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What sticks are in that bundle of rights?

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INVERSE CONDEMNATION OF OYSTERS AND OYSTER LEASES

What sticks are in that bundle of rights?

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Whether you love or hate eating oysters, or if you deal with entities that have infrastructure in or near tidal waters, the most recent inverse condemnation case out of the Supreme Court of Virginia may be of interest to you. The plaintiffs in *Johnson, et al. v. City of Suffolk, et al.* alleged that a municipality took or damaged oyster beds, which the plaintiffs leased from the state, by discharging pollution into a local river. While (spoiler) the plaintiffs in this case did not prevail in the trial court or on appeal, inverse condemnation claims involving shellfish and/or aquaculture can be a concern under the correct fact pattern.

The Context

“Inverse condemnation” is a claim that private property has been taken or damaged for public use without payment of just compensation. If private property is negatively impacted by a public infrastructure project without having received the usual procedural treatment (including payment of just compensation for the rights taken), an inverse condemnation claim may arise. When dealing with infrastructure in and around tidal waters, it is easy to overlook subaqueous property interests including leased oyster beds (or other types of leased shellfish beds). Many, if not all, coastal states have some form of leasing program for state-owned submerged bottoms (i.e. the bottoms of coastal bays and rivers). Such leased bottoms are often used by farmers and fisherman for the propagation and harvest of shellfish. It is important to consider these property interests and ensure one understands the applicable rights and interactions when working on projects where there may be an impact on them.

The Case

In *Johnson, et al. v. City of Suffolk, et al.*, the plaintiffs, a group of oystermen, leased various portions of the bottom of the Nansemond River — a tidal, saltwater river located in the city of Suffolk in eastern Virginia — from the Commonwealth of Virginia under Virginia statutes allowing such leases. Their complaint alleged that the City of Suffolk and the Hampton Roads Sanitation District “operate ... sanitary sewer systems to accommodate the needs of the City of Suffolk and the surrounding area,” and that the City operates a stormwater system. The plaintiffs alleged that sewer and stormwater discharges polluted the waters in which they raised their oysters, and that the alleged pollution caused the Virginia Department of Health’s Division of Shellfish Sanitation to close



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parts of the river to the harvesting of oysters, thereby “preventing the[m] ... from properly managing and using their oyster ground leases, harvesting their oyster property, planting oysters and otherwise using and enjoying their property.” The plaintiffs contended that this constituted a deprivation of their property or property rights by the defendants for public use, and that they should therefore be entitled to just compensation. The City of Suffolk and the Hampton Roads Sanitation District moved to dismiss the case on various grounds. The trial court dismissed the case with prejudice based on a very old Virginia case that had also been affirmed by the United States Supreme Court.

Oysters are an important part of Virginia history and culture. The Supreme Court of Virginia recognized that “the oyster has played and continues to play a significant role in the culture, history, economy and ecology of the Chesapeake Bay and its tidal waters,” and that “the word ‘Chesapeake’ is derived from its Native American name ‘Chesepioc’ which means ‘great shellfish bay.’”

The Supreme Court of Virginia ruled on a case with allegations similar to those in *Johnson, et al. v. City of Suffolk* more than a century ago. The 1919 case involved an oysterman and another coastal Virginia municipality just across Hampton Roads from the City of Suffolk. In *Darling v. City of Newport New*, the Supreme Court of Virginia held that the holders of oyster ground leases take their leases subject to the risk of water pollution. The eponymous Mr. Darling even appealed his case to the United States Supreme Court but to no avail. The Virginia and U.S. Supreme Courts agreed that the oyster lessees take their leases subject to the risk of pollution of the water.



The Johnson plaintiffs appealed to the Supreme Court of Virginia on various grounds, including that “the trial court erroneously ruled that the City and [the Sanitation District] have the right to pollute the Commonwealth’s waters and that they need not pay just compensation to the oystermen. In doing so, it relied on now-obsolete caselaw and erroneously applied that caselaw.” Phrasing their appeal in this way may have been a tactical attempt to appeal to public opinion, but it was not an accurate statement of the trial court’s ruling or the defendants’ arguments — nor did the Supreme Court of Virginia rule that the defendants have the right to pollute the river. Instead, the case turned on a careful reading of the property rights involved and the statutes which created them, which lead the court to conclude that the plaintiffs did not have the necessary property rights to maintain an inverse condemnation claim.

The Ruling

The parameters of a protected property interest are determined by the law that created the interest. If your property interest is thought of as the proverbial bundle of sticks, the law that created that property interest determines exactly what sticks are in that bundle. Not all bundles of sticks are the same. In the Johnson case, the bundle contained very few sticks indeed. To determine exactly how few, the court looked to the “statutes, cases, and the leases at issue to elucidate the nature of a lessee’s rights under an oyster lease of publicly owned bottomland.”

First, the Commonwealth has “title to and dominion over subaqueous bottomland.” If any of our friends across the pond should happen to be reading this, the Supreme Court of Virginia also specifically noted that “the state has succeeded to all the rights of both the Crown and Parliament of England in the navigable waters within its limits, and in the soil under them.” The actual paper leases involved in Johnson et al. v. City of Suffolk did not define the rights involved. For the most part, the paper leases only identified the location of the leased grounds. Therefore, the court went through a careful examination of the applicable statutes which allow the creation of this kind of lease.

The Code of Virginia authorizes the Commissioner of the Virginia Marine Resources Commission to lease public subaqueous bottoms for the purpose of raising oysters. Lessees can occupy the oyster bed “for the purpose of planting or propagating oysters,” and rent is set at the nominal amount of \$1.50 per acre per year. The Virginia Code authorizes relief from rent payments if “any natural or man-made condition arises which precludes culture of oysters in that area.” Furthermore, the State Health Commissioner is authorized to “analyze the water and bottom sediment in and adjacent to the crustacea, finfish, or shellfish growing areas for evidence of pollution and he may survey the sanitary conditions and pollution hazards adjacent to shellfish growing areas.” The State Health Commissioner can condemn areas where pollution renders the shellfish in the area unfit for market. The right to

harvest the oysters is further limited by statute, as the statutes provide that the oysters can be harvested only if the sanitary conditions permit harvesting.

However, none of the statutes give the holder of an oyster lease the right to control the contents of the water in the river. The Supreme Court of Virginia concluded that oyster lessees still take their leases subject to the risk of pollution of the water. The leases do not guarantee that the holder of the lease will have a profitable or even viable harvest. Any other conclusion would make the state a guarantor to the lessee of the quality of the water and a profitable harvest.

Such a guarantee would make no sense in the context of an oyster lease when one considers the function of an oyster in the environment. As delicious as they are, oysters are nature’s purification system for bodies of saltwater. Oysters’ filtration work can easily be observed in a process recommended in various cookbooks — putting oysters (or clams) in a bath of saltwater with some cornmeal in advance of shucking them. The oysters filter the water and as they do, they take in the cornmeal grains and spit out grit, leaving one with less grit in one’s meal. In the wild, the very sorts of alleged pollution about which the plaintiffs were complaining — for example, fecal coliform bacteria — are part of what filter feeders like oysters eat. As oysters eat the bacteria, they remove them from the water.

Conclusion

Although the plaintiffs in this particular case did not prevail, the outcome may differ in other jurisdictions or on other fact patterns. Given the amount of money involved in various fisheries, particularly oysters, risk and potential liability to the condemning authority can be quite high if the physical and legal interactions of the various property interests involved are not properly analyzed. If your employer or client are working in or near tidal waters, it may well be prudent to make sure the personnel involved are aware of the potential for such claims and that public waters may contain complex private property issues. 🗣️



Ross Greene and Dave Arnold are law partners and right of way attorneys licensed in Virginia and North Carolina. Together they successfully defended the City of Suffolk in both the trial court and before the Virginia Supreme Court in the Johnson case. For more information about this case and other compelling right of way issues, you can subscribe to their blog at rightofway.law or check out the Pendulum Land Podcast on iTunes or wherever you get your podcasts.