



# Virginia Legal Rulings Impacting Working Waterfronts: An Overview of Recent Virginia Supreme Court Cases

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# Presentation Overview

- Two recent Virginia Supreme Court cases on aquaculture
  - Carter, Zoning Administrator County of York v. Bavuso
  - Carter, Zoning Administrator County of York v. Garrett
- 2011 Virginia Supreme Court case on local government authority to regulate beyond the mean low-water mark
  - Jennings v. Board of Supervisors of Northumberland County
- How these recent cases identify and clarify jurisdictional boundaries for our coastal localities.
  - Regulating working and changing waterfronts

J. Mark Carter, Zoning Administrator County of  
York v. Anthony Bavuso  
(unpub. order 130143, Jan. 2014)

- Background

- Bavuso living and operating an oyster farm on the waterfront in York County in a residential district zoned Resource Conservation (RC).
  - 2010: Bavuso began an oyster farming business on his property
  - Nov. 2011: Zoning Administrator (Carter) required a special use permit to continue farming on residential property
- Jan. 2012: Bavuso challenged Carter’s requirement before the York County Board of Zoning/Subdivision Appeals
  - Bavuso must have a “special use permit” to live & operate business on his property
  - County zoning code only allows one “principal” use on a residential lot without a special use permit.
  - A lot can only support one principal use and one “accessory” use, but the accessory use must be found on a table in the code.

# Carter v. Bavuso

- Case History

- Sept. 2012: Bavuso appealed BZA Decision in Circuit Court of Virginia, York County (85 Va. Cir. 336)
  - Bavuso argued & the court found that aquaculture = agriculture, which does not require a special use permit
  - Court overturned the decision of the BZA, holding that decisions & interpretation of BZA were arbitrary → found for Bavuso → No Special Use Permit required
- Jan. 2014: Board of Zoning appealed in the Supreme Court (unpub. order 130143)
  - Court reversed the Circuit Court’s judgment & held that living on the property & operating an aquaculture business are competing principal uses & requires a special use permit. (CCY §24.1-200) → Overturned Circuit Court decision
    - If the use is not on the accessory table, then it’s not a use permitted to exist alongside a principal residential use. (CCY §24.1-271)
      - » It could be a “home occupation.” Home occupations are “accessory use[s] of a dwelling unit by the occupant of the dwelling for or with the intent of gainful employment involving the provision of goods and services.” (Bavuso at 3, CCY § 24.1-104)
      - » Docking of boats for the purpose of unloading seafood is permitted under CCY §24.1-283.
      - » Home occupation uses also require Special Use Permits
    - Permitting previous terrestrial farming uses on residential properties by the Zoning Administrator was not found arbitrary.
      - “there is no authority in Virginia law indicating that an overbroad interpretation of an ordinance with respect to one land use necessitates the same overbroad interpretation with respect to a different land use.” (Bavuso at 5)
      - Local governments have discretion to interpret their statutes differently in various scenarios

Carter, Zoning Administrator for the County of York  
v. Gregory Garrett  
(unpub. order 130144, Jan. 2014)



[Source: http://ggoysters.com/](http://ggoysters.com/)

# Carter v. Garrett

- **Background** (Similar to Carter v. Bavuso)
  - Garrett operating oyster farming business on his waterfront residential property zoned Rural Residential (RR) in York County.
    - 2009: Garrett began raising oysters
      - Farming included underwater cages, as well as unloading oysters on the property’s dock. Employs non-residential workers.
    - RR zoning district permits “crop/livestock farming” (CCY § 24.1-306)
  - Zoning Administrator (Carter) notified Garrett that he was in violation of the County of York Code.
    - Garrett’s ‘oyster farming operation’ required a special use permit.

# Carter v. Garrett

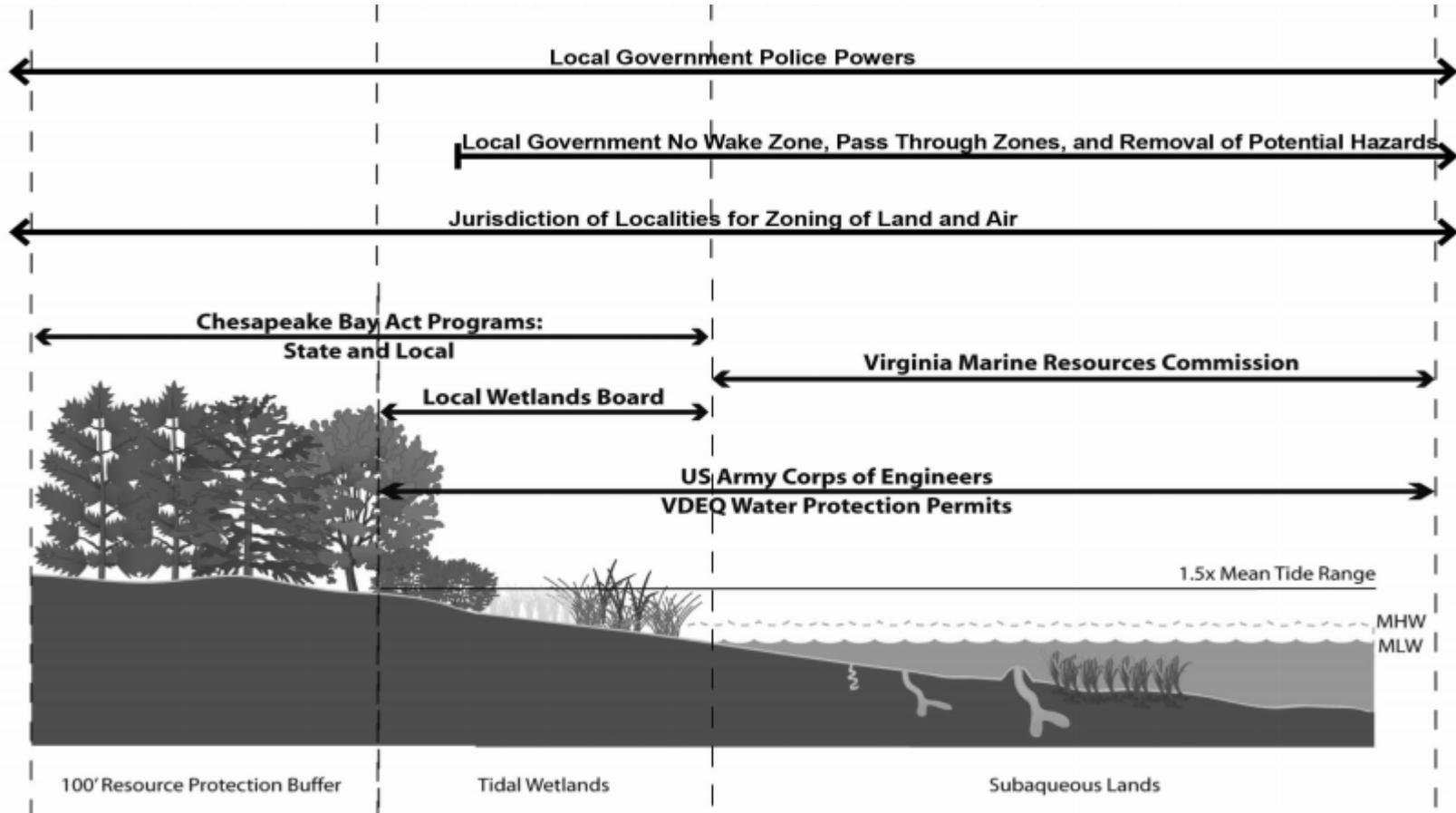
- Case History

- Oct. 2012: Garrett appealed BZA Decision in Circuit Court of Virginia, York County-Poquoson (85 Va. Cir. 447)
  - Dispute over the definitions of “aquaculture” and “agriculture”
    - Garrett argued that his business is not aquaculture, as defined by the code, because he didn’t grow oysters in a “controlled environment” (Garrett at 1)
    - Garrett argued that his business is “agriculture” (as defined by CCY §24.1-104 which interprets oysters = livestock). Livestock agriculture is a permitted use in RR zone → no special use permit is required.
  - Dispute over applicability of “home occupation” (CCY §24.1-104)
    - Court does not explain why his business did not qualify as a ‘home occupation’ use, but found that it did not
  - Circuit Court found for Garrett → Oyster business permitted → No special permit required
- Jan. 2014: Board of Zoning appealed in the Supreme Court (unpub. order 130144)
  - BZA argued that oysters are not livestock, as they were deemed by the Circuit Court, and Garrett’s business is not crop/livestock farming
  - Majority of the case was essentially a debate over definitions

# Carter v. Garrett – Definition Debate

- “Livestock”: Defined as “all domestic or domesticated...animals [that are typically characterized as farm animals,] or any other individual animal specifically raised for food for fiber...” (Garrett at 3, CCY §24.1-104)
  - Garrett argued oysters are grown for the purpose of food and are therefore “livestock”
- Court then focused on definition of “animal”: Defined as “[a]ny nonhuman vertebrate species except fish...” (Garrett at 3, CCY §24.1-104)
  - Court further looks to definition of “[a]nimal, agricultural” as “[a]ll livestock and poultry.” (Garrett at 3, CCY §24.1-104)
    - Garrett goes even further down the definition rabbit hole and argued there is a difference between “animal” and “animal, agricultural” – “animal” can be interpreted more broadly... (See Garrett at 4-5)
- Ultimately, the court finds that oysters are invertebrates and therefore NOT ANIMALS under the CCY.
  - Garrett’s oyster farming was found to be NOT LIVESTOCK FARMING
    - Garrett can continue his oyster farming business through the application of a special use permit, through the accessory use/home occupation use (CCY §24.1-283(d) – “docking...offloading seafood.”)
- Found for the County → Special Use Permit required

# Case about Coastal Jurisdiction





# John L. Jennings v. Board of Supervisors of Northumberland County

281 Va. 511 (2011)

- Background

- Jennings owns Jennings Boatyard Marina, located on Cockrell’s Creek, a tributary of the Chesapeake Bay. The marina has 45 mooring slips and “accompanying piers.” (Jennings at 514)
- March 2005: Jennings wanted to expand the Marina by building 46 additional slips with accompanying piers.
  - Slips proposed to lie about 300 – 400 feet beyond mean low-water mark of Creek (deep water slips for sailboats)
  - Northumberland County’s Board of Supervisors received Jennings’ application for special exception permit to expand the marina
- Board of Supervisors delayed the application requiring a riparian rights survey
  - Jennings acquired survey → reduced slips from 46 to 31 “to accommodate riparian lines” (Jennings at 514)
- Board of Supervisors denied application for special exception permit (unanimously)
  - Reasoning: Three existing marinas in the vicinity does not warrant the creation of new slips
- Jennings filed for declaratory relief from the Board
  - Jennings’ Claim: County does not have jurisdiction to require permit because VMRC has exclusive jurisdiction over and authority to regulate piers beyond mean low-water mark
  - Board’s Answer: Board of Supervisors has “authority to regulate beyond the mean low-water mark of the County’s creeks and rivers.” (Jennings at 515)

# Jennings v. Board of Supervisors

- Case History
  - Northumberland County Circuit Court:
    - Jennings challenged the Board’s decision, claiming:
      - County’s ordinances requiring special exception permits are invalid because:
        - » (1) VMRC has exclusive jurisdiction over land below mean low-water mark
        - » (2) Counties’ “sole grant of authority...to zone in tidal[,] navigable waters” (Jennings at 515) is from VMRC’s exception to their exclusive jurisdiction (Va. Code § 28.2-1203(A))
    - Circuit Court found for the County: ordinances requiring permits are valid because:
      - (1) VMRC has “**title** to land below [the] mean low[-]water [mark]” (emphasis added)(Jennings at 515). Note, VMRC only has title, not exclusive jurisdiction.
      - (2) Jennings interpretation of Va. Code § 28.2-1203(A) is incorrect because the “general grant of authority to zone land...necessarily and fairly implie[s] that the County[,] in zoning upland for a marina/boatyard[,] has the authority to regulate piers and boat slips which are necessarily part of the same use.” (Jennings at 515)
        - » Therefore: Construction of the new slips and piers “may be constructed only pursuant to a permit from the VMRC, but [is also] subject to the Northumberland County Zoning Ordinance.” (Jennings at 515)

# Jennings v. Board of Supervisors

- Case History (continued)
  - Circuit Court of Northumberland County
    - Evidentiary Hearing
      - Jennings argued that the zoning ordinances in question (County Code § 148-95(A) & § 148-138(A): requiring the special exception permit) were invalid because they had no “objective criteria stated.” (Jennings at 515)
  - Circuit Court’s Letter Opinion in Response
    - Denied Jennings’ request for relief
      - » Ordinance is valid
      - » Board’s rejection of application for the special exemption permit was “not arbitrary, capricious and unreasonable.” (Jennings at 516)

# Jennings v. Board of Supervisors

- April 2011: Jennings appealed in the Supreme Court (281 Va. 511 (2011))
  - Questions of law the Court Considered:
    - (1) “whether the County’s zoning jurisdiction extends to the regulation of commercial piers and marinas to be constructed on bottomlands that lie beyond the mean low-water mark in the Commonwealth’s tidal, navigable waters.” (Jennings at 516)
    - (2) “whether the County’s ordinance regulating the issuance of special exception permits is void for lack of adequate standards.” (Jennings at 516)

# Jennings v. Board of Supervisors

## VA Supreme Court's Analysis

- (1) Court found County & VMCR share concurrent jurisdiction
  - Commonwealth delegated zoning power to localities through the creation and adoption of local zoning ordinances
  - Va Code §15.2-2280 is express grant of authority to zone “the territory under its jurisdiction” through “regulat[ing], restrict[ing], permit[ting], prohibit[ing], and determin[ing]” ... “the use of land, buildings, structures and other premises for agricultural, business...residential...as well as [t]he construction...of structures.” (Jennings at 517)
    - Creek’s bottomland = “territory under [the County’s] jurisdiction.” (Jennings at 517)
  - Jurisdiction of County established → Sub question:
    - Does VMRC have concurrent jurisdiction and authority over the regulation of state-owned bottomlands?
      - Court held YES → Although the Commonwealth’s zoning code does not define the “territory” of a locality’s zoning authority, Va. §15.2-3105 does.

# Jennings v. Board of Supervisors

## VA Supreme Court's Analysis

- Court proves concurrent authority/jurisdiction
  - Va. Code §15.2-3105: “[t]he boundary of every locality bordering on the Chesapeake Bay...shall embrace all wharves piers, docks and other structures ...including its tidal tributaries...” (Jennings at 518)
    - The statute continues to read, “However, only the wharves, piers, docks, or other structures which lie within the territorial jurisdiction of this Commonwealth shall be embraced within the boundary of such locality.” (Va. Code §15.2-3105)
    - This statute is used to define boundary lines between two potentially disputing localities, but the court said, “[t]he territory under a locality’s jurisdiction subject to its zoning ordinances cannot vary depending on the identity of the parties to the dispute.” (Jennings at 518)
      - Statute creates a rule for defining county boundaries as they fall along the shores of a creek → court found it an acceptable standard
  - Claim that VMRC has exclusive jurisdiction denied
    - Va. Code §28.2-1203(A)(5) – VMRC permits are not required to build private piers on “riparian lands in the waters opposite those lands” if the piers meet standards, BUT the piers “remain ‘[s]ubject to any applicable local ordinances.’” (Jennings at 519)

# Jennings v. Board of Supervisors

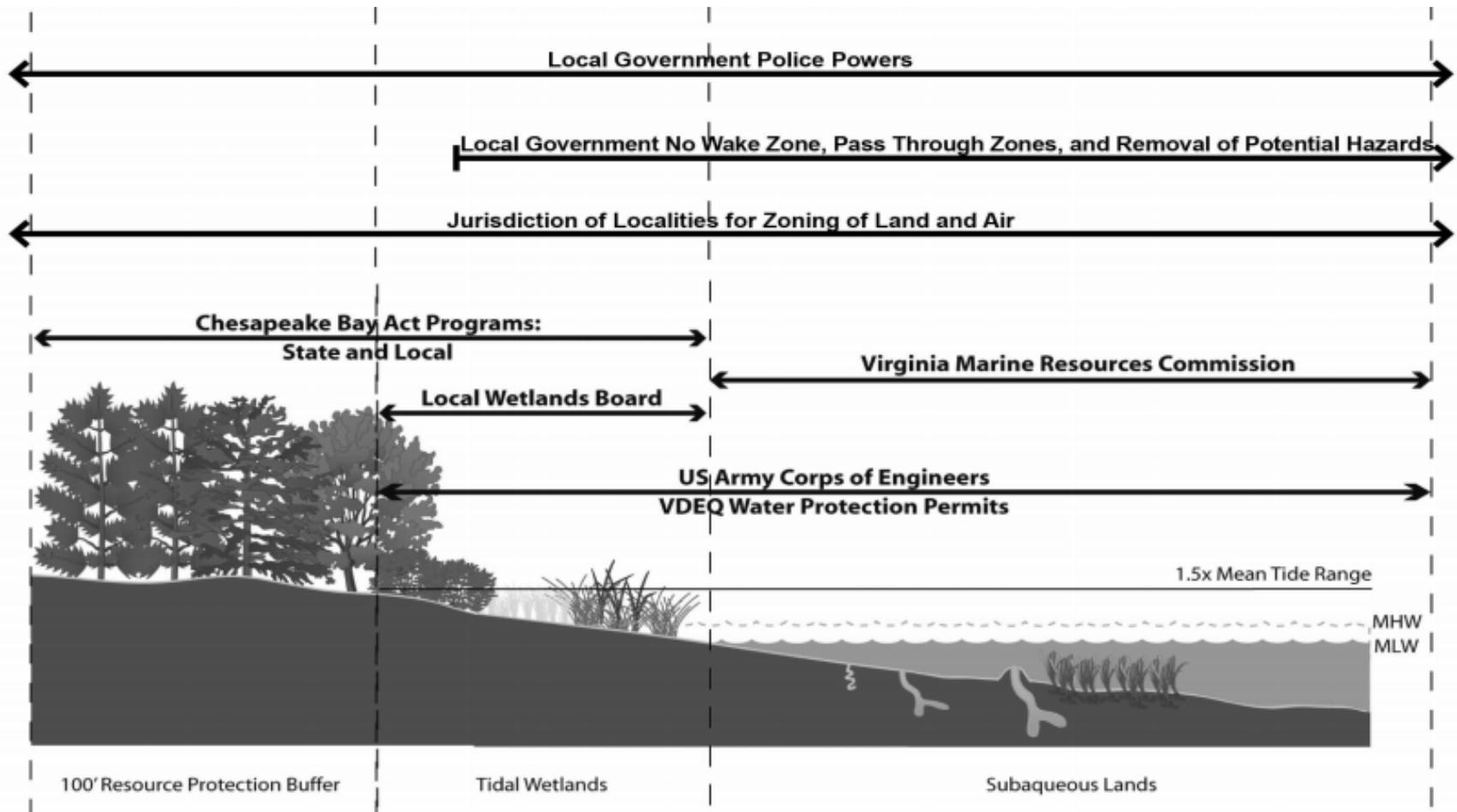
## VA Supreme Court's Analysis

- (2) Ordinance found NOT void for lack of adequate standards
  - Court cited *Bollinger v. Board of Supervisors*, 227 S.E.2d 682 (1976), in which nearly identical language was used to guide the decision making process for permit approval: “[t]hese permits shall be subject to such conditions as the governing body deems necessary to carry out the intent of this chapter.” (Jennings at 519)
    - Ordinances are not required to “include standards concerning issuance of special use permits where local governing bodies are to exercise their legislative judgment or discretion.” (Jennings at 520, quoting *Bollinger* at 683)
  - Ordinance and process for permit approval found valid.
- Judgment of Circuit Court affirmed: Permit Denied

# Take Home Points

- **Bavuso v. Carter**
  - Local governments have flexibility in interpreting its ordinances
- **Garrett v. Carter**
  - Courts can look to the whole body of a local government's ordinances for definitions and interpretation.
- **Jennings v. Board of Supervisors**
  - Local governments and VMRC have concurrent jurisdiction to regulate bottomlands of the Bay, extending beyond the mean low-water mark.

# Jurisdictional Boundaries



# Authority/Jurisdiction

Authority and jurisdiction has remained the same



# Regulating working and changing waterfronts

- Anderson's Neck Oyster Company
  - Innovative businesses push us to adjust our routine expectation of businesses as usual



# Thank you

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