



Court Dismisses Inverse Condemnation Case Over Wet Weather Issues September 2019

In late 2018, watermen with oyster beds in the Nansemond River sued the City of Suffolk and Hampton Roads Sanitation District (HRSD), alleging that they had intentionally designed and operated their stormwater system (Suffolk) and sanitary sewers (both) to discharge contaminants onto their oyster beds (leased from the Virginia Marine Resources Commission), resulting in condemnation of their oysters by the Virginia Department of Health. On September 9, 2019, the Suffolk Circuit Court dismissed the watermen's claims with prejudice.

Instead of bringing a claim for nuisance or trespass, which would have been barred by sovereign immunity, the oystermen sued under the theory of inverse condemnation. Rooted in the Article I, Section 11 of Virginia's Constitution (which prohibits the taking or damaging of public property without just compensation), an inverse condemnation claim is based on an implied contract between property owner and the Commonwealth, where the government takes or damages property to benefit the public with the implied understanding that it would pay the property owner later. Inverse condemnation claims have emerged in Virginia as a way to attempt to avoid sovereign immunity.

To survive a defendant's motion to dismiss a complaint for failing to state a proper claim (referred to as a "demurrer"), the complaint must allege that the plaintiff has a private property right taken or damaged for public use by a body with condemnation authority, who failed to pay just compensation. In this case, the Suffolk Circuit Court granted HRSD's and Suffolk's demurrers, holding that the facts of a case from the Virginia and United States Supreme Courts more than 100 years ago were so identical to the current case that dismissal was required.

In the early 1900s, watermen sued the City of Newport News for its discharge of untreated sewage that polluted their oyster beds and rendered their oysters unfit for consumption. The Supreme Court of Virginia dismissed the case on the grounds that their oyster bed leases were taken subject to the superior right of the Commonwealth and its political subdivisions to discharge refuse into state waters. *Darling v. Newport News*, 123 Va. 14 (1918). The watermen appealed to the United States Supreme Court, which agreed with the Virginia Supreme Court that the oyster bed lease is taken at the risk of the water's pollution. *Darling v. Newport News*, 249 U.S. 540 (1919). In the recent case, the Suffolk Circuit Court dismissed the complaint on the same basis in light of these authorities.