
In The
Supreme Court of Virginia

RECORD NO. _____

ORION SPORTING GROUP, LLC,

Appellant,

v.

BOARD OF SUPERVISORS OF NELSON COUNTY,

Appellee.

PETITION FOR APPEAL

Stephen P. Halbrook, VSB #18075
LAW OFFICE OF
STEPHEN P. HALBROOK
10560 Main Street
Suite 404
Fairfax, Virginia 22030
(703) 352-7276 (Telephone)
(703) 359-0938 (Facsimile)

Counsel for Appellant

Steven L. Raynor, VSB #27806
John B. Simpson, VSB #38759
MARTIN & RAYNOR, P.C.
1228 Cedars Court
Charlottesville, Virginia 22903
(434) 817-3100 (Telephone)
(434) 817-3110 (Facsimile)

Counsel for Appellant

Anthony F. Troy, VSB #05985
William H. Hurd, VSB #16967
TROUTMAN SANDERS LLP
Post Office Box 1122
Richmond, Virginia 23218
(804) 697-1318 (Telephone)
(804) 698-5162 (Facsimile)

Counsel for Appellant

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STATEMENT OF NATURE OF CASE AND MATERIAL PROCEEDINGS IN TRIAL COURT

The Orion Sporting Group, LLC (“Orion”), operates a hunting preserve on its 450-acre estate in a rural part of Nelson County which is zoned agricultural. Orion also wishes to operate a sporting clays facility on the estate. Sporting clays consists of shooting at clay pigeons thrown by machines which mimic the flight patterns of game birds and the movements of game animals.

The Nelson County Board of Supervisors (“the Board”) approved the hunting preserve, but denied Orion’s application for a conditional use permit for the sporting clays facility. Orion appealed this decision to the circuit court. Chancery No. CH04-0020. Orion also filed a separate action seeking a declaratory judgment that operation of a sporting clays facility, *inter alia*, is protected by the constitutional right to hunt. Chancery No. CH04-0019.

On May 18, 2005, the circuit court entered an order finding that a safety warm-up of shooting at clay pigeons is incidental to the main activity of a pheasant hunt and denied the Board’s motion for an injunction against that activity.

At a three-day trial on the merits, Orion put on extensive evidence from hunting, conservation, and shooting witnesses, lay and expert, concerning how sporting clays promotes proficient, safe, and humane hunting. The Board argued that persons can learn to hunt on live game, except that sighting in a gun at the beginning of the season is part of hunting. When Orion rested, the Board moved to strike. The court denied the motion, finding that “a prima facie case has been made on all the issues.” Transcript, Vol. III, p. 605. The Board then rested without presenting any evidence.

Nonetheless, the circuit court issued a letter opinion dated June 29, 2005, ruling in favor of the Board and against Orion in both cases. The court recognized that “the constitutional right to hunt, fish, and harvest game under the Constitution of Virginia is a fundamental right.” Op. 3. However, it relied on criminal cases which gave the term “hunt” a narrow definition, and held that “the word ‘hunt’ in its plain, obvious, and common sense means the pursuit of game. Shooting sporting clays is not the pursuit of game.” Op. 4-5.

The court rejected the concept that the hunting of “simulated game,” to learn to hunt real game properly, is implied in the constitutional right to hunt. “This argument fails because the commonly understood definition of the word ‘hunt’ does not include proficiency, safety, or the humane hunting of game.” Op. 5. Contrariwise, the court found that under the Zoning Ordinance, “the use of sporting clays for warm-ups and safety tests in conjunction with hunts of live animals on the hunting preserve is an accessory use.” Op. 8. The court did not address the Board’s policy that hunters are entitled to only a brief “sighting-in” period at the beginning of the season.

On August 4, 2005, the circuit court issued a final order dismissing the remaining counts in both bills of complaint. This appeal followed.

ASSIGNMENTS OF ERROR

I. THE COURT ERRED IN HOLDING THAT OPERATION OF A FACILITY FOR SPORTING CLAYS, AN ACTIVITY WHICH INCORPORATES THE ESSENTIAL ELEMENTS OF LIVE GAME HUNTING, ON A 450-ACRE RURAL TRACT, IS NOT PROTECTED BY THE RIGHT TO HUNT AND HARVEST GAME, VA. CONST., ART. XI, § 4.

II. THE COURT ERRED IN RULING THAT THE CONSTITUTIONAL RIGHT TO HUNT DOES NOT PROTECT ACQUISITION OF SHOOTING SKILLS, BASED ON ITS HOLDING THAT “THE COMMONLY UNDERSTOOD DEFINITION OF THE WORD ‘HUNT’ DOES NOT INCLUDE PROFICIENCY, SAFETY, OR THE HUMANE HUNTING OF GAME.”

III. THE COURT ERRED IN CONCLUDING THAT THE CONSTITUTIONAL RIGHT TO HUNT DOES NOT INCLUDE PRACTICE SHOOTING WHICH ENHANCES ONE’S HUNTING ABILITIES, DESPITE HAVING RECOGNIZED THAT OPERATING A SPORTING CLAYS FACILITY FOR WARM-UP SHOOTING AND SAFETY CHECKS IS A LAWFUL ACCESSORY USE OF A HUNTING PRESERVE.

IV. THE COURT ERRED IN ALLOWING A LOCALITY TO RESTRICT THE RIGHT OF HUNTERS TO PREPARE FOR HUNTING ONLY IN A BRIEF BUT UNDEFINED “SIGHTING IN” PERIOD, CONTRARY TO THE PROVISO THAT THE RIGHT TO HUNT IS ONLY “SUBJECT TO SUCH REGULATIONS AND RESTRICTIONS AS THE GENERAL ASSEMBLY MAY PRESCRIBE BY GENERAL LAW,” VA. CONST., ART. XI, § 4.

STATEMENT OF FACTS

Orion Sporting Group, LLC (“Orion”) owns a 450-acre estate in Nelson County zoned agricultural, where it operates a hunting preserve licensed by the Virginia Department of Game and Inland Fisheries. It wishes also to operate a sporting clays facility, which includes various kinds of clay pigeon shooting, including helice, trap and skeet.¹ The Board of Supervisors of Nelson County denied Orion’s application for a conditional use permit for a sporting clays facility.

The parties disputed the meaning of the term “hunting.” While the Board called no witnesses, Fred Boger, the County’s Director of Planning and Zoning Administrator, testified that hunting is limited to the taking or killing of live animals and birds. Ex. 12, p. 8, 22, 26.

Orion’s 13 witnesses described a diverse array of hunting forms practiced in Virginia, contemporaneous to the constitutional amendment. Hunting may include the use of simulated and artificial game, and does not always involve the direct pursuit of live animals. Moreover, sporting clays enhances a hunter’s proficiency, safety, and humaneness. At its viewing of the Orion Estate, the Court observed demonstrations of simulated hunting with sporting clays, and live hunting in which pheasants flew in patterns similar to those in sporting clays.

Fox hunts involve chasing a real fox or, where there is loss of habitat, pursuing a scent left by dragging a bag. Trial Trans., Vol. III, p. 456-72. Falconry involves hunting live or simulated prey, such as a lure. Trial Trans., Vol. II, p. 428. Hound hunting involves

¹As proposed, live birds would be hunted throughout the Estate, while sporting clays would be shot only in some areas. Plaintiff’s Exhibit 2Q. With sporting clays, the ammunition used is quieter, and fewer shots would be fired, than with hunting. Trial Trans., Vol. III, p. 552.

pursuit of a live animal, or pursuit of the trail left by a scent bag. Trial Trans., Vol. III, p. 445-48.

Wing (bird) shooters had abundant game birds to hunt in Virginia in the 1960s, but game birds in the wild have declined. Trial Trans., Vol. II, p. 396, 401. Wing shooters may now hunt at preserves, where pheasants are tossed into the air by handlers, or placed in fields to be flushed by dogs. Trial Trans., Vol. I, p. 60-63, 68-70. Sporting clays offers similar targets which replicate the flight patterns of live birds. Trial Trans., Vol. I, p. 43-47. The hunting experience is virtually the same. Trial Trans., Vol. II, p. 387-89.

An environmental psychologist testified that as man has evolved, today hunting is characterized by anticipation, a sense of pursuit, a weapon, and a goal, which “does not require the killing of an animal to be hunting.” Trial Trans., Vol. II, p. 343. A hunting journalist found no significant difference between sporting clays and live dove hunting. Trial Trans., Vol. II, p. 416-17.

Morris Peterson, Orion CEO, testified that “my preference in hunting today are clay targets and helice because, one, I don’t enjoy cleaning birds and I will not kill anything that we’re not going to eat.” Trial Trans., Vol. III, p. 490-91.

The Board’s policy, which the court allowed to stand, is that one can learn to hunt by practicing on wild animals. As stated by Mr. Boger: “Generally, you can learn out in the field to hunt during hunting season.” Plaintiff’s Exhibit 12, p. 18. However, the Board does consider sighting in and practice to be hunting during a brief time period each year. Asked whether the County would “allow both sighting in of rifles and hunter safety training to be

conducted on property as part of a hunting use of property,” Mr. Boger responded: “If it’s at the beginning of the hunting season.” Trial Trans., Vol. 1, p. 143-44.²

The facts are not in dispute that sporting clays enhances one’s ability to hunt and harvest live game, and not solely at the beginning of hunting season. An expert who trains state game departments on the use of sporting clays to make wing shooters more proficient and reduce the incidence of wounded birds addressed “the ethical question of practicing on live game. . . . This is just so beyond the evolving ethic of hunting that we couldn’t even begin to suggest that. There is no way you can shoot enough live game birds to develop that level of proficiency without an incredible wing loss.” Trial Trans., Vol. I, p. 221-22. An instructor for the Virginia Hunter Education Program and the 4-H Shooting Education Program testified about the need to teach youngsters safe and proficient shooting skills before hunting live game. Trial Trans., Vol. I, p. 164-69.

²Mr. Boger explained in more detail as follows (Plaintiff’s Exhibit 12, p. 40-41):

Q What is the purpose of allowing them to sight in their rifles?

A I assume to hit where they’re aiming at.

Q For purposes of –

A Hunting.

Q More accurate, humane kills?

A I would assume so.

Q And the County allows them to do that at the beginning of the season because that’s something that is ordinarily, customarily part of a hunting use?

A Of the hunting of live game; yes.

Q When they’re shooting at these targets, they’re not shooting any live game; is that right?

A Right.

Q But that’s still hunting?

A If you’re shooting at targets outside the hunting season; no.

John Long, who has insured just under a thousand shooting preserves, testified that sporting clays are found at 80-90% of preserves. Trial Trans., Vol. II, p. 262-63, 266-67. As Mr. Peterson noted, that becoming a competent bird hunter required far more than the safety warmup with sporting clays that Orion conducts before pheasant hunts. Trial Trans., Vol. III, p. 527-29.

QUESTIONS PRESENTED

I. Whether operation of a facility for sporting clays, shotgun shooting which incorporates the essential elements of live game hunting, on a 450-acre rural tract, is protected by Va. Const., Art. XI, § 4, which provides that “the people have a right to hunt . . . and harvest game”

II. Whether the constitutional right to hunt is limited to a narrow definition of the word “hunt” found in the criminal law, and that the right “does not include proficiency, safety, or the humane hunting of game.”

III. Whether, given that operating a sporting clays facility for warm-up shooting and safety checks is a lawful accessory use of a hunting preserve, the constitutional right to hunt protects practice shooting which enhances one’s hunting abilities.

IV. Whether allowing a locality to prescribe a restriction such that hunters have a right to prepare for hunting only in a brief but undefined “sighting in” period, runs afoul of the limitation that the right to hunt is only “subject to such regulations and restrictions as the General Assembly may prescribe by general law,” Va. Const., Art. XI, § 4.

ARGUMENT

I. OPERATION OF A SPORTING CLAYS FACILITY IS PROTECTED BY THE CONSTITUTIONAL RIGHT TO HUNT AND HARVEST GAME

A. As a Constitutional Right, the Right to Hunt Must Be Broadly Construed

The Constitution of Virginia provides: “The people have a right to hunt, fish, and harvest game, subject to such regulations and restrictions as the General Assembly may prescribe by general law.” Va. Const., Art. XI, § 4. Sporting clays, helice and other clay target sports are forms of hunting that are virtually identical to forms which involve live animals. In a broad, constitutional sense (not in the narrow sense under the criminal statutes), and as the activity has evolved historically, to shoot at clay pigeons is to “hunt.”³

At trial, the court ruled that Orion made out a prima facie case and denied the Board’s motion to strike.⁴ That meant that Orion had established facts sufficient to prove that its proposed sporting clays facility was protected by the constitutional right to hunt. The burden of going forward with evidence then shifted to the Board. However, the Board rested without presenting any evidence. Orion was thereby entitled to judgment in its favor. *Darden v. Murphy*, 176 Va. 511, 514 (1940), explains:

³The Board conceded that it may not regulate hunting, and that the narrow issue for the circuit court was whether sporting clays is a hunting activity. Trial Trans., Vol. I, p. 27; Plaintiff’s Exhibit 12, p.19. If it is hunting, the Board (which presented no testimony) conceded that the activity must be allowed.

⁴“I overrule the motion to strike. I find that a prima facie case has been made on all the issues.” Transcript, Vol. III, p. 605.

[A plaintiff] may rest when he is of the opinion that he has made out a prima facie case. If he be right in that, then, without more, he is entitled to a judgment. At that stage in the trial the burden of producing evidence to overcome the case thus made shifts to the defendant, and he must produce it or judgment should go against him.⁵

Contrary to the above, the court's decision of June 29, 2005, held that the operation of a sporting clays facility is not a constitutionally-protected right or activity under Va. Const., Art. XI, § 4. Op. 1-2. The court correctly observed that "the constitutional right to hunt, fish, and harvest game under the Constitution of Virginia is a fundamental right." Op. 3. Given this recognition, the court should have construed the right to hunt broadly, but did not.

"[T]he constitution ought to receive not a strict and narrow, but a liberal and reasonable construction." *In re Broadus*, 73 Va. (32 Gratt.) 779, 786 (1880). The Constitution "is an instrument of government, made and adopted by the people for practical purposes connected with the common business and wants of human life," and to achieve that end, "every word in it should be expounded in its plain, obvious, common sense." *Farinholt v. Luckhard*, 90 Va. 936, 937, 21 S.E. 817, 817 (1886). The Constitution must not be construed with "such rigor and inflexibility" that "we not only violate accepted principles

⁵This would be the case even in under a deferential standard inappropriate in constitutional challenges. As explained in *Norton v. City of Danville*, 268 Va. 402, 410-11, 602 S.E.2d 126 (2004):

To meet Norton's evidence of unreasonableness, the city council was obligated to put forth some evidence of reasonableness for its decision in order to carry its burden to render the matter fairly debatable. Despite this low threshold, the city council failed to present evidence demonstrating that its decision was reasonable. . . . As a matter of law, the trial court could not conclude the issue was fairly debatable because the city council adduced no evidence of reasonableness.

of interpretation, but we destroy the rights which the Constitution intended to guard.”
Moore v. Pullem, 150 Va. 174, 194, 142 S.E. 415, 421 (1928) (citation omitted).

Constitutional rights are to be construed broadly. “This constitutional protection must not be interpreted in a hostile or niggardly spirit.” *Ullmann v. United States*, 350 U.S. 422, 426 (1956). “To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution.” *Id.* at 428-29.

“When words are used therein [in a constitution] which have both a restricted and general meaning, the general must prevail over the restricted unless the nature of the subject-matter of the context clearly indicates that the limited sense was intended.” *Gaiser v. Buck*, 203 Ind. 9, 179 N.E. 1, 4 (1931) (citing, *inter alia*, 1 Story, Const. § 451).⁶

The historical evolution of a constitutional right must be considered in its interpretation. *Dean v. Paolicelli*, 194 Va. 219, 226, 72 S.E.2d 506, 510, 511 (1952), explained:

The office and purpose of the constitution is to shape and fix the limits of governmental activity. It thus proclaims, safeguards, and preserves in basic for the pre-existing laws, rights, *mores*, habits and modes of thought and life of the people as developed under the common law and as existed at the time of its adoption to the extent and as therein stated The purpose and object sought to be attained by the framers of the Constitution is to be looked for, and the will and intent of the people who ratified it is to be made effective.

The right to hunt is a contemporary amendment to the Virginia Constitution, effective in 2001. By that time, hunting had evolved to encompass a wide variety of hunting practices

⁶A constitution “should not receive too narrow or literal an interpretation, but rather the meaning given it should be applied in such a manner as to meet new or changed conditions as they arise.” *Flaska v. State*, 51 N.M. 13, 22, 177 P.2d 174 (1947).

and experiences, many of which do not involve the pursuit and killing of live animals. Man had evolved so hunting for food was no longer a necessity; society had evolved so that, with loss of habitat, greater urbanization, diminution of wildlife and increased societal pressure from animal rights activists, different forms of hunting that met “instinctive energies” developed, that do not require killing of game. (See Swan testimony, Trial Trans., Vol. II, p. 83.)

“A fundamental right is one explicitly or implicitly guaranteed by the Constitution.” *Ballard v. Commonwealth*, 228 Va. 213, 216, 321 S.E.2d 284 (1984), citing *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973). The right to hunt, being explicitly protected by the Constitution, is a fundamental right. The “least restrictive alternative” must be followed when “state action impinges on the exercise of fundamental constitutional rights or liberties.” *Arlington County v. Richards*, 217 Va. 645, 649, 231 S.E.2d 231, 234 (1977) (citation omitted).

“When . . . a statute affects a fundamental right . . . , its constitutionality will be judged by the ‘strict scrutiny’ test.” *Hess v. Snyder Hunt Corp.*, 240 Va. 49, 53, 392 S.E.2d 817 (1990). Under the strict scrutiny test, the government must show that (1) it has a “compelling interest in restricting” the activity, (2) “the restrictions further such an interest,” and (3) “a more narrowly drawn restriction will frustrate its interest.” *Adams Outdoor Adver. v. City of Newport News*, 236 Va. 370, 381-82, 373 S.E.2d 917, 922 (1988).

By analogy, the right to free speech protects much more than words; it protects expression of all kinds. *Texas v. Johnson*, 491 U.S. 397 (1989) (burning flag); *S.E. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975) (theater, which “mixes speech with live action or conduct”); *Am. Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572, 575 (7th

Cir. 2001), *cert. denied*, 122 S. Ct. 462 (2001) (video games in which players shoot at monsters). Similarly, the right to hunt protects a broad range of activities.

Hunting in Virginia has always been understood to include a continuum of related activities, not just the bare act of taking wild game. It protects the human experiences and values that are inherent in hunting, as well as all of the activities preparatory for and appropriate to hunting. It also protects the right of the people to obtain the necessary skills and knowledge so that they might practice their choice of the hunting arts.

B. As the Text Indicates, the Right to Hunt is Broader Than the Right to Pursue and Harvest Game

Va. Const., Art. XI, § 4 recognizes that “the people” have a “right to hunt,” and a right to “fish,” and a right to “harvest game.” The “right to hunt,” unlike the right to “harvest,” is not restricted to game. Not only are those activities listed separately, but their separation by the term “fish” makes clear that the term “game” refers only to the term “harvest.” The term “game” does not relate back to or limit the “right to hunt,” which includes activities besides the taking of game. In short, the people have a “right to hunt,” and not just a “right to hunt game.”

Use of the terms “hunt . . . and harvest game” indicates that these words have meanings that are divergent. Since the right to pursue game is implied by the right to harvest game, limiting the “right to hunt” to that activity would render its separate mention meaningless. “Under settled rules of statutory construction, legislative enactments ‘should

be interpreted, if possible, in a manner which gives meaning to every word.” *Roberts v. Bd. of Sup’rs*, 249 Va. 2, 7, 453 S.E.2d 258, 261 (1995).⁷

The above distinction is illustrated by a historian’s comment that, as a youngster, Thomas Jefferson was taught both how to “fire his gun” and to press through the hills “in pursuit of deer and wild turkeys.” Henry S. Randall, *The Life of Thomas Jefferson* (Philadelphia: J.B. Lippincott & Co., 1865), vol. 1, at 14-15. Had an explicit right to hunt been needed in those days, it would have accorded protection to learning how to shoot proficiently and safely. Otherwise no one would have ever harvested any deer or turkeys.

The argument that the general term “hunt” includes nothing more than more specific term “harvest game” would “restrict the meaning of the general words by the more specific and particular description which follows,” the effect of which would be “not to restrict the meaning of the general words, but to render them mere surplusage, or without any meaning.” *Stephen Putney Shoe Co. v. Richmond, F. & P. R. Co.*, 116 Va. 211, 81 S.E. 93, 97 (1914).

The legislative history of the constitutional amendment further clarifies that the right to “hunt” was not intended to be limited to the right to “hunt *game*.” When the proposal was brought to the Senate floor in 2000, Senator William Mims moved to strike the phrase “and harvest game,” so that the opening clause would have read simply: “The people have a right to hunt and fish” The Senate rejected the motion.⁸ This episode in the Amendment’s

⁷“It would be absurd to conclude that the legislature would say the same thing twice in one statutory provision. . . . The rules of statutory interpretation argue against reading any legislative enactment in a manner that will make a portion of it useless, repetitious, or absurd.” *Jones v. Conwell*, 227 Va. 176, 180-81, 314 S.E.2d 61, 64 (1984).

⁸*See* the General Assembly’s Legislative Information System website, <http://leg1.state.va.us/cgi-bin/legp504.exe?001+amd+HJ124ASR>. Exhibit D to Orion’s Post-Trial Memorandum.

drafting history again reinforces that the right to “hunt” and the right to “harvest game” are separate and distinct rights.

The circuit court’s opinion would excise all but the literal harvesting of live game in the narrowest sense. But a constitutional guarantee that “the people have the right” to hunt guarantees the right to engage in activities associated with the hunting arts, which extend beyond merely the taking of live game. The phrase “the people have the right” that they have a right broadly to experience the full range of the hunting arts. Focusing only on the literal act of harvesting live game ignores the right of hunters to enjoy the activities, interests and values involved in the hunting experience, including the right to hunt simulated game.

Moreover, the existence of a right also includes the right not to exercise that right.⁹ Some wish to exercise the right to hunt but *not* the right to harvest game. The circuit court’s narrow view prohibits persons from exercising the right to hunt unless they are pursuing and harvesting live game.

The right to hunt is in Article XI of the Constitution, which concerns “Conservation.” *See* Va. Const., Art. XI, § 1 (conservation policy), § 2 (natural resources and historical sites), and § 3 (preservation of oyster beds). While § 4’s guarantee of hunting as a “right of the people” makes that activity an individual right just like the other individual rights guaranteed in the Bill of Rights,¹⁰ its placement in the article on Conservation highlights the policy of the Commonwealth to promote and regulate hunting and the harvesting of game for

⁹*E.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (“Freedom of association . . . plainly presupposes a freedom not to associate.”).

¹⁰*E.g.*, Va. Const., Art. I, § 12 (“the right of the people peaceably to assemble”) and § 13 (“the right of the people to keep and bear arms”).

conservation purposes. *See* A.E. Dick Howard, II, *Commentaries on the Constitution of Virginia* 1151, 1154 (noting that Article XI establishes a public trust in the natural resources of the State).

The circuit court characterized the right to hunt as a “grant of interest in the land itself” or a “profit a prendre.” While not decisive to the issues here, the right to hunt should be analyzed under the public trust doctrine, having roots in the Magna Carta and Roman law and made a part of the Virginia Constitution. As stated in *Geer v. Connecticut*, 161 U.S. 519, 529 (1896): “While the fundamental principles upon which the common property in game rest have undergone no change, the development of free institutions had led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.”

It is undisputed that sporting clays offers a hunting experience with no adverse impact on conservation, and promotes conservation by advancing ethical hunting and harvesting of game. The circuit court’s view discourages practice and proficiency, and encourages hunters to pursue and shoot at live game without adequate preparation and training. To the contrary, the constitutional guarantee must be understood in a manner to further its dual purposes of protecting a broad “right of the people” and of promoting conservation in the Commonwealth.

II. THE RIGHT TO HUNT INCLUDES THE RIGHT TO HUNT PROFICIENTLY, SAFELY, AND HUMANELY

A. Constitutional Rights Include Both Core and Auxiliary Rights

Sporting clays enables the hunter to become proficient, safer, and more humane when hunting and harvesting live game. A constitutional guarantee protects activities that are ordinary and necessary to exercising the core right. A “right” would be meaningless if one could not take the steps necessary to exercise it in a substantial manner. The “right to hunt” describes a continuum of activities that may, but need not, lead to the actual harvesting of game.

The court below decided that learning to hunt proficiently, safely, and humanely, such as through sporting clays, is not implied in or incident to the right to hunt. It stated: “This argument fails because the commonly understood definition of the word ‘hunt’ does not include proficiency, safety, or the humane hunting of game.” Op. 5.

Thus, the court narrowly equated the “right to hunt” with the specific act of hunting live game, ignoring that a constitutional right is an umbrella for exercise of activities that are necessary to exercise the core, primary activity. If the right to hunt “does not include proficiency, safety, or the humane hunting of game,” then this “right” may be exercised only in its most minimal, crude form – incompetent, unsafe, and inhumane hunting.

Every constitutional right includes that which is fairly implied in the right expressly recognized. See *Robert v. City of Norfolk*, 188 Va. 413, 427, 49 S.E.2d 697, 704 (1948) (invalidating ordinance which “permits the punishment of *incidents fairly within the protection of the guarantee* of a free press”) (emphasis added). “Without those peripheral rights the specific rights would be less secure.” *Griswold v. Connecticut*, 381 U.S. 479, 482-

83 (1965) (holding that free speech and press include “the right to distribute, the right to receive, . . . and freedom to teach”).¹¹

This principle was well established in Virginia as far back as St. George Tucker, *Blackstone’s Commentaries* (1803), I, *140-41, which stated about “the principal absolute rights which appertain to every Englishman”:

But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment. It has, therefore, established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers, to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property.

An analogy may be gleaned from the incidents protected by the right to keep and bear arms,¹² which is closely related to the right to hunt.¹³ *Andrews v. State*, 3 Heisk. 165, 8 Am. Repts. 8, 13 (Tenn. 1871), explained:

¹¹ “[The] specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.” *Id.* at 484.

¹² Va. Const., Art. I, § 13, provides in part “That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed” In World War II, with the National Guard sent abroad, the Governor organized the Virginia Reserve Militia. “The accepted plan was to interest the sportsmen, trap and skeet shots, the hunters and members of the Izaak Walton League” *Report of the Adjutant General* (Richmond 1943), 10.

¹³ St. George Tucker, who would become a Justice on the Virginia Supreme Court, wrote:

Wherever . . . the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction. In England, the people have been disarmed, generally, under the specious pretext of preserving the game

Tucker, *Blackstone’s Commentaries*, vol. 1, Appendix, 300.

What, then, is involved in this right of keeping arms? It necessarily involves the right to purchase and use them in such a way as is usual, or to keep them for the ordinary purposes to which they are adapted; and as they are to be kept, evidently with a view that the citizens making up the yeomanry of the land, the body of the militia, shall become familiar with their use in times of peace, that they may the more efficiently use them in times of war; then *the right to keep arms for this purpose involves the right to practice their use*, in order to attain to this efficiency. (Emphasis added.)

In 1964, the General Assembly resolved that “many citizens of this Commonwealth who own and enjoy the use of firearms are greatly disturbed by the proposals of certain groups to regulate and restrict gun ownership,” and noted the necessity of “proper training in the safe and effective use of firearms” *Journal of the Senate (Va.)* 250-251, 472 (1964). Training in safety and proficiency are inherent in any firearms-related activity and thus are within protected rights.

The Board argued below that Orion’s position that activities preceding the actual hunt are protected would “extend constitutional protection [to] shopping for shotgun shells and hunting clothing.” Yet if that is not protected, then the Board could ban shotgun shells and other items necessary for hunting, as long as it did not ban the actual pursuit of game. However, as held about a related right, “the right to keep arms, necessarily involves the right to purchase and provide ammunition suitable for such arms” *Andrews*, 8 Am. Repts. at 13.

For the above reasons, the right to hunt and to harvest game includes the right to offer and receive training and practice which makes one proficient, safe, and humane in the hunting and harvesting of game. The court below erred in failing to recognize the constitutional right includes incidents fairly within the protection of the guarantee.

B. The Public Policy of the Commonwealth Promotes Firearm Safety and Shooting Facilities for Hunting Purposes

The right to hunt is “subject to such regulations” as the General Assembly may prescribe. Va. Const., Art. XI, § 4. The General Assembly has enacted laws which promote firearm safety and training, shooting ranges, and game preserves. While the infrastructure for hunting activities is left primarily to private initiative, these enactments indicate that the public policy of the Commonwealth recognizes that the right to hunt includes activities which make hunters proficient, safe, and humane.

The functions of the Board of Game and Inland Fisheries illustrate the close relation between shooting facilities, hunting, and conservation. The Board is directed to “[c]onduct operations for the preservation and propagation of game birds, game animals, fish and other wildlife,” as well as to “acquire lands and waters for game and fish refuges, preserves or *public shooting and fishing . . .*”¹⁴ Va. Code §§ 29.1-103.4 (emphasis added). *See also* Va. Code § 29.1-106 (Board may establish “public shooting and fishing preserves”).

To obtain a hunting license, one must either complete a hunter education program or have had a prior license. Va. Code § 29.1-300.1. The Department of Game and Inland Fisheries “shall provide for a course of instruction in hunter safety, principles of conservation, and sportsmanship,” and shall cooperate with organizations with such objectives. Va. Code § 29.1-300.2. Hunter education may involve shooting practice. *E.g.*, Va. Code § 29.1-300.3 (cost of instruction may include range fees and ammunition).

The right to hunt includes not just the minimal hunter education course required by law, but also more advanced training. The Department itself sponsors hunting workshops

¹⁴“The Department of Game and Inland Fisheries has public sighting-in ranges available at [selected] Wildlife Management Areas. These ranges are built with safety and accuracy in mind”
http://www.dgif.state.va.us/hunting/where_to_hunt/shooting_ranges.html.

which include shooting practice.¹⁵ The hunter education program is just a beginning, and practice and proficiency are necessary to learn to hunt live game. The Commonwealth is not expected to provide facilities and training to learn to hunt any more than it hands out a free shotgun to every hunter. Orion’s proposed sporting clays facility would serve the Commonwealth’s public policy objectives to promote hunter safety, principles of conservation, and sportsmanship.¹⁶

This is particularly the case because Orion is a shooting preserve licensed by the Department of Game and Inland Fisheries. *See* Va. Code § 29.1-600. The license authorizes the hunting of Chukar, Northern Bobwhite, Hungarian Partridges and Ring-necked Pheasant. A sporting clays facility would allow hunters to practice the efficient and humane taking of such game.

The fact that the hunting preserve is a commercial venture does not change the use as a hunting use protected by the right to hunt. Status as a licensed shooting preserve means that “the licensee and such other persons as he may designate, because of payment of fees or otherwise, may hunt on the licensed premises, and shoot . . . any game birds or animals of the species licensed.” Va. Code § 29.1-604. Similarly, the right to hunt includes the right to train hunters to hunt.

¹⁵*E.g.*, *Becoming An Outdoors-Woman*® includes “practice shotgun shooting techniques at the range.”
<http://www.dgif.virginia.gov/events/documents/2005BOWbrochure.pdf>.

¹⁶*See Avery v. Beale*, 195 Va. 690, 703, 80 S.E.2d 584, 592 (1954) (game law “enacted for the conservation of waterfowl, the protection and safety of those engaged in shooting them, and for the promotion of better sport and recreation.”).

In sum, the public policy of the Commonwealth is to promote shooting activities and facilities which make hunters proficient, safe, and humane. The pertinent regulations enacted by the General Assembly demonstrate that the right to hunt protects such activities and facilities.

C. The Constitutional Right is Not Confined to Narrow Definitions in the Game Code Which Create Crimes and Which Must be Narrowly Construed

To define the word “hunt,” the court below relied on criminal cases involving hunting without a license. Op. 4-5. The court also relied on dictionaries in support of the same restrictive definition. Op. 5. The court then held that “the word ‘hunt’ in its plain, obvious, and common sense means the pursuit of game. Shooting sporting clays is not the pursuit of game.” Op. 5.

This ignores that the words of a criminal statute are defined narrowly, while constitutional rights are construed broadly. The Commonwealth has an interest in defining hunting as the pursuit of live game for conservation purposes only. Moreover, a bare definition of the word “hunt” is not dispositive of the meaning of the “right to hunt” and of the incidental or auxiliary rights it protects.

Commonwealth v. Bailey, 124 Va. 800, 802, 97 S.E. 774, 774 (1919), which involved the crime of hunting fox without a license, quoted definitions of hunting such as “the act of pursuing and taking wild animals; the chase.” Even then, the court also offered broader definitions, such as “to follow with dogs or guns for sport or exercise.” *Id.*

Bailey is inapposite here, for it involved the meaning of “hunt” under a criminal statute, and “it is a cardinal principle of law that penal statutes are to be construed strictly against the [Commonwealth].” *Wade v. Commonwealth*, 202 Va. 117, 122, 116 S.E.2d 99,

103 (1960). It sheds no light on the meaning of the “right to hunt,” which must be broadly construed.

The game code does define “hunting,” but the definition is restricted as follows: “As used in and *for the purposes of this title [Title 29.1] only*, or in any of the regulations of the Board, unless the context clearly requires a different meaning. . . .” Va. Code § 29.1-100 (emphasis added). That section provides:

“Hunting and trapping” includes the act of or the attempted act of taking, hunting, trapping, pursuing, chasing, shooting, snaring or netting birds or animals, and assisting any person who is hunting, trapping or attempting to do so regardless of whether birds or animals are actually taken; however, when hunting and trapping are allowed, reference is made to such acts as being conducted by lawful means and in a lawful manner. The Board of Game and Inland Fisheries may authorize by regulation the pursuing or chasing of wild birds or wild animals during any closed hunting season where persons have no intent to take such birds or animals.¹⁷

The definition is narrow as it applies to the criminal prohibition on hunting without a license and other crimes, reflecting the Commonwealth’s interest in the conservation of wildlife.¹⁸ Because wildlife is not harvested while hunting simulated game, it is not included in the definition of “hunting” for purposes of defining crimes.¹⁹

¹⁷As noted, hunting includes “assisting” another who “*is* hunting,” in the present tense. In a broader sense, and not for purposes of the criminal provisions regarding hunting, a person operating a sporting clays facility would be “assisting” a person who “will be hunting,” in the future tense, by enhancing the hunter’s proficiency. The constitutional right to hunt is broad enough to include activities which directly assist hunters in this sense.

¹⁸See Va. Code § 29.1-300 (“It shall be unlawful to hunt . . . without first obtaining a license”); § 29.1-335 (hunting without license a Class 3 misdemeanor); § 29.1-519(F) (hunting with unauthorized weapons unlawful); § 29.1-521 (unlawful to hunt on Sunday, to hunt over the bag limit, or to hunt other than as permitted by law); § 29.1-521.1.A (unlawful “to willfully and intentionally impede the lawful hunting . . . of wild birds or wild animals”).

¹⁹“Hunting” is defined differently for various purposes. *E.g.*, Va. Code § 29.1-52 (“For the purpose of this section, the terms ‘hunt’ and ‘trap’ shall not include the necessary crossing of highways for the bona fide purpose of going into or leaving a lawful hunting or

The game code recognizes that hunting need not involve the taking of live game and is an art that can be practiced. As seen above, the definition in § 29.1-100 itself refers to the pursuit of game in the closed season when persons have no intent to harvest game. Field trials with dogs need not involve the shooting of game.²⁰ Foxes may be hunted on horseback without firearms.²¹ The law prohibits shooting at live pigeons as a form of target practice,²² obviously preferring the shooting of clay pigeons for target practice. Hunting is not restricted to pursuing game. *E.g.*, Va. Code § 18.2-56.1(B) (punishing reckless handling of firearms “while the person is engaged in hunting, trapping *or* pursuing game”) (emphasis added).

Finally, constitutional rights may not be reduced to bare dictionary definitions. A simplistic dictionary definition of the word “hunt” cannot constrict what is a fundamental right, nor does it speak to what activities are auxiliary to the core right. As explained in *Ullmann v. United States*, 350 U.S. 422, 439 n.14 (1956):

The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic, living institutions transplanted from English soil. Their significance is vital, not formal; it is to be gathered

trapping area.”).

²⁰*See* Va. Code § 29.1-422 (Board may “grant permits to bona fide field trial clubs and associations to hold field trials with dogs If wild game is to be shot over or in front of dogs engaged in such field trials, the person actually shooting must have a license”).

²¹The hunter-education requirement for a hunting license “shall not apply to persons while on horseback hunting foxes with hounds but without firearms.” Va. Code § 29.1-300.1(C).

²²Va. Code § 3.1-796.126 provides in part: “Live pigeons or other birds or fowl shall not be kept or used for the purpose of a target, or to be shot at either for amusement or as a test of skill in marksmanship. . . . Nothing contained herein shall apply to the shooting of wild game.”

not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.

No court would ever hold that the government could ban electronic media on the basis of the argument that the First Amendment guarantees only a right to a free press, and the term “press” is “short for printing press.” Webster’s New World Dictionary, 3rd College Ed. (1991), at 1066.

In sum, the right to hunt provides an umbrella of activities such as sporting clays which make it possible to hunt and to harvest game proficiently, safely, and humanely. Constitutional rights are not and have never been limited to definitions found in criminal codes or dictionaries.

III. GIVEN THAT SPORTING CLAYS FOR WARM-UP SHOOTING AND SAFETY CHECKS IS AN ACCESSORY USE TO A HUNTING PRESERVE, THE RIGHT TO HUNT INCLUDES PRACTICE SHOOTING

The extent to which sporting clays may be considered as an adjunct right to the primary right to hunt is suggested in the court’s analysis of whether sporting clays is an accessory use in an agricultural district under the Zoning Ordinance.²³ While the court’s ruling that sporting clays is not generally an accessory use is not being appealed, its discussion bears on the issue of whether sporting clays are what could be called an “accessory” right to the primary right to hunt.

The court recognized that sporting clays shooting for safety and warmup are part of a specific hunt. Given that, no basis exists to limit safety to the time period just before an

²³Nelson County Zoning Ordinance § 4-1-12 permits, by right, “accessory uses” on land that is zoned as an Agricultural District A-1, like the Orion property. An “accessory use” is defined as “a subordinate use . . . customarily incidental to and located upon the same lot occupied by the main use or building.” Nelson County Zoning Ordinance § 2.2.

actual hunt, or to allow a warmup just before a hunt only but not to allow practice at other times.

As the court noted, “John Long, an insurance agent who specializes in insurance for hunting preserves, testified that approximately 80 to 90 percent of hunting preserves nationally have a sporting clays facility.” Op. 6, citing Trial Trans., Vol. II, p. 277. The court remarked: “At first blush, it seems that the sporting clays facility is a subordinate use customarily incidental to the hunting preserve.” Op. 7.

However, the court decided that sporting clays would be the main activity, and hence Orion was not entitled to engage in that activity as a matter of right. *Id.* Yet the court’s reasons for concluding that sporting clays would be the main activity are legally insufficient. First, it noted that the shooting preserve license allowed hunting game only eight months of the year, but the clays facility could operate all twelve months. *Id.* However, not only would year-round practice make the actual hunting of game more meaningful, but also non-game species may hunted all year long.

Second, the court noted evidence that sporting clays was useful for attracting women shooters, and offered an alternative to those who did not wish to engage in the “blood sports.” Op. 7. Yet it was uncontested that this encouraged many such persons eventually to engage in the hunting of live game. Some persons practice an activity more than others before engaging in the actual activity.

Third, the court noted testimony that the sporting estate would not be feasible without the sporting clays course. Op. 7. Yet the court had recognized previously that hunting preserves generally have sporting clays. Op. 6. It would be no surprise that a hunting

preserve with inadequate facilities for practice and safety training would not be a commercial success. A sporting clays facility is an integral part of a hunting preserve.

Boone County Area Plan Comm'n v. Kennedy, 560 N.E.2d 692, 697 (Ind. App. 1990), held that a skeet and shooting range was an accessory use to a recreational country home with 40 acres. The court here sought to distinguish *Boone* because the recreational use there occurred primarily on weekends. Op. 7. Yet *Boone* held that the result would be the same even if the skeet range was used every day, as the issue was “the nature of the use, not the degree of intensity with which the use is pursued.” 560 N.E.2d at 696 n.2.

An instructive analogy may be made between sporting clays as an auxiliary right to the primary constitutional right to hunt, and sporting clays as an accessory use to the main hunting use under a zoning ordinance. The court itself found that a limited amount of sporting clays is an accessory use to hunting as follows:

. . . I do find that the use of sporting clays for warm-ups and safety tests in conjunction with hunts of live animals on the hunting preserve is an accessory use. The facts establish that this limited use of sporting clays is customary to allow a hunter to warm-up prior to engaging in a hunt of wild game, and for the staff and guides to evaluate the proficiency of the hunter for safety purposes. Thus, and for this limited purpose, the shooting of sporting clays is allowed as an accessory use. Accordingly, while a sporting clays facility is not an accessory use under the Nelson County Zoning Ordinance to a hunting preserve, shooting of sporting clays, or for that matter skeet or trap, is subordinate and incidental to the hunting preserve for purposes of warm-ups and safety evaluations. Op. 8.

If shooting sporting clays to warm-up for a hunt and to allow a safety check are part of hunting at the time of a specific hunt, so too are practice and safety training at other times. One is playing basketball not just during the warm-up before a game, but also on practice days. And if safety is a legitimate part of hunting just before an actual hunt, it is equally legitimate at other times. In short, having found that proficiency and safety are proper

components of a specific hunt, the court should have recognized that promotion of these same objectives at other times is encompassed in the right to hunt.

IV. A LOCAL RULE THAT HUNTERS HAVE A RIGHT ONLY TO AN UNDEFINED “SIGHTING IN” PERIOD RUNS AFOUL OF THE RESTRICTION THAT THE RIGHT TO HUNT IS ONLY SUBJECT TO REGULATIONS PRESCRIBED BY THE GENERAL ASSEMBLY

A. The Right to Hunt is Subject to Regulation by the General Assembly, Which has Authorized Counties to Regulate Only in Narrow Circumstances

The circuit court’s decision allows the County to restrict activities at the very core of the right to hunt. Here, as Mr. Boger’s testimony shows, the Board has imposed a restriction that one must “learn out in the field to hunt during hunting season.” Plaintiff’s Exhibit 12, p. 18. The only exception is that the Board allows “both sighting in of rifles and hunter safety training to be conducted on property as part of a hunting use of property,” only “if it’s at the beginning of the hunting season.” Trial Trans., Vol. 1, p. 143-44. Sighting in at the beginning of the season is allowed because it is “ordinarily, customarily part of a hunting use,” i.e., “of the hunting of live game,” but not so “if you’re shooting at targets outside the hunting season” Plaintiff’s Exhibit 12, p. 40-41.

The Board’s imposition of these restrictions, unrestricted under the circuit court’s interpretation, runs afoul of the proviso that the right to hunt is “subject only to such regulations and restrictions as the General Assembly may prescribe by general law.” Va.

Const., Art. XI, § 4.²⁴ This negates any local power to regulate the right.²⁵ Indeed, the declaration of the right to hunt is squarely directed against adverse action by localities.

The legislative history of the Amendment demonstrates the rejection of any local power to restrict the right to hunt. In addition to moving to strike the phrase “and harvest game,” Senator William Mims moved to insert at the end, “allowing regulation as any city or town may prescribe by charter.” As reworded, the Amendment would have stated: “The people have a right to hunt and fish, subject to such regulations and restrictions as the General Assembly may prescribe by general law and any city or town may prescribe by charter.” The Senate rejected both amendments.²⁶ This rejection of local regulation highlights that the proviso that the right is subject to regulation only by the General Assembly was carefully chosen to prohibit restrictions based on local ordinances or local land use decisions.

Where the General Assembly has denied counties the power to pass ordinances restricting certain activities, restricting the same activities through land-use decisions cannot be considered reasonable exercises of the county’s police power. “In determining the constitutional scope of the zoning police power delegated to local governments in Virginia,

²⁴Even before ratification of the amendment, it was held that “absent specific authority to the contrary, county boards of supervisors are not authorized to pass ordinances regulating hunting.” 1993 Va. Rep. Atty. Gen. 157, *3 n.1 (locality may not prohibit bow hunting on private property).

²⁵“The proviso . . . is generally intended to restrain the enacting clause, and to except something which would otherwise have been within it, or in some measure to modify the enacting clause.” *Commonwealth v. Ford*, 70 Va. (29 Gratt.) 683, 688 (1878) (citation omitted).

²⁶See the General Assembly’s Legislative Information System website, <http://leg1.state.va.us/cgi-bin/legp504.exe?001+amd+HJ124ASR>. Exhibit D to Orion’s Post-Trial Memorandum.

we look first to our own enabling statutes.” *Board of Sup'rs v. Rowe*, 216 Va. 128, 137, 216 S.E.2d 199, 208 (1975). *Lawless v. County of Chesterfield*, 21 Va. App. 495, 499, 465 S.E.2d 153 (1995), explains:

In Virginia, the boards of supervisors of the counties do not have broad general authority to adopt whatever ordinance they deem appropriate or desirable. The power of a county, like that of a municipal corporation, is controlled by Dillon’s Rule, which authorizes the locality to exercise those powers or adopt ordinances that the legislature expressly authorizes by statute or that are conferred by necessary implication.

The General Assembly has authorized counties to pass ordinances to prohibit hunting only pursuant to strict criteria. Hunting may be prohibited in or within a half mile of a subdivision or other heavily populated area if it would be dangerous.²⁷ Hunting may be prohibited on or within 100 yards of a highway,²⁸ school, or park.²⁹ A county may prohibit hunting with a shotgun loaded with slugs or a rifle larger than .22 caliber rimfire.³⁰ A county has no authority to prohibit hunting with a shotgun loaded with shot, which is used in sporting clays.

Similarly, the General Assembly has authorized counties to pass ordinances to prohibit the discharge of firearms only pursuant to clearly-defined criteria. A county may prohibit the shooting of firearms in areas of the county which are “so heavily populated as

²⁷Va. Code § 15.2-1210.

²⁸Va. Code § 29.1-526.

²⁹Va. Code § 29.1-527.

³⁰Va. Code § 29.1-528(A).

to make such conduct dangerous to the inhabitants thereof.” Va. Code § 15.2-1209.³¹ However, the opinion of the court below allows the Board to circumvent this provision through a land use decision rather than an ordinance, by prohibiting shooting of firearms at sporting clays without danger to anyone, on a 450-acre rural tract zoned Agricultural. *See Bd. of Sup’rs v. Rowe*, 216 Va. 128, 144, 216 S.E.2d 199, 212 (1975) (“Nor is there any evidence that such uses are noxious, dangerous, or otherwise inimical to the public health, safety, or welfare”).

The General Assembly has also preempted localities from adopting any ordinance or taking any action governing the purchase, possession, transfer, ownership, carrying or transporting of firearms or ammunition except as expressly authorized by statute. Va. Code § 15.2-915. Even aside from preemption statutes, localities do not have power to regulate firearms use absent specific authority. 1998 Va. Op. Atty. Gen. 56, *1, states the familiar rules:

Virginia follows the Dillon rule of strict construction concerning the powers of local governing bodies.³² Under that rule of construction, local governing bodies have only those powers that are expressly granted, those that are

³¹Section 15.2-1209 provides:

Any county may prohibit the shooting of firearms in any areas of the county which are in the opinion of the governing body so heavily populated as to make such conduct dangerous to the inhabitants thereof.

Any county that prohibits the firing of firearms shall provide an exemption for the killing of deer pursuant to § 29.1-529. Such exemption shall apply on land of at least five acres that is zoned for agricultural use.

³²Citing *Commonwealth v. Arlington County Bd.*, 217 Va. 558, 232 S.E.2d 30 (1977); *City of Richmond v. County Bd.*, 199 Va. 679, 684, 101 S.E.2d 641, 644-45 (1958).

necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.³³

... [W]hen a statute creates a specific grant of authority; the authority exists only to the extent specifically granted in the statute. The mention of one thing in a statute implies the exclusion of another.³⁴

Applying the above rules, Attorney General opinions have consistently opined that local regulation of firearms is invalid unless explicitly authorized.³⁵ In short, if a county is not empowered to pass an ordinance prohibiting certain activity, it may not achieve the same result through a land-use decision.

B. The County May Not Restrict the Right to Hunt For Other Constitutionally Impermissible Reasons

The denial of the conditional use permit was based on the objections of certain neighbors, noise considerations (even though Orion would have complied with the noise ordinance), and because Orion could go someplace else to conduct the activity. While none of these were legitimate reasons to restrict the constitutional right to hunt, the judgment below allows the Board's improper decision to stand.

The "negative attitude of the majority of property owners" is not a legitimate reason to deny a zoning permit. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985). "Denial of a permit is arbitrary where the decision to deny was not related to any

³³*Bd. of Sup'rs v. Horne*, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975).

³⁴Moreover, any fair, reasonable doubt concerning the existence of power is resolved by the courts against the municipal corporation, and the power is denied. *County Board of Arlington County v. Brown*, 229 Va. 341, 344, 329 S.E.2d 468, 470 (1985).

³⁵1998 Va. Op. Atty. Gen. 56, *1 (locality may require concealed handgun applicant to be fingerprinted only if it adopts ordinance, which was authorized by statute); 1982-83 Va. Op. Atty. Gen. 163 (absent express grant, county may not prohibit carrying of a loaded firearm); 1982-83 Va. Op. Atty. Gen. 755 (absent grant, locality may not require a permit for purchase of handgun).

substantial zoning interest, but was instead motivated principally by the heavy opposition of neighbors expressed at a public hearing.” *Marks v. City of Chesapeake*, 883 F.2d 308, 311 (4th Cir. 1989) (citation, brackets and internal quote marks omitted). Zoning officials may not rely “on public distaste for certain activities” *Id.*

In making zoning decisions, counties must be cognizant of and respect constitutional rights. “As the Board says, the police power is ‘elastic.’ But its stretch is not infinite. If it were, no property right, indeed, no personal right, could co-exist with it.” *Bd. of Sup’rs v. Rowe*, 216 Va. 128, 139, 216 S.E.2d 199, 209 (1975).

A reasonable level of sound is inherent in the constitutional rights to hunt and to keep and bear arms, as both necessarily involve the discharge of firearms at targets, whether game or non-game. A right may not be suppressed because someone objects to a characteristic inherent in the exercise of the right.³⁶

Here, noise was the reason given by the Board for its denial of the permit. Trans. of Board of Supervisors Meeting, Feb. 4, 2004, at 18-24, 29. Plaintiff’s Exhibit 2N, at 5–6. One neighbor testified that he is opposed to ever hearing *any* gunshot sound. Trans. of Planning Committee Meeting, Nov. 19, 2003, at 50, Plaintiff’s Exhibit 1A.

Orion complied with the only noise ordinance on the books, and yet was denied a permit, apparently because some witnesses speculated that they might be annoyed by the sound of shotguns. As *Saia v. New York*, 334 U.S. 558 (1948) asked, must a person’s ability to use a sound truck “depend on the whim or caprice of the Chief of Police,” and on his

³⁶Virginia does not encourage noise reduction for firearms. *See* Va. Code § 18.2-308.6 (felony to possess unregistered firearm muffler or silencer).

ability to “prove to the satisfaction of that official that his noise will not be annoying to people?” *Id.* at 561-62. To the contrary, “Noise can be regulated by regulating decibels” and “by narrowly drawn statutes.” *Id.* at 562.

A permit to conduct a constitutionally protected activity cannot be denied because the right might be exercised someplace else. Just before calling for the Board vote, the Chairperson stated, “I’d like to think maybe Orion could find another spot for the shotgun area” Trans. of Board of Supervisors Meeting, Feb. 4, 2004, at 31. Given that the Orion Estate sits on an extremely rural 450 acres zoned Agricultural, in one of Virginia’s most rural counties, the sporting clays facility is essentially banned from the entire county. As held in an analogous situation, “one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.” *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939).

In sum, contrary to the proviso that the right to hunt is “subject only to such regulations and restrictions as the General Assembly may prescribe by general law,” Va. Const., art. XI, § 4, Nelson County has restricted the right by recognizing the activity of sighting in a gun as a hunting activity only at the beginning of the hunting season. And it did so for reasons that would be constitutionally impermissible even without the existence of the constitutional right.

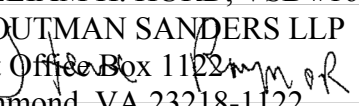
CONCLUSION

This Court should grant this petition for appeal.

Respectfully Submitted,
ORION SPORTING GROUP, LLC.
By Counsel

STEPHEN P. HALBROOK, VSB #18075
10560 Main St., Suite 404
Fairfax, VA 22030
Phone (703) 352-7276
Fax: (703) 359-0938
Counsel for Appellant

STEVEN L. RAYNOR, VSB #27806
JOHN B. SIMPSON, VSB #38759
MARTIN & RAYNOR, P.C.
1228 Cedars Court
Charlottesville, VA 22903-4801
Phone: (434) 817-3100
Fax: (434) 817-3110
Counsel for Appellant

ANTHONY F. TROY, VSB #05985
WILLIAM H. HURD, VSB #16967
TROUTMAN SANDERS LLP
Post Office Box 1122 
Richmond, VA 23218-1122
Phone: (804) 697-1318
Counsel for Appellant

CERTIFICATE PURSUANT TO RULE 5:17(e)

1. The name of the Appellant is Orion Sporting Group, LLC. Counsel for Appellant is as follows:

STEPHEN P. HALBROOK, VSB #18075
10560 Main St., Suite 404
Fairfax, VA 22030
Phone: (703) 352-7276

STEVEN L. RAYNOR, VSB #27806
JOHN B. SIMPSON, VSB #38759
MARTIN & RAYNOR, P.C.
1228 Cedars Court
Charlottesville, VA 22903-4801
Phone: (434) 817-3100

ANTHONY F. TROY, VSB #05985
WILLIAM H. HURD, VSB #16967
TROUTMAN SANDERS LLP
Post Office Box 1122
Richmond, VA 23218-1122
Phone: (804) 697-1318


The name of the Appellee is Board of Supervisors of Nelson County. Counsel for Appellee is as follows:

John W. Zunka, Esq.
Alvaro A. Inigo, Esq.
Zunka, Milnor, Carter, & Inigo, Ltd
414 Park Street
Charlottesville, VA 22902
Phone: (434) 977-0191

Phillip D. Payne, IV, Esq.
P.O. Box 447
84 Courthouse Square
Lovingson, VA 22949
Phone: (434) 263-7010

2. I hereby certify that seven copies of the foregoing Petition for Appeal were hand filed with the Clerk of the Supreme Court of Virginia and a true copy of the foregoing Petition for Appeal was mailed first class, postage prepaid, this 3rd day of November, 2005, to all opposing counsel.

3. Counsel wishes to state orally to a panel of this Court the reasons why this petition for appeal should be granted, and to do so in person.


Steven L. Raynor