In The

Supreme Court of Virginia

RECORD NO. 191563

C. ROBERT JOHNSON, III, LISA LAWSON JOHNSON, THOMAS A. HAZELWOOD, JOHNSON AND SONS SEAFOOD, LLC, and HAZELWOOD OYSTER FARMS, INC.,

***Appellants*,**

v.

CITY OF SUFFOLK and HAMPTON ROADS SANITATION DISTRICT,

Appellees.

BRIEF OF APPELLEE CITY OF SUFFOLK

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STATEMENT OF THE CASE

This is an appeal of the final judgment issued by the Suffolk Circuit Court dismissing the claim of C. Robert Johnson III, Thomas A. Hazelwood, Johnson and Sons Seafood, LLC, and Hazelwood Oyster Farms, LLC (collectively hereinafter "Lessees"). The Lessees filed a declaratory judgment petition alleging that the City of Suffolk ("Suffolk") and Hampton Roads Sanitation District ("HRSD") intentionally operated and maintained sanitary sewer and stormwater systems in a way that caused pollutants to illegally enter the Nansemond River and flow over their leased oyster planting grounds, leading to the closure of the area for direct seafood harvesting.

The City and HRSD filed separate demurrers and pleas in bar. Following briefing, the parties gave oral argument and submitted post-hearing letter briefs. The Circuit Court ruled that the City and HRSD have condemnation authority over the Lessees' oyster planting grounds even though the General Assembly has forbidden localities from condemning such grounds in Va. Code § 28.2-628. The court nevertheless granted the City's and HRSD's demurrers on the ground that the Lessees' inverse condemnation claims were barred under *Darling v. City of Newport News*, 249 U.S. 540 (1919), which held that lessees of oyster planting grounds take their leases subject to the risk of pollution. The Circuit Court entered a final order

dismissing the action with prejudice. The Lessees appealed, and HRSD and the City of Suffolk assign cross-error.

ASSIGNMENTS OF CROSS-ERROR

1. The trial court erred in overruling the demurrers on the ground that an inverse condemnation case will not lie against the City because the City lacks the authority to exercise eminent domain over the oyster ground leases in this case. Preserved at App. 193, 223-25, 228-29, 235-39, 254, 264.

2. The trial court erred in failing to consider the argument in the City's demurrer that the Petition should have been dismissed because the Appellants failed to allege a public use and failed to allege facts sufficient to show that their property was taken or damaged for a public use. Preserved at App. 193, 225-26, 247, 254-55, 263.

3. The trial court erred in failing to consider the argument in the City's demurrer that the Petition should have been dismissed because oyster ground leases do not guarantee lessees water of a certain purity or pollution level. Preserved at App. 193-95, 232.

4. The trial court erred in failing to consider the argument raised in the City's demurrer that the Petition should be dismissed because whatever taking or damage the Appellants did allege was due to the state's exercise of its police power. Preserved at App. 196, 245, 255.

5. The trial court erred in failing to consider the argument raised in the City's plea in bar that the Petition should be dismissed as time-barred because the claims are premised on conditions which have existed continuously since before the three-year statute of limitations. Preserved at App. 199-201, 248-253, 255-56.

STANDARD OF REVIEW

All of the assignments of error and cross-error, save the City's last assignment of cross-error, pertain to the trial court's decision to sustain or deny a demurrer, which is a question of law reviewed *de novo*. *Bragg Hill Corp. v. City of*

Fredericksburg, 297 Va. 566, 577, 831 S.E.2d 483, 489 (2019) (citing *Glazebrook v. Bd. of Supervisors*, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003)). In conducting that review, the court accepts "as true all facts properly pleaded in the bill of complaint and all reasonable and fair inferences that may be drawn from those facts." *Id.* (quoting *Glazebrook*, 266 Va. at 554, 587 S.E.2d at 591).

The last assignment of cross-error pertains to an issue raised by a plea in bar. Where, as here, the proponent of the plea in bar does not put on evidence in support of the plea but instead relies upon the pleadings, the trial court's judgment is subjected to a "functionally de novo review" in which the properly pleaded facts in the complaint are deemed true. *Massenberg v. City of Petersburg*, 298 Va. 212, 216, 836 S.E.2d 391, 394 (2019) (quoting *Lostrangio v. Laingford*, 261 Va. 495, 497, 544 S.E.2d 357, 358 (2001)).

STATEMENT OF FACTS[1]

The Lessees hold leases of oyster planting grounds in the Nansemond River and its tributaries. App. 9-11. The City operates a storm water system and, in conjunction with HRSD, a sewer system. App. 12. The Lessees allege that the City

[1] As noted in the standard of review, the properly pleaded facts in the Petition are treated as true for purposes of reviewing a court's dismissal of a case on demurrer. Accordingly, the facts in this section are taken from those alleged in the declaratory judgment petition and are recited herein solely for purposes of considering the legal sufficiency of the declaratory judgment petition. The City does not admit or concede these alleged facts.

and HRSD intentionally allowed their storm water and sewer systems to overflow, which resulted in the City and HRSD releasing untreated sewage and storm water into the Nansemond River. App. 13. These overflows go "onto, over, across, and through" the Lessees' leased grounds. App. 13. The City and HRSD, in using and maintaining the storm water and sanitary sewer system in a manner that allows overflows, act "without right or authority." App. 13. Indeed, as recognized in an Amended Consent Decree memorialized by HRSD and in a Consent Order executed by the City, discharges (if they actually occurred) are unpermitted or unauthorized and therefore illegal under the Clean Water Act and Virginia State Water Control Law. App. 14-15, 71-72, 163.

The Virginia Department of Health has prohibited or conditioned the harvest of shellfish from certain areas of the Nansemond River because of the pollution level in the river. App. 15-17, 184-191. The first such order cited by the Lessees is effective from September 10, 2015 through September 26, 2016, though the order clearly states that it replaces an order that was effective starting August 26, 2014. App. 17, 190. Such orders have been issued for an unbroken period since at least then. App. 16-17.

ARGUMENT

In their appeal, the Lessees attempt to recast the trial court's ruling as granting the City and HRSD an unfettered right to pollute the waterways of the

Commonwealth with abandon. In truth, the trial court did not hold that the City has the right to pollute the waterways without consequence, and the City has never advanced such a radical position. The trial court actually held that under Virginia law, an oyster ground lessee cannot maintain an inverse condemnation claim premised on pollution because the lessee takes the lease subject to the risk of pollution of the waterway. This long-standing rule was recognized in the U.S. Supreme Court's decision in *Darling v. City of Newport News*, 249 U.S. 540 (1919), and it remains the controlling rule under Virginia law to this day.

Even if that rule had been overturned in some way, the Lessees' suit would still be deficient in other ways that would require dismissal. First, the Lessees' claim for inverse condemnation is improper because the City lacks the power, authority or right to exercise eminent domain over the leases or the oysters on them. Second, the Lessees cannot maintain an inverse condemnation action because they allege that the City has acted illegally in discharging untreated waste water into the river. Next, the Lessees' have failed to show that the City invaded their property right because the terms of their leases do not guarantee that the waters over their leases will be sufficiently pure to permit direct harvesting from the grounds. In addition, the Lessees' stated position is not that the City itself prevented them from harvesting oysters, but instead that the Commonwealth, acting pursuant to a valid and uncontroverted police power, has prohibited the harvest of such oysters to protect

the public health. The Commonwealth's exercise of police powers has long been held to be non-compensable. Finally, the Lessees' claim is time barred.

I. The trial court correctly applied precedent in rendering its decision.

The Lessees' entire argument on appeal boils down to one faulty premise: the trial court applied federal law to their state law claims, and had the trial court applied the correct standard, it would not have dismissed their petition. The trial court cited two opinions from federal courts in its letter opinion. In each of those opinions, a federal court applied Virginia property law to find that the plaintiffs in each case had failed to state a claim under the Fourteenth Amendment. Those cases are appropriate persuasive authority that demonstrate that the Lessees' claims were appropriately dismissed under Virginia law.

The first case cited by the trial court was the U.S. Supreme Court's opinion in *Darling v. City of Newport News*, 249 U.S. 540 (1919). App. 270. In *Darling*, the holder of an oyster lease sued the City of Newport News in Virginia state court to prevent Newport News from discharging its sewage in a manner that polluted his oysters. 249 U.S. at 541. The trial court dismissed his complaint upon demurrer, and this Court affirmed. *Darling v. City of Newport News*, 123 Va. 14, 21, 96 S.E. 307, 309 (1918).

The leaseholder appealed to the U.S. Supreme Court, arguing that the discharge of pollution violated the 14th Amendment to the U.S. Constitution.

Darling, 249 U.S. at 542. The Supreme Court affirmed the dismissal of the case, stating that:

> [W]e agree with the court below that when land is let under the water of Hampton Roads, even though let for oyster beds, *the lessee must be held to take the risk of the pollution of the water*. It cannot be supposed that for a dollar an acre, the rent mentioned in the Code, or whatever sum the plaintiff paid, he acquired a property superior to that risk . . . .

Id. at 543-44 (emphasis added). Accordingly, the Court held that under Virginia law, a lessee of an oyster lease takes the lease subject to whatever pollution is in the waterway and that a city's discharge of pollution does not constitute a taking of property under the Fourteenth Amendment. *Id.* at 542, 544. This Court had already found that there was no issue under the Constitution of Virginia,[2] so the dismissal of the case was affirmed. *Id.* at 544.

The other case that the trial court relied upon was *Ancarrow v. City of Richmond*, 600 F.2d 443 (4th Cir. 1979). App. 270. In *Ancarrow*, marina owners claimed that they had a state-recognized riparian property right to demand water of a particular purity for their own use and the use of their marina customers and that

[2] Curiously, the Lessees acknowledge that the U.S. Supreme Court in *Darling* discussed whether the actions of Newport News would constitute "damaging" property under the Constitution of Virginia and deferred on the state law issue to this Court's ruling. *See* Appellant Br. 5. In other words, they acknowledge that this Court did not see an issue under the Constitution of Virginia in *Darling*. Yet they still insist that somehow the Constitution of Virginia supplies a more favorable standard that, had the trial court applied it, would have allowed their claim to survive. *Id.* at 6 (arguing that "Virginia's 'damage or take' provision provides stronger property-rights protection" than the Fourteenth Amendment).

the city of Richmond had taken that right by discharging sewage into the James River. 600 F.2d at 446. The Fourth Circuit rejected that claim, holding that "[under] Virginia law, a citizen's riparian right to use public waters of a particular purity is always subject to the superior right of the public to pollute those waters for sewage disposal." *Id.* The court went on to reject the marina owners' argument that an intervening change in the law—namely, the enactment of a provision in the State Water Control Law, Va. Code §§ 62.1-44.2 through 62.1-44.34:28—had limited the public's right to pollute and, by implication, had given them a new riparian right to pure water. *Id.* at 446-447. The court noted that the statute is "merely one portion of a statutory scheme to regulate the quality of the Commonwealth's waters" and that it "does not by its terms purport to grant a new riparian right to private property owners which is superior to a city's state-regulated right to lawfully pollute public waters." *Id.* at 447. The court thus held that the enactment of environmental laws limiting the public's right to pollute had not conveyed a property right to riparian owners to be free from such pollution, so the marina owners had failed to establish that any property right had been taken. *Id.*

Taken together, those cases establish that under Virginia law, an oyster ground lessee (like the Lessees here) takes the lease subject to the risk that the waters surrounding the leased grounds will be insufficiently pure to permit the direct harvest of shellfish from them. Environmental laws regulating the discharge of pollution

into the state's waters do not change that result. In other words, while laws like the State Water Control Law have limited any right to discharge pollutants, they have not changed the terms of the leases to eliminate the risk of pollution or otherwise conferred on the Lessees a private right to pure water. Accordingly, those laws have not created a property right that can be taken or damaged within the meaning of Va. Const. art. I, § 11, by a condemning authority's discharge of pollutants into a waterway. Instead, violations of those environmental laws are addressed through clearly defined enforcement mechanisms, which have already been put in operation to address this very situation.[3]

The Lessees' attempt to distinguish *Darling* and *Ancarrow* fails. The Lessees cite language in each case that suggests that a city may be held liable if it pollutes water to such an extent that a nuisance is created. Then they argue that because they alleged that scenario here, the case should have been presented to a jury. Appellant Br. 7-8. However, the exception they cite is reserved for physical invasions of privately-owned on-shore land and has no application to the limited interests held by the Lessees in government-owned submerged land. *Darling*, 249 U.S. at 543 ("And we apprehend that the mere ownership of a tract of land under the salt water would not be enough of itself to give a right to prevent the fouling of the water as

[3] This is evidenced by the consent decree executed by HRSD and the consent order executed by the City, among others, which are attached to the Lessees' Petition. App. 68-183.

supposed. The ownership of such land, *as distinguished from the shore*, would be subject to the natural uses of the water." (emphasis added)); G.*L. Webster Co. v. Steelman*, 172 Va. 342, 360-61, 1 S.E.2d 305, 312-313 (1939) (distinguishing previous cases involving the discharge of pollutants on the ground that "[n]o question of the creation of a nuisance upon high land, or upon land between low-water and high-water mark was involved in" those cases).[4] The case at hand, which solely involves leased grounds that are beneath the low-water mark and totally submerged beneath saltwater, clearly does not fall within that exception. What's more, if Newport News did not create a nuisance on submerged leases in the *Darling* case by continuously discharging raw sewage into the nearby waters, the City of Suffolk clearly has not done so by allegedly allowing intermittent discharges of untreated waste water into the river.

Lessees next claim that they have pleaded a valid cause of action under *Livingston v. VDOT*, 284 Va. 140, 726 S.E.2d 264 (2012) and *AGCS Marine Ins. Co. v. Arlington County*, 293 Va. 469, 800 S.E.2d 159 (2017). Neither case is

[4] The court in *Ancarrow* noted that the plaintiffs there had not alleged a "nuisance-like physical invasion of their exclusive land space." 600 F.2d at 446. The Lessees here have not alleged such an invasion, either, because they do not have "exclusive land space." Instead, they hold a limited interest in state-owned submerged land that only permits them to exclude other shellfish harvesters from those grounds. *Darling*, 123 Va. at 19, 96 S.E. at 308. They cannot exclude other boaters, fishermen, or anyone else from using the waters above the leases or from physically touching the grounds. Accordingly, the interests they hold do not qualify as "exclusive land space."

applicable here because the Lessees, unlike the owners in *Livingston* and *AGCS Marine*, do not have a right to exclude floodwaters or sewage from their property. The *Livingston* plaintiffs, homeowners or renters in a neighborhood abutting a tributary of the Potomac River, alleged that a heavy rain overwhelmed an improperly designed and maintained drainage system, causing the tributary to overflow its banks onto the plaintiffs' land and sewer systems to back up into their homes. 284 Va. at 145-47, 726 S.E.2d at 267-68. Similarly, the plaintiff in *AGCS* alleged that a municipality had intentionally caused a sewage backup into a grocery store to allow its overloaded sanitary sewer system to function for other users. 293 Va. at 486, 800 S.E.2d at 168. In both cases, upland property owners, who clearly had the right to exclude floodwaters and sewage from being thrust upon their land, were nevertheless forced to bear the cost of an improvement by having such material pushed onto their property.

Those cases have no application to state-owned subaqueous bottoms. After all, lands that are already submerged under water cannot be flooded. In addition, the Lessees do not have fee simple rights to the leased grounds, and the limited rights they do hold do not include the right to exclude floodwaters or pollutants from the leased grounds or the waters surrounding them. *See Darling*, 249 U.S. at 543 ("But we agree with the court below that when land is let under the water of Hampton Roads . . . the lessee must be held to take the risk of the pollution of the water.");

Darling, 123 Va. at 18-19, 96 S.E. at 308 (holding that a lessee of oyster grounds "does not take fee simple title, nor can he use the property for any other purpose except for that stated in the statute"). Accordingly, *Livingston* and *AGCS*, which each involved plaintiffs that had the right to exclude floodwaters and sewage from their properties, are inapposite.

The Lessees next raise the public trust doctrine and environmental laws passed in the years since *Darling* was decided and argue that these mandate reversal in this case. They point to Article XI of the Constitution of Virginia[5] and to the State Water Control Law as embodying the uncontroversial idea that the City and HRSD have not been granted the right to pollute the water with impunity. This argument entirely misses the point. Again, the City has never claimed a right to pollute with impunity

[5] The Lessees' citation to Article XI, § 3 is somewhat puzzling, as it has absolutely no application to leased oyster grounds. That section provides that:

> The natural oyster beds, rocks, and shoals in the waters of the Commonwealth shall not be leased, rented, or sold but shall be held in trust for the benefit of the people of the Commonwealth, subject to such regulations and restrictions as the General Assembly may prescribe, but the General Assembly may, from time to time, define and determine such natural beds, rocks, or shoals by surveys or otherwise.

Va. Const. art. XI, § 3. Obviously, if the oyster planting grounds at issue were natural oyster beds, rocks, or shoals, the Lessees could not lease them. Indeed, the General Assembly has explicitly stated that the Baylor Survey and associated reports, done in the late 1800s, show all natural oyster beds, which are defined to be all of the public oyster grounds in the state, and that such grounds cannot be leased. Va. Code §§ 28.2-551, 28.2-603.

and acknowledges that it is subject to the State Water Control Law. However, the State Water Control Law and other environmental laws have not changed the rule that oyster ground lessees take such leases subject to the risk of pollution of the water. Because the Lessees took their leases subject to that risk, they cannot now maintain an inverse condemnation action because the risk has allegedly materialized.

II. The trial court should have dismissed the case because the City lacks the authority to exercise eminent domain over the oyster ground leases.

Eminent domain is a sovereign power of the state, not of a city. *See Hopewell v. Norfolk & W. R. Co*., 154 Va. 19, 25, 152 S.E. 537, 538 (1930) ("A city has no inherent right or power of condemnation, but derives such rights and powers from legislative enactment passed pursuant to constitutional provisions."). No city may exercise the power of eminent domain unless the state legislature has explicitly delegated the power to it. *Id.* at 25-26, 152 S.E. at 538-39. "A city stands upon the same footing as other corporations possessing the power of eminent domain. It can only exercise the right of eminent domain upon such terms, in such manner and for such public uses as the General Assembly may direct." *Id.* at 25, 152 S.E. at 839; *Bristol Redevelopment & Hous. Auth. v. Denton*, 198 Va. 171, 178, 93 S.E.2d 288, 293 (1956) (holding that a city may only exercise eminent domain "for the purpose, to the extent, and in the manner provided by law").

The General Assembly has specifically addressed condemnation of leased oyster bottoms and grounds by localities, and has forbidden condemnation of the leased oyster grounds involved under the circumstances of this case:

> However, a locality shall not exercise the right by eminent domain to acquire any right or interest, partial or complete, in and to any oyster-planting grounds leased pursuant to Article 1 (§ 28.2-600 et seq.) or 2 (§ 28.2-603 et seq.) of Chapter 6, other than a water-dependent linear wastewater project where there is no practical alternative and the project is subject to permitting under the State Water Control Law (§ 62.1-44.2 et seq.).

Va. Code Ann. § 28.2-628. No water-dependent linear-wastewater project is at issue here, so, under the circumstances of this case, the City cannot exercise the power of eminent domain to acquire any right or interest in the leased oyster grounds at issue. In other words, the City has not been delegated the ability to use its eminent domain power to take or damage the Lessees' leased oyster grounds in the manner alleged by the Lessees in their Petition for Declaratory Judgment.

The interaction between a City's condemnation authority and Va. Code § 28.2-628 and related statutes has been examined relatively recently in *City of Va. Beach v. Va. Marine Res. Comm'n*, 2018 Va. App. LEXIS 231 (Aug. 21, 2018). There, the Court of Appeals held:

> Under Code § 15.2-1800, "[a]cquisition of any interest in real property by condemnation is governed by Chapter 19," which in turn expressly states that "[o]yster bottoms and grounds may be condemned utilizing the procedures . . . required by [Code] § 28.2-628." Code § 15.2-1902(3). To reiterate, Code § 28.2-628 explains that "a locality shall not exercise the right by eminent domain to acquire any right or interest,

> partial or complete, in and to any oyster-planting grounds leased pursuant to Article 1 (§ 28.2-600 et seq.) [riparian oyster-planting leases] or 2 (§ 28.2-603 et seq.) [general oyster-planting leases] of Chapter 6." . . . Thus, following the statutory trail of breadcrumbs, it is evident that the Code expressly forbids a service district from condemning or exercising eminent domain when said grounds are leased for oyster planting.

City of Va. Beach, 2018 Va. App. LEXIS 231, at *12 n.6. The court went on to state that "[w]hatever authority the General Assembly has granted to the City to dredge waterways does not include the right to do so in an area subject to an active oyster lease, nor does it authorize the City to invalidate a lease issued under Code § 28.2-600." *Id.*[6] The same rationale applies to any allegation of taking or damage in the case at bar. Whatever authority the General Assembly has granted to the City of Suffolk to condemn property does not include the right to do so in an area subject to an active oyster lease. The City of Suffolk does not have condemnation authority over the property at issue in this case, and therefore it could not maintain a formal eminent domain case to accomplish any taking or damage to it.

Given that the City could not accomplish what the Lessees allege has occurred by means of a formal condemnation action, the City cannot be liable in inverse condemnation for such acts. *See AGCS Marine Ins. Co.*, 293 Va. at 479, 490, 800

[6] The lease at issue in *City of Virginia Beach* was a riparian oyster lease issued pursuant to Va. Code § 28.2-600. While such leases are different in some respects from the leases at issue here, which are issued under Va. Code § 28.2-603, the court's rationale applies equally to both kinds of leases.

S.E.2d at 164, 171 (holding that "[w]hat is true for eminent domain is likewise true for inverse condemnation claims" and that a definition in the eminent domain statutes "has the indirect effect" of addressing inverse condemnation claims because such claims presuppose a constitutionally implied contract "arising out of a de facto use of the eminent domain power").

This premise is further proven by examination of the well-settled law applicable to implied contracts with a Virginia municipality, since an inverse condemnation action is by its nature an implied contract action. *See Burns v. Bd. of Supervisors*, 218 Va. 625, 627, 238 S.E.2d 823 (1977) (stating that an inverse condemnation action is based on "an implied contract that [a property owner] will be paid [for his property that has been taken] such amounts as would have been awarded if the property had been condemned under the Eminent Domain statute"). A city in Virginia has only those powers—including the power to enter into contracts—that are expressly granted to it or that can be implied from expressly granted powers.[7] If the legislature withholds the power to make certain contracts from the municipality, or expressly forbids the municipality from entering into such

[7] *Johnson v. Arlington County*, 292 Va. 843, 853, 794 S.E.2d 389, 393 (2016) ("Virginia follows the Dillon Rule. Under this principle, local governing bodies have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.") (internal quotation omitted); *Bd. of Zoning Appeals v. Bd. of Supervisors*, 276 Va. 550, 553-54, 666 S.E.2d 315, 317 (2008).

contracts, then the municipality simply cannot enter into the unauthorized contract, either expressly nor by implication. *American-Lafrance & Foamite Indus., Inc. v. Arlington County*, 164 Va. 1, 5-6, 178 S.E. 783, 784 (1935) ("When the legislature withholds power to contract, or permits the exercise of the power in a given case only in accordance with imposed restrictions, the [municipal] corporation may no more bind itself by implied contract than by the forbidden express contract."). Thus, a city cannot enter into a contract which exceeds the city's delegated powers, and such a contract, express or implied, is ultra vires and void. A contract to pay just compensation cannot be implied, and thus inverse condemnation liability cannot lie, where, as here, the City has not been delegated the power that would give rise to the duty to pay just compensation.

The trial court, at the Lessees' urging, rejected this limitation, holding that the City has "general condemnation authority" that is only limited, not taken away, by Va. Code § 28.2-628 and that to hold otherwise would permit the City to unconstitutionally take or damage private property without paying just compensation. App. at 268. This reasoning is circular because it presupposes the result that the Lessees' wish to achieve. Contrary to Lessees' assertions, lack of inverse condemnation liability in these circumstances does not run afoul of the Constitution of Virginia. Article I, § 11 only prohibits the taking or damaging of property without payment of just compensation *if the property is taken for a public*

use. Not all damage to private property interests by a municipality constitutes a constitutionally cognizable taking or damaging of the property that can give rise to inverse condemnation liability; sometimes property damage is just property damage. *See AGCS Marine Ins. Co.*, 293 Va. at 483-484, 800 S.E.2d at 167 ("They presupposed that inverse condemnation principles can provide a remedy for property damage of any nature, whether intentional, negligent, or wholly innocent, caused by a governmental entity. If that were true, of course, sovereign immunity would no longer exist in the Commonwealth of Virginia for property damage claims. Nearly every function that a government and its agents perform (e.g., building roads, driving police vehicles, maintaining traffic signals, operating school buses, deploying snow plows, and constructing bridges) can, and sometimes does, damage private property.").

In addition, the Lessees have argued that, regardless of the City's authority to take the leases, the City has the authority to condemn the oysters planted on them, pointing to *Town of Cape Charles v. Ballard Bros. Fish Co.*, 200 Va. 667, 107 S.E.2d 436 (1959). App. at 260. In *Ballard*, the Town of Cape Charles sought to condemn leased oyster grounds for a dredging project. 200 Va. at 669, 107 S.E.2d at 438. At the time, a statute gave the town and other localities "the specific right" to condemn

the leased grounds. *Id.*[8] In its ruling, this Court noted that Ballard's oysters were the company's personal property and that the dredging operation would remove the oysters that were left on the grounds and effectively destroy them. *Id.* at 673, 107 S.E.2d at 440. It further noted that, while the owner of property taken by eminent domain is normally required to minimize his damages, there was evidence that the oysters could not be removed and replanted in a cost-effective manner. *Id.* Accordingly, it held that if Ballard's oysters were destroyed during the dredging project, it should be paid just compensation for them. *Id.*

Notably, *Ballard* does not stand for the proposition that a locality has the authority to take the oysters separately from taking the beds in which they are planted. Instead, it stands for the relatively uncontroversial view that, if a locality's authorized taking of an interest in real property results in the taking or damaging of personal property that cannot be prevented by the landowner, the locality must pay just compensation for the personal property taken.[9] As noted above, because the

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[8] That statute was the predecessor to the current Va. Code Ann. § 28.2-628. Section 28.2-628 was amended in 2014, long after the *Ballard* case was decided, to prohibit localities like the City from exercising the right of eminent domain over leased oyster grounds subject to a single limitation that is not relevant here. *See* 2014 Va. Acts ch. 162.

[9] *See Livingston v. VDOT*, 284 Va. 140, 161, 726 S.E.2d 264, 276 (2012) (noting that "Article I, Section 11's primary focus is the taking and damaging of real property" but holding that owners must be compensated for appurtenant personal property taken in connection with the taking of real property).

City does not have authority to take the leased oyster grounds at issue here, *Ballard* simply has no application.

Of course, there are situations where a condemning authority can take personal property without the taking of real property, but like other exercises of eminent domain authority, the power to take personal property or a particular kind of personal property must be delegated to the municipality before that municipality can exercise it. *See AGCS Marine Ins. Co.*, 293 Va. at 490, 800 S.E.2d at 171 (noting that inverse condemnation liability can lie for the taking or damaging of personal property "[i]f such a claim meets all of the necessary requirements to recover for a taking or damaging of private property"). The Lessees have cited no statutory authority that would authorize the City to exercise eminent domain over personal property under these circumstances or that would authorize the City to take oysters specifically.

If one accepts the Lessees' argument that the City can exercise eminent domain over the oysters on the leased grounds even though Va. Code § 28.2-628 prohibits the taking of the grounds themselves, then the whole purpose of the law will be negated. After all, if a municipality could condemn and remove all of the oysters found on a particular lease, it will have effectively condemned the leased ground itself because the lessee has no right to use the grounds for any other purpose. "In the construction of statutes conferring the power of eminent domain, every

reasonable doubt is to be solved adversely to the right; that the affirmative must be shown, as silence is negation; and that unless both the spirit and letter of the statute clearly confer the power, it cannot be exercised." *Sch. Bd. of Harrisonburg v. Alexander*, 126 Va. 407, 413, 101 S.E. 349, 351 (1919). It is patently obvious that the language preventing a municipality from condemning leased oyster beds is also intended to prevent the condemnation of the oysters in said leased oyster beds. Accordingly, the City also lacks the authority to take or damage the oysters themselves, as well as the leased oyster beds. The City cannot be liable for an inverse condemnation action in this context.

III. The Appellants failed to allege a public use and failed to allege facts sufficient to show that their property was taken or damaged for a public use.

A property owner asserting an inverse condemnation claim must plead that his property was taken or damaged for a public use. *AGCS Marine Ins. Co.*, 293 Va. at 484-85, 800 S.E.2d at 168. Here, the Lessees allege that the City has intermittently discharged untreated waste water "without legal right" or "authority" and in violation of its "duty to prevent" such discharges imposed by law and a consent order.[10] App. 7, 13-15, 18. Such allegations do not, and cannot by definition, establish a public use. *AGCS Marine Ins. Co.*, 293 Va. at 479, 800 S.E.2d at 164

[10] That consent order describes such discharges as a "violation[] of the State Water Control Law." App. 14-15.

(holding that the "for-public-use limiting principle" is only satisfied by "lawful acts" by government officials and that a government official's tortious acts, wrongful conduct, or unauthorized acts can never establish a public use). The Lessees' claim is, therefore, fatally defective.

In an attempt to avoid addressing the merits of this argument, the Lessees assert that the City's second assignment of cross-error merely challenges their failure to include the words "public use" in the Petition. They then point to their use of the phrase "for a public use" and allegations that the claims stem from the City's provision of stormwater and sewer management services to claim that the assignment has no merit. First, even if the assignment was confined to the Lessees' failure to allege a public use, it would still be valid. A plaintiff cannot survive demurrer by merely including conclusory allegations that a taking is for a public use or that the alleged harm is incident to a public use. *Brown v. Jacobs*, 289 Va. 209, 212 n.2, 768 S.E.2d 421, 423 n.2 (2015) ("[A court] is not bound by 'conclusory allegations in a review of a demurrer.'" (quoting *Ogunde v. Prison Health Servs.*, 274 Va. 55, 66, 645 S.E.2d 520, 527 (2007)); *AGCS Marine Ins. Co.*, 293 Va. at 485, 800 S.E.2d at 168 ("Simply alleging that damage occurred *incident to* the operation of the public sewage system is insufficient to state a claim for inverse condemnation . . . ."). Second, the assignment of cross-error does not only challenge the Lessees' failure to allege a public use; instead, it also states that the Lessees failed to "allege

facts sufficient to show that their property was taken or damaged for a public use." As discussed above, the facts alleged are clearly insufficient to show that the property was taken for a public use because they allege the exact opposite: that the property was taken through illegal acts that, by definition, are not a public use.

IV. Oyster ground leases do not guarantee lessees water of a certain purity or pollution level.

In addition to alleging a valid public use, a landowner seeking to establish a valid inverse condemnation action must allege that his or her property has been taken or damaged. *Richmeade, L.P. v. City of Richmond*, 267 Va. 598, 600-01, 594 S.E.2d 606, 608 (2004). Generally, this means that the landowner must allege physical damage to the property itself or the dislocation of a specific property right. *Byler v. Va. Elec. & Power Co.*, 284 Va. 501, 509, 731 S.E.2d 916, 921 (2012) (recognizing that a partial diminution in value is only compensable if it stems from the dislocation of a specific property right); *Livingston*, 284 Va. at 155, 726 S.E.2d at 273 (holding that damage claims may be premised on physical damage to the corpus of the property); *Richmeade, L.P.*, 267 Va. at 602, 594 S.E.2d at 609 ("Taking or damaging property in the constitutional sense means that the governmental action adversely affects the landowner's ability to exercise a right connected to the property.").

The Lessees have failed to establish that they have any property right that has been taken or damaged by the alleged actions of the City. The property rights conferred by an oyster ground lease are extremely limited. Shellfish leases "are

strictly construed against the lessee" and "[n]othing passes except what is granted specifically or by necessary implication." *Working Waterman's Ass'n v. Seafood Harvesters, Inc.*, 227 Va. 101, 111, 314 S.E.2d 159, 165 (1984) (quoting *Darling*, 123 Va. at 18, 96 S.E. at 308). The lease statutes allow a lessee to occupy and use leased grounds "for the purpose of planting and propagating oysters." Va. Code § 28.2-603. Thus, the statutes give the lessee the right to exclude others from taking oysters from his grounds. *Darling*, 123 Va. at 19, 96 S.E. at 308 (stating that, after a lessee is assigned a lease, "all others are excluded from either planting or taking oysters from such ground during his term"). "[T]his marks the limit of [the lessee's] right, for there is nothing to indicate that any other public or private right is withdrawn, limited or curtailed." *Id.*; *Working Waterman's Ass'n*, 227 Va. at 111, 314 S.E.2d at 165 (stating same for leases of clam grounds). The Lessee have alleged nothing that indicates that their right to exclude other harvesters has been invaded. Instead, they allege that, because of the City's and HRSD's discharges, the water over their leases is so impure that the Virginia Department of Health will not permit them to harvest the oysters from their grounds for direct sale.[11] App. 16. This would only violate the Lessees' property rights if the Lessees had a right to pure

[11] Of course, the Lessees could still harvest the oysters on the leases in closed waters and transfer them to another lease or a depuration facility before selling them. *See* Va. Code Ann. § 28.2-811 (providing for permits for relaying oysters from polluted waters for depuration).

waters over their lease. However, as was recognized in *Darling*, the leases do not give the lessee any such right to pure water. 249 U.S. at 543-44 (holding that oyster ground leaseholders "must be held to take the risk of the pollution of the water" and noting that the "case is not changed by the guaranty in" the statute, as it is "directed to the possession of the land, not to the quality of the water"). The statute has not been amended to add such a right for leaseholders since *Darling* was decided.[12] Accordingly, the Petitioners have failed to allege a property right that has been taken or damaged.

V. Whatever taking or damage the Appellants did allege was due to the state's exercise of its police power.

As noted above, the Lessees contend that they were prohibited from directly harvesting oysters from their leased grounds because of the Virginia Department of

[12] The Lessees and the *amici* supporting the Lessees point out that the leases themselves are property. That point is uncontroversial. *See Working Waterman's Ass'n*, 227 Va. at 104, 314 S.E.2d at 160 ("A shellfish lease . . . is a chattel real . . . ."); *see also* Va. Code Ann. § 28.2-613 ("The interest in such ground is chattel real."). However, it does not help the Lessees' case. To use the oft-repeated "bundle of sticks" analogy for property, *see Cygnus Newport-Phase 1B, LLC v. City of Portsmouth*, 292 Va. 573, 586, 790 S.E.2d 623, 629 (2016) (analogizing property rights to a bundle of sticks), all that the Lessees have established is that the leases are a bundle of sticks. They have not alleged or established that the particular sticks at issue here—the right to exclude pollutants from the leased grounds or the right to have water of sufficient purity flowing over the leased grounds—are among the bundle that they hold as a result of the lease. The opinions of this Court and the U.S. Supreme Court in *Darling* say that those sticks are not in the bundle, and the Lessees have cited to nothing that suggests that those holdings have been reversed or superseded.

Health's closure[13] of the waters over their leases. This alleged harm is non-compensable because it arises from the state's exercise of its police power.

The statutes found at Va. Code §§ 28.2-800 to -826 provide for the regulation of the harvesting of seafood, including shellfish, from polluted areas by the Virginia Department of Health and the Virginia Marine Resources Commission. The aim of such regulation is to protect the public health. *See, e.g.*, Va. Code Ann. § 28.2-801(C) (authorizing the Marine Resources Commission to promulgate emergency regulations pertaining to shellfish in closed waters "to protect the health of the public"). As such, the statutes were passed pursuant to the state's police power. *See Gorieb v. Fox*, 145 Va. 554, 560, 134 S.E. 914, 916 (1926) ("The legislature may, in the exercise of the police power, restrict personal and property rights in the interest of public health, public safety, and for the promotion of the general welfare.").

"A citizen holds his property subject to the proper exercise of the police power either by the General Assembly directly, or by municipal corporations or other State agencies to which such power has been delegated." *Weber City Sanitation Comm'n v. Craft*, 196 Va. 1140, 1148, 87 S.E.2d 153, 158 (1955). Shellfish leases and the

[13] These closures are sometimes called a "condemnation" of the waters. *See, e.g.*, Va. Code Ann. § 28.2-807 ("This area shall be condemned and remain so until the Health Commissioner finds such crustacea, finfish or shellfish, or area, sanitary and not polluted."). To avoid confusion with the concept of condemnation or inverse condemnation pursuant to the power of eminent domain, the City will refer to the restrictions on harvesting from such waters as a closure rather than a condemnation.

shellfish planted on them, like other property, are subject to the police power. *See Working Waterman's Ass'n*, 227 Va. at 112, 314 S.E.2d at 165 (upholding a law that eliminated the only economically feasible way to harvest clams from leased grounds because "the General Assembly's power to protect the public interest cannot be frustrated by a private desire to take profits from the public shellfish resources"). Laws passed pursuant to the police power "do not appropriate private property for public use but simply regulate its use and enjoyment by the owners" and losses occasioned by such laws are therefore non-compensable. *Weber*, 196 Va. at 1148, 87 S.E.2d at 158.

Here, the alleged harm to the Lessees is their inability to directly harvest seafood from their leased grounds. The City's alleged pollution of the waterway does not physically prevent the Lessees from harvesting the shellfish.[14] Instead, they cannot directly harvest their shellfish from the waters because of Virginia's regulation of harvests from polluted waters pursuant to the police power.[15] As the only harm alleged flows from this exercise of the police power, it is non-compensable.

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[14] Indeed, "[f]ecal coliform bacteria are not harmful to the oysters; indeed, they thrive on it." *Ex parte Fowl River Protective Ass'n*, 572 So.2d 446, 465 (Ala. 1990).

[15] The Lessees misconstrue the City's argument on this point as asserting that it has a police power to pollute. Appellant Br. 16. The City claims no such power.

VI. The Petition is time-barred because the claims are premised on conditions which have existed continuously since before the three-year statute of limitations.

Inverse condemnation actions are based on an implied contract. *Richmeade, L.P.*, 267 Va. at 601, 594 S.E.2d at 608. Accordingly, they are governed by the three-year limitations period for implied contracts. Va. Code Ann. § 8.01-246(4). The period begins to run on the date that the alleged breach occurred. Va. Code Ann. § 8.01-230. In an inverse condemnation case, the breach of the implied contract occurs when the government limits an owner's property rights without paying the landowner for the limitation. *Richmeade, L.P.*, 267 Va. at 603, 594 S.E.2d at 609.

The acts or omissions of the City that the Lessees allege breached the implied contract occurred well outside the three-year limitations period. The Lessees filed their Petition on November 9, 2018. App. at 1. Accordingly, any action concerning a breach that occurred before November 9, 2015 is time-barred. As noted previously, the Lessees complain about discharges of untreated sewage and stormwater from the City's and HRSD's storm water and sanitary sewer systems. App. at 13. To support their allegations, the Lessees cite to a series of amendments to a Consent Decree between HRSD and the governments of the United States and the Commonwealth that pertains to sanitary sewer overflows. App. at 14, 68-159. The first Amended Consent Decree identified by Lessees is dated February 3, 2010.

App. at 14. The Third Amended Consent Decree, which is attached to the Petition as an Exhibit, is dated August 2014. App. at 14, 68-159. In addition, the Lessees cite to a Consent Order that several localities, including the City, entered into with the Department of Environmental Quality pertaining to violations of the State Water Control Law that included unauthorized discharges of untreated sewage. App. at 14-15, 160-183. That order is dated December 19, 2014. App. at 14. Thus, the Lessees allege that the actions of the City and HRSD that led to the pollution began outside of the limitations period.

Similarly, the allegations in the Petition allege that any harm began occurring outside of the limitations period. The Lessees allege that the pollution caused the Virginia Department of Health to order the closure of the waters over their leased grounds to the direct harvest of oysters. App. at 17. The first closure they report was effective from September 10, 2015 through September 26, 2016, App. at 17, a period that is partially outside of the limitations period. An examination of the closure order itself reveals that the order replaces a previous closure order for a similar area that was effective starting August 26, 2014. App. at 190. This demonstrates that the alleged harm—the closure of the waters over the Lessees' grounds to the direct harvest of shellfish—first occurred outside of the limitations period.

The Lessees maintain that they can bring still bring this action to challenge sewage discharges that occurred within the three years preceding the filing of their Petition under *Hampton Roads Sanitation District v. McDonnell*, 234 Va. 235, 360 S.E.2d 841 (1987). That case is inapplicable here. In *McDonnell*, the court held that the owner of upland property could maintain an action for intermittent discharges of sewage onto his property that began outside the limitations period because each discharge created distinct harm and thus gave rise to its own cause of action. *Id.* at 239, 360 S.E.2d at 844. A later case clarified that the general rule for property damage cases like *McDonnell* is that the cause of action accrues when the harm to the property first occurs, and subsequent compounding or aggravating damage "does not restart a new limitation period for each increment of additional damage." *Forest Lakes Cmty. Ass'n v. United Land Corp. of Am.*, 293 Va. 113, 123-24, 795 S.E.2d 875, 881 (2017). There are situations, like *McDonnell*, where a recurring damage will give rise to a new cause of action that is a standalone claim with a new limitations period. *Id.* at 124, 795 S.E.2d at 881. The distinguishing feature between the two is the permanence of the injury. "[W]hen the recurring injuries 'in the normal course of things, will continue indefinitely, there can be but a single action therefor, and the entire damage suffered, both past and future, must be recovered in that action.'" *Id.* at 126, 795 S.E.2d at 882-83 (quoting *Norfolk County Water Co. v. Ethendge*, 120 Va. 379, 380-81, 91 S.E. 133, 134 (1917)). On the other hand, where

"a series of 'repeated actions' caus[e] *temporary* injuries to property," a new cause of action occurs with each repeated action that triggers a new limitation period. *Id.* at 127-28, 795 S.E.2d at 883 (citing *Virginia Hot Springs Co. v. McCray*, 106 Va. 461, 463-64, 56 S.E. 216, 217-18 (1907)).

Aside from conclusory allegations that their property was damaged, the Lessees do not allege anything that would indicate that the discharge of pollutants into the river actually harms the leased grounds themselves or the oysters thereon. Instead, they allege simply that the pollutants have led the Virginia Department of Health to close the waters to the harvest of oysters, making it impossible to directly harvest oysters from the leases. App. at 15. Portions of the Nansemond River and the waters of the Hampton Roads more generally have long been known to be too heavily polluted for harvesting shellfish. *See Darling*, 123 Va. at 19, 96 S.E. at 308 ("Hampton Roads . . . is a large, tidal, navigable body of salt water, formed by the confluence of the waters of the Atlantic Ocean, Chesapeake Bay, the James, Elizabeth and Nansemond rivers . . . . That some of its waters have long been polluted and unfit for the planting of oysters for human food is . . . apparent . . . ."). Indeed, the Lessees themselves allege that the closure orders of which they have complained have been in effect without lapse since at least September 10, 2015. App. at 17. Because this harm is not temporary in nature but is instead indefinite and each new alleged release of pollutants at most compounds or aggravates the

harm caused by sewage released long ago, there is a single cause of action for all such releases. Those releases began outside of the applicable limitations period, so the cause of action is now time-barred.

CONCLUSION

The judgment of the trial court dismissing the Lessees' Petition should be affirmed, either for the reason it set forth in its letter opinion or for the alternative reasons set forth above.

CITY OF SUFFOLK

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CERTIFICATE

I hereby certify that on this 13th day of July, 2020, pursuant to Rule 5:26, an electronic copy of the Brief of Appellee was filed, via VACES, with the Supreme Court of Virginia. On this same day, an electronic copy of the Brief of Appellee was served, via email, upon:

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