

**IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

KALORAMA CITIZENS ASSOCIATION, <i>et al.</i>	:	
	:	
Plaintiffs,	:	
	:	
v.	:	2017 CA 004182 B
	:	Judge Todd E. Edelman
SUNTRUST BANK COMPANY, <i>et al.</i>	:	Next Date: 09-15-2017
	:	
Defendants.	:	
	:	
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PLAINTIFFS’ MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs, Kalorama Citizens Association and Adams Morgan for Reasonable Development, by their counsel, Paul Zukerberg and Zukerberg & Halperin, PLLC, respectfully move pursuant to Sup. Ct. Civ. R. 65 for the issuance of a preliminary injunction, enjoining the defendants from demolishing the public plaza (“Plaza”) at 1800 Columbia Road, Northwest, or otherwise interfering with the public’s use and enjoyment of the Plaza. As discussed below, the Plaza enjoys a common law easement by public dedication prohibiting the defendants’ proposed development.

Defendants have recently applied for a raze permit, and demolition of the Plaza is imminent. (Raze Permit Application, Exhibit 1.) Destruction of the public easement is a clear and present threat to the plaintiffs’ use and enjoyment of an irreplaceable community resource. An injunction would allow the court time to reach a meaningful decision on the merits. The public’s right to continued use of the Plaza should be decided by a court and not by a bulldozer.

Wherefore, for the reasons stated, those found in the attached memorandum of law and exhibits, and those which may arise at a hearing on this motion, which hearing is

requested, plaintiffs move that the Court issue the preliminary injunction requested by this motion and provide such other relief as is just.

/S/ PAUL ZUKERBERG

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION**

Plaintiffs Kalorama Citizens Association and Adams Morgan for Reasonable Development are nonprofit citizens groups with organizational standing to challenge the taking of their neighborhood public plaza for private use. *See, e.g., DuPont Circle Citizens Ass’n v. Barry*, 455 A.2d 417 (D.C. 1983); *D.C. Library Renaissance Project v. District of Columbia Zoning Comm’n*, 73 A.3d 107 (D.C. 2013). (Complaint at ¶¶ 2-5.)

Defendants include a group of real estate developers (P.N. Hoffman & Associates, Inc.; Potomac Investment Properties, Inc.; 1800 Columbia Potomac Investment Properties, LLC; and 1800 Columbia Road, LLC), who, through an agent, recently applied for a raze permit to demolish the public plaza, located on the southwest corner of 1800 Columbia Road, Northwest (“Plaza”), and to build in its place a 54-unit luxury condominium complex. (Complaint at ¶¶ 8-14.) Defendants also include two banks (Crestar Financial Corp. (“Crestar”) and SunTrust Banks, Inc. (“SunTrust”)) that are currently the owners of the Plaza and the rest of the parcel and have apparently entered into a purchase agreement with one or more of the aforementioned real estate developers

for the Plaza and the rest of the parcel. Plaintiffs seek the entry of a preliminary injunction because the Plaza enjoys an easement in favor of the public, prohibiting the defendants' proposed development of the site. (Complaint at ¶¶ 37-46.)

I. Legal Standard for Injunctive Relief

The D.C. Court of Appeals has established a four-factor test for whether a preliminary injunction should issue: (1) whether there is a substantial likelihood that the movants will prevail on the merits; (2) whether they are in danger of suffering irreparable harm during the pendency of the action if the injunction is not granted; (3) whether the balance of the equities is in their favor; and (4) whether the public interest would be disserved by the issuance of an injunction. *Dist. of Columbia v. Reid*, 104 A.3d 859 (D.C. 2014), citing *Wieck v. Sterenbuch*, 350 A.2d 384, 387 (D.C. 1976).

II. Plaintiffs Are Likely to Prevail on the Merits

a. The Plaza was Created by a Common Law Dedication Which is Now Irrevocable

A common law easement in favor of the public is created when a landowner dedicates a portion of his property for public use and the public accepts the offered dedication. *Brown v. Consolidated Rail Corporation*, 717 A.2d 309, 315, n.7 (D.C. 1998) (citing *Black's Law Dictionary*). In 1836, the U.S. Supreme Court described public easements by dedication as “an established principle of the common law...sanctioned by the experience of ages.” *Mayor of New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 712 (1836). “There is no particular form or ceremony necessary in the dedication of land to public use. All that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation.” *City of Cincinnati v.*

The Lessee of White, 31 US 431, 440 (1832). The doctrine of common law public easements has been applied to every kind of property, including springs, commons, plazas, parks, wharves, and, most recently, beaches.¹

Under controlling law,² “[w]hen a parcel of land is dedicated as a street or for other public use, the owner of the land retains his fee simple interest, subject to an easement for the public.” *Nat’l Capital Park & Planning Comm’n v. McCaw*, 229 A.2d 584, 591 (Md. 1967); *Windsor Resort Inc. v. Ocean City*, 526 A.2d 102, 105 (Md. App. 1987). Both in general legal parlance and under controlling case law, a dedication creates an easement. *Flores v. Nat’l Capital Park & Planning Comm’n*, 103 A.3d 1124 (Md. App. 2014).

The two elements necessary to create a public easement by common law dedication are (1) an intent by the grantor to create the easement and (2) the acceptance by the public. *Washington Land v. Potomac Ridge*, 767 A.2d 891, 895 (Md. App. 2001) (“A completed common law dedication requires an offer and an acceptance”). “The intention of the owner is the governing test.” *Blank v. Park Lane Center*, 209 Md. 568, 574 (1956).

¹ *McConnell v. Town of Lexington*, 25 U.S. (12 Wheat.) 582 (1827) (public spring); *City of Cincinnati v. Lease of White*, 31 U.S. (6 Pet 431) (1832) (common); *Poudler v. City of Minneapolis*, 115 N.W. 274 (Minn. 1908) (park); *Gion v. City of Santa Cruz*, 465 P.2d 50 (Cal. 1970) (public beach); see *State ex rel Thornton v. Hay*, 462 P.2d 671 (Or. 1969) (the public’s use of beach sufficient to serve as notice to potential purchasers of shoreline easement).

² Unless superseded by statute, the District of Columbia follows the common law of Maryland. See, e.g., *Heard v. United States*, 686 A.2d 1026, 1029 (D.C. 1996) (“In the absence of governing case law in our jurisdiction, we look to the common law of Maryland”); see generally, D.C. Code § 49-301.

Acceptance of the easement by the public can be shown by documents or by usage, which is the best evidence of acceptance. *Morse v. Zeize*, 24 N.W. 287, 288 (Minn. 1985) (Public use of the easement “is the very highest kind of evidence” of public acceptance of a dedication); *see also*, *Smith v. State*, 282 S.E.2d 76, 83 (Ga. 1981) (the public’s long, uninterrupted use of a beach was enough to establish both offer and acceptance).

In the case of the Plaza, a former owner of the property, Perpetual Federal Savings & Loan Association (“Perpetual”), offered to dedicate the Plaza for public use in 1976. (See Affidavit of Marie Nahikian at ¶¶ 11-12, Exhibit 2; November 2, 1976, letter from Thomas H. Owen to members of the Adams Morgan community, Exhibit 3; *see also* Exhibit 5 for additional information on Perpetual.)

Once that dedication was accepted, through both agreement and public use, the easement became irrevocable by successor Plaza owners. *Heppes v. City of Chicago*, 260 Ill. 506, 103 N.E. 455, 458 (1913) (“Whenever there is ...[a] dedication by the owner and acceptance by the public, the public easement becomes perfect, and the dedication irrevocable”).

In the case at bar, evidence of the intent of the grantor to create a public easement on the Plaza includes a 1976 letter written to members of the Adams Morgan community by Perpetual’s president proposing the public dedication (Exhibit 3) and the bank’s “affirmative act” of building the Plaza in 1978 in conformity with the dedicated use. (Exhibit 11; Nahikian Affidavit at ¶ 14, Exhibit 2.)

Evidence of acceptance of the easement by the public includes a 1977 agreement by community organizations to withdraw a protest against Perpetual’s application to

build a bank branch on the site, which was pending before the Federal Home Loan Bank Board (“FHLBB”), and 38 years of continuous public use of the space. (Nahikian Affidavit at ¶¶ 11-14), Exhibit 2; Exhibits 9-23.)

b. The Landowner Created an Easement on behalf of the Public for Use of the Plaza by Dedication

Soon after its acquisition of the property, Perpetual³ agreed to dedicate the Plaza to public use as a marketplace and public square. Perpetual’s intention to dedicate the Plaza to public use is memorialized in a November 2, 1976, letter from Thomas J. Owen, the president of Perpetual, to members of the Adams Morgan community affirming that Perpetual had agreed:

to develop the property in such a way as to preserve its open quality, attractiveness and accessibility to the vendors that presently use it..[and build] a branch housed in a modest three story building placed as far back as possible in order to allow ample room for vendors and other open-air activities.⁴

This offer was accepted by the community and became part of a larger negotiated agreement in 1977 which required the Advisory Neighborhood Commission for the Adams Morgan neighborhood (“ANC”), the Adams Morgan Organization (“AMO”), and other community groups, to withdraw their protest against Perpetual’s application to establish a bank branch at 1800 Columbia Road, which was pending before the FHLBB.⁵

³ Perpetual acquired the property in early 1976. (Exhibit 4 (Washington Post, May 19, 1976).)

⁴ November 2, 1976, letter from Thomas H. Owen to the Adams Morgan community, Exhibit 3.

⁵ Leading Adams Morgan civic associations, including the ANC and AMO, opposed Perpetual’s plans to open a bank branch at 1800 Columbia Road, unless it agreed to end redlining and establish the Plaza for public use. (Complaint at ¶¶ 21-20.) Perpetual’s

Owen restated Perpetual's intent to dedicate the Plaza to public use in March of 1977⁶; that commitment was confirmed in an article in the Washington Post in April of 1979, which reiterated that Perpetual would

permit fruit and curio vendors who have traditionally sold their wares on the same corner the bank occupies to continue to do so.⁷

Photos of the vendors before Perpetual built the Plaza (Exhibits 9 and 10), during construction (Exhibit 11), and after completion of construction (Exhibits 12-23) show continuous use of part of the 1800 Columbia Road parcel as a public marketplace. That marketplace use, legally recognized as a public use by Perpetual's dedication of the Plaza, continues to this day along with the many additional public uses made possible by the construction of the Plaza in 1978. (Exhibits 12-23.)

The written and oral declarations of the Perpetual president to establish a public dedication and the public's acceptance of that dedication through agreement and continuous use created an easement on the Plaza portion of the parcel in favor of the public for use of the space as a marketplace and a public square. Successor owners of the Plaza cannot now undo that dedication some 38 years after it was established and fully realized in the form of the Plaza.

c. The Affirmative Act of Building the Plaza Proves an Intent to Dedicate for Public Use

The "affirmative act" of building the Plaza in 1978 in accordance with Perpetual's dedication provides additional evidence of Perpetual's dedication of the space to public

dedication of the Plaza for use as a market and public square and its agreement to end redlining, paved the way for the construction of the Plaza.

⁶ Washington Post, March 31, 1977, Exhibit 6.

⁷ Washington Post, April 26, 1979, Exhibit 7.

use. A dedication for public use may be shown by “the owner's writings, affirmative acts, acquiescence in public use, or some combination thereof, so long as the owner's intent to dedicate clearly appears.” *Town of Newfane v. Walker*, 161 Vt. 222, 225 (Vt. 1993); *see also, Trepanier v. County of Volusia*, 965 So.2d 276, 285 (Fla. App. 2007) (dedication created by oral declarations followed by acts consistent therewith); *Shear v. Stevens Bldg. Co.*, 418 S.E.2d 841, 847 (N.C. App. 1992) (“dedication...expressed in the visible conduct and open acts of the owner”); *Nicholas v. Furniture Co.*, 248 N.C. 462 (1958) (“the owner's intention to dedicate some particularly described land ... may be manifested by his affirmative acts whereby the public use is invited”). Thus, in *Lindner v. Hill*, 691 S.W.2d 590, 591 (Tex. 1985) the donor’s building of a public school on a portion of his parcel established an implied public dedication of the road which led to the school.

Perpetual commissioned the modernist Washington architect Seymour Auerbach to design the Plaza branch in accordance with Perpetual’s stated intent to establish a public space in the form of the Plaza for vendors and other public activities. (Exhibit 8.) The design and construction of the parcel as a public square and marketplace constituted an affirmative act of dedication.

Perpetual’s Adams Morgan bank branch and the Plaza were built in accordance with Auerbach’s plans in 1978, were opened in 1979, and exist in essentially the same form today. The Plaza built by Perpetual in 1978 features a 2,500-square foot public common, with a 1,500-square foot elevated speakers’ platform and bandstand. (Exhibit 15.) The bank itself is housed, as Perpetual promised, in a modest three-story building placed toward the rear of the parcel. (Exhibit 12.) Perpetual’s design and construction of

the Plaza constitute an “affirmative act” manifesting an intent to dedicate the Plaza to public use.

There are no fences, gates, or lines of demarcation separating the Plaza from the public roads and sidewalks. (Exhibits 12, 16, 18, 21-23.) The Plaza features built-in tables for vendors to display their wares. (Exhibits 12-23.) Hundreds of civic, cultural, musical, and community events have been held on the Plaza, and it is continually in use as a public square and meeting place. (Exhibits 12-23.)

After becoming insolvent during the savings and loan crisis of the late 1980s, Perpetual was dissolved, with many of its assets, including the bank branch at 1800 Columbia Road and the Plaza, transferred to Crestar in 1992 by the Resolution Trust Corporation (“RTC”). Ownership of the bank branch and the Plaza was transferred to SunTrust in 2000 after it acquired Crestar. SunTrust continued to honor Perpetual’s dedication of the Plaza to public use for some 17 years, only seeking to end that commitment in 2017 with the planned sale of the parcel, including the Plaza, to developers. The developers now seek approval of a raze permit application, filed on May 3, 2017, for demolition of the bank branch and the Plaza. The continuous use of the Plaza as a public space during Perpetual’s 13 years of ownership (1979 to 1992) and then for another 25 years (8 years by Crestar (1992 to 2000) followed by 17 years by SunTrust (2000-17) provides further evidence of ratification and acknowledgment of Perpetual’s easement by dedication.

Perpetual agreed to dedicate space to public use and built the Plaza in accordance with that commitment. It honored that commitment for the 13 years in which it owned the Plaza and the rest of the parcel on which the bank branch was located. Perpetual’s

successors honored that commitment for another 25 years for a total of 38 years of continuous dedication to a public use.

d. The Public Accepted Perpetual's Dedication, Making It Irrevocable

An easement by common law public dedication is irrevocable once it has been created and accepted. *Heppes, supra*. Acceptance can be by agreement, as it was in this case, when the community groups formally agreed to withdraw their protests before the Federal Home Loan Bank Board. (Nahikian Affidavit at ¶¶ 10-14, Exhibit 2; Complaint at ¶¶ 24-25.)

Acceptance can also be shown by long public use. *Town of Newfane, supra*, at 576 (“The public's use of the land for more than forty years for the purpose for which it was dedicated is in law equivalent to an acceptance and completed the dedication”). In the case of the Plaza, public use has been continuous and uninterrupted since it was completed about 38 years ago. In a 1982 Washington Post article, Seymour Auerbach, the architect for both the Plaza and the bank branch building, stated that Perpetual's “plaza is probably the most used public square in the city.”⁸ The same article also noted that the bank building and Plaza were in the “heart” of the neighborhood.:

The Columbia Road office [of Perpetual] in the heart of the District's Adams Morgan neighborhood, overlooks a small plaza where fruit and vegetable venders often set up shop.⁹

In 1992, the property containing the Plaza was conveyed via the RTC to Crestar through a quitclaim deed at the nominal price of ten dollars. Quitclaim deeds do not contain covenants of title and serve to transfer only the interest in the property actually

⁸ Washington Post, March 27, 1982, Exhibit 8.

⁹ *Id.*

owned by the grantor. Thus, the quitclaim transfer from the RTC to Crestar was subject to the original public easement. *See, Heppes, supra* (once perfected, common law dedications run with the land and cannot be revoked).

Verified evidence of public acceptance by usage is depicted in the attached historical photos:

<u>Exhibit</u>	<u>Year</u>	<u>Description</u>
9	1977	Vendors at 18 th & Columbia sell produce & other items before the Plaza was built
10	1977	Vendors on the vacant lot at 18 th & Columbia before the Plaza was built
11	1978	Farmers sell their produce during Plaza construction
12	1979	Washington Post photo of the new Perpetual Plaza with vendors and built-in tables
13	1979	Cider making on the Plaza
14	1982	Kids dance while the <i>All Police Band</i> plays on the Plaza speakers' platform
15	1982	<i>All Police Band</i> on the Plaza Performers' platform
16	1984	Farmers market on the Plaza
17	1988	H.D. Cooke Elementary School's double Dutch team performs on the Plaza. They earned a trip to the Soviet Union
18	1990	Ayuda 8K Race at the Plaza
19	2005	Urban Reforestation event on the Plaza
20	2014	Three Kings Day on the Plaza
21	2016	Farmers Market on the Plaza in 2016
22	2017	Farmers Market on the Plaza in June of 2017
23	2017	Farmers Market on the Plaza in June of 2017

III. Destruction of the Plaza Constitutes Irreparable Harm

On a motion for preliminary injunction “the most important inquiry is that concerning irreparable injury.” *Wieck v. Sterenbuch*, 350 A.2d 384, 387-88 (D.C. 1976). Destroying a public Plaza by building a privately-owned structure in its place is the textbook example of irreparable harm. *Don't Tear It down, Inc. v. District of Columbia*, 395 A.2d 388, 391 (D.C. 1978) (“appellant would suffer both irreparable harm and harm

to a greater extent than Foley, since once the permit is issued the building will be razed”). The injury would be irreparable since every property is unique. *Flack v. Laster*, 417 A.2d 393, 400 (D.C. 1980). Should the Plaza be demolished and a privately-owned condominium complex built in its place, the harm would be irreparable.

“The usual role of a preliminary injunction is to preserve the status quo pending the outcome of litigation.” *District 50, United Mineworkers of America*, 412 F.2d 165, 168 (D.C. 1969). Plaintiffs’ motion for a preliminary injunction does exactly that and no more – maintaining the status quo so as to “preserve the court's ability to render a meaningful decision on the merits.” *Wieck, supra* at 387-88, quoting *Canal Authority v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974).

IV. The Balance of the Equities Favors an Injunction

On the other hand, any injury to defendants, should the injunction issue, would be *de minimis*. Building projects of any scope in urban areas face a variety of regulatory, administrative, community, and legal hurdles. The need to resolve easement questions are among the most common of these challenges.

The defendants are on actual notice of the current use of the Plaza by the farmers market and the general public and are fully aware of the plaintiffs’ specific public easement claim. Representatives of the defendants have attended ANC and other community meetings that addressed their plans for development of the Plaza, and know from participating in those forums that much of the community sees the Plaza as public space that is unavailable for private development. Thus, the resolution of the public easement issue by the court is a necessary and anticipated stage of the process.

V. An Injunction is in the Public Interest

Where the easement, if sustained, is in favor of the public at large, little additional argument is required to establish that an injunction would be in the public interest. The loss of the social, cultural, nutritional, and economic benefits of the Plaza would cause irreparable harm to plaintiffs' members. Public opposition to the destruction of the Plaza has been expressed by the ANC's unanimous vote in opposition to the defendants' plans for the site and to the elimination of the Plaza. The Plaza's continuous use by the public for approximately 38 years is a testament to its enduring and vital importance to the public.

Destruction of the Plaza would also harm members of vulnerable groups, including children, young mothers, and senior citizens, who would lose access to programs which provide fresh farm products to them at no cost. The well-being of children would be especially affected by not having access to a farmers market and public square in their neighborhood. If the Plaza is demolished, it will be lost to the public forever.

Plaintiffs are all-volunteer community organizations, with the Kalorama Citizens Association having been centrally involved in the civic life of the Adams Morgan neighborhood since 1919. Decisions by the plaintiff organizations authorizing this action represent an expression of the public's strong interest in resolution of this case by a court and not by a bulldozer. An injunction to provide the court with the time to reach a meaningful decision on the merits is in the best interest of the public.

Conclusion

Plaintiffs have established their right to a preliminary injunction enjoining the defendants from demolishing the public Plaza at 1800 Columbia Road, Northwest, or otherwise interfering with the public's use and enjoyment of the Plaza. A proposed order is attached.

/S/ PAUL ZUKERBERG

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ORDER

This cause is before the Court on the plaintiffs’ motion for entry of a preliminary injunction, and that motion having been considered by the Court, as well as any opposition thereto, and for good cause shown, it is this _____ day of _____, 2017,

ORDERED, that the motion is **granted**, and it is further

ORDERED, that the defendants are enjoined from demolishing the public Plaza at 1800 Columbia Road, Northwest, known at the SunTrust Plaza, or otherwise interfering with the public’s use and enjoyment of said Plaza.

TODD E. EDELMAN
JUDGE OF THE SUPERIOR COURT

Copies To:

All Counsel And Parties Of Record