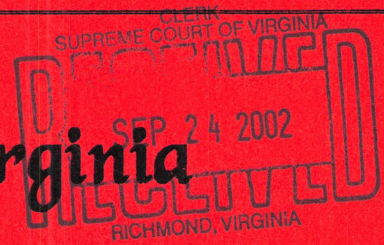


265VA256

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.

JOINT APPENDIX
VOLUME IV OF V
(Pages 942-1460)

Robert McFarland
Steven R. Zahn
MCGUIRE WOODS LLP
9000 World Trade Center
Norfolk, Virginia 23510
(757) 640-3700 (Telephone)
(757) 640-3964 (Facsimile)

Daniel Morris
THE MORRIS GROUP
2013 Pleasure House Road
Suite 200
Virginia Beach, Virginia 23455
(757) 552-0300 (Telephone)
(757) 552-0304 (Facsimile)

Jon C. Poulson
ATTORNEY AT LAW
3 Cross Street
Accomac, Virginia 23301
(757) 787-2620 (Telephone)
(757) 787-2749 (Facsimile)

Counsel for Shooting Point, L.L.C.

Counsel for Shooting Point

Counsel for John W. Wescoat

TABLE OF CONTENTS
Volume I of V

Appendix Page

| | |
|---|----------|
| Bill of Complaint Chancery No. CH00-14, With Exhibits, filed February 16, 2000 | 1 |
|---|----------|

Exhibits:

| | |
|---|-----------|
| A. Grant of Easement Deed Made By and Between Margaret W. Wescoat, Harold Wescoat and Anne W. Holland, William W. Holland and Elizabeth S. Jones dated June 18, 1974 | 8 |
| B. Deed Made By and Between Elizabeth S. Jones, Curtis H. Jones and James T. Martin, Dixon R. Doll dated September 20, 1974 | 11 |
| C. Deed Made By and Between James T. Martin, Dixon R. Doll, Carol A. Doll and Shooting Point, L.L.C., A Virginia Limited Liability Company dated December 7, 1999 | 18 |
| D. Plat of Shooting Point Farm Located on Church Neck, Eastville District dated December 8, 1999 | 21 |

Bill of Complaint
Chancery No. CH00-14,
With Exhibits,
filed February 16, 2000, continued:

Exhibits:

| | | |
|----|--|----|
| E. | Deed Made By and Between Shooting Point, L.L.C. and Jon L. Manetta dated December 16, 1999 | 22 |
| F. | Deed Made By and Between Shooting Point, L.L.C., Gary C. Cole and Ruth B. Cole dated December 16, 1999 | 25 |
| G. | Deed Made By and Between Shooting Point, L.L.C., Mark T. Finn and Sandra B. Finn Re: One Half Interest dated December 16, 1999 | 28 |
| H. | Deed Made By and Between Shooting Point, L.L.C., Mark T. Finn and Sandra B. Finn dated December 16, 1999 | 30 |
| I. | Deed Made By and Between Shooting Point, L.L.C., Paul F. Vogel and Susan L. Vogel dated January 18, 2000 | 33 |

| | |
|--|----|
| Respondent's, Shooting Point, L.L.C., Brief in Opposition to Temporary Injunction Chancery No. CH00-14, Without Exhibits, filed March 23, 2000 | 35 |
|--|----|

| | |
|---|----|
| Transcript of Motion Proceedings before The Honorable Frederick B. Lowe Re: Temporary Injunctive Relief, With Exhibits, on March 23, 2000 | 49 |
|---|----|

Testimony of John Wescoat:

| | |
|---|----|
| Direct Examination by Mr. Poulson | 53 |
| Cross Examination by Mr. McFarland | 72 |
| Redirect Examination by Mr. Poulson | 80 |

Testimony of Curtis H. Jones:

| | |
|---|----|
| Direct Examination by Mr. Poulson | 80 |
| Cross Examination by Mr. McFarland | 87 |
| Redirect Examination by Mr. Poulson | 91 |

Testimony of William M. Cummings, Jr.:

| | |
|---|-----|
| Direct Examination by Mr. Poulson | 92 |
| Cross Examination by Mr. McFarland | 101 |
| Redirect Examination by Mr. Poulson | 119 |
| Examination by the Court | 120 |
| Further Redirect Examination by Mr. Poulson | 122 |

Transcript of Motion Proceedings before
The Honorable Frederick B. Lowe
Re: Temporary Injunctive Relief,
With Exhibits,
on March 23, 2000, continued:

Testimony of John Humphreys:

| | |
|---|-----|
| Direct Examination by Mr. McFarland | 138 |
| Cross Examination by Mr. Poulson | 146 |
| Redirect Examination by Mr. McFarland | 152 |

Testimony of Marlene Cree:

| | |
|---|-----|
| Direct Examination by Mr. McFarland | 153 |
| Cross Examination by Mr. Poulson | 156 |
| Examination by the Court | 161 |

Exhibits:

| | | |
|----|--|-----|
| 1. | Grant of Easement Deed Made By and Between Margaret W. Wescoat, Harold Wescoat and Anne W. Holland, William W. Holland and Elizabeth S. Jones dated June 18, 1974 | 181 |
| 2. | Aerial Photograph undated | 182 |
| 3. | Colored Photographs A-J undated | 183 |
| 4. | Map of Subdivision Shooting Point Farm undated | 184 |

Transcript of Motion Proceedings before
The Honorable Frederick B. Lowe
Re: Temporary Injunctive Relief,
With Exhibits,
on March 23, 2000, continued:

Exhibits:

5. Virginia Department of Transportation
Minimum Standards of Entrances To State Highway
undated 185
6. Letter to
Sandra Benson from
K. M. Wright
Re: Necessary Permit Process
dated January 14, 2000 186

Order of
The Honorable Frederick B. Lowe
Chancery No. CH00-14
Re: Denying Plaintiff's Motion for Temporary Injunction
entered April 7, 2000 187

Respondent's, Shooting Point, L.L.C.,
Answer to The Bill of Complaint
Chancery No. CH00-14
filed April 10, 2000 190

| | |
|---|-----|
| Bill for Declaratory Judgment Chancery No. CH01-02, With Exhibit, filed January 26, 2001 | 195 |
|---|-----|

Exhibit:

| | |
|---|-----|
| E. Department of Transportation Land Use Permit 65, Northampton dated August 14, 2000 | 206 |
|---|-----|

| | |
|---|-----|
| Respondents', Commonwealth Transportation Board and Charles D. Nottingham, Commonwealth Transportation Commissioners, Answer to Bill of Declaratory Judgment Chancery No. CH01-02 filed February 16, 2001 | 211 |
|---|-----|

| | |
|--|-----|
| Respondent's, Shooting Point, L.L.C., Answer to Bill of Declaratory Judgment Chancery No. CH01-02 filed February 23, 2001 | 218 |
|--|-----|

| | |
|--|-----|
| Respondent's, Shooting Point Property Owners Association, Inc., Answer to Bill of Declaratory Judgment, With Attached Proposed Order, Chancery No. CH01-02 filed March 8, 2001 | 224 |
|--|-----|

| | |
|--|-----|
| Respondent's, Shooting Point, L.L.C., Motion for Leave to File Cross Bill Chancery No. CH01-02 filed April 18, 2001 | 232 |
|--|-----|

| | |
|---|-----|
| Respondent's, Shooting Point, L.L.C., Cross-Bill Chancery No. CH01-02 filed April 18, 2001 | 234 |
|---|-----|

| | |
|--|------|
| Complainants' Motion for Issues Out of Chancery Chancery Nos. CH01-02, CH00-14 filed May 1, 2001 | 240 |
| Respondent's, Shooting Point Property Owners Association, Inc., Response to Motion for Issues Out of Chancery Chancery No. CH01-02 filed May 4, 2001 | 246 |
| Respondent's, Shooting Point, L.L.C., Brief in Opposition to Complainants' Motion for Issues Out of Chancery Chancery Nos. CH00-14, CH01-02 filed May 8, 2001 | 248 |
| Letter to Counsel from Jon C. Poulson Re: Complainant's Supplemental Response to Interrogatories of Shooting Point, L.L.C. dated May 15, 2001 | 254A |
| Complainants' Demurrer Chancery No. CH01-02 filed May 25, 2001 | 255 |
| Complainants' Prospective Witness List and Prospective Exhibit List Chancery Nos. CH01-02, CH00-14 filed May 29, 2001 | 260 |
| Respondent's, Shooting Point, L.L.C., Brief in Opposition to Complainants' Motion for Issues Out of Chancery Chancery Nos. CH01-02, CH00-14 filed May 29, 2001 | 263 |

| | |
|--|-----|
| Respondent's, Shooting Point, L.L.C., Trial Brief Chancery No. CH00-14 filed May 29, 2001 | 271 |
|--|-----|

| | |
|--|-----|
| Respondent's, Shooting Point Property Owners Association, Inc., Motion In <i>Limine</i> Chancery No. CH00-14 filed May 29, 2001 | 287 |
|--|-----|

| | |
|---|-----|
| Respondent's, Shooting Point, L.L.C., Second Motion In <i>Limine</i> Chancery Nos. CH00-14, CH01-02 With Exhibits, filed May 29, 2001 | 290 |
|---|-----|

Exhibits:

| | |
|---|-----|
| A. Plat of Survey Location of 15' Right of Way Easement from S.R. 622 "Shooting Point" dated February 7, 2001 | 293 |
| B. Plat of Survey Intersection of a Fifteen (15') Right of Way Easement With State Route No. 622 (Glebe Road) dated January 19, 2001 | 294 |

| | |
|--|-----|
| Respondent's, Shooting Point, L.L.C., Designation of Witnesses and Exhibits Chancery Nos. CH00-14, CH01-02 filed May 29, 2001 | 296 |
|--|-----|

| | |
|--|-----|
| Respondent's, Shooting Point, L.L.C., Motion In <i>Limine</i> to Exclude Testimony of Sandra Gail Benson Chancery No. CH00-14 filed May 29, 2001 | 302 |
|--|-----|

| | |
|---|-----|
| Complainants' Motion In <i>Limine</i> Chancery No. CH01-02 Re: Prohibiting the Introduction of Subdivisions Which Do Not Comply with VDOT Requirements filed May 29, 2001 | 311 |
|---|-----|

| | |
|--|------|
| Complainants' Response to Respondent's, Shooting Point, Motion In <i>Limine</i> As to Sandra Gail Benson's Testimony Chancery No. CH00-14 filed May 30, 2001 | 312A |
|--|------|

| | |
|---|-----|
| Complainants' Response to Respondent's, Shooting Point, Motion In <i>Limine</i> As to George E. Water's Testimony and Plats Chancery No. CH00-14 filed May 30, 2001 | 313 |
|---|-----|

| | |
|--|-----|
| Letter to Counsel from Jon C. Poulson Re: Motions Chancery Nos. CH01-02, CH00-14 dated May 29, 2001 | 319 |
|--|-----|

| | |
|--|-----|
| Complainants' Motion to Amend Bill of Complaint Chancery No. CH00-14 filed May 30, 2001 | 320 |
|--|-----|

| | |
|---|-----|
| Complainants' Motion In <i>Limine</i> Chancery No. CH00-14 Re: Any Testimony in Regards to Easement filed May 30, 2001 | 322 |
|---|-----|

| | |
|---|-----|
| Complainants' Motion In <i>Limine</i> Chancery Nos. CH01-02, CH00-14 Re: Various Witnesses' Testimony filed May 30, 2001 | 324 |
|---|-----|

Transcript of Trial Proceedings before
The Honorable Frederick B. Lowe
Vol I

on May 30, 2001 326

Testimony of John W. Wescoat, Jr.:

Direct Examination by Mr. Poulson 354

TABLE OF CONTENTS
Volume II of V

Appendix Page

Transcript of Trial Proceedings before
The Honorable Frederick B. Lowe
Vol II

| | |
|-----------------------|-----|
| on May 31, 2001 | 388 |
|-----------------------|-----|

Testimony of John W. Wescoat, Jr.:

| | |
|--|-----|
| Direct Examination by Mr. Poulson | 395 |
| Cross Examination by Mr. McFarland | 400 |
| Cross Examination by Mr. LePage | 436 |
| Further Cross Examination by Mr. McFarland | 440 |
| Redirect Examination by Mr. Poulson | 443 |

Testimony of Curtis Jones, Jr.:

| | |
|--|-----|
| Direct Examination by Mr. Poulson | 444 |
| Cross Examination by Mr. McFarland | 464 |
| Cross Examination by Mr. LePage | 475 |
| Redirect Examination by Mr. Poulson | 477 |
| Recross Examination by Mr. McFarland | 478 |

Testimony of Richard E. Meekins:

| | |
|---|-----|
| Direct Examination by Mr. Poulson | 480 |
| Cross Examination by Mr. McFarland | 485 |
| Cross Examination by Mr. Morris | 491 |
| Redirect Examination by Mr. Poulson | 491 |

Testimony of John W. Wescoat, Sr.:

| | |
|---|-----|
| Direct Examination by Mr. Poulson | 492 |
| Cross Examination by Mr. McFarland | 528 |
| Redirect Examination by Mr. Poulson | 538 |

Transcript of Trial Proceedings before
The Honorable Frederick B. Lowe
Vol II

on May 31, 2001, continued:

Testimony of Kenneth Wright:

| | |
|---|-----|
| Direct Examination by Mr. Poulson | 540 |
| Cross Examination by Mr. LePage | 579 |
| Redirect Examination by Mr. Poulson | 585 |
| Recross Examination by Mr. LePage | 591 |
| Cross Examination by Mr. McFarland | 593 |
| Cross Examination by Mr. Morris | 598 |
| Further Redirect Examination by Mr. Poulson | 599 |
| Recross Examination by Mr. McFarland | 601 |
| Examination by the Court | 602 |

Testimony of William D. Cumming, Jr.:

| | |
|---|-----|
| Direct Examination by Mr. Poulson | 606 |
| Cross Examination by Mr. LePage | 652 |

TABLE OF CONTENTS
Volume III of V

Appendix Page

**Transcript of Trial Proceedings before
The Honorable Frederick B. Lowe
Vol III**

on June 4, 2001 663

Testimony of William D. Cumming, Jr.:

Cross Examination by Mr. McFarland 669
Redirect Examination by Mr. Poulson 694
Recross Examination by Mr. LePage 714
Further Redirect Examination by Mr. Poulson 718
Further Recross Examination by Mr. McFarland 719
Further Redirect Examination by Mr. Poulson 722
Further Recross Examination by Mr. LePage 724
Examination by the Court 725

Testimony of Suzanne Wescoat:

Direct Examination by Mr. Poulson 729
Cross Examination by Mr. McFarland 739
Redirect Examination by Mr. Poulson 751

Testimony of Denard C. Spady:

Direct Examination by Mr. Poulson 753
Cross Examination by Mr. McFarland 762
Cross Examination by Mr. Morris 768

Testimony of Sandra Benson:

Direct Examination by Mr. Poulson 771
Cross Examination by Mr. McFarland 787

Transcript of Trial Proceedings before
The Honorable Frederick B. Lowe
Vol III

on June 4, 2001, continued

Testimony of Sandra Benson:

| | |
|--|-----|
| Redirect Examination by Mr. Poulson | 807 |
| Recross Examination by Mr. McFarland | 811 |

Testimony of B.W. James:

| | |
|---|-----|
| Direct Examination by Mr. Poulson | 814 |
| Cross Examination by Mr. McFarland | 848 |
| Redirect Examination by Mr. Poulson | 865 |

Testimony of George E. Walters:

| | |
|--|-----|
| Direct Examination by Mr. Poulson | 870 |
| Cross Examination by Mr. McFarland | 899 |
| Cross Examination by Mr. LePage | 911 |
| Redirect Examination by Mr. Poulson | 912 |
| Recross Examination by Mr. McFarland | 914 |

Testimony of Charles E. Cooley:

| | |
|--|-----|
| Direct Examination by Mr. Poulson | 919 |
| Cross Examination by Mr. McFarland | 929 |
| Cross Examination by Mr. LePage | 935 |
| Redirect Examination by Mr. Poulson | 936 |
| Recross Examination by Mr. McFarland | 937 |
| Recross Examination by Mr. LePage | 938 |

TABLE OF CONTENTS
Volume IV of V

Appendix Page

**Transcript of Trial Proceedings before
The Honorable Frederick B. Lowe
Vol IV**

| | |
|------------------------|-----|
| on June 12, 2001 | 942 |
|------------------------|-----|

Testimony of James B. Latimer, II:

| | |
|---|-----|
| Direct Examination by Mr. Poulson | 949 |
| Cross Examination by Mr. McFarland | 951 |
| Redirect Examination by Mr. Poulson | 953 |
| Cross Examination by Mr. McFarland | 956 |

Testimony of Jerry Pauley:

| | |
|--|------|
| Direct Examination by Mr. LePage | 978 |
| Cross Examination by Mr. Poulson | 990 |
| Cross Examination by Mr. McFarland | 1021 |
| Cross Examination by Mr. Morris | 1029 |
| Further Cross by Mr. Poulson | 1034 |
| Redirect Examination by Mr. LePage | 1036 |
| Examination by the Court | 1038 |
| Recross Examination by Mr. Poulson | 1040 |
| Recross Examination by Mr. McFarland | 1042 |
| Further Recross Examination by Mr. Poulson | 1042 |

Testimony of James Cleveland:

| | |
|--|------|
| Direct Examination by Mr. LePage | 1043 |
| Cross Examination by Mr. Poulson | 1052 |
| Cross Examination by Mr. McFarland | 1064 |
| Further Cross Examination by Poulson | 1067 |
| Cross Examination by Mr. Morris | 1070 |

Transcript of Trial Proceedings before
The Honorable Frederick B. Lowe
Vol IV

on June 12, 2001, continued:

Testimony of James Cleveland:

| | |
|--|------|
| Redirect Examination by Mr. LePage | 1072 |
| Recross Examination by Mr. McFarland | 1073 |

Testimony of James A. Cline:

| | |
|--|------|
| Direct Examination by Mr. LePage | 1076 |
| Cross Examination by Mr. Poulson | 1090 |
| Cross Examination by Mr. McFarland | 1103 |
| Redirect Examination by Mr. LePage | 1108 |
| Recross Examination by Mr. Poulson | 1110 |
| Recross Examination by Mr. McFarland | 1120 |
| Examination by the Court | 1121 |
| Further Recross Examination by Mr. Poulson | 1123 |
| Further Recross Examination by Mr. McFarland | 1124 |

Testimony of Jack Hodge:

| | |
|---|------|
| Direct Examination by Mr. McFarland | 1125 |
| Cross Examination by Mr. Poulson | 1157 |
| Redirect Examination by Mr. McFarland | 1183 |
| Examination by the Court | 1185 |
| Recross Examination by Mr. Poulson | 1187 |

Testimony of Scottie Scott, Jr.:

| | |
|---|------|
| Direct Examination by Mr. McFarland | 1189 |
|---|------|

Transcript of Trial Proceedings before
The Honorable Frederick B. Lowe
Vol IV

on June 12, 2001, continued:

Testimony of James B. Latimer, II:

| | |
|---|------|
| Direct Examination by Mr. McFarland | 1202 |
| Cross Examination by Mr. Poulson | 1225 |
| Redirect Examination by Mr. McFarland | 1232 |
| Recross Examination by Mr. Poulson | 1236 |

Transcript of Trial Proceedings before
The Honorable Frederick B. Lowe
Vol V

| | |
|------------------------|------|
| on June 21, 2001 | 1244 |
|------------------------|------|

Testimony of Stephen Castiglioni:

| | |
|---|------|
| Direct Examination by Mr. McFarland | 1256 |
| Cross Examination by Mr. Poulson | 1291 |
| Redirect Examination by Mr. McFarland | 1332 |
| Recross Examination by Mr. Poulson | 1340 |

Testimony of M.E. Duff, Jr.:

| | |
|---|------|
| Direct Examination by Mr. McFarland | 1345 |
| Cross Examination by Mr. Poulson | 1398 |
| Redirect Examination by Mr. McFarland | 1418 |
| Recross Examination by Mr. Poulson | 1421 |
| Further Redirect Examination by Mr. McFarland | 1422 |

Testimony of John L. Manetta:

| | |
|--|------|
| Direct Examination by Mr. Morris | 1424 |
| Cross Examination by Mr. Poulson | 1436 |

Transcript of Trial Proceedings before
The Honorable Frederick B. Lowe
Vol V

on June 21, 2001, continued:

Testimony of John L. Manetta:

| | |
|--|------|
| Further Cross Examination by Mr. McFarland | 1440 |
| Recross Examination by Mr. Poulson | 1445 |

TABLE OF CONTENTS
Volume V of V

Appendix Page

**Transcript of Trial Proceedings before
The Honorable Frederick B. Lowe
Vol V**

on June 21, 2001, continued:

Plaintiffs' Exhibits:

| | | |
|------------|--|-------------|
| 1. | Aerial Plat | 1461 |
| 2. | Colored Photographs | 1462 |
| 3. | Colored Photographs | 1463 |
| 4. | Colored Photographs | 1464 |
| 5. | Colored Photographs | 1465 |
| 6. | Colored Photographs | 1466 |
| 7. | Colored Photographs | 1467 |
| 8. | Colored Photographs | 1468 |
| 9. | Video Tape | 1469 |
| 10. | Video Tape | 1470 |
| 11. | Map Shooting Point Farm | 1471 |

Transcript of Trial Proceedings before
The Honorable Frederick B. Lowe
Vol V

on June 21, 2001, continued:

Plaintiffs' Exhibits:

12. Grant of Easement
Deed Made By and Between
Margaret W. Wescoat, Harold Wescoat and
Anne W. Holland, William W. Holland and
Elizabeth S. Jones
dated June 18, 1974 1472
13. Deed Made By and Between
Elizabeth S. Jones, Curtis H. Jones and
James T. Martin, Dixon R. Doll
dated September 20, 1974 1475
14. Deed Made By and Between
James T. Martin, Charity H.A. Martin,
Dixon R. Doll and Carol Ann Doll
dated June 18, 1979 1482
15. Bonifant Plat
undated 1485
16. Deed Made By and Between
James T. Martin, Dixon R. Doll, Carol A. Doll and
Shooting Point, L.L.C., A Virginia Limited Liability Company
dated December 7, 1999 1486
17. Map of Subdivision
Shooting Point Farm
undated 1489

Transcript of Trial Proceedings before
The Honorable Frederick B. Lowe
Vol V

on June 21, 2001, continued:

Plaintiffs' Exhibits:

18. Declarations of Protective Covenants,
 Conditions, Easements and Restrictions for Shooting Point
 dated October 20, 1999 1490
19. Deed of Trust Made By and Between
 Shooting Point, L.L.C. and
 Farmers & Merchants Bank-Eastern Shore
 dated December 29, 1999 1542
20. Deed Made By and Between
 Shooting Point, L.L.C. and
 Jon L. Manetta
 dated December 16, 1999 1554
21. Deed Made By and Between
 Shooting Point, L.L.C.,
 Gary C. Cole and Ruth B. Cole
 dated December 16, 1999 1557
22. Deed Made By and Between
 Shooting Point, L.L.C.,
 Mark T. Finn and Sandra B. Finn
 dated December 16, 1999 1560
23. Deed Made By and Between
 Shooting Point, L.L.C., Mark T. Finn, Sandra B. Finn and
 Gary C. Cole and Ruth B. Cole
 dated December 16, 1999 1563

Transcript of Trial Proceedings before
The Honorable Frederick B. Lowe
Vol V

on June 21, 2001, continued:

Plaintiffs' Exhibits:

24. Deed Made By and Between
Shooting Point, L.L.C.,
Paul F. Vogel and Susan L. Vogel
dated January 18, 2000 1566
25. First Amendments to
The Declaration of Protective Covenants, Conditions,
Easements and Restrictions for Shooting Point
dated May 22, 2001 1568
26. Escrow Agreement Made By and Between
Shooting Point, L.L.C.,
Shooting Point Property Owners Association, Inc. and
Robert C. Oliver, Jr.
dated May 24, 2001 1576
27. Virginia Department of Transportation
Minimum Standards of Entrances To State Highways
undated 1579
28. Department of Transportation
Land Use Permit
65, Northampton
dated August 14, 2000 1626
29. Letter to
Sandra Benson from
K.M. Wright
Re: Necessary Permit Process
dated January 14, 2000 1650

Transcript of Trial Proceedings before
The Honorable Frederick B. Lowe
Vol V

on June 21, 2001, continued:

Plaintiffs' Exhibits:

30. Drawing of
Sate Road and Paved Portion
undated 1651
31. Department of Transportation
Land Use Permit
65, Northampton
dated October 17, 2000 1652
32. Letter Transmission to
Mr. Hodge from
Kenny Wright
Re: Copies of Sketches A&B - Shooting Point
dated August 14, 2000 1655
33. Facsimile Transmission to
James Cline, Lynn Wagner from
Julie Brown
dated February 21, 2000 1659
34. Letter to
Julie Brown from
W.M. Cumming, Jr.
Re: Permit for Private Road
dated February 22, 2000 1660

Transcript of Trial Proceedings before
The Honorable Frederick B. Lowe
Vol V

on June 21, 2001, continued:

Plaintiffs' Exhibits:

35. Telephone Messages for
Mr. Cumming
Re: Secondary Roads
dated July 1661
36. Facsimile to
Jim Givens from
W. M. Cumming, Jr.
dated April 17 1662
37. Facsimile Letter to
W. M. Cumming, Jr. from
Stephen L. Castiglioni, P.E.
Re: Application for Entrance Permit
dated July 28, 2000 1664
38. Facsimile to
Jim Cline from
C. M. Cumming
Re: Land Use Permit
dated August 25, 2000 1669
39. Daily Record of Events
Re: Notes Referencing Project
dated January 10 through August 21, 2000 1675
40. Notes
Re: Conversation with Will
dated November 17, 2000 1678

Transcript of Trial Proceedings before
The Honorable Frederick B. Lowe
Vol V

on June 21, 2001, continued:

Plaintiffs' Exhibits:

41. Plat of Survey
dated January 19, 2001
revised May 29, 2001 1679
42. Plat of Survey
dated February 7, 2001
revised May 29, 2001 1680
43. Plat of Survey
dated May 1, 2001 1681
44. Sketch of
Proposed Shooting Point Entrance on Rt. 622
Re: Stop Sign Location
dated July 28, 2000 1682
45. Sketch of
Proposed Shooting Point Entrance on Rt. 622
Re: Stop Sign Location
dated July 28, 2000 1683
46. Sketch of
Proposed Shooting Point Entrance on Rt. 622
Re: Stop Sign Location
dated July 28, 2000 1684
47. Letter to
Lemoin B. Cree from
Stephen L. Castiglioni, P.E.
Re: 15 Foot Ingress/Egress
dated February 28, 2000 1685

Transcript of Trial Proceedings before
The Honorable Frederick B. Lowe
Vol V

on June 21, 2001, continued:

Plaintiffs' Exhibits:

48. Facsimile Transmission to
Lemoin Cree from
Steve Castiglioni
Re: Letter to Gary C. Byler
dated July 6, 2000 1689
49. Land Use: 250
Retirement Community
Description
undated 1695

Defendants' Exhibits:

1. Photographs 1702
2. Letter to
Mr. & Mrs. Mark T. Finn from
John W. Wescoat
dated January 13, 2000 1703
3. Map Plat
dated October 20, 1999 1705
4. Aerial Photograph
undated 1706
5. Oversized Photograph 1707
6. Photographs 1708
7. Department of Planning and Zoning
dated November 1, 1999 1709

Transcript of Trial Proceedings before
The Honorable Frederick B. Lowe
Vol V

on June 21, 2001, continued:

Defendants' Exhibits:

| | | |
|-----|--|------|
| 8. | Virginia Department of Transportation Subdivision Street Requirements undated | 1710 |
| 9. | Plat Including Photographs and Information about Westerhouse Road undated | 1711 |
| 10. | Aerial Photograph | 1712 |
| 11. | Aerial Photograph | 1713 |
| 12. | Aerial Photograph | 1714 |
| 13. | Photographs | 1715 |
| 14. | Deed Made By and Between James T. Martin, Dixon R. Doll and Baxley T. Tankard dated September 20, 1974 | 1716 |
| 15. | Photographs | 1722 |
| 16. | Aerial Photograph taken October 5, 1989 | 1723 |
| 17. | Aerial Photographs | 1724 |
| 18. | Map | 1725 |
| 19. | Photograph (1979 Bonifant Survey) | 1726 |

Transcript of Trial Proceedings before
The Honorable Frederick B. Lowe
Vol V

on June 21, 2001, continued:

Defendants' Exhibits:

| | |
|-----------------------|------|
| 20. Photographs | 1727 |
| 21. Photograph | 1728 |
| 22. Video Tape | 1729 |
| 23. Photograph | 1730 |

Transcript of Trial Proceedings before
The Honorable Frederick B. Lowe
Vol VI

| | |
|------------------------|------|
| on July 10, 2001 | 1731 |
|------------------------|------|

Respondent's, Shooting Point Property Owners Association, Inc.,
Post Trial Brief
Chancery No. CH00-14

| | |
|---------------------------|------|
| filed July 10, 2001 | 1845 |
|---------------------------|------|

Respondent's, Shooting Point, L.L.C.,
Post Trial Brief
Chancery No. CH00-14

| | |
|---------------------------|------|
| filed July 10, 2001 | 1857 |
|---------------------------|------|

Letter to
Counsel from
Jon C. Poulson
With Attached Proposed Decree,
Chancery Nos. CH01-02, CH00-14

| | |
|----------------------------|------|
| dated August 2, 2001 | 1879 |
|----------------------------|------|

Letter to
Counsel from
The Honorable Frederick B. Lowe
Re: Entry of Final Decree
Chancery Nos. CH01-02, CH00-14
dated October 19, 2001 1892

Final Decree of
The Honorable Frederick B. Lowe
Chancery Nos. CH01-02, CH00-14
entered January 2, 2002 1893

Respondent's, Shooting Point, L.L.C.,
Motion for Reconsideration of Rulings Set Forth in Final Decree
Chancery Nos. CH01-02, CH00-14
filed January 25, 2002 1905

Complainants' Notice of Appeal
Chancery Nos. CH01-02, CH00-14
filed January 29, 2002 1909

Letter to Collette at
Zahn, Hall & Zahn, Ltd. from
Jon C. Poulson
Re: Request for Preparation of Trial Transcripts
Chancery Nos. CH01-02, CH00-14
dated January 28, 2002 1914

Respondent's, Shooting Point Property Owners Association,
Notice of Appeal
Chancery Nos. CH01-02, CH00-14
filed February 1, 2002 1916

Respondent's, Shooting Point, L.L.C.,
Notice of Appeal
Chancery Nos. CH01-02, CH00-14
filed February 1, 2002 1918

Letter to
Kenneth F. Arnold, Clerk from
Robert W. McFarland
Re: Request for Motion for Reconsideration to Be Withdrawn
Chancery Nos. CH01-02, CH00-14
dated February 18, 2002 1922

Complainants' Notice of Filing of Transcripts
Chancery Nos. CH01-02, CH00-14
filed February 26, 2002 1923

Letter to
Kenneth F. Arnold from
Jon C. Poulson
Re: Transcripts Volume I - VI
Chancery Nos. CH01-02, CH00-14
dated February 26, 2002 1926

Letter to
Kenneth F. Arnold from
Robert W. McFarland
Re: No Objection to The Transcripts File by Complainants
Chancery Nos. CH01-02, CH00-14
dated February 28, 2002 1928

Respondent's, Shooting Point, L.L.C.,
Motion to Enforce the Final Decree
(Show Cause) in Part, and To Stay The Final Decree, in Part
Chancery Nos. CH01-02, CH00-14
filed March 13, 2002 1929

**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 1931

Exhibits:

| | |
|---|-------------|
| A-1. Colored Photograph of New Stakes | 1936 |
| A-2. Colored Photograph of New Stakes | 1937 |
| A-3. Colored Photograph of New Stakes | 1938 |
| A-4. Colored Photograph of New Stakes | 1939 |
| A-5. Colored Photograph of New Stakes | 1940 |
| A-6. Colored Photograph of New Stakes | 1941 |
| A-7. Colored Photograph of New Stakes | 1942 |
| A-8. Colored Photograph of New Stakes | 1943 |
| A-9. Colored Photograph of New Stakes | 1944 |
| A-10. Colored Photograph of New Stakes | 1945 |

**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:

| | |
|---|-------------|
| A-11. Colored Photograph of New Stakes | 1946 |
| A-12. Colored Photograph of New Stakes | 1947 |
| A-13. Colored Photograph of New Stakes | 1948 |
| A-14. Colored Photograph of New Stakes | 1949 |
| A-15. Colored Photograph of New Stakes | 1950 |
| A-16. Colored Photograph of New Stakes | 1951 |
| 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

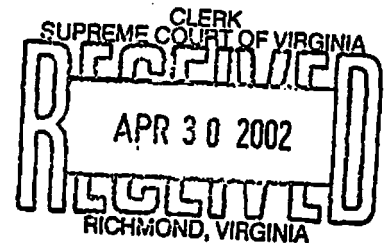
MARGARET WESCOAT and JOHN WESCOAT,)
Plaintiffs,)

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 IV

Before: THE HONORABLE FREDERICK B. LOWE

June 12, 2001

Northampton County, Virginia

Appearances:

JON C. POULSON, ESQUIRE
Three Cross Street
Accomac, Virginia 23301
Counsel for PlaintiffsMCGUIRE, WOODS, BATTLE & BOOTHE
By: ROBERT W. MCFARLAND, ESQUIRE
9000 World Trade Center
Norfolk, Virginia 23510
Counsel for the Defendant Shooting
Point, LLC

Filed: Feb 26 2002
Testis: [Signature]
Clerk: [Signature]
NORTHAMPTON COUNTY CIRCUIT COURT

Appearances (cont.):

THE MORRIS GROUP

By: DANIEL R. MORRIS, ESQUIRE
273 Granby Street, Third Floor
Norfolk, Virginia 23510
Counsel for Defendant Shooting Point
Property Owners Assoc.

ASSISTANT ATTORNEY GENERAL

By: TODD E. LEPAGE, ESQUIRE
900 E. Main Street
Richmond, Virginia 23219
Counsel for Commonwealth
Transportation Commissioner -
Commonwealth Transportation Board

I N D E X

WITNESSESPAGE:ON BEHALF OF THE PLAINTIFFS:

JAMES B. LATIMER, II

Direct Examination by Mr. Poulson 6

Cross-Examination by Mr. McFarland 8

Redirect Examination by Mr. Poulson 10

Cross-Examination by Mr. Morris 13

ON BEHALF OF THE DEFENDANTS:PAGE:

JERRY PAULEY

Direct Examination by Mr. LePage 37

Cross-Examination by Mr. Poulson 49

Cross-Examination by Mr. McFarland 80

Cross-Examination by Mr. Morris 88

Further Cross by Mr. Poulson 93

Redirect Examination by Mr. LePage 95

Examination by the Court 97

Recross-Examination by Mr. Poulson 99

Recross-Examination by Mr. McFarland 101

Further Recross-Examination by Mr. Poulson 101

JAMES CLEVELAND

Direct Examination by Mr. LePage 102

Cross-Examination by Mr. Poulson 111

I N D E X

WITNESSESPAGE:ON BEHALF OF THE DEFENDANTS:

JAMES CLEVELAND (Cont'd)

| | |
|--|-----|
| Cross-Examination by Mr. McFarland | 123 |
| Further Cross-Examination by Mr. Poulson | 126 |
| Cross-Examination by Mr. Morris | 129 |
| Redirect Examination by Mr. LePage | 131 |
| Recross-Examination by Mr. McFarland | 132 |

JAMES A. CLINE

| | |
|--|-----|
| Direct Examination by Mr. LePage | 135 |
| Cross-Examination by Mr. Poulson | 149 |
| Cross-Examination by Mr. McFarland | 162 |
| Redirect Examination by Mr. LePage | 167 |
| Recross-Examination by Mr. Poulson | 169 |
| Recross-Examination by Mr. McFarland | 179 |
| Examination by the Court | 180 |
| Further Recross-Examination by Mr. Poulson | 182 |
| Further Recross-Examination by Mr. McFarland | 183 |

JACK HODGE:

| | |
|---------------------------------------|-----|
| Direct Examination by Mr. McFarland | 184 |
| Cross-Examination by Mr. Poulson | 216 |
| Redirect-Examination by Mr. McFarland | 242 |
| Examination by the Court | 244 |
| Recross-Examination by Mr. Poulson | 246 |

I N D E X

WITNESSESPAGE:ON BEHALF OF THE DEFENDANTS:

MR. SCOTTIE SCOTT, JR.

Direct Examination by Mr. McFarland 248

JAMES B. LATIMER, II

Direct Examination by Mr. McFarland 261

Cross Examination by Mr. Poulson 284

Redirect Examination by Mr. McFarland 291

Recross-Examination by Mr. Poulson 295

| | | | |
|----|-------------------------------------|---------------------------------------|--------|
| 1 | E X H I B I T S | | |
| 2 | NO. | DESCRIPTION | MARKED |
| 3 | <u>ON BEHALF OF THE PLAINTIFFS:</u> | | |
| 4 | 44 | DOCUMENT ✓ | 63 |
| 5 | 45 | DOCUMENT ✓ | 68 |
| 6 | 46 | DOCUMENT ✓ | 73 |
| 7 | | | |
| 8 | <u>ON BEHALF OF THE DEFENDANTS:</u> | | |
| 9 | 8 | PAGE FROM SUBDIVISION STREET MANUAL ✓ | 91 |
| 10 | 9 | DOCUMENT ✓ | 212 |
| 11 | 10 | AERIAL PHOTOGRAPH ✓ | 251 |
| 12 | 11 | AERIAL PHOTOGRAPH ✓ | 251 |
| 13 | 12 | AERIAL PHOTOGRAPH ✓ | 251 |
| 14 | 13 | PHOTOGRAPHS ✓ | 269 |
| 15 | 14 | DEED OF TRUST TO TAGGARD ✓ | 280 |
| 16 | | | |
| 17 | | | |
| 18 | | | |
| 19 | | | |
| 20 | | | |
| 21 | | | |
| 22 | | | |
| 23 | | | |
| 24 | | | |
| 25 | | | |

TRANSCRIPT OF PROCEEDINGS

(The court reporter was duly sworn.)

THE COURT: All right. Mr. Poulson, as I recall in our last session, you had one additional witness that you wish to call?

MR. POULSON: Yes, sir.

THE COURT: Are you ready?

MR. POULSON: I don't know that Mr. Latimer is here, which is one of their witnesses. They were going to make him available at some point in time.

MR. MCFARLAND: I think he's here. He's definitely on his way, Your Honor. He may well be outside.

There was also an issue of a video, Your Honor, I think we were going to take up.

THE COURT: I think what it is, it was a video that had already been put into evidence, but there was more than one.

MR. POULSON: It was two segments, the same video. So it wasn't an additional exhibit; we just went back and referred to the previous exhibit.

THE COURT: I think that's covered. All right.

MR. MCFARLAND: I take it the Court is

1 going to admit the video for --

2 THE COURT: Yes. I mean, it will just
3 be admitted under the same number as what it was
4 previously.

5 MR. POULSON: It was actually number 9,
6 Judge, is what it was, sir.

7 THE COURT: Is he out there?

8 THE DEPUTY: Yes.

9 MR. MCFARLAND: Okay.

10 THE CLERK: Come up here and be sworn,
11 please.

12
13 JAMES B. LATIMER, II, called as a
14 witness by and on behalf of the Plaintiffs, being first
15 duly sworn, testified as follows:

16

17 DIRECT EXAMINATION

18 BY MR. POULSON:

19 Q. Mr. Latimer, state your name for the
20 record, please.

21 A. James B. Latimer, II.

22 Q. And what is your occupation, sir?

23 A. I'm a land surveyor.

24 Q. And were you employed by one of the
25 respondents in this case, Shooting Point L.L.C.?

1 A. Yes.

2 Q. Okay. And were you involved in the
3 drawings and the underlying work for the entrance permit
4 that was issued in this case?

5 A. I was responsible for overseeing the
6 necessary topography, supervision of the crews to support
7 the engineering for the drawing.

8 Q. And let me show you, if I may, please,
9 part of Exhibit 28. And looking specifically at Plan A
10 dated July 28, 2000, are you familiar with that?

11 A. I have seen it.

12 Q. The center line that is shown on there,
13 it says, "easement center line," right here?

14 A. Uh-huh.

15 Q. Okay. What is that center line? Is
16 that the 1974 plat, the center line?

17 A. That center line that's shown there is
18 the one that's on the Bonifant survey, and I believe that
19 that's --

20 Q. '79?

21 A. I believe it's 79.

22 Q. It is the Bonifant survey?

23 A. It is the Bonifant survey.

24 Q. Okay. And was that the center line that
25 was repeated in the Shooting Point subdivision plat in

1 late 1999?

2 A. Yes, that is the same.

3 Q. Okay. And let me show you, if I may,
4 what is part of 28C, Plan A, dated September 27, 2000.

5 There is a pin shown there right at what
6 would be the front tandem axle of the track for there,
7 "pin found"?

8 A. Uh-huh.

9 Q. What is that pin?

10 A. That is also the center line of the
11 Bonifant.

12 Q. The Bonifant survey line.

13 MR. POULSON: Okay. Thank you, sir.
14 Answer counsel, please.

15
16 CROSS-EXAMINATION

17 BY MR. MCFARLAND:

18 Q. I have just a couple of questions for
19 you at this time, Mr. Latimer. Good morning.

20 Let me hand you what I believe is
21 Complainant's Exhibit 15. Handing you what's been marked
22 previously Plaintiff's Exhibit 15, Mr. Latimer, do you
23 recognize that, sir?

24 A. Yes, sir.

25 Q. Would that be the Bonifant survey?

1 A. Yes, sir, this is the Bonifant survey.

2 Q. And it was done when, Mr. Latimer?

3 A. May 22nd, 1979.

4 Q. All right. Is there any geometry on
5 that survey at the entrance that Bonifant has depicted on
6 his plat of survey?

7 A. Rephrase that again.

8 Q. Sure. Is there any specific description
9 of the entrance of the right-of-way on the Bonifant 1979
10 survey?

11 A. Mr. Bonifant never connected the
12 right-of-way to Route 622 by any numbers, only by
13 graphics. No bearings, no distances, just graphics only.

14 Q. And what is the first geometry we see on
15 that survey? How far back from the connection between
16 Route 622 and the beginning of the right-of-way?

17 A. Plus or minus fifty feet.

18 Q. And is there any geometry on the turns
19 on the Bonifant survey?

20 A. There's no geometry on the turns.

21 Q. All right. One second. I think
22 that's -- did you have any role with respect to the
23 drawings that were submitted with the application?

24 A. As I've stated previously, I was taking
25 the topography for the engineer to draw the permits. I

1 had nothing to do with the drawings.

2 Q. So you didn't actually do any of the
3 drawings that were submitted with the application?

4 A. No.

5 Q. And by the drawings, I mean what's been
6 identified as, I think, 28A through C?

7 A. The permit.

8 Q. Yes, permit.

9 Okay. All right. Thank you.

10 MR. MCFARLAND: That's all I have at
11 this time.

12 MR. MORRIS: No questions, Your Honor.

13 MR. LePAGE: No questions.

14 MR. POULSON: I have a few questions.
15 Let me see that plat again.

16

17 REDIRECT EXAMINATION

18 BY MR. POULSON:

19 Q. What do you mean by the phrase
20 "geometry"?

21 A. The numbers, bearings, distances.

22 Q. Well, first, let's take on the curves.
23 The curves have pins set --

24 A. Uh-huh.

25 Q. -- each place on the curve, do they not?

1 A. At the point of intersection.

2 Q. And the point of intersection.

3 And there are courses, and distances
4 leading to each of those pins?

5 A. Correct.

6 Q. Okay. And then down here at the
7 entrance, there is a course running it appears to be south
8 9 degrees 59 minutes 05 seconds west?

9 A. Seven hundred and something feet.

10 Q. Seven hundred and seventy-two feet?

11 A. But that does not connect to Route 622.

12 Q. Correct.

13 Is there anything here to show any
14 course deviation to the right-of-way there?

15 A. You would have to make some assumptions,
16 or something. The only thing that you -- like I say, the
17 graphics, but there is no geometry, no numbers to connect
18 you to the state road.

19 Q. Mr. Latimer, is there any deviation in
20 the course from the pin set near the right-of-way, sir, or
21 is it a continuous straight line to the right-of-way?

22 A. Well, that's an assumption. I mean, you
23 can take a straight edge and -- it looks like it's got a
24 little deviation to me, but pin to paper --

25 Q. Mr. Latimer, is there anything on the

1 plat, sir, that shows the deviation?

2 A. Well, there's no numbers that show the
3 deviation.

4 Q. And if there was a deviation, there
5 would be a different course, would it not, sir?

6 MR. MCFARLAND: I'm going to object to
7 the speculation called for.

8 THE COURT: Overrule the objection.

9 BY MR. POULSON:

10 Q. This easement has courses and distances
11 for its whole length, does it not, Mr. Latimer?

12 A. Sure. Yes, except for the connection to
13 Route 622, and it stops fifty-something feet short of
14 connecting to Route 622.

15 Q. And there is nothing in there on this
16 survey that shows any course change from the course shown
17 for that leg, is there, Mr. Latimer?

18 A. No, there's no numbers to show any
19 deviation.

20 Q. Okay. Thank you, sir.

21 THE COURT: What is that exhibit number?

22 MR. MCFARLAND: Complainant's 15.

23 MR. MORRIS: Your Honor, may I ask one
24 question?

25 THE COURT: Sure.

CROSS-EXAMINATION

BY MR. MORRIS:

Q. Mr. Latimer, my name is Daniel Morris.

I represent the Property Owners Association.

On the survey that you have before you,
what is the purpose of the notations that are throughout?

MR. POULSON: I'm going to object to
that question. The notations are on the plat. It shows
what they are. The plat speaks for itself.

BY MR. MORRIS:

Q. Would you please -- do you have your
glasses with you?

A. I don't need them to read the plat.

Q. Could you read what this notation says
right here?

A. "The center line dirt lane width and
status unknown."

Q. Width and status unknown?

A. Correct.

MR. MORRIS: I have no further
questions. Thank you, Judge.

THE COURT: All right. Anything else?

MR. MCFARLAND: Not at this time;
however, I reserve my right to call Mr. Latimer during our
case.

1 THE COURT: All right. Thank you,
2 Mr. Latimer. You may step down.

3 All right. Mr. Poulson, is that it for
4 you?

5 MR. POULSON: Yes, sir.

6 THE COURT: The plaintiffs rest. All
7 right.

8 MR. LePAGE: Your Honor, at this point
9 I'm going to move to strike the plaintiff's evidence with
10 respect to the 01 and 02 case.

11 To prevail on their claim that the
12 Department of Transportation was arbitrary and capricious,
13 they would have had to show that no reasonable public
14 official could have interpreted the minimum standards the
15 way that VDOT interpreted them in this case.

16 If you look at the Complainant's
17 evidence still, their case is that the easement is
18 fifteen-feet wide, and it was measured on what they call
19 the skew, what we call the geometrics, parallel to the
20 edge of pavement, to determine that it is twenty-four-feet
21 wide.

22 Their argument is that the illustration
23 at page 29 of the minimum standards is an absolute
24 minimum, that VDOT could not go below that without being
25 arbitrary or capricious, that two large vehicles could not

1 pass each other coming into the entrance, and because one
2 would have to wait on the main line, which is 622, for the
3 vehicle to clear the entrance, that it presents a safety
4 hazard.

5 And there has been a lot of innuendo
6 about a man named Jack Hodge causing the higher-ups in the
7 Department of Transportation to direct Mr. Cumming with
8 respect to how he would issue this permit.

9 And, finally, they had Mr. Cooley who
10 testified that in his opinion it was not reasonable to
11 interpret the standards the way they are interpreted in
12 this case.

13 If you look at the evidence as a whole,
14 however, the minimum standards are guidelines. The
15 overriding principle of the minimum standards is to
16 provide traffic safety.

17 The easement was measured with the
18 geometrics in this case, which is consistent with VDOT
19 policy. As a result, the easement was determined to be
20 twenty-four-feet wide in terms of the pavement.

21 But even if the Court does not agree
22 with VDOT's interpretation on that, the introduction to
23 the minimum standard says that the engineer, which in this
24 case is the resident engineer, has the authority to reduce
25 those standards if it will meet the purposes of the

1 minimum standards.

2 Mr. Cumming testified that he followed
3 normal procedures, and consulted with traffic engineering
4 in this case. They evaluated it, and on the basis of the
5 narrow nature of Route 622, the unlimited sight distance,
6 and the very light traffic which would exist out there
7 after a subdivision goes in, that this entrance can
8 function safely; there is no real danger of a rear-end
9 collision.

10 There is no question that Mr. Cumming
11 changed his mind from when he previously testified in this
12 case; however, there is nothing to indicate that he was
13 arbitrary or capricious in his decision in this case.

14 And Mr. Cooley's testimony, I would
15 submit to the Court, was meaningless. He testified that
16 he was not familiar with VDOT's policies off the Eastern
17 Shore, and he testified that he didn't know whether the
18 minimum standards allowed a reduction by anyone.

19 And, in fact, I would submit to the
20 Court that his lack of knowledge of the minimum standards
21 was breathtaking in this case.

22 I would submit that there has been no
23 evidence to bear the burden that VDOT was arbitrary or
24 capricious, and that the evidence should be struck.

25 MR. MORRIS: Your Honor, Shooting Point

1 Property Owners Association joins in with that motion.

2 THE COURT: I take it you do, also?

3 MR. MCFARLAND: We do, too. We have
4 another motion with respect to the end of the plaintiffs'
5 case, but I'll let Mr. Poulson, if he wants to respond to
6 VDOT.

7 THE COURT: Okay.

8 MR. POULSON: Judge, we would, of
9 course. The question here is has VDOT been unreasonable,
10 arbitrary, and capricious, and when we look at all of the
11 evidence, I would respectfully submit to the Court that
12 the evidence is quite strong in this particular regard.

13 I think we start with the prior
14 statement of the resident engineer on March 23rd, 2000 in
15 this very court, his sworn testimony, emphatic that there
16 was no way that this entrance could comply with the
17 minimum standards. There wasn't any question about it.
18 He laid it right on the line, absolutely no way
19 whatsoever.

20 And then some four or five months later,
21 Mr. Cumming issued a permit. How did the permit get
22 issued? And I think the Court well sees the evidence,
23 what the evidence was, and we look at statements that
24 Mr. Cumming later made to Mrs. Wescoat, and also made to
25 Mr. Spady talking about the Tavi permit as well as this

1 one, noting that an ex-highway engineer got involved in
2 the thing, they went over his head, and noting that in
3 talking about Tavi and this permit with Mr. Spady, that
4 they did not comply with the drawings is the way that it
5 was put.

6 Basically, we have a device here. What
7 has happened here is, I guess, perhaps because of an
8 ex-chief engineer for the state, and the people that he
9 knew, basically he has found a way, which we do not think
10 is engineeringly sound, so to speak, or reasonable to be
11 able to turn fifteen into twenty-four.

12 We look at the regulations, and we look
13 specifically at the regulations here. We've got a lot of
14 introductory comments in that book, but the regulations
15 are very clear what the minimum standards are, and what
16 you have to have.

17 And I would note to the Court's
18 attention, if the Court should happen to look at those
19 regulations, in every one of them, except for the one
20 showing the private subdivision, there is some language
21 there to the effect that you can vary somewhat depending
22 on the conditions. I believe it says based on sound
23 engineering principles.

24 There is no such language on the minimum
25 standard applicable to a private subdivision. They are

1 law.

2 Apparently, the Commonwealth does not
3 say they varied them; they've just used this methodology
4 where they have tried to come in and measured twenty-four
5 feet on the skew.

6 Is that reasonable, arbitrary, and
7 capricious? We would say it's clearly unreasonable,
8 arbitrary, and capricious.

9 The whole purpose of the regulations are
10 to, among other things, have entrances that you can have
11 safe ingress and egress of two vehicles. And they have
12 just totally violated that whole principle in trying to
13 determine the width, the required width of the entrance by
14 measuring the thing on a skew.

15 It gives a misleading figure. It is a
16 misapplication, and no one reasonable could end up
17 measuring the width at the back of the entrance
18 twenty-five feet from the right-of-way line in the manner
19 in which they've done.

20 The regulations don't even say parallel.
21 This is just a methodology that they have tried to do to
22 turn fifteen into twenty-four to try to give a permit to
23 somebody that had some pull from the state.

24 So we would submit, sir, that when you
25 look at all of the evidence, and when you look at

1 Mr. Cooley, and even Mr. Cumming says in his thirteen and
2 a half years, no, I've never seen it measured that way
3 either. Mr. Cooley, in thirty years, has never seen it
4 measured that way.

5 We would respectfully submit to the
6 Court it is very clear what they have done here. They
7 have simply pulled a device in their desire to try to
8 accommodate an ex-high-placed highway official.

9 And that is what has happened, and
10 basically, sir, it is unreasonable, it is arbitrary, and
11 it is capricious.

12 THE COURT: All right. You also have a
13 motion, Mr. McFarland?

14 MR. MCFARLAND: Well, I do, Your Honor.
15 I just want to address on the VDOT issue because,
16 obviously, we do have a stake in that.

17 THE COURT: Okay.

18 MR. MCFARLAND: Your Honor, the evidence
19 taken -- and I recognize that the Court sitting hearing at
20 the end of the complainant's evidence has to view the
21 evidence in the light taken most favorably to the
22 complainant, but the evidence taken in that light simply
23 indicates the following:

24 That Mr. Cumming had a change in his
25 opinion as to whether a permit could be issued for this

1 entrance.

2 He testified in a hearing, and we went
3 through in detail what he did before he testified at the
4 March hearing, and then what he did later when he reviewed
5 this application, everything that he looked at, the people
6 he consulted with.

7 The primary principle that guides the
8 issuance of a entrance permit is safety. And there is no
9 testimony from anyone who has any position of authority
10 with VDOT or otherwise that this is not a safe entrance.

11 Mr. Cooley has zero experience with this
12 type of an entrance when we've got a private subdivision
13 with an entrance on a curve. He admitted that. He has
14 never dealt with this kind of an entrance before. So his
15 testimony -- and he has never worked with VDOT. His
16 testimony is irrelevant.

17 The Tavi entrance has nothing to do with
18 this case, and is of no bearing for this entrance.

19 The only other testimony that in any way
20 casts any implication on this is Mrs. Suzanne Wescoat's
21 testimony in which all she says is that he appeared to be
22 apologizing for the issuance of the permit, and something
23 along the effect of, "It went over my head."

24 Well, it did go over his head because
25 Mr. Cumming admits that he consulted with the traffic

1 safety engineer in the sense of a consultation, and the
2 traffic safety engineer signed off on this.

3 The primary guiding principle here is
4 safety, Your Honor. There is simply no evidence that this
5 is not a safe entrance.

6 And this Court is well aware of the
7 deference that must be given to VDOT when it is acting in
8 a legislative capacity with a delegation from the General
9 Assembly that it is the one who reviews entrance permits,
10 that it can establish its own guidelines.

11 And contrary to Mr. Poulson's repeated
12 references, there is testimony by witnesses that the
13 manual at issue here is a guideline. It is not an
14 absolute.

15 As is consistent with this Court's
16 experience, no agency promulgates regulations and doesn't
17 have any discretion to interpret its own regulations. The
18 evidence is that VDOT regularly interprets its
19 regulations, and has the right to review them, and use
20 them, and apply them, but not literally is mandated to
21 follow them word for word. It gives an overall
22 impression.

23 The evidence plainly fails to establish
24 that the actions of Mr. Cumming in issuing this permit
25 were arbitrary, or capricious, or unreasonable. And I

1 would say that on that point, the motion to strike has to
2 be granted.

3 And we do have another motion as to the
4 overburdening.

5 THE COURT: All right. Do you want to
6 go ahead with that?

7 MR. MCFARLAND: I would be happy to,
8 Your Honor.

9 The other aspects of this case is
10 whether my client's use of the dominant estate would
11 overburden the servient estate.

12 The evidence to that, I submit, is clear
13 as a matter of law when this Court looks at the two cases
14 that control this issue, and they are Cushman versus
15 Barnes found at 204 Va 245, Supreme Court 1963; and Hayes
16 versus Aquia Marina, a more recent case, 243 Va 255, 1992,
17 in which our Supreme Court makes clear that Cushman is
18 still the guiding principle.

19 Cushman makes plain that when you are
20 looking at the type of situation we have here, the first
21 thing you do is you look at the grant, if there is one, of
22 easement.

23 And there is a quote that is
24 particularly relevant, Your Honor, and I would like to
25 cite it because it talks about how you interpret the

1 quote -- excuse me -- the grant.

2 "As a general rule, when an easement is
3 created by grant or reservation, and the instrument
4 creating the easement does not limit the use to be made of
5 it, the easement may be used for any purpose to which the
6 dominant estate may then or in the future reasonably be
7 devoted." That's the guiding principle.

8 Now, it's to note that in Cushman the
9 issue was whether a right-of-way that is actually smaller
10 than the right-of-way here would support a more extensive
11 subdivision of, I believe, over thirty lots. That was in
12 Cushman.

13 And in Cushman, the property had been
14 used for agriculture and residential. It was going to be
15 used for residential and commercial, specifically
16 commercial, and the Virginia Supreme Court found that
17 where you did not have expressed language prohibiting
18 those uses, it was permissible.

19 The same principle was upheld in Hayes
20 versus Aquia Marina. And the argument that Mr. Poulson
21 has that, well, there was no residential beforehand is
22 refuted by the factual evidence in this case, his own
23 evidence, that there was a residence on that property at
24 some point in time.

25 And by Cushman, which is clear that the

1 residential use, which is not legally prohibited, and, in
2 fact, was approved by Northampton County through the
3 recordation of the plat is permissible.

4 So we have a permissible use here that
5 is not prohibited, and has got to be followed.

6 The issue then becomes, as a matter of
7 law, can this Court say that my client's use of the
8 dominant estate will not overburden the servient estate.

9 And the answer is clear. There is no
10 damage to Mr. Wescoat from our proposed subdivision. It
11 doesn't affect his use of the easement at all. He's
12 admitted it. Nor does it affect Curtis Jones, the tenant
13 farmer, in a way that would make it an overburdening.

14 In this case, Curtis Jones testified as
15 to his use of the easement, but the Court is clear. The
16 Virginia Supreme Court states with great specificity
17 overburdening is not simply increased traffic on the
18 easement, or an increase of the burden; it's a new burden,
19 which is not going to be the case here, Your Honor.

20 And, so, I submit, for all of these
21 reasons, it is plain that Mr. Poulson's evidence on behalf
22 of the complainant has not made out a case sufficient to
23 meet his burden of showing overburdening, and that issue
24 also should be decided in favor of the respondents.

25 THE COURT: I take it counsel for the

1 other respondents join in that motion?

2 MR. MORRIS: Yes, Your Honor.

3 MR. LePAGE: Yes, sir.

4 THE COURT: All right. Mr. Poulson, do
5 you want to respond?

6 MR. POULSON: Judge, I will respond
7 briefly to the burden issue.

8 Of course, we looked at the Cushman
9 case, and the Aquia Marina case, too. The Aquia Marina
10 case was a fairly recent case, 1992; Cushman goes back to
11 1963.

12 And the principles are very clear in
13 there, but you do have to apply facts to the principle.
14 And basically, just quoting quickly from Aquia Marina, a
15 couple of points they make, that "An easement is not
16 affected by any reasonable change of the use of the
17 dominant estate."

18 And then it goes further that you can't
19 have, "even if it's a reasonable use of the dominant
20 estate, it can't be a use which is different from the use
21 established at the time of its creation, and which imposes
22 an additional burden upon the servient estate."

23 And, Judge, I think all we have to do is
24 look at the testimony of Curtis Jones, Jr. This is man
25 that is probably more familiar with the easement than

1 anybody. He's the man that's used it all these years
2 going back basically decades, he and his father.

3 And in 1974, what is the situation when
4 the easement is granted? There is no residential use.
5 The Court has looked at the pictures. There wasn't any
6 house in existence, and Curtis Jones said so in 1974.

7 So basically there's been agriculture,
8 recreational use. You had some sporadic residential use
9 by Mr. Meekins for a short period of time, but Mr. Meekins
10 found out -- it took him a little while to find out what
11 it took the Court to find out the first day that we heard
12 this thing, that the residential use will not work given
13 the length of the easement, the width of the easement, and
14 the turns of the easement with the agriculture use.

15 Mr. Jones has talked extensively about
16 how he uses the easement with his farming, his equipment
17 coming in. His equipment can't back up. You farm
18 basically on the easement.

19 And then he's also indicated based on
20 his observations that this easement, by its very nature
21 and characteristics, would not, number one, support a
22 subdivision with the many uses attended to the
23 subdivision, and then further indicates that uses of a
24 subdivision on this easement would basically render his
25 use of the easement basically non-existent. It would

1 certainly be extremely detrimental to its use.

2 So basically I would respectfully submit
3 to the Court, number one, under Cushman and Aquia Marina,
4 first you look at the facts of the case that go to the
5 principles.

6 And in particular in the Aquia Marina
7 case, they talked about the evidence in that particular
8 case did not come up. They weren't talking about the
9 principle; they were talking about the evidence in that
10 case.

11 You basically had a marina, basically
12 had some additional slips put in. The easement had been
13 created years before for that particular use. That's not
14 the situation here, sir.

15 Basically, we have a fifteen-foot dirt
16 farm road used for agriculture and recreational purposes,
17 and somebody is coming in putting a totally change of use
18 in here with all of the myriad uses that would be made of
19 that subdivision.

20 So we respectfully submit, sir, that the
21 evidence is clear that it does constitute an additional
22 and unreasonable burden on the servient estate.

23 MR. MCFARLAND: Your Honor, I don't want
24 to belabor this, but the issue is not whether there is
25 going to be an increase in the degree of burden. And both

1 Cushman and Aquia Marina make that very plain.

2 The fact that Mr. Jones may encounter
3 more traffic on the easement right now, if the subdivision
4 goes through, and homes are built, is not at all a
5 relevant factor.

6 The question is whether there is an
7 additional burden, an additional -- although there aren't
8 many -- I'm not aware of any case that's found an
9 additional burden, but when it's discussed by the Virginia
10 Supreme Court and other courts, it's talking about an
11 entirely new condition; i.e., either removing land from
12 the servient estate, or adding land to the servient
13 estate, or imposing some brand-new device, or mechanical
14 system such as the laying of pipe lines across the
15 easement or into the servient estate, or the raising of
16 animals. That's not what we've got here at all.

17 And the evidence is clear that there was
18 a house on the dominant estate going back as far as fifty
19 years. The evidence is also clear that Meekins has a
20 house on the property.

21 So the idea that we can't put in a
22 residential subdivision is factually refuted, and it's
23 also refuted by Cushman where they are putting in a more
24 extensive subdivision, and commercial use, and commercial
25 was in no way being done before the easement grant.

1 So I say here simply it is plain as a
2 matter of law that the evidence does not establish
3 overburdening as our Virginia Supreme Court has laid out
4 the principles.

5 And when the evidence doesn't meet it,
6 the Court has no choice but to strike the evidence.

7 THE COURT: Interestingly,
8 Mr. McFarland, you mentioned an example of overburdening
9 to be a change in the use, and one of the examples you
10 used was laying pipeline over the easement. What about
11 paving?

12 MR. MCFARLAND: Paving is clearly
13 permissible, Your Honor. That is an improvement to the
14 easement, and there are cases -- in fact, that comes up in
15 Aquia Marina.

16 At the very end of Aquia Marina, that is
17 an issue that is raised by the losing party, and it is
18 found to be that paving is absolutely a permissible
19 improvement. A legion of cases support that, Your Honor.

20 THE COURT: I take it you thought about
21 this issue, and about the affect that paving would have on
22 the farming operation?

23 MR. MCFARLAND: Yes, sir, Your Honor.
24 Paving is legally permissible. And, as Mr. Cumming has
25 testified before this Court, it will not affect the

1 entrance, servient estate in any -- and there hasn't been
2 any testimony that it would either.

3 THE COURT: Let me ask you this. Now,
4 let's say Mr. Jones was in there with a disk harrow
5 chopping up that field, and he's turning around, and the
6 easement is paved, and he chops up the paved easement,
7 too. Where does that leave you?

8 MR. MCFARLAND: If he chops up the paved
9 easement, that's something that will have to be dealt with
10 then when it occurs.

11 Let me say, Your Honor. My clients will
12 look at that, and they will work with Mr. Jones, and
13 Mr. Wescoat. They are willing to work with them in a
14 number of ways as to this easement.

15 But legally, as to whether that would
16 constitute an overburdening, with all due respect, doesn't
17 even come close to that.

18 THE COURT: Now, let me just take these
19 in reverse order.

20 First of all, with regard to the motion
21 to strike by Shooting Point L.L.C. As you've pointed out,
22 Mr. McFarland, the Court has to decide this issue at this
23 stage of the proceedings in the light most favorable to
24 the complainant in this case.

25 Under those circumstances, factually the

1 Court is of the opinion that the motion to strike ought to
2 be overruled, and I will overrule the motion to strike.
3 Note your exception to the Court's ruling for the record.

4 With respect to the motion to strike
5 made on behalf of the Commonwealth Transportation Board,
6 joined in likewise by the other named respondents, I will
7 say that the concern that the Court has in this regard,
8 quite frankly, is the testimony of Mr. Cumming, and I
9 think that alone, given his sworn testimony at a prior
10 hearing in this case, which is basically a hundred and
11 eighty degrees out from his sworn testimony at the most
12 recent hearing in this matter, is sufficient at this stage
13 of the proceedings to overrule the motion to strike, and I
14 will do so.

15 I will point out, quite frankly, that
16 this issue of somehow coming up with twenty-four feet by
17 measuring on a curve, and so forth, and so on is, of
18 course -- the Court, quite frankly, finds that to be
19 somewhat disingenuous.

20 I don't know what the thinking was other
21 than to somehow be able to throw a piece of paper out
22 there showing twenty-four or twenty-five feet.

23 There is no way that the width of this
24 easement is ever going to be any wider than fifteen feet,
25 and it doesn't matter if you measure it on the curve, or

1 on a zigzag, or however you want to measure the fifteen
2 feet. It's always going to be fifteen feet.

3 I don't know why there was some feeling
4 that this was somehow going to soothe somebody's nerves to
5 be able to show this twenty-four feet.

6 Quite frankly, if VDOT were to simply
7 say, you know, the guidelines are just that, guidelines,
8 and even though it's only fifteen feet, the fact that it
9 is on a curve, you can see well going in, and you can see
10 well coming out, that, Hey, that's good enough, and it's
11 good enough for us, so we're going to grant the permit.

12 I don't really, quite frankly, see the
13 logic of coming up with this numbers game to somehow make
14 it seem like it's all okay.

15 But be that as it may, the Court does
16 find at this stage of the proceedings, taking the evidence
17 in the light most favorable to the plaintiff, finds that
18 the motion to strike ought to be overruled, and I will so
19 do that.

20 Note your exception and objection to the
21 Court's ruling for the record.

22 Now, what's the status of your witness
23 list, Mr. McFarland?

24 MR. MCFARLAND: Well, we've got
25 witnesses, Your Honor, but I think by agreement we were

1 going to let Mr. LePage go for VDOT. He's had some people
2 from even farther away for longer.

3 The other thing I might say, Your Honor,
4 is that if all of the respondents are going to present
5 their evidence, we are not going to finish today.

6 THE COURT: Oh, I'm sure we won't.

7 MR. MCFARLAND: And I was wondering for
8 planning, so that I could call some people, if we could
9 maybe set the next day in the -- and we can go off the
10 record. I just -- I've got people who are waiting to hear
11 when we're going to resume again.

12 THE COURT: Okay. We can do that. Why
13 don't we just recess, and go off the record at this point,
14 and see where we stand.

15 (Brief recess.)

16 THE COURT: All right. Are we ready?

17 MR. LePAGE: Yes, sir.

18 THE COURT: All right. Who do you have
19 next?

20 MR. LePAGE: Jerry Pauley.

21 THE COURT: All right.

22

23

24

25

1 JERRY PAULEY, called as a witness by and
2 on behalf of the Defendants, being first duly sworn,
3 testified as follows:

4
5 DIRECT EXAMINATION

6 BY MR. LePAGE:

7 Q. Mr. Pauley, could you state your name,
8 please, and spell it for the court reporter?

9 A. Yes. Jerry Pauley, P-a-u-l-e-y.

10 Q. And, Mr. Pauley, what is your
11 occupation?

12 A. I'm the assistant district traffic
13 engineer for the Virginia Department of Transportation in
14 the Hampton Roads District.

15 Q. And how long have you been the assistant
16 district traffic engineer?

17 A. Since 1989, well over twelve years now.

18 Q. And how long have you worked for VDOT?

19 A. Since 1986.

20 Q. What is your educational background?

21 A. I went to engineering school at a small
22 college in West Virginia, graduated from there, came into
23 the training program with the Department.

24 Q. Do you have an engineering degree?

25 A. Yes, sir.

1 Q. What is that in?

2 A. Civil engineering.

3 Q. Okay. Can you tell the Court what your
4 normal duties entail with respect to entrance permits?

5 A. Yes, sir. I review all of the land
6 development which takes place within the Hampton Roads
7 district.

8 Q. And what area does the Hampton Roads
9 district encompass?

10 A. That includes six counties, including
11 Accomac, Northampton, James City, York, City of Suffolk,
12 Isle of Wight County.

13 Q. So essentially all of Tidewater
14 Virginia?

15 A. Yes, sir.

16 Q. What is the scope of your review when
17 you get one of these entrance permits?

18 A. We review it first for safety and to
19 ensure that it meets the department's criteria for a safe
20 entrance, and that all of the -- that the appropriate
21 traffic control devices are installed.

22 Q. Okay. When you say it meets the
23 appropriate criteria, what criteria are you looking at
24 specifically for entrance permits?

25 A. The criteria as set forth in the manual

1 of minimum entrance standards.

2 Q. And do the minimum entrance standards
3 incorporate any other VDOT regulations?

4 A. Yes, they bring in the -- let's see.
5 The entrance manual -- not entrance manual. The
6 subdivision standards and the minimum standards.

7 Q. The subdivision street requirements? Is
8 that what you're referring to?

9 A. Subdivision street requirements.

10 MR. POULSON: Judge, we're going to --
11 basically, we are going to object to that. We have been
12 told that the only thing that applies to this permit is
13 the minimum standards, a maintenance policy manual, and
14 the land use permit manual which we were provided by the
15 Commonwealth.

16 MR. LePAGE: Your Honor, if you look at
17 the regulation, I think it's 170 of the requirements,
18 which the complainants have put into evidence, it
19 incorporates by reference. It's on page 31 of the minimum
20 standards. It says it incorporates by reference eight
21 different VDOT documents.

22 THE COURT: All right. Go ahead.

23 BY MR. LePAGE:

24 Q. All right. Mr. Pauley, so what is the
25 purpose of your review when you review the minimum

1 entrance standards?

2 A. To make sure that a safe entrance is
3 installed, to make sure that it meets all of the
4 department's criteria, and to make sure that it's
5 appropriate.

6 Q. Have you been assigned this duty by
7 anyone?

8 A. Yes. The district traffic engineer
9 assigned it to me.

10 Q. And what specifically have you been
11 assigned to do when you review these entrance permits?

12 A. Basically, the total review of all of
13 the land development has been passed to me.

14 Q. Has he given you any authority with
15 respect to whether you need to bring anything to him if
16 there has been any reduction in the standards?

17 A. No, sir. Basically, I make the
18 decisions.

19 Q. Okay. Perhaps you misunderstood my
20 question.

21 You have authority to make decisions
22 with respect to standards that are reduced from the
23 manual?

24 A. Yes, sir. The district administrator
25 has provided us verbal authority to make minimum

1 reductions in the standards.

2 MR. POULSON: Judge, if I may, please.

3 Interrogatory number 8, we were talking about in that
4 particular interrogatory any lawful authority that
5 supports the determination, or permits a response to waive
6 such requirements, and we're talking, of course, page 29
7 of the minimum standards.

8 And part of the answer here is the
9 minimum width requirement has not been waived. Period. I
10 mean, this is their Interrogatory Answer, and it sounds
11 like they're trying to vary with their Interrogatory
12 Answer now and say that it has been waived.

13 MR. LePAGE: And, Your Honor, our
14 position is that it has not been waived; however, our
15 position is also, as argued in the motion to strike, is
16 that even if it is -- if the Court has determined, and the
17 Court has exhibited reservations in this case as to
18 whether or not the entrance should be measured to be
19 twenty-four feet, but the issue is whether or not, or even
20 if it has, that there is authority to do that.

21 And Mr. Poulson has deposed Mr. Pauley,
22 and Mr. Pauley has testified in his deposition that he had
23 authority, he had been assigned authority for these kinds
24 of minimum reductions.

25 His testimony is totally consistent with

1 his testimony at the deposition, which was subsequent to
2 the answer of the interrogatory.

3 THE COURT: I guess what he's saying,
4 you're bound by your Interrogatory Answer.

5 MR. LePAGE: Pardon?

6 THE COURT: I guess what he's suggesting
7 is that you're bound by your Interrogatory Answer.

8 MR. POULSON: Judge, that's what we are
9 saying, and he testified in the deposition that he
10 complied with page 29 of the minimum standards. He was
11 very clear about that.

12 MR. LePAGE: No, he actually testified
13 that he has had authority to reduce the standards.

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

16 MR. LePAGE: Thank you.

17 BY MR. LePAGE:

18 Q. All right. So, Mr. Pauley, how many
19 entrance permits have you reviewed, approximately?

20 A. Thousands, probably. We are reviewing,
21 say, five or six hundred per year for twelve years, so
22 six, seven thousand.

23 Q. Okay. And during the course of your
24 duties, were you asked to review the permit application
25 for the Shooting Point subdivision?

1 A. Yes, sir.

2 Q. When and how did that come about?

3 A. Mr. Cumming faxed me a couple of sheets
4 on the subdivision, or the entrance, and asked me if we
5 would take a look at it, and give him some recommendations
6 back.

7 Q. Okay. And what did you do when you got
8 that?

9 A. First thing is typical, we took it,
10 talked to Will about it, what type of road it was on,
11 where it was at, and those types of things.

12 Took a look at the traffic volumes that
13 are associated with it, it being a single-family
14 residential, that it would generate ten trips per lot,
15 eighteen lots. That would be a hundred and eighty trips,
16 approximately twenty-eight vehicles a day on existing
17 Route 622 that would add on top of that.

18 So now you've got about two hundred and
19 ten trips per day, rounded it up to two ten. Split that
20 as is typical, or multiply it by .11, which is a peak hour
21 figure, to bring that daily traffic down to a peak hour
22 figure. That multiplies out to, what, twenty-four
23 vehicles a day. I mean, twenty-four vehicles in a peak
24 hour.

25 Split this to look at the traffic going

1 into the subdivision versus coming out, and that would
2 give about seventeen vehicles exiting a.m., and seven
3 coming back in.

4 And then looked at the entrance, looked
5 at a variety of different aspects on the entrance itself;
6 making it wider, putting in wider radiuses, all of these
7 types of issues, and comparing it with the existing
8 roadway.

9 Q. Can you tell the Court what the existing
10 roadway has for characteristics?

11 A. The existing roadway is one curve at the
12 entrance which is coming in -- it's relatively straight,
13 flat other than that approximately fifteen feet of
14 pavement throughout. That's about it.

15 Q. Would, in fact, that Route 622 is
16 fifteen-feet wide have any impact on your issuing in this
17 case?

18 A. Yes, sir. One of the things I was
19 looking at, if the entrance was made wider, or larger, and
20 had larger radiuses on it, that would make the entrance
21 more attractive than Route 622.

22 That, in effect, created a situation of
23 safety in my mind because if someone were coming down 622
24 which were not familiar with it, they may assume that this
25 larger, nicer road was actually the way that they should

1 be going, and try to take that.

2 Because the department does not maintain
3 what is behind the right-of-way line, then we don't know
4 what the condition of that roadway could be, and that
5 could create a hazard for the people trying to go down the
6 road.

7 Q. Okay. Did you reach any conclusions
8 about the width of the easement, twenty-five feet from the
9 edge of pavement?

10 A. Yes, sir. Initially, and in accordance
11 with the manual, I determined that it had the twenty-five
12 feet, or the thirty feet that is required by the manual.

13 Q. Now, that doesn't really make the
14 easement twenty-four-feet wide, does it?

15 A. No, sir, but that is the way that the
16 manual illustrates to take the measurement.

17 Q. Did that give you any cause for concern?

18 A. No, sir, because that is identical to
19 what is on Route 622. You have the same pavement width on
20 Route 622 which actually, to some degree, makes it better
21 because now the two roads look very similar.

22 Q. What is the sight distance at the
23 intersection of the easement at 622? Do you know?

24 A. It's as far as the eye can see. It's
25 unlimited.

1 Q. Is it at least six hundred feet in each
2 direction?

3 A. Definitely.

4 Q. Did that factor into your decision as to
5 whether or not this would be a safe entrance?

6 A. Yes, sir.

7 Q. Why is that important?

8 A. To make sure that the vehicles that are
9 coming up and existing from the entrance can see any
10 vehicles which would be approaching so that they wouldn't
11 pull out in front of and potentially create an accident.

12 Q. What about rear-end accidents?

13 A. Same thing. It's the same for each way,
14 that way any vehicles coming and going can see what is
15 ahead of them for any distance and have the opportunity to
16 stop or whatever is necessary.

17 Q. Did you have any concern that a vehicle
18 might have to stop in Route 622 and let another vehicle
19 who was in the entrance exit before they could enter?

20 A. Some, but considering if they were to
21 pass on Route 622, it's the same situation.

22 Q. Is there adequate sight distance for
23 that vehicle to slow down as they approach?

24 A. Yes, sir.

25 Q. Did anyone else in the traffic

1 engineering division at Hampton Roads review this permit
2 application?

3 A. No, sir.

4 Q. It was only you?

5 A. Yes, sir.

6 Q. Did anyone tell you what decision to
7 make with respect --

8 A. No, sir.

9 Q. Did anyone communicate to you that they
10 had any expectation about any decision that would be made
11 in this case?

12 A. No, sir.

13 Q. Did you have any concern about whether
14 or not an easement existed at the location shown on the
15 entrance permit application?

16 A. No, sir. The drawing showed that there
17 was an easement there. Typically, a lot of times when we
18 do a review of development, the developer may not actually
19 own that right-of-way at that point in time; they may have
20 an option on it. However, it holds very little bearing on
21 what we make them do.

22 Q. Would you have any concern if this
23 easement was actually located nine feet to the east?
24 Would it have any impact on your decision?

25 MR. POULSON: I'm going to object to

1 that. That's immaterial. We've got what we've got.

2 THE COURT: Sustain the objection. He
3 said he went by what he got in the ordinance.

4 MR. LePAGE: If I may rephrase.

5 BY MR. LePAGE:

6 Q. If the easement were nine feet back to
7 the east, would it adversely affect sight distance in any
8 way?

9 MR. POULSON: Again, Judge, it's
10 immaterial. It looks like they're trying to shift the
11 entrance right here in court today.

12 MR. LePAGE: It's highly material, Your
13 Honor.

14 THE COURT: Overrule the objection. He
15 can answer.

16 THE WITNESS: No, sir. The sight
17 distance would still be very well. It would have no --

18 BY MR. LePAGE:

19 Q. Would any of the other conditions
20 change?

21 A. No, sir.

22 MR. LePAGE: Thank you. I don't have
23 any further questions.

24 THE COURT: All right. Mr. Poulson?
25

CROSS-EXAMINATION

BY MR. POULSON:

Q. Mr. Pauley, basically in doing your review, I believe you have -- would it be correct that the only thing you had was a sketch and talked to Will Cumming on the telephone?

A. Correct.

Q. In fact, you didn't even see the site until after you had sent back your review to Mr. Cumming; is that correct?

A. Yes, sir.

Q. Okay. And you indicated that you didn't need any radius on what would be the west side?

A. Yes, sir.

Q. Did you contemplate the fact that there would be Wescoat vehicles using the roadway?

A. Yes, sir, but I also contemplated that that would be a minimum amount of vehicles. And based upon the volumes of traffic which would be using the road, it would be very minimal.

Q. Of course, you didn't even know that at the time that you made this decision, did you? The only thing you knew it was an eight-lot subdivision?

A. I don't understand your question.

Q. At the time you made your decision, you

1 were not even aware of the fact that the Wescoat parcel
2 had the use of this roadway?

3 A. No, sir. I mean, it's irrelevant.

4 Q. Irrelevant to you, even though you cut
5 out the radius to the west?

6 A. Yes, sir. It's still an appropriate
7 entrance designed for the amount of traffic which is using
8 it.

9 Q. Now --

10 MR. MCFARLAND: He can finish his
11 answer. Mr. Poulson cut him off, Your Honor. I object to
12 that.

13 THE COURT: Go ahead.

14 BY MR. POULSON:

15 Q. Now, it's your position that it complied
16 with the regulations, correct?

17 A. Yes, sir.

18 Q. Page 29 specifically; is that your
19 position?

20 A. Yes, sir.

21 Q. And is your position that no variance is
22 necessary even if it could be done, correct?

23 A. The only question would be on the
24 radius.

25 Q. The only question would be on the

1 radius?

2 A. Yes, sir.

3 Q. And basically you had varied that based
4 on, I believe what you have referred to as the unwritten
5 rule to vary standards?

6 A. Yes, sir.

7 Q. Which is not a written policy?

8 A. Correct.

9 Q. Not a regulation?

10 A. Correct.

11 Q. Not a statute?

12 A. Correct.

13 Q. How are we to know what VDOT's unwritten
14 policy is, sir, if we're not Jack Hodge?

15 MR. MCFARLAND: I'm going to object to
16 the characterization, Your Honor.

17 THE COURT: I'll disregard that.

18 BY MR. POULSON:

19 Q. How is one to know what VDOT's unwritten
20 policy, sir?

21 A. Whenever someone comes in and they are
22 requesting an entrance, we go over the things with them,
23 and they tell us what the situations are, and if we feel
24 that it is appropriate to give a variance, then we do.

25 Q. So if you feel like it's appropriate in

1 your sole discretion, that's what you go by?

2 A. Not my sole discretion. It's a
3 combination of myself and the resident engineer.

4 Q. That's the unwritten policy? Okay.

5 Now, you would agree, would you not,
6 that the purpose of the regulations is to have a minimum
7 width to ensure good ingress and egress?

8 A. Yes, sir.

9 Q. No question about that at all?

10 A. No, sir.

11 Q. And that is the overriding principle of
12 these regulations including the one on page 29?

13 A. Yes, sir, to make sure that you have a
14 safe entrance.

15 Q. Okay. And how much distance do you need
16 between vehicles, Mr. Pauley, to pass?

17 A. I have no idea. I mean, the more the
18 better, but --

19 Q. Well, the one on the drawing indicates a
20 tractor and trailer eight-foot wide, and a sports utility
21 van of six feet nine inches, which leaves three inches
22 total for the vehicles.

23 A. Yes, sir.

24 Q. What is the requirement of safe passing
25 distance?

1 A. That is an irrelevant point because if a
2 vehicle -- what is the probability that a tractor-trailer
3 would be coming back in there? If that condition
4 happened, one of the vehicles is going to have to stop
5 just the same as they would on Route 622.

6 Q. All right. So what you're saying is
7 vehicles will have to stop on 622?

8 A. Yes, sir.

9 Q. Okay. But the purpose of the regulation
10 is to let vehicles get off the highway and one to ingress
11 and one to egress at the same time, is it not, Mr. Pauley?

12 A. Not at all times, sir. If this
13 situation were so that the entrance came in perpendicular
14 on a straight section of road, and the entrance was shown
15 just as it is on page 29, and a tractor-trailer desired to
16 enter that entrance, he would not be able to enter that
17 entrance with the vehicle sitting there. He would have to
18 wait until that vehicle moves, and then make its entrance.

19 Q. But the permit that you-all have issued
20 shows a tractor and trailer eight-foot wide and a
21 six-foot-nine-inch sports utility sitting in the entrance
22 at the same time, and one ingressing, and one egressing,
23 does it not, sir?

24 A. Yes, it does.

25 Q. And my question is how much safe

1 clearance do you need between the vehicles?

2 Are you telling this Court that three
3 inches total is sufficient?

4 A. What I am saying is that in reviewing
5 that, I also looked at the fact that one of these vehicles
6 would have to stop in the situation that was provided.

7 Q. Are you aware -- are you finished? I'm
8 sorry.

9 Are you aware that Mr. Cumming in his
10 April the 4th letter said that that was not a condition of
11 the permit, that they would have to be able to ingress and
12 egress at the same time?

13 MR. MCFARLAND: Your Honor, I object to
14 that characterization. That's not what the letter says.

15 MR. POULSON: I believe the letter does
16 say that, as well as their engineer confirmed that.

17 THE COURT: You can take it up on
18 cross-examination, Mr. McFarland. Go ahead.

19 BY MR. POULSON:

20 Q. You never saw the April 4th letter, did
21 you?

22 A. No.

23 Q. You saw the depositions the other day,
24 did you not?

25 A. Yes, sir.

1 Q. And you agree that's what it says?

2 That's one of Mr. Cumming's conditions?

3 A. From memory, I'll say yes.

4 Q. Now, the methodology here, the
5 engineering principle of measuring the width at the back
6 of the entrance twenty-five feet from the edge of
7 pavement. You didn't come up with that, did you?

8 A. Yes, sir.

9 Q. I thought Jack Hodge came up with it.

10 A. No, sir.

11 Q. Jack Hodge didn't suggest it?

12 A. No, sir.

13 Q. This was something that you came up
14 with?

15 A. Yes, sir.

16 Q. But I believe you previously told us you
17 can't ever recall seeing it or doing it before?

18 A. No, sir.

19 Q. You didn't say that?

20 A. No, sir. I don't recall saying that.

21 Q. Well, let me take you back to your
22 deposition on May the 17th, page 31, beginning with line
23 8. Okay.

24 Question: "Okay. So you're telling me
25 because 622 is a relatively narrow road that you adopted

1 this way of measuring the width of the entrance?"

2 Answer: "Yes, sir."

3 Question: "That's what you're telling
4 me?"

5 Answer: "Yes, sir."

6 Question: "All right. Have you ever
7 measured one like this before?"

8 "I have no idea. Honestly, I cannot
9 recall one in memory."

10 BY MR. POULSON:

11 Q. Did you say that?

12 A. Yes, sir, I did.

13 Q. Now, is there anything, sir, in the
14 minimum standards that says measure it parallel? And let
15 me show you page 29.

16 A. I'm not sure I understand what your
17 question is.

18 Q. Is there any language in the example
19 given, the regulation, that says you measure it parallel
20 in all cases?

21 A. Yes. You have the line measurement
22 which is indicated right here back to the back of the
23 right-of-way which says measure that twenty-five feet
24 back.

25 Q. It happened to be parallel.

1 Is there anything in the language, sir,
2 that says measure it parallel in any of the words on page
3 29?

4 A. No, there's not in the words. No, sir.

5 Q. Not in words. So what you're telling us
6 is that in every case you would simply measure it parallel
7 to get your width?

8 A. Most cases, yes, sir. I mean, each
9 entrance is reviewed individually.

10 Q. But we have a regulation. Now, which is
11 it? I mean, do we do it parallel? Is that what the rule
12 is?

13 THE COURT: I assume you mean parallel
14 to the edge of the pavement?

15 MR. POULSON: Yes, sir.

16 THE WITNESS: Typically, yes.

17 BY MR. POULSON:

18 Q. Typically, yes?

19 A. Like I said, I have reviewed thousands
20 of these, and every case I can come to mind has been
21 reviewed that way. I can't say that there hasn't been
22 some that haven't been.

23 Q. Okay. So every once in a while you'll
24 use your own written policy to vary one?

25 A. Not that I can think of, but that's

1 possible.

2 Q. Not that you can think of.

3 So you agree that it's supposed to be
4 done parallel with the edge of the pavement?

5 A. Yes, sir.

6 Q. And that's how you make your
7 determination?

8 A. According to the sketch.

9 Q. Bearing in mind, Mr. Pauley, that the
10 overriding concern is to ensure a requisite width for
11 ingress and egress, correct?

12 A. Yes, sir.

13 Q. Would you agree that measuring on the
14 skew here, or at the angle gives a misleading width, sir?

15 A. It can give a different width.

16 Q. Is it a misleading width?

17 A. In what -- what reference to --

18 Q. Is it usable as twenty-four feet, sir?

19 A. It is measured twenty-four feet. Is
20 it -- I'm not sure I understand.

21 Q. Well, let me give you an example.

22 Suppose we've got two tractor and trailers nine-feet wide
23 with their mirrors. If we had twenty-four-foot width,
24 they could pass easily, couldn't they?

25 A. Yes, sir.

1 Q. But that's not the case with your
2 methodology, the way that you want to apply the
3 regulation, is it?

4 A. No, sir.

5 Q. Because the bottom cut line is we've got
6 fifteen feet however we look at it?

7 A. Yes, sir.

8 Q. And we don't have twenty-four feet?

9 A. You have twenty-four feet where the
10 sketch shows to measure it.

11 Q. Is it a realistic twenty-four feet,
12 Mr. Pauley?

13 A. That is the way --

14 MR. MCFARLAND: I'm going to object to
15 the characterization, Your Honor. It is what it is;
16 twenty-four feet. It's twenty-four feet.

17 BY MR. POULSON:

18 Q. So you're telling the Court that that is
19 a reasonable way to measure the width of this entrance at
20 its back is twenty-four feet?

21 A. That is in compliance with the manual.

22 Q. The way you've interpreted the manual,
23 or the regulation?

24 A. Yes, sir.

25 Q. Okay. So basically we do it parallel

1 with the edge of the pavement, and that gives us what
2 we're supposed to have, one way or the other?

3 A. Yes, sir.

4 Q. You would agree that most entrances come
5 in perpendicular to the edge of the roadway, do you not?

6 A. That is the preference.

7 Q. That is the preference.

8 And you never check the width of a
9 tractor and trailer?

10 A. No, sir.

11 Q. You weren't given any information on
12 guest cottages on the track?

13 A. Excuse me?

14 Q. You weren't given any information as to
15 the availability of guest cottages on these lots?

16 A. No, sir.

17 Q. And 622 has shoulders, does it not?

18 A. There is an area to set a pavement, yes.

19 Q. And, so, it's a thirty-foot easement, is
20 it not, prescriptive easement --

21 A. I'm not sure.

22 Q. You don't know that? Have you ever
23 measured the pavement?

24 A. Yes, sir.

25 Q. And what was it?

1 A. The pavement was approximately fifteen
2 feet.

3 Q. And you went and measured it after the
4 permit got issued, did you not?

5 A. Yes, sir.

6 Q. Because you had never been over there
7 before you talked to Mr. Cumming and told him to go ahead
8 and issue the permit?

9 A. No, because Mr. Cumming and --
10 Mr. Cumming had said there's fifteen foot of pavement out
11 there, and I had no reason not to believe that.

12 Q. Now, this is part of 28A. This was the
13 original drawing that basically you approved?

14 A. Yes, sir.

15 Q. Okay. And this has got the twenty-four
16 foot on there?

17 A. Yes, sir.

18 Q. Okay. And when it came to you, did it
19 have twenty-four on there?

20 A. No, sir.

21 Q. What did Will Cumming tell you insofar
22 as determining the twenty-four?

23 A. I'm not sure what you're asking.

24 Q. You hadn't heard of twenty-four from
25 anybody when you got this?

1 A. No, sir.

2 Q. And what is supposed to be twenty-four
3 here, the line struck across the arch?

4 A. Yes, sir.

5 Q. That is supposed to be twenty-four? Did
6 you actually measure it?

7 A. Yes, sir.

8 Q. And what did it come out to be?

9 A. Twenty-four feet.

10 Q. Are you sure it wasn't about twenty-two
11 feet?

12 A. No, sir. You have a reproduction.

13 Q. It's got a scale on it. The scale stays
14 the same on reproductions, doesn't it?

15 A. Not necessarily, but -- I mean, I
16 enlarged it up to appropriate scale, measured it off, and
17 then it was reduced back down.

18 Q. Well, you would agree that if you've got
19 a scale on here, whatever changes, it has to stay the same
20 because the scale --

21 A. True.

22 Q. -- moves with whatever is here?

23 And in here you ended up measuring, of
24 course, parallel to the edge of the pavement to get your
25 twenty-four feet?

1 A. Yes, sir.

2 Q. And this complies with the regulation is
3 what you're telling us?

4 A. Yes, sir.

5 (Plaintiff's Exhibit 44 was marked for
6 identification.)

7 BY MR. POULSON:

8 Q. I'll show you for identification
9 Plaintiff's Exhibit 44.

10 MR. MCFARLAND: Do you mind if I come
11 up, Your Honor, so I can follow this?

12 THE COURT: Help yourself.

13 MR. MORRIS: Your Honor, I'm going to
14 object to the exhibit as irrelevant.

15 MR. LePAGE: Me, too, Your Honor. I'm
16 not sure what the purpose of it is.

17 MR. POULSON: The relevance is
18 methodology.

19 MR. LePAGE: I think we've covered
20 methodology.

21 THE COURT: Well, I think it's
22 appropriate. I think it's appropriate. Go ahead. You
23 can go ahead.

24 BY MR. POULSON:

25 Q. Mr. Pauley, I show you Complainant's

1 Exhibit 44. And showing you the red lines, assume that
2 that is the course of the easement and the entrance, or as
3 the easement comes into the right-of-way.

4 A. Okay.

5 Q. And, of course, just disregard anything
6 here to the south after the easement breaks off at the
7 forty-five-degree angle.

8 A. So you just want me to consider the two
9 red lines?

10 Q. You consider the two red lines.

11 A. Okay.

12 Q. That's our new easement.

13 A. Okay.

14 Q. Will that comply with the regulations,
15 sir?

16 MR. MCFARLAND: I'm going to have an
17 objection, Your Honor, as irrelevant to these proceedings.
18 That's not -- talking about changing the easement,
19 Mr. Poulson's hypothetical definitely changes the location
20 of the easement.

21 BY MR. POULSON:

22 Q. Under your methodology and your manner
23 of applying the regulation --

24 THE COURT: Overrule the objection.
25

1 BY MR. POULSON:

2 Q. -- and how you measure, does that comply
3 with the regulations, sir?

4 A. I don't know without measuring the
5 entrance to ensure that it does.

6 Q. Well, there's your twenty-four feet.
7 The twenty-four feet hasn't changed, does it?

8 A. No, but where you have it broken, the
9 line has changed.

10 Q. But so what?

11 A. I don't know what this distance is,
12 which is where it's tying in to the right-of-way line, and
13 that's what we're measuring. We're measuring the distance
14 at the right-of-way line, parallel to the pavement.

15 Q. You measure twenty-five feet back from
16 the edge of pavement, do you not?

17 A. Yes, sir.

18 Q. Okay. And do you not already have a
19 line here twenty-five feet from the edge of the pavement
20 that goes back to your original line on the original
21 sketch?

22 A. Yes, sir.

23 Q. And the twenty-five foot line is built
24 in for you, is it not?

25 A. Yes, sir.

1 Q. Okay. So right back here, across here,
2 we still have twenty-four feet by your methodology?

3 A. Yes, sir.

4 Q. Okay. So this would comply with the
5 regulation?

6 A. Not necessarily.

7 Q. Why not?

8 A. Because you have not made it continuous.
9 If you were continuous with that same width, then I might
10 possibly agree. And I can't verify that at this time.

11 Q. If we were continuous at the same width?

12 A. Correct.

13 Q. At the twenty-four feet?

14 A. Yes, sir.

15 Q. Is the original continuance width
16 twenty-four feet all the way down to the edge of the
17 pavement?

18 A. Yes, sir. By measuring in that
19 methodology, yes, it is.

20 Q. So by this slanted line, the slanted
21 line drops at its twenty-four foot width?

22 A. Yes, sir.

23 Q. And you're saying you don't know about
24 this one, whether this one would comply or not?

25 A. I'm not positive. I mean, without being

1 able to measure and check it, I'm not sure.

2 Q. And you would agree that this entrance
3 coming in perpendicular to the roadway is as you'd prefer?

4 A. As to each individual entrance must be
5 reviewed individually, or each entrance is reviewed
6 individually.

7 Q. And you're not able to review this one
8 for us now?

9 A. No, that's not what I'm saying, sir.
10 What I'm trying to say is that in this situation --
11 actually, I like this entrance, this straight off entrance
12 better because the majority of the traffic is going to be
13 going straight in.

14 Let me back up for a second. This
15 entrance may meet, and it could be appropriate; however,
16 this is the one that we were reviewing at the time.

17 Q. Well, we're talking about this one right
18 now, Mr. Pauley.

19 A. I understand.

20 Q. Under your methodology.

21 A. I understand, but that's what I'm
22 saying.

23 Q. And in both of them --

24 MR. LePAGE: Can he have an opportunity
25 to explain?

1 THE WITNESS: Both of them could
2 possibly meet. Which one is better, is a matter of
3 choice.

4 BY MR. POULSON:

5 Q. You would agree that basic widths are
6 the same, are they not?

7 A. Like I said, without checking the
8 distances, I can't say that for absolutely.

9 Q. Okay. Let's find one with an easement
10 on it.

11 MR. POULSON: 45.

12 MR. MORRIS: Same objection, Your Honor.

13 MR. LePAGE: I object, too.

14 THE COURT: Plaintiff's 45.

15 (Plaintiff's Exhibit 45 was marked for
16 identification.)

17 BY MR. POULSON:

18 Q. Mr. Pauley, let's try this one. And
19 we'll break the road off much sooner. Okay?

20 A. Okay.

21 Q. And as you can see, measured twenty-five
22 foot from the pavement, it extends much deeper than
23 twenty-five foot from the edge of pavement. Do you agree
24 with that?

25 A. Yes, sir.

1 Q. Okay. And what is the width of this?

2 A. I don't know, sir.

3 Q. Well, there's fifteen foot up there. Is
4 this that difficult to measure, Mr. Pauley?

5 A. You can make the assumption, but could I
6 say definitely?

7 Q. Well, let me get a ruler, and we will
8 let you measure it, sir, if we may.

9 MR. MORRIS: Your Honor, we'll stipulate
10 it's fifteen feet.

11 THE COURT: Well, let me just say this:
12 The objections are overruled as long as the contention of
13 the respondents in this case is that the granting of the
14 permit is based in total or in part on the assumption that
15 it is twenty-four foot there.

16 If that's the contention of the
17 respondents, and it continues to be, then these exhibits
18 are relevant.

19 MR. LePAGE: My contention, Your Honor,
20 is that the easement meets the terms of the entrance,
21 meets the terms of the minimum standards because it can
22 function safely.

23 THE COURT: I understand. I understand
24 what you're telling me, counsel, but the witness continues
25 to say that it's twenty-four feet.

1 And on the basis at least in part, as I
2 understand his testimony for granting it, is the fact that
3 somehow we come up with this twenty-four feet, because
4 it's measured on the curve.

5 That being the case, then these exhibits
6 as offered up to this point are relevant.

7 MR. LePAGE: Well, Your Honor, I asked
8 him on direct whether or not it was really twenty-four
9 feet, or whether the easement is actually fifteen-feet
10 wide.

11 On redirect, I will go back and ask him
12 that question. Our position --

13 THE COURT: Well, when you get to
14 redirect, you can do it, but as it stands right now --

15 MR. POULSON: Of course, our position is
16 they can't change their horse in mid stream. The answer
17 is that it complies with the regulation because they get
18 the twenty-four foot measurement, and that complies, and
19 that's been their position throughout.

20 That's been their position In
21 interrogatories, and it's been their position in the
22 depositions, sir.

23 MR. LePAGE: Your Honor, our position is
24 that VDOT has the authority to interpret their
25 regulations, and to reduce the standards shown in the

1 minimum standards if it's appropriate under the
2 conditions. That position has not changed.

3 THE COURT: I understand what you're
4 telling me, but the evidence in the case has been not
5 totally aimed in that direction. We're still talking
6 about twenty-four feet, and what we're talking about with
7 the burden, as you well pointed out on the complainant, is
8 to show that the decision was arbitrary and capricious.

9 The more we dwell on this, how you turn
10 fifteen feet into twenty-four feet, the more you look at a
11 situation in which everybody tried to make it look like
12 twenty-four feet, the more arbitrary it is starting to
13 sound every minute.

14 So, at any rate, under those
15 circumstances, the exhibits, I think, are appropriate at
16 this stage, and you can come back on your redirect and do
17 whatever you want to do.

18 MR. MORRIS: With regard to the fifteen
19 feet on that, I mean, if it's okay, if this is agreeable
20 to you, can we just stipulate that that's approximately
21 fifteen feet, and let him testify to that rather than
22 going through and having --

23 THE COURT: I think that would be
24 probably appropriate.

25 MR. POULSON: So we do stipulate that

1 within the red lines running down to the right-of-way is
2 fifteen-foot width?

3 MR. LePAGE: Yes.

4 MR. MORRIS: Yes, on that exhibit,
5 correct.

6 BY MR. POULSON:

7 Q. Now, Mr. Pauley, this would not comply
8 under your application of the regulations, would it, sir?

9 MR. MCFARLAND: I'm going to object to
10 that characterization. Even taking in mind what the
11 Court's been discussing here, his testimony is that each
12 application has to be judged individually.

13 THE COURT: Well, if -- I mean --
14 overrule the objection. He can answer if it complies with
15 the regulations.

16 BY MR. POULSON:

17 Q. That doesn't comply, does it,
18 Mr. Pauley, under your application methodology?

19 A. Okay. There would be a question
20 about -- I would have two questions about the pavement
21 width, and about the sight distance in this scenario.

22 Q. Well, let's take sight distance, if we
23 can. You see where it comes out, and you've got a
24 straight shot right down the road. The sight distance has
25 not changed, has it?

1 A. Probably not.

2 Q. Okay. And the width is fifteen feet
3 across here?

4 A. Yes, sir.

5 Q. Including parallel with the pavement?

6 A. Okay.

7 Q. So this one will not comply with the
8 regulations?

9 A. Not as it's stated in the book.

10 MR. POULSON: 46.

11 (Plaintiff's Exhibit 46 was marked for
12 identification.)

13 BY MR. POULSON:

14 Q. Mr. Pauley, on this one, if you will,
15 please, let's assume our easement comes out at a point
16 five hundred and fifty feet from the curve --

17 MR. LePAGE: Your Honor, I'm going to
18 object to the relevancy of that. There can be no
19 relevancy.

20 MR. POULSON: Same methodology.

21 MR. MORRIS: And I join that objection.

22 THE COURT: Let's see what the question
23 is.

24 BY MR. POULSON:

25 Q. Assume this one comes out essentially

1 perpendicular to the highway, that the width is fifteen
2 feet, that there is no problem with sight distance because
3 it's five hundred and fifty feet from the end of the
4 curve. Understand?

5 A. Yes, sir.

6 Q. Okay. Under your methodology, how would
7 you determine whether that complies with the regulations
8 or not, Mr. Pauley?

9 A. By measuring along the right-of-way
10 twenty-five feet back.

11 Q. Twenty-five feet back. Okay.

12 And you would agree that that's going to
13 produce a figure of approximately fifteen feet, would you
14 not?

15 A. Yes, sir.

16 Q. And this one won't comply with your
17 regulations either, will it, sir?

18 A. Not specifically; however, that's not to
19 say that the permit couldn't be granted for it.

20 Q. Well, how would the permit be granted?

21 A. Just what is appropriate for this
22 individual location.

23 Q. Well, do we just toss the regulation out
24 the window?

25 A. No, sir. But, I mean, you already have

1 a fifteen-foot-wide roadway there.

2 Q. Okay. And the regulation says we must
3 have either thirty or twenty-four?

4 A. Yes, sir. And it also says that we can
5 reduce that if we deem it appropriate.

6 Q. Where does it say that?

7 A. Back in the beginning.

8 THE COURT: Is that the last exhibit?

9 MR. POULSON: Yes, sir.

10 THE COURT: Gentlemen, you can resume
11 your stations.

12 THE WITNESS: Right here. "Any
13 alteration that will reduce the standards set forth in
14 this manual shall be subject to the approval by the
15 district administrator or the engineer."

16 BY MR. POULSON:

17 Q. That's not part of the regulation, is
18 it, Mr. Pauley?

19 A. Yes, sir. It's part of the manual.

20 Q. That's part of the preamble, is it not?

21 A. That's part of the manual.

22 Q. That's part of the preamble?

23 A. Yes, sir.

24 MR. LePAGE: Your Honor, this is a legal
25 question.

1 THE COURT: I agree. Sustain the
2 objection.

3 BY MR. POULSON:

4 Q. Mr. Pauley, if you will, please, sir,
5 look at page 29. And, of course, 29 and 30, one is our
6 measurement, and the other is metric, of course.

7 Look at 29, sir. Is there any language
8 on 29 at all that permits any variation or modification?

9 A. Not on this individual page.

10 Q. Okay.

11 A. However, it's given prior to that.

12 Q. Back up to page 28. Does 28 and 27
13 contain a note about specific sight requirements,
14 beginning with "note"?

15 A. Okay.

16 Q. Read the note, please, to the Court.

17 A. "Entrance detail shown on this sheet may
18 be modified to meet specific sight requirements as
19 directed or approved by the engineer when based on sound
20 engineering principles."

21 Q. So within that particular entrance,
22 which is not applicable to this case, there is to be some
23 room to vary depending on sight conditions, correct?

24 A. That's basically the same note that's in
25 the beginning.

1 Q. All right. But that note is not on page
2 29, is it?

3 A. No, sir.

4 Q. Back up to the two pages preceding that
5 particular example, regulation.

6 A. Yes, sir.

7 Q. Same note appear on that particular kind
8 of entrance?

9 A. Yes, sir.

10 Q. Back up two more.

11 A. Yes.

12 Q. Same note appears?

13 A. Yes, sir.

14 Q. And it says based on what? Sound
15 engineering principles?

16 A. Yes, sir.

17 Q. Okay. And I take it you're telling this
18 Court that it is a sound engineering principle here to
19 turn this twenty-four from fifteen?

20 A. It was appropriate in these conditions.

21 Q. Appropriate in these conditions.

22 And what were the conditions?

23 A. A very low volume road, a road with a
24 pavement width of fifteen-feet wide.

25 Q. Plus shoulders?

1 A. Plus shoulders.

2 Q. So basically, you-all did it because you
3 wanted to do it?

4 MR. MCFARLAND: I'm going to object to
5 that, Your Honor. I recognize there is no jury, but that
6 is just a mischaracterization by Mr. Poulson.

7 THE COURT: Sustain the objection.

8 BY MR. POULSON:

9 Q. Showing you Plaintiff's Exhibit 43, the
10 plat of survey of Shore Engineering.

11 MR. MORRIS: Your Honor, I'm going to
12 renew my objection on that exhibit previously made as to
13 relevance.

14 THE COURT: Okay. Go ahead.

15 BY MR. POULSON:

16 Q. Mr. Pauley, looking at the example down
17 in the right corner right-of-way line there, okay?

18 A. Uh-huh.

19 Q. And I assume that your methodology would
20 be the same? You would measure at a point twenty-five
21 feet back from the edge of the pavement?

22 A. It depends on the location and where the
23 road is going in.

24 Q. It depends on the location?

25 A. I mean, you would measure twenty-five

1 feet back, yes.

2 Q. And you would take a line parallel with
3 the edge of the pavement?

4 A. Yes, sir.

5 Q. Okay. And in this one, if you've got
6 twenty-four feet in the line parallel with the edge of the
7 pavement, twenty-five feet, correct?

8 A. Yes, sir.

9 Q. Then this one would comply?

10 A. Potentially.

11 Q. Potentially. Even though it's only a
12 twelve feet width?

13 A. I mean, a lot of things come into play.
14 That entrance coming in on an angle, that would have a
15 play into the decision as well. The road it's being
16 placed on would play into the decision as well.

17 Q. But you have told us that under the
18 regulations you measure, and if you get twenty-four feet,
19 it qualifies under the regulation.

20 A. It can.

21 Q. It can.

22 A. But you have to look at the
23 appropriateness of the entrance in relation to where it's
24 at.

25 Q. And if this one was out in the middle of

1 the boon docks without another house within ten miles,
2 would it comply?

3 A. I would question it for some other
4 reasons, and part of that is the entrance -- the angle of
5 the entrance coming into the roadway.

6 Q. So you don't know whether these folks
7 would get a permit or not?

8 A. I can't say for sure.

9 MR. POULSON: All right, Mr. Pauley.
10 Thank you, sir.

11 MR. MCFARLAND: I have a few questions,
12 Your Honor.

13

14 CROSS-EXAMINATION

15 BY MR. MCFARLAND:

16 Q. Good morning, Mr. Pauley. Robert
17 McFarland on behalf of Shooting Point L.L.C. I have a few
18 questions for you.

19 Mr. Poulson asked you a number of times
20 isn't it true the primary purpose of the regulations is to
21 get a measurement for ingress or egress, or something to
22 that effect.

23 That's not the primary purpose of the
24 regulations, is it, Mr. Pauley?

25 MR. POULSON: Judge, I don't know that

1 he can take Mr. Pauley on cross. I mean, this is a
2 witness that they have listed.

3 MR. LePAGE: He's my witness, Your
4 Honor.

5 THE COURT: I don't think you can
6 cross-examine, Mr. McFarland.

7 MR. MCFARLAND: Your Honor, with all due
8 respect, I didn't call this witness, and I don't represent
9 VDOT in this case, and I'm on cross-examination as a
10 co-defendant in this case.

11 MR. POULSON: Well, they have also
12 maintained that the permit is valid in their pleadings,
13 and they've listed him on their witness list.

14 MR. MCFARLAND: I listed Mr. Wescoat and
15 Mrs. Wescoat on my list, too, but I'm on cross.

16 THE COURT: I'm not going to belabor the
17 point. We don't have a jury here, and I suppose we're
18 going to get to it one way or the other anyway, so go
19 ahead.

20 BY MR. MCFARLAND:

21 Q. Isn't it true, Mr. Pauley, the primary
22 purpose of the regulations is to ensure a safe entrance?

23 A. Yes, sir.

24 Q. Correct?

25 A. Yes, sir.

1 Q. Not whether the width is specifically at
2 "X" feet or "Y" feet, or twenty-five feet, or twenty-eight
3 feet, correct?

4 MR. POULSON: Judge, this is totally
5 contrary to the law to the regulation. Mr. McFarland is
6 now trying to toss the regulation out of the window and go
7 on some different theory. They can't do this at this
8 stage of the game.

9 THE COURT: Well, let's see where it
10 goes.

11 BY MR. MCFARLAND:

12 Q. VDOT's overriding concern with respect
13 to the issuance of any permit is what, Mr. Pauley?

14 A. For safety.

15 Q. Okay. And in your capacity as the
16 district engineer, you reviewed some materials that
17 Mr. Cumming sent to you, correct?

18 A. Yes, sir.

19 MR. POULSON: He's not the district
20 engineer.

21 BY MR. MCFARLAND:

22 Q. Assistant district engineer. I
23 apologize.

24 A. Traffic engineer.

25 Q. The record will reflect that -- if I've

1 elevated you too high, Mr. Pauley, I wish you the best,
2 and I will correct the title that I gave you.

3 You reviewed some materials Mr. Cumming
4 sent you, correct?

5 A. Yes, sir.

6 Q. And you made an independent
7 determination yourself as to whether there was a safe
8 entrance, correct?

9 A. Yes, sir.

10 Q. Okay. And you determined it was, in
11 fact, a safe entrance, correct?

12 A. Yes, sir.

13 Q. And what you looked at were the sight
14 lines?

15 A. Yes, sir.

16 Q. Sight distances, entrance width itself
17 for the right-of-way?

18 A. Yes, sir.

19 Q. And the width of the Route 622 itself?

20 A. Yes, sir.

21 Q. Okay. And, in fact, as one is at the
22 entrance exiting from it, you are aware that to the right
23 the only residence or business is one house approximately
24 a half a mile down the road?

25 A. Yes, sir.

1 MR. POULSON: Your Honor, I didn't think
2 that Mr. McFarland was going to be permitted to lead.

3 THE COURT: Go ahead.

4 BY MR. MCFARLAND:

5 Q. I'm correct?

6 A. Yes.

7 Q. Okay. Which means that you are not
8 going to expect very much traffic coming to the
9 right-of-way from the Wescoat home?

10 A. Correct.

11 Q. Okay. And, in fact, the total traffic
12 on Route 622 is what, sir, according to the last survey?

13 A. Twenty-eight vehicles a day.

14 Q. Which is -- clarify that for us. What
15 is twenty-eight vehicles a day at radiations of traffic?

16 A. That's minimal, very minimal.

17 Q. And even when we assume ten trips per
18 day per house in the subdivision, and you're aware there
19 were eighteen lots?

20 A. Yes, sir.

21 Q. That gets us a hundred and eighty trips?

22 A. Yes, sir.

23 Q. Adding that to the last statistics that
24 VDOT has for Route 622 gives us, what, approximately two
25 ten?

1 A. Approximately, yes, sir.

2 Q. And what category does two hundred and
3 ten vehicles per day fall into?

4 A. It's still minimal.

5 Q. And I take it that works in favor of the
6 entrance, of the width of this entrance?

7 A. Yes, sir.

8 Q. Okay. And am I also not correct,
9 Mr. Pauley, that the way the curve of Route 622 is as it
10 comes into the entrance works in favor of the entrance?

11 A. Yes, sir.

12 Q. Okay. And that's because the way the
13 curve works gives you an even better sight distance,
14 correct?

15 A. Yes, sir.

16 Q. This certainly isn't the first entrance
17 permit that you have been associated with that's been
18 granted where there was some modification from the exact
19 language of the VDOT standards, is it?

20 A. No, sir.

21 Q. In fact, modifications from the
22 standards happen on a regular basis?

23 A. Yes, sir.

24 MR. POULSON: Note our objection Judge,
25 to this whole line of testimony.

1 THE COURT: All right.

2 BY MR. MCFARLAND:

3 Q. The standards are, I take it,
4 Mr. Pauley, guidelines, correct?

5 A. Yes, sir.

6 MR. POULSON: Again, same objection.
7 It's law.

8 BY MR. MCFARLAND:

9 Q. And the most important consideration to
10 you here was the safety aspects for this entrance, not
11 specifically measurements, correct?

12 A. Yes, sir.

13 Q. Now, there was reference made by
14 Mr. Poulson of a letter of April 4th from Mr. Cumming with
15 respect to the requirements for this entrance, and I think
16 Mr. Poulson asked you isn't it true that it was a
17 requirement in this letter that two vehicles be able to
18 pass side by side in the entranceway, and I think he may
19 have even said two large vehicles.

20 Let me hand you the letter itself.

21 MR. MCFARLAND: And I'm not sure if this
22 is already in evidence.

23 MR. POULSON: This is part of 28. There
24 would be some 28A, and some B, and C also.

25

1 BY MR. MCFARLAND:

2 Q. I think this letter is part of 28, but
3 I'm just going to hand you my copy, Mr. Pauley, if I
4 might. That's the letter of April 4th, 2000. And you
5 take whatever time is necessary, sir.

6 Have you seen that before today?

7 A. Yes, sir.

8 Q. Okay. That's Mr. Cumming's letter to
9 Mr. Cree?

10 A. Yes, sir.

11 Q. Discussing the entrance permit?

12 A. Yes, sir.

13 Q. And what would be necessary?

14 A. Yes, sir.

15 Q. In fact, you can peruse that. There is
16 nothing in that letter that specifically references the
17 ability of vehicles to pass in the entranceway, is there?

18 A. No, sir. I don't see anything.

19 Q. Okay. In fact, the first paragraph of
20 that letter, what Mr. Cumming is concerned with is
21 vehicles speeding down Route 622, or coming down Route 622
22 and entering the right-of-way at too high of speed.

23 Is that what his concern is?

24 A. Yes, sir.

25 Q. So he states in that letter that that is

1 going to have to be addressed, correct?

2 A. Yes, sir.

3 Q. And it was, correct?

4 A. Yes, sir.

5 Q. Okay. Thanks.

6 MR. MCFARLAND: Thank you, Mr. Pauley.

7 That's all the questions I have at this time.

8 THE COURT: Anybody else?

9 MR. MORRIS: Yes, Your Honor, if I may.

10

11 CROSS-EXAMINATION

12 BY MR. MORRIS:

13 Q. Mr. Pauley, my name is Daniel Morris. I
14 represent the Property Owners Association.

15 Let me show you --

16 MR. MORRIS: What did we name the
17 minimum standards exhibit number? Just for the record, I
18 show the exhibit that's before him. And this would be--

19 MR. POULSON: The minimum standards is
20 27.

21 BY MR. MORRIS:

22 Q. Would you turn to page 71 on that
23 document?

24 A. Yes, sir.

25 Q. And on page 31, would you read for the

1 record the introduction here in number 2?

2 A. Yes, sir. Information pertaining to the
3 availability and costs of these publications should be
4 directed to the Department's division indicated by writing
5 to the Virginia Department of Transportation 1401 East
6 Briar, Richmond, Virginia 23219.

7 Q. Just prior to that, read what's there.

8 A. All right. 24VAC30-71-170 listing
9 documents incorporated by reference.

10 Q. And then read number two below that.

11 A. 24VAC30-09-10, subdivision street
12 requirements, 1996, secondary roads division, VDOT.

13 Q. Now, subdivision street regulations,
14 those deal with regulations of subdivisions that are using
15 roadways that will eventually be dedicated to the state;
16 is that correct?

17 A. Yes, sir.

18 Q. And that would be at a higher standard
19 than a private subdivision roadway system; is that
20 correct?

21 A. That is possible, yes, sir.

22 Q. I am going to show you -- give me a
23 moment here. I'm going to show you a document that was
24 provided to me. I believe your name is at the top of
25 this; is that correct?

1 A. Yes, sir.

2 Q. Could you describe to the Court briefly
3 what the document is?

4 A. This is a page out of the subdivision
5 street manual which lists a variety of sections of the
6 code which pertain to it and give authority.

7 MR. MORRIS: Your Honor, I would like to
8 submit this into evidence. I'm not sure what exhibit
9 number we're on.

10 MR. POULSON: Our objection, it applies
11 to subdivision streets being taken into the system.

12 MR. MORRIS: I believe the law is it's
13 showing the standards at a higher level.

14 THE COURT: Okay. I think it's
15 relevant.

16 MR. POULSON: We don't have a street
17 that's coming into the system here.

18 THE COURT: I understand that. I think
19 the purpose is like the purposes of 43, 44, 45, and 46.

20 Defendant's Number 8, I think.

21 MR. MCFARLAND: I'm sorry. Defendant's
22 8, Your Honor?

23 THE COURT: I think that's right.

24 THE DEPUTY: 8.
25

(Defendant's Exhibit 8 was marked and
admitted into evidence.)

BY MR. MORRIS:

Q. Let me show you what's now been marked
as Exhibit 8. Would you just describe for us in whatever
detail you feel necessary at this point concerning the
sections that deal with discretionary authority, and the
entrance permits below?

A. Yes, sir.

Q. If you would prefer to read them, then
that would be fine.

A. Let me read through it to make sure.

Q. Okay.

A. Okay. I'll basically just read it.

24VAC30-09-07 discretionary authority.
Department's resident engineers are authorized
considerable discretionary authority in application on
changing minimum standards relative to allowing grade for
streets, function, and classified -- such judgment should
take into consideration the individual situation, but in
no instance are the safety feature, or structural
integrity, or traffic capacities prescribed by these
requirements to be sacrificed.

-- alignment and road grade
satisfactorily providing adequate stopping distance,

1 reasonable alignment, and grading are provided to safety
2 accommodate the projected traffic at the designed speed.

3 Q. Concerning the permits below that?

4 A. Yes, sir. 24VAC30-09-09 entrance
5 permits. An entrance permit is required by the general
6 rules and regulations of Commonwealth's Transportation
7 Board for any form of access to state-maintained roads
8 including any connection of subdivision streets.

9 Such connection shall comply with the
10 applicable commercial entrance requirements, the
11 Department's permit manual, and minimum entrance
12 standards.

13 Due to the wide variation of the prevail
14 conditions, each location shall be evaluated individually
15 to determine exact requirements.

16 Q. Now, just for clarification, this is
17 concerning subdivision streets which eventually will be
18 dedicated to the state?

19 A. Yes, sir.

20 Q. And you testified just a moment ago that
21 that would be a higher standard than the standards that
22 are the subject of this case?

23 A. Yes, sir.

24 Q. Okay. Now, with regard to the petition
25 that's -- excuse me -- the permit that was presented in

1 this case, as long as you do not compromise safety, is it
2 your testimony that you have discretion in dealing with
3 the various standards that are within this manual; is that
4 correct?

5 A. Yes, sir.

6 MR. MORRIS: Okay. That's all I have.
7 Thank you.

8

9 FURTHER CROSS-EXAMINATION

10 BY MR. POULSON:

11 Q. So what you're telling us, Mr. Pauley,
12 is you have total discretion and don't have to go by this
13 manual, sir? Is that what you're telling us now?

14 A. No, sir. What we're saying is that we
15 have discretion to provide an entrance that is appropriate
16 for the location.

17 Q. But these are minimum standards, are
18 they not, sir?

19 A. Yes, sir.

20 Q. Okay. Minimum. No question what the
21 word "minimum" means, is it?

22 A. No, sir.

23 Q. Okay. In fact, on your commercial
24 entrances on page 15, it says the entrance can be between
25 thirty and forty feet?

1 A. Yes, sir.

2 Q. But page 29 is minimum? And you still
3 say, after all the smoke is cleared, that this does have
4 to comply with page 29 of the minimum standards?

5 A. Yes, sir. It has to be an appropriate
6 entrance for the area.

7 Q. Are you telling me yes?

8 A. Yes, sir.

9 Q. That it does have to comply with the
10 minimum standards?

11 Now, was the land use permit manual
12 incorporated in the minimum standards?

13 A. I believe so.

14 Q. Okay. And if you will, please, on page
15 1-5, Section 15, in lieu of introducing this into the
16 record, if you will, please, read Section 15 of that
17 manual.

18 A. The commissioner under section
19 33.1-12(3) Code of Virginia, 1950, as amended, reserves
20 the power to regulate entrance from adjunct property upon
21 the right-of-way of any highway within the state system of
22 state highways.

23 No entrance of any nature shall be made
24 built constricted upon the right-of-way of any highway
25 within the system of state highways until the location has

1 been determined in the opinion of the appropriate officer
2 of the Department to be acceptable from a public safety
3 standpoint.

4 And, further, until approval has been
5 granted by the Department. The design construction of
6 such entrances as approved by the Commissioner pursuant to
7 section 33.1-98 Code of Virginia, 1950, as amended, must
8 comply with the manual of minimum entrance standards for
9 state highways and land use permit manual for the same are
10 applicable.

11 Q. So that says it must comply with the
12 regulations?

13 A. Yes, sir.

14 Q. And you would agree that there is no
15 discretion there?

16 A. Not noted in that section.

17 MR. POULSON: All right. Thank you,
18 sir. I believe that's all.

19 MR. LePAGE: Your Honor, I have one or
20 two further questions.

21 THE COURT: Okay.

22 REDIRECT EXAMINATION

23 BY MR. LePAGE:

24 Q. Mr. Pauley, do you, in your routine
25

1 practice of reviewing these entrance permit applications,
2 construe that you have authority to go below what are
3 called the minimum standards?

4 A. Yes, sir.

5 MR. POULSON: Again, objection, Judge --

6 MR. LePAGE: He is --

7 THE COURT: I think the objection is
8 well taken as to leading, because we've finally got to the
9 point, he is your witness.

10 Sustain the objection. It is a leading
11 question.

12 BY MR. LePAGE:

13 Q. Do you have any authority to modify the
14 minimum standards, or to interpret item?

15 A. Yes, I do.

16 Q. What is that authority?

17 A. The district administrator has allowed
18 us the authority to change the standards insofar as --

19 MR. POULSON: I'm going to object to
20 that on hearsay basis.

21 THE COURT: Overruled. Go ahead.

22 THE WITNESS: Insofar as it does not
23 compromise the safety.

24 BY MR. LePAGE:

25 Q. And are there any entrances anywhere

1 within the Hampton Roads district the are less than
2 twenty-four feet, where the easement is less than
3 twenty-four-feet wide?

4 MR. POULSON: Objection. Again, it's
5 immaterial.

6 THE COURT: Overruled.

7 THE WITNESS: I'm sure there are many.

8 BY MR. LePAGE:

9 Q. And in those instances, VDOT has
10 interpreted the entrances to either be twenty-four-feet
11 wide, or they have reduced the standards; is that correct?

12 A. Yes, sir.

13 MR. LePAGE: Thank you. I have nothing
14 further.

15 THE COURT: Anything else?

16 MR. POULSON: None that haven't been
17 already asked.

18 MR. MCFARLAND: No.

19 THE COURT: I have one question, and
20 this is a little bit off the subject of what you-all are
21 talking about, but --

22

23 EXAMINATION

24 BY THE COURT:

25 Q. Mr. Pauley, one of the things which you

1 indicated was considered after having determined that the
2 illustrations that were submitted showing a
3 tractor-trailer going in, and a sports utility vehicle
4 coming out, and after having determined that indeed they
5 probably could not pass one another going in and out, that
6 you indicated you considered the fact that a
7 tractor-trailer as depicted in the diagram could safely
8 sit on the roadway of Route 622, and wait for the other
9 vehicle to come out before going in because there's plenty
10 of room to sit there?

11 A. Yes, sir.

12 Q. Did you consider at all a scenario of,
13 again, using the sports utility vehicle, and the
14 tractor-trailer, of the tractor-trailer already having
15 entered the easement, say for example, and was fifty feet
16 into the easement, and the other vehicle came the other
17 way?

18 Was that scenario considered as to what
19 would be the appropriate safe maneuver at that point?

20 A. Not really, because we were not
21 reviewing anything except the entrance.

22 But one of the things that I did
23 consider was what was the probability of that happening.
24 With the low volume of traffic, the probability of a
25 tractor-trailer actually accessing or coming to access the

1 road is minimal at best.

2 Q. So I take it your answer is you didn't
3 consider that?

4 A. Not inside the easement, no, sir.

5 Q. Well, with respect to perhaps having to
6 back out in order to let the other vehicle out?

7 A. No, sir.

8 THE COURT: Okay. All right. Anything
9 else? Any other questions?

10 MR. POULSON: One thing, if I may,
11 Judge. Let me find something real quick.

12

13 RECROSS-EXAMINATION

14 BY MR. POULSON:

15 Q. In reference to some questions of
16 Mr. McFarland, as part of the permit, there was a
17 submittal letter from Baldwin and Gregg?

18 A. Okay.

19 Q. If you will, please, read the first two
20 paragraphs of Baldwin and Gregg's letter.

21 MR. MCFARLAND: Your Honor, I'm going to
22 object.

23 MR. MORRIS: I object, Your Honor.

24 MR. LePAGE: Objection.

25 MR. MCFARLAND: This is beyond the scope

1 of the Court's question. If this was going to be taken
2 up, it should have been taken up earlier.

3 Secondly, I don't think this gentleman,
4 he never saw the Baldwin and Gregg application. At the
5 time, his role in this was done by then.

6 MR. POULSON: He said he didn't see the
7 Cumming letter of April 4th either of 2000. He's
8 testified as to the Cumming letter that he hadn't seen,
9 and this is in reference to the engineer's letter
10 referencing Mr. Cumming's letter of April 4th.

11 THE COURT: Are you talking about the
12 part that says two vehicles should be able to enter in and
13 out the entrance simultaneously?

14 MR. POULSON: And the second part says
15 tractor-trailer ought not to have to sit on the roadway.

16 THE COURT: I mean, the Court -- the
17 exhibit speaks for itself.

18 MR. POULSON: All right, sir.

19 THE COURT: Any other questions?

20 MR. POULSON: No, sir.

21 THE COURT: Anything else?

22 MR. MCFARLAND: Just one, Your Honor.
23
24
25

RECROSS-EXAMINATION

BY MR. MCFARLAND:

Q. Mr. Pauley, two standard size sedans can pass each other in the entranceway without a problem, correct?

A. Yes, sir.

Q. And a standard size sedan, and an SUV can pass each other without a problem?

A. Should be able to, yes, sir.

FURTHER RECROSS-EXAMINATION

BY MR. POULSON:

Q. How wide is a standard size sedan, Mr. Pauley?

A. Approximately six to eight feet.

Q. Six to eight feet?

How wide is a standard utility vehicle?

A. I'm not sure.

Q. You really don't know, do you?

A. I really don't. I mean, whatever was on the measurement.

MR. POULSON: All right, sir. Thank you.

THE COURT: All right. Thank you, sir. You may be -- may he be excused?

1 MR. LePAGE: Yes, sir.

2 THE COURT: Thank you.

3 Who do we have next?

4 MR. LePAGE: I would call Jim Cleveland.

5 THE COURT: All right.

6

7 JAMES CLEVELAND, called as a witness by
8 and on behalf of the Defendants, being first duly sworn,
9 testified as follows:

10

11 DIRECT EXAMINATION

12 BY MR. LePAGE:

13 Q. Mr. Cleveland, would you tell the Court
14 your full name, and spell it for the court reporter,
15 please?

16 A. James C. Cleveland, C-l-e-v-e-l-a-n-d.

17 Q. And, Mr. Cleveland, what is your
18 occupation?

19 A. I am the Hampton Roads district
20 administrator for VDOT.

21 Q. And what is your educational background?

22 A. I have a BS in civil engineering, and
23 also a professional engineer.

24 Q. And from what institution did you
25 graduate?

1 A. Virginia Tech.

2 Q. And how long have you been the district
3 administrator for the Hampton Roads district?

4 A. Approximately five years.

5 Q. And what did do you prior to that?

6 A. I was a district construction engineer
7 for about -- since '82.

8 Q. For the Hampton Roads district --

9 A. Yes, sir.

10 Q. -- with Department of Transportation?
11 And what do your duties entail as
12 district administrator?

13 A. I have oversight, overview of everything
14 that goes on within Hampton Roads that deals with traffic
15 or area construction, maintenance, and that type of --
16 anything that pertains to VDOT.

17 Q. Do you have any responsibilities for the
18 minimum standards of entrances to state highways?

19 A. That comes under my responsibility, yes.

20 Q. Okay. Have you given any instructions
21 to the resident engineers who report to you, or to the
22 district traffic engineer in the Hampton Roads district
23 about their authority with respect to the minimum
24 standards of entrances for state highways?

25 A. The resident engineers have a

1 responsibility to issue permits and those types of things
2 with the expertise and guidance coming from the traffic
3 engineering section.

4 Q. Are they expected to consult with the
5 traffic engineering section, if necessary?

6 A. When it becomes necessary. Generally, a
7 resident engineer would issue permits, so that would fall
8 within his area of responsibility. If anything unusual,
9 or a modification, or type thing, he would normally expect
10 to consult with the traffic engineering section.

11 Q. Do you have any authority to reduce
12 standards in the minimum standards, if appropriate?

13 MR. POULSON: Note our objection to that
14 question.

15 THE WITNESS: The standard is a guide,
16 and as a guide, they have the responsibility to make
17 certain modifications that might be necessary.

18 BY MR. LePAGE:

19 Q. Okay. So your testimony is that you do
20 have authority to reduce standards?

21 A. Yes, sir, as resident engineer.

22 MR. POULSON: Judge, again, we just want
23 to make our point.

24 We have been told in interrogatories, we
25 have been told in discovery we did not vary any standards

1 here. We applied page 29. That's their Interrogatory
2 Answer, and it's been consistent all the way through. Now
3 at the late hour they're trying to say well, we did vary.

4 THE COURT: Note your continuing
5 objection. Go ahead.

6 BY MR. LePAGE:

7 Q. Is this an unwritten rule, or is this --
8 have you given any written direction with respect to this,
9 or have you done it verbally?

10 A. No, it's been done verbally.

11 Q. And how long has this practice been in
12 place?

13 A. Ever since I've been with the
14 organization. I served as a resident engineer at one
15 time, and took that responsibility as a resident engineer.

16 Q. How long have you worked for VDOT?

17 A. I'm going on forty-one years.

18 Q. So this policy has been in place as far
19 as you know since you've been a resident engineer which
20 was prior to 1982?

21 A. I was assistant resident engineer,
22 resident engineer, and worked under residency, and had the
23 responsibility to issue permits, and these types of
24 things, and as a part of my normal responsibility, like I
25 said, as assistant resident engineer, and also as a

1 resident engineer.

2 Q. And when has it been your instructions
3 that they must come to you under any modification of the
4 standards?

5 A. A resident engineer would be expected to
6 issue permits with advice, if he needs advice, from
7 traffic engineering.

8 If it's something that's really unusual,
9 then normally the resident engineer, and/or the traffic
10 engineering section would review what their
11 recommendations might be in a particular situation.

12 Q. When you say "unusual," what do you mean
13 by that?

14 A. A modification. It depends on the type
15 of modification. It depends on -- each individual
16 location is reviewed on its own merit, and it becomes a
17 judgment call from a resident engineering standpoint, what
18 he feels, he or she feels that that's within their purview
19 to issue the permit.

20 And if he or she would review a
21 modification, they would discuss that, would be expected
22 to discuss that with the traffic engineering group, and
23 then with that, if it's a modification to the degree that
24 they, in their judgment, would want my advice, or my
25 review, then they would be expected to come to me for

1 that.

2 Q. All right. I would like to direct your
3 attention to page 29 of the minimum standards in reference
4 to state highways, which is Exhibit 27, I believe.

5 What kind of subdivision does that apply
6 to?

7 A. It applies to standard private
8 subdivision roads, street entrances.

9 Q. And do you, as the district
10 administrator, or the resident engineers that report to
11 you have any authority to modify those standards?

12 MR. POULSON: Same continuing objection,
13 sir.

14 THE WITNESS: Yes, they would. Yes.
15 They would look at the particular situation and make a
16 decision, and if a modification is necessary for public
17 safety, then they would be expected to make that decision.

18 BY MR. LePAGE:

19 Q. Does VDOT have any authority to
20 interpret those standards?

21 A. Yes, sir. This is a guide, and as a
22 guide, they have interpreting responsibilities to make
23 interpretations, modifications as they see fit for a
24 particular location.

25 Q. Are the standards depicted on page 29

1 absolute minimums?

2 A. No. They could be something less than
3 that depending on the circumstances that you're trying to
4 fit to, and primarily they want to look at it from a
5 safety standpoint, are you providing safety for the road
6 user, and the individual that might be using the entrance.

7 Q. And directing your attention to the
8 portion of that illustration which indicates that you have
9 to have twenty-four feet of pavement, has VDOT in the
10 Hampton Roads district issued any entrance permits to
11 easements that less than twenty-four-feet wide measured
12 side to side?

13 MR. POULSON: Same objection, Your
14 Honor. Materiality.

15 THE COURT: Note your objection. Go
16 ahead.

17 THE WITNESS: I'm confident that we
18 have. It would not be unusual.

19 MR. POULSON: I move to strike that
20 answer. "I'm confident that we have" is not --

21 THE COURT: Sustain the objection,
22 unless he knows.

23 BY MR. LePAGE:

24 Q. Do you know?

25 A. I do not know.

1 Q. Okay. Have you reviewed the entrance
2 for Shooting Point?

3 A. Yes, I looked at it. Yes.

4 Q. Did you review it before the application
5 was submitted?

6 A. No.

7 Q. You reviewed it after?

8 A. Yes.

9 Q. Have you reached any conclusions about
10 the appropriateness of the permit being granted?

11 MR. POULSON: Judge, that's immaterial.
12 He didn't issue the permit.

13 THE COURT: Overruled.

14 THE WITNESS: Yes. When I looked at it,
15 I felt that the entrance, as I had reviewed the sketches
16 after they had been set, that it very well fit the
17 location in looking at it from a safety standpoint, and
18 sight distance primarily, that it met whatever -- all
19 requirements in that regard.

20 BY MR. LePAGE:

21 Q. Have you gone out and looked at it on
22 the ground?

23 A. Yes, I viewed it on the ground.

24 Q. Did that have any impact on your
25 conclusion?

1 A. That's when I reached that conclusion.
2 When I viewed it on the ground, I felt that the permit
3 that I had seen, and the sketches that had been drawn for
4 that location, I felt it adequately fit the location and
5 the situation that we were trying to meet on a safety,
6 sight distance viewpoint.

7 Q. Did anybody contact you while the
8 application was pending about the application?

9 A. Yes. I had a phone call from Jack
10 Hodge.

11 Q. You did? And what did you tell
12 Mr. Hodge?

13 A. I told him we would look at it and make
14 a decision on it.

15 Q. Did you communicate with Mr. Cumming?

16 A. No, I did not talk to Mr. Cumming
17 directly. I did talk to my assistant for operations to
18 take a look and see how he might view the entrance and the
19 application.

20 Q. Did he look at it?

21 A. Yes. He looked at it on the ground.

22 Q. After he looked at it, did you have any
23 reservations about whether or not a permit should be
24 granted?

25 A. No. He came back and discussed it with

1 me, and showed me, you know, how the permit, the sketch
2 would have been --

3 MR. POULSON: We're going to object to
4 hearsay from whoever this unidentified person is.

5 THE COURT: Overruled. Go ahead.

6 THE WITNESS: When Mr. Clark came back
7 after he had viewed it, and showed me the sketch, and
8 after he discussed it with me, I didn't have any
9 reservation that it would have been issued based on the
10 intent of our guide, and our standards.

11 BY MR. LePAGE:

12 Q. Did you communicate with Mr. Cumming
13 after that?

14 A. I don't recall talking to Will Cumming
15 at all about the entrance.

16 MR. LePAGE: No further questions.

17

18 CROSS-EXAMINATION

19 BY MR. POULSON:

20 Q. Mr. Cleveland, am I correct in that if
21 it's been reported to us in an Interrogatory Answer that
22 you discussed the issues with W. M. Cumming, Jr., that
23 that is not correct?

24 A. I don't recall discussing it with him.
25 I did talk to, like I said, Mr. Clark.

1 Q. Mr. Clark, what is his position?

2 A. He is the assistant for operation
3 systems, district administrator for operations, and
4 maintenance.

5 Q. Okay. And you know that -- you worked
6 under Jack Hodge?

7 A. A number of years ago.

8 Q. Up until when? 1995?

9 A. No, sir. I worked -- he was the
10 resident engineer when I was the assistant in the '60s,
11 and from that point on, I never did work directly under
12 him except -- I'm trying to think when he was chief
13 engineer. It might have been a short period of time I
14 worked under him as a district administrator.

15 Q. Of course, it would have been nine of
16 you directly under him?

17 A. There are nine district administrators,
18 yes.

19 Q. You've known Jack Hodge for many years?

20 A. Yes.

21 Q. Who else have you talked to about this
22 particular application, sir?

23 A. I don't recall talking to anyone except
24 Mr. Clark.

25 Q. Mr. Clark is the only one that you've

1 talked with?

2 A. That is the only one I recall, yes.

3 Q. Did Mr. Hodge talk to Mr. Clark?

4 A. I don't know.

5 Q. Okay. And you say if there can be
6 modifications made, they are made as part of this
7 unwritten policy?

8 A. I didn't understand your question.

9 Q. You indicated that modifications could
10 be made to the minimum standards. Is that what you're
11 saying?

12 A. Modifications based on the guide that we
13 have, modifications could be made to meet a particular
14 situation, yes.

15 Q. And that's part of this unwritten
16 policy?

17 A. Well, I don't know that it's an
18 unwritten policy. This is the guide. And my
19 interpretation of a guide is that you use your engineering
20 judgment in this particular instance to issue whatever the
21 situation might require.

22 Q. Okay. Sir, are you aware that page 29
23 is actually part of a regulation adopted by the
24 Commonwealth Transportation Board?

25 A. Yes.

1 Q. As opposed to simply being a guide?

2 A. Yes.

3 Q. Are you aware of what a regulation is?

4 A. Yes, sir.

5 Q. It's law, is it not?

6 A. Yes, sir.

7 Q. And these are minimum standards,

8 correct?

9 A. It says minimum standards.

10 Q. It says minimum. And there's no
11 question what the word "minimum" means?

12 A. Well, there again, it goes back to the
13 fourth authorization in the introduction. I go back to
14 that. It says it's a guide, that one of the things that
15 it states that we want to ensure safe -- for the purpose
16 of safety.

17 Q. And that's your manual. That's just an
18 introduction. That is prior to the regulations actually
19 being set forth, correct?

20 MR. MCFARLAND: Your Honor, I think the
21 Court has heard this, and it's going to be up to the Court
22 to determine what part of it --

23 THE COURT: I think it speaks for
24 itself. Go ahead. Next question.

25

1 BY MR. POULSON:

2 Q. And on page 29, Mr. Cleveland, there's
3 absolutely nothing on page 29 that indicates there can be
4 any variation, is there, sir?

5 A. It says standards, private entrances,
6 and it says safe minimum standards for entrances for state
7 highways.

8 Q. Okay. Look back on page 27.
9 Do you see the note at the bottom of the
10 one on page 27?

11 A. I guess you're referring to, it says,
12 "Note. Entrance detail as shown as the street may be
13 modified?"

14 Q. Yes. That appears on the one on page
15 27, doesn't it?

16 A. Yes.

17 Q. Of course, it talks about sound
18 engineering practices, too, does it not, the principles?

19 A. Yes.

20 Q. And, sir, in this particular case, what
21 was the variation in this case?

22 A. For the private subdivision?

23 Q. Yes, in this particular case, the permit
24 before the Court. What was the variation from the minimum
25 standards?

1 A. I don't know that there was.

2 Q. There wasn't any variation, was it?

3 A. No.

4 Q. It had to comply with the minimum
5 standards? And that's the basis upon which you-all issued
6 the permit saying that it complied with the minimum
7 standards, correct?

8 A. It does apply to the minimum standards.

9 Q. Okay. So there was no variation in this
10 case?

11 A. Not in this particular case.

12 Q. And the manner in which you issued it
13 was measuring the twenty-four on the skew, or on the
14 angle? Are you familiar with that?

15 A. Yes, sir.

16 Q. And that was the manner in which -- your
17 methodology?

18 A. It was measured parallel to the
19 pavement.

20 Q. Is there anything on page 29 that says
21 parallel?

22 A. No, but the sketch indicates it's
23 parallel.

24 Q. The sketch happens to indicate it.

25 And, sir, is it not the primary purpose

1 of an entrance regulation to ensure that there is
2 sufficient ingress and egress for two vehicles at the same
3 time, sir?

4 A. No, sir, not necessarily.

5 Q. Mr. Cleveland, that is not the
6 underlying principle of every one of these entrance
7 requirements, sir?

8 A. No, I don't agree with that statement.

9 Q. You don't agree that statement?

10 A. No.

11 Q. So two vehicles are not supposed to exit
12 an entrance at the same time?

13 A. There are --

14 MR. MCFARLAND: I would object. That's
15 a different question. He said -- his first question was
16 is it not true that it's the underlying principle that
17 ingress and egress permit to two vehicles to enter an exit
18 at the same time.

19 THE COURT: Overrule the objection. Go
20 ahead.

21 BY MR. POULSON:

22 Q. Sir, isn't every one of these entrances
23 under the regulations designed and promulgated that two
24 vehicles can enter and exit the highway at the same time,
25 sir? And look at each one of them, if you want to take

1 the time to do so.

2 A. Well, the width is shown, depending on
3 where you are on this particular one, on page 29 is shown
4 at twenty-four feet, so you could conclude that that would
5 accommodate two automobiles.

6 Q. Or two trucks even, would it not?

7 A. That depends on the size.

8 Q. Pardon?

9 A. Depends on the size.

10 Q. Well, how wide is a tractor and trailer,
11 sir?

12 A. Twelve feet.

13 Q. Twelve feet, a tractor and trailer?

14 A. No.

15 Q. Are you sure of that?

16 A. No. I'm sorry. Probably about eight
17 feet.

18 Q. Probably eight feet. And if you had
19 twenty-four feet, you would certainly be able to pass two
20 eight-foot-wide tractor and trailers, wouldn't you?

21 A. If they were lined up.

22 Q. If would be tight, though, even then,
23 wouldn't it?

24 A. Well --

25 Q. How much clearance do you need to safely

1 pass, Mr. Cleveland, from your experience?

2 A. I wouldn't know. We have plenty, lots
3 of roads that are anywhere from twelve, fifteen, sixteen,
4 eighteen feet.

5 Q. Plus shoulders?

6 A. Some of them have shoulders, and some of
7 them don't.

8 Q. And, of course, you're not endorsing
9 those roads, I take it?

10 A. No.

11 Q. You would like to change every one of
12 them, wouldn't you, if you had the money; I'm sure?

13 So how much distance, sir, should there
14 be in an entrance for two tractor and trailers to pass?

15 A. It would depend. For the turning
16 radius, if they were lined up, you could have anywhere
17 from eighteen to twenty feet if they were parallel with
18 each other. But if they're turning, then, of course, it
19 takes much more room.

20 Q. But you think you would need at least
21 eighteen to twenty feet for two tractor and trailers to
22 pass?

23 A. Well, if they're eight feet wide, that's
24 sixteen feet, so --

25 Q. You would agree that a total of three

1 inches would never be safe and sufficient, wouldn't you?

2 MR. MCFARLAND: I'm going to object to
3 that, Your Honor.

4 THE COURT: Well, I don't think the
5 question is very clear. You may want to rephrase the
6 question.

7 BY MR. POULSON:

8 Q. Sir, assuming that you've got a vehicle.
9 eight-foot wide, for example a tractor and trailer, and
10 we'll forget about mirrors for a minute, and assume you
11 have an SUV of six feet nine inches for a total of
12 fourteen feet nine inches.

13 Would you agree, sir, that they cannot
14 enter and exit and pass each other in a fifteen-foot-wide
15 area, sir, safely and efficiently?

16 A. Well, I think we're dealing with the
17 entrance, and I'm not sure I understand, you know, what
18 your question is.

19 Q. All right. Well, let me rephrase it
20 then. Suppose you got an SUV coming out of the entrance,
21 okay? It hits the back of the entrance, and just about
22 that time a tractor and trailer has turned off the road,
23 and the tractor and trailer is in the entrance also, and
24 one is eight-feet wide, and the SUV is six feet nine
25 inches, leaving three total inches on a fifteen-foot-wide

1 space.

2 Would you agree that three inches is not
3 sufficient for those two vehicles to safely and
4 efficiently pass, and one exit, and one enter the
5 entrance, sir?

6 A. Well, this entrance, twenty-four feet,
7 when that tractor-trailer is turning, and the radius that
8 is shown would not accommodate both in that entrance at
9 the same time.

10 Q. Well, let's assume that they are in the
11 entrance, that they've got into the entrance.

12 A. Well, from that point on back from the
13 entrance, from VDOT's standpoint, we're concerned about
14 the entrance.

15 Q. Okay. And let's assume that the tractor
16 and trailer is coming out of the entrance.

17 A. And one would probably have to wait for
18 the other to exit.

19 Q. And the SUV is coming in.

20 So you would agree that they couldn't
21 safely pass; one would have to wait on the highway?

22 A. The entrance is not designed -- the
23 geometrics of this entrance would not accommodate either
24 one of those making movements, turning movements
25 simultaneously in that entrances.

1 Q. You're talking about the
2 fifteen-foot-wide one?

3 A. Or even the twenty-four.

4 Q. You mean two vehicles cannot pass?

5 A. Not if a tractor-trailer is coming off
6 this main line, making this turn. I don't think the
7 radius that we're showing will allow that tractor-trailer
8 to track itself without loading up onto the curb.

9 Q. All right. Let's assume that that
10 tractor and trailer is coming out, Mr. Cleveland, and he's
11 just about there coming into the entrance.

12 The entrance is twenty-five-feet deep
13 from the edge of the pavement, and that tractor and
14 trailer comes into that entrance, and just about at the
15 time he hits the entrance, there comes an SUV down the
16 road who turns into the entrance also, and one is
17 six-feet-nine-inches wide, and one is eight-foot wide.

18 Can they safely pass within that
19 entrance, sir?

20 A. One would wait. One would wait for the
21 other one to -- either which one was coming in or out
22 would normally expect to wait for that one to clear.

23 Q. So your answer is no, within fifteen
24 feet, they couldn't do it?

25 A. The entrance is not designed to

1 accommodate both of those large vehicles in a turning
2 situation.

3 Q. We don't have a turning situation, sir.

4 A. Well --

5 Q. The tractor and trailer is coming out,
6 and the SUV has turned in already.

7 A. If he's turned in, he's going to have to
8 wait because he's probably moved over into the opposing
9 lane to make the turn. The turning radius -- I'm not an
10 expert certainly on the turning radius, but I don't think
11 an SUV will make that twenty-five foot radius without
12 moving into the opposing lane.

13 MR. POULSON: Okay. All right. I have
14 no further questions.

15 MR. MCFARLAND: I have just a few, Your
16 Honor.

17

18 CROSS-EXAMINATION

19 BY MR. MCFARLAND:

20 Q. Good afternoon, Mr. Cleveland. My name
21 is Robert McFarland. I represent Shooting Point L.L.C. in
22 this litigation.

23 Look with me, if you will, please, on
24 page 29 of the manual. Am I correct, sir, that the
25 twenty-four feet that is shown in that top diagram -- do

1 you see that notation for the twenty-four feet?

2 A. Yes.

3 Q. The twenty-four feet is to be measured
4 parallel to the edge of pavement, correct?

5 A. That's what's shown on the sketch, yes.

6 Q. Okay. And that's a common practice, to
7 measure parallel to the edge of pavement?

8 A. Yes.

9 Q. To get that width, correct?

10 A. Yes.

11 Q. Okay. Now, it's not a requirement for
12 the issuance of a permit that two tractor-trailers be able
13 to pass each other at the entranceway, is it, sir?

14 A. This entrance will not accommodate two
15 tractor-trailers in that entrance.

16 Q. Okay. And there's tons of entrances in
17 the Commonwealth of Virginia that aren't going to
18 accommodate two tractor-trailers, correct?

19 A. That's correct.

20 Q. And it's not uncommon, particularly on
21 rural roads in the Commonwealth of Virginia for a vehicle
22 to have to wait on the state road while another vehicle
23 exits an ingress egress point, correct?

24 A. That is pretty much the normal practice,
25 yes.

1 Q. Okay. And I take it the overriding
2 concern, Mr. Cleveland, that you know of from your
3 forty-one years with the Department of Transportation, the
4 overriding concern that is looked at for the issuance of a
5 permit, entrance permit is what, sir?

6 A. Safety and sight distance. Of course,
7 sight distance is a part of the safety aspect that you
8 look at for safe egress and ingress out of the entrance on
9 a state road with the proper sight distance to accommodate
10 that.

11 Q. All right. And you, yourself, have come
12 out to the entrance that is the subject of this lawsuit,
13 correct?

14 A. Yes, sir.

15 Q. You have looked at it?

16 A. Yes.

17 Q. With your forty-one years of experience.
18 And you will agree that that is a safe entrance for the
19 circumstances of that entrance and Route 622, correct?

20 A. It has safe access, it has good sight
21 distance on the outside of the curve which maximize the
22 sight distance.

23 Q. Okay. And I take it that you also take
24 into consideration the amount of traffic on Route 622?

25 A. Yes.

1 Q. And it's minimal, isn't it,
2 Mr. Cleveland?

3 A. The best I can tell. I don't know what
4 the traffic count is, but when I was there, I only
5 observed one on it.

6 MR. MCFARLAND: Thank you. That's all I
7 have.

8
9 FURTHER CROSS-EXAMINATION

10 BY MR. POULSON:

11 Q. Mr. Cleveland, you didn't go see it until
12 after this thing became an issue, did you?

13 A. No. I just looked at it a couple of
14 weeks ago.

15 Q. A couple of weeks ago is the first time
16 you ever looked at it?

17 A. Yes.

18 Q. Are you telling the Court that it's a
19 safe entrance when a vehicle has to wait on the public
20 highway, stopped on the public highway for another vehicle
21 to come out of the entrance, sir?

22 A. What I'm saying is that is not an
23 uncommon practice for entrances on the state highway,
24 whether it be this one or any others throughout the
25 Commonwealth.

1 Q. I'm asking you, sir, is that a safe
2 practice?

3 A. Anytime you're stopped on a highway,
4 it's not --

5 Q. It's dangerous, and it's against the
6 law.

7 A. -- safe --

8 MR. MCFARLAND: Mr. Poulson, has twice
9 now cut off the witness while he's trying to answer the
10 question.

11 THE COURT: Court let him finish,
12 please.

13 THE WITNESS: Or, you know, to stop on a
14 state highway is unsafe. But in this particular instance,
15 that is not an uncommon practice on many such locations
16 throughout the state.

17 Q. So what you're --

18 A. Now, in my driveway, there is an
19 entrance for my driveway, and if someone has to come out
20 of my driveway, which is probably as wide as twenty-four
21 feet, I have to wait for that person to exit.

22 Q. You're talking about just a private
23 driveway to your house?

24 A. Yes, and it's on a state-maintained road
25 with a fairly high traffic count.

1 Q. Which are routinely not the width of
2 subdivision, or other commercial entrances?

3 A. Well, my entrance is a probably twenty,
4 twenty-four feet.

5 Q. And you're telling the Court in
6 twenty-four feet two vehicles can't pass in your
7 twenty-four-foot driveway?

8 A. What I'm saying it's not uncommon for
9 ingress and egress of an entrance, or if both happen to
10 occur at the same time, it's not uncommon for one or the
11 other to wait for the other person to clear.

12 Q. But we don't design for that situation,
13 do we, Mr. Cleveland?

14 A. This entrance sketch here as such, like
15 I said earlier, will not accommodate large vehicles coming
16 in and out of the entrance at the same time.

17 Q. Even the one in the manual, you're
18 saying on page 29 will not accommodate two vehicles?

19 A. Depending on the size.

20 Q. Two eight-foot vehicles it won't
21 accommodate?

22 A. It would not accommodate a
23 tractor-trailer, and a large truck. The turning radius of
24 those vehicles are just more than what this entrance
25 provides.

1 This is a minimum entrance for small
2 volumes of traffic that would occasion the location.

3 Q. Mr. Cleveland, isn't every entrance in
4 that book, sir, predicated on a vehicle coming in and a
5 vehicle going out?

6 A. Not necessarily at the same time.

7 Q. You don't think so?

8 MR. POULSON: That's all I have.

9 THE COURT: Anything else?

10 MR. MORRIS: Just one question, Your
11 Honor.

12 THE COURT: Okay.

13

14 CROSS-EXAMINATION

15 BY MR. MORRIS:

16 Q. You have the minimum standards in front
17 of you. Would you turn to page 29 and 30.

18 What are the differences between those
19 two pages?

20 A. One is metrics measure, and ones is in
21 English.

22 Q. Do they show the same type of standards
23 than an engineer would use for the permit that is in
24 question?

25 A. Yes.

1 Q. On either one, metric or --

2 A. Either one, yes.

3 MR. MORRIS: Your Honor, without going
4 into the details of this thing, I would like to submit
5 that they do show the distances that have been described
6 as twenty-four feet on page 29 convert to 23.621976 feet
7 on page 30.

8 And the distance of thirty feet on page
9 29 converts to 29.52747, and the differences between the
10 two of those pages would be 5.678 inches with regard to
11 the thirty-foot section, and 4.5 inches with regard to the
12 twenty-four foot section.

13 MR. POULSON: I don't know what the
14 materiality is.

15 MR. MORRIS: It's fair to say that the
16 same standards be on both sides, and we're talking about
17 inches here throughout the entire trial.

18 MR. POULSON: Well, one is inches and
19 feet, and the other is the metric system.

20 MR. MORRIS: But they're the same page.
21 The evidence, I believe, from this witness is that they
22 are both the same.

23 THE COURT: I'll accept that. That's
24 fine. Go ahead.

25 MR. MORRIS: Thank you, Your Honor.

1 MR. LePAGE: Your Honor, may I ask one
2 or two more questions?

3 THE COURT: Sure.

4
5 REDIRECT EXAMINATION

6 BY MR. LePAGE:

7 Q. Mr. Cleveland, it's not your position,
8 is it, that --

9 MR. POULSON: I'm going to object.
10 Obviously, it's a clear leading question to begin with.

11 THE COURT: Sustained.

12 MR. LePAGE: Let me rephrase the
13 question.

14 BY MR. LePAGE:

15 Q. Mr. Cleveland, if you measure this
16 easement on the parallel to the edge of pavement, is the
17 entrance twenty-four-feet wide?

18 A. Based on the sketch I've seen, that's
19 the measurement, twenty-four feet, based parallel to the
20 pavement.

21 Q. But it's measured -- it's twenty-four
22 feet because of the angle; is that correct?

23 A. Yes, at that angle, yes.

24 Q. The easement is really fifteen-feet
25 wide?

1 A. From my understanding, yes.

2 Q. Would there be any problem with two
3 tractor-trailers passing each other on 622?

4 A. In my view, yes, it would.

5 MR. POULSON: Again, Judge, it's
6 immaterial whether they can pass on 622.

7 THE COURT: I agree. It's immaterial.

8 MR. LePAGE: No, further questions.

9 THE COURT: Okay. Anything else?

10 MR. POULSON: No, sir.

11 MR. MCFARLAND: Just very briefly, Your
12 Honor.

13

14 RECROSS-EXAMINATION

15 BY MR. MCFARLAND:

16 Q. Mr. Cleveland, I'm looking at page 29 of
17 the manual, and it shows the private entrance there having
18 a measurement of twenty-four feet parallel to the edge of
19 pavement at a distance twenty-five feet back from the edge
20 of pavement, correct?

21 A. It's -- well, of course, it says minimum
22 twenty-five feet, or the right-of-way line, which ever is
23 further.

24 Q. Okay. All right. But am I also correct
25 that that diagram shows the private entrance narrowing?

1 A. Yes.

2 Q. Okay. One of the factors that's going
3 to be looked at by someone entering an easement, or a
4 right-of-way is not simply the vehicle that's there, but
5 also the consideration of what happens with that
6 entranceway going back, correct?

7 A. Yes. You look at the entrance, and
8 develop a design based off the circumstances that exist.

9 Q. Right. So, in other words, you may
10 decide to wait on the highway until that vehicle clears
11 even if you could pull into the entranceway safely,
12 because you know that you're going to have difficulty
13 farther back on the right-of-way, correct?

14 MR. POULSON: Judge, this is calling for
15 gross speculation. This witness doesn't even know
16 anything about the easement, at least he hasn't testified
17 about the easement.

18 MR. MCFARLAND: I'm just going by the
19 diagram that's shown here, Your Honor.

20 THE COURT: Does any diagram in that
21 book show any -- everybody is talking about measuring
22 parallel to the edge of pavement.

23 Does any diagram in this book show a
24 curved pavement?

25 MR. MCFARLAND: I'm sorry. Shows what?

1 THE COURT: Show curved pavement?

2 MR. MCFARLAND: No, Your Honor, but I'm
3 not aware of a diagram that shows the measurement other
4 than parallel to the pavement.

5 MR. POULSON: Because they're all right
6 angles.

7 MR. MCFARLAND: It's not just because
8 they're right angles, Your Honor. Well, we'll get to
9 that.

10 THE COURT: All right. Well, let's
11 finish this witness. I mean, I can't figure out where
12 you-all are going with this. One minute it's twenty-four
13 feet, the next minute it's fifteen, and it doesn't make
14 any difference, and I am having a very difficult time
15 figuring out what your theory is at this point.

16 But, at any rate, go ahead.

17 MR. MCFARLAND: That's all I have, Your
18 Honor.

19 THE COURT: Anything else?

20 MR. POULSON: No.

21 THE COURT: Thank you, sir. You may
22 step down.

23 MR. LePAGE: Your Honor, I have one more
24 witness, but it's a quater to one, and it will probably
25 take --

1 THE COURT: Who would that be?

2 MR. LePAGE: Jim Cline.

3 THE COURT: And he's going to take a
4 while?

5 MR. POULSON: I would think so, Your
6 Honor.

7 THE COURT: Well, maybe we ought to just
8 go ahead and break for lunch now and come back about 1:45.
9 Is that satisfactory with everybody?

10 MR. LePAGE: Yes, sir. Thank you.

11 THE COURT: All right.

12 (Lunch recess.)

13 THE COURT: Who do we have next?

14 MR. LePAGE: Jim Cline.

15 THE COURT: Raise your right hand,
16 please, sir.

17 (Mr. Cline was duly sworn.)

18

19 JAMES A. CLINE, called as a witness by
20 and on behalf of the Defendants, being first duly sworn,
21 testified as follows:

22

23 DIRECT EXAMINATION

24 BY MR. LePAGE:

25 Q. Mr. Cline, would you tell the Court your

1 name, and spell it for the court reporter, please?

2 A. It's James A. Cline, C-l-i-n-e.

3 Q. And, Mr. Cline, what is your occupation?

4 A. I'm the assistant division administrator
5 for the maintenance division in charge of permits.

6 Q. And where is your office located?

7 A. Richmond, Virginia, central office.

8 Q. And you said you're the assistant
9 division administrator for the maintenance division; is
10 that correct?

11 A. Yes, sir.

12 Q. And how long have you been in that job?

13 A. Roughly about three and a half years.

14 Q. And what did you do prior to that?

15 A. I was the permit manager for maintenance
16 division.

17 Q. And what responsibilities did you have
18 as permit manager for the maintenance division?

19 A. I oversaw the land use permit program
20 from 1991. I came into that position in 1991 to
21 overseeing the land use permit program for the central
22 office.

23 Q. And does the land use permit program
24 encompass the minimum entrances to state highways?

25 A. Yes, sir, it does.

1 Q. Okay. And how long have you worked for
2 VDOT in total?

3 A. Forty-one years.

4 Q. Forty-one years.

5 And how long have you been dealing with
6 the minimum standards of entrances to state highways?

7 A. Ten years directly, roughly fourteen or
8 fifteen years indirectly.

9 Q. Okay. So you have ultimate
10 responsibility within the maintenance division for the
11 permit program?

12 A. Yes, sir.

13 Q. And that includes the minimum entrances
14 standards?

15 A. Yes, sir, it does.

16 Q. All right. So in that position, are you
17 ever called upon to make interpretations concerning the
18 minimum entrances?

19 A. Yes, sir, quite frequently.

20 Q. Are the minimum standards absolute
21 minimums?

22 A. No, sir, not in my interpretation
23 they're not. The introduction tells you that they are the
24 minimum standards, but it also tells you that they are
25 guidelines to be followed and working in conjunction with

1 several other diagrams and memorandums that we have.

2 MR. POULSON: Judge, let me note my
3 objection to this whole line of questioning that there are
4 variations.

5 THE COURT: All right. Objection noted.
6 Go ahead.

7 BY MR. LePAGE:

8 Q. When the minimum standards were
9 presented to the Commonwealth Transportation Board, was
10 the entire document presented for approval, or was it
11 merely the --

12 A. Yes, sir.

13 Q. The numbered paragraphs?

14 A. Yes, sir.

15 Q. So the Commonwealth Transportation Board
16 has approved --

17 MR. POULSON: Judge, counsel is leading
18 something fiercely.

19 THE COURT: Sustain the objection.

20 BY MR. LePAGE:

21 Q. Has the Commonwealth Transportation
22 Board approved the introduction?

23 A. This manual, and I think it's been
24 introduced --

25 Q. It's an exhibit.

1 A. -- or you can have this one. This
2 manual was presented to the Commonwealth Transportation
3 Board and approved with the signatures of certain members
4 of the department inside of it. Yes, sir, this manual in
5 its entirety.

6 Q. What is the purpose of the minimum
7 standards?

8 A. The minimum standards, the way that I
9 interpret it, is to set guidelines that allows the
10 district administrator, or the resident engineer to allow
11 people who request entrances, we try to accommodate them
12 in the best way possible.

13 That is the way that I look at it. Now,
14 sometimes we can; sometimes we can't.

15 Q. And what standards do you use in making
16 the determination --

17 A. We use the minimum standards as a
18 guideline to go by, and we apply sight distance to it to
19 make sure that it's -- that sight distance available.

20 Q. What are you trying to achieve by the
21 application of the minimum standards?

22 A. We're trying to achieve, number one, to
23 grant the request of the person that requests an entrance
24 an entrance in the safest and best place possible.

25 Q. How do you evaluate an entrance permit

1 application?

2 A. We look at the geometrics of it, we look
3 for the sight distance, the angle that it comes off, and
4 if we have any doubts about it, we look at the traffic
5 volumes. If we have any doubts at all, then we request
6 our traffic engineering division.

7 We have at our disposal several
8 different divisions that have the ability to provide
9 expertise to us in addition to what we apply ourselves.

10 Q. And then who ultimately makes the
11 decision on whether or not the permit will be granted?

12 A. The resident engineer?

13 Q. And is there an appeal process?

14 A. Yes, there is.

15 Q. Are you involved in that?

16 A. Normally, yes, sir.

17 Q. Do the resident engineers come to you
18 with questions, if they have questions about the
19 interpretation as to issuance?

20 A. Yes, they do.

21 Q. Did you have any conversations with
22 Mr. Cumming in this case?

23 A. Yes, I did.

24 Q. Can you tell the Court what you told
25 him?

1 A. I had so many conversations, I can't
2 remember what it is. I sorry.

3 Q. Did you have any conversation with
4 anyone else?

5 A. No, sir.

6 Q. About this?

7 A. Not before the permit was issued, no.

8 Q. And what is VDOT's standard practice in
9 terms of how they measure the width of the entrance?

10 A. We measure it with geometrics of the
11 entrance.

12 Q. And when say you "measure with
13 geometrics," what do you mean?

14 A. The main road that the road is coming
15 off is on an angle, and then we try to measure it at an
16 angle. You can do that.

17 Q. Does it ever have an impact on the width
18 of the entrance?

19 A. Sometimes it does, yes, sir. It doesn't
20 have an impact on the entrance; it has an impact on the
21 number that you see, because if you look at the minimum
22 entrance standards, that entrance is coming off at ninety
23 degrees, and it is drawn on a fifty-foot right-of-way, and
24 in order to put that on a thirty foot prescriptive
25 right-of-way, you have to modify it right off the back.

1 Q. Why would you have to do that?

2 MR. POULSON: I'm going to object to
3 this. We're still trying to modify this permit after the
4 fact in the fourth day of trial.

5 Judge, and I would just ask the Court to
6 look at the Interrogatory Answers, number eight, concludes
7 the minimum width requirement has not been waived; number
8 nine, there was no waiver of the shoulder requirement in
9 this case.

10 I mean, this has been their position all
11 along, that they simply complied with the regulations,
12 there has not been any waiver, or any variance. And now
13 they're going to try to do that at the eleventh hour.

14 THE COURT: Well, I can't tell if it is
15 yet or not. So far as the question so far, I overrule the
16 objection.

17 THE WITNESS: Could you re-read the
18 question? I got distracted.

19 (The previous question was read back by
20 the court reporter.)

21 BY MR. LePAGE:

22 Q. Why would you have to modify the
23 entrance right off the back if it's a thirty-foot
24 right-of-way?

25 A. Because most all of the designs in the

1 design manual are set for a fifty foot right-of-way, which
2 is most of the time is the minimum we get and require, and
3 to design that entrance on a thirty-foot right-of-way, it
4 will not fit.

5 You have to drop the radius down. It
6 will not fit. Those two twenty-five foot radiuses will
7 not foot fit on a thirty-foot right-of-way.

8 Q. Does VDOT require a fifty-foot
9 right-of-way to grant an entrance permit?

10 A. No, sir. If we're taking it into the
11 state system, we ask for a fifty-foot right-of-way, but
12 the Byrd Act (phonetic) has given us the thirty-foot
13 prescriptive easement that we have to deal with, so -- and
14 that is what we have to deal with is the thirty-foot
15 easements.

16 Q. Have you gone out and reviewed the
17 entrance in this case?

18 A. Yes, sir, I have.

19 Q. Did you reach any conclusions about that
20 entrance?

21 MR. POULSON: Judge, again, all the
22 evidence is Mr. Cumming is the one who issued this permit,
23 and this gentleman is coming in after the fact and
24 apparently wants to approve this.

25 THE COURT: Overrule the objection. Go

1 ahead.

2 THE WITNESS: Would you repeat the
3 question, please?

4 BY MR. LePAGE:

5 Q. The question was whether you had gone
6 out and reviewed the entrance, and if you had reached any
7 conclusions about the entrance?

8 A. Yes, I did. I drove out on two
9 different occasions and looked at it once at night, and
10 once in the morning.

11 Probably, in my opinion, that entrance,
12 giving what it's going to serve, will probably be as safe
13 as any entrance going into a McDonald's, or a Hardee's, or
14 in anybody else.

15 Q. And why is that?

16 A. Because this entrance is going to
17 serve residential homes. Granted, you're going to have
18 some trucks, delivery trucks, concrete trucks, and that
19 type of thing going into that entrance, but any entrance
20 that we design for commercial use, unless it's
21 specifically designed for tractor-trailers will not
22 accommodate two tractor-trailers, or even one unless --

23 If there is a vehicle sitting in the
24 mouth of that entrance, a tractor-trailer, or a large
25 truck would have a very difficult time turning into a

1 standard commercial entrance.

2 Q. Does VDOT have any concerns about
3 tractor-trailers having to stop in the roadway?

4 A. Yes, sir, we do. That's why we look --
5 when we start looking at what's being developed on the
6 site, we ask questions specifically on what you are going
7 to develop and this type of thing so that we can look at
8 it.

9 And if we feel that the amount of truck
10 usage is going to be high enough, then we can request that
11 a larger entrance, turn lanes, larger radiuses. We
12 design -- typically design the entrance to accommodate the
13 turning vehicles, which would be trucks.

14 Q. Okay. And what kind of vehicles
15 normally have turn movements into and out of private
16 subdivisions?

17 A. You will probably have -- the most thing
18 you are going to have is going to be concrete trucks. You
19 are going to have your building materials, delivery
20 trucks. Most of those are going to be what we call three
21 axle tandem trucks.

22 Probably -- you might have one or two
23 tractor-trailers, moving vans coming in to bring furniture
24 in, and move them in. We would assume that, but we don't
25 know.

1 Q. And when VDOT reviews an entrance permit
2 application, how far back from the state roadway does VDOT
3 review the entrance?

4 A. To the right-of-way line.

5 Q. To VDOT's right-of-way line?

6 A. To VDOT's right-of-way line. If it's
7 going to be a private road subdivision, or a private road,
8 then we review it back to the right-of-way line. If it is
9 going to be a subdivision, it's going to be taken into the
10 state system and maintained by VDOT, then we review the
11 entire system, the entire road, all the way back.

12 Q. Now, in this case, this entrance is for
13 a private subdivision?

14 A. That's my understanding, yes, sir.

15 Q. Is there any authority for the resident
16 engineer to modify an entrance, or to have any discretion
17 where they are going to become part of the state system,
18 and it's a subdivision street requirement?

19 A. I don't really understand the question.

20 Q. Well, the question is, is there anything
21 in the subdivision street requirements that gives
22 authority to the resident engineer to exercise discretion
23 with respect to entrances on roadways which are ultimately
24 going to be brought into the state system as part of the
25 subdivision?

1 A. Yes, sir, we have our certain design
2 standard that we have to have, and that he has that
3 authority on roads that are going to be brought into the
4 state system, but if they are not going to be brought into
5 the state system, then we have no authority whatsoever.

6 Q. No authority to review beyond the
7 right-of-way?

8 A. No, sir. That would be a county
9 ordinance, whatever the county requires, and that type of
10 thing. We have no control over that.

11 Q. Now, you measure the width of the
12 easement twenty-five feet from the edge of the pavement,
13 or from the edge of the right-of-way line, which ever is
14 greater; is that correct?

15 A. Yes, sir.

16 Q. All right. And on this particular
17 easement, have you looked at that measurement?

18 A. Yes, sir.

19 Q. And what does that measurement provide?

20 A. That measure, it provides you a
21 theoretical number that have you reached twenty-four feet
22 twenty-five feet back from the edge of pavement when in
23 essence you're still in a fifteen-foot easement, but
24 theoretically, if you measure with the geometrics of Route
25 622 I believe it is, you come up with a measurement of

1 twenty-four feet.

2 Q. That does not turn it into twenty-four
3 feet, however, does it?

4 A. No, sir, it doesn't. And just as a
5 another point, I have dealt with some entrances that have
6 twenty-five foot easements that came in perpendicular
7 ninety degrees, and we've modified those to fit, because
8 they will not fit -- a standard -- that design on page 29
9 will not fit a twenty-five foot easement. You can't get
10 that entrance in on a twenty-five foot easement.

11 Q. Now, when VDOT reviews the entrance
12 applications, does it matter where the easement is
13 located?

14 A. Does it matter where the easement is
15 located?

16 Q. Where the actual easement is located on
17 the ground?

18 A. What we do is when the applicant submits
19 an application, we ask him to identify the easement, and
20 we fit the entrance to the easement.

21 We are assuming that that entrance, the
22 easements are such if the easement has to be moved one way
23 or the other, a small amount of distance, then the
24 entrance will match or should match that easement.

25 It doesn't make any difference as long

1 as -- in this particular instance, if you moved it
2 probably ten to fifteen feet, it wouldn't make any
3 difference with this, and the entrance will still tie into
4 the easement.

5 MR. POULSON: Same objection, Judge,
6 just briefly, trying to shift the requirement.

7 THE COURT: All right.

8 MR. LePAGE: I don't have any further
9 questions.

10 THE COURT: Questions, Mr. Poulson?

11 MR. POULSON: Yes, sir.

12

13 CROSS-EXAMINATION

14 BY MR. POULSON:

15 Q. Mr. Cline, in this particular case,
16 there was no variation, was there, from the minimum
17 standards?

18 A. There was or wasn't?

19 Q. It wasn't, was there?

20 A. Yes, there was.

21 Q. What was the variation?

22 A. The radiuses have been reduced. There's
23 no shoulders on this road. And, like I said at the very
24 beginning, the land use, the minimum standards in my
25 opinion allows the resident engineer or district

1 administrator to make that call.

2 Q. So, basically, the only variation you
3 got rid of the shoulders, which is called for by the
4 minimum standards, correct?

5 A. Yes, sir.

6 Q. Three feet on each side, and you change
7 the -- I guess what would be the radii on both, plural?

8 A. Yes, sir.

9 Q. That was the only variation. But the
10 twenty-four-foot measurement was not a variation?

11 A. It's not a variation? I don't
12 understand what you mean.

13 Q. Well, you-all found twenty-four by your
14 methodology of measuring, did you not, on the permit?

15 A. Did I what?

16 Q. I say you all found twenty-four by your
17 methodology of measuring for the permit, did you not?

18 A. Twenty-four feet is indicated. It's a
19 theoretical line that's measured twenty-five feet back.
20 Yes, sir.

21 Q. Theoretical line. What do you mean
22 theoretical line, sir?

23 A. Meaning it's twenty-four. It meets the
24 requirements that was asked for. I think in the letter
25 that Will wrote he specifically asked that it meet the

1 twenty-four foot requirement twenty-five foot back.

2 Theoretically, it meets that requirement.

3 Q. Theoretically. Of course, one can't use
4 that theoretical width, can they, sir?

5 A. I don't know.

6 Q. Well, I mean, isn't that a fairly simple
7 question, Mr. Cline? One can't use a theoretical
8 measurement, can they, sir?

9 A. Theoretically, it measures twenty-four
10 feet within that fifteen feet which meets the requirement
11 that Will asked for.

12 Q. The entranceway is fifteen-feet across,
13 is it not, sir?

14 A. If you measure perpendicular, this
15 entrance comes off at angle.

16 Q. And isn't the normal highway VDOT
17 department procedure to measure at right angles, sir?

18 A. If the entrance comes off at right
19 angles, yes, sir, it is, but if it doesn't come off at
20 right angles, you cannot measure at right angles.

21 Q. And it's nothing on page 29 that says
22 measure parallel, is it.

23 A. There's nothing that says measure it
24 right angle either, sir.

25 Q. Well, in looking to get a determination,

1 sir, applying sound engineering principles would not you
2 try to see and get a true width?

3 A. The true width in this particular
4 instance, in my opinion, the theoretical width
5 accomplished what Will wanted, the entrance accomplishes
6 what everyone else wanted which was an entrance that was
7 safe, and in my opinion, and in Will's opinion, I'm sure,
8 it is a safe entrance.

9 Q. It accomplished what Will wanted?

10 A. What Will wanted in his letter, the
11 twenty-four feet --

12 Q. The theoretical twenty-four feet?

13 A. Yes, sir.

14 Q. And you're telling the Court that that
15 is a sound engineering practice to measure it that way,
16 sir, to get this theoretical distance?

17 A. Sir, I can't tell you if it's a sound --
18 I'm not -- Will was the one that made that decision, and I
19 can't tell you whether Will made it on a sound judgment,
20 but in my opinion, that is true.

21 Q. In your professional opinion, it would
22 be a sound engineering principle, sir, to measure it that
23 way?

24 A. Based on what they requested, and the
25 entrance, and given all of the total entire group and

1 request, yes, sir.

2 Q. You would not agree that it give a false
3 reading or a false measurement, sir, insofar as the actual
4 determination of the width and usability -- if that's a
5 word -- of the entrance?

6 A. It could, but I don't know that it will
7 because theoretically you're getting twenty-four feet out
8 of a fifteen-foot easement.

9 Q. Basically you're turning fifteen into
10 twenty-four?

11 A. That's basically what you're doing.

12 Q. And if we move this thing five hundred
13 feet up the roadway so there wasn't any question of sight,
14 and it came into the roadway perpendicular, and it was
15 fifteen-foot wide, it wouldn't qualify, would it, sir?

16 A. You're exactly right.

17 Q. Would not qualify.

18 A. But the angle that it does come in on,
19 it does qualify.

20 Q. Okay. Now, you indicated a while ago
21 you just have authority to the right-of-way line?

22 A. Yes, sir.

23 Q. I mean, don't you actually -- can't you
24 go back twenty-five feet from the edge of the pavement, or
25 the right-of-way line, which ever is the greater?

1 A. Page 29 asks for that. I've got a real
2 problem asking for that because that's somebody else's
3 property. I don't own it.

4 Q. But that's what the regulation says?

5 A. That's what the --

6 Q. You agree the regulation is law, do you
7 not?

8 A. Yes, sir.

9 Q. Is there anything in 29 that gives you
10 or anybody else the right to waive the shoulder
11 requirements?

12 A. On page 29?

13 Q. Yes, sir.

14 A. No, sir.

15 Q. Nothing?

16 A. But in the introduction it does.

17 Q. The introduction is not the regulation,
18 is it, sir.

19 MR. LePAGE: Your Honor, I'm going to
20 object. That's a legal question to be argued.

21 THE COURT: Sustain the objection.

22 BY MR. POULSON:

23 Q. And you would agree that the minimum
24 standards actually require -- we've been talking
25 twenty-four feet -- thirty feet?

1 A. Would I agree?

2 Q. Yes, at the twenty-five foot mark
3 twenty-five foot from the edge of the pavement?

4 A. I think on the page 29 it says
5 twenty-four or thirty.

6 Q. Is it twenty-four paved, and then three
7 on each side for shoulders?

8 A. That's for the shoulders, yes.

9 Q. That's for shoulders. And shoulders
10 don't necessarily mean drainage, do they?

11 A. Drainage?

12 Q. Yes.

13 A. No, sir.

14 Q. Okay. What were you told about the use
15 of this road, sir?

16 A. When was I told about it?

17 Q. Yes.

18 A. After the permit was issued.

19 Q. And what were you told about the use?

20 A. That it was a private road subdivision.

21 Q. To be used by whom?

22 A. They didn't tell me who was going to use
23 it. It's just a private road subdivision.

24 Q. That's all you knew, was a private road
25 subdivision?

1 A. Right. And in my opinion when dealing
2 with private road subdivisions, most private subdivisions
3 or all I deal with are residential homes built on a
4 private road.

5 Q. And, so, your understanding was
6 residential homes were going to be the use of that
7 roadway?

8 A. No, sir. I didn't say that. I said
9 that it was my understanding that it was a private road
10 subdivision, and my interpretation of a private road
11 subdivision is that residential homes are on that.

12 Q. Okay. Were you aware that there was
13 going to be farm equipment, and farm machinery using this
14 road?

15 A. (Witness shakes head.)

16 Q. You weren't told that?

17 A. All I was told, sir, was that it was a
18 private road subdivision.

19 Q. Now, the normal procedure is for the
20 resident engineer to take care of these permits, is it
21 not?

22 A. Yes, sir.

23 Q. And if he has a question, normally he
24 goes to Suffolk, Hampton Roads district as it's called?

25 A. The appeals process is -- if Will has a

1 question, and if it's appealed --

2 Q. We don't have an appeal in this case, do
3 we?

4 A. All right.

5 Q. If Mr. Cumming has a question, he
6 normally goes to Suffolk?

7 A. Yes, sir.

8 Q. He don't come to Richmond with that
9 question?

10 A. Normally -- it depends. I have a
11 working relationship with the resident engineers
12 throughout the state, and a lot of them will call me,
13 and --

14 Q. Did Jack Hodge --

15 MR. MCFARLAND: Can he finish his
16 answer, Your Honor? I'm going to object to Mr. Poulson
17 cutting off the witness before he was finished.

18 THE COURT: Let him finish his answer.

19 MR. POULSON:

20 Q. Did Jack Hodge call you, Mr. Cline?

21 A. After the permit was issued, yes, sir,
22 he did.

23 Q. Is Jim Givens in your office?

24 A. No, sir, he is not.

25 Q. Where is he?

1 A. Jim Givens is a state secondary road
2 engineer, and he's located in the Annex building.

3 Q. Both of you are in Richmond, I take it?

4 A. Yes, sir.

5 Q. And you say Jack Hodge called you after
6 the permit was issued?

7 A. Yes, sir.

8 Q. What did he call you for after?

9 A. He called me and asked me if I had my
10 invitation to court.

11 Q. If you had your invitation to court?
12 When did he call you?

13 A. Sir, I didn't write it down, but it was
14 apparently when everybody else was getting summoned.

15 Q. You were well aware of Jack Hodge's
16 involvement in this matter, were you not, from an early
17 day?

18 A. Yes, sir, I was.

19 Q. Okay. And you and Jack Hodge go back
20 how many years, sir?

21 A. Well, I would say probably back twenty
22 or thirty years. I worked for Jack Hodge from '91 up
23 until -- I don't know -- three or four years. I don't
24 remember exactly when. They changed it around, but the
25 maintenance division used to fall under the chief

1 engineer.

2 Q. In fact, you and Mr. Hodge's
3 relationship is such that he calls you Jimmy; is that
4 correct?

5 A. Sir, just everybody in VDOT calls me
6 Jimmy.

7 Q. My question is Jack Hodge calls you
8 Jimmy?

9 A. Yes, he calls me Jimmy or Jim.

10 Q. Who else did you talk to or discuss this
11 permit with?

12 A. Who else?

13 Q. During the period of its review, and it
14 being issued, and thereafter.

15 A. I didn't talk to anyone during the
16 period of review. After it was issued, I talked to Will,
17 and Jack, and if I'm not mistaken, you called me.

18 Q. And nobody other than that?

19 A. Not that I can recollect right offhand,
20 no, sir.

21 Q. How many permit were you involved in on
22 the Eastern Shore of Virginia in the last three years?

23 A. How many?

24 Q. Yes, sir.

25 A. Once.

1 Q. One? And which one would that be?

2 A. The one that's in question right now.

3 Q. Just this one?

4 A. Yes, sir.

5 Q. Now, you were, I take it, for years in
6 the land use permit division?

7 A. Yes, sir.

8 Q. And you are familiar with the manual
9 there?

10 A. Yes, sir.

11 Q. Okay. Under the foreword, it reads as
12 follows: "Accordingly, shared right-of-way use and
13 occupancy requires, underline, consistent, and uniform
14 permit regulation as a means of corroborative land
15 management." That's in there. You agree that?

16 A. Yes, sir.

17 Q. "This manual is for use by the
18 department's field personnel, and the general public in
19 interpretation, and implementation of policies to provide
20 for uniform processing of all land use permits"?

21 A. Yes, sir.

22 Q. And are you aware of Section 15 on page
23 1-5, which concludes, "The design and construction of such
24 entrances as approved by the Commissioner pursuant to
25 section 33.1-198 Code of Virginia 1950, as amended, must

1 comply with the, quote, manual of minimum entrance
2 standards for state highways, and the land use permit
3 manual where the same are applicable."

4 Are you familiar with that statement,
5 also?

6 A. Yes, sir.

7 Q. And on page 4-2 in talking about
8 commercial entrances, and this is a form of commercial
9 entrance, is it not?

10 A. No, sir, it's not, not really.

11 Q. Does your resident engineer share that
12 opinion? Do you know?

13 A. I don't know. It falls under the
14 heading of commercial entrance, but when this manual, the
15 minimum entrance standards was written in '98, we had a
16 problem with private road subdivisions, and family
17 subdivisions of property that divided more -- that served
18 more than three homes, so we had to come up with something
19 rather than a commercial entrance, and a private entrance,
20 so that's where the birth of page 29 came in effect.

21 Q. And it's a lesser entrance, and an
22 entrance to a Hardee's?

23 A. Yes, sir, it is.

24 Q. But even under 4-2 it talks about "the
25 islands and size of entrances must conform to the

1 department entrance standards." Are you familiar with
2 that phrase?

3 A. Uh-huh.

4 MR. POULSON: That's all I have. Thank
5 you.

6 THE COURT: Any other questions?

7 MR. MCFARLAND: Just briefly, Your
8 Honor.

9

10 CROSS-EXAMINATION

11 BY MR. MCFARLAND:

12 Q. Good afternoon, Mr. Cline. My name is
13 Robert McFarland, and I represent Shooting Point L.L.C. in
14 this matter. I have just a few questions for you.

15 I take it, sir, that each application
16 for an entrance permit has to be judged individually?

17 A. Yes, sir, it does.

18 Q. Okay. And what is done in part in
19 judging the application is to review the standards such as
20 we've been discussing on page 29, but those standards are
21 not in any way a be all and end all?

22 A. No, sir.

23 MR. POULSON: Same objection, Judge, to
24 this whole line of questioning.

25 THE COURT: All right, sir.

1 BY MR. MCFARLAND:

2 Q. And I take it the circumstances of the
3 entrance have to be examined not only in and of
4 themselves, but also in conjunction with the state road
5 that the entrance is going to meet with?

6 A. Yes, it does.

7 Q. And what are the factors that one looks
8 at in that respect?

9 A. We look at the curvature, sight
10 distance, and traffic volume, usage, and the width, just
11 the general geometrics of the road that's it's going to
12 tie into, and how what you are connecting to would affect
13 the main line, or what we refer to as the main line in
14 this particular entrance, 622, how it would affect that
15 traffic, and the traffic count on 622, the geometrics of
16 the pavement, and stuff on 6722.

17 Q. All right. In this case we've heard lot
18 of testimony that the width of 622 is fourteen or fifteen
19 feet paved depending on exactly what part is measured.

20 How does that width coincide with the
21 width of the right-of-way at issue here?

22 A. I don't really understand what you're
23 saying.

24 Q. Okay. Does the fact that Route 622
25 itself is only fourteen or fifteen feet factor into the

1 safety of the entrance permit for this entrance?

2 A. That, plus the fact that I believe the
3 traffic counts are very, very low on 622, so that factors
4 into it.

5 Q. Okay. I take it when there was a number
6 of questions about the types of vehicles that would be
7 used, that you would expect to see coming into this
8 right-of-way, certainly one of the factors would be you're
9 not expecting a lot of tractor-trailers to be using this
10 right-of-way?

11 A. In my opinion, no, sir, I wouldn't think
12 so.

13 Q. Okay. And I take there is no
14 requirement either in the manual, or anything else that
15 you are aware of that requires two tractor-trailers to be
16 able to pass each other in an entranceway?

17 A. Not to my knowledge, no, sir. It's no
18 requirement.

19 Q. And I take it it's not unusual when
20 we've got two big vehicles, and one is exiting, and one is
21 coming into an entrance, for one is that entering to have
22 to wait for the one coming out to complete its exit?

23 A. That is correct. Yes, sir.

24 Q. And in this circumstance for this
25 entrance at issue here with Route 622, there is good

1 visibility for a vehicle traveling down Route 622, and
2 particularly with the recommended speed warning posted for
3 that vehicle to see a vehicle waiting on 622?

4 A. Yes, sir.

5 Q. In fact, the sight distances for this
6 entrance, Mr. Cline, are excellent, aren't they?

7 A. In my opinion yes, sir, they are.

8 Q. You were asked some questions about the
9 application of some of the regulations with respect to the
10 inclusion of a private road into the state system, and if
11 I followed your testimony, I want to be clear on this,
12 there is discretion for a resident engineer even as to a
13 road that is going to be brought -- is anticipated is
14 going to be brought into the state system as to what
15 requirements it has, correct?

16 MR. POULSON: Number one, objection to
17 leading. Number two, a subdivision road being brought
18 into the state system has no applicability here.

19 THE COURT: Overrule the objection on
20 the first ground. Sustain the objection on the second.

21 MR. MCFARLAND: Let me see if I can
22 rephrase it, Your Honor.

23 BY MR. MCFARLAND:

24 Q. Does a resident engineer have discretion
25 with respect to his review of a road that is expected to

1 be brought into the state system that originally may be
2 part of a private subdivision?

3 A. Yes, it does.

4 Q. Is it your understanding that there is
5 any plan to bring the right-of-way at issue here into the
6 state system?

7 MR. POULSON: I'm going to object to
8 that until some better foundation is shown.

9 THE COURT: I think we all know there
10 isn't. So go ahead.

11 THE WITNESS: In my opinion, I don't
12 think there are. We would not accept it anyway.

13 BY MR. MCFARLAND:

14 Q. And what is the overriding concern to
15 the evaluation of an entrance, Mr. Cline?

16 A. Safety.

17 Q. And from your review of the document in
18 issue in this case, and your personal review of the
19 entrance, do you feel this is a safe entrance?

20 A. Yes, sir. I have stated earlier I think
21 this entrance is very safe. Given the projected use of
22 this entrance, I feel that it is very safe.

23 MR. MCFARLAND: One moment if I might,
24 Your Honor. Thank you.

25 THE COURT: Anything else from over

1 here?

2 MR. MORRIS: No, Your Honor.

3 THE COURT: Redirect?

4 MR. LePAGE: Just a couple.

5 THE COURT: Okay.

6

7 REDIRECT EXAMINATION

8 BY MR. LePAGE:

9 Q. Mr. Cline, would the fact that farm
10 equipment uses that easement have any impact on your
11 conclusion about the safety of the entrance?

12 A. The safety of the entrance no, sir, it
13 wouldn't. The entrance, in my opinion, is safe enough to
14 get a piece of farm equipment off of the road, and that's,
15 as far as I am concerned, what the entrance is supposed to
16 do.

17 Q. And you testified that you -- in the
18 last three years, this was the only communication you had
19 with Mr. Cumming about a permit on the Eastern Shore?

20 A. Just on a permit issue. I have talked
21 with Will on several other issues, but this is the only
22 permit issue that I have had.

23 Q. Was there anything sinister in the fact
24 that this was the only time you talked to him about this
25 entrance?

1 A. Could you repeat that?

2 Q. Was there anything sinister in the fact
3 that this was the only time you talked to him about it?

4 A. No, other than the fact normally he
5 issues them, and does okay. Normally, we don't talk about
6 entrances unless he's got a question, or he's got some
7 kind of question that he wants me to respond to, or get an
8 opinion on.

9 Q. And to your knowledge, did VDOT depart
10 in any way from its uniform policies in this case?

11 A. No, sir. We've got the roads in
12 Southwest Virginia that are paved that belong to us that
13 are not as wide as these roads are. We operate on them --

14 MR. POULSON: Judge, again, it's
15 immaterial what they have in South West Virginia state
16 highway maybe however many feet wide.

17 THE COURT: Sustain the objection.

18 MR. LePAGE: Judge, Mr. Poulson raised a
19 serious issue about the uniform application in terms of --

20 THE COURT: He wasn't talking about the
21 same set of circumstances. I think what he's talking
22 about are roads that are inherited into the state system
23 that they wish they didn't have, but they have, and have
24 to maintain.

25 It's apples and oranges really. If you

1 want to ask him specifically about this case --

2 BY MR. LePAGE:

3 Q. And my question was designed in terms of
4 the approval of the permit in this case. Did VDOT depart
5 from its normal policies?

6 A. No, sir.

7 MR. LePAGE: Thank you.

8

9 RECROSS-EXAMINATION

10 BY MR. POULSON:

11 Q. And, in your opinion, it does comply
12 with page 29 of the regulations?

13 A. In my opinion, it complies with the
14 introduction which gives the resident engineer the
15 authority to make changes. Yes, sir.

16 Q. But I understood the only change was
17 shoulders and radius; is that correct?

18 A. That's what I said.

19 Q. No. So as far as the width is concerned
20 of twenty-four paved feet, it is your position that it
21 complies with the regulations?

22 A. The theoretical twenty-four feet
23 complies with the regulation. Yes, sir.

24 Q. What is the speed limit on 622,
25 Mr. Cline?

1 A. If it's unposted -- if it's a secondary
2 road, and it's unposted, it's fifty-five miles per hour
3 statutory.

4 Q. Is it unposted?

5 A. I don't remember seeing a sign, sir. I
6 have only driven the road twice, so I can't tell you
7 whether it's posted or not.

8 Q. You didn't look at that in making your
9 evaluation of whether it's posted or not?

10 A. No, sir. I wasn't evaluating the speed
11 limit on 622.

12 Q. You've testified about low speeds, and
13 small number of automobiles. Did you check the speed
14 limit, sir?

15 A. No, sir.

16 Q. And you said that with this entrance a
17 piece of farm machinery could get off the highway?

18 A. In my opinion, yes, sir, it can.

19 Q. Well, how about if there was a vehicle
20 coming out, Mr. Cline, that was a approximately thirty
21 feet from the entrance coming south towards the entrance,
22 and a piece of farm machinery coming on the road, coming
23 to go into the entrance?

24 A. Sir, one of them would have -- I would
25 imagine that the farm equipment would have to stop on the

1 road. That's why we asked for sight distance so that
2 people can see.

3 Q. And if you had two SUV's, one of them
4 would have to stop on the road, would you not?

5 A. Fifteen-foot wide SUV's, no, sir. I
6 don't think so.

7 Q. How wide is an SUV?

8 A. An SUV is probably about six foot nine
9 inches, or seven-foot wide.

10 Q. And how much is a safe tolerance passing
11 distance, sir?

12 A. Sir, you're asking me something I can't
13 speculate. I don't know.

14 Q. You don't know? I mean, do you-all
15 design -- do they have some sort of minimum distance that
16 vehicles can enter and exit?

17 A. Sir, we design roads that the lanes are
18 ten and twelve-foot wide.

19 Q. I'm asking on entrances, sir.

20 A. That entrance is designed safe. There
21 is not a center line on that entrance. That entrance is
22 design to allow traffic to ingress and egress into a site.
23 There is not a center line on that, sir.

24 Q. And you can't tell us what a safe
25 reasonable passing distance would be between two vehicles?

1 A. No, sir, I can't. If you can get by, to
2 me it's reasonable and safe.

3 Q. Just so you can get by, whether you've
4 got three inches, or more?

5 A. To me that would be safe, yes, sir.

6 Q. To you as a -- are you an engineer, sir?

7 A. Yes, sir.

8 Q. And you're telling us that three inches
9 is sufficient width on a fifteen-foot road for two
10 vehicles to pass?

11 A. No, sir. You said at fifteen foot at
12 the entrance. In the entrance both vehicles are pretty
13 much either coming to a stop, or at a stopped condition.

14 So three inches, in my opinions, is a
15 good distance because at the entrance they're either at a
16 stop, or a slowed-down condition. They're not driving
17 fifty-five miles an hour.

18 Q. All right. So they've slowed down, one
19 is coming out, and one is coming in. Is three inches
20 sufficient tolerance?

21 A. Three inches at the mouth of that
22 entrance where it exits off of 622 onto the private
23 entrance is wider than fifteen feet.

24 Q. Let's go then to the --

25 MR. MCFARLAND: May he finish?

1 THE COURT: He finished. He said it's
2 wider than fifteen feet.

3 BY MR. POULSON:

4 Q. Let's go to the right-of-way line. How
5 wide is it there?

6 A. It's probably fifteen feet or wider.

7 Q. And how is it wider? Theoretically
8 again, or what?

9 A. The way it -- it comes in at angle.

10 Q. Comes in at an angle?

11 A. Yes, sir.

12 Q. Well, just because it's got an angle,
13 your fifteen foot doesn't get any wider on this side of
14 the right-of-way line, or either side of the right-of-way
15 line, does it, Mr. Cline?

16 A. Theoretically, it's fifteen feet or
17 wider.

18 Q. Fifteen feet or wider? That's your
19 testimony?

20 A. Yes, sir, at the right-of-way line.

21 Q. And we're looking at the same permit
22 here, right?

23 A. Yes, sir.

24 Q. This one?

25 A. This one here?

1 Q. Yes, sir.

2 A. At the thirty foot right-of-way line
3 you've got fifteen feet coming in, but the angle that it's
4 on, I would imagine that it's probably wider measured this
5 way.

6 Now, if you want to measure it this way,
7 it's not -- up here it's fifteen feet, but the way it
8 intersects this point and this point is wider than
9 fifteen.

10 Q. But, of course, the vehicle doesn't come
11 in sideways, does it?

12 A. At the angle that this is on, it's going
13 to come in this way, and this way.

14 Q. It's going to come in parallel with the
15 fifteen-foot easement?

16 A. This right here.

17 Q. Okay. And what happens, sir, when three
18 or four hundred yards up this roadway we've got a right
19 hand ninety-degree turn, and the theoretical tractor and
20 trailer has come in.

21 What does the tractor and trailer do?
22 Back out on the highway?

23 A. Sir, I can't answer anything beyond this
24 point right here because we were asked to issue an
25 entrance for a private road subdivision. What is beyond

1 this point, we did not review, I did not look at, so I
2 cannot answer that question.

3 Q. And what happens when the tractor and
4 trailer pulls into the entrance and then meets a vehicle
5 coming out that has come around the turn, and it's coming
6 down towards the tractor and trailer?

7 Does the tractor and trailer back out on
8 the highway?

9 A. One would back up out, or the other one
10 would back up, sir.

11 Q. Three tenths of a mile? Back up, the
12 other one?

13 A. You're asking me something that's in
14 that private. I can't speak to the private.

15 Q. And you would agree, would you not, that
16 vehicles ought not be stopping on the highway?

17 A. They shouldnt' be, but they can, and
18 they do out of courtesy for people entering and exiting.
19 We don't like it, but it does happen in a lot of
20 instances.

21 Q. But it don't mean it's safe, does it?

22 A. It doesn't mean it's unsafe either.

23 Q. You're telling us that it's not --

24 A. Depending on the condition.

25 Q. -- unsafe?

1 A. Depending on the condition. If I can
2 see the way that I can see on this, I see no reason why a
3 tractor and trailer can't sit right here because, number
4 one, there is no traffic that was used in evaluating the
5 entrance, he's got plenty of sight distance, he can see.

6 So I see no reason, in my opinion, that
7 he can't sit on this road.

8 Q. Well, how about other traffic from the
9 subdivision? Suppose someone is coming home. We have a
10 different count once we have a different subdivision.

11 A. Well, then, that's why you've got the
12 sight distance that you've got, and I would imagine that
13 if someone rounded the curve at the far end headed towards
14 the subdivision that they could see that truck sitting
15 there.

16 Q. And you would agree that the more narrow
17 the road is, the public highway, the more unsafe it is for
18 a vehicle to sit out there, would you not?

19 A. Fourteen feet is narrow, but it's --
20 yes, it's not -- I'm not saying it's unsafe. It could be
21 unsafe given a condition where it was a blind curve, or
22 something, or someone coming around and see it would not
23 be able to see it.

24 But given the location and the sight
25 distance that's already been approved for this entrance, I

1 feel, in my opinion, that it has adequate sight distance
2 for someone to identify whether the truck is either
3 sitting still, exiting the site, or whatever, and they
4 have plenty enough time to make a judgment either to stop,
5 or slow down, or do whatever they need to do.

6 Q. Well, theoretically, the vehicle can be
7 sitting out there for a considerable period of time,
8 couldn't it, sir, if it was a tractor coming out of that
9 roadway pulling a disk harrow or something?

10 A. Sir, you're asking me something that I
11 can't answer.

12 Q. Well, aren't these things that you've
13 considered?

14 A. I don't consider anything back up in
15 that entrance. So, you know, if it comes out, I mean -- I
16 don't know whether the tractor backs up, the truck backs.
17 I don't have any idea.

18 Q. So the only thing you're concerned about
19 is the twenty-five feet?

20 A. What I'm concerned about is the safe
21 ingress and egress to a private road subdivision.

22 Q. And you're not concerned with the fact
23 that one someone else may be coming out at the same time
24 somebody else is coming in?

25 A. That would be engulfed in my concern for

1 safe ingress and egress into the site. Yes, sir.

2 Q. Why was Andy Bailey involved in this
3 matter? He's what, assistant commissioner?

4 A. Sir, I can't tell you why Andy was
5 involved in this.

6 Q. He was involved?

7 A. I have no idea. You'll have to ask
8 Andy.

9 Q. You have no idea, sir?

10 A. I know that Andy Bailey was called. Now
11 what Andy Bailey had to say, or what he had to do, I
12 cannot respond to that.

13 Q. And he is what, assistant commissioner?

14 A. Andy Bailey is the assistant
15 commissioner for operations. Yes, sir.

16 Q. And would you know why Andy Bailey would
17 have come over here and looked at this entrance?

18 A. No, sir, I would not.

19 MR. POULSON: All right. Thank you.

20 THE COURT: Anything else of this
21 witness?

22 MR. MCFARLAND: Just briefly, Your
23 Honor.

24

25

RECROSS-EXAMINATION

BY MR. MCFARLAND:

Q. I think you've got -- do you still have their Exhibit 28A, Mr. Cline?

THE COURT: It's over here.

MR. MCFARLAND: Thank you, Your Honor.

BY MR. MCFARLAND:

Q. I hand you a portion of 28A, Mr. Cline. Referring to that diagram, when Mr. Poulson was asking you about unposted speed limites, I guess for this Route 622, what does the diagram show in terms of a speed sign?

A. This diagram shows that it's a maximum safe speed, which is -- I'm sorry, sir, is not an enforceable speed.

Q. I understand. But it's a recommendation?

A. It's a regulatory.

Q. It's a warning, in other words?

A. It's a warning. It's not a regulatory sign.

Q. I understand. But it's a warning to motorists that they need to watch their speed as they're coming up to that point?

A. Yes, sir.

Q. Okay. This certainly isn't the only

1 entrance on the Eastern Shore of Virginia where a vehicle
2 may have to sit out and wait for another vehicle, correct?

3 MR. POULSON: Totally immaterial.

4 THE WITNESS: I can't answer that.

5 Based on my knowledge and driving, and not seeing it, I
6 would suspect that it's not, but that's merely
7 speculation.

8 MR. MCFARLAND: Thank you.

9 MR. POULSON: I move to strike the
10 answer.

11 THE COURT: The motion will be granted
12 since he just said he doesn't know.

13 Let me just ask one or two questions to
14 make sure I understand.

15

16 EXAMINATION

17 BY THE COURT:

18 Q. Mr. Cline, I haven't taken geometry in a
19 while, but I take it you would agree with me that the
20 distance of an entrance ease of ingress and egress, the
21 distance that is measured along the edge of the pavement
22 of a state road can be increased or decreased with the
23 angle at which that easement or right-of-way enters the
24 state road?

25 A. Yes, sir. That's correct.

1 Q. And I suppose, theoretically, if -- I
2 don't know how far you can take it. Like I say, I haven't
3 taken geometry in a while. But you could probably turn
4 about a six foot easement into a twenty-four foot
5 measurement on the edge of the pavement if you came in at
6 a tight enough angle, couldn't you?

7 A. Yes, sir, you probably could.

8 Q. So I guess the Court's concern is, and
9 my question is, I understand you've testified that you've
10 got to look at the big picture. How narrow would you go
11 on an easement if it met the twenty-four-foot requirement,
12 the theoretical requirement that you've indicated is
13 present in this case?

14 A. How narrow of an easement would we go?

15 Q. Yes. I mean, in other words, we know
16 one is fifteen feet. Theoretically, you get twenty-four
17 by measuring at the angle. I guess the question is, would
18 you go fourteen? Would you go thirteen? Would you go --
19 where would it stop?

20 A. Sir, you would have to look at the big
21 picture. The geometrics, sight distance, the angle of
22 intersection, what is using it, the traffic, and the speed
23 there, and of using the road that you are going to exit
24 off of, it's hard to say what an absolute minimum would
25 be.

1 I know I looked at this one real hard.
2 It's -- you know, this one here if it had come in at
3 ninety degrees probably would not have met the
4 requirement. You just look at the total picture. But I
5 would say you're cutting on the bottom edge at fifteen
6 feet.

7 THE COURT: All right. Any other
8 questions in response to the Court's questions?

9

10 FURTHER CROSS-EXAMINATION

11 BY MR. POULSON:

12 Q. And none of those considerations that
13 you mentioned show up anywhere on page 29, do they?

14 THE COURT: You're talking about of
15 the --

16 BY MR. POULSON:

17 Q. What you just told the Court.

18 A. That's what we as VDOT employees are
19 taught and trained to look at when we evaluate a site,
20 sir.

21 Q. So we just --

22 A. You don't put stuff like that -- I mean,
23 you don't put a check list of what needs to be evaluated.
24 We learn that, and we know that when we do our evaluation.

25 Q. So we just ignore the minimum standards

1 even though they are minimums?

2 A. The minimum standard is part of it, sir.

3 Q. Is part of it.

4 And they do apply? No question about
5 that, correct? Am I correct, sir?

6 THE COURT: I think his testimony is
7 they apply, but not always. That's the best I can get out
8 of it.

9 All right. Any more questions?

10 MR. MCFARLAND: Just one, Your Honor, in
11 response to the Court's questions.

12

13 FURTHER RECROSS-EXAMINATION

14 BY MR. MCFARLAND:

15 Q. The angle here, Mr. Cline, certainly
16 doesn't work against you with respect to how you evaluate
17 the safety of this entrance?

18 A. No, sir. The angle of this particular
19 entrance being on the outside of a curve, and the angle
20 certainly helped you in this situation.

21 Had you been in reverse, and been on the
22 inside, you would have been in big trouble.

23 MR. MCFARLAND: Okay. Thank you.

24 THE COURT: All right. Anything else?

25 MR. LePAGE: No, sir.

1 THE COURT: Thank you very much, sir.

2 You may be excused.

3 Who do you have next?

4 MR. LePAGE: I have no further
5 witnesses.

6 THE COURT: All right.

7 MR. POULSON: Can we take five maybe,
8 Judge?

9 THE COURT: Sure. Why don't we, while
10 he's getting out, just off the record.

11 (Brief recess.)

12 THE COURT: Who do we have next,
13 Mr. McFarland?

14 MR. MCFARLAND: We have Jack Hodge, Your
15 Honor.

16 THE COURT: All right.

17

18 JACK HODGE, called as a witness by and
19 on behalf of the Defendants, being first duly sworn,
20 testified as follows:

21

22 DIRECT EXAMINATION

23 BY MR. MCFARLAND:

24 Q. Would you state your full name, please?

25 A. Jack Hodge.

1 Q. And where do you reside, Mr. Hodge?

2 A. 2734 Cottage Road, Blackstone, Virginia.

3 Q. And what is your educational background,
4 sir?

5 A. I am a professional engineer. I have a
6 bachelor's of civil engineering from the University of
7 Virginia, 1957.

8 Q. And after graduating from the University
9 of Virginia, what has your employment career been,
10 Mr. Hodge?

11 A. I went to work for the Virginia
12 Department of Highways, then became the Virginia
13 Department of Highways and Transportation, and then to the
14 Department of Transportation.

15 Q. And when did you start with what is now
16 called the Virginia Department of Transportation?

17 A. Theoretically, I started in June, July
18 the 1st, 1957.

19 Q. You say "theoretically"?

20 A. Well, it's the same organization. They
21 changed names now, and added transportation to it.

22 Q. And in what position did you start with
23 what is now the Virginia Department of Transportation?

24 A. Engineer training.

25 Q. And what was your progress with VDOT?

1 A. I served in every field position,
2 training to an assistant resident engineer, resident
3 engineer, assistant district engineer, district
4 engineer --

5 Q. Slow down a little bit. Let the court
6 reporter take it down.

7 A. Assistant district engineer, district
8 engineer, assistant chief engineer, chief engineer, and
9 resident engineer.

10 Q. And did you retire from the Virginia
11 Department of Transportation, Mr. Hodge?

12 A. I did.

13 Q. When was that, sir?

14 A. March 1st, 1996.

15 Q. And at the time you retired, what
16 position did you hold?

17 A. Chief engineer for the department.

18 Q. And what were your duties as chief
19 engineer?

20 A. My duties were to be responsible for
21 oversight of all of the design divisions, right-of-way
22 divisions, construction divisions, maintenance divisions,
23 and the nine districts.

24 Q. Did you stay in the same geographic area
25 with the Virginia Department of Transportation in your

1 tenure there?

2 A. I stayed within the State of Virginia
3 the entire time, and moved seventeen times in the process.

4 Q. And do you know why that was?

5 A. Because the department told me to go to
6 certain different positions, and solve certain problems
7 they wanted solved.

8 Q. Now, what is your present position, sir?

9 A. I am vice president for David Vogle's
10 Associates (phonetic).

11 Q. And what do you do for Vogle's and
12 Associates (phonetic).

13 A. I do quality control, quality assurance.
14 I do marketing. I do design oversight. I work with
15 different clients on small projects, and big projects that
16 involved engineering depending on what I'm asked to do.

17 Q. Is it -- and you tell me if I'm
18 mischaracterizing, but are you a consulting engineer in
19 part?

20 A. Yes, I am a consulting engineer. Not in
21 part -- well, part-time. I work part-time for the
22 company.

23 Q. All right. And do you still have
24 occasion to work with the Virginia Department of
25 Transportation as a consulting engineer?

1 A. The firm does, yes, and I work with them
2 individually on projects that we have with them.

3 Q. Now, when did you get involved with the
4 Shooting Point project, Mr. Hodge?

5 A. I think March or April of 2000.

6 Q. And how did you become involved, sir?

7 A. Mrs. Cree called me.

8 Q. And what did you-all discuss?

9 A. She explained the situation regarding
10 the entrance off Route 622, and she would like to see if I
11 could see whether or not a permit could be issued for that
12 situation.

13 Q. And at this time, don't go into the
14 details of your involvement, but did you become involved
15 with respect to the issuance of a permit for Shooting
16 Point?

17 A. I did. And I guess I am.

18 Q. Are you a licensed engineer in the
19 Commonwealth of Virginia, Mr. Hodge?

20 A. Yes, I am.

21 Q. How long have you been licensed, sir?

22 A. Ten years. Twelve years.

23 Q. And are you prepared to render certain
24 opinions at trial here?

25 A. Yes, I am.

1 MR. MCFARLAND: We would offer him as an
2 expert witness, Your Honor.

3 THE COURT: Question as to his
4 expertise?

5 MR. POULSON: I don't know what the
6 opinions are going to be. I don't know. He's qualified,
7 I guess, as an engineer.

8 THE COURT: Well, let's see what it is,
9 and when it comes up, if you feel it's objectionable, I'm
10 sure you'll let us know.

11 BY MR. MCFARLAND:

12 Q. Mr. Hodge, after Mrs. Cree contacted
13 you, what is the first thing that you did, sir?

14 A. I asked her to send me whatever
15 information she had, any photographs so that I would be
16 able to look at it before I came to the Shore to look at
17 it on the ground.

18 Q. And what were you provided?

19 A. I believe an aerial photograph, and some
20 information concerning the background of Shooting Point.

21 Q. And from your initial review of the
22 photographs and documents, did you make any
23 determinations?

24 A. I couldn't see from what information I
25 had why a permit could not be issued by the resident

1 engineer.

2 Q. And what did you do next, sir?

3 A. I checked with the secondary road
4 division, since this was a private subdivision, and I had
5 been away from the department for a couple of years, to
6 see if there were any rules and regulations that I didn't
7 know about that would prohibit this type of a --

8 Q. And who did you speak with specifically,
9 sir?

10 A. Mr. Givens, James Givens.

11 Q. And were you advised of anything that
12 changed your determination or evaluations?

13 MR. POULSON: I am going to object to
14 what obviously is hearsay from Mr. Givens, in whatever
15 form it's coming in.

16 THE COURT: Overruled. I don't that
17 he's asking him to tell us what he was told. He's just
18 asking as a result of what he was told did he change his
19 mind, and he said no.

20 THE WITNESS: No. I went back to
21 Mr. Cumming.

22 BY MR. MCFARLAND:

23 Q. And just for the record, why did you
24 consult with Mr. Givens at that point in time, sir?

25 A. I wanted to be sure that there was no

1 changes in the subdivision ordinance, private, or the
2 regular subdivision standards from the Department of
3 Transportation, and how far back from the roadway did
4 Mr. Givens think the department had authority.

5 Q. And what was Mr. Givens' title?

6 A. He is the state secondary roads
7 engineer.

8 Q. And what do his duties include as state
9 secondary roads engineer?

10 A. Oversight of the secondary road system
11 for the entire state, subdivision ordinances, when there
12 can be new additions, maintenance, construction.

13 Q. Let me hand you, Mr. Hodge, what's been
14 marked as Exhibit 27. Do you recognize --

15 A. Yes, sir.

16 Q. -- that pamphlet, sir?

17 A. The minimum standards of entrances to
18 state highways.

19 Q. And you were with the Department of
20 Transportation for how long, sir?

21 A. Thirty-eight years, nine months, and
22 some-odd time.

23 Q. During your -- can we call it almost
24 thirty-nine years?

25 A. Yes.

1 Q. During your almost thirty-nine years,
2 was that manual in operation for all or any part of your
3 tenure?

4 A. Yes, sir. As the chief engineer I think
5 in 1988, somewhere along in there, I signed and approved
6 the manual that was probably the predecessor to this one.

7 Q. And what is your understanding of what
8 the purpose of that manual is?

9 A. There are several purposes. Number one,
10 to depict and illustrate the different types of entrances
11 that can be allowed on all of the systems, or highways,
12 and it is designed to be a user-friendly, to be able to
13 have a laymen lay the entrances out.

14 Q. Is it designed to encompass all types of
15 permit applications that the department might be faced
16 with?

17 A. It's impossible.

18 Q. Why is that, sir?

19 A. Terrain, degree of curvature of a road,
20 all of the different facets, whether it's a mountainous
21 terrain, flat terrain such as the Shore. It gives an
22 illustration of what the resident engineer can go by to
23 issue a permit and modify the conditions.

24 MR. POULSON: I would object to the
25 whole line of questioning so far as the modification of

1 the minimum standards.

2 THE COURT: Note your objection. Go
3 ahead.

4 MR. MCFARLAND: I don't think there's
5 been anything asked as to modifications at this point,
6 Your Honor.

7 BY MR. MCFARLAND:

8 Q. What is the overriding concern under the
9 regulations as to the issuance of an entrance permit?

10 A. The overriding?

11 Q. Yes.

12 A. I would say that safety and welfare of
13 the traveling public as well as the people that you are
14 trying to serve.

15 Q. From your experience with the Department
16 of Transportation, and the time you were there, and your
17 experiences since then as a consulting engineer, is that
18 manual designed as an absolute?

19 A. No, sir.

20 MR. POULSON: Again, same objection.

21 THE COURT: All right. So noted.

22 BY MR. MCFARLAND:

23 Q. From your experience with the Department
24 of Transportation while you were there, and your
25 experience since you've left, is there discretion for

1 engineers with respect to the application of that manual?

2 A. Absolutely.

3 MR. POULSON: Continuing objection, sir.

4 BY MR. MCFARLAND:

5 Q. Now, you mentioned, Mr. Hodge, that you
6 received some documents and photographs from the Crees.
7 You reviewed those. You made a phone call to Mr. Givens
8 to check on certain things.

9 What did you do next, sir?

10 A. I discussed it with Mr. Givens, the
11 permit, and I agreed that it should be issued by the
12 resident engineer, Mr. Cumming.

13 Q. Why is that?

14 A. That is where all permits imminent for
15 access to state highways.

16 Q. And, so, what did you do next?

17 A. I called Mr. Cumming to see if he could
18 tell me what I needed to do to get a permit for the Crees.

19 Q. And what was the results of that
20 conversation?

21 A. Initially, he said that he would not
22 issue the permit because it could not meet the standards
23 as shown in the book, and I asked him what they were, and
24 he said that he wanted to make sure that twenty-four feet,
25 twenty-five feet back from the edge of pavement was there,

1 and he wanted enough room to make sure that a large truck,
2 tractor and trailer would not be stopped in Route 622.

3 Q. And, so, what did you do at that point,
4 Mr. Hodge?

5 A. Went back to Mrs. Cree, back to the
6 engineer, Baldwin and Gregg, and gave them the
7 requirements to see if they could take the requirements,
8 using the standards, and fit it to the entrance.

9 Q. Now, from your experience while you were
10 at the Department of Transportation, and your post
11 retirement experience, had you ever seen a requirement
12 before as to the tractor-trailer aspect that Mr. Cumming
13 was mentioning?

14 A. No, sir, but I felt Will was trying to
15 be as safe as possible to show that one could sit there
16 and not be in the road.

17 Q. Did you know Mr. Cumming, by the way,
18 before you placed the phone call to him with respect to
19 this permit?

20 A. Yes, sir. If you're chief engineer, you
21 have an opportunity at least know by first name all the
22 resident engineers. You may not be close friends, but you
23 know them.

24 Q. Had you ever directly supervised
25 Mr. Cumming?

1 A. No.

2 Q. Okay. What did you do next, sir?

3 A. We obtained the sketches from Baldwin
4 and Gregg through Mrs. Cree, and I met Mr. Cumming on the
5 ground.

6 Q. And when was that?

7 A. I think it was late April, or maybe
8 later than that. I don't remember. I would have to go
9 back to diaries to come up with it.

10 Q. 2000, we're speaking about?

11 A. Spring or summer of 2000.

12 Q. All right. And what did you do when you
13 met Mr. Cumming? I take it you met him at the Shooting
14 Point entrance?

15 A. I did. He and Mr. Wright were there,
16 and I asked could he -- as a matter of fact, I think it
17 was probably August because I think my grand daughter came
18 over at the same time.

19 And I asked him could he issue the
20 permit, and he indicated it looked like it might be the
21 thing, but he was going to send it to the district traffic
22 engineer, and I said fine, that I was going back across
23 the creek, if he wanted me to take it and drop it off, and
24 he said no, it was a staff meeting, I think, the following
25 Monday.

1 Q. So you met with Mr. Cumming at the
2 entrance?

3 A. Yes.

4 Q. Showed him the sketches, and I take it
5 you reviewed the sketches in conjunction with the actual
6 entrance?

7 A. Yes, sir.

8 Q. And asked him to issue the permit at
9 that point?

10 A. Yes, sir.

11 Q. And his response was what?

12 A. I believe that he wanted to be sure that
13 he checked it with traffic engineer.

14 Q. Now, when you went out to the entrance
15 of Shooting Point, Mr. Hodge, what did you find?

16 A. I found state Route 622 on a very sharp
17 curve with an entrance that went off of it that had been
18 marked with stakes that I was led to believe was the
19 easement.

20 Q. And were you able to determine what was
21 the width of Route 622?

22 A. Yes, sir. I had tape, and it varied
23 thirteen, fourteen feet of pavement.

24 Q. Does that factor in at all in your
25 opinion as to the issuance of a entrance permit for

1 Shooting Point entrance?

2 A. The width of the roadway, and I had
3 information from the owners, the Crees, that there was
4 twenty-five to thirty cars a day on Route 622.

5 Looking at the situation with the
6 easement, I saw no reason whatsoever with the department
7 that Mr. Cumming couldn't issue the permit.

8 Q. What did you find with respect to the
9 sight distances both for vehicles coming around Route 622
10 and for vehicles coming out of the entrance exit?

11 A. Excellent. And it probably far exceeded
12 any of the secondary roads down in that particular site.

13 Q. Does the term "radius" mean anything to
14 you as an engineer, Mr. Hodge?

15 A. Absolutely. All curves, all roads have
16 curves, whether anybody wants to think otherwise. They're
17 either very slight or not, but they all have radiuses, and
18 that ties the two straight lines with the tangents
19 together.

20 Q. Now, with respect to this entrance and
21 Route 622, where do the radiuses come into play?

22 A. In the curve.

23 Q. And what did you find with respect to
24 the radii?

25 A. That for a secondary road, they are very

1 short radiuses, or the radii, as compared to Route 13.

2 You can go down Route 13 and go around a curve, and really
3 not know it. When you get to 622, you'd best slow down.

4 Q. The curve itself, how does that factor
5 in, if at all, with respect to this entrance?

6 A. All entrances are developed, as I
7 indicated, to be user friendly. They are laid off from
8 the edge of pavement. How far back is the -- I'm going to
9 take Route 13, so I can work my way back.

10 If you put in a right turn lane, the
11 dimension starts at the edge of pavement. The back of
12 entrance from the edge of the pavement, as is the case on
13 this particular pavement, the back of the entrance is
14 twenty-five feet from the edge of the pavement, and you
15 measure parallel to the radius of the edge of pavement,
16 whether it be on this road, or anywhere else.

17 Q. Now, there has been throughout this
18 trial a lot of talk about measuring parallel to the
19 payment. Is that something that you came up with strictly
20 for the Shooting Point situation, Mr. Hodge?

21 A. No, sir. If the Court wishes, I can
22 show you in this book every dimension is labeled off the
23 edge of the pavement.

24 Q. Well, let's go to page 29 of that book,
25 if you will, sir. And I think there is a primary

1 illustration on page 29?

2 A. It is. The private, standard private
3 subdivision road, slash, street entrance.

4 Q. And I was not a great geometry student,
5 but it's looks to me that that entrance that is depicted
6 on the top of page 29 is coming at what I would think is a
7 ninety-degree angle?

8 MR. POULSON: I am going to object to
9 continuous leading by Mr. McFarland.

10 MR. MCFARLAND: I'm just trying to lay
11 some background.

12 THE COURT: Let's not argue with that.
13 Go ahead.

14 THE WITNESS: The entrance is shown on a
15 straight section of road.

16 BY MR. MCFARLAND:

17 Q. How does that compare with what we find
18 on 622 at Shooting Point?

19 A. The secondary road on Shooting Point is
20 on a curve. The curve follows the edge of the pavement on
21 the road wherever it goes, and wherever the edge of the
22 pavement goes, any measurement for any entrances are
23 measured off that edge of pavement.

24 Q. That's true for Shooting Point and
25 anything else?

1 A. Yes, sir.

2 Q. So what was done -- given the existence
3 of the curved road, what was done with respect to Shooting
4 Point to find a point twenty-five feet back?

5 A. There's two ways you can do it, but the
6 way they did it was to take probably one foot or
7 thereabout increments around the edge of pavement,
8 measured twenty-five feet back, plot the points, connect
9 the points, and that gives you the parallel line to the
10 edge of pavement which as it crosses the fifteen-foot
11 easement is twenty-four feet measurement along the arch.

12 Q. Anything else that you note from your
13 visit to Shooting Point in the summer of 2000?

14 A. Well, in the summer of 2000 there were
15 two visits by me, and I noticed no traffic other than one
16 lawn mower, and I have been back subsequently three times
17 and met one Pickup truck other than the -- I understand --
18 I stand corrected. There was one other car when I met
19 Mr. Cumming. It was his car.

20 Q. Now, you mentioned that Mr. Cumming
21 referenced that he wanted to have the permit reviewed by
22 the traffic safety engineer.

23 A. The district traffic engineer in
24 Suffolk.

25 Q. And where would that office be located?

1 A. Suffolk.

2 Q. Is that unusual for a resident engineer
3 to bring in the district traffic safety engineer for an
4 application permit?

5 A. Not unusual. It's up to the resident
6 engineer if he wants to do that. He doesn't have to.

7 Q. And what was your next involvement with
8 this matter, Mr. Hodge?

9 A. The permit came back, I got a call from
10 Will, and he wanted to change it to change the radius on
11 the east end of it slightly. We, again, went back to
12 Baldwin and Gregg, made the corrections, the corrections
13 were submitted to Mr. Cumming, and he issued the permit.

14 Q. Let me hand you what has been marked
15 Plaintiff's Exhibit 28. Do you recognize that, Mr. Hodge?

16 A. I do.

17 Q. And do you understand that to be the
18 application that was submitted?

19 A. It appears to be the application that
20 was submitted.

21 Q. Did you deliver that to Mr. Cumming
22 yourself?

23 A. No, I did not.

24 Q. I note with respect to 28 with the
25 original application, there are two drawings, I believe,

1 that were submitted?

2 A. Yes, sir.

3 Q. Do you know why there were two drawings
4 submitted, and what each one represents?

5 A. Yes, sir. I suggested that we, in
6 working with the department, this drawing A, I believe, is
7 on the thirty-foot prescriptive right-of-way. I suggested
8 that one be submitted for a fifty-foot right-of-way in the
9 event that the road was ever upgraded.

10 It would be the permittee's
11 responsibility to upgrade the permit and bring it up to
12 the fifty-foot standards, and probably that was a little
13 bit of highway department still sticking in my pocket.

14 Q. And as submitted, is it your opinion
15 that the application shows a safe entrance?

16 A. Yes, it does.

17 Q. Do you have any question about that?

18 A. No.

19 Q. You've mentioned that you in addition to
20 speaking with the Crees, obviously, a meeting with
21 Mr. Cumming, that you had a conversation with Mr. Givens?

22 A. Yes.

23 Q. Did you talk with anyone else at VDOT
24 before the application was submitted?

25 A. Yes. I talked to Mr. Clark.

1 Q. And when was that, sir?

2 A. Shortly after I met with Mr. Cumming, I
3 wanted to be sure in my own mind that if transportation
4 policy and procedures changed, that I missed something in
5 reviewing that that would preclude an entrance being
6 issued, entrance permit.

7 Q. Was there anything from your
8 conversation with Mr. Clark that changed your evaluation
9 of the situation.

10 A. No, but he said he would look at it at
11 his --

12 Q. Don't tell us what he said. I'll
13 anticipate Mr. Poulson's objection.

14 MR. POULSON: Thank you.

15 BY MR. MCFARLAND:

16 Q. NOW, with respect to your review of the
17 drawings, and your personal inspection of the entrance,
18 can two normal-width vehicles, sedans, pass in the
19 entrance side by side at the same time?

20 A. Yes.

21 Q. How about two sports utility vehicles?

22 A. Yes.

23 Q. All right. Now, I know that there is a
24 tractor-trailer depicted on the drawing for at least one
25 of the application drawings. I think both on plan A and

1 plan B there is a tractor-trailer?

2 A. Yes, sir.

3 Q. Why was a tractor-trailer shown in the
4 drawing, Mr. Hodge?

5 A. Mr. Cumming asked me to be sure that a
6 tractor and trailer would not have to be stopped on 622,
7 and we showed it, that he could get it in there. It would
8 stop, and he would not block the entrance.

9 Q. Is that a requirement from your years of
10 experience at the Virginia Department of Transportation
11 and your post retirement dealings, is that an absolute
12 requirement?

13 A. No, it's not a requirement.

14 Q. Is there a stop bar depicted anywhere on
15 the drawings for application?

16 A. Yes, sir.

17 Q. And where do we find that?

18 THE COURT: I think it's wherever it's
19 shown. You can't change it by looking at it. Go ahead.

20 BY MR. MCFARLAND:

21 Q. And what is the purpose of the stop bar?

22 A. To be sure that if a traffic tractor and
23 trailer would show up at the entrance, then another
24 vehicle coming out would stop for the tractor, or the
25 tractor and trailer would stop, and I think one or the

1 other would stop. There is no question about that.

2 Q. Now, from the time that the application
3 was submitted, Mr. Hodge, to the time that the permit was
4 issued, did you have any conversations with anyone at the
5 Virginia Department of Transportation?

6 A. No.

7 Q. And who issued the permit?

8 A. Mr. Cumming.

9 Q. After the meeting with Mr. Cumming at
10 the Shooting Point entrance, did you have any further
11 communications with him up to the point that the permit
12 was issued?

13 A. As I explained, I believe I got a phone
14 call saying that he wanted it modified. He sent it over
15 to the traffic engineer, and he wanted it modified, put a
16 radius on the east end of it, which we accomplished before
17 it was sent back over to formally apply.

18 Q. Other than that?

19 A. No, sir.

20 Q. And do I understand, Mr. Hodge, that
21 there were two amendments with respect to the application?

22 A. Yes, sir, but there were some -- it had
23 nothing to do with the permit. It was just a note on
24 there as to where the center line was of the easement.

25 Q. Is it your opinion that the amendment

1 did not in any way affect the substance of the
2 application?

3 A. No, sir. The easement is still what it
4 is, and the entrance is still what it is.

5 Q. You understand what is to be the
6 proposed use of the lots in Shooting Point subdivision?

7 A. I do.

8 Q. And that is what, sir?

9 A. It is depicted to be a private
10 subdivision basically with retirees living in it.

11 Q. And from your experience with the
12 Virginia Department of Transportation, and your experience
13 as a consultant, do you have a comparison in terms of the
14 number of trips per day for a retirement subdivision
15 versus your typical suburban subdivision?

16 A. I can answer it in two ways. I am
17 retired, and we don't make any trips that are unnecessary.
18 You go to the grocery store, or mailbox, other otherwise
19 it's combined. But, yes, there is a lesser amount.

20 Somewhere I believe the department
21 requires a depiction of ten vehicles per day, and I would
22 imagine that the retired people, combined trips, don't go,
23 and it would be somewhere between five and seven.

24 MR. POULSON: Judge, this appears to be
25 speculation. He says "I imagine."

1 THE COURT: Sustained.

2 BY MR. MCFARLAND:

3 Q. Let me go back a second, Mr. Hodge. The
4 primary ingress to the entrance would be people taking a
5 right turn off Route 622, correct?

6 A. Correct.

7 Q. From your understanding, what, if any,
8 houses or buildings are there once you get past the
9 Shooting Point entrance?

10 A. One.

11 Q. That would be what, sir, for the record?

12 A. I believe it's the Wescoat residence at
13 the end of the road.

14 Q. Now, in the event that someone wanted to
15 make a left turn into the Shooting Point entrance in a
16 car, Pickup truck, or SUV, from your review of the
17 materials, and your personal experience visiting the site,
18 is there any difficulty making a left turn into the
19 Shooting Point?

20 A. No.

21 Q. Are the sight distances for someone
22 making a left turn --

23 A. The sight distances are excellent.

24 Q. In conjunction with your evaluation of
25 the Shooting Point entrance as a means of safe ingress and

1 egress, have you reviewed other entrances of private
2 subdivisions on the Eastern Shore?

3 A. Yes, sir.

4 Q. And how many, sir?

5 MR. POULSON: And I am going to object,
6 Judge. Whether something else is in compliance is law.
7 It's totally immaterial as to this situation that we're
8 dealing with.

9 THE COURT: I don't know if that's the
10 question he's going to ask. Overrule the objection.

11 BY MR. MCFARLAND:

12 Q. How many other entrance roads have you
13 reviewed, Mr. Hodge?

14 A. On my first visit, twenty-five to
15 thirty. Last visit, I reviewed the ten that were
16 submitted to you people.

17 Q. All right. And what did you find from
18 your review of other entrance roads on the Eastern Shore?

19 And we are speaking about entrance roads
20 that lead to private subdivision of two or more homes,
21 correct?

22 A. Correct.

23 Q. Okay.

24 A. My comparison was to be sure that the
25 entrance at Shooting Point was as safe or safer than any

1 other that I saw, and the easements were and usage were
2 comparable

3 Q. And what did you find?

4 MR. POULSON: And this is going to be my
5 objection, sir. I mean, you know, the question here is
6 Shooting Point, and whether Shooting Point complies with
7 the law.

8 Now, whether somebody thirty miles down
9 the road has been able to get by the law for the last
10 twenty years is totally immaterial. It's the old trooper
11 question, you know, but he didn't stop somebody else; he
12 stopped me.

13 THE COURT: Well, it does have some
14 materiality as to whether or not the decision was
15 arbitrary made by Mr. Cumming, whether or not -- one of
16 the burdens that you're required to prove is was the
17 decision arbitrary and capricious.

18 MR. POULSON: Well, it would seem there
19 would have to be some foundation showing that Mr. Cumming
20 acted on these, sir.

21 THE COURT: Well, that could very well
22 be the case.

23 MR. MCFARLAND: Well, the other aspect,
24 Your Honor, is that Mr. Poulson's argument -- one of his
25 arguments when we moved to strike at the end of his

1 evidence was as to whether this subdivision was unsafe,
2 whether the dominant was unsafe.

3 THE COURT: I understand. Overrule the
4 objection.

5 BY MR. MCFARLAND:

6 Q. What did you find, Mr. Hodge, with
7 respect to your review of other entrances for other
8 private subdivisions on the Eastern Shore?

9 A. I found that Shooting Point was safe or
10 safer than all of the ones that I reviewed.

11 Q. All right. And let me direct your
12 attention -- are you familiar with the Wester House
13 subdivision?

14 A. Yes, I am.

15 Q. Where is that located, sir?

16 A. Back out 622, hit 619, go to the right,
17 I believe it's the first entrance on your right.

18 Q. Okay. Roughly, how many miles from
19 Shooting Point?

20 A. One, two. I'm not sure.

21 Q. And do you know whose property is
22 bounded by the Wester House subdivision?

23 A. No, but I could look at notes and tell
24 you.

25 Q. And in particular, what did you find

1 with respect to the Wester House subdivision?

2 A. The access a is nine- to ten-foot
3 easement hooking up to 619. The sight distance is
4 somewhat obscured by the mailboxes and paper boxes, and
5 the 619 traffic is much more traffic, and runs a whole lot
6 faster.

7 Q. Do you have any understanding as to when
8 an entrance permit was issued for Wester House?

9 A. No, I don't.

10 Q. Do you have any photographs, Mr. Hodge,
11 from your visits?

12 A. Yes, I do.

13 Q. Okay. I believe this has been
14 introduced. Is this the Wester House?

15 A. I believe it is.

16 Q. Okay.

17 MR. MCFARLAND: Let me first tender this
18 to Mr. Poulson.

19 Let me tender this to my co-respondents
20 counsel.

21 THE COURT: What number are we on?

22 THE DEPUTY: Nine.

23 MR. MCFARLAND: If I can get these
24 marke, Your Honor. If I may, if the Court wants to mark
25 that one, and I will see if I can find my copy of this.

1 THE COURT: That's all right. It's all
2 the same number, same thing?

3 MR. MCFARLAND: Yes.

4 THE COURT: Defendant's Number 9.

5 (Defendant's Exhibit 9 was marked for
6 identification.)

7 MR. POULSON: Judge, we are going to
8 object to the exhibit because there's no materiality shown
9 to the Wester House.

10 THE COURT: Note your objection.

11 B MR. MCFARLAND:

12 Q. Mr. Hodge, let me hand you what's been
13 marked as Defendant's Exhibit 9. And why don't we just
14 start at the top. What is the first document there?

15 A. An aerial photograph.

16 Q. Of?

17 A. I assume it's for the Waterhouse Road.

18 MR. POULSON: Move to strike the
19 response. Assumption.

20 THE COURT: Sustain the objection.

21 MR. MCFARLAND: I'll remove the aerial
22 at this point, Your Honor. We'll hold that for another
23 witness.

24 BY MR. MCFARLAND:

25 Q. The next document, I think, comes

1 directly from your file, Mr. Hodge.

2 A. It's the plat showing the subdivision.

3 Q. All right. And what have you shaded on
4 the plat?

5 A. Shade areas that were potential.

6 Q. And how many lots would this subdivision
7 have?

8 A. Approximately seventeen.

9 Q. Now, did you have an opportunity to
10 measure the entrance road?

11 A. I did.

12 Q. And what was the width?

13 A. Well, thirteen, eleven, nine and a half
14 to thirteen. Roughly thirteen as it approaches the Route
15 619. I did not measure them initially. The people in the
16 picture measuring it is somebody else. I verified those
17 measurements myself.

18 Q. And what did you find the sight
19 distances were for a vehicle exiting the Wester House
20 ingress and egress means?

21 A. If you were driving a normal vehicle,
22 meaning an automobile, it is somewhat restricted by the
23 mailboxes. If you're in an SUV, you're a little bit
24 higher than that to see over it.

25 Q. Did any part of the width of the

1 entrance for the Wester House reach fifteen feet?

2 A. No, sir.

3 Q. Okay. And the next page is what, sir?

4 A. The next page is yours.

5 Q. Okay. Same thing, just in color?

6 A. Yes.

7 Q. Okay.

8 THE COURT: Let me see. What are going
9 to do with the other thing?

10 MR. MCFARLAND: We'll pull this out.

11 Mr. Poulson objects to it.

12 THE COURT: Give me that. All right.

13 BY MR. MCFARLAND:

14 Q. Now, we've discussed the Wester House
15 community in detail, Mr. Hodge. What was your findings --
16 I'm sorry. I'll wait for the Court.

17 THE COURT: All right. Go ahead.

18

19 BY MR. MCFARLAND:

20 Q. Were your findings with respect to the
21 Wester House subdivision consistent with your findings
22 with the other subdivisions?

23 A. Wester House probably had narrower
24 easement and usage areas than the others, but most of them
25 on the private entrance subdivisions had easements varying

1 from sixteen to fifty feet, but they had usage of nine to
2 twelve feet.

3 MR. MCFARLAND: One moment, if I might,
4 Your Honor.

5 That's all I have at this time,
6 Mr. Hodge. If you'd answer Mr. Poulson's questions.

7

8 CROSS-EXAMINATION

9 BY MR. POULSON:

10 Q. You say your information was that these
11 lots for were for retirees?

12 A. Potentially, yes, sir.

13 Q. Okay. Were you aware that one man had
14 bought three different lots? John Manetta?

15 A. No.

16 Q. That wouldn't seem to be for retirement,
17 would it?

18 A. I don't know.

19 Q. Pardon?

20 A. I don't know. If he wanted to buy three
21 lots to build one house, it's up to him.

22 Q. Well, you would agree that that would
23 certainly not appear to be directed toward someone simply
24 retiring?

25 A. I don't know.

1 Q. And did you read the covenants?

2 A. No, sir, I did not read the covenants.

3 Q. And if you didn't read the covenants,
4 obviously -- strike that question, please.

5 The Wester House. Do you have the
6 highway permit for Wester House?

7 A. No, I do not.

8 Q. Did you check to see whether one had
9 ever been issued for Wester House?

10 A. No, I didn't.

11 Q. You didn't check to see whether one had
12 been issued?

13 A. No, sir.

14 Q. It would be in the Accomac residency
15 office, wouldn't it?

16 A. It should be.

17 Q. So we don't know that the Highway
18 Department ever issued anything for Wester House?

19 A. We know that if it didn't, it's there
20 illegally.

21 Q. So it may be their illegally?

22 A. It doesn't make it any safer.

23 Q. But it may be their illegally?

24 A. Could be.

25 THE COURT: If that be the case,

1 Mr. McFarland, I don't think it's admissible.

2 MR. MCFARLAND: I'm sorry, Your Honor?

3 THE COURT: If that be the case, unless
4 you can tie it up that a permit was issued for this, I
5 don't think it's admissible.

6 MR. MCFARLAND: Well, as I indicated,
7 Your Honor, I'm going to tie up the photograph. There
8 will be other people to testify about whether --

9 THE COURT: Well, as it stands right
10 now, Defendant's Exhibit 9 would be for identification
11 purposes only.

12 BY MR. POULSON:

13 Q. The minimum standard, sir, I believe you
14 were asked the question about the fact that in the book
15 they all appear basically at right angles, do they not?

16 A. They all appear on straight line
17 drawings.

18 Q. And basically VDOT does things on right
19 angles, do they not?

20 A. Not all the time, no, sir.

21 Q. Isn't that the general principle that
22 you try to do things on right angles?

23 A. No, sir.

24 Q. But you would agree that each and
25 everyone of these --

1 A. If we did everything on right angles,
2 there wouldn't be any curves in the road.

3 Q. Well, obviously, we have curves in the
4 road, Mr. Hodge, but all of the manuals and regulations
5 are on right angles?

6 A. That is an illustration, Mr. Poulson.

7 Q. Just an illustration?

8 A. Yes, sir.

9 Q. Something to go by?

10 A. Yes, sir.

11 Q. But they're called minimum standards?

12 A. And they're also adaptable by the
13 resident engineer to the terrain. That is a
14 one-dimensional drawing that you're looking at.

15 Q. To the terrain?

16 A. And the curve in the road.

17 Q. Does terrain justify a methodology of
18 where you turn a fifteen-foot-wide easement into a
19 twenty-four-foot wide easement, sir?

20 A. I have not turned any fifteen-foot wide
21 easement into a twenty-four-foot wide easement.

22 Q. This was your measurement, was it not?

23 A. No, sir.

24 Q. Whose methodology was it?

25 A. VDOT's, and it's right here, sir.

1 Q. Did you send a drawing with a
2 twenty-four feet measured on the skew, sir?

3 A. No, sir. I sent a drawing showing it
4 measured twenty-four feet on an arch.

5 Q. So you told them how to do it,
6 basically?

7 A. This book tells them how to do it,
8 Mr. Poulson.

9 Q. Does that book say anything on page 29
10 about the world parallel, sir?

11 A. It says the distance shall be
12 twenty-four feet, twenty-five feet from the edge of
13 pavement.

14 Q. Okay. Does it use the word "parallel,"
15 sir?

16 A. If you measure along the --

17 THE COURT: You have to answer the
18 question first, and then you can explain it.

19 THE WITNESS: Sir?

20 THE COURT: The question was does it say
21 parallel?

22 THE WITNESS: It doesn't say parallel.

23 BY MR. POULSON:

24 Q. It doesn't say parallel?

25 So basically you're the one that --

1 MR. MCFARLAND: Now he can explain, Your
2 Honor.

3 THE COURT: He can.

4 MR. MCFARLAND: Now you can explain your
5 answer, Mr. Hodge.

6 THE WITNESS: From the edge of the
7 pavement, Mr. Poulson, you measure around the edge of the
8 pavement, the full width of the back of the entrance, the
9 back of the entrance is twenty-four-feet wide, which meets
10 the standard that was required by Mr. Cumming.

11 It does not make the fifteen-foot-wide
12 easement that existed there any wider. The two of them
13 intersected in two different measurements.

14 BY MR. POULSON:

15 Q. So basically you took twenty-five feet,
16 drew an arch parallel to the arch of the edge of the
17 pavement, correct?

18 A. That's the way all of them are laid out,
19 Mr. Poulson.

20 Q. Even on a curve?

21 A. Even on a curve.

22 Q. And then you drew a straight line across
23 the top of the arch?

24 A. No, I did not.

25 Q. Who drew that?

1 A. I don't know.

2 Q. You don't know. But you did the arch
3 and told the engineers how to do it.

4 A. I didn't draw the arch.

5 Q. I thought you said you did draw the
6 arch.

7 A. Baldwin and Gregg drew the sketch. They
8 took the fifteen -- they took twenty-five feet from the
9 edge of the pavement as it intersected with the
10 fifteen-foot easement, and where it intersected the
11 fifteen-foot easement, the fifteen-foot easement didn't
12 get any wider, and it didn't get any narrower, but the
13 back of the entrance meets the requirements that
14 Mr. Cumming put on it of twenty-four feet.

15 Q. Measured on the skew?

16 A. Measured on the arch.

17 Q. Measured on the arch.

18 Now, when you talked to Baldwin and
19 Gregg, did you tell them how to do it, sir?

20 A. I told them how the permit manual told
21 them how to do it. It's measured from the edge of the
22 pavement.

23 Q. So I take it your answer is yes, you
24 told Baldwin and Gregg how to do it?

25 A. I told them the permit manual says from

1 the edge of the pavement.

2 Q. Now, sir, when you did this, did you
3 consider, in looking at Plaintiff's Exhibit 46 -- look at
4 28.

5 MR. MCFARLAND: May I approach, Your
6 Honor, so I can what diagram Mr. Poulson is using?

7 MR. POULSON: I'm looking at Plan A.

8 BY MR. POULSON:

9 Q. Did you consider taking a line from the
10 edge of the pavement here and shooting it straight up the
11 easement and back twenty-five feet?

12 A. No, I didn't, because that isn't the way
13 you lay out an entrance.

14 Q. That's not the way you lay it out?

15 A. No, sir.

16 Q. And drawing a line, straight line
17 across?

18 A. No, sir.

19 Q. You don't think that would give you a
20 more realistic?

21 A. I'm not -- you're trying to tell me what
22 you think is realistic. I'm trying to tell you how you
23 lay out an entrance.

24 Q. This is how you did it?

25 A. Yes, sir, that's the way I did it for

1 forty years.

2 Q. And how many of these did you issue?

3 A. How many permits did I issue?

4 Q. Yes, like this.

5 A. I don't know how many secondary road I
6 issued permits. There are no two entrances alike,
7 Mr. Poulson, anywhere.

8 Q. But we have a regulation?

9 A. What's the regulation?

10 Q. Page 29?

11 A. And I followed 29.

12 Q. And you followed that?

13 A. Yes, sir.

14 Q. Would you agree, sir, that one of the
15 primary reasons for the regulation is to ensure adequate
16 width?

17 A. It's to ensure safety.

18 Q. Does that mean adequate width for
19 vehicles to pass, sir?

20 A. It means that the entrance has to be
21 safe for the traffic leaving it, and entering it, and the
22 resident engineer has the authority to reduce it, if it's
23 necessary and he so sees it.

24 Q. To reduce what?

25 A. The width.

1 Q. The width?

2 A. Yes.

3 Q. The width wasn't reduced in this one,
4 was it?

5 A. No. Mr. Cumming wanted it to be
6 twenty-four feet.

7 Q. And you-all arrived at a way to make it
8 twenty-four feet?

9 A. We didn't arrive at it. It's shown
10 right here on the book.

11 Q. Is there anything in book that shows how
12 to do it on a curve, sir?

13 A. Since all of the pictures in this book
14 are illustrated on a straight line, or tangent section,
15 the only way to do it, unless that book was two-feet
16 thick, would be to measure the edge of the pavement
17 wherever it is, and however you find it.

18 Q. I take it your answer is no?

19 A. No.

20 Q. Now, you said you retired from VDOT in
21 1996?

22 A. Yes, sir.

23 Q. And I believe you previously indicated
24 that other than the commissioner, you have nine thousand
25 people under you?

1 A. Approximately.

2 Q. And this would include Jimmy Cline among
3 others?

4 A. When you have nine people -- nine
5 thousand people, and you have many, many supervisors
6 between you and the nine thousand people --

7 Q. You knew Jimmy Cline on a personal
8 basis, did you not, sir?

9 A. I know Mr. Cline, yes.

10 Q. In fact, you call him Jimmy?

11 A. I call him Jimmy.

12 Q. And Mack Clark, you and Mack Clark
13 started at the same time, did you not, at VDOT?

14 A. At that time same time frame with VDOT.
15 We had parallel careers.

16 Q. And this is the man who you went to see
17 at Suffolk?

18 A. I did.

19 Q. Now, when you met with Will Cumming back
20 after you initially were hired, Mr. Cumming told you he
21 could not issue this permit because it did not comply with
22 the regulations?

23 A. That it could not be put in exactly the
24 way it was in this book.

25 Q. So it did not comply with the

1 regulations as he interpreted them?

2 MR. MCFARLAND: Well, I'm going to
3 object, Your Honor. That's calling for him to speculate.
4 He can only say what Mr. Cumming told him, not what
5 Mr. Cumming was thinking when he said this.

6 THE COURT: Well, I assume the question
7 is what he told him.

8 MR. MCFARLAND: Well, I think the
9 question was an interpretation of what was told.

10 BY MR. POULSON:

11 Q. Cumming told you he did not believe the
12 permit could be issued. Isn't that what he said, sir?

13 A. Yes, sir, and I asked him what would be
14 necessary to issue the permit.

15 Q. And Mr. Cumming told you you had to
16 comply with the minimum standards, did he not?

17 A. Mr. Cumming told me that I would need
18 enough room to put a tractor and trailer to keep it off of
19 Route 622, and the back of the entrance would have to
20 measure twenty-four feet, and it does.

21 Q. Did he tell you you would have to comply
22 with the minimum standards?

23 A. I answered your question, sir.

24 Q. Did he tell you, sir, it would have to
25 comply with the minimum standards?

1 A. No.

2 Q. He didn't tell you that?

3 A. He didn't say it would have to meet the
4 requirements of the standards.

5 Q. What?

6 A. The requirements of the standard. He
7 can change the standards and modify them to meet the
8 conditions, Mr. Poulson.

9 Q. Do you recall testifying at your
10 deposition, sir?

11 A. I do, and I also had some errors in
12 there, too.

13 THE COURT: Just try to answer the
14 questions, please.

15 THE WITNESS: Yes, sir.

16 BY MR. POULSON:

17 Q. At page 17, sir, line 1:

18 Question: "Okay. And he was taking a
19 position, referring to Mr. Cumming, that you had to comply
20 with the minimum standards?"

21 Answer: "That you had to comply. And I
22 advised him the entrance permits were put together
23 everywhere for the safety, health, and welfare of the
24 people. Safe distance was good. No problem, as I saw
25 it."

1 A. That's true.

2 Q. So he did tell you you had to comply
3 with the minimum standards?

4 A. And the minimum standards are
5 illustrative, as I testified before. They can be modified
6 by the resident engineer. Mr. Cumming told me that he
7 wanted a twenty-four foot measurement, and he wanted a
8 truck in there. We complied with those, and Mr. Cumming
9 issued the permit.

10 Q. And you previously testified, or
11 indicated that there is nothing in writing that authorizes
12 the standards to be varied, is it?

13 A. That's true. But I believe that there
14 is in this particular manual, and it may not have been in
15 the one before.

16 Q. But you indicated some few days ago
17 there was nothing in writing that so authorized?

18 A. That I knew of at the time.

19 Q. And when Will Cumming told you that you
20 had to comply with the minimum standards, you told him you
21 would elevate it over him, did you not, sir?

22 A. I told him that if he couldn't issue it,
23 I would have to go see why it couldn't be issued, and I
24 would go to the district.

25 Q. And elevate was your word, was it not,

1 sir?

2 A. Elevate was my word.

3 Q. And you did elevate it over him? You
4 went to see Mack Clark?

5 A. At the same time that I went to see
6 Mr. Clark, Mr. Cumming took his information to his traffic
7 engineer to see if the permit would be acceptable.

8 Q. Now, basically, Mr. Hodge, you have
9 taken the position, have you not, sir, that the mere fact
10 that the county recorded this subdivision, that the uses
11 are permissible in there, and you're simply going to find
12 a way to hook them up to the highway, is that not true,
13 sir?

14 A. No, sir.

15 Q. You haven't said that?

16 A. No, sir.

17 Q. Have you taken the position that the
18 county approved every use in there, and that's the
19 county's problem?

20 A. I have taken the position that the
21 country approved the subdivision, allowed the owners to
22 sell lots, which they did. I have taken the position that
23 a permit could be issued, which it has.

24 Q. And, basically, you've indicated you
25 were going to find a way to get the permit issued, did you

1 not?

2 A. I didn't say that. You said that.

3 Q. Now, in addition to talking to Mack
4 Clark, you talked to Jim Givens in Richmond?

5 A. I did.

6 Q. Okay. And I believe, sir, if I
7 understand correctly, that in a consultant basis your
8 company still does about two million dollars a year, or a
9 period of two years with VDOT for the years 2000, and
10 2001?

11 A. We had two projects at that time that
12 are complete. Yes.

13 Q. To the tune of about two million dollars
14 in fees to your company?

15 A. Yes.

16 Q. So you still maintain your contacts
17 within VDOT, do you not?

18 A. I maintain -- I have contacts in VDOT,
19 and maintain contact with LDOT, and NCDOT, West Virginia
20 DOT.

21 Q. Well, I'm only asking VDOT.

22 A. Well, part of my job --

23 Q. I take it your answer is yes?

24 A. -- is to make contact with the people
25 that I do make business with.

1 Q. Now, as far as the use of this easement,
2 you have previously opined, have you not, that two tractor
3 and trailers could be in there side by side?

4 A. I erred. When I saw the thing in
5 deposition, I corrected my deposition, Mr. Poulson, that
6 two tractor and trailers may fit in there. Now, whether
7 or not they can drive in there, I don't know.

8 Q. And based on your, deposition you went
9 back and changed several things where two tractor and
10 trailers appeared in the testimony?

11 A. I corrected it to the point of where the
12 truck was requested by Mr. Cumming to be going out, and
13 another vehicle could pass it.

14 Q. But you agree that you did say that two
15 tractor and trailers in your deposition?

16 MR. MCFARLAND: He's answered it, Your
17 Honor.

18 THE COURT: I think said that. He said
19 he did say that, and -- go ahead.

20 BY MR. POULSON:

21 Q. And I believe you've opined in that
22 deposition that a tractor and trailer was
23 six-and-a-half-feet wide?

24 A. And I was in error.

25 Q. How wide is a tractor and trailer?

1 A. A tractor and trailer is ninety-six
2 inches wide. The legal limit is eight-feet wide.

3 Q. Without mirrors?

4 A. Without mirrors. Eight-and-a-half feet
5 with mirrors.

6 Q. And, obviously, it could not fit in the
7 easement?

8 A. Yes, a tractor and trailer will fit in
9 the easement.

10 Q. Not two?

11 A. Not two.

12 Q. And I believe -- is it true that
13 vehicles need at least one to two feet between them for
14 safe passage?

15 A. That would be desirable, Mr. Poulson,
16 but as long as they don't touch, vehicles can pass safely.
17 You have to take into consideration where it is. If
18 you're moving very slowly down a very narrow area, you can
19 drive closer.

20 Q. Have you previously indicated in
21 deposition, sir, that one to two feet --

22 A. In the deposition I indicated
23 approximately one to two feet would be desirable.

24 Q. And that's in-between them without
25 regard to what's on the outside of them?

1 A. Well, you asked me could they pass. You
2 didn't ask me what was on the outside.

3 Q. What is the required minimum safe
4 distance?

5 A. There is no required minimum safe
6 distance.

7 Q. But you would agree that in-between them
8 you need at least one to two feet?

9 A. I would say that that would be
10 desirable, and you can drive closer than that, if you're
11 driving close to a large vehicle, and small vehicle at a
12 slow speed.

13 Q. Would it be three inches?

14 A. Could be.

15 Q. As little as three inches safe passage?

16 A. Could be, if it doesn't touch.

17 Q. If it doesn't touch?

18 A. Well, if it touches, it's not safe
19 distance.

20 Q. Now, Mr. Hodge, showing you Plaintiff's
21 Exhibit 44, sir. And if you will look at what is outlined
22 in red there, and assume that is the course of the
23 fifteen-foot easement as it comes in to the edge of the
24 highway right-of-way?

25 A. Mr. Poulson, I'm looking at something

1 that somebody has changed to change the easement as it
2 comes in. It does not come in that way.

3 Q. I agree with that. If you will assume
4 that easement, sir --

5 A. I will not assume that easement.

6 Q. Well, I'm asking you to assume that
7 easement, and I want you to answer the question whether
8 that qualifies under the regulation, sir.

9 A. Does it qualify under the regulation?

10 Q. Yes, sir.

11 A. It could.

12 Q. It could. And what would be your basis
13 that it does qualify?

14 A. It would be the easement as it touches
15 the right-of-way.

16 Q. And you've got twenty-four feet by your
17 methodology, do you not?

18 A. Right. It's probably got the same
19 fifteen that you have in the middle of the twenty-four
20 that you had before.

21 Q. So this one, in your opinion qualifies?

22 MR. MCFARLAND: I'm going to object that
23 characterization. It's not his exact words, Mr. Poulson.

24 THE COURT: Well, it's
25 cross-examination.

1 BY MR. POULSON:

2 Q. Would it under the regulations?

3 A. It could.

4 Q. And the reason that it could, I take it,
5 is in part because of your twenty-four-foot measurement
6 there?

7 A. It's not my twenty-four-foot
8 measurement. It is the measurement that we were asked to
9 form by Mr. Cumming to meet the minimum standard that's in
10 there.

11 We followed the rules and regulations,
12 and the twenty-four feet is there. And you're saying that
13 I manipulated it. I say you're manipulating it.

14 Q. Did you come up with a twenty-four-foot
15 figure, sir?

16 A. I came up with the twenty-four-foot
17 figure, twenty-five feet on a radius twenty-five feet away
18 from the edge of pavement.

19 Q. So you did come up with it?

20 A. I did, and Baldwin and Gregg did.

21 Q. Okay. Now, let me show you Plaintiff's
22 Exhibit 45?

23 MR. MORRIS: Your Honor, we're just
24 going to renew our same objections as to relevance.

25 THE COURT: All right.

1 BY MR. POULSON:

2 Q. Follow the red lines there, if you will,
3 sir.

4 A. There are two red lines. I don't know
5 what you want me to do without laying it out all out,
6 and -- you're asking whether I can get twenty-five feet.
7 You can't get twenty-five feet. It's not germane to this
8 entrance.

9 Q. Give me a measurement, sir, twenty-five
10 feet from the edge of the pavement to the back of what an
11 entrance would be with that particular example, sir.

12 A. I cannot do it without getting the
13 scales, and laying it out, and checking it out.

14 Q. Well, let me get you a ruler, sir.

15 A. I'm sorry. I'll do it with the scales.

16 Q. It's not too difficult to measure
17 fifteen feet, is it, sir, if you'll take that ruler and
18 assume that easement is fifteen-foot wide.

19 A. I think the problem that you're asking
20 me to do is to give you an arch measurement without the
21 ability to do it. I can't do it.

22 Q. How much would the arch measurement go
23 to fifteen foot, sir?

24 A. I don't know.

25 Q. You don't know?

1 A. No.

2 Q. Well, let's assume --

3 A. I'm not going assume it.

4 Q. Well, let's assume that seventeen
5 feet --

6 THE COURT: Let me just stop and make
7 you understand your role.

8 You were called as an expert witness,
9 qualified as an expert witness by the counsel who called
10 you. The purpose of an expert witness is to make certain
11 assumptions, and to try to answer expertly based on those
12 assumptions.

13 So under those circumstances, his
14 questions are perfectly legitimate, and you should try to
15 answer them as best you can.

16 THE WITNESS: I cannot give you an
17 answer with a straight ruler.

18

19 BY MR. POULSON:

20 Q. Mr. Hodge, look at that example, if you
21 will, and where that easement comes in, it's very little
22 arch, is it not, sir?

23 A. Very little, but it's still on the
24 curve.

25 Q. It's still on the curve.

1 Assuming that that arch length is no
2 more than seventeen feet.

3 A. All right.

4 Q. Would it qualify under the regulations
5 then?

6 MR. MCFARLAND: I'm going to note an
7 objection to the form of that question. I think there
8 needs to be other --

9 THE COURT: Overrule the objection.

10 THE WITNESS: I think that it will not
11 meet the twenty-four foot measurement, but it does not
12 make it an unsafe entrance, and it's under the purview of
13 the resident engineer to change it if he so desires.

14 BY MR. POULSON:

15 Q. So you're telling the Court that the
16 resident engineer can change anything he wants to under
17 the regulation?

18 MR. MCFARLAND: I'm going to object to
19 that characterization, Your Honor. It's not what his
20 testimony was.

21 THE COURT: It's a perfectly legitimate
22 cross-examination. The question, I think he's intelligent
23 enough to answer. Go ahead.

24 THE WITNESS: Within reason, yes.

25 BY MR. POULSON:

1 Q. Within reason?

2 A. Yes.

3 Q. So that would mean that he could cut
4 down to twenty-four -- and, actually, we're talking about
5 thirty. We keep saying twenty-four. Really we're talking
6 about thirty, are we not, under that regulation?

7 A. We're talking about twenty-four feet of
8 pavement.

9 Q. And three feet on each side for
10 shoulders?

11 A. There's no shoulders required on this
12 one.

13 Q. Is there anything that says no shoulders
14 are required under the regulation?

15 A. There is a permit that was issued by the
16 resident engineer that did not call for the shoulders.

17 Q. Is there anything on page 29 that says
18 the requirement for shoulders may be dispensed with?

19 A. No, but there's nothing on there that
20 says it has to be built either.

21 Q. But it shows three feet on each side,
22 does it not, sir?

23 A. It shows three feet on the back side.

24 Q. So if we assume that the arch is no
25 longer than seventeen feet, that would not qualify, would

1 it?

2 A. No.

3 Q. Because we don't have the twenty-four.
4 You can't find a way to measure to get twenty-four on that
5 particular illustration, can you, sir?

6 A. No.

7 Q. Now, showing you, if I may, please --
8 Mr. Hodge, showing you Plaintiff's
9 Exhibit 46, sir. Let's assume the easement is up here, it
10 comes into the highway perpendicular, at a straight point
11 on the highway, five hundred and fifty feet west of the
12 end of that curve there, sir.

13 A. The fifteen-foot easement would be the
14 back of the entrance, and you couldn't put twenty-four in
15 it.

16 Q. So this one would not qualify at all
17 under the methodology of measuring that you-all utilized?

18 A. From the edge of the pavement, that's
19 correct.

20 Q. Okay. Have you ever measured to see
21 what it is, whether it is, in fact, twenty-four across?

22 A. No.

23 Q. You have not done that?

24 A. No.

25 Q. And you would agree that by the

1 methodology of using the twenty-four, that it's basically
2 not a usable twenty-four foot, right?

3 A. I would agree that the twenty-four feet
4 is the fifteen feet. Both of them are the same.

5 Q. Both are the same?

6 A. Yes.

7 MR. POULSON: Thank you, Mr. Hodge.

8 THE COURT: Any other questions?

9 MR. LePAGE: No, Your Honor.

10 MR. MORRIS: No, Your Honor.

11 MR. MCFARLAND: Just briefly, Your
12 Honor, on redirect.

13

14 REDIRECT EXAMINATION

15 BY MR. MCFARLAND:

16 Q. Is the manual in front of you there,
17 Mr. Hodge?

18 A. I still have page 29.

19 Q. How about going to page 6 for me,
20 please.

21 A. Page 6. All right, sir.

22 Q. What is found on page 6 of the VDOT
23 manual?

24 A. I find the bonds, and the guarantee, and
25 the irrevocable letter of credit.

1 Q. Maybe I've got the wrong page.

2 Look at Roman Numeral VI, Mr. Hodge.

3 A. Okay.

4 THE COURT: Is this back to the same
5 thing we've quoted a hundred times before?

6 MR. MCFARLAND: This has to do with the
7 discretion that's found in the introduction.

8 THE COURT: Whatever it is,
9 introduction, or something?

10 MR. MCFARLAND: Yes.

11 THE COURT: We've heard it, and I know
12 it's there. It's in evidence.

13 MR. MCFARLAND: Okay. I just want to --

14 THE COURT: All right.

15 MR. MCFARLAND: All right.

16 BY MR. MCFARLAND:

17 Q. Did you ever, at any time, Mr. Hodge,
18 put any pressure on Mr. Cline to issue this permit?

19 A. I didn't see Mr. Cline until I got over
20 here.

21 Q. Did you ever, at any time, put any
22 pressure on Mr. Clark to issue the entrance permit?

23 A. No, I did not.

24 Q. Did you ever, at any time, put any
25 pressure on Mr. Cleveland to issue the entrance permit?

1 A. No, I did not.

2 Q. Did you ever, at any time, put any
3 pressure on Mr. Cumming to issue the entrance permit?

4 A. I did not. I asked him to take it up
5 the line.

6 Q. The depiction of the tractor-trailer,
7 and the SUV on plan A of the drawing 28A, I believe is how
8 we've been referring to it, came at whose request?

9 A. Mr. Cumming.

10 MR. MCFARLAND: One moment, if I might,
11 Your Honor.

12 THE COURT: While you're thinking, I
13 want to make sure I understand this gentleman's testimony,
14 and I think I do. Of course, he was called as sort of
15 partially a factual witness, and partially an expert
16 witness. It's a little unusual, but since no one
17 objected, I suppose it's okay.

18 But I want to make sure I understand
19 exactly what he is telling the Court as an expert.

20

21 EXAMINATION

22 BY THE COURT:

23 Q. I take it, sir, that the request by
24 Mr. Cumming was that there be, as you pointed out,
25 twenty-four feet, and that two vehicles were able to get

1 in and out at the same time, essentially?

2 A. Yes, sir.

3 Q. And I take it fortuitously as it
4 happened to turn out, once you got out there, once you,
5 Baldwin and Gregg got out there and started measuring, lo
6 and behold, it turned out to be twenty-four feet, so you
7 were covered on that.

8 And then the other thing that he drew on
9 to show that two vehicles could go in and out at the same
10 time.

11 With that in mind, is it your testimony
12 that Mr. Cumming's request for twenty-four feet is what
13 prompted you to submit it with the fortuitous twenty-four
14 feet on there, but in your professional opinion, he didn't
15 have to require twenty-four feet?

16 A. Yes, sir.

17 Q. So, in other words, you were just trying
18 to accommodate what he was asking for?

19 A. Yes.

20 Q. But in your expert opinion, if it had
21 turned out not so fortuitously, that the measurement had
22 been twenty-three feet, that would have been okay, too?

23 A. As long as it was safe, yes, sir. And I
24 think it is.

25 THE COURT: I just wanted to make sure I

1 understood the dual purposes of your testimony.

2 All right. Any questions prompted by
3 the Court's question?

4 MR. POULSON: I have a couple.

5 THE COURT: All right. Go ahead.

6

7 RECROSS-EXAMINATION

8 BY MR. POULSON:

9 Q. Mr. Hodge, Mr. Cumming -- so you didn't
10 put any pressure on Mr. Cumming?

11 A. No, sir.

12 Q. Even though you told him you were going
13 to elevate it over his head, and you had old friends in
14 high places in both Suffolk and Richmond?

15 A. I felt that Will could issue the permit,
16 and there wouldn't be any problem to issue the permit, and
17 I asked him to do it.

18 Q. But he told you he wasn't going to issue
19 the permit because it didn't comply?

20 A. That's correct.

21 Q. And then you told him you were going to
22 elevate it over him?

23 A. I had to find out if I was wrong.

24 Q. And these other subdivisions that you
25 referenced, I take it you haven't looked for any entrance

1 permits on any of those?

2 A. I was making a comparable, as I
3 indicated to you. They connect to the secondary system,
4 Shooting Point connects to the secondary system, were they
5 equally as safe, or was Shooting Point equally as safe or
6 better, and that is my opinion, that it is.

7 Q. Is your answer no, sir? You did not
8 check for any permits?

9 THE COURT: I think he answered that he
10 didn't check, and that's why we withheld the exhibit at
11 this point in time.

12 MR. POULSON: That's all, sir.

13 THE COURT: Anything else prompted by
14 those questions, or the Court's questions?

15 MR. MORRIS: No, Your Honor.

16 MR. LePAGE: No, sir.

17 THE COURT: Thank you, sir. You may be
18 excused.

19 Who are you going to have next?

20 MR. MCFARLAND: If I can have just one
21 minute to check.

22 THE COURT: You can have five minutes.

23 (Brief recess.)

24 THE COURT: All right. Who do we have
25 next?

1 MR. MCFARLAND: We have Mr. Scott, Your
2 Honor.

3 THE COURT: All right.

4
5 MR. SCOTTIE SCOTT, called as a witness
6 by and on behalf of the Defendants, being first duly
7 sworn, testified as follows:

8
9 DIRECT EXAMINATION

10 BY MR. MCFARLAND:

11 Q. State your full name, please.

12 A. Scottie Scott, Jr.

13 Q. And where do you live, Mr. Scott?

14 A. I reside down at Seaside.

15 Q. And how long have you resided on the
16 Eastern Shore?

17 A. All my life.

18 Q. And what is your occupation, sir?

19 A. Right now I'm retired.

20 Q. And prior to -- when did you retire?

21 A. I retired at the end of '90.

22 Q. The end of?

23 A. 1990.

24 Q. And prior to that, what did you do?

25 A. I farmed for thirty-eight years.

1 Q. Have you had an opportunity, Mr. Scott,
2 to view the Shooting Point properties?

3 A. Yes, I have.

4 Q. And when did do you that, sir?

5 A. Gosh. I guess it's been a week, ten
6 days ago.

7 Q. All right, sir. And from your
8 observations of the Shooting Point properties, what is the
9 route of access for farm equipment to Shooting Point?

10 A. I think the right number is 622.

11 Q. And what is the importance of Route 622
12 in terms of farming parcels on Shooting Point in the
13 Wescoat property?

14 A. Well, that's the only way they can get
15 to it, I guess.

16 Q. Now, did have you an opportunity to view
17 what was actually being planted in the fields at the time?

18 A. It's not anything being planted there.

19 Q. Did you have an opportunity to view
20 photographs of what was previously planted in the field?

21 A. Yes, I saw photographs of what was
22 previously planted.

23 Q. Okay.

24 THE COURT: Maybe you can look at that,
25 and everybody agree what it is, and save a lot of time.

1 You have three of them there.

2 MR. MCFARLAND: Do I? I'm going to hand
3 it to Mr. Poulson now, Your Honor.

4 THE COURT: Just for identification
5 purposes, this will be 10. All of these seem to be aerial
6 photos of the portion of the property in question, and we
7 will have 10, 11, 12. Is that about right?

8 MR. POULSON: Judge, I don't know if
9 there's any foundation for these photographs now, sir.

10 THE COURT: That's why I asked if you
11 could look at them to see if you-all could agree. Are you
12 disagreeing at this point?

13 MR. POULSON: Sir?

14 THE COURT: That's why I asked you to
15 look at them and see whether or not you agree or disagreed
16 of their admissibility.

17 MR. POULSON: I disagree at this point
18 because there is no foundation for them.

19 THE COURT: All right. Go ahead.
20 Number 10. Is there one here you showed me for
21 identification purposes? All right.

22 MR. MCFARLAND: Why don't we go ahead
23 and we can mark them all, Your Honor, and I'll start
24 laying a foundation.

25 THE COURT: This is 11, 12 for

1 identification purposes.

2 (Aerial photographs were marked 10, 11,
3 and 12 for identification.)

4 THE COURT: All right, sir.

5 MR. MCFARLAND: Thank you, Your Honor.

6 BY MR. MCFARLAND:

7 Q. Mr. Scott, what is your understanding of
8 what area Mr. Curtis Jones farms of the Shooting Point and
9 Wescoat properties?

10 A. The only piece that I've looked at is
11 where it's adjoining the easement that goes down Shooting
12 Point, which would be going down to Jack's house, would be
13 on the right-hand side.

14 Q. Okay. Let me show you what has been
15 marked as Defendant's Exhibit 10 for identification
16 purposes.

17 Do you recognize what is depicted in
18 that photograph, sir?

19 A. Yes, I do.

20 Q. From your observations and your
21 understanding, can you point out the area that Mr. Curtis
22 Jones farms?

23 A. Yes. He farms all this area right in
24 here, what I've been told.

25 Q. Why don't you wait a second.

1 Mr. Poulson is approaching.

2 All right.

3 A. This is what -- I know he farms this,
4 too, but this is the only thing that I've looked at right
5 through here. I didn't even go back here, but I've seen
6 all along in here.

7 Q. Okay. And for purposes of so we can
8 sort of lay an orientation, where do you understand the
9 right-of-way at issue to be, sir?

10 A. Right here.

11 Q. All right. And where is Route 622, if
12 it's depicted on this photograph?

13 A. It comes right around here, and goes
14 down here.

15 Q. Now, are you able to tell from
16 Defendant's Exhibit 10 what is the crop that is planed in
17 the area that you've just --

18 A. There is no crop there. It looks like
19 to me he had harvested grain out there last year, soy
20 beans, or some kind of grain crop.

21 Q. Okay. How would that crop be planted,
22 sir?

23 A. He planted it north and south.

24 Q. And what is the significance, if any, of
25 planting the crop north and south?

1 MR. POULSON: Judge, excuse me just a
2 minute. And correct me if I'm wrong. I don't believe
3 Mr. Scott has been identified as any kind of expert
4 witness as to anything, I don't believe, in discovery.

5 THE COURT: Is he being offered as an
6 expert?

7 MR. MCFARLAND: He's not offering
8 opinions at this point, Your Honor. He's just testifying
9 as to what he --

10 MR. POULSON: He's getting ready to
11 offer an opinion right now, the significance of planting
12 north and south.

13 THE COURT: I think he's right.

14 MR. MCFARLAND: Well, in that case, I
15 would offer him as an expert in the subject of farming,
16 the thirty-eight years, or however many years.

17 MR. POULSON: We would object because he
18 hasn't been designated in all these months as an expert in
19 any way.

20 MR. MCFARLAND: He's a rebuttal witness,
21 Your Honor, in light of Mr. Curtis Jones' testimony.

22 MR. POULSON: This is their case in
23 chief.

24 MR. MCFARLAND: The only time I present
25 evidence, Your Honor, is after Mr. Poulson presents

1 evidence.

2 MR. POULSON: He took Curtis Jones'
3 deposition. Curtis Jones testified last year, and, you
4 know, there is no reason at all not to have identified
5 Mr. Scott as an expert witness.

6 THE COURT: He's right, Mr. McFarland.
7 That's a pretty far stretch, isn't it?

8 MR. MCFARLAND: Well, no, Your Honor. I
9 took Curtis Jones' deposition in May of this year, and
10 after taking his deposition, I designated Mr. Scott.

11 MR. POULSON: Not as an expert, though.

12 MR. MCFARLAND: I disclosed Mr. Scott.

13 MR. POULSON: He was never designated as
14 an expert. He's simply listed as one of the fact
15 witnesses when we filed perspective witnesses with the
16 Court and exhibits.

17 THE COURT: You-all know that better
18 than I. If he wasn't designated as an expert, I think
19 he's got a good point, don't you?

20 MR. MCFARLAND: Well, there was no
21 scheduling order. I asked to have a scheduling order
22 submitted in this case; there was none. So after I took
23 Mr. Curtis Jones' deposition, and got his testimony, we
24 spoke with --

25 THE COURT: All right. Let me -- let's

1 try to put an end to this, because we can argue this all
2 afternoon. Give me a proffer of what he's going to tell
3 me.

4 MR. MCFARLAND: Mr. Scott will testify
5 that based on his review of the photographs, and his
6 review of the property, that Mr. Jones has other access to
7 his crops other than the easement at issue, that there are
8 other roads that he can use to get to his crops without
9 any complications at all, or any problems at all
10 whatsoever with the subdivision.

11 Further, he will testify that the posts
12 as have been put up by the Wescoats impede any farmer
13 using equipment that a farmer uses on the property.

14 MR. POULSON: And this is pure expert
15 testimony. One of my questions as to Mr. McFarland's
16 questions was to identify your experts. He has never at
17 any point identified Mr. Scott as an expert at any time.

18 He says in rebuttal of Mr. Jones.
19 Mr. Jones testified last year. He took Mr. Jones'
20 deposition also, and there was no reason -- if he had
21 planned to use Mr. Scott as an expert, he should have been
22 designated a long time ago.

23 THE COURT: I think he's right,
24 Mr. McFarland. I mean, that's pushing it pretty hard.

25 MR. MCFARLAND: I took Mr. Jones -- for

1 the record, Your Honor, I took Mr. Jones' deposition, I
2 believe, on May 9th, or May 11th of this year, and it was
3 after that deposition that we evaluated the situation and
4 thought it would be helpful for the Court to hear from
5 another farmer.

6 THE COURT: Well, the thing that kind of
7 raised my antenna was when you he initially said he was
8 out there a week to ten days ago. That's even after we
9 started the trial.

10 MR. MCFARLAND: I don't know if he's got
11 the exact date.

12 THE WITNESS: It could have been two
13 weeks ago. I don't remember.

14 MR. MCFARLAND: I would just point out,
15 Your Honor, there was not a scheduling order entered in
16 this case. There was a ton of last-minute discovery being
17 conducted in this case because Mr. Poulson was unavailable
18 essentially the entire month of April.

19 I got his expert's plats literally the
20 day before we started the trial, May 29th.

21 MR. POULSON: And Mr. McFarland didn't
22 even designate his experts until like the 28th of March,
23 you know, roughly a month before trial, and Mr. Scott has
24 never been designated until this minute, sir, until he
25 walks on the witness stand.

1 THE COURT: Well, I think he's right,
2 Mr. McFarland. Theoretically, because of the way this
3 case has been spaced out over days, I mean, you could have
4 let him know last week, and he could have taken his
5 deposition.

6 I mean, this is really pretty much -- it
7 would be even better if you didn't know about it at all.
8 But to have him designated as factual witness and then
9 bring him in at the last minute and say --

10 MR. MCFARLAND: He's just designated,
11 Your Honor. He's not designated either way.

12 THE COURT: Well, I think we know where
13 we are on this. I think you're going to get yourself in
14 too deep with this. It's probably not important enough to
15 you to want to risk the situation, to be honest with you.
16 I think it's not proper.

17 MR. MCFARLAND: All right. I don't mean
18 to incur the Court's wrath, but in that case, I'd better
19 take another short recess to check and see where we are.

20 THE COURT: You're not going to incur my
21 wrath. Trust me.

22 MR. MCFARLAND: No, I'm talking about
23 scheduling, Your Honor, because we're at --

24 THE COURT: I mean, you can ask him any
25 questions about any facts that you want to.

1 MR. MCFARLAND: Okay.

2 THE COURT: I don't know that there are
3 any, to be honest with you.

4 All right. Any questions then based
5 upon the Court's ruling with regard to his testimony as an
6 expert?

7 MR. MCFARLAND: I think I can ask a
8 factual question, Your Honor, that would not --

9 THE COURT: All right.

10 MR. MCFARLAND: It certainly is not an
11 expert opinion.

12 THE COURT: I understand.

13 BY MR. MCFARLAND:

14 Q. Let me refer you to what's been marked
15 Defendant's Exhibit 11. Do you recognize that?

16 A. Yes, sir.

17 Q. What does that depict, sir?

18 A. It depicts field running north and
19 south, where they planted north and south, and the ditch
20 in the center of it, and Route 622, and the buffer sign
21 where he runs his equipment.

22 Q. From a factual, and -- from your
23 observation, what is this area that I'm pointing to here,
24 which would appear to me in that picture running parallel
25 north of Route 622?

1 A. It looks like a road on the other side
2 of that where he may be using, maybe he turns around on
3 this end, is what it looks like to me.

4 MR. POULSON: This is -- it looks like
5 where he may have been turning around.

6 THE WITNESS: It's not maybe. It shows
7 for itself, sir.

8 MR. MCFARLAND: It's a factual
9 observation.

10 THE COURT: All right. Go ahead.
11 Anything else?

12 MR. MCFARLAND: One moment, if I might,
13 Your Honor.

14 BY MR. MCFARLAND:

15 Q. How wide is a combine, Mr. Jones?

16 A. How wide is a combine?

17 Q. Yes, sir.

18 A. They vary from, I guess, fifteen feet up
19 to twenty-two sometimes, maybe. Maybe there might be even
20 some bigger than that.

21 Q. Is there a cutter head to a combine?

22 A. Yes, sir.

23 Q. Where is that located, sir?

24 A. In the front.

25 Q. And do they raise?

1 A. Yes, sir.

2 Q. And how high do they raise?

3 A. I would say maybe the front, maybe four
4 and a half, five feet.

5 MR. MCFARLAND: Okay. Thank you.

6 That's all I have.

7 THE COURT: Any other questions? Any
8 questions, Mr. Poulson?

9 MR. POULSON: No, sir.

10 THE COURT: All right. Thank you, sir.
11 You may step down.

12 MR. MCFARLAND: Your Honor, the next
13 witness I have would be pretty lengthy, and I'm not --

14 THE COURT: Who is it?

15 MR. MCFARLAND: Jim Latimer. And I'm
16 not sure at this point because of what happened to
17 Mr. Scott, I'm not sure if he's still here or not.

18 THE DEPUTY: What's the name?

19 MR. MCFARLAND: Jim Latimer.

20 THE COURT: Come up, sir, if you would,
21 please, and raise your right hand.

22 (Mr. Latimer was duly sworn.)

23 THE COURT: Let me have those exhibits
24 that were marked for identification purposes.

25 MR. MCFARLAND: Sure, Your Honor.

1 THE COURT: Thank you.

2 All right, sir.

3

4 JAMES B. LATIMER, II, called as a
5 witness by and on behalf of the Defendants, being first
6 duly sworn, testified as follows:

7

8 DIRECT EXAMINATION

9 BY MR. MCFARLAND:

10 Q. Would you state your full name, please?

11 A. James B. Latimer, II.

12 Q. And, Mr. Latimer, you were sworn earlier
13 this morning and testified, I believe, briefly on
14 Mr. Poulson's examination, but I have a number of
15 questions I want to ask you.

16 Where do you reside, sir?

17 A. Townsend, Virginia.

18 Q. And how long have you lived on the
19 Eastern Shore?

20 A. Off and on probably for ten years.

21 Q. And how are you presently employed, sir?

22 A. I'm a licensed land surveyor for Eastern
23 Shore Surveyors.

24 Q. And how long have you been with Eastern
25 Shore Surveyors?

1 A. Off and on for ten years.

2 Q. And how long have you been licensed as a
3 surveyor?

4 A. Since 1991.

5 Q. And in your capacity as a licensed
6 surveyor, how many properties have you surveyed on the
7 Eastern Shore, Mr. Latimer?

8 THE COURT: You don't have to be exact.

9 THE WITNESS: Hundreds.

10 THE COURT: Hundreds. All right.
11 That's good enough. Go ahead.

12 BY MR. MCFARLAND:

13 Q. And have you done some survey work in
14 conjunction with the Shooting Point property?

15 A. The extent of that was to do some
16 topography for engineering for a permit.

17 Q. Okay. And have you also reviewed a plat
18 of survey prepared by Baldwin and Gregg?

19 A. I have seen it.

20 Q. Okay.

21 MR. MCFARLAND: At this time, Your
22 Honor, we'd offer Mr. Latimer as an expert in the field of
23 surveying.

24 THE COURT: Any questions?

25 MR. POULSON: No, I don't have any

1 questions.

2 THE COURT: He will be so qualified. Go
3 ahead.

4 BY MR. MCFARLAND:

5 Q. When were you retained by Shooting
6 Point, Mr. Latimer?

7 A. Let's see.

8 THE COURT: Do you know when it was?

9 MR. MCFARLAND: I believe it was early
10 2000.

11 THE COURT: Okay. Go ahead.

12 THE WITNESS: Yes, early 2000.

13 BY MR. MCFARLAND:

14 Q. And what were you first asked to do?

15 A. We were asked to perform a boundary
16 survey in a subdivision plat that I recommended we get the
17 parent company that owns Eastern Shore Surveyors to do it,
18 Baldwin and Gregg.

19 Q. That would have been in approximately
20 March of 2000?

21 A. That's about right.

22 Q. Okay. Did you yourself go out to the
23 entrance of Shooting Point, sir, at that point in time?

24 A. At that point in time, I went out to
25 look at the lay of the land, topography to make sure the

1 information was gathered, and correctly, and sent it to
2 the engineers.

3 Q. All right. And what did you find from
4 your personal observation of the entrance at Shooting
5 Point when you went out there in March of 2000?

6 A. We located the pins and stakes. I saw
7 the stakes in the road, the pavement, and located the
8 necessary information to draw a topographic map.

9 Q. Where were the stakes located,
10 Mr. Latimer?

11 A. The stakes were located basically
12 centered on the existing drive as it was being used, and
13 one of the stakes was next to a pin that would be the
14 center line of the Bonifant easement.

15 Q. And in order to drive the right-of-way,
16 what would one have to do at that point in comparison to
17 the stakes?

18 A. You mean drive down the road?

19 Q. Exactly.

20 A. You would have to split the stakes.

21 Q. In other words, you would have to go
22 through them?

23 A. Through them.

24 Q. Okay. Did you make any other
25 observations, or perform any other work at that point in

1 March of 2000?

2 A. No, that's about all we did there in
3 March of 2000.

4 Q. Now, with respect to the surveying of
5 Shooting Point, are you aware of any other surveys, of any
6 surveys that were done prior to March of 2000 that show
7 Shooting Point in the entrance?

8 A. The Bonifant survey.

9 Q. When was that --

10 A. In '79. Okay.

11 MR. MCFARLAND: And I believe that's in
12 evidence as 15?

13 MR. POULSON: Wait a minute, and I'll
14 tell you. Bonifant is 15. Subdivision plat is 17.

15 BY MR. MCFARLAND:

16 Q. Let me hand you, if I might,
17 Mr. Latimer, what's been marked as Complainant's Exhibit
18 15.

19 Do you recognize that, sir?

20 A. Yes, I do.

21 Q. And it is what, for the record?

22 A. It is the Bonifant survey of 1979.

23 Q. And what, in your professional opinion,
24 does the Bonifant survey represent, sir?

25 A. Well, it's a boundary survey of a piece

1 cut off of a whole, and showing a right-of-way to get to
2 that cutoff piece.

3 Q. And what, if any, geometry does Bonifant
4 survey have at the entrance of Route 622 and the
5 right-of-way at issue in this case?

6 A. Didn't we testify to that this morning?
7 You want me to do it again?

8 Q. Please.

9 A. There is no connection mathematical
10 between the turns point, and the Bonifant pin at 772 to
11 connect to Route 622. There is no mathematics, no
12 geometry.

13 Q. Where is the first pin or reference
14 point that you find on the Bonifant survey, sir?

15 A. Where is the first point of reference I
16 found?

17 Q. No, on that -- on the survey itself, the
18 1979 Bonifant survey, where is the first point -- moving
19 north from the intersection of Route 622 and the entrance,
20 where is the first time you see a point of reference?

21 A. It's fifty or sixty feet north of the
22 center line, or the edge of the right-of-way at 622.

23 Q. Are there other markings, geometry on
24 the Bonifant survey?

25 A. Sure. The center line is located,

1 except on the curves.

2 Q. What is there with respect to the
3 curves?

4 A. Graphics shown to be scale. There's no
5 radii, no radiuses given.

6 Q. Does the Bonifant survey depict the
7 present usage of the right-of-way that you found when you
8 went there in March of 2000?

9 MR. POULSON: Judge, again, I don't
10 think it's material. I mean, we've beat this horse many,
11 many times. We've got two plats.

12 THE COURT: I understand, and I
13 understand what your argument is, and is going to be,
14 Mr. Poulson, but Mr. McFarland is still -- go ahead.

15 THE WITNESS: It fits the usage very
16 close until it gets to the southern -- where the
17 connection is being made to 622.

18 BY MR. MCFARLAND:

19 Q. And what happens at 622?

20 A. The Bonifant center line is closer to
21 the east, closer to the woods than the physical road
22 that's there.

23 Q. Now, if you were to survey the
24 right-of-way today, Mr. Latimer, what would you look at,
25 and what would you do, sir?

1 A. I would use the original grants, and the
2 physical road as it's being used today.

3 Q. When you say the grant, that would be
4 the grant of easement?

5 A. The grant of easement.

6 Q. Have you had an opportunity to review
7 that, sir?

8 A. Yes, I have read it.

9 Q. All right. Does it give a metes and
10 bounds description of the easement?

11 THE COURT: I think we can all agree
12 that it doesn't.

13 BY MR. MCFARLAND:

14 Q. What is more important to you,
15 Mr. Latimer, in determining --

16 THE WITNESS: What did you say, Judge?
17 I'm sorry.

18 THE COURT: The original grant of
19 easement doesn't have a metes and bounds description.

20 THE WITNESS: Right.

21 THE COURT: Go ahead.

22 BY MR. MCFARLAND:

23 Q. As a surveyor, Mr. Latimer, what's more
24 important to you if you were to presently survey the
25 right-of-way, the grant of easement, or that 1979 Bonifant

1 survey?

2 A. I would hold the center line, the road
3 as it's being used, but I would also show on the plat the
4 Bonifant survey itself also. Both of them would be shown.

5 MR. MCFARLAND: I would tender to
6 Mr. Poulson some photographs.

7 THE COURT: This would be 13.

8 Have you seen all of these, Mr. Poulson?

9 MR. POULSON: Yes, sir.

10 THE COURT: Any objection?

11 MR. POULSON: Same continuing objection,
12 people trying to shift the easement.

13 THE COURT: All right. Defendant's
14 Number 13 will be admitted into evidence.

15 (Photographs were marked and admitted
16 into evidence as Defendant's Exhibit 13.

17 THE COURT: You've got them in the order
18 that you want them? Let's make them one exhibit. Put
19 them in whatever order you want them in.

20 MR. MCFARLAND: That's fine, Your Honor.

21 BY MR. MCFARLAND:

22 Q. Let me hand you what's been marked as
23 Defendant's Exhibit 13, Mr. Latimer. Looking at that
24 first page there, do you recognize what is depicted in the
25 two photographs on the first page?

1 A. I recognize the pictures, yes.

2 Q. Okay. And you mentioned that you were
3 out on the property in March of 2000, I believe?

4 A. Yes.

5 Q. Did you also return to the property at a
6 later time?

7 A. Yes, I believe I did come back one more
8 time.

9 Q. Have you been to the property in 2001?

10 A. Yes.

11 Q. Okay. What does the top photograph
12 depict, sir?

13 A. It's showing the posts, and the existing
14 road that's going through the posts.

15 Q. Okay. And can you tell which way we're
16 looking from the top photograph of Respondent's Exhibit
17 13?

18 A. I believe we're looking south.

19 Q. Okay. Now, how about the bottom
20 photograph?

21 A. The bottom photograph is looking north
22 about three quarters of the way up the right-of-way of
23 622.

24 Q. Okay. And what is depicted in those two
25 photographs compared with what you saw when you visited

1 the property in March of 2000?

2 A. It looks like the road moved some in the
3 picture.

4 Q. You're looking at which picture now,
5 sir?

6 A. The one looking south.

7 Q. Okay. The top photograph?

8 A. Uh-huh.

9 Q. Okay. And when you say the road has
10 moved some, in which direction has the road moved in that
11 picture from what you saw on your first visit there in
12 March of 2000?

13 A. It looks like to me it's moved to the
14 west.

15 Q. Okay.

16 A. In this area here. But in this area
17 down here, it's kind of a -- it's really not a defined
18 road, but it looks like here it's moved some to the east
19 on this edge, and as it gets over here it's kind of butted
20 out.

21 Q. All right. You're looking at the top
22 photograph saying that it appears that the usage has moved
23 somewhat to the east?

24 A. In this area.

25 Q. Okay. Would you attribute that to the

1 placement of the post?

2 MR. POULSON: Calling for speculation.

3 MR. MCFARLAND: Not as an expert, Your
4 Honor.

5 THE COURT: If he has an opinion, I
6 don't know how he could possibly know.

7 THE WITNESS: And the question is do I
8 think that the --

9 BY MR. MCFARLAND:

10 Q. Has the placement of the posts affected
11 the usage of the road that you can tell as a surveyor?

12 A. Sure.

13 Q. Okay. And tell us how it's affected the
14 use of the road, the placement of the posts.

15 A. Well, you're going to dodge the posts to
16 get down the road.

17 Q. Is it fair to say that they've moved --
18 that the usage of the road --

19 MR. POULSON: Objection. Leading.

20 MR. MCFARLAND: I'll rephrase it.

21 BY MR. MCFARLAND:

22 Q. What direction has the usage moved in
23 the top photograph if we use north, south, east, west?

24 A. It's moved some to the east in this area
25 in here. They had to go over that way to get away from

1 the post.

2 Q. Did you have an opportunity to review
3 where the posts are placed with respect to the Bonifant
4 survey that is Complainant's Exhibit 15?

5 A. Say that again now. Do I have the
6 relationship of the posts to Bonifant survey?

7 Q. Yes.

8 A. I know what the relationship is.

9 Q. Okay. What is the relationship?

10 A. The Bonifant survey skews more to the
11 east of the existing center line, going to the south,
12 going towards the south, it skews to the east.

13 Q. Do the posts then, as they have been put
14 in the ground by Mr. and Mrs. Wescoat, accurately reflect
15 the Bonifant survey lines from the 1979 survey?

16 MR. POULSON: Judge, until he -- he
17 testifies as to the survey --

18 THE COURT: We are plowing ground that
19 we've plowed two weeks ago. I mean, we all know that they
20 don't. We all know that the explanation -- that's why
21 we've got the blue lines, or whatever it is.

22 The blue lines on Plaintiff's Exhibit 41
23 and 42 are the same as the Bonifant survey, and the blue
24 lines were put in there later after the posts were put in
25 because of the fact that they realized they picked the

1 wrong pin as a center line. We've been through all of
2 that.

3 MR. MCFARLAND: I understand, Your
4 Honor, but I want there to be a complete record on this.

5 THE COURT: I think the record is
6 complete. If the record is not complete, I mean, I don't
7 know how you can get it any more complete.

8 We went through that over and over
9 again, and there was an explanation as to why the posts
10 were put up, where they were put up, and there was an
11 explanation that they thought one pin was the center line,
12 and it turned out that that wasn't the center line, there
13 was another one that was the center line and,
14 consequently, jogged it over to the east, and therefore,
15 the posts were off line with the Bonifant survey.

16 MR. MCFARLAND: All right. I'll move
17 along. I don't want to belabor this, but I --

18 THE COURT: I think your record is very,
19 very clear on that. I really do.

20 MR. MCFARLAND: All right.

21 THE COURT: If anybody has any question
22 about it, let them speak now. But, I mean, according to
23 my notes, the blue lines on Plaintiff's 41 and 42, the
24 blue lines are the same as the Bonifant survey, and
25 they -- the Bonifant survey, the blue lines on Plaintiff's

1 41 and 42 are the same as the Shooting Point plats.

2 MR. POULSON: And the black center line,
3 I believe, was the center line of the Bonifant survey.

4 THE COURT: Correct. Is everybody in
5 agreement with that?

6 MR. MCFARLAND: That's fine, Your Honor.

7 THE COURT: Okay.

8 BY MR. MCFARLAND:

9 Q. From your visit to the property --

10 MR. MCFARLAND: I'm going to hand him
11 back, Your Honor, Defendant's Exhibit 15 just as a point
12 of reference.

13 BY MR. MCFARLAND:

14 Q. From your visit to the property in 2001,
15 Mr. Latimer, are the turns as now exist with respect to
16 the posts consistent with what you saw when you were there
17 last year in 2000?

18 MR. POULSON: Judge, I'm going to object
19 until some foundation is laid to answer that question.

20 THE COURT: Overrule the objection. I
21 think we've got sufficient foundation based on other
22 evidence that's already been presented. There's already
23 been testimony that at one point it jogged out, somebody
24 said the tree had fallen down --

25 MR. MCFARLAND: Well, it's more than

1 that, Your Honor.

2 THE COURT: I understand that, but, I
3 mean, you know, why don't you ask him what you want him to
4 say, and let's try to move along. We're covering a lot of
5 the same ground we've gone over before.

6 I'll allow you some latitude, even
7 though Mr. Poulson is going to jump up and say -- go
8 ahead.

9 BY MR. MCFARLAND:

10 Q. You've been to the property in 2000 and
11 2001, correct?

12 A. Right.

13 Q. And you've seen the posts that were
14 placed at some point in early 2001?

15 A. Correct.

16 Q. Okay. Would you agree with me that the
17 course as now marked by the posts has much sharper turns
18 than you found when you visited the property in 2000?

19 A. Correct.

20 Q. And would you agree with me that the
21 course with the posts as currently in place in 2001 does
22 not reflect in the turns prior usage before the placement
23 of the posts?

24 A. The posts do not represent prior usage.

25 Q. In the turns?

1 A. That is correct. They do not represent
2 prior usage.

3 Q. Okay. Now, Mr. Latimer, did you have a
4 chance to traverse all of the Shooting Point property
5 that's owned by --

6 A. I have ridden out there after this
7 litigation.

8 Q. And what did you find, sir, with respect
9 to any residences currently occupied or abandoned?

10 A. The old house that's been pretty much in
11 bad shape is the only house that I know of out there.

12 Q. And where is that located?

13 A. On the eastern bank of water on the
14 creek.

15 Q. And from your inspection of that old
16 house, were you able to determine if at some point it had
17 electricity running to it?

18 A. Yes. It had an electrical line going to
19 it.

20 MR. POULSON: Judge, it's immaterial if
21 it was pre-1974.

22 THE COURT: I don't know. I don't know.
23 Nobody knows when the house was -- at least nobody's
24 testified as to when the house was built, used, abandoned,
25 or anything. I don't know.

1 MR. POULSON: I think Mr. Jones
2 testified it had been long abandoned prior to 1974.

3 THE COURT: I would assume that it has.
4 Maybe we can put the old house to rest.

5 MR. MCFARLAND: I'm not disputing -- it
6 was unoccupied before 1974, but I don't think that's the
7 determination at all.

8 BY MR. MCFARLAND:

9 Q. But my point is if there is an old house
10 there, the question to Mr. Latimer is did you find that it
11 had electricity running to it at some point?

12 A. Quite some time, yes, it did.

13 Q. Did you also do a title search for this
14 property, Mr. Latimer?

15 A. A title search? I didn't go all the way
16 back. I did a basic search on it, yes.

17 Q. Okay. And did you find a chain of
18 title, a deed from Elizabeth Jones to Martin and Dall?

19 A. Yes.

20 THE COURT: I think it's already in. I
21 think we had all of that chain of title was put in at some
22 point.

23 MR. POULSON: Jones to Martin is Exhibit
24 13.

25 BY MR. MCFARLAND:

1 Q. Did you also find a deed of trust from
2 Martin and Dall to Baxley Taggard of Eastville?

3 THE COURT: Is that in?

4 MR. POULSON: I don't believe it is.

5 THE WITNESS: I don't recall -- I don't
6 recall seeing that one.

7 THE COURT: What number are we to now?

8 MR. POULSON: He said he didn't recall
9 seeing that.

10 THE COURT: 14. Any doubt in your mind,
11 Mr. Poulson, that this is a deed of trust?

12 MR. POULSON: No, sir.

13 THE COURT: That he just described?

14 MR. POULSON: Can I look at it just a
15 second?

16 THE COURT: All right.

17 MR. POULSON: He said he wasn't familiar
18 with it, so I put it down.

19 THE COURT: Is there anything particular
20 about it that he needs to testify to?

21 MR. MCFARLAND: Can I see it?

22 THE COURT: It's in evidence, so he
23 doesn't need to identify it.

24 MR. POULSON: It's not in evidence.

25 THE COURT: I thought you said you have

1 no objection to it.

2 MR. POULSON: I don't have any
3 objection.

4 THE COURT: Then it's in evidence.

5 MR. MCFARLAND: Okay. I thought
6 Mr. Poulson wanted me to lay a further foundation.

7 THE COURT: No.

8 (Deed of trust was marked and admitted
9 into evidence as Defendant's Exhibit 14.)

10 THE COURT: Go ahead.

11 BY MR. MCFARLAND:

12 Q. Did you have any involvement with a
13 survey done by Mr. Duff in 2000, Mr. Latimer?

14 A. The only thing I had was scheduling some
15 crews to go out there and meet Mr. Duff on the site. I,
16 myself, was not really involved in the survey itself, of
17 that part of it.

18 Q. Did you have occasion to review the plat
19 of survey prepared by him?

20 A. I did look at it, yes.

21 Q. And what did you look at it for?

22 A. He asked me to review it, to look it
23 over to see if I saw anything on there that looked
24 abnormal, or, you know, correct errors.

25 Q. Did you find anything abnormal, and did

1 you note the need to correct any errors?

2 A. No, not that I recall. I don't believe
3 there was any on there.

4 THE COURT: Now, were you referring to
5 exhibits that are already in?

6 MR. MCFARLAND: No, Your Honor. This is
7 an exhibit that will be presented through Mr. Duff.

8 THE COURT: Okay. Go ahead.

9 MR. MCFARLAND: But rather than recall
10 him --

11 THE COURT: I understand.

12 BY MR. MCFARLAND:

13 Q. Mr. Latimer, you've live on the Shore, I
14 believe you said, for ten years?

15 A. Yes.

16 Q. Okay. And from your position as a
17 surveyor, are you familiar with other entrance roads for
18 other private subdivisions?

19 A. Yes.

20 Q. Have you had an opportunity to review
21 other entrance roads for other private subdivisions in the
22 past couple of months?

23 A. I have seen some roads going in other
24 subdivisions on the Eastern Shore, yes.

25 Q. All right. And did you take some

1 measurements with respect to ingress egress roads for
2 other private subdivisions?

3 MR. POULSON: Again, same objection
4 unless he can show the highway department issued permits
5 the same --

6 THE COURT: Sustain the objection.

7 MR. POULSON: -- unless you can show
8 that they were permitted.

9 BY MR. MCFARLAND:

10 Q. In your examination of other subdivision
11 roads used for ingress and egress for private
12 subdivisions, Mr. Latimer, did you make any examinations
13 as to whether they had obtained permits from the Virginia
14 Department of Transportation?

15 A. No, I have not.

16 Q. Did you have an opportunity to measure
17 Route 622?

18 A. Yes.

19 Q. And where did you measure Route 622,
20 Mr. Latimer?

21 A. Various places coming from where it
22 intersects Church Neck Road going back to the site we're
23 talking about.

24 Q. Okay. And what did you find was the
25 width of Route 622 at its entrance with Shooting Point?

1 A. Fourteen feet, I believe, in that
2 neighborhood.

3 Q. And what did you find with -- did you
4 have a chance to look at the shoulders on Route 622 in
5 that area?

6 A. Yes.

7 Q. And what did you find with respect to
8 the shoulders for Route 622 at the entrance area?

9 A. The shoulders were a couple of feet
10 wide.

11 Q. Were the shoulders consistent all the
12 way down Route 622 to the Church Neck entrance?

13 A. No.

14 Q. And were there points when you had to
15 search to find if there was any usable shoulder?

16 A. A few, not many. But there's a little
17 old creek down in there that the shoulder sloughs off.

18 MR. MCFARLAND: Okay. One moment, if I
19 might, Your Honor. That's all I have at this point, Your
20 Honor.

21 THE COURT: Questions?

22 MR. POULSON: Very briefly.

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CROSS-EXAMINATION

BY MR. POULSON:

Q. Just a couple of questions, if I may, please. You talked about that if you drew a plat, you would show the Bonifant survey, and you would also show a survey which you said based on the grant of easement and usage. Is that what you said?

A. Uh-huh. Yes.

Q. Usage when?

A. The day I got out there.

Q. But how do you know how long the usage has existed?

A. Well, it's -- look at a raod, and you just look at the tree line, and you look at the road, and you kind of -- as many as you look at, I have looked at, I can pretty well tell where the uses of the road has been.

Q. But can you tell for how long?

A. Woods grow out.

Q. But I believe you previously testified that the usage had changed from when you saw the poles down there in 2000 and when you went back sometime in 2001.

A. Well, the poles made the road move, people going down the road trying to dodge the poles.

Q. Well, the poles were on the outside,

1 were they not?

2 A. They were on both sides.

3 Q. They were on both sides. And people
4 move over to miss mud holes, don't think?

5 A. They move over to miss poles, too.

6 Q. Mr. Latimer, when it comes right down to
7 it, as a surveyor, usage has no affect whatsoever on a
8 plat unless it measures up to prescriptive use over a
9 required period of years, does it, sir?

10 MR. MORRIS: Your Honor, I'm going to
11 object to that question. It really calls for a conclusion
12 of law, I believe.

13 THE COURT: Well, I think it's a proper
14 question as an expert as far as a surveyor is concerned.

15 MR. MORRIS: In terms of the split, he
16 phrased the question --

17 THE COURT: It may not have been phrased
18 exactly the way it should have been, but I think the tenor
19 of the question was as a surveyor would view it.

20 THE WITNESS: Prescriptive right goes
21 with the usage.

22

23 BY MR. POULSON:

24 Q. But in order for that use to have --
25 usage to have any effect, it must measure up to

1 prescriptive use for the requisite number of years. Do
2 you agree with that theory?

3 A. Yes.

4 Q. Okay. Now, you do research when you do
5 a plat, do you not?

6 A. Yes.

7 Q. Okay. And you found a Bonifant plat.
8 You're familiar with that?

9 A. Yes.

10 Q. Okay. And that Bonifant plat, as we
11 talked about ad nauseam, it has courses and distances in
12 it?

13 A. Yes.

14 Q. And you've indicated this morning there
15 is nothing to indicate a change of course out near 622?
16 The lines continue on, right?

17 A. The graphic --

18 MR. MCFARLAND: I'm going to object to
19 that because there was testimony about that, and there
20 was --

21 THE COURT: Overrule the objection. Go
22 ahead.

23 BY MR. POULSON:

24 Q. The lines continue on?

25 A. Yes.

1 Q. And without any indicating course
2 change, correct?

3 A. Yes.

4 Q. Okay. And are you aware, sir, that the
5 1999, I believe October 1999 subdivision plat -- you've
6 seen that?

7 A. Yes.

8 Q. That shows the same points, and the same
9 courses, and the same distances as the Bonifant plat, does
10 it not?

11 A. Correct.

12 Q. Okay. And are you aware, sir, that
13 Shooting Point gave a deed of trust on a lot indicating
14 that the easement was as per the subdivision plat?

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

16 Q. You didn't find that in your research?

17 A. I don't recall that.

18 Q. Okay. Are you aware that there's been,
19 I believe, at least five deeds, and I may stand to be
20 corrected on that, but I think it's five -- five deeds out
21 subsequent to that deed of trust indicating that the
22 right-of-way is as per the subdivision plat?

23 MR. MCFARLAND: Well, I'm going to
24 object to that, Your Honor. It has a mischaracterization.

25 MR. POULSON: Well, we can read them and

1 see.

2 THE COURT: Wait a minute. Let me just
3 stop you. What's the mischaracterization?

4 MR. MCFARLAND: Well, I think what they
5 say is not exactly as Mr. Poulson just stated what the
6 deeds of trust says.

7 THE COURT: Let's pull them out and look
8 at them. I thought that's what they said.

9 MR. MCFARLAND: Maybe I'm confusing the
10 document.

11 MR. POULSON: Here is the Manetta deed
12 which is 20. Fifteen foot right-of-way between the
13 division of Shooting Point farm and Virginia State Route
14 622 as shown on said plat of survey.

15 BY MR. POULSON:

16 Q. Have you seen any of these deeds, sir?

17 A. No, sir.

18 Q. Would you agree as a surveyor that that
19 description ties down the course of the easement?

20 A. This deed, yes.

21 Q. Okay. And assuming all five deeds are
22 the same language, that pretty well ties it down, doesn't
23 it?

24 A. If I had to trace this deed, yes.

25 Q. You wouldn't feel very comfortable

1 showing it anywhere else and putting your stamp on it,
2 would you, Mr. Latimer?

3 MR. MCFARLAND: I'm going to object to
4 the form of the question, Your Honor.

5 THE COURT: Overrule the objection.

6 THE WITNESS: Am I suppose to answer
7 that?

8 THE COURT: Yes, sir.

9 THE WITNESS: Would I put my stamp on
10 this right-of-way?

11 BY MR. POULSON:

12 Q. Would you put your stamp on any other
13 right-of-way other than that right-of-way?

14 A. I would go back to what I originally
15 said. I would show both right-of-ways.

16 Q. In spite of the fact that the deed of
17 trust in five deeds out, you would show it another way?

18 A. These deeds were written after the plat
19 was made.

20 Q. Exactly, by your client Shooting Point
21 L.L.C.

22 A. But, I mean, I had nothing to do with
23 the writing of these deeds. These deeds are written from
24 the plat.

25 Q. And you wouldn't pay any attention to

1 them as a surveyor if you were doing a plat?

2 A. After the fact, yes, I would be looking
3 at this.

4 Q. Obviously, you would be looking at them.

5 A. Sure. I would --

6 Q. And today you wouldn't show any other --

7 MR. MCFARLAND: He should be able to
8 finish his answer, Your Honor. Mr. Poulson is cutting him
9 off.

10 THE WITNESS: I would still show both
11 right-of-ways as the usage, and the right-of-way of the
12 Bonifant, and call this right-of-way out that's in this
13 deed.

14 BY MR. POULSON:

15 Q. Well, would that lead to potentially
16 there being two right-of-ways?

17 A. There could be three.

18 Q. Could be three. So we could end up
19 having three right-of-ways in this case, even though
20 Shooting Point has conveyed five lots like that?

21 And you have indicated that usage, you
22 agree, usage means nothing unless it runs for a
23 prescriptive period and it's adverse?

24 A. It has to run with prescriptive time,
25 yes.

1 Q. And you have absolutely no evidence that
2 there's been any adverse use, or prescriptive use as to
3 what's on the ground, do you, sir?

4 A. I haven't been there that long.

5 MR. POULSON: All right. Thank you.
6 That's all I have.

7 THE COURT: Any redirect?

8 MR. MCFARLAND: Yes, Your Honor.

9

10 REDIRECT EXAMINATION

11 BY MR. MCFARLAND:

12 Q. First off, I thought Mr. Poulson was
13 just asking you about the usage for the easement. Doesn't
14 the 1979 Bonifant survey, isn't that simply a depiction of
15 usage in 1979, Mr. Latimer?

16 THE COURT: Are you cross-examining him?

17 MR. MCFARLAND: I'll rephrase. I
18 apologize.

19 BY MR. MCFARLAND:

20 Q. What does the 1979 Bonifant survey
21 represent, Mr. Latimer?

22 A. It's supposed to show the existing road
23 that's there, but --

24 Q. In other words, it shows usage?

25 A. It shows usage, but it's -- I don't feel

1 that the road was ever there where Bonifant set the pin in
2 the center line. I don't believe that road was ever
3 there. I always thought -- that road, to me, has always
4 been where it's at.

5 MR. POULSON: I am going to move to
6 strike that. That is just utter speculation. The man
7 hadn't been here but ten years, and wants to go back to a
8 '79 plat and say he don't believe it's ever --

9 THE COURT: It would have to be a little
10 more than speculation.

11 BY MR. MCFARLAND:

12 Q. Now, you've seen the grant of easement
13 in this?

14 A. Yes.

15 Q. With respect to the grant of easement
16 and the Bonifant survey, what's going to control in terms
17 of the location of the easement?

18 MR. POULSON: That's really a question
19 of law.

20 THE COURT: I think that's the ultimate
21 question, or one of the ultimate questions that the Court
22 has to answer.

23 MR. MCFARLAND: Well, I think as a
24 surveyor, Your Honor, he could say what he would use. I
25 mean, I'll rephrase.

1 THE COURT: Okay. Let's see what he has
2 to say. Go ahead.

3 BY MR. MCFARLAND:

4 Q. As a licensed surveyor, Mr. Latimer, if
5 you were shown the 1979 Bonifant survey, and the grant of
6 easement, and you were given the task of surveying the
7 right-of-way for this that's at issue here, which would
8 you place more reliance on?

9 A. There again, I'm going to say what I
10 know about roads, and I've seen roads, the road that's
11 there today as it's being used, I would use that as the
12 grant of easement of the road that's there. I would use
13 that road as the right-of-way also showing the Bonifant
14 survey.

15 MR. MCFARLAND: Now, I forget the exact
16 number, but it's the subdivision plat. 17?

17 BY MR. MCFARLAND:

18 Q. This keeps getting brought up. Let me
19 hand you what's been --

20 MR. POULSON: It's probably 15, Rob.

21 MR. MCFARLAND: There's 17.

22

23 BY MR. MCFARLAND:

24 Q. Let me hand you what's been marked as
25 Complainant's Exhibit 17. Do you recognize that,

1 Mr. Latimer?

2 A. I do.

3 Q. And what is it, sir?

4 A. It's the Shooting Point subdivision
5 plat.

6 Q. Mr. Poulson asked you if the Shooting
7 Point subdivision plat incorporates Bonifant. What else
8 does it incorporate, Mr. Latimer?

9 A. It incorporates -- it's got the
10 right-of-way on it, and it's got the whole farm.

11 Q. Okay. Let me direct your attention
12 to --

13 THE COURT: Isn't that one that has the
14 little squiggly lines out there that shows where the
15 actual track is? Is that the one we're talking about?

16 MR. MCFARLAND: No, Your Honor.

17 THE COURT: Well, what are you looking
18 for? Just tell him what you want him to point out.

19 BY MR. MCFARLAND:

20 Q. Does it incorporate the grant of
21 easement as recorded in the deed grant book in Northampton
22 County?

23 THE COURT: Does it?

24 MR. MCFARLAND: Yes.

25 THE COURT: Okay. We'll assume that it

1 does, if it is on the --

2 THE WITNESS: It's on a note in here,
3 yes. Deed book 179, page 29, fifteen foot right-of-way.

4 MR. MCFARLAND: Right. Okay. That's
5 all I have. Thank you.

6 THE COURT: Anything else?

7 MR. POULSON: Two questions.

8
9 RECROSS-EXAMINATION

10 BY MR. POULSON:

11 Q. Mr. Latimer, you can take the Bonifant
12 plat and basically scale off the curves from the original
13 plat, can you not, sir?

14 A. Yes, you could do that.

15 Q. Okay. And you have not looked at the
16 original plat in the clerk's office in Northampton?

17 A. Yes, I have.

18 Q. You have. Did you make any effort to
19 scale off the curves?

20 A. I didn't have anything to do with
21 withdrawing that plat, as I have testified earlier. Okay?

22 Q. So is your answer no?

23 A. My answer would be no.

24 Q. Okay. All right. And you agree that --
25 and I don't know all of these terms, radiuses, and

1 tangents, and arches, and whatever, but I take it you
2 surveyors can plot that curve by looking at the original
3 plat; is that correct?

4 A. You can assume that the original -- the
5 intent of the surveyor that drafted the lines was trying
6 to follow as best he could the road that's there.

7 Q. And you're telling us, as I understand
8 it now, that if you were going to do a plat of survey
9 here, you would use what is on the ground right now as a
10 opposed to the Bonifant survey line, and the subdivision
11 survey --

12 A. When you say right now, I mean, we're
13 going back to 1999, or are we talking about right now? I
14 mean, the road is all --

15 Q. Well, let's go in the year 2000.

16 A. I would use the road that's there.

17 Q. You would use the road that's there.

18 A. I would split the road that's there, the
19 usage of that road as best I could in the curves, and use
20 that as --

21 Q. Even though you have no evidence that
22 the usage has been established over any period of
23 requisite number of years?

24 A. No. The grant of easement -- the deed
25 book and the grant of easement was written up stating

1 where the road is.

2 Q. And then they came along with a '79 plat
3 that harnessed the easement, as the old expression goes,
4 did they not, courses, and distances?

5 A. They attempted to.

6 Q. Well, did they?

7 A. Well --

8 Q. I mean, they've got pins in the ground
9 marking the intersecting lines of the center of the
10 roadway where the curves are.

11 A. Right.

12 Q. And then they came along with the
13 subdivision plat in 1999?

14 MR. MORRIS: Your Honor, he keeps saying
15 "they."

16 MR. POULSON: Shooting Point L.L.C.

17 MR. MORRIS: But I think you're
18 referring to Bonifant, and I think there's a distinction
19 there that we are going to make later on in this case.

20 THE COURT: Well, I think the term
21 "they" is probably not -- why don't we just say exhibit
22 number so-and-so did this, exhibit number so-and-so did
23 that.

24 BY MR. POULSON:

25 Q. Shooting Point had a subdivision plat

1 prepared?

2 A. That they used the Bonifant survey --

3 Q. And they used the Bonifant survey?

4 A. Right.

5 Q. And you now understand that they gave at
6 lease one deed of trust out utilizing the subdivision
7 roadway as platted, correct?

8 A. Yes. I just saw it.

9 Q. And you understand that there is at
10 least five deeds out with the same prescription?

11 MR. LePAGE: Your Honor, we have gone
12 over this already.

13 THE COURT: We have. We have. No
14 question about it.

15 BY MR. POULSON:

16 Q. And you're telling the Court you would
17 use something else as a certified surveyor?

18 A. I would use the existing road that's
19 there.

20 THE COURT: Anybody else have any more
21 questions of Mr. Latimer?

22 MR. LePAGE: No, sir.

23 MR. MORRIS: No.

24 MR. MCFARLAND: No, Your Honor.

25 THE COURT: He did not prepare those

1 plats.

2 MR. MCFARLAND: Pardon?

3 THE COURT: He did not prepare those
4 plats. Remember that. He wants everybody to know that.

5 THE WITNESS: That's right, I did not
6 prepare those plats.

7 THE COURT: I know you didn't. All
8 right. Thank you very much, sir. You may step down.

9 MR. MCFARLAND: If I haven't, Your
10 Honor, let me move them into evidence.

11 THE COURT: They're all in.

12 All right. Where are we going to go
13 from here at our next meeting?

14 MR. MCFARLAND: The 21st, Your Honor.

15 THE COURT: Right. How many more
16 witnesses do you have?

17 MR. MCFARLAND: Two or three, Your
18 Honor.

19 THE COURT: Okay. Do you want to give
20 us a clue as to who they might be?

21 MR. MCFARLAND: Mr. Castioni, Your
22 Honor. Mr. Duff.

23 THE COURT: Okay.

24 MR. MORRIS: And Mr. Manetta.

25 THE COURT: And who?

1 MR. MORRIS: Mr. Manetta. He's a
2 property owner. Very short.

3 THE COURT: All right. So what are we
4 looking at time wise?

5 MR. MCFARLAND: Half a day, two-thirds,
6 Your Honor, at the most, I would think.

7 THE COURT: All right. And then have
8 you determined yet, Mr. Poulson, whether you're going to
9 have any rebuttal?

10 MR. POULSON: Judge, I haven't
11 determined yet, but what I'm thinking now it's going to be
12 very short from what I know right now.

13 THE COURT: Well, one thing that I think
14 that as much time and effort that you-all have spent on
15 this case, and as much evidence and testimony as we've
16 heard, I think it would be important for the fact finder
17 in this case to visit the area in question.

18 I think it would be appropriate to do
19 that, so let's think about that also on the 21st.

20 MR. MCFARLAND: That would be fine, Your
21 Honor.

22 THE COURT: And whoever wants to go can
23 go; whoever doesn't want to go, doesn't have to go. And
24 I'm -- quite frankly, I think you-all have done a good
25 job. You can almost picture it in the your mind now with

1 all of the pictures and descriptions that we've had.

2 But I think it would be appropriate to
3 go out and take a look at it. I might even bring a
4 fifty-foot tape to see if everybody was right.

5 MR. POULSON: Judge, you have to be sure
6 to read the smart end.

7 THE COURT: Do what?

8 MR. POULSON: You've always got to read
9 the smart end of the tape, because it's a hearsay
10 objection if you're holding the other end.

11 THE COURT: Depending on who wants to
12 hold it, we'll give somebody else the other end of the
13 tape.

14 All right. Thank you-all. I'll see you
15 a week from Thursday, I guess.

16 MR. POULSON: The 21st at ten o'clock.

17 (Whereupon, court recessed to reconvene
18 on June 21, 2001, at 10:00 a.m.)
19
20
21
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 17th 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

1 VIRGINIA:

2 IN THE CIRCUIT COURT OF NORTHAMPTON COUNTY

3
4 MARGARET WESCOAT, et al.,)

5 Complainants,)

6 v.)

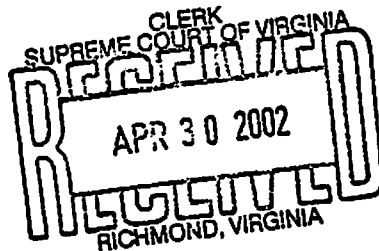
IN CHANCERY NO.
CH 01-02

7 SHOOTING POINT PROPERTY)

8 OWNERS ASSOCIATION, INC.,)

9 et al.,)

Respondents.)



VOLUME 5

TRANSCRIPT OF PROCEEDINGS

Eastville, Virginia

June 21, 2001

Before: THE HONORABLE FREDERICK B. LOWE.

Appearances:

JON C. POULSON, ESQUIRE
Three Cross Street
P. O. Box 478
Accomac, Virginia 23301
Counsel for Complainants

McGUIRE, WOODS, BATTLE & BOOTHE
By: ROBERT W. McFARLAND, ESQUIRE
9000 World Trade Center
Norfolk, Virginia 23510
Counsel for Defendant Shooting
Point, LLC

Filed: Feb. 26, 2002
Teste: [Signature]
Clerk
NORTHAMPTON COUNTY CIRCUIT COURT

1 Appearances (cont.):

2 THE MORRIS GROUP

3 By: DANIEL R. MORRIS, ESQUIRE
4 273 Granby Street, Third Floor
5 Norfolk, Virginia 23510
6 Counsel for Defendant Shooting
7 Point Property Owners Assoc.

8 ASSISTANT ATTORNEY GENERAL

9 By: TODD E. LePAGE, ESQUIRE
10 900 E. Main Street
11 Richmond, Virginia 23219
12 Counsel for Commonwealth
13 Transportation Commissioner/
14 Commonwealth Transportation
15 Board

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

I N D E X

| <u>WITNESSES</u> | <u>DIRECT</u> | <u>CROSS</u> | <u>REDIRECT</u> | <u>RECROSS</u> |
|------------------|---------------|--------------|-----------------|----------------|
|------------------|---------------|--------------|-----------------|----------------|

ON BEHALF OF THE DEFENDANT:

| | | | | |
|---------------------|----|----|----|--------|
| STEPHEN CASTIGLIONI | 13 | 48 | 89 | 97,101 |
|---------------------|----|----|----|--------|

| | | | | |
|-----------------|-----|-----|---------|-----|
| M. E. DUFF, JR. | 102 | 155 | 175,179 | 178 |
|-----------------|-----|-----|---------|-----|

| | | | | |
|-----------------|-----|---------|--|-----|
| JOHN L. MANETTA | 181 | 193,197 | | 202 |
|-----------------|-----|---------|--|-----|

| | | | | |
|----|------------------------------------|----------------------------|--------|----------|
| 1 | E X H I B I T S | | | |
| 2 | | | | |
| 3 | NO. | DESCRIPTION | MARKED | RECEIVED |
| 4 | <u>ON BEHALF OF THE PLAINTIFF:</u> | | | |
| 5 | 47 | Letter dated 2-28-00 | 62 | 62 |
| 6 | 48 | Memo dated 7-6-00 | 73 | 73 |
| 7 | 49 | Land Use 250, Retirement | 77 | 77 |
| 8 | | | | |
| 9 | <u>ON BEHALF OF THE DEFENDANT:</u> | | | |
| 10 | 15 | Two pictures | 24 | 24 |
| 11 | 16 | Aerial photograph | 132 | |
| 12 | 17 | Two aerial photographs | 133 | |
| 13 | 18 | Proposed plan | 142 | 142 |
| 14 | 19 | Proposed plan/aerial photo | 153 | 153 |
| 15 | 20 | Three photographs | 185 | 185 |
| 16 | 21 | Document | 192 | 192 |
| 17 | 22 | Videos | 205 | 205 |
| 18 | 23 | Aerial photo | 206 | 206 |
| 19 | | | | |
| 20 | <u>JOINT EXHIBITS</u> | | | |
| 21 | A | Interrogatories/responses | 212 | 212 |
| 22 | | | | |
| 23 | | | | |
| 24 | | | | |
| 25 | | | | |

TRANSCRIPT OF PROCEEDINGS

THE COURT: All right. Mr. McFarland, I guess we're ready for your next witness.

MR. McFARLAND: Thank you, Your Honor. Your Honor, before we begin a couple of preliminary matters, if I might.

THE COURT: All right.

MR. McFARLAND: When we were last together on June 12th, approximately a little more than a week ago, there was an issue as to -- we asked Mr. Lattimer and also Mr. Hodge certain questions as to the comparison of this entrance to other entrances for subdivisions on the Eastern Shore.

Mr. Poulson objected on the grounds that unless we could prove that those other entrances were also permitted, it was irrelevant, and the court sustained the objection.

I wanted it clear for the record the reason we attempted to offer that evidence was that part of the defense or part of the attack on the easement by the complainant is that the proposed use of the dominant estate is unsafe given the right-of-way.

And Ms. Benson, over our objection, was

1 permitted to offer certain testimony as to that, and
2 I believe their other engineer was as well. We don't
3 believe that that testimony was proper, but to the
4 extent that the court --

5 THE COURT: Excuse me a minute. We have
6 a different court reporter today.

7 (Court reporter was sworn.)

8 MR. McFARLAND: And as I said, the
9 complainant has offered evidence through Ms. Benson
10 and also through their engineer that our use of the
11 dominant estate would be unsafe, particularly given
12 the width of the right-of-way.

13 The purpose of my asking Mr. Hodge and
14 Mr. Lattimer about the comparison of this entrance to
15 other entrances they had personally inspected on the
16 Eastern Shore was to show that there are literally
17 dozens of private subdivisions on the Eastern Shore
18 that have entrances of similar or less width in terms
19 of ingress and egress and the route for the ingress
20 and egress, and that they have operated without
21 incident for years.

22 So it was offered to rebut that. I
23 understand that Mr. Lattimer was not able to say
24 whether those were permanent entrances.

25 THE COURT: Do you want to respond to

1 that, Mr. Poulson?

2 MR. POULSON: Judge, I'll just briefly
3 say one, there was no evidence that they operated
4 without incident.

5 But the whole point here was the mere
6 fact that they may be substandard and not comply with
7 the law does not excuse this particular entrance. I
8 think that was the main point that we were looking
9 at. We're looking at this entrance.

10 And again, it goes back to, you know,
11 there may be three speeders and the police may only
12 catch one, but there's nothing there to show that
13 VDOT had acted upon them and then granted entrance
14 permits.

15 THE COURT: I'm going to continue to
16 sustain the objection, Mr. McFarland, based upon the
17 fact that -- unless, of course, you can show that
18 they were properly permitted entrances. Otherwise, I
19 just don't think it's relevant.

20 MR. McFARLAND: All right. I appreciate
21 the court's ruling, and I'll note that so that we
22 don't rehash the same --

23 THE COURT: I'll note your exception for
24 the record.

25 MR. McFARLAND: Thank you.

1 THE COURT: All right. Who do we have
2 next?

3 MR. McFARLAND: One other matter, Your
4 Honor. This court indicated at the end of the last
5 day of trial on June 12th that it intended to conduct
6 a site visit today, I believe, after the --

7 THE COURT: If we get to it.

8 MR. McFARLAND: Okay. I had the
9 opportunity with my clients last night to go out to
10 the right-of-way. To get to the right-of-way, as the
11 court has heard, one travels Route 622.

12 It was immediately evident to us the
13 instant we turned onto Route 622 that both sides of
14 Route 622 have been bush-hogged. And they have been
15 bush-hogged down to the nub such that the appearance
16 of Route 622 as it was cut yesterday or the day
17 before -- and it is evident that the cutting was very
18 recent, because the cuttings are laying in the road.

19 It is evident that the cutting has
20 created an impression of Route 622 that does not
21 match how that state road has been used and kept
22 during the entire proceedings since my clients have
23 purchased their property and before. In fact, Route
24 622, the shoulders have been cut down to the absolute
25 nub to the extent that we found a broken bush-hog

1 blade.

2 Mr. Cumming, I believe, will state that
3 that cutting was not done by the Virginia Department
4 of Transportation. And it has created an improper
5 appearance.

6 As this court is well aware, one of the
7 considerations that the VDOT officials have testified
8 about is the width of Route 622 versus the width of
9 the easement and about the shoulders and lack
10 thereof. What has been done to Route 622, and we
11 believe by a private citizen, has been to alter the
12 appearance significantly.

13 Moreover, when we got to the easement
14 itself, it is apparent that since this trial has
15 began, the tenant farmer has plowed up to where the
16 Wescoats have improperly placed posts in the easement
17 such that prior usage of the easement has been
18 destroyed.

19 It has always been our position that the
20 location of the posts as placed by the Wescoats
21 earlier this year in February or so of 2001 does not
22 represent the true course of the easement as it has
23 been used. The court has even heard testimony as to
24 that and will hear further testimony.

25 What's been done since this trial began

1 is that the tenant farmer has plowed over existing
2 usage of the right-of-way, so that the only tracks
3 that now exist for the easement are essentially what
4 is between the posts, which is not the true course of
5 the easement.

6 THE COURT: All right. I'll keep all
7 that in mind at the appropriate time.

8 MR. McFARLAND: It represents, Your
9 Honor, a destruction of evidence. It represents an
10 alteration of the site so as to create a false
11 impression as to the width and usage of the
12 right-of-way. It is a trespass and an interference
13 with our easement, and I submit it is absolutely
14 improper.

15 Moreover, I would note that it appears
16 crops have been planted in what has been the
17 easement, including rye grass that certainly was not
18 there when we began this trial.

19 THE COURT: All right. I'll keep all
20 that in mind.

21 MR. POULSON: Judge, I would like to
22 comment on that, if the court would give me about 30
23 seconds.

24 THE COURT: Sure.

25 MR. POULSON: Number one, I think

1 probably Mr. Jones is probably the one that cut along
2 the road, not something that he has not done before
3 and has done it in the past.

4 In fact, it was my understanding that
5 VDOT was supposed to cut it the other day and didn't
6 do it. It was scheduled according to somebody with
7 VDOT and didn't do it.

8 But in any event, 622 is there. They
9 have a 30-foot easement, and it doesn't change
10 anything. You've got the right to ride on the
11 shoulder and so forth whether the grass is cut or
12 not.

13 Now, as far as the entranceway itself, I
14 haven't seen it. It's my understanding that probably
15 Mr. Jones has gone ahead and planted his soy beans.
16 He is in possession of the land, not Mr. Wescoat and
17 not Shooting Point, LLC. He has a right to tend his
18 land, as he has done.

19 And it has not been plowed. I think
20 probably the only thing that he's done is drilled in
21 his soy beans, which is a no-till procedure anyway.
22 And he's not a party to this suit. He is in
23 possession. He is not required to do anything one
24 way or the other.

25 We have not changed anything on the

1 easement, and there's a million pictures in evidence
2 anyway one way or the other. Of course, we've talked
3 about, quote, usage for several days, which really
4 has no significance.

5 THE COURT: Given the evidence that has
6 been presented by way of video as well as by way of
7 still photography, I think that in the event the
8 court determines that it would be appropriate to view
9 the actual situation on the ground, that the court
10 will be able to determine what, if any, alteration
11 has been made.

12 I don't think it will be a problem, Mr.
13 McFarland.

14 MR. MCFARLAND: Well, I appreciate that,
15 Your Honor, and we certainly can point it out. But
16 the other aspect is Mr. Jones has planted and plowed
17 based on what we believe is an absolute incorrect
18 calculation of the property lines. We think he is
19 now --

20 THE COURT: Well, that, of course, has
21 yet to be determined. And if you do prevail, I
22 suppose that if, in fact, as Mr. Poulson opined that
23 soy beans have been planted there and if, in fact,
24 you do prevail in your argument, then I would just
25 simply say that part of those soy beans are going to

1 be lost. But that's, I don't think, neither here nor
2 there at this stage in the proceedings.

3 All right. Anything else before we get
4 on to the next witness?

5 MR. McFARLAND: No, Your Honor.

6 THE COURT: All right. Who do we have
7 next?

8 MR. McFARLAND: Steve Castiglioni, Your
9 Honor.

10 THE COURT: All right.

11 THE BAILIFF: What was his name again?

12 MR. McFARLAND: Steve Castiglioni. I
13 believe that's a correct pronunciation. The G, I
14 believe, is silent the way he spells it, Your Honor.

15 THE COURT: Okay.

16

17 STEPHEN L. CASTIGLIONI, called as a
18 witness by and on behalf of the Defendants, being
19 first duly sworn, testified as follows:

20 DIRECT EXAMINATION

21 BY MR. McFARLAND:

22 Q. Good morning. Would you state your full
23 name, please, sir?

24 A. Stephen Louis Castiglioni.

25 Q. And would you spell the last name,

1 please?

2 A. Yes, C-a-s-t-i-g-l-i-o-n-i, and that's
3 Louis with L-o-u-i-s.

4 Q. And your address, Mr. Castiglioni?

5 A. 5516 Old Providence Road, Virginia
6 Beach.

7 Q. And your educational background, sir?

8 A. I graduated from Virginia Tech with my
9 Bachelor of Science in civil engineering in 1977.

10 Q. And what has your professional career
11 been since graduating from Virginia Tech in '77?

12 A. I've been working for consulting
13 engineering firms ever since I graduated. I worked
14 for J. K. Timmons and Associates in Richmond for four
15 years, and then I began work at Baldwin and Gregg in
16 1981.

17 Q. And what is your current position at
18 Baldwin and Gregg, sir?

19 A. I am the vice president.

20 Q. And how long have you held the position
21 of vice president?

22 A. Since 1984.

23 Q. And what does that mean when you say
24 you're vice president of Baldwin and Gregg?

25 A. I'm in charge of all the civil

1 engineering activities.

2 Q. Do you have an area of specialty or
3 expertise?

4 A. Generally specializing in transportation
5 and site development and drainage projects.

6 Q. And have you had experience with
7 permits --

8 A. Yes, sir.

9 Q. -- for entrances?

10 A. Entrance permits, yes.

11 Q. Are you licensed as a professional
12 engineer in the Commonwealth of Virginia?

13 A. Yes. I received my license in 1981.

14 MR. McFARLAND: We would offer Mr.
15 Castiglioni as an expert, Your Honor, in the field of
16 civil engineering.

17 THE COURT: Any questions?

18 MR. POULSON: No voir dire, Your Honor.

19 THE COURT: All right. Go ahead.

20 BY MR. McFARLAND:

21 Q. Mr. Castiglioni, when were you first
22 contacted regarding Shooting Point?

23 A. It was back in January of 2000.

24 Q. And who contacted you, sir?

25 A. Lemoin Cree, who was the developer.

1 Q. Had your firm already been involved with
2 Shooting Point to your knowledge when you were
3 contacted?

4 A. I found out that we had done a division
5 plat for the property.

6 Q. Now, before January of 2000 had you ever
7 served as a consulting engineer on any projects
8 involving the Virginia Department of Transportation
9 and the issuance of entrance permits?

10 A. Yes, sir.

11 Q. Approximately how many?

12 A. Dozens. I can't count them there's so
13 many.

14 Q. And how long have you been doing
15 entrance permit work?

16 A. Since I began my career.

17 Q. When you were contacted by Shooting
18 Point, Mr. Castiglioni, what, if any, documents were
19 you given?

20 A. We had received a map of the property,
21 the survey subdivision plat through my survey
22 department, and the easement agreement, I guess it
23 was, for the 15-foot access easement.

24 And then I also received a copy of a
25 letter that VDOT had written to the county, and I

1 guess the developer had received a copy of this,
2 saying that they would need to have a permit.

3 Q. Did you conduct any publications from
4 the Virginia Department of Transportation in
5 conjunction with this assignment?

6 A. Did I --

7 Q. Review any VDOT materials?

8 A. Yes, sir.

9 Q. What did you review and why?

10 A. Well, the first one was the subdivision
11 -- I mean, yeah, the subdivision street standards was
12 one, but the key one was the Minimum Standards for
13 Entrances to Highways.

14 Q. Do you have a copy of that with you --

15 A. Yes, I do.

16 Q. -- this morning?

17 A. Yes. This is the standards for highway
18 entrances, and this is the subdivision street
19 requirements.

20 Q. All right. Let's take the first one
21 that you referenced, the subdivision -- can you read
22 the title again?

23 A. Yes, sir.

24 Q. Actually, the other one is the one I
25 meant. I apologize.

1 A. That's all right.

2 Q. The title of that document is what?

3 A. Minimum Standards of Entrances to State
4 Highways.

5 MR. MCFARLAND: And I think that's
6 already in evidence, Your Honor.

7 THE COURT: All right.

8 BY MR. MCFARLAND:

9 Q. From your understanding of the entrance
10 for Shooting Point, what is the applicable
11 regulation?

12 A. Well, it's --

13 Q. And where is it found?

14 A. It's new in this standards. This is
15 1998. It's Standard Private Subdivision Road and
16 Street Entrances on page 29.

17 Q. What is the other VDOT manual that you
18 have there, Mr. Castiglioni? And what, if any, is
19 its significance or relevance to the Shooting Point
20 entrance?

21 A. Subdivision Street Requirements, and
22 this applies to subdivision projects particularly
23 when you're going to have a road that's taken into
24 the state system.

25 So this wasn't applicable from that

1 standpoint, but we do look at it in terms of the
2 entrance, seeing what requirements are mentioned
3 regarding the entrance.

4 Q. I take it you've used those manuals many
5 times before you were contacted by Shooting Point?

6 A. Yes, sir.

7 Q. From your experience as a civil engineer
8 with the use of those manuals, what is their purpose?

9 MR. POULSON: Judge, let me raise an
10 objection for the record. He is referring to the
11 Subdivision Street Standards, but in two breaths ago
12 he said that they're not applicable. So if they're
13 not applicable, they're not applicable.

14 THE COURT: Well, I think he is probably
15 right. I think the only one we're dealing with is
16 the minimum standards, isn't it?

17 MR. McFARLAND: It is, and perhaps let
18 me just for background ask another question to
19 clarify.

20 BY MR. McFARLAND:

21 Q. Why did you review the subdivision
22 manual, Mr. Castiglioni? And what, if any,
23 significance does it have for the Shooting Point
24 entrance?

25 A. Well, I believe in the beginning of this

1 manual it refers to other manuals that VDOT has for
2 pertinent issues.

3 Q. By this manual you're referencing which
4 one, sir?

5 A. The entrance manual.

6 Q. Okay. And so because that referenced
7 other manuals you did what?

8 A. We reviewed that. There were several
9 other applicable documents that I didn't bring with
10 me. One is the Standards for Pavements on
11 Subdivision Streets, and that was referred to in some
12 of the letters from VDOT as well.

13 Q. All right. Now, what has your
14 experience been with respect to the minimum standards
15 manual as to its use and interpretation by the
16 Virginia Department of Transportation?

17 A. Generally, they're a guideline for us to
18 use when we were preparing permit documents or
19 drawings to be submitted to VDOT.

20 Q. What is the overriding purpose of the
21 standards manual?

22 A. Well, as it indicates in the beginning,
23 it's really to come up with an entrance that is safe
24 for the public to use.

25 Q. Did you and your firm conduct any

1 investigation as to whether the Virginia Department
2 of Transportation had ever required an entrance
3 permit in Northampton County for an exempt private
4 subdivision before Shooting Point?

5 MR. POULSON: Objection, materiality.

6 MR. McFARLAND: I think it's relevant to
7 know, Your Honor.

8 THE COURT: He may be able to link it
9 up. I'm going to overrule the objection.

10 MR. POULSON: Note our exception,
11 please.

12 A. You asked if --

13 BY MR. McFARLAND:

14 Q. Did you and your firm conduct an
15 investigation as to whether the Virginia Department
16 of Transportation had ever required an entrance
17 permit for a private exempt subdivision in
18 Northampton County before Shooting Point?

19 A. We did ask several people about that,
20 and to my knowledge it had never been applied before.

21 MR. POULSON: He has no foundation to
22 express that knowledge or lack thereof.

23 THE COURT: The first objection is
24 sustained. Go ahead.

25 MR. McFARLAND: If I can try to overcome

1 the --

2 THE COURT: From what he's said now,
3 it's just through hearsay. Go ahead.

4 BY MR. MCFARLAND:

5 Q. Was that investigation conducted on your
6 behalf by your engineering firm?

7 A. Not by our firm, no.

8 Q. What did you do, Mr. Castiglioni, in
9 addition to reviewing the VDOT manuals and the
10 documents provided by Shooting Point?

11 A. Well, we were asked to be involved in
12 the preparation of a drawing to submit to VDOT for
13 the permit application. That's one of the
14 requirements in the application.

15 So we, as a first step, requested the
16 owner to have us allow our survey firm to go out and
17 survey the entrance so we had some geometry in which
18 to work out the entrance layout.

19 Q. And did you yourself go out to the
20 entrance, sir?

21 A. Yes.

22 Q. When did you do that?

23 A. It was in the beginning of February of
24 last year.

25 Q. February of 2000?

1 A. Of 2000.

2 Q. All right. And what did you find from
3 your personal inspection as you went out to the
4 entrance?

5 A. Well, the first thing we noticed was
6 that someone had put up a sign that said that the
7 easement begins here, 15-foot easement begins here
8 with an arrow pointing to the edge of a wooden sign,
9 indicating that from there towards the woods line was
10 the location of this 15-foot easement.

11 THE COURT: Do you have these two
12 pictures?

13 MR. POULSON: Yes, sir. And we have an
14 objection, because basically they're immaterial.
15 Because the fact there is a sign up and two stakes
16 placed there by John Wescoat does not signify the
17 legal easement, sir, so the picture has no
18 materiality.

19 THE COURT: Well, they are with respect
20 to the extent that they show what this gentleman
21 described he saw when he went out there, to some
22 extent relevant. I'll go ahead and staple them
23 together.

24 I can't remember what exhibit we're up
25 to.

1 MR. MCFARLAND: I was trying to
2 remember, Your Honor, and I --

3 THE COURT: Does anybody know?

4 THE BAILIFF: Exhibit 15.

5 THE COURT: All right. It will be
6 Defendant's No. 15.

7 (The two pictures were marked
8 Defendant's Exhibit No. 15 and received
9 in evidence.)

10 MR. MCFARLAND: Thank you, Your Honor.

11 BY MR. MCFARLAND:

12 Q. Mr. Castiglioni, let me hand you what's
13 been marked as Defendant's Exhibit 15, which is two
14 photographs stapled together. Looking at the top
15 photograph, do you recognize that, sir?

16 A. Yes. That was the sign that was there.

17 Q. And to get to the right-of-way, did you
18 have to travel down Route 622?

19 A. Yes. You have to travel north on 622.

20 Q. And what, if anything, did you notice on
21 Route 622 as you traveled to the right-of-way?

22 A. Well, one important consideration is the
23 very sharp left turn in the existing roadway that
24 turns to the left. We found it to be about a 75-foot
25 radius on that turn.

1 It is a super-elevated turn, so all of
2 the drainage in that right-of-way at the turn flows
3 towards the west side of the roadway.

4 Q. And look at the second picture. Does
5 that also accurately depict the site of the
6 right-of-way and its intersection with Route 622 when
7 you were there in February of 2000?

8 A. Yes, it does. It's a straight alignment
9 going from 622 north into the easement.

10 Q. All right. Now, did you have occasion
11 to measure the width of Route 622 when you were out
12 there in February of 2000, sir?

13 A. Yeah. I had a tape measure, and I
14 measured the pavement from grass to grass of about 13
15 and a half feet.

16 Q. And what, if anything, did you notice as
17 to the --

18 MR. POULSON: Again, materiality Judge.
19 Objection.

20 THE COURT: Go ahead.

21 BY MR. MCFARLAND:

22 Q. What, if anything, did you notice as to
23 the shoulders in the area that you measured on Route
24 622?

25 A. Well, they were built up somewhat and

1 very narrow, and then they drop off to a ditch as you
2 go to the south away from the entrance.

3 Q. What else did you see, Mr. Castiglioni,
4 when you went out to the right-of-way in February of
5 2000?

6 A. Well, the drive or the dirt drive into
7 the Shooting Point property is very narrow in terms
8 of the actual traveled path, and it's very close to
9 the woods that are to the east of that easement.

10 The property within the easement drains
11 -- generally slopes into the adjacent farm fields, so
12 there's good drainage.

13 Q. Now, you have noted the sign that is
14 found in those photographs, Defendant's Exhibit 15.
15 Did you note any stakes that were placed in the
16 right-of-way when you went there in February 2000?

17 A. There was a stake next to the sign and
18 then another one up approximately 15 -- or exactly 15
19 feet away.

20 Q. And where was the location of the stakes
21 in relation to how that right-of-way had obviously
22 been traveled?

23 A. The traveled way was directly in between
24 the stakes.

25 Q. Did you travel the right-of-way yourself

1 in your vehicle?

2 A. Not at that time, but later I did.

3 Q. When you traveled the right-of-way, were
4 you able to do so without coming into contact with
5 any overhanging trees?

6 A. On the easement, no. There were trees
7 that forced us to move towards the field, toward the
8 left side or the west side of the easement.

9 Q. And when was that, sir, when you had to
10 move? What was the date that this occurred?

11 A. Most recently it was this morning,
12 actually.

13 Q. What did you notice as to the site
14 distances for vehicles exiting from the right-of-way
15 on the easement?

16 A. Exiting going south?

17 Q. Yes.

18 A. You have a clear line of sight to the
19 south until the turn in the -- the bend in the road
20 of about 750 to 1,000 feet. And then to the west it
21 was a straight alignment shot of over 1,000 feet.

22 We actually measured the distance to a
23 vehicle 550 feet away and had a clear line of sight
24 between the vehicle and the entrance in both
25 directions.

1 Q. Now, why did you measure from 550 feet?

2 A. Well, 550 feet is the site distance
3 required for a 55-mile-an-hour speed limit, and we
4 wanted to see in the worst possible case if it had
5 been posted for 55 would there be adequate site
6 distance, which there is.

7 Q. Now, as a professional engineer what
8 would you expect, given the curve that you mentioned
9 a few moments ago, to be the more normal speed for
10 vehicles traveling Route 622 and approaching the
11 easement?

12 A. Well, in my professional judgment that
13 curve would require you to slow down to a speed of
14 about 15 to 17 miles an hour based on curves that are
15 provided by VDOT in their standards book.

16 Q. Incidentally, Mr. Castiglioni, the
17 right-of-way is how long, sir?

18 A. The easement?

19 Q. Yes.

20 A. From 622 to the Shooting Point property
21 is almost right around 1,500 feet.

22 Q. And that translates into what in terms
23 of miles or tenths?

24 A. It's three-tenths of a mile, roughly.

25 Q. And do you have a recommended speed for

1 vehicles traveling the easement?

2 MR. POULSON: Judge, that's totally
3 immaterial, what a recommended speed that an engineer
4 may have for people traveling the easement. Mr.
5 Wescoat's tenant farmer, he goes 60 miles an hour if
6 he wants to on the roadway, as can Mr. Wescoat.

7 THE COURT: I really don't think it
8 makes any difference, Mr. McFarland.

9 MR. McFARLAND: Well, it has to do with
10 the follow-up question, Your Honor, if I might.

11 THE COURT: Well, why don't you ask the
12 follow-up question first, and then I'll see whether
13 or not it's relevant.

14 MR. McFARLAND: Very well.

15 BY MR. McFARLAND:

16 Q. Assuming a speed of 15 miles an hour on
17 the easement, how long would it take a vehicle to
18 traverse the easement at 15 miles per hour?

19 A. Well, I've done the math on that, and
20 it's about 67 seconds.

21 MR. POULSON: Did you say 67?

22 A. 67 seconds, just over a minute from one
23 end to the other.

24 BY MR. McFARLAND:

25 Q. What other factors, Mr. Castiglioni, did

1 you observe and consider as to whether this would be
2 a safe entrance for a permit?

3 A. Well, besides site distance, which is
4 the key important element, overall safety of the
5 intersection, the capacity of the receiving road and
6 traffic volumes on that road, as well as traffic
7 volumes that might be generated by Shooting Point.
8 And then drainage is another concern.

9 Q. Let's take them in turn. What did you
10 find out in terms of -- what did you personally
11 observe in terms of traffic on Route 622 itself?

12 A. Well, on three trips to the site myself
13 I've never seen another vehicle coming out of 622 or
14 in any direction. The traffic volumes that VDOT has
15 performed in 1996, I believe, was about 25 vehicles
16 per day on the average, average daily count they call
17 it.

18 Q. And you understand there are 18 lots on
19 the property?

20 A. That's right.

21 Q. As a civil engineer with your experience
22 in permits and transportation, what would you expect
23 to be the average number of trips per lot for this
24 community?

25 A. Well, there's two parts to that

1 question, I think. VDOT standards on an average --
2 for an average lot, they say to use ten vehicles per
3 day. That's actually on the high side of what the
4 Institute of Transportation Engineers recommends for
5 residential. So that would equate to about 180
6 vehicles per day.

7 The Institute of Transportation
8 Engineers also looks at traffic volumes for different
9 types of properties. I understand this property
10 would be, well, mostly for retirees, and retirement
11 communities generally have a much lower traffic
12 volume, between five and seven vehicles per day.

13 Q. All right. Let's for a moment take the
14 highest VDOT number, which I believe is ten trips.

15 A. Ten per day per lot.

16 Q. That gets us 180 trips; correct?

17 A. Right.

18 Q. Generated from the subdivision?

19 A. Yes, sir.

20 Q. And then I think you testified that your
21 research indicated something in the neighborhood of
22 25 vehicles per day on Route 622?

23 A. Right.

24 Q. Which I think gives us a math in the
25 range of 205 total vehicles coming into contact with

1 the entrance on Route 622; correct?

2 A. That's right.

3 Q. How does that classify in terms of
4 heavy, low, high, moderate or whatever volume for
5 traffic?

6 A. Well, that actually falls below the
7 lowest range for VDOT. Their lowest range is from
8 zero to 250 vehicles per day is the lowest
9 classification of a road in the state system.

10 Q. Did you also note what, if any, other
11 businesses or residences were to the right of the
12 Shooting Point entrance if one is standing in the
13 entrance?

14 THE COURT: Can we all stipulate that
15 the only residence there is Mr. Wescoat's property?

16 MR. POULSON: Yes, sir.

17 MR. McFARLAND: That's fine.

18 THE COURT: So that we don't have to ask
19 that question again.

20 MR. McFARLAND: That's fine, Your Honor.

21 BY MR. McFARLAND:

22 Q. Does that factor in at all in terms of
23 the safety of the entrance?

24 A. If there were other entrances
25 intersecting at the same point, you would factor that

1 in, yes.

2 Q. In terms of drainage, Mr. Castiglioni,
3 what did you find from your observations and your
4 work as to the Shooting Point entrance?

5 A. Because of the sharp curve the pavement
6 is super-elevated, which means that it all slopes
7 towards one side or to the west side of the road away
8 from the entrance.

9 So the entrance itself actually has an
10 ideal situation for drainage. There was no need to
11 have roadside ditches right at the entrance. There's
12 no need to have a culvert under the entrance in order
13 to carry the drainage away.

14 Q. And assume with me that the entrance of
15 the easement is paved. How, if at all, does that
16 affect drainage?

17 A. There would be a very slight increase in
18 runoff, but it would be very slight, because the
19 ground already there is somewhat packed down from the
20 heavy usage.

21 Q. Any other factors that you looked at and
22 considered from your visit in terms of safety and use
23 of the entrance?

24 A. Well, yeah. We considered what would
25 happen if two vehicles were to be passing each other

1 or approaching each other at the entrance, and we
2 considered the fact that this would be a very rare
3 occasion.

4 Because even during the peak hour, which
5 is generally 10 to 12 percent of the total daily
6 traffic, there might only be 18 to 20 vehicles
7 approaching that entrance during the peak hours, so
8 that's less than one every three minutes. And so
9 it's very rare that two vehicles would ever probably
10 meet each other on the entrance.

11 Q. If two standard size sedans or two
12 sedans met each other on the entrance, and by that I
13 mean a Ford Taurus and a Mercury Marquis or a Honda
14 Accord or something of that nature, can two sedans
15 pass each other on the right-of-way?

16 MR. POULSON: Judge, can we have a
17 little bit better foundation as to whether this
18 gentleman even knows the width of a standard sedan?

19 THE COURT: Well, I don't want to cut
20 into the way you're trying your case, Mr. McFarland.
21 But I think that we established a long time ago that
22 two sedans could probably make it, could make it,
23 even established that an SUV and a tractor-trailer
24 could make it, but it would only have three inches of
25 clearance.

1 I mean we've been down this road. I
2 think all of those things are pretty well
3 established.

4 MR. McFARLAND: All right. I don't mean
5 to replot, but at the same time, Your Honor, as the
6 court is well aware, I need to make sure the record
7 is complete with the evidence that we feel is
8 necessary.

9 THE COURT: I was going to say replowed,
10 but I hesitated to do that.

11 MR. McFARLAND: It was not a deliberate
12 pun, Your Honor, but it perhaps fits the
13 circumstances.

14 THE COURT: All right. Go ahead.

15 BY MR. McFARLAND:

16 Q. Was there any condition that you were
17 aware of in writing that required a tractor-trailer
18 and an SUV to be able to pass at the entrance?

19 A. No. There was a letter from the VDOT
20 resident's office that said two vehicles needed to be
21 able to pass.

22 And they also said one of the other
23 conditions that they would be looking for in the
24 permit application was that a tractor-trailer should
25 be able to get off of the pavement on Route 622, out

1 of the pavement safely in case another vehicle might
2 be approaching.

3 Q. And accordingly, is that why that's
4 depicted on the entrance application?

5 A. Yes, sir. We wanted to indicate that a
6 tractor-trailer could pull off, and we showed a stop
7 bar on the entrance drive far enough back to allow a
8 tractor-trailer to pull off the road completely.

9 Q. What was the purpose of the stop bar,
10 Mr. Castiglioni?

11 A. Essentially to be a location for --

12 MR. POULSON: I hate to keep objecting,
13 but a stop bar, again the stop bar has no materiality
14 in this case one way or the other. Obviously, a stop
15 bar is not applicable to anybody, especially Mr.
16 Wescoat and his tenant's use of the property. It
17 means nothing.

18 MR. McFARLAND: It's shown on the
19 application, Your Honor, and I think he can describe
20 it.

21 THE COURT: I understand that, but I
22 really think he's right. I don't think it means
23 anything.

24 MR. McFARLAND: I guess if they want to
25 ignore it, Your Honor, that's their --

1 THE COURT: I think so. Go ahead. Next
2 question.

3 BY MR. MCFARLAND:

4 Q. Did there come a time, Mr. Castiglioni,
5 when based on your inspection of the property, your
6 review of documents, and your review of the VDOT
7 manuals that you prepared a permit application?

8 A. I'm sorry. Could you repeat that?

9 Q. Sure. Did you prepare a permit
10 application for the entrance?

11 A. Yes. We prepared a drawing to be
12 submitted with the permit application.

13 Q. Let me hand you what's been marked and
14 introduced into evidence as Plaintiff's Exhibit 28,
15 Mr. Castiglioni. Do you recognize that, sir?

16 A. Yes. This is the permit that was issued
17 by VDOT to Shooting Point with attachments.

18 Q. And do you recognize the attachments,
19 sir?

20 A. Yeah. These are subsequent
21 correspondence between us and VDOT and their
22 responses.

23 Q. And does what's been introduced as
24 Plaintiff's Exhibit 28 also depict the drawings that
25 you prepared?

1 A. Yes, it does.

2 Q. Now, I believe that there were initially
3 submitted two drawings, a plan A and a plan B?

4 A. Yes, sir.

5 Q. If you can find the plan A that's dated
6 July 28th, 2000?

7 A. Yes, I have that.

8 Q. Okay. What is that depicting, Mr.
9 Castiglioni?

10 A. This is the actual permit application
11 drawing indicating how the entrance geometry would be
12 configured in relationship to Route 622.

13 Q. Does that drawing show the intersection
14 of the easement with Route 622?

15 A. Yes, it does.

16 Q. And how was that determined, sir?

17 A. That was based on our field surveys,
18 locating the stakes, as well as the alignment of the
19 built-up edge of road use.

20 Q. I take it that drawing does not contain
21 a metes and bounds description for the location or
22 the intersection of Route 622 and the easement?

23 A. No, it doesn't.

24 Q. From all the permits that you've done,
25 would it be typical for you to do a metes and bounds

1 description for that kind of application?

2 A. Not for something of this nature.

3 Q. Does the drawing, though, accurately
4 show the intersection of Route 622 and the easement?

5 A. Yes, it does.

6 Q. Does the drawing in plan A use any of
7 the adjoining landowner's property for the 15-foot
8 easement?

9 MR. POULSON: I'm going to object to
10 that as something apparently the court is going to be
11 deciding at some point in time.

12 THE COURT: Well, I think that's
13 probably true, Mr. McFarland.

14 MR. McFARLAND: I think as an engineer,
15 Your Honor, as the person who prepared the drawing he
16 can say --

17 THE COURT: Well, the point of the
18 matter is that one of the issues in this case is the
19 location, is it not?

20 MR. McFARLAND: That appears to be what
21 it is.

22 THE COURT: I suppose if he wants to say
23 in his opinion it doesn't, then that's okay, as long
24 as you understand that that may or may not be true
25 depending on where the court determines that the

1 easement is located ultimately in this case.

2 MR. MCFARLAND: Right. Your Honor, I
3 understand that one of the issues the complainant is
4 trying to raise is the location of the right-of-way.

5 But there has been -- let me state for
6 the record there has been no testimony proffered to
7 date by complainant that the right-of-way as depicted
8 on that diagram or any other one uses any of Mr.
9 Wescoat's property.

10 THE COURT: Okay. As long as we all
11 understand where we're going, and the case is not
12 over. Mr. Poulson may very well have a smoking gun
13 waiting in the wings to come in and rebut that.

14 MR. POULSON: I think Mr. Lattimer has
15 indicated that the center line of the Bonifant survey
16 is clearly not within the July 28th drawing.

17 THE COURT: There's some confusion
18 there, but at any rate, go ahead.

19 BY MR. MCFARLAND:

20 Q. From your engineering work done for this
21 application, Mr. Castiglioni, does the drawing
22 depicted in plan A use any of the adjoining
23 landowner's property for the 15-foot right-of-way?

24 A. No. We did not have to go outside the
25 easement to use -- or the adjoining property to use

1 the easement.

2 Q. Does the drawing in plan A incorporate
3 all of the safety factors that we've been discussing?

4 A. Yes, it does.

5 Q. Is there also a reference made on the
6 drawing to a warning sign on Route 622?

7 A. Yes. We have recommended a maximum safe
8 speed of 15 miles an hour with the standard highway
9 arcing left arrow approximately 700 feet in advance
10 of the curve.

11 Q. Now, was there a cover letter that was
12 prepared for the application?

13 A. I believe so. Yes, there was.

14 Q. And we don't need to belabor this and go
15 through it point by point, but does the cover letter
16 address the concerns that Mr. Cumming had previously
17 raised as to the entrance?

18 A. Yes. On page 2 we addressed these five
19 factors that he requested.

20 Q. From your experience with numerous
21 entrance permits previously and your expertise as a
22 civil engineer, to the extent that a vehicle had to
23 wait on Route 622 while another vehicle was exiting
24 from the easement and given the character of Route
25 622 and its location and the traffic volume, do you

1 believe that presents any particular safety hazard?

2 MR. POULSON: Judge, objection. It's
3 against the law for a vehicle to stop on the highway.

4 THE COURT: Well, to the extent that he
5 can testify that it presents a safety hazard, I
6 suppose he can testify to that. It's a different
7 argument as to whether or not it's against the law.
8 But anyway --

9 MR. LePAGE: Your Honor, I don't believe
10 it is against the law to stop on the highway. You
11 have to stop on the highway if there is a wreck, and
12 it's not --

13 MR. POULSON: Well, but we don't have a
14 wreck here. You cannot generally stop on the
15 highway, Mr. LePage. That's just in the case of an
16 emergency, and this is not an emergency.

17 THE COURT: Well, generally speaking I
18 think he is correct.

19 MR. McFARLAND: I agree generally
20 speaking, Your Honor.

21 BY MR. McFARLAND:

22 Q. But in the event that a vehicle has to
23 wait for a vehicle to pull out of the right-of-way,
24 from your experience as a civil engineer and your
25 review of the easement, does that present any

1 particular safety hazard?

2 A. Well, no, because we allowed for that in
3 the location of the stop bar to allow a vehicle to
4 get completely out of the right-of-way -- or out of
5 the traffic way on 622 safely.

6 Q. Now, the application for the entrance
7 permit also contained a plan B, Mr. Castiglioni?

8 A. Yes.

9 Q. And I don't want to belabor it, but what
10 was the purpose in submitting plan B?

11 A. Plan B was essentially a proffer by
12 Shooting Point to VDOT in the event that VDOT were to
13 obtain additional right-of-way on 622.

14 Currently, it's a 30-foot right-of-way,
15 15 foot on either side of the center line of the
16 road, and their current standards are usually to have
17 a minimum 50 foot right-of-way.

18 In the event that they were to obtain
19 additional right-of-way, Shooting Point proffered to
20 widen the radius on their entrance to allow for a
21 little more radius within the right-of-way.

22 Q. And we've heard some testimony, I
23 believe, there was also a correction as to certain
24 ministerial mistakes that were on some of the
25 drawings?

1 A. Yes. There were two corrections that we
2 made.

3 Q. Let's take them in turn. I believe the
4 first one was by letter of October 3rd?

5 A. Yes.

6 Q. What was the purpose of the October 3rd
7 letter, Mr. Castiglioni?

8 A. We had noted in our drawing of plan B
9 that the alignment wasn't the same as the alignment
10 for plan A. This is because we had looked at
11 different scenarios and looking at different options,
12 and that subsequently was included incorrectly.

13 So we submitted the revised plan B using
14 the same alignment which was the alignment of plan A
15 following the existing drive path.

16 Q. So that's correcting the alignment with
17 respect to the 50-foot right-of-way document?

18 A. Right, only in the proper drawing.

19 Q. And then was there also a submission in
20 November of 2000?

21 A. Right. After VDOT approved that
22 correction, then we noted -- it was pointed out that
23 we had shown the easement center line call-out that
24 was incorrect, so we corrected that on both plan A
25 and plan B.

1 Q. And when you say the center line
2 call-out, can you show where you're referencing on
3 the revised plan A and plan B?

4 A. Yeah. On revised plan A and plan B we
5 put an arrow to the actual center line of the
6 easement at the top of both drawings indicating the
7 actual center line of the easement being halfway
8 between the two sides of the easement.

9 Q. Does that in any way affect the location
10 of the easement at its intersection with Route 622?

11 A. No, because that was set by the existing
12 field conditions and also our survey data.

13 Q. Does it in any way affect the width of
14 the easement?

15 A. No. The width of the easement is still
16 15 feet, and it still has the same alignment straight
17 -- basic straight alignment intersecting with Route
18 622.

19 Q. Is the center line even required to be
20 shown in a permit application drawing, Mr.
21 Castiglioni?

22 A. No, it's not generally shown.

23 Q. Mr. Castiglioni, from your professional
24 experience as a civil engineer and your visits to the
25 property, can fire trucks safely traverse the 15-foot

1 easement?

2 A. Yes, they can get down there. We used a
3 standard Federal Highway Administration template for
4 a fire truck vehicle of the size that we were aware
5 of on the Eastern Shore, and we found it to be able
6 to not only go down the straight-of-way sections but
7 around the curves as well.

8 Q. How about standard trucks?

9 A. We looked at what they refer to --

10 MR. POULSON: I would object, the fact
11 that I don't know what a standard truck is.

12 THE COURT: I don't either, whether it's
13 a tractor-trailer or a bread truck.

14 BY MR. MCFARLAND:

15 Q. Before we get to a tractor-trailer, is
16 there another dimension truck such as we see, a
17 delivery truck?

18 A. Yeah. We refer to it as a single-unit
19 or SU type of truck, and we checked that as well.

20 Q. What is the width of that vehicle, those
21 vehicles?

22 A. Seven or eight foot max.

23 Q. Did you examine the ability of a, you
24 called it a single --

25 A. SU.

1 Q. -- SU vehicle to traverse the easement?

2 A. Right.

3 Q. And what did you find, sir?

4 A. That it was able to go around the curves
5 and the straight-of-ways.

6 Q. How about with respect to a
7 tractor-trailer?

8 A. We did look at a WB-40 and a WB-50 type
9 tractor-trailer as designated by the Federal Highway
10 Administration.

11 Q. And what would the length of those
12 vehicles be, sir?

13 A. They're maximum eight foot by 40- to
14 50-foot trailers.

15 Q. And what did you find with respect to
16 their ability to traverse the easement?

17 A. They were just barely able to make the
18 turns in the easement.

19 Q. Mr. Castiglioni, does the Shooting Point
20 entrance as depicted in the application and the
21 drawings that you prepared conform to the Virginia
22 Department of Transportation entrance requirements?

23 A. Does this comply? Yes, I think it does.

24 Q. Okay. And Mr. Castiglioni, as a
25 licensed professional engineer and given your

1 involvement with Shooting Point, is the entrance safe
2 for use as a means of ingress and egress to Route 622
3 for Shooting Point residents and guests?

4 A. Yes, I think so.

5 Q. And is it also safe as a means of
6 ingress and egress for users of Route 622?

7 A. Yes.

8 MR. MCFARLAND: One moment, if I might,
9 Your Honor.

10 That's all the questions I have, if you
11 would answer any questions that Mr. Poulson and any
12 other respondents may have.

13 CROSS-EXAMINATION

14 BY MR. POULSON:

15 Q. Mr. Castiglioni, on your drawing this
16 55-foot long tractor and trailer that you've got on
17 here, do you know the width of a tractor and trailer
18 is only eight feet, sir?

19 A. Yeah, that is -- I think that's a legal
20 limit on the width.

21 Q. Does that include the mirrors?

22 A. No.

23 Q. It doesn't include the mirrors?

24 A. No, not usually.

25 Q. Not usually. So the actual width ends

1 up most times well over nine and a half feet, does it
2 not, with your mirrors?

3 A. It would vary. I don't think -- that
4 would be the absolute max.

5 Q. Have you ever measured one?

6 A. Yes.

7 Q. How long ago?

8 A. About a year ago.

9 Q. At the Ford plant?

10 A. Yeah. How did you guess?

11 Q. How wide was it?

12 A. It was an eight-foot vehicle.

13 Q. And how wide were the mirrors?

14 A. I didn't measure the mirrors.

15 Q. You didn't measure the mirrors?

16 A. No.

17 Q. Okay. Now, tell me this, if you will,
18 please. We've got this, according to your drawing,
19 eight foot by 50-foot, 55-foot wide tractor and
20 trailer setting in this entrance. What happens when
21 it gets down to the first turn?

22 A. He has to make a sweeping turn. I
23 mean --

24 Q. Can he make the turn?

25 A. Yeah. We checked that out with the

1 templates we have.

2 Q. With templates?

3 A. Yes.

4 Q. Have you seen the video of a 59-foot
5 tractor and trailer trying to maneuver down the
6 easement?

7 A. No, I haven't.

8 Q. You haven't see that?

9 A. No.

10 MR. MCFARLAND: Well, I'll object, Your
11 Honor, because that video doesn't depict the course
12 of the easement as we believe it exists.

13 THE COURT: Well, it's the same
14 situation as we talked about before, Mr. McFarland.
15 It may or it may not depict the course of the
16 easement. We don't know. Let's go ahead.

17 BY MR. POULSON:

18 Q. But you have not seen that?

19 A. No.

20 Q. So if this 55-foot-long tractor and
21 trailer, eight plus feet wide runs down to that first
22 turn and can't get rid of it, how does it get out of
23 this easement?

24 A. How does it get out?

25 Q. How does it get out?

1 A. You mean you're assuming he can't get
2 around --

3 Q. Yes. I'm assuming he can't get through
4 there, can't make the turn.

5 A. Well, he would have to back out then.

6 Q. He would back out, and we would have a
7 very significant problem at the entrance as to the
8 other vehicles using 622, wouldn't we?

9 A. Assuming he couldn't make the turn.

10 Q. Assuming he couldn't make the turn you
11 would agree with that, that it would be a significant
12 problem at the easement entrance?

13 A. If there was another vehicle there, yes.

14 Q. Well, I mean do we assume there's not
15 going to be any vehicles there?

16 A. Well, you've assumed that he can't make
17 the turn, and I think that our templates --

18 Q. Your template says he can --

19 MR. McFARLAND: Well, could he finish
20 his answer? Mr. Poulson is cutting him off. Let him
21 finish his answer.

22 THE COURT: Well, I think he was
23 finished. Go ahead.

24 BY MR. POULSON:

25 Q. That's by your templates?

1 A. The Federal Highway Administration
2 templates, yes.

3 Q. Obviously, you haven't conducted any
4 experiments down on the property or observations as
5 to a tractor and trailer being able to get around it?

6 A. No.

7 Q. Now, on these drawings, the initial
8 drawing, the easement center line shown on the July
9 28th drawing, okay -- see where we're talking about
10 there?

11 A. Yes, where it says easement center line.

12 Q. Yes, sir. Now, that is actually the
13 Bonifant center line, is it not, from your
14 understanding?

15 A. Well, at the time we weren't sure what
16 that was, but subsequently, yes, that ties into a pin
17 that we believe was the original Bonifant easement.

18 Q. Bonifant center line, and that's what
19 you showed on the July 28th drawing.

20 MR. McFARLAND: For the record, you're
21 talking about plan B?

22 MR. POULSON: No, I'm talking about
23 plan A.

24 A. Plan A?

25 BY MR. POULSON:

1 Q. I'm just concerned with plan A, and
2 that's what you showed on the drawing?

3 A. It was on there, yes.

4 Q. And obviously, your entranceway does not
5 line up with the center line of the Bonifant plat;
6 correct? Do you understand that?

7 A. Yes.

8 Q. And then you changed it on the, I
9 believe September -- look at the September 27th
10 drawing A, if you will. It's several pages back.
11 Have you got that?

12 A. No.

13 Q. Keep flipping.

14 MR. POULSON: Mr. McFarland, did you
15 move in all of those or just -- they all should be
16 there together.

17 A. I've got it.

18 BY MR. POULSON:

19 Q. Have you got it?

20 A. Yeah.

21 Q. And on your September 27th drawing you
22 still show a pin, I believe, marking the Bonifant
23 pin; is that correct? Is that what is shown there?
24 It says pin, parentheses, F?

25 A. Yes, F.

1 Q. Okay. But what you've done on this
2 drawing is basically changed the center line of the
3 easement as shown in the drawing; correct?

4 A. Right, to follow the course of the
5 traffic way.

6 Q. To follow the course of the traveled
7 way?

8 A. Right.

9 Q. To follow the course of where John
10 Wescoat put stakes and a sign?

11 A. Right.

12 Q. Is that what you were doing?

13 A. They corresponded with the stakes and
14 sign that he had put out.

15 Q. You have seen the survey, have you not,
16 the Bonifant survey in your investigation?

17 A. Yes, the plat of that.

18 Q. You've seen your subdivision plat --

19 A. Yes.

20 Q. -- that you all prepared? And both of
21 them have courses and distances on them, do they not?

22 A. Yes, they do.

23 Q. And you would agree that the road does
24 not follow the courses and distances of the Bonifant
25 and your subdivision survey that you all did?

1 A. The existing traveled pathway doesn't
2 follow the Bonifant course way, yes.

3 Q. Nor your subdivision plat?

4 A. The subdivision only depicted the course
5 of the Bonifant taken from the deed. It wasn't
6 surveyed in the field.

7 Q. But are you aware that your plat, your
8 subdivision plat had courses and distances on it and
9 markers for the easement?

10 A. Yeah, taken from that plat.

11 Q. Taken from the Bonifant survey?

12 A. Right.

13 Q. And are you aware that there were deeds
14 that subsequently utilized that subdivision plat as
15 showing the easement as well as the lot itself?

16 A. I'm not --

17 Q. You haven't seen that?

18 A. I'm not familiar with that.

19 Q. I can understand that. Let me have that
20 please, sir. Thank you.

21 Now, your plan A had a condition to it,
22 did it not, as to the course of the easement?

23 THE COURT: You're talking about the
24 original plan A?

25 MR. POULSON: Yes, sir, of July 28.

1 A. I'm not sure what you're referring to.

2 BY MR. POULSON:

3 Q. Okay. If I may, please, it says up here
4 after plan A: Course of 15-foot easement should
5 servient and dominant parcel owners agree to same.

6 A. Yeah.

7 Q. It says that, doesn't it?

8 A. Yes.

9 Q. Are you ever aware of any such
10 agreement?

11 A. Well, the agreement that I'm aware of is
12 the original easement grant.

13 Q. The original easement grant?

14 A. 1974.

15 Q. But this doesn't say anything about
16 1974. This says should the dominant and servient
17 owners agree to the course as you have shown it;
18 correct? Is that correct?

19 A. Yes.

20 Q. Okay. Now, let me show you, if I may,
21 please, the September 27, 2000, plan A, and do we
22 still have the same condition on there?

23 A. Yes.

24 Q. Same conditions on there. In other
25 words, it's good if the servient and dominant owners

1 agree to the course of the easement.

2 MR. McFARLAND: I'm going to object to
3 the characterization. It says what it says, Your
4 Honor.

5 A. Yeah, that's the same note.

6 BY MR. POULSON:

7 Q. Same note. Okay. Now, as far as plan B
8 is concerned, your proffer, you can find nothing to
9 indicate that plan B, this 50-foot expansion is
10 anywhere in the highway department plans; correct?

11 A. It is not in their six-year plan.

12 Q. And to use the old phrase, with that
13 area down there down at Church Neck Road, it's the
14 proverbial chance in you know what for that ever to
15 become a 50-foot road, isn't it, sir?

16 A. Well, there's always --

17 MR. McFARLAND: That calls for him to
18 grossly speculate, Your Honor.

19 MR. POULSON: He's testified that he
20 submitted a plan and a proffer.

21 THE COURT: Overrule the objection.

22 BY MR. POULSON:

23 Q. You would agree with that, wouldn't you?

24 A. There's always a chance that the other
25 property owners might try to develop their property,

1 and the county could require them to grant additional
2 right-of-way.

3 Q. That other property owners may want to
4 develop. Now, you've seen Mr. Cumming's letter of
5 April 4, have you not? I believe it's part of that
6 permit exhibit there.

7 And you're aware of paragraph two that
8 indicates that as a condition of that permit there
9 had to be verifiable proof that Shooting Point had
10 the right to use the land basically that connects to
11 the entrance?

12 A. Yes.

13 Q. You understand that?

14 A. Right.

15 Q. And would you further agree, sir, that
16 even your original plan A showing the center line of
17 the Bonifant shows that it doesn't connect, the
18 proverbial railroad tracks?

19 A. I think that there is an easement
20 according to the grant of easement, so the actual
21 location of that easement in relationship to the
22 roadway is a survey issue.

23 So based on the findings of our
24 surveyors, that drawing does depict what we believe
25 to be the actual location of that entrance.

1 Q. But your drawing of July 28th shows a
2 different center line, does it not?

3 A. It shows the line of the Bonifant plat,
4 yes, sir.

5 Q. All right. Which you take the trouble
6 to show as the center line on this drawing, and it
7 obviously does not connect up.

8 A. Right.

9 Q. Correct?

10 A. Yes, and that is the center line from
11 the 1979 easement.

12 Q. As well as your survey plat, as well as
13 your subdivision plat; correct?

14 A. Yes.

15 Q. In responding to Mr. Cumming's letter
16 you indicated on page 2, and I'll read you this if
17 you need it, sir: It is my understanding that you
18 are requiring the following for the Shooting Point
19 entrance:

20 One, two vehicles should be able to
21 enter and exit the entrance simultaneously. Two, a
22 tractor and trailer should not have to wait on the
23 surface of 622 while another vehicle is exiting the
24 entrance.

25 That was two things you wrote back. Do

1 you want to see this?

2 A. No.

3 Q. And you further wrote after several
4 other things that the entrance designs we have
5 submitted herewith address all of these requirements,
6 and you think they do?

7 A. Yes.

8 Q. But your tractor and trailer is
9 predicated on a vehicle having to stop up the road on
10 the easement before it gets to the entrance?

11 A. Yeah. In order for it to get completely
12 out of the 622 pavement, yes.

13 Q. And then it would have, even by your
14 width, some three inches of clearance at least as
15 between the vehicles?

16 A. For an SUV or a very large vehicle, yes.

17 Q. Your one that you've shown on there is
18 six feet, nine inches, I believe --

19 A. Right.

20 Q. -- is what you're showing there.

21 A. Correct.

22 Q. And I believe you've previously told me
23 that in your professional opinion you need at least
24 what, one foot between vehicles to have any kind of
25 safe passage at all?

1 A. That would be a recommendation for
2 vehicles passing each other at 15 miles an hour.

3 Q. At 15 miles an hour?

4 A. Yeah.

5 Q. Well, how much do they need at ten miles
6 an hour?

7 A. I think they just need enough to be able
8 to pass without hitting each other. I think there is
9 a comfort level that they would need. I'm saying in
10 my opinion about a foot would be good.

11 Q. And that would be even at ten miles an
12 hour, wouldn't it, frankly? I mean you're not going
13 to tell us three inches is sufficient, are you, Mr.
14 Castiglioni, with no tolerance on the outsides?

15 A. Well, if they didn't hit each other,
16 then I guess it would be enough.

17 Q. You're going to tell us that three
18 inches is sufficient safety-wise in your professional
19 opinion as an engineer, sir, traffic engineer?
20 You're going to tell us that?

21 A. If they're going very slow and you have
22 very large vehicles, which would be a rare occasion,
23 they may have to get that close.

24 Q. They may have to get that close?

25 A. Yeah.

1 Q. But obviously, it wouldn't be safe to
2 get that close.

3 A. It's not recommended.

4 Q. It wouldn't be safe to be that close,
5 would it, sir, quite frankly?

6 A. Not going any speed.

7 Q. Now, let me show you -- within your file
8 do you have your letter of February 28th, 2000, to
9 Mr. Cree?

10 A. Yes, if it was the --

11 Q. And you were to report back to Mr.
12 Cree.

13 MR. POULSON: We would offer that,
14 Judge, as our next --

15 THE COURT: Where are we?

16 THE BAILIFF: No. 47.

17 THE COURT: Plaintiff's 47.

18 (The letter dated 2-28-00 was marked
19 Plaintiff's Exhibit No. 47 and received
20 in evidence.)

21 A. I don't know what I did with that. What
22 was the date of that?

23 BY MR. POULSON:

24 Q. February 28th, sir.

25 THE COURT: Baldwin and Gregg to Mr.

1 Cree dated February 28th of 2000.

2 A. I thought I did, but I don't see it.

3 BY MR. POULSON:

4 Q. You gave it to me, so hopefully, you've
5 got a copy of that.

6 A. Well, I may have taken it out of here
7 inadvertently.

8 Q. It's got a fax note on the top of it.

9 A. No, I don't seem to have that.

10 Q. Okay. Let me let you use that one.

11 Now, this letter originated after you had come over
12 and investigated, reviewed your documents, and looked
13 at the easement, did it not, and the entrance?

14 A. Yes.

15 Q. And as you said, you've been doing this
16 kind of work for about 20 years?

17 A. Yes.

18 Q. Now, in your letter, and I direct your
19 attention to page 1 in the interest of time, you
20 initially told Mr. Cree that Kenny Wright, the
21 Assistant Resident Engineer, was wrong in his
22 recommending or saying that the required entrance was
23 basically the one shown on page 15, i.e., what you
24 refer to as a commercial entrance.

25 A. If you read his description, that's what

1 it seemed to be implying was a commercial entrance as
2 on page 15 of the standards.

3 Q. Page 15. Okay. Now, of course -- and
4 let me digress just a second here. All of these
5 entrances, even the private subdivision entrances are
6 coined as commercial entrances, are they not?

7 A. Well, I don't know if they specifically
8 refer to a subdivision entrance as a commercial
9 entrance.

10 Q. Do you have your book, your minimum
11 standards book?

12 A. Yeah.

13 Q. And look at page 2, if you will, in the
14 interest of time.

15 A. All right.

16 Q. Under the first regulation, second
17 definition from the bottom, private subdivision road
18 or street.

19 A. Yes.

20 Q. And they indicate there that it requires
21 what they refer to as a commercial entrance permit.

22 A. Yes. It requires a commercial, what
23 they call a commercial entrance permit.

24 Q. So they're all commercial entrance
25 permits. It's just the different ones that may be

1 applicable to the situation.

2 A. Right.

3 Q. Now, at the time that you said that,
4 were you aware that at that point the declarations
5 provided for a country inn with as many as ten
6 bedrooms and eating facilities for transients?

7 A. No, I wasn't aware of that.

8 MR. McFARLAND: Your Honor, Mr. Wright
9 has testified he wasn't aware of those either, so
10 this is irrelevant.

11 MR. POULSON: It's not irrelevant.

12 MR. McFARLAND: Mr. Wright didn't
13 reference commercial -- he indicated he didn't
14 reference commercial entrance in his initial
15 correspondence with Shooting Point because of the
16 country inn. He admits he made an initial error.

17 THE COURT: I understand. It's still a
18 proper question on cross-examination. Go ahead.

19 BY MR. POULSON:

20 Q. You weren't aware of that, were you?

21 A. No.

22 Q. And you were not aware that there could
23 be as -- that people could have a four-bedroom bed
24 and breakfast on at least that one lot? You weren't
25 aware of that either, were you?

1 A. A bed and breakfast, four-bedroom? You
2 mean it's --

3 Q. For transients.

4 A. No.

5 Q. Okay. Would you agree, sir, that if
6 such uses were permitted, that it would take the page
7 15 commercial entrance?

8 A. I think that would be completely up to
9 the county to determine that.

10 Q. I'm talking about the highway department
11 now. I'm not talking about the county.

12 A. I don't know if that's classified as
13 commercial or not.

14 Q. You don't know whether a country inn
15 with ten bedrooms with eating and overnight
16 facilities for transients is commercial?

17 A. Is it similar to a hotel or something?
18 I mean I've never even heard of such a thing.

19 Q. It appears to be.

20 A. If there had been something like that,
21 it probably would have been a -- I can't conjecture
22 how VDOT would look at that.

23 Q. Well, how would you look at it with your
24 20 years? Page 15?

25 A. No, absolutely not.

1 Q. You would just call it a private
2 subdivision for homes?

3 A. I think we would have to defer to
4 whatever the county would allow them. This is more
5 of a planning issue than a VDOT entrance issue.

6 Q. Now, you continue on in your letter, if
7 you will, please, and then I believe you expressed
8 the opinion that Mr. Wright is wrong, that this is
9 not a page 15, this is a page 25 -- or I mean a page
10 29.

11 A. Page 29, yes.

12 Q. And then I believe you further concluded
13 in that letter and say this, that the easement is
14 still of insufficient width to meet these
15 requirements. Do you say that?

16 A. Where are you reading that?

17 Q. I think it's on page 2.

18 MR. McFARLAND: I'm sorry, which page?

19 MR. POULSON: I believe page 2.

20 THE COURT: Do you know where it is, Mr.
21 Poulson? I mean we can sit here all day and have him
22 look for it. If somebody knows where it is, let's
23 point it out.

24 BY MR. POULSON:

25 Q. Top of the paragraph on page 2.

1 A. Okay, correct. It says: Although the
2 Shooting Point entrance could more closely conform to
3 the residential requirements, page 9, the VDOT
4 publication than to the commercial requirements cited
5 by Mr. Wright noted on page 15, because easement is
6 still of insufficient width to meet these
7 requirements.

8 Q. And then you further go on to express
9 the opinion that you think VDOT can do modifications;
10 correct?

11 A. Yes.

12 Q. And I believe you had previously told us
13 that you think that is under page 4 of the regulation
14 which deals with appeals?

15 MR. McFARLAND: Told us what?

16 MR. POULSON: On page 4 of the
17 regulation, appeal procedure.

18 A. Yes, as well as on page Roman numeral
19 VI, which is that the district administrator or
20 engineer has the power to issue alterations.

21 BY MR. POULSON:

22 Q. Of course, that's not part of the
23 regulation, is it?

24 A. It's in the introduction.

25 Q. It's part of the booklet, but not the

1 regulation.

2 MR. McFARLAND: Well, to use Mr.
3 Poulson's statement, that's a question that the court
4 is going to have to determine as to what the --

5 THE COURT: Go ahead. Next question.
6 Go on.

7 BY MR. POULSON:

8 Q. Now, after getting through that you
9 start talking about the situation with traffic going
10 west, do you not?

11 A. On 622?

12 Q. Yes, with anybody coming out of the
13 easement road.

14 A. Okay.

15 Q. And the first thing that you indicate is
16 that any traffic coming out of the easement and going
17 west is going to have to go into the oncoming traffic
18 lane.

19 A. That would assume that the adjacent
20 property owner were to erect some kind of barricade
21 or barrier to prevent people from using the current
22 traveled way.

23 Q. From going on his land?

24 A. Yeah. Well, the area that's already in
25 use that people make turns there now.

1 Q. What people make turns there?

2 A. Well, whoever is making the track marks
3 on the ground.

4 Q. Including Mr. Wescoat?

5 A. Yeah. He has a right to use his own
6 land.

7 Q. And then you suggest further, do you
8 not, that this is a problem, and one way to solve it
9 is possibly putting up a no right turn there by VDOT?

10 A. If VDOT were to raise an objection, that
11 was a possible solution, to have a no right turn.

12 Q. But -- I'm sorry. Go ahead and finish
13 your answer.

14 A. That we could proffer that a no right
15 turn sign could be put there, that residents of
16 Shooting Point would not be allowed to turn right.

17 Q. Well, of course, your letter indicates
18 no right turn, period, which you opine would create
19 quite a hardship on the Wescoats.

20 A. Well, they have a right to use their own
21 property.

22 Q. In other words, drive off their own road
23 and drive in the field to make the right-hand turn?

24 A. Well, use the existing area of travel
25 that is outside of the easement.

1 Q. And then you go one step further, do you
2 not, sir, and suggest that, well, maybe the ultimate
3 solution would be for VDOT to condemn part of Mr.
4 Wescoat's property, so a proper right-hand turn could
5 be made there, did you not?

6 A. This is a possibility. If VDOT were to
7 require that situation, that would probably be the
8 only -- one solution.

9 Q. So you recognized that a right-hand turn
10 was a significant problem with this entranceway.

11 MR. McFARLAND: I'll object to the
12 characterization, Your Honor. That's not what the
13 letter reflects.

14 A. It's not a significant problem. I mean
15 it's not uncommon for people to go out into the other
16 lane in making turns when there is no traffic.

17 BY MR. POULSON:

18 Q. But you still further went on and
19 suggested that maybe we need a new right turn there,
20 and maybe it will have to come down to VDOT
21 condemning Mr. Wescoat to get what they want there to
22 make a safe entrance.

23 A. If VDOT felt that was a problem.
24 They're the ones who issue the permits.

25 Q. Now, you basically ended up concluding

1 that the only way to get a permit would be for VDOT
2 to modify the standards as the width was not
3 sufficient.

4 A. No. They would have to -- they could
5 alter it if it didn't meet that 24-foot width
6 requirement.

7 Q. Now, you say Baldwin and Gregg has been
8 in this business a long time?

9 A. Baldwin and Gregg was founded in 1908.

10 Q. And you've been in it 20 years, getting
11 these permits and familiar with the regulations and
12 so forth?

13 A. Yes.

14 Q. But in spite of that, Shooting Point
15 went out and got Jack Hodge, didn't they?

16 A. I understand that they hired him as an
17 advisor, consultant.

18 Q. And Jack Hodge basically as an engineer,
19 I guess -- does he have the same designation as you
20 do, or do you know?

21 A. Yes, he is a professional engineer.

22 Q. Just as you are?

23 A. Yes.

24 Q. And you're experienced in these things,
25 these matters. Do you know why they got Jack Hodge,

1 Mr. Castiglioni?

2 A. My understanding is it's his long
3 knowledge and history with VDOT.

4 Q. His long knowledge and history with
5 VDOT?

6 A. Right.

7 Q. Now, you've also -- and I show you first
8 for identification a memo from you to Mr. Cree dated
9 July 6, 2000, which included a letter to one Gary C.
10 Byler dated June the 28th. That came from you, did
11 it not?

12 A. Yes.

13 Q. And you drafted the letter.

14 THE COURT: Is it 48, Mr. Clerk?

15 THE BAILIFF: No. 48.

16 MR. McFARLAND: I would object to this,
17 Your Honor, as irrelevant. That's not what we
18 submitted to VDOT.

19 THE COURT: Overruled.

20 (The memo dated 7-6-00 was marked
21 Plaintiff's Exhibit No. 48 and received
22 in evidence.)

23 BY MR. POULSON:

24 Q. Now, I believe you have previously
25 indicated, Mr. Castiglioni, that Mr. Byler was going

1 to serve as a liaison with VDOT?

2 A. That was my understanding, that he would
3 be possibly making the actual permit application.

4 Q. Well, you said liaison, I believe was
5 your word.

6 MR. MCFARLAND: What was his word? He
7 didn't use that word on direct examination, I'm
8 pretty certain of that.

9 MR. POULSON: He used the word in
10 deposition, Mr. McFarland.

11 MR. MCFARLAND: Well, you can use a lot
12 of words in deposition. It's irrelevant.

13 A. Well, basically, he would be the person
14 to deliver the permit.

15 BY MR. POULSON:

16 Q. You do agree you used the word liaison
17 in your deposition?

18 A. I may have, but liaison being --

19 Q. And you drafted the letter for Mr.
20 Byler. Do you have a copy of that with you, sir?

21 A. Yes, I do.

22 Q. Now, if you will look at that, and we'll
23 try to move through it hurriedly, if we may, please.

24 Now, you knew who Mr. Byler was, did you not?

25 A. I know he is an attorney. That's all I

1 know.

2 Q. Did you know that he was a commissioner
3 on the Chesapeake Bay Bridge Tunnel Commission?

4 A. No.

5 Q. You didn't know that?

6 A. No.

7 Q. Now on page 2 of the letter I believe
8 you mention, among other things, that under this
9 proposal, under this permit that you all were going
10 to submit that a tractor and trailer would not have
11 to wait on 622 while another vehicle was exiting the
12 entrance?

13 A. Yes.

14 Q. And on page 3, if you will, please, I
15 believe you further note that the proposed drawings
16 would require a modification of the VDOT standards?

17 A. What paragraph was that?

18 Q. I believe it would be the fourth
19 paragraph down, or third paragraph down, I guess.

20 Q. Although both plans A and B require, you
21 say, a small modification of the entrance standards.

22 A. Okay. Yeah, I see that.

23 Q. And you then go ahead further and talk
24 about because right turns to the west by vehicles
25 exiting the entrance are prohibited. That's what the

1 plan was.

2 A. Yes.

3 Q. Okay. Now, you talk about also that
4 this is going to be a -- your understanding is this
5 is a retirement community?

6 A. That these -- yeah. Predominantly
7 people who have bought the lots have been people who
8 are going to build retirement homes, to my
9 understanding.

10 Q. That's what you were told?

11 A. That's what I've been told.

12 Q. Did you ever read the declarations?

13 A. I didn't read all of them, no.

14 Q. So you don't know whether there was any
15 restrictions in the declarations on that or not?

16 A. No.

17 Q. Were you aware that at least one party
18 had bought two lots and had contracted for a third
19 lot?

20 A. I had heard that someone had bought
21 three lots, yes.

22 Q. Were you aware that there were two
23 couples who had each bought a lot and bought a third
24 lot together?

25 A. Yeah, I thought I heard that some people

1 had two lots and some had three lots, so there were
2 actually fewer buildings being built.

3 Q. Now, you used some figures for, I
4 believe, retirement communities in coming up with
5 your traffic count; is that correct?

6 A. Yes, that traffic volumes for retirement
7 communities are less than the average volumes on
8 residential.

9 Q. And that came, I believe, from what, the
10 Institute of Transportation Engineers?

11 A. Yes, sir.

12 MR. POULSON: What's the next exhibit,
13 Your Honor?

14 THE BAILIFF: It will be No. 49.

15 THE COURT: Plaintiff's No. 49. It's
16 entitled Land Use 250, Retirement Community.

17 (The land use document was marked
18 Plaintiff's Exhibit No. 49 and received
19 in evidence.)

20 BY MR. POULSON:

21 Q. Now, were you aware in formulating your
22 proposed counts that there was farming and traffic by
23 the Wescoats on their parcel?

24 A. That their vehicles could use this
25 easement as well?

1 Q. Yes.

2 A. Yes, I believe that would be part of the
3 28 count, average count for the street.

4 Q. Even to the vehicles going to the right,
5 going back to the Wescoat parcel or to the Wescoat
6 house?

7 A. I'm not sure where they took the counts
8 on Route 622.

9 Q. So you're not sure, then. Okay. And do
10 you know what the count would be in the summertime
11 from the farm use by Mr. Jones, the tenant farmer on
12 Wescoat? Do you have any idea?

13 A. No.

14 Q. In arriving at your figures as to your
15 count, were you aware that there could be guest
16 cottages on Shooting Point for like domestic help?

17 MR. McFARLAND: Your Honor, I'm going to
18 object to the mischaracterization. He hasn't given a
19 count. He just said he's looked at it from the
20 transportation engineering standards, and they
21 indicate it's less for retirement communities.

22 I specifically didn't have him give a
23 count. And my direct examination used VDOT standards
24 for the trips per day, and the maximum, ten per day
25 was VDOT uses.

1 THE COURT: I think we all understand
2 that. Go ahead.

3 BY MR. POULSON:

4 Q. Now, this is what you used, was it not,
5 sir?

6 A. This is something that I provided a copy
7 of this to Lemoin to show that -- to give him an idea
8 of what traffic volumes are for retirement
9 communities.

10 Q. And as far as a retirement community, of
11 course, this study talks about it being restricted to
12 adults or senior citizens.

13 A. Those are the particular studies that
14 were done. I think there was only one study done.

15 Q. Only one study done?

16 A. That's what it says.

17 Q. Do you have any information that this
18 subdivision is restricted to adults or senior
19 citizens?

20 A. No.

21 Q. It also says it contains residential
22 units similar to apartments or condominiums, and
23 they're usually self-contained villages. Is there
24 any evidence that Shooting Point is anything of this
25 nature?

1 A. No.

2 Q. They may also contain special services
3 such as medical facilities, dining facilities and
4 some limited supporting retail facilities. That is,
5 people don't have to come out because they've got
6 everything down there.

7 Any evidence that Shooting Point is
8 going to be this?

9 A. No. And actually, that is not
10 representative of a single-family type of retirement
11 community.

12 Q. But this is what you submitted to Mr.
13 Cree.

14 A. I gave him information, all of the
15 information that I had at the time available from the
16 Institute of Transportation, yes.

17 Q. So obviously, you must have thought it
18 had materiality to submit it to him.

19 A. I'm just responding to his request for
20 information.

21 Q. And then, of course, it also said users
22 are cautioned to use this data with care because of
23 the small sample size.

24 A. Yes.

25 Q. And with this measurement, this 24 feet

1 on the skew, as I'll refer to it -- and you know what
2 we're talking about, don't you? There's no
3 misunderstanding of that, is there?

4 A. When you say skew, I think you really
5 mean on a radius or a parallel line.

6 Q. On a radius with a straight line drawn
7 through the top of the arc.

8 A. On a radial line, not a straight line.

9 Q. A radial line.

10 A. Yes, sir.

11 Q. Jack Hodge is the one that came up with
12 that concept, did he not?

13 A. No, I think it was a VDOT concept.

14 Q. Did Jack Hodge come up with it, sir --

15 A. No, I think --

16 Q. -- and give it to you?

17 A. -- this is his understanding of what
18 VDOT allows.

19 Q. Did Jack Hodge communicate this
20 information to you, sir, as the way to try to process
21 this permit?

22 A. It was -- yeah, he indicated that that
23 is what VDOT allows.

24 Q. And you've been doing this for 20 years,
25 and you didn't come up with the concept, did you?

1 A. No. I had never come across a very rare
2 situation of a private subdivision entrance of this
3 nature.

4 Q. In fact, for 20 years you've indicated
5 you hadn't seen anything like that, had you?

6 A. Like what?

7 Q. Drawing a line like that on what I'll
8 refer to as the skew to determine the width of the
9 entrance.

10 A. Well, we've always measured the width of
11 an entrance parallel or right angles to the pavement
12 of a roadway.

13 Q. And you've measured it right angles to
14 the easement itself, have you not, sir?

15 A. If you're measuring the easement, yes.
16 If you're measuring the entrance --

17 Q. If you're measuring the easement. And
18 in fact, you have never seen anything quite like this
19 measured that way, have you?

20 A. Measured on a --

21 Q. On an angle like that.

22 A. Radial, yes. We have seen stuff
23 radial --

24 Q. You have seen them?

25 A. Yes, sir.

1 Q. You didn't indicate in deposition that
2 you thought this was a unique --

3 MR. McFARLAND: I'm going to object. If
4 he wants to point to a specific page and line in the
5 deposition, but to give these general references to
6 depositions is improper.

7 MR. POULSON: Well, let's try page 49.

8 BY MR. POULSON:

9 Q. At page 12 on page 48 --

10 THE COURT: That's line 12, page 48. Go
11 ahead.

12 BY MR. POULSON:

13 Q. And are you going to testify that this
14 is a proper way of doing the measurement to get the
15 necessary width? Answer: That was a method that we
16 understood was acceptable to VDOT.

17 Question: And where did you understand
18 that from? From our conversations with Mr. Jack
19 Hodge. With Jack Hodge? Answer: Yes.

20 Question: Okay. Had you ever seen this.
21 done before? Answer: Had I ever seen it done before?
22 Uh-huh, measured that way. I never had an entrance
23 quite like this one. In all your 20 years you never
24 saw it done that way?

25 Answer: No, I'm not saying that. I'm

1 saying that this particular intersection was somewhat
2 unique and required some deviation, or not deviation
3 but interpretation of the guidelines on a
4 case-by-case basis.

5 What was unique about it? The fact that
6 it was a 15-foot road? Answer: It's unique that it
7 was an intersection and a 90 degree bend in a
8 roadway. Question: Okay. And what did that have to
9 do with how wide, how wide the entrance should be,
10 sir, the fact that it was on a curve?

11 Well, the requirement is for 24 feet. I
12 think what you're asking is how did we measure it,
13 why did we measure it on a curve, and it was measured
14 on a curve because the existing pavement is in a
15 curve.

16 Question: But you said this entrance
17 was particularly unique, and I'm asking you why the
18 simple fact that it happened to be on a curve had any
19 materiality as to how wide the easement or entrance
20 was. And your final answer: The only available --

21 MR. McFARLAND: Wait a minute, Mr.
22 Poulson. There was an objection. I objected to the
23 form of the question and to the substance of it.

24 MR. LePAGE: Your Honor, I've listened
25 to this whole thing. There wasn't anything in there

1 where he said this was the only time; that was the
2 question.

3 THE COURT: I understand, but let's go
4 ahead and let him finish up.

5 BY MR. POULSON:

6 Q. Answer: The only available -- the
7 easement was only 15 feet, so the entrance has to
8 fall within the 15 feet of the easement.

9 So basically, sir, you hadn't seen
10 anything like it before in all your 20 years.

11 MR. LePAGE: Your Honor, that's not what
12 he testified to.

13 MR. POULSON: Here it is.

14 MR. LePAGE: He's missing two pages of
15 testimony.

16 THE COURT: Well, we'll make a decision
17 as to what the testimony was. Go ahead. Next
18 question.

19 BY MR. POULSON:

20 Q. So you had never seen it done this way
21 before, had you?

22 A. I have seen measuring parallel to the
23 roadway, yes.

24 Q. But you had never seen a 15-foot way, a
25 15-foot easement turned into a 24-foot width, have

1 you, Mr. Castiglioni?

2 A. Well, if you only have 15 feet on your
3 easement, there's no way you can get more than that.

4 Q. And basically, sir, that's what it all
5 comes down to, doesn't it? You had 15 feet, and you
6 tried to fit an entrance for 15 feet, did you not?

7 MR. McFARLAND: I'm going to object,
8 Your Honor. I mean this is argument. This isn't
9 proper questioning.

10 THE COURT: Overruled.

11 A. We have a 15-foot -- the owner has the
12 right to use 15 feet of land, so the entrance has to
13 fit within that 15 feet.

14 BY MR. POULSON:

15 Q. So you made it fit.

16 A. We provided a drawing that meets the
17 requirements of VDOT and fits within the 15 feet.

18 Q. And you think that drawing, sir, is
19 sound engineering methodology?

20 A. In this scenario, this specific
21 instance, yes.

22 Q. Why is that? Why is it sound?

23 A. Well, because we provided an entrance
24 that is safe, has site distance far exceeding the
25 requirements, meets the drainage requirements, meets

1 the requirements for vehicles passing and keeping the
2 tractor-trailers off the road.

3 These are all requirements that actually
4 go beyond VDOT's normal standards.

5 Q. Does it meet the 24-foot wide
6 requirement for paved surface?

7 A. The easement is 15 feet. It meets -- it
8 is 24 feet wide at a distance of 25 feet back, if you
9 measure it.

10 Q. If you measure on the, quote, skew for
11 lack of a better word, but there still is only 15
12 feet between the sidelines of this easement to
13 traverse.

14 A. At that distance back, yes.

15 Q. Okay. And in your opinion that is sound
16 engineering methodology?

17 MR. LePAGE: Your Honor, that question
18 was asked and answered.

19 THE COURT: I'll sustain the objection.
20 You don't have to answer it if you already answered
21 it.

22 BY MR. POULSON:

23 Q. Do you agree, sir, that one of the
24 requirements of the minimum standards is to ensure
25 certain specified minimum widths?

1 A. Of the entrance width?

2 Q. Yes.

3 A. Yeah, it mentioned a width that they
4 required.

5 Q. And everywhere you look in those
6 regulations they set forth widths, do they not, sir?

7 A. They set forth desired and minimum
8 widths, yes.

9 Q. Desired or required? Which is it?

10 A. Well, they have a minimum and a desired.

11 Q. Is there any --

12 A. You're talking about the commercial
13 entrance.

14 Q. On all the other sheets there's some
15 variation and leeway, is there not?

16 A. Right. There's leeway that the highway
17 department has --

18 Q. For example, page 15 it says 30 to 40
19 width, correct, I believe?

20 A. Do you want me to look at it?

21 Q. If you would quickly do so.

22 A. Yeah, width is 30 to 40 feet.

23 Q. And look at page 29, and there's nary a
24 note on that one like every other one in the book as
25 to deviating, is it, other than saying radii may be

1 increased?

2 A. Right.

3 Q. That's the only deviation shown on
4 page 29.

5 A. The only deviation would be the radius,
6 correct.

7 MR. POULSON: Thank you. That's all I
8 have, Judge.

9 THE COURT: Anything from either
10 counsel?

11 MR. MORRIS: No, Your Honor.

12 MR. McFARLAND: Brief redirect, Your
13 Honor.

14 MR. LePAGE: Nothing, Your Honor.

15 REDIRECT EXAMINATION

16 BY MR. McFARLAND:

17 Q. What is the diagram on page 29 designed
18 to represent, Mr. Castiglioni?

19 A. Well, it's something new in this book.
20 It wasn't in any previous minimum standards book.
21 And it's depicting what the entrance pavement should
22 look like for a subdivision, private subdivision
23 entrance.

24 Q. Is it designed to fit all subdivision
25 entrances? Is it designated for all subdivision

1 entrances?

2 MR. POULSON: I'm going to object to
3 that question. The regulation is the regulation.
4 What it says is what it says.

5 THE COURT: Well, we've been asking him
6 these questions all morning. Go ahead.

7 A. Well, yeah, it's a guideline to be
8 used. There's flexibility allowed by VDOT to meet
9 specific instances.

10 And the 24 feet or the 25-foot distance
11 in our interpretation is the distance used to measure
12 how far back from the existing pavement that you're
13 required to pave the entrance.

14 BY MR. McFARLAND:

15 Q. From your experience the Department of
16 Transportation can issue a permit for an entrance
17 regardless of the 24 feet; correct?

18 A. Yes.

19 MR. POULSON: I'm going to object to
20 that. That's basically saying they can do whatever
21 they want to do.

22 MR. McFARLAND: No.

23 THE COURT: Well, I gather -- I mean he
24 said yes. I don't know, maybe you want to follow up
25 and find out which ones he knows about, but that's

1 what he said.

2 BY MR. McFARLAND:

3 Q. Given in the regulations there is the
4 provision for the Department of Transportation to
5 look at applications on a case-by-case basis;
6 correct?

7 A. Yes, sir.

8 MR. POULSON: Your Honor, the regulation
9 speaks for itself without counsel trying to
10 incorrectly paraphrase it.

11 THE COURT: Well, I think we've pretty
12 much established what's in the Roman numeral page,
13 whichever one that is. We're all pretty familiar
14 with that by now. Go ahead.

15 BY MR. McFARLAND:

16 Q. With respect to the widths of vehicles,
17 Mr. Castiglioni, where are the mirrors located on a
18 tractor-trailer?

19 A. They're over my head. They're about six
20 feet up.

21 Q. With respect to the location of the
22 mirrors on a tractor-trailer and another vehicle that
23 it would go by, are the mirrors going to come into
24 contact with the other vehicle?

25 A. No, not passing a vehicle or a small

1 SUV.

2 Q. Now, let me direct your attention to
3 Plaintiff's Exhibit 15, which is the Bonifant survey,
4 since Mr. Poulson asked you some questions.

5 He asked you if there were measurements
6 and distances on this survey. Look at the Bonifant
7 survey, Plaintiff's Exhibit 15. Are there any calls
8 or measurements at the entrance depicted on that
9 survey?

10 A. No. The last pin falls about 40, 50
11 feet away from Route 622.

12 Q. Are there any calls or measurements
13 depicted on the turns in the Bonifant survey?

14 A. No, there are no radii, no curve -- data
15 at all on the curves.

16 Q. Is there even a center line on the
17 Bonifant survey in the turns?

18 A. In the curves, no.

19 Q. Okay. Thank you. And in fact, I don't
20 know if you can make it out, but what am I pointing
21 to here, and what does it say, Mr. Castiglioni?

22 A. Center line dirt lane, width and status
23 unknown.

24 Q. Width and status unknown. As a
25 professional engineer who has reviewed, I'm going to

1 say more than one survey in your lifetime --

2 A. Yes.

3 Q. -- what does that indicate to you, sir?

4 MR. POULSON: I don't know that he can
5 indicate that. He's not a surveyor.

6 THE COURT: Go ahead. It's a proper
7 question.

8 A. Center line dirt lane, width and status
9 unknown, in other words, they didn't measure it at
10 the time.

11 BY MR. McFARLAND:

12 Q. Okay. What notation do you see here to
13 the eastward side of where the easement is depicted?

14 A. Well, between the easement and the
15 Shooting Point property it says owner or owners
16 unknown.

17 Q. What from your professional experience
18 does that indicate to you?

19 A. Well, they could have -- it could be a
20 disputed land issue.

21 MR. POULSON: Obviously speculation,
22 could be.

23 BY MR. McFARLAND:

24 Q. Does it indicate that a title search was
25 done by whoever, Mr. Bonifant?

1 A. Either he didn't --

2 MR. POULSON: Objection, calls for
3 speculation.

4 THE COURT: I don't think there is any
5 way in the world he could know that.

6 BY MR. McFARLAND:

7 Q. Now, with respect to this February 28th
8 letter to Mr. Cree, do you still have a copy there,
9 Mr. Castiglioni?

10 A. Yes.

11 Q. This letter was never submitted to the
12 Department of Transportation; correct?

13 A. No. This --

14 MR. POULSON: Objection, foundation. He
15 doesn't know what Mr. Byler did. I'm not sure I do.

16 A. This is a letter from us to Mr. Cree.

17 THE COURT: Wait a minute, if he knows.
18 I don't know if he knows or not.

19 BY MR. McFARLAND:

20 Q. Who is the letter directed to?

21 A. This was written to Lemoin Cree.

22 Q. Okay. And can you read, please, where
23 there appears to be a post-it facsimile notation in
24 the upper right corner?

25 A. Yes, sir.

1 Q. What is written underneath that?

2 A. Draft for your review.

3 Q. Am I correct that this was an initial
4 evaluation letter before you had spoken with Mr.
5 Hodge?

6 MR. POULSON: Objection, leading.

7 THE COURT: Sustained.

8 BY MR. McFARLAND:

9 Q. Was this letter prepared before you
10 spoke with Mr. Hodge?

11 A. Yes.

12 Q. Now, with respect to the language that's
13 been referenced on the top of the application
14 drawings that you prepared, sir -- I'm looking for my
15 copy -- what is your understanding of the phrase
16 under the designation plan A, in parentheses, course
17 of 15-foot easement, et cetera?

18 MR. POULSON: Judge, he's already -- I
19 mean there it is. I don't know that he can go back
20 and say well, this means this or it means that.
21 There it is.

22 MR. McFARLAND: Well, this the author of
23 the document, Your Honor. Mr. Poulson was trying to
24 create an interpretation that I think is inaccurate.
25 I think he is entitled to explain what that language

1 means.

2 THE COURT: All right. Let's let him
3 explain it quickly and then move along.

4 A. Well, we were requested to add this
5 language by our client, because my understanding was
6 it was up in the air. It was something to be
7 determined yet the exact -- and agreed to, the exact
8 location of the easement.

9 BY MR. MCFARLAND:

10 Q. With respect to -- did you review the
11 grant of easement?

12 A. The grant in 1974, yes.

13 Q. Okay. And did that provide you certain
14 understanding as to the easement?

15 A. Yeah. Well, it read that it followed
16 the course of the existing drive.

17 Q. Now, with respect to the facsimile of
18 July 6th, which I believe has been marked as
19 Plaintiff's Exhibit 48 --

20 THE COURT: Yes, 48.

21 BY MR. MCFARLAND:

22 Q. -- and the letter to Mr. Byler, was the
23 letter that you drafted for Mr. Byler ever submitted
24 to the Department of Transportation?

25 MR. POULSON: Foundation objection.

1 THE COURT: If he knows and if he knows
2 other than through hearsay.

3 A. No, I don't believe it was.

4 BY MR. MCFARLAND:

5 Q. Did the Department of Transportation
6 ever raise a concern about right-hand turns out of
7 the Shooting Point entrance?

8 A. No.

9 MR. MCFARLAND: One moment, Your Honor.

10 THE COURT: While he is looking, do you
11 have anything else, Mr. Poulson?

12 MR. POULSON: Very briefly.

13 RECROSS-EXAMINATION

14 BY MR. POULSON:

15 Q. What did Mr. Byler do, Mr. Castiglioni?

16 A. I don't know. I never spoke to him.

17 Q. You never spoke with him. You were
18 still copying him. In fact, you even copied him on
19 the July 28th submittal letter to Mr. Cumming with
20 the permit application, did you not?

21 A. Yeah, I may have.

22 Q. Let me show you mine real quick.

23 A. Okay.

24 Q. So he was still somewhere in the loop
25 doing something.

1 A. Well, that was at the direction or
2 request of our client.

3 Q. Oh, your client told you to do it.
4 Okay. So you don't know who he talked with at VDOT?

5 A. Who our client spoke to at VDOT?

6 Q. No, who Mr. Byler may have spoken with
7 at VDOT.

8 A. I don't know if he spoke to anyone.

9 Q. And I take it, if I understand you
10 correctly, that as far as this permit is concerned,
11 it is still your opinion that it does comply with
12 page 29, and there was no variation from the page 29
13 standards?

14 A. It seemed to have met VDOT's
15 requirements, because they granted the permit.

16 Q. My question is in your opinion there was
17 no variation to page 29 the way you all did the
18 measurement, what you think is proper.

19 A. Well, we did have to vary with the
20 25-foot radius.

21 Q. So you had to vary the radiuses, and you
22 had to vary on the 30 feet, too, didn't you, for the
23 shoulders?

24 A. Well, there was no need for shoulders.
25 There was no roadside ditches at that point.

1 Q. Does anything on 29 say thou shall not
2 necessarily have shoulders if there's no ditches?

3 A. It doesn't say that.

4 Q. It didn't say that, does it? It just
5 shows shoulders tying into the shoulders of 622 or
6 whatever road, whatever public road.

7 A. Correct, and then discontinues at that
8 point.

9 MR. POULSON: Thank you, sir. That's
10 all.

11 THE COURT: Anything else?

12 MR. McFARLAND: No, Your Honor.

13 THE COURT: Let me just ask one
14 question. Mr. Castiglioni, on your January -- excuse
15 me, June 28th, 2000, letter directed again to Mr.
16 Byler, page 4, do you have that there?

17 THE WITNESS: Yes.

18 THE COURT: On paragraph two you refer
19 to the homes and parcels that use the Shooting Point
20 entrance and connect the Shooting Point easement to
21 the state road existed of record prior to the letter
22 that Mr. Wright sent to the county on January 14th,
23 2000. Do you see that?

24 THE WITNESS: Yes.

25 THE COURT: Were you under the

1 impression at that time that there were homes there?

2 THE WITNESS: I didn't think there were
3 any -- on the Shooting Point property I don't think
4 they had any at that time.

5 THE COURT: I'm just trying to
6 determine why you used that language. Because I was
7 going to say I think it would be unfortunate for VDOT
8 to deny the Shooting Point homes and parcels that
9 existed prior to January 14th, 2000.

10 THE WITNESS: Well, the reason was that
11 they had already had their subdivision approved by
12 the county with the 15-foot easement, and then --

13 THE COURT: Well, I just wanted to make
14 sure that there's not any confusion here, though,
15 because I've been led to believe that there were no
16 homes prior to that time.

17 THE WITNESS: Yeah, I think we were
18 speaking in the sense of would use once they started
19 to build out there. They owned -- people already had
20 purchased properties at that time.

21 THE COURT: In other words, you didn't
22 mean homes that existed prior to January 14th, 2000.

23 THE WITNESS: No, parcels.

24 THE COURT: All right. Anything else?

25 MR. POULSON: I have one question.

1 FURTHER RECROSS-EXAMINATION

2 BY MR. POULSON:

3 Q. I believe, Mr. Castiglioni, somewhere in
4 one of these letters you indicated that the owners of
5 Shooting Point had never been told that you had to
6 have an entranceway for a private subdivision?

7 A. They had never been told you needed to
8 have a permit for the entrance for a private
9 subdivision.

10 Q. That is information you had been given
11 by the Crees, I take it?

12 A. Yes, I mean based on the letter that --
13 well, based on their conversations with the county,
14 the county planning department, the planning
15 department had never required that before.

16 Q. You're not aware of a 1992 letter from
17 -- I believe a '92 letter from Mr. Cumming to Mr.
18 Cree that made any such requirement?

19 A. No.

20 MR. POULSON: Okay. Thank you.

21 THE COURT: All right. Anything else of
22 this witness?

23 MR. McFARLAND: No.

24 THE COURT: All right. Thank you, sir.
25 You may step down.

1 (Witness excused.)

2 THE COURT: Make sure you don't have any
3 of the exhibits.

4 THE WITNESS: No, I left them all here.

5 MR. LePAGE: Your Honor, I hesitate to
6 ask for this, but can we have a two-minute recess?

7 THE COURT: Oh, we're going to take a
8 little bit longer than that, as soon as we find out
9 who Mr. McFarland is thinking of calling next.

10 MR. McFARLAND: Mr. Duff, Your Honor.

11 THE COURT: Okay. Then you can have him
12 standing by, and we'll take about ten minutes.

13 (Short recess.)

14 THE COURT: All right. Who do you have
15 next, Mr. McFarland?

16 MR. McFARLAND: We have Mr. Duff, Your
17 Honor.

18
19 M. E. DUFF, JR., called as a witness by
20 and on behalf of the Defendants, being first duly
21 sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MR. McFARLAND:

24 Q. Would you state your full name, please?

25 A. Millison Elwood Duff, Jr.

1 Q. And where do you reside, Mr. Duff?

2 A. Norfolk, Virginia.

3 Q. How are you employed, sir?

4 A. I'm president of Baldwin and Gregg
5 Surveyors.

6 Q. And tell us a little bit about your
7 background as a surveyor. How long have you been
8 doing it and who for?

9 A. I started surveying in 1962 and was
10 licensed in Virginia in 1976. In 1977 I was licensed
11 in Maryland, North Carolina, and West Virginia.

12 Q. How long have you been with Baldwin and
13 Gregg, sir?

14 A. Since 1962.

15 Q. And can you give us an approximation as
16 to how many pieces of property you're surveyed in
17 your career?

18 A. Hundreds or thousands. I really
19 couldn't tell you. It's been several.

20 Q. Have you been licensed continually since
21 your, I think you said your first licensing was --

22 A. Yes, 1976 continuously.

23 Q. And have you testified previously as an
24 expert witness in circuit courts --

25 MR. POULSON: Judge, we have no trouble

1 having him testify as an expert.

2 THE COURT: All right. He can testify
3 as an expert surveyor. Go ahead.

4 MR. McFARLAND: Thank you.

5 BY MR. McFARLAND:

6 Q. When did your involvement with Shooting
7 Point begin, Mr. Duff?

8 A. Approximately two years ago we started
9 doing calculations in the Norfolk office for the
10 subdivision, for the property.

11 Q. And I take it you've reviewed a number
12 of documents in your work for Shooting Point?

13 A. Yes.

14 Q. Okay. Let me hand you Plaintiff's
15 Exhibit 12.

16 MR. POULSON: The deed of easement?
17 Okay.

18 BY MR. McFARLAND:

19 Q. That's the grant of easement. Have you
20 seen that before today, sir?

21 A. Yes, I have.

22 Q. Does that document provide a description
23 of the easement at issue in this case?

24 A. It describes a 15-foot easement, 15-foot
25 width over the lands of Wescoat and Holland. It

1 describes at Church Neck, describes Route 622 and
2 various turns.

3 Q. Does that grant of easement give a set
4 location for the easement?

5 A. Other than the present along the road
6 that's beside the woods from Route 622 to Shooting
7 Point property, Shooting Point farm.

8 Q. Does it give a metes and bounds
9 description of the easement?

10 A. No, it does not.

11 Q. Did you also have occasion to review a
12 survey prepared in 1979 which is called the Bonifant
13 survey?

14 A. Yes, sir.

15 Q. Let me hand you what's been previously
16 introduced into evidence as Plaintiff's Exhibit 15.
17 Have you seen that before today, sir?

18 A. Yes, I have.

19 Q. What is your understanding of when that
20 was prepared?

21 A. The date on it says 22 May 1979.

22 Q. And what does it represent?

23 A. It states survey of part of the property
24 of Shooting Point farm. It's got what appears to
25 have been a cut-out of some property owned by

1 Elizabeth Jones, 13.2 acres. It has a 15-foot access
2 right-of-way shown on it and some lines stating the
3 center line of a dirt lane, width and status unknown.

4 Q. As a professional surveyor, Mr. Duff,
5 what does that notation signify to you, if anything?

6 A. Well, the lines shown by the label say
7 center line of dirt lane. So I would assume from
8 that comment that that line represents generally
9 along the center line of a dirt road, the width of
10 which is not stated because it says unknown, and the
11 status is unknown, meaning ownership, et cetera.

12 It also does not -- graphically it shows
13 going to Route 622, but by metes and bounds it does
14 not get to Route 622. It stops short of it.

15 Q. In surveying what is the term call used
16 to describe?

17 A. Call?

18 Q. A call, what is that?

19 A. A call would be a bearing and distance.

20 Q. What is the first call if we proceed
21 northward from the intersection of Route 622 and the
22 intersection of the easement?

23 A. Southwest 09 5905, west 772 feet from a,
24 it looks like P found, f-d. F-d is the abbreviation
25 commonly referred to for found.

1 Q. And what is the location of that pin or
2 call from the entrance, approximately?

3 A. That point is -- this purports to be 20
4 equals 100 feet, so by eye without a scale it looks
5 like it's 50 to 60 feet north of the Route 622
6 right-of-way.

7 Q. So we're clear, then, there are no
8 measurements or no calls describing the entrance on
9 the Bonifant survey?

10 A. No, not at 622.

11 Q. Okay. Are there any specifically
12 describing the turns on the Bonifant survey?

13 A. No. The turns are graphically depicted
14 at the three angle points.

15 Q. Are there even center lines put in the
16 turns on the 1979 Bonifant survey?

17 A. Not at the curves.

18 Q. As a professional surveyor, what does
19 the absence of calls and a center line at the turns
20 indicate to you, if anything?

21 A. There are probably several reasons to
22 consider. One could be that by note he says width
23 and status unknown, so he was not sure how wide this
24 road was supposed to be. He may have been unaware of
25 the existence of an ingress/egress easement.

1 And he may not have measured sufficient
2 information, the curves especially, because it
3 becomes a timely, costly process in the field and to
4 calculate in the office.

5 Q. Is it fair to say, then, that the curves
6 do not depict with any certainty --

7 MR. POULSON: I'm going to object to the
8 question as leading, is it fair to say with
9 certainty.

10 MR. McFARLAND: I'll rephrase.

11 BY MR. McFARLAND:

12 Q. What, if any, preciseness can we draw
13 from that survey as to the location of the turns in
14 1979?

15 A. It's obviously an attempt to show that
16 there is some type of dirt lane connecting Shooting
17 Point farm to Route 622. The exact position and
18 alignment, especially through the curves, is a guess.

19 Q. Does that survey even reference the 1974
20 grant of easement, Mr. Duff?

21 A. I see nothing in there about that deed
22 book and page.

23 Q. What, if any, significance does that
24 have for you as a professional surveyor in reviewing
25 what Mr. Bonifant did in '79?

1 A. He either failed to list or was unaware
2 of the existence of an easement.

3 Q. From your review of the Bonifant survey
4 -- and I take it that you've been to the Shooting
5 Point property?

6 A. Yes.

7 Q. Is it fair to say another surveyor might
8 have depicted those turns differently back in 1979
9 had they done a survey at the same point in time?

10 MR. POULSON: Objection, calls for
11 speculation.

12 THE COURT: I expect it probably does
13 call for speculation.

14 BY MR. McFARLAND:

15 Q. Does the Bonifant survey make any
16 reference as to the accuracy of its depictions?

17 MR. POULSON: I'm going to object to
18 that. The survey speaks for itself.

19 THE COURT: Well, there's no question
20 about that. They all speak for themselves. But at
21 any rate, go ahead. I think the question is -- go
22 ahead.

23 BY MR. McFARLAND:

24 Q. Does the Bonifant survey make any
25 statement as to the accuracy of its depictions or

1 lack of accuracy as to its depictions?

2 A. No. It just states it's a survey, and
3 from another surveyor's point of view, the plat
4 speaks for itself. It would require that I go out
5 and do a field survey to see if these calls are
6 correct.

7 Q. Is there a notation on the survey as to
8 other property, ownership of other properties?

9 A. Well, based on the title -- the property
10 survey, 13.20 acres is going to be conveyed to
11 Richard E. and Charlotte B. Meekins. The piece north
12 of that is now formerly Elizabeth S. Jones.

13 The piece immediate to the south is
14 Wescoat and Wilkins now formerly, and the piece
15 between the Meekins piece that he acquired from Jones
16 and the roadway has a statement that says owner or
17 owners unknown.

18 Q. Now, were you also involved, Mr. Duff,
19 in the Shooting Point plat of survey of October 20,
20 1999?

21 A. Yes, I was.

22 Q. Let me see if I can locate that. Let me
23 hand you what's been previously placed into evidence
24 as Plaintiff's Exhibit 17. Do you recognize that,
25 sir?

1 A. Yes, I do.

2 Q. What was your involvement with the
3 Shooting Point plat of survey?

4 A. The drafting of and the calculations of
5 the street layouts were done in the Norfolk office of
6 Baldwin and Gregg under my supervision and direction.

7 Q. Does that plat of survey also depict the
8 easement at issue in this litigation?

9 A. It states that there is a 15-foot
10 right-of-way to Route 622 as the deed calls for at
11 179, page 29.

12 Q. I'm sorry, as the --

13 THE COURT: I don't think that answered
14 the question.

15 MR. McFARLAND: I'm sorry, Your Honor?

16 THE COURT: I said I don't think that
17 answered the question. I think the question was does
18 it depict the easement.

19 BY MR. McFARLAND:

20 Q. Does that plat of survey give a
21 depiction for the easement that's at issue in this
22 litigation?

23 A. Yes, it does.

24 Q. Where is that found, Mr. Duff?

25 A. On the map or --

1 Q. Yes, on the plat.

2 A. On the left side coming from Shooting
3 Point, the common line between Shooting Point and
4 John Wescoat follows a southeast bearing and a
5 southwest call-out going to the three curves out to
6 Route 622.

7 Q. And how was the depiction of the
8 easement made? What was used to place the depiction?

9 A. The Bonifant survey, which has the
10 calls, was scaled from the record that -- the copy
11 that we had, and the draftsman placed it on this
12 drawing.

13 And the four shortened lines on the last
14 call going into 622 indicates that Route 622 is not
15 shown to scale, but all of the other depictions were
16 shown to scale as per what Mr. Bonifant did.

17 Q. Is the depiction of Route 622 and the
18 right-of-way done pursuant to an actual survey for
19 the 1999 plat?

20 A. Yes, sir, it was.

21 Q. Which survey, now?

22 A. This survey was done pursuant to actual
23 field work.

24 Q. Pursuant to field work?

25 A. Yes.

1 Q. But the incorporation of the easement at
2 issue was done how?

3 A. This entire map was made without benefit
4 of field survey.

5 Q. I'm sorry?

6 A. This entire map was made without benefit
7 of field survey, to include the location of this
8 easement.

9 Q. Without benefit of field survey?

10 A. Yes, sir.

11 Q. Does the entrance on the plat of survey
12 for the intersection of Route 622 and the easement at
13 issue give any specific distances or calls?

14 A. No.

15 Q. Does it give any distances in the turns?

16 A. No.

17 Q. Or calls in the turns?

18 A. No.

19 Q. Does it show any center lines in the
20 turns?

21 A. No.

22 Q. Does the 1999 plat of survey reference
23 the grant of easement of 1974?

24 A. Yes.

25 Q. Where do we find that, Mr. Duff?

1 A. It's over on the left side. Right over
2 here it says 15 foot R, dot, 0 or O, dot, W, dot to
3 Route 622, deed book 179; page 29.

4 Q. Now, why is the grant of easement
5 referenced on the plat of survey?

6 A. Because the grant of easement says it's
7 along the existing road, and since we had not done a
8 field survey at this time, I wasn't about to use this
9 as the only source.

10 Q. Okay. Why wouldn't you use the 1979
11 Bonifant survey as the only source of the easement?

12 A. The source of the easement is the deed
13 at 179. Okay. That set the easement.

14 Q. All right. What was the purpose, then,
15 in adopting certain of the characteristics of the '79
16 Bonifant survey on the plat of survey in 1999?

17 A. It appeared to follow generally along
18 the road that we had evidence of being in existence
19 at that time.

20 Q. As shown on the plat of survey, does the
21 easement at issue intersect with Route 622?

22 A. Did you say this one?

23 Q. Yes.

24 A. Yes. Yes, we intersected it with Route
25 622.

1 Q. Do you know if the Bonifant 1979 survey
2 is even referenced in Shooting Point's chain of
3 title?

4 A. No, I have not -- it wasn't up to this
5 point.

6 Q. And how do we know that, sir?

7 A. In reading the deeds they all call for
8 the easement, but I never ran across this map except
9 for the piece where Mr. Meekins bought it.

10 Q. Now, Mr. Duff, you've also had occasion
11 to visit Shooting Point?

12 A. Yes.

13 Q. And when have you visited the property,
14 sir?

15 A. Three or four months ago, a month ago,
16 and yesterday and this morning.

17 Q. On your first visit did you have the
18 opportunity to view the entire easement?

19 A. Yes. Well, I drove down a road.

20 Q. And how long was the road you drove
21 down?

22 A. I didn't measure it, but it had the
23 configuration as shown on the Baldwin and Gregg map,
24 on the Bonifant map. It started at Route 622 and
25 went all the way to the Shooting Point property.

1 Q. Now, in order to drive down that road,
2 what did you have to do, sir?

3 A. Stay between the foliage and the fence
4 posts that were there.

5 Q. Did you have occasion to view the course
6 as it was set out by the fence posts and the ground
7 in general?

8 A. Yes. I saw the way the fence posts were
9 put into the ground and also noticed where there was
10 evidence of usage both in between the posts and
11 outside of the posts.

12 Q. All right. Can you tell us how the
13 comparison was between the course as laid out by the
14 fence posts and what you saw from your trained
15 surveying eyes as to usage?

16 A. At the first curve, which is roughly 770
17 feet north of Route 622, right before you start to go
18 into the curve there is a low spot which collects
19 water when it rains. It appeared that people were
20 driving off to the left away from the woods to avoid
21 the mud hole.

22 As you went around the curve, the first
23 one to the right, there was evidence of usage that
24 was outside of the fence posts.

25 When you made the next turn to the left,

1 there was twice as much usage outside of the posts as
2 inside the posts. So there was about 30 feet of
3 usage, evidence of, you know, no crops, no furrows.
4 It was flat ground and had been driven on.

5 When you got to the next curve going to
6 the right, there was evidence of usage outside of the
7 posts.

8 And when you got to the very end, there
9 was total usage going between the next to the last
10 post and the last post. Because the large tree has a
11 limb blocking the way, and people tend to cross over
12 between the posts to go to the Shooting Point farm.

13 Q. Now, the evidence of usage that you saw
14 from your experience as a surveyor where it differed
15 from the course as laid out by the posts, were you
16 able to make some determination as to how long that
17 usage had been going on?

18 MR. POULSON: Judge, I would object. I
19 mean this is utter, rank speculation. This man has
20 seen this within a year and is going to come in here
21 and tell the court how long the usage has been?

22 THE COURT: Well, I'd be anxious to hear
23 what he has to say. I'm going to overrule the
24 objection because I -- go ahead.

25 A. I can say that at least through the end

1 of the last growing season. It had not been plowed
2 when I first went out there. So there was evidence
3 of people driving across it, and it had not been
4 plowed up or planted.

5 BY MR. McFARLAND:

6 Q. What, if anything, do the overhanging
7 tree limbs -- I think you said they were at the last
8 turn?

9 A. The worst tree was at the last 20 feet
10 going into Shooting Point farm. Nobody had cut the
11 limb, and everybody had drive around it. People had,
12 I guess for lack of a better word, violated the
13 easement and had made a pass going to the left for
14 20, 30 feet.

15 The other branches were -- when I first
16 saw it, it didn't have leaves. Now we have leaves
17 and we've had growth, so there is at least maybe four
18 or five inches of extension of the branches into the
19 easement or into the area where the posts are that
20 cause the car to be scratched. Before we had no
21 leaves and not that much growth.

22 Q. The tree that you saw that's got the
23 overhanging branches toward the end, I guess that's
24 in the third turn?

25 A. That's after the third turn, yeah.

1 Q. Right after the third turn? All right.
2 From your experience as a surveyor, approximate age
3 of that tree?

4 A. I couldn't begin to tell you. The
5 branch itself is four- to five-inch diameter, so that
6 is coming off of a tree that's at least 15 to 18
7 inches, maybe 21 inches.

8 Q. Is it a tree that's been in existence
9 since 1979?

10 MR. POULSON: Objection. He has already
11 said he doesn't know the age of the tree.

12 THE COURT: Objection sustained.

13 BY MR. McFARLAND:

14 Q. Did you have occasion to look at the
15 posts as they were placed along the turns versus
16 specific tracks or evidence of usage?

17 A. Yes, sir.

18 Q. And what did you find?

19 A. Well, that's where the posts -- at the
20 first turn coming off of 622, there was obvious usage
21 outside of the posts to the left going away from the
22 woods.

23 Q. Would that be going in a westward --

24 A. That would be going northwest.

25 THE COURT: I think he's already

1 testified to that. He said he pulled out around a
2 mud hole in the first turn, pulled out around a tree
3 limb after the third turn, and it spread out from
4 about 15 feet to 30 feet going through the second
5 turn. That's what he said.

6 MR. McFARLAND: Okay. I'll move along,
7 Your Honor.

8 BY MR. McFARLAND:

9 Q. Did you find any pins in your visit to
10 the property?

11 A. Yes.

12 Q. Surveyor's pins?

13 A. Yes.

14 Q. And what did you find and where, Mr.
15 Duff?

16 A. We found a -- starting at Route 622 we
17 found a pin in the center of the existing usage of
18 tracks. We found a pin approximately nine feet east
19 of that, which was struck. By that I mean it was
20 bent like it had been hit by a plow blade.

21 At the first turn 772 feet to the
22 northwest we found another struck pin in the plowed
23 field.

24 Q. All right. Let me stop you for just a
25 second.

1 Let me hand you what's been previously
2 introduced into evidence as Defendant's Exhibit 15,
3 and perhaps you can reference the photographs and
4 hold them up for the court. Can you point out there
5 where you found the pins?

6 THE COURT: Just mark on it. He can
7 just mark on there. That will be fine.

8 THE WITNESS: Do you want me to mark on
9 it with pencil?

10 THE COURT: That's fine. Just let him
11 mark on there where he found them.

12 A. Somewhere in this area here was the
13 center of usage. Somewhere over here was about nine
14 feet away, somewhere up in this area here. This
15 would be the same thing, somewhere in this area and
16 then there. That's the first two.

17 BY MR. MCFARLAND:

18 Q. Now, using Defendant's Exhibit 15, do
19 you see a sign in that?

20 A. Yes.

21 Q. What do you understand that sign to be,
22 Mr. Duff?

23 A. I see what appears to be 15 feet, and
24 the rest of it is unreadable to my eyes.

25 Q. Okay. Do you have an understanding as

1 to certain stakes being placed at the beginning of
2 the easement in March of 2000?

3 A. No, sir, I never witnessed the stakes.
4 I've never seen the stakes nor the sign that you see
5 in this picture.

6 Q. Where in relation to -- using the
7 western-most pin that you found at the entrance,
8 where is that in relation to the sign?

9 THE COURT: He just marked it on there,
10 didn't he?

11 MR. McFARLAND: I apologize, Your Honor.
12 I don't have a very good picture. I thought it was
13 going to be a better closeup, but I'll see if I can
14 find one for later.

15 MR. POULSON: Judge, I think we've
16 probably all stipulated at this point in time there
17 was another bent pin in the center of the usage, and
18 there was a pin to the right, 9.1 feet to the east of
19 that pin, I believe.

20 THE COURT: Yes, that's what I
21 understood.

22 MR. McFARLAND: And I'm trying to
23 establish where the western pin is, Your Honor, in
24 relation to the sign.

25 THE COURT: I think that was all

1 established. Didn't we go through all of that when
2 we were looking at Plaintiff's Exhibit 41 and 42,
3 and that's why the blue lines were on there? Because
4 they had to change it because they mistook the one
5 pin for the center line, and it was really the other
6 pin that was the center line?

7 MR. McFARLAND: Well, I'm not quite
8 going there, Your Honor. I'm just --

9 THE COURT: Well, I mean I don't know
10 how much he is going to be able to add to that. I
11 mean I assume you have a point, but I'm not sure at
12 this point exactly what it is.

13 MR. McFARLAND: Let me see if I can
14 follow up.

15 BY MR. McFARLAND:

16 Q. Where, if you can -- I recognize this is
17 probably not the best photograph to use. But where
18 in relation to the sign that's depicted in
19 Defendant's Exhibit 15 was the western-most pin that
20 you found at the entrance?

21 A. In the center of the evidence of usage.

22 THE COURT: And you did mark it on
23 there, did you not?

24 THE WITNESS: Yes, sir, but I only
25 marked it in the center of the evidence of usage.

1 Its relationship to the sign I can't attest to.

2 THE COURT: Let me see it. Okay.

3 BY MR. McFARLAND:

4 Q. Did you find a pin that at some point
5 you determined to be the center line pin from the '79
6 Bonifant survey?

7 A. According to the calls on his map, yes,
8 we found it.

9 Q. And where was that pin located?

10 A. That would be the pin that's roughly
11 nine feet east of the center of the existing roadway.

12 Q. How does that center line pin relate to
13 the usage that you found for the right-of-way?

14 A. The pin that -- well, by the calls on
15 the Bonifant survey, that pin is about nine feet east
16 of the center line of the evidence of usage today.

17 Q. And where does that -- does the location
18 of that pin relate to any trees that you found at the
19 entranceway?

20 A. If we say that the bent pin that is east
21 of the roadway, the eastern-most of the two pins, if
22 you step over seven and a half feet to the east
23 further and then go towards the 772-foot distance,
24 you go right through an 18-inch pine tree.

25 Q. And what does that tell you in terms of

1 the location of that pine tree and the placement of
2 the easement on the Bonifant survey in 1979?

3 A. If that's where the road was, it was
4 extremely close to the trees, closer than I would
5 want to drive.

6 Q. Mr. Duff, there has been testimony from
7 Mr. Poulson's expert, Mr. Walters, that for this
8 easement, given the language of the grant and the
9 fact that it was being used before the grant was
10 given, including usage of turns, that at the time the
11 grant was given the turns would be reasonable and not
12 90 degrees.

13 Do you have an opinion as to whether you
14 agree or disagree with that statement?

15 MR. POULSON: Nobody has -- that they
16 would be 90 degrees? Nobody has suggested that the
17 turns should be 90 degrees or not.

18 THE COURT: I don't recall any testimony
19 of that nature, Mr. McFarland.

20 MR. McFARLAND: I'll rephrase, Your
21 Honor.

22 BY MR. McFARLAND:

23 Q. Do you have an opinion as to what would
24 have been the usage at the turns at the time the
25 easement was granted in 1974?

1 MR. POULSON: Objection, no foundation
2 at all for that. The man had never seen the thing
3 until last year.

4 THE COURT: Sustained.

5 BY MR. McFARLAND:

6 Q. You've reviewed the grant of easement?

7 A. Yes.

8 Q. Mr. Walters has testified that he would
9 agree that the usage at the turns at the time the
10 easement was granted and thereafter would be
11 reasonable.

12 A. I would agree with that.

13 Q. Okay. Now, if you had been asked to
14 survey the easement in 1974, Mr. Duff, at the time
15 the grant was given, what would you have done?

16 MR. POULSON: Objection. If he had been
17 asked to do it in '74?

18 MR. McFARLAND: Right. If he had done
19 an actual survey --

20 MR. POULSON: It's immaterial what he
21 would have done in '74.

22 MR. McFARLAND: No, I'm asking him given
23 the grant of easement, what he would have done to
24 survey the easement at that time.

25 MR. POULSON: Well, it's immaterial.

1 We've got a survey, and we've got a grant. We've got
2 two surveys.

3 THE COURT: I'll overrule the objection.
4 Go ahead.

5 BY MR. MCFARLAND:

6 Q. What would you have done -- in 1974 if
7 you had been asked at the time that this grant of
8 easement was given, what would you have done to
9 survey the easement?

10 A. The generally straight sections of the
11 road would have been surveyed. And depending on the
12 desires of the grantor and the usage that the
13 grantees were going to have, if there were minor
14 discrepancies in the straight sections we would have
15 probably overlooked them, minor being a foot left or
16 right of center. The preponderance of usage would
17 have held on the straight pieces.

18 On the curved pieces to generate
19 information for curves, you need two parts, two
20 pieces. You need the angle of intersection, which is
21 commonly referred to as the Delta angle. And you'd
22 need either the radius, which would be hard to get
23 because you would be in the woods, or you would need
24 to make the tangents, the distance from the pins that
25 are shown on the Bonifant survey to the beginning of

1 the curve.

2 Having those two properties you can
3 compute a smooth curve through those angles. That
4 information would have been computed -- we would have
5 measured the tangent distances and what's called the
6 external, so that we would have gotten the curve to
7 fit, not touched the woods because the grant says
8 it's along the edge of the woods, and we would have
9 minimized the usage into the plowed area.

10 But the preponderance of usage at that
11 time would have been held, since everybody was
12 obviously driving some type of vehicle, be it a car,
13 be it a combine or an 18-wheeler. The preponderance
14 of usage would have held through the curves.

15 Q. Now, if you were given the assignment of
16 surveying the easement today, what would you do, sir?

17 A. The same thing. The preponderance of
18 usage would have held, especially at the curves. The
19 tangent pieces and straight pieces, generally
20 speaking, are pretty much like the map shows.

21 Q. What, if any, effect would you give the
22 1979 Bonifant survey if you were to conduct a survey
23 of the easement today?

24 A. That would be a point to start from to
25 start looking for pins. Owing that he shows pins or

1 pipes set at those points of intersection, that would
2 be a point to start.

3 The trees along the common line or
4 between the owners unknown at Shooting Point, it's
5 difficult to start at 622, because there's no bearing
6 and distance tied to the right-of-way of 622.

7 Q. From your visits to the property, your
8 review of the Bonifant survey, the grant of easement,
9 and your location of certain pins from your visit, is
10 it evident to you that the easement has moved?

11 MR. POULSON: Objection, leading
12 question.

13 THE COURT: Sustained.

14 BY MR. McFARLAND:

15 Q. What, if any, evidence do you find that
16 the easement has moved, Mr. Duff, from how it is
17 depicted on the 1979 Bonifant survey?

18 MR. POULSON: I would object to that
19 question. I think it may indicate how the roadway
20 may have moved, not how the easement may have moved.

21 THE COURT: I suppose you should
22 rephrase it. How the usage has moved, I suppose, is
23 the issue.

24 MR. McFARLAND: All right.

25 BY MR. McFARLAND:

1 Q. From your review of certain materials
2 and your experience as a surveyor what, if any,
3 evidence do you find if the roadway has moved or the
4 usage has moved from how it is depicted on the 1979
5 Bonifant survey?

6 A. If his map is correct, the first
7 bearing, the first course at 772 feet goes to the
8 bent pin, which is nine feet east of the straight pin
9 that's in the center of usage today.

10 So it's one of two things. The road has
11 moved roughly nine feet, or there was an error in the
12 preparation of the plat. From the evidence on the
13 ground it appears that that road has been where it is
14 right now for several years.

15 At the curves I cannot tell you that his
16 three curves depict anything any different today than
17 what was there in 1979, because there is no evidence
18 on his curves other than drafting.

19 He has a picture, and it's not
20 substantiated with distances. There's no radius,
21 there's no tangent, and there's no core bearing.
22 It's just a picture showing a curve.

23 Q. How, then, do we establish the turns for
24 a 15-foot right-of-way at the present time?

25 A. You would go out and survey and locate

1 the preponderance of usage and fit a curve in there.

2 You may end up with a reverse curve,
3 especially at the first turn where the mud hole is if
4 -- and I would assume this would come from the
5 grantor and the grantee agreeing that this mud hole
6 cannot be repaired, so we want to come out a little
7 to the left.

8 So you would have a curve to the left
9 and then go back to the right around the curve into
10 the next tangent. And then when you get to the
11 inside curve breaking to the left, you would take the
12 preponderance of usage.

13 The same thing with the third curve.
14 The picture in the end would probably look like this
15 to the untrained eye. It would be similar to the two
16 pictures in the back of the courtroom. They are
17 photographs or paintings, but they're not the same
18 people.

19 I could do the same thing that he's done
20 here and would put a little bit more information on
21 it, so that it could be surveyed in the field again.

22 Q. Would sound surveying practice indicate
23 that you would go by usage if you were trying to
24 depict the turns at the present time?

25 A. Yes.

1 MR. MCFARLAND: Let me have this marked
2 as our next exhibit for identification.

3 MR. POULSON: We would object to it.
4 There is no foundation for that exhibit whatsoever.

5 THE COURT: All right. Let's mark it
6 for identification.

7 What number are we at?

8 THE BAILIFF: No. 16.

9 THE COURT: No. 16 for identification
10 purposes at this time. Go ahead.

11 (The aerial photograph was marked
12 Defendant's Exhibit No. 16 for
13 identification.

14 MR. MCFARLAND: Thank you, Your Honor.

15 BY MR. MCFARLAND:

16 Q. Let me hand you what's been marked as
17 Defendant's Exhibit 16 for identification purposes,
18 Mr. Duff. Do you recognize what he has depicted in
19 that aerial photograph?

20 A. This appears to be Route 622 coming in
21 here and going to a dwelling there that I believe is
22 Mr. Wescoat's dwelling, and this is the point of land
23 that's called Shooting Point farm.

24 Q. All right.

25 MR. MCFARLAND: The court's indulgence

1 just for a moment, Your Honor, if I might.

2 THE COURT: What have you got here?

3 MR. McFARLAND: Two aerial photographs.

4 MR. POULSON: Same objection, Judge. No
5 foundation for those photographs.

6 THE COURT: Are these the same as that
7 one?

8 MR. McFARLAND: No, Your Honor. These
9 are earlier than that one.

10 THE COURT: Okay. I guess we'll mark
11 them -- where are we, 19?

12 THE BAILIFF: No. 17, Judge.

13 THE COURT: No. 17 for identification
14 purposes at this time, and we'll make them one.

15 (The two aerial photographs were marked
16 Defendant's Exhibit No. 17 for
17 identification.)

18 BY MR. McFARLAND:

19 Q. Let me hand you, Mr. Duff, what's been
20 marked as Defendant's Exhibit 17 for identification,
21 two photographs. Looking at the top photograph,
22 which is a 1969 aerial photograph, can you --

23 MR. POULSON: I'm going to object to
24 that unless it's shown on there, because that --

25 THE COURT: I think all he can do is

1 look at it and see if he can identify it. I don't
2 know that he can establish -- I know there's 1969
3 written up at the top, but I don't know who put it
4 there.

5 MR. McFARLAND: These were obtained from
6 the government, Your Honor.

7 MR. POULSON: That doesn't make them
8 necessarily admissible because they were obtained
9 from the government, Judge.

10 MR. McFARLAND: I understand. I'm just
11 doing this for identification. I'm just trying to --

12 THE COURT: I understand. Go ahead.
13 The only problem is that I don't think you can refer
14 to it, at least at this stage, as a 1969 photograph.

15 MR. McFARLAND: All right.

16 BY MR. McFARLAND:

17 Q. Looking at the first page of Defendant's
18 Exhibit 17, Mr. Duff, do you recognize what is shown
19 there?

20 A. Yes. This road right here is 622, and
21 there's a plowed field here of sorts and a plowed
22 field over here.

23 And this is the woods line that is
24 depicted on the Bonifant, or close to it, and it's
25 also depicted on that photograph there. And this is

1 the Shooting Point farm here.

2 Q. And how are you able to determine that
3 the first page of Defendant's Exhibit 17 is a
4 depiction of the Shooting Point farm?

5 A. Well, the woods lines are very similar.
6 The Shooting Point woods line down here to the south
7 and the east, east of the common line is the same.
8 This corner right in here is this corner right in
9 here.

10 And we can orient the two maps, and this
11 light area right in here that's like a kidney, that's
12 that piece there, and this little elbow right here is
13 that.

14 And this woods line comes around here as
15 shown on that one, and it comes down right here. And
16 this is a road here with this plowed area there,
17 which is this area right in here.

18 Q. Okay. Are you able to point out where
19 the easement at issue in this litigation is on the
20 top page of Defendant's Exhibit 17 for
21 identification?

22 MR. POULSON: Objection to the word
23 easement. He may point out a roadway.

24 THE COURT: All right. Go ahead.

25 BY MR. MCFARLAND:

1 Q. Can you point out where the roadway is?

2 A. There is an appearance of a road going
3 along the edge of this woods all the way into --
4 making one, two, three turns and going into the
5 Shooting Point farm area and turning and continuing
6 on into the Shooting Point area.

7 Q. And from that photograph what, if
8 anything, can you see as to the turning areas on the
9 first page for the roadway on Defendant's Exhibit 17?

10 A. It's pretty hard to read on the first
11 turn.

12 Q. Okay.

13 A. It's obliterated.

14 Q. Go to the second page of Defendant's
15 Exhibit 17, please. Do you recognize what is shown
16 on the second page of Defendant's Exhibit 17?

17 A. It's the same area, Shooting Point being
18 up here, and there's a little wedge shape there.
19 It's the same on that photograph.

20 Q. And where would the roadway which is
21 relevant to this litigation be on the second page of
22 Defendant's Exhibit 17?

23 A. It would start right here at 622 and run
24 along the edge of this woods, curling around that,
25 curling around that, and then around in there.

1 Q. Okay. Thank you.

2 THE COURT: How much more do you have of
3 him, Mr. McFarland?

4 MR. McFARLAND: I've got a bit, Your
5 Honor. Do you want to --

6 THE COURT: We probably ought to go
7 ahead and break for lunch, I guess. It's after 1
8 o'clock. We'll go ahead and recess for an hour and
9 come back, and we'll resume.

10 Don't discuss your testimony at this
11 time since you're already on the stand, Mr. Duff,
12 with anyone. Okay?

13 All right. Thank you very much.

14 (At 1:05 p.m. the trial was recessed to
15 reconvene at 2:00 p.m.)

16

17

18

19

20

21

22

23

24

25

1 AFTERNOON SESSION (2:05 p.m.)

2 THE COURT: All right, sir.

3 MR. McFARLAND: Thank you, Your Honor.

4 DIRECT EXAMINATION (cont.)

5 BY MR. McFARLAND:

6 Q. Mr. Duff, have you been out to the
7 easement this week?

8 A. Yes.

9 Q. And did you also have occasion to travel
10 Route 622 in the past couple of days?

11 A. Yes.

12 Q. Okay. When, sir?

13 A. Yesterday afternoon late and this
14 morning.

15 Q. What did you notice about the present
16 condition of Route 622 that you saw yesterday
17 afternoon and this morning versus its condition that
18 you had seen previously?

19 A. The grass on the outside edge of the
20 pavement up to the ditch has been cut down, and the
21 remaining cut grass has been left in the roadway on
22 the pavement.

23 Q. When you say the grass is cut down, can
24 you be more specific?

25 A. Grass, weeds, whatever was growing

1 there, it was cut down to the ground level, the dirt
2 level.

3 Q. How about with respect to the condition
4 of the easement and the adjoining land westward that
5 you -- how does that differ from what you saw when
6 you were out there earlier this year in, I believe
7 you said March or so of this year, versus what you
8 saw yesterday and this morning?

9 A. It's obviously been plowed, and soy
10 beans are about an inch, inch and a half out of the
11 ground.

12 Q. When you say it's plowed, how has it
13 been plowed in relation to where the location of the
14 posts are in certain areas?

15 A. Except for the first piece of 722 feet
16 long, which has about roughly a two-foot grass/weed
17 buffer, all the rest of the post line, if you will,
18 it's been almost plowed up to it.

19 Q. Did you notice anything growing in an
20 area that was evident to you was prior usage other
21 than soy beans at the present time?

22 A. There is a, I don't know if it's rye
23 grass or something. But there is something at the
24 second curve that has been -- is growing now where
25 there used to be evidence of usage.

1 Q. In conjunction with your work in this
2 case, Mr. Duff, have you prepared a survey showing
3 what you believe is the most accurate course for the
4 easement?

5 A. Yes.

6 Q. When did you prepare that?

7 A. That was October of 1999.

8 Q. Did you also prepare something this
9 year?

10 A. Yes. We went out and located the posts,
11 the four-inch diameter posts, the --

12 THE COURT: Well, I think he has
13 responded to your question. He said yes.

14 MR. McFARLAND: All right. This would
15 be the next defendant's exhibit, Your Honor.

16 THE COURT: What is the date on that,
17 Mr. McFarland?

18 MR. McFARLAND: May 24th, I believe,
19 Your Honor.

20 THE COURT: Of 2001?

21 MR. McFARLAND: Yes, sir.

22 THE COURT: What number are we up to?

23 THE BAILIFF: No. 18.

24 THE COURT: No. 18? Okay.

25 MR. McFARLAND: I apologize for its

1 unruliness, Your Honor.

2 THE COURT: That's all right. What else
3 have you got there?

4 MR. McFARLAND: I've got a copy for the
5 court so you can follow along.

6 THE COURT: All right. It will be
7 Defendant's No. 18.

8 MR. POULSON: Judge, we're going to
9 object to that exhibit basically on two things.

10 Number one, it shows apparently three
11 courses on there. It shows the Bonifant which, of
12 course, we have no problem with. It then purports to
13 show an easement based on usage, and there's
14 absolutely no evidence before the court to show any
15 kind of easement based on usage.

16 The third thing it shows is that here is
17 what we would like for the easement to be.

18 THE COURT: Well, I assume that's
19 essentially what the testimony is going to be.
20 Probably not in the same way you stated it, but I
21 think to the extent that -- I assume that you're
22 going to proffer, Mr. McFarland, that this witness is
23 going to testify that in his professional opinion
24 this is this and this is this and this is this, is
25 what I think essentially.

1 MR. McFARLAND: That's correct, Your
2 Honor, and not with any disrespect to the court, but
3 not quite as --

4 THE COURT: Well, I understand that.
5 I'm sure it's going to be much more in-depth than
6 what I just said. It will be Defendant's No. 18.

7 (The proposed plan was marked
8 Defendant's Exhibit No. 18 and received
9 in evidence.)

10 THE COURT: Now, let me just ask you
11 this, Mr. McFarland. No. 16 and 17, have you
12 essentially given up on those? Because they're not
13 in evidence. They were marked for identification.

14 But I just wanted to make sure you
15 understand for the record that they were marked for
16 identification purposes and not --

17 MR. McFARLAND: I understand that. I
18 will move them into evidence, and I understand his
19 objection and having addressed it.

20 THE COURT: Well, the problem is I don't
21 know that the witness really ever identified anything
22 other than the fact that -- I mean I'm not trying to
23 prolong it; don't get me wrong.

24 But you just sort of handed it to him,
25 he looked at them, and then there was some discussion

1 about whether it was really '69 or not, 1969. And
2 you said well, it's a government aerial photo, and
3 that was kind of the end of it.

4 MR. McFARLAND: Well, I mean the first
5 one, Your Honor, for the record, which I think is
6 No. 16, is a 1989 aerial photo.

7 THE COURT: Well, let's try to get it
8 straight so that everybody will understand.

9 This witness can't say with any
10 specificity when that aerial photo was made, other
11 than to rely on the hearsay taken thereon that it was
12 October the 5th of 1989. Is that essentially
13 correct?

14 MR. McFARLAND: That's correct, Your
15 Honor.

16 THE COURT: And the same is true with
17 the other one?

18 MR. McFARLAND: That's correct. We can,
19 however, say that they depict from the air the
20 Shooting Point property.

21 THE COURT: I understand, but not when.

22 MR. McFARLAND: Other than --

23 THE COURT: Other than we know it has to
24 have been sometime between now and when the aerial
25 photo was first developed, which I don't know when

1 that is.

2 MR. McFARLAND: Well, we also know, Your
3 Honor -- I don't want to testify here, but we know
4 that there is a house in the 1989 photograph that's
5 shown, and we had some testimony as to when that was.

6 THE COURT: I think his objection, at
7 least at this point, is well taken, and we still
8 agree it's for identification purposes. Let's move
9 along.

10 MR. McFARLAND: All right.

11 BY MR. McFARLAND:

12 Q. Let me hand you, Mr. Duff, what's been
13 marked as Defendant's Exhibit 18. Do you recognize
14 that, sir?

15 A. Yes.

16 Q. What is that, Mr. Duff?

17 MR. POULSON: You don't have another
18 color copy, do you?

19 MR. McFARLAND: I don't. That's all
20 I've got.

21 THE COURT: You can stand up here and
22 look at it with him, if you want to.

23 A. As it's labeled in here, the orange line
24 says the center line of course of the '79 Bonifant
25 survey, and that goes to the bent pin found with the

1 currency F that is 50 or 60 feet north of state Route
2 622. And that is the center line as shown of what
3 Mr. Bonifant purports on his map.

4 The second orange line is the center
5 line of course of Wescoat's posts. These are the
6 four-inch fenceposts that we found.

7 We did not locate all of them, because
8 in the straight portions they are very straight, did
9 an excellent job of making those posts on a straight
10 line. We did, however, locate those posts, and
11 they're depicted throughout the three curves as
12 small orange or red filled-in circles.

13 You will also notice that beside some of
14 those posts at the beginning and ends of the curve we
15 say pipe found. There is a one-inch cast iron pipe
16 or steel pipe, iron pipe in the ground at the
17 beginning and end of all three curves, also at the
18 start of the fenceposts near Route 622.

19 The green line that is shown on there --
20 what does that say? Oh, the blue line, let's do the
21 blue line.

22 The blue line depicts the evidence of
23 usage starting at Route 622 and going all the way
24 down to and through the three curves to the Shooting
25 Point farm, noting at the very end of the fenceposts

1 that the usage does go outside of the posts into
2 Shooting Point.

3 BY MR. McFARLAND:

4 Q. Now, how did you determine -- how did
5 you plat the usage, what you've said is the blue
6 line?

7 A. What we did is we averaged the shots.
8 We measured the distance between the outer limit of
9 the usage, which in this case it was March, so grass
10 hadn't started to grow very heavy. But there was
11 evidence of car tracks and a lack of vegetation.

12 And at several spots throughout we
13 located those edges, and that's what we show as the
14 evidence of usage. It varies at the first curve at
15 the pipe found.

16 Before you go into the curve you will
17 notice that it swings way out into the plowed field,
18 which is evidence of where the pothole is.

19 Q. What, if anything, else is depicted?

20 A. Well, there is a course shown on here
21 that is the desired course of our client that at the
22 first 722 feet --

23 MR. POULSON: Judge, I would like one of
24 these continuing objections that the Supreme Court
25 says I can't have, but in the interest of not

1 continuing to object. I mean again, it has
2 absolutely no materiality.

3 THE COURT: All right.

4 MR. McFARLAND: Well, I think we have to
5 see how he ties it in, Your Honor.

6 BY MR. McFARLAND:

7 Q. All right. If you would go on, Mr.
8 Duff. What is the --

9 A. The magenta line, if you will, the
10 reddish-pink is the desired course of the easement to
11 go around and get to Shooting Point, and in most
12 cases through the tangent area we tend to favor using
13 the existing roadway.

14 At the curves we favor the evidence of
15 usage that was evident on the ground at that time,
16 which is not out there today because of the plowing
17 that's happened. But when we get to the first curve,
18 we are generally inside to favoring the right side of
19 the posts.

20 So the posts in the curve today are
21 there. This document shows that we want to go closer
22 to the woods by a foot or so to go around that curve.

23 Q. All right. Just let me stop you there.
24 At that curve, then, for purposes of this question
25 only, accepting that the posts at that curve

1 delineate the easement as Mr. Wescoat says it exists,
2 what is the difference, if any, between what you've
3 delineated for the proposed usage and the posts?

4 A. Two feet, three feet lateral shift to
5 the -- we're proposing going to the right as you go
6 up the roadway.

7 Q. Would that, then, encompass using any
8 more of Mr. Wescoat's property, assuming again for
9 purposes of this question only that those posts in
10 that area demarcate the easement as he says it
11 exists?

12 A. Now, rephrase your question?

13 MR. MCFARLAND: Judge, should I
14 rephrase it? I guess it would be better if --

15 THE COURT: I think the answer is
16 obvious. The answer has got to be no. It's 15 feet
17 wide. It's the same amount of property.

18 MR. MCFARLAND: That's correct.

19 A. Right. What this does is it moves the
20 easement away from the plowable land closer to the
21 woods.

22 BY MR. MCFARLAND:

23 Q. How does the radius of that first turn
24 compare for what you've shown as the proposed course
25 versus what is the radius based on the posts?

1 A. The proposed radius is 75 feet, and
2 that's at the center line. The posts generate a
3 61.5-foot radius.

4 Q. All right. From your professional
5 opinion as a surveyor, which would be a safer, for
6 all vehicles using it, radius?

7 A. The larger one is most definitely safer.

8 Q. If you would continue, please, as to
9 where the -- what is the next variation, if any, that
10 you see in terms of the proposed course based on
11 usage versus the posts?

12 A. At the next curve going to the left the
13 usage is out -- I have to phrase this correctly,
14 because if you go there today, you will not see
15 this.

16 The usage as we found it back in March
17 is the blue line, and the proposed usage or easement
18 that we are requesting is inside or favoring the
19 woods. However, the posts, the left-side posts seem
20 to split the area of usage, and the right-side posts
21 seem to be right on the edge of the usage.

22 Again, this radius is 75 feet requested
23 versus a 56 and a half foot radius, but we still are
24 in where the usage was.

25 Q. And why is it significant -- when you

1 say we still are in where the usage was, why is that
2 significant to you as a surveyor?

3 A. Well, number one, we're not really
4 taking or wanting to use anything other than what's
5 been used by evidence of the usage. Historically
6 that's what's been driven on, and our request is that
7 we stay within that area, not go out into the plowed
8 field.

9 Q. Now, if you would continue, how do the
10 blue tracks compare as we head to the third turn
11 versus what is presently posted by the Wescoats?

12 A. Down this one?

13 Q. Yes.

14 A. As you go down here there is a slight
15 difference in usage versus requested based on trees.
16 There's several trees in this area, limbs that have
17 grown out and have pushed -- if somebody went down in
18 a car, they would naturally go over to the left.

19 If somebody went down in an old Ford
20 pickup truck, they would probably just go right on
21 through the bushes, but most people would bear off a
22 little to the left in that area to get around this
23 foliage.

24 Q. All right.

25 A. When you get to the curve, again, we

1 are requesting a radius that is very safe. And also
2 we are requesting inside or to the right of the
3 existing posts, both sides, which again does not
4 impede or take away any more plowable land than was
5 requested.

6 It takes away less plowable land than
7 what is requested if you use the posts.

8 Q. Okay. Now, you're saying as requested.
9 What is the request based on, Mr. Duff, for the blue
10 line in this third turn?

11 A. Well, the blue line is the evidence of
12 usage, and we are going inside of that. The green
13 line is where the posts are, and the magenta line is
14 what the client would like to have in there. But
15 that's our design radius of 75 feet.

16 Q. All right. So would the third turn then
17 also have a design radius of 75?

18 A. Yes. All three curves would have a
19 design radius, center line radius of 75 feet.

20 Q. And how does that compare with what is
21 presently shown by the posts that have been placed
22 there?

23 A. The third curve has got a 68-foot plus
24 or minus center line radius, the second one is 56.5,
25 and the first one is 61.5.

1 Q. All right. Thank you.

2 THE COURT: What do we have there, Mr.
3 McFarland?

4 MR. McFARLAND: This is that exhibit,
5 Your Honor, imposed on an aerial photograph. And for
6 this one, if Mr. Poulson requires, I've got the
7 photographer who took this --

8 THE COURT: It will be Exhibit 19.

9 MR. McFARLAND: -- who took this aerial
10 photograph that can come in and testify that he took
11 it and when he took it.

12 THE COURT: All right. Let me have it,
13 please.

14 MR. POULSON: Again, Judge, same
15 objection. As I read the thing, plan one, course
16 proposed with flattened turnaround. No foundation,
17 no basis whatever.

18 THE COURT: Can we all assume that Mr.
19 Duff is going to testify that this is the plan we
20 just looked at, Exhibit No. 18 on Defendant's Exhibit
21 No. 19, super-imposed on another photograph?

22 MR. McFARLAND: Yes, sir.

23 THE COURT: All right. Do the same
24 color lines depict the same thing, Mr. McFarland?

25 MR. McFARLAND: Yes, Your Honor. That's

1 certainly my understanding, and for the record that
2 would be his testimony as well.

3 THE COURT: All right. I don't doubt
4 that it would. Defendant's No. 19.

5 (The proposed plan/aerial photo was
6 marked Defendant's Exhibit No. 19 and
7 received in evidence.)

8 MR. MCFARLAND: Just for the record,
9 Your Honor, so it's clear what this is --

10 THE COURT: I think I described it, I
11 think.

12 MR. MCFARLAND: You did, but I may not
13 have used the correct term. This is a telemetric
14 photograph, Your Honor, and just if he could explain
15 what telemetry is so that --

16 A. This one?

17 BY MR. MCFARLAND:

18 Q. No. 19, I believe. Yes, that one.

19 A. What this is, our client asked that we
20 have aerial panels placed per our photogrammetrist's
21 desires so that we could take aerial photography of
22 this project, and we could at a future date perform a
23 topographic survey without having to do it on the
24 ground conventionally.

25 The photograph that is shown here is an

1 author rendition that the photogrammetrist did to
2 bring the entire picture into perfect scale. On
3 standard issue photography they are nine-inch square
4 photographs, and they overlap about 30 percent. And
5 you have to look at them with a stereoscope.

6 If you remember when you were a child
7 and you held the little view finder up and you pushed
8 the button, it's the same principle, except now we're
9 talking several hundred thousand dollars of
10 equipment.

11 The photograph that you get, if you've
12 ever had an aerial photography job done, that
13 nine-inch square photograph is not to scale as
14 reported on the photograph except at photograph
15 center.

16 The further away from center you go,
17 both left, right, up and down, is distorted,
18 something about the earth being round, I believe.
19 But for sure that's what it is.

20 So when we called the photogrammetric
21 people and said this area we need to have reduced and
22 plotted to scale, and that's what he has done. He
23 has gone in with his equipment and has rendered a
24 photograph that is to scale through photogrammetric
25 process.

1 So this is a scale drawing of one inch
2 equals 40, which should overlay with the other
3 exhibit.

4 THE COURT: All right.

5 MR. McFARLAND: Okay. Thank you.

6 BY MR. McFARLAND:

7 Q. Mr. Duff, you've been a surveyor for how
8 many years, sir?

9 A. Since 1962, licensed since 1976.

10 Q. Have you ever heard the term harness the
11 easement?

12 A. No.

13 MR. McFARLAND: One moment, if I might
14 Your Honor. I think I'm done.

15 THE COURT: All right. While he is
16 thinking, Mr. Poulson, do you have any questions?

17 MR. POULSON: Yes, sir.

18 MR. McFARLAND: That's all I have at
19 this point, Your Honor.

20 CROSS-EXAMINATION

21 BY MR. POULSON:

22 Q. Mr. Duff, you said the land was plowed?

23 A. Yes.

24 Q. When was it plowed?

25 A. I have no idea, but it was obviously

1 plowed since I was there sometime in March.

2 Q. March of when?

3 A. This year.

4 Q. So you think the land has been plowed
5 this year? Do you know what plowing is?

6 A. I'm a city fellow so --

7 Q. That's what I'm getting ready to get at.

8 A. I can tell you that the ground that was
9 there in March that had I desired to trespass, if you
10 will, by going outside of the four-inch posts, I
11 could have driven on with ease and not sunk in any
12 mud.

13 Today there is evidence of furrows
14 throughout that area, and there's evidence of green
15 growth, grass of some type and soy beans, that was
16 not there in early March when we there were.

17 Q. You don't think there was soy bean
18 stubble there in early March of this year?

19 A. It may have been soy bean stubble, but
20 when you plant new soy beans, the stubble gets plowed
21 under, does it not?

22 Q. And you're saying on this farm there's
23 soy beans out there, green, an inch and a half tall?

24 A. It would appear to me to be soy beans
25 out there. There's growth of some type.

1 Q. Now, you're telling us that in looking
2 and determining where the easement is now, we are to
3 look at existing use?

4 A. Yes.

5 Q. Existing use by whom?

6 A. I would assume by the grantor or the
7 heirs of the grantor of the easement and the heirs of
8 the grantees of the easement. Someone has obviously
9 made roadways out there.

10 Q. And did it when?

11 A. Over the past years.

12 Q. Over the past year or years?

13 A. I would think years.

14 Q. You would think.

15 A. That ground is pretty hard packed.

16 Q. Okay. Are you telling me, sir, that if
17 Mr. Wescoat, the owner of what we call the servient
18 parcel, if he had driven his pickup out there and
19 evaded the mud hole on the first turn, that that is
20 material as to where the location of the easement is
21 for Shooting Point?

22 A. I would think that just because there's
23 a sink hole that may not move, that is one anomaly.
24 When we drive a truck down a road, we do not drive it
25 absolutely straight as is reflected in Mr. Bonifant's

1 map. We all know that there is a little weave.

2 We report that this is the center line
3 from a surveying standpoint. If we spent the time
4 and effort to locate every deviation, we would be
5 locating the center of that roadway every foot.

6 And maybe then it still wouldn't be
7 enough, because between one foot and the next foot
8 there would be a deviation, minute. You will never
9 see it on a one inch equals 200 scale map.

10 Very possibly the deviation to avoid the
11 mud hole is a moot point, because that's what they've
12 done as opposed to -- they being anyone. That's what
13 has happened as opposed to filling it in with shell.

14 Q. Well, let me ask you as a CLS in
15 preparing a plat, suppose your azimuth was that one
16 of the property owners at Shooting Point decided over
17 a week that he happened to be down here on vacation,
18 I'm going to drive where I want to, and for a week he
19 drove down 20 feet away from the easement area.

20 Does that become evidence of use, sir,
21 to you as a surveyor?

22 A. Well, we would have to see what it
23 looked like in the field. Is it something that
24 somebody has done helter-skelter to disrupt, or is it
25 something that was done for a reason?

1 And the preponderance of the usage would
2 still dictate it. If you go out and you see where
3 one set of tracks has gone out and off to the left,
4 you throw that anomaly away.

5 Q. Well, let's assume that there's five
6 Shooting Point lot owners, and they come onto the
7 easement and say, we don't like where this is.

8 And they cut out 20 feet and go straight
9 as an arrow down to the first turn, go 20 feet past
10 the first turn, go to the right, don't get to the
11 second turn, shoot down straight again, go past the
12 third turn, and then shoot over to Shooting Point
13 20 feet away from the easement, and they do this for
14 a month, all five of them.

15 Is that evidence of use as to the
16 location of the easement, sir?

17 A. That's evidence of use. The easement
18 states it's 15 foot in width, and it's along the edge
19 of the woods.

20 Now, if it's 15 foot in width and it's
21 along the edge of the woods and they move it over --
22 they being anybody -- they move it over 20 feet,
23 there's still evidence of use that they can't erase.
24 It's still there, and that's where the easement is
25 going to be, against the edge of the woods.

1 Q. Against the edge of the woods.

2 A. And 15 feet in width.

3 Q. So despite the fact that they make a
4 wide turn, that really doesn't have anything to do
5 with it, does it?

6 A. Well, I think a normal piece of
7 equipment out there is going to make a wide turn.
8 The radiuses that we are requesting, being 75 feet,
9 do not impact the plowable ground except at the
10 center one.

11 And that only takes into -- that only
12 uses the evidence of use that was there a month ago.

13 Q. If Curtis Jones, the tenant farmer on
14 Mr. Wescoat's parcel, if he has a big piece of
15 equipment and it's necessary for him to get further
16 off away from the road and he makes a wide turn,
17 you're telling us that that becomes evidence of use
18 as to the location of this easement?

19 A. That's evidence of use. I'm not saying
20 a big combine that requires a larger radius to turn
21 than a Mercedes is going to go into that plowed
22 field.

23 If we're going to take and say the
24 evidence of usage for that vehicle is going to
25 dictate, yes, it might. The only place that it does

1 is at the number two curve.

2 Q. Well, let's assume that this, quote,
3 evidence of use that you're referring to has happened
4 in the last two years. Does that tell you where to
5 locate the easement?

6 A. I don't know that I could verify that
7 it's happened in the last two years or not.

8 Q. You don't know when it happened, do you?

9 A. What I have seen is the second curve has
10 been plowed up, and that's where there was a lot of
11 usage going inside.

12 Q. And you don't know by whom --

13 A. I do not, no, sir.

14 Q. -- and at what point in time.

15 A. I could not tell you.

16 Q. Okay. Now, you say the location of this
17 easement. What does the '74 deed say as to the
18 location of the easement?

19 A. It's 15 foot wide, and it's along the
20 edge of the woods.

21 Q. And that's what it says?

22 A. I can't quote it verbatim, but the main
23 points are that it's 15 feet wide and it's along the
24 edge of the woods.

25 Q. Let me show you a copy of the grant of

1 easement, and there's one very important term that I
2 have put red around at the bottom of it. What's that
3 term?

4 A. It says easement to follow the present
5 road leading from Virginia state highway.

6 Q. To follow the present road. Okay. What
7 does that mean to you, to follow the present road?

8 A. The present road at the date this was
9 recorded.

10 Q. That's the easement, then, the present
11 road as it existed in 1974; correct?

12 A. That's what this says.

13 Q. And that's the grant of easement;
14 correct?

15 A. I don't know that I can show you and I
16 don't know that anyone can show you where the road
17 was in '74 short of doing a soils analysis.

18 Q. The easement says, sir, the present
19 roadway as it existed in 1974, does it not?

20 A. Yes.

21 Q. Okay. Are you telling this court that
22 the easement should be anywhere other than where the
23 roadway was as it existed in 1974?

24 A. We have no evidence of where the road
25 was in '74.

1 THE COURT: Try and answer the question,
2 if you would, Mr. Duff. Obviously, I would assume
3 that the answer is no. And then you can go ahead to
4 explain there's no way you can, because you don't
5 have any evidence as to where it was in '74.

6 A. Rephrase it.

7 BY MR. POULSON:

8 Q. Are you saying that it should be in any
9 different location than where it was in 1974?

10 A. No.

11 Q. Okay. Now, secondly, there was a plat
12 done, what, some five years later, was it not?

13 A. Yes, 1979.

14 Q. And that's the Bonifant plat?

15 A. Yes.

16 Q. And do you understand, sir, that this
17 was a plat that was attached to a deed given by the
18 predecessors in title of Shooting Point?

19 A. Yes.

20 Q. And on the Bonifant plat it does have
21 courses and distances, doesn't it?

22 A. Yes.

23 Q. And it has pins marking at the corners;
24 correct?

25 A. No, sir.

1 Q. It doesn't?

2 A. No, sir. You said the corner, but
3 that's not the corner of the property.

4 Q. I'm not talking about the corner of the
5 property. I'm talking about easement now. Now, that
6 pin has a purpose, does it not?

7 A. Yes.

8 Q. It marks the intersection of the center
9 line of the roadway, the easement.

10 A. It marks the center line extension of
11 the tangent part of the easement.

12 Q. And in fact, on the plat the center line
13 is designated center line dirt lane, is it not?

14 A. Yes.

15 Q. And this is five years after the grant
16 of easement.

17 A. Right.

18 Q. Are you aware of anything prior to that
19 since 1974 showing the course of the easement?

20 A. No.

21 Q. And you would agree that from the pin
22 out here to the road, there is nothing to designate
23 any change of course on this plat, is there?

24 A. No.

25 Q. And you would agree, would you not, in

1 the field of surveying that if there is nothing there
2 to indicate a change, the presumption is that it
3 continues along the same course?

4 A. Right.

5 Q. Now, as far as Mr. Bonifant's survey is
6 concerned, this survey, one can take the original of
7 that survey and basically scale the turns on it, can
8 he not?

9 A. Sure.

10 Q. Did you do it?

11 A. No.

12 Q. You did not do it?

13 A. No. Well, wait just a minute. When we
14 drew it on the Shooting Point subdivision plat, yes,
15 for picture purposes only.

16 To scale, to scale and have it accurate,
17 go upstairs or go downstairs to the clerk's office in
18 this courthouse, and you have a paper copy, not as
19 accurate as the Mylar original which resides in Mr.
20 Bonifant's office.

21 Q. Did you go to Mr. Bonifant's office?

22 A. No.

23 Q. Did you scale off the one here in the
24 clerk's office?

25 A. We scaled off the copy that we had made

1 from the microfiche here.

2 Q. You scaled off a copy of what?

3 A. Of the microfiche here.

4 Q. So you scaled from a copy here.

5 A. Yes.

6 Q. Okay. Now, as far as the survey that
7 you all did in 1999, you all relied on Mr. Bonifant's
8 plat, did you not, sir?

9 A. To some degree, yes.

10 Q. Well, what was the degree that you
11 didn't?

12 A. We used his information to establish the
13 common line between the piece that Mr. Meekins
14 purchased and Shooting Point, and we compared his
15 line to Mr. Badger's line and the common line between
16 Mr. Wescoat and Shooting Point.

17 And we used his information as called
18 for to show what we purported to be the easement
19 based on the usage as granted in the easement, in the
20 deed of easement.

21 Q. Did you slap on your 1999 plat the
22 identical information from the Bonifant plat in 1979
23 as to the easement, sir?

24 A. Yes.

25 Q. Courses and distances and pins and

1 everything?

2 A. Courses and distances. We didn't say
3 pin found, because we did not do a pin survey at that
4 time.

5 Q. Well, your little pins are shown on the
6 subdivision plat, are they not?

7 A. There are circles shown. They do not
8 say pin found or pin set.

9 Q. Well, what are those circles out there,
10 Mr. Duff?

11 A. They are pins today, but we did not do a
12 field survey. And if I don't say pin found or pin
13 set, it isn't anything.

14 Q. So why did you put them on there?

15 A. Because they were copied from Mr.
16 Bonifant's map.

17 Q. And obviously, you relied on that.

18 A. For that picture.

19 Q. And you thought it was sufficient.

20 A. It was sufficient to tell somebody that
21 they had an ingress/egress easement per that deed to
22 go from Route 622 to Shooting Point.

23 Q. And per those courses and distances;
24 correct? They're on there.

25 A. Possibly, until we do a field survey.

1 Q. Possibly? Do you say anything on this
2 plat that this is only good until we do a field
3 survey?

4 A. We state that we did not do a field
5 survey.

6 Q. Do you say don't rely on this until we
7 go back and do a field survey?

8 A. No, we don't.

9 Q. You don't say that, do you?

10 A. No.

11 Q. So you put a big subdivision plat to
12 record, and basically you want to tell the court but
13 it's not very good. Nobody ought to rely on this.
14 Is that what you're telling us?

15 A. No, I'm not telling you that. I'm
16 telling that you that there is an ingress/egress
17 easement per a deed to get from 622 to Shooting
18 Point.

19 Q. And you all signed off on this, did you
20 not?

21 A. Yes, sir.

22 Q. And you say then I won't say that
23 there's an easement. It doesn't say any more than
24 that. It doesn't lay the course of it at all.

25 A. Not according to the reference that we

1 used, which is the deed.

2 Q. Okay. And apparently, you saw no need
3 to do a field survey, because you didn't do it.

4 A. We hadn't been requested to do one at
5 that time.

6 Q. You hadn't been requested to do it?

7 A. Right.

8 Q. But you put your name on something, and
9 I assume you felt like it was reliable and true and
10 accurate.

11 A. The fact that we stated that it was not
12 based on a field survey is sufficient.

13 Q. How long have you been working with the
14 City of Norfolk?

15 A. I don't work for the City of Norfolk.

16 Q. Working within the City of Norfolk.

17 A. Within?

18 Q. Yes.

19 A. I've been surveying -- Baldwin and Gregg
20 has been located in Norfolk since 1908.

21 Q. How many surveys have you done in the
22 country, sir?

23 A. In the country?

24 Q. Yes, sir.

25 A. Like I answered earlier, several

1 hundred, maybe thousands.

2 Q. Out in the country, farmland, sir?

3 A. Oh, I'm sorry. I thought you said in
4 the country meaning in the states.

5 Q. Not in the USA. My mistake. How many
6 surveys have you done of farmland and things of that
7 nature?

8 A. Probably of the total number that I have
9 done, which I can't say right now, maybe a third
10 to --

11 Q. Maybe a third?

12 A. -- maybe a third to a half.

13 Q. And so basically, the bottom line here
14 is up near the entrance there is a question about the
15 Bonifant survey, and you agree the bent pin is the
16 center line of the Bonifant survey out near the
17 entrance. We agree on that; right?

18 A. According to his map. What he says on
19 the map taken at face value, the pin that we found at
20 the angle made up by the two points at the first
21 curve, the bent pin found that's nine feet east of
22 the pin that's in the center of usage today is this
23 pin that Mr. Bonifant calls from.

24 Q. You did not talk to Mr. Bonifant at any
25 point, I assume, sir.

1 A. No.

2 Q. And other than that deviation up there,
3 the course of the poles pretty well follows the
4 Bonifant survey, does it not, once you come out of
5 the first turn?

6 A. It follows the picture that is shown on
7 Mr. Bonifant's. There are three curves. The posts
8 are at least 15 feet -- well, they're wider than 15
9 feet even at the center of the posts, but they
10 generally follow this picture.

11 Q. You call it a picture. It's not a
12 picture. It's a plat, isn't it, Mr. Duff?

13 A. I think it's an attempt to show the
14 center of the road as he saw it.

15 Q. In 1979 five years after the grant of
16 easement.

17 A. Yes.

18 Q. And that's the same, quote, picture you
19 put on your plat too.

20 A. Yes.

21 Q. That you certified as a CLS.

22 A. Yes.

23 MR. POULSON: Judge, I don't have any
24 anything else. Thank you.

25 THE COURT: Anything else?

1 MR. POULSON: Oh, I do have one more
2 question. Sorry.

3 BY MR. POULSON:

4 Q. Have you seen -- I show you a deed of
5 trust, Plaintiff's Exhibit 19, a deed of trust to
6 Farmers and Merchants Bank. It's of one of the lots
7 down there.

8 Looking at the Schedule A, were you
9 aware that a deed of trust was given, and the
10 easement on the subject property was as per your
11 subdivision plat?

12 A. May I look at the front page?

13 Q. You certainly may, of course.

14 A. It was dated December the 29th, 1999,
15 after we had done our plat.

16 Q. Okay.

17 A. I would have no reason to go pull this
18 out.

19 Q. It was done after you did your plat?

20 A. Yes, sir.

21 Q. So would you interpret that as meaning
22 that an easement was given to the trustee for the
23 benefit of the bank in accordance with the location
24 on your plat of survey?

25 MR. McFARLAND: Well, I'll object, Your

1 Honor. It's asking for a conclusion from this
2 witness that is beyond his area. He is a surveyor.

3 MR. POULSON: Well, he does research as
4 a surveyor.

5 THE COURT: I think he can go ahead and
6 answer.

7 A. The second paragraph under Schedule A
8 says that they are given the perpetual non-exclusive
9 easement of right-of-way over et cetera, et cetera,
10 15 feet wide as shown on, and if you refer back to
11 that plat, you will see that it refers to the deed of
12 easement granted.

13 BY MR. POULSON:

14 Q. Along with courses and distances;
15 correct?

16 A. But the deed governs where the easement
17 is.

18 Q. And so we can ignore the courses and
19 distances on your plat?

20 A. It is reported to get you from 622 and
21 show you -- I could have shown lines without bearings
22 and distances, but we had a plat. We had a plat that
23 had that information.

24 Q. So you did not choose to eliminate the
25 courses and distances?

1 A. That's right.

2 Q. Okay. And just to show you another deed
3 to Mr. Manetta, as per your survey.

4 A. Okay.

5 Q. And I'm not going to take the time to
6 show you four more, but you don't think that creates
7 a confused situation? I mean how many easements are
8 there?

9 MR. MCFARLAND: I'm going to object,
10 Your Honor. It's calling for pure speculation, and
11 it's an improper question of this witness as to
12 whether it creates confusion.

13 THE COURT: Go ahead.

14 BY MR. POULSON:

15 Q. You're saying that there is an easement,
16 and it does not follow your plat of survey; right?

17 A. It doesn't follow exactly the calls that
18 Mr. Bonifant put on there, which we copied over.

19 Q. And it doesn't follow it at the entrance
20 also, does it?

21 A. I don't know. Mr. Bonifant didn't put
22 in any information.

23 Q. But we presume the course keeps
24 straight, and you found the Bonifant center line.

25 A. We found two pins there.

1 MR. POULSON: All right. That's all,
2 Mr. Duff.

3 THE COURT: Any redirect?

4 MR. LePAGE: No, Your Honor.

5 MR. MORRIS: No, Your Honor.

6 MR. MCFARLAND: Briefly, Your Honor.

7 REDIRECT EXAMINATION

8 BY MR. MCFARLAND:

9 Q. Mr. Poulson keeps asking you to presume
10 the course keeps straight. In that Bonifant 1979
11 survey, under good surveying practice can you simply
12 assume that the course keeps straight from the last
13 call moving southbound?

14 A. He has it drafted as the east edge of
15 the easement appears to tie into the east edge of
16 Route 622. This is a one inch equals 100 scale map.
17 This is not exactly one inch equals 100 feet.

18 It is extremely difficult to say exactly
19 where the east or the west side of the easement
20 strikes Route 622. There is no information to tell
21 us whether it hits in the curve, on the tangent or
22 wherever.

23 Q. And what did you find with respect to an
24 existing tree when you went out to the scene of the
25 easement in relationship to that center line pin?

1 A. The pin as shown on the Bonifant survey
2 as being the center of the easement, if it's the
3 center of a 15-foot easement, you go seven and a half
4 feet both ways to be at the edge.

5 And if you went seven and a half feet
6 and then went towards the pin at the end of the
7 722-foot line, the right side of your car would be
8 scraped by a 15-inch pine tree today.

9 Q. Now, Mr. Poulson has asked you -- you
10 didn't conduct a field survey for the 1999 plat;
11 correct? Is that standard surveying practice given
12 what was done there?

13 A. Not normal. But the client asked that
14 we prepare this, and so we did.

15 Q. Is there any indication that the
16 Wescoats adopted the 1979 Bonifant survey? Anything
17 on there indicate that they assented to what Mr.
18 Bonifant had drawn?

19 A. I don't understand that question. All I
20 can say is there's evidence of usage out there, and I
21 don't see that that bent pin we found at 622 could
22 ever have been a road.

23 So if that's what you mean, no, I don't
24 see that anybody has adopted that line or that
25 course. The rest of it fits pretty well.

1 Q. How about in other documents that you've
2 seen in conjunction with your position in this case?
3 Has there ever been anything that you've seen by
4 which the servient estate has adopted the 1979
5 Bonifant depiction?

6 A. No. Everything has been per this map
7 with the exception of Route 622.

8 Q. Mr. Poulson asked you a number of
9 questions about usage as indicating the location of
10 the easement. Now, you've seen the posts that have
11 presently been placed along the roadway.

12 A. Yes.

13 Q. Does the placement of the posts in any
14 way indicate the existence of the easement?

15 A. You can drive between the posts.

16 Q. Correct.

17 A. There are a couple of facts that are
18 true. The line of the posts follow generally along
19 the line of the edge of the woods. They follow the
20 woods, generally speaking. They are absolute, center
21 to center, 15 foot, 4 inches. We measured them.

22 Whether they follow at the curves what
23 the evidence of usage is or what could be construed
24 to be evidence of usage, what the normal person or
25 vehicle, farm vehicle would use is subject to

1 question.

2 Q. All right. So with respect to the
3 placement of the posts, you can't say that those any
4 more accurately represent the location of the
5 easement as it existed in 1974 than what you've done
6 in terms of relying on usage and other documents.

7 A. No.

8 THE COURT: Is that it, Mr. McFarland?

9 MR. MCFARLAND: One second, if I might,
10 Your Honor.

11 THE COURT: Anything else while he is
12 thinking, Mr. Poulson?

13 MR. POULSON: Yes, sir.

14 RE CROSS-EXAMINATION

15 BY MR. POULSON:

16 Q. Mr. Duff, you wouldn't say that the 1979
17 Bonifant plat is the best evidence that this court
18 has as to where the location of the roadway was in
19 1974, sir?

20 A. It's possible. I can't say what the man
21 did, Mr. Poulson. I wasn't there.

22 Q. Was he a CLS?

23 A. Well, I don't want to be flippant with
24 you, sir, but we are now called Land Surveyors.
25 Certified Land Surveyors went out 25 years ago.

1 But he is a licensed Land Surveyor, and
2 if he says this is the center of the road, then I
3 have to believe him until I prove him otherwise.

4 Q. And you did believe him when you did
5 your plat in 1999.

6 A. I did believe that was the best evidence
7 we had.

8 Q. And as far as branches, are you aware
9 that branches grow out and intrude on roadways?

10 A. Yes.

11 Q. And you can cut them, can't you?

12 A. Sure.

13 MR. POULSON: That's all.

14 THE COURT: All right. Can we let him
15 go?

16 MR. McFARLAND: Well, I want to just
17 clarify a point.

18 FURTHER REDIRECT EXAMINATION

19 BY MR. McFARLAND:

20 Q. You accepted Bonifant's depictions on
21 the straight-of-ways; correct?

22 THE COURT: Now, come on.

23 MR. POULSON: I object to that.

24 THE COURT: I think that we have -- you
25 all have tried to pin Mr. Duff down as tight as he

1 wants to be pinned at this point. You know, let's go
2 on with the next witness.

3 MR. McFARLAND: All right, Judge.

4 THE COURT: Thank you, Mr. Duff. I
5 think you can be excused.

6 (Witness excused.)

7 THE COURT: Who do you have next?

8 MR. McFARLAND: Just a moment, if I
9 might, Your Honor.

10 I think that's it at this point, Your
11 Honor, for us. We'll rest.

12 THE COURT: Okay. The defense rests.

13 MR. MORRIS: Your Honor, I do have one
14 witness I would like to call.

15 THE COURT: All right.

16 MR. MORRIS: Mr. John Manetta.

17 THE COURT: That's the Shooting Point,
18 LLC; right?

19 MR. MORRIS: The property owners'
20 association.

21 THE COURT: Excuse me, Shooting Point
22 Property Owners' Association, Incorporated. All
23 right.

24 MR. MORRIS: I will be brief.

25 THE COURT: Come on up, if you would

1 please, sir.

2

3 JOHN L. MANETTA, called as a witness by
4 and on behalf of the Defendants, being first duly
5 sworn, testified as follows:

6 DIRECT EXAMINATION

7 BY MR. MORRIS:

8 Q. Good afternoon, Mr. Manetta. Could you
9 state your full name and spell it for the court
10 reporter, please?

11 A. My full name is John Lyman, L-y-m-a-n,
12 Manetta, M-a-n-e-t-t-a.

13 Q. And your current residence?

14 A. My current residence is 2411 Whaler
15 Court, Virginia Beach, Virginia 23451.

16 Q. And what is your occupation, sir?

17 A. I'm retired as a senior vice president
18 of operations from Norfolk Southern of 44 years,
19 presently working a temporary job as executive
20 director of the Virginia Zoological Society in
21 Norfolk.

22 Q. Now, you are currently an owner of some
23 property at Shooting Point?

24 A. That's correct.

25 Q. And what made you seek retirement

1 property on the Eastern Shore?

2 A. Well, the reason I sought property over
3 here, I looked up and down the Eastern Shore and
4 found that the conditions --

5 MR. POULSON: Judge, I would object to
6 this, the reason that he sought property on the
7 Eastern Shore, on a materiality basis.

8 THE COURT: Well, I think he is probably
9 going to get there.

10 MR. MORRIS: I'll get there very
11 quickly.

12 THE COURT: Go ahead.

13 BY MR. MORRIS:

14 Q. What made you choose Shooting Point?

15 A. I chose Shooting Point because of the
16 conditions that were being set up in the sale of the
17 property for conservation and for privacy issues, and
18 I liked the quiet and peaceful surroundings.

19 Q. When did you first visit Shooting Point
20 property?

21 A. I believe it was sometime in November of
22 '99.

23 Q. When did you close on your purchase?

24 A. I believe December of '99.

25 Q. And how many lots did you purchase?

1 A. Three.

2 Q. And why did you choose three contiguous
3 lots?

4 A. I wanted to build on 11, which is the
5 middle lot, and use ten and 12 as buffers to keep
6 other people at a distance.

7 Q. Do you have any plans in the future to
8 sell off the other two lots?

9 A. No, sir.

10 Q. With regard to your understanding of the
11 previous use of the easement that's the subject of
12 this lawsuit, were you aware of the size of the
13 easement when you purchased your property?

14 A. Yes, sir.

15 Q. And how did you navigate what you
16 understood was the course of the easement when you
17 first went out to the property to view it?

18 A. I drove following the path of the tire
19 marks down through the field.

20 Q. And that was back in 1999?

21 A. That's correct.

22 Q. And about how many times have you driven
23 the easement yourself since that time?

24 A. Oh, 30 or 40 times.

25 Q. What type of vehicle did you drive the

1 easement with?

2 A. I have a Dodge Durango.

3 Q. Is that what you consider an SUV?

4 A. SUV, yes, sir.

5 Q. With regard to the tracks that were left
6 by the previous use that you followed, prior to the
7 time that these posts that are subject to a lot of
8 discussion here, where did those tracks lead you with
9 respect to bushes and branches and so forth along the
10 edge of the easement?

11 A. Well, the posts which you refer to that
12 have been placed on both sides of the general
13 easement have --

14 Q. I'm talking specifically before the
15 posts were there. How would the course go with
16 regard to trees, branches and that sort of thing?

17 A. It swung wider than it does now.

18 Q. And in all of your visits, these 30 or
19 40 visits over the easement, did you ever deviate
20 from the existing tracks that were down on the
21 ground?

22 A. No, sir.

23 Q. During your course of driving the
24 easement, did you ever have the occasion to encounter
25 other vehicles coming from the other direction?

1 A. I have been in vehicles -- I have not
2 actually driven, but I have been in vehicles that
3 encountered other vehicles on the right-of-way.

4 Q. And with regard to those types of
5 vehicles, were they small vehicles or large vehicles?

6 A. One was an Excursion, and the other one
7 was a sedan.

8 THE COURT: Where are we?

9 THE BAILIFF: No. 20.

10 THE COURT: Three photographs showing a
11 Ford SUV and a red sedan passing, Defendant's 20.

12 (The three photographs were marked
13 Defendant's Exhibit No. 20 and received
14 in evidence.)

15 BY MR. MORRIS:

16 Q. Mr. Manetta, this is what has been
17 marked as Defendant's Exhibit 20. Would that depict
18 in your mind how the vehicles passed when you
19 experienced passing the vehicles on the easement?

20 A. Yes, sir.

21 MR. MORRIS: Your Honor, I have a small
22 video that just is two minutes long concerning the
23 passing of vehicles. I can either show it to you,
24 and he is just going to testify that that is
25 consistent with the matter. But I would like to have

1 it entered as evidence.

2 THE COURT: All right.

3 MR. MORRIS: But for the sake of time,
4 do you want us to avoid seeing the video?

5 THE COURT: No, no. You go right ahead.

6 MR. POULSON: Is that one that I've been
7 provided?

8 MR. MORRIS: Yes, it is. I think it's
9 this one right there.

10 BY MR. MORRIS:

11 Q. Now, while they're preparing this video,
12 you've had occasion to see these videos, have you
13 not?

14 A. Yes, sir.

15 Q. And the first video we're going to show
16 you is the one with the passing vehicles.

17 Mr. Manetta, can you see this?

18 A. Yes, sir.

19 Q. Now, the video that you are looking at
20 now, this is after the posts were erected; is that
21 correct?

22 A. That's correct.

23 Q. And do you recognize the easement?

24 A. Yes, sir, I do.

25 Q. And would this be consistent, then, with

1 how you would pass vehicles on that easement?

2 A. Yes, sir.

3 Q. While we have this here, with regard to
4 the roadway ruts -- or excuse me, you indicated it
5 was tracks. Are these the tracks that you had
6 indicated that you followed?

7 A. Yes, sir, at present.

8 Q. All right.

9 MR. MORRIS: That's fine, and then that
10 goes on for about two or three more passes. And if
11 you will put on the second video.

12 BY MR. MORRIS:

13 Q. You've had the occasion to go down and
14 visit the easement today?

15 A. Yes, sir.

16 Q. All right. Can you recognize that road?

17 A. Yes, sir. It's looks like 622.

18 Q. Is that the condition of the road as you
19 remember it back when you purchased the property?

20 A. Yes, sir.

21 Q. And is that the condition of the road as
22 it is today?

23 A. This morning it looked like it had been
24 bush-hogged on both sides and cut down, and the edges
25 of the roads are not readily visible.

1 Q. And again, is this the continuation of
2 622?

3 A. Yes, sir, it is.

4 Q. Are you familiar with how wide 622 is?

5 A. I have never measured it, but I
6 understand it's somewhere between 14 and 15 feet.

7 Q. Well, while we're watching this thing go
8 forward, have you ever had any concern with regard to
9 any emergency vehicles or other vehicles getting to
10 your property?

11 A. No, sir. I figure if they could
12 negotiate 622, they could negotiate that 15 feet
13 also.

14 Q. And again, is this the condition of the
15 entranceway as you recall it back when you purchased
16 the property?

17 A. Yes, sir, pretty much so.

18 Q. When was the first indication that there
19 was some objection by Mr. Wescoat to the use of the
20 easement?

21 MR. POULSON: I don't know what the
22 materiality would be as to when Mr. Wescoat may have
23 objected to the use of the easement.

24 THE COURT: I don't think it is.

25 BY MR. MORRIS:

1 Q. When did you --

2 A. I received a letter dated January 13th
3 of the year 2000 from Mr. Wescoat stating that
4 objection.

5 Q. And on your visits at -- well, what was
6 your opinion of the letter? I mean what did --

7 MR. POULSON: It's been sustained as
8 immaterial.

9 THE COURT: I sustain the objection.

10 BY MR. MORRIS:

11 Q. All right. On your visits to the
12 property after the letter, were you directed to
13 follow a different course than you were used to
14 following?

15 A. State that again, please.

16 Q. After you received the letter, were you
17 in any way directed to follow a different course
18 along this easement than you were used to following?

19 A. After I received the letter, sometime
20 pretty soon after that there was two stakes put up
21 with a sign marking the entrance to the 15 feet,
22 which really bound the entrance as used. So I pretty
23 much used the same route that I had used before I got
24 the letter.

25 Q. And once these posts were erected, was

1 there any other deviation, then, on the course that
2 you were normally used to taking?

3 A. Yes, sir. The posts when put in place
4 forced the cars to drive closer to the woods.

5 Q. And in particular with regard to the
6 turns?

7 A. The turns were made tighter. And I
8 noticed the first day I went down there that where
9 the posts approached -- the last two posts before
10 they entered Shooting Point, I thought it was a
11 little bit amusing.

12 There was a fencepost right between the
13 two posts, the last post there, and had indications
14 of wire being strung on them like it was a corner
15 post, and it was stuck right between the two of
16 them. You couldn't have drove between them if you
17 wanted to.

18 And it stayed there about a month or so,
19 and then somebody took it out.

20 Q. And that was located at the end of this
21 easement?

22 A. The end of the easement where it enters
23 Shooting Point property.

24 MR. MORRIS: I believe we have this in
25 evidence elsewhere. Do you know which number it is?

1 MR. POULSON: It's probably in there
2 somewhere.

3 MR. MORRIS: Your Honor, just for speed
4 sake, I was going to show him this and have him
5 indicate where the post was. It's already been
6 entered into evidence once.

7 THE COURT: Oh, okay. That's fine.

8 BY MR. MORRIS:

9 Q. I'm going to show you a picture that has
10 been entered into evidence once. Could you identify
11 what you see in that picture?

12 A. The post was approximately right in the
13 middle, right under the tree limbs right between the
14 last two posts.

15 Q. Can you take that pen and make a circle
16 there where you thought the post was?

17 A. All right.

18 Q. And you don't know how long the post was
19 there?

20 A. No. I had not noticed it before because
21 the other posts did not bring my attention to it, and
22 I was just treating it as any other post around the
23 property.

24 THE COURT: Where are we?

25 THE BAILIFF: No. 21.

1 THE COURT: Defendant's 21.

2 MR. MORRIS: Thank you.

3 (The document was marked Defendant's
4 Exhibit No. 21 and received in
5 evidence.)

6 BY MR. MORRIS:

7 Q. Mr. Manetta, with regard to the entrance
8 permit, what involvement did you have, if any, in
9 preparing or obtaining the entrance permit
10 application or the permit itself?

11 A. I had none.

12 Q. Do you or did you join with the other
13 property owners in supporting the permit as it was
14 submitted?

15 A. I did not have any action in connection
16 with the permit.

17 Q. Were you approached by anyone to assert
18 any political pressure or influence on VDOT or any
19 political subdivision to add pressure to approve the
20 permit?

21 A. No, sir.

22 MR. MORRIS: That's all the questions
23 that I have.

24 THE COURT: Any questions, Mr. Poulson?

25 MR. POULSON: Yes, sir, a few questions.

CROSS-EXAMINATION

BY MR. POULSON:

Q. Mr. Manetta, actually, you have just closed on two lots; is that correct?

A. I put a holder on the third one.

Q. You put a deposit down on the third one?

A. Yes, sir.

Q. And when you bought your two lots, did you have an attorney representing you?

A. Yes, sir.

Q. And did you see a copy of the plat for Shooting Point?

A. I had seen one, yes, sir.

Q. You have seen it?

A. Yes, sir.

Q. You've read the declarations, I assume, the covenants?

A. Yes, sir.

Q. Now, on the first turn there was a mud hole, was there not?

A. There is one now.

Q. And I take it you swung out around the mud hole?

A. Back when we originally started going down there, I don't remember a mud hole being there.

1 Q. So a mud hole has started recently?

2 A. Because the traffic has been forced all
3 up in the confines of that corner, yes.

4 Q. And everybody swings outside of the mud
5 hole; is that correct?

6 A. No, sir.

7 Q. Where do they go?

8 A. They do like I do. They drive with one
9 wheel up almost into the trees and one wheel in the
10 mud hole.

11 Q. Well, do you know how this, quote, usage
12 occurred that swings out into the field on the first
13 turn?

14 A. I assume it was people using it prior to
15 the posts being put up.

16 Q. Prior to the posts being put up?

17 A. That's correct.

18 Q. Did you swing out in the field prior to
19 the posts going up?

20 A. I did not swing out into the field. I
21 followed the tire tracks that were there at the time
22 before the posts were put up.

23 Q. Well, when did the mud hole come into
24 being?

25 A. I assume sometime with the rainy

1 season. I don't know.

2 Q. And you would agree that people have
3 swung out around the mud hole and swung into the
4 field, or somebody has; right?

5 A. Since the posts were put up?

6 Q. Before the posts were put up.

7 A. As far as I know there wasn't any mud
8 hole there before the posts were put up.

9 Q. And you don't know when it came into
10 being?

11 A. No, sir, I do not.

12 Q. And I take it that at this point in time
13 -- of course, most of the posts are down now, aren't
14 they?

15 A. Maybe 40 percent, I suppose.

16 Q. And of course, it's not possible to
17 drive outside the posts now. At least the posts
18 designate the inside and outside of the purported
19 easement, do they not?

20 A. I would assume people like me try to
21 follow the route as it's presently marked, yes.

22 Q. Have you ever measured an emergency
23 vehicle?

24 A. No, sir.

25 Q. Ever driven one?

1 A. No, sir, I haven't had the occasion.

2 Q. Never been a member of a volunteer fire
3 company?

4 A. No, sir. .

5 Q. Don't know how wide they are?

6 A. They shouldn't be any wider than any
7 other large delivery truck.

8 Q. Do you think the width of a delivery
9 truck is how wide a fire truck is?

10 A. Yes. I would think that trucks, unless
11 they're over standard width, are going to have to be
12 moved as restricted vehicles.

13 Q. What is standard width?

14 A. I don't have the foggiest idea.

15 Q. And of course, 622 doesn't have the
16 three curves on it like this 15-foot easement does.

17 A. No, but it's got a blind one right about
18 midway of it that turns back from right to left.

19 Q. Out on 622?

20 A. On 622.

21 Q. But the radius is not as sharp as it is
22 on the three turns on the easement, is it, sir?

23 A. I don't know that it's as sharp or not
24 as sharp, but it's not -- the pavement is not any
25 wider than the area which you have between the posts.

1 Q. And how wide are the shoulders adjacent
2 to the pavement?

3 A. Well, I figured that the state and the
4 county would have decided that the pavement was wide
5 enough to pass two vehicles or they would have made
6 the pavement wider, so I assume that 14 to 15 feet is
7 wide enough.

8 Q. How wide are the shoulders, Mr. Manetta?

9 A. I have no idea what the shoulders are.

10 Q. And you would agree that if somebody
11 needs to move over, they can move over on the
12 shoulder on 622, would you not?

13 A. I wouldn't call that a real safe
14 practice in there, because there's a drop-off of the
15 pavement, and the shoulders in a lot of places drop
16 right into the ditch.

17 Q. But you don't know how wide the
18 shoulders are on 622?

19 A. No, but you could lose control.

20 MR. POULSON: That's all I have.

21 THE COURT: Anything else?

22 MR. McFARLAND: Just a few, Your Honor.

23 CROSS-EXAMINATION

24 BY MR. McFARLAND:

25 Q. From your visits down 622, Mr. Manetta,

1 have you ever noticed the shoulders being disturbed
2 or torn up?

3 A. No, sir. They're pretty clean.

4 Q. Now, I believe you testified that when
5 you first bought your property, there was no specific
6 demarcation of the right-of-way, correct, when you
7 turned off 622?

8 A. You mean such as stakes or posts?

9 Q. Exactly.

10 A. That's correct, there was none.

11 Q. And then at some point in early 2000
12 someone put up stakes; correct?

13 A. At the entrance to the road off of 622,
14 that's correct.

15 Q. And would I be correct, sir, that the
16 stakes that were placed in the ground were outside
17 the obvious tracks that had been made for that
18 roadway?

19 A. That's correct.

20 Q. And you followed those stakes?

21 A. That's correct.

22 Q. And in fact, do I also understand there
23 was a sign placed that said begin 15-foot
24 right-of-way?

25 A. That's correct.

1 Q. Now, with respect to the posts that have
2 been put up by the Wescoats, that was done earlier
3 this year?

4 A. Somewhere around January of this year or
5 maybe a little bit after, somewhere in that area. I
6 don't know.

7 Q. And now because of the placement of the
8 posts, you have had to vary the course that you would
9 have otherwise traveled on that right-of-way;
10 correct?

11 A. Yes, sir, some places as much as four or
12 five feet.

13 Q. And as I understand it, in some places
14 you are shoved eastward or to the right, right
15 alongside obviously existing trees with overhanging
16 branches?

17 A. That's correct.

18 Q. And in some places where the posts have
19 been set by the Wescoats, we now find that the turns
20 are much sharper than you ever experienced in your
21 previous use of the property?

22 A. Yes, sir. They are sharper than what
23 was there prior to the posts.

24 Q. And I take it that when you first went
25 to the property in 1999, you could see existing usage

1 tracks?

2 A. Yes, sir.

3 Q. And you had followed those existing
4 usage tracks until the posts were placed?

5 A. That's correct, yes, sir.

6 Q. And those existing usage tracks didn't
7 take you through the trees or through overhanging
8 limbs?

9 A. No, sir.

10 Q. Let's see, I believe this is No. 17.
11 Let me hand you Plaintiff's Exhibit 17, Mr. Manetta.
12 Do you recognize that document, sir?

13 A. Yes, sir.

14 Q. Is that the survey plat --

15 A. Yes, sir.

16 Q. -- for the Shooting Point subdivision?
17 Did you have occasion to review that before you
18 purchased your lots?

19 A. Yes, sir.

20 Q. Did you in any way rely on the depiction
21 of the right-of-way down here in the left corner of
22 Plaintiff's Exhibit 17 in purchasing your lots?

23 MR. POULSON: Judge, I would object to
24 this. This is so far afield.

25 THE COURT: Overrule the objection.

1 Let's see what he says.

2 A. State your question again, sir.

3 BY MR. MCFARLAND:

4 Q. Sure. Did you in any way rely on the
5 depiction of the right-of-way in the bottom corner of
6 Plaintiff's Exhibit 17?

7 A. I reckon I'm not sure what you mean by
8 rely on. You mean did I accept that this was the
9 picture of the road as was in place that I was using?

10 Q. Did you accept that as an exact
11 representation of the right-of-way?

12 A. Yes.

13 Q. Okay.

14 THE COURT: Are you going to withdraw
15 your objection?

16 MR. POULSON: I'm going to withdraw it.

17 BY MR. MCFARLAND:

18 Q. You were also aware there was a deed of
19 easement?

20 A. Yes, sir.

21 Q. In traveling the right-of-way, Mr.
22 Manetta, did you notice that there was crushed shell
23 placed in certain parts of it?

24 A. Yes, sir.

25 Q. That wasn't placed by you, I take it.

1 A. No, sir.

2 Q. And where was that crushed shell?

3 A. It was generally in the tracks going
4 down through the easement.

5 MR. McFARLAND: That's all I have, Your
6 Honor.

7 THE COURT: Anything else?

8 MR. LePAGE: No, sir.

9 MR. MORRIS: No, Your Honor.

10 RECROSS-EXAMINATION

11 BY MR. POULSON:

12 Q. I mean, basically, you've continued
13 going down the tracks, haven't you, Mr. Manetta?
14 Other than at the far end where there is a tree that
15 comes out over the roadway, have you not?

16 A. I went down the tracks that were
17 established prior to the posts being placed in the
18 ground. After the posts were placed in the ground,
19 it was very limited traffic down there.

20 So you might say that I may have been
21 part of the people who made new tracks so that we
22 could stay between the posts, and as those tracks
23 were established, generally that's what was followed.

24 Q. And of course, the tracks are only six
25 or seven feet wide, are they not, the two tracks?

1 A. Well, whatever the wheel base of a car
2 is..

3 Q. And basically, whatever tracks have
4 pretty well now stayed between the posts, have they
5 not?

6 A. They've stayed between the posts, but
7 they're generally made with only one vehicle
8 traveling in between the posts because of the limited
9 amount of traffic in there. So what you're seeing is
10 tracks down through the middle of the posts,
11 generally speaking.

12 Q. Which is the normal way, because it's
13 very difficult for two vehicles to get by through
14 there, is it not?

15 A. No, I would not say that. I experienced
16 passing other vehicles down there, and I didn't see
17 any problem with it. I can take mine down there and
18 pass anytime.

19 Q. Who did you pass?

20 A. I was in a vehicle that was passed by
21 when some of the Crees were driving.

22 Q. Some of the Crees that were in this film
23 here?

24 A. That's correct.

25 Q. Okay. And one of those vehicles ended

1 up hitting a post, did it not, banged into the post
2 that was stuck into one of the markers?

3 A. Oh, no. That was -- I think that was
4 one of those stakes that was laying out across the
5 road that had already been down. And when they drove
6 across where it was laying across the tracks, it
7 flipped it up.

8 Q. So you've seen that stake or post
9 flipping up there?

10 A. Yes, sir. I saw it flip up, yes, sir.

11 Q. Thank you, sir.

12 MR. POULSON: That's all.

13 THE COURT: All right. Anything else?

14 MR. MORRIS: No, Your Honor.

15 THE COURT: All right. Thank you, sir.

16 (Witness excused.)

17 THE COURT: Any further witnesses to
18 present? Anybody else?

19 MR. LePAGE: No, sir.

20 THE COURT: All right. Anything else?

21 I'm not begging you. I'm just asking you.

22 MR. McFARLAND: No, I understood, Your
23 Honor. Before I had a witness -- could we take five
24 minutes so I can check on something?

25 THE COURT: Sure.

1 (Short recess.)

2 MR. McFARLAND: Your Honor, I believe
3 I've moved all our exhibits into evidence, but to the
4 extent I haven't -- and I'm putting aside the ones
5 that the court marked for identification only.

6 THE COURT: Everything is in except the
7 ones that at this stage have been marked for
8 identification purposes only, and I think I've
9 pointed those out to you. Everything else is in
10 evidence.

11 MR. McFARLAND: Your Honor, the only
12 other thing I have is I have a photograph --

13 THE COURT: Let me take that back. With
14 the exception of, I don't think I said for the
15 record, the last videos that we saw, and I marked
16 those as Exhibit 22. And they are admitted into
17 evidence.

18 (The videos were marked Defendant's
19 Exhibit No. 22 and received in
20 evidence.)

21 MR. McFARLAND: Okay. And Your Honor,
22 with respect to the videos, I know there was -- the
23 second video was being shown while there was also
24 questioning of Mr. Manetta.

25 I'm sure the court will have the

1 opportunity to review the entire video at an
2 appropriate time, and we would ask that that be
3 done. And if the court would want to take five
4 minutes and look at it now, we certainly have no
5 problem with that whatsoever.

6 THE COURT: No, that's fine.

7 MR. McFARLAND: Then the only other
8 thing I have, Your Honor, is I do have a photograph
9 of the property that I would like to put into
10 evidence. I can recall Mr. Manetta if Mr. Poulson
11 objects to this. It's simply an aerial picture of
12 the property.

13 THE COURT: Let me take a look at it.

14 Okay. I don't know that one more is
15 going to hurt.

16 MR. POULSON: At this hour of the day, I
17 dare not object.

18 MR. McFARLAND: In that spirit, Your
19 Honor, I have a witness --

20 THE COURT: That will be Defendant's 23.

21 (The aerial photograph was marked
22 Defendant's Exhibit No. 23 and received
23 in evidence.)

24 MR. McFARLAND: Thank you.

25 MR. POULSON: Don't go for another one,

1 now.

2 MR. McFARLAND: No, I'm not. I just
3 want to make clear in the spirit of what Mr. Poulson
4 said, I have a witness who would testify about the
5 ability of emergency vehicles to travel that
6 roadway. But I have a sense that the court has
7 probably heard as much as it thinks is necessary --

8 THE COURT: Let me tell you what I was
9 thinking about where we're going to go from here. If
10 you want to put the witness on, that's fine with me.
11 I don't mind listening to him.

12 As I said at our last session prior to
13 today, I do want to go take a look at the property
14 myself. I think that it's probably the least the
15 court can do given the fact that we've probably spent
16 enough money on the aerial photographs to pay my
17 salary for a year.

18 And I'm mindful of the fact that
19 everybody is going to want to put his two cents worth
20 in by way of argument. So I'm going to suggest that
21 we're probably going to need one more session,
22 hopefully to allow you all to get your argument
23 pretty well organized and maybe direct, to the point.
24 You know what I mean?

25 MR. McFARLAND: Does the court want to

1 set that argument after a period by which the
2 transcript is prepared and typed up or we submit
3 briefs?

4 THE COURT: I don't care about your
5 submitting briefs. I mean probably enough transcript
6 fees have been paid in this case already. I don't
7 think you all ready need to worry about submitting
8 briefs. I really don't.

9 I think what I'm going to do in a minute
10 is I'm going to outline for you what at least the
11 court feels are the four main issues in this case,
12 and I'm going to ask you all when you argue to
13 concentrate on those in the order that I've given
14 give them to you.

15 And then that way I think if you take
16 some time and organize your argument based upon this
17 order of presentation and be ready to point out by
18 way of argument what testimony you want to
19 concentrate on and what particular exhibits you want
20 to concentrate on in presenting your argument, I
21 think we can do it without you all having to go back
22 and spend two or three days putting together a
23 brief. I really do.

24 So why don't we try to do it that way?
25 I guess the next question is when you think you can

1 get us a transcript. And I don't know, have you all
2 been getting this transcribed as we go along or what?

3 MR McFARLAND: Not the entire parts,
4 Your Honor.

5 THE COURT: Well, I would suspect that
6 you probably would need at least a week or two, don't
7 you?

8 MR. POULSON: I imagine a month would be
9 more like it.

10 THE COURT: Sir?

11 MR. POULSON: I would think probably a
12 month would be more like it. I mean I don't need a
13 transcript.

14 THE COURT: Well, I don't need one
15 either, if you all don't need one.

16 MR. POULSON: The court knows more about
17 the facts than we do, because the court keeps
18 throwing them back with no problem.

19 THE COURT: Well, I'm happy not to put
20 you all to the expense of a transcript, not that down
21 the road you might not have to do it anyway, but that
22 will be your decision, not mine.

23 MR. McFARLAND: So if I'm following the
24 court, we would set a date --

25 THE COURT: We're going to set a date

1 right now, the last, final, drop-dead date when you
2 all are going to come back and be ready to present a
3 clear, concise argument as to what the court ought to
4 do and why.

5 And this afternoon the bailiff and I are
6 going to take a little ride out there and check it
7 out, and then I'm going to go on back across the
8 creek. And we'll get back together whenever you all
9 put your heads together.

10 But at any rate, if you all want to
11 write this down --

12 MR. POULSON: Judge, I've got one item
13 of rebuttal I want to get into evidence before you
14 close down.

15 THE COURT: Well, maybe we'd better do
16 that first, then.

17 MR. POULSON: And Judge, what I would
18 like to offer -- and I've got them in a file, and I
19 won't take the trouble to pull them out. I want to
20 offer the Commonwealth interrogatory number eight and
21 answer, number nine and answer, and number 11 and
22 answer.

23 MR. LePAGE: Your Honor, I would like to
24 put in the entire responses to those interrogatories,
25 because they're very germane to the issue that Mr.

1 Poulson is raising.

2 THE COURT: Okay.

3 MR. POULSON: I think I'm entitled to
4 offer just the ones that --

5 THE COURT: So by way of rebuttal -- is
6 this the whole package?

7 MR. POULSON: That's the whole package,
8 yes, sir.

9 THE COURT: All right. By way of
10 rebuttal Mr. Poulson is offering into evidence the
11 question and response to interrogatory numbers, what,
12 eight, nine and ten?

13 MR. POULSON: I believe it's eight, nine
14 and perhaps 11.

15 THE COURT: Eight, nine and 11? Yeah,
16 eight, nine and 11. And as a matter of surrebuttal
17 the Commonwealth is moving into evidence all of the
18 rest of the questions and answers.

19 MR. LePAGE: Well, particularly three,
20 four --

21 THE COURT: Well, why don't we just put
22 them all in?

23 MR. LePAGE: Okay.

24 THE COURT: We'll call this a
25 combination plaintiff's exhibit and defendant's

1 exhibit, and for purposes of the record since both of
2 you all want part of it in, we'll put it all in and
3 call it Joint Exhibit A..

4 (The interrogatories and responses were
5 marked Joint Exhibit No. A and received
6 in evidence.)

7 THE COURT: All right. Anything else?

8 MR. POULSON: When are we going to set
9 this other date, because I need to get my calendar in
10 the car?

11 THE COURT: Well, you all write this
12 down first, and let's try to get this straight. And
13 then we can recess and set the other date.

14 The way that I see the issues in this
15 case -- and I'm trying to simplify it as much as
16 possible. I understand that, obviously, you all are
17 going to argue much more technically than this. But
18 broken down to its lowest common denominator, I see
19 the issues in this case as follows:

20 Number one, does there exist an easement
21 over the land of the plaintiffs herein extending from
22 Virginia Route 622 to the land of Shooting Point, LLC
23 and its assigns?

24 Number two, if so, what is the location
25 of such easement?

1 Number three, given the existence and
2 location of such easement, does its proposed use by
3 Shooting Point, LLC and its assigns over-burden the
4 estate of the plaintiff herein?

5 And finally, number four, should the
6 granting by the Virginia Department of Transportation
7 of a permanent ingress and egress to said easement
8 from Virginia Route 622 be over-turned by the court?

9 I think those are the four issues we've
10 got to deal with in this case. So if you would,
11 please, in crafting your argument -- because that's
12 my mind-set at this point and how I'm viewing this
13 thing from top to bottom. So try to craft your
14 arguments, if you would, to follow that scenario, and
15 let's see where we go from there.

16 MR. POULSON: Can you read three and
17 four, if you will again, sir?

18 THE COURT: Number three is given the
19 existence and location of such easement, does its
20 proposed use by Shooting Point, LLC and its assigns
21 over-burden the estate of the plaintiff herein?

22 And number four, should the granting by
23 the Virginia Department of Transportation of a
24 permanent ingress and egress to said easement from
25 Virginia Route 622 be over-turned by the court? All

1 right?

2 MR. POULSON: Thank you, sir.

3 THE COURT: Okay. Now, we'll officially
4 go off the record, be in recess, and you all can
5 check your calendars and we'll see what we've got.

6 (Short recess.)

7 MR. McFARLAND: So it's 7-10 at 10?

8 THE COURT: Right, 7-10 at 10. It will
9 be continued to 7-10 at 10 o'clock.

10 MR. POULSON: Judge, I've got one other
11 thing which I think needs to be on the record.

12 THE COURT: All right.

13 MR. POULSON: There has been certain
14 testimony by Mr. Duff which was related to
15 photographs that were not introduced into evidence.
16 We would move to exclude that testimony, whatever it
17 was.

18 THE COURT: To the extent that -- it
19 wasn't much, but to the extent that it does relate,
20 we'll exclude it. Okay.

21 MR. POULSON: We've got some
22 housekeeping stuff too. There was an order that I
23 sent out to sign and date, an order dropping Ms.
24 Wescoat's mother because of her death. And
25 somebody's probably got it in a file somewhere. I

1 don't know whether it's come back or not.

2 THE COURT: I don't recollect having
3 seen it.

4 MR. McFARLAND: I'll look and see.
5 Maybe they've --

6 MR. LePAGE: I don't think I have them.

7 MR. POULSON: And we probably need to
8 get an order together with all those preliminary
9 things that we had, motion to remedy this, that and
10 the other and all that stuff, cross-bill. We ought
11 to try and do something.

12 THE COURT: All right. Anything else?

13 MR. POULSON: I don't believe so.

14 MR. McFARLAND: The court is going to go
15 out and view the easement?

16 THE COURT: Yes.

17 MR. McFARLAND: Does the court want
18 counsel to be there at the same time or not be there
19 at all?

20 THE COURT: Not be there at all.

21 MR. POULSON: Judge, what are you going
22 to do about your reputation after going with Mr.
23 Robbins?

24 THE COURT: I'll have to take a chance.
25 Thank you all.

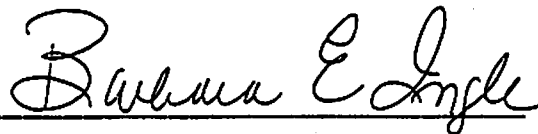
1 (At 4:00 p.m. the proceedings in the
2 above-entitled matter were recessed to
3 reconvene at 10:00 a.m., Tuesday, July
4 10, 2001.)
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER

I, Barbara E. Ingle, RPR, do hereby
certify that I reported verbatim the proceedings in
the Circuit Court of the County of Northampton, in
the above-entitled matter, heard by The Honorable
Frederick B. Lowe, Judge of said Court.

I further certify that the foregoing
is a true, accurate and complete transcript of said
proceedings.

Given under my hand this 27th day of
June, 2001, at Norfolk, Virginia.

A handwritten signature in cursive script, reading "Barbara E. Ingle", is written over a horizontal line.

Barbara E. Ingle, RPR