FIFTH JUDICIAL CIRCUIT OF VIRGINIA

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September 9, 2019

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Re: C. ROBERT JOHNSON, III, et al v. CITY OF SUFFOLK, et al
Suffolk Circuit Court
Case Number: CL18-2350

Dear Counsel:

This matter came before the Court on April 9, 2019 on demurrers filed by defendants City of Suffolk (herein after "the City") and Hampton Roads Sanitation District (hereinafter "HRSD"). As a demurrer requires the Court to consider only those facts within the "four corners" of the document, the Court relies solely on the facts as alleged in the plaintiff's complaint and, therefore, will not restate them for purposes of this opinion. While the City and HRSD each filed separate demurrers, they rely on the same arguments and case law and, as such, the Court will address them together.

The petitioners argue that they are owed compensation for their oysters which were damaged by the intentional and intermittent discharges into the Nansemond River of untreated sewage by the City of Suffolk and the Hampton Roads Sanitation District. In response, the respondents argue that they cannot be held liable in inverse condemnation because they do not have the statutory authority to condemn leased oyster beds and,

therefore, are not a condemning authority. The respondents also maintain that, even if they are intentionally disposing of untreated sewage, they cannot be held liable for such for the reasons set forth in Darling v. City of Newport News, a U.S. Supreme Court case from 1919 which held that an oyster bed lessee's right to the use of their property is subordinate to the locality's superior right to use the water for waste disposal. The petitioners argue that Darling is no longer good law on that point. Finally, the Respondents maintain that if the discharge was unintentional or unlawful, that negligent or unlawful acts give rise only to a tort action, not condemnation. The Petitioners maintain in their complaint that the Respondents' actions were intentional acts or omissions intended to carry out the public purpose of providing for the disposal of sewage and waste water.

A claim for inverse condemnation is grounded in Article I § 11 of the Virginia Constitution, which provides that "[n]o private property shall be damaged or taken for public use without just compensation to the owner thereof."

In inverse condemnation cases, the law implies the constitutional duty of compensation in circumstances where the taking or damaging of private property would be compensable under traditional eminent domain principles. For this reason, we say that an inverse condemnation claim is not a tort action but a contract action based upon an implied constitutional promise of compensation. AGCS Marine Ins. Co. v. Arlington Co., 293 Va. 469, 478 (2017). Inverse condemnation permits recovery only when property is taken or damaged for public use – thereby bestowing on the owner a right to sue upon an implied contract that he will be paid therefore such amount as would have been awarded if the property had been condemned under the current eminent domain statute. Id at 477.

These provisions have been held to apply to personal property in addition to real property. Id at 490. Oysters are personal property "and if taken or damaged in eminent domain proceedings, just compensation must be rendered therefor." Town of Cape Charles v. Ballard Bros. Fish Co., 200 Va. 667, 673 (1959).

Authority to Condemn

The respondents argue that the petitioners may not proceed against them in an inverse condemnation suit because they lack the statutory authority to condemn leased oyster beds. Petitioners argue that a statute protecting the property rights of oyster bed lessees should not be construed to prevent them from recovering for property damage in inverse condemnation.

Both respondents concede that they are localities with general condemnation authority. However, Va. Code § 28.2-628 limits that authority, providing 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.) 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." This limiting language was added to the statute in 2014 and, since that time, there has been only one court opinion interpreting

that language. In an unpublished opinion, the Virginia Court of Appeals interpreted that language as forbidding a locality "from acquiring any right or interest, partial or complete, in leased riparian oyster grounds." City of Virginia Beach v. Virginia Marine Resources Commission, 2018 WL 3977505. However, this opinion does not address the ultimate issue of whether such a statutory limitation on the authority to condemn would prevent a property owner from recovering in an inverse condemnation proceeding for property actually taken by an authority lacking the authority to condemn in an eminent domain proceeding.

The U.S. Supreme Court explained the difference between condemnation proceedings and inverse condemnation proceedings in U.S. v. Clarke.

Condemnation proceedings, depending on the applicable statute, require various affirmative action on the part of the condemning authority. To accomplish a taking by seizure, on the other hand, a condemning authority need only occupy the land in question. Such a taking thus shifts to the landowner the burden to discover the encroachment and to take affirmative action to recover just compensation. 445 U.S. 253, 257, 100 S. Ct. 1127, 1130, 63 L. Ed. 2d 373 (1980). While the Court in Clarke did not directly answer the question of whether a locality that takes or damages property without the statutory authority to condemn may nonetheless be liable for damages in inverse condemnation, the Court in Clarke does suggests that a taking may be accomplished, for inverse condemnation purposes, merely by occupying the property. Additionally, the plain language of Article I, § 11 seems to support a conclusion that it may be held liable because it prohibits damage to private property for public use without just compensation.

It is undisputed that both of the Respondents have general condemnation authority provided to them by the Commonwealth for purposes of constructing and maintaining mechanisms for the provision of water and sewage. Va. Code § 28.2-628 limits that authority, providing 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 this Article. (emphasis added). The Code Section does not say that the locality does not have the right of eminent domain, it simply limits the exercise of that right. To hold otherwise would allow a taking of the oyster grounds or oysters by the Respondents for public use without any remedy available to the owner of the property. Such a ruling is incompatible with Article I, § 11of the Virginia Constitution and with the intent of the Va. Code § 28.2-628, which, it appears, was intended to protect lessees of oyster beds from eminent domain by a locality. For this reason, the Court denies the Respondents' demurrer that is grounded in the argument that the Respondents do not have condemnation authority.

<u>Darling v. City of Newport and Lawful versus unlawful conduct</u>

The respondents argue that, if their conduct of discharging sewage was lawful, then the plaintiffs' claims are barred by the U.S. Supreme Court's holding in Darling v. City of Newport News. Conversely, they argue that if their conduct of discharging sewage was unlawful, then the petitioners are limited to tort claims which are barred by

sovereign immunity. The lawful versus unlawful distinction, as described in recent caselaw, appears to focus on whether the governmental action is alleged to be intentional or as a result of negligence.

"The power of eminent domain can never be exercised except for public use and, even then, that power can only be exercised to the extent necessary to achieve the stated public use." Id. "Because the power of eminent domain extends only to lawful acts by government officials, it does not include negligent or other wrongful acts committed outside or in violation of their authority." AGCS Marine, 293 Va. at 479. "Tortious or wrongful conduct by a government official, acting outside his or her lawful authority, can never be a sufficient ground, in itself, for an inverse condemnation award." Id. "Inverse condemnation is not appropriate to avoid sovereign immunity in a true tort action against the government." Id at 485.

The court in AGCS Marine analyzed a line of inverse condemnation cases that evaluated allegations in a complaint to determine whether they involved intentional governmental action, as opposed to mere negligence. In describing allegations that were sufficient to survive demurrer, the court explained that [i]n none of these scenarios was private property taken or damaged through the mere negligence of a governmental actor incident to, or while participating in, a public function. Rather, in these cases, the government asked private property owners to bear the cost of a public improvement. This element distinguishes an inverse condemnation claim from a mere tort claim alleging negligence, nuisance, trespass, or other common-law theories of recovery. None of those claims require any showing that the damage resulted from a purposeful act or omission seeking to advance the public welfare in a manner that satisfies the for-public-use requirement of Article I, Section 11 of the Constitution of Virginia. Id at 483. In the present case, the Petitioners do not maintain that the action of the respondents were by "mere negligence", but instead allege that they were "purposeful acts or omissions seeking to advance the public welfare" by providing for waste disposal.

AGCS Marine involved allegations that Arlington County purposefully designed its sewage system to allow overflow under certain circumstances. It was this overflow that resulted in damage to the property owner. The allegations in the complaint asserted that the County "purposefully took or failed to take certain actions that, when combined, intentionally caused the sewer line at Harris Teeter to back up so that the entire system could continue to operate." Id at 486. The court held that this, along with other allegations in the complaint alleging purposeful actions on the part of the County to incur the risk of damage to the plaintiffs' property in order to keep the sewer system operational for the public was sufficient to allow the plaintiffs leave to amend after granting a demurrer. The court held that "[i]f the insurers could prove that the policies, procedures, and practices of the County consisted of a plan or design to use the Harris Teeter property in this manner, they may have an inverse condemnation claim." Id.

Here, the petitioners have alleged that the respondents have designed and maintained the sewer system to allow overflow into the Nansemond River. See, Compl. para. 46-47. In addition, they have alleged that the respondents have so designed and maintained the system "in full knowledge of the most probable risk of damaging the Petitioners' property, for the purpose of keeping the sewer and water systems

operational. Compl. para. 48. These allegations appear to be in line with the holding of AGCS Marine with one major exception: There was no allegation in AGCS Marine that the system was intentionally designed to allow overflow to flow into a public waterway.

The respondents maintain that even if their conduct was intentional as alleged they are still not liable in inverse condemnation because the U.S. Supreme Court has held that an oyster bed lessee's property rights are subordinate to the locality's right to pollute the waterways. The petitioners argue that Darling is no longer good law in that the Clean Water Act and numerous additional restrictions on localities' ability to pollute calls the holding into question.

In Darling v. City of Newport News, the U.S. Supreme Court held 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 supposed." 249 U.S. 540, 543 (1919). In support of its holding, the Court explained:

> The ocean hitherto has been treated as open to the discharge of sewage from the cities upon its shores. Whatever science may accomplish in the future we are not aware that it yet has discovered any generally accepted way of avoiding the practical necessity of so using the great natural purifying basin. Id at 543.

In addition, the Fourth Circuit has held, in a case involving the construction of a marina property on a polluted river, that "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." Ancarrow v. City of Richmond, 600 F.2d 443, 446 (4th Cir.1979).

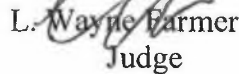
The Court notes that both of the cases predate many of the legislative acts taken at the State and Federal level to limit the pollution of the waterways and that these cases may rightly be subject to review and reconsideration by the courts from which the opinions come. In fact, the Fourth Circuit has questioned the holding in Ancarrow in an inverse condemnation case arising in South Carolina. The court clarified that "[t]he authority is, of course, correct in its initial premise that a legitimate sewage discharge can be a proper exercise of a government's police powers. The Clean Water Act, however, imposes a severe limitation on the right to discharge sewage or other pollutants into the nation's waterways." Stoddard v. Western Carolina Regional Sewer Auth., 784 F.2d 1200 (4th Cir.1986). However, the Stoddard court relied on a South Carolina law which established that a nuisance was a taking. Id at 1206. There does not appear to be any authority under Virginia law establishing that a nuisance may be a taking.

The allegations in petitioners' Complaint mirror the allegations in AGCS Marine in that they allege a purposeful act for the public good that resulted in the damaging of their property. Since the allegations go beyond mere negligence and allege an intentional act for the public benefit, they appear to fall into the category categorized as "lawful" activity by the respondents. The Petitioners urge the Court to take the next step and to find that, although Darling is still good law, the subsequent limitations on a locality's right to pollute water call its holding into question. The Court declines to do so. The fact remains that the Darling case remains the law. While it may be time to revisit Justice

Holmes' decision, the Court does not believe that a Judge in the 5th Circuit of Virginia is the person to do so. Simply put, the Petitioners complain that the Respondents designed a sewage system and waste water system for the public good that allowed overflow to flow into a public waterway. The Darling opinion would appear to bar recovery in inverse condemnation under those circumstances. For this reason, and this reason alone, the Respondent's demurrer is granted and the petitioners' Complaint is dismissed. As a change in the factual allegations would not alter the Court's opinion, the Court is not granting an opportunity to file an amended complaint.

I direct that one of the Respondents' attorneys prepare an order consistent with this opinion and forward the same to remaining counsel for review and endorsement. Please forward the order to the Court within 14 days of the date of this letter.

Yours very truly,



L. Wayne Farmer
Judge

CC: Hon. W. Randolph Carter, Jr., Clerk

Gentlemen –

I want to apologize for the length of time that it took me to issue this opinion. As some of the issues were unfamiliar to the Court, I spent a great deal of time reviewing and reading in preparation for the same. Add to that a family member with some medical issues and two sons headed off to college during this period and it has been quite busy. Thank you all for your understanding.

- Wayne Farmer

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