Commonwealth of Virginia

FIFTEENTH JUDICIAL CIRCUIT

JUDGES

Horace A Revercomb, III
Harry T. Taliaferro, III
J. Martin Bass
Gordon F. Willis
David H. Beck
Joseph J. Ellis
J. Overton Harris

Dixon L. Foster, Retired
J. Peyton Farmer, Retired
Joseph E. Spruill, Jr., Retired
William H. Ledbetter, Jr., Retired
H. Harrison Braxton, Jr., Retired
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John Richard Alderman, Retired

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COURTS

Northumberland County
Westmoreland County
Spotsylvania County
King George County
Lancaster County
Caroline County
Richmond County
Stafford County
Hanover County
Essex County
City of Fredericksburg

September 4, 2009

Roger G. Hopper, Esquire
Post Office Box 1315
Saluda, Virginia 23149

W. Leslie Kilduff, Jr., Esquire
Burke & Kilduff
Post Office Box
Kilmarnock, Virginia 22482

Re: John L. Jennings t/a Jennings Boatyard, Inc. v. Board of Supervisors of Northumberland County
Northumberland County Circuit Court
Chancery No.: 57-05

Dear Counsel:

The plaintiff John L. Jennings, t/a Jennings Boatyard, Inc. ("Jennings") brings this action seeking declaratory judgment that the action of the Board of Supervisors of Northumberland County (the "Board") denying him a special exception permit to expand his commercial marina was invalid and for an award of monetary damages incurred in submitting his application to the Board.[1] The complaint alleges that the Board's business judgment that Jennings already had enough slips was not a valid legal reason to deny the application.

Circuit courts have jurisdiction to render declaratory judgment. "In cases of actual controversy, circuit courts . . . shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed." Virginia Code §8.01-184.

[1] In a Motion for Summary Judgment, previously overruled, Jennings claimed the Board had no jurisdiction to apply its zoning ordinance.

FILED IN CLERK'S OFFICE
9-8-09 DATE
Stu. Dep. CLERK
CIRCUIT COURT OF
NORTHUMBERLAND
COUNTY, VIRGINIA

I. FACTUAL SUMMARY

From consideration of all the evidence in this proceeding, the Court finds as follows:

A. The Permit Application and Public Hearing

Jennings owns 12.4 acres of land in Northumberland County on Cockrell Creek. There he operates a commercial marina/boatyard with 45 mooring slips and accompanying piers. In March, 2005, Jennings employed Craig Palubinski of Bay Shore Design to draw plans to add 46 slips. Jennings through his agent Bay Shore submitted an application and drawings to the County to procure a special exception permit under the Northumberland County Zoning Ordinance ("NZO") and to obtain Wetlands Board approval. Jennings originally submitted his request at an April 14, 2005, meeting, however, the Board of Supervisors at that time tabled the matter in order for Jennings to obtain a riparian survey and to deal with objections from adjoining owners Swift, Headley and McNeal.

The proceedings before the Board at the public hearing on October 13, 2005, are not stated here as they are set forth in the minutes of such hearing. (Plaintiff's Exhibit 2)

On October 17, 2005, Wellington Shirley, the County Zoning Administrator, wrote a letter to Jennings which stated the application was denied because the Board felt the three marinas in the area, including his, "have mooring slips available" and "there would be no justification to allow an expansion at this time."

B. Circuit Court Hearing

At the trial of this case on September 18, 2007, the Board offered no evidence. Jennings presented the testimony of Palubinski and Sharon Jennings and four exhibits: Bay Shore's revised drawings (Plaintiff's Exhibit 1); excerpt from minutes of October 13, 2005 Board meeting (Plaintiff's Exhibit 2); Philip Keyser's riparian apportionment survey (Plaintiff's Exhibit 3); and October 18, 2005, letter from Norfolk District US Army Corps of Engineers ("USACOE") to Jennings (Plaintiff's Exhibit 4).

Palubinski testified that after the application was tabled for 6 months, the drawings were revised to account for the waters of adjacent properties as shown on the survey. He stated that after the first Board meeting he had spoken with Eades and Shirley about the neighbors' objections which he tried to ameliorate by scaling back the addition. There were no discussions of parking or health department requirements. He stated he understood the denial was because the Board felt there was no need for expansion.

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Sharon Jennings testified that they acquired the marina property 28 years ago; that they hired Bay Shore Design to do their permits; that neighboring owners objected about infringement on their waters; that such objections were the reasons for initially tabling the application to get a riparian survey per the request of Eades and Shirley; and that prior to the public meeting, they were told nothing about there being no need for additional slips. Ms. Jennings also testified that the expansion was for the purpose of constructing deepwater sailboat slips for which there was a demand. She testified she felt the Board of Supervisors did not give a legitimate reason for the denial because in the past when Jennings added mooring slips they were rented right away and that the only person who spoke against them at the public hearing was Headley, a business competitor who operated an adjacent marina.

The documents (cancelled checks, receipts and invoices admitted in discovery) constituting elements of damages claimed by Jennings were admitted as evidence.

II. ANALYSIS

The issues argued to the Court are (1) whether the denial of the special exception permit by the Board was arbitrary and capricious because the Board's finding in its own business judgment that there was not a need for more boat slips was not a valid legal reason for the denial and (2) whether the zoning ordinance was fatally defective for failure to state any standards to be applied in considering the special exception application.

A. Error to Base Denial on Business Reasons.

It is not a proper function of a zoning ordinance to restrict competition. Board of Sup'rs of Fairfax County v. Davis, 200 Va. 316, 106 S.E.2d 152 (1958); Hanky v. City of Richmond, 532 F.Supp. 1298 (E.D. Va. 1982). "Legislative action is reasonable if the matter in issue is fairly debatable." Board of Supervisors v. Lerner, 221 Va. 30, 34, 267 S.E.2d 100, 102 (1980). An issue is "fairly debatable when the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different (or differing) conclusions." Bell v. City Council of Charlottesville, 224 Va. 490, 495, 297 S.E.2d 810, 813 (1982).

At its public hearing the Board had before it the collective evidence of the site plan, survey, objections by adjacent owners, the location of the site in a small cove on which there were five other waterfront landowners and the proximity of the pier expansion to the land and waters of such owners. On the other hand, at the public hearing the Board had before it that the USACOE had issued a permit for the project, that the proposed expansion had been scaled back to fit the riparian survey, that one of the objectors withdrew her objection, that Headley who spoke in opposition was Jennings business competitor, that no health department or parking

issues were raised and that no prior issue had been made of availability of boat slips in area marinas.

After public comment was closed, Eades, Kilduff and Supervisor Russell questioned the scope of the USACOE permit and before the matter was put to a vote Supervisor Self opined, according to the minutes, that there was "already too much in this cove of the creek." He further stated that area marinas were "not at capacity" and that "this extension is too close to the neighbors property" and extends into the "10 foot navigation waters as shown [on] the survey." Even though Self expressed reluctance to vote against Jennings because his business was good for the County, he clearly could and did weigh the negative impact of the substantial enlargement of the marina facility on the waterfront landowners in the small cove.

A separate consideration must be the October 17, 2005, Shirley letter to Jennings. The only reason stated in this letter for the Board's action was the availability of slips in three area marinas including Jennings. Had this been all that was in the minutes, there may well have been an issue about intent to restrict competition being the only basis for denial. Even if the stated reason in his letter did not form a valid basis for denial, however, the Board had other evidence before it that validly supported its conclusion. The minutes show consideration of independent reasons related to the small cove.

It is not a function of the Court to exercise legislative discretion, that is left solely to the governing body provided it complies with the law. The Court only looks to see if the Board acted within the range of reasonableness prescribed by what is "fairly debatable." Considering the applicable standard, the Court finds that the Board's action in rejecting the request was not arbitrary, capricious and unreasonable. Both quantitatively and qualitatively, the information before the Board made approval or denial of the application fairly debatable in that reasonable persons could have come to different conclusions based on what the Board could properly consider. The Court finds that Shirley's letter does not change this outcome.

B. No Standards for Special Exception Permits in the Zoning Ordinance

Jennings cites Cole v. City Council of Waynesboro, 218 Va. 827 (1978) and Ames v. Town of Painter, 239 Va. 343 (1990) to support its argument of invalidity. The zoning ordinance in Cole was found to be invalid because its disjunctive language would have permitted the issuance of a special exception without a requirement that "good zoning practice" be followed. The Ames decision upheld a trial court's opinion that a special use permit issued by a Board of Zoning Appeals was invalid because there was no evidence to support the permit's issuance and the BZA had made no other findings or conclusions with respect to standards which were set out in the ordinance. Neither case addressed the validity of a governing body granting a special exception when the zoning ordinance sets out no standards for doing so.

The County cites the controlling authority of Bollinger v. Roanoke County, 217 Va. 185 (1976). There the Board of Supervisors issued a special exception permit for a sanitary landfill, which right it reserved to itself in the county zoning ordinance. The matter went to the Supreme Court on an assignment of error to the trial court's finding that the zoning ordinance was not invalid for failure to set forth specific standards for issuance of the special use. Noting that Va. Code §15.1-491 (now §15.2-2286) provides that a zoning ordinance "*may*" include reasonable regulations for granting of special exceptions, the Supreme Court held that a "zoning ordinance enacted pursuant to this statute need not include standards concerning issuance of special use permits where local governing bodies are to exercise their legislative judgment or discretion. It would be impractical to provide standards in ordinances that would be applicable to all situations that might arise." Bollinger, 217 Va. at 187. We accordingly find that the NZO is not invalid for failure to set forth standards for the Board of Supervisors to apply in issuing special exceptions.

III. CONCLUSION

The Court declares that the denial of Jennings' application for a special exception permit by the Board was reasonable and not arbitrary and capricious, that the Board's decision was based upon fairly debatable evidence before it and that the NZO is not invalid for failure to state standards to be applied by the Board in the issuance of a special exception permit. The monetary relief sought by Jennings is denied. Mr. Kilduff shall prepare an Order reflecting the judgment of this Court as stated in this letter which shall be endorsed by both counsel with exceptions duly noted and submitted to the Clerk of this Court for entry by the Judge.

Yours truly,

Harry T. Taliaferro, III

HTT:dbh
cc: Ms. Linda L. Booth, Clerk

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VIRGINIA: Inst#200909000702

IN THE CIRCUIT COURT OF NORTHUMBERLAND COUNTY

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

Complainant

v. CHANCERY No. 05-57

BOARD OF SUPERVISORS OF NORTHUMBERLAND COUNTY,

Defendant.

ORDER

This cause came to be heard upon the papers formerly read, upon trial of the matters at issue and was argued by counsel; and

It appearing to the Court that for the reasons set forth in its letter opinion filed with the papers in this cause, the denial of Complainant's application for a special exception permit by the Defendant was reasonable and not arbitrary and capricious, that the Board's decision was based upon fairly debatable evidence before it; and that the Northumberland Zoning Ordinance is not invalid for failure to state standards to be applied by the Board in the issuance of a special exceptions permit.

THEREFORE, it is ADJUDGED, ORDERED and DECREED that the relief sought by the Complainant is denied; and it is further ordered that the cause be filed among the ended causes.

ENTER

Date: OCT 13 2009

Judge: Harry T. Tavenner

I ask for this:

W. Leslie Kilduff Jr., p.d.
W. Leslie Kilduff, Jr. County Attorney
Burke and Kilduff, P.C.
P.O. Box 1801
Kilmarnock, Virginia 22482

Mailed 17 to 10/9/09

Seen and objected to: for the reasons set froth in the attached two pages attached hereto and made a part hereof.

R G Hopper, p.q.
Roger G. Hopper, Attorney at Law
P.O. Box 1215
Saluda, Virginia 23149

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OBJECTIONS OF JOHN L. JENNINGS, t/a JENNINGS BOATYARD, INC., TO THE COURT'S LETTER OPINION OF SEPTEMBER 9, 2009, AND TO THE PROPOSED/OR ENTERED ORDER (*sic.* Final Decree) IN THE ABOVE-STYLED CASE

The complainant, John L. Jennings, t/a Jennings Boatyard, Inc., by counsel, objects to the above-mentioned letter opinion and proposed order (*sic.* Final Decree) to which these objections are attached for the following reasons:

1. Overruling complainant's Motion for Summary Judgment for the reasons set forth therein, in the Memorandum in Support thereof, and in complainant's counsel's letter brief dated November 17, 2006, all of which are incorporated herein by this reference.

2. Not holding that the denial of the complainant's application for a special exception permit by the Northumberland Board of Supervisors was arbitrary and capricious because the Board (a) substituted its own business judgment for that of the complainant in stating the complainant did not need any more slips, notwithstanding that these were sailboat and not power boat slips, in order, among other things, to favor a competitor of the complainant; and (b) abrogated unto itself the powers of the U. S. Army Corps of Engineers as to navigability in stating that the proposed slips were "too close to the neighbor's [competitor's] property".

3. Not holding that the Northumberland County Zoning Ordinance was fatally defective for stating no objective specified standards to preclude the totally subjective and unfettered whim of the Supervisors in making this decision.

4. Applying the "fairly debatable" standard to the Supervisors' arbitrary and capricious actions in this case.

5. Not entering judgment against the Board in favor the complainant including $3,413 in damages.

6. Because the court's findings and holdings are contrary to the law and evidence in this case.

ASSIGNMENTS OF ERROR

1. The [c]ourt erred in the following particulars by:

    1. Overruling Jennings' motion for summary judgment prior to the trial and again upon Jennings' renewed motion at the conclusion of the evidence.

    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.

    4. Not holding the provision of the County Zoning Ordinance as to marinas to be unconstitutional and void.

    5. Not granting judgment for Jennings upon the Bill.