In The

Supreme Court of Virginia

RECORD NO. 190764

HOOKED GROUP, LLC,

Appellant,

v.

CITY OF CHESAPEAKE, VIRGINIA, a municipal corporation,

Appellee.

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STATEMENT OF THE CASE

Appellee, City of Chesapeake, Virginia ("City"), accepts the Statement of the Case contained in the Brief of Appellant ("Brief") filed by the Hooked Group, LLC ("Hooked").

FACTS

Under well-established principles of appellate review, this Court considers only "those facts as set forth in the declaratory judgment petition, along with those reasonably and fairly implied from them, in the light most favorable to the plaintiff." *Doe v. Zwelling*, 270 Va. 594, 597, 620 S.E.2d 750, 751 (2005). Thus, the operative facts are those alleged in Hooked's Petition for Declaratory Judgment ("Petition").

In September 2017, the Chesapeake City Council ("City Council") held a public hearing to consider a street closure application, which proposed the closure of 250 linear feet at the eastern terminus of Callison Drive ("Callison") and the sale of the residual property to Hooked. J.A. 27-31. Within the area of the proposed closure, a gravel apron extended to Callison, which abutted Hooked's property. *Id.* As the record reflects, the entrance constructed on Callison adjacent to the Hooked parcel had been "chained for many years[.]" J.A. 28.

During the public hearing, numerous citizens appeared in opposition and expressed concerns related to traffic and safety impacts on their residential neighborhood that would be associated with reconfigured and unrestricted access to Callison by Hooked from its western property boundary. J.A. 27. City Council was advised by City staff that Hooked's property would retain direct access to Battlefield Boulevard S./Route 168, a main thoroughfare, in the event that the street closure was granted. J.A. 28. Rather than approve the street closure with stipulations as proposed (including sale of the residue to Hooked), a member of City Council moved for the City to exercise its property rights and police powers to impose traffic restrictions on the 250 linear feet of Callison, altering access to emergency vehicles only. J.A. 28-29.[1] To the extent that Hooked maintains that the City acted contrary to its own ordinances, Section 15.2-2008 of the Code of Virginia and Chesapeake City Code Section 66-15 expressly provide that purchase of the right-of-way subject to a street closure by abutting property owners is an *optional* condition of such closure.

[1] Although the Ordinance was not attached to Hooked's Petition, it was referenced and quoted throughout the Petition at ¶¶ 16-18; 22; 24; 26 (J.A. 3-5). The trial court and this Court may take judicial notice of municipal law, including ordinances, pursuant to Va. R. Evid. 2:202.

Hooked filed suit, and in its Petition claimed that the alteration of Callison damaged its property by "extinguishing its easement of direct access" from its property to Callison. J.A. 2 ¶ 6. Importantly, ingress and egress to Callison was the only specified property interest Hooked alleged was damaged or taken. In accordance with well-established Virginia Supreme Court precedent, Hooked's right to ingress and egress is "subordinate to the right of the municipality, derived by legislative authority, to so control the use of the streets as to promote the safety, comfort, health and general welfare of the public." *Wood v. City of Richmond*, 148 Va. 400, 402, 138 S.E. 560, 561 (1927).

ARGUMENT

Standard of Review

This Court reviews a trial court's decision to sustain a demurrer under a de novo standard of review because it is a pure question of law. *Glazebrook v. Bd. of Supervisors*, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003). 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, 624 S.E.2d 24, 28 (2006).

DISCUSSION

This is an inverse condemnation proceeding for which Hooked misunderstood the scope of the City's police power, presumed a cause of action based on modified access to the inferior of two points of access to public rights-of-way, and did not preserve its assignments of error below. City Council held a public hearing and acted within its legislative prerogative to listen and respond to those in the community who voiced their concerns that noise, congestion, and safety would be compromised by commercial traffic generated by Hooked's proposed development. J.A. 27.

Despite Hooked's arguments to the contrary, the police power is alive and well in Virginia. Valid exercises of the police power for the safety and welfare of the citizens of a community are not takings within the meaning of the Virginia Constitution, even if they result in a limitation or reduction of a parcel's access. "All citizens hold property subject to the proper exercise of the police power for the common good. Thus, no taking occurs in those circumstances, even where a substantial economic loss results." *Fredericksburg Auto Auction, Inc., et al. v. Dep't of Motor Vehicles*, 242 Va. 42, 48, 406 S.E.2d 23, 27 (1991) (citing *Commonwealth ex rel. State Water Control Bd. v. County Utils. Corp.*, 223 Va. 534, 542, 290 S.E.2d 867, 872 (1982)).

This Court has long-standing respect for a city council's judgment when it exercises its police power. *See City of Virginia Beach v. Virginia Land Inv. Ass'n, No. 1*, 239 Va. 412, 415, 389 S.E.2d. 312, 313 (1990). As this Court reiterated in *Wood v. City of Richmond*:

> The rule is generally recognized that municipal corporations are prima facie sole judges respecting the necessity and reasonableness of their ordinances. Every intendment is made in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health and safety, and it is not the province of the courts, except in clear cases, to interfere with the exercise of the powers vested in municipalities for the promotion of the public safety.

148 Va. at 405, 138 S.E.2d at 562. City Council's action here involved its sole discretion over City-owned right-of-way and converting that right-of-way to City-owned land, undesignated as right-of-way, in order to safeguard a residential neighborhood. J.A. 28.

This case presents the question of whether sustaining the City's demurrer, with prejudice, is reversible error. Hooked pled that it was deprived of its "easement of access" to one of its two access points, *i.e.,* Callison. J.A. 4 ¶ 18. The City demurred on the basis that Hooked failed to state a cause of action because its Petition claimed that the City's Ordinance operated as an exercise of eminent domain, which resulted in limiting access to Callison solely to emergency vehicles. J.A. 4, ¶ 18, 26. The Demurrer argued that the Petition failed to allege any public use as defined by Virginia

Code Section 1-219.1, and failed to aver a complete extinguishment of access to the property.

The trial court reasonably inferred from the facts alleged in the Petition and the Ordinance that the alteration of Callison was done to protect the health, safety, and welfare of residents of the adjacent neighborhood. J.A. 28. Thus, a fair inference from the facts pled demonstrated that City Council exercised its police power. J.A. 28-29. A fair reading of the Petition also informed the trial court that the closing of Callison to non-emergency vehicles did not deprive Hooked of its frontage or direct access to Battlefield Boulevard S./Route 168. J.A. 3, ¶ 10, 18 and J.A. 4, ¶ 18. The allegations in the Petition, taken as true, presented a police power regulation case for which the trial court, as a matter of law, found that no compensation was warranted because there was a reduction, but not a termination, of access from an abutting public right-of-way. Nowhere in the Petition was there an allegation of material impairment to its access to Battlefield Blvd./Route 168 or that the loss of unrestricted access to Callison created unreasonable access or a circuitous traffic condition that was not shared in common with the general traveling public.

The trial court correctly ruled that the reduction of access to Hooked's parcel was the result of a valid exercise of the City's police power to protect

public safety and welfare, from which a compensable property interest does not arise under Article I, Section 11 of the Virginia Constitution or Virginia Code Section 25.1-100 (collectively "2012 Amendments"). Without conceding that a different outcome would have been merited, Hooked never raised an argument before the trial court that the 2012 Amendments modified the controlling case law.

Hooked's argument hinges on an unpreserved error arising from an alleged conflict with case law decided prior to the 2012 Amendments. Hooked further insists, belatedly, that the 2012 Amendments have negated or weakened the police power to claims of a taking or damaging of private property. Br. of Appellant at 7. Although the City disputes Hooked's interpretation of the 2012 Amendments related to lost access and the effect on this Court's police power cases, this Honorable Court should not reach the merits of this argument. Hooked failed to raise any challenges to this precedent or argue an intervening change in the law in its pleadings or in oral or written argument before the trial court.

A. <u>Hooked's Petition was deficient as a matter of law, and its attempt to resurrect it with an unpreserved assertion about the impact of the 2012 Amendments on controlling case law is barred by Rule 5:25.</u>

1. Hooked's Petition was deficient as a matter of law because it did not plead that Callison Drive was the sole direct access to any public right-of-way or a loss of all reasonable access to the property.

It is well established that no court can base its judgment or decree upon a right which has not been pled and claimed. *Ted Lansing Supply Co. v. Royal Aluminum & Const. Corp.*, 221 Va. 1139, 1141, 277 S.E.2d 228, 229 (1981). Hooked invites this result in seeking to overturn the trial court's ruling based upon a theory of relief that it never properly pled or preserved. "Pleadings are as essential as proof, and no relief should be granted that does not substantially accord with the case as made in the pleading." *Id.*

The Petition never averred that its property was left with unreasonable access after the alteration of Callison, or that the closure caused a loss of all direct access to its property. J.A. 1-8; 12-13. Accordingly, the Demurrer was properly granted because absent these averments, Hooked failed to state a valid claim for inverse condemnation. J.A. 12-13; 21-23; 121. Under controlling case law, the loss of direct access to a public road is not compensable when the municipality restricts access in the interest of the public's safety and welfare and reasonable access to the parcel remains. *Wood*, 148 Va. at 407; 138 S.E. at 563 (holding that city's extinguishment of

access to 34th Street for public safety purposes was "not a taking, [but] an exercise of police power, and not of eminent domain"); *State Highway & Transp. Comm'r v. Linsly*, 223 Va. 437, 443, 290 S.E.2d 834, 837 (1982) (holding that "reduction or limitation of direct access to an abutting landowner's property generally is not compensable"); *Close v. City of Norfolk*, 82 Va. Cir. 636, 645-46 (Norfolk Cir. Ct. 2009) ("a landowner is only entitled to reasonable access to his property [and] … it is within the police powers of governmental bodies to reasonably regulate and restrict direct access easements.").

When Hooked realized its omission, it argued in its brief in opposition to the Demurrer that the City "cannot take an abutter's reasonable access" and "that the loss of reasonable access [is] a compensable damage." J.A. 37. This was the first time that Hooked asserted that its remaining access was unreasonable. It was never pled in its Petition.

A brief in opposition is not a pleading. *See* Va. Sup. Ct. R. 3:8; 3:18; 4:15(c); *In re Episcopal Church Prop.*, 76 Va. Cir. 947 (Fairfax Cir. Ct. 2008) (ruling "in unmistakable terms … briefs are not pleadings."). If this were so, a party could survive a proper demurrer by alleging facts in its brief to salvage an otherwise legally deficient claim. Thus, Hooked's allegation of unreasonable access in its brief was insufficient to cure its pleading

deficiency. Furthermore, Hooked did not refer to the 2012 Amendments in its opposition to the City's Demurrer, despite an obvious opportunity to respond to the City's references to the statutory definition of lost access. J.A. 21-22; 37-38; *see* Va. Code Ann. §§ 25.1-100; 25.1-230.1 (defining lost access and material impairment).

During oral argument on the Demurrer, Hooked argued that "what we're left with [is] unreasonable access to [the] property" and that Hooked was "left with unreasonable access [which is] compensable." J.A. 95; 107. However, as stated *infra*, that argument was not pled. *See Ted Lansing Supply Co.*, 221 Va. at 1141, 277 S.E.2d at 229. Moreover, Hooked did not rely upon or mention the 2012 Amendments or argue *at any point while the Demurrer was pending* that the amendments compelled a different result from case law precedent. J.A. 84-118.

The trial court correctly ruled that Hooked failed to state a valid claim for inverse condemnation under Virginia law because Hooked never averred that its remaining access was unreasonable or that all direct access to its property was materially impaired. Indeed, the Petition averred facts that were strikingly similar to the *Wood* case, which this Court held more than ninety years ago was a valid exercise of a municipality's police power. 148 Va. at 407, 138 S.E.2d at 562. Furthermore, the trial court correctly ruled

that granting Hooked leave to amend to allege all loss of reasonable access was futile because Hooked admitted in its Petition that it had access to Battlefield Boulevard S./Route 168, which is a major thoroughfare in Chesapeake. J.A. 3 ¶¶10; 13; J.A. 126. In fact, Hooked did not challenge the trial court's ruling that amendment was futile in its motion to reconsider and rehear. J.A. 126; 127-131.

2. Hooked failed to preserve its argument regarding the 2012 Amendments under Rule 5:25 because the record is devoid of such argument other than a passing reference in a footnote in its motion to reconsider and rehear.

After the trial court issued its letter opinion sustaining the Demurrer, Hooked filed a motion to reconsider and rehear ("Motion"). J.A. 127. There, for the very first time – in a footnote – Hooked referenced the 2012 Amendments. The text of that footnote states:

> In 2012 the Virginia Constitution was amended by the Virginia Property Rights Amendment, which requires that just compensation be paid for "lost access." No parties have cited Virginia Supreme Court cases after the Amendment, because yet none exist. The Amendment surely strengthens and not weakens Hooked Group's constitutional claims before this Court.

J.A. 127. Hooked did not mention the 2012 Amendments in any other part of its five page motion or develop this argument elsewhere.

Conversely, in this appeal, Hooked advances a multitude of arguments based upon the 2012 Amendments. First, Hooked asserts that the

constitutional amendment "extends the constitutional protections described in [*State Highway Comm'r v. Easley*, 215 Va. 197, 207 S.E.2d 870 (1974) and its progeny] by requiring compensation where none was due before." Br. of Appellant at 6. Hooked also argues that the City's "police-power immunity is not on the same footing as it was before 2012" and that "material impairment of direct access" is a per se taking rather than a non-compensable exercise of the City's police power. Br. of Appellant at 7. Finally, Hooked argues that the Virginia Constitution does not contain a "reasonable access remains" exception to the just compensation requirement. *Id.* These were all arguments that could have been made, and should have been made, to the trial court.

However, the record demonstrates, Hooked did not advance any of these arguments at the trial court level. J.A. 1-151. Instead, Hooked seeks reversal of the trial court's ruling based upon arguments that were never meaningfully presented to it. As a result, Hooked invites this Court to run afoul of the most basic tenet of appellate review.

Appellate courts do not review trial courts, they review trial courts' rulings. Here, there is no ruling on the 2012 Amendments to review and no applicable record to analyze. The impact of the 2012 Amendments was

neither presented as an argument for the trial court to consider, nor posed as a legal question for it to decide.

It is well-established law that this Court:

> will not consider questions not presented to the court below, nor brought to its attention. We do not consider matters which are not presented in the pleadings or involved in the issues of the case in the trial court. New contentions first appearing in the petition for appeal are beyond our review of the case.

Stevens v. Mirakian, 177 Va. 123,129, 12 S.E.2d 780, __ (1941).

This principle of appellate review is codified in Virginia Supreme Court Rule 5:25. It states, in relevant part, that "[n]o 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[.]" *Id.* Rule 5:25 also has as its statutory counterpart Section 8.01-384 of the Virginia Code, which provides that "[a]rguments made at trial via written pleading, memorandum, recital of objections in a final order, oral argument reduced to transcript, or agreed written statements of facts shall, unless expressly withdrawn or waived, be deemed preserved therein for assertion on appeal." *Id.*

This Court has previously held that a party can preserve an argument for appeal by raising it in a motion for reconsideration. *Brandon v. Cox*, 736 S.E.2d 695, 697 (Va. 2012). However, under *Cox*, when analyzing whether a litigant has satisfied the requirements of Section 8.01-384 and Rule 5:25,

this Court has "consistently focused" on whether the trial court had an "opportunity to rule intelligently" on the issue. *Cox*, 736 S.E.2d at 696 (citing *Scialdone v. Commonwealth*, 279 Va. 422, 437, 689 S.E.2d 716, 724 (2010)). Specifically, a party must state the grounds for an objection "so that the trial judge may understand the precise question or questions he is called upon to decide." *Jackson v. Chesapeake & Ohio Ry. Co.*, 179 Va. 642, 651, 20 S.E.2d 489, 493 (1942). Here, the trial court had no opportunity to intelligently rule on this issue because Hooked made a perfunctory reference to the 2012 Amendments in a footnote with no meaningful legal citation or argument.

A mere allusion to the fact that the 2012 Amendments "strengthened" Hooked's constitutional claims is simply too amorphous to permit review. Moreover, asserting that there is a dearth of case law on a legal topic is not an excuse for failing to make a good faith argument for an extension of existing law. Virginia lawyers do this every day. *See Tullidge v. Bd. of Supervisors of Augusta Cnty.*, 239 Va. 611, 614, 391 S.E.2d 288, 290 (1990) (reversing attorney sanctions under Virginia Code Section 8.01-271.1 when attorney's legal contention could have been accepted by trial court based on an evaluation of legal precedent at the time he presented his case). If Hooked sought to preserve its opportunity to pursue "law development" in

this area for review by this Honorable Court, mentioning it in a passing footnote is simply not enough. Br. of Appellant at 5.

In *Singson v. Commonwealth*, 46 Va. App. 724, 748, 621 S.E.2d 682, 693 (2005), the Virginia Court of Appeals held that a footnote in a pre-trial brief stating that the defendant had "grave concerns" about his prosecution because of the Virginia Constitution's prohibition against "cruel and unusual punishment" was insufficient to preserve an Eight Amendment claim for the purposes of his appeal. *Id.* There, the Virginia Court of Appeals held that the footnote was insufficient to qualify as a contemporaneous objection because raising a concern about the potential range of punishment was not the equivalent to lodging a contemporaneous objection or providing a meaningful argument. *Id.* The *Singson* Court stated that the argument must be such that "the trial judge would know the particular point being made in time to do something about it." *Id.* (internal citation omitted) (analyzing preservation issue under Va. Ct. of Appeals Rule 5A:18, which is the procedural equivalent to Rule 5:25); *see also Scialdone*, 279 Va. at 437, 689 S.E.2d at 724 (citing Rule 5A:18 and Rule 5:25 as procedural equivalents).

If Hooked wanted to argue that the 2012 Amendments impacted controlling Virginia precedent, it should have developed and supported this argument in the body of its motion. It failed to do so. There is ample authority

in other state and federal jurisdictions holding that arguments raised in footnotes are either waived or unpreserved on appeal. Five federal circuit courts of appeal and three state appellate courts have reached this very logical conclusion.[2]

The purpose of Rule 5:25 "is to afford the trial court the ability to address an issue. If that opportunity is not presented to the trial court, there

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[2] *See, e.g.*, *Smithkline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) ("[A]rguments raised in footnotes are not preserved."); *Sugarcane Growers Coop. of Florida v. Veneman*, 289 F.3d 89, 93 n.3 (D.C. Cir. 2002) ("appellants failed to raise their Regulatory Flexibility Act claim—a footnote at the end of their opening brief does not suffice."); *Bakalis v. Golembeski*, 35 F.3d 318, 326 n.8 (7th Cir. 1994) (argument "made only in a footnote in the opening brief" and "not fully developed until the reply brief… is deemed waived"); *Hays v. Sony Corp. of America*, 847 F.2d 412, 420 (7th Cir. 1988) (same); *To-Am Equip. Co. v. Mitsubishi Caterpillar Forklift America, Inc.*, 152 F.3d 658, 663 (7th Cir. 1998) (burying an argument in a footnote will not do); *Pond v. Michelin N. Am., Inc.*, 183 F.3d 592, 597 (7th Cir. 1999) (Arguments must be raised in more than a conclusory fashion); *Milligan v. Bd. of Trs. of S. Ill. Univ.*, 686 F.3d 378, 386-87 (7th Cir. 2012) (An argument must actually be developed so that the district court has an adequate opportunity to consider it as the court contemplates its decision); *United States v. Centeno*, 793 F.3d 378, 388 n.9 (3d Cir. 2015) (holding that issues that were not "squarely argued" and were merely "raised in passing (such as, in a footnote)" were waived) (internal citations omitted); *Tallahassee Mem. Regional Med. Ctr. v. Bowen*, 815 F.2d 1435, 1446 n. 16 (11th Cir. 1987) (same); *Bonnette v. Conoco, Inc.*, 837 So. 1219, 1227 (Ala. 2003) ("[T]o be preserved, an argument must be pressed, and not merely intimated" in a footnote.); *People v. Crosswhite*, 124 Cal. Rptr. 2d 301, 306 n.5 (Cal. Ct. App. 2001) ("This argument is waived by raising it only in a footnote under an argument heading which gives no notice of the contention."); *Roberts v. Worcester Redev. Auth.*, 759 N.E.2d 1220, 1227 n.11 (Mass. App. Ct. 2001) ("We are not required to address an argument raised in a footnote.").

is no ruling by the trial court on the issue, and thus no basis for review or action by this Court on appeal." *Riverside Hosp., Inc. v. Johnson*, 272 Va. 518, 526, 636 S.E.2d 416, 420 (2006). Because Hooked raised the 2012 Amendments solely in a footnote, it has not preserved this issue for appellate review. This case presents neither the record nor the adversarial exchange required for meaningful review of this issue.

B. Eliminating non-emergency vehicular access to Callison Drive was a valid exercise of the City's police power and not a compensable taking as a matter of law.

Eliminating non-emergency vehicular access to Callison was not a complete extinguishment of access to the subject parcel, but a reduction in access resulting from City Council's exercise of the City's police power in the interest of traffic control, and public safety and welfare. As such, it was a valid exercise of the City's police power and not a compensable taking, as a matter of law. Hooked complains that the trial court erroneously sustained the City's Demurrer because the closing of a portion of Callison extinguished all of Hooked's direct access to one of its two access points and that just compensation should have been paid for the City's action. There is no dispute that the Ordinance adopted by City Council restricted all non-emergency vehicles from using a portion of Callison. J.A. 28-29. Nor is there any dispute that its Petition alleged frontage (*i.e.*, access) onto Battlefield

Boulevard S./Route 168. J.A. 3, ¶ 10, 13. The dispute arises over whether, under Virginia law, the loss of access from one of several access points is compensable when a city exercises its police power to protect the safety and welfare of its citizens by reducing or limiting the overall access of a parcel. Controlling Virginia precedent holds that it is not.

1. Hooked misconstrues this Court's decision in Linsly that the extinguishment of any access is always compensable.

The Court in *Linsly* had a razor-sharp focus on the difference between a complete extinguishment and termination of all of a landowner's rights of direct access and a reduction or limitation of direct access. 223 Va. at 443, 290 S.E.2d at 838. The Court did not conclude that loss of direct access from a single abutting road creates a prima facie factual question of compensability. *Id.* at 444, 838. Instead, the facts in *Linsly* related to a diminution in value associated with the substitution of a service road for direct access to a public thoroughfare without any other alternate points of access from other abutting roads. *Id*. Before the taking, the parcel had access to a single public road and eminent domain was exercised for purposes of conversion of a conventional highway into a limited access highway. In fact, the Court made clear that "a reduction or limitation of direct access to an abutting landowner's property is generally not compensable". *Id.* at 443, 838.

In the matter before this Court, Hooked had access to two public roads prior to the City Council's exercise of its police power, Battlefield Boulevard S./Route 168, a major four lane primary thoroughfare for commercial traffic, and an apron on Callison, which had been chained for many years J.A. ¶ 10, 13, 28; 30-31. Callison is a residential, two lane street that dead ends at the northern side of Hooked's property. J.A. 31. As the maps appended to the Ordinance show, to reach Hooked's parcel via Callison requires multiple turns onto several residential streets creating a circuitous route through a neighborhood. J.A. 30-31. Leaving the property via Callison presents the same circuitous route in order to reach a main thoroughfare. *Id.*; *see also Hart v. Commonwealth*, 131 Va. 726, 735, 109 S.E. 582, 584 (1921) (recognizing that geographical facts that are matters of common knowledge in a jurisdiction can be judicially noticed); *Williams v. Commonwealth*, 289 Va. 326, 333, 771 S.E.2d 675, 679 (2015) (same).

This case is factually distinct from *Linsly.* Before the taking, Linsly's property had direct access from a single highway after which direct access was substituted with a service road. Here, Hooked only had circuitous access to reach its parcel via Callison Drive, but retained its direct access on Battlefield Boulevard S./Route 168. Hooked's misapplication of the facts and rationale in *Linsly* support affirming the trial court's holding.

Without explanation, Hooked omitted controlling precedent of this Court in its Brief and in its Petition for Appeal that is directly applicable, *Wood v. Richmond*. 148 Va. at 400, 138 S.E. at 560. In *Wood*, the landowner owned a gas station located at the southeast corner of two public streets, 34th Street and Leigh Street. *Id.* at 402, 561. The Richmond Public Works Department provided the landowner with a permit to construct a driveway apron from 34th Street and Leigh Street. *Id*. The landowner thereafter constructed a driveway to each street and actively utilized them as commercial entrances. *Id.* When the City determined that the ingress and egress from 34th Street posed a hazard for vehicular and pedestrian traffic contrary to the zoning ordinance, the City directed its closure by revocation of a permit for an entrance. *Id*. at 402, 561. Wood appealed the trial court's ruling in favor of the City, arguing that an abutter has an "absolute and inherent" right of ingress and egress to abutting public right-of-way. *Id*. at 403, 561. This Court agreed with the City's assertion that Wood only had a reasonable right of access to his parcel "subordinate" to its exercise of the police power. *Id.* at 407, 562 (citing *Bowman v. Va. State Entomologist*, 128 Va. 351, 362, 105 S.E. 141, 145 (1920) (Use of private property must be compatible with the general welfare, and legislative acts are a "regulation and not a taking, an exercise of police power, and not of eminent domain".)

(internal citation omitted). While this Court acknowledged in *Wood* that "[t]he abutter has an easement in the public road which amounts to a property right[,]" its decision expressly subordinated it to the municipality's police power, rejecting an inherent or absolute private property right. 148 Va. at 407, 138 S.E. at 562. Specifically, the Court held "we are of the opinion that the exercise of this right is subordinate to the right of the municipality, derived by legislative authority, to so control the use of the streets as to promote the safety, comfort, health and general welfare of the public." *Id*. The fact that the landowner in *Wood* was given a permit expressly subject to a revocation clause for the entrance to 34th Street does not strip *Wood* of its controlling application to these facts or the Court's ruling that an easement of access is subordinate to the police power. *Id*. at 406, 562. In light of presumptive reasonable access remaining from another public road and a valid exercise of the police power, the *Wood* Court upheld a grant of a demurrer to the City on a petition for injunctive relief. *Id.* at 408, 563.

2. Dennison is inapplicable to this case because the landowner in Dennison was left with only circuitous access, but Hooked's parcel maintains direct access and Hooked did not allege unreasonable access.

Contrary to Hooked's assertion, this Court's decision in *State Highway & Transp. Comm'r v. Dennison* does not state a per se "rule" that reasonable access is a factual issue when a property that had direct access to two roads

is left with only one such access point. 231 Va. 239, 343 S.E.2d 324 (1986). *Dennison* involved two adjoining parcels of land under common ownership. Each parcel had frontage on two highways. The Commissioner exercised eminent domain to construct a cross road between the two parallel highways that resulted in access changes to each parcel. The southern parcel lost all direct access to the four lane highway and instead was left with remaining access to a two lane highway. In the present case the reverse is true. Battlefield Boulevard S./Route 168 is a four lane, commercial thoroughfare with two way traffic going north and south, whereas Callison is a two lane dead end road in a residential neighborhood with only circuitous access to major east-west and north-south highways. J.A. 31. Simply put, Hooked's claimed right of an easement of access to and from Callison was circuitous access only, not direct, and the property has retained its access to a major four lane thoroughfare.

Factual distinctions aside, of critical importance in this case is that Hooked did not allege in its Petition that it had unreasonable access or a circuitous traffic condition not shared by the general traveling public. Unlike *Dennison*, where reasonable access was a factual question associated with an award of just compensation, this is an inverse condemnation case and Hooked was required to plead facts sufficient to support a declaratory

judgment that there was a compensable taking or damage of its property before it was entitled to a separate proceeding regarding compensability.

3. Lanier Farm was not a departure from Linsly. The police power exception still applies if there is reasonable access and not a complete extinguishment of direct access to the parcel from abutting public rights-of-way.

The *Lanier Farm* case followed the *Linsly* standard when determining if a taking of access is compensable:

> 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 the 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.

State Highway & Transp. Com'r of Virginia v. Lanier Farm, Inc., 233 Va. 506, 510, 357 S.E.2d 531, 533 (quoting *Linsly*, 223 Va. at 442-443, 290 S.E.2d at 837).

Hooked misinterprets the holdings in *Lanier Farm* and *Linsly* by taking the following language out of context and insisting that loss of access from a single highway creates a compensable taking: "direct access to an abutting highway" or "all rights of direct access to the highway." In *Lanier Farm* and *Linsly*, the facts involved properties with frontage on just one public street. Therefore, language referencing street or highway in the singular is reflective

of the particular facts of those cases and does not set a legal precedent requiring compensation in police powers when reasonable access remains to another public road, particularly one with superior access. Moreover, the Petition failed to allege that unreasonable access remains.

C. The trial court correctly applied *Wood* and *Linsly*.

All of the cases relied upon by Hooked involved the loss of direct access to a highway and not the loss of a circuitous route to an inferior, dead end road such as Callison. Hooked is arguing for an extension of law incompatible with this Court's precedent. Hooked contorts the holdings in *Linsly* and *Lanier* by relying on the singular use of "highway" in each case, which as discussed, *supra*, reflects the particular facts of those cases, but does not create a new cause of action in any instance in which access is extinguished to the inferior of two or more public rights-of-way. Hooked is seeking a per se rule contrary to controlling precedent that would eviscerate municipal police power and create a windfall to landowners.

The trial court's decision is supported by *Wood*, *Linsly*, and their progeny. Loss of access to a minor residential road, while retaining direct access to an adjacent commercial route on the **same** parcel, is not the standard for creating a factual question of reasonable access. Failing to

plead unreasonable access is fatal to the Petition as was Hooked's factual admission that direct access to a major thoroughfare remained.

D. In granting the Demurrer, the trial court looked no further than the Petition for Declaratory Judgment.

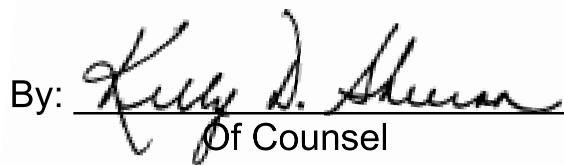
The Petition expressly pled that Hooked had frontage, *i.e.,* access, to Battlefield Boulevard S./Route 168. J.A. 3, ¶ 10, 13. This fact, taken as true, acknowledged that Hooked retained direct access to a public thoroughfare and therefore, there was no complete extinguishment of direct access resulting from the City's exercise of its police power. Hooked's admission regarding access to Battlefield Boulevard S./Route 168 resulted in the inability of the trial court to find the existence of a taking or damage to support Hooked's cause of action. Accordingly, the Petition failed to state a cause of action for inverse condemnation.

CONCLUSION

Hooked seeks an expansion of the *Linsly* holding that is simply not supported by this Court's precedent. Hooked also argues for the first time on appeal that this Court should analyze the impact of the 2012 Amendments on the right of a municipality to exercise its police power for public safety and welfare. That argument was never developed below and is barred by Virginia Supreme Court Rule 5:25.

The trial court correctly applied controlling case law to the facts as pled in the Petition. The Petition admitted that access remained to another right-of-way and failed to allege unreasonable access or a circuitous traffic condition not shared by the general traveling public. If there is any inconsistency between the 2012 Amendments and any previously decided case law, Hooked did not preserve that argument. A wise judge once remarked: “There are three cases a lawyer can try. The one he wanted to try, the one he did try, and the one he should have tried.” The same can be said for Hooked’s pleadings below and the arguments raised in Hooked’s Brief. These arguments go far beyond what was pled or preserved in the underlying case and should not be considered by this Court. For all these reasons, this Court should affirm the trial court’s judgment.

City of Chesapeake, Virginia



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CERTIFICATE

I hereby certify that on this 19th day of December, 2019, pursuant to Rule 5:26, three paper copies of the Brief of Appellee 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 Brief of Appellee was served, via email, upon:

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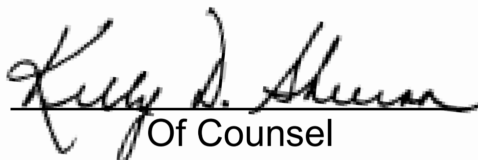

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