In The

Supreme Court of Virginia

RECORD NO. 190764

HOOKED GROUP, LLC,

Appellant,

v.

CITY OF CHESAPEAKE,

Appellee.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is an appeal of a final judgment of the Chesapeake Circuit Court in an inverse-condemnation action. Hooked Group, LLC filed a declaratory-judgment petition against the City of Chesapeake, alleging that, for a public use, the City took or damaged Hooked Group's easement of access to an adjoining road without paying just compensation. The City filed a demurrer and a motion to dismiss.

The circuit court entertained argument and issued a letter opinion, ruling that the petition failed to state a compensable claim. The landowner moved the court to rehear, but the court issued a second letter opinion denying that motion and restating its earlier holding. It entered a final order sustaining the demurrer, denying the motion to rehear, and dismissing the declaratory-judgment action with prejudice. This Court awarded the landowner an appeal on October 30, 2019.

FACTS

Because the trial court decided this case on a demurrer, the facts are those alleged in the Petition for Declaratory Judgment, ¶¶13-27 (A. 3-5). *Crosby v. ALG Trustee, LLC*, 296 Va. 561, 567 (2018).

Hooked Group owns land in the Great Bridge section of Chesapeake, just south of the Intracoastal Waterway. The property's eastern boundary is Battlefield Boulevard; its northern boundary is Callison Drive, which was, until the City's recent action, a public street. A. 27-28, 30-31. The property is zoned for commercial use, and for many years enjoyed direct commercial access to and from both Callison Drive and Battlefield Boulevard.

In 2017, the City of Chesapeake, by ordinance, closed only the portion of Callison Drive adjacent to the landowner's property. A. 30-31. This ordinance extinguished the landowner's existing easement for ingress from and egress to Callison Drive, and declared that the City would retain a fee interest in the vacated right-of-way.[1] A. 29.

The landowner did not consent to the extinguishment of its direct access to Callison Drive. The City's action has changed the property's highest and best use, detrimentally affecting its value. Although the City acknowledges that the ordinance resulted in the inability of Hooked

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[1] Chesapeake City Code § 66-16 required otherwise: "An effective street closure shall serve to convey the city's interest in the vacated right-of-way to the abutting property owners, with each such owner acquiring the abutting right-of-way up to the centerline of the street." *See also Bond v. Green*, 189 Va. 23, 32 (1949) (absolute title reverts to abutting owner upon street closure, without further government action).

Group to utilize Callison Drive as an access point from its property, it has paid no compensation to the landowner. Instead, it has taken the access easement, eliminated all of the property's direct access to and from Callison Drive, and retained the closed right-of-way "for public purposes." A. 28-29.

ASSIGNMENT OF ERROR

The trial court erroneously sustained the City's demurrer. The City took the landowner's easement for ingress/egress by extinguishing the property's direct access to Callison Drive. This action took a property right and damaged the remaining property without just compensation, violating Art. I, §11 of the Constitution of Virginia. [*Preserved*: A. 92-98; A. 6-7 (¶¶28-39); A. 35-40; A. 127-30]

ARGUMENT

Standard of Review

This Court reviews de novo the sustaining of a demurrer. *Kalergis v. Comm'r of Highways*, 294 Va. 260, 264 (2017). The Court accepts "the truth of all material facts that are ... expressly alleged, those that are implicitly alleged, and those that may be fairly and justly inferred from the facts alleged." *Harris v. Kreutzer*, 271 Va. 188, 195 (2006).

Discussion

This is an inverse-condemnation proceeding. The constitutional principle of inverse condemnation permits an owner whose property is taken or damaged for a public use "to waive all other remedies and to sue upon an implied contract that he will be paid therefor such amount as would have been awarded if the property had been condemned under the eminent domain statute." *Burns v. Fairfax County Board of Supervisors*, 218 Va. 625, 627 (1977). This Court recently reaffirmed this holding in *AGCS Marine Ins. Co. v. Arlington County*, 293 Va. 469, 477-78 (2017) (quoting *Burns*).

Inverse-condemnation procedure permits such a landowner to seek a judgment declaring that its property has been taken or damaged for a public use without just compensation, in violation of Virginia Const. Art. I, §11. If the trial court so rules, it then empanels a jury to determine just compensation. Code §8.01-187.

Each jurisdictional prerequisite is present here. The City's ordinance concedes that this street closure completely extinguishes the subject property's access to Callison Drive and that its retention of the underlying fee – contrary to the mandates of its own City Code – is for a public use. Rather than challenge the City's action, Hooked Group has

elected to initiate this inverse-condemnation proceeding to enforce its constitutional right to just compensation.

Our constitution has always protected an owner's right to just compensation for a complete extinguishment of an easement of direct access to an adjoining public road, because an easement is a property right. After 2012, this protection has been extended to cover governmental actions that materially impair direct access, even if they do not extinguish it.

1. Eliminating all direct access to a road is a compensable taking.

This appeal presents an opportunity for error correction and for law development. The judgment below holds that where a property fronts on two roads, and a government extinguishes all direct access to one road, no just compensation is due because access remains to the other road. This Court held directly to the contrary in its 1986 *Dennison* decision, discussed below. The appeal also presents, as a matter of first impression, certain effects of the 2012 amendment to Art. I, §11 of the Constitution of Virginia. That amendment strengthened the protection of property rights in Virginia, by stating that just-compensation analysis must include "lost access."

Before the amendment, a landowner had a claim for just compensation only when governmental action left *unreasonable* access or extinguished all direct access to a road, relying on the line of caselaw discussed below. The Amendment extends the constitutional protections described in those cases by requiring compensation where none was due before.

A. The 2012 constitutional amendment strengthened the right of access to public roads.

In 2012, the citizens of Virginia amended the Constitution to protect landowners whose access is taken. That amendment to Art. I, §11 specifies in pertinent part that (1) property is a fundamental right and (2) lost access is a component of just compensation. The legislature then amended Code §25.1-100 to define *lost access* as "a material impairment of direct access to property." *Direct access* is separately defined as "ingress or egress on or off a public road, street, or highway at a location where the property adjoins that road, street, or highway." Code §25.1-230.1.

The 2012 amendment and the statutes require that if government materially impairs direct access to private property for a public use, it must pay just compensation. The citizens of Virginia have placed greater

weight on the rights of landowners by ensuring that access is now constitutionally protected. The factfinder *must* consider lost access in determining just compensation when government action materially impairs direct access.

These changes mean that police-power immunity is not on the same footing as it was before 2012. Because "material impairment of direct access" is a per se taking, it is not a non-compensable exercise of the police power. The Constitution does not contain a "reasonable access remains" exception to the requirement for compensation.

Property is *impaired* if its value is diminished. Bryan A. Garner, *Black's Law Dictionary* (10th ed. 2014) at 869 (defining *impair* as "[t]o diminish the value of [property or a property right]"). An impairment is *material* where it is "[o]f such a nature that knowledge of the item would affect a person's decision-making; significant; essential." *Id*. at 1125 (third sense).

The landowner here pleaded that the City's actions caused a change in the highest and best use of the property, diminishing its value. A. 5-6, §§27, 32-33 (alleging a "substantial negative effect" on value and highest and best use). The landowner thus stated a claim for which

relief can be granted, and the trial court erroneously decided this case on demurrer. *See* part D of this brief, at p. 12 below.

B. Extinguishment of an access easement was compensable under pre-2012 law.

In three seminal rulings before the 2012 amendments, this Court held that a condemnor may be liable to pay just compensation when it eliminates direct access to an abutting road. Each rests on the principle that an abutter's easement of direct access to a public street is a property right. These decisions remain relevant; they recognize that complete extinguishment of access is a compensable taking.

1. *Linsly*

In *State Highway & Transp. Comm'r v. Linsly*, 223 Va. 437 (1982), the property enjoyed direct access to U.S. Route 17. *Id.* at 439. The Commissioner condemned its frontage to facilitate a limited-access highway, and substituted indirect access for direct access by building a service road. *Id*. at 439-40 and n.3.

The Court there balanced the compensability of the elimination of all direct access to a road against the police power to regulate traffic. *Id*. at 443. Describing this question as one of first impression in Virginia, *id*. at 444, the Court ruled that "a complete extinguishment and termination

of all the landowners' rights of direct access to Route 17" was different from a mere "reduction or limitation of direct access." *Id*. at 443. The former was compensable. *Id*. at 444-45.

The 2012 Amendment would not change the outcome of *Linsly*, because a complete extinguishment of access is still a taking. Whether a reduction or limitation of access is a *material* impairment is a question of fact for the jury, not suitable for demurrer.

2. *Dennison*

The *Linsly* rule applies even where a property has direct access to two roads, and the government closes access to one of them. In *State Highway & Transp. Comm'r v. Dennison*, 231 Va. 239 (1986), an owner held property between two parallel roads, one a four-lane divided highway bounding the property on its east side, and the other a two-lane road to its west. The property had direct access to both roads. *Id*. at 241.[2]

The Commissioner there took a small (0.08 acre) portion of the southern edge of the property, but did not stop there. He erected a 6"

[2] Copies of the VDOT acquisition plats from the *Dennison* appendix are attached as an addendum to this brief for the Court's convenience; the landowner asks that the Court take judicial notice of those plats. *Harris v. Commonwealth*, 262 Va. 407, 413 (2001).

high curb along the property's entrance to the four-lane highway. This curb "left no openings from [the highway] to the residue of that parcel," though the land was still accessible from the smaller road. *Id*. at 245-46. This Court again weighed the compensability of lost access against the police power and held that extinguishment of direct access to a public road was compensable.

Here, the City attempted to distinguish *Dennison* below by claiming that "it wasn't a police power case." A. 98, l. 23-24. This claim was mistaken; *Dennison* expressly turned on an exercise of the police power, namely, the blocking of all access by the new curb. *See* 231 Va. at 245, quoting *State Highway Comm'r v. Easley*, 215 Va. 197 (1974) and citing the police power.

The 2012 Amendment would not alter the outcome in *Dennison*.

3. *Lanier Farm*

The next year, in *State Highway & Transp. Comm'r v. Lanier Farm, Inc*., 233 Va. 506 (1987), the Court reaffirmed that cutting off "all rights of direct access to the highway" was a compensable taking under the Constitution, but "a mere partial reduction or limitation of" that access was not. *Id*. at 510.

The Amendment would, under the facts of *Lanier Farm*, require a jury to determine if a partial reduction of access is a material impairment requiring just compensation.

C. The trial court's ruling here.

The circuit court failed to apply the *Linsly*, *Dennison*, and *Lanier Farm* doctrines and the constitutional Amendment. Those decisions establish that the extinguishment of all rights of direct access to a road is a compensable taking, despite the police power. The trial court instead ruled here that just compensation was due only when the condemnor extinguishes all means of access to *any and all roads* – that is, where the action creates a landlocked parcel. In a letter opinion, it ruled, "Here, the petition admits that access to the property still exists from Battlefield Boulevard; thus, there is not a complete extinguishment of access to the property." A. 126.

The City offered, and the trial court cited, no authority for such a "landlocked parcel" rule. *Dennison* stands for the opposite principle: Closing access to one of two abutting roads is compensable. *Linsly* also establishes that there is no landlocked-parcel rule. There, the take eliminated all direct access from the owner's property to a public highway. The Commissioner built a service road to provide indirect

access to the parcel, so the property was never landlocked; but this Court held that that the elimination of direct access was a compensable taking, not a police-power exercise.

This principle applies here. The trial court mistakenly believed that the landowner could not state a claim as long as the property retained a single point of access to any public roads. If this were true, *Linsly* and *Dennison* would have had different outcomes.

When government action deprives a property of all access to an abutting road, as happened here, that deprivation triggers constitutional liability under *Linsly*, *Dennison*, and *Lanier Farm* – and does so even more clearly now, under the 2012 amendments.

D. <u>The trial court decided the merits on demurrer here</u>.

On demurrer, courts must accept the landowner's factual pleadings and all reasonable inferences from them. *Yuzefovsky* v. *St. John's Wood Apts*., 261 Va. 97, 102 (2001). The landowner here pleaded a valid claim for inverse condemnation based on the extinguishment of its easement for direct access. But the trial court proceeded to "evaluate and decide the merits of" this case, an approach that Virginia law forbids. *Assurance Data, Inc. v. Malyevac*, 286 Va. 137, 143 (2013).

The existence of access through a second road does not immunize the City from its constitutional obligation to pay just compensation.

CONCLUSION

The City eliminated all of the landowner's direct access to Callison Drive. It has taken Hooked Group's access easement and damaged its remaining property by extinguishing that access. Under the 2012 amendments to the Constitution and Code, and this Court's unambiguous holdings, that action triggers the constitutional requirement to pay just compensation. This Court should reverse the judgment below and remand the case for trial.

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CERTIFICATE

I hereby certify that on this 25th day of November, 2019, pursuant to Rules 5:26 and 5:32(a)(3)(i), three paper copies of the Brief of Appellant and three paper copies of the Appendix have been hand-filed with the Clerk of the Supreme Court of Virginia and electronic copies of the Brief and Appendix were filed, via VACES. On this same day, electronic copies of the Brief of Appellant and Appendix were served, via email, upon:

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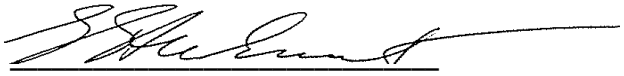

L. Steven Emmert, Esq.

ADDENDUM

The attached maps are pages 140 and 142 of the appendix in *State Hwy. and Transp. Comm'r v. Dennison*, Record No. 821916. The pages are oriented so that north is at the top of each page. Highlighting indicates the property lines for Dennison's two parcels (yellow) and the locations of U.S. Route 23 to the east and Route 727 to the west (red).

The complete appendix is accessible at https://scholarlycommons.law.wlu.edu/va-supreme-court-records-vol231/10/ (last accessed Nov. 22, 2019)

LIMITED ACCESS HIGHWAY — By resolution of State Highway and Transportation Commission dated 6-21-78

REVISED	FUNC. REGION	STATE	FEDERAL AID PROJECT	ROUTE	STATE PROJECT
2-9-78 3-14-78 6-13-78	3	VA.		23	0023-084-116 RW-201, C-501

RW PLANS

Telephone poles are the property Intermountain Telephone Co.- Kingsport, Tenn.

Power poles (Va. Side) are the property A.E.P. Co.- Abingdon, Va.

Power poles (Tenn. Side) are the property Kingsport Power Co.- Kingsport, Tenn.

Television Cable is the property of Power Cable - Kingsport, Tenn.

Power Lines (Va. Side) are the property Meadow Gap Sanitation District- Bristol City, Va.

E SURVEY U.S. 23
P.I. Sta. 1293+98.36
Δ = 25°20'00" Rt.
D = 2°00'
Ls = 200'
Bs = 2°00'
Ts = 743.98'
Es = 72.06'
L.T. = 133.34'
S.T. = 66.67'
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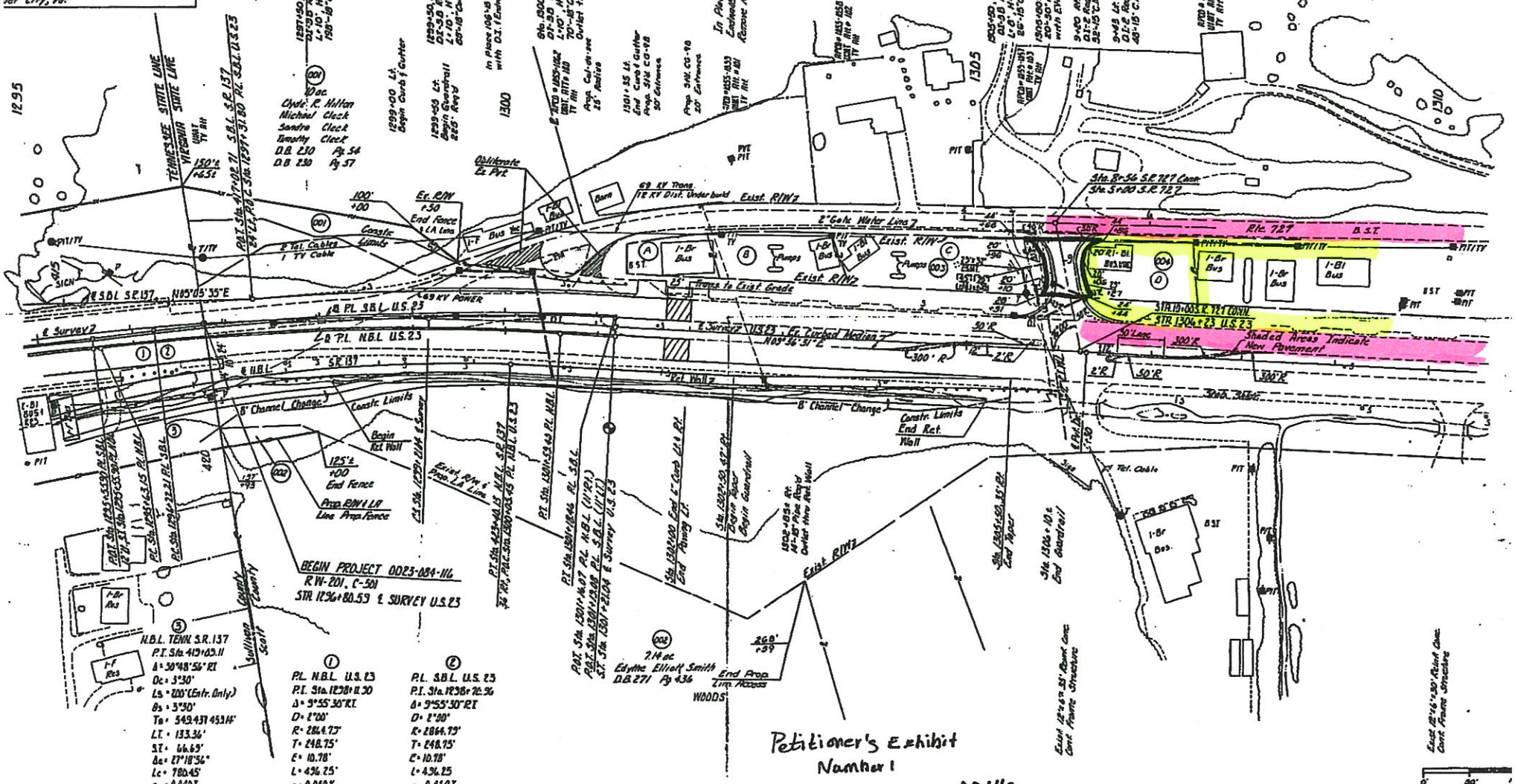

00142

R/W REQ'D:

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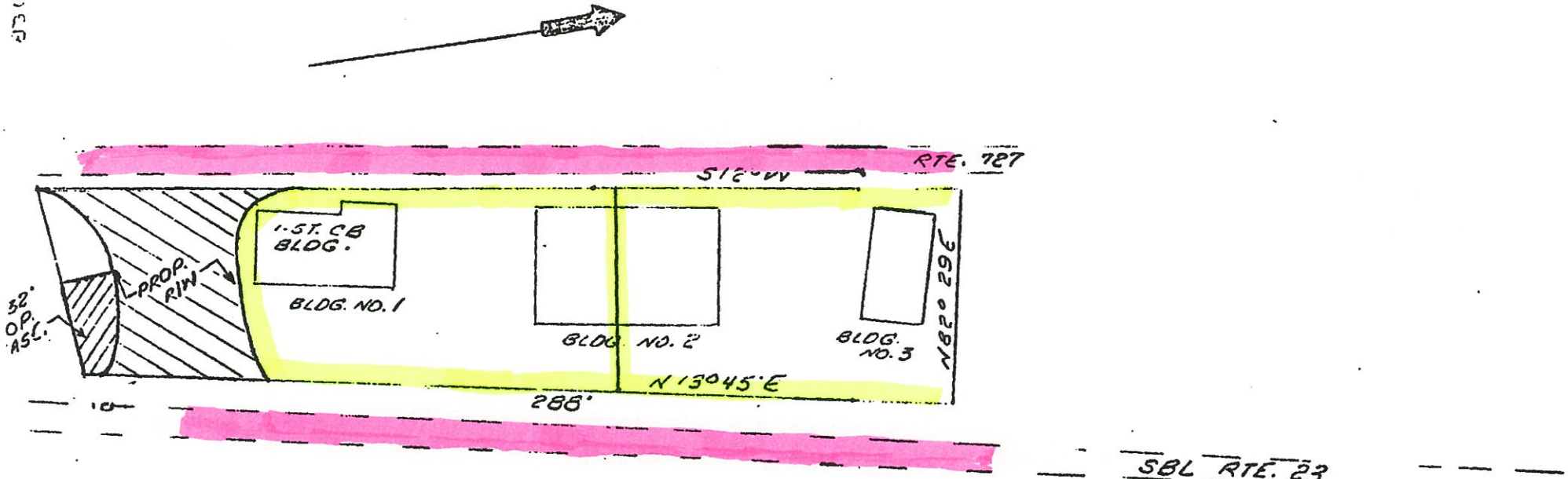
TAKE 0.08
RESIDUE : 0.33

EASE. REQ'D : 0.01 AC.



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PARCEL 004

JACK A. DENNISON