

V I R G I N I A:

IN THE CIRCUIT COURT FOR NORTHAMPTON COUNTY

DAVID B. TANKARD,

Plaintiff,

v.

CASE NO: CL22000113-00

CHRISTOPHER J. MONROE

and

JODI LEE REYNOLDS,

Defendants.

REQUEST FOR PRELIMINARY INJUNCTION

BEFORE: The Honorable Stephen C. Mahan, Judge

DATE: August 18, 2022

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APPEARANCES: DOUGLAS E. KAHLE, ESQ.
Basnight, Kinser, Leftwich & Nuckolls, P.C.
308 Cedar Lakes Drive
Chesapeake, Virginia 23322
Counsel on behalf of the Plaintiff

KEVIN E. MARTINGAYLE, ESQ.
Bischoff & Martingayle
3704 Pacific Avenue, Suite 300
Virginia Beach, Virginia 23451
Counsel on behalf of the Defendants

Reported by: Jill Showers, CCR

I N D E X

WITNESS

DIRECT

CROSS

DAVID B. TANKER, JR.....

41

79

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I N D E X

EXHIBITS

ADMIT'D

REFUSED

PLAINTIFF:

1. Google Earth photographs.....

48

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2. Printout of Parcel 2-3-B.....

52

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3. 1987 Deed.....

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4. Plat/survey of Babinski Farm....

56

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5. Deed dated 1/11/2010.....

60

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6. Photos of pickup truck & poles..

79

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DEFENDANT:

A. Plat of survey dated 12/23/11...

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104

B. Tax Map.....

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104

1. Map of different parcels.....

108

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2. Proposed zoning districts.....

115

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C. Zoning application dated 2016...

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117

3. Color map of Property B.....

119

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4. Color photo.....

121

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1 (The court reporter was sworn.)

2 THE COURT: All right. This is the
3 matter of Tankard against Monroe, et al.; is that
4 correct, Counsel?

5 MR. KAHLE: Yes.

6 MR. MARTINGAYLE: Yes, sir.

7 THE COURT: Counsel ready to proceed?

8 MR. KAHLE: Yes, Your Honor. Doug Kahle
9 here on behalf of the plaintiff, ready to
10 proceed.

11 MR. MARTINGAYLE: Judge, Kevin
12 Martingayle on behalf of the defendants. I would
13 like to introduce the people at my table. This
14 is Chris Monroe, one of the defendants. At the
15 other end of the table is Jodi Reynolds, the
16 other defendant. And between them is Patricie
17 Drake who is an attorney in my firm. I don't
18 know if you have had a chance to meet her yet so
19 I thought I would introduce her.

20 THE COURT: Thank you, Mr. Martingayle.
21 Welcome, Ms. Drake.

22 Now, we're set today on a request for a
23 preliminary injunction; is that correct?

24 MR. KAHLE: That's correct, Judge.

25 THE COURT: All right. Mr. Kahle.

1 MR. KAHLE: Shall I proceed?

2 THE COURT: You may if you're ready.

3 MR. KAHLE: I am ready and I have with me
4 Mr. David Tankard sitting beside me. And, Judge,
5 in lieu of doing a site visit and driving up the
6 shore, it would be a nice drive, we have a couple
7 of aerial photographs that you may want to see
8 just to kind of get yourself oriented. If I may
9 approach, Your Honor?

10 THE COURT: You may. Any objection,
11 Mr. Martingayle?

12 MR. MARTINGAYLE: I don't have an
13 objection because I don't know if he's trying to
14 move them into evidence but I don't have a
15 problem with you looking at them.

16 THE COURT: Thank you. All right.

17 MR. KAHLE: You may want to pull them
18 apart like Mr. Martingayle did. Google Earth
19 couldn't capture the whole picture without losing
20 detail.

21 THE COURT: All right.

22 MR. KAHLE: And the one that has a red
23 roof in it, hold that to the left.

24 THE COURT: All right.

25 MR. KAHLE: So this is the property we're

1 talking about, Judge. What we're going to hear
2 from Mr. Tankard is that that red roof there,
3 that's the defendants' house. That road you see
4 going sort of north and south is Route 183.

5 THE COURT: You said north and south?

6 MR. KAHLE: I'm pretty sure this is
7 oriented north and south and Mr. Tankard is
8 nodding in agreement. So Route 183 is the paved
9 highway.

10 THE COURT: That looks like it's more or
11 less east and west if the compass orientation is
12 correct.

13 MR. KAHLE: I'm going to go with your
14 compass direction and just orient it just based
15 on how the picture is set up then.

16 THE COURT: That is from the bottom of
17 the image on the left-hand side toward the top of
18 the image, is that the paved road we're speaking
19 about?

20 MR. KAHLE: I do see that. Let me back
21 up and I'm just going to talk based on the way
22 that picture is oriented. The paved road that
23 shows running from the bottom of the page up is
24 State Route 183. You're going to hear toward the
25 bottom of the page that's a dirt road which is in

1 the easement that's the subject of the dispute
2 that we have here.

3 Now, the pictures are a little bit dark
4 but you can see coming in from Route 183 past the
5 red-roofed house you can see where a forested
6 area begins. Well, Mr. Tankard is going to
7 testify that that's about 15 acres where he
8 converted farmland back in 1987 to a treed
9 forested area which of course created a 15-acre
10 buffer between his farming operation and the
11 defendants' property.

12 Carrying on, you're also going to see,
13 and you can kind of make it out in the left
14 photograph that in between the easement and the
15 defendants' home is a treed area of a certain
16 size.

17 Now, I will tell you that Mr. Tankard is
18 going to testify that pretty much right across
19 the street from this dirt road that's in the
20 easement is where his, I call it headquarters,
21 that's where his office is. He calls it a
22 distribution center which is where when the
23 plants are brought off the farms they go there
24 where they get sorted and put in tractor-trailers
25 and taken to customers up and down the east

1 coast. You're going to hear from Mr. Tankard
2 that his family specifically negotiated that
3 easement because it presented the preferred way
4 to get to their distribution center from this
5 farm and another farm that the family bought back
6 in '87.

7 In the right-hand photograph you're going
8 to see two things. Well, you'll see where the
9 farm actually begins and you're going to hear
10 from Mr. Tankard that compared to 1987 when they
11 bought the property that he reduced the farm area
12 by that 15 acres when he converted it into a
13 forest area.

14 You can see once you get out of the treed
15 area and you start to get to where there is looks
16 like a row of plants, there's a structure and
17 that you're going to hear is where Mr. Tankard's
18 family back in '06 wanted to house some migrant
19 workers so they got a permit to build what I
20 understand is six bedrooms, three apartments.

21 You're going hear from him that he got
22 all the permits and then for some short period
23 migrant workers lived there. He's going to
24 testify that the county did all the inspections
25 and once it was finished that they were cleared

1 to live there but that at some point after '06 he
2 stopped having migrants live there and he has
3 full-time employees living on site.

4 Towards the top of the right photograph,
5 Judge, you can kind of see a white line, if you
6 will, you're going to hear from Mr. Tankard that
7 that's an irrigation pond that was there. I
8 understand it's kind of hard to see but that's an
9 irrigation pond that was there back when he
10 bought the farm or when his family bought the
11 property in '87. It's still there.

12 He says over the 34 years since '87, I'll
13 go with that, that the irrigation pond increased
14 but he's never operated a borrow pit on the
15 property. It's clearly an irrigation pond and
16 farms have irrigation ponds.

17 So absent questions about what you're
18 seeing, what we're here about, as you said at the
19 outset, we just want to maintain the status quo
20 ante. That's what we're looking to get done
21 here. We want to preliminarily enjoin the
22 defendants from interfering with the right, that
23 Parcel B, which is the big farm right there, the
24 right it has to an express easement. It's
25 pertinent to Parcel B which gives it the right to

1 get from Parcel B down to Route 183. You're
2 going to see a 1987 deed where his family with
3 him being one of the grantees bought this Parcel
4 B farm and they bought another farm called Parcel
5 A that's another 13 or 14 or so acres that also
6 has the express easement to use this dirt road to
7 get down to 183.

8 Of course you've got to go through Parcel
9 B to get to Parcel A because the easement ends at
10 Parcel B so the right for Parcel A to use the
11 easement requires plants and whatever from Parcel
12 A to go through Parcel B.

13 Judge, the easement, it is a dirt road.
14 It is a dirt road. You're going to see from a
15 plat that defines my client's property pursuant
16 to his deed. You're going to see that
17 Mr. Tankard's property abuts the defendants'
18 property. The 15 acres of forest area abuts
19 their property --

20 You'll hear from him back in '87 when the
21 whole family bought both properties between then
22 and 2010 and the children got in the business
23 that they divided things up. My client got
24 Parcel B and his brother got Parcel A.

25 Now, what you're going to hear and see is

1 that the defendants oppose the request for a
2 preliminary injunction on two theories, it's a
3 nuisance because it's a farm. Well, I think
4 anyone knows farms can be dusty and noisy and
5 even kind of stinky and it has a lot of equipment
6 going back and forth.

7 Well, you saw a reference to the Virginia
8 Right to Farm Act that we're going to be talking
9 basically what it does as you'll hear it
10 prohibits a nuisance action against a farm as
11 long as the farm is complying with the laws and
12 regulations, as long as it's complying with best
13 management practices and the statute says it's
14 presumed that the farm is substantially complying
15 unless proven otherwise.

16 You'll hear from Mr. Tankard what he does
17 to comply and you'll hear from him things he does
18 not do that would not be in compliance. You're
19 going hear from him that he has never blasted on
20 his Parcel B. There is no reason to. It's a
21 nursery. You'll see that he has never operated a
22 borrow pit on his property. He has an irrigation
23 pond, nothing more.

24 He's going to testify under oath that he
25 has never hauled sand off of this Parcel B. In

1 the course of 34 years of operating a farm on
2 that property using that easement apparently one
3 time you're going to hear about when some piece
4 of equipment, a motor grader had a hydraulic
5 leak. One time in 34 years. You'll hear about
6 that.

7 When it came to Mr. Tankard's attention
8 it was addressed, it was fixed and no follow-up
9 adverse consequence. I will reserve just a fact,
10 back from this first picture that shows the red
11 house, you're going to hear from opposing counsel
12 and the defendants they would rather Mr. Tankard
13 not use the easement but instead go out a
14 different direction which would require then all
15 of Mr. Tankard's vehicles to go along 183, past
16 the defendants' house where they would then turn
17 right into my client's distribution center, and
18 Mr. Tankard walked it out, from 183 to the front
19 door of the defendants' house is about 40 feet
20 give or take, where the distance from the
21 easement is four times that.

22 So in terms of the noise and other
23 matters that the defendants consider a nuisance,
24 they want to bring it four times closer. Judge,
25 so as to the nuisance part, again, you're going

1 to see and maybe you've already read the Right to
2 Farm Act bars a nuisance claim. Mr. Tankard
3 substantially complies with best management
4 practices and the laws and regulations.

5 Then they say, well, important, that
6 Parcel B is overburdening the easement and they
7 argue about that migrant camp, migrant workers
8 camp. Well, you see in the picture and you'll
9 hear from Mr. Tankard it's three small apartments
10 for full-time employees.

11 As to whether that fact overburdens the
12 easement — Judge, just very briefly, there's a
13 Cushman case, Cushman Corporation versus Barnes,
14 it's a 1963 case, 204 Va. 245, talks about an
15 easement like ours where the easement is
16 unlimited as to what it can be used for and the
17 law says access and easement, access and egress
18 to Parcel B, it says, Supreme Court says in that
19 situation the easement may be used, in quotes,
20 any purpose to which the dominant estate may then
21 or in the future unreasonably be devoted.

22 Of interest in the Cushman case, Judge,
23 it was a 126-acre farm, had two dwellings on it
24 and the owner wanted to subdivide it to create a
25 subdivision with commercial uses and 34

1 residential lots. The Supreme Court said that's
2 reasonably foreseeable. Judge, I submit that
3 even though those three apartments for employees
4 weren't on the property back in 1987, that it's
5 reasonable for a nursery operation to have three
6 apartments for employee housing consistent with
7 the Cushman case.

8 Overburdening the easement, Judge, you're
9 going to hear from Mr. Tankard that he's reduced
10 the farmland by 15 acres since 1987, hasn't
11 increased the farmland whatsoever. I'm sure
12 you're going to hear that he did acquire eight
13 acres along the way, along his Parcel B that got
14 brought into Parcel B, eight acres of forest
15 area, no farmland. There's been a net decrease
16 you'll you'll hear from him in farmland from
17 1987 to the present.

18 Now, we've been talking so far, Judge,
19 about the express easement that you've seen and
20 will see more about pertinent to Parcel B.
21 Totally separate from that, Judge, there have
22 been plants brought off of another farm west of
23 Parcel B down that dirt road and it's been going
24 on since 1987. That's not being done.

25 That other farm isn't using that dirt

1 road pursuant to any express easement but it's
2 been doing it since 1987. If the defendants
3 don't want that other farm to bring its product
4 down that dirt road, well, it could have some
5 time in the last time 34 years or arguably now
6 bring trespass action against that other farm but
7 that dirt road being used by that other farm is
8 not being used pursuant to the express easement
9 in favor of Parcel B. Again, a trespass action
10 that could seek that other farm to stop using
11 that dirt road, that trespass action is not
12 before the Court.

13 You're going to see, Judge, what really
14 brought things to a head here, you going to hear
15 from Mr. Tankard he kept a timeline he called of
16 the different interactions, problems he was
17 having with Mr. Monroe. He kept a timeline on
18 his computer going back to February of 2020 and
19 there's a lot of entries but I'm going to have
20 him just go to maybe five or six of them to
21 highlight, but it culminated with what you saw in
22 the complaint, a photograph where Mr. Monroe
23 admits that he planted whatever it is, six or
24 eight short telephone poles blocking the easement
25 at which point in time Mr. Tankard sought legal

1 assistance.

2 You're going to hear, well, he can get
3 out of his property going other ways. He can get
4 to his distribution center going other ways. Of
5 course, Judge, there is not an easement by
6 necessity we're claiming. It's an express
7 easement that Mr. Tankard bargained and his
8 family bargained to get back in 1987 and he wants
9 to be able to continue using it, and you'll hear
10 from him that for the first 31 years, give or
11 take, the use of the easement, never a complaint.
12 Nobody had any problems with it.

13 He's going to testify that nothing in
14 substance has changed in terms of his operations
15 until these defendants came in. Judge, I'll save
16 it for closing but I contend if you'll agree at
17 the end of the day the four factors that would
18 support a preliminary injunction in this case
19 protecting Mr. Tankard's right to use the
20 easement like he has for 34 years, I think you'll
21 find that those factors are all satisfied.

22 THE COURT: So specifically what specific
23 or itemized relief are you requesting as a part
24 of the injunction?

25 MR. KAHLE: Yes, what I've requested I

1 believe I phrased it, to enjoin the defendants
2 temporarily, preliminarily from interfering with
3 Mr. Tankard's use of the easement, broad sense.
4 Clearly that would subsume within that that he
5 remove those poles or we establish when he will
6 remove those poles so that that, the use of that
7 easement is I call it unfeathered.

8 And, you know, Judge, last comment, I
9 think on the screen you're going to see a lot of
10 photos of trucks and trailers and farm type
11 equipment coming and going on the easement. I'll
12 tell you now, we'll stipulate that over 34 years,
13 I can't even image, I'm sure vehicles went up and
14 down that easement thousands of times, not at
15 issue. That's what the farm does.

16 Vehicles come and go, plants come and go.
17 They sent me about two or three hours ago copies,
18 I think 184 pictures showing that and we
19 stipulate that was probably on the dirt road
20 we're talking about and we have no problems those
21 photos. Thank you.

22 THE COURT: Thank you, Mr. Kahle.

23 Mr. Martingayle.

24 MR. MARTINGAYLE: Thank you, Judge. And
25 as the great Paul Harvey used to say, now for the

1 rest of the story. So the first thing is I want
2 to say what we're asking for. I'll start with
3 our conclusions. Number 1, we don't think they
4 can prove they're entitled to a temporary
5 injunction. We believe it should be denied. The
6 parties should then proceed with discovery, set a
7 trial and have a trial.

8 There's a lot going on here that requires
9 a lot of evidence and this is not nearly as
10 simple as Mr. Kahle would like for it to be.
11 However, our alternate position if you decide
12 that they can establish the need for this
13 easement pending a trial is if you do so with a
14 number of restrictions and I'll tell you
15 generally what those restrictions are that we
16 would seek.

17 Number 1, that the easement would serve
18 only Lots A and B and that it be explicitly
19 stated that it cannot serve anything that is the
20 expanded portion of B because the evidence is
21 going to show that B had approximately six and a
22 half acres added to it when a property line was
23 vacated.

24 So they automatically created additional
25 burden as a matter of law which they're not

1 allowed to do. They've made the servient estate
2 more servient and they don't get to do that. So
3 we would want it to serve Lots A and B, nothing
4 else.

5 Number 2, that they would only be
6 permitted to conduct properly permitted and zoned
7 uses. So anything that doesn't have all the
8 requisite permits and not properly zoned would
9 not be allowed.

10 The third condition we would want is that
11 there would be no use by anyone residing on Lots
12 A or B. The reason we say that is we have tried
13 through every means possible in contacting people
14 at the county to find if there's a certificate of
15 occupancy applicable to this property.

16 Not only is there no certificate of
17 occupancy, as it turns out the tax assessment map
18 indicates that there is no dwelling on this
19 property. Well, they just handed you a photo
20 that shows there is. It's on the picture that
21 shows where the lot was on the back and you see a
22 home that he said was originally intended to be
23 migrant housing and is now used for something
24 else.

25 Well, the county doesn't appear to know

1 that because there's no CO, and as far as we
2 know, there's also water because their own plat,
3 which we got in full which shows the writing at
4 the top that they cut off, says it has not been
5 approved for any source of water.

6 So there's not supposed to be a person
7 there and so we would want whatever is going on
8 that it can't be used by any residents. I'm not
9 asking you at this time to make some clear
10 determination as to whether or not people are
11 allowed to live there or not, but the easement to
12 the extent it is being used, should not be used
13 by any people who are residing there.

14 The next condition that we would ask is
15 that you declare that we are, in fact, allowed to
16 install a gate, and to the extent that we use a
17 lock, Mr. Tankard would be given a key or an
18 access code as appropriate but only Mr. Tankard
19 would be allowed to use it and only his legally
20 authorized agents and nobody else. It can't
21 become a situation where any old person can run
22 up and down that road and that's the problem that
23 we've been contending with.

24 Now, these are the problems that we
25 believe the evidence is going to show, Judge.

1 First of all, the idea that they need this is
2 undone by what Mr. Kahle has already handed to
3 you. He talked about the house with the red
4 roof. If you look up the left side of that
5 photo, follow the road up, you'll see that there
6 is a sandy looking trail.

7 THE COURT: Right.

8 MR. MARTINGAYLE: That is what is often
9 referred to as the Johnson easement. That land
10 we're going to show is owned by Mr. Tankard and
11 the reason it's called the Johnson easement is
12 that some years ago Johnson got an easement. So
13 in this situation Tankard is the servient
14 property and someone at some point was allowed to
15 use it as an easement to get to the back of that
16 property.

17 But we've got evidence showing, including
18 video that Tankard is currently using that and
19 it's a very convenient route. It goes straight
20 across Route 183 and straight off to Tankard's
21 property. So currently he's got a straight shot
22 easement or path that has been used for quite a
23 while now and he's got other access points that
24 we'll show you. So the idea that he needs this
25 today is just not accurate.

1 THE COURT: Does that easement extend all
2 the way back to the structure that Mr. Kahle
3 suggested is employee housing?

4 MR. MARTINGAYLE: Yes, it goes all the
5 way back and then they have other accesses for
6 that house to use. And the evidence is going to
7 show that there are lots of ways on and off of
8 this property.

9 For some reason and the only thing we can
10 speculate, Judge, is that some of the people
11 don't like driving these large vehicles on Route
12 183. So what they like to do is use all these
13 different paths and little roads that are back
14 there and then come down the easement that comes
15 to my clients' home and then cut across there but
16 they don't need it. They've got other routes and
17 that's the point.

18 So Number 1, we don't believe he can
19 prove that he needs this access because he's got
20 multiple. Number 2, they've expanded the size of
21 Parcel B by six and a half acres which the law
22 says you can't do. Number 3, we are going to
23 show you, Judge, that they're using or
24 historically have used this easement that is at
25 issue here today to serve other lots and other

1 properties including some that aren't even
2 connected.

3 Why, because the Tankards are a family
4 and they've got all these different properties
5 and operations going on in that area. So the way
6 they look at it is, hey, you can use my easement
7 and you can drive all over my property to get to
8 your property. We don't agree with that.

9 They have increased the size and scope of
10 the easement and the law says they can't do that
11 either. They're not allowed to serve other lots
12 including some that aren't even connected. We
13 know that they have been serving at least one
14 other business. This nursery is called David's
15 Nursery. There's another one called Tankard
16 Nursery, a relative of the plaintiff.

17 And so they're using this route as well
18 to go to and from Tankard Nursery. They changed
19 the zoning and that's a fascinating thing that we
20 think the documents are going to show very
21 clearly. In 2006 they got a building permit to
22 build migrant housing. This is in somebody's
23 handwriting.

24 It shows right here, 2006, migrant
25 housing. After that was built, ten years later,

1 they didn't like the zoning that was applied.
2 The zoning at the time, Judge, we put it in our
3 pleading, the zoning was ES/R-A1, existing
4 subdivision residential agriculture one.

5 So in 2016 Mr. Tankard contacts the
6 county and says, we don't think that's the right
7 zoning. It should be different zoning that
8 allows us to do more stuff. So then there's a
9 zoning application put in and guess how it
10 describes the land, vacant land, no buildings
11 proposed. There's a building on it that had been
12 there for nearly ten years.

13 The zoning got changed creating an
14 additional burden allowing them to do more with
15 the property, that's part of the problem. And to
16 the extent that they do have migrant housing
17 going on, which I don't know exactly what the
18 evidence will be here today, we haven't had the
19 benefit of depositions.

20 We haven't had a chance to start going
21 and checking out who's in that building but to
22 the extent they're doing migrant housing, it's
23 illegal. They're not allowed to do that. Once
24 again, an additional burden.

25 So, Judge, this is the problem. This is

1 not the same use that it has always been used
2 for. It has been expanded by the size, the
3 nature. They changed the zoning. They changed
4 the zoning based on a false representation by
5 somebody. It's a mess.

6 THE COURT: All right. Let's assume for
7 a moment the zoning has been changed, a change in
8 the zoning in and of itself doesn't in the
9 abstract increase any burden on the servient
10 estate, right?

11 MR. MARTINGAYLE: Well, except for this,
12 Judge, the servient estate still has the same old
13 zone. So what they're doing is they got a more
14 intense or heavier use on the back side of the
15 property. So they're going through us. We don't
16 have the right to do what they get to do. They
17 get to do something that's heavier and creates
18 more traffic.

19 THE COURT: Whether the right exists to
20 do the same thing isn't the test I don't think,
21 is it?

22 MR. MARTINGAYLE: Well, it has to do --

23 THE COURT: That's a different argument
24 but I don't think that's the test. My only
25 question was, the existence of two different

1 zonings for the adjacent properties does not in
2 and of itself create any specific burden on your
3 clients, right?

4 MR. MARTINGAYLE: It depends on the
5 nature of the change in the zoning.

6 THE COURT: The change or the use?

7 MR. MARTINGAYLE: Well, so zoning
8 typically allows or disallows different uses and
9 so to the extent that you have changed the
10 zoning, particularly where there was a false
11 statement to get it, creates an additional
12 burden, that would be a problem because it
13 increases the servitude nature of the servient
14 estate.

15 THE COURT: It could be a problem but
16 doesn't it depend upon how it's used.

17 MR. MARTINGAYLE: It depends on that and
18 how you view it.

19 THE COURT: Okay. So if I'm correct
20 about that, what about the use, if anything, has
21 changed since the zoning was changed?

22 MR. MARTINGAYLE: It increased in the
23 size and the nature of what they're, what they're
24 calling the farming operation which is really a
25 nursery operation with sometimes dump truck sand

1 coming off the property when they claim they
2 haven't done any blasting, but my client is going
3 to say, I've heard the blasting, I went to
4 investigate it and I saw a big backhoe in there
5 digging up sand, putting it in trucks and taking
6 it off. That's not farming. What that is that
7 is some kind of pit operation which also requires
8 a certain permit.

9 THE COURT: It may.

10 MR. MARTINGAYLE: So they're doing a lot
11 of additional things back there that we think
12 that they -- they in their own words and we've
13 got an email from Mr. Tankard to Northampton
14 County where he's complaining about the zoning
15 and saying that he thinks that's going to limit
16 him in some way and he requested the change.

17 So I don't know what all the evidence is
18 because I haven't had a chance to take his
19 deposition yet, so at this point I'm doing the
20 best I can with all the records that we've been
21 able to dig out but what we do know is that based
22 on video and photographic evidence that we've
23 been able to put together, we created something
24 to show you today.

25 We know that there's been a very heavy

1 commercial type of use of this and that it is
2 serving multiple other properties, which is not
3 allowed, and that it involves sand hauling, which
4 is not allowed, and a number of other problems
5 including the spill that Mr. Kahle referred to.
6 There's so many different issues going on.

7 THE COURT: All right. And let me go
8 back to what I was asking about before, under the
9 prior zoning, prior to the 2016 change, what was
10 permitted in terms of use, that is, what was the
11 scope and use permitted under that prior zoning?

12 MR. MARTINGAYLE: It describes in the
13 zoning under ES/R-A1 as, if you look at the
14 zoning table, it's described as a secondary
15 zoning district within primary subdivision
16 residential zoning and it gives recognition to
17 rural origins and allowable light agricultural
18 uses.

19 It does anticipate all of this property
20 being used as a heavy commercial operation where
21 they brag about being an interstate nursery that
22 serves all over the place. So that's the
23 problems and I think Mr. Tankard's own email --

24 THE COURT: What does light agricultural
25 mean?

1 MR. MARTINGAYLE: Judge, in terms of the
2 definitions, it's not entirely clear but I think
3 what you're likely to determine is that what
4 they're doing back there is clearly more than
5 whatever that's intended to mean.

6 So I think, once again, we're still
7 trying to figure a lot of this out and it's
8 complicated and there's a lot of history to it,
9 but that's one of the reasons why we don't
10 believe they're entitled to an injunction today.

11 There's an awful lot of fact discovery
12 that needs to occur. There's a lot of formal
13 discovery that needs to take place and they
14 currently have access to one hundred percent of
15 their property. They have not been prevented in
16 any way from conducting their operations so they
17 don't need an injunction.

18 THE COURT: Is it correct that your
19 clients do expect the evidence to demonstrate
20 that your clients have, in fact, blocked the use
21 of the easement?

22 MR. MARTINGAYLE: Yes.

23 THE COURT: All right. So --

24 MR. MARTINGAYLE: Because of the way it
25 was being used.

1 THE COURT: And do you agree that this is
2 an express easement?

3 MR. MARTINGAYLE: Yes.

4 THE COURT: And so other than your
5 clients' dissatisfaction with the use of the
6 express easement, what permits them to block the
7 easement from any use, what principle of law?

8 MR. MARTINGAYLE: Well, until this suit
9 was filed, they weren't sure this was allowed at
10 all. What they were told by their closing
11 attorney is that --

12 THE COURT: It doesn't matter what they
13 were told.

14 MR. MARTINGAYLE: What they believed --

15 THE COURT: It doesn't matter what they
16 believed. I'm asking you what principle of law
17 permits them to block access and use of an
18 express easement?

19 MR. MARTINGAYLE: If it's demonstrated in
20 court through competent evidence that there is,
21 in fact, an express easement in place and that it
22 is being used properly, the answer is that they
23 can't block it. The evidence is not going to
24 show that. The evidence is going to show that
25 it's being used for a number of reasons and by

1 other people not authorized and so what do you do
2 at that point?

3 THE COURT: Well, my question was, and I
4 appreciate you answering a question I didn't ask
5 as a good advocate, Mr. Martingayle, but my
6 question was, what principle of law, even if they
7 disagree with the use of the easement, what
8 principle of law permits them to block all use of
9 the easement?

10 MR. MARTINGAYLE: I don't know the answer
11 to that.

12 THE COURT: I think I do. I think
13 there's none but there may be, there may be of
14 which I'm not aware but I'm not aware of any.

15 MR. MARTINGAYLE: I don't know how there
16 is a way to slow down, regulate or limit the use
17 of an easement to legal purposes only without
18 going to court.

19 THE COURT: Right. Other than through
20 some either negotiations out of court among the
21 principals or in a court proceeding of some
22 kind.

23 MR. MARTINGAYLE: True. If somebody is
24 trying to engage in self-help really it would be
25 this, they either leave the easement open and

1 then it continues to be misused or they block it
2 off and they have prevented all uses including
3 those that should be allowed. So it sounds like
4 self-help is not the greatest solution.

5 THE COURT: It also sounds as if it may
6 create other issues potentially including in a
7 court of equity.

8 MR. MARTINGAYLE: Well, you would have to
9 find that anyone who comes in seeking equitable
10 relief also has clean hands, so that would apply
11 to both sides, but we're not the one moving for
12 an injunction. The party moving for the
13 injunction have to show, Number 1, they need it,
14 they're suffering irreparable harm without it,
15 which they're not because they have lots of
16 access, and that they have been using the
17 easement correctly, which they have not.

18 THE COURT: If they have an express
19 easement that has been deprived them in its
20 entirety, that would seem by definition
21 irreparable harm. There's a reason for my
22 questions up to this point and I know you know
23 that, Mr. Martingayle, but for the benefit of
24 everybody else, I just thought it might be
25 helpful to say it.

1 MR. MARTINGAYLE: Judge, I appreciate the
2 questions and I understand your thinking in this
3 and the problem, of course, is that after a lot
4 of push and pull between people who didn't come
5 to court, finally the breaking point was reached
6 and the easement was blocked and the folks on my
7 side knew that they had other access points that
8 they could use and stopped the misuse of the
9 easement.

10 THE COURT: So let me say this before
11 what I'm going to ask everybody to do in a
12 moment, I appreciate the two individuals such as
13 the parties in this case, that what may seem as
14 if it is a straight-forward and effective
15 solution for something that aggravates them for
16 whatever reason, it's not always something that
17 the law smiles upon on either side.

18 To make that clear, it's equal
19 opportunity in that regard and if somebody, the
20 law as a general proposition would appear, I'm
21 happy if counsel thinks that I am misapprehending
22 the law, I'm happy to be corrected, but as a
23 general proposition, if there is an express
24 easement, it's hard to imagine or conceptualize
25 the circumstance under which a party could

1 deprive the holder of that easement of all use of
2 the easement.

3 MR. MARTINGAYLE: I understand that.

4 THE COURT: It could exist. Again, I'm
5 willing to acknowledge that in the law there's
6 almost never a never but it's hard to imagine
7 one.

8 By the same token, of course, an express
9 easement is for a particular purpose and has to
10 be exercised in accordance with the grant of the
11 easement and certain activities which
12 substantially burden or overburden the estate
13 from which the easement was granted are also not
14 smiled upon by the law. Not only are they not
15 smiled upon but they can be enjoined or
16 prohibited or can be the subject of a claim for
17 many things including damages, as can deprivation
18 of an express easement without legal
19 justification being the basis for a claim of
20 damages I think.

21 So that all leads me to where I'm trying
22 to go at this point because part of what I've
23 heard suggests to me that there may be, while
24 this litigation pends, some accommodations the
25 parties may be able to reach among themselves and

1 eliminate potential problems to both sides at
2 least while this is pending or until, that is
3 while it's pending whether it's resolved by
4 judgment down the road or by settlement among
5 the parties. Has there been any discussion?

6 MR. MARTINGAYLE: Yes, sir.

7 THE COURT: There has?

8 MR. KAHLE: Yes, Judge, not successful.

9 THE COURT: All right. Of course I don't
10 know if my comments may not have been of any
11 assistance in that regard, I don't know, but
12 certainly it would seem at first blush based on
13 the Court's review of the pleadings and openings
14 of counsel that there are potential risks or
15 consequences to both sides in this case which
16 reasonable people might want to try to mitigate
17 or reduce if they can but maybe they don't.

18 Would it be of any assistance to give
19 counsel a few minutes to chat? We can't take a
20 lot of time today if we're going to have it heard
21 today but I'm happy to give everybody a little
22 bit of time here.

23 MR. KAHLE: Judge, we did talk,
24 Mr. Martingayle and I, before we came into court
25 here and the conditions that they would seek,

1 it's not tenable unfortunately. It would be --
2 especially based on the relationship the last two
3 to three years.

4 THE COURT: I appreciate that that often
5 creates personal difficulties in reaching what
6 otherwise might seem rational or reasonable to a
7 third party who does have any of those emotions.

8 MR. KAHLE: And I'm a big believer in a
9 suit being resolved if it can be but I'm also
10 very comfortable when you hear the evidence, not
11 an attorney's argument, when you hear the
12 evidence, there's nothing about Mr. Tankard
13 operating out there in any way that's not by the
14 books, and I have to say this, the statement most
15 of which is not ever going to be in evidence that
16 the county didn't even know those apartments were
17 out there, that's no water to that property, I
18 mean, Mr. Tankard has handed me, which will be in
19 evidence which is what the facts are, that his
20 property has a well, it has a septic tank, and as
21 far as the county, this is 2022, It shows part of
22 the land as a building site.

23 So I don't know where the argument is
24 coming from that the county doesn't know there's
25 a building but it's obviously factually not true.

1 So it's that kind of thing that you've heard that
2 the evidence isn't going to support. The
3 evidence will support that Mr. Tankard is a good
4 farmer, his family has been operating there 34
5 years, not a problem from the county, from the
6 state, nobody until the defendant wished they
7 hadn't moved next to a farm, that's the bottom
8 line.

9 THE COURT: All right. So is that no you
10 don't want to take a few minutes to talk?

11 MR. KAHLE: Unfortunately I know what
12 they want and —

13 THE COURT: Well, what they wanted before
14 coming here today may be different, it may not be
15 now. As I said, my comments may not have been of
16 any assistance in helping people to appreciate
17 that maybe prior positions need to be
18 re-evaluated. I don't know what their prior,
19 anybody's prior positions may have been.

20 MR. MARTINGAYLE: Judge, I don't mind
21 telling you, for purposes of resolving everything
22 we were happy to let them use their easement
23 subject to the same restrictions I read out loud
24 in the beginning.

25 THE COURT: I don't want to get into

1 negotiations.

2 MR. MARTINGAYLE: But they want to put on
3 their case and what I'm going to ask you to do at
4 the end of their presentation is to strike it
5 because I think you're going to find enough
6 evidence of unclean hands and expansion of the
7 use so they will not be entitled to it. So it's
8 a gamble on their part too.

9 THE COURT: That could be, that could be,
10 but given at least the initial assessment or what
11 appears to be the initial assessment, there may
12 not be a legal principle that permits a blockage
13 of all use of the easement.

14 MR. MARTINGAYLE: If we were at trial,
15 Judge, that might be your final ruling.

16 THE COURT: I'm only ruling on an
17 injunction today.

18 MR. MARTINGAYLE: Right, they're here for
19 extraordinary relief that has certain elements
20 that they must prove including that they are
21 suffering irreparable harm.

22 THE COURT: As I said, there may well be
23 there's no legal principle that permits that type
24 so-called self-help for the alleged improper use
25 of an easement. Then, in and of itself a

1 violation of the express easement would appear to
2 constitute, I think by definition as a matter of
3 law, as irreparable harm, I think. But this is a
4 court of equity and the Court has some additional
5 potential tools in the tool box, if you will.

6 MR. MARTINGAYLE: Judge, this is what is
7 interesting to me that I don't understand and
8 haven't really got an answer to. It's hard to
9 conceive why they would have an objection to
10 limiting this to Lots A and B exactly as the
11 easement does, what would be the objection?

12 THE COURT: I don't want to get into all
13 of that, Mr. Martingayle.

14 MR. MARTINGAYLE: The fact that they're
15 fighting us over the things that I mentioned as
16 the limits that should be on it explains how we
17 got here today because he wants to have unlimited
18 use of the easement as if he owns the property
19 which he does not.

20 He is going across this property owned by
21 my clients to conduct his operation and he wants
22 zero limits and the law doesn't allow it. So I
23 guess he could put on his presentation and
24 explain to you the justification for the relief
25 sought, which is you have to unblock it and we

1 get to do whatever we want with this easement.

2 THE COURT: I don't know that that is
3 going to be the Court's ruling either.

4 MR. KAHLE: We're not asking for that.
5 We want the express easement that's pertinent to
6 Parcel B to be respected and his rights not to be
7 interfered with. And you're right, because in
8 part you saw my brief in support of a motion for
9 a preliminary injunction. The Supreme Court says
10 when you interfere with somebody's property
11 rights it's deemed to be irreparable harm, that's
12 the law.

13 As far as the unclean hands, there's
14 nothing you're going to see -- I'm going to
15 change my sequence when I put Mr. Tankard on the
16 stand to respond to the statement made by Mr.
17 Martingayle that the county doesn't know that
18 there's a well for water out there, there's a
19 septic tank and there's a building site. I want
20 to set the tone in the beginning so you
21 understand and are attuned to the evidence and
22 not what attorneys say.

23 THE COURT: I appreciate that, Mr. Kahle,
24 that there is going to be -- lawyers probably
25 know this but your clients may not know but as a

1 general proposition, the Judge generally
2 understands when one party says something, the
3 other party disputes it and that, therefore, it
4 is not something the Court simply accepts without
5 some skepticism or openmindedness is probably a
6 better way to put it.

7 MR. KAHLE: And my last comment before I
8 put Mr. Tankard on since Mr. Martingayle brought
9 it up about a gate, in the normal life a gate
10 which would defer somebody straying onto that
11 dirt road, hypothetically what's wrong with that,
12 but when you add the notion of a gate with a
13 punch code, I can see right now, the second day,
14 oh, my gosh, the punch code doesn't seem to work
15 and Mr. Tankard has got trucks backed up. With
16 history, unfortunately, you look forward by
17 looking back and knowing what he's dealt with to
18 have the defendants have some kind of punch code,
19 gate that all his drivers got to use back and
20 forth, obviously it's just not feasible for a
21 nursery operation like this.

22 THE COURT: All right. Who is your first
23 witness?

24 MR. KAHLE: I call Mr. David Tankard to
25 the stand.

-----oOo-----

DAVID TANKARD,

called as a witness on his own behalf,
having been first duly sworn, was examined
and testified as follows:

DIRECT EXAMINATION

BY MR. KAHLE:

Q If you'll state your name for the record.

A David Tankard, Jr.

Q What do you do for a living, sir?

A I'm a nursery owner and CO of David's
Nursery, LLC.

Q Now, how long have you worked in the
commercial nursery business?

A My father started the nursery in late '77
and I've been involved weekends when I was still in
school and since then.

Q Now --

A I did take a break for nine years when I
was in the U.S. Navy. Other than that, I've been at the
nursery even when I was in college working summers.

Q Thank you. I was thinking I should
probably make sure we're clear that at the times when I

1 ask you a question and I pose it as you, that I'm talking
2 about you individually and you operating as your business
3 operation, David's Nursery?

4 MR. MARTINGAYLE: Your Honor, I need to
5 object. I think it's important for this record
6 to know when he's talking about this as Tankard
7 the plaintiff who is an individual versus talking
8 as a representative of a separate entity in his
9 business.

10 THE COURT: All right. Mr. Kahle.

11 MR. KAHLE: I assume he'll object when I
12 ask a question. If it's not clear to you, Your
13 Honor, what's he's talking about in context then
14 I'll belabor the matter.

15 MR. MARTINGAYLE: Your Honor, I need to
16 get clarification, for the record if he asks him
17 a question and says "you," that means the man
18 sitting up here who is the plaintiff in this
19 case. The business is not a party to this case.
20 We may have a necessary parties problem but I
21 think it needs to be clear that if there's a
22 question put to him as "you," I'm going to assume
23 and I hope the Court does it means Mr. Tankard as
24 an individual.

25 THE COURT: Is there any question about

1 who owns the easement?

2 MR. KAHLE: There shouldn't be, Judge.
3 You're going to see in the deed --

4 THE COURT: Is it Mr. Tankard
5 individually?

6 MR. KAHLE: Mr. Tankard owns the easement
7 individually.

8 THE COURT: Right. So there may or may
9 not be a necessary parties issue,
10 Mr. Martingayle, I don't know, but for this
11 purpose I'm not sure that that's meaningful.

12 MR. KAHLE: I don't think there's a
13 missing party here, Judge, but --

14 THE COURT: I'll ask you, Mr. Kahle, if
15 you're attempting to specify anybody other than
16 Mr. Tankard, that you do so with your question.

17 MR. KAHLE: Sure, sure. Judge, what is
18 your protocol, Judge. May I approach witness
19 from time to time?

20 THE COURT: You may.

21 MR. KAHLE: And, of course, the first one
22 is going to be the Google photographs you've
23 already seen and then, Judge, your protocol as I
24 have documents which I'm going to follow up and
25 request to move into evidence, do you want to see

1 them as the witness sees them or only after
2 they've been admitted into evidence?

3 THE COURT: Only after the witness has
4 identified it and it's been admitted.

5 MR. KAHLE: Okay.

6 THE COURT: Unless it's something that
7 you're asking the witness to testify about, at
8 which point if you'll offer it for admission,
9 then it can be returned to the witness and we can
10 view it together.

11 MR. KAHLE: I'll follow that.

12

13 BY MR. KAHLE:

14 Q Mr. Tankard, I've handed you two Google
15 Earth photographs, now, do you recognize those as
16 photographs that you brought to me?

17 A Yes.

18 Q So this is coming from you, not from my
19 argument, if you'll place the two photographs side by
20 side with the photograph with the red roof to the left,
21 talk through and explain to the Judge what he is seeing
22 in this photograph starting with that red roof. What's
23 that red roof belong to?

24 MR. MARTINGAYLE: Your Honor, can we have
25 some further foundation laid, for example, as to

1 when these were supposedly taken because they
2 appear dated?

3 THE COURT: Can you lay some foundation
4 for their application in today's context,
5 Mr. Kahle?

6 MR. KAHLE: Sure.

7
8 BY MR. KAHLE:

9 Q Mr. Tankard, the images depicted on these
10 Google Earth photographs, do they represent the
11 conditions that exist out on those properties currently?

12 A Yes.

13 Q You're familiar with the property that
14 these photographs depict?

15 A Yes.

16 Q You're familiar with where the
17 defendants' property is?

18 A Yes.

19 Q Do you know firsthand that their house
20 has a red roof?

21 A Actually, no, I had never seen it. I
22 mean, maybe, I guess I do driving by. I do think it's
23 red.

24 Q Are you familiar with where the house
25 is?

1 A Yes.

2 Q Are you familiar with the location of
3 their house vis-a-vis the dirt road that goes back to
4 Parcel B?

5 A Yes.

6 Q The photograph here, does that show
7 Parcel B, the dirt road as it was back in about 1987 when
8 you, you or your nursery or your family first started
9 using that?

10 A Yes, that is where the dirt road was when
11 we first put it in.

12 Q Looking back at the photograph off to the
13 right, I see a structure there, do you recognize that
14 structure?

15 A Yes.

16 Q What is that structure?

17 A That's migrant housing that we built in
18 2006.

19 Q And who is living in that structure right
20 now?

21 A Right now we have seven employees living
22 there in that house.

23 Q And the area in, I'm seeing an area it
24 looks like a forest area, do you recognize that area?

25 A Yes.

1 Q Does that show -- what is that area?

2 A Well, between Monroe's house, you see his
3 is, Monroe's property is a little littler green. Where
4 it gets dark green is where the transition is to our
5 property, and when we initially bought the property that
6 dark green was all farmland. We have since planted it in
7 pine trees and it's all pines right now.

8 Q And do these photographs accurately
9 depict the current maturity of that forest area?

10 A Yes, it appears so. I'm actually not
11 sure how long ago this photograph was taken and from the
12 top you can't really tell how big the trees are so they
13 might be a little bigger now.

14 Q But my question is, do the photographs
15 accurately depict the current situation out there on the
16 ground?

17 A Yes.

18 MR. KAHLE: Judge, I move to admit
19 this document as Exhibit Number 1, he's
20 described --

21 THE COURT: Any objection?

22 MR. MARTINGAYLE: No, sir.

23 THE COURT: All right. Plaintiff's 1.
24 If you'll hand that to the bailiff, Mr. Tankard,
25 to your right, there you go, I'll mark it.

1 (Plaintiff's Exhibit Number 1 was marked
2 for identification and admitted into evidence.)

3 THE COURT: Sir, return that to
4 Mr. Tankard.

5

6 BY MR. KAHLE:

7 Q Looking back at Plaintiff's 1,
8 Mr. Tankard, look at the upper right-hand corner of the
9 right photograph, do you see a long white streak?

10 A Yes.

11 Q What is that?

12 A That is next to the pond where sand was
13 dug out of the pond. So on the far side of that white
14 streak is where our irrigation pond is that's on the
15 property that existed before 1987 and still is.

16 Q Silly question, what is the irrigation
17 pond used for?

18 A It's used just for irrigating the crops
19 on Parcel 2-3, Parcel B and Parcel A. So we use
20 irrigation for that and we use irrigation on our adjacent
21 Parcel 8-A-7 which would be to the west from, yeah, west
22 of the current parcel.

23 Q And did I hear you say that that pond has
24 been there since 1987?

25 A It was there when we bought to property

1 in '87. We did expand the pond. We haven't done any
2 expansion in at least ten years I would say.

3 Q Okay. Did I hear you say when you
4 planted that 15 acres of trees they're now forest, that
5 that used to be farmland?

6 A Yes, it did.

7 Q Since 1987 has the farmland on your
8 Parcel B net increased or decreased?

9 A It's net decreased by 15 acres.

10 Q Staying with that structure, that little
11 housing structure, what's the composite of it, how many
12 apartments?

13 A Three apartments, each apartment has two
14 very small bedrooms and a small common area.

15 Q Back when you first built it, let's see,
16 back in 2006, back when it was first built, was the
17 intent for it to be for migrant housing?

18 A Yes, that was the intent when it was
19 first built.

20 Q Do you recall when you stopped using it
21 for migrant housing?

22 A I do not exactly. I think we used it for
23 four or five years for migrant housing. It might have
24 been longer, I'm really not sure, but at some point we
25 did convert it over to where it's now just full-time

1 housing for some of our employees.

2 Q Now, you heard in opening argument that
3 Mr. Martingayle said something to the effect that those
4 apartments weren't approved for occupancy, somewhere he
5 said that, do you recall that?

6 A Yeah.

7 Q So talk through that, were you present
8 back when those apartments were built and interactions
9 with the county?

10 A So, 2006, yes, I was back at the nursery.
11 I'll be honest, my father really needed help with the
12 building of the apartments. I talked with him this
13 morning and he had all the permits --

14 MR. MARTINGAYLE: Judge, I need to object
15 based on hearsay, what other people told him.

16 THE COURT: Sustained.

17 MR. KAHLE: We know.

18 THE WITNESS: Sorry.

19

20 BY MR. KAHLE:

21 Q I'm going to hand you a document which I
22 don't have copies of because it only came up this morning
23 when he suggested that the county didn't know about it.

24 MR. MARTINGAYLE: May I see it first,
25 please?

1 BY MR. KAHLE:

2 Q Mr. Tankard, I've handed you a document,
3 front page, back page. I'm looking for a title of it
4 but, first of all, do you recognize that document?

5 A Yes.

6 Q And what is that document that you're
7 holding in front of you?

8 A It's a printout of Parcel 2-3-B, which is
9 Parcel B in these proceedings, that shows what was the
10 appraised value for this parcel.

11 Q Towards the center of that page tell the
12 Judge what it says relative to a well and septic.

13 A It does say it does have a well and
14 septic.

15 Q And towards the bottom of the exhibit or
16 the document there, do you see any reference to there
17 being a building site acknowledged by the county?

18 A Yes, on the right-hand side of this piece
19 of paper it does say appraised building of \$104,000.

20 Q And has -- back to that little building,
21 has someone, be they migrant workers or in more recent
22 years your employees, lived in that building since 2006,
23 give or take, 2007?

24 A Yes.

25 MR. KAHLE: Judge, I would like to move

1 that document into evidence as Plaintiff's 2. It
2 reflects with respect to that building, contrary
3 to opening argument, that the county does know
4 about the building. The county knows it has a
5 well. It knows it has a septic system.

6 MR. MARTINGAYLE: Judge, he's now
7 testifying himself. If he's moving to admit
8 that —

9 THE COURT: Any objection to the
10 document?

11 MR. MARTINGAYLE: That's correct, Judge,
12 I do not object to the document.

13 THE COURT: Plaintiff's Exhibit 2.

14 (Plaintiff's Exhibit Number 2 was marked
15 for identification and admitted into evidence.)
16

17 BY MR. KAHLE:

18 Q Mr. Tankard, I've handed you like a
19 three-page document which is a certified true copy of a
20 1987 deed certified by the deputy clerk of the
21 Northampton Circuit Court. My question for you is, first
22 of all, do you recognize that as the deed back when you
23 and members of your family bought some property?

24 A Yes.

25 MR. KAHLE: Judge, I would like move this

1 into evidence as Plaintiff's Exhibit 3.

2 THE COURT: Any objection?

3 MR. MARTINGAYLE: No, sir.

4 THE COURT: Do you have extra copies?

5 MR. KAHLE: I do, yes, sir.

6 THE COURT: Do you need the witness to
7 refer to it?

8 MR. KAHLE: If you hold that one, I'll
9 give him another copy.

10 THE COURT: Okay. Plaintiff's Exhibit 3.

11 MR. MARTINGAYLE: Is this Defendant's, I
12 mean Plaintiff's 3?

13 THE COURT: Plaintiff's 3.

14 (Plaintiff's Exhibit Number 3 was marked
15 for identification and admitted into evidence.)

16

17 BY MR. MARTINGAYLE:

18 Q Now, we're not going to read this deed,
19 Mr. Tankard, but first of all, are you the David B.
20 Tankard, Jr. that's one of grantees?

21 A Yes.

22 Q Now, come on down, you see where there is
23 a Parcel 1, left-hand column, you see underscored it says
24 Parcel 1?

25 A Yes.

1 Q And it's kind of hard to read. Do you
2 see the third line it talks about designated as Parcel A?

3 A I see.

4 Q Now, do you personally own Parcel A at
5 this time?

6 A No, my brother owns Parcel A.

7 Q Okay. The next paragraph where it says
8 Parcel 2, do you see reference to property that has been
9 designated as Parcel B?

10 A Yes.

11 Q Who owns that property today?

12 A I do own that property myself today.

13 Q Now, following down that 1987 deed, see
14 to the bottom where it says together with an easement?

15 A Yes.

16 Q Now, I'm just going to highlight where it
17 talks about a 30-foot easement and I want you to tell the
18 Judge, when I say about that easement, what generated and
19 tell him briefly the history that lead to that easement
20 being expressly set forth in that deed?

21 A Okay. When the family acquired the
22 property, the most direct route back from the property
23 was to go through the easement that we made an express
24 condition of buying the property. At the time that we
25 bought the property the Babinskis owned Parcels A, B and

1 C. Parcel A being the one my brother currently owns.
2 Parcel B and C is the property in question today. Parcel
3 C being Mr. Monroe's current property. The Babinskis
4 owned -- what I'm saying is that the Babinskis owned both
5 the parcel that my brother owns and I own and they had no
6 problem granting a 30-foot easement for the use and they
7 knew it was going to be for a nursery and heavy
8 equipment and --

9 MR. MARTINGAYLE: Judge, I object as to
10 what he thinks somebody else knew.

11 THE COURT: Sustained.

12 MR. MARTINGAYLE: Thank you.

13 THE WITNESS: I'm sorry. Okay. So we
14 did acquire an easement for the express purpose
15 of getting our vehicles back from Parcel B to the
16 nursery by the most direct route possible without
17 spending anymore time than necessary on Route 183
18 or any other paved roads.

19

20 BY MR. KAHLE:

21 Q And of course I said it but it's got to
22 come from you. I'll tell you what we're going to do,
23 we're going to look at a plat that I think will further
24 help the following questions. And I'll say, as I see in
25 this 1987 deed, a reference to a plat and I want to ask

1 you if you recognize a plat that I'm going to hand to
2 you?

3 A Yes, I do recognize this plat.

4 Q Okay. So what I've just handed to you is
5 a plat entitled Plat showing survey of the Babinski farm,
6 it is a two-page document, both pages having been
7 certified true copies certified by the Northampton County
8 Clerk's Office, you recognized this document?

9 A Yes.

10 MR. KAHLE: Judge, I would like to move
11 this into evidence as Plaintiff's 4.

12 THE COURT: Any objection?

13 MR. MARTINGAYLE: No, sir.

14 THE COURT: Plaintiff's Exhibit 4.

15 (Plaintiff's Exhibit Number 4 was marked
16 for identification and admitted into evidence.)
17

18 BY MR. KAHLE:

19 Q Looking at Plaintiff's 4, Mr. Tankard,
20 now I can more accurately talk about north, south, east
21 and west. Looking at the first page of this plat, talk
22 through with the Judge where Route 183 is compared to the
23 defendants' property and compared to your property, kind
24 of highlight what we're seeing here.

25 A Okay. Again, Parcel B is the parcel in

1 question which is my current property. Parcel C is
2 Mr. Monroe's parcel, his current property. And Route 183
3 is the road running east/west contrary to what my counsel
4 said earlier, it's actually running east/west, not
5 north/south. That would be on the southern edge of this
6 plat.

7 Q And can you point out, can you read where
8 that 30-foot ingress/egress is denoted?

9 A Yes, that's noted inside the borders of
10 Parcel B pointing to the 30-foot ingress/egress for
11 Parcels A and B.

12 Q If you'll flip back to the second page of
13 this exhibit, I see where it says Parcel A up there.

14 A Yes.

15 Q So -- and of course you read, the Judge
16 read and you just noted that this ingress/egress easement
17 is for Parcel A and B. So how does -- well, what is
18 Parcel A used for?

19 A Parcel A is also completely for nursery
20 stock. We're growing a nursery production.

21 Q So how do plants or whatever products
22 that come off of Parcel A, how do they get to this
23 easement, this 30-foot easement?

24 A Well, in the middle of Parcel A you have
25 a dirt road that runs all the way from Parcel B to the

1 corner where Parcel A is currently to those other noted
2 paved roads which is Route 635. It's actually called
3 Batchelers Branch Road and I think it's called Clear View
4 Drive is the other one that goes all the way to the end
5 of Parcel C there, but, anyway, from that corner there is
6 a dirt road that goes straight to the south that then
7 joins up with the easement.

8 Q To make sure I follow that, does
9 Parcel A plat have to come across Parcel B to get to the
10 easement?

11 A Yes.

12 Q All right. Looking at Plaintiff's 4 I
13 see where it says Parcel B has 79.25 acres; is that
14 right?

15 A That's what it was back in 1987, yes.

16 Q And tell the Judge what's happened since
17 1987 as far as the acreage?

18 A Since then there is another piece to the
19 west that I have, that I also ended up acquiring, that
20 the family bought in I think it was '89 when we bought
21 that other piece of property and that was another eight
22 acres. So we did erase the property line between that
23 eight acres and it's completely woods and we erased the
24 property line between that Parcel B since I own both of
25 them.

1 Q Does that, I think you said eight acres,
2 does that, did that or does that contain farmland?

3 A No, it does not.

4 Q Looking still at this exhibit,
5 Plaintiff's 4, back on the first page of that I see
6 something shown as being the pond, is there where that
7 irrigation pond is?

8 A That is where the irrigation pond is,
9 yes.

10 Q I've handed you, Mr. Tankard, what looks
11 like a five-page document, a certified true copy of a
12 2010 deed wherein you are being shown as the grantee, do
13 you recognize this document?

14 A Yes, I do. Sorry, the wording was
15 confusing me a little bit but, yes, I do recognize this
16 document.

17 Q You had me worried there. I thought I
18 handed you the wrong deed.

19 A No. I thought you did too. You are
20 correct.

21 Q So make sure, did I give you a deed that
22 is November 1st, 2010?

23 A Yes, I do recognize this document.

24 Q Okay. Thank you.

25 MR. KAHLE: Judge, move this into

1 evidence as Plaintiff's 5.

2 THE COURT: Any objection?

3 MR. MARTINGAYLE: No, sir.

4 THE COURT: Plaintiff's 5.

5 (Plaintiff's Exhibit Number 5 was marked
6 for identification and admitted into evidence.)
7

8 BY MR. KAHLE:

9 Q Now, Mr. Tankard, we saw a 1987 deed
10 where you along with other members of your family bought
11 Parcel A and B and now I see from this 2010 deed you
12 already testified that you bought Parcel B, explain to
13 the Judge what happened leading up to 2010 that caused
14 you to become the sole owner of Parcel B.

15 A Well, my parents divested themselves of
16 most of the real estate that they owned and then it ended
17 up being in the hands of me, my brother and my sister.
18 We since, in 2000, what is this, 2010 we divided up all
19 the property so instead of jointly owning several farms,
20 we individually owned different farms and that's how I
21 came to acquire 2-3-B, Parcel B.

22 Q Then looking over to Page 2 of this deed,
23 can you see the first full paragraph?

24 A Yes.

25 Q Without reading it verbatim, tell the

1 Judge what you received with your deed to Parcel B.

2 A So with my deed to Parcel B I also got
3 the easement that granted the 30-foot right of way that's
4 being disputed today.

5 Q Now, let's talk about the farming
6 operations conducted on Parcel B today. You testified
7 earlier that the size of the farming operation has
8 diminished and reduced by 15 acres since 1987?

9 A Correct.

10 MR. MARTINGAYLE: Object to leading.

11 THE COURT: I'm going to allow it for
12 today's purposes, that question at least,
13 Mr. Martingayle. We'll see how much more there
14 is that could be objectionable.

15 MR. KAHLE: Since he already testified to
16 that, I don't think I was leading him, just
17 trying to move things along.

18 THE COURT: I appreciate it. It's
19 overruled.

20

21 BY MR. KAHLE:

22 Q Now, I think there's been maybe some
23 pleadings that business has grown by approximately
24 25 percent since 1987, but to be clear, let's not talk
25 about sales but in terms of acreage devoted to farming on

1 your Parcel B, has it increased or decreased since 1987?

2 A The acreage to farming has decreased.

3 Q Are you familiar with the best management
4 practices applicable to the operation being conducted out
5 on Parcel B?

6 A Yes, as a nursery operation we do try to
7 follow or we do follow all best management practices.

8 Q What do you understanding those best
9 management practices to include?

10 A A couple of examples are fertilizer. We
11 take soil samples and then we apply it back to the
12 fertilizer that we need. We try not to apply excess
13 fertilizer. Main goal is to prevent any runoff of any
14 water that would lead to the Chesapeake Bay which is what
15 our nursery is fairly close to.

16 Another example is pesticides. We
17 definitely want to minimize pesticide use. We do have to
18 use some pesticides for our crop. Again, the goal is to
19 only use what is necessary. We're scouting all the time
20 so we know how much we need and where we need to apply
21 it. We also are inspected routinely by the State of
22 Virginia for pesticides, for pesticide usage to make sure
23 we're applying where and when we have to.

24 Another example is ground water. We --
25 one of the reasons we have ponds is so that we're not

1 impacting the ground water. The Eastern Shore is a
2 single -- so we're minimizing the use of ground water,
3 which we do have a permit to use some wells on the main
4 farm, but on this farm we don't use ground water which is
5 the whole purpose of using the pond.

6 Q How about laws and regulations that would
7 be applicable to the commercial nursery operation being
8 conducted on Parcel B, are you familiar with the laws and
9 regulations that relate to what is going on out there?

10 A Yes, we try to follow all the laws. I
11 mean, the biggest, one of the bigger laws is again the
12 chemicals and pesticide applications and we definitely
13 follow all the laws there. We teach safety all the time
14 to make sure everybody is operating in a safe
15 environment.

16 Q When your workers out there are applying
17 pesticides or fertilizer in there a special type of garb
18 they have to wear?

19 A Not for fertilizer because most of that
20 is granular and distributed in little cups and it's not
21 through a sprayer or anything like that, but pesticides,
22 yes, they do have to wear protective gear. It's
23 required. The labels on every pesticide is exactly what
24 you have to wear when you are applying the pesticides.

25 Q To your knowledge, is the operation out

1 on that farm in substantial compliance with all best
2 management practices?

3 A Yes.

4 Q And in compliance with all applicable
5 laws and regulations?

6 A Yes.

7 Q Now, in addition to Parcel B that we've
8 talked about and you of course pointed out the express
9 easement to Parcel B, over the years, well, since 1987 I
10 guess, was product being brought from Parcel A down
11 through the easement out to the — stop right there. I
12 want to get the terms straight. On the other side of the
13 easement from 183, let's give a name to this. Does
14 David's Nursery own some property right across the street
15 from 183 where the easement intersects?

16 A We own the property right across the
17 street from 183. It's a little bit of a catty-corner.
18 You have to go maybe 20 feet on the road to then turn
19 into the nursery.

20 Q Now, what should I call that, is it your
21 headquarters, your distribution center?

22 A We call it our loading area. It's where
23 we bring all the plants back to. Everything that is done
24 is being brought back there to be loaded on a truck to be
25 shipped out.

1 Q Your loading area?

2 A Yes.

3 Q Okay. Thank you. Parcel A, are plants
4 brought from Parcel A through Parcel B through the
5 easement to the David's Nursery loading area?

6 A Yes.

7 Q And do vehicles servicing Parcel A, be
8 they trucks, tractor-trailers, heavy equipment, do those
9 go up the easement from 183 through Parcel B?

10 MR. MARTINGAYLE: Judge, I've got to
11 object to the leading. First of all, these are
12 long compound questions but he's loading the
13 question with a lot of details and going
14 basically isn't that right. That is clearly
15 leading and I would ask that he ask open-ended
16 questions.

17 MR. KAHLE: Judge, I never said is that
18 right.

19 THE COURT: Sustain the objection. You
20 can rephrase, Mr. Kahle.

21

22 BY MR. KAHLE:

23 Q Do farm vehicles go towards Parcel A
24 through the easement --

25 A Yes.

1 Q And did I hear you say that various farm
2 vehicles have exited Parcel A, gone through Parcel B and
3 gone down through the easement?

4 MR. MARTINGAYLE: Judge, object to the
5 leading.

6 THE COURT: Sustained. Rephrase.

7

8 BY MR. KAHLE:

9 Q Tell me how vehicles leaving Parcel A get
10 down to the loading center.

11 A They go through Parcel B through the
12 easement to get to the loading area.

13 Q Thank you. Was product brought from a
14 separate farm, not from Parcel A, not from Parcel B, but
15 from a separate farm through the easement?

16 A Yes, product was brought from farm tax
17 map number 8-A-7, I think, which is the farm to the west
18 and that product, I think it's 24 acres of farmland there
19 and we do bring farm product back from there through the
20 easement also.

21 Q Are you claiming the right to use that
22 pursuant to your, pursuant to the easement pertinent to
23 Parcel B?

24 A When we initially bought it, we owned
25 8-A-7 and we already previously owned this piece of

1 property and the Babinskis and us, yes, we believed that
2 that easement would apply to this even though it was not
3 specifically named in the deed.

4 Q Okay. Let's go to the borrow pit. Have
5 you ever operated a borrow pit on Parcel B?

6 A No.

7 Q Have you ever hauled sand that was taken
8 from Parcel B through the easement?

9 A It has happened in the past. If you look
10 at the photographs, you'll see the white sand next to the
11 pond and that sand was hauled out of there. I don't
12 think anything has been hauled out of there in several
13 years, before, certainly before Mr. Monroe bought his
14 piece to the best of my knowledge.

15 Q If I didn't hear you say it, where did
16 that sand come from?

17 A It was dug -- so when we dig a pond, we
18 always end up with sand and dirt that's left over from
19 the pond and we use that sand and dirt to fill in roads,
20 repair roads on the nursery and other parts of the
21 nursery.

22 Q And there's the reference to a pond, the
23 pond we saw that's Plaintiff's 4.

24 A Yes, the pond and plat it's shown on the
25 west side, on the west side of 2-3 Parcel B.

1 Q Blasting, has blasting ever occurred on
2 Parcel B?

3 A No, never.

4 Q Is there any reason you would blast
5 something on Parcel B?

6 A No, we have never blasted. I have no
7 idea where that is coming from.

8 Q Prior to this legal proceeding did the
9 defendant ever complain about hearing blasting coming
10 from Parcel B?

11 A No.

12 Q I've seen reference and heard in opening
13 argument that somehow there was a bullet shot in the
14 defendants' house, have you heard that statement?

15 A I just saw it in the pleadings. I don't
16 know anything about that.

17 Q Have the plaintiffs, have the defendants
18 ever explained to you or told you anything about that
19 that somebody somehow from somewhere shot a bullet into
20 their house?

21 A No.

22 Q Have you ever received a complaint from
23 the defendants about some vehicles coming and going
24 through the easement that are blowing their horns at odd
25 hours?

1 A I have not heard that complaint, no. If
2 anything, we have told our employees to be circumspect if
3 possible with Mr. Monroe. We told them to avoid him
4 whenever he's physically blocking the easement, which he
5 has done in the past, that they take the long way around
6 to not confront Mr. Monroe and that's David's Nursery has
7 told all of its employees.

8 Q Do I understand one time over the years
9 there was a hydraulic leak from one vehicle?

10 A Yes, that happened this spring actually
11 and it happened on the easement shortly right here with
12 183. A different neighbor, not Mr. Monroe, and I did
13 call DEQ to explain about it. The size of the leak was
14 four gallons. Reporting requirement is 25 gallons, so
15 we're well below any reporting requirements. DEQ did
16 come to investigate and I have emails that they are
17 satisfied with our response and cleanup. I also have
18 receipts where we took the contaminated waste to a
19 disposal facility I think in Chesapeake.

20 Q So other than one oil leak, were there
21 any other instances any of the vehicles coming and going
22 across this easement leaked oil?

23 A Not that I'm aware of. Could it have
24 happened in 34 years, it might have but I know of no
25 other location of oil.

1 Q We've talked about, there's a reference
2 to you maintaining a migrant labor camp on your property.
3 Now, other than those apartments you testified about
4 before, any other housing on your property or has there
5 been any other housing where migrant workers lived?

6 A No, just that one three room or three
7 apartment with six bedrooms.

8 Q The dirt road, the dirt road that runs
9 down easement, how wide is the actual dirt road part?

10 A The dirt road part is actually 20 feet
11 wide. The cleared area is probably the whole 30 feet
12 wide I would say. I just actually walked it off this
13 morning but the dirt part of it is probably 20 feet I
14 would say. Tractors are meeting each other, which is the
15 reason why we got a 30-foot easement so they could past
16 each other and they probably do go off, one of them would
17 have to go off the road.

18 Q To your knowledge have vehicles ever
19 strayed beyond the 30-foot width?

20 A No.

21 Q Do you curse or yell at Mr. Monroe?

22 A No.

23 Q Does he ever curse or yell at you?

24 A Yes.

25 Q One time, more than one time?

1 A Only one time.

2 Q Mr. Tankard, I've handed you a multipage
3 document. Up top it's labeled David's Nursery, LLC. It
4 says compiled timeline regarding Christopher Monroe and
5 right of way to Concord Farm, do you recognize this
6 document?

7 A Yes.

8 Q Tell the Judge briefly what this document
9 is?

10 A Well, all this started back on
11 February 5th of 2020 is when it started. My brother and
12 I realized it could be an issue at some point in the
13 future so we took notes on our computer, a Microsoft word
14 document, and every time there was an encounter or
15 interaction with Mr. Monroe that we were aware of or
16 something that he may have done or anything to do with
17 the right of way, we made notes of it on the computer.
18 It probably is not complete. There are probably
19 interactions that are not included on here because they
20 may not have been reported to the office.

21 MR. KAHLE: Judge, I can move that into
22 evidence as Plaintiff's 6 I believe.

23 THE COURT: Any objection?

24 MR. MARTINGAYLE: Yes, sir, multiple. He
25 has not identified this as something that he

1 wrote. He used the word "we" in terms of
2 somebody else participating in this. It's just a
3 bunch of self-serving statements. It's not an
4 official business record. It's simply some sort
5 of diary or log perhaps having numerous authors.
6 There's just no basis for this coming in, Judge,
7 and it clearly is more prejudicial than it is
8 probative.

9 MR. KAHLE: I'll lay some more
10 foundation, Judge.

11
12 BY MR. KAHLE:

13 Q I think I heard you testify but maybe I
14 didn't because Mr. Martingayle didn't, where is this
15 document, where was this document maintained?

16 A It was maintained on an office computer
17 on our server drive and, yes, entries were made by me and
18 my brother. We're the only two that made entries into
19 this document.

20 Q And did you print this document off of
21 your corporate computer?

22 A Yes.

23 Q And was this document on the computer
24 maintained in the ordinary course of business?

25 A Yes.

1 MR. KAHLE: It's a business document.
2 It's his business. He's testified this document
3 came out of his business computer and it was
4 document maintained in the ordinary course of
5 business.

6 THE COURT: Mr. Martingayle.

7 MR. MARTINGAYLE: Judge, simply having
8 something on a business computer that you're
9 planning to use for litigation purposes later on
10 with entries by a couple different people doesn't
11 make it a business record used in the ordinary
12 course of conducting of business. It's not a
13 business record and it's not within the exception
14 to the rule, so I would ask that you exclude
15 this.

16 THE COURT: Mr. Kahle.

17 MR. KAHLE: Well, obviously I disagree.
18 He's testified it's maintained. He's testified
19 it was maintained back when he started having
20 issues with Mr. Monroe about the right of way.
21 The right of way is something that the business
22 uses to bring products back and forth across the
23 easement. So it's a business interest to
24 preserve the use of this right of way. There's
25 nothing else that could be done to establish this

1 is a corporate document that was generated over
2 time.

3 THE COURT: I'm going to sustain the
4 objection to the admissibility of the document.
5 Some of the information in the document may or
6 may not otherwise be admissible through this
7 witness.

8 MR. KAHLE: Sure.

9
10 BY MR. KAHLE:

11 Q Mr. Tankard, look at the document in
12 front of you there and I'm not going to have you read
13 through all of these but looking at the entry for
14 February 5th, 2020 --

15 MR. MARTINGAYLE: Judge, if I may be
16 heard on this issue, I think the proper way for
17 him examine this witness is to first ask him what
18 he recalls of his memory and then if he needs to
19 have something to refresh his recollection,
20 that's the point at which he can start looking at
21 entries but this is not the right way. He just
22 handed him a self-serving diary or a log and then
23 he's going to walk him through it. That's both
24 leading and it's not proper use of a refreshment
25 document.

1 BY MR. KAHLE:

2 Q Mr. Tankard, can you recall all of the
3 encounters between, with Mr. Monroe since February 5th of
4 2020?

5 A No.

6 Q Do you need something to help refresh
7 your recollection?

8 A Yes, it would definitely help. I can
9 recall some of them but I'm not able to recall all of
10 them.

11 Q Then do this, looking at the document
12 I've given you to the extent to refresh your
13 recollection, look through the entries and then tell the
14 Judge about the different events that happened that you
15 had firsthand knowledge of back at the time but with
16 respect to which you're now being refresh looking at this
17 document. Okay?

18 A Yes, sir.

19 Q So go ahead.

20 A Our first interaction with Mr. Monroe was
21 on February 5th, according to this document, 2020. I
22 would not recall the exact date but I would remember
23 February of 2020. Mr. Monroe first called David's
24 Nursery to talk to me about the use of the right of way,
25 at that time he felt -- from right then was the first

1 notification that he felt like the right of way was being
2 abused because of the heavy traffic and heavy equipment
3 that was using the right of way.

4 I was not in the office at the time. My
5 brother did tell me that he talked to Mr. Monroe and even
6 offered to plant plants to help reduce the impact.
7 Mr. Monroe said the only thing he would be happy with was
8 if we stopped using heavy equipment on the right of way.
9 So that's my recollection of the February 5th encounter.

10 Q Now, look through the document and look
11 through it and then when you see an entry that reflects
12 and refreshes your memory as to an encounter you
13 personally had with Mr. Monroe.

14 A My personal encounter with Mr. Monroe was
15 February 27th of 2020. Again, he called to complain
16 about the noise made by David's Nursery use of the right
17 of way. I did talk to Mr. Monroe at that time. I did
18 not give in on the use of the right of way. I said it's
19 been a right of way for a long time and we plan to keep
20 using it. He did get very upset and that was basically
21 the end of it. He didn't want to hear that we planned to
22 keep using the right of way.

23 My next personal encounter with Mr.
24 Monroe was in March, March 9th of 2020. That's our one
25 face-to-face encounter. He was personally — this is his

1 actual blockage of the right of way was in March of 2020.
2 He was standing in the middle of the road and would not
3 let nursery vehicles use the right of way. I did drive
4 over to talk to Mr. Monroe.

5 I told him he needed to get out of the
6 right of way, that it was a legal right of way. We've
7 used it for a long time just like I told him on the
8 phone. He proceeded to start screaming at me, said he
9 couldn't believe I was coming at him that way. He was
10 cursing at me. He got nose to nose with me while I was
11 just standing there. I could feel the spittle from him
12 he was so mad. He was really going off. That went on
13 for a couple of minutes and eventually I left.

14 Then after that, I mean things went back
15 and forth. He would do things. He's blocked the right
16 of way. Many times he was physically in the right of
17 way, our tractors would go around but basically it went
18 on and off for two years which would be March of this
19 year when he started cutting trees down to block the
20 right of way. That's, anyway, he probably cut at least
21 ten trees down.

22 We would tow the trees away. There were
23 several different, many days of this. Eventually not
24 doing it the next day, we'd wait a week so he could
25 hopefully calm down. Every time we'd tow the trees away,

1 he would cut another tree down to block the right of way.
2 That went on until April of this year. So it's March and
3 April cutting down of the trees, probably five or six
4 different times, probably towed ten trees.

5 And then in April of this year he first
6 planted some stakes, poles across the right of way. We
7 left them there for a couple of weeks. I think the exact
8 dates are here but basically probably — I can look it up
9 real quick but this happened twice. It first happened,
10 let's see, April, yep, April 17th of 2022. Mr. Monroe
11 first blocked the right of way with his pickup truck and
12 then he put some poles behind his pickup truck and then
13 he moved his pickup truck so it was just blocked by the
14 poles.

15 On April 28th of this year we removed
16 those poles that were blocking the right of way. We
17 removed them one day and the next day when we came back
18 at there early in the morning, he had planted more poles
19 back in the right of way. So that would have been April
20 29th. So the poles are still there blocking the right of
21 way currently.

22 Q I've handed you a color photograph,
23 Mr. Tankard, do you recognize this photograph?

24 A Yes.

25 Q What does that photograph show?

1 A That's Mr. Monroe's pickup truck
2 blocking the right of way and the poles blocking the
3 right of way.

4 Q To your knowledge, are those poles there
5 as we sit here today?

6 A Yes.

7 MR. KAHLE: Judge, I would like to move
8 that into evidence as Plaintiff's 6.

9 THE COURT: Any objection?

10 MR. MARTINGAYLE: No, sir.

11 (Plaintiff's Exhibit Number 6 was marked
12 for identification and admitted into evidence.)

13 MR. KAHLE: No questions more for me for
14 this witness.

15 THE COURT: All right. Mr. Martingayle.

16 MR. MARTINGAYLE: Thank you. Judge, may
17 I come up and see the exhibits that are already
18 in?

19 THE COURT: You may.

20

21 CROSS-EXAMINATION

22 BY MR. MARTINGAYLE:

23 Q Do you have Exhibit 1?

24 A Yes, I do.

25 Q Okay. Thank you. Mr. Tankard, I want to

1 ask you a few questions about Exhibit 1. First of all,
2 that house right there that you see above this
3 sandy-colored path, that structure is not there anymore,
4 right?

5 A That's correct, it burned down a few
6 years ago. I'm not sure how many.

7 Q So the picture is at least several years
8 old?

9 A Correct.

10 Q Now, looking at this, you've got the
11 paved road, that's 183 also known as Occohannock Neck
12 Road, correct?

13 A Correct.

14 Q Below the house with the red roof is this
15 path and that's the one, that easement, that's the one
16 we're talking about, right?

17 A Yes.

18 Q And then up at the top that sandy-looking
19 path, that is what is often referred to as the Johnson
20 easement, right?

21 A I've never heard it referred to that and
22 that easement is in dispute.

23 Q By whom?

24 A My parents said if you look at my deed,
25 there's a lawsuit about that easement and my parents

1 say this is --

2 Q Hold on, I don't want to hear what your
3 parents said. I just want to know -- is it an actual
4 legal dispute?

5 A My understanding is that access may or
6 may not be a legal access. Regardless of whether it's a
7 legal access, I prefer the preferred means and best means
8 of ingress and egress as this easement that's being
9 disputed right now.

10 Q We've got video of the trucks and so
11 forth of your, from your property going across that
12 straight onto your nursery operation. You're still using
13 it, right?

14 A We are using it because Mr. Monroe is
15 blocking our preferred means of egress and ingress.

16 Q We'll call it, just give it a label and
17 call it the Johnson easement. The Johnson easement gives
18 you the same amount of access that you have if you used
19 the easement that's a dispute here in court, right?

20 A It is not, it is not as good of an
21 easement to get back from our property.

22 Q But you still have the same degree of
23 access if you use the Johnson --

24 A I disagree.

25 Q Tell me how you have less access if

1 you're able to get onto --

2 A The nursery --

3 Q Hold on, let me ask the question. You've
4 got the nursery operations on one side of 183 and then
5 you've got the farm that serves the nursery on the other
6 side, right?

7 A Correct.

8 Q All right. So if you use the Johnson
9 easement you get to both properties and if you use the
10 easement that brings us here in court today you get to
11 both properties, correct?

12 A Yes.

13 Q Okay. So you have access if you use the
14 Johnson easement.

15 MR. KAHLE: Objection, Judge. It has
16 nothing to do with the fact that my client has an
17 express easement that he's said repeatedly is his
18 preferred way to get to that property. We're not
19 here on an easement by necessity. Whether there
20 was some other way off the property, it may or
21 may not be in dispute, has no relevance to the
22 defendants' interruption with my client's
23 preferred easement.

24 THE COURT: Mr. Martingayle.

25 MR. MARTINGAYLE: First of all, I need to

1 object to the way that objection was just given.
2 It was in the nature of an education objection to
3 educate his client. It was more in the nature of
4 argument. If the objection was relevance, he
5 should have said objection, relevance. And so
6 that's not proper and I ask that he not do it
7 anymore. It is relevant --

8 THE COURT: The Court will ask that all
9 counsel simply state the nature of their
10 objection without making a speaking objection.

11 MR. MARTINGAYLE: Judge, under the
12 applicable standard for a temporary injunction
13 the Court obviously weighs what the alternatives
14 that are available are and so that's why we do
15 think it is relevant that there are other access
16 points and that's what I'm trying to explore it.

17 THE COURT: All right. The objection on
18 relevance grounds is overruled.

19
20 BY MR. MARTINGAYLE:

21 Q So you admit that the Johnson easement is
22 currently being use, has been use recently and can still
23 be used, right?

24 A It is being used. I am not sure if it's
25 a lawful easement which is one of the reasons I really

1 have to have this easement.

2 Q Has anybody to your knowledge attempted
3 to stop you or your business from using the Johnson
4 easement?

5 A No, but that doesn't mean they might
6 stop us in the future.

7 Q I want to show you a series of pages and
8 walk through them and see if you can identify what we're
9 looking at and talking about. I've handed --

10 MR. MARTINGAYLE: And, Judge, so you can
11 see what we're talking about and I'm not moving
12 them into evidence yet. Just to follow along
13 with the questions.

14 THE COURT: All right.

15

16 BY MR. MARTINGAYLE:

17 Q First of all, this first page, I think
18 you and I both use reading glasses but the print is
19 really small. All right. So do you recognize what this
20 represents first of all?

21 A Yes, I do.

22 Q Does it depict -- let me show you my
23 highlighting. Does it depict in this portion of
24 highlighting right here lot or property B?

25 A What you have highlighted right there is

1 the property where the line got erased that was added to
2 Parcel B.

3 Q Right, this is the additional portion
4 that was tacked on to Parcel B to the right of that?

5 A Yes.

6 Q All right. So do we agree that this
7 there added what looks like, does that say 8.5 or
8 6.5 acres?

9 A I can't read it here but I have seen it
10 as 8.5 and 6.5 in different proceedings. I think when it
11 was initially bought, it was assumed to be 6.5 acres and
12 when they surveyed it, I think this number here is 8.5.
13 So I think it was 8.5 acres when it was surveyed.

14 Q Okay. And then at the bottom still
15 highlighted at the bottom says Occohannock Neck Road,
16 that's the same SR which means State Route 183, right?

17 A Yes.

18 Q And then there's a skinny line that comes
19 down the side. That right there is what we call the
20 Johnson easement. It goes and connects to 183 and
21 actually it can go straight across to your nursery
22 operation, correct?

23 A That is what you're calling the Johnson
24 easement, yes.

25 Q And you actually own this property.

1 According to this document there is actually part of the
2 property you own that runs up to Lot B and both
3 originally configured and expanded size Lot B, right?

4 A Again, what I have been told is that that
5 Johnson easement that you keep trying to talk about --

6 Q Don't tell me what you have been told.

7 MR. KAHLE: Objection. He's testifying
8 please.

9 MR. MARTINGAYLE: It's hearsay.

10 THE COURT: Is that an objection to the
11 response?

12 MR. MARTINGAYLE: Yes, I don't want him
13 to give unresponsive answers with hearsay.

14 THE COURT: Mr. Tankard, you can't tell
15 us what somebody told you. So you can answer the
16 question.

17 THE WITNESS: I do not think that that is
18 a legal -- I do not know for sure if that is a
19 legal easement.

20

21 BY MR. MARTINGAYLE:

22 Q What I'm getting at is this, according to
23 this, that line gives a straight line that it connects up
24 to Lot B, the original size Lot B, right? This right
25 here, this is the outline of B, correct?

1 A That's correct.

2 Q Okay. So that line connects, where is
3 the Johnson property, is it further up?

4 A No, the Johnson property is over here
5 (indicating).

6 Q Okay. To the left side?

7 A To the left side.

8 Q But this line according to what we're
9 looking at shows that that was actually part of, it's a
10 little extra piece of property coming off of B and then
11 goes right down to Route 183, right?

12 MR. KAHLE: Judge, objection, asked and
13 answered at least once.

14 THE WITNESS: I do not know if that is
15 actually correct.

16

17 BY MR. MARTINGAYLE:

18 Q So that's something that needs to be
19 investigated further?

20 A Yes, but either way, the preferred means
21 of ingress/egress, the most direct shot to the main road
22 going into the nursery is the current easement that's
23 being disputed today. And the main loading area is
24 catty-corner from that easement directly down Mount Hope
25 Road which is where the loading area is. What you're

1 saying, the back means which we have had several thousand
2 dollars spent to get a permit from the county to put a
3 culvert in so we could cross the road at this may or may
4 not be a legal easement. It is still a more windy road.
5 It comes in back behind the nursery and doesn't go
6 directly to the loading area like our preferred means of
7 ingress and egress.

8 Q All right. So I want to show you Exhibit
9 3. It would be easier probably to just look at this
10 highlighted copy. You understand that it says here on
11 the first page, the language, together with an easement
12 to use in common with others having the right to use same
13 and being for the use and benefit of both Parcel A and
14 Parcel B for the purpose of providing ingress and egress
15 to and from the lane herein conveyed — oh, above that,
16 you see the reference to the Johnson, in the Johnson by
17 decree of court. So there was an easement established by
18 a court order, right, you understand that, what we call
19 the Johnson easement?

20 A I do not know exactly what that court
21 order says.

22 Q I wanted to have you — first of all,
23 make sure that we can read this. This is really small
24 writing but I'm showing you this right here, let's see if
25 you can agree, that that paragraph at the top left side

1 of the document I've handed you says this, The
2 Northampton County Health Department has not approved
3 these parcels for any water supply or sewage disposal,
4 and then it goes on to explain you need a certificate, do
5 you see that language?

6 A I cannot even read that but if that's
7 what it says.

8 Q Do you know whether or not there has
9 actually been a certificate obtained after 2011?

10 A So that statement is incorrect. This
11 certificate was before 2011 when we built the, when we
12 built the migrant housing.

13 Q I'm going to get to that in a minute. Go
14 ahead and turn to the next page of this document. And
15 this is a blowup of the first page and I just want to
16 emphasize this right here, it shows in larger form a
17 circled, the direct access point coming off of B straight
18 down to 183.

19 A That's --

20 MR. KAHLE: Judge, he's --

21 THE COURT: Whoa, standby, one at a time
22 please.

23 MR. KAHLE: He's asking again the same
24 question that's been asked and answered.

25 THE COURT: He's asking with regard to a

1 different iteration of the prior document at this
2 point. Overruled.

3

4 BY MR. MARTINGAYLE:

5 Q Do you agree that what this document
6 shows is that there is that lane coming off of B straight
7 down on 183?

8 A Yes, but that's not our preferred --

9 Q I didn't ask you that question what you
10 preferred. I'm just asking for you to agree that shows
11 this part of your property. Are you disowning this
12 property, you mean you don't own it?

13 A I do not know if I own it or not.

14 Q Has somebody challenged your ownership?

15 A No.

16 MR. MARTINGAYLE: Judge, I would move
17 this in as Defendant's Exhibit Number 1.

18 MR. KAHLE: Objection, lack of
19 authenticity. This is not a certified true copy
20 of anything. All the questions asked were did he
21 recognize certain features on this but this has
22 not been authenticated much less the subsequent
23 two pages as an authentic document.

24 MR. MARTINGAYLE: It doesn't have to be,
25 Judge, he's identified it.

1 MR. KAHLE: He identified what it showed.
2 The surveyor isn't here and this is not
3 apparently a recorded document where the clerk
4 would authenticate it. Objection on
5 authentication and hearsay.

6 THE COURT: All right. Mr. Martingayle.

7 MR. MARTINGAYLE: Judge, he identified
8 this document and if it's identified by the
9 witness it's no different. I'll ask further
10 questions foundationally if I need to.

11 THE COURT: You can try.

12 MR. MARTINGAYLE: All right.

13 THE COURT: The objection is sustained at
14 this point.

15

16 BY MR. MARTINGAYLE:

17 Q You see this page and then the two pages,
18 do you recognize this as being a plat of survey
19 applicable to the property depicted that you've seen?

20 A It looks familiar, I will grant you that.

21 Q All right. Do you see anything on that
22 you think is misconstrued or misdrawn?

23 A Not that I recognize.

24 Q Thank you.

25 MR. MARTINGAYLE: Judge, I move that in

1 as defendant's first exhibit.

2 MR. KAHLE: Same objection, Your Honor.
3 What he can or cannot recognize being presented
4 with a copy of this uncertified unauthenticated
5 hearsay document --

6 THE COURT: Page 2 appears to have Tracy
7 Johnson's certification on it, the clerk of
8 court.

9 MR. KAHLE: That's when it was recorded
10 in the court. That doesn't satisfy the
11 requirements for this being a certified true
12 copy.

13 THE COURT: I'm sorry, I misunderstood
14 your objection. All right.

15 MR. MARTINGAYLE: Judge, it's a photocopy
16 of one of these records that was indeed a valid
17 copy. There is no special rule applicable to
18 deeds that says you absolutely must have it.
19 That applies if you're trying to get it in if
20 somebody won't authenticate it, doesn't recognize
21 it or disputes it, then you use a certified copy.

22 THE COURT: I'm going to sustain the
23 objection on this foundation, Mr. Martingayle.
24 This witness doesn't dispute it but he doesn't
25 authenticate it either.

1 MR. MARTINGAYLE: Judge, it's also a copy
2 of their exhibit to their pleading. It's what
3 they filed with the court.

4 THE COURT: It may be.

5 MR. MARTINGAYLE: Can I ask further
6 questions about that?

7 THE COURT: You may.

8

9 BY MR. MARTINGAYLE:

10 Q Do you recognize this as what was
11 filed as a part of the complaint that you filed in this
12 case?

13 A Again, it looks similar. I can't say for
14 sure.

15 MR. MARTINGAYLE: May I show the witness,
16 this is what they filed in court?

17 THE COURT: Show it to Mr. Kahle, maybe
18 he can stipulate.

19 MR. MARTINGAYLE: And, Judge, I might add
20 that I filed a motion craving oyer and then was
21 provided with the documents. And there was a
22 court order filed recognizing the exhibits as
23 authentic, that's how they were represented to
24 me. So I'm using their own exhibit.

25 THE COURT: Show it to Mr. Kahle. Is

1 that document made a part of the pleadings, Mr.
2 Kahle?

3 MR. KAHLE: Yeah, I've got it here, sir.
4 Just a minute.

5 MR. MARTINGAYLE: It should be Exhibit C.

6 MR. KAHLE: Judge, I've got my response
7 to the motion craving oyer and I represent that
8 is not the document that Mr. Martingayle is
9 presenting to the witness. I can approach and
10 show you my response to the motion craving oyer.

11 MR. MARTINGAYLE: This is Exhibit C we're
12 talking about.

13 MR. KAHLE: This is a document --

14 MR. MARTINGAYLE: It is Exhibit C that
15 was attached to the complaint, plat of survey
16 from Shore Engineering.

17 MR. KAHLE: There was a small portion of
18 a plat attached to Exhibit C, not this document
19 here. That portion didn't reflect a lot of what
20 this property document is and, of course, that
21 doesn't get around the certification requirements
22 required by the --

23 THE COURT: If it's part of the
24 pleadings, then it's already in, if it's part of
25 the plaintiff's pleadings. Mr. Martingayle.

1 MR. MARTINGAYLE: On that basis I would
2 ask you to receive it and give it the weight you
3 think is appropriate. This is obviously not a
4 jury trial, you can give it the appropriate
5 weight that you think it deserves. I would note
6 that the plaintiffs have admitted photographs not
7 taken by them, they're years old.

8 And now I've got the witness admitting,
9 shows a structure, for example, that was, it's
10 not there and hasn't been for years. All that's
11 in the record so I think it feels a bit
12 outrageous for Mr. Kahle to be nitpicking on this
13 give the exhibits that he's already put in.

14 THE COURT: Mr. Kahle has objected on the
15 grounds that it is not a copy of the exhibit but
16 it's an expansion of the exhibit that was
17 attached to the pleadings.

18 MR. MARTINGAYLE: Well, it's the full
19 version instead of the little tiny corner of it
20 that they used. So we're trying to provide the
21 Court with the full thing.

22 THE COURT: I'm going to sustain the
23 objection. The portion that corresponds to the
24 pleadings can be admitted, Mr. Martingayle.

25 MR. MARTINGAYLE: Well, Judge, I would

1 ask that you take, I don't have the, I don't have
2 a photocopy of Exhibit C but I would ask that you
3 recognize Exhibit C as part of the record.

4 THE COURT: I'm happy to recognize that
5 as part of the record.

6 MR. MARTINGAYLE: Thank you. May I
7 approach?

8 THE COURT: Yes, sir.

9

10 BY MR. MARTINGAYLE:

11 Q Do you recognize that, sir, November 20,
12 2006, building department permit for the migrant
13 housing?

14 A I have not seen it. Again, it looks like
15 it was filled out by my father and mother.

16 Q It says David B. Tankard, that's not you?

17 A I'm David Tankard, Jr.

18 Q So you've never seen this before?

19 A Not that I can recollect.

20 Q Okay. Do you agree that in 2006, that's
21 when there was a permit that was obtained to build
22 migrant housing?

23 A Yes, I do agree with that.

24 Q Fair enough. You were earlier shown
25 documents by your counsel that I think was a tax record.

1 I want to see if you can identify this particular tax
2 record.

3 A In the top right corner it says 2-3-B
4 which is the property of concern.

5 Q All right. And do you agree that at the
6 bottom of the first page under building it says no
7 building, you agree with that?

8 A I do not know where this record came
9 from. The record that I printed out and provided to my
10 counsel is what I believe is correct and what the county
11 is showing.

12 Q I'll use that. Let me have that back.
13 Is it your understanding that the building that is
14 currently out there being used by employees was listed as
15 a residence in county records?

16 A I do not know.

17 Q With regard to your calling them
18 employees, are these W-2 employees?

19 A I'm not sure what a W-2 employee is.
20 They fill out W-4s and I-9s to legally work for us.
21 What is a W-2 employee?

22 Q So when you call them employees, what
23 kind of employees are they, migrant employees or --

24 A They're full-time employees. Their
25 citizenship status I'm not sure about. They do all fill

1 out a valid I-9 which gives them authorization to work in
2 the United States if they're not U.S. citizens.

3 Q With regard -- how many are there, you
4 said seven?

5 A Seven in the house, yes.

6 Q Seven in the house. And you don't know
7 whether or not they're citizens currently?

8 A I do not.

9 Q In fact, you know that they're
10 immigrants?

11 A I do not.

12 Q And how long -- when you say that they
13 are full-time employees, do you mean they are year-round
14 employees?

15 A Yes.

16 Q So for some number of years that building
17 was used as migrant housing but now you deny that it's
18 used as migrant housing?

19 A Yes.

20 Q With regard to the building in which they
21 live, do you think there is a certificate of occupancy
22 that allows them to live in that building?

23 A I think so, yes.

24 Q Why do you think that?

25 A Again, my parents did all the paperwork

1 for it and I would assume that they did. I talked to my
2 parents this morning and you told me it's hearsay so I
3 have nothing else I can tell you.

4 Q Have you ever seen a certificate of
5 occupancy to the property?

6 A Not that I can recall.

7 Q We'll talk about — Mr. Kahle mentioned
8 something about sales number versus acreage that is farm,
9 isn't it true that your business has increased by 25
10 percent?

11 A Yes, it has increased. The business
12 itself has increased. Now, we own lots of farms so if
13 you're talking about David's Nursery, LLC, it has grown
14 by significantly more than 25 percent.

15 Q By how much?

16 A What standard are you talking about?

17 Q Well, David's Nursery, RLLP was
18 established in 2000, does that sound right?

19 A That sounds like it's probably correct.
20 The nursery was actually founded in '77 by my father and
21 I was the co-owner at that time. At some point we did
22 become a LLP and I was a partner and that may have been
23 2009, I do not know the exact date, and now we're
24 currently a LLC and, again, I'm not sure of the exact
25 date that that happened.

1 Q All right. And you described this online
2 as being a family nursery with a background date of 1933,
3 right?

4 A That is Tankard Nursery where my father,
5 my grandfather initially with one of the brothers found
6 Tankard Nursery. My dad left Tankard Nursery to start a
7 completely independent nursery which is David's Nursery
8 and that happened in late '77.

9 Q All right. And according to the way you
10 advertised it, it has grown to over 300 acres, growing
11 over 250 cultivars of evergreens, insidious and perennial
12 plants, right?

13 A Yes.

14 Q And how much of an increase in the past
15 five years would you say that David's Nursery has had?

16 A Five years, probably 15 percent.

17 Q The truck drivers who go up and down that
18 easement, they're not employees of your nursery, are
19 they?

20 A Yes, they are.

21 Q Are they employees or are they 1099,
22 independent contractors, do you know what their actual
23 status is?

24 A Almost all of the drivers that I know are
25 employees. We did have one person that I know was

1 harvesting soybeans on the farm that came through with a
2 combine that I know Mr. Monroe accosted but he had
3 permission to use the right of way to harvest soybeans.

4 Q I want to show you another document and
5 see if you are able to identify this. This is a document
6 that apparently indicates tax map numbers showing the
7 different lots and then a series of Tankard names, all
8 using the same billing address, Post Office Box 926, do
9 you know what this is?

10 A It appears to be different pieces of
11 property that are owned by my family.

12 Q And everybody uses the same billing
13 address?

14 A Yes, because it is the nursery billing
15 address and that is where we get most of our business
16 mail. I do not, I cannot recognize all the tax map
17 numbers but I assume a lot of these properties are used
18 by David's Nursery.

19 Q Is it accurate to say that all of these
20 use the nursery's address for billing purposes and for
21 business purposes?

22 A Yes. Maybe not all but probably.

23 Q Well, they all have the same P. O. Box.

24 A Yes, David B. Tankard Family, LLP is
25 listed here is something -- some of that may be related

1 to the nursery but other than that, it is a separate
2 entity that doesn't have, some of it doesn't have
3 anything to do with the nursery so I can't use a blanket
4 statement on all of these parcels, but most of them I
5 would say, I would concede are used by the nursery.

6 Q All right.

7 MR. MARTINGAYLE: Your Honor, I would
8 move this in as Plaintiff's Exhibit 1. With
9 regard to the one --

10 THE COURT: Defendant's Exhibit 1.

11 MR. MARTINGAYLE: Defendant's. I had a
12 trial two days ago when I was on the plaintiff's
13 side, Judge, so I'm having a hard time. On the
14 one that was not admitted, would you mark is as
15 offered and refused.

16 THE COURT: I will.

17 MR. KAHLE: Judge, I would object to this
18 coming in. Mr. Tankard testified that he didn't
19 recognize all the properties in here. He
20 recognized some, not all of them. I don't know
21 where this came from. I don't know who drafted
22 this.

23 According his testimony, it's at least,
24 if not partially inaccurate, he doesn't know
25 whether it is accurate or not to some parts. So

1 it's hearsay. It's an unauthenticated document
2 prepared by somebody who is not in court. I
3 don't know -- plus relevance as to the fact his
4 argument is that these businesses had the same P.
5 O. Box, I can't gleam any relevance to the
6 defendants' blockage of an easement to Parcel B.

7 THE COURT: Mr. Martingayle.

8 MR. MARTINGAYLE: Judge, it goes to the
9 part of our theme that this is being used by the
10 nursery. The nursery is serving more than
11 itself. It's serving a whole lot of related
12 family property.

13 THE COURT: The relevance, I understand
14 relevance. How about authenticity?

15 MR. MARTINGAYLE: He doesn't have to
16 authenticate it. He's identified what it is.
17 He's identified this as a series of lots that are
18 owned by the indicated parties. He doesn't know
19 exactly where all of them are but he conceded
20 that most of them are served by the nursery and
21 all of them use the nursery's address and use
22 that for business purposes. So I think it's
23 entitled to the weight you decide to give it but
24 it's certainly admissibility.

25 MR. KAHLE: Actually, that's not what he

1 said. He said some of those he doesn't
2 recognize.

3 THE COURT: I'm going to sustain the
4 objection.

5 MR. MARTINGAYLE: Would you please mark
6 it as offered and refused.

7 THE COURT: I've marked the three-page
8 document, the plat of survey and the, shown as
9 the plat of survey from Shore Engineering
10 Company, Incorporated, dated December 23rd, it
11 appears 2011, if I can read it correctly, and the
12 other two pages thereafter as Defendant A and
13 this document I'll mark as Defendant B.

14 (Defendant's Exhibits A and B were marked
15 offered and refused.)

16

17 BY MR. MARTINGAYLE:

18 Q Mr. Tankard, I want to get to a very
19 particular issue, do you admit that the easement in
20 question has been used to benefit lots other than A and
21 B, correct?

22 A One other lot, yes.

23 Q What is that one other lot?

24 A It's the one directly to the west of
25 Parcel B.

1 Q Is that shown on any of the documents
2 that we have looked at here today or do we need to have
3 another map?

4 A I can show you where it is on this
5 document but it has not been authenticated but it would
6 be over there (indicating).

7 Q Let me ask you about this one. So I'm
8 going to use this right here for a moment. Are you able
9 to identify what I just handed to you?

10 A Yes.

11 Q What is it that you are looking at right
12 now?

13 A A map showing different parcels.

14 Q Do you recognize this as a map that comes
15 off the county records?

16 A I can't say that for sure but it looks
17 accurate.

18 Q All right. It does look accurate?

19 A Yes.

20 Q All right. And this part that we've
21 highlighted here, what is that right there?

22 A That's property, the nursery uses that
23 property also.

24 Q All right. And when the nursery uses
25 that property, the trucks and tractors and so forth when

1 you're allowed to use the easement --

2 MR. KAHLE: Judge, I'm not following what
3 he's pointing to --

4 THE COURT: You may approach.

5 A So, yes, 8-A-1 that usually goes out
6 through Concord Wharf Road and then you can cut across.

7 Q It also sometimes cuts over and then
8 comes down an easement, correct?

9 A We don't -- we tell our drivers not to do
10 that. They should come down Concord Wharf Road.

11 Q Do you see this red circle in the middle?

12 A That is one -- yes, we do acknowledge
13 that tractors from there do go down through the easement.

14 Q And what property is that?

15 A That is property used by the nursery that
16 is owned by my brother.

17 Q That is 8-A-7?

18 A Yes, I think so.

19 Q All right. And then the highlighted part
20 up and down the middle, that's --

21 A Parcel B.

22 Q -- Parcel B. And then this is the
23 nursery highlighted down here?

24 A The main -- right down there where you
25 see the buildings at the bottom is the loading area.

1 Q All right. And does this map appear to
2 be accurate in terms of the way the lines are related to
3 the land?

4 A I don't know what this big black square
5 is here but it appears accurate, yes. I can't say for
6 sure.

7 Q So in terms of this highlighting, just to
8 be clear, the highlighted portion is property owned by
9 your brother?

10 A No, that highlighted portion is owned by
11 David B. Tankard, LLP, which is owned by many members of
12 the family, not just my parents, my brother, my sister,
13 me and seven grandchildren, nieces, nephews and my
14 children, the David B. Tankard Family, LLP.

15 Q And that parcel is labeled 8-A-1?

16 A I don't know for sure.

17 Q Do you see that?

18 A It looks like that, yes.

19 Q And then we've already identified the
20 8-A-7 as your brother's property and then the two
21 highlighted ones here, does that say 2-3-8?

22 A Yes.

23 Q All right.

24 MR. MARTINGAYLE: Judge, I would ask --
25 I'm going to ask to admit the highlighted one

1 because that's what we've been talking about for
2 the record and we've got the red circle in the
3 middle which he has identified.

4 THE COURT: Any objection?

5 MR. KAHLE: I'll just note I don't have a
6 copy that's been marked up like he's marked it
7 up.

8 THE COURT: It will be Defendant's
9 Exhibit 1.

10 (Defendant's Exhibit Number 1 was marked
11 for identification and admitted into evidence.)

12

13 BY MR. MARTINGAYLE:

14 Q Now, Mr. Tankard, you've already admitted
15 you don't own A, right, that's owned by your brother?

16 A Parcel A is owned by my brother, correct.

17 Q And your brother has rights that relate
18 to this easement, correct?

19 A Parcel A has rights in Mr. Monroe's deed
20 but there are rights for ingress and egress through
21 there.

22 Q So currently with Mr. Monroe blocking the
23 easement, that affects the rights of the parcel owner who
24 owns A and that's your brother?

25 A Yes.

1 Q Is there a reason why your brother is not
2 a party to the case?

3 A Because Parcel B is a much bigger parcel
4 and we are busy people and this is tying up a lot of time
5 as it is so that is why I decided to take it just for
6 Parcel B.

7 Q Do you understand that you cannot use
8 this easement for other purposes and other properties
9 other than those listed in the deed?

10 A I do not understand that.

11 Q So you believe that you are entitled --

12 A I --

13 Q Hold on, let me ask the question. You
14 believe you're entitled to use this easement to serve
15 purposes and properties other than those listed in the
16 deed language itself?

17 A Only Parcel 8-7-A which we talked about
18 before, the one you circled in red.

19 Q Why do you believe that you're allowed to
20 use this easement to serve any different property or
21 function other than what were listed in the deed?

22 A Because when this property was initially
23 bought, we already owed 8-A-7, the family did. I mean,
24 obviously it should have been included in the deed but
25 they understood they owned Parcel C where Monroe's house

1 is.

2 Q I don't want to get into what the
3 Babinskis understood according to what you think they
4 understood. That would be speculation and hearsay. I'm
5 just simply trying to understand if there is some
6 factual legal basis that tells you that you're allowed to
7 use an easement for purposes and properties other than
8 those that are listed in the deed language?

9 A I don't know the answer.

10 Q But you acknowledge that that's an
11 increase in the use of the easement?

12 A It has not been an increase in the use of
13 the easement because it was used for that purpose from
14 the very beginning.

15 Q The nursery business that you have
16 exports to other states, right?

17 A Yes.

18 Q And I think we agree that David's Nursery
19 has increased in expansion of the business since the
20 beginning of the easement, right?

21 A Yes.

22 Q And there are multiple other lots that
23 are used in this vicinity by the nursery, correct, more
24 than just Lots A and B?

25 A Yes.

1 Q And your nursery operation has used the
2 easement to service other lots that are in the area other
3 than Lots A and B?

4 A I've already testified that, yes, that we
5 use it for 8-A-7.

6 Q Are you testifying that that's the only
7 one and no others?

8 A Parcel A and B, those are the only ones
9 that we are using the easement for.

10 Q So let's make it since time that my
11 clients have been involved with their property. So
12 starting in the year 2019 and coming forward to now, is
13 it your testimony under oath that the only other property
14 that has been involved in the use of the easement in that
15 period of time is that single one that you identified
16 here and no other ones?

17 A My belief is yes. Could a tractor have
18 driven from another property and then have something to
19 do on 8-A-7 or Parcel B and then come back through the
20 easement, yes, that is possible.

21 Q So if the Judge grants you a temporary
22 injunction here today, do you have any problem with it
23 being restricted to the uses and the properties that are
24 listed in the deed?

25 A And 8-A-7 I would want to use also.

1 Q Although you don't know legally or
2 factually why?

3 A I do not have a legal answer except we
4 have been using it for over 30 years.

5 Q And if the Judge grants a temporary
6 injunction here today, do you have any problem with it
7 restricting activities to only those which are properly
8 zoned and legally permitted?

9 A I do not have a problem with that.

10 Q And with regard to the potential for a
11 gate being put at the entrance to the easement in
12 question, if you are provided with an access code or key
13 do you have a problem with a gate being installed as
14 permitted by law?

15 A A gate would be a burden on my tractors
16 going back and forth, especially if you put it right at
17 the entrance. Then they would have to stop on a busy
18 highway to walk across to open to gate and then go back
19 and go back through and close the gate. So I would be
20 adverse to putting a gate especially at 183.

21 Q With regard to your employees who live in
22 what was formerly migrant housing, do they make use of
23 the easement?

24 A Yes.

25 Q So --

1 A Well, they were until it was blocked.

2 Q So is it your contention that those
3 individuals who are living there, they all rent from you,
4 right?

5 A They actually have free housing. Some of
6 our more valued employees we do not charge them.

7 Q Okay. So with regard to them is it your
8 contention that they have the right to make use of the
9 easement?

10 A Yes.

11 Q Is there any reason why those individuals
12 whose rights are affected are not parties to this
13 litigation?

14 A Because I'm the property owner. I'll
15 admit, I don't know all the legal niceties.

16 Q I want to show you now an email and see
17 if you're able to identity it as an email that you wrote.
18 The email is one page in length. It says from David
19 Tankard, Friday, February 19th, 2016, addressed to info
20 at the County of Northampton, do you remember this?

21 A Barely, it's been a while ago but I
22 remember something about this. So it looks like it's
23 probably correct.

24 Q Do you remember expressing the concern in
25 here that the zoning might somehow affect your ability to

1 remain in the AFD?

2 A It wasn't to remain in the AFD but it was
3 exactly for this kind of purpose that we were concerned
4 about the zoning, that we wanted to operate a nursery
5 operation and they were changing the zoning to make it
6 ES-R-A1 which we did not understand why that zoning was
7 being changed and we requested to change it back to what
8 it was originally which was just plain agricultural
9 zoning just for this kind of purpose.

10 Q Well, you acknowledge that the zoning had
11 already been changed at some point from AG to ES-R-A1 as
12 stated in your email, right?

13 A That is what I stated in this email. I
14 am not a hundred percent sure if that was a proposed
15 change. I'm saying that their proposal was changing or
16 actually had changed, I do not know. I do not recall.

17 Q For the record what is AFD?

18 A That's an ag forestry district which is
19 the whole purpose of an ag forestry district is that
20 agricultural can be done by right and it's understood
21 that you can operate pumps, any sort of heavy equipment
22 right on the edge of an AFD which would mean right next
23 to Mr. Monroe's house at all hours.

24 MR. MARTINGAYLE: Judge, I would ask this
25 come in as our next exhibit.

1 MR. KAHLE: And, Judge, what we've
2 observed is an incomplete document. According to
3 the document itself, it says a scan of current
4 and proposed zoning districts for this land is
5 attached and it's not attached so it's an
6 incomplete document, Judge, I object.

7 THE COURT: Objection is overruled.
8 Defendant's Number 2.

9 (Defendant's Exhibit Number 2 was marked
10 for identification and admitted into evidence.)

11 THE WITNESS: I would make one other
12 note, if it was changed to a residential zoning,
13 it would cause more of a burden on the right of
14 way because you could subdivide however many lots
15 we wanted and then still be using that right of
16 way.

17
18 BY MR. MARTINGAYLE:

19 Q Sir, are you familiar with this zoning
20 application from 2016?

21 A I am not familiar with it.

22 Q You've never seen this zoning application
23 that relates to the property that you own?

24 A Not that I recall. I'm reading it. I
25 must admit I don't recall seeing this but it does seem to

1 go with the email. Yes, I do admit we did want other
2 zoning to be agriculture.

3 MR. KAHLE: Mr. Tankard, there is no
4 question on the table.

5 THE WITNESS: Okay.

6
7 BY MR. MARTINGAYLE:

8 Q On the second page of this document where
9 it identifies open land with no building proposed we
10 agree that that's wrong, right?

11 A Again, I don't recall seeing this but
12 when was this done, 2016.

13 Q After your email.

14 A Right, there was one building there so
15 this is an inaccurate document, that's correct.

16 Q And the one building that was there is
17 the building that we've called the former migrant housing
18 that is now the employee housing?

19 A Correct.

20 MR. MARTINGAYLE: Judge, I would ask that
21 you accept this as our next exhibit.

22 MR. KAHLE: Judge, the objection is the
23 document Mr. Tankard clearly said he didn't
24 recognize by somebody named Katherine Nunez who
25 is a county administrator I guess it says but he

1 doesn't recognize it.

2 THE COURT: Objection sustained.

3 MR. MARTINGAYLE: I would ask that you
4 mark this, Judge, as our next refused exhibit.
5 And if I may just say for the record, this is
6 going to be part of our argument why there should
7 not be a temporary injunction. We don't have the
8 benefit of a full trial preparation figuring out
9 who is going to be able to identify what and be
10 able to get all the witnesses. So just so
11 Mr. Kahle is aware, I think the more he blocks
12 me, the more I think he's making that case for
13 me.

14 THE COURT: Defendant's C not admitted.

15 MR. KAHLE: So you're marking these
16 Defendant's A, B, C?

17 THE COURT: Yes.

18 MR. KAHLE: Thank you.

19 THE COURT: I think we're up to C. Let
20 me confirm that.

21 (Defendant's Exhibit C was marked offered
22 and refused.)

23

24 BY MR. MARTINGAYLE:

25 Q In addition, sir, to the easement we

1 called the Johnson easement that gives ingress and egress
2 for your nursery, are there other ingress and egress
3 access points in other locations?

4 A We own a lot of land, not near where
5 we're talking about that I can think of.

6 Q I want to show you this color map and see
7 if you can identify that for us.

8 A Yes, that appears to be Property B.

9 Q Okay. Do you see the green boxes on the
10 corners?

11 A Yes.

12 Q Would you agree that those green boxes
13 represent additional access points that allow for access
14 to the properties that we're talking about?

15 A Yes, I do agree.

16 Q So those are three more access points in
17 addition to what we've called the Johnson easement?

18 A Correct, they would be substantially
19 longer to go around via those access points but they are
20 means of access to the property.

21 MR. MARTINGAYLE: I would ask, Judge,
22 that this be admitted as our next exhibit.

23 MR. KAHLE: Judge, relevancy. He said
24 repeatedly he wants to use the express easement
25 that is the preferred access. It's not an

1 easement by necessity. The fact he can get off
2 the property other ways is not relevant to this
3 case.

4 THE COURT: Objection is overruled.
5 Defendant's 3.

6 (Defendant's Exhibit Number 3 was marked
7 for identification and admitted into evidence.)

8

9 BY MR. MARTINGAYLE:

10 Q Now, I want to show you another document
11 if I may. It's another photograph that's in yellow
12 markings and see if you can agree on what this shows. So
13 is the highlighting -- first of all, do you recognize
14 what the blue dot is, what that represents, what area?

15 A Okay. The blue dot I guess is where --
16 I'm sort of clueless. What am I looking at here?

17 Q Do you recognize what this represents,
18 the line down the middle?

19 A I'm still not sure what I'm looking at,
20 sorry. If you could show me 183 on here to orient me.

21 Q Do you recognize the dark line across the
22 bottom as being 183? And that this is the easement up
23 here at the beginning of the highlighting?

24 A The beginning of the yellow is where the
25 easement is. The yellow is the easement. Okay. I can

1 see that. I guess the blue dot is covering up
2 Mr. Monroe's house.

3 Q He's located in Lot C, right?

4 A He is located in Lot C.

5 Q This is what I'm trying to show, do you
6 agree that this yellow shows a path that has been used by
7 your trucks and tractors and so forth to go on the route
8 shown as part of what they've used the easement for?
9 They used this path to do their various work and they
10 come around as shown to access other properties and then
11 to come back around to the nursery.

12 MR. KAHLE: Objection, Judge, form of the
13 question. He specified that "you" needed to be
14 distinguished between you personally and the
15 business.

16 MR. MARTINGAYLE: Okay, I'm doing that,
17 the business.

18

19 BY MR. MARTINGAYLE:

20 Q Do you recognize this as a path that
21 business employees and truckers and haulers use from time
22 to time using the easement and then conducting the
23 business, cutting across the path?

24 A It does happen occasionally, it might. I
25 can't deny that but most of the vehicle traffic from this

1 far point is going to use 183 and then go into the
2 nursery that way.

3 Q Okay. If there is an injunction
4 granted would you agree that nobody should be cutting
5 across any other property and using it as any kind of a
6 throughfare?

7 A Again, only 8-A-7 is the piece of
8 property I believe should be part granted use through the
9 easement.

10 MR. MARTINGAYLE: Judge, I would ask that
11 this marked as our next exhibit.

12 THE COURT: All right. Any objection?

13 MR. KAHLE: No, Judge. I'm not sure what
14 it shows but no.

15 THE COURT: Defendant's 4.

16 (Defendant's Exhibit Number 4 was marked
17 for identification and admitted into evidence.)

18 THE COURT: Counsel, it's now one minute
19 before 5:00 o'clock. What do you want to do?
20 Well, it's now 5:00 o'clock.

21 MR. MARTINGAYLE: Judge, I don't have a
22 lot more questions for him but obviously I have
23 my own witness or witnesses who I maybe just
24 calling one or possibly both of them. So if I'm
25 getting the drift of what you are suggesting, we

1 may need to suspend this and finish this at
2 another time.

3 THE COURT: We may, we may.

4 MR. MARTINGAYLE: Should we go off the
5 record for a moment?

6 THE COURT: Yes.

7 (A break was taken and there was a
8 conference in chambers.)

9 THE COURT: Let's go back on the record.
10 Everybody standby. Thank you for conferring with
11 the Court in chambers.

12 Counsel, I'm going to — under the
13 circumstances, we're going to get a new date. In
14 the meantime, under the circumstances, on a
15 temporary basis for a period of 60 days from
16 today, I'm going to grant a temporary injunction
17 to the plaintiff.

18 You may step's down, Mr. Tankard, sorry.

19 The defendants are enjoined from
20 interfering with the plaintiff's use and
21 enjoyment of the easement. Defendants are to
22 remove all obstructions to the easement by
23 5:00 p.m., Sunday, August 21st, 2022, that's this
24 Sunday, by 5:00 p.m.

25 As I mentioned, the injunction is for a

1 period of 60 days from today unless sooner
2 modified or dissolved by the Court and I will
3 require an injunction bond.

4 Do you want to be heard on that,
5 Mr. Kahle, as to the appropriate amount?

6 MR. KAHLE: Judge, if I may suggest,
7 given the fact that it's an express easement, a
8 bond in the amount of \$5,000 would be
9 appropriate.

10 THE COURT: All right. Mr. Martingayle.

11 MR. MARTINGAYLE: Judge, we have a
12 counterclaim where we have asserted that my
13 clients are suffering damages because of the
14 manner in which this easement has been used and
15 so we would request that the bond be set in the
16 amount of \$50,000.

17 THE COURT: All right. Bond in the
18 amount of \$10,000 for the temporary injunction.

19 MR. MARTINGAYLE: And when is that due?
20 That needs to be filed --

21 THE COURT: As a condition of the
22 injunction.

23 MR. MARTINGAYLE: As a condition.

24 THE COURT: Until the bond is posted, the
25 injunction will not be --

1 MR. KAHLE: And can Mr. Tankard bring a
2 check into the court and the court hold it?

3 THE COURT: You'll have to confer with
4 the clerk about that, Mr. Kahle, about the
5 mechanics.

6 MR. KAHLE: Okay. That sounds great,
7 thank you, Judge.

8 THE COURT: All right. Will you prepare
9 an order, Mr. Kahle?

10 MR. KAHLE: Yes, sir.

11 MR. MARTINGAYLE: Your Honor, may I state
12 some objections on the record?

13 THE COURT: Yes.

14 MR. MARTINGAYLE: Thank you, Judge. We
15 object on the following grounds: First of all,
16 as the record reflects, we did not finish our
17 cross-examination and the plaintiff did not
18 finish his presentation.

19 We did not have any opportunity to
20 present our defense evidence. The elements
21 necessary for a temporary injunction were not
22 established by the plaintiff and the plaintiff
23 admitted under oath to using the easement in such
24 a manner that it increased the burden on the
25 defendants' property and, therefore, there is

1 just no basis in the law of equity for the
2 granting of a temporary injunction.

3 We appreciate the Court's time today and
4 we will be prepared to move forward as
5 expeditiously as possible.

6 THE COURT: I'll ask the parties also to
7 for scheduling purposes to confer with my
8 assistant, Ms. Beasley, tomorrow to schedule the
9 next continuation of this hearing.

10 MR. KAHLE: Yes, Judge.

11 MR. MARTINGAYLE: Do you want us to try
12 and pick an afternoon or how do you want us to
13 try to --

14 THE COURT: We'll try to accommodate
15 counsels' schedules as best we can. I have -- I
16 don't think my next duty week is until the end of
17 September and so we'll have to try to carve out
18 some time one day as we did today.

19 MR. MARTINGAYLE: And, Judge, one other
20 thing that I think is important for the record, I
21 indicated that my client intends to install a
22 gate and that's pursuant to Code Section
23 33.2-110, Subparagraph A, and I believe you
24 indicated back in chambers and I simply want to
25 confirm that the issue of a gate is not before

1 you today but we don't want to run afoul of your
2 temporary injunction. So as I understand it,
3 you're not prohibiting us from installing
4 whatever kind of gate would comply with the law,
5 are you?

6 THE COURT: I'm enjoining any
7 interference with the lawful or with plaintiff's
8 enjoyment and use of the easement, that's the
9 injunction.

10 MR. MARTINGAYLE: For clarification, are
11 we prohibited us from installing a gate if we
12 have statutory authority for a gate?

13 THE COURT: I'm not giving you an
14 advisory opinion on that, Mr. Martingayle.

15 MR. MARTINGAYLE: I'm simply trying to
16 keep my client out of trouble and I just want to
17 know the breath of your --

18 THE COURT: I appreciate that.

19 MR. MARTINGAYLE: -- the degree of what
20 you would constitute to be interference? I
21 understand the poles are different because poles
22 constitute blockage but if there's a gate, that
23 would be allowed? I'm simply trying to determine
24 whether you would view that as a problem.

25 THE COURT: Mr. Martingayle, the issue is

1 not before me. I can't give you an advisory
2 opinion on that point. Your client I'm sure will
3 confer with counsel and receive the advice of
4 counsel and assess the potential risks associated
5 with in any way violating the terms of the
6 injunction.

7 MR. MARTINGAYLE: In terms of what
8 statutes might apply, you're not saying that we
9 are prohibited from doing what statutes might
10 expressly allow?

11 THE COURT: I'm not saying anything other
12 than what I have said. That is, the defendants
13 are enjoined from interfering with the
14 plaintiff's use and enjoyment of the easement.
15 That can be -- ultimately, if there's a
16 controversy that arises as to if the defendants
17 are interfering with the plaintiff's use and
18 enjoyment of the easement, the Court will be
19 called upon to resolve it, but I can't give you a
20 prospective ruling on a hypothetical, which is
21 one of the reasons I was hoping that counsel
22 could be a little -- one of the reasons I was a
23 little more hopefully about meeting in chambers
24 but it turned out or worked out as it worked out.
25 In any event, that's where we are.

1 I appreciate the reasons you asked
2 that question, Mr. Martingayle, I really do but
3 the posture we're in right now doesn't permit me
4 to answer it. All right. Anything else for
5 today?

6 MR. KAHLE: No, Judge. Just as to the
7 timing of them removing the poles, I guess that's
8 clear. I'll get up with the clerk tomorrow as to
9 how we can post that bond as to what kind of
10 surety. I think in cash will do.

11 MR. MARTINGAYLE: If I understand your
12 order, they've got to do that before the order
13 takes effect. If they don't get it done
14 tomorrow, then they don't have to have the poles
15 out until it's actually done.

16 THE COURT: Mr. Martingayle --

17 MR. KAHLE: I understand that.

18 THE COURT: -- I'm not going to give you
19 an advisory opinion on that either.

20 MR. MARTINGAYLE: Well, we've got to put
21 together an order that reflects what you said and
22 so I just want to be clear. We should all walk
23 out with the clearest understanding that we can
24 because we're going to be reducing it to an
25 order. Are you going to do a handwritten order

1 too, Judge?

2 THE COURT: No, I'm not. All right. Can
3 we go off the record for a moment?

4 (A discussion was held off the record.)

5 THE COURT: We're adjourned.

6

7 (The proceedings where concluded at 5:30
8 p.m.)

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1 COMMONWEALTH OF VIRGINIA AT LARGE, To-Wit:

2
3 I, Jill Showers, Court Reporter, CCR#0315051,
4 Notary Public for the Commonwealth of Virginia at Large,
5 whose commission expires March 31, 2024, certify that the
6 foregoing is a correct transcript to the best of my
7 ability of the Judge's ruling in the case of David B.
8 Tankard, Jr. versus Christopher J. Monroe and Jodi Lee
9 Reynolds taken before the Honorable Stephen C. Mahan,
10 Judge.

11 I further certify that I am not a relative or
12 employee of attorney or counsel of any of the parties or
13 financially interested in the action.

14 Given under my hand this 29th day of August,
15 2022.

16
17
18
19 *Jill Showers*

20 _____
21 Notary Public
22 7871363
23
24
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