In The

Supreme Court of Virginia

RECORD NO. 200512

IN RE: AUGUST 15, 2018 DECISION OF THE BOARD OF ZONING APPEALS OF RONAOKE County of Roanoke

STAN SEYMOUR, *et al.*,

Petitioners – Appellants,

v.

THE BOARD OF SUPERVISORS OF ROANOKE COUNTY, VIRGINIA, *et al.*,

Respondents – Appellees.

BRIEF IN OPPOSITION AND ASSIGNMENT OF CROSS-ERROR

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

STATEMENT OF THE CASE

This case involves the issue of whether a person is sufficiently "aggrieved" to have standing to bring a challenge to a zoning administrator's determinations regarding another person's property. In this case, property owners (the Petitioners) who reside on a Coleman Road, a rural country road in Roanoke County, Virginia, became frustrated with traffic going to and from property owned by the Respondent, 5985 Coleman Road, LLC, and leased to the Southwest Virginia Wildlife Center of Roanoke, Inc (the "Wildlife Center"), a non-profit wildlife rehabilitation center that operates at the end of Coleman Road, hundreds of feet away from the Petitioners.

In an effort to shut down the operations of the Wildlife Center, the Petitioners requested opinions from the Roanoke County Zoning Administrator regarding the general operations of the Wildlife Center. Upset with the Zoning Administrator's determinations, they appealed to the Roanoke County Board of Zoning Appeals (the "BZA"), which concluded that the Petitioners were not aggrieved by the Zoning Administrator's determinations, and therefore, lacked standing to appeal. The Petitioners thereafter appealed to the Roanoke County Circuit Court. The trial court again affirmed that the Petitioners were not sufficiently aggrieved and therefore lacked standing.

This issue of law - who is a "person aggrieved," has been clearly answered by this Court, and the trial court ultimately reached the correct conclusion in this matter: the Petitioners are not aggrieved and the appeal must be dismissed.

ADDITIONAL ASSIGNMENT OF ERROR

1. The trial court erred in applying the first prong of the two-prong test for the "person aggrieved" standing test set forth by this Court in *Friends of the Rappahannock v. Caroline Cnty. Bd. of Supervisors*, 286 Va. 38 (2013), and in finding that the first prong of the test had been met by the Petitioners. (Preserved at Final Order dated January 24, 2020).

STATEMENT OF FACTS

The Respondents generally agree with the Petitioners' statement of facts, as set forth in the Petition; however, there are facts contained in the Petition with which the Respondents disagree. The specific facts with which the Respondents disagree, or to which additional amplification is needed are:

Fact with which the Respondents Disagree

The Respondents disagree with the Petitioners' assertion that "in rendering its decision, the Roanoke BZA provided no specific … conclusions of law." (Pet. for Appeal, at 14). The BZA, in its August 16th letter to the Petitioners, concluded that "your clients lacked standing to appeal the determinations made by the County Zoning Administrator …." (Ans., Ex. A).

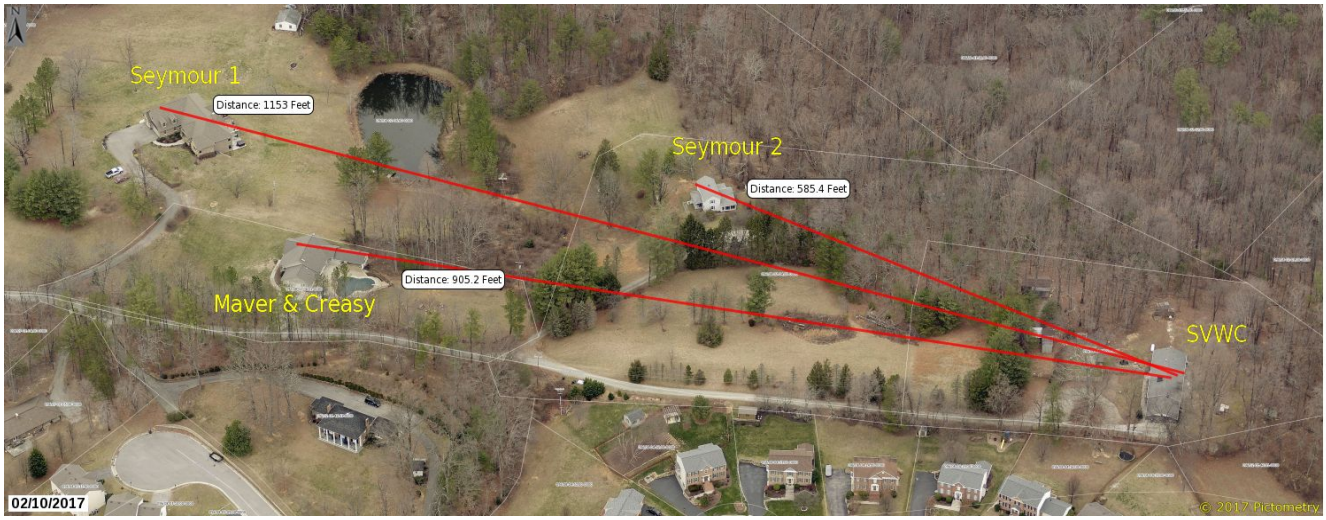
Facts That Require Additional Amplification

In their Petition, the Petitioners include factual background regarding the Wildlife Center's application for a special use permit (SUP), which application was heard and granted by the Roanoke County Board of Supervisors, and which is the basis of an entirely different pending matter before the Circuit Court of Roanoke County. While the Respondents agree that the factual background regarding the SUP is helpful to understand the matter at hand, it must be emphasized that matters involving the granting of the SUP are separate and distinct from the issue at hand. To be clear, the Zoning Administrator does not have the ability to grant a SUP, and he did not attempt to do so.

Further, in agreeing that the Petitioners set forth a number of alleged harms that they would suffer as a result of the BZA's decision, the Respondents do not agree that such alleged harms have been or would be suffered by the Petitioners.

Finally, in their Petition, the Petitioners, Stan Seymour and Jane Seymour, state that they are the owners of Seymour2, LLC, which owns property immediately adjacent to the subject property. The below diagram is instructive of the location of the properties, and the proximity of surrounding neighboring properties (SVWC denoted the location of the subject property). While it is true that Seymour2, LLC is the title owner of property immediately adjacent to the subject property, Seymour2, LLC is not a party to this matter, and after motion and

argument made by the Petitioners to the trial court, the trial court refused to allow Seymour2, LLC to become an additional party to the matter.



(Ex.: County's Demonstration, 2; Record, 657).

MATERIAL PROCEEDINGS BELOW

The Respondents agree with the Petitioners' statement regarding the material proceedings below.

STANDARDS OF REVIEW

A. Standing Matters are Reviewed De Novo

The Petitioners set forth two assignments of error which both deal with the same issue – whether a person has standing because they are "aggrieved." The two assignments of error should be combined to one single issue; in an appeal pursuant to Section 15.2-2314 of the Code of Virginia, a person lacks standing if they are not "aggrieved."

The Respondents agree that questions of standing are questions of law that this Court reviews *de novo*. *See Thorsen v. Richmond Soc'y for the Prevention of Cruelty to Animals*, 292 Va. 257, 267 (2016).

B. Standing Generally

The Supreme Court of Virginia, in *Cupp v. Board of Supervisors*, 227 Va. 580, 589 (1984), has stated the following with regards to "standing":

> The concept of standing concerns itself with the characteristics of the person or entity who files suit. The point of standing is to ensure that the person who asserts a position has a substantial legal right to do so and that **his rights will be affected by the disposition of the case**.

(Emphasis added).

In the matter at hand, the Appellants are not denied a personal or property right as a direct result of the Zoning Administrator's determinations. The Appellants do not own the property that is the subject of the determinations. Their rights and ability to use their own property are in no way affected by the Zoning Administrator's determinations.

C. Standing Pursuant to an Appeal From Sections 15.2-2311 and 15.2-2314 of the Code of Virginia: a "Person Aggrieved"

Further, in order to have standing to appeal a zoning administrator's decision to the Board, a petitioner must meet the "person aggrieved" standard, which standard exceeds the general requirements for standing that are set forth above. Section 15.2-2311 of the Code of Virginia, which sets forth the standards and

procedures for a proper party to appeal a zoning administrator's decision to a local board of zoning appeals, states that **"any person aggrieved**" by a decision of the zoning administrator may appeal such decision to the Board. (Emphasis added). Likewise, in order to petition a circuit court for certiorari to review a BZA's decision, pursuant to the Code of Virginia Section 15.2-2314, a person must be "aggrieved."

This Court, in *Virginia Beach Beautification Comm'n v. Board of Zoning Appeals*, 231 Va. 415, 419-20 (1986), in interpreting whether a party was a "person aggrieved," and thus whether the party had standing to bring suit, held:

> The term "aggrieved" has a settled meaning in Virginia when it becomes necessary to determine who is a proper party to seek court relief from an adverse decision. In order for a petitioner to be "aggrieved," it must affirmatively appear that such person had some direct interest in the subject matter of the proceeding that he seeks to attack. The petitioner "**must show that he has an immediate, pecuniary and substantial interest in the litigation, and not a remote or indirect interest**" …. The word "aggrieved" in a statute contemplates a substantial grievance and means a **denial of some personal or property right**, legal or equitable, **or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally**.

(Emphasis added).

In *Friends of the Rappahannock v. Caroline County Bd. of Sup'rs*, 286 Va. 38, 46-47, 743 S.E.2d 132, 136 (2013), the Court, in applying the above standard, stated:

> a party who claims no ownership interest in the subject property has standing to file **a declaratory judgment action challenging a land use decision** only if it can satisfy a two-step test.
>
> First, the complainant must own or occupy "real property within or in close proximity to the property that is the subject of" the land use determination, thus establishing that it has "a direct, immediate, pecuniary, and substantial interest in the decision."
>
> Second, the complainant must allege facts demonstrating a particularized harm to "some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner from that suffered by the public generally.

(Emphasis added).

In short, *Friends of the Rappahannock* simplifies the *Virginia Beach Beautification* analysis by providing a short cut for the first part of the analysis; in certain land-use matters, if a complainant owns or occupies real property within close proximity to the property that is the subject of the land use determination, a court may assume that such person had some direct interest in the subject matter of the proceeding that he seeks to attack, and that he has demonstrated that he has an immediate, pecuniary and substantial interest in the litigation, and not a remote or indirect interest. The matter at hand is distinguishable from the facts of *Friends of the Rappahannock*, and the Court should decline to take the short-cut offered by the *Friends* test.

ARGUMENT

A. The Trial Court Erred in Applying the First Prong of the *Friends of the Rappahannock* Test to Determine Standing for a "Person Aggrieved"

The Petitioners have no ownership interest in the subject property that is possessed by the Wildlife Center. As acknowledged by the Petitioners, the adjoining landowner, Seymour 2, LLC, is not a party to this matter. Despite the fact that some of the Petitioners own Seymour 2, LLC, this entity is the actual property owner. It was not made a party to the lawsuit. As such, none of the Petitioners are adjacent property owners to the Wildlife Center.

The Petitioners argue that because they own property that is in close proximity to Wildlife Center's property, they have satisfied the first step of the above two-step test; they argue that the Petitioners, by owning such property, have established that they have a direct, immediate, pecuniary, and substantial interest in the Zoning Administrator's determinations.

The matter at hand is factually distinguishable from *Friends of the Rappahannock*, and accordingly, the Court should decline to find that the first prong of the *Friends* test has been satisfied. In the case at hand, the Court should apply the analysis set forth in *Virginia Beach Beautification Comm'n v. Board of Zoning Appeals*, 231 Va. 415, 419-20 (1986). The matter at hand is not an action for declaratory judgment and the Zoning Administrator's determinations are not

"land use determinations." The Zoning Administrator did not grant the Wildlife Center authority to do build a new structure; he lacks authority to do so. In Roanoke County, Virginia, only the Board of Supervisors can grant such authority through issuing a special use permit. None of the Zoning Administrator's determinations affected the status quo or present use of the subject property.

As a matter of common sense, there are a multitude of zoning determinations that may be made by a zoning administrator that in no way implicate the direct, immediate, pecuniary and financial interests of neighboring landowners who live hundreds of feet away (such as whether a property owner may build a backyard garden arbor). While it follows that *some* determinations made by a zoning administrator may implicate the direct, immediate, pecuniary and financial interests of neighboring property owners, certainly not *all* such determinations will. In the matter at hand, the Zoning Administrator's determinations, do not implicate the direct, immediate, pecuniary and financial interests of the Petitioners.

However, if the Court finds that the first prong of the *Friends* test is applicable, and that the Petitioners have met the first step of the *Friends* test simply by virtue of owning property on the same road, the Court should find that the Petitioners lack standing because the Petitioners have failed to satisfy the second step of the *Friends* test – they have not "alleged facts demonstrating a particularized harm" to some personal or property right, or imposition of a burden

or obligation upon the petitioner different from that suffered by the public generally.

B. The Trial Court Properly Found That the Petitioners Lack Standing Because They Failed to Satisfy the Second Prong of the *Friends of the Rappahannock* Test to Determine Standing for a "Person Aggrieved"

As noted above, the second prong of the *Friends* test coincides with the second portion of the analysis set forth in *Virginia Beach Beautification Comm'n*.

In *Friends of the Rappahannock*, the Caroline County Board of Supervisors issued a permit to Black Marsh Farm, Inc., subject to thirty-three (33) enumerated conditions, to conduct a sand and gravel mining operation on a tract of land bordering the Rappahannock River in Caroline County. *Id*. at 42. Although the property was zoned industrial, extraction of natural materials required a special use permit. Friends of the Rappahannock, a non-profit organization, along with six individual complainants, challenged the Board's decision to issue the permit (a land-use decision). The plaintiffs' complaint alleged bases for standing for each of the individual complainants, who were all neighboring land owners; they were concerned that the permitted use would:

- End the scenic beauty of the river area,
- Increase noise, dust, traffic from barges and commercial boats in a manner that would alter their quiet enjoyment of the area,
- Harm their recreational use (wading, observing wildlife),

- Have a detrimental effect on the long-term health and well-being of their children, one of whom was asthmatic.

Id. at 42-3.

The Court found that the plaintiffs' allegations of harm were not supported by facts, were conclusory, and did not show a loss of some personal or property right different from that suffered by the public generally:

> Although the individual complainants presented conclusory allegations as to possible harms, the general objections pled by the individual complainants **present no factual background** upon which an inference can be drawn that Black Marsh's particular use of the property would produce such harms and thus impact the complainants. Thus, the individual complainants **have not met their burden to provide sufficient facts <u>in their complaint</u> to allege how this particular use**, Black Marsh's sand and gravel extraction site, **causes the loss of some personal or property right** belonging to the individual complainants **different from the public in general**.

Id. at 49 (emphasis added).

Accordingly, the Court affirmed that the plaintiffs lacked standing to proceed. *Id*. at 51.

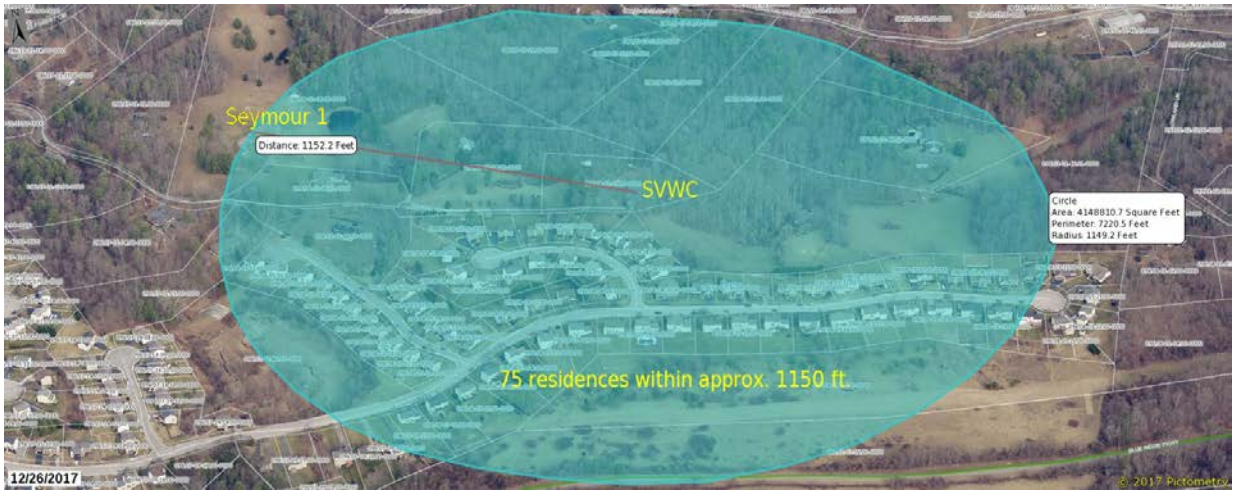
In the matter at hand, the Plaintiffs have failed to set forth sufficient facts to allege how the Zoning Administrator's determinations cause the loss of some personal or property right belonging to each of individual complainants, different from the public in general. As noted above, the Supreme Court of Virginia has clearly established that the Petitioners must meet "their burden to provide sufficient facts in their complaint." *Id*. at 49.

In their Petition for Appeal, the Plaintiffs set forth a list of conclusory allegations of present and future harm that are remarkably similar to the speculative allegations of harm alleged by the petitioners in *Friends of the Rappahannock*. In doing so, they intermingle alleged harms associated with the Board of Supervisors' granting of the SUP, fail to provide factual bases for their conclusory allegations, fail to specify which, if any, of the Zoning Administrator's determinations have had or will have such effects.

Further, when discussing such harms attributable to the Wildlife Center's construction of buildings pursuant to the SUP (which, again, should be kept separate from the matter at hand), the Petitioners fail to acknowledge any of the several conditions (including setback and vegetative buffering requirements) imposed in the SUP. (See 5985 Coleman Rd's Brief in Opposing Pet's Motion for Summary Judgment, Ex. C).

Further, the Petitioners have not provided any factual support for their general conclusions sufficient to claim particularized harms to rights not shared by the general public. Although the Property is located at the end of Coleman Road, there are many other properties within the same proximity as the Plaintiffs.

The Seymour 1 residence is located approximately 1152.2 feet from the existing SVWC structure. So are 75 other residences.



(Roanoke County's Demonstration, 17; Record, 671).

The Maver & Creasy residence is located approximately 902.8 feet from the existing Wildlife Center structure. So are 59 other residences.

(Roanoke County's Demonstration, 18; Record, 672).

The Petitioners argue that they are situated differently than all of these other surrounding property owners because they share road use with SVWC. Road use is not affected, in any way, by the Zoning Administrator's determinations. The

Petitioners failed to plead facts sufficient to claim particularized harms to rights not shared by the general public.

CONCLUSION

The Petitioners failed to establish that they have a direct, immediate, substantial, and pecuniary interest that has been implicated by any of the determinations of the Roanoke County Zoning Administrator regarding the property located at 5985 Coleman Road. Although the Petitioners have made conclusory allegations of harm, they have categorically failed to allege supporting facts to support any of these allegations. Further, they have failed to allege facts demonstrating a particularized harm to some personal or property right, legal or equitable, or the imposition of a burden or obligation upon the Petitioners different from that suffered by the public, generally. Accordingly, the Petitioners are not aggrieved by the Zoning Administrator's determinations, and lack standing to proceed in this matter.

WHEREFORE, the Respondents jointly move this Court to Dismiss the Petition with prejudice.

Respectfully submitted,

THE ROANOKE COUNTY BOARD OF SUPERVISORS

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Rule 5:18 because this brief contains 2,967 (less than 4,375) words, excluding the parts of the brief exempted by Rule 5:26(b).

2. This brief complies with the typeface and type of style requirements of Rule 5A:4(a) and Rule 5:6 because this brief has been prepared in a proportionally space typeface using Microsoft Word 2017 in 14pt Times New Roman.

Date: May 6, 2020

Peter S. Lubeck (VSB: 71223)

Date: May 6, 2020

James I. Gilbert, IV (VSB No. 38229)

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of May 2020, seven copies the foregoing Brief were hand-delivered to the Clerk of the Virginia Supreme Court and a copy was served via email and first-class U.S. Mail, postage prepaid, to:

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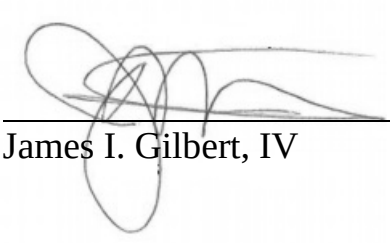

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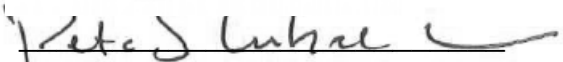

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