FOURTH JUDICIAL CIRCUIT OF VIRGINIA

CIRCUIT COURT OF THE CITY OF NORFOLK

DAVID W. LANNETTI
JUDGE

150 ST. PAUL'S BOULEVARD
NORFOLK, VIRGINIA 23510

December 20, 2024

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Re: *Pretty Lake 5757 LLC v. City of Norfolk*
Docket No. CL22-15232

Dear Counsel:

Today the Court provides its post-trial ruling related to the First Amended Complaint filed by Plaintiff Pretty Lake 5757 LLC ("Pretty Lake") against Defendant the City of Norfolk (the "City"). Pretty Lake claims unlawful entry by the City and seeks its ejectment from certain real property owned by Pretty Lake. Part of the property has been subject to the City's right of way associated with an unbuilt section of Pretty Lake Avenue that would have run through the property roughly parallel to the shoreline of Little Creek. Pretty Lake asserts that the City abandoned its right of way by never building a roadway in those area or, alternatively, that the City exceeded its allowed use of the right of way because improvements the City made are inconsistent with building a roadway. The City counterclaims that it has acquired, by adverse possession, portions of Pretty Lake's real property located on both the right of way and south of the right of way, *i.e.*, toward Little Creek. The City also claims that a twenty-five-foot strip of land it owns along Little Creek—adjacent to Pretty Lake's property located south of the right of way—is measured landward, as opposed to seaward, from "the high water mark visible to the naked eye at high tide" and that, if needed, it has acquired an implied easement to access this strip of land. Additionally, the City claims that the statutes of limitations have run on Pretty Lake's ejectment and unlawful entry claims. Finally, the City claims that if Pretty Lake prevails on either its ejectment or unlawful entry claim, then the City is entitled to compensation for the value of the improvements it made to Pretty Lake's property.

The Court rules that (1) the City has not abandoned its right of way, which is subject to Pretty Lake's underlying fee; (2) the City's use of its right of way cannot exceed the scope of the associated dedication and acceptance, *i.e.*, public transportation, including but not limited to building a roadway; (3) the twenty-five-foot strip of land that the City owns is measured landward from "the high water mark visible to the naked eye at high tide"; (4) the City has not acquired by adverse possession any real property owned by Pretty Lake; (5) an implied easement for the City to access the twenty-five strip of land is not required; (6) the statutes of limitations for Pretty Lake's ejectment and unlawful entry claims have not run; and (7) the City is not entitled to compensation for the value of the improvements it made to Pretty Lake's property because it did not prove such damages with reasonable certainty.

Background

This litigation focuses primarily on two parcels of land located in East Ocean View section of Norfolk, Virginia, commonly referred to as "Pretty Lake"[1]: the "Pretty Lake Avenue" parcel (the "Pretty Lake Parcel"), which is subject to the City's right of way (the "Right of Way"), and the "Snake" parcel (the "Snake"). *See* Pl.'s Ex. 7; Def's Ex. 16. An additional aspect of the litigation involves the impact on those two parcels of a twenty-five-foot strip of land adjacent to Little Creek (the "Bragg Strip"). *Id.* This Court previously found, in separate litigation, that the City owns the Bragg Strip. *See* Pl.'s Ex. 33.

On December 9, 2003, certain real property, including the Pretty Lake Parcel and the Snake (collectively, the "Property"), was conveyed to Clark Investments, LLC ("Clark") via Special Warranty Deed (the "2003 Deed"); the associated real property consists of land near the shoreline of Little Creek that stretches between 13th Bay Street and 30th Bay Street in the City of Norfolk. Pl's Exs. 9, 12. The 2003 Deed indicates that the parcel is subject to a right of way owned by the City and includes a reference to "Pretty Lake Avenue" between 19th Bay Street and 30th Bay Street, although the portions of the street between 19th Bay Street and 21st Bay Street and between 22nd Bay Street and Shore Drive apparently were never built; hence, these sections have been referred to collectively in this litigation as a "paper street." Pl.'s Ex. 9; Tr. 42. The real property associated with the Snake is a serpentine parcel that lies south of the Pretty Lake Parcel and north of Little Creek, from 13th Bay Street to 14th Bay Street and then from 16th Bay Street to Shore Drive (formerly named 23rd Bay Street).[2] Pl.'s Ex. 8.

Evidence at trial demonstrated that the City has maintained the Property, at least to some degree, as a public park since at least 1990. *See* Tr. 390-91. In 1992, the City constructed three gazebos on the Property.[3] Tr. 134. In 2008, the City constructed a large concrete "community

[1] To avoid confusion, the local body of water is referred to herein as "Little Creek," and the plaintiff is referred to as "Pretty Lake."

[2] Of note, only the portions of the Snake between 19th Bay and 21st Bay Streets and between 22nd Bay Street and Shore Drive relate to the present litigation.

[3] The gazebo located at the southern end of 20th Bay Street is only partially on the Pretty Lake Parcel. *See* Pl.'s Ex. 7A; Def.'s Ex. 16; Tr. 237–38.

pier" (the "Pier") along the shoreline between 20th Bay Street and 21st Bay Street, as well as a paved walkway to allow public access to the Pier. Tr. 150. The terminus of the Pier and a portion of the walkway are both located within the Pretty Lake Parcel. *See* Pl's Ex. 7; Def.'s Ex. 16; Tr. 706–09, 744–45. After the Pier was constructed, the City built a kayak ramp and installed several cooking grills, trash cans, park benches, and signs (collectively, the "Other Improvements") on the Property. Tr. 546, 759. Although Pretty Lake concedes that the gazebos, Pier, and Other Improvements were continuously maintained by the City, it claims that they are used infrequently by the public.

The Bragg Strip is a twenty-five-foot-wide strip of land measured from the local high-water mark of Little Creek at high tide (the "High-Water Mark") and, pursuant to prior litigation, stretches along at least the coastline between 19th Bay and 21st Bay Streets. *See* Pl.'s Ex. 12. The Bragg Strip defines the southern edge of the Snake. *Id.*; *see also* Pl.'s Ex. 7; Def's Ex. 16. The source deed that created the Bragg Strip was a conveyance to S. Burnell Bragg dated August 8, 1906 (the "Bragg Deed"). Pl.'s Ex. 12. Based on the prior litigation, the City conclusively owns all interests associated with the Bragg Strip.

In 2008, a dispute arose between Clark and the City regarding the location of the proposed Pier and, more broadly, ownership of the Bragg Strip and its possible impact on the Snake. Later that year, Clark filed a quiet title action against the City (case number CL08-458) regarding the Snake and the Bragg Strip, and in 2009 the Court entered an Order resolving the quiet title claim (the "2009 Judgment Order"). Pl's Ex. 12. The 2009 Judgment Order held that Clark owned the Snake and that the City owned the Bragg Strip. *Id.* The Order also stated that Clark's ownership of the Snake was subject to the rights of the City to the Bragg Strip and that the Bragg Strip is measured "from the high-water mark visible to the naked eye at high tide." *Id.* Because the Bragg Strip is measured at all times from the High-Water Mark, the precise location of the Bragg Strip is dynamic over time, moving seaward or landward with the then-existing high tide at Little Creek.

The City assessed real estate taxes against Clark on the Property, and at some point Clark stopped paying the assessed taxes. Tr. 79–80, 720. As a result, on December 14, 2021, the City filed a suit to enforce the tax lien by selling the Property. Tr. 79. In April 2022, Pretty Lake purchased the Property from Clark via Specialty Warranty Deed (the "2022 Deed"). Pl.'s Ex. 8. The 2022 Deed indicates, among other things, that all appurtenances run with the Property. *Id.* No evidence was presented to support Pretty Lake's grant to the City of an easement, license, or any other express permission to use or to make any improvements to the Property. After Pretty Lake purchased the Property, the City began assessing related real estate taxes against Pretty Lake, and Pretty Lake has paid all assessed taxes. Tr. 91, 728–30.

In November 2022, Pretty Lake filed a complaint against the City—setting forth claims of declaratory judgment, statutory ejectment, common law ejectment, and unlawful entry—

which it subsequently amended.[4] In its amended complaint (the "Complaint"), Pretty Lake seeks (1) a judicial declaration that Plaintiff is entitled to exclusive ownership of the Property and (2) an injunction ordering the City to cease use or operation of the Property; to not use or operate the gazebos, the Other Improvements, or any portion of the Pier that are located on either the Pretty Lake Parcel or the Snake; and to not construct any new improvements on the Property. Compl. 13, 14, 17–18, 21, 24. On December 20, 2023, the Court granted the City's demurrer to Pretty Lake's declaratory judgment claim. Dec. 20, 2023, Order. The City filed counterclaims to quiet title and recover the value of improvements to the Property should the Court rule that the City was not entitled to construct those improvements. 2d Am. Countercl. 1–2, 7–8. More specifically, the City seeks (1) title via adverse possession—to the extent needed—to all portions of the Property, including the Pier, the gazebos, and the Other Improvements; (2) a declaration that the Bragg Strip, which it owns, is measured landward from "the high water mark visible to the naked eye at high tide"; (3) an implied easement over the Snake, if needed, in order to access the Bragg Strip; and (4) if the Court finds that the City has no rights to the improvements it made to the Property, compensation for the value of the improvements. *Id.* at 7.

Legal Standard

After conceding the validity of a deed, the parties are later estopped from asserting its invalidity. *Leonard v. Boswell*, 197 Va. 713, 720, 90 S.E.2d 872, 877 (1956).

Mere non-use of a right of way does not "operate to discontinue a legally established highway, unless coupled with affirmative evidence of an intent to abandon." *Moody v. Lindsey*, 202 Va. 1, 6, 11 S.E.2d 894, 898 (1960).

At common law, a dedication required no writing or special form of conveyance and "was a grant to the public, by a landowner, of a limited right of user in his land." *Brown v. Tazewell Cnty.*, 226 Va. 125, 129, 306 S.E.2d 889, 891 (1983). At common law, "where streets, alleys, and highways are dedicated to the public without reservation," the effect of such dedication gives the dedicatee rights of an easement in the land dedicated. *Payne v. Godwin*, 147 Va. 1019, 1025, 133 S.E. 481, 483 (1926).

An easement holder is not permitted to use a dedicated easement for an activity different from that for which it was originally dedicated. *See e.g.*, *Burns v. Bd. of Supervisors*, 226 Va. 506, 516, 312 S.E.2d 731, 736 (1984).

A party claiming adverse possession has the burden of proving, by clear and convincing evidence that, for fifteen years, there existed "actual, hostile, exclusive, visible, and continuous possession, under a claim of right." *Grappo v. Blanks*, 241 Va. 58, 61–62, 400 S.E.2d 168, 170–71 (1991).

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[4] Pretty Lake subsequently amended its original complaint on July 6, 2023. In its amended complaint, Pretty Lake expanded its claims from the City's alleged interference with the Snake to alleged interference with both the Snake and the Pretty Lake Parcel.

A person claiming an implied easement by necessity must prove that (1) "at some point in the past, the dominant and servient estates belonged to the same person," (2) the right of way "is reasonably necessary to the enjoyment of the dominant estate," and (3) there is no "means of ingress and egress" onto the dominant estate. *See Hurd v. Watkins*, 238 Va. 643, 653-54, 385 S.E.2d 878, 884 (1989).

The statute of limitations for an unlawful entry or detainer claim is three years and the statute of limitations for an ejectment claim is fifteen years. *Va. Code* § 8.01-236 (2020 Repl. Vol.).

If an ejectment action defendant wishes to claim compensation for improvements made to the disputed property, he "shall file with his pleading a statement of his claim therefor, in case judgment be rendered for the plaintiff." *Id.* § 8.01-160.

A claimant seeking damages must prove the amount with reasonable certainty. *Martin v. Moore*, 263 Va. 640, 651, 561 S.E.2d 672, 679 (2002). Although this "does not require proof with mathematical precision . . ., the claimant must present sufficient evidence to permit an intelligent and probable estimate of the amount." *Id.*

Analysis

The Court has considered the pleadings, evidence and oral argument presented at trial, post-trial briefs, and applicable authorities, and the Court now rules on the matters before it.

A. The Right of Way.

It is undisputed that in 1906 the City followed proper common-law procedures—dedication and acceptance—to establish a right of way to build Pretty Lake Avenue between 19th Bay Street and 25th Bay Street.[5] Tr. 704–05. Although East Ocean View Land Company Plat A, Section No. 2, clearly depicts Pretty Lake Avenue following the shoreline of Little Creek between 13th Street and 25th Street (now 13th Bay Street and 25th Bay Street), the sections of the depicted roadway between 19th Bay Street and 21st Bay Street and between 22nd Bay Street and Shore Drive, *i.e.,* the Right of Way, apparently were never constructed. The City claims that it is entitled to use the Right of Way for whatever purpose it deems appropriate. Pretty Lake, on the other hand, argues that by not using the Right of Way to build a roadway as originally dedicated and accepted, the City abandoned the Right of Way such that it no longer encumbers Pretty Lake's fee interest.

The Court finds that Pretty Lake has fee simple ownership of the Pretty Lake Parcel subject to the Right of Way. As noted above, the Right of Way—which encompasses the

[5] The procedures for dedication of a public right of way are now defined by statute. *See Va. Code.* § 15.2-2265 (2020 Repl. Vol.). However, these statutory procedures were not enacted until after the City accepted the Right of Way in 1906. Both parties agree that the 1906 plat depicting Pretty Lake Avenue establishes that the City has been granted the Right of Way. *See* Pl.'s Ex. 2; Tr. 29–30.

boundaries of the Pretty Lake Parcel—is a thirty-foot wide "paper street" that appears to have been originally designed to connect Pretty Lake Avenue between 19th Bay Street and 21st Bay Street and between 22nd Bay Street and Shore Drive. *See* Pl.'s Ex. 2. Three gazebos, several trash cans and park benches, three grills, and the terminus of the Pier are located on the Pretty Lake Parcel. Additionally, two paved walkways cut through portions of the Pretty Lake Parcel.

1. The "Squared Off" Survey Most Accurately Defines the Boundaries of the Right of Way.

There is some disagreement regarding the exact boundaries of the Right of Way. The City's expert, Thomas Reed, prepared two different surveys of the Right of Way that were based on different sources. *See* Def.'s Ex. 16, at 3 of 4, 4 of 4. One survey, which was based on both a 1975 survey prepared by Baldwin & Gregg and a City survey it prepared in 1977 and revised in 1981, has a more circular boundary on the western portion of the Right of Way. Tr. 478; Def.'s Ex. 16, at 3 of 4. Neither of the underlying source surveys were recorded, however. Tr. 478. Reed's other survey, which was based on the recorded Ocean View plat from page 79 of Map Book 4, has a more "squared-off" boundary on the western portion of the Right of Way. *See* Tr. 476–78; Def.'s Ex. 16, at 4 of 4; Pl.'s Ex. 2.

Reed testified that he considered the "squared off" version to the more accurate survey because it was based on a recorded survey. Tr. 478. The Court agrees. The Court finds that the "squared off" Right of Way, Def.'s Ex. 16, at 4 of 4, defines the actual Right of Way because it is based on a recorded survey.

2. Pretty Lake Is the Fee Simple Owner of the Pretty Lake Parcel Subject to the City's Right of Way.

At trial, the City challenged—for the first time—Pretty Lake's ownership of the Pretty Lake Parcel based on the omission of any description of the Right of Way in the 2022 Deed, which conveyed certain property to Pretty Lake. *See* Pl.'s Ex. 8. Although this apparent oversight might arguably be cured by the 2022 Deed's derivation clause, a defect appears to exist there as well. Specifically, the 2022 Deed appears to incorrectly reference in its derivation clause an unrelated 2004 deed, Pl.'s Ex. 10, instead of the 2003 Deed, Pl.'s Ex. 9. *See* Pl.'s Ex. 8. Of note, however, the Right of Way is properly referenced in the 2003 Deed, which conveyed the parcel to Clark. Pl.'s Ex. 8.

Regardless, the City admitted during the course of litigation that Pretty Lake is the fee simple owner of the Pretty Lake Parcel, and the City is bound by this admission. Pl.'s Ex. 6 (admitting that Pretty Lake "owns the fee beneath the City's claimed 'right of way'"). For purposes of this litigation, this admission supersedes any alleged clerical errors in the related deeds. *Leonard v. Boswell*, 197 Va. 713, 720, 90 S.E.2d 872, 877 (1956) (holding that parties

conceding the validity of a deed are later estopped from asserting its invalidity).[6] As a result, the City's admission that Pretty Lake has a fee interest in the Pretty Lake Parcel trumps any deficiencies in the 2022 Deed. Pl.'s Exs. 6, 8.

Hence, the Court holds that Pretty Lake is the fee simple owner of the Pretty Lake Parcel, subject to the City's Right of Way.

3. The City Has Not Abandoned the Right of Way.

Pretty Lake argues that the City abandoned the Right of Way due to the City's failure to build a road for vehicular travel on the Pretty Lake Parcel. The City, on the other hand, contends that it has not abandoned the Right of Way, as evidenced by its maintenance of the Right of Way and the public's use of the Right of Way. The Court agrees with the City.

Stanley Stein, a former City employee, testified that the Property—including where the Right of Way is located—has been maintained as a public park since at least 1990. *See* Tr. 390-91. Another City employee, Tammy Halsted, testified that the City constructed gazebos in the Right of Way in 1992. Tr. 134. Other witnesses for the City testified about the significant use of the Property by individuals participating in City-run programs. *See* Tr. 525, 559. Although the number of individuals who use the Right of Way has varied by season, the Court finds that, contrary to Pretty Lake's contention, the Right of Way is *not* used infrequently and is *not* used by only a small portion of the general public.

The Court finds that the City waiting until the 1990s to begin using the Right of Way does not necessarily mean that the Right of Way was previously abandoned. Mere non-use does not operate to discontinue a "legally established highway, unless coupled with affirmative evidence of an intent to abandon." *Moody v. Lindsey*, 202 Va. 1, 6, 11 S.E.2d 894, 898 (1960); *see also Basic City v. Bell*, 114 Va. 157, 166, 76 S.E. 336, 339 (1912) (holding that "[d]elay in opening a street by a municipality which has been expressly dedicated and expressly accepted is not an abandonment thereof"). In other words, a municipality's inchoate right to open a dedicated street remains until it is needed. *See e.g.*, *Barter Found., Inc. v. Widener*, 267 Va. 80, 91–93, 592 S.E.2d 56, 61–63 (2004) (finding that a street that "has never been paved or otherwise opened to public use" and "remains in a more or less natural state" was not abandoned); *see also Basic City*, 114 Va. at 165–66, 76 S.E. at 339 (holding that "[r]oads and streets are frequently laid out or dedicated with reference to future requirements as well as with reference to the existing conditions of things, and it is not just to assume that because all of the way is not used by the public or by abutters it has been abandoned").

Based on the above, the Court finds that the City has not abandoned the Right of Way and therefore that the Pretty Lake Parcel is still subject to the Right of Way.

[6] Further, the Court has the power to correct clerical errors. *Va. Code* § 8.01–428(B) (2020 Repl. Vol.) (stating that "[c]lerical mistakes . . . may be corrected by the court at any time on its own initiative"); *Westgate at Williamsburg Condo. Ass'n v. Philip Richardson Co.*, 270 Va. 566 575, 621 S.E.2d 114, 118 (2005) (noting that correcting clerical mistakes is a "court sanctioned action").

4. The City's Lawful Use of the Right of Way Is Limited to the Purpose for Which the Right of Way Was Dedicated and Accepted.

Pretty Lake argues that even if the City has not abandoned the Right of Way, it does not have the right to build and operate infrastructure on the Pretty Lake Parcel that is unrelated to public transportation. The Court agrees.

The Supreme Court of Virginia has held that "[w]hen a right of way is granted over land . . . and the instrument creating the easement does not limit the use to be made thereof, it may be used for any purpose to which the dominant estate may then, or in the future, reasonably be devoted." *Cushman Va. Corp. v. Barnes*, 204 Va. 245, 253, 129 S.E.2d 633, 639 (1963); *see also Payne v. Godwin*, 147 Va. 1019, 1025, 133 S.E. 481, 483 (1926) (holding that a dedicated right of way gives the dedicatee the right of an easement but not the right to the underlying fee). More importantly, a right of way may not be used in any manner "different from that established at the time of its creation [or] which imposes an additional burden upon the servient estate." *Cushman*, 204 Va. at 253, 129 S.E.2d at 639–40 *see also Burns v. Bd. of Supervisors*, 226 Va. 506, 516, 312 S.E.2d 731, 736 (1984) ("Common law dedication involves the precise right offered, not a different right."); *Brown v. Tazewell Cnty.*, 226 Va. 125, 130, 306 S.E.2d 889, 891 (1983) ("If the land was dedicated to a particular public use and accepted, the public authorities were confined to that use and those necessarily attendant upon it or incidental thereto."); *Va. Hot Springs Co. v. Lowman*, 126 Va. 424, 430, 101 S.E. 326, 328 (1919) (holding that "a right of way acquired for one purpose cannot be used for another").

Although an easement holder may only use a right of way for the particular purpose for which it was originally dedicated, *e.g.*, for public transportation, some courts have found that the manner, frequency, and intensity of the specific burden of the easement upon the servient estate may be changed depending on the circumstances. *See, e.g.*, *Shooting Point, L.L.C. v. Wescoat*, 265 Va. 256, 266, 576 S.E.2d 497, 502 (2003) (finding an easement meant for ingress and egress could be used in a residential subdivision because it "would only result in an increase in the degree of the existing burden"); *Hayes v. Aquia Marina, Inc.*, 243 Va. 255, 261, 414 S.E.2d 820, 823 (1992)) (allowing defendants to expand a marina parking lot because it would not "unreasonably increase the burden upon the servient estate"); *Va. Hot Springs*, 126 Va. at 430, 101 S.E. at 328 ("But if the new use is in all respects of the same nature and character as the old, and difference is in degree only, and no additional burden is put upon the servient estate, then the new use is within the prescriptive use.").

Here, the Right of Way was dedicated and accepted for the purpose of public transportation. The Court finds that allowing the public to traverse along the Pretty Lake Parcel by, for example, bicycle or foot, is both consistent with the particular purpose for which the Right of Way was dedicated and puts no additional burden on Pretty Lake's fee interest in the Pretty Lake Parcel. The Court further finds that the construction of paved walkways within the Pretty Lake Parcel to facilitate transportation is consistent with the purpose for which the Right of Way was dedicated.

However, the Court finds that the construction and maintenance of the gazebos, trash cans, park benches, and grills located on the Pretty Lake Parcel are not consistent with the purpose for which the Right of Way was dedicated. These improvements cannot be said to be of the "same nature and character" of the purpose of public transportation, 126 Va. at 430, 101 S.E. at 328, and thus impose an additional burden upon the Pretty Lake Parcel.

5. The City Has Not Acquired the Pretty Lake Parcel by Adverse Possession.

The City asserts that it has acquired the Pretty Lake Parcel by adverse possession. Specifically, it argues that if the Court finds that the Right of Way either was abandoned or is overburdened, then it acquired the underlying fee, *i.e.*, the Pretty Lake Parcel, by adverse possession. As the party claiming adverse possession, the City has the burden of proving—by clear and convincing evidence—that, for fifteen years, there existed "actual, hostile, exclusive, visible, and continuous possession, under a claim of right." *Grappo v. Blanks*, 241 Va. 58, 61–62, 400 S.E.2d 168, 170–71 (1991).

However, the City concedes that if the Court finds that the City did not abandon the Right of Way, then its adverse possession claim does not apply to the Pretty Lake Parcel. Because Pretty Lake is the fee simple owner of the Pretty Lake Parcel, subject to the City's Right of Way, the City already has limited rights to use the Pretty Lake Parcel. The Court finds that although the City exceeded the scope of the dedication, this does not result in the City's ability to claim adverse possession to the underlying fee. Similarly, the City cannot claim on one hand that its use of the Right of Way was proper while simultaneously claiming that it acquired title to the Pretty Lake Parcel by adverse possession. *See Chaney v. Haynes*, 250 Va. 155, 159, 458 S.E.2d 451, 453 (1995) ("The essence of an adverse use is the intentional assertion of a claim hostile to the ownership right of another . . . . Use of property, under the mistaken belief of a recorded right, cannot be adverse as long as such mistake continues.").

Ultimately, the Court finds that Pretty Lake has fee simple ownership of the Pretty Lake Parcel, *i.e.*, the "paper street," subject to the City's Right of Way "easement."

B. <u>The Bragg Strip.</u>

1. The Boundary of the Bragg Strip Is Measured Landward—as Opposed to Seaward—from the High-Water Mark.

The City contends that the twenty-five foot wide Bragg Strip is measured landward from the High-Water Mark, whereas Pretty Lake asserts that it is measured seaward. The Court agrees with the City.

As an initial matter, it is undisputed that the 2009 Judgment Order established the City's ownership of the Bragg Strip, the exact location of which varies over time with the tide based on the language used in the Order. *See* Pl.'s Ex. 12. The surveys admitted at trial depict the Bragg Strip as it currently exists. *See* Pl.'s Exs. 7, 7A; Def.'s Ex. 16. Both Pretty Lake and the City offered surveys to establish the current "high water mark visible to the naked eye at high tide":

Pretty Lake's survey was based on actual observation of the High-Water Mark while the City's survey was based on floating markers that were observed after the tide receded, creating a "debris line" that was designed to correspond with the High-Water Mark location. *Compare* Pl.'s Ex. 7A *with* Def.'s Ex. 16. The Court finds that the survey prepared by Pretty Lake more accurately represents the "high water mark visible to the naked eye at high tide" than the City's survey due to Pretty Lake's survey method of actually observing high tide as opposed to the City's "debris line" demarcation method.[7] Pl.'s Ex. 7; *See* Tr. 176-77.

The Court's holding that the Bragg Strip is measured landward is supported by the language used in both the Bragg Deed and the 2009 Judgment Order. *See* Pl.'s Exs. 11, 12; Tr. 18. The Bragg Deed conveyed "all the water, together with the land thereunder and in addition thereto the aforesaid strip twenty-five (25) feet in width." Pl.'s Ex. 11. Measuring the Bragg Strip seaward from the High-Water Mark would mean that the Bragg Strip includes only water at high tide—"together with the land thereunder"—which would not make sense when "all the water" already was included.

The Bragg Deed also refers to the "right to remove the saw-timber on the [Bragg Strip]." *Id.* The specific reference to a land-based natural resource, *i.e.*, saw-timber, further supports that measuring the Bragg Strip landward is a more logical interpretation than a seaward measurement, as timber is unlikely to grow in an area completely covered by water at high tide. *See id.* Additionally, Pretty Lake's own expert testified that he depicted the Bragg Strip landward in a previous survey—unrelated to this litigation—that he prepared, that the only two other surveys he had seen of the Bragg Strip depicted the strip landward, and that measuring the strip landward conformed with common sense because "why would the city want a strip of land that's out in the middle of Pretty Lake[? W]hat could [it] do with it?" Tr. 269-72.

Accordingly, the Court holds that Bragg Strip is measured landward.

2. The Bragg Strip Exists Independent of the Characterization of the Adjacent Land.

The parties disagree regarding whether the Bragg Strip is limited to the area of the Snake and, therefore, does not extend onto the Pretty Lake Parcel, despite portions of the Pretty Lake Parcel lying within twenty-five feet of the High-Water Mark. Pretty Lake argues that the 2009 Judgment Order only affected the location of the Bragg Strip with respect to the Snake and that, therefore, the Bragg Strip does not extend onto the Pretty Lake Parcel even when portions of the Pretty Lake Parcel are within twenty-five feet of the High-Water Mark. The City, on the other hand, asserts that the entire twenty-five-foot wide Bragg Strip runs along the shoreline of Little Creek, regardless of whether the adjacent land is the Snake or the Pretty Lake Parcel. The Court agrees with the City.

The conclusion that the Bragg Strip exists independent of the characterization of the adjacent land, *i.e.*, the Snake or the Pretty Lake Parcel, is supported by both the Bragg Deed

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[7] As the parties acknowledged at trial, the differences between the two surveys are minimal. Tr. 506–07.

itself and the interpretation of that deed in the 2009 Judgment Order. The Bragg Deed identifies the Bragg Strip as "a strip off of the lands . . . contiguous to the said waters of Little Creek twenty-five (25) feet wide." Pl.'s Ex. 11. Additionally, in the 2009 Judgment Order, Judge Thomas ruled that "the portions of Little Creek proximate to the snake parcel were indeed conveyed [to Bragg] by the Bragg deed and thereby, concomitantly, it was the [seller's] intention to convey the 25-foot strip, quote, contiguous to the said waters, end quote, along the hundreds of feet of shoreline of Little Creek *which included the shoreline of the snake parcel.*" Pl.'s Ex. 12, at 16 (emphasis added); *see also id.*, at 2 (referring to the Bragg Strip as "the 25'-strip surrounding the waters of Pretty Lake"). Further, the surveys prepared by both parties annotate the Bragg Strip within the Pretty Lake Parcel.

Hence, the Court holds that the Bragg Strip is not limited to the area of the Snake and that it extends to those portions of the Pretty Lake Parcel that are within twenty-five feet of the High-Water Mark.

C. The Snake.

1. The Snake Is Contoured According to the Landward Measurement of the Bragg Strip.

The Snake is the residual land between the southern boundary of the Pretty Lake Parcel and the northern edge of the Bragg Strip. Pl.'s Ex. 8. The portions of the Snake relevant to this litigation are the portions bounded between 19th Bay Street and 21st Bay Street and between 22nd Bay Street and Shore Drive. Tr. 881–82. The geometric area of the Snake will change with the dynamic high-tide location over time because the location of the landward edge of the Bragg Strip is measured from the High-Water Mark. In other words, if high tide increases at some point in the future, the area of the Snake will decrease. As with the Pretty Lake Parcel, no evidence was presented to indicate that Pretty Lake gave the City permission to construct or operate the Other Improvements on the Snake.

2. The City Has Not Acquired the Snake by Adverse Possession.

The City asserts that it has acquired the Snake by adverse possession. As the party claiming adverse possession, it has the burden of proving—by clear and convincing evidence—that there existed for fifteen years "actual, hostile, exclusive, visible, and continuous possession, under a claim of right." *Grappo v. Blanks*, 241 Va. 58, 61–62, 400 S.E.2d 168, 170–71 (1991). Possession is considered hostile if it is "under a claim of right and adverse to the right of the true owner." *Id.* Under Virginia law, "permission negates hostile possession." *Quatannens v. Tyrrell*, 268 Va. 360, 372, 601 S.E.2d 616, 622 (2004).

Here, even had the City proven the elements of actual, exclusive, and visible possession of the Snake, *arguendo*, the Court finds that it failed to satisfy its burden of proving, by clear and convincing evidence, that it continuously acted hostile and adverse under a claim of right for the requisite fifteen years. Of note, in 2006, Clark and the City engaged in discussions regarding permissive use of a portion of the Snake to support the proposed construction of the Pier. Tr.

135, 140, 142-143. No evidence was produced at trial indicating that Clark ever objected to the City using the Snake as part of a park or that the City was not permitted to construct additional improvements, other than the Pier, on the Snake. Additionally, the 2009 Judgment Order resolved the dispute between Clark and the City regarding ownership of the Bragg Strip—and, concomitantly, parts of the Snake—which the Court finds effectively restarted any adverse possession limitations period related to the Snake.

The City relies upon a recent decision by this Court, *City of Norfolk v. Bay View Beach Corp.* to support its argument that it acquired the Snake by adverse possession. No. CL14-4464 (Norfolk Cir. Ct. July 14, 2023). In *Bay View*, the City filed an adverse possession action claiming it was the fee simple owner of two sections of beach lining the Chesapeake Bay. *Id.* at 1. Owners of lots adjoining the beach filed a motion to intervene, asserting they were the owners of the disputed sections of the beach. *Id.* at 1. After the Court found that the City had engaged in daily clean up, set hours of beach operation, and patrolled the beaches at issue for over thirty years, it concluded that the City had acquired the beach sections by adverse possession. *Id.* at 10.

Although the facts of that case arguably are similar to the facts here, at least at first blush, there are key differences that make it distinguishable. In *Bay View*, "[t]here was no evidence of any payment of taxes on the [property in question], or that the City ha[d] ever assessed [the lot owners] for taxation." *Id.* at 3. Here, by contrast, the City not only continuously taxed the Property; it also took action to enforce its real estate tax lien through a judicial sale of the Property, resulting in the Property being sold to Pretty Lake in order to pay the taxes assessed against Clark. The City then assessed real estate taxes against Pretty Lake on the Property, including on the Snake, which Pretty Lake paid. This distinction is significant because, by doing so, the City expressly recognized Pretty Lake's title to the Property. The Court finds that the City's implicit disclaimer of title—by assessing taxes on the Property against Pretty Lake—negates any alleged claim of adverse possession by the City. *See Erskine's Ex'rs v. North*, 55 Va. 60, 66 (1857) (holding that a possessor claiming adverse possession "negatives the idea of adverse possession" when it acknowledges the title of another and opining that "[w]hen the possessor has acknowledged a title in the claimant, then the possession will not be deemed adverse").

More recently, in *Walton v. Rosson*, the Supreme Court of Virginia opined that a would-be adverse possessor's claim of right would be undermined by recognizing another's title in land, or its own lack of title. 216 Va. 732, 735, 222 S.E.2d 553, 556 (1976) (explaining that an adverse possession claim of right may be demonstrated through "actual occupation, use and improvement of the premises, *without* payment of rent, *recognition of another's title or disavowal of one's own title*" (emphasis added)).

The Court finds that the City assessing taxes on a piece of real estate that the City simultaneously claims to have adversely possessed completely undermines the City's contention that it had continuously acted hostile and adverse under a claim of right for the requisite fifteen years.

3. The City Has Not Acquired an Easement by Implication Over the Snake Because the Bragg Strip Is Not Landlocked.

The City asserts that if it has not acquired the Snake by adverse possession, it acquired an implied easement by necessity over the Snake in order to access the Bragg Strip, which it owns. As noted above, because the Court holds that the Bragg Strip is measured landward, the precise location of its boundary moves as the High-Water Mark changes over time, which affects the size of the Snake. The City argues that this interaction must mean that it has acquired an implied easement by necessity across the Snake in order to use and enjoy the Bragg Strip.

The Court agrees that the dynamic nature of the Bragg Strip results in it affecting the size of the Snake—as well as the size of the Pretty Lake Parcel in certain places on the Property. However, the Court finds that an easement by implication is unnecessary here. Based on the layout of the Property and the Court's holdings herein, the Bragg Strip is not landlocked within the Property. *See Hurd v. Watkins*, 238 Va. 643, 653-54, 385 S.E.2d 878, 884 (1989) (holding that in order to establish an implied easement by necessity, the claimant must prove, among other things, that there is no "means of ingress and egress" onto the dominant estate other than over the servient estate).

As discussed above, the Court holds that the City has not abandoned the Right of Way and that the public can traverse over the Right of Way. The Court also holds that the Bragg Strip boundary is landward of the High-Water Mark. This results in areas of the Property where the Bragg Strip intersects the Right of Way, *i.e.*, where there are no portions of the Snake between the Right of Way and the Bragg Strip. *See* Pl.'s Ex. 7, at 3 of 3. Hence, the Bragg Strip can be accessed directly from the Right of Way, so there is no need for an easement by implication.

D. Pretty Lake's Statutory and Common Law Ejectment Actions Are Viable.

The City asserts that Pretty Lake cannot sustain its actions for common law and statutory ejectment against the City as a matter of law. The Court holds that although Virginia's ejectment statute codifies common-law ejectment, the statute expressly does not preclude a common law action. *See Va. Code* § 8.01-131 (2020 Repl. Vol.) ("The action of [common law] ejectment is retained, subject to the provisions hereinafter contained, and to the applicable Rules of the Court."). "Ejectment is an action to determine the title and right of possession to real property" and results in a successful plaintiff recovering possession of the premises. *Sheffield v. Dep't. of Highways & Transp.*, 240 Va. 332, 335, 397 S.E.2d 802, 803 (1990); *see also Va. Code* § 8.01-155 (establishing that recovery of the property is the proper remedy for a successful ejectment action).

The City relies on *Sheffield v. Department of Highways & Transportation*, 240 Va. 332, 397 S.E.2d 802 (1990), to support its assertion that Pretty Lake cannot sustain an ejectment action against the City. The City argues that the Supreme Court of Virginia in *Sheffield* created a blanket prohibition on ejectment actions against a governmental entity when the claim is that the

government has used or occupied land for public use. Pretty Lake argues that *Sheffield* does not provide such a blanket prohibition and that the facts in *Sheffield* are distinguishable from those in the instant case. The Court agrees with Pretty Lake.

In *Sheffield*, William Sheffield filed an ejectment action against the Virginia Department of Highways & Transportation (the "Department") alleging that the Department—when condemning certain real property to be used as part of a public highway—misidentified the owners of the condemned property, resulting in condemnation compensation being paid to the wrong party. 240 Va. at 334–35. At the time the Department condemned the property and built the highway, Sheffield's predecessor owned the property. *Id.* Some years after the highway had been constructed, Sheffield came into possession of the property and filed an ejectment action. *Id.* at 33. The sole issue before the Court was whether ejectment is available to a landowner whose property has been taken wrongfully and without compensation under the color of eminent domain. *Id.*

After examining relevant secondary sources, the court found ejectment to be an "inappropriate and unsuitable [] vehicle to prosecute an inverse condemnation claim against the Commonwealth." *Id.* at 336. The court did so with the understanding that if landowners whose property had been taken without compensation "could eject the State from the highway and take possession of the roadway, the public transportation system could be thrown into chaos and a continuous highway system would be jeopardized." *Id.* However, the court expressly indicated that it was only deciding the case on the facts before it and acknowledged that implicit in its decision was the assumption that "sovereign immunity would not bar the action of ejectment against the Commonwealth." *Id.*

Sheffield appears to stand for the proposition that when considering whether ejectment of a governmental entity is an appropriate remedy, the Court must consider the adverse effects ejectment would have on the public. With that in mind, the Court finds that the instant case does not present the same potential for adverse effects to the public that supported the *Sheffield* decision. Permitting ejectment of the City from property that the City operates as a public park will not result in the same degree of adverse effects as shutting down a major highway—which would have occurred if the plaintiff in *Sheffield* prevailed. Significantly, here the City will still be able to use the Right of Way on the Pretty Lake Parcel to fulfill the purpose for which the Right of Way was originally dedicated, *i.e.*, public transportation. Accordingly, the Court finds that Pretty Lake's common law and statutory ejectment actions are viable.

E. <u>The Statute of Limitations Has Not Run for Pretty Lake's Unlawful Entry Claim.</u>

The City argues that Pretty Lake's unlawful entry claim is barred by the applicable statute of limitations. The action of unlawful entry and detainer is meant to protect a landowner's possession of property against unlawful invasion. *Grundy v. Goff*, 191 Va. 148, 159, 60 S.E.2d 273, 277 (1950). A successful claim does nothing to settle title or right of possession and is

merely meant to restore the parties' status quo. *Id.* The statute of limitations for an unlawful entry or detainer claim is three years. *Va. Code* § 8.01-236 (2020 Repl. Vol.).

Pretty Lake acquired the Property in April 2022. As discussed above, the City failed to prove, by clear and convincing evidence, ownership of the Property for the requisite adverse possession period. Relatedly, the Court finds that the City—by suing to enforce its tax lien on the Property and subsequently assessing real estate taxes against Pretty Lake after the Property was conveyed—expressly recognized Pretty Lake as the new owner of the Property, effectively restarting the statute of limitations for any unlawful entry claim Pretty Lake might have against the City. Accordingly, the Court finds that the City failed to prove that it unlawfully occupied the Property for more than three years.

F. The City Did Not Properly Assert a Statute of Limitations Affirmative Defense for Either Ejectment Action.

At trial, the City argued that even if Pretty Lake could bring common law and statutory ejectment actions against the City, such actions were time-barred by the applicable statute of limitations. However, the Court finds that the City has not properly asserted a statute of limitations defense regarding the two claims of ejectment.

Section 8.01-235 of the *Code of Virginia* governs when a party must raise a statute of limitations defense. *Va. Code* § 8.01-235 (2020 Repl. Vol.). It states, in pertinent part, that "[an] [o]bjection that an action is not commenced within the limitation period prescribed by law can only be raised as an affirmative defense specifically set forth in a responsive pleading." *Id.* Here, the City argued—as an affirmative defense in its Answer—that Pretty Lake's ejectment actions were not properly pleaded because the City used its eminent domain powers to "take" Pretty Lake's property. The City further alleged that any action to compensate Pretty Lake for the City's "taking" expired under a three year statute of limitations. In making this argument, the City failed to expressly plead a statute of limitations defense for the ejectment actions. Accordingly, the Court finds that the City did not properly assert a statute of limitations defense for either Pretty Lake's common law or the statutory ejectment actions.

G. The Improvements.

The City counterclaims, should it not prevail on its adverse possession claims, for the value of any improvements the City made to the Property, including the walkways, gazebos, Pier, and Other Improvements. Pretty Lake argues that these improvements conveyed when Pretty Lake purchased the Property, *see* Pl.'s Ex. 8 (stating that all appurtenances convey with the Property) and, even if the Court finds that they did not, the City failed to prove with reasonable certainty the monetary value of the improvements.

As an initial matter, the Court finds—based upon the reasoning discussed above—that the Bragg Strip is measured landward and, therefore, the northern boundary of the Bragg Strip encroaches upon not only the Snake, but also upon the Pretty Lake Parcel. Hence, the Bragg Strip includes the portion of the Pretty Lake Parcel where the terminus of the Pier is located. Accordingly, the Court finds that the City, as the owner of the Bragg Strip in fee simple, owns the Pier.

Additionally, as noted above, the Court finds that the City has not abandoned the Right of Way, which is located on the Pretty Lake Parcel. However, the City is limited to use of the Right of Way to fulfill the purpose for which it was originally dedicated, *i.e.*, public transportation. The Court finds that construction of paved walkways within the Pretty Lake Parcel to facilitate transportation is consistent with the purpose for which the Right of Way was dedicated. Accordingly, ownership of the paved walkways within the Pretty Lake Parcel did not transfer to Pretty Lake when Pretty Lake purchased the Property and remains with the City.

As to the gazebos and the Other Improvements located on the Pretty Lake Parcel, the Court—for reasons set forth above—finds that the construction and maintenance of these improvements are not consistent with the purpose for which the Right of Way was dedicated. And because the 2022 Deed transferred all rights Clark had in the appurtenances located on the Property, Pretty Lake became the owner of these improvements when it purchased the Property. Finally, as mentioned above, the Court finds that Pretty Lake owns the Snake in fee simple. Accordingly, any of the Other Improvements located within the Snake—other than those within the Bragg Strip—also conveyed to Pretty Lake upon Pretty Lake's purchase of the Property.

Although an ejected party may seek compensation for the improvements it made on the property at issue, *see* Va. Code § 8.01-160 (2020 Repl. Vol.), the Court finds that the City failed to prove with reasonable certainty the depreciated fair market value of the improvements that were conveyed to Pretty Lake.[8] *See Martin v. Moore*, 263 Va. 640, 651, 561 S.E.2d 672, 679 (2002).

Conclusion

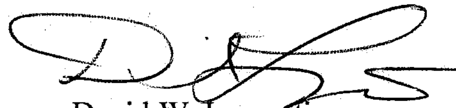
Pretty Lake is the fee simple owner of the Pretty Lake Parcel, subject to the City's Right of Way. The City has not abandoned, and therefore continues to possess, the Right of Way. Pretty Lake is the fee simple owner of the Snake, which is the residuary land south of the Pretty Lake Parcel and north of the Bragg Strip. The Bragg Strip is measured landward—as opposed to

[8] The only evidence the City provided at trial pertaining to the value of the improvements was the testimony of Tammy Halstead, an engineer with Norfolk Public Works Design. Ms. Halstead was not qualified as an expert witness and merely offered her lay opinion regarding the approximate *current* costs associated with construction of gazebos, park benches, and grills similar to ones located on the Property. Tr. 154–156, 158–160. Additionally, she testified that she has not visited the Property since 2016 and had no opinion as to the current condition of any of the improvements. Tr. 163. The City provided no evidence regarding the actual costs of construction, any reduction of value due to depreciation, or current fair market value.

seaward—from the "high water mark visible to the naked eye at high tide," and its twenty-five foot width exists independent of the Snake and the Pretty Lake Parcel. Although the City might be entitled to compensation for the improvements it made within the Snake and the Pretty Lake Parcel, it failed to prove with reasonable certainty the depreciated fair market value of these improvements.

Attached is an Order consistent with the ruling in this letter opinion.

Sincerely,



David W. Lannetti
Judge

DWL/ajl