In The

Supreme Court of Virginia

RECORD NO. 190764

HOOKED GROUP, LLC,

***Appellant*,**

v.

CITY OF CHESAPEAKE,

Appellee.

BRIEF OF *AMICI CURIAE* OF LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INC., VIRGINIA MUNICIPAL LEAGUE, AND VIRGINIA ASSOCIATION OF COUNTIES IN SUPPORT OF APPELLEE

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IDENTITY AND INTEREST OF THE *AMICI CURIAE*

Amici Curiae Local Government Attorneys of Virginia, Inc. ("LGA"), the Virginia Municipal League ("VML"), and the Virginia Association of Counties ("VACo"), by counsel, respectfully submit this *Amici Curiae Brief*, pursuant to Rule 5:30 of the Supreme Court of Virginia, in support of the Appellee, City of Chesapeake ("City").

LGA. LGA is a nonprofit professional corporation created to promote the continuing legal education of local government attorneys; furnish information to local government attorneys; offer a forum through which its members may meet and exchange ideas of import; and initiate, support or oppose legislation and litigation that, in the judgment of LGA, is significant to Virginia localities.

LGA was founded in 1975 and its members include cities, counties and towns of the Commonwealth, represented by their civil legal counsel, government organizations, private law firms that specialize in local government matters, and members of the judiciary. LGA has over 300 members, represented by more than 800 public and private attorneys. LGA is regularly asked by the Virginia General Assembly and agencies of the Commonwealth to offer legal advice on matters of state policy and to recommend knowledgeable attorneys to serve on legislative study committees and commissions. LGA also regularly files amicus briefs in litigation that will significantly impact local governments.

VML. VML is an association of political subdivisions of the Commonwealth, currently consisting of 38 cities, 160 towns and 8 counties, formed and maintained pursuant to §15.2-1303 of the Code of Virginia (1950), as amended, for the purpose of promoting the interest and welfare of its members as may be necessary or beneficial. VML is an instrumentality of its member political subdivisions.

VACo. VACo is a non-profit, non-partisan, statewide association organized in 1934 to support county officials and to represent, promote and protect the interests of counties in order to better serve the people of Virginia. VACo's membership includes ninety-four counties. Formed and maintained pursuant to §15.2-1303 of the Code of Virginia (1950), as amended, VACo is an instrumentality of its member counties.

LGA, VML and VACo are uniquely qualified to express the interests of cities, towns and counties in Virginia with respect to matters of common concern that come before this Court. Each organization has previously filed *amicus curiae* briefs in cases before this Court that implicate issues of special importance to Virginia's local governments.

LGA, VML and VACo have requested and obtained the consent from both parties to file this *Amici Curiae Brief*.

STATEMENT OF THE *AMICI CURIAE*

The trial court correctly sustained City's *Demurrer* because the factual allegations in Hooked Group's *Petition For Declaratory Judgment* were not sufficient to state a cause of action for inverse condemnation on the basis of lost access. The LGA, VML and VACo make three points in this regard:

1. Hooked Group's *Petition For Declaratory Judgment* failed to allege that the subject property's remaining access was unreasonable, an essential allegation to an inverse condemnation action predicated on deprivation of access.
2. Hooked Group's *Petition For Declaratory Judgment* failed to allege that City's action resulted in a "material impairment of direct access" to the subject property. Furthermore, the trial court was not given the opportunity to address this standard because neither party brought it to its attention.
3. The City's closure of Callison Drive was a reasonable exercise of its police power and not compensable under the Virginia Constitution.

STATEMENT OF CASE

The LGA, VML and VACo adopt the Statement of Case submitted by the City in the *Brief of the Appellee*.

STATEMENT OF FACTS

The LGA, VML and VACo adopt the Statement of Facts submitted by the City in the *Brief of the Appellee*.

STATEMENT OF REVIEW

The LGA, VML and VACo adopt the Statement of Review submitted by the City in the *Brief of the Appellee*.

ARGUMENT

1. TRIAL COURT CORRECTLY SUSTAINED CITY'S *DEMURRER* BECAUSE LANDOWNER'S *PETITION FOR DECLARATORY JUDGMENT* FAILED TO ALLEGE THAT SUBJECT PROPERTY'S REMAINING ACCESS WAS UNREASONABLE.

Hooked Group argues that eliminating direct access to any abutting road is a compensable taking, regardless of the government's police power or consideration of the subject property's remaining access. *Brief of Appellant*, 5-6. This Court has addressed the issue of what constitutes compensable lost access under the Virginia Constitution numerous times. The Landowner's position is simply not supported by these cases. When the following cases are read in conjunction with one another, the general rules under existing case law on the compensability of lost access can be summarized as follows:

- A landowner has a general easement to access abutting public roads, which is subordinate to the government's police power to regulate traffic. *Wood v. City of Richmond*, 148 Va. 400 (1927).

- A reasonable limitation or reduction of direct access resulting from the government's police power is not compensable. The landowner has the burden of proof to show that the government's action was unreasonable. *State Highway Comm'r v. Easley*, 215 Va. 197 (1974) and *State Highway and Transp. Comm'r v. Lanier Farm, Inc.*, 233 Va. 506 (1987).

- An abutting landowner has no property right in the continuance of the flow of traffic past his property. Circuity of travel imposed upon the abutting landowner resulting from the exercise of the police power in the regulation of traffic is not the taking or damaging of a property right. *State Highway Comm'r v. Howard*, 213 Va. 731 (1973).

- The elimination of all direct access to a parcel of land is unreasonable and compensable, even when the government provides for the substitution of indirect access via a service road. *State Highway & Transp. Comm'r v. Linsley*, 223 Va. 437 (1982).

- The elimination of all direct access to a major four-lane abutting road is unreasonable and compensable even if the subject property maintains indirect access via a minor two-lane road. *State Highway & Transp. Comm'r v. Dennison*, 231 Va. 239 (1986).

Under the facts of the present case, the subject property had frontage and entrances on two abutting roads prior to the road closure: 1) Route 168 (South Battlefield Boulevard), a major four-lane arterial road; and 2) Callison Drive, a small local road leading to a residential subdivision. A. 3-4 and 27-32. The Landowner's *Petition for Declaratory Judgment* alleged that the closing of a portion of Callison Drive eliminated the property's access to the minor local road

(Callison Drive) but admitted that the subject property maintained direct access to the major four-lane road (Route 168). A. 3-4 and 27-32.

The Landowner's *Petition for Declaratory Judgment* failed to allege that the subject property was left with unreasonable access or that the City's actions resulted in the elimination of direct access to the major four-lane road (Route 168), as required by the following case law. A. 1-9.

A. Wood

Wood v. City of Richmond, 148 Va. 400 (1927) involved a parcel of land improved with a gas station and located on a corner abutting two public roads with one entrance on each road. *Id*. at 402. In accordance with its police power, the City required the landowner to close one of the two entrances because it violated a zoning ordinance and the landowner sued the City to enjoin it from closing the entrance. *Id*. This Court held that although an abutting landowner "has an easement in the public road which amounts to a property right," that right is "subordinate" to the government's police power to reasonably control the use of the streets in order "to promote the safety, comfort, health and general welfare of the public." *Id*. at 406-407. The Court specifically held that the closing of one of two entrances to the property was "a regulation and not a taking, an exercise of police power, and not of eminent domain." *Id*. at 407.

The present case is analogous to *Wood* since it also involves a property abutting two public roads with one entrance on each road. As in *Wood*, the City of Chesapeake used its police power, as opposed to its power of eminent domain, to close one entrance leaving the property with one remaining entrance. The Court in *Wood* held that the closing of one of two entrances to a property was a reasonable exercise of the government's police power and not a taking. *Id*. Hooked Group is asking this Court to reverse its holding in *Wood*.

B. Easely

State Highway Comm'r v. Easley, 215 Va. 197 (1974) was a partial acquisition condemnation case for a road project in which the State restricted access to the residue by placing curbing along the property's previously unrestricted right-of-way in addition to acquiring a small portion of the property in fee simple. *Id*. at 198. This Court held that such a limitation of access was reasonable and therefore not compensable. *Id*. at 204. The Court specifically stated, "the owner of property abutting a public road has no right to compensation when the state, in the exercise of its police powers, reasonably regulates the flow of traffic on the highway. [T]he burden is on him who assails the action of the Commissioner to show that the Commissioner acted unreasonably." *Id. at* 203.

C. Howard

In *State Highway Comm'r v. Howard*, 213 Va. 731 (1973), the Court was faced with a situation in which the State, in conjunction with a partial taking of property situated on a two-lane road, installed a median strip within the abutting road which restricted the property's access to the opposite side of the road and required that one lane of traffic be redirected a short distance in order to access the property. *Id*. at 732. This Court held that an abutting landowner "has no property right in the continuance or maintenance of the flow of traffic past his property. Circuity of route imposed upon the abutter resulting from the exercise of a police power in the regulation of traffic, is an incidental result of a lawful act. It is not the taking or damaging of a property right." *Id.*

D. Linsley

The subject property in *State Highway & Transp. Comm'r v. Linsley*, 223 Va. 437 (1982), enjoyed direct access to a single road, Route 17, prior to the State's partial acquisition. *Id*. at 439. As a result of the road project, the subject property's direct access to Route 17 was completely extinguished and replaced with indirect access via a service road. *Id*. The Virginia Supreme Court held that the loss of all direct access to the main road was unreasonable and therefore a compensable element of damage to the residue. *Id*. at 444-445.

The Landowner in the present case has relied heavily on *Linsley* for its argument that the elimination of direct access to any abutting road is a compensable taking. *Brief of Appellant*, 8-9, 11-12. However, that argument fails in light of the facts in *Linsley*. As the trial court correctly pointed out in its *Opinion Letter* overruling Landowner's *Motion to Reconsider and Rehear*, dated February 19, 2019, the property in *Linsley* had a single entrance to a single road (Route 17) before the take. (A. 140-141). The State's taking resulted in the elimination of the sole direct access to a major road and substituted instead indirect access via a service road. *Id*. at 439. The language in *Linsley* refers to the loss of direct access in the singular, rather than plural. *Id*. at 444. The present case is clearly distinguishable from *Linsley* since the subject property lost access only to a minor local road but maintained direct access to Route 168, a major four-lane road. A. 3-4, 27-32.

E. Dennison

In *State Highway & Transp. Comm'r v. Dennison*, 231 Va. 239 (1986), the property consisted of two parcels of land, each with frontage on two existing roads. *Id*. at 241. One of the abutting roads was U.S. Route 23, a four-lane highway with a median, and the other road was State Route 727, a smaller two-lane road with no median. *Id*. As a result of the State's partial acquisition, the subject property lost all direct access to the major four-lane road (U.S. Route 23) and maintained an

entrance on the smaller two-lane road (Route 727), the exact opposite situation from the instant matter. *Id*. This Court held that the loss of all direct access to the major four-lane road (U.S. Route 23) was unreasonable, when the only remaining access to the property after the taking was via the smaller two-lane road. *Id*. Therefore, the Court found that the loss of access to the major four-lane road was a compensable element of damage to the residue. *Id*. at 245-246.

The Landowner in the present case relies heavily on *Dennison* to support its argument. *Brief of Appellant*, 9-10, 11-12. However, the facts in the present case are clearly distinguishable from *Dennison*. In *Dennison*, the property lost direct access to the abutting primary four-lane road (US Route 23) and was left with indirect access via a smaller two-lane road (Route 727). This Court found that the indirect access via the smaller two-lane road (Route 727) was not reasonable and therefore the loss of all direct access to the major four-lane road (US Route 23) was compensable. *Id*. In the present case, the subject property has maintained direct access to the major four-lane road (US Route 168) and lost access to the smaller local road (Callison Drive). A. 3-4 and 27-32.

F. Lanier Farm

In *State Highway and Transportation Commissioner v. Lanier Farm, Inc*., 233 Va. 506 (1987) the State's partial acquisition of a parcel of land, being held for a future residential subdivision, forced the landowner to change the location of its

planned entrance due to a sight distance issue. *Id*. at 508. The property maintained direct access to the abutting road and, as a result, the Court found no compensable damage, summarizing the law on compensable lost access as follows:

> Although a complete extinguishment and termination of all the landowners' rights of direct access to an abutting highway constitutes a compensable taking within the eminent domain clause of the Virginia Constitution, a mere partial reduction or limitation of an abutting landowner's rights of direct access, imposed by governmental authority in the interest of traffic control and public safety, constitutes a valid exercise of the police power and is not compensable in condemnation proceedings. *Lanier Farm, Inc*., 233 Va. at 510. (internal citations omitted).

G. Peters

This Court has dealt with a fact pattern similar to the present case before. In *City of Lynchburg v. Peters*, 156 Va. 40 (1931) the landowner owned a private hospital abutting two public roads, Court Road and Church Street. *Id*. at 44-45. The City closed a portion of Court Road to construct a public park and stadium. *Id*. at 44. There was no acquisition from the property. The landowner's property did not abut the portion of Court Road that the City closed, but it was situated very close to that area of the road. *Id*. (Also see copy of plat showing the landowner's property and the portion of the closed road included in *City of Lynchburg v. Peters*, 145 Va. 1, 5 (1926).) This Court held that the City's closure of Court Road was not a compensable element of damage, in part, because the landowner maintained "ample access to and egress from his estate by other ways." *Id*. at 46. Likewise, the Landowner in the present case maintained access to Route 168, a major four-

lane thoroughfare. A. 3-4, 27-32. As demonstrated in the *Peters* case, this Court has historically looked at a property's alternative access in determining whether a change in access is compensable.

2. TRIAL COURT CORRECTLY SUSTAINED CITY'S DEMURRER BECAUSE LANDOWNER'S *PETITION FOR DECLARATORY JUDGMENT* DID NOT ALLEGE "MATERIAL IMPAIRMENT OF DIRECT ACCESS" AND NEITHER PARTY BROUGHT THAT STANDARD TO THE TRIAL COURT'S ATTENTION.

The Landowner's *Brief* takes the position that the 2012 Amendment to Article I, §11 of the Virginia Constitution has "strengthened" its argument that the trial court erred in granting the City's *Demurrer*. *Brief of Appellant*, 5. However, a reading of the lost access statutes (§§25.1-100 and 25.1-230.1) reveals that the application of the Amendment to the facts of this case confirms the trial court's granting of the *Demurrer*. Hooked Group is correct that Article I, §11 of the Virginia Constitution was amended in 2012 to include the term "lost access" as a specific element of just compensation and allowed the General Assembly to define the term.[1] §25.1-100 was amended in 2012 to define "lost access" as "a material

[1] In 2011 the Virginia General Assembly passed House Joint Resolution No. 693, which was the initial step in amending Article I, §11 of the Virginia Constitution to include the term "lost access." The same amendment was again proposed and agreed to at the 2012 Regular Session of the General Assembly by Acts 2012, cc. 564, 684, 736 and 738, and was later approved by the voters at the general election on November 6, 2012. The 2012 Amendment to Article I, §11 of the Virginia Constitution became effective January 1, 2013.

impairment of direct access to the property."[2] The term "direct access" was also defined in §25.1-230.1 as "ingress and egress on or off a public road, street, or highway at a location where the property adjoins that road, street, or highway."[3] The General Assembly did not define the term "material impairment" and, up to this point, the Court has not addressed the meaning of this term.

The Landowner's *Petition for Declaratory Judgment* failed to allege that the City's actions resulted in a "material impairment of direct access." A. 1-8. Furthermore, neither party raised the statutory definition of "lost access" with the trial court. Reference to either §§25.1-100 and 25.1-230.1 or the "material impairment of direct access" standard is noticeably absent from any of the pleadings in the case, the various briefs filed in trial court and the transcript from the hearing on the City's *Demurrer*.

After the hearing on the *Demurrer* and the trial court's ruling, the Landowner's *Motion To Reconsider and Rehear* did include a passing reference to the inclusion of the term "lost access" in the 2012 Amendment to Article I, Section 11 in a footnote. A. 127. However, there was no mention of the "material

[2] The 2012 Amendment to §25.1-100 to define "lost access" was conditioned upon the passage of the 2012 Constitutional amendment and became effective on January 1, 2013.

[3] The 2012 Amendment to §25.1-230.1 addressing "lost access" was conditioned upon the passage of the 2012 Constitutional amendment and became effective on January 1, 2013.

impairment of direct access" standard or reference to the lost access statutes (§§25.1-100 and 25.1-230.1).

A proper determination of the impact of the 2012 Amendment to Article I, §11 adding "lost access" as an element of just compensation will involve a careful review, construction and synthesis of the Amendment with §§25.1-100 and 25.1-230.1, which provide the constitutionally mandated definition of "lost access," along with the considerable body of prior case law dealing with the compensability of lost access in order to determine whether the prior case law was modified by the Amendment and if so, how. Clearly the trial court had no such opportunity.

Rule 5:25 of the Rules of the Virginia Supreme Court requires parties to state their objection with reasonable certainty at the time of the ruling to preserve the issue for appellate review. "No ruling of the trial court ... will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling." *Brandon v. Cox*, 284 Va. 251 (2012). A party cannot raise a constitutional issue for the first time on appeal. *Newlon v. City of Alexandria*, 213 Va. 336, 336 (1972).

Hooked Group did not properly and timely bring the "material impairment of direct access" standard to the trial court's attention. Therefore, Hooked Group did not preserve its right to appeal the trial court's ruling on the basis that the City's *Demurrer* was not decided upon the "material impairment of direct access"

standard. This is simply not the appropriate case for the Court to address the meaning of "material impairment of direct access" or decide whether §§25.1-100 or 25.1-230.1 have changed the law in Virginia on the compensability of lost access since the 2012 Amendment to the Constitution because the trial court was never given the opportunity to address this standard.

3. CITY'S CLOSURE OF CALLISON DRIVE WAS A REASONABLE EXERCISE OF POLICE POWER AND NOT COMPENSABLE UNDER VIRGINIA CONSTITUTION.

Hooked Group's *Brief* failed to bring to this Court's attention the fact that the new statutes on lost access, §§25.1-100 and 25.1-230.1, have retained the common law exception that a reasonable exercise of the police power in the regulation of traffic, resulting in a change in access, is not compensable under the Virginia Constitution. §25.1-230.1(B) states in part that "(t)he body determining just compensation may not consider an injury or benefit that the property owner experiences in common with the general community, including off-site circuity of travel and diversion of traffic, *arising from an excise of the police power*." (Emphasis added.)

This is an inverse condemnation case and not a condemnation. The City did not acquire any portion of the subject property for a public use. The City adopted an Ordinance closing a portion of Callison Drive pursuant to the City's police power and authority under §§15.2-2001, 15.2-2006 and §2.01 of the City Charter.

(A. 27-32). The Ordinance specifically closed approximately 250 linear feet of Callison Drive to all non-emergency vehicular traffic. (A. 27-32). Even if the Landowner had properly pled the "material impairment of direct access" standard or had brought the standard to the trial court's attention, the closing of Callison Drive clearly arose out of the exercise of the City's police power and affected all non-emergency vehicular traffic equally. The subject property was left with direct access to Route 168, a major four-lane road. Therefore, under §25.1-230.1(B) any "injury" that Hooked Group incurred was "experienced in common with the general community," as a result of the City's police power authority and would not be compensable.

After the 2012 Amendment took effect in January 2013, this Court addressed the issue of whether the government's reasonable exercise of its police power could result in a compensable taking under the Virginia Constitution. In *Smith v. Commonwealth*, 286 Va. 52 (2013) a convicted sex offender brought an action against the State alleging that it violated Article I, §11 of the Virginia Constitution by enacting legislation that deprived him of his contractual rights under an existing plea agreement without just compensation. *Id*. at 55. The Court rejected this argument on the basis that "(t)he Commonwealth was permitted to enact retroactive legislation regulating convicted sex offenders as part of its police power. Thus, the reclassification of Smith's conviction was not an unconstitutional

taking." *Id*. at 59. Likewise, the City's closure of Callison Drive under its police power was not a constitutional taking. It was a reasonable exercise of the City's police power.

CONCLUSION

For the foregoing reasons the LGA, VML and VACo pray that this Court affirm the trial court's ruling on the City's *Demurrer*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 2019, pursuant to Rule 5:26, three paper copies of this Brief of *Amici Curiae* have been hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy of the Brief has been filed, via VACES. On this same day, an electronic copy of this Brief of *Amici Curiae* was served, via email, upon:

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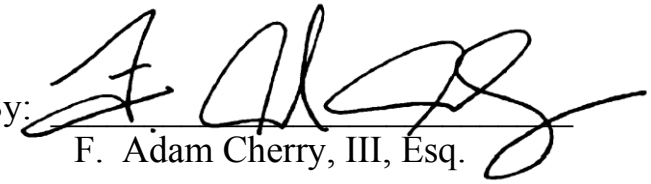
By: 
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