

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the
City of Richmond on* Friday *the* 3rd *day of* January, 2014.

J. Mark Carter, Zoning Administrator
for the County of York, et al., Appellants,

against Record No. 130143
Circuit Court No. 12-4545-00

Anthony T. Bavuso, et al., Appellees.

Upon an appeal from a
judgment rendered by the Circuit
Court of York County.

Upon consideration of the record, briefs and argument of counsel, the Court is of opinion that there is reversible error in the order appealed from.

Anthony T. Bavuso owns waterfront property in York County located in a Resource Conservation (RC) Zoning District. Bavuso has a residence on his property, and he formed the Seaford Oyster Company, LLC, and has farmed oysters from his property since 2010.

Bavuso raises the oysters using a cage method; he grows the oysters in Chisman Creek in cages to protect them from predators. Bavuso also uses upwellers, which are land-based tanks wherein seed oysters are grown until the oysters reach a certain state of maturity, at which time they are transferred to cages and placed in Chisman Creek. He has a dock on his property where he moors his boat and loads and offloads oysters.

Bavuso requested an opinion from the York County Zoning Administrator J. Mark Carter (Administrator) as to whether Bavuso's oyster operation was permitted on his property pursuant to York County zoning ordinances. The Administrator informed Bavuso that

Bavuso needed to obtain a Special Use Permit (SUP) in order to continue to operate his business at his residence.¹ Bavuso appealed the Administrator's determination to the York County Board of Zoning/Subdivision Appeals (BZA). The BZA upheld the Administrator.

Bavuso appealed to the Circuit Court of York County. The circuit court found in favor of Bavuso and held that his oyster farm was a permitted use under the County's zoning ordinances, and Bavuso therefore did not need an SUP to continue his oystering activities on his property. The County appeals.

The County argues that the circuit court erred because Code of the County of York (CCY) § 24.1-200 prohibits multiple principal permitted uses on a residential property. It claims Bavuso violates CCY § 24.1-200 because he has a residence and either engages in aquaculture or crop/livestock farming on his property without an SUP. Bavuso replies that oyster farming, which he asserts is aquaculture or livestock farming, is not a "principal use" of his property, and such use is allowed on his property as a matter of right under the CCY.

"Interpretation of a local zoning ordinance, like interpretation of a statute, is a pure question of law, subject to de novo review." Alexandria City Council v. Mirant Potomac River, LLC, 273 Va. 448, 455, 643 S.E.2d 203, 207 (2007).

The table of permitted uses in the CCY indicates that "single family detached residence," "crop/livestock farming" and "aquaculture" are all permitted uses in an RC zoning district in

¹ Shortly thereafter, the County amended its zoning codes, but the parties agree that the preamendment ordinances are applicable in this appeal.

York County. CCY § 24.1-306. It is undisputed that Bavuso's single family residence is the principal use of his property.

CCY § 24.1-200(b) states, "Except as may be specifically authorized by other provisions of this chapter, a principal residential use shall not occupy the same lot with any other principal use." A principal use is "[t]he primary or main use of land or structures, as distinguished from a secondary or accessory use." CCY § 24.1-104. In the event of conflict between the table of uses and the text of the zoning ordinances, the text shall control. CCY § 24.1-301(c)(1). Thus, whether his oyster farming constitutes aquaculture or crop/livestock farming, Bavuso's oystering activities must be a secondary or accessory use on his residential property to avoid violating CCY § 24.1-200. Also, as a secondary or accessory use, his oyster farming must comply with the requirements for secondary or accessory uses stated in the text of the CCY.

An accessory use is "[a] use of land . . . incidental and subordinate to the principal use of the land . . . and located on the same lot with such principal use." CCY § 24.1-104. The oyster farming on Bavuso's property is incidental and subordinate to the principal residential use of his property. CCY § 24.1-271 permits certain accessory uses in conjunction with residential uses, and expressly provides that "[l]and uses not listed in [that] section and not deemed similar to a listed use . . . shall be deemed not allowed as residential accessory uses." Neither aquaculture nor crop/livestock farming is listed as an accessory use allowed in

conjunction with a principal residential use. CCY § 24.1-271.² Thus, Bavuso's oyster farm enterprise is not an accessory use allowed pursuant to CCY § 24.1-271.

However, oyster farming may be allowed as a home occupation. A home occupation is a permitted "accessory use 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." CCY § 24.1-104. CCY § 24.1-283, which lists home occupations permitted by an SUP, includes home occupations that use the land rather than the dwelling unit in RC and Rural Residential zoning districts. CCY § 24.1-283(d), which permits the docking of a workboat and the offloading of seafood, would appear to allow Bavuso to continue his oyster farming operations if he acquires an SUP.

Accordingly, the circuit court did not err in determining that Bavuso's oyster farming was not a principal use of his property. However, the circuit court did err in failing to recognize that if it is not a principal use, Bavuso's oystering enterprise must be an allowed accessory use or home occupation in order for Bavuso to operate it on his residential property. It is not a permitted accessory use, and the only applicable home occupation use is one that requires an SUP. Thus, the circuit court erred in holding that Bavuso did not need an SUP to continue his oyster farming activities on his residential property.

Lastly, the parties dispute whether the Administrator has been arbitrary in allowing farmhouses to coexist with crop/livestock farming, but not allowing Bavuso's residence and oyster cultivation

² The revised CCY § 24.1-271(dd) allows riparian shellfish gardening and similar pursuits if the produce is not for commercial purposes.

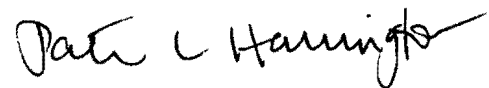
to coexist. Oyster farming is not crop/livestock farming under the CCY. See Carter v. Garrett, Record No. 130144, (December 6, 2013) (unpublished). Although the Administrator has allowed farmhouses on the same property as crop/livestock farming, the Administrator was not arbitrary in prohibiting commercial oyster farming on a parcel with a residence. Even assuming that the Administrator has been inconsistent, 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.

Accordingly, we reverse the judgment of the Circuit Court of York County and enter final judgment for the County. This order shall be certified to the said circuit court.

CHIEF JUSTICE KINSER and JUSTICE MILLETTE dissent.

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Teste:



Clerk