IN THE

Supreme Court of Virginia

RECORD NO. 130062

OLD DOMINION BOAT CLUB,

Appellant,

v.

ALEXANDRIA CITY COUNCIL, et al.,

Appellees.

BRIEF OF APPELLEES

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Appellees the City of Alexandria, Alexandria City Council (collectively the "City") 106 Union Dublin, LLC and 106 Union Ireland, LLC, (collectively the "106 South Union defendants"), by and through their respective counsel, submit this brief in opposition to the brief filed by the appellant Old Dominion Boat Club in this matter.

The Nature of the Case and Material Proceedings Below

In this case, the Old Dominion Boat Club ("ODBC") sought to prevent the 106 South Union defendants from constructing a deck for outdoor dining purposes within Wales Alley. The 106 South Union defendants had obtained approval for operation of a restaurant at their location and in the context of the outdoor dining aspect of their operation, had entered into a license agreement with the City whereby the City allowed the restaurant to construct a deck over a portion of Wales Alley, considered by both the City and the 106 South Union defendants to be a public street. The ODBC objected on a variety of levels, including the assertion that the alley was private property and therefore not properly the subject of a license by the City and that the proposed use violated the terms of an easement held by the ODBC by virtue of a 1789 deed. ODBC initiated the underlying proceeding in the Circuit Court for the City of Alexandria asserting various theories of relief based on these assertions.

The alley was the subject of an earlier case brought by the ODBC against another adjoining property owner. Specifically, in 1972, under an apparent claim that it owned the alley, Dockside Sales, the owner at that time of the same property in which the 106 South Union defendants are currently operating their restaurant, constructed fences across both the east and west ends of the alley, closing it to all traffic. The ODBC sued Dockside Sales (the City was not a party) and the Chancery Court for the City of Alexandria ruled on April 13, 1972 that Wales Alley was "an established public way" and that the ODBC had "a vested easement of way" therein. The 1972 case decision held that Dockside Sales was "permanently enjoined from closing or erecting any further fences, buildings or other structures over Wales Alley, so as to interfere with the free use of it."

The Circuit Court held a bench trial and accepted post-trial briefing, resulting in an opinion and order dated April 22, 2011 (the "April 22, 2011 decision") which held that after 1972, Wales Alley had become a public alley owned by the City via implied dedication and acceptance pursuant to Section 2.02(a) of the Alexandria City Charter, but declined to resolve any conflicts between the City's ownership and the ODBC's rights in the alley because the 106 South Union defendants were barred by the doctrine of

res judicata from constructing the deck, since they were successors in interest to Dockside Sales, the defendants in the 1972 case, which had been enjoined from blocking the alley.

This Court, by its mandate dated May 25, 2012, reversed the April 22, 2011 decision, holding that the 1972 *Dockside Sales* case did not provide a basis under the doctrine of *res judicata* for determining the City's rights in the alley and by extension, what rights they might license to the 106 South Union defendants.

On remand, the Circuit Court, with the agreement of the parties, took no additional evidence, but allowed additional argument and briefing. Thereafter, the Circuit Court issued the October 9, 2012 decision, which held that the City's implied dedication and acceptance of the alley under the terms of its Charter gave the City the authority to control the alley, including the licensing of a portion of the alley to the 106 South Union defendants. The ODBC has appealed from that ruling.

Statement of Facts

Wales Alley, at times previously known as Fitzgerald Alley, was created by a Partition Deed executed in 1789. (Joint Appendix at pp. 57-62). At the time Wales Alley was created, no applicable subdivision ordinance or other local law or state statute governed the creation of public

streets and roads. Transcript at pp. 208-209. The ODBC acquired real property known as 2 King Street by deed in 1935, which adjoins Wales Alley. Joint Appendix at pp. 5-6. In the early 1970's, a dispute arose between the ODBC and Dockside Sales (the owner of the property now occupied by the 106 South Union defendants) regarding Dockside Sales' ability to construct fences on each end of the alley, blocking public access to the alley, resulting in litigation between the ODBC and Dockside Sales. Joint Appendix at p. 6 and pp. 63-66. In 1972, the Chancery Court for the City of Alexandria, in the case of *ODBC vs. Dockside Sales, Inc.*, Chancery No. 16364, ruled that Wales Alley was an "established public way" and that Dockside Sales was permanently enjoined from interfering with the free use of the alley. The City was not a party to this case. Joint Appendix at pp. 63-64.

After the 1972 decision in the *Dockside Sales* case, the City began to take steps to maintain the alley, including paving it, enforcing parking restrictions in the alley, arranging for the construction of a brick sidewalk, installing signage and conducting repairs of the alley surface and sidewalk. Joint Appendix at p. 113. By virtue of the City's actions, and because the alley had been used by the public as a public alley for over one hundred years, the alley was implicitly dedicated to and accepted by the City as a

public street pursuant to Section 2.03 (2) of the City's Charter. Joint Appendix at p. 122.

In May of 2010, the City Planning Commission and City Council approved a Special Use Permit ("SUP") for the 106 South Union defendants to operate a restaurant at 106 South Union Street. Joint Appendix at pp. 70-98. The SUP allowed outdoor dining and in connection with that dining, the City and the 106 South Union defendants entered into a license agreement whereby the City granted the restaurant permission to construct a deck on a portion of Wales Alley. Joint Appendix at pp. 99-106. The SUP and license agreement between the City and the 106 Union defendants left a straight travel lane within Wales Alley of approximately 14 feet in width. Transcript at p. 279. The SUP and license agreement between the City and the 106 South Union defendants will generate both revenues for the City and additional improvements to the public infrastructure. Joint Appendix at p. 73 (regarding payments to the City) and p. 71 (regarding applicant's requirement to repave the alley). The SUP and license agreement between the City and the 106 South Union defendants, by providing additional outdoor dining, advance the City's goals of improving attractions on the waterfront and promoting an active pedestrian experience. Joint Appendix at p. 72. The ODBC objected to the changes

within the alley and brought the underlying proceeding.

Standard of Review

The appellees agree with the appellant that the standard of review in this matter is *de novo*.

Argument

I. Introduction

This case, involving a small alley in the City of Alexandria, has been the subject of litigation since 2009. In reversing the Circuit Court's erroneous reliance on the doctrine of *res judicata*, this Court's May 12, 2012 mandate was clear that the Circuit Court had to determine what effect the City's implied dedication and acceptance and ensuing ownership of the alley had on the private rights that may have been held by adjoining land owners, including the ODBC, prior to the alley becoming publicly owned. The Circuit Court made that ruling in the October 9, 2012 decision, finding that the plain language of Alexandria City Charter Section 2.03(a) means exactly what is says – that once the alley became part of the City's public infrastructure, the City has the complete authority to "lay out, open extend, widen, narrow . . . or close . . ." the alleys of the City, including for alleys like Wales Alley, which were acquired by implied dedication and acceptance. There is no reason to disturb that ruling on appeal.

II. Any private rights held by the ODBC do not survive dedication and acceptance of the alley as a public way pursuant to the City's Charter.

The arguments set forth in the ODBC's brief all revolve around the assertion that the ODBC at one time had a "vested easement of way" and that the City's receipt of Wales Alley as a part of the public infrastructure somehow did not impact that easement.

The law in Virginia is clear that once a jurisdiction accepts dedication of a right of way, putative private access rights are extinguished. Once dedication to and acceptance by a locality takes place, private access rights become merged into the public way and the holder of the easement is only entitled to reasonable and adequate access, like any other member of the public. *Fugate v. Nettleton,* 213 Va. 26, 27, 189 S.E.2d 377, 378 (1972), *citing City of Norfolk v. Meredith*, 204 Va. 485, 132 S.E.2d 431 (1963), *City of Hampton v Stieffen*, 202 Va. 777, 120 S.E.2d 361 (1961), *Keppler v. City of Richmond*, 124 Va. 592, 98 S.E. 747 (1919) and *Buntin v. Danville,* 93 Va. 200, 24 S.E. 830 (1896). This court's recent decision in *3232 Page Ave. Condominium Unit Owners Assoc. v City of Virginia Beach*, 286 Va. 639, 735 S.E. 2d 672 (2012) is consistent with the foregoing authority and expressly held that a private fee simple ownership interest over a portion of the beach is extinguished after implied dedication

and acceptance by the City of Virginia Beach. See, 286 Va. at 677-78, 735 S.E.2d at 649. Interestingly enough, the ODBC cites this case in support of its position, based on the assertion that because it had a lesser interest – an easement – instead of fee simple ownership, the lesser interest is somehow not extinguished. This is directly contrary to the power granted the City in its charter.

The City's authority under its Charter is clear; it has full dominion and control over its streets, alleys and other public ways. Section 2.03(a) provides:

> Sec. 2.03 Powers relating to public works, utilities and properties.
>
> In addition to the powers granted by other sections of this charter the city shall have power:
>
> (a) To lay out, open, extend, widen, narrow, establish or change the grade, or close, vacate, abandon, construct, pave, curb, gutter, grade, regrade, adorn with shade trees, otherwise improve, maintain, repair, clean and light streets, including limited access or express highways, alleys, bridges, viaducts, subways and underpasses, and make and improve walkways upon streets and improve and pave alleys within the city; and the city shall have the same power and authority over any street, alley or other public place ceded or conveyed to the city or dedicated or devoted to public use as over other streets, alleys and other public places; <u>provided, further, that whenever any ground shall have been opened to and used by the public as a street or alley for ten years it shall be considered as dedicated to the public and the city shall have the same authority and jurisdiction over and right and interest therein as it has over other streets</u>.

(Emphasis added)

As the Circuit Court held in the October 9, 2012 decision, the finding that the alley had been dedicated to and accepted by the City meant that the powers expressly granted to the City in the Charter with respect to public ways applied to Wales Alley, like any other street or way. Therefore, the City had the power to do exactly what it did, including making the alley one way, narrowing the travel surface of the alley and licensing a portion of the non-travel surface to the 106 South Union defendants. There is no "savings clause" for private rights in the charter, as the ODBC seems to suggest; the City has complete dominion and control over the alley once it becomes part of the public roadways.

III. The ODBC easement in Wales Alley was extinguished when its purpose is fulfilled and is no longer necessary.

The easement language in the 1789 deed on which the ODBC relies was intended to grant adjoining property owners protection from private action by other adjoining property owners, which might interfere with their access to public ways. The 1789 deed reserved for the adjoining property owners:

> free use and passage of the several Streets and Alleys in common now left by them from their grounds for the more easy communication with the public main streets . . .
>
> Joint Appendix at p. 59 (original deed) and p. 62 (transcripted deed).

However, once the alley itself became a public way, there is no longer any need for such a private interest, since the easement holder, like every other member of the public, now has access to the public right of way, subject to the City's exercise of proper control thereof. Once the particular purpose for which an easement is granted is fulfilled, that easement is extinguished. *American Oil Co. v. Leaman*, 199 Va. 637, 652, 101 S.E.2d 540, 552 (1958). Here, once the alley became public, the risk of private interference with access to the adjoining public streets ended, so the purpose of the easement was no longer relevant.

To hold otherwise would ignore the very purpose of Alexandria City Charter Section 2.03, and other analogous charter provisions in other jurisdictions throughout the Commonwealth. Those charter sections eliminate confusion, ambiguity or inconsistency regarding ownership of streets, roads, alleys and other public ways where, as here, there has been clear, uninterrupted and documented public use and acceptance, and put responsibility for them firmly with the locality. Indeed, the fact that the alley became public completely avoids the possibility that private action by an adjoining property owner could impede any other adjoining owner's access. This was exactly what was litigated in the *Dockside Sales* case in 1972; the alley's subsequent dedication to and acceptance by the City into its system

of public streets and ways makes the holding in that case moot. After Wales Alley's acceptance into the public domain, the ODBC's right to use the alley became the same as any other member of the public and is not subject to the vagaries of competing private rights. [1]

[1] / Moreover, as the Circuit Court made clear in the October 9, 2012 decision, it was not ruling on any claim for compensation of the value for whatever right ODBC claims to have lost. While the City contends that there is no value associated with any such rights, ODBC is presumably able to make such a claim if it chooses.

Conclusion

The Circuit Court's second decision in this case is a simple and clear application of the City's Charter powers. There is no legal error, the appeal should be denied and the circuit court's decision affirmed.

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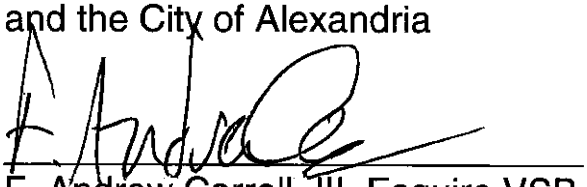

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Certificate of Service

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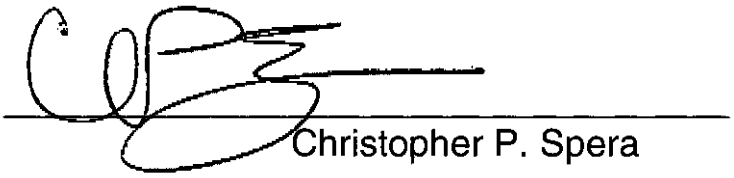

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