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.

REPLY BRIEF OF APPELLANT

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APPELLANT'S REPLY BRIEF

John L. Jennings, t/a Jennings Boatyard, Inc. ("Jennings") pursuant to Rule 5:29, Rules of Supreme Court of Virginia, submits this brief in reply to the Appellee's Brief of Board of Supervisors of Northumberland County (the "Board"). This brief will reply to the argument headings as used in the Board's brief.

I.

LAW AND ARGUMENT

The opening paragraph of Appellee's Brief conclusively demonstrates the impossibility of its argument. "Had Jennings been granted the special exceptions by the County, the VMRC and the USCOE would both have had the opportunity to review and decide on the proposal." But they did not grant the permit and thereby precluded any consideration of any kind whatsoever by VMRC and USACOE.

Riparian owners have the absolute right under §§ 62.2-164 (which codifies the common law) and 28.2-1305A.5. to place a private pier for noncommercial purposes in waters opposite those lands out to the line of navigability if they do not exceed certain dimensions set by the latter statute. Even though counties, cities and towns (collectively, "counties")

may have zoning jurisdiction over such private, noncommercial piers they cannot preclude them from being built if they comply with the dimensions set forth in this section of the Code of Virginia.

Not so under the Board's claim of "concurrent jurisdiction" over commercial boatyards and marinas. Under their theory a Board of Supervisors may nip in the bud any and all commercial applications by riparian owners and prevent not only the initial wharfing-out, but any additions to existing slips (and boatyard facilities) just as the Board did in this very case.

This is illimitable discrimation in its crassest form, a fatal flaw which permeates and abrogates the Board's entire position in this case.

The Board's last sentence in its opening paragraph claims this Court has not granted an appeal on the issue of whether the Board's actions were arbitrary and capricious, but whether its zoning ordinance as to marinas in unconstitutional. Jennings submits that if the ordinance is unconstitutional, which it is, then any actions by the Board thereunder would be arbitrary and capricious, which they were.

A. The County and the Commonwealth cannot both exercise jurisdiction over the placement and regulation of commercial marinas and boatyards upon the Commonwealth's subaqueous bottoms.

The Board admits that §§ 28.2-1203, 1204, and 1205 subject marinas to the permitting process of VMRC. They then claim that because none of the sections state that VMRC's jurisdiction is exclusive or expressly prohibits the exercise of local jurisdictions in the regulation of commercial activities in tidal waters, the Board automatically has such powers and wins this case by default. Unfortunately for the Board, this is not the law.

The County is a mere local agent of the state, having no other powers than such as are clearly and unmistakably granted by the state. *Culpeper v. VEPCO*, 215 Va. 189, 192, 207 S.E.2d 864, 867 (1974); *Whiting v. Town of West Point*, 88 Va. 905, 14. S.E. 698, 15 L.R.A. 860, 29 AM. St. Rep. 750 (1892).

Then, says the Board in a circuitry of equivocation, "if there is an exemption of private noncommercial piers from VMRC jurisdiction under § 28.2-1203, there <u>should</u> be a similar exemption of the counties' jurisdictions for commercial activities and such an exemption is not found anywhere in the Code".

It seems rather elementary that since the Commonwealth owns all the tidal bottoms up to the MLW, that if it desires to exempt little private, noncommercial piers from its permitting process (no doubt having been inundated by applications) and letting counties govern this on a very limited extent by zoning, it does not have to make a corresponding surrender of its jurisdiction over commercial improvements to the zoning jurisdiction of counties.

Notwithstanding the Attorney's General's opinion, § 28.2-1203A.5. is the only grant – although a somewhat oblique one – of very limited local zoning authority over private, noncommercial piers which are exempted from having to have a VMRC permit by this very code section. But this is a very qualified exemption because (a) the Commonwealth is only giving up jurisdiction over a small amount of square footage of its tidal bottoms, (b) if any adjoining property owner objects to a proposed roof structure then VMRC will take over the whole permitting process, and (c) it incorporates the requirement of § 28.2-1205D. that any of these private piers that will exceed 100 feet will require a VMRC permit.

Jennings did not, as stated in the second paragraph of page 4 of the Board's brief, "accept § 15.2-2280 as the vesting statute for the Board's

authority to regulate piers under its reasonable zoning powers" by setting forth the Attorney General's opinion, he merely quoted the opinion. The reason it cannot be ignored is because the words "local ordinance" appear three times in § 28.2-1203A.5., not because the one word, "water" appears in § 15.2-2280. However, by the opinion delimiting private, noncommercial piers from commercial piers or wharves eight times, it is absolutely clear that he meant that Counties cannot regulate commercial improvements on the Commonwealth's tidal bottoms. And for good reason, as it will subsequently appear.

Also, § 28.2-1205.C requires that VMRC grant permits for marinas, boatyards and other commercial uses. It does not share this jurisdiction.

On page 5 of its brief the Board tries its best to apply § 15.2-3105 out of its true context: being part of a boundary line suit chapter where it can only come into existence where Commissioners are attempting to settle a boundary dispute between counties. It confers no zoning jurisdiction on counties.

On page 6, the Board once again proffers the utopia of "current jurisdiction" by suggesting "inconsistencies" would ensue if counties could not subject marinas to zoning regulation – why, it states as its sole

example, there may not be sufficient additional parking. The Board must surely know that every county has off-street parking regulations that apply to all commercial uses. [It is a moot point in the case at bar: Jennings owns 12 acres of land surrounding his boatyard/marina, not that anyone from the Northumberland County zoning office has ever been there].

The brief proceeds to claim that six jurisdictions, other than the Northen Neck, regulate marinas through zoning. This is interesting because the Board put on no evidence at trial and, as the transcript clearly shows, it was not so argued at trial. It is also remarkable because it does not tell this Court of the scores of jurisdictions that have Commercial Waterfront Districts wherein marinas and boatyards are permitted as a matter of right, and whether any of the six so referred to are therein included.

B. The provisions of the Northumberland zoning ordinance as to marinas are unconstitutional.

In a vain effort to cure the County's lack of any objective standards governing the granting of denial of special exception permits as applied to marinas, the Board ignores the plain holdings of the *Bollinger*, *Cole*, and *Ames* cases. Moreover, it attempts to avoid its ordinance's utter absence of ay objective criteria, standards, procedures to follow or definite factors to

be considered by suggesting that it acted to protect the safety and welfare of the citizenry, when if fact it acted to protect one of Jennings' competitors, the only solitary soul who objected to the application.

Specifically, it argues that its pronouncements: "there is already too much in this cove of the creek", and "this extension is too close to the neighbor's property", and "extends into the 10-foot navigational waters on the survey" (it omitted "they are not operating at full capacity", and "the marinas in the area are not at full capacity", and "since there are currently three marinas in the area, including yours, there would be no justification for allowing an expansion at this time") were merely badges of "good zoning practices" and were a "sufficient basis" for their action.

Jennings has thoroughly rebutted this selective discernment of the facts and these baseless assertions on pages 26 through 30 of his Brief of Appellant to which pages the Court is respectfully exhorted to re-read.

When a Board of Supervisors decides navigational and riparian rights location/infringement issues they not only wrongfully arrogate to themselves the jurisdiction of both USACOE and VMRC, but of the Circuit Courts; when they substitute their business judgment for that of an applicant's 28 years of experience at that location, especially when it is to

protect one of his competitors; and – worthy of the Mad Hatter – when they make up unwritten and unstated after-the-fact rules, such as Jennings having to be at full capacity and the other marinas in the creek likewise having to have no vacancies; then they are clearly beyond the pale of constitutionality.

The Board professes it is not satisfied with the myriad factors § 28.2-1205 imposes on VMRC to consider, not to mention the six state agencies that must review, approve and report to it plus its own staff report and regulations (the Siting of Marinas Regulations – found on its web site – alone consumes five single-spaced pages) because it would create inconsistencies. The inconsistencies of which it speaks no doubt being its self-acclaimed sole right to veto any application involving commercial improvements on the Commonwealth's tidal bottoms, thereby preventing any consideration thereof by VMRC and USACOE.

The problem with this, other than not being the law, is that it results in rank discrimination. The Board cannot prohibit riparian owners from having private, noncommercial piers opposite their lands, rights vouchsafed them by §§ 62.2-164 and 28.2-1205A.3. But under its theory – and practice – the Board can absolutely prevent any commercial improvements from

being placed or added to by riparian owners, and this upon the merest arbitrary or capricious notions as amply demonstrated in this very case.

Why counties (if any there be outside of the Northern Neck) would be obsessed with having this veto power is not hard to imagine: the words ego and power spring instantly to mind; so that no jot of the little meed of homage to their individual selt-importance could by any possibility be overlooked; protecting friends and supporters being part and parcel thereof.

An unbridled ordinance that allows and encourages such rampant abuses is an affront to the law, fairness, reality and proportion. The Board lacks both the jurisdiction and constitutional right to have done such in this case.

II.

CONCLUSION

For the foregoing reasons and those in his Brief of Appellant, Jennings prays that the Court grant the relief therein requested.

Respectfully submitted,

JOHN L. JENNINGS, t/a
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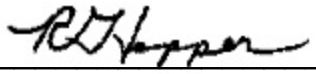
By counsel



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CERTIFICATE

I hereby certify that, pursuant to Rule 5:26(h) on this 3rd day of September, 2010, fifteen bound copies of this Reply Brief of Appellant have been hand-filed with the Clerk's Office of the Supreme Court of Virginia, and three bound copies of the Reply Brief of Appellant have been served via United States Mail, postage pre-paid, to opposing counsel at the following address:

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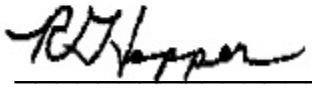
A digital copy (via CD) of this Brief was also hand-filed with the Clerk's Office of the Supreme Court of Virginia this same date.



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