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.

APPELLEE BRIEF OF HAMPTON ROADS SANITATION DISTRICT

Christopher D. Pomeroy (VSB No. 40018)
Paul T. Nyffeler (VSB No. 77144)
AQUALAW PLC
6 South Fifth Street
Richmond, Virginia 23219
(804) 716-9021 (Telephone)
x202 (Pomeroy); x206 (Nyffeler)
(804) 716-9022 (Facsimile)
chris@AquaLaw.com
pnyffeler@AquaLaw.com

Counsel for Hampton Roads Sanitation District

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES**

CONSTITUTIONAL PROVISIONS

STATUTES

STATEMENT OF THE CASE

This is an appeal of a final judgment of the Suffolk Circuit Court (Case No. CL18-2350), which dismissed the inverse condemnation claim of C. Robert Johnson III, Thomas A. Hazelwood, Johnson and Sons Seafood, LLC, and Hazelwood Oyster Farms, LLC (collectively "Petitioners" or "Lessees") with prejudice. The Lessees filed a declaratory judgment petition asserting a single claim for inverse condemnation related to certain Nansemond River oyster grounds that, according to the Lessees, are (a) allegedly leased by the Commonwealth of Virginia (the "Commonwealth" or the "State"), acting through the Virginia Marine Resources Commission ("VMRC"), to the Lessees, (b) allegedly impaired by two political subdivisions of the Commonwealth, the City of Suffolk ("Suffolk") and the Hampton Roads Sanitation District ("HRSD" and collectively "Appellees"), by sanitary sewer (Suffolk and HRSD) and stormwater drainage system (Suffolk) operation-related pollution, and (c) allegedly condemned by the Commonwealth acting through the Virginia Department of Health ("VDH") due to pollution by its political subdivisions.

HRSD and Suffolk filed separate demurrers. Following briefing, the parties gave oral argument and submitted post-hearing letter briefs. The Circuit Court ruled that (a) Suffolk and HRSD have condemnation authority over the Lessees' oyster planting grounds, despite the General Assembly's revocation of such authority under Virginia Code § 28.2-628 as to grounds leased by the Commonwealth to third parties, but that (b) the Lessees' inverse condemnation claims were barred under the reasoning of *Darling v. City of Newport News*, 249 U.S. 540 (1919), affirming *Darling v. City of Newport News*, 123 Va. 14 (1918), that oyster planting ground leases are granted by the Commonwealth subject to the risk of pollution. The Circuit Court entered a final order denying in part and sustaining in part Appellees' demurrers and dismissing the action with prejudice. The Lessees appealed, and HRSD and Suffolk cross-appealed.

ASSIGNMENT OF CROSS-ERROR

The Circuit Court erred in denying in part HRSD's demurrer by finding that HRSD has condemnation authority over the Lessees' alleged oyster planting ground leases despite Virginia Code § 28.2-628, which removed its condemnation authority over grounds leased by the

Commonwealth to third parties pursuant to Virginia Code §§ 28.2-600 *et seq*. [*Preserved*: A. 205-06, 214-15, 221-22, 235, 237-40, 261-62, 274].

STATEMENT OF FACTS

The following facts are alleged in the declaratory judgment petition and accepted as true by the Court solely for purposes of considering the legal sufficiency of the declaratory judgment petition and HRSD's demurrer. HRSD does not admit or concede these alleged facts.

The Lessees' case is based on leases allegedly issued by VMRC for certain Nansemond River oyster planting grounds. A. 7, 9-11 ¶¶ 9, 24, 26-38. The only unexpired leases attached to the Lessees' petition do not contain any rights beyond those conferred by statute. *See, e.g.,* A. 62 ("THIS OYSTER PLANTING GROUND LEASE ASSIGNMENT is made pursuant to the provisions of the Code of Virginia, §28.2-600 to 28.2-650 . . . .").

The Lessees allege that Appellees use, operate and maintain sanitary sewer systems, and Suffolk uses, operates and maintains a stormwater system, "to accommodate the needs of the City of Suffolk and the surrounding area," A. 12, ¶ 44, that they do so in a manner that "allows the systems to overflow," A. 13, ¶ 48, and that their discharge

"enters and pollutes the Nansemond River and the [Lessees'] property," A. 13, ¶ 46.

The Lessees further allege that VDH condemned or conditionally condemned (*i.e.*, temporarily limited the use of) oyster planting grounds in parts of the Nansemond River, including areas leased to the Lessees, thereby making it unlawful to harvest and market oysters from such grounds without first cleansing them through existing VDH-authorized methods. *See* A. 16-17, ¶¶ 55-57; A. 184-191.

As part of its special role continuously improving water quality throughout the Hampton Roads region, HRSD agreed to and entered into a 2010 consent decree with the U.S. Environmental Protection Agency ("EPA") and the State Water Control Board and Virginia Department of Environmental Quality (collectively "DEQ") and various subsequent amendments to establish a long-term implementation program for various additional infrastructure improvements in furtherance of the federal Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, and the State Water Control Law, Va. Code §§ 62.1-44.2 *et seq*. *See* A. 14 ¶ 49; A. 68-159 (consent decree); *but see* A. 151 ¶ 159 (consent decree between United States, Virginia, and HRSD "shall not be construed to create rights in, or

grant any cause of action to, any third party not party to this Consent Decree."). Similarly, Suffolk and numerous other Hampton Roads localities agreed to and entered into a related consent order with DEQ. A. 14-15, ¶ 50.

ARGUMENT

The Lessees seek to overturn 100 years of settled law on the limited nature of the rights granted by the Commonwealth to private parties through oyster planting ground leases. The fundamental limitation at issue here—that such leases are made subject to the risk of pollution—was confirmed by this Court in 1918 and affirmed by the Supreme Court of the United States in 1919. *Darling v. City of Newport News,* 123 Va. 14 (1918), *aff'd*, 249 U.S. 540 (1919). Rather than ask the General Assembly to grant the new "pure water" right they seek, the Lessees ask this Court to do so by finding new inferences in old laws enacted in the 1930s and 1940s. *See* Appellants' Br. 11-12. The proper venue for considering their proposed re-write of Virginia's oyster planting ground leasing statutes—which would expose the Commonwealth and its agencies and political subdivisions to substantial liability and

unfortunately lead perhaps to reduced lease availability—is in the legislature, not the courts.

It is deeply ironic that the Lessees have sued HRSD to demand compensation from its ratepayers on water quality grounds. Since HRSD's creation by voter referendum in 1940 under new legislation enacted that year by the General Assembly, this political subdivision of the Commonwealth has drastically ***reduced*** water pollution under the leadership of the HRSD Commission, whose members are appointed by the Governor. *See* Acts of Assembly, 1940, ch. 407, p. 730. Today, HRSD is a nationally renowned and frequently awarded clean water agency that is conducting one of the most advanced wastewater treatment and recycling programs in the world, its Sustainable Water Infrastructure For Tomorrow ("SWIFT") initiative. The fact that the condition of the tidal waters in the expansive, populous Hampton Roads region—though vastly improved due to HRSD's efforts—has not reached a state of purity is not a fair basis for criticism, much less this lawsuit.

For the reasons provided in the proceeding below and summarized here, the Circuit Court's partial sustaining of HRSD's demurrer should be affirmed.

A. Standard of Review.

This Court reviews a grant of a demurrer *de novo*, taking as true all material facts properly pleaded in the declaratory judgment petition, those impliedly alleged, and those that may reasonably be inferred from the pleading. *Ayers v. Shaffer*, 286 Va. 212, 216-17 (2013).

B. Legal Standard for Inverse Condemnation Claims.

Inverse condemnation claims are rooted in Article I, § 11 of Virginia's Constitution, which states "[n]o private property shall be damaged or taken for public use without just compensation to the owner thereof." Property "taken or damaged ***for public use***" bestows "on the owner a right to 'sue upon an ***implied contract*** that he will be paid therefor such amount ***as would have been awarded*** if the property had been condemned under the eminent domain statute.'" *AGCS Marine Ins. v. Arlington County*, 293 Va. 469, 477 (2017) (quoting *Burns v. Bd. of Supervisors*, 218 Va. 625, 627 (1977)) (emphasis in original). For Virginia constitutional purposes, property is "damaged" where "the corpus of the owner's property itself, or some appurtenant right or easement connected therewith, or by the law annexed thereto, is directly (that is, in general if not always, physically) affected, and is also specially affected (that is, in a manner not common to the property owner and to the public at

large)." *Livingston v. VDOT*, 284 Va. 140, 155-56 (2012) (quoting *City of Lynchburg v. Peters*, 156 Va. 40, 49 (1931)). Partial diminution in property value is "compensable only if it results from dislocation of a specific right contained in the property owner's bundle of property rights." *Livingston*, 284 Va. at 156 (internal citation omitted). Property is considered "taken" only if "the government's action deprives the property of all economic use." *Bd. of Supervisors v. Omni Homes, Inc.*, 253 Va. 59, 72 (1999). Any injury to property that occurs due to the government's exercise of "[l]aws and ordinances relating to the comfort, health, good order and general welfare of the inhabitants of a community which can properly be styled police regulations" is not a taking or damaging that is constitutionally compensable. *Weber City Sanitation Comm'n v. Craft*, 196 Va. 1140, 1148-49 (1955) (quoting 1 Dillon, Municipal Corporations § 141 (3rd ed., 1881)).

C. The Circuit Court's Dismissal of Lessees' Inverse Condemnation Claim Should Be Affirmed.

1. Oyster Planting Ground Leases Granted by the Commonwealth Provide the Right to "Plant and Propagate" Oysters But Not to "Pure Water."

The Lessees' inverse condemnation claim against HRSD falls short because no specific right associated with oyster planting ground leases

has been taken or damaged. The Lessees' declaratory judgment petition alleges that HRSD has "interfere[d] with and deprive[d] [the Lessees] of their right to exclusive possession of their property, or right to exclude all others, their right to sell or alienate the property, and their right to the use and enjoyment of their property." A. 18 ¶ 62. The Lessees' allegations merely amount to blindly copying elements of *AGCS* and *Livingston*—two factually distinguishable cases involving upland property titled in private ownership, as opposed to publicly-owned tidal river beds leased for individual commercial purposes on statutory terms—without ever addressing which specific property rights the Commonwealth actually conveyed in the oyster ground leases or how those specific rights were damaged. *Compare* A. 13 ¶ 48, 17 ¶ 58; *with AGCS*, 293 Va. at 482; *Livingston*, 284 Va. at 159; *see also* Appellants' Br. 6-7. The Lessees ignore this issue at their peril, as their inverse condemnation claim must fail if no specific property right has been damaged.[1] *See Livingston*, 284 Va. at 156 ("Virginia law holds partial

[1] Even if there were a right to pure water under the oyster planting ground leases, the Lessees have not properly alleged that their property has been taken because they can still take advantage of the statutory options of relaying and depurating the oysters, as described *infra*.

diminution in the value of property compensable only if it results from dislocation of a specific right contained in the property owner's bundle of property rights.") (quoting *Omni Homes*, 253 Va. at 72).

Oyster planting ground leases do not convey to lessees "fee simple title" or all property rights appurtenant thereto. *Darling*, 123 Va. at 19. Rather, the leases are "[g]rants in derogation of the common or public right," and as such, all rights not "granted specifically" by the leases are reserved to the Commonwealth, which owns all subaqueous bottomlands. *See Darling*, 123 Va. at 16 ("[T]he bed of the navigable, tidal salt water and the waters themselves are owned and controlled by the State, for the use and benefit of all the public, subject only to navigation.") (quoting *Hampton v. Watson*, 119 Va. 95, 98 (1916)), *aff'd*, 249 U.S. 540 (1919); *Working Waterman's Ass'n of Va., Inc. v. Seafood Harvesters, Inc.*, 227 Va. 101, 111 (1984) ("Shellfish leases, which are grants in derogation of the common or public right, are strictly construed against the lessee.

Because HRSD's alleged actions, if accepted as true for appellate purposes, have not deprived the Lessees' "all economic use" of their property, their property cannot be considered "taken for constitutional purposes." *Bd. of Supervisors v. Omni Homes*, 253 Va. 59, 72 (1999).

'Nothing passes except what is granted specifically or by necessary implication.'") (quoting *Darling*, 123 Va. at 18).

Oyster planting ground leases only convey the limited right to plant and propagate oysters within the leased ground and to exclude all other persons "from either planting or taking oysters from such ground during" the term of the lease. *Darling*, 123 Va. at 19; *see* Va. Code §§ 28.2-603, -618. For example, oyster planting ground leases convey no right to exclude members of the public from "fishing in waters above the bottoms," Va. Code § 2.82-618(3), or from using the waters above the leased ground for navigation, *see Va. Marine Res. Comm'n v. Chincoteague Inn*, 287 Va. 371, 387 (2014). Oyster planting ground leases do not expressly convey any right to exclusion of upland or upstream activities effectively using the leased ground or water above it "as a storage site for" anything. *Livingston*, 284 Va. at 159.

The Lessees have not identified any provision in the controlling statutes of Va. Code § 28.2-600 *et seq.* or in their purported leases that actually conveys to them the rights they now claim have been taken or damaged. There are no statutory or other lease provisions that (i) guarantee pure water, (ii) promise that no impure water will flow in the

Nansemond River rendering the leased ground "as a storage site for excess discharge" (as the Lessees alleged), or (iii) provide any other characterization of the quality of water to be found above the leased ground. Under the State laws controlling this leasing activity, the opposite is the case; the leases always have been and properly remain subject to the risk of pollution. As this Court explained in 1900,

> All running streams are, to a certain extent, polluted; and especially are they so when they flow through populous regions of country, and the waters are utilized for mechanical and manufacturing purposes. The washing of the manured and cultivated fields, and the natural drainage of the country, of necessity bring many impurities to the stream; but these, and the like sources of pollution, cannot, ordinarily, be restrained by the court. Therefore, when we speak of the right of each riparian proprietor to have the water of a natural stream flow through his land in its natural purity, those descriptive terms must be understood in a comparative sense; as no proprietor does receive, nor can he reasonably expect to receive, the water in a state of entire purity.

Trevett v. Prison Ass'n of Virginia, 98 Va. 332, 339-40 (1900) (quoting *Mayor of Baltimore v. Warren Mfg. Co.*, 59 Md. 96, 108-09 (1900)). Similarly, this Court later explained "the oyster planter takes his right to plant and propagate oysters on the public domain of the Commonwealth in the tidal waters, subject to" the natural uses of the water, including upland runoff. *Darling*, 123 Va. at 21, *aff'd*, 249 U.S.

540; *see also Commonwealth ex rel. Attorney Gen. v. City of Newport News*, 158 Va. 521, 552-56 (1932) (hereinafter "*Newport News*"); *Hampton v. Watson*, 119 Va. 95, 101 (1916).

Despite all of the benefits HRSD has provided through billions of dollars of wastewater infrastructure, the fact remains that the tidal waters continue to bear some (markedly reduced) level of pollution from various upland and upstream sources. Because the Lessees' rights are inferior to the public right to use Virginia's rivers and streams for drainage, the oyster planting ground leases convey no more of a right to be free from man-made sources of contaminants (*e.g.*, runoff from roadways, agricultural operations, and commercial and residential properties; seepage of human waste from septic tanks or sewers; discharges from manufacturers; or deposition of air pollutants onto the water) than from natural sources of contaminants (*e.g.*, excrement from wildlife washed or deposited into the Nansemond River).[2]

[2] If the Court were to accept as true for purposes of this appeal the Lessees' allegation that sewage discharges purportedly from HRSD's system "enter[ed] and pollute[d] the Nansemond River," A. 13 ¶ 46, the alleged harm would not have "specifically affected" the Lessees' private property as required by Article I, § 11 of Virginia's Constitution, *Livingston*, 284 Va. at 155-56 (quoting *Lynchburg*, 156 Va. at 49). Their

Given this reality, it is not surprising that the General Assembly has not expanded oyster planting ground lease terms to add a right of pure water. In fact, the statutes governing the issuance of oyster ground leases are extremely consistent from the beginning of the 20th century to today. A lessee had, and still has, the right "'to continue to use and occupy'" the leased ground for the term of the lease as long as the required rent is paid. *Compare* Va. Code § 28.2-618 *with* General Oyster Law §§ 6, 9, Acts of Assembly, 1910, ch. 343, p. 545-47; *see also Darling*, 123 Va. at 17-18. Then, as now, leases allow "oyster planting grounds" to "be occupied 'for the purpose of planting or propagating oysters . . . .'" *Compare* Va. Code § 28.2-603 *with* General Oyster Law §§ 6, 9, Acts of Assembly, 1910, ch. 343, p. 545-47; *see also Darling*, 123 Va. at 17-18. The only significant change in the rights conferred by an oyster planting ground lease in more than 100 years is the lease period decreased from twenty years to ten. *Compare with* Va. Code § 28.2-613 *with* General

---

allegation of a polluted river means the alleged harm to their property rights occurred "in a manner" that was "in common to the property owner and to the public at large," including any and all leaseholders, fishers, swimmers, boaters, riparian waterfront landowners, etc., which is fatal to an inverse condemnation claim. *Id*.

Oyster Law §§ 6, 9, Acts of Assembly, 1910, ch. 343, p. 545-47; *see also Darling*, 123 Va. at 17-18.

The Lessees incorrectly assert that oyster planting ground leases contain by "necessary implication" a new right to the level of water quality sufficient to allow them to harvest oysters directly from the leased grounds for marketing straight to consumers. Appellants' Br. 16 (citing *Working Watermen's Assoc.*, 227 Va. at 111); *but see Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 429 (2012) ("necessary implication" means statute would cease to function without the missing provision). However, Virginia's statutes governing oyster planting grounds have consistently provided that water conditions may render oysters unsafe, temporarily at least, for human consumption and have long prohibited lessees from "taking of oysters therefrom except for the purpose of removing them to unpolluted waters, there to remain until cleansed, purified and made suitable for human food." *Darling*, 123 Va. at 21; *see* Acts of Assembly, 1916, ch. 46, pp. 51-52, § 3. When VDH opts to "condemn" (*i.e.*, close) oyster planting grounds under Virginia Code §§ 28.2-803 and 28.2-807, lessees may still grow and harvest oysters from the closed grounds and "relay" them to an approved area for natural

purification. *See* Va. Code §§ 28.2-800, -811. Lessees may also render oysters harvested from closed grounds marketable by using a controlled aquatic environment to cleanse them in a process referred to as depuration. *See id.*

By this longstanding statutory structure, the General Assembly balanced competing interests. Watermen may obtain leases from the Commonwealth (VMRC) despite known or potential contamination risks from numerous private and public sources, subject to the Commonwealth (VDH) closing the oyster grounds for direct harvesting and marketing as needed for public health protection, in which case the statute still allows lessees the options of relaying and depurating to continue benefiting from their leases. Therefore, the statutory scheme itself—like the obvious fact of continuing tidal water pollution risk—contradicts what the Lessees ask the Court to infer as a necessary implication. Rather than a right to direct harvest and marketing by necessary implication, the statutes actually provide for closures with permitted relaying and depuration. Again, the General Assembly could have changed this statutory structure at any time over the past century to grant what the Lessees ask the Court to find by implication, but the General Assembly has not chosen to do so.

For these reasons, the Circuit Court's dismissal of the Lessees' inverse condemnation claim should be affirmed.

2. The Circuit Court's Citation to the U.S. Supreme Court's *Darling* Opinion Rather than Directly to the Supreme Court of Virginia's Earlier *Darling* Opinion Is a Distinction Without a Difference.

The Lessees assign error to the Circuit Court's citation to the U.S. Supreme Court's opinion rather than the Supreme Court of Virginia's opinion, a hyper-technical argument that is insufficient as a matter of law. They argue that the U.S. Supreme Court's *Darling* opinion is inapposite because it does not account for the Virginia's Constitution "stronger property-rights protection" of its "damage or take" provision. *See* Appellants' Br. 6. However, the U.S. Supreme Court actually recognized this potential difference between the federal and state constitutions and explicitly stated that "upon that point we follow the Supreme Court of the State" (*i.e.*, the Commonwealth of Virginia). *Darling*, 249 U.S. at 544. The question of whether an oyster planting ground lessee could assert an inverse condemnation claim under the "damage or take" provision of Virginia's Constitution was before the Supreme Court of Virginia in 1918. *See Darling*, 123 Va. at 22 (discussing "liability to make 'just compensation' for 'damage' it may cause to private

property" under the Constitution of Virginia of 1902, art. IV, § 58, the predecessor of art. I, § 11) (Sims, J., dissenting). For its part, the U.S. Supreme Court heard this case on assignment of "Error to the Supreme Court of Appeals of the State of Virginia." The U.S. Supreme Court noted that "[t]he constitution of Virginia, like some others, requires compensation for property taken *or damaged* for public use." *Darling*, 249 U.S. at 544 (emphasis added). The U.S. Supreme Court deferred to this Court's judgment with regard to the Constitution of Virginia. *Id.* Finally, the U.S. Supreme Court affirmed this Court on this very point. *Id.*

The Lessees' argument is a distinction without difference. The two *Darling* opinions are the same case, the outcomes are the same, and their reasoning is the same. The Circuit Court did not err in sustaining HRSD's demurrer by citing the U.S. Supreme Court's *Darling* opinion discussing and affirming the Supreme Court of Virginia's ruling on the Virginia Constitution's "damage or take" provision. Even if it somehow were error, this distinction without a difference is the epitome of harmless error.

3. Lessees' "Obsolete Caselaw" Argument Is Wrong Because Post-*Darling* Legislation Did Not Expand Their Lease Rights or Create New Causes of Action.

The Lessees' second and final assignment of error asks this Court to dramatically expand the rights conveyed by the Commonwealth in current oyster planting ground leases, not because the lease terms or the controlling statutes in Title 28.2 of the Code of Virginia have been amended to convey the additional rights they claim, but because the Lessees wish to infer such lease term amendments based on separate general environmental provisions enacted since *Darling*. *See* Appellants' Br. 9-13. None rises to the level of the requisite clear and explicit amendment to add a right to pure water (or as the Lessees put it, freedom from others using the oyster grounds "as a storage site for" anything) to the leases, which as grants in derogation of public rights must be strictly construed against the lessee, as discussed above. The Lessees' mischaracterization of the issue as localities demanding the unfettered freedom to pollute (which is not HRSD's goal) is a distraction from the fact that they do not hold the property right they claim.

a. *The Lessees Misinterpret Article XI of Virginia's Constitution and Misunderstand the Commonwealth's Rights of Jurisdiction and Dominion.*

The Lessees attempt to justify their alleged right to pure water with out-of-context excerpts from §§ 1-3 of Article XI of the Constitution of Virginia and a confused amalgamation of the right of *jus publicum* and the right to fish in Virginia's waters. First, the Lessees discuss § 1 of Article XI, which states that "it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth," and § 2, which states that "[i]n the furtherance of such policy, the General Assembly may undertake . . . the protection of its atmosphere, lands, and waters from pollution, impairment, or destruction, by agencies of the Commonwealth or by the creation of public authorities . . . ." However, these policy statements regarding environmental protection are not directly enforceable and thus have no effect on the lease rights absent the enactment of a law that establishes some specific effect—and there is none for oyster planting ground leases. *See Robb v. Shockoe Slip Found.*, 228 Va. 678, 682-83 (1985) (Article XI, § 1 of Va. Const. "is not self-executing"). Nor can these policy statements

be interpreted as adding lease terms that the General Assembly did not enact and include in the leases in light of its awareness (or properly presumed awareness) of this Court's controlling ruling in *Darling* and lack of legislative change. *See Gillespie v. Commonwealth*, 272 Va. 753, 758-59 (2006) ("In ascertaining legislative intent, we presume that the General Assembly, when enacting new laws, is fully aware of the state of existing law relating to the same general subject matter. The General Assembly is not only presumed to have been aware of the . . . statutes in effect . . . , but is also presumed to have been aware of our decisions construing them.") (internal citations omitted). Indeed, these Article XI provisions have been part of the Constitution since 1971 and have never been applied in laws by the General Assembly in the manner that the Lessees wish.

After misinterpreting the policy statements in Article XI, §§ 1 and 2 as enforceable mandates, the Lessees then selectively quote from § 3 to make a "public trust" argument. Appellants' Br. 9-10 (quoting Va. Const. art. XI, § 3). This constitutional provision, however, is inapplicable to the "public trust doctrine." *Id.* The language in this section, which dates to at least 1902, states:

> 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 restriction as the General Assembly may prescribe . . . .

Va. Const. art. XI, § 3 (emphasis added); *see* Va. Const. art. XIII, § 175 (1902). Because § 3 applies to unleasable natural oyster beds, it does not apply to this dispute over oyster planting ground lease rights.

Next, the Lessees have it backwards in suggesting that the *jus publicum* supports their claim. In fact, the opposite is true. As this Court explained in *VMRC v. Chincoteague Inn*, "the Commonwealth's sovereign authority over public environments, including subaqueous bottomland, has two facets," namely the rights of *jus publicum* and *jus privatum*. 287 Va. 371, 382 (2014). The first "facet" of sovereign authority, the right of *jus publicum*, is a State's "right of jurisdiction and dominion for governmental purposes over all the lands and waters within its territorial limits, including tidal waters and their bottoms." *Newport News*, 158 Va. at 546. "The *jus publicum* contains within it, as 'inherent' and 'inseparable incidents thereof,' certain 'rights of the people.'" *VMRC* at 382-83 (quoting *Newport News*, 158 Va. at 546). The second "facet" of sovereign authority, the right of *jus privatum*, is, "as proprietor," a State's

"right of private property in all the lands and waters within its territorial limits (including tidal waters and their bottoms) of which neither it nor the sovereign State to whose rights it has succeeded has divested itself." *Newport News*, 158 Va. at 546.

Contrary to the Lessees' assertion, "the use and enjoyment by the people of the tidal waters and their bottoms for the purpose of taking fish and shellfish . . . is an incident of the *jus privatum* of the State, not of the *jus publicum*." *Newport News*, 158 Va. at 549. The right to allow drainage from property into "navigable streams has been regarded as part of the *jus publicum*" from "time immemorial." *Id.* at 554 (quoting *Hampton v. Watson*, 119 Va. 95, 101 (1916)). This Court has previously held that Virginia's Constitution denies the General Assembly of the authority to "make a grant of a proprietary right in or authorize, or permit the use of, the public domain, including the tidal waters, except subject to the *jus publicum*." *Id.* at 546-47. For this reason, oyster planting ground leases, as part of the *jus privatum* of the State, are subject to the risk of pollution from upstream natural, agricultural, residential, commercial, industrial, governmental, and other sources and cannot convey a right to pure water.

b. *HRSD's Formation Did Not Supplement the Rights Conveyed by Oyster Planting Ground Leases.*

The Lessees take Virginia Code § 21-218 out of context and rely on it incorrectly to suggest that it somehow exposes HRSD to liability for inverse condemnation claims. This 1938 provision is part of Chapter 3 of Title 21, which provides for the creation of certain sanitation districts.[3] Section 21-218 states, in pertinent part:

> No county, city, town or other public body, or person shall discharge, or suffer to be discharged, directly or indirectly into any tidal waters of the district any sewage, industrial wastes or other refuse which may or will cause or contribute to pollution of any tidal waters of the district, provided, that this provision shall be applicable only to such part or parts of the tidal waters of a district as shall be bounded and described in a ***notice***, published in a newspaper . . . to the effect that ***the commission has provided facilities reasonably sufficient*** in its opinion for the disposal of sewage, which by discharge from public sewer systems might cause or contribute to pollution . . . , ***and that pollution . . . is forbidden by law***. . . . The provisions of this section shall not prohibit the disposal of sewage and industrial wastes in the manner in which the same is now being disposed of, or in any other reasonable manner, by any county, city or town, no part of which constitutes a part of any district, or by any person in

[3] Chapter 3 of Title 21 technically applies to the creation of sanitation districts with outstanding bonds not in excess of $10 million, *see* Va. Code § 21-189, whereas HRSD had over $800 million in bonds outstanding as of June 30, 2018. Today, HRSD's enabling authority is separately provided in Chapter 5 of Title 21. Va. Code § 21-291.2.

> any such county, city or town, no part of which constitutes a part of any district.

Va. Code § 21-218 (emphasis added). The Lessees note that Virginia Code § 21-218 dates back to 1938 to suggest that its issuance ended the "era of unfettered pollutant discharge." Appellants' Br. 11-12. The Lessees' view of this 1938 provision is wrong for three reasons.

First, Chapter 3 of Title 21 is enabling legislation for the optional formation of sanitation districts in the future. The provision of this authority for future sanitation districts contains no "clear and explicit" change to give the Lessees a pure water right in oyster planting ground leases separately issued by VMRC without regard to the existence of a local sanitation district. Surely the General Assembly understood the obvious fact then—which continues to this day—that the risk of impure water always exists within tidal waters.

Second, the specific prohibition the Lessees quote is not a prohibition on any sanitation district that may be formed, but rather upon the acts of third parties within the district. Once a sanitary district gives public notice that it has completed public facilities reasonably sufficient for the sewage disposal within the district, third parties within the district must connect and use the public facilities. The sanitation

district itself is not restricted. But that alone does not guarantee the tidal waters would always be pure for shellfishing or amend leases for oyster planting grounds. *See HRSD v. Smith*, 193 Va. 371, 378-79 (1952).

Third, HRSD's creation does not mean that the rights accompanying oyster planting ground leases are expanded or water is guaranteed to be in a state of entire purity. Although HRSD's efforts to clean up the tidal waters of the Hampton Roads region have undeniably produced a long road of tremendous progress, this Court has previously rejected suggestions that HRSD "must wholly prevent the happening of any pollution at any future time" or that HRSD is responsible for achieving a fixed reduction within any fixed period. *Smith*, 193 Va. at 379.

For all of these reasons, § 21-218 of the Code of Virginia has no relevance to the Lessees' effort to impose liability on HRSD while this political subdivision of the Commonwealth proudly continues to pursue its clean water mission in the public interest.

c. *Neither the State Water Control Law nor the Clean Water Act Supplemented the Rights Conveyed by Oyster Planting Ground Leases.*

The Lessees also rely on the State Water Control Law's general policy statement at Virginia Code § 62.1-44.2, which they date to 1946. What is most notable about this policy statement of the Commonwealth is that rather than guaranteeing pure water, it actually recognizes the continuing presence of pollution. It provides that the Commonwealth's goal is to "prevent any increase in pollution" (not "prevent all pollution"), "reduce existing pollution" (not "eliminate existing pollution"), and "restore" water quality (not provide "water in a state of entire purity," which this Court has acknowledged is an unreasonable expectation). Va. Code § 62.1-44.2; *Trevett*, 98 Va. at 340 (no riparian owner "does receive, nor can he reasonably expect to receive, the water in a state of entire purity.").

While it is true that HRSD has agreed to certain long-term infrastructure improvements through a consent decree—just as have most other large governmental sewer system owners nationwide—it is

also true that neither the consent decree,[4] the State Water Control Law, nor the federal Clean Water Act altered the rights conveyed in oyster planting ground leases. Nor can it be presumed that the General Assembly indirectly amended the oyster planting ground leasing statutes, made HRSD the pure water and financial guarantor for oyster planting ground lessees throughout Hampton Roads, and authorized the very inverse condemnation claims rejected in this Court's earlier ruling in *Darling*. *See Bd. of Supervisors v. Corbett*, 206 Va. 167, 171 (1965) ("In determining the meaning of a statute, it will be presumed, in the absence of words therein, specifically indicating the contrary, that the legislature did not intend to innovate upon, unsettle, disregard, alter, violate, repeal or limit a general statute or system of statutory provisions, the entire subject matter of which is not directly or necessarily involved in the act.") (quoting *Smith v. Kelley*, 162 Va. 645, 651 (1934)). Or as the U.S. Supreme Court put it, when the legislature "wishes to alter the fundamental details of a regulatory scheme, as [appellants] contend it

[4] "This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree." A. 151 ¶ 159.

did here . . . , we would expect it to speak with the requisite clarity to place intent beyond dispute." *U.S. Forest Serv. v. Cowpasture River Pres. Assoc.*, 590 U.S. __, 140 S. Ct. 1837, 2020 U.S. Lexis 3251, *23 (June 15, 2020) (internal quotations omitted). Thus, if the General Assembly wanted to modify oyster ground leases to begin granting a new right the Lessees assert is now implied, it would not do so using "vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

The Lessees' case depends entirely on this Court finding that the General Assembly hid the pure water guarantee lease re-write "elephant" (and related inverse condemnation rights) in these general policy pronouncement "mouseholes," codified anyplace but in the oyster planting ground lease provisions of Virginia Code Title 28.2. The Circuit Court's sustaining of HRSD's demurrer should be affirmed.

4. The Chesapeake Bay Foundation's Arguments Fail to Align with the Lessees' Allegations Against HRSD.

HRSD appreciates and respects the efforts that amicus curiae Chesapeake Bay Foundation (CBF), like HRSD, undertakes to protect the Chesapeake Bay and its resources for Virginia's citizens and that CBF takes no position on HRSD's liability in this dispute. CBF Br. 1. The

arguments presented in CBF's brief, however, do not align with the Lessees' allegations against HRSD in this dispute. First, CBF errs by suggesting this case involves "the destruction of oysters subject to a leasehold interest" or that "[t]hird-parties can simply take [the Lessees' oysters] at will by polluting them . . . ." CBF Br. 12-13. As explained *supra*, the Lessees' allegations fail to establish that oysters have been destroyed or taken because oysters from closed grounds may still be harvested and rendered marketable by relaying and depuration and cannot be considered "taken for constitutional purposes" because HRSD's alleged actions have not deprived the Lessees' "property of all economic use." *Omni Homes*, 253 Va. at 72; *see* Va. Code §§ 28.2-800, -811.

Second, CBF correctly discusses the challenges that "wastewater treatment facilities in Virginia" face, including "stringent discharge limits for bacteria in their permits especially if they are discharging to shellfish waters or to waters with a bacteria TMDL like the Nansemond River." CBF Br. 15. However, HRSD does not own or operate a wastewater treatment facility that discharges into the Nansemond River. The Lessees' declaratory judgment petition (rightly) contains no such

allegation, as HRSD's nearest treatment facility—the Nansemond Wastewater Treatment Plant—actually discharges into the James River.

5. This Court Has Already Rejected the Pacific Legal Foundation and Owners' Counsel of America's Arguments for Expanding Inverse Condemnation Liability to Include Mere Foreseeability.

The brief amicus curiae filed by the Pacific Legal Foundation and Owners' Counsel of America (collectively "PLF") raises arguments similar to the Lessees and CBF but also calls upon this Court to permit a dangerous expansion of inverse condemnation liability for the Commonwealth and its political subdivisions.

First, PLF argues that oyster planting ground leases contain a "right to cultivate," which was taken by HRSD's alleged conduct, thereby depriving the Lessees "of all economically viable use of their leased properties." PLF Br. 15-17. PLF acknowledges the government's right to "'resist compensation,' even in categorical takings, if an 'inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.'" *Id.* 18 (quoting *City of Virginia Beach v. Bell*, 255 Va. 395, 400 (1998) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029-30 (1992))). However, PLF focuses on an undefined "right to cultivate" instead of focusing on the specific rights conveyed *vel*

non by Virginia's oyster statutes and related lease provisions ("planting and propagating" oysters but not a right to pure water). Moreover, the availability by statute of options for relaying and depuration means that the Lessees are not deprived of all economically viable uses of their property even if the presence of pollutants results in VDH imposing a closure order. *See* Va. Code §§ 28.2-800, -811; *Omni Homes*, 253 Va. at 72. PLF also suggests that HRSD's alleged discharges interferes with the Lessees' "reasonable investment backed expectations" in their alleged oyster ground leases. *Id.* 19 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)). But no property owner can reasonably expect to receive tidal river water "in a state of entire purity." *Trevett*, 98 Va. at 339; *see Darling*, 123 Va. at 19-20. Because oyster planting ground leases never provided and do not now purport to provide such a right, there was no interference with any "reasonable investment backed expectations" of the Lessees.

Second, PLF further suggests that this Court should make explicit PLF's (mistaken) belief that Virginia law allows a claim of inverse condemnation to be brought "against state action that ***foreseeably*** results in the destruction or invasion of private property for a public use."

PLF Br. 3 (emphasis added); *see id.* 13 (this Court "has not expressed the foreseeability test as a rule of law"). However, this Court has been consistently clear that inverse condemnation liability only occurs when the government engages in "affirmative and purposeful" acts, or alternatively, when "the entity has made the deliberate calculated decision to proceed with a course of conduct, in spite a known risk." *AGCS*, 293 Va. at 483, n.7 (quotation omitted). If PLF's lower "foreseeability standard" were accepted, the government could face expanded inverse condemnation liability "for property damage of any nature, whether intentional, negligent, or wholly innocent," a position that this Court previously rejected. *See id.* at 483-84. PLF's additional cases are, on the whole, distinguishable because they do not apply Virginia law. Under existing Virginia court precedent, foreseeability, at best, could be relevant to assess what the "calculated risk" would be, in that "the owner must allege and prove at least the kind of deliberate taking of a calculated risk . . . so that the damage can meaningfully be said to have occurred 'for' (*i.e.*, in order to accomplish) a public use." *Id.* at 479 n.6 (quoting *Electro-Jet Tool & Mfg. Co. v. City of Albuquerque*, 1992-NMSC-060, 114 N.M. 676, 845 P.2d 770, 774-80 (N.M. 1992)). This

Court should not entertain such an invitation to lower the standard for pleading and proving an inverse condemnation claim in Virginia.

D. The Circuit Court Erred by Concluding that HRSD's Condemnation Authority Exceeds the Authority Conferred by the General Assembly.

HRSD's Assignment of Cross-Error concerns the Circuit Court's ruling that Virginia Code § 28.2-628 does not bar the Lessees' claim of inverse condemnation, even though the statute prohibits localities from obtaining any right or interest in oyster planting grounds by condemnation where, as here, those grounds are leased out by the Commonwealth. *See* Va. Code § 28.2-628 (forbidding use of eminent domain by localities to condemn leased oyster planting grounds, except in the limited instance for constructing water-dependent linear wastewater projects such as submerged sewer line river crossings not at issue here); Va. Code § 15.2-2122(10)(f) (defining "locality" for sewage disposal purposes to include wastewater authorities and sanitation districts). This ruling should be reversed because it creates an irreconcilable conflict between § 28.2-628 and the law of inverse condemnation.

Under the Dillon Rule, localities "have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable." *Johnson v. Arlington Cty.*, 292 Va. 843, 853 (2017) (internal quotation omitted). "[I]f there is a reasonable doubt whether legislative power exists, the doubt must be resolved against the local governing body." *Sinclair v. New Cingular PCS, LLC*, 283 Va. 567, 576 (2012) (internal quotation omitted). Here, the plain text of Virginia Code § 28.2-628 forbids a locality from condemning leased oyster planting grounds.

This Court's prior rulings establish that improper or unlawful activities by localities are not a valid basis for inverse condemnation claims. *See, e.g.*, *Erickson v. Anderson*, 195 Va. 655, 661 (1954) ("The prohibition . . . of the Constitution against the enactment of laws permitting the taking or damaging of private property, without just compensation, has no application to acts committed in violation of law."); *City of Richmond v. Va. Bonded Warehouse Corp.*, 148 Va. 60, 70 (1927) (a "municipal corporation is not liable for the failure to exercise, or for the negligent or improper exercise of its governmental, legislative or discretionary powers"). However, the court below essentially held that a

locality can legally exceed the authority granted by the General Assembly. A. 267-68.

If the statute remains valid and applicable—as statutes must be presumed, *see City of Newport News v. Elizabeth City Cty.*, 189 Va. 825, 831(1949) ("every presumption is made in favor of the constitutionality of an act by the legislature")—then couching the alleged actions or omissions by Suffolk and HRSD as an inverse condemnation claim is impossible. Virginia Code § 28.2-628 applies when a locality attempts to exercise its eminent domain authority formally ***and*** when a locality is alleged to have done so informally, *i.e.*, in an inverse condemnation action. As this Court held in *AGCS Marine Insurance v. Arlington County*, "[w]hat is true for eminent domain is likewise true for inverse condemnation claims." 293 Va. at 479. The underlying statutory delegation of authority, or in this case express lack thereof, is the same in either posture. For the alleged actions of Suffolk and HRSD to constitute an inverse condemnation action would mean that they have exercised condemnation power they have not been delegated. Such a situation is untenable under Virginia law, and therefore no inverse condemnation claim can arise here.

HRSD respectfully requests that this Court find that the Lessees' inverse condemnation claim must fail because HRSD generally lacks condemnation authority over leased oyster planting grounds.

CONCLUSION

For the reasons stated above, the Circuit Court's dismissal of the Lessees' claim with prejudice should be affirmed, and the Circuit Court's conclusion that HRSD has condemnation authority over the alleged leased oyster planting grounds should be reversed.

July 13, 2020

Respectfully submitted,

HAMPTON ROADS SANITATION DISTRICT

By s/Christopher D. Pomeroy
Counsel

Christopher D. Pomeroy (VSB No. 40018)
Paul T. Nyffeler (VSB No. 77144)
AQUALAW PLC
6 South Fifth Street
Richmond, Virginia 23219
(804) 716-9021 (Telephone)
x202 (Pomeroy); x206 (Nyffeler)
(804) 716-9022 (Facsimile)
chris@AquaLaw.com
pnyffeler@AquaLaw.com

CERTIFICATE

Pursuant to Rule 5:26 of the Supreme Court of Virginia, counsel for the HRSD hereby certifies that on this 13th day of July, 2020, an electronic version of the foregoing Appellee Brief of HRSD was filed electronically through the Virginia Appellate Courts Electronic System (VACES).

I further certify that on this same day, a copy of the foregoing Appellee Brief of HRSD was served via email to the following: L. Steven Emmert (lsemmert@sykesbourdon.com), Joseph T. Waldo (jtw@waldoandlyle.com), Russell G. Terman (rgt@waldoandlyle.com), David L. Arnold (darnold@pendercoward.com), and D. Rossen S. Greene (rgreene@pendercoward.com).

Pursuant to Rule 5:26(b), this Appellee Brief of HRSD exceeds neither 50 pages nor 8,750 words.

s/Christopher D. Pomeroy
Counsel for Appellee HRSD