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Commonwealth of Virginia

YORK COUNTY - POQUOSON
CIRCUIT COURT

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Re: Bavuso, et al v. York County Board of Supervisors, et al Case No. 14-60139

Dear Counsel:

This matter is before the Court after trial on the merits without a jury. Upon consideration of the evidence taken at the trial, the exhibits admitted into evidence, and the argument of counsel as set forth in the post-trial briefs, judgment will be rendered in favor of Complainants.

Complainants have filed an action for declaratory judgment on the issues of whether or not York County has the authority to require them to obtain a special use permit ("SUP") to conduct oyster farming on property located within an RC(Residential Conservation) zone and upon which is located their residence.. They argue that the Code of the County of York ("CCY") and its

definition of "agriculture" (S24 . 1-104) violate Title 15.2, Code ofVa, §2288 and the Virginia Right to Farm Act found at Title 3.2, Code of Virginia, S300, et seq.

This court ruled previously that the prior litigation arising from Complainants' appeal from the Board of Zoning Appeals ruling requiring them to obtain an SUP did not preclude Complainants from raising these issues in this declaratory judgment action.This court ruled that it did not have subject matter jurisdiction over these issues in the prior litigation as its jurisdiction was derivative of the Board of Zoning Appeals. That Board had no jurisdiction to rule on the statutory issues. The County has objected to those rulings. (See letter opinion May 22, 2014.)

While evidence was taken at trial, the material facts are not in dispute. Complainants have, since 2010, conducted oyster farming activities at 1 14 Creek Circle, Seaford, Virginia,which is residential property located in an area zoned RC(Residential Conservation). In November of 2011, they requested an opinion from the zoning administrator ("Carter") as to whether the zoning ordinance then in effect required an SUP to conduct oyster farming at the property. Carter responded, ruling that the ordinance as then written required them to obtain an SUP. The appeal to the County Board of Zoning/Subdivision Appeals ("BZA") resulted in the BZA affirming Carter's decision. This Court reviewed that decision upon an appeal by Complainants. After this Court ruled that no SUP could be required, the Virginia Supreme Court reversed the trial court and ruled that the County could require an SUP. That decision, unpublished, is found at Carter v. Bavuso 2014 WL3510293 (Va2014). That decision did not address the issues raised here.

At trial, Complainants produced evidence as to their methods of raising oysters and expert testimony from Michael Osterling that the methods of raising these oysters were in fact "agricultural". The Court found this general testimony to be admissible and the County objected to any testimony or inference that Mr. Osterling was testifying to the meaning of and application of either statute (Sections 15.2-2288 and 3.2-301). The County's objection to the testimony on this basis is sustained and the Court will not consider it except in so far as the testimony concludes that in the general areas of "agricultural" and "aquaculture", the latter is considered an agricultural activity.

The Complainants also produced the expert testimony of Eileen C. Carroll on the issues of the definition of the term " district or classification" found in S 15.2-2288. Again, the County's objection is sustained as to the testimony or any inference therefrom to the extent that Ms. Carroll was expressing any opinions as to the meaning of those words in the statute and her testimony will not be considered as such. The meaning of terms within the statutes are issues of law for determination by the Court.

Mr. Oesterling's testimony describing the process used in the raising of these oysters is not disputed by the County and will not be recited here.

Subsequent to the Supreme Court's decision, the legislature amended Title 15.2-2288 by adding to the definition of "production agriculture". The pertinent language of this section now reads :

> For the purposes of this section, production agriculture and silviculture is the bona fide production or harvesting of agriculture products as defined in Section 3.2-6400___
> (Emphasis added to show the added language)

The prior version of Section 15.2-2288 had and the current version has language as follows: A zoning ordinance shall not require that a special exception or special use permit be obtained for any production agriculture or silviculture activity in an area that is zoned as an agricultural district or classification.

Title 3.2, Code of Va., S6400 states " 'Agricultural products' means any livestock, aquaculture, horticultural, floricultural, viticulture, silvicultural, or other farm crops." Thus the legislature, by amending 15.2-2288 to include this definition,made it clear that "aquaculture" was a practice for which no SUP could be required. The County, however, argues that this statute does not apply in this case because York County has no "area that is zoned as an agricultural district or classification" (emphasis added). Particularly the County argues that the RC zone in which Complainant's property is located is a residential-conservation zone who's purposes are environmental in nature not agricultural. The County points to its Comprehensive Plan for the expression of the goals of the RC zone.

Complainant's argue that the words "district or classification" are not defined by the statute (or anywhere else) and, giving the words their ordinary meanings, must refer to any "district or classification" that allows agriculture as a "by-right use" or a "primary permitted use". They point to the CCY and the Category 2 Table that reflects that aquaculture and crop/livestock farming are permitted by- right uses in the RC District.

In giving effect to the intent of the legislature,which is obviously to restrict localities in requiring SUPS for agricultural and related activities, the districts and classifications referred to in S 15.2-2288 are those districts and classifications in which agriculture and aquaculture are permitted as by-right activities. Hence §15.2-2288 applies to the Code of the County of York. The use by the legislature of both "district" and " classification" indicate a legislative intent to give the statute a broad application.

Further, the Court finds that this statute, prior to the amendment, applied to the CCY and would have barred the County from requiring Complainants to obtain an SUP.

Likewise,Title 3.2, Code of Virginia, Section 301 (Virginia's Right to Farm Act) applies even though the legislature did not amend this statue to add to the definition of "production

agriculture". Courts must interpret statutes, whenever possible, in a consistent manner to give effect to the purposes of the statutes. This statute and its use of the term "production agriculture" is not inconsistent with Section 15.2-2288. The Court finds that the Amendment to 15.2-2288, coming so close in time to the Virginia Supreme Court's decision in Carter v. Bavuso, supra, was a clarification of existing law when (basically) the legislative added "aquaculture" to the definition of "production agriculture" by referring to an existing statute (Title 3.2,Code of Virginia,Section 6400).

Section 3.2-301 reads in part:

> In order to limit the circumstances under which agricultural operations may be deemed to be a nuisance, especially when nonagricultural land uses are initiated near existing agricultural operations, no locality shall adopt any ordinance that requires that a special exception or special use permit be obtained for any production agriculture or silviculture activity in an area that is zoned as an agricultural district or classification... no locality shall enact zoning ordinances that would unreasonably restrict or regulate farm structures or farming and forestry practices in an agricultural district or classification unless such restrictions bear a relationship to the health, safety, and general welfare of its citizens.

The purpose of the statute is clearly stated in the first sentence;namely, protecting agricultural interests in areas where non- agricultural activities are undertaken near existing agriculture operations. The last sentence above provides the only exception to the ban on requiring SUPs, i.e. for the protection of the health, safety, and general welfare of citizens. Nowhere in this case (nor in the first) is there any evidence that the requiring the SUP of Complainants was done as an exercise of the County's police powers under this exception.

The Court rejects Complainants' claim of judicial estoppel and, likewise, has not considered the Complainants' reply brief as to any new evidence offered, such as Exhibit A attached to the brief and a reference to a video (pg. 6) for purposes of showing the legislative history The County has not had an opportunity to cross-examine or present evidence on these issues and they will not be considered in rendering this opinion

The Court concludes that the Code of the County of York, in so far as it requires Complainants to obtain an SUP for their oyster farming activities, is in violation of Virginia's Dillon Rule; that is, the sections of the CCY relied upon by the County in asserting its right to require the SUP conflict with state statutes and must be declared void in the circumstances here.

For the foregoing reasons, the Code of the County of York's provisions requiring Complainants to obtain an SUP to conduct oyster farming operations at 114 Creek Circle,

Seaford, Virginia are void and unenforceable under the circumstances existing here. Complainants are granted the relief prayed for.

Mr.Reichle shall prepare an appropriate order,noting Defendants' objections.

Very truly yours,

Alfred D. Swersky,Judge Designate