In The

Supreme Court of Virginia

RECORD NO. 150328

CITY OF CHESAPEAKE, VIRGINIA,
a municipal corporation,

***Appellant*,**

v.

DOMINION SECURITYPLUS SELF STORAGE, L.L.C.,

Appellee.

REPLY BRIEF OF APPELLANT

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SCV: Submitted on 12-04-2015 15:45:59 EST for filing on 12-04-2015

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ARGUMENT

A review of Dominion's brief takes the reader down the "rabbit hole." That is because Dominion has taken liberty with the factual realities of this case and resolves the issues presented by applying laws other than those which are long standing in this Commonwealth. This case presents issues that can be decided under Virginia's well settled legal principles.

This case is about a landowner-developer ("Dominion") who wheeled and dealed for the approval of its site plan against the back drop of a certain future road improvement project adjacent to the land it purchased for development of its storage facility. Long before its purchase on January 7, 2002, Dominion was willing to accept the fact that it would lose direct access to Dominion Boulevard in return for a subdivision variance and it was willing to accept placing a right of way reservation on its subdivision plat that prevented a future claim of damages to the improvements and residue land when the City purchased the reserved area.

In this case, the trial court allowed evidence of damages to the residue as a result of the fee simple taking of land across the property's frontage. All of the fee simple taking was within the right of way

reservation.[1] There was un-contradicted testimony that the fee simple taking was for the closure of direct access to Dominion Boulevard and construction of a new at grade access road. A. 646-652, 959-961. City seeks reversal of the trial court's ruling based upon its re-writing of the right of way reservation, specifically, adding the term that the loss of direct access or other damages had to be foreseeable before they could be waived. A. 154.

The trial court further allowed evidence of damages for the loss of the public's visibility of the property that was undisputedly caused by the improvements made on the City's property. While the admission of evidence for loss of direct access and loss of visibility are the primary issues raised in Dominion's appeal, these issues arise out of what can be best described as a Shakespearean background where truth has the starring role.

The undisputed testimony by Dominion's engineer ("Kellam") was that he, at all times, made Dominion aware of these conditions and requirements, including the future height of the bridge, but they gambled

[1] City never took the position that Dominion was barred from claiming damages as a result of the taking of the easements outside of the reservation area.

that the City would not have enough funding for the Dominion Boulevard project and proceeded to develop the storage facility. A. 124-140.

Sometimes the truth and the law can be at odds with each other but not in this case. As this Court found in *Board of County Supervisors v. Sie-Gray Developers, Inc.*, 230 Va. 24, 334 S.E.2d 542, 546 (1985), if a developer voluntarily agrees to a condition that would otherwise be prohibited, in return for site plan approval, an enforceable contract is created. This Court's ruling and rationale in *Sie-Gray* is applicable to both the right of way reservation issue and the visibility issue.

1. Dominion sought to introduce evidence in violation of its voluntary contract to waive damages to the residue and in violation of its voluntary acceptance of a conditional subdivision variance.

In its brief, Dominion wrongly states that the Right of Way Reservation was not applicable in this case because City filed a condemnation petition to acquire not only the area within the reservation but additional easements outside the reservation. What Dominion fails to mention in its brief is that the subdivision plat clearly labeled the reserved area as "50' R/W HEREBY RESERVED FOR FUTURE ROAD IMPROVEMENTS." A. 46. City sought to enforce the Right of Way Reservation's waiver of damages clause to preclude a claim of damages arising from the City's purchase of the reserved area. No one disputes that

the entire fee area is within the reservation. Nor is there any dispute that the fee take is what caused the loss of direct access.

At page 8 in its brief, Dominion makes an incorrect statement of material fact. It asserts that the trial court based its ruling to allow evidence of residue damage on the fact that the City took more land than that shown in the reservation. The Court will note that Dominion's citation to the appendix is A. 150. However, nowhere in that citation is there such a statement by the trial court. See A. 155. In its brief, Dominion is clearly attempting to re-write the basis for the trial court's ruling on the reservation in an effort to avoid the "foreseeability" issue that the trial court injected into this case. It is quite clear that the trial court invoked an additional term in the reservation contract. That was the basis of its ruling which the City contends was a re-writing of the reservation contract.

Continuing down the rabbit hole, Dominion contends that the City did not act pursuant to its Reservation because it filed its certificate and petition to acquire the property within the reserved area. It is not disputed that prior to filing its certificate, the City made an offer to purchase for fair market value the property within the reserved area as required by the language in the reservation. A. 45, 379-380.

Further down the rabbit hole, Dominion asserts that the Reservation and its waiver of damages clause does not apply in this eminent domain case because the term "by reason of said purchase" was used instead of "by reason of said purchase or taking." As shown on the plat, the reservation was clearly for the purchase of right of way for future road improvements, therefore it makes no difference that the term "by reason of said purchase" as opposed to "or taking" was used. A. 45-46.

2. City's Motion for Reconsideration was in response to the Court's re-writing of the reservation contract thus leading to the discovery of new information that Dominion voluntarily and knowingly agreed to the conditions in return for subdivision plat and site plan approval.

Dominion contends that there was no evidence that the decision of the Planning Commission to place conditions on subject's subdivision variance was conveyed to Dominion. To the contrary, City informed the trial court in its Motion of Dominion's knowledge through its engineer, Kellam and offered the deposition testimony of Kellam as an Exhibit to its Motion for the Court to Grant a Hearing on its Motion for Reconsideration. A. 280, 285, 289, 432, 491, 513-527, 530-531.

Oddly, Dominion next contends that the City is seeking to add terms to the Reservation. Dominion omits any citation to the appendix that supports its claim. Since the trial court invoked a foreseeability standard on

the waiver of damages clause, it was in error for it to ignore newly discovered evidence related to the conditional variance and Kellam's testimony that he discussed it with Dominion.

The City did not limit Dominion's rights to seek just compensation for damages to the residue, Dominion did it to itself, willingly and voluntarily, and like the developer in *Sie-Gray*, it did not matter that the voluntary acceptance by *Sie-Gray* was not in the chain of title because *Sie-Gray*, like Dominion, voluntarily contracted for site plan approval. The real question is whether Dominion voluntarily accepted conditions in return for subdivision plat and site plan approval. The answer to that question is "yes."

This case is factually opposite to the *Linkhorn* case cited in Dominion's brief. In contrast to the Landowner in *Linkhorn*, Dominion had more than knowledge of the road project, it bargained for site plan approval by accepting the terms of the reservation and conditional variance.

Dominion's argument that the City failed to pass a threshold test for the trial court to consider its new evidence fails analytically. It was not until the trial court re-wrote the reservation contract that the issue of foreseeability was raised. City had no reason to pursue that course of investigation until the trial court invoked such a standard in its rationale to limit the reservation.

3. No evidence is in the record that Dominion had an appurtenant easement in the City's right of way nor was there any evidence that the take or the use of the take caused a loss of visibility.

The approval of a curb cut and a turn lane on the City's right of way does not equate to an appurtenant easement in the City's land. Sinking further down the rabbit hole, approval of the site plan does not convey an easement appurtenant. A. 45-46. Although never placed in evidence, the performance bond is required to be posted by a developer when it works in the City's right of way to insure that work is done properly. A performance bond does not convey an easement. The record is devoid of any evidence that Dominion had an appurtenant easement in the City's right of way or that the bridge and new road were constructed on land that was acquired from Dominion. Dominion does not offer any citation to the appendix to back up such a claim. Dominion's claim is akin to a Hail Mary pass after time has run out. This Court should not entertain such an argument that is for the first time being raised on appeal. The only experts qualified to give testimony on where the bridge and new road were constructed were Mssrs. Lundgren and Kiefer, both of whom testified that the fee take was located wholly within the reservation and was taken and used for the purpose of building an at grade access road. They further testified that any improvement that blocked the public's visibility of Dominion was

constructed entirely within the City's right of way. A. 647-649, 651, 796-800, 828-830.

City has now addressed Dominion's "practical argument." Now we address its "better argument." That is, that the Court should adopt the project rule from the Utah Supreme Court's decision in *Admiral Beverage*, 275 P.3d 208. That rule allows severance damages for loss of visibility if an improvement is built on property other than that which was condemned if the use of the condemned property is essential to the completion of the project as a whole. Such a rule does not comport with either Virginia Code Section 25.1-230(A)(1) or the Virginia Constitution, both of which state that just compensation includes damages that result from the take or the use of the take. Further, the majority of states follow the Alaska Rule from *8960 Square Feet v. State of Alaska*, 806 P.2d 843 (1991) which recognizes that to recover damages for loss of visibility the loss must result from changes to the property acquired. However, in this case, even if the area acquired within the reservation caused a loss of visibility, it would not be compensable because Dominion voluntarily accepted the reservation's waiver of damages clause.

Dominion's reliance on *Town of Galax*, 129 S.E.2d at 511 is creative but misplaced. *Galax* involved a change in grade and the right to

reasonable access to the main street. Here, the area acquired was for an at grade frontage access road not for the purpose of erecting the new road or bridge.

Nowhere in the record was there evidence that widening Dominion from two to four lanes and replacing a draw bridge with a fixed span bridge is an unreasonable regulation of the flow of traffic. To the contrary, the record contains testimony by Mssrs. Lundgren and Kiefer that the widening of the road and new bridge will eliminate congestion and promote free flowing traffic. A. 652-654, 831-832.

Damages for loss of visibility in this case should have been barred for three reasons: 1. No legal or appurtenant right in the City's property was conveyed to Dominion; 2. Neither the take nor the use of the take caused a loss of visibility; and irrespective of reasons 1. and 2., Dominion voluntarily waived any claim of damages to the residue under the right of way reservation contract.

4. Whether the City Planning Commission had authority to impose upon Dominion a condition on the subdivision variance that direct access to Dominion Boulevard would be closed in the future is irrelevant. Nor does it matter that the condition was not in the chain of title because Dominion voluntarily accepted the condition in return for subdivision plat approval.

Without the subdivision variance there would have been no site plan approval. That fact was established by the City's correspondence between

the City and Dominion's engineer, Kellam. A. 37-42, 44-47. Both City's engineer, Milinazzo, and Kellam testified that before the site plan could be approved the subject property had to be legally subdivided and to be legally subdivided it needed the variance. A. 683-689, 711-716. This Court made it crystal clear in *Sie-Gray* that a landowner-developer can contract away its property rights and that is precisely what Dominion did by its acceptance of the condition and its later action of purchasing the property and developing its facility.

5. Kellam's testimony was relevant to the issue of whether Dominion breached its agreements with the City to build a facility that would make concessions for the future road improvements in return for site plan approval.

Dominion in its fifth and final argument suggests that in an eminent domain proceeding contractual actions and obligations cannot be raised in defense of a damages claim. Yet again, Dominion provides no legal authority for such a principal.

Kellam's testimony and the testimony of Milinazzo established that Kellam informed Dominion of both the conditional subdivision variance and reservation. A. 257-260, 261-356, A. 678-690, A. 719, A. 394-418, 429-434. Kellam's testimony undoubtedly conceded that Dominion contracted away its claim for damages.

CONCLUSION

The right of way reservation and its waiver of damages clause was clear and its plain meaning should have been enforced by the trial court. Even the trial court held that it was binding regardless of the acquisition of the additional land for easements outside of the reservation. Dominion in its brief has turned to a theory of last resort. That being that the waiver of damages clause does not apply because the City acquired easements outside of the reservation. Dominion for good reason avoids the issue of "foreseeable damages," a term that the trial court wrote into the reservation. Dominion cannot escape the rabbit hole it voluntarily jumped into. Dominion was consistently informed by its agent-engineer of the City's development requirements and conditions and it voluntarily accepted those conditions in return for site plan approval. It was plain error for the trial court to re-write the reservation and allow evidence of damages.

It was also an abuse of discretion to strike the testimony of Dominion's engineer. It was not speculative but rather evidence of an enforceable agreement. City got what it wanted and Dominion got what it bargained for. There is no authority in Virginia allowing recovery for a loss of visibility. While it may be an advantage it is not an absolute right nor is it an appurtenant right in this case. If it were, the legislature would have

addressed it specifically as it did loss of business profits and change in access in the recent constitutional amendment. Moreover, the amendment continues to require a nexus between the taking or use of the take and damages. For these reasons, City respectfully requests that the Court will reverse the trial court's judgment and remand the case for a new trial on the issue of damages.

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CERTIFICATE OF SERVICE

Pursuant to Rules 5:26(h) of the Rules of the Supreme Court of Virginia, I hereby certify that on this 4th day of December, 2015, one electronic copy of this Reply Brief of Appellant was filed, via VACES, and ten paper copies of the same have been hand-filed with the Clerk of the Supreme Court of Virginia. In addition, one electronic copy of the same was served, via e-mail, upon counsel for Appellee:

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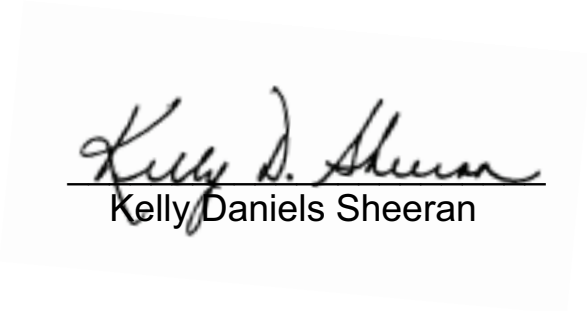

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