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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

-----:
KALORAMA CITIZENS :
ASSOCIATION, et al, :
: Civil Action No.
Plaintiff :
: 2017 CAB 4182
v. :
: :
SUNTRUST BANK, et al, :
: :
Defendant :
-----:

Washington, D.C.

Friday, August 4, 2017

The above-entitled matter came on for HEARING before the Honorable Todd Edelman, associate judge, in Courtroom Number 212, commencing at 2:00 p.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS HER NOTES AND RECORDS OF TESTIMONY AND PROCEEDINGS IN THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Plaintiff:

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On behalf of the Defendant:

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Mahalia M. Davis, RPR
Official Court Reporter

(202) 879-1029

1 PROCEEDING

2 THE DEPUTY CLERK: Your Honor, calling Kalorama
3 Citizens Association, et al v SunTrust Bank Company, et al
4 2017 CAB 4182.

5 Parties, please stand and state your names for the
6 record.

7 MR. ZUCKERBERG: May it please the court, I'm Paul
8 Zuckerberg on behalf of the plaintiffs who are present.

9 THE COURT: Good afternoon.

10 MR. ROSS: Good afternoon, Your Honor, Michael
11 Ross on behalf of all defendants.

12 THE COURT: Good afternoon, Mr. Ross.

13 All right, this matter is here today for a ruling
14 on plaintiff's preliminary injunction, the motion that was
15 filed on June 16th of this year. The defendant's filed
16 their opposition to those motion on June 23rd and I read
17 those filings, the attached exhibits and the cited cases. I
18 also, of course, heard the evidence presented by the parties
19 of the testimony and the exhibits they presented on July
20 19th of 2017 at the hearing. The plaintiffs supplemented
21 the record on a particular point on July 25th of 2017. I
22 heard the parties' arguments on July 27th and I'm now ready
23 to rule on the motion.

24 In summary the plaintiff's, Community
25 Organizations, have brought this suit to prevent the

1 defendants, a combination of banks and developers, from
2 destroying a plaza that exists at 1800 Columbia Rd northwest
3 in the district or from otherwise interfering with the
4 public's use and enjoyment of that plaza.

5 Plaintiff's argue that the plaza, while presently
6 owned in fee simply by SunTrust Bank, is subject to what's
7 called a common law easement by public dedication which
8 prohibits the defendants from forward with the development
9 -- a proposed development of a mixed use residential and
10 commercial building that would substantially demolish the
11 plaza and eliminate the vast majority of the public space
12 that it provides.

13 Through the present motion the plaintiffs asked
14 the court to enjoin the defendants from demolishing the
15 plaza during the pendency of the lawsuit, the lawsuit, which
16 will ultimately determine the validity of their claimed
17 easement.

18 Undoubtedly the plaintiff's request calls for an
19 extraordinary remedy. Like all requests for temporary or
20 preliminary injunctions, the plaintiffs here are asking the
21 court to provide them a remedy prior to discovery and prior,
22 of course, to a full hearing for trial on the merits of
23 these issues. In order to obtain a preliminary injunction,
24 the moving party, here the plaintiffs, bear the burden of
25 proof and bear the burden of showing four things:

1 First, that there's a substantial likelihood the
2 plaintiffs will prevail on the merits.

3 Secondly, the plaintiffs are in danger suffering
4 irreparable harm during the pendency of the suite if the
5 injunction is not granted.

6 Third, the balance of equities and interest favor
7 the injunction, that is, that more harm will result to the
8 plaintiffs from the denial of the injunction than would
9 result to the defendants from its grant.

10 And fourth, that the public interest would not be
11 disserved by the issuance of the injunction. These four
12 factors are repeated over and over again in many of cases.
13 I cite specifically to *Wieck v Sterenvuch* that's *W-I-E-C-K v*
14 *S-T-E-R-E-N-V-U-C-H* 350 A.2nd 384 at 397 from our court of
15 appeals in 1976.

16 I want to start with the second of those factors,
17 irreparable injuries. That is the second factor listed in
18 this talismanic listing of the relevant factors. And it
19 certainly was not the emphasis that I asked the parties to
20 focus on at oral arguments last week on the motion.

21 But I want to start here because our court of
22 appeals has emphasized that the showing of irreparable
23 injury is the most important factor to be considered when
24 evaluating a request for preliminary injunction and applying
25 the four factor balancing test. As the court of appeals

1 stated in that *Wieck* case 350 Atlantic 2nd at 387, quote,
2 while it is fundamental to the granting of an injunction,
3 that the court makes specific findings on all prerequisites
4 for such relief, the most important inquiry is that
5 concerning irreparable injury. This is true because the
6 primary justification for the issuance of a preliminary
7 injunction is always to prevent irreparable injury so as to
8 preserve the court's ability to render a meaningful decision
9 on the merits.

10 I've heard uncontested testimony the plaza plays
11 an important and unique role in the neighborhood. It was
12 described in the testimony as the geographic heart of the
13 neighborhood as a community resource and as the town square.
14 I've also been presented with evidence regarding the
15 specific public uses of the plaza as a meeting place, as the
16 site of a farmers market and of other community events.

17 Without an injunction, obviously the development
18 project would proceed and before the end of litigation the
19 plaza would likely be destroyed would be destroyed. And
20 whatever value it has to he community as a public space
21 would be eliminated. At that point, once that's occurred,
22 no remedy the court could fashion would be a realistic one.
23 Regardless of the outcome of the lawsuit and the findings
24 ultimately made regarding the existence of an easement by
25 public dedication, there would be nothing that could be done

1 to remedy the harm suffered by the plaintiff.

2 As the court of appeals has noted, the legal
3 remedy, a remedy of monetary damages is generally inadequate
4 in real property cases, quote, since each quote parcel of
5 land is unique. And I'm quoting there from *Flack v Laster*
6 *417 A.2d 393 at 400* from the court of appeals in 1980. And
7 that's obviously the case here. Once the plaza is destroyed
8 and replaced by a building, whatever value that has to the
9 community would be lost. So certainly the plaintiffs have
10 met their burden showing that the injury suffered absent
11 injunction would be an irreparable one.

12 So moving on to what I'm going to spend most of my
13 time talking about, the likelihood of success on the merits
14 of this lawsuit. As I indicated a few moments ago, in order
15 to prevail in the request for preliminary injunction, the
16 plaintiffs need to show that they have a substantial
17 likelihood of success on their claims.

18 Now this does not necessarily means that the
19 plaintiffs must present an overwhelming case at this
20 juncture. In fact, our court of appeal in *Ortberg*
21 *O-R-T-B-E-R-G* versus *Goldman Sachs Group* *64 A.3d 158 at 162*
22 *in 2013*. And even more recently in *Competitive Enterprise*
23 *Institute v Mann*, that's *M-A-N-N 150 A.3d 1213 at 1234 in*
24 *2016*. In both those cases the court of appeals indicated
25 that substantial likelihood of success on the merits does

1 not equate to a mathematical probability of success.

2 In fact, *Mann* at footnote 27 cites various federal
3 cases holding that the movements showing must show greater
4 than the mere possibility of success of better than
5 negligible prospect for success on the merits, but the
6 movement need not show that it will more likely than not
7 prevail.

8 So here the plaintiffs must establish by this
9 standard, a likelihood of success on their claim. The plaza
10 18th and Columbia is subject to a common law easement but
11 public dedication and that the defendant's plan to construct
12 a building that would eliminate that plaza would infringe on
13 this easement.

14 As described in the only District of Columbia case
15 that we could find that discusses that grant of an easement
16 by public dedication and that's *Brown versus Conrail* 717
17 A.2d 309 at 315 footnote 7 in 1998 a dedication, as the
18 court relied on black's law dictionary to define, is, quote,
19 and appropriation of land or an easement therein by the
20 owner for the use of the public and accepted for such use by
21 or on behalf of the public, end quote.

22 This definition of the easement and its elements
23 appears consistent with that provided on the Maryland
24 cases -- excuse me, provided by the Maryland cases relied
25 upon and cited by the parties, for example, *Gregg Neck Yacht*

1 *Club -- and that's Gregg, G-R-E-G-G Neck Yacht Club*
2 *Incorporated versus County Commissioners of Kent County 769*
3 *A.2d 982 at 995* from the Maryland court of special appeals
4 in 2001 and *Washington Land Company v Potomac Ridge*
5 *Development Corporation 767 A.2d 891 at 895*, again from the
6 court of special appeals in 2001.

7 Under all of these cases, the question of whether
8 this type of easement exists resembles a matter of contract
9 law focussing on whether there's been an offer and
10 acceptance. Whether a property owner has made an offer of a
11 dedication turns on a finding intent by the owner to give
12 over his land for public use. The expression of that
13 intent, as defendants have correctly pointed out, must be
14 clear and unequivocal.

15 To determine the intent of the property owner the
16 trial court must, according to the *Washington Land Company*
17 case, again, *767 A.2d at 895* examine, quote, the
18 declarations of the landowner, his intentions as manifested
19 by its act and all the other circumstances of the case, end
20 quote.

21 Similarly, the public must show its acceptance of
22 the dedication clearly and decisively. An acceptance can be
23 shown by the public use consistent with the offer
24 dedication. There is no requirement in any of the cases
25 cited or any I have found that this type of easement be

1 record in the land records. In fact, these cases generally
2 imply that such an easement has not been so recorded.

3 So the case law that I have just cited that I'm
4 going to review as I discuss the facts involved in this case
5 is useful to the extent that it defines at least some of the
6 doctrines surrounding this type of easement. But in other
7 ways the value of the case law in this area has some
8 definite limitations.

9 To begin with, the question of whether there has
10 been an intent or offer to make a public dedication and an
11 acceptance of that dedication by the public, is by
12 definition a fact intensive inquiry. So to some extent the
13 cases the parties cite and others that I have read are of
14 limited value because those decisions were so fact bound.

15 In addition, most of the cases defining this
16 doctrine and in particular most of the cases cited by the
17 defendant deal with efforts by a court to evaluate
18 circumstantial evidence of a purported implied dedication of
19 property. And in many of those cases, courts have found
20 that circumstantial evidence relating to patterns of use of
21 private property was simply not enough to clearly and
22 unequivocally show a dedication to the public.

23 Turning to the evidence in this case, however, the
24 plaintiffs have presented direct evidence of an explicit
25 public dedication by Perpetual Federal Savings, the entity

1 that constructed the plaza and the bank branch that had been
2 past on through the Resolution Trust Corporation and Crestar
3 to its current owner, the defendants, SunTrust Bank.

4 When I speak of the direct evidence, I first of
5 all refer to the Ms. Marie Nahikian. Ms. Nahikian in the
6 early 1970's was director of the Adams Morgan Organization
7 or AMO, and later on she became an advisory neighborhood
8 commissioner. In her testimony she described how the AMO
9 and other local organizations originally opposed the opening
10 of Perpetual Bank Branch and even filed an official
11 objection to the branch's opening with the Federal Home Loan
12 Bank Board and sent representatives to Atlanta to voice the
13 objection at a board hearing.

14 Eventually the community groups withdraw their
15 objection based on an agreement with Perpetual. Ms.
16 Nahikian testified that this agreement was detailed and had
17 multiple parts, including a portion in which Perpetual made
18 assurances regarding its lending practices. But she also
19 stated that Perpetual had agreed to construct its branch to
20 include a plaza for public use.

21 In her records -- and I'm quoting what she said at
22 the hearing. Quote, they agreed to design a building that
23 would allow for continued, as we said, perpetual use of the
24 public space as the kind of heart of the community at that
25 the location, end quote. She also noted that the farmer's

1 market was specifically listed in the agreement as part of
2 the public uses that would be permitted. According to Ms.
3 Nahikian, this agreement regarding the design and use of the
4 plaza was important part, and these are her words, an
5 important part of the consideration that the community
6 received in exchange for dropping the official objection it
7 had lodged before government board.

8 Secondly, as direct evidence of the intent of the
9 grantor, that being Perpetual, the plaintiff also presented
10 the hearing the declaration of Frank Smith. Mr. Smith did
11 not testify at the hearing. He was not subject to
12 cross-examination, so this written declaration had much less
13 weight than sworn in-court testimony would have. The
14 document itself is sworn and notarized and I do find it
15 reliable enough -- as I said during the hearing, reliable
16 enough to consider in this non-trial proceeding, even if it
17 is less weighty than in-court testimony would be.

18 According to the declaration, Mr. Smith was
19 chairman of the Adams Morgan ANC in 1976 and was personally
20 involved in the negotiations Perpetual regarding the
21 creation of the bank branch and plaza. And he testified at
22 the hearing in Atlanta referenced by Ms. Nahikian.

23 In Paragraph 7 and 8 of the declaration Mr. Smith
24 stated, and I'll again quote, after long negotiations, an
25 agreement was reached with Perpetual Bank. In exchange for

1 withdrawing our opposition to the opening of a Perpetual
2 Bank at 18th and Columbia, Perpetual agreed to modify its
3 lending practices and to dedicate the plaza portion of the
4 parcel at 18th and Columbia for the continued use by the
5 market as a market and neighborhood open space.
6 Specifically, Perpetual agree to design its new bank branch
7 building and a modest structure far back into the partial to
8 preserve the open space as a public plaza and provide
9 accessibility to the vendors and general public for the
10 holding of open-air public activities and to dedicate the
11 plaza for public use, end quote.

12 On top of that, at least some of the surviving
13 documentation from the mid 70s corroborates the accounts of
14 Ms. Nahikian and Mr. Smith. The parties have placed a lot
15 of emphasis on their competing interpretation of Plaintiff's
16 Exhibit Number 1, which was the letter sent to the community
17 by Thomas J. Owen, the president of Perpetual Federal
18 Savings on November 2nd of 1976.

19 According to the testimony of Ms. Nahikian, this
20 letter went to all property owners in the neighborhood. The
21 letter described meetings with the AMO, with the local
22 business community, with the Spanish speaking community and
23 with other civic organizations and states. Quote, following
24 these meetings, Perpetual agreed to develop the property in
25 such a way as to preserve it's open quality, attractiveness

1 and accessibility to the vendors that presently use it.
2 Present plans call for a bilingual branch housed in a modest
3 three-story building placed as far back as possible in order
4 to allow ample room for vendors in open-air activities. The
5 letter also included a plea for members of the community to
6 support the creation of the bank branch and enclosed a card
7 for citizens to send back to express their support.

8 The defendant's counsel made some interpretations
9 of this letter that I found to be fairly creative. I doff
10 any lawyerly hat to you for that. But in the end I found
11 these explanation or interpretations of the letter to be
12 fairly unconvincing.

13 First the defendants argue that the letter
14 contained no explicit commitment to maintain the public
15 space forever. But the letter describes an agreement to
16 preserve the property's open quality, that's the verb used.
17 So a verb that's certainly suggestive of continuance use of
18 the property. It's difficult for me to even conceive of the
19 concept of temporary preservation, as the defendants have
20 urged me to.

21 The defendants also contend that this letter only
22 represents a promise to the vendors. They argue that the
23 sentence, Perpetual agree to develop the property in such a
24 way as to preserve its open quality, attractiveness and
25 accessibility to the vendors that presently use it, should

1 be read to refer only to an agreement reached with the
2 vendors.

3 And, as the defendant correctly argues, if
4 Perpetual did only make an agreement with or dedication to
5 the vendors, that would not create this type of easement, as
6 stated by the Maryland Court of the special appeals and the
7 *Washington Land Company case 767 A.2d at 902*, conferring a
8 use to a portion of the public does not create a easement by
9 dedication for the entire public.

10 But as I indicated at the argument, I think this
11 is a rather tortured view of the sentence. It requires me
12 to read the clauses in the letter describing the agreement
13 as an agreement to preserve the property's open space and
14 attractiveness as modifying or relating only to the vendors.
15 In other words, all three clauses there, preserve it's open
16 quality, attractiveness and accessibility to the vendors,
17 should be read as preserve it's open quality to the vendors,
18 attractiveness to the vendors and accessibility to the
19 vendors. The much more natural reading of this sentence,
20 plain language reading of the sentence is the banks is
21 saying it agreed to develop is the bank is saying it agreed
22 to develop to preserve, one, its open quality; two, it's
23 attractiveness and three, its accessibility to the vendors.

24 The defense interpretation of this portion of the
25 letter also ignores the beginning of the sentence and the

1 entire context of the letter, which is describing an
2 agreement reached following these meetings, that's how the
3 sentence began, which were not meetings with the vendors,
4 but meetings with a variety of community groups representing
5 the general public.

6 So I think the most logical reading of this letter
7 is that it constituted a promise to develop a property to
8 continue it's usage by the public at large in an explicit
9 effort to gain the public's support for the development
10 based, at least in part, on that promise. While it's not as
11 explicit it could be, I think this letter can be seen as at
12 least some direct evidence as the intent to dedicate for
13 public use or as an offer to do so. But more importantly,
14 at the very least, I think this letter serves as
15 circumstantial evidence supporting the testimony of Ms.
16 Nahikian and the affidavit of Mr. Smith regarding the nature
17 of the intent or offer expressed at that time.

18 In addition, I'll point to Plaintiff's Exhibit 2,
19 the August 18th 1977 resolution of the Federal Home Loan
20 Bank Board as also providing some corroboration of the
21 accounts of Ms. Nahikian and Mr. Smith, at least to the
22 extent that it references in a general way the objections
23 made by various objections and the agreement that was
24 reached to withdraw the objections.

25 So the testimony of Ms. Nahikian and the

1 declaration of Mr. Smith and the interpretation of
2 Mr. Owens' letter, that I believe to be supported by their
3 accounts, is also bolstered by what I find to be other
4 circumstantial evidence of intent, that is the way in which
5 the plaza it's itself was constructed. It is a substantial
6 open space with no fence or other lines demarcation
7 separating the plaza from the public sidewalk or street.

8 There are permanent structures that were created
9 on the plaza for public use, the raised brick platform the
10 vendors use and raised porch or bandshell for public events.
11 These pieces of evidence taken together constitute at least
12 some amount of proof of an intent by Perpetual to dedicate
13 the plaza for public use. Or to put it in another way, to
14 offer the plaza to the public for its use.

15 As I stated earlier, for the dedication to be
16 perfected, the public must manifest an acceptance of it.
17 Importantly, that acceptance that must occur does not
18 involve any action or require any action by any governmental
19 authority or entity. As the Supreme Court of Georgia stated
20 in *Smith versus State* 282 S.E. 2d 76 at 82 in 1981, quote,
21 acceptance by the public for public use is sufficient to
22 complete the dedication without acceptance by the
23 appropriate public authorities, end quote.

24 The Maryland cases cited earlier, *Gregg Neck Yacht*
25 *Club* and *Washington Land Company* both state that the public

1 can accept an offer to dedicate through one of four methods:
2 Acceptance of a deed or other record; Acts in pay, such as
3 improvements at public expense; Long use by the public at
4 large or Expressed statutory or official action.

5 Here, the plaintiffs appear to argue that the
6 public has accepted the dedication through a long history of
7 public use and there's really not much dispute in what's
8 been brought before me. The plaza has been used by the
9 public in a manner consistent with the claimed easement by
10 public dedication. As the witnesses described, the plaza
11 has been used for a wide variety of public purposes serving
12 as everything from an informal meeting place to the formal
13 situs of a farmer's market and other events.

14 Once a finding were to be made that Perpetual
15 intended to make a public dedication in 1976 and made such
16 an offer to the public, the history of the public's use of
17 the plaza since then makes the question of acceptance of the
18 offer fairly obvious.

19 Given all this, I think the plaintiffs have made a
20 fairly strong evidentiary showing at this stage of the
21 litigation as to the merits of their claim for a common law
22 easement by dedication. However, this is not an
23 uncomplicated claim and there are numerous issues and
24 problems that have been raised, both factually and legally
25 with respect to the plaintiffs' claim. And I want to focus

1 on what I view as the three more substantial issues.

2 First, there's the issue relating to what that
3 easement is, the parameters or boundaries of the claimed
4 easement and what would constitute a infringement on it
5 seems hard to define. And that's an issue that I raised at
6 the argument last week as well.

7 At the argument plaintiff's counsel argued that
8 the easement could be defined by fidelity to the dedicated
9 purpose. It appears from the case law that is he correct
10 about that and that an easement can be defined in terms of
11 the use permitted on the dedicated piece of property.

12 For example, in the case of town of *Newfane*, that
13 *N-E-W-F-A-N-E versus Walker* 637 A.2d 1074 at 1076 and 77,
14 the Vermont case in 1993 regarding the common law dedication
15 of a swimming hole to the public. The court said, quote,
16 the dedication here was a easement, but the scope of the
17 dedication, not the nature of the property interest it
18 conveys determines how the public May use the property.
19 What the easement allows is public entry for the full range
20 of uses, primarily recreational, but some utilitarian for
21 which the property was dedicated, end quote.

22 *Smith versus State* 282 S.E. 2d at 83 and 84 uses
23 similar language in reasoning to describe how an easement by
24 public dedication of a beach can be defined. Given that the
25 easement here claimed is one defined by use, I don't believe

1 that the broad and somewhat amorphous nature of the easement
2 claimed precludes a finding that such an easement was
3 dedicated.

4 The second issue relates to who owns and who
5 controls the property. The defendants forcefully argue that
6 the exercise of dominion and control over the plaza by
7 SunTrust and its predecessors undermines the claim of
8 easement by public dedication. And suggests in stead that
9 the private owner has permitted, licensed or even encouraged
10 public use of what should remain unencumbered private
11 property. The defendants presented uncontradicted evidence
12 regarding its responsibility for the plaza. SunTrust pays
13 the taxes for the plaza. SunTrust pays insurance for it and
14 even settled a slip and fall case when somebody fell on the
15 plaza and sued.

16 SunTrust maintains the plaza physically by
17 shovelling snow off of it and so forth. Similarly, the
18 defendant's point to something called the Police Regulation
19 Amendments Act of 1981, which designated the plaza street
20 market, quote, provided that prior written consent of the
21 owner of the property has been obtained for such purposes,
22 end quote.

23 There's evidence it was presented from several
24 witness, including plaintiff's witnesses, that SunTrust
25 issues licenses to the vendors who use the farmer's market

1 and to those who wish to use the plaza for other events or
2 purposes.

3 So three points I'd like to make about this
4 evidence regarding SunTrust control of the plaza: First of
5 all, not that anyone has urged me to look at it this way,
6 but I don't think it provides useful circumstantial evidence
7 regarding the original intent to create an easement or
8 whether Perpetual made an offer of public dedication.

9 Given the time lapse between the dates of the
10 purported dedication in the mid 1970's and the testimony
11 regarding the more recent treatment of the plaza by SunTrust
12 or before that by Crestar, this evidence doesn't provide
13 much of a barometer as to the intent of the parties at the
14 relevant time, which was, as I said, in the mid 1970's.

15 Secondly, even if SunTrust had no specific
16 knowledge of the easement and is acting now as if there were
17 no such easement, that would not by itself affect the
18 analysis. As explained in *Heppes Company H-E-P-P-E-S*
19 *company versus Chicago 260 Illinois Reporter 506 at 514* from
20 back in 1913 and the more recent *Town of Newfane Case 637*
21 *A.2d at 1077*, a common law easement by public dedication
22 once created is irrevocable and be extinguished only if
23 easement is abandoned by the public, which hasn't happened
24 here, based on all the evidence of the current use of the
25 plaza.

1 So again, whether SunTrust knows of the easement
2 or behaves as if it's there is not as relevant since the
3 easement, if it was created is irrevocable.

4 Thirdly, related to all this evidence of control
5 and dominion over the plaza, and perhaps most importantly,
6 all of the defendant's evidence regarding its care and
7 responsibility for the plaza, all of that evidence is
8 consistent with SunTrust continuing to be the owner of the
9 plaza in fee simple with its ownership burdened by the
10 common law easement dedicated in 1976 by Perpetual.

11 In our oral arguments defense counsel argued that
12 a property owner who makes a dedication to the public
13 relinquishes all control over the property. I think this
14 argument conflates a dedication of easement with a
15 dedication of ownership and the argument is not at all
16 supported by the vast bulk of the case law.

17 The D.C. case I cited earlier *Brown versus Conrail*
18 *717 A.2d at 315 footnote 7* again quotes Blacks Law
19 Dictionary for the proposition, that quote, the dedicating
20 party reserves to himself no other rights than such are
21 compatible with the full exercise and enjoyment of the
22 public uses to which the property has been devoted, end
23 quote.

24 The court of special appeals of Maryland stated it
25 more clearly in *Flores versus Maryland National Capital Park*

1 *and Planning Commission 103 A.3d 1124 at 1130 in 2014 where*
2 *it said, quote, under Maryland law when a partial of land is*
3 *dedicated as a street or for other public use, the owner of*
4 *the land retains its fee simple interest subject to an*
5 *easement for the public, end quote.*

6 In the Vermont Supreme Court, again in that *Town*
7 *of Newfane Case 637 A.2d at 226* described it similarly.
8 Quote, a common law dedication unlike the more formal
9 statutory dedication does not pass fee simple. Rather it
10 passes an easement to use the property in a manner
11 consistent with dedication. Use not ownership is the crux
12 of the dedication.

13 Even the Great Neck Yacht Club case cited by
14 defense to support it's argument, the dedication eliminates
15 ownership of the property actually says the opposite. It
16 contradicts that position on the explaining at 769 A.2d 986,
17 quote, an easement is a non-possessory interest in the real
18 property of another. If land is burdened by an easement,
19 the owner of the servient estate is not divested of
20 ownership of the property. Rather, the easement area
21 remains the property of the servient state, end quote.

22 Later at Page 995 the case uses the same language,
23 a very similar language that I cited from the *Flores* noting
24 that the owner of the property who makes a common law
25 dedication of the easement, quote, retains a fee simple

1 interest in the dedicated partial subject to an easement for
2 the public, end quote.

3 So I go through all that to explain that the fact
4 that SunTrust maintains, repairs and insures the plaza and
5 pay taxes on it is perfectly consistent with the existence
6 of the claimed easement as SunTrust remains the owner of
7 that property in fee simple. Nor does the fact does
8 SunTrust and its predecessors issue licenses to vendors and
9 other uses of the plaza undermine the notion that an
10 easement exists, whether that licensing stems from the
11 police regulation amendments act or is undertaken
12 independently of that.

13 An easement by public dedication can have
14 conditions attached to it. As the court of special appeals
15 of Maryland put it in *Washington Land Company 776 A.2d at*
16 *900*, quote, an owner making a voluntarily dedication of its
17 property in public use may annex such conditions and
18 limitations to its grant as are not inconsistent with the
19 dedication and will not defeat the operation of the grant,
20 end quote.

21 And here there's been testimony that the licenses
22 and vendor agreements like the ones used in the plaza are
23 also used with regard to the other public property, examples
24 given of Walter Pierce Park and Eastern Market.

25 In the end, the evidence regarding SunTrust's

1 exercises control over the plaza do not seem to be at this
2 state to weaken the argument as to the easement by public
3 dedication made by the plaintiffs.

4 The third main issue that I identify with the
5 plaintiffs' claim is the most substantial argument, I think,
6 raised by the defendants. It relates to the nature and the
7 weight of the evidence produced by the plaintiffs.

8 There's no doubt that the plaintiffs in supporting
9 their case are relying on people's memories from many many
10 years ago, going back 40 plus years to attempt to establish
11 the intent of Perpetual and its offer of public dedication.

12 Ms. Nahikian and Mr. Smith provided what I view
13 as the most direct evidence of public dedication. And I
14 acknowledge, of course, as I must, that memories,
15 particularly of something like this that happened so long
16 ago, can fade over time. At the same time these witnesses
17 have no reason that I can discern to fabricate or exaggerate
18 what they remember. Ms. Nahikian in particular is someone
19 who doesn't even live in the community or in the city
20 anymore. Their accounts, as I mentioned earlier, were
21 corroborated to a large extent by what I view as the most
22 natural reading of Mr. Owen's letter and by the manner in
23 which the plaza was constructed.

24 And importantly, this evidence regarding the
25 dedication was not contradicted by any other evidence

1 presented to me in the course of the hearing on the motion.

2 As a result, I do credit the accounts provided by
3 Ms. Nahikian in her testimony and Mr. Smith in his
4 declaration. In applying the standard that I must here, I
5 find the plaintiffs have shown a substantial likelihood of
6 success on their claim that a common easement by public
7 dedication exists.

8 When I speak about the final two factors more
9 briefly. First with relation to the balance of equities and
10 interest here. I find that the balance of equities also
11 favors the plaintiff's position. Mr. Simons testified that
12 an injunction would have a negative impact on the
13 development, difficulty with getting title insurance and
14 going to closing. The very least it would affect the timing
15 of the property. And I don't doubt this ruling could have
16 impact in that respect.

17 The most significant impact cited by the
18 defendants losing the financing and potentially blowing up
19 the entire deal is extremely hypothetical as best. I'll
20 note that PN Hoffman, the developer, signed a contract for
21 this development apparently several years ago and it's been
22 extended several times since then. Mr. Simons also
23 testified at this point there's no start date for the
24 construction project and the branch is slated to remain in
25 operation in its present building, at least through

1 December.

2 The plan here -- my plan is to resolve the merits
3 of this case as expeditiously as possible to minimize the
4 potential impacts on the defendant. And if the plaintiffs'
5 case is ultimately shown to have no merit, then there's no
6 specific reason that's been given or proven as to why the
7 project could not go forward at that time.

8 On the other side of the scale, not issuing the
9 injunction would, as I mention earlier, entirely extinguish
10 the plaintiffs' interest before the lawsuit could even be
11 concluded.

12 Finally, there's the question of whether the
13 public interest would be disserved by the issuance of the
14 injunction. And I want to make myself as clear as I can
15 here, I'm not here to make a determination about what the
16 best use of this space would be for the public, whether it's
17 better to have this whole plaza there or better to have a
18 new condominium development there.

19 I've heard a lot from witnesses called by the
20 plaintiff who appear to care a lot about the plaza and the
21 role that it play in the community and I credit their
22 testimony that it does have that meaning to that segment of
23 the population that testified there and others like them.
24 But I also think that reasonable well meaning people can
25 disagree about which use is better for the community. I'm

1 not assuming the role of the person making that choice. I'm
2 not here saying the plaza is better than condo or condo is
3 better than plaza. That choice is not one that a judge can
4 or should be making.

5 In terms of what the public interest here is, I
6 think surly the public is better served by maintaining the
7 status quo while this litigation proceeds, again, in an
8 expeditious fashion. Rather than allowing the defendants to
9 go full steam ahead with their project and raise this plaza
10 in a irreparable way, particularly in light of my finding
11 there's a substantial likelihood that further court
12 proceedings would subsequently result in a finding the
13 project infringes on a public use easement, surely
14 maintaining the status quo while the court process can
15 proceed, again, expeditiously for the third time I'll use
16 that word, I think is what would you're the public.

17 As a result of that all, I find the applicable
18 factors all favor the grant of the injunction. I'm going to
19 grant the motion for preliminary injunction that was filed
20 by the plaintiffs. I'm going to issue a brief order putting
21 that order in writing today.

22 Let me suggest also to you the following before we
23 go. As I indicated, I think it's in everyone's interest to
24 resolve this matter expeditiously and to get to the merits
25 as quickly as we can. I know that the dispute has been

1 going on for a long time. And based on representations made
2 in argument that there's a lot of what would be discovery
3 that's already been done. I know you all have a scheduling
4 conference scheduled for sometime in October or something
5 like that, September or October?

6 MR. ZUCKERBERG: I believe it's mid September.

7 THE COURT: Mid September?

8 MR. ZUCKERBERG: Yea.

9 THE COURT: I would suggest we issue a track one
10 scheduling order today. And just get the case going today.
11 You won't have to come back here for the scheduling
12 conference. And that way we can move this case forward as
13 quickly as we can to get this resolved.

14 Does anyone have any issue with that?

15 MR. ROSS: We do not, Your Honor.

16 MR. ZUCKERBERG: What would those dates be, the
17 track one? Judge, track one would put plaintiff's at a
18 severe disadvantage. We have not had an opportunity to
19 conduct any meaningful discovery. Track one would have the
20 plaintiffs' experts due September 11th and we haven't even
21 begun the factual discovery.

22 THE COURT: That's the way our discovery orders
23 all work in every case, the Rule 26 reports are required
24 prior to the closed date of discovery. I understand that
25 can be something at issue. This is the only case that

1 someone has raised that issue. I think I'm perfectly
2 willing to be flexible within -- when is the closed date of
3 discovery?

4 MR. ZUCKERBERG: That -- the discovery closes on
5 Track one November 7th.

6 On Track 2, which is more typical track, discovery
7 closes December 18th. In light of the defendant's statement
8 that they wouldn't -- they're not even planning to close the
9 bank branch until December, I would ask for a Track two,
10 that would give us time.

11 I'd also note that the defendants just amended
12 their answer this week raising another issue of whether or
13 not the transfer from the Resolution Trust Corporation to
14 Crestar can extinguished the easement under a new theory.
15 And we have to now not only do discovery about what happened
16 in 1977, '76 but also what happened in 1992 to determine if
17 Crestar, as they alleges, a bonafide purchaser for value.

18 And the -- I will also say that the discovery we
19 need is -- involves some third parties trying to get
20 documents from Resolution Trust Corporation, trying to get
21 documents from entities which no longer exist in their
22 current form. We have to go back.

23 So I think the court should balance the need for
24 speed. It's really a complex case that would really be
25 Track three. But I think Track two with mid December close

1 of discovery would be a fair compromise so we could have
2 sometime. That would require our experts by October 10th.
3 And that's pretty quick because we need real estate experts
4 and, you know, perhaps other experts. And that would at
5 least give us the month of September, people are away pretty
6 much in August. That would give us 60 days to be able to
7 identify experts and get our discovery request.

8 THE COURT: Do you have a preference for Track
9 one.

10 MR. ROSS: Absolutely, Your Honor.

11 THE COURT: I mean I think that -- and that's what
12 I'm going to do. This case is different from other cases in
13 one primary way, which is I've enjoined a party from taking
14 what otherwise would be a perfectly legal action that they
15 would be free to do. Part of the balancing that I've done
16 here involves attempts to minimize the prejudice to the
17 defendants from the issuance of the injunction. I
18 understand it might be hard. It might require more
19 different pace work than usually. But given the issuance of
20 the injunction, I strongly feel that this case needs to go
21 much quicker than normal.

22 It might involve more work and different types of
23 work than normal, but I understand this isn't the normal
24 track that this type of case would be on. And I also
25 understand our scheduling tracks when they go to different

1 jurisdictions are all slower than what things would occur in
2 some places.

3 Again, I would be flexible dates within that
4 general structure, particularly if the parties are working
5 together and on the same page about getting things done.
6 But I am going to issue a Track one scheduling order today.

7 MR. ROSS: Would it be possible to also set a
8 trial date?

9 THE COURT: Why don't we -- I will say that my
10 calendar is not tremendously full. Setting a trial date is
11 not going to be an issue once we get to the point there's
12 going to be a trial.

13 MR. ROSS: One other issue, Your Honor, as I'm
14 sure Your Honor's aware, Rule 65-C requires that the
15 plaintiffs post a bond in connection with issuance of an
16 injunction. We would ask that a substantial bond be placed
17 here given the nature of the relief?

18 THE COURT: What are you asking for in terms of a
19 bond?

20 MR. ROSS: I would ask for \$20,000,000.

21 THE COURT: Where is that number -- I mean, I'll
22 set aside the tone you used in saying \$20,000,000, but where
23 is that number coming from?

24 MR. ROSS: Well there's going to be 50 condos --
25 if this development project goes forward, there's 50

1 condominium units. This is a deal that is worth tens of
2 millions of dollars. I think it's undisputed that --

3 THE COURT: But it still might be. It still could
4 be worth that.

5 MR. ROSS: But it's entirely possible, as Mr.
6 Simons testified and he was not contradicted at all, that
7 the mere issuance of an injunction may cause parties to get
8 cold feet and move away. So it could completely blow up the
9 deal.

10 THE COURT: It could. I mean I didn't -- I did
11 not -- I don't find, based on his testimony, that that is at
12 all a likely result.

13 MR. ROSS: There is no question that this is a
14 valuable piece of property. It's a substantial development
15 that's been in work for years. And Rule 65-C is written --
16 it's a requirement. It's a precondition, so we would ask
17 for a substantial bond given the nature of the relief they
18 requested and they've now received, they should be required
19 to post a substantial bond.

20 THE COURT: Mr. Zuckerberg?

21 MR. ZUCKERBERG: Well first of all, we're not
22 preventing the defendants from doing anything. They're not
23 doing a raised permit now. We're not stopping them, they
24 don't have their permits. They don't have their financing.
25 And they testified that the earliest they could possibly

1 move forward is in December because their branch is going to
2 be opened through December. So they're not suffering any
3 harm at this time.

4 They could also move forward at any time. It's a
5 16,000 parcel. The plaza's a 4000 square feet. They can
6 move forward at any time on their 75 percent of the plaza or
7 they can -- you know, they have the key to their own relief
8 in their pocket by just agreeing to develop the property and
9 preserving the plaza as everyone else did. So, they've
10 made -- they're making this -- they're overstretching in an
11 attempt to harvest all of the equity is of their own doing,
12 so we don't believe that.

13 THE COURT: Let me think about this, I'll get you
14 something on Monday or Tuesday regarding the bond.

15 MR. ROSS: May I just respond briefly, Your Honor?

16 THE COURT: Sure.

17 MR. ROSS: First of all, the sale of the land was
18 supposed to occur in October, that's obviously not going to
19 happen in light of the injunction. There's also a lag time
20 between the actual transfer of title and property and
21 commencement of the construction. So the idea that simply
22 because the SunTrust branch wasn't going to relocate before
23 December, does not mean that this transaction was going to
24 be on hold or not move forward at all until December, it's
25 quite the opposite.

1 THE COURT: Like I said, I'll get you something on
2 Monday or Tuesday about amount of the bond.

3 MR. ZUCKERBERG: Can I just make one other point
4 on that?

5 THE COURT: Sure.

6 MR. ZUCKERBERG: We had given them all of this
7 information in September of 2016. We had written them -- we
8 give them all the documents, Mr. Owens' letters, all the
9 evidence that we had presented at the preliminary injunction
10 hearing. The plaintiffs have provided them way back nine
11 months ago, they could have found a suit to quiet title and
12 they didn't. They sat on their rights and we had to wait
13 until the application of the raised permit, the plaintiffs
14 did, to have standing to come in here and the issue was
15 ripe. So the defendants waited that period of time.

16 They will get, Judge, at the end of this trial a
17 benefit. They will have a property with a clear title to
18 it, either a clear title to build on 75 percent of the
19 property, as the plaintiffs allege or a clear title to build
20 on 90 percent of the property as they will. But that's a
21 benefit to the defendant, because if these plaintiffs had
22 not come in and diligently pursued this, some other
23 plaintiff could come in and they would still have a cloud on
24 the title, which is a cloud on the title. They're providing
25 a benefit, because in this very short period of Track one,

1 the cloud is going to be removed and people are going to
2 know their rights.

3 And finally, the plaintiffs are community groups,
4 non-profits. They have very little funds for this. And if
5 it is the purpose of the preliminary injunction would be
6 defeated because they simply couldn't -- don't have
7 \$20,000,000. If they did they might just buy the property
8 themselves. But they don't have that type of money. It
9 would completely defeat what the court is trying to do,
10 which is to preserve it until it can be done on the merits.

11 THE COURT: Thank you.

12 Again, I'll get you something on this in the next
13 couple of days.

14 MR. ZUCKERBERG: Would the court also consider
15 finally on the Track one -- I know the court hasn't ruled on
16 Track one. Plaintiffs' experts are due on 9/11 which are in
17 30 case days. Discovery requests are available up to 10/10.
18 Would the court consider allowing the -- moving back the
19 expert discovery and we will name our witnesses. Obviously,
20 we'll make them available for deposition. But we just can't
21 have our witnesses our experts within 30 days, it's not
22 going to give us enough time.

23 MR. ROSS: I would point out we've -- they've
24 already served us with RFPs interrogatories and we've
25 responded to those. There's already been substantial

1 discovery.

2 THE COURT: Again, I'm going to have you try to
3 comply with the order. And if you -- all these difficulties
4 you're raising are hypothetical. If you make a good faith
5 effort to get this done and something in particular gets in
6 the way of getting it done by September 18th, you can let me
7 know. But I want to do everything we can to stick to the
8 schedule where it is today.

9 MR. ROSS: Okay.

10 THE COURT: All right, you can come forward and
11 get your order. Thank you. Have a good day.

12 (Proceedings concluded at 2:53 p.m.)

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CERTIFICATE

I, Mahalia Davis, an Official Court Reporter for the District of Columbia Courts, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced, upon the hearing in the case of Kalorama Citizens Association, et al v SunTrust Bank Company, et al, Civil Case Number 2017 CAB 4182, in said Court, on the 4th day of August, 2017.

I further certify that I have transcribed the foregoing 36 pages from said machine shorthand notes and reviewed same with the backup tapes, if any, to the best of my ability.

In witness whereof, I have hereto subscribed my name, this the 9th day of August, 2017.



Official Court Reporter