In The

Supreme Court of Virginia

RECORD NO. 130062

OLD DOMINION BOAT CLUB,

Appellant,

v.

THE ALEXANDRIA CITY COUNCIL, and THE CITY OF ALEXANDRIA, VIRGINIA, and 106 UNION DUBLIN, LLC, and 106 UNION IRELAND, LLC,

Appellees.

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

ODBC Did Not Dedicate its Easement Interest, and the City of Alexandria Charter Section 2.03(a) Does Not Control.

The City Parties urge that when "the alley was dedicated" and the City accepted it, all other interests were extinguished. Brief of Appellees at 6.

The error in this argument is that it is based on a fundamentally flawed premise. Wales Alley cannot be viewed simply as a single unit of physical space. It is rather a legal construct composed of distinct, layered interests. The task before this Court is to evaluate and apportion those interests.

Perhaps this litigation is unique in the Virginia jurisprudence of implied dedication. In each of the two leading cases on the issue, Keppler v. City of Richmond, 124 Va. 592, 98 S.E. 747 (1919) and City of Staunton v. The Augusta Corp., 169 Va. 424, 193 S.E. 695 (1937), and in this Court's most recent case, 3232 Page Ave. Ass'n v. City of Va. Beach, 284 Va. 639, 735 S.E.2d 672 (2012), the court's attention was required only as to a single landowner, who claimed the entirety of the fee-simple interest over the real property at issue. In Keppler, this was an eight-foot strip of ground within the landowner's deed description. In Staunton, it was a three-foot strip similarly

claimed in fee-simple. In 3232 Page Avenue, it was a section of beachfront claimed in fee-simple by a condominium association entity.

The court's consideration of the actions (and inactions) alleged to represent implied dedication as to those properties focused only on the single landowner in each instance. If that person or entity were found to have impliedly dedicated his fee-simple interest, *and there were no other interest-holders to be considered by the court*, then that completed the inquiry.[1]

Contrast that with the situation involving ODBC here. The trial court found that "neither ODBC nor the Union Defendants have claimed a fee simple interest in Wales Alley." Opinion and Order (April 22, 2011), App at 118. It found instead that they have a "vested easement." Id. The trial court made no formal finding as to who or what entity *did* hold the fee-simple interest (underlying and servient to ODBC's and others' easements), but ruled that, as of at least 1972, "the alley must be considered as having been dedicated by 'long public use.'" Opinion and Order (April 22, 2011), App at 121.

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[1] It bears noting that the owner(s) of other parcels adjacent to the length of Wales Alley as it has existed since the 1789 deed, similarly situated to the ODBC and Union Parties, are not a party to this litigation.

The City and Union Parties urge that this finding triggers the City of Alexandria Charter Section 2.03(a), such that the City now has the entire "right and interest" in Wales Alley.

But as a crucial threshold matter, it must be borne in mind that it was not the entire right and interest in the alley that was deemed to have been given by implied dedication. Rather, the trial court specifically found—in an unappealed holding—that ODBC had *not* dedicated its easement interest, either explicitly or implicitly, through declarations, actions, or inactions. Opinion and Order (April 22, 2011), App at 120.[2]

As Keppler and Staunton hold, Charter sections similar to the City's section 2.03(a) are by their terms operational only as to land or interests which have been "opened to" the public, which under Virginia jurisprudence has come to mean impliedly dedicated. Since ODBC did not impliedly dedicate its easement interest, that easement interest is simply unaffected by the Charter section directly, and is certainly not swept up and "extinguished" under the Charter section

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[2] Implied dedication in Virginia "is founded on the doctrine of estoppel *in pais*." Keppler v. City of Richmond, 124 Va. 592, 610, 98 S.E. 747 (1919). As the evidence showed that ODBC has continuously used its easement, there has been no basis for the City Parties to rely to their unilateral detriment on the idea that it was unattended to or could be disregarded.

as a consequence of the actions of some other, unidentified and unrelated non-party entity.

It may well be that the City now controls the underlying fee-simple interest in Wales Alley, but that fee-simple interest is and has always been servient to the express, written easement to which ODBC succeeded through its chain of title stretching back to 1789.

The City, as the present servient owner, may make any use of Wales Alley that does not interfere with the use and enjoyment of ODBC's ingress and egress easement. Preshlock v. Brenner, 234 Va. 407, 410, 362 S.E.2d 696, 698 (1987). It may grant to others subsequent easements, licenses, or other permission to use its servient estate in Wales Alley, provided of course that those grants and the uses made of them may similarly not interfere with ODBC's ingress and egress. Id. These principles of real property law govern no less when one of the several interest-holders is a public body. Id.

Granting a license to a private restaurant to build a raised concrete patio upon the surface of Wales Alley, which would obstruct a large portion thereof, and declaring the alley to be open only to one-way vehicular traffic, are both violations of this principle by the City Parties. ODBC Ex 15, App at 70-73; Union Ex 18, App at 99-106.

The Purpose of ODBC's Easement Continues to Exist.

The Fitzgerald/Peers deed of 1789 creating Wales Alley and the easement across it describes the purpose of the easement as providing "for the more convenient communication with the public main [s]treets and the river." ODBC Exhibit 1, App at 57-62. It is undisputed that Wales Alley connects the ODBC parcel with Union Street, a public street in the City of Alexandria, and there was considerable testimony at trial that the ODBC members use it frequently for passage between it and the Club's property. Transcript at 79; Opinion and Order (April 22, 2011), App at 113.[3]

The City Parties cite American Oil Co. v. Leaman, 199 Va. 637, 101 S.E.2d 540 (1958) for the principle that when the particular purpose of an easement is fulfilled, the easement is extinguished.[4] Brief of Appellees at 10. In Leaman, the easement at issue was

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[3] This unimpeded access-egress easement also belongs to the other successors-in-title to properties adjacent to Wales Alley on the Peers-Fitzgerald partition deed, including the Union Parties and the other owners along the north side of Wales Alley.

[4] The full quotation from Leaman paraphrased by the Brief of Appellees and found at the pinpoint cite given therein is "If the particular purpose for which the easement is granted is fulfilled *or otherwise ceases to exist*, the easement also falls to the ground." (emphasis added) 199 Va. at 652, 101 S.E.2d at 552.

granted specifically by its terms for access "out to the public highway known as Goodwyn's Neck Road." Id. at 651, 551. That road was formally abandoned by legislative act of the Board of Supervisors of York County, which act was later ratified by the deputy Highway Commissioner. Id. at 647, 548.

This Court ruled that because the particular purpose of the easement had ceased to exist, the easement was extinguished. Id. at 652-653, 551-552. Cases citing Leaman have undertaken the same analysis, with the same outcome: In McCreery v. Chesapeake Corp., 220 Va. 227, 257 S.E.2d 828 (1979), an easement "to the county road" was extinguished when Route 212 was abandoned pursuant to an interstate highway project; in Pyramid Development v. D&J Associates, 262 Va. 750, 553 S.E.2d 725 (2001), the court found that the "easement [was] specifically limited to allowing access to the spur tracks and sidings . . . [which] are no longer in use; therefore, the limited purpose of the easement is no longer in existence." Id. at 755, and so "the easement to use the spur tracks and sidings was extinguished when rail service was discontinued." Id.

None of these scenarios is analogous to the situation in the City of Alexandria, where the ODBC has continuously used its easement

over Wales Alley for ingress and egress between its property and Union Street, which continues today as a public main street in the City of Alexandria. The original purpose of the easement persists, and it is erroneous to argue that it has somehow been fulfilled and therefore ended.

CONCLUSION

As we said in our opening brief, the ultimate irony of this case is that, for all the discussion of "implied dedication to the public," it is the ODBC that is trying to keep Wales Alley entirely open for continued use by the public and itself, while the City and an adjacent owner are trying to close off a significant portion as private restaurant space, and limit the use of the rest of it.

In short, the "public" is trying to make it private, while a private owner is trying to keep it fully public.

As the Circuit Court held in its 2011 Opinion and Order, ODBC enjoys a 30-foot easement in Wales Alley for ingress and egress to its property arising from a 1789 deed in its chain of title, maintained through continuous use, and never interfered with. Based on these findings, which were unappealed and are the settled law of this case,

the Circuit Court should have recognized ODBC's "vested easement" by granting Count 2 of ODBC's Amended Complaint.

The Circuit Court should have enjoined the City Parties and the Union Parties from any interference therewith, by granting Counts 4 and 5 of ODBC's Amended Complaint. This court should do so now.

Respectfully Submitted,

OLD DOMINION BOAT CLUB

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CERTIFICATE

Pursuant to Rule 5:26(h), I hereby certify that on this 8th day of July, 2013, I caused fifteen bound copies, with one electronic copy on CD, of this Reply Brief of Appellant, to be hand filed with the Clerk of this Court, and that on the same day, the required number of bound copies, with one electronic copy on CD, of the same to be served, via UPS Ground Transportation, to Counsel for the Appellees:

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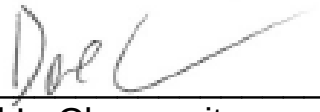

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