In The

Supreme Court of Virginia

RECORD NO. 190764

HOOKED GROUP, LLC,

Appellant,

v.

CITY OF CHESAPEAKE,

Appellee.

REPLY BRIEF OF APPELLANT

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SCV: Submitted on 01-02-2020 10:04:55 EST for filing on 01-02-2020

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The focus of this appeal is this Court's repeated holding that a locality effects a taking when it extinguishes all access to a road from an abutting property. In that event, despite the police power, the locality has taken the landowner's easement of access. That easement is a property right, and such a taking requires just compensation under the Constitution.

Below, the City of Chesapeake urged a far narrower rule, contending that just compensation is due only when the locality extinguishes access to any and all roads – in effect, only when the locality maroons the land, leaving no access at all. The trial court adopted this narrower reading. A. 140 ("Here, because access still exists from Battlefield Boulevard, there is not a loss of access to the property from a 'public' road that existed prior to the City's actions."). This landlocked-property-only approach would limit the scope of constitutional protection, and contradict the legislative and electoral decision to expand protection of access. It would also overturn this Court's prior access holdings.

As the landowner here pointed out in its opening brief, there is no landlocked-parcel-only rule in Virginia. The *Dennison* decision is the

best illustration; there, the Court found a compensable taking where the condemnor closed all access to one road, leaving access open to a second. *State Highway & Transp. Comm'r v. Dennison*, 231 Va. 239, 245-46 (1986); *see also* the maps attached as an addendum to the landowner's opening brief. This is just what happened here.

To address this patent problem, the City invents and now urges a third interpretation, crafted in a desire to shape the outcome here to its liking. It argues that the facts here are the opposite of *Dennison* because the City closed a two-lane road, leaving access to a four-lane road, whereas the Commissioner closed Dennison's access to a four-lane road, leaving access to a two-lane road. Brief of Appellee at 22. The City offers no explanation why this difference matters. Instead, it insists that while closing access to a "major" road and leaving access to a "minor" one – the City does not define those terms – may be a taking, closing access to a "minor" road and leaving access to a "major" one is, *as a matter of law*, not. It cites no precedent for such a rule.

The City also proposes a test of circuitous access as a measure for compensability. This voids this Court's prior holdings that the loss of direct access to a road is a compensable taking. And it, too, is undefined: Any access may be circuitous, depending on where one starts.

The closure of Callison Drive matters to the landowner because it changes the highest and best use of the property. A. 6, ¶32. The trial court was required to accept this factual assertion in considering the demurrer. *Anderson v. Dillman*, 297 Va. 191, 193-94 (2019).

In the trial that should have happened below, the landowner was prepared to prove that the site's development capacity has been reduced and its value diminished as a result of the City's extinguishment of the access to Callison Drive. This second access point would have permitted development at a higher density than would be possible with sole access from Battlefield. From the landowner's vantage point, Callison is certainly a "major" road in its development plans.

* * *

Seeking support for the premise that a locality may close all access to one of two roads with impunity, the City reaches back far beyond *Dennison* to *Wood v. Richmond*, 148 Va. 400 (1927). But the City seeks far more out of *Wood* than it can deliver.

First and most obviously, *Wood* was not a condemnation case. There, the landowner sought an extraordinary remedy – an injunction barring the City of Richmond from destroying one entrance to a lot. *Id*. at 402. While there is constitutional protection for just compensation,

there is no constitutional right to enjoin a municipal government from road work.

Second, the landowner's permit to build the challenged driveway in *Wood* was revocable:

> Before constructing the driveway in question, [Wood] first obtained consent from the director of public works. The permit granted expressly reserved to the appellee the right to revoke the same at any time.

Id. at 406. This permit was not an easement, but effectively a license. Bryan A. Garner, *Black's Law Dictionary* (10th ed. 2014) at 1059 (*license*, sense 2). Easements are not revocable at will in the way licenses are. *See AGCS Marine Ins. Co. v. Arlington County*, 293 Va. 469, 492 (2017).

Wood understandably forgoes a discussion of the police power in the takings context, since it was not a condemnation case. It finds that the City's action to revoke the permit was a reasonable exercise of the police power because it had reserved the right of revocation. This ruling supports the landowner's assignment of error because it would require the presentation of evidence to determine whether access has been impaired and the police power was reasonably exercised.

Viewed in context, *Wood* cannot carry the weight that the City assigns to it. In contrast, *Dennison* directly addresses the compensability

in eminent domain of the complete extinguishment of access to one of two abutting roads. *This* is the rule that the Court should apply here.

* * *

The City urges that the landowner did not preserve an argument that its access had been "materially impaired" because it did not use those words below. In truth, the landowner did far more: It pleaded a complete *extinguishment* of all access to Callison. This extinguishment is compensable; under the facts here, there is no balancing of remaining access to determine whether that access is reasonable. The landowner's pleading followed this Court's jurisprudence.

The City's argument stems from its mistaken understanding of this Court's previous rulings. It is also a shot across the trial court's bow, implying an inability to read Art. I, §11 of the Constitution. The landowner cited that provision no fewer than eight times in its Declaratory Judgment Petition (Preamble, 1, 8, 26, 29, 33, 37, 38). It also alleged that the City had created "barriers to the use" and "interfered with and deprived" the landowner of its right of direct access in at least two other paragraphs (27, 32).

CONCLUSION

The parties agree that the City extinguished the property's easement of direct access to and from Callison Drive. Under this Court's precedent and the 2012 amendments to the Constitution of Virginia, the City has taken a property right and owes just compensation.

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CERTIFICATE

I hereby certify that on this 2nd day of January, 2020, pursuant to Rule 5:26, three paper copies of the Reply Brief of Appellant have been hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy of the Brief was filed, via VACES. On this same day, an electronic copy of the Reply Brief of Appellant was served, via email, upon:

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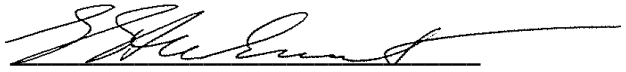

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