked out differently,
11 correct?

12 A. I guess if you stake it out in any way,
13 but I mean, what I saw was roughly -- I mean, I didn't
14 put a protractor on it, but it basically appeared to very
15 sharp, close to ninety-degree turns.

16 Q. What you saw on that day based on what
17 the posts --

18 THE COURT: We've been through and
19 through that.

20 MR. MCFARLAND: Okay.

21 BY MR. MCFARLAND:

22 Q. Now, in terms of difficulties with other
23 vehicles traveling the easement while the emergency
24 vehicles are -- all your emergency vehicles have radios,
25 don't they, Mr. James?

1 A. Yes, sir.

2 Q. And isn't it standard procedure when
3 emergency vehicles respond to a fire, first off, the
4 sheriff's department is called in, correct?

5 A. In many case. Not a hundred percent,
6 but if officers are available, the police officers
7 respond.

8 Q. And isn't it the purpose of the
9 sheriff's department to monitor traffic to and from the
10 area of the fire?

11 A. Not just the sheriff's department, the
12 state police, town police, depending on the area you're
13 talking about. But it's all based on timing.

14 Q. I understand. But once other
15 authorities arrive, they can monitor the traffic to and
16 from the easement, correct?

17 A. Even the fire department does that.

18 Q. Well, you've anticipated my next
19 question. In fact, your vehicles can monitor through
20 their radio system the ingress and egress out of the
21 easement, correct, during fire fighting?

22 A. Yes, sir.

23 Q. And, in fact, that's what you would
24 expect?

25 A. We communicate while we're working an

1 incident.

2 Q. Sure. And that's what you would expect.
3 Once a vehicle gets on the scene, one of the things that's
4 going to be done is to make sure that other vehicles that
5 are not involved in fighting the fire or responding to the
6 emergency do not go in and out of that right-of-way,
7 correct, sir?

8 A. That would be a goal, yes, but that's
9 not necessarily going to be guaranteed.

10 Q. I don't know about the guarantee, sir,
11 but are you trying to tell me that people generally
12 violate the instructions of the fire department not to go
13 and interfere with fire fighting?

14 A. Yes, sir. I've seen that in the past.

15 Q. Okay.

16 A. I've seen road blocks, I've seen people
17 go through fire lines, drive across fire hoses.

18 Q. In that case, there is a way to set up a
19 check point at the end of the right-of-way and beginning
20 of the right-of-way to prohibit vehicles from going onto
21 the right-of-way?

22 A. In an ideal circumstance with manpower,
23 you build your instant command as elaborate as you want,
24 but sometimes you don't have that luxury.

25 Q. Well, your testimony was that you would

1 expect for a structure fire back at Shooting Point three
2 and maybe four companies to respond, correct, Mr. James?

3 A. Yes, sir.

4 Q. Okay. And that's in addition to local
5 law enforcement and/or state troopers?

6 A. That's not saying how many personnel you
7 would get on that, and it's not going to say you are going
8 to have every piece of apparatus fully staffed.

9 Q. Did you happen to time how long it took
10 the fire engines to traverse the easement?

11 A. No.

12 Q. Okay. You said it was three-tenths of a
13 mile, the easement?

14 A. Yes, sir.

15 Q. That was measured, I take it, by you?

16 A. Yes, sir.

17 Q. You would agree with me --

18 A. In a vehicle I was in. Yes, sir.

19 Q. Okay. You would agree with me that at
20 fifteen miles an hour, it would take a minute and fifteen
21 seconds to traverse that easement?

22 A. I'll have to take you at your word on
23 that.

24 Q. Okay. And so we're clear, obviously the
25 fire engines were able to traverse the easement on April

1 29th, 2001?

2 A. Yes, sir.

3 THE COURT: Is that it?

4 MR. MCFARLAND: No, just a little bit
5 more, Your Honor.

6 BY MR. MCFARLAND:

7 Q. Now, you mentioned about the
8 characteristics of the potential subdivision in Shooting
9 Point. It's true, sir, that as you get into a higher
10 residential subdivision, by higher I mean more extensive
11 residential, the homes are generally better built,
12 correct, sir?

13 A. That's a matter of opinion.

14 Q. Okay.

15 A. The building code is a building code.

16 Q. And you are aware, sir, that this
17 subdivision is required to have lots of five acres or
18 more?

19 A. Yes, sir.

20 Q. Okay. So we don't have the high density
21 that you would see in other subdivisions where the houses
22 are close together, correct?

23 A. Yes, sir.

24 Q. That helps, I take it, with the concerns
25 that you have about containing the fire, about limiting

1 the number of people that might be at risk?

2 A. On the number of sites on that
3 particular plot with guest houses, and garages, and
4 anything other thing that covenants allow.

5 Q. And respect to the area that is not
6 built, what is not houses, that remains fields or
7 whatever, that's what the property has been for years and
8 years, correct, Mr. James?

9 A. Yes, sir.

10 Q. I mean, the risk here is the same risk
11 it's always been for Shooting Point? There has always
12 been a risk when that property was farmed that you might
13 have a fire develop from a piece of equipment that was
14 being used to farm the property, correct?

15 A. Possible.

16 Q. And it would be the same fifteen-foot
17 easement that the fire trucks would have to travel back
18 then to get to the fire started by farming equipment,
19 correct?

20 A. Yes, sir.

21 Q. Okay. And I heard you give all kinds of
22 qualifications with respect to the dry hydrant, but you're
23 now aware that Shooting Point has made provisions for the
24 installation of a dry hydrant on the property, correct?

25 A. Yes, sir.

1 Q. And that certainly helps in the fighting
2 of any fire on that property, correct, sir?

3 A. It helps.

4 Q. What it means is instead of before
5 having to go the next closest dry hydrant, as I understand
6 would be on the Kellam's property?

7 A. Yes, sir.

8 Q. That's a couple miles down Route 622,
9 correct?

10 A. Uh-huh.

11 Q. Okay. Now there would be access to
12 water right on the property for the fire trucks, correct?

13 A. Yes, sir.

14 Q. And you're aware that there is a very
15 large pond on the property?

16 A. I've seen it on the plat. I didn't see
17 it on the property itself. I saw it on the plat.

18 Q. You've just seen it on the plat?

19 A. That's correct.

20 Q. You didn't think it was important in
21 your capacity as an expert witness to check the source of
22 water on the property when you were there on April 29th,
23 2001?

24 A. I didn't got on Shooting Point property.
25 I was just on the easement.

1 Q. Did you happen to ask Mr. Wescoat or his
2 son who were present during this demonstration about the
3 availability of water on the Shooting Point at that time,
4 sir?

5 A. I asked about the creek, and any access
6 to the creek because I knew the branches at Nassawatux
7 creek came up behind it, and it appeared to be accessible.

8 Q. And you would agree with me, sir, that
9 preplanning, that was something that was mentioned at the
10 end of Mr. Poulson's examination, would be very important
11 for a subdivision such as this, so that the fire fighters
12 would know before they had to respond what were the
13 characteristics of the access road, where the homes were
14 located, et cetera?

15 A. Preplanning is very important in your
16 municipal county, or larger departments. It's an integral
17 part of their operation. In a volunteer-based system, it
18 may or may not happen. In a lot of cases, it does not.
19 In many cases, it does not.

20 Q. Now, I guess you've got a concern with
21 the width of the right-of-way here in terms of its
22 capacity to handle emergency vehicles?

23 A. Yes, sir, and then meeting or passing
24 any other vehicles.

25 Q. Right. What is the width of Route 622

1 immediately in front of the easement, Mr. James?

2 A. I did not measure it.

3 Q. You didn't think that was important?

4 A. I knew there were several other people
5 working on other parts of this case. I was asked then to
6 deal with the fire apparatus size, and measurements on
7 that particular easement.

8 MR. MCFARLAND: One moment, if I might,
9 Your Honor.

10 THE COURT: All right. Anything else?

11 MR. POULSON: I have three quick
12 questions.

13 MR. LePAGE: No, Your Honor.

14 MR. MORRIS: No.

15

16 REDIRECT EXAMINATION

17 BY MR. POULSON:

18 Q. Mr. James, fairly quickly. What occurs
19 to the risk factor of fires with the increase in
20 inhabitants and dwellings?

21 A. It increases the fire load. It
22 increases the potential of an incident. If nothing is
23 there other than existing natural environment, there's
24 nothing to burn.

25 Q. Can you-all carry fire trucks down on

1 the creek shore, so to speak, and fill it?

2 A. In certain areas, but it's got to be a
3 good hard bank, or a bulk head area, or boat ramp, or dock
4 that's sturdy enough to get a forty- or fifty-thousand
5 pound piece of equipment on, which has been done.

6 Q. Does the fact of whether it's a large
7 pond, or a small pond have any significance other than the
8 fact you can get a dry fire hydrant, they say, on this
9 pond.

10 A. Like I say, anything -- there's two big
11 challenges in rural fire fighting and that's manpower and
12 water. And anything that will enhance the water is going
13 to be of a benefit.

14 The issue with rural water supply is a
15 little more fill sites, and the more tankers you have the
16 more efficient it is which equates to more gallons per
17 minutes on the fire.

18 In the case of if Shooting Point did not
19 have a dry pipe, they would look at the Kellam pond, and
20 probably back to the water source here in Eastville
21 whereas with a large fire, they would want more than one
22 fill site, whereas in that circumstance you'd have a fill
23 site on the development itself, and the Kellam pond.

24 Q. And that's my question. In your
25 opinion, would you need one site or two fill sites?

1 A. Two file sites on a major fire, if
2 you're going to sustain the type of gallons per minute we
3 were discussing.

4 THE COURT; anything else of Mr. James?

5 MR. MCFARLAND: I realize he has some
6 notes. I would like to see what he brought with him here
7 today, which I notice he referenced during his testimony.

8 THE COURT: Anything exciting in there?

9 MR. MCFARLAND: No. I can't read his
10 writing, Your Honor.

11 THE WITNESS: I have that same problem.

12 THE COURT: We'll take a recess, and you
13 can sit with the him and see if there's anything in there
14 you want to pursue it or not.

15 MR. MCFARLAND: I think if he reads this
16 to me, Your Honor, that will be the end of it.

17 THE COURT: I don't want him to read it
18 to you on the record, is what I'm telling you. He can
19 read it to you off the record.

20 MR. MCFARLAND: I would like to have on
21 the record, Your Honor, what he brought with him.

22 THE COURT: Well, I bet you would, but
23 you can't put that in. They are his notes, and it's a
24 matter of if he's using it to refresh his memory, or not.
25 He can read them to you off the record, and if you think

1 it's any smoking gun, then you can put it in evidence.

2 MR. MCFARLAND: All right, Your Honor.

3 Thank you.

4 THE COURT: Let's take a short recess.

5 (Brief recess.)

6 THE COURT: All right, Mr. Poulson?

7 MR. POULSON: We'd call Mr. Walters,
8 please.

9 THE COURT: Before we get started,
10 Mr. Poulson, let's see what we can do here to -- I assume
11 Mr. Walters has been deposed?

12 MR. MCFARLAND: No, he has not, Your
13 Honor.

14 THE COURT: Are you aware of who
15 Mr. Walters is?

16 MR. MCFARLAND: I am aware of who he is,
17 Your Honor.

18 THE COURT: Is there going to be any
19 question as to his expertise? Not necessarily as to his
20 opinion, but as to his qualifications to testify as an
21 expert surveyor? Any question about that?

22 MR. MCFARLAND: My understanding is
23 Mr. Walters has been a surveyor for a long time, Your
24 Honor, so I think he's --

25 THE COURT: All right. So I take it,

1 then, that the answer is no to the question with regard to
2 his ability to testify as an expert?

3 MR. MCFARLAND: Not on that aspect, Your
4 Honor, there's no objection.

5 THE COURT: Anybody else?

6 MR. MORRIS: No, Your Honor.

7 THE COURT: All right. Mr. Poulson,
8 then, for the benefit of the record, why don't you just go
9 ahead and proffer for the record what information about
10 Mr. Walters that makes him an expert, and then we can
11 launch right into his testimony.

12 MR. POULSON: Thank you, Your Honor.

13 Mr. Walters is one of the two principals
14 in Shore Engineering, Co. Shore Engineering company has
15 operated in the engineering and survey business on the
16 Eastern Shore of Virginia for approximately thirty years,
17 Mr. Walters?

18 THE WITNESS: Yes.

19 MR. POULSON: And Mr. Walters is one of
20 the two principals, along with Mr. Charles Cooley, who is
21 an engineer.

22 Shore Engineering has performed surveys
23 on the Eastern Shore of Virginia literally in the
24 hundreds, if not thousands, by number. Mr. Walters has
25 testified as an expert witness I know in Accomac County.

1 I don't whether he has in Northampton County before or
2 not.

3 THE COURT: Gentlemen, is that
4 satisfactory to you-all?

5 MR. LePAGE: Yes, sir.

6 MR. MORRIS: Yes, sir.

7 MR. MCFARLAND: Yes, Your Honor.

8 THE COURT: All right. Go right ahead,
9 Mr. Poulson.

10
11 GEORGE E. WALTERS, called as a witness
12 by and on behalf of the Plaintiffs, being first duly
13 sworn, testified as follows:

14
15 DIRECT EXAMINATION

16 BY MR. POULSON:

17 Q. Mr. Walters, at the request of John W.
18 Wescoat, did you prepare plats of the roadway leading from
19 622 across the Wescoat parcel to Shooting Point?

20 A. Yes, sir.

21 Q. And I'm going to show you, and I'm going
22 to renumber --

23 MR. POULSON: I'm going to renumber
24 instead of 42 and 43, 41 and 42 now on my exhibit list.
25 This is a revision.

1 MR. MCFARLAND: This is revised as of
2 May 29th?

3 MR. POULSON: Yes.

4 MR. MCFARLAND: I will say, Your Honor,
5 and it doesn't go to Mr. Walters' expertise as a surveyor,
6 but the first time that we ever received these was May
7 29th when it was faxed to me, and all I've got is a faxed
8 copy of two plats of survey, and that are not particularly
9 easy to discern.

10 THE COURT: I've got a survey dated
11 January 19th, 2001, will be Plaintiff's Exhibit 41. And
12 the plat of survey dated February 7th, 2001 being
13 Plaintiff's Exhibit 42.

14 (Plaintiff's Exhibits 41 and 42 were
15 marked for identification.)

16 MR. MORRIS: Your Honor, for the record,
17 are these ones that were revised on May 29th, 2001?

18 THE COURT: I just looked at the primary
19 date on them.

20 MR. MCFARLAND: Yes. It's the January
21 that you've marked as 41, Your Honor?

22 THE COURT: Right. It says revised May
23 29th, 2001. Both of them say revised May 29th, 2001.

24 MR. POULSON: Judge, here is an
25 additional copy for the Court. He's going to be

1 testifying from it. It will be helpful.

2 THE COURT: No, I don't need it.

3 BY MR. POULSON:

4 Q. And are they copies of the survey,
5 Mr. Walters? You've got one of each, Mr. Walters, or just
6 one?

7 A. All three of these are the same.

8 Q. Mr. Walters, in preparing these surveys,
9 what were you intending to do, sir?

10 A. We were attempting -- the first time the
11 right-of-way was surveyed was by Phil Bonifant in 1979.

12 MR. MORRIS: Your Honor, I can't hear
13 him from over here.

14 THE COURT: Speak up, if you could,
15 Mr. Walters. And if you-all still can't hear him, feel
16 free to get up and move over here.

17 All right. Go ahead.

18 THE WITNESS: The right-of-way was first
19 surveyed by Phil Bonifant in 1979, and we were attempting
20 to resurvey what he had.

21 BY MR. POULSON:

22 Q. Okay. And was the Bonifant survey
23 repeated in the subdivision plat of Shooting Point?

24 A. Yes, sir.

25 Q. Okay.

1 MR. MCFARLAND: I'm going to object to
2 that characterization, Your Honor, when he says repeated.
3 The survey plat speaks for itself as to what it does and
4 does not contain.

5 THE COURT: Well, how about included
6 within? Does that make more sense?

7 BY MR. POULSON:

8 Q. Does the Shooting Point survey plat
9 carry courses, and distances, and measuring points
10 identical to the Bonifant survey, sir?

11 A. Yes, sir.

12 Q. From your review in your record search,
13 is that easement description, has that been utilized by
14 Shooting Point, L.L.C. in subsequent deeds and deed of
15 trust?

16 A. Yes, sir.

17 Q. Now, if you will, sir, will you explain
18 the plat, and if you will take the first one which covers
19 the entire course of the easement from 622 back to
20 Shooting Point?

21 A. The plat that we did?

22 Q. Yes.

23 A. All right. We start at the property
24 line between the Wescoat property and Shooting Point. I
25 sent my men down earlier with the Shooting Point plat, and

1 Bonifant's plat. I told them to see what points they
2 could find along the property line; namely, the pine
3 trees, and the monument, and I would be down shortly
4 after.

5 So when I got up with them, they had
6 found the monument, the two pine trees, and we then
7 proceeded to try to run this right-of-way out to 622.

8 We pulled the first distance from the
9 property line going in the direction towards 622, and we
10 pulled the three hundred and seventy-one feet, and we
11 found that we had gone substantially beyond the road as it
12 was being used.

13 We used a metal detector at that
14 distance, and we couldn't find any kind of a marker. So
15 then I told my men to just go ahead, set travers points,
16 locate the road as its being used, locate the edge of the
17 woods, and we would plot up in field and see what we had.

18 After I left them, I went out to 622.
19 And according to Bonifant's plat, there was a pin in the
20 center of the road, so I used the metal detector, and I
21 started at the highway and just walked down the center of
22 the used road, and I found a rebar.

23 So I went back and told my men that I
24 found a rebar out near the highway, and I flagged it up,
25 and they were located as it came through.

1 Q. Now, back at the first turn, did you-all
2 eventually find a marker?

3 A. Yes, sir.

4 Q. And where did you --

5 A. At the first turn going in.

6 Q. The first turn going in. Okay.

7 Did you find a marker in the area of the
8 first turn?

9 A. Leaving the highway going in.

10 Q. Yes.

11 A. Yes, sir.

12 Q. You did?

13 And where was the next marker that you
14 found?

15 A. The next marker was to the east -- now,
16 we're talking about the road going all the way through?

17 Q. Yes.

18 A. All right. The next marker was to the
19 east in the corner of the woods.

20 Q. All right. And a third marker?

21 A. The third marker was at the last bend
22 where the road bends and goes to the east is another
23 rebar.

24 Q. And were you able to establish a point
25 for the right-of-way on the boundary line between Wescoat

1 and Shooting Point?

2 A. Yes, sir.

3 Q. Okay. Now, as far as the -- showing you
4 Plaintiff's Exhibit 4, a series of pictures, are these the
5 markers that you are referring to, for example, the woods
6 at turn two?

7 A. I don't see the marker.

8 All right. I went down after my men had
9 gone back and found these markers.

10 Q. Thumb them, if you'd like.

11 A. Okay. These rebars, or these pins, they
12 were buried, and, I mean, I can't attest to the
13 vegetation, but it was back in the bushes.

14 Q. Okay. Are these rebars shown on your
15 plat?

16 A. Yes, sir.

17 Q. And where are they shown there on your
18 plat?

19 A. This one is out in the field. This is
20 the one --

21 Q. With the notation?

22 A. Buried rebar found. This is in the
23 woods. It was a bent rebar. This other one was out in
24 the field. It's a buried rebar.

25 Q. Okay. Now, out at the highway, or near

1 the intersection of 622, you say there was one in the
2 approximate area of the middle, traveled roadway out
3 there?

4 A. Yes, sir.

5 Q. And initially, did you believe that to
6 be the center line, the continuing point of the Bonifant
7 survey?

8 A. Yes, sir.

9 Q. And is that how you initially surveyed
10 it in?

11 A. Initially, yes, sir.

12 Q. Okay. Now, at that time, had you
13 discovered the bent rebar?

14 A. My men had located it initially, but the
15 fall on the Bonifant's plat was in the center of the
16 traveled road, so I put more weight to that one than I did
17 the nine foot off to the side.

18 Q. Okay. Now, in preparing for this case
19 recently, did you go back and reexamine the situation?

20 A. Yes, sir.

21 Q. And as part of your reexamination, did
22 you consult with Mr. Bonifant?

23 A. Yes, sir.

24 Q. And after your review, where did you
25 locate the point with Mr. Bonifant's plat out near 622?

1 A. The rebar that was nine feet to the east
2 of the one that was in the center of the physical road was
3 the center line of the fifteen-foot easement.

4 Q. Okay. Will roads along woods land, will
5 they shift insofar as their use, Mr. Walters, in your
6 experience of some number of years?

7 A. Yes, sir.

8 Q. Now, on that plat, what color shows the
9 courses and distances corresponding with the Bonifant
10 plat?

11 A. The black designates the center line.
12 The blue designates the width of the fifteen foot.

13 Q. Okay. And this would be -- you say nine
14 feet eastward at that end, on the south end?

15 A. Yes, sir.

16 Q. Over what you initially had staked out?

17 THE COURT: I don't think that's right.
18 He's saying the blue represents the Bonifant plat?

19 THE WITNESS: Well, plats of record,
20 sir.

21 THE COURT: Then I'm confused as to his
22 testimony. I thought he first indicated that he thought
23 the bent rebar right near the road, that the bent rebar he
24 initially thought was the eastern edge, but then he
25 changed his mind and decided that that was the center line

1 instead of the other piece. I thought that's what he
2 said.

3 MR. POULSON: I think he said that the
4 one in the middle of the road he believed initially was
5 the Bonifant center line.

6 THE COURT: Right. But he later
7 determined that that was the western edge.

8 THE WITNESS: Well, neither of these
9 rebars designate the edge of the right-of-way.

10 THE COURT: Neither of them?

11 THE WITNESS: No, sir.

12 BY MR. POULSON:

13 Q. Where is the rebar in the middle of the
14 road that you finally determined?

15 A. The rebar in the center of the traveled
16 road is the PI of the highway. If you would take the
17 center line of the highway on either side of the curve,
18 and extend it, it would hit that rebar.

19 MR. MCFARLAND: For the record, could we
20 designate the color of that rebar, Mr. Walters?

21 THE COURT: It doesn't have a color.

22 THE WITNESS: It's a red circle.

23 MR. MCFARLAND: Is it the red, or the
24 magenta?

25 THE COURT: See where it says "bent

1 rebar found"?

2 THE WITNESS: This one right here.

3 THE COURT: Is that the one you're
4 looking at?

5 THE WITNESS: Yes.

6 MR. MCFARLAND: Okay.

7 THE WITNESS: That's the center line PI.
8 If you take the center line to the highway coming this
9 way, the center line to the highway going that way, and
10 they intersect.

11 BY MR. POULSON:

12 Q. And that is not the bent rebar?

13 A. No, sir. That's the one that's in the
14 middle of the traveled road.

15 MR. MCFARLAND: It's to the left of the
16 rebar.

17 THE COURT: Oh, okay.

18 MR. POULSON: To the left coming in.

19 MR. MCFARLAND: Yes. The reason I --
20 for the record, let me just clarify. I was looking at the
21 January 19th. I thought you were referencing off that,
22 and it appears to be sort of a magenta, purplish color on
23 that, correct, Mr. Walters?

24 THE WITNESS: Right. See, that's the
25 one where I initially thought was it because the fall was

1 in the center of the traveled road.

2 MR. MCFARLAND: Is that matching this?

3 THE WITNESS: Yes, sir.

4 THE COURT: All right.

5 MR. MCFARLAND: That's what I thought.

6 I didn't mean to confuse you.

7 THE COURT: I mean, I thought his
8 testimony was that the survey moved it to the east. His
9 testimony actually was that the survey moved it to the
10 west. Am I right?

11 THE WITNESS: No.

12 THE COURT: Well, he said the Bonifant
13 plat was the one that was shown in blue. That's what his
14 testimony was. Obviously, that can't be the case. The
15 Bonifant plat must have been the one shown in yellow.

16 MR. MCFARLAND: Is Your Honor using the
17 blowup?

18 THE COURT: Either one.

19 BY MR. POULSON:

20 Q. On the blowup, number one, where is that
21 end of the easement as you initially thought it was?

22 A. The center line?

23 Q. Yes, sir.

24 A. Would be -- what did you call it,
25 magenta? This one coming down here.

1 Q. And the parameter of the easement is
2 shown in what color?

3 THE COURT: Gold.

4 THE WITNESS: Tan, gold.

5 MR. MCFARLAND: I'm sorry. The
6 parameters of the --

7 MR. POULSON: Of the initial
8 determination point.

9 MR. MCFARLAND: The initial
10 determination point.

11 THE WITNESS: These are the magenta
12 rebar.

13 THE COURT: I got it.

14 MR. MCFARLAND: Okay.

15 BY MR. POULSON:

16 Q. And as you subsequently revised it, what
17 color are the parameters of the Bonifant subdivision
18 easement as shown on this?

19 A. The black line is the center, the blue
20 line is the edges of the fifteen foot.

21 Q. And is that a bent rebar?

22 A. Yes, sir.

23 Q. Okay.

24 MR. MCFARLAND: Those are both Bonifant,
25 then, as later determined?

1 THE WITNESS: Yes, sir.

2 MR. MCFARLAND: Okay.

3 THE COURT: All right. I got it. Go
4 ahead.

5 BY MR. POULSON:

6 Q. Does that likewise follow the
7 subdivision plat references, courses, and distances, and
8 markers?

9 A. Yes, sir.

10 THE COURT: Which one are you talking
11 about? The blue lines?

12 THE WITNESS: The blue lines, yes, sir.

13 THE COURT: Okay. Go ahead.

14 BY MR. POULSON:

15 Q. Now, do you have a professional opinion
16 as to which course designates or reproduces the easement
17 as shown on the Shooting Point subdivision plat, and the
18 Bonifant plat?

19 A. Yes, sir. It would be what's outlined
20 in the blue.

21 Q. Now, Mr. Walters, in preparing this
22 plat, what attention did you give to the curves?

23 A. The three of the curves are roughly
24 ninety degrees, or close to it. Two of the curves are
25 blind.

1 Q. And did you find markers -- the markers
2 that you've described further on into the easement back to
3 the curves, what significance were they?

4 A. Well, they were the center line PI
5 points of the right-of-way.

6 Q. PI means?

7 A. If you would take the center lines, and
8 extend them out to where they would intersect.

9 Q. And, of course, you did find them?

10 A. Yes, sir.

11 Q. Okay. They were from the Bonifant plat?

12 A. Yes, sir.

13 Q. Okay. Now, after having found those,
14 what did you do to plot the curves accurately as to the
15 Bonifant, and the Shooting Point plat?

16 A. I came to the clerk's office and scaled
17 the tangents of the curves off of the record plat, which
18 was full scale.

19 Q. Why the necessity of doing that?

20 A. You need two properties of a curve in
21 order to figure out the other properties of a curve.

22 Q. Can't you just take the copy of a plat
23 and do that?

24 A. Not too well.

25 Q. Why is that?

1 A. Well, the curves are regular. They have
2 a beginning and an end.

3 Q. So you came and got the original plat
4 and worked off that?

5 A. Yes, sir.

6 Q. Now, the revision that you did, what, if
7 anything, did it affect, and from what point in the plat?

8 A. It moved the entrance as it came off of
9 622 approximately nine foot further to the east.

10 Q. Okay. Did you set the pipes based on
11 the first determination?

12 A. Yes, sir.

13 Q. Of the two variations, which one would
14 result in a tighter turn at turn number one?

15 A. The second, or corrected version.

16 Q. Which --

17 MR. MCFARLAND: The second or?

18 THE WITNESS: The second version.

19 BY MR. POULSON:

20 Q. That would produce a tighter turn?

21 A. Yes, sir.

22 Q. Okay. So if any trucks had run, or
23 experiments had been conducted prior to you doing this, it
24 would have been in a looser turn?

25 A. Yes, sir.

1 Q. For lack of a better word?

2 A. Yes, sir.

3 Q. Was the second and third turn affected
4 in any way?

5 A. No, sir.

6 Q. Mr. Walters, as a certified land
7 surveyor, and your investigation of the easement, and the
8 preparation of your plat, what significance, if any, did
9 you give to one, the fact that some tracks ran outside the
10 plotted fifteen-foot course of the easement as platted?

11 A. It's been my experience with farm field
12 roads that they tend to wander. If they get a pot hole in
13 them, people being people, don't like to fill them up, so
14 they start driving around them.

15 It's the same thing if a road is
16 adjacent to a piece of woods, limbs grow out over it,
17 instead of cutting them off, they just drive around them.

18 Q. As a certified land surveyor, did you
19 find any other basis to place the easement in any location
20 other than the platted subdivision location of the
21 subdivision and the Bonifant survey location?

22 A. No, sir.

23 Q. Now, if I may, please, show you Exhibit
24 28A, which is the permit. Assuming, sir, see center line
25 easement?

1 A. Yes, sir.

2 Q. On 28A?

3 A. Yes, sir.

4 Q. Okay. Assuming, sir, that that is the
5 Bonifant center line of the easement that runs on out?

6 A. Yes, sir.

7 Q. Okay. If that be the case, does the
8 easement and the entrance line up?

9 A. No, sir.

10 Q. And showing you what will be 28C -- and
11 I'm looking at Plan A, September 27th, 2000. Now, it has
12 a center line up here. See that?

13 A. Yes, sir.

14 Q. But assume, if you will, that the pin
15 found here that shows up near the front axle of the tandem
16 of the tractor portrayed on there. See where my finger
17 is?

18 A. Yes, sir.

19 Q. It says pin, parenthesis, found. If
20 that is the Bonifant survey pin marking the center line of
21 the easement, does the entrance line up here with the
22 entrance?

23 A. No, sir.

24 Q. Okay.

25 MR. MCFARLAND: Your Honor, I would

1 object. It's not designated as such on this diagram.

2 MR. POULSON: That's why we wanted
3 Mr. Latimer. He's made himself not available.

4 43, sir.

5 MR. MCFARLAND: Your Honor, I have an
6 objection to this. I don't want to pre-object, but just
7 so the Court is aware.

8 MR. MORRIS: I join in that objection.

9 THE COURT: This is 43?

10 MR. POULSON: Yes, sir.

11 THE COURT: All right. You want to have
12 him identify it, and then I guess he can state his
13 objection, if he has any.

14 BY MR. POULSON:

15 Q. Is this a plat that you likewise
16 prepared?

17 A. Yes, sir.

18 THE COURT: Ask him what it is.

19 BY MR. POULSON:

20 Q. What does it attempt to portray?

21 A. It attempts to portray the different
22 arrangements, or situations that could arise using the
23 Highway Department's criteria of twenty-five feet back
24 from the edge of the pavement to be twenty-four-foot wide.

25 Depending on the angle of the

1 intersection of the right-of-way with the highway, you can
2 come up with different widths of easements.

3 Q. Okay. Is the line marking at the
4 twenty-five-foot mark, is it drawn parallel with the edge
5 of the pavement?

6 A. Yes, sir.

7 Q. Okay. And, so, what did you -- you are
8 familiar with the line as drawn on 28A, the methodology
9 used?

10 A. Yes, sir.

11 Q. Parallel to the edge of the roadway?

12 A. Yes, sir.

13 Q. And what were you able to do using
14 various angles with that criteria of drawing a measuring
15 line twenty-five feet from the edge of the pavement,
16 Mr. Walters?

17 A. We could come up with different widths
18 of right-of-ways.

19 Q. And what did you find you were able to
20 do with a thirty percent angle there?

21 A. We ended up with a twelve-foot
22 right-of-way.

23 Q. But what was your measurement at
24 twenty-five foot, drawing it on the skew, for lack of a
25 better word?

1 A. Twenty-four four feet.

2 Q. Twenty-four feet?

3 A. Yes, sir.

4 Q. The actual width of the roadway was?

5 A. Fifteen.

6 Q. Fifteen or twelve?

7 A. Oh, excuse me. Twelve.

8 Q. Twelve. Okay. Did you do other
9 examples varying the angles?

10 A. Yes, sir.

11 Q. And tell us what they ended up, please.

12 A. At ninety degrees, it ended up a
13 twenty-four-foot right-of-way. Forty-five degrees, it was
14 16.97 foot right-of-way, almost seventeen.

15 Q. Now, that sixteen feet, how was that
16 measured?

17 A. 16.97.

18 MR. LePAGE: For the record, I'll
19 stipulate that if you had it almost --

20 THE COURT: Yeah, it just depends on the
21 angle. I mean, you can make it any manner of size you
22 want to depending on how you swing it.

23 BY MR. POULSON:

24 Q. And this was the same methodology as
25 used by the Highway Department?

1 MR. MCFARLAND: Your Honor, I'm going to
2 to object to that characterization.

3 THE COURT: He said he went out and
4 measured it on the ground. Interestingly enough, he came
5 up with twenty-four feet, and I assume that was using what
6 he then thought to be the entrance as it existed, which is
7 shown in gold on Plaintiff's Exhibit 41.

8 If you move it over to the east, as
9 Mr. Walters says it ought to be, you come up with, it
10 looks like, almost forty-seven feet.

11 MR. POULSON: I don't think that's what
12 he's saying, Judge. He did not measure it on the ground
13 as such.

14 THE COURT: Well, what does this --

15 MR. MCFARLAND: Well, that's the
16 problem, Your Honor, and this doesn't -- the road, if you
17 will, in the diagram doesn't accurately depict --

18 THE COURT: All it does is just
19 demonstrate how you can get different distances.

20 MR. LePAGE: Right, Your Honor, which I
21 will stipulate for the record.

22 THE COURT: You need to clarify this one
23 thing. Mr. Walters, look at your number 41 there, the one
24 that shows just the entrance to the highway.

25 THE WITNESS: Yes, sir.

1 THE COURT: You see down there right
2 almost in the middle of the page where it says L equals
3 47.96 feet?

4 THE WITNESS: Yes, sir.

5 THE COURT: What does that represent?

6 THE WITNESS: That is the length of the
7 arch where the fifteen-foot right-of-way --

8 THE COURT: Between what and what?

9 THE WITNESS: Between the ends of the
10 blue lines where they intersect the highway right-of-way.

11 THE COURT: And the arch between the
12 ends of the yellow lines would be 26.63 feet?

13 It's on the same piece of paper right
14 above that. See what I'm talking about?

15 MR. MCFARLAND: I lost you on the 26.

16 THE WITNESS: 26?

17 THE COURT: Is that correct?

18 MR. MCFARLAND: I saw the 46 and 47, but
19 I've lost you as to 26.

20 THE COURT: Maybe I've got something
21 you-all don't have. Look at mine. Maybe that will help
22 you. Maybe that's why we're confused.

23 MR. MCFARLAND: Yes, you've got -- this
24 is -- I'm going to object, Your Honor, this is a --

25 MR. MORRIS: You've got extra numbers.

1 MR. MCFARLAND: Yes, you've got extra
2 numbers on yours that we you don't have.

3 THE COURT: Maybe you want to take a
4 look at it.

5 MR. POULSON: Some of them had both
6 platted on it with the numbers.

7 THE COURT: The one that Mr. Walters
8 has, is that the same as the actual exhibit is?

9 MR. POULSON: Yes. They have more
10 information on theirs than the actual exhibit.

11 MR. MCFARLAND: We have less. We don't
12 have this.

13 MR. POULSON: You have it. We don't
14 have it on this one. Either one you want to use is fine.

15 THE COURT: All I'm interested in is the
16 length and the arch on the revised portion showing the
17 blue lines versus the length of the arch on what you
18 thought was correct which is in the gold lines.

19 THE WITNESS: Correct. The blue lines,
20 the length of the arch on the correct right-of-way is
21 47.96. The incorrect right-of-way alignment, the length
22 of the arch where it hits the highway is 26.63. So that's
23 the incorrect one.

24 BY MR. POULSON:

25 Q. And that is dependent on the nature of

1 the arch?

2 MR. MCFARLAND: Judge, I'm going to
3 object to the leading.

4 THE COURT: Well, it's what it is. I
5 mean, it is what it is.

6 MR. LePAGE: Your Honor, I'm sorry, I'm
7 confused. Is he saying that if you measured it the way at
8 parallel to the edge of the pavement it's forty-seven
9 feet?

10 THE COURT: That's what he said.

11 MR. LePAGE: On the corrected one, and
12 twenty-six under the incorrect one?

13 THE COURT: Yes. And if your man had
14 went out and measured and got twenty-four feet, he
15 probably was measuring from where he actually got the
16 26.63 feet on the plat. And by moving it nine feet to the
17 east, you got a bigger arch now than you had before.

18 MR. POULSON: Judge, the measurement of
19 twenty-four foot is done twenty-five feet away from the
20 edge of pavement. This measurement is not. This is done
21 at the edge of the pavement.

22 THE COURT: I understand.

23 MR. POULSON: Edge of right-of-way.
24 It's not edge of the pavement; it's edge of right-of-way.

25 THE WITNESS: Yes.

1 BY MR. POULSON:

2 Q. Did you do a measurement twenty-five
3 feet away from the edge of the pavement as shown on the
4 permit?

5 A. No.

6 Q. Okay. And when you did this
7 compilation, you measured --

8 MR. MCFARLAND: Which are we referring
9 to now?

10 MR. POULSON: 43.

11 MR. MCFARLAND: Okay.

12 BY MR. POULSON:

13 Q. When you did this complication, or
14 examples, how did you measure twenty-four feet?

15 A. All right. This was done in the office.
16 It was using the Highway Department's specifications of it
17 to be twenty-four feet wide on the square, twenty-five
18 feet back from the edge of the pavement.

19 Q. Now, Mr. Walters, at my request, did you
20 measure certain vehicles through the course of preparing
21 this for this upcoming case?

22 A. Yes, sir.

23 Q. Okay. If you will look at some of your
24 sheets, please, I would like to disclose some of those.

25 Now, initially were you able to measure

1 Q. Okay.

2 A. April 30th.

3 Q. Now, I want to make sure, Mr. Walters, I
4 understand what your instructions were when you were asked
5 to survey this property.

6 And what instructions were you
7 specifically given, sir?

8 A. We were to survey the fifteen-foot
9 right-of-way as it was on record.

10 Q. As it was on record. Now, were you
11 given a copy of the grant of easement?

12 A. No. I did my own research. I got a
13 copy of when the easement was granted, and I got a copy of
14 the Bonifant survey.

15 Q. Okay. When the easement was granted,
16 that was June the 18th of 1974 when it was --

17 A. Yes, sir.

18 Q. -- dated, correct?

19 A. Yes, sir.

20 Q. Okay. The original grant of easement is
21 not a metes and bounds easement, correct, Mr. Walters?

22 A. Correct.

23 Q. And your research confirmed that there
24 was no survey done of the easement in 1974, correct?

25 A. Correct.

1 a 1994 Ford F-150 Pickup?

2 A. Yes, sir.

3 Q. And what was the width of that Pickup?

4 A. Mirror to mirror, or fender to fender?

5 Q. Both.

6 A. Mirror to mirror was eight feet.

7 Q. 1999 Chevrolet Tahoe sports utility?

8 A. Mirror to mirror is seven feet ten

9 inches.

10 Q. Are these standard mirrors, by the way?

11 A. Yes, sir.

12 Q. Did you catch Judge Phillips' van one
13 day?

14 A. Yes, sir.

15 Q. And what was the width of that?

16 A. Eight feet one inch.

17 MR. MORRIS: Your Honor, I'm going to
18 object to this line of testimony. It goes far beyond what
19 a survey is in this case. We're talking about widths of
20 vehicles. I think that's been fairly established
21 throughout.

22 THE COURT: It probably has. Where are
23 you going with it?

24 MR. POULSON: I just wanted to show that
25 all of these vehicles are bigger than six feet and so

1 forth.

2 MR. LePAGE: Your Honor, I'll stipulate
3 to that.

4 MR. MCFARLAND: We're measuring mirror
5 to mirror here.

6 MR. POULSON: Well, mirrors are standard
7 equipment. You don't take the mirrors off when you go
8 into an easement.

9 MR. MCFARLAND: The problem I had with
10 the last vehicle was I think it was referenced to Judge
11 Phillips' van? I think we'd better know what type of
12 vehicle it is.

13 THE COURT: Well, I know what type of
14 vehicle it is. I've seen it, and I know what it is.

15 BY MR. POULSON:

16 Q. Were you able to check a 1994 Crown
17 Victoria automobile?

18 A. Yes, sir.

19 Q. And what was the width of that?

20 A. Six feet eleven inches.

21 MR. MCFARLAND: Just so I -- that's
22 mirror to mirror, Mr. Walters?

23 THE WITNESS: Yes, sir, all of these are
24 mirror to mirror.

25

1 BY MR. POULSON:

2 Q. Did the Crown Victoria mirrors, are they
3 built as part of the vehicle, or are they an attachment?

4 A. They are fixed. The glass part rotates,
5 or is adjustable.

6 Q. And did you also, during this period of
7 time, catch a moving van?

8 A. Yes, sir.

9 Q. And how wide was the tractor on that
10 moving van?

11 A. The mirrors were nine feet ten inches.

12 Q. And how long was that moving van, by the
13 way?

14 A. Sixty-five feet.

15 MR. POULSON: All right. Answer
16 counsel.

17
18 CROSS-EXAMINATION

19 BY MR. MCFARLAND:

20 Q. Good afternoon, Mr. Walters. Let me
21 introduce myself. I'm Robert McFarland. I represent
22 Shooting Point, L.L.C. in this action.

23 Now, sir, you were first retained when?

24 A. We started our field work September the
25 11th. I had done research prior to that. I think it was

1 June. I done some research June the 28th.

2 Q. All right. And so we're clear, that
3 would be 2000?

4 A. Oh, yes, sir. Last year.

5 Q. Almost a year ago that you've started
6 your research?

7 A. Yes, sir.

8 Q. Okay. And I noticed that there's
9 apparently been a revision to your plats of survey on May
10 29th, but the original plats of survey were dated January
11 19th of 2001?

12 A. Yes, sir.

13 Q. And February the 7th of 2001, correct,
14 sir?

15 A. Yes, sir.

16 Q. All right. And when were they provided
17 to Mr. Wescoat, or Mr. Poulson, those original plats?

18 MR. POULSON: Judge, if I may interpose
19 an objection. It has no materiality at this point in
20 time. We've been through this. The plats were made
21 available the first week in May.

22 MR. MCFARLAND: Wait a minute.

23 Mr. Poulson is testifying. I'm entitled to ask this
24 witness --

25 THE COURT: Where are you going with it?

1 MR. MCFARLAND: I'd just like to know,
2 Your Honor. I mean, there's been a revision now that we
3 got literally the day before we started this trial.

4 THE COURT: I understand that, but you
5 can't be at all unhappy with it.

6 MR. MCFARLAND: Well, I'm not unhappy
7 with it, Your Honor; I'm just trying to clarify --

8 THE COURT: Well --

9 MR. MCFARLAND: Part of my problem is I
10 didn't see these plats --

11 THE COURT: -- the attorney general is
12 not unhappy with it. He's real happy with it.

13 MR. MCFARLAND: I recognize that, too,
14 Your Honor. But I would like to know -- I mean, we didn't
15 get these until I took Mr. Cooley's deposition.

16 THE COURT: Well, I mean, is there any
17 real probative value other than your interest in whether
18 or not you got it on time? I mean, do we really care?

19 MR. MCFARLAND: Well, I think it is
20 relevant in terms of what was the course of what this
21 gentleman did when he revised his opinions and what he
22 came up with on May 29th.

23 THE COURT: Well, I think he explained
24 that, but go ahead with it. I mean, obviously he
25 explained it.

1 MR. MCFARLAND: It's one question.

2 THE COURT: He originally thought that
3 the straight piece of rebar was the center, and then after
4 he got to looking, he determined that it wasn't that one;
5 it was the bent piece of rebar, so he moved the center
6 line over nine feet and shot it straight to the first
7 curve.

8 So, in effect, what happens is that the
9 entrance off of 622 is nine feet further east than he
10 originally thought it was, and it sort of angles upward,
11 and cuts into wherever the next piece of rebar is up the
12 strip.

13 That was his explanation of it. Now, I
14 don't know that, you know, if you beat him over the head
15 or whatever, what else he's going to say.

16 MR. MCFARLAND: I understand that, Your
17 Honor. I'm just trying to get a full picture and a
18 foundation.

19 THE COURT: Okay. Go ahead.

20 BY MR. MCFARLAND:

21 Q. Simple question, Mr. Walters. The
22 original plats of survey that are dated January 19th,
23 2001, and February 7th of 2001, when were they provided to
24 either Mr. Wescoat or Mr. Poulson?

25 A. I have a date written here of 4-30.

1 Q. Okay. But what the grant of easement is
2 memorializing is that right-of-way as it was being used as
3 of June 1974, correct?

4 A. Yes, sir.

5 Q. Okay. And I think you testified it's
6 common for such a right-of-way to move over time?

7 A. It can move, yes, sir.

8 Q. Okay. As the tree lines, and the brush
9 grows up, the easement is going to move over to
10 accommodate that, correct?

11 A. Unless people go in and cut the brush.

12 Q. Okay. And when we look at the 1979
13 Bonifant survey, what that's representing, Mr. Walters, is
14 simply a depiction of where the easement was according to
15 Mr. Bonifant in 1979, correct?

16 A. It depicts where -- in talking to him,
17 it's where he surveyed the road as it was when he did the
18 survey.

19 Q. When he did the survey in 1979, correct?

20 A. Yes, sir.

21 Q. It certainly isn't depicting the road as
22 it exists right now at the present time, as it's being
23 used?

24 A. No.

25 Q. Okay. And do I understand, sir, that

1 you also reviewed the 1999 Shooting Point plat of survey?

2 A. Yes, sir.

3 Q. Okay. Now, that plat of survey
4 references not only the Bonifant survey, but it also
5 represents the grant of easement as it was recorded in the
6 clerk's office here, correct?

7 A. Yes, sir.

8 Q. And you've got a notation, sir, on your
9 survey, "This plat is based on a current field survey"?

10 A. Yes, sir.

11 Q. Meaning what, sir?

12 A. That my field crew and myself went out
13 and physically did the work in the field.

14 Q. Okay. So what you're doing is you're
15 matching up where Bonifant, as he surveyed in 1979, where
16 that would be now?

17 A. Right. We found his points.

18 Q. Okay. And initially, if we look at what
19 is Exhibit 41, the gold lines on that survey represent
20 where the posts are at the present time, correct, sir?

21 A. Yes, sir.

22 Q. Okay. And the posts were put up based
23 on your original surveying of the right-of-way, correct?

24 A. Yes, sir.

25 Q. Okay. And you would agree with me that

1 the posts track generally how the easement has apparently
2 been used over some period of time? In other words, we
3 can see, for the most part, the road through the posts?

4 A. With a push and a shove.

5 Q. Exactly, with a push and a shove. Okay.

6 Back when this easement was created in
7 1974, Mr. Walters, the easement deed was based on the
8 existing usage at that time, correct?

9 A. Well, I believe it was on the use, and
10 also it defined along the edge of the woods.

11 Q. Along the edge of the woods?

12 A. Yes,

13 Q. But not into the woods?

14 A. No, sir.

15 Q. And there is no indication that at the
16 time this easement was created in 1974 that it had
17 unreasonable turns in it, correct?

18 A. I can only assume so because I never saw
19 it.

20 Q. Well, if a grant of easement is going to
21 match existing use, you would agree with me, sir, that
22 based on your extensive experience, it wouldn't provide
23 for unreasonable use of the easement, correct?

24 MR. POULSON: I don't know what
25 unreasonable is, Judge. I don't know what he means by

1 unreasonable.

2 THE COURT: It's a question of what was
3 reasonable or unreasonable.

4 MR. MCFARLAND: Let's me see if I can
5 better clarify it.

6 BY MR. MCFARLAND:

7 Q. Back in 1974, there are turns that are
8 reflected both in the Bonifant survey, and the work you've
9 done, correct?

10 A. Yes, sir.

11 Q. And in the easement?

12 A. Yes, sir.

13 Q. But back in 1974, if the easement, the
14 grant of easement is memorializing existing usage, as a
15 surveyor, you have to assume that those were not straight
16 ninety-degree turns back in 1974, correct?

17 A. By ninety-degree turns, you mean right
18 angle?

19 Q. Exactly.

20 A. Yes, sir. No, it's impossible to drive
21 them.

22 Q. If we're matching existing usage, you
23 don't suppose that back then in 1974 it came and abruptly
24 shifted like that at a ninety-degree angle?

25 A. Uh-uh.

1 Q. Okay. I think there's also reference,
2 Mr. Walters, in your survey to a 1952 badger plat?

3 A. Yes, sir.

4 Q. Now, that's what document, sir?

5 A. What do you mean document?

6 Q. What does the badger plat represent from
7 your research?

8 A. I believe that was Shooting Point.

9 Q. Okay. That goes all the way back to
10 1952, correct?

11 A. I'll take your word unless you want me
12 to go through the file. I mean, that was -- from what I
13 understand, that was the whole of Shooting Point.

14 Q. Okay. And that's when Elizabeth Jones
15 was given a portion of the property?

16 A. Yes, sir.

17 Q. Okay. Did you happen to see any stakes
18 that had been placed in the ground by the Wescoats when
19 you began your work in 2000?

20 A. I didn't.

21 Q. Okay. Did you happen to see a sign that
22 said, "Begin fifteen-foot right-of-way" when you began
23 your work in the year 2000?

24 A. I think they were probably our stakes
25 when we put the posts, but I'm not sure.

1 Q. I'm talking about a sign now.

2 A. Oh, a sign?

3 Q. Did you ever see a sign that said,
4 "Begin fifteen-foot right-of-way"?

5 A. No, sir.

6 Q. Okay. You would agree with me, sir,
7 that with respect to the 1979 Bonifant survey, there are
8 no geometric labels on the turns, correct?

9 A. Correct.

10 Q. Now, on your what has been marked as
11 Exhibits 41 and 42, I understand we've got the Bonifant
12 survey, how you originally platted the right-of-way based
13 on the original markers that you found, correct, which
14 matches the post?

15 A. Yes, sir.

16 Q. Okay. And do we also have the existing
17 usage for the tracks on the ground?

18 A. Yes, sir.

19 Q. Depicted on your survey?

20 A. Yes, sir.

21 Q. And where are those, sir, for the
22 record?

23 A. They are --

24 THE COURT: The dotted black lines.

25 THE WITNESS: Dotted gray.

1 BY MR. MCFARLAND:

2 Q. Dotted gray?

3 A. Yes, sir.

4 Q. Okay. So present usage then has
5 moved -- if we are entering the right-of-way, present
6 usage has moved left, or westward of where Bonifant
7 surveyed in 1979?

8 A. Yes, sir.

9 Q. Now, I understand you were surveying for
10 Mr. Wescoat. You were trying to match up the Bonifant
11 survey. But if you were assigned the task, sir, of going
12 out today to survey the easement, the right-of-way, you
13 would agree with me you would have to take into
14 consideration where the tracks on the grounds were --

15 MR. POULSON: Judge, I object to that.
16 That is totally contrary to any theory whatsoever that
17 they can come in here and try to move the easement because
18 there's some tracks on the ground without any attempt to
19 prove prescriptive use, or anything.

20 As the Court has mentioned, this could
21 have been Mr. Jones, it could have been Mr. Jones going
22 down on the Wescoat parcel. I mean, it's legally
23 impossible.

24 THE COURT: Well, your argument may be
25 valid, Mr. Poulson, but it doesn't make the question

1 objectionable. We'll just have to see what he says. I
2 overrule the objection.

3 BY MR. MCFARLAND:

4 Q. You would agree with me that if you were
5 set out with the task of surveying the easement today, you
6 would have to take into consideration, given the grant of
7 easement language, what are the existing tracks on the
8 ground?

9 A. Yes.

10 Q. And, in fact, as a surveyor, the most
11 important thing for you in trying to determine the
12 right-of-way today is the language of the granting
13 document, correct, the deed of easement?

14 A. Well, the deed of easement, in a
15 surveyor's opinion, is pretty vague.

16 Q. Yes, but that's the document that
17 establishes the easement, correct, Mr. Walters?

18 A. Correct.

19 Q. Okay. The fact that someone did a
20 survey in 1979 does not establish the present location of
21 the easement?

22 MR. POULSON: I'm going to object to
23 that because the someone that did that survey was the
24 owners of Shooting Point.

25 THE COURT: I'm going to sustain the

1 objection for the reason that that's one of the ultimate
2 issues that the Court has to decide. Go ahead. Next
3 question.

4 MR. MCFARLAND: All right.

5 BY MR. MCFARLAND:

6 Q. You also had access to a survey prepared
7 May 24th by Mr. Duff and Mr. Latimer? Did you ever review
8 such a survey?

9 A. May 24th?

10 Q. Of this year.

11 A. I don't recall it. I mean, if I -- if
12 you have a copy of it, I mean, you know, I can take a
13 look.

14 MR. MCFARLAND: One moment, Your Honor.
15 Some of the other gentlemen may have questions while I
16 check my notes.

17 MR. MORRIS: No further questions.

18 MR. LePAGE: I just have one for the
19 purpose of the record.

20

21 CROSS-EXAMINATION

22 BY MR. LePAGE:

23 Q. Mr. Walters, if the easement actually
24 exists and shifted nine feet over to the east, as you've
25 testified, it doesn't affect sight distance looking down

1 Route 622 as you exit the easement on 622, does it?

2 A. No, sir.

3 THE COURT: Anything else?

4 MR. MCFARLAND: No, that's all I've got,
5 Judge.

6 MR. POULSON: Just a few questions, if I
7 may, please.

8

9 REDIRECT EXAMINATION

10 BY MR. POULSON:

11 Q. All right. Mr. Walters, what does the
12 phrase "harnessing an easement" mean?

13 A. Usually tying it down with bearings,
14 distances, and points.

15 Q. Okay. In addition to the Bonifant 1979
16 survey, look at the Shooting Point subdivision plat in, I
17 believe, October to December 2000. Do you have a copy of
18 that?

19 A. Yes. Let me find it.

20 October 20th, '99?

21 Q. Yes.

22 A. Okay.

23 Q. Does the Shooting Point subdivision plat
24 harness the easement, sir?

25 A. Yes, sir.

1 Q. Does it have courses and distances by
2 it?

3 A. Yes, sir.

4 Q. And further, let me show you, if I may,
5 please, beginning with -- you say you do your own
6 research?

7 A. Yes, sir.

8 Q. Showing you Plaintiff's Exhibit 19,
9 which is a deed of trust from Shooting Point to C. A.
10 Turner, Jr. --

11 THE COURT: Can we all stipulate for the
12 purposes of the record that the plat of Shooting Point
13 subdivision is the same plat that's attached to the deed
14 out to the various owners?

15 MR. LePAGE: Yes.

16 MR. MCFARLAND: That we can stipulate
17 to, Your Honor.

18 MR. MORRIS: Yes.

19 THE COURT: Isn't that what you were
20 getting ready to ask him?

21 MR. POULSON: Well, what I'm getting
22 ready to show, sir, is each one of those descriptions, the
23 fifteen-foot right-of-way is described as being shown on
24 the subdivision plat of Shooting Point.

25 THE COURT: Exactly. So all of those

1 deeds out on the various parcels within the subdivision
2 reference the plat that was put to record --

3 MR. POULSON: Specifically --

4 THE COURT: -- as far as the easement is
5 concerned. Everybody in agreement on that?

6 MR. LePAGE: Yes, sir.

7 MR. MORRIS: Yes, sir.

8 BY MR. POULSON:

9 Q. Mr. Walters, insofar as present usage
10 tracks on the ground, do you know whose made them?

11 A. I guess people riding down Shooting
12 Point.

13 Q. Are you aware that the Wescoats have a
14 right to use his own easement, or use the same road?

15 A. I think so.

16 MR. POULSON: All right. Thank you.

17 THE COURT: Anything else?

18 MR. MCFARLAND: Very briefly, Your
19 Honor.

20

21 RECROSS-EXAMINATION

22 BY MR. MCFARLAND:

23 Q. Do you have the plat of survey for
24 Shooting Point in front of you, sir?

25 A. Yes, sir.

1 Q. Okay. Am I not correct that in addition
2 to referencing the 1979 Bonifant survey, it also
3 specifically references the grant of easement as recorded,
4 correct, Mr. Walters?

5 A. Wait a minute.

6 THE COURT: I think we all understood
7 that to be the case.

8 MR. MCFARLAND: I know, Your Honor, but
9 I would like to -- well --

10 BY MR. MCFARLAND:

11 Q. Do you find that, Mr. Walters?

12 A. Not yet.

13 MR. MCFARLAND: May I assist him, Your
14 Honor, and maybe move this along?

15 THE COURT: Sure.

16 BY MR. MCFARLAND:

17 Q. Let me direct your attention here. See
18 where I'm pointing to now, Mr. Walters?

19 A. Yes, sir.

20 Q. Isn't that a reference to fifteen-foot
21 right-of-way, ROW?

22 A. Correct.

23 Q. To Route 622, DB meaning deed book, 179,
24 page 29?

25 A. Yes, sir.

1 Q. Okay. And, in fact, isn't it also true,
2 sir, that the Shooting Point subdivision plat specifically
3 says that this easement has not been surveyed for purposes
4 of this plat?

5 MR. POULSON: I object to the question.
6 Field survey?

7 BY MR. MCFARLAND:

8 Q. Is that what it says?

9 THE COURT: Whatever it says is what it
10 says.

11 THE WITNESS: Well, the plat itself says
12 it does not represent a current boundary survey. Now,
13 whether that includes the right-of-way easement or not, I
14 don't know.

15 BY MR. MCFARLAND:

16 Q. All right. And you would agree with me,
17 sir, that the last known survey before that plat was
18 recorded in November or December of 1999 was the Bonifant
19 survey?

20 A. Of the right-of-way?

21 Q. Yes.

22 A. Yes, sir.

23 THE COURT: Anything from anybody else?

24 MR. LePAGE: No, sir.

25 MR. MORRIS: No questions.

1 MR. POULSON: Not that haven't been
2 asked.

3 THE COURT: Not that haven't been asked?
4 You're probably right.

5 All right, Mr. Walters, thank you very
6 much. You may be excused. Whatever is there that's got a
7 sticker on it, leave that. You can take the rest of the
8 stuff with you.

9 While he's getting squared away, who are
10 you going to have next, Mr. Poulson?

11 MR. POULSON: Judge, I would have called
12 Mr. Latimer, but we're unable to locate him. He was
13 subpoenaed by the other side.

14 MR. MCFARLAND: Well, let me be clear.
15 Mr. Latimer was our witness. Mr. Poulson never told me
16 before this morning that he wanted Mr. Latimer here.

17 THE COURT: That's not a problem. We'll
18 get Mr. Latimer here for you whenever we can. Is there
19 anybody else?

20 MR. POULSON: I have Mr. Cooley with the
21 understanding that I can call Mr. Latimer at some point in
22 time.

23 THE COURT: Mr. Cooley is here?

24 MR. POULSON: Yes, sir.

25 THE COURT: And it would be my

1 understanding that after Mr. Cooley testifies, that you
2 have Mr. Latimer briefly, and your case will be concluded?

3 MR. POULSON: Yes, sir. We have one
4 issue with Mr. Wescoat. Mr. Wescoat has asked me, and I
5 don't know if I asked him or not, whether it was adduced
6 in evidence from him that Mr. Tankerd had prepared the
7 actual deed of easement back in 1974.

8 THE COURT: Well, why don't you get
9 together with the counsel. I'm sure they will probably be
10 willing to stipulate to that.

11 All right. Let's go ahead.

12 MR. POULSON: Does everybody stipulate
13 to that, or do I have to put him back on?

14 MR. LePAGE: I have no objection.

15 MR. MORRIS: You mean that it was
16 drafted by him?

17 MR. POULSON: Mr. Tankerd.

18 MR. MCFARLAND: I'll stipulate it was
19 drafted, as long as it's clear that Mr. Wescoat reviewed
20 it in a representative capacity as an attorney.

21 THE COURT: Okay, that's fine.

22 MR. MORRIS: That's fine.

23

24

25

1 CHARLES E. COOLEY, called as a witness
2 by and on behalf of the Plaintiffs, being first duly
3 sworn, testified as follows:
4

5 DIRECT EXAMINATION

6 BY MR. POULSON:

7 Q. Mr. Cooley, your name?

8 A. Charles E. Cooley.

9 Q. Your residence?

10 A. My residence address is General
11 Delivery, Jamesville.

12 Q. And your occupation?

13 A. I'm a professional engineer.

14 Q. And your education?

15 THE COURT: All right. Let me stop you
16 right there. Is there any problem?

17 MR. LePAGE: No objections, Your Honor.

18 MR. MORRIS: No objection.

19 MR. MCFARLAND: As an engineer.

20 THE COURT: Proffer for the record,
21 Mr. Poulson, his qualifications that he will testify as an
22 expert as an engineer.

23 MR. POULSON: Mr. Cooley got his
24 engineering degree from the University of Florida. He
25 subsequently came to Virginia, and worked for the State

1 Water Control Board, and was in charge of their waste
2 water programs for some thirteen years, I believe.

3 And eventually in the early '70s he and
4 Mr. Walters came to the Eastern Shore and formed Shore
5 Engineering Company, and he's been engaged in engineering
6 and the planning of subdivisions for approximately the
7 last thirty years in his capacity with Shore Engineering.

8 THE COURT: All right. Any questions as
9 to his expertise?

10 MR. LePAGE: No.

11 MR. MORRIS: No.

12 MR. MCFARLAND: No.

13 THE COURT: He's so qualified. You may
14 proceed, Mr. Poulson.

15 BY MR. POULSON:

16 Q. Over the years, how many residential
17 subdivisions has your firm designed and secured entrance
18 permits for from VDOT?

19 A. Fifty, seventy. I'm really not exactly
20 sure, but in that range. Fifty plus or minus.

21 Q. Okay. Was there any other person
22 actively involved with you in that work?

23 A. In engineering or surveying?

24 Q. Engineering wise.

25 A. John Rippen.

1 Q. Okay. And Mr. Rippen's condition these
2 days?

3 A. Mr. Rippen was a design draftsman, and
4 he did most of the at-the-table work.

5 Q. What is his health condition these days?

6 A. His health condition is very poor. He
7 has lung cancer.

8 Q. Okay.

9 A. And is under treatment.

10 Q. Okay. Did Mr. Rippen work for VDOT for
11 a period of time before he started working for Shore
12 Engineering?

13 A. Yes, sir, he did.

14 Q. Approximately how long?

15 A. Probably six or seven years.

16 Q. Okay. Now, are you familiar with the
17 minimum standards for entrances to regulations put out --

18 A. Yes, sir.

19 Q. -- and established by VDOT?

20 A. Yes, sir.

21 Q. Okay. And if I may, please, I want to
22 show you Plaintiff's Exhibit 28A, specifically the drawing
23 made part of the permit referencing plan A dated July
24 28th, 2000?

25 A. Okay.

1 Q. Are you familiar with that?

2 A. Okay.

3 Q. Now, if you will, Mr. Cooley, look at
4 the manner in which the twenty-four feet is determined.

5 A. Okay.

6 Q. The required minimum width. Do you see
7 it?

8 A. Yes, sir.

9 Q. Okay. During your years with Shore
10 Engineering and securing permits, do you ever recall
11 seeing the width of an entrance being determined in the
12 manner as shown on this particular drawing, sir?

13 A. No, sir.

14 Q. Engineering wise, sir, in your
15 professional opinion, is this a proper or reasonable way
16 to determine the width of the entrance, or right-of-way
17 entrance permit at a point twenty-five feet from the edge
18 of the pavement?

19 A. No, sir.

20 MR. MCFARLAND: I'm going to note an
21 objection, Your Honor. Number one, he doesn't have a
22 foundation. He says he's never seen it this way.

23 THE COURT: Overrule the objection.

24 MR. POULSON: Your answer?

25 THE WITNESS: Repeat the last part of

1 the question, please, sir.

2 BY MR. POULSON:

3 Q. Engineering wise, in your professional
4 opinion, is this a proper or reasonable way to determine
5 the width of an entrance for a right-of-way entrance
6 permit determine the width at a point twenty-five feet
7 from the edge of the pavement?

8 A. No, sir.

9 Q. And tell the Court why.

10 A. In my experience in working with the
11 minimum standards, twenty-four feet is a distance that's
12 perpendicular to a point, and that entrance -- that
13 entrance should be perpendicular to the tangent, or
14 parallel to the tangent on this thing, perpendicular to
15 the tangent on the curve, or radial to that point, and you
16 should have a true twenty-four feet.

17 Q. All right. Is this a true twenty-four
18 feet as shown on that --

19 A. No, sir.

20 Q. -- drawing?

21 A. No, sir.

22 Q. From your understanding, what is the
23 purpose of the minimum standard, sir?

24 A. To have something that's been looked at
25 from a safety standpoint by the approving agency, and that

1 fits within their system, and one that will work in every
2 case.

3 Q. And what are vehicles supposed to be
4 able to do under the minimum standards?

5 A. They're supposed to be able to safely
6 pass each other.

7 Q. If you will, please, look at the tractor
8 and trailer shown on there. Do you need your glasses?

9 A. Yes.

10 A. Okay.

11 Q. Now, what is the indicated width of the
12 tractor and trailer?

13 A. Eight feet.

14 Q. Okay. And in the real world, what is
15 the width of a tractor-trailer?

16 MR. MORRIS: Your Honor, not to be
17 disrespectful, but this is about the 25th time we've gone
18 through the width of vehicles, and I believe that the
19 evidence is clear to the Court.

20 THE COURT: You know, if you are trying
21 to convince me that a tractor-trailer and whatever other
22 vehicle can't pass through that fifteen-foot easement at
23 the same time, I'm convinced. I think they've even agreed
24 to stipulate to that.

25 MR. MCFARLAND: I wouldn't stipulate

1 quite that way, Your Honor. I'll admit it's tight. I'll
2 admit, according to that diagram, there is three inches --

3 THE COURT: Well, I tell you what,
4 whether you stipulate it or not, I'm going to say to you
5 that I don't believe that it can be done safely. Now,
6 insofar as that is concerned, that issue is off the table.

7 MR. MCFARLAND: Right. And I'm not
8 going to beat that --

9 THE COURT: If you've got two big
10 vehicles, it isn't going to work, and the issue now
11 becomes whether or not you have to be able to do that in
12 order to make your situation work. That's what it boils
13 down to now.

14 MR. MCFARLAND: That's fine, Your Honor.
15 I understand what the court is saying.

16 THE COURT: At least I'm not going to be
17 driving one of them.

18 MR. MCFARLAND: I understand.

19 BY MR. POULSON:

20 Q. Mr. Cooley, if I may, please, let me ask
21 you this: I want to talk to -- are you aware that the
22 easement is fifteen foot?

23 A. Yes, sir.

24 Q. Okay. In your professional opinion,
25 having designed subdivision roads for, what, thirty years?

1 A. Uh-huh.

2 Q. Okay. Is this particular easement, sir,
3 sufficient to handle, number one, the Wescoat track with
4 its farm use, and its recreational use, plus an
5 eighteen-lot subdivision of single-family residences, and
6 I am going to ask you to assume at this point in time, and
7 we're only talking about eighteen lots of single-family
8 residences, that the houses that are to be constructed
9 thereon is a minimum of two thousand square feet of living
10 space with some additional porches not counting, and so
11 forth, that use of Shooting Point insofar as the
12 residential use will vary with the number of homes
13 constructed at any given time, and the use to be made by
14 the residents, that the recreational use of Shooting Point
15 again will vary with however much the residents want to
16 use it, that Shooting Point will also have a farm use to
17 it of some fifty acres, the use which will be dependent on
18 the crops and the time of the season.

19 Now, looking at that whole equation,
20 sir, and assuming the normal uses attended to a
21 subdivision such as construction trucks, delivery trucks,
22 friends coming in, and so forth, will that fifteen-foot
23 easement road handle that load, sir?

24 A. No, sir.

25 Q. And tell us why not.

1 A. It's too narrow. You have too many
2 different types of vehicles, you have emergency vehicles,
3 fire trucks, ambulance, you have larger SUV's, and its
4 difficult for me to picture an SUV passing a passenger car
5 in fifteen feet when you've only got -- the most you could
6 have would be a few inches, a couple of inches between the
7 vehicles, and the posts that are actually there.

8 Q. Is that a safe tolerance, two or three
9 inches?

10 A. No, sir. Not to me it isn't.

11 Q. Are you familiar with the turns on the
12 easement?

13 A. Yes, sir.

14 Q. How much does that enter into your
15 opinion?

16 A. Well, and the fact that on two of them
17 you don't have any sight radius. You don't have enough
18 sight when you're going around the curve enters into it a
19 lot.

20 Q. And are you familiar with the length of
21 the easement?

22 A. Approximately four hundred feet, three
23 hundred and something feet.

24 THE COURT: I thought we all agreed that
25 it was three-tenths of a mile.

1 BY MR. POULSON:

2 Q. Three-tenths of a mile?

3 A. Okay.

4 Q. Would that enter into your
5 determination?

6 A. To have three curves fifteen-feet wide,
7 and the turning radiuses that they are -- well, the
8 turning radiuses aren't so bad as the fact that it's
9 fifteen feet that you have to stay within, and I don't
10 think any of the curves you could pass another vehicle on
11 safely.

12 Q. Construction trucks? Are you familiar
13 with construction trucks, and block trucks, and things of
14 that nature?

15 A. There's all types of them.
16 Tractor-trailers, low boys, large, single-unit vehicles,
17 we call them, which are trucks. Quite a few different
18 kinds.

19 Q. Did you and Mr. Walters specifically
20 examine any block trucks, or concrete mixer trucks?

21 A. Mr. Walter did.

22 MR. LePAGE: Your Honor, I object.

23 We've gone through with Mr. Walters the measurements of
24 all sorts of vehicles.

25 THE COURT: Well, I think the concrete

1 truck is one we haven't gotten yet. Let's see what we
2 have. Go ahead.

3 BY MR. POULSON:

4 Q. Did you examine the concrete truck?

5 A. Mr. Walters did. I did not.

6 Q. Are you familiar with concrete trucks?

7 A. Yes.

8 Q. Who has concrete trucks?

9 A. T & W Block.

10 Q. From your observations, what kind of
11 difficulty, if any, would Mr. Walters, or T & W concrete
12 delivery trucks have getting into Shooting Point?

13 A. I think they would have trouble if there
14 were any other vehicle in sight of it.

15 Q. Okay.

16 A. And from a heighth aspect, too.

17 MR. POULSON: All right. Answer these
18 gentlemen.

19

20 CROSS-EXAMINATION

21 BY MR. MCFARLAND:

22 Q. Good afternoon, Mr. Cooley. My name is
23 Robert McFarland I represent. Shooting Point, L.L.C.,
24 sir.

25 Did I understand you to say you have

1 been involved in over fifty VDOT permits?

2 A. Probably more than that, but at least
3 that.

4 Q. Okay. Those would be permits, sir,
5 where we're speaking about -- are those all for private
6 subdivisions, or are those also commercial entrances?

7 A. Both.

8 Q. Both?

9 A. We had probably fifty subdivisions plus
10 all of the commercial entrances.

11 Q. Okay. And your experience with VDOT
12 permits is to private subdivisions has always involved an
13 ingress egress road that was designed to become part of
14 the secondary state system, correct?

15 A. Uh-huh.

16 Q. Okay. You understand that's not the
17 case here?

18 A. Okay.

19 Q. You understand that?

20 A. You're telling me that. Okay.

21 Q. Okay. Have you ever reviewed the
22 deeds of easement, Mr. Cooley?

23 A. The deed of easement?

24 Q. Grant of easement?

25 A. For the property?

1 Q. Right.

2 A. No.

3 Q. Okay. Until Mr. Poulson handed it to
4 you, have you ever reviewed the permit application?

5 A. Yes.

6 Q. And when is the first time you did that,
7 sir?

8 A. Well, I first knew about this situation
9 probably in the fall sometime, September, October, maybe,
10 and probably in February when I knew exactly what this
11 was.

12 Q. Right. But in terms of the first time
13 that you actually reviewed the application for an entrance
14 permit that my client submitted, that wasn't until this
15 past month, correct, Mr. Cooley?

16 Do you remember me taking your
17 deposition on --

18 A. No. But I saw this in February.

19 Q. In February? Okay. All right, sir.

20 Now, you mentioned your concern about
21 vehicles passing on the right-of-way, correct?

22 A. (Witness nods head.)

23 Q. And you understand it's only a
24 fifteen-foot right-of-way?

25 A. (Witness nods head.)

1 Q. What is the width of Route 622
2 immediately in front of the right-of-way?

3 A. Fourteen feet.

4 Q. Fourteen feet?

5 A. The right-of-way, or the pavement?

6 Q. What is the width of the pavement on
7 Route 622?

8 A. Fourteen feet.

9 Q. Fourteen feet. Okay.

10 Now, given your capacity as an expert
11 witness in this case, did you make any references, or
12 review any studies of traffic conditions for rural
13 subdivisions?

14 A. Except -- no.

15 Q. Okay. I mean, you gave the opinion that
16 you thought there was going to be too much traffic?

17 A. That's right.

18 Q. On the right-of-way --

19 A. I reviewed it --

20 Q. -- to accommodate its width? But did
21 you study anything, any surveys, any documents, any
22 reports that talked about the amount of traffic generated
23 by a rural residential subdivision?

24 A. I did.

25 Q. What did you study, sir?

1 A. The state minimum standards for
2 entrances. I can't remember the name of it.

3 Q. Okay.

4 A. But we've passed it around here.

5 Q. And I think, if I'm understanding what
6 you're saying, that would state that normal residential
7 subdivisions would produce ten trips per day per
8 household?

9 A. Right.

10 Q. Okay. Did you study anything else other
11 than that?

12 A. I have studied the ASHTO, portions of
13 the ASHTO manual that dealt with how they philosophy at
14 least designing roads. ASHTO is the American Association
15 of State Highway and Transportation Officials.

16 Q. Right. But that's ASHTO is used for the
17 designing of roads that are going to meet state standards,
18 correct, Mr. Cooley?

19 A. Probably correct, yes.

20 Q. Okay. Not this fifteen-foot
21 right-of-way that's not intended to meet the state
22 standards?

23 A. Okay.

24 Q. Right?

25 A. Uh-huh.

1 Q. Okay. Sir, have you ever worked for
2 VDOT?

3 A. No, I have not.

4 Q. Now, when you were asked some questions
5 about the measurement that was done in this case as to
6 twenty-four feet, I understood you to say you didn't think
7 that was proper, how the twenty-four feet was measured in
8 this case?

9 A. No, sir, I don't.

10 Q. You don't?

11 A. I do not.

12 Q. But you've never submitted an
13 application to the Virginia Department of Transportation
14 which had twenty-four feet measured parallel to a curved
15 road, correct?

16 A. Well, the only way I know how to answer
17 that question is not like this.

18 Q. Okay. Well, you've never submitted an
19 application in which you measured the width of the
20 right-of-way parallel to the pavement of a curved road,
21 correct?

22 A. That's correct.

23 Q. Okay. You haven't had to deal with a
24 situation where you've got a curved road in an entrance
25 requirement?

1 A. That's true. That's true.

2 Q. Okay. So what you're telling us you
3 haven't seen this type of measurement before?

4 A. No.

5 Q. Okay.

6 THE COURT: Court is that about it,
7 Mr. McFarland?

8 MR. MCFARLAND: I think it is.

9 THE COURT: Does counsel have any
10 questions?

11 MR. LePAGE: Yes, sir, just a couple.

12 THE COURT: Okay.

13

14 CROSS-EXAMINATION

15 BY MR. LePAGE:

16 Q. Mr. Cooley, I'm Todd LePage from the
17 attorney general's office, and I represent VDOT in this
18 matter.

19 Has your experience in preparing
20 subdivision plats and entrance permits with VDOT been
21 confined to the Eastern Shore?

22 A. Yes, sir.

23 Q. Okay. So you have not had any
24 involvement with VDOT in any areas of the state off the
25 Eastern Shore?

1 A. No, sir.

2 Q. And you don't know, in fact, how VDOT
3 measures the pavement twenty-five feet from the edge of
4 pavement in those areas of state, do you?

5 A. No, sir.

6 Q. Now, the minimum standards that you've
7 talked about, are they absolute minimum, or do they allow
8 some discretion from the VDOT engineering --

9 A. I'm not sure. I'm not sure the answer
10 to that.

11 MR. POULSON: I'm going to object to
12 that question. I think this is matter of law.

13 MR. LePAGE: He's raised the issue.

14 THE COURT: Wait a minute. I think his
15 answer is about what you're going to get. He's not sure.
16 He doesn't know. Next question.

17 MR. LePAGE: No further questions.

18 THE COURT: All right.

19 MR. POULSON: I've got about two.

20

21 REDIRECT EXAMINATION

22 BY MR. POULSON:

23 Q. Mr. Cooley, very briefly, sir. Does 622
24 have shoulders?

25 A. Yes, sir.

1 Q. Okay. Has your firm designed private
2 entrance subdivisions that are not under the county
3 ordinances, that are not to be taken in the state system,
4 the roadways?

5 A. Yes, sir.

6 Q. Okay. And let me ask you this, sir, to
7 get right to the nitty-gritty, as the old expression goes.

8 Based on your training, and experience,
9 and your previous dealing with VDOT over the last thirty
10 years, would you submit such an application to VDOT
11 utilizing the methodology used there to get twenty-four
12 feet?

13 A. No, sir.

14 Q. And why not, sir?

15 A. Because their instructions, and their
16 minimum standards manual that I see, there's nothing that
17 says that you can do that, that I can find.

18

19 RECROSS-EXAMINATION

20 BY MR. MCFARLAND:

21 Q. A couple of quick points, Mr. Cooley.

22 So I'm clear, the subdivision permits
23 that you have been involved with all involve new
24 entrances, correct, not existing right-of-ways such as is
25 at issue here?

1 A. I don't know about that, now. I'm not
2 sure of your question there.

3 Q. Well, Mr. Poulson just asked you on
4 redirect about your experience. Your experience has been
5 involved with new entranceways where you're creating a new
6 ingress egress method?

7 A. Okay.

8 Q. Right?

9 A. Right.

10 Q. Okay. And, sir, you've been out to look
11 at the property at Shooting Point one time?

12 A. One time.

13 Q. And that was when? Late April of 2001?

14 A. Uh-huh.

15 MR. MCFARLAND: That's all I have.

16 Thank you very much.

17 MR. LePAGE: One or two or more
18 questions.

19 THE COURT: You can stay right there.

20

21 RE CROSS-EXAMINATION

22 BY MR. LePAGE:

23 Q. Mr. Cooley, are you familiar with the
24 minimum standards?

25 A. As much as I can be.

1 Q. Okay. Are you familiar with page Roman
2 numeral six of the introduction to the minimum standards?

3 A. Not necessarily.

4 Q. Well, if I told you that it says --

5 THE COURT: Isn't that already in
6 evidence? I mean, his only answer was he didn't know. I
7 mean --

8 MR. LePAGE: Okay. Thank you, Your
9 Honor. I have nothing further.

10 THE COURT: All right. Anything else of
11 this gentleman?

12 MR. POULSON: No, sir.

13 THE COURT: May he be excused? Thank
14 you, sir. You may be excused.

15 All right. Now, Mr. Poulson, you
16 indicated your last witness is Mr. Latimer, who, I take
17 it, is not a witness today?

18 MR. POULSON: Yes, sir, that's correct.

19 THE COURT: And he is I guess another
20 surveyor?

21 MR. POULSON: Yes, sir.

22 THE COURT: Or engineer. But actually
23 he's a surveyor engineer who has had been subpoenaed by
24 Mr. McFarland?

25 MR. POULSON: Yes, sir.

1 THE COURT: So, Mr. McFarland, you are
2 going to make him available as Mr. Poulson's last witness,
3 whenever we can decide --

4 MR. MCFARLAND: Whenever we reconvene,
5 Your Honor. I would be happy to. I didn't know that
6 Mr. Poulson specifically wanted Mr. Latimer today until
7 this morning, and he had already left for Virginia Beach
8 to do regular work.

9 THE COURT: So, at any rate, after you
10 call him, I take it as an adverse witness, Mr. Poulson,
11 then the complainant would be resting?

12 MR. POULSON: Yes, sir, Your Honor.

13 THE COURT: All right. Okay. With that
14 having been said then, I think we can go off the record,
15 and we'll be officially recessed.

16 So everybody who is involved with the
17 case except for the attorneys, you can pack up, and do
18 whatever you want to do. We are going to need to get
19 together and figure out where we go from here.

20 (Court recessed to reconvene on June 12,

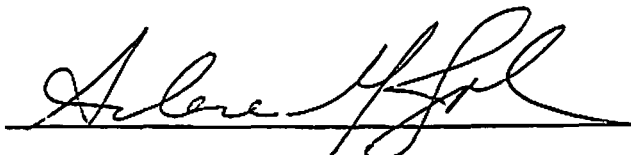
21 2001 at 10:00 a.m.)
22
23
24
25

CERTIFICATE OF REPORTER

I, Arlene Martin-Johnson, RPR, do hereby certify that I reported verbatim the proceedings in the Circuit Court of Northampton County, in the matter of Margaret Wescoat and John W. Wescoat versus Shooting Point Property Owners Association, Inc., et als, heard by The Honorable Frederick B. Lowe, Judge of said Court.

I further certify that the foregoing is a true, accurate transcription of said proceedings.

Given under my hand this 8th day of June, 2001 at Norfolk, Virginia.

A handwritten signature in cursive script, appearing to read 'Arlene Martin-Johnson', written over a horizontal line.

Arlene Martin-Johnson, RPR