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 APPELLEE

W. Leslie Kilduff
VSB #15887
BURKE & KILDUFF, P.C.
P.O. Box 1801
48 S. Main Street
Kilmarnock, Virginia 22482
Telephone: 804-435-0851
Facsimile: 804-435-0551
E-mail: bkpc@bkpclaw.com

Counsel for Appellee

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES ii

1. STATEMENT OF THE NATURE OF THE CASE 1

2. STATEMENT OF FACTS 2

3. LAW AND ARGUMENT 2

   1. The County and Commonwealth both exercise jurisdiction over the placement and regulation of commercial marinas and boatyards upon the Commonwealth's subaqueous bottoms. (Errors No. 1, 2 and No. 5) 2

      A. Standard of Review 2

      B. Discussion of the Issues 2

   2. The provisions of the Northumberland County zoning ordinance as to marinas are constitutional (Errors No. 4 and 5) 7

      A. Standard of Review 7

      B. Discussion of the Issues 7

TABLE OF AUTHORITIES

Page(s):

Cases:

Ames v. The Town of Painter,
239 Va. 343 (1990) 9

Bollinger v. Roanoke County,
217 Va. 185 (1976) 8

Cole v. City Council of Waynesboro,
218 Va. 827 (1978) 8

Statutes:

Va. Code § 15.1-486C.....3

Va. Code § 15.1-491.....8

Va. Code § 15.2-2280 ..... 3, 4, 5

Va. Code § 15.2 2286 8

Va. Code § 15.2-3105.....5

Va. Code § 28.2 2

Va. Code § 28.2-1203 ..... 2, 3, 4

Va. Code § 28.2-1203(A) 3

Va. Code § 28.2-1203(A)(5) 3

Va. Code § 28.2-1204.....2

Va. Code § 28.2-1205 3

Va. Code § 62.1-3(10) 3

Other:

Northumberland County Zoning Ordinance § 148-137 10

1.

STATEMENT OF THE NATURE OF THE CASE

The County disagrees that this case involves the question of whether the counties through this zoning ordinance can disenfranchise the Virginia Marine Resources commission ("VMRC") and the U.S. Army Corps of Engineers ("USCOE"). Rather, the question is whether the counties through zoning can exercise concurrent jurisdiction with those agencies as is the existing practice. Had Jennings been granted the special exceptions permit by the County, the VMRC and the USCOE would both have had an opportunity to review and decide on the proposal. The County agrees that the second issue is whether the zoning ordinance of Northumberland County as is applies to marinas is unconstitutional. However, this Court has not granted an appeal on the issue of whether the Board's action was arbitrary and capricious.

2.

STATEMENT OF FACTS

The County agrees with the statement of the facts as set forth in Jennings' brief.

3.

LAW AND ARGUMENT

1. The County and Commonwealth both exercise jurisdiction over the placement and regulation of commercial marinas and boatyards upon the Commonwealth's subaqueous bottoms. (Errors No. 1, 2 and No. 5)

A. Standard of Review

The County agrees that there are no facts in dispute in the instant case and that this Court reviews matters of law de novo.

B. Discussion of the Issues

The County readily acknowledges the grant of jurisdiction to the VMRC as contained in Chapter 28.2 of the Code of Virginia. It acknowledges § 28.2-1203 requires permits from the VMRC for encroachments upon or over the beds of tidal, navigable waters for commercial purposes; § 28.2-1204 authorizes the VMRC to issue permits for all responsible uses of the bottom lands not

authorized under subsection A of § 28.2-1203, and § 28.2-1205 indicates that marinas are subject to the permitting process.

However, none of the preceding code sections state that the jurisdiction of the VMRC is exclusive, nor do they expressly prohibit the exercise of local jurisdiction in the regulation of commercial activities of tidal waters of the Commonwealth of Virginia.

Jennings cites the Opinion of the Attorney General 1985-86, 108 to the Hon. W. Taylor Murphy, Jr. as to the statutory authorization for placement of private piers for noncommercial purposes by riparian owners. The Opinion states that § 28.2-1203A(5) [formerly 62.1-3(10)] exempts private noncommercial piers from the permitting requirements of the VMRC for encroachments on the Commonwealth's subaqueous bottoms. The exemption allows the localities, through the enabling statute § 15.1-486C [now 15.2-2280] to regulate private, noncommercial piers under its' reasonable zoning powers. The question presented by Delegate Murphy specifically addressed only private noncommercial piers and therefore the opinion by the Attorney

General finding jurisdiction in the local governing body to regulate by zoning specifically those piers and not commercial piers, provides no inference as to the authority of the County to regulate commercial piers through zoning. Clearly, the Attorney General only responded to the question asked and did not expound on the authority of the County as to matters not addressed by the Delegate.

As stated, Jennings did accept § 15.2-2280 as the vesting statute for the County's authority to regulate piers under its reasonable zoning powers. That statute as set forth in the opinion to Delegate Murphy, gives the counties authority to regulate "the areas and dimensions of land, water and air space to be occupied by buildings, structures and uses ....". It does not limit the exercise of zoning to waters for noncommercial private piers. If there is an exemption of private noncommercial piers from the VMRC jurisdiction under § 28.2-1203, there should be a similar exemption of the counties' jurisdiction for commercial activities and such an exemption is not found anywhere in the Code. Where is the local authority to zone limited to buildings,

structures and uses over waters for private piers only? Jennings would have you believe that the grant to VMRC for commercial and exemption for private somehow limits the grant of jurisdiction to the localities to zone under § 15.2-2280. In fact, the grant and exemption stand alone, and it is illogical to argue that jurisdiction over encroachments into the waters of localities through local zoning ordinances is limited to private noncommercial uses without a statutory exemption for commercial uses when conversely the grant to VMRC is limited by a statutory exemption for private, noncommercial piers.

Jennings contends that § 15.2-3105 is not a jurisdictional statute in that the purpose of the section is to establish boundaries between localities. Clearly, once jurisdiction is conferred upon the counties to zone as it is by § 15.2-2280, the extent of the jurisdiction is dependent upon the establishment of boundaries. In that sense, statutory aids in establishing boundaries are jurisdictional because they establish the extent of same. § 15.2-3105 establishes that the extent of the County's jurisdiction for zoning and other matters includes the wharfs,

piers, docks and other structures erected along the waterfront of the locality and is pertinent therefore to the marina under consideration.

Jennings contends that the grant of jurisdiction to the VMRC precludes any grant of jurisdiction to the localities for commercial structures, arguing that concurrent jurisdiction would create a hodgepodge of regulation inconsistent with good government practices. In fact, as the trial court pointed out in its letter ruling of March 30, 2007 (App. 37), the inability of the County to apply zoning regulation to the construction in Cockrell's Creek would create a paradox. The county has unquestioned authority to zone the upland acreage for usage for marina boatyards. The VMRC cannot zone upland and the upland use is clearly related to the piers and slips in the creek. It is, as the court pointed out a single use extending over land and water. Without a County right to regulate the water portion of the marina, the marina is subject to regulation which may create inconsistencies. As an example, the VMRC could approve additional slips where there was insufficient land available for additional parking. The VMRC

seems to agree with the unified approach local jurisdiction offers in that it has not challenged its concurrent jurisdiction with local zoning. As was pointed out in the counsel's letter of November 28, 2006 (App 30), all of the counties of the northern neck as well as six of eight jurisdictions including Stafford County, Fairfax County and the cities of Norfolk and Hampton regulate marinas through zoning. Rather than creating a regulatory nightmare as contended by Jennings, the joint or concurrent regulatory scheme has functioned quite nicely.

2. The provisions of the Northumberland County zoning ordinance as to marinas are constitutional (Errors No. 4 and 5)

A. Standard of Review

The Count agrees with Jennings that this Court reviews matters of law de novo.

B. Discussion of the Issues

Jennings alleges that the zoning ordinance as it pertains to special exception permits is unconstitutional in that it lacks any objective specified standards for guidance to the Board of Supervisors. However, the controlling authority as to the

necessity for standards is *Bollinger v. Roanoke County*, 217 Va. 185 (1976) in which the Court, noting that § 15.1-491 [now 15.2 2286] provides that a zoning ordinance "may" include responsible regulations, held that zoning ordinances need not include standards concerning issuance of special use permits where local governing bodies are to exercise their legislative judgment or discretion.

The case of *Cole v. City Council of Waynesboro*, 218 Va. 827 (1978) cited by Jennings is not on point. The Court in that case found that the ordinance was invalid because its disjunctive language would have permitted issuance of a special exception without requirement that "good zoning practice" be followed. If the ordinance had required public necessity, convenience, general welfare and <u>good zoning practices</u> the ordinance would not have been found effective and the preamble to the actual special exception permit would have required a finding of good zoning practices as well as convenience, welfare and public interest. There is nothing in the Northumberland County ordinance that

precludes the finding of good zoning practices in the issuance of a special exceptions permit.

Jennings also cites *Ames v. The Town of Painter*, 239 Va. 343 (1990) which decision upheld the trial court's opinion that a special use permit was invalid because there was no evidence to support the permit's issuance and the Board of Zoning Appeals had made no other findings or conclusions with respect to standards set out in the ordinance. The County contends that there was ample evidence presented to support the court's finding that overcrowding existed in the cove of the creek where the proposed marina expansion was requested and therefore the expansion was detrimental to the safety and welfare of the citizenry. The lower court, in its letter opinion of September 4, 2009 on page 4 (App 110), cited several factors considered by the Board, including the findings that there was "already too much in this cove of the creek"; the marinas were "not at capacity" and "this extension is too close to the neighbors property and extends into the 10' navigational waters as shown

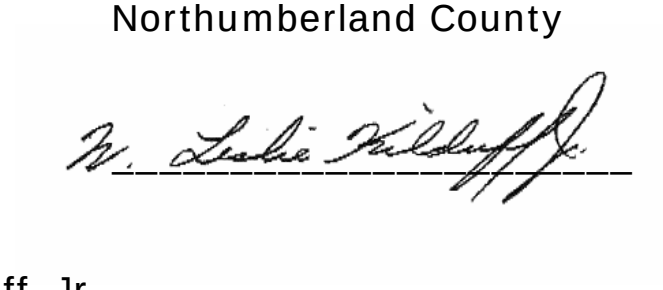
on the survey". These findings provided a sufficient basis for the court's finding that the Board exercised good zoning practices.

Finally, regarding standards, as counsel pointed out in his letter of October 2, 2007 to the Court (App 97, 98), the Northumberland County Zoning Ordinance Section 148-137 (App 99, 100) provides guidance for the imposition of conditions for conditional use permits. The criteria listed therein are applicable to both conditional uses and special exceptions, since they are distinguished only by the conditional uses being listed in each zoning district and the special exception uses being listed for all districts. The criteria contained therein, together with the general requirement to consider good zoning practices, are sufficient to guide the Board to make decisions and grant special exceptions which are in the best interests of the citizens of Northumberland County.

Therefore it is asserted that the County's special exception ordinance is constitutional and that the Board acted reasonably in denying the special exception permit.

Respectfully submitted,

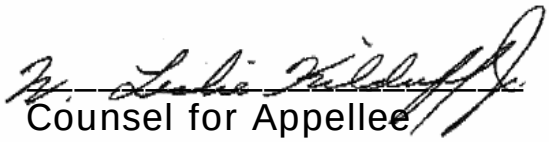
Board of Supervisors of
Northumberland County



W. Leslie Kilduff, Jr.
VSB #15887
Burke & Kilduff, P.C.
P.O. Box 1801
48 S. Main Street
Kilmarnock, Virginia 22482
T: (804) 435-0851
F: (804) 435-0551
bkpc@bkpclaw.com

CERTIFICATE

The undersigned, counsel for the Appellee, Wellyn Flores Chan, hereby certifies the following in compliance with the provisions of Rule 5:26(h): that fifteen (15) copies of this Brief of Appellee were filed with the Supreme Court of Virginia via hand delivery; one (1) copy was filed electronically via e-mail at scvbriefs@courts.state.va.us and, that three (3) copies and one (1) disk copy of the said Brief were mailed via U.S. First Class Mail to, Roger G. Hopper, P.O. Box 1215, Saluda, VA 23149-1215.



Counsel for Appellee