In The

Supreme Court of Virginia

RECORD NO. 100068

JOHN L. JENNINGS, t/a Jennings Boatyard, Inc.,

Appellant,

v.

BOARD OF SUPERVISORS OF NORTHUMBERLAND COUNTY,

Appellee.

BRIEF OF APPELLANT

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I.

STATEMENT OF THE NATURE OF THE CASE

This appeal presents the Court with two questions, the first – a long-festering riparian one – can counties in Tidewater Virginia through the guise of zoning ordinances disenfranchise both the Virginia Marine Resources Commission ("VMRC") and the U.S. Army Corps of Engineers ("USACOE") and preclude and/or control all commercial activities beyond the mean low watermark ("MLW") on state-owned bottoms; and the second is whether the Northumberland County (the "County") zoning ordinance as it applies to marinas is unconstitutional and the Supervisors' action in this case is arbitrary and capricious.

By claiming such jurisdiction, the County prevented the expansion of Jennings' existing marina by exercising grounds exclusively reserved to VMRC and USACOE and by substituting its business judgment for that of Jennings who had owned and operated the facility for the past 28 years.

Jennings claims that by virtue of Virginia Code §§28.2-1200 through 28.2-1205, the Commonwealth, through VMRC, has sole jurisdiction over the placement and regulation of boatyards and marinas upon its subaqueous bottoms and that such jurisdiction has never been delegated

or surrendered to counties or municipalities (hereinafter collectively referred to as “counties”).

The lower court held on three grounds that the Board’s zoning jurisdiction extended to all commercial improvements beyond MLW on state-owned bottoms: (1) §15.2-3105; (2) by one word, “water” in §15.2-2280, and “floating docks” and “gazebos” in §28.1-1205, and (3) Jennings’ marina was not commercial.

Jennings further claims that the lower court erred in holding the Board’s action on his application was not arbitrary and capricious; and that the County’s zoning ordinance as to marinas is unconstitutional and void.

It is within the foregoing context that this case comes before this Honorable Court.

II.

MATERIAL PROCEEDINGS IN THE TRIAL COURT

On November 4, 2005, John L. Jennings, t/a Jennings Boatyard, Inc. (“Jennings”) filed a bill for declaratory judgment and further relief (the “Bill”) against the Board of Supervisors of Northumberland County (the “Board”) alleging (App 1) that Jennings owns 12.5 acres on Cockrell’s Creek, a tidal, navigable body of water which is an inlet of Chesapeake Bay, upon which

he operates a commercial marina/boatyard; that Jennings wanted to add 46 additional slips and submitted the necessary applications to VMRC and the Board for a special exception zoning permit even though the slips would lie 300 to 400 feet beyond the MLW; that the Board took the matter up and requested a reduction in the number of slips and a riparian apportionment survey was then submitted by Jennings who then reduced the number of slips from 46 to 31; that the Board rejected the application stating that since there were other marinas in the creek with slips available for boaters there would be no justification for Jennings' expansion. The Bill alleged that the Board had no zoning jurisdiction as to any commercial uses of the state-owned bottom beyond the MLW, this being the sole jurisdiction of VMRC; that the Board had a duty to advise Jennings of this fact, and regardless of same, its decision merely substituted its business judgment for Jennings' and was arbitrary; and that the Board acted in bad faith causing Jennings to suffer monetary damages unnecessarily. It requested the court to hold the Board's decision invalid, void and vacate the same, and award damages and attorneys' fees.

The Board answered (App 9) denying that its decision was arbitrary and capricious and that it had zoning jurisdiction over commercial

improvements beyond the MLW. By requests for admissions, it admitted that Jennings had spent a total of $7,013 (excluding attorney's fees) in this matter.

Jennings filed a motion for summary judgment (App 24) and memorandum in support claiming the Board had no zoning jurisdiction, but regardless of same the Board's action was in bad faith, arbitrary, and capricious; and asking that the decision be declared void and monetary judgment entered for Jennings. After oral argument the court overruled the motion, to which Jennings took exceptions.

The case was tried on September 18, 2007, at which the Board put on no evidence. At the conclusion of the evidence Jennings renewed its motion for summary judgment (App 39). The court reserved its decision which it finally gave on September 4, 2009 by letter opinion (App 107), the final order, to which Jennings took exceptions, was entered October 13, 2009 (App 112).

III.

ASSIGNMENTS OF ERROR

The Court erred in the following particulars by:

1. Overruling Jennings' motion for summary judgment prior to the trial (error preserved on App 39) and again upon Jennings' renewed motion at the conclusion of the evidence (error preserved on App 79, 112).

2. Failing to hold that the Commonwealth has not relinquished its sole jurisdiction over the placement and regulation of commercial marinas and boatyards upon its subaqueous bottoms (error preserved on App 39, 112-114).

4. Not holding the provisions of the County Zoning Ordinance as to marinas to be unconstitutional and void (error preserved on App 39, 112-114).

5. Not granting judgment for Jennings upon the Bill (error preserved on App 112-114).

IV.

STATEMENT OF THE FACTS

The evidence showed that Jennings had operated a marina/boatyard on the creek for 28 years (App 60, 61) which consisted of a marine railway, shop, travellift, marina (mainly for power boats), and dry boat storage (App 42). That because of market demand for deep water sailboat slips Jennings wanted to add 46 of these (App 66). The prior year he added some of these deep water slips and they were rented immediately, even before the electricity was installed (App 66).

He hired a marine designer who not only filed an application with VMRC, but also for a special exception zoning permit with the County whose ordinance had no district for commercial waterfront, rather treated all marina applications as requiring special exception permits. The Board took up the application and requested the number of slips be reduced, so Jennings had a riparian apportionment survey prepared and accordingly amended its application to 31 slips (App 46, 60, 61).

The Board had no discussions of any other kind with Jennings about the application. It never came to count slips, inquire as to whether Jennings was operating at full capacity, what type of slips were being

applied for, or about parking, health department permits, or any other matter (App 65).

At no time did the Board inform Jennings that he was required to operate at full capacity, that all other marinas in the creek had to be at full capacity, that his piers had a set-back requirement, or advise him of any requirements or conditions he would have to meet to be allowed a special use permit (App 62, 63, 64). Co-owner, Sharon Jennings, testified that going into the hearing she heard supervisor Selph [*sic*, Self] inform the Board members, “They are not operating at full capacity”.

At the hearing only one person, Roy Headley, a business competitor who operated an adjacent marina, opposed the application saying Jennings already had “plenty slips and this was too much spreading out”. Said Supervisor Self, “There is already too much in this cove of the creek” and that “the marinas in the area are not at full capacity”. The Board then voted against the application and had the zoning administrator, by letter of October 17, 2005, advise Jennings that, “The Board felt that since there are currently three (3) marinas in the area, including yours, that have mooring slips available for boaters, there would be no justification for allowing an expansion at this time.”

At trial Mrs. Jennings testified that they have small slips and also dry storage; that if a slip is empty the boat could well be in dry storage. Continuing, she stated that her husband had had a stroke and she had to run the marina (App 64):

> Q. So, you know exactly what's going on at all times?
>
> A. I definitely know. I know what's going on. So I just feel if the County had informed us we had to show a need for the slips, since that was the reason we were turned down because we didn't need anymore slips. So, we could have done that, I could have provided a list of requests if that had ever been brought up. We just were not aware of that. So, even the money, the thousands that we spent on the riparian survey, since that didn't come into consideration, we didn't need to do that. I just feel that the Northumberland County Board of Supervisors should give Jennings Boatyard a legitimate reason for denying the permit to expand our business. And that's all.

Mrs. Jennings testified that Jennings was a commercial enterprise, open to the public that charged money for the rent and use of the piers and boat slips (App 66).

There is no dispute as to the facts or evidence in this case.

VI.

LAW AND ARGUMENT

1. The Commonwealth has sole jurisdiction over the placement and regulation of commercial marinas and boatyards upon its subaqueous bottoms. (Errors No. 1. and No. 5.)

A. Standard of Review

When reviewing a trial court's denial of summary judgment, this Court "review[s] the record applying the same standard a trial court must adopt in reviewing a motion for summary judgment, accepting as true those inferences from the facts that are most favorable to the nonmoving party, unless the inferences are forced, strained, or contrary to reason". *Fultz v. Delhaize America, Inc*, 278 Va. 84, 677 S.E.2d 272 (2009). Summary judgment is proper only when there are no material facts genuinely in dispute. *Carson v. LeBlanc*, 245 Va. 135, 427 S.E.2d 189 (1993); Va. Sup. Ct. Rules 3:18, 3:20. There are no facts in dispute in the instant case.

This Court reviews matters of law *de novo*. *Hubbard v. Dresser, Inc.*, 271 Va. 117, 624 S.E.2d 1 (2006).

B. Discussion of the Issues

Jennings says that the bed or bottom of Cockrell's Creek is owned by the Commonwealth; that the General Assembly, while delegating to local

authorities the right to regulate private, noncommercial piers by zoning ordinances out to the navigable line, has not relinquished its sole jurisdiction over the placement and regulation of commercial boatyards and marinas upon the subaqueous bottoms of the Commonwealth lying beyond the MLW.

Section 28.2-1200 states that all the beds of the bays, rivers, creeks and shores of the sea within the jurisdiction of the Commonwealth shall remain the property of the Commonwealth, more about which later.

Section 28.2-1202 extends the limits of highland owners to the low watermark, *but no farther*. Conversely, the Commonwealth owns the beds *up to MLW*. This Court has upheld and given effect to these statutes many times, e.g. *Taylor v. Commonwealth*, 102 Va. 759, 47 S.E.2d 875 (1904), and *Thurston v. City of Portsmouth*, 205 Va. 909, 140 S.E.2d 678 (1965).

Section 28.2-1203 requires permits from VMRC to encroach upon or over the beds under tidal, navigable waters (property of the state), but excepts the placement of private, noncommercial piers by riparian owners in waters opposite their lands [on their riparian rights].

Section 28.2-1204 states that every other use of the state's bottoms not authorized by the preceding statutes is within the jurisdiction of VMRC and it alone must issue permits for such uses.

Section 28.2-1205C states that permits for marinas or boatyards for commercial uses *shall be granted by VMRC* if they have a sewage permit issued by the Health Department. Paragraph B. of this section lists the voluminous studies and judgments that VMRC must make before issuing such permits.

As set forth in that certain Opinion of the Attorney General, 1985-86, 108, to the Hon. W. Tayloe Murphy, Jr., (copy attached as Exhibit 11 to the motion for summary judgment (the "Opinion"), §28.2-1203A.(5) [formerly 62.1-3(10)] provides statutory authorization for the placement of private piers for noncommercial purposes by riparian owners provided private piers shall be wholly located on such owner's riparian rights and not extend beyond the navigation line or lawful private pier lines established by proper authority. The Attorney General states that this Code sub-section exempts *private, noncommercial* piers from the permit requirements of VMRC for encroachments on the Commonwealth's subaqueous bottoms and thus by the enabling statute §15.1-486(c) [now §15.2-2280], delegated the

Commonwealth's authority to regulate private, noncommercial piers to localities' reasonable zoning powers.

Specifically, the Opinion states that "a local government may by ordinance regulate the construction of private, noncommercial piers, consistent with the purposes for which zoning ordinances may be enacted". It painstakingly delimits private, noncommercial piers from commercial piers or wharves *eight times* - screaming by inference that counties cannot regulate commercial ones.

Clearly, every use of state-owned bottom other than private, noncommercial piers under §28.2-1203A.(5) is within the sole jurisdiction of VMRC. It was error for the court to have overruled Jennings' motion for summary judgment.

2. The Legislature has not granted counties zoning jurisdiction to regulate commercial improvements lying beyond the MLW. (Errors No. 2. and No. 5.)

A. Standard of Review

This Court reviews matters of law *de novo*. *Hubbard v. Dresser, Inc.*, 271 Va. 117, 624 S.E.2d 1 (2006).

B. Section 15.2-3105 does not grant zoning jurisdiction to counties

The lower court erred in relying on §15.2-3105. That section provides as follows:

> The boundary of every locality bordering on the Chesapeake Bay, including its tidal tributaries (the Elizabeth River, among others), or the Atlantic ocean shall embrace all wharves, piers, docks and other structures, except bridges and tunnels that have been or may hereafter be erected along the waterfront of such locality, and extending into theChesapeake Bay, including its tidal tributaries (the Elizabeth River, among others), or the Atlantic Ocean. However, only the wharves, piers, docks, or other structures which lie within the territorial jurisdiction of this Commonwealth shall be embraced within the boundary of such locality.

It is difficult to understand how it could possibly construe §15.2-3105 as giving zoning jurisdiction to counties. This section is found under Article 1 of Chapter 31 which chapter is entitled "Settling Boundaries Between Localities", Article 1 being entitled "Boundary Lines Established by Commissioners". Thus, the purpose of Chapter 31 is to settle the boundary lines between counties (and other localities). Under Article 1, and when there is a boundary dispute between counties, the Commissioners (appointed by the circuit courts for the respective localities) are given the authority to settle the boundaries. Section 13.2-3000 ("Commissioners to Settle Disputed Boundary Lines"); see also *City of Newport News v.*

Warwick County, 191 Va. 591, 61 S.E.2d 871 (1950) (in a proceeding to establish the true boundary line between Warwick and York Counties, the City of Newport News was entitled to appear before boundary commissioners and present such evidence as it had concerning the boundary liens). The other sections under Article 1– §15.2-3101 ("Survey and Plats"), §15.2-3102 ("Report of Commissioners"), §15.2-3103 ("Compensation of Commissioners, etc."), §15.2-3104 ("Procedure When Commissioners Fail to Agree") — set forth the manner and procedures the Commissioners must follow when settling the boundary dispute.

Section 15.2-3105 is also found under Article 1 which is only triggered when the Commissioners are attempting to settle a boundary dispute and directs the Commissioners that when settling the boundary lines the boundaries may embrace wharves, piers, docks and certain other structures. In various locations counties lie right across somewhat narrow tidal rivers from each other such as King William/New Kent, James City/Gloucester, Caroline/Westmore- land, Middlesex/Gloucester. Boundary disputes between such counties would invoke §15.2-3105.

C. Neither the words "water" in §15.2-2280 nor "floating docks" and "gazebos" in §28.1-1205 is a grant by the Commonwealth to counties of zoning authority over commercial improvements on state-owned bottoms. (Errors No. 2. and 5.)

The General Assembly has made *no* delegation to localities of zoning authority to regulate marinas, boatyards and other commercial uses upon the state's bottoms. Indeed, §28.2-1204 lodges the regulation of all state-owned bottomlands not authorized under subsection A of §28.2-1203 (private piers for noncommercial purposes, in particular) in VMRC alone. Also, §28.2-1205C. states that permits for <u>marinas</u>, <u>boatyards and other commercial</u> uses *shall be granted by VMRC*.

Again, clearly there is no delegation of power to localities to impose zoning laws on commercial marinas and boatyards; and jurisdiction and authority reserved unto the state and not delegated by the state remain in the state. As this Court held in *Whiting v. Town of West Point*, 88 Va. 905, 14. S.E. 698, 15 L.R.A., 860, 29 AM. St. Rep. 750 (1982), a municipality has no element of sovereignty. It is a mere local agent of the state, having no other powers than such as are clearly and unmistakably granted by the state.

Counties have zoning jurisdiction over the highland and can decide where in their counties they want this type of commercial use to be located, what parking and health facilities are necessary, what height restrictions will apply to highland structures, where and what size access roads are to be located, and other reasonable related factors (but they may not make these up as they go along).

They can extend reasonable zoning regulations past MLW to the line of navigability as they relate to *private, noncommercial piers*, but they cannot assume the mantles of VMRC and USACOE as to commercial structures; otherwise, the legislature would not have bothered to put VMRC in the picture at all, it would have simply provided that each county would own and have jurisdiction over all submerged lands opposite their respective counties. See *People's Counsel for Baltimore County v. Maryland Marine Manufacturing Co., Inc.*, 316 Md. 491, 560 A.2d 32 (1989) holding that state-owned tidal bottom-lands are not subject to the county's zoning authority in the absence of a clear and specific provision in the state zoning enabling act.

The court decided that the one word "water" in §15.2-2280 granted the Board jurisdiction over all commercial uses of state-owned bottoms —

out into Chesapeake Bay, across the Intercoastal Waterway and on out to the three mile limit it is supposed! Its opinion is not only wrong, it is respectfully submitted that it is bereft of judicial common sense. If the Legislature had intended to subject *commercial* activity to local zoning laws it would have said so and not limited it by the repeated use of the words "private" and "noncommer- cial". Clearly, the "water" referred to would mean lakes, ponds and non-tidal rivers.

The lower court claimed that the words "local ordinances" in §28.2-1203A.(5) about floating docks and gazebos was a grant by the legislature to counties of zoning powers over *commercial* improvements lying beyond MLW. This so obviously refers to private, noncommercial piers as allowed in this *very section* – over which counties may exercise zoning powers – that further discussion is needless to expose.

Section §28.2-1205 states what factors shall be considered by VMRC before issuing a permit. It must consider the provisions of Article XI, §1 of the Virginia Constitution plus Virginia's public trust doctrine, plus, "in addition to other factors", 11 other specific factors. Moreover, *six state agencies* must review, approve and report to VMRC (plus its own staff report) on every commercial application before VMRC can issue a permit.

All of these factors pertain to commercial, non-private uses and it is submitted that these should be quite sufficient to protect the citizens of any town, city or county, for whatever else could "local ordinances" in this section mean but zoning ordinances under A.(5) of the same statute.

Section 28.2-100 defines 29 counties and 17 cities as constituting "Tidewater Virginia". The Court can visualize 46 separate, helpless jurisdictions attempting to comply with these mandates in exerting control over marinas, boatyards and all other commercial activities on the state's subaqueous bottoms of creeks, bays and rivers that flow into and past their localities. Uniformity of laws and their informed regulatory application is one of the main reasons we have state governments. The eco-systems of the subaqueous bottoms of our state are too fragile to allow piecemeal, politically influenced, willy-nilly, non-informed regulation by 46 separate jurisdictions.

D. Jennings' marina and boatyard is a commercial enterprise and as such is free of the County's zoning ordinance. (Errors No. 2. and 5)

In its letter dated November 28, 2006 to the lower court (App 26), the Board's counsel stated that "the County permits commercial piers by right and, unlike marinas, they are subject solely to the jurisdiction of

VMRC", then claimed Jennings' marina was not a commercial enterprise. It was argued at trial by Jennings (App 83) that this claim by the County was preposterous. The evidence (App 66) was that it was commercial, it was open to the public and that Jennings charged money for the rent and use of the piers and boat slips. Obviously, it is commercial and such an absurd distinction could only be known on the other side of the looking glass.

Regardless of the repeated statutory distinctions, the lower court grazed beyond the edge of credence in its attempt to uphold this claim by the flocculent use of an oxymoronic phrase (App 92):

"It is", it said, "a private commercial pier"[!]

As opposed to a commercial commercial pier, it is supposed.

The undisputed evidence shows it is commercial and as such it is free of local political fetters.

E. The Commonwealth did not convey away its ownership rights of tidal bottoms within the boundaries set out in the legislative acts creating counties. (Errors No. 2. and 5.)

At oral argument upon Jennings' appeal petition a question was raised as to whether boundaries set out in legislative acts creating counties would have conferred ownership to the counties of those portions of

bottoms lying beneath tidal waters within these boundaries; *viz*. did the state thereby convey away its ownership rights and permit the counties to impose zoning control over the same? The answer is: certainly not.

Prior to Virginia becoming an English colony, the bottoms under tidal, navigable waters there were held by the King, before and after Magna Charta, in his public and regal character as the representative of the nation in trust for them as part of the *jus publicum*. What was not granted away by the King remained in the Crown for the common benefit of the people, including those of its colonial possessions. When the American Revolution took place the people of each state became themselves sovereign and in that character held the absolute right to all their navigable waters and the soils under them for the common use, subject only to the rights since surrendered by the Constitution to the general government (*e.g.* navigation). *Commonwealth v. Morgan*, 225 Va. 517, 303 S.E.2d 899 (1983); *McCready v. Comm*., 27 Gratt 985 (1876); *Shively v. Bowlby*, 152 U. S. 1, 38 L. Ed. 331, 14. Sup. Ct. 548 (1894).

In Virginia these tidal beds are held by the Commonwealth in trust for the people in common. This ancient common law doctrine has been codified by statutes in Virginia: §28.1-1200, the descendent of the 1779

statute, c. III, Hening Statutes At Large 50; and §28.1-1202, the descendent of the 1679 statute, 2 Hen. Stat. 456 which provides that the state owns these bottoms *up to the low watermark* of the highland.

This Court held in *Zappulla v. Crown*, 239 Va. 566, 391 S.E.2d 65 (1990), Justice Russell writing the opinion of a unanimous court, that "Code §62.1-3 (now 28.2-1204) vests in the MRC jurisdiction to issue permits for 'reasonable uses of state-owned bottomlands, including ... the placement of wharves ... by owners of riparian lands, in waters opposite such riparian lands ...' <u>Administrative approval is required for such uses of subaqueous beds because title to the bed is vested in the Commonwealth, subject to use by the people in common</u>, unless such beds have been conveyed by special grant or compact".

Also, §28.2-1205A. states that "the Commission shall also consider the public and private benefits of the proposed project and shall exercise its authority under this section *consistent with the <u>public trust</u> doctrine as defined by the common law of the Commonwealth* adopted pursuant to

Section 1-200[1] in order to protect and safeguard the public right to the use and enjoyment of the subaqueous lands of the Commonwealth held in trust by it for the benefit of the people as conferred by the public trust doctrine and the Constitution of Virginia".

And, in final answer to the question raised, from the original organization of the Commission up until 1970, every single pier placed in any tidal body of water in this state had to have a permit issued by the Commission of Fisheries, now known as VMRC.

For at least 150 years this was the case; however this changed on April 5, 1970, when the General Assembly adopted §62.1-3(10), Acts of Assembly, 1970, c. 621, now §28.2-1203A(5), permitting the placement of private, non-commercial piers by riparian owners on their riparian rights without a permit from VMRC, (which by inference allowed counties to regulate these private piers by zoning ordinances). This state regulation of *all* improvements for all those years surely nullifies any notion that the legislative grants incorporating counties within such boundary lines

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[1] "The common law of England, insofar as it is not repugnant to the principals of the Bill of Rights and Constitution of this State, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly."

conferred any jurisdiction to them whatsoever over the tidal bottomlands owned by the state and held in trust for all the people of this Commonwealth.

3. The provisions of the Northumberland County zoning ordinance as to marinas is unconstitutional and void and the Board's actions thereunder were arbitrary and capricious. (Errors No. 4 and 5.)

A. Standard of Review

This Court reviews matters of law *de novo*. *Hubbard v. Dresser, Inc.*, 271 Va. 117, 624 S.E.2d 1 (2006).

B. Discussion of the Issues

The County's zoning ordinance has no zoning district for commercial waterfront as many counties do, but handles marinas with special exception permits. Section 148-95(A), special exceptions, are treated in Section 148-138(A) and (B) in the ordinance (submitted to the court in oral argument (App 70). These are the only mention of special exceptions in the whole ordinance.

Subparagraph (A) says the location of a permitted special exception shall require in addition to a zoning permit and certificate of zoning compliance, a special exceptions permit issued by the governing body which shall be subject to such conditions the governing body deems

necessary "to carry out the intent of this chapter." This last phrase having solely to do with conditions. Subparagraph (B) states unless otherwise specified by the governing body, a special exceptions permit will last one year. And that's it.

The ordinance has no objective criteria stated, no prescribed standards, no procedures to follow, and no sufficient outlines of specified standards or definite factors to be considered. It is left entirely to the sole, unrestrained, subjective discretion of the Board.

In *Cole v. City Council of Waynesboro*, 218 Va. 827, 241 S.E.2d 765 (1978), this Court held that the ordinance under which the City acted in granting special exceptions and which reserved to Council authority to issue special exceptions or use permits in any zoning district in the City whenever in its sole discretion such action was justified by public necessity and convenience and general welfare without establishing clear-cut standards and a definite procedure to be followed in issuing special use permits, is invalid. The Court said on page 7 in paragraph 3:

> "One who owns land always faces a possibility of it being rezoned. However, our policy" (meaning the Court) "which holds that permissible land use should be reasonably predictable assures a landowner that such use will not be changed suddenly, arbitrarily, or capriciously, but only after a period of investigation and community planning and only where

> circumstances substantially affecting the public interest have changed."

Continuing, it said,

> When the governing body of any locality reserves unto itself the right to issue special exceptions permits, then the ordinance must set forth the purposes and intents of the zoning ordinances *and contain sufficient outlines and standards for enacting and administering them*. The action must be taken within the framework of the zoning ordinances and state statutes on zoning because a special exception and a use permit involve land use and that is what zoning is all about. Therefore, their actions must be measured by zoning consideration, not merely by whether such actions are reasonable or are arbitrary and capricious. The legality of the ordinance is to be tested not by what has been done under it, but by what may by its authority be done. Accordingly, for the reasons assigned in this opinion the ordinance as adopted by the City of Waynesboro is declared to be invalid."

Ames v. The Town of Painter, 239 Va. 389, S.E.2d 702, is a 1990 case. It has to do again with the special use permit. In this case the Circuit Court reversed the Board and dismissed the application. This Court held that the record was insufficient to sustain the granting of the permit (the opposite of what happened in the instant case). This opinion stated:

> "Where the courts are called upon to review the acts of officials, agencies, and boards exercising delegated legislative powers, the inquiry must ordinarily be whether the official, agency, or board has acted arbitrarily or capriciously or rather *whether it has acted in accordance with the policies and standards specified in the legislative delegation of power*. That inquiry becomes necessary because delegations of legislative

> power are valid *only if they establish specific policies and fix definite standards to guide the official, agency, or board in the exercise of the power*. Delegations of legislative power which lack such policies and standards are unconstitutional and void."

Further, the Court held that when the record is silent there is no basis for a reviewing court to find that any consideration has been given to legislative standards.

In the County's ordinance in the case at bar, no legislative standards were prescribed. Excerpts from the Middlesex County zoning ordinance concerning special exceptions were tendered to the court by way of illustration (App 75, 76) showing that throughout the ordinance in every situation where a special exception is permitted, the next section following states special exception criteria; the purpose obviously being that most ordinances have criteria and standards by which any special use is to be either approved or rejected.

Examining the Board's denial of Jennings' application, Headley, a competitor adjoining Jennings on the same creek, was the only person objecting. And what did he say? That Jennings already had plenty of slips and it was too much spreading out. In other words, Jennings should not have any more than Headley had: that was enough for Jennings because it might hurt Headley's business.

This was echoed by Supervisor Self who said there is already too much in this cove of the creek. Then Supervisor Self declared the marinas in the area are not at capacity. So, in his judgment, all the marinas in the creek, whether Jennings' was or not, would have to be at capacity before any of them could expand.

There were no studies or evidence of any kind given before the Board or at trial to substantiate any of this.

What specific factors in the ordinance state an application will not be granted if there is too much in the cove or that all of the marinas must be full before a permit can be granted? Well, Mr. Self was not finished.

Notwithstanding the riparian apportionment survey, this extension, said he, is too close (out in the water) to the neighbors, no doubt referring to Headley, thereby arrogating to the Board the power of USACOE (and possibly VMRC also) as to navigation. Then he said Jennings' proposed piers would extend into the ten-foot navigation waters (meaning to or past the line of navigability[2]). So Self not only set up the Board as a substitute

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[2] This line was established in this very creek by the case of *Rice v. Standard Products Company,* 199 Va. 380, 99 S.E.2d 529 (1957).

USACOE and VMRC, it was also getting into the riparian rights apportionment business.

That was all. No other consideration was stated or made a part of the record.

Plainly, the Board substituted their business judgment for that of Jennings who had been in business for 28 years at this location; all, it would seem, to protect a competitor. Moreover, the Board had no cognizance of the fact that the slips applied for were deep-water slips for sailboats.

Jennings was blind-sided. He was not told that he had to have every slip rented or that every slip in every other marina in the creek must be rented before he could apply for an expansion.

So without any jurisdiction of any kind whatsoever over Jennings enlarging his marina, the Board took his application, took his money, took the matter up, tabled it, requested a reduction in the number of slips, which was complied with, then denied his application because it was “too close to a neighbor’s property and there was too much activity in the creek”.

The utter lack of any objective specified standards or definite factors that the Board had to consider in determining whether to grant this, or any

special exception, is the issue here. An ordinance as to special exceptions that lets anything go at the total subjective whim of the Supervisors is invalid, void, unconstitutional, as were these arbitrary, subjective, unfettered reasons used by the Board to deny Jennings' application; especially after leading him down the primrose path without a clue as to what in the Board's sole judgment he was supposed to do to comply with the ordinance.

The Board set themselves up as a super USACOE, a super VMRC, a super court in apportionment of riparian rights, and a super body with the power to make up regulations as they went along. Not having any standards whatsoever for special exceptions, the public is at the Board's total caprice. Whoever has more political pull with the Board will win. Deny one, grant another. "When it comes to marinas we'll say who gets what and who doesn't get what." This is an arbitrary and uncontrolled exercise of discretion.

The lower court also rested it's decision to uphold the ordinance on the case of *Bollinger v. Roanoke County*, 217 Va. 185, 227 S.E.2d 682 (1976), a case as factually inapposite as possible to the instant case and decided years before *Cole* or *Painter*. In *Bollinger*, the Board of

Supervisors had done “thorough studies” and “numerous tests” and after “due deliberation”. Here, the Board did not even set foot on Jennings’ property, much less make *any* studies - thorough or otherwise - as to vacancies, capacity, types of slips being applied for, or anything else. It did not even know how many marinas there were in Cockrell’s Creek! (App 63). This was a rank, arbitrary and illimitable exercise of discretion, and the County’s zoning ordinance is unconstitutional and void for permitting such cupidity.

But far more is at stake here. Notwithstanding the lack of jurisdiction aforesaid, by the use of special exception/use permits that have no objective criteria and where rules are made up after the fact, petty political and/or popularity considerations can terminate any marina-related or other commercial application and foreclose the knowledgeable, non-biased consideration by VMRC and the other state agencies. This is not just unfair, it is arbitrary, capricious and unconstitutional.

Why the lower court would go to such extremes to insist that people who, by no fault of their own, have no expertise in the subject whatsoever are empowered to extinguish with an unbridled whim the rights granted by

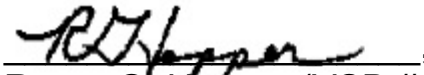
the Code of Virginia to commercial boatyards and marinas can scarcely be imagined.

VII.

CONCLUSION

For the foregoing reasons, Jennings asks this Court to reverse the final order of the lower court in its entirety (a) holding that the County has no zoning jurisdiction over commercial improvements lying beyond the MLW on state-owned bottoms in tidal, navigable waters, (2) declaring the County's zoning ordinance as to marinas to be invalid and void, (3) holding that the Board's actions with regard to Jennings' application was arbitrary and capricious, (4) awarding recovery of his costs in this Court, and (5) ordering a refund of his $500 cash appeal bond posted with the Clerk of the Northumberland Circuit Court.

Respectfully submitted,
JOHN L. JENNINGS, t/a
Jennings Boatyard, Inc.
By Counsel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CERTIFICATE

I hereby certify that, pursuant to Rule 5:26(h) on this 2nd day of August, 2010, fifteen bound copies of this Opening Brief of Appellant and Appendix have been hand-filed with the Clerk's Office of the Supreme Court of Virginia, and three bound copies of the Opening Brief of Appellant and two bound copies of the Appendix have been served via United States Mail, postage pre-paid, to opposing counsel at the following address:

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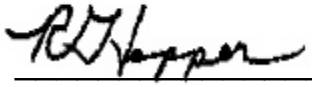
A digital copy (via CD) of this Brief along with a digital copy of the Appendix was also hand-filed with the Clerk's Office of the Supreme Court of Virginia this same date.



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