

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF NELSON

ORION SPORTING GROUP, LLC,

Plaintiff,

v.

Case Nos. CH04-0019, CH04-0020

BOARD OF SUPERVISORS
OF NELSON COUNTY,

Defendant.

PLAINTIFF’S POST-TRIAL MEMORANDUM

Orion Sporting Group, LLC, (“Orion”) owns the Orion Estate (“Estate”), a 450-acre property in an area of Nelson County (“County”) zoned agricultural. It received and has permission from the County to operate its corporate training facility. It has a by right use to operate a hunting preserve, allowed and licensed under the auspices of the Virginia Department of Game and Inland Fisheries.

Orion does not and cannot operate its planned sporting clay and other shooting activities—helice, trap and skeet—because the Board of Supervisors of Nelson County (the “Defendant Board” or the “Board”) asserts that such activity was subject to a separate conditional use permit, which it denied. The Board failed and still fails to recognize that such planned activity was constitutionally protected, failed and still fails to understand the breadth of the constitutional language, and failed and still fails to understand, at a minimum, that such activity is entitled to be implemented as an accessory use by right.

STATEMENT OF THE FACTS

The Board asserts that the only activities protected under Virginia’s constitutional “right to hunt,” Virginia Constitution Article XI, Section 4, are those in which live animals are being

pursued or killed. Trial Trans., Vol. I, p. 32. The Board asserts that, if a live animal is not being pursued or killed, the activity cannot be hunting, and is not constitutionally protected. The predicate for the Board's position is the narrow, technical definitions found in the fish and game laws and the dictionary. Trial Trans., Vol. I, p. 33.¹ According to the testimony of Mr. Fred Boger, the County's Director of Planning and Zoning Administrator, hunting is limited only to "live animals [and] birds," Ex. 12, p. 8; "if you're not taking game" it's not hunting, Ex. 12, p. 22; "shooting live game; that's hunting," Ex. 12, p. 24; it's "not hunting, because you aren't killing the animal," Ex. 12, p. 26; anything else is "target shooting." Ex. 12, p. 27.

The meaning of a constitutional amendment adopted pursuant to public ratification, however, is not to be derived from a narrow, technical, or dictionary definition, but instead must be determined in light of the practices contemporaneous to the amendment. Constitutional protections must be broadly construed and applied.

In that context, Orion's 13 witnesses testified to a wide variety of hunting practices and experiences in the different hunting arts, all of which existed and were in practice in 2000, the year that Virginia's citizens ratified the constitutional amendment. Orion's witnesses described a number of forms of hunting which did not involve the pursuit or killing of live animals, including fox hunting, hounds hunting, falconry lure hunting, and sporting clays and helice.

Nelson County did not call a single witness. Though Fred Boger did provide the Defendant's definition of hunting, the Court did not hear a single witness state that drag fox

¹ "And so based upon the authorities available to the Court, hunting, in clear and unambiguous terms, has been dealt with in the Code of Virginia and case law. In the Code itself, where the General Assembly has defined hunting in the appropriate Game, Inland Fisheries and Boating part to the Virginia Code and it is in Webster's Dictionary."

hunting, hounds drag hunting, falconry lure hunting, and sporting clays and helice were not forms of hunting contemporaneous to the subject constitutional amendment.²

In addition to the testimony of Orion's witnesses, the Court conducted a viewing of the subject property and observed demonstrations of live game presentations and different simulated game presentations.

A. AT THE TIME OF THE ADOPTION OF THE VIRGINIA CONSTITUTIONAL AMENDMENT PROTECTING THE RIGHT TO HUNT, HUNTING IN VIRGINIA INVOLVED MANY DIVERSE PRACTICES AND DISCIPLINES.

The testimony described vividly a variety of different hunting arts, including falconry, fox hunting, hounds hunting, small and large game hunting, and hunting with guns, and bow and arrow, which were all contemporaneous to the constitutional amendment at issue. The testimony illustrated the amazing diversity that exists in the practices, activities, experiences, knowledge, and traditions of the various forms of hunting. All were uncontroverted in the record, and importantly, also uncontroverted was the fact that hunting, at the time of the constitutional amendment, included activities which did not involve the pursuit or killing of live animals.

1. The Hunting Art of the Fox Hunter.

The exciting art of fox hunting was described to the Court by James Crawford as an experience so steeped in tradition, that even the particular clothing and colors worn by the hunters contain special meaning derived from the rich heritage of this hunting art. Trial Trans., Vol. III, p. 454.

² Rather than present any testimony concerning what is, or is not, hunting, the Board instead chose to rely on its assertion that the meaning of the constitutional protection at issue is to be determined simply as a matter of law.

The actual hunt itself involves the complex coordination of a variety of different skills and disciplines, all of which must undergo substantial and continual training and practice. The hunt is also reflected in the various different participants, including the “Field Master,” the “field” (the actual group on horseback), the non-jumping group on horseback, the “whippers” who handle the pack of hounds, and the hounds. Trial Trans., Vol. III, p. 456-57.

As in other forms of hunting, the complexity and inherent dangers of the fox hunt require year-round preparation including, at the end of the formal season, training and integrating new puppies into the pack, and evaluating new riders through a rigorous process. Trial Trans., Vol. III, p. 456-68. Evaluation and training are essential. Trial Trans., Transcript, Vol. III, p. 463-64.

Importantly, Crawford also testified that fox hunting is not limited to chasing an actual live fox, especially in areas where there has been loss of habitat. Rather, a scented bag is dragged and the pursuit is not of a live fox, but rather the scent left by dragging the scent bag. Comparing the drag hunt with the live fox hunt, Mr. Crawford stated: “The rules are the same. The livery is the same. The pursuit is the same. Manners in the field are the same. The training’s the same. Nothing changes.” Trial Trans., Vol. III, p. 472.

2. The Hunting Art of the Falconer.

Michael Garcia described the art of falconry to the Court. A relatively solitary practice, falconry is nonetheless hunting. It too has its traditions. In falconry the “clothing” is functional. The bird wears a hood to keep it calm. The bird also wears “jessees,” leather objects on the leg to which a leash is attached when the handler is holding the bird. The handler wears a glove to protect his or her hand. Trial Trans., Vol. II, p. 428.

Importantly, just as in drag fox hunting, falconry also involves hunting simulated animals or prey, in the form of a lure. As Garcia stated, in falconry, “[t]he lure is the prey for the bird. If

you're hunting pheasant, you might add two wings of a pheasant onto the lure and put a piece of meat on it." Trial Trans., Vol. II, p. 428.

3. The Hunting Art of the Houndsman.

Robert Troxell shared his sixty years experience in hound hunting. Trial Trans., Vol. III, p. 445. He described how this type of hunting includes dragging a scent bag, used in drag hunts. Trial Trans., Vol. III, p. 446. As with the fox drag hunt, the hound drag hunts, both in competition hunts and otherwise, involve, not the pursuit of a live animal, but rather a simulated animal in the form of the dragged scent. Trial Trans., Vol. III, p. 446.

This hunting art also has its valued traditions, especially for those who enjoy a dog's bay. "[A]nd the hunt mainly, with most of the hound hunters, is listening to the dogs." Trial Trans., Vol. III, p. 444.

When asked to compare the drag hunt to the live animal hunt, Mr. Troxell testified as follows:

A: Well, basically the difference there will be where you are using an artificial, what do I say, animal, for them to pursue rather than a regular animal.

Q: (By Mr. Simpson): Is the hunting experience itself in terms of the chase the way the dogs behave any different?

A: No, no, it's absolutely the same. Trial Trans., Vol. III, p. 447-48.

4. The Hunting Art of the Wing Shooter.

A number of different witnesses described the hunting arts which are part of wing (or bird) shooting. Jim Brewer, a hunting and outdoor activities sports writer for approximately 20 years, testified about his rich and varied hunting experiences over a period of almost fifty years. Trial Trans., Vol. II, p. 396.

Significantly, Mr. Brewer stated that when he first came to Virginia in 1967, he was primarily a bird hunter, but that those game birds have virtually disappeared over the years.

A: When I first came to Virginia, there were no deer much. I was a bird hunter primarily. I'd quail hunt and dove hunt and grouse hunt. I sort of had to start shooting or going after deer in order to hunt because wild birds pretty much disappeared.

Q: (By Mr. Simpson) When did the wild birds pretty much disappear?

A: I would say they began to decline around 1980 or so. It's been going downhill rapidly. Trial Trans., Vol. II, p. 401.

5. Simulated and Artificial Wing Shooting Hunts.

Just as the hunting arts of fox hunting, falconry, and hounds all include hunting simulated prey or animals, so too do the wing shooting or shotgun sport hunting arts.

The artificial game presentations used in wing shooting involve two basic formats. In one, pen-raised animals are presented to shooters and in the other, through sporting clays and helice technologies, different shapes and sizes of clays or helice targets are presented in ways that are true to the origins of, and replicate the movements of, live animals.

Both forms were described by James Slaughter in his testimony. In, for example, European driven release, pheasants are purchased and brought to a specific elevated location. Below that point the shooters are situated in certain prescribed positions. The pen-raised birds, usually pheasants, are removed from crates by handlers who proceed to toss them into the air. Hunters then attempt to shoot these birds from fixed positions. Trial Trans., Vol. I, p. 60-63.

Another form of staged live game presentation was described by Mr. Slaughter as a "walk-up hunt." Trial Trans., Vol. I, p. 68. Similar pen-raised birds are presented in game fields which have been constructed for this purpose. After these birds have been placed, the hunters walk

through the fields and, with the help of dogs, flush the birds and attempt to shoot them. Trial Trans., Vol. I, p. 68-70. The Court saw a live demonstration of this involving the English Setter, Freckles.

6. Sporting Clays and Helice Presentation.

Uncontroverted testimony also described simulated game presentation in wing shooting by means of sporting clays and helice technologies. In addition, the Court viewed the “Pull!” video and a demonstration at the Orion property which showed the use of these technologies. As described by the witnesses and seen in the “Pull!” video and in the field demonstration, sporting clays and helice involve technologies which present simulated game targets in a variety of different ways, all of which replicate the movements of and presentations of specific wild game. Trial Trans., Vol. I, p. 43-47.

Experienced wing shooting hunters, like Cindy Kaiser, testified that in all material aspects, the hunting experience involved in presentations involving simulated game in sporting clays and helice is no different than the hunting experience involving live animals. The physical environment is the same. Trial Trans., Vol. II, p. 387. The excitement and sense of anticipation is similar. Trial Trans., Vol. II, p. 387-88. The pursuit, insofar as wing shooting involves the swing of the shotgun, is the same. Trial Trans., Vol. II, p. 388. The weapon and use thereof is the same. Trial Trans., Vol. II, p. 389.

Likewise, Dr. James Swan, qualified as an expert in environmental psychology as it relates to hunting, (Trial Trans., Vol. II, p. 332-42), testified about the behavioral needs and primordial instinct to hunt innate in man, (Trial Trans., Vol. II, p. 333), the five stages regarding motivational psychology regarding hunting (Trial Trans., Vol. II, p. 337-41) and, most importantly, that as man has evolved, today hunting is characterized by “anticipation,” “a sense of pursuit,” a weapon, and

a goal, and that goal or total experience “. . . does not require the killing of an animal to be hunting.” [emphasis added]. Trial Trans., Vol. II, p. 343.

Similarly, Mr. Brewer testified that there was no significant difference between sporting clays and live hunting. In comparing the experience of dove hunting with sporting clays, other than the fact that sporting clays does not involve a live animal, he stated:

About the only difference is you can stand beside somebody and rib them when they miss as opposed to saying, hey, I saw you miss that one. In dove hunting you're maybe 50 yards way or so. When you get to sporting clays, you can walk to each stand, chat, shoot. But for the experience, there's very little difference. Trial Trans., Vol. II, p. 416-17.

Morris Peterson also testified that sporting clays and helice are in fact hunting.

I hunt – as a matter of fact, 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.

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Q: (By Mr. Troy) Do you consider helice and sporting clays to be hunting?

A: Yes, I do. And I consider hunting for all of the reasons that short of killing a live animal we can replicate every action that occurs during what has been coined as the chase or pursuit or all of the acronyms that have been used for in the act of the hunt.

We can replicate every one of those right up to the choice point of saying, we are either going to kill a live target or we're going to kill an inanimate or simulated target. Trial Trans., Vol. III, p. 490-91.

Significantly, there was no testimony offered by Nelson County to rebut any of Orion's witnesses' testimony describing the use of simulated and artificial game in a number of the different hunting arts. The record conclusively establishes that hunting, as practiced in its various

forms in Virginia, contemporaneous to the constitutional amendment, includes the use of simulated and artificial game.

B. THE ACTIVITIES WHICH CONSTITUTE TRAINING, PRACTICE AND PROFICIENCY ARE INSEPARABLE AND INTEGRAL COMPONENTS OF EACH OF THE HUNTING ARTS.

It is difficult to conceive, for example, how there could be a fox hunt without the comprehensive year-round training and practice described above. Skills, coordination and knowledge which must be applied in order to undertake a hunt cannot be obtained without training, practice and proficiency development. In the context of the constitutional amendment, one cannot have a meaningful right to fox hunt without the right to obtain the knowledge, skills, training and proficiency which are required to exercise that right. Fox hunting, while involving its own complexities, is not unique in this respect.

Each of the hunting arts involves its own subset of skills and knowledge. The evidence established that one cannot master, for example, the art of wing shooting without having the ability to obtain the knowledge, skills, proficiency and training that are required. The Court heard evidence that, in the context of the relatively contemporaneous constitutional amendment, sporting clays and helice, as proposed by Orion, offer perhaps the only reasonable means for wing shooters to develop the necessary knowledge, skills and proficiency required to exercise this particular hunting art.³

³ Q: (By Mr. Halbrook) To what extent, if any, can you just simply gain proficiency by hunting live birds?

A: (Tony Monzingo): You typically don't...as a raw number we have more hunters out there chasing a smaller resource because of changing land practices, development of urban and suburban areas and there simply isn't the opportunity for a hunter to go out and practice on live game.

Not to mention 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

C. THE PROPOSED SPORTING CLAYS AND HELICE USE OF THE PROPERTY IS A SUBORDINATE AND CUSTOMARILY INCIDENTAL USE TO THE MAIN USE OF THE PROPERTY.

The Court was given a clear and specific picture of Orion's intended hunting use:

A: (By Mr. Peterson): We are attempting to build a unified sporting estate that serves the needs of the sportsmen and sportswomen from a hunting and shooting approach that is completely seamless. . . .

The components of the sporting estate are the hunting preserve and the hunt club, our proposed shooting grounds, a corporate training facility, as well as event grounds. Those were all built and are completely interrelated from the standpoint that the same clients that we have for one are the clients that we bring to the other. Trial Trans., Vol. III, p. 481-82.

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.

Similarly, Morris Peterson testified:

There's no crash course that you can go to and get a certificate that goes, you're magically a hunter.

In the 20th century, this usually took place over a decade where, as Mr. Brewer said, he learned it from his dad and granddad, and it's a continuous learning process.

It's in our estimation that if we were going to teach competency of a shooter, it's certainly more than a safety warm-up assessment that we do for a pheasant shoot. We're looking at somewhere between 80 to 120 non-contiguous hours. . . .

[T]hen we still have to deal with the discipline of hunting that you are going to partake in

So you could potentially have another 20 to 40 hours, maybe 60 hours over time of learning the nuances of that discipline and mastering the difficulties of those shots. Trial Trans., Vol. III, p. 527-29.

In contrast, the Board asserts hunters should have little or no opportunity to develop safe proficient practices. Fred Boger testified that as far as the Board is concerned, people can learn to hunt in the field by practicing on wild animals.

Generally, you can learn out in the field to hunt during hunting season. Plaintiff's Exhibit 12, p. 18.

The record also makes clear that the Board limits hunter safety and proficiency to a single sighting of rifles at the beginning of hunting season. Plaintiff's Exhibit 3C.

As the uncontroverted testimony and the viewing established, the intended use of sporting clays and helice technologies was to take place in a uniquely suitable physical environment as an integral component of a unified hunting and sporting enterprise.

As noted above, Orion's proposed use of the subject property is as a hunting or "sporting" estate. It was at the request of Nelson County that this unified plan was artificially divided into a "corporate training center" and a "shotgun sports center." Trial Trans., Vol. III, p. 503-04. The uses specifically approved by Nelson County under the corporate training center conditional use permit included commercial hunting. See Plaintiff's Exhibit 2P. The evidence presented at trial established that the sporting clays and helice components of the hunting or sporting estate were subordinate and customarily incidental uses to the main hunting use of the property that was primarily manifested in the form of shooting preserves.

John Long testified that, commencing in the very early 1950's, he has insured, "short of a thousand" shooting preserves all over the United States. Trial Trans., Vol. II, p. 262-63, 266. Mr. Long further testified that when he insures a shooting preserve he insures all of the activities that are usual and customary to the preserve. Trial Trans., Vol. II, p. 267. Among those usual and customary activities are sporting clays. Trial Trans., Vol. II, p. 267. Mr. Long even went so far as to quantify the basis for his statement that sporting clays were a usual and customary activity for hunting preserves insofar as 80-90 percent of hunting preserves have such facilities. Trial Trans., Vol. II, p. 276-77.

Mr. Peterson's testimony described the overall intended use of the property and the relationship of the proposed sporting clays and helice facilities to the shooting preserves and other hunting uses of the property. In his description, Mr. Peterson made clear that the proposed

sporting clays and helice use of the property was a significantly lesser activity than the other and main hunting uses of the property.

This was illustrated in several different ways. First, despite the Board's attempt to set out in "theory" the total mathematical calculation of the number of hunters on a sporting clay course, Slaughter made clear that the totality of the use of the sporting clay courses would be limited to approximately 300 persons and he would employ staff anticipating only 5 to 6 hunters a week. Trial Trans., Vol. I, p. 98.

Second, Mr. Peterson testified that the focus of the monetary investment is on the development of the hunting preserve element of the sporting estate, rather than on the sporting clays and helice components. Trial Trans., Vol. III, p. 534-35.

Third, as logically would flow from such an investment strategy, the amount of business/income that would be derived would be substantially greater from the hunting preserve use than would be generated as a result of the sporting clays and helice uses. Trial Trans., Vol. III, pp. 534, 552.

Fourth, the actual effects and impacts of the shooting preserve use on the property would be significantly greater than those of sporting clays and helice. These greater use impacts include more noise and more lead being dispersed into the environment as a result of the hunting preserve use of "high brass" shells. Trial Trans., Vol. III, p. 535.

Fifth, not only would the ammunition used in the shooting preserves generate greater noise and lead, but the number of gunshots fired would be greater on the shooting preserves than for the proposed sporting clays. Trial Trans., Vol. III, p. 552.

Finally, as the evidence established, though hunting of live birds would take place throughout the property, the sporting clay courses and helice technologies would use only a portion of the 450-acre property. *See* Plaintiff's Exhibit 2Q.

ARGUMENT

A. ORION'S BURDEN OF PROOF IS BY A PREPONDERANCE OF THE EVIDENCE.

Despite the Defendant Board's continued insistence that they acted reasonably—not arbitrarily—in denying the conditional use permit for the shotgun sports facility, such assertions are irrelevant. It is the constitutional right to hunt, the by right hunting use, and hunting as an accessory use asserted in Counts I, II, and IV of Orion's declaratory judgment action that are before the Court. (Case No. CH04-0019).⁴ The conditional use permit denial is not before the Court, and thus the Board's insistence on the arbitrary and capricious standard as its safe haven is misplaced.

Though Count VI in Case No. CH04-0020 is an appeal, there is not, and cannot be, any standard of deference to the decision of the Board. Count VI asserts, as does Count IV in the declaratory judgment action, that the Board's action has violated Orion's constitutional right to hunt. It is nonsensical to assert that a constitutional right can be violated provided the Defendant Board did not do so in an arbitrary and unreasonable manner.

In an action for declaratory judgment, the burden of proof is not put on the plaintiff merely because he has filed the action. Rather, the court must examine the underlying issues to determine who bears the burden of proof. *Reasor v. City of Norfolk*, 606 F. Supp. 788, 793 (E.D. Va. 1984). In Count IV of Orion's declaratory judgment action, Orion asserts that the proposed use

⁴ The constitutional right to hunt is also asserted in Count VI of Orion's appeal from the County's denial of Orion's conditional use permit (Case No. CH04-0020).

of its property is protected under the Virginia constitutional right to hunt. In this Court, Orion seeks an adjudication of the parties' rights under the Virginia Constitution. This Court, to adjudicate the issue before it, must make a factual determination regarding the construction of the Virginia constitution right to hunt. There is no presumption in favor of the Board with regard to the construction of the Virginia Constitution. Each party must prove what hunting is or is not. Each party must prove what the right to hunt protects or does not protect. This Court must construe the constitutional right to hunt based upon the evidence before it. Thus, there is no greater burden on Orion than there is on the Board, to put before this Court evidence of what is encompassed within the constitutional right to hunt.

Under Count II of its declaratory judgment action, Orion seeks a determination that the proposed use of its land is a by right accessory use of agriculturally zoned land. The determination whether a certain use of property is an accessory use (*i.e.* whether the use is subordinate and customarily incidental to the main use) is a question of fact for this Court. *See Wiley v. County of Hanover*, 209 Va. at 156, 163 S.E.2d at 163 (“Whether [an] activity is ‘customarily incidental’ to the main use . . . and permitted under the terms of the [zoning] ordinance is a matter to be determined from the evidence adduced.”).

It is conceded that Orion may operate a hunting preserve by right. Orion's sporting clay facility is either an accessory use or it is not, as determined by the facts adduced at trial. Such a determination must be based upon the evidence put forth by the parties on this issue. Orion, as the moving party, bears the burden of demonstrating those facts “by the preponderance of the evidence.” *See Jones v. Beavers*, 221 Va. 214, 221, 269 S.E.2d 775, 779 (1980) (holding that the plaintiffs in a declaratory judgment action have the burden of proof); *Welcome Corp. v. Bendall*, 50 Va. Cir. 170, 190 (City of Alexandria 1999) (court applying preponderance of the evidence

standard in declaratory judgment action to determine who was driving a car during an accident); *Revell v. USAA Cas. Ins. Co.*, 42 Va. Cir. 259, 261 (City of Norfolk 1997) (applying the preponderance of the evidence standard to declaratory judgment action to determine whether there had been an “occurrence” under an insurance policy).

B. ORION’S PROPOSED SPORTING CLAYS ARE CONSTITUTIONALLY PROTECTED.

1. The Sporting Clays Constitute Hunting.

a. As a Constitutional Right, the Right to Hunt Must Be Broadly Construed to Include the Activities, Interests and Values Involved in the Hunting Experience, Including the Right to Hunt Simulated Game.

The Constitution of Virginia provides that, “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. This provision protects the human activities, interests, and values that are involved in the hunting experience, including the right to practice the wide variety of different skills, disciplines, activities and enterprises that make up the hunting arts.

Virginia has long recognized that its 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). And the judiciary’s construction of the words must remain faithful to the people’s wishes. *See Moore v. Pullem*, 150 Va. 174, 194, 142 S.E. 415, 421 (1928) (“When we construe a constitution by implication of such rigor and inflexibility as to defeat the legislative regulations, we not only violate accepted principles of interpretation, but we destroy the rights which the Constitution intended to guard.”) (citation omitted).

Because constitutional rights are to be construed broadly,⁵ sporting clays, helice and other clay target sports are forms of hunting that are virtually indistinguishable from other 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.” Where words are used in a constitutional provision, which have both a restricted and a general meaning, the general meaning must prevail over the restricted meaning, unless the context of the provision clearly indicates that the limited sense is intended. *Gaiser v. Buck*, 203 Ind. 9, 179 N.E. (1930); *Flaska v. State*, 51 N.M. 13, 177 P.2d 174 (1947). Words or terms used in a constitution, being dependent on the ratification by the people voting upon it, must be understood in the sense most obvious to the common undertakings at the time of its adoption. *Dean v. Paocelli*, 194 Va. 219, 226, 72 S.E.2d 506, 510 (1952); *Va. & S.W. Ry Co. v. Clower’s Admx.*, 102 Va. 867, 871-72, 47 S.E. 1003, 1004 (1904).

In placing a construction on a constitutional provision, a Court may and should look to the history of the times and examine the state of matters existing when the constitutional provision was adopted. *Almond v. Day*, 197 Va. 782, 787, 91 S.E.2d 660, 664 (1956). The Virginia constitutional right to hunt is a contemporary amendment to the Virginia Constitution, effective in the year 2001. By that time, hunting had evolved to encompass a wide variety of hunting practices 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

⁵ “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.

animal rights activists, different forms of hunting that met “instinctive energies” (*See* Swan, Trans., Vol. II, p. 83) developed, that do not require killing of game. The evidence at trial demonstrated this wide diversity of hunting activities existing in contemporary Virginia.

Words or terms used in a constitution, being dependent on ratification by the people voting upon it, must be understood in the sense most obvious to the common undertakings at the time of its adoption. *Kirkpatrick v. King*, 228 Ind. 236, 91 N.E. 785 (1950); *Colorado Interstate Gas Co. v. Board of County Comm'rs*, 247 Kan. 654, 802 P.2d 584 (1990).

Thus it is this understanding, based on the evidence adduced, not an incomplete dictionary definition of “hunting,” that the Court should look to in interpreting fundamental rights. 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 not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.⁶

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) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 51 (1973)). A right is “fundamental” if it is “explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny.” *San Antonio*, 411 U.S. at 17, 33. There is

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.

no question that, in this Commonwealth, hunting is now a fundamental right as it is explicitly protected by the Virginia Constitution.

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).⁷

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.⁸

Hunting in Virginia has always been understood to include a continuum of related activities, not just the bare act of taking wild game.⁹ It protects the human experiences and values that are inherent in hunting, as well as all of the activities preparatory for and appropriate to

⁷ As the Defendant Board has taken the position that it does not intend to regulate hunting, the narrow issue for the Court is whether the clays and helice courses constitute hunting and/or protected hunting related (practice and proficiency) activities. Trial Trans., Vol. I, p. 27; Plaintiff’s Exhibit 12, p.19. If it is hunting the Board, which presented no testimony, concedes the activity must be allowed.

⁸ It is for these reasons that the Board’s suggestion that this Court defer to the legislature is misplaced and analytically unsound. Courts are obligated to construe and protect constitutional rights. For example, no court would nor should feel it was obligated to defer to the legislative branch of government if first confronted with the question whether the new modern form of communication—e-mail—was entitled to First Amendment protection. The same analysis applies in the instant case as the Court considers what is encompassed in the constitutional protection given to “hunting.”

⁹ As a youngster, Thomas Jefferson, an avid hunter, 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.

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. The Text and Legislative History of the Guarantee Clarify that the “Right to Hunt” Encompasses More than the Harvesting of Game.

i. The Text Distinguishes Between the “Right to Hunt” and the Right to “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.” Similarly, the term “game” does not relate back to or limit the “right to hunt,” which as the evidence demonstrates, includes activities besides the taking of game.

Use of the terms “hunt . . . and harvest game” indicates that these words must by law have meanings that are divergent. “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).¹⁰

Defendant Board would excise all but the literal harvesting of live game in the narrowest sense.¹¹ 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 far beyond merely the taking of live game. The phrase “the people have the right” makes clear that individuals may

¹⁰ “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).

¹¹ Defendant has also argued that hunting means pursuing live game. The General Assembly, however, has distinguished between “hunting, trapping or pursuing game.” Va. Code § 18.2-56.1(B) (2004) (punishing reckless handling of firearms “while the person is engaged in hunting, trapping or pursuing game”).

engage in broad conduct. They have a right to experience the full range of the hunting arts. By focusing only on the literal act of harvesting live game, the Board 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.¹² Some persons wish to exercise the right to hunt but *not* the right to harvest game. The Board's narrow concept prohibits persons from exercising the right to hunt unless they are pursuing and harvesting live game. The Board, with its definition of hunting, has yet to answer the question – if one chooses not to exercise the right to harvest game, how, in Nelson County, does one exercise the independent right to hunt?

The right to hunt is in Article XI of the Constitution, which concerns conservation. Sections 1 and 2 of Article XI deal with conservation and development of natural resources and historical sites (“for the benefit, enjoyment, and general welfare of the people of the Commonwealth”). Section 3 relates to preservation of natural oyster beds (“for the benefit of the people of the Commonwealth”). Section 4 recognizes the right of the people to hunt, fish, and harvest game. The hunting and the harvesting of game is regulated by law in the interests of conservation. Sporting clays offers a hunting experience with no adverse impact on conservation, and promotes conservation by advancing ethical hunting and harvesting of game.

¹² “Freedom of association . . . plainly presupposes a freedom not to associate.” *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (First Amendment case).

ii. **The Legislative History Further Clarifies that the Right to “Hunt” is Not Restricted to the Right to “Hunt *Game*,” and that Only the General Assembly, Not Localities, May Regulate the Right.**

The legislative history of the constitutional amendment demonstrates that the General Assembly did not intend to restrict the right to “hunt” to the right to “hunt *game*.” It also clarifies that localities may not regulate the right, other than pursuant to specific authorization by the General Assembly.

During the 1997 race for Attorney General the suggestion arose for an amendment to the Constitution of Virginia that would protect the citizens’ right to hunt. Later that year, Delegate A. Victor Thomas asked the General Assembly’s Division of Legislative Services to draft two proposals for a constitutional amendment. *See* Letter from Mary Spain, Senior Attorney, Division of Legislative Services, to Hon. Mark L. Early, Attorney General of Virginia 1 (December 18, 1997) (on file with Division of Legislative Services for Commonwealth of Virginia).¹³ The letter and attachments are attached as Exhibit A. The first alternative stated:

The people have a right to hunt, fish, and take game, subject only to reasonable restrictions, as prescribed by law, related to the rights of the owners of affected real property, to the methods, times, and locations of hunting, fishing, and taking game, and to the health and safety of the people of the Commonwealth.

The second proposal was shorter and based on a similar constitutional amendment passed by the Alabama legislature in 1996.¹⁴ It stated: “The people shall have the right to *hunt and fish*

¹³ This letter can be found in the legislative file for the amendment. The file is referred to as the legislative “jacket.” These materials were also exhibits to Orion’s Brief in Opposition to Summary Judgment.

¹⁴ The Alabama amendment states: “All persons shall have the right to hunt and fish in this state in accordance with law and regulations.” ALA. CONST. amend. 597 (2005).

in this Commonwealth in accordance with the laws of the Commonwealth.” (Emphasis added) In comparing the two proposals, their drafter said:

Alternate A is, I think, the stronger proposal because it used the phrase “subject only to reasonable restrictions” and would give a basis for challenges to laws that are “unreasonable.” Alternate B states the concept, but leaves to statute the expression of specific rights to hunt and fish.

During the 1999 General Assembly, “Alternate A” was offered as an amendment to the Constitution of Virginia.¹⁵ The proposal is attached as Exhibit B. The House Committee on Rules modified the language of the proposed amendment to read: “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.” The amended proposal, as modified by the House Committee on Rules was agreed to by the entire Assembly, at the Regular Session of 1999, and referred to the 2000 Session.¹⁶ See Exhibit C attached.

When the amendment was brought to the floor of the Senate in 2000, Senator William Mims (R) of Loudon sought to amend it, removing the phrase “and harvest game,” and inserting, after the clause providing for regulation by the General Assembly, the additional clause “. . . allowing regulation as any city or town may prescribe by charter.” The Senate rejected both amendments.¹⁷

¹⁵ The amendment was offered as House Joint Resolution No. 523.

¹⁶ In 2000, the proposed amended was introduced as House Joint Resolution 124.

¹⁷ Mims’s proposed amendments would have reworded the guarantee as follows: “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.*” (Emphasis added.) On a related note, Senator Janet Howell (D) of Fairfax tried to propose amendments that would protect the rights to “golf and shop.” The Senate rejected her amendments. The rejected amendments can be viewed on the General Assembly’s Legislative Information System website, <http://leg1.state.va.us/cgi-bin/legp504.exe?2001+amd+HJ124ASR>. A hardcopy of the rejected amendments is attached as Exhibit D.

The proposed amendment, being agreed to in separate legislative sessions, *see* Va. Const. art. XII, Sec. 1, was submitted to the citizens of Virginia. By popular vote on November 7, 2000, the amendment was ratified and became effective on January 1, 2001. *See* Va. Const. art. XI, § 4.

It is thus clear, not only from the language, but from the legislative history, that the right to “hunt” and the right to “harvest game” are separate and distinct rights. If the right to “harvest game” was the same as, or was included in, the right to “hunt,” the Senate could have adopted the amendment of Senator Mims. If the right to “hunt” included the right to “harvest game,” then the amendment as set forth in “Alternate B” as drafted by the Division of Legislative Services, dealing only with “the right to hunt and fish” could have been proposed.

Moreover, because the right to “harvest game” and the right to “hunt” are separate and distinct, neither modifies nor limits the other. A citizen can harvest many things: oysters,¹⁸ organs, timber, etc. The term “harvest” is defined as “[t]he act or process of gathering a crop.” Webster’s II New Riverside University Dictionary 566 (1988). The Assembly decided to protect the right to harvest “game.” Yet, it did not limit the right to “hunt” in the same way. In this way, the legislative history is very telling.

The legislature rejected a limitation of the constitutional rights solely to hunting and fishing; it recognized that the rights granted create tension with local land use decisions, yet it rejected the Mims’s proposal which would address that issue; and it recognized that the rights granted created tension with owners of adjoining or affected real property, yet it rejected consideration of the proposed “Alternative A” which would have given those owners certain rights. The proposed Howell amendments demonstrate that, in the 21st Century, hunting, like

¹⁸ The Assembly regulates the harvesting of oysters. *See* Va. Code Ann. § 28.2-226(B) (“No license shall be required of an oyster grounds leaseholder, or other person authorized or employed by a leaseholder, to harvest oysters or clams from the leasehold”).

golf, is viewed by some as a sport and hobby, albeit now a constitutionally protected sport and hobby.

In sum, the legislative history reinforces the plain text of the guarantee, particularly that the right to hunt is distinct from the right to harvest game, and that the right is subject to regulation by the General Assembly, not by localities.

c. The Constitutional Guarantee is not Limited to Narrow Definitions in the Game Code Which Create Crimes and Which Must be Narrowly Construed.

Defendant Board would reduce the constitutional right to hunt to the narrow meaning of “hunting” in the context of the criminal law, citing *Commonwealth v. Bailey*, 124 Va. 800, 802, 97 S.E. 774, 774 (1919), which involved the crime of hunting fox without a license, yet quoted definitions such as “the act of pursuing and taking wild animals; the chase.”¹⁹

However, “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). The narrow meaning of “hunt” in the criminal context cannot constrain the broad meaning of the constitutional “right to hunt.”

Defendant also relies on Va. Code § 29.1-100,²⁰ but that provision explicitly restricts the definition of hunting to Title 29.1 only:

¹⁹ Even then, the court also offered broader definitions, such as “to follow with dogs or guns for sport or exercise.” *Id.*

²⁰ As the last sentence acknowledges, a person may hunt (pursue or chase game) with no intent to take such game.

“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.

As used in and *for the purposes of this title only*, or in any of the regulations of the Board, unless the context clearly requires a different meaning. . . .

This definition is intentionally narrow as it applies to the criminal prohibition on hunting without a license and other crimes.²¹ It is narrowly defined to reflect the Commonwealth's interest in the conservation of wildlife. Because hunting simulated game does not result in the direct harvesting of wildlife, the Commonwealth has no interest in restricting that activity and thus does not include it in the definition of "hunting" for purposes of defining crimes.²² However, the Commonwealth does have an interest in encouraging the proficient, safe, and humane harvesting of game, and thus promotes shooting and the hunting of simulated game.

For purposes of § 29.1-100, in its narrow context, whether a person is hunting without a license, "assisting" a hunter would mean actually being in the field helping a hunter pursue or take game, such as handling dogs to flush pheasants. In a broader sense, and not for purposes of the criminal provisions regarding hunting, a person (such the operator of a clay-throwing machine) would be "assisting" a hunter in the context of enhancing the hunter's proficiency. In the latter instance, neither the hunter nor the person assisting the hunter would be "hunting" within the meaning of § 29.1-100. Nonetheless, as the definition in § 29.1-100 illustrates, "hunting" may include activities that "assist" hunting, and its precatory clause makes clear that "context" gives words "different meaning[s]." By the same token, the constitutional "right to hunt . . . and

²¹ See Va. Code § 29.1-300 (2004) ("It shall be unlawful to hunt . . . without first obtaining a license"); § 29.1-335 (2004) (hunting without license a Class 3 misdemeanor); § 29.1-519(F) (2004) (hunting with unauthorized weapons unlawful); § 29.1-521 (2004) (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 (2004) (unlawful "to willfully and intentionally impede the lawful hunting . . . of wild birds or wild animals").

²² The General Assembly defines hunting differently for different purposes. For instance, Va. Code § 29.1-52 (2004) authorizes a county to prohibit hunting within 100 yards of a highway, but adds: "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 trapping area."

harvest game” encompasses activities, such as sporting clays, that “assist” one in hunting and harvesting game.

In sum, the term “hunting” is defined narrowly in the game law for purposes of defining certain crimes. The constitutional right to hunt is in no manner, nor can it be, restricted to a definition found in the criminal code.

d. A Constitutional Right Cannot be Violated Because Neighbors Object to its Exercise or for other Impermissible Reasons.²³

i. A Constitutional Right May Not Be Prohibited Because Neighbors Object to Its Exercise.

The denial of the conditional use permit was apparently based on the objections of neighbors, noise considerations (even though Orion would have complied with the noise ordinance), and because some other location might have been better. None of these were legitimate reasons, particularly given the existence of a constitutional right.

As reflected in the hearings leading to the denial of the permit, a handful of property owners in the vicinity of Orion’s 450-acre estate objected to the proposed shotgun sports facility. However, a negative attitude of surrounding property owners does not suffice to deny the exercise of a constitutional right.

Indeed, mere opposition by neighbors is not a legitimate reason to deny a zoning permit, even where the lowest forms of constitutional scrutiny are applied. The Supreme Court of the United States in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), for instance, overturned the denial of a special use permit for the operation of a group home for the mentally retarded. Even though the proposed use was protected only by rational basis scrutiny, the Court

rejected as a rational consideration “the negative attitude of the majority of property owners,” explaining:

But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like. It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, . . . and the City may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic.

Id. at 448.

The same applies here. “Denial of a permit is arbitrary where the decision to deny was not related to any 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, instead of on legislative determinations concerning public health and safety” *Id.*²⁴

A county has no authority to violate a constitutional right through adverse zoning or land-use decisions. 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*

²³ The issue of the denial of the conditional use permit application is not currently before the court. This discussion is provided to make clear that the concerns raised in the administrative process do not provide a sufficient basis to interfere with Orion’s constitutional rights.

²⁴ Similarly, *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958), held:

[A]n ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official as by requiring a permit or license which may be granted or withheld in the discretion of such official is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Sup'rs v. Rowe, 216 Va. 128, 139, 216 S.E.2d 199, 209 (1975). In denying the application in this case, Defendant Board failed to consider the adverse effects on the constitutional right to hunt and, accordingly, violated that right.

ii. Exercise of a Constitutional Right Which Entails Some Noise May Not Be Denied Where the Noise Would Be Within Applicable Legal Standards.

A reasonable level of sound is inherent both in the constitutional right to hunt and in the constitutional right to keep and bear arms, both rights which necessarily involve the discharge of firearms at targets, whether game or non-game. When a certain level of noise is inherent in the exercise of a constitutional right, exercise of that right may not be suppressed because others object to the noise.²⁵

Here, noise was a reason given by the Board for its denial of the permit.²⁶ Transcript 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. Transcript 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 rhetorically asked in *Saia v. New York*, 334 U.S. 558 (1948), must a person's ability to use a sound truck "depend on the whim or caprice of the Chief of Police," and on his ability to "prove to the satisfaction of that official that his noise will not be annoying to people?" *Id.* at

²⁵ Virginia does not encourage noise reduction for firearms. See Va. Code § 18.2-308.6 (2004) (felony to possess unregistered firearm muffler or silencer); *Gray v. Commonwealth*, 260 Va. 675, 681, 537 S.E.2d 862, 865 (2000) (such devices reduce noise).

²⁶ While that fact may be concluded from the record, the Board should have more explicitly "state[d] reasons or grounds for the Board's action in order (1) that the parties may be apprised thereof and (2) that court on review may know such grounds or reasons and whether or not the board has acted within its discretion or has acted arbitrarily." *Burkhardt v. Bd. of Zoning Appeals*, 192 Va. 606, 615, 66 S.E.2d 565, 570 (1951).

561-62. To the contrary, “Noise can be regulated by regulating decibels” and “by narrowly drawn statutes.” *Id.* at 562.

iii. A Constitutional Right May Not Be Prohibited in One Place Because It “Might” Be Exercised Elsewhere.

Denial of a zoning permit to conduct constitutionally protected activities cannot be justified by the argument that the constitutional right involved could be exercised someplace else.

Indeed, in this instance, the Board denied a permit to operate a sporting clays facility on an extremely rural, 450-acre estate, zoned agricultural, in Nelson County, one of Virginia’s most rural counties. The Chairperson, just before calling for the Board vote, stated, “I’d like to think maybe Orion could find another spot for the shotgun area” Transcript of Board of Supervisors Meeting, Feb. 4, 2004, at 31. This was not a reasonable regulation of the time, place, and manner in which the activity is conducted. It is an outright prohibition with no available alternative.²⁷

In an analogous context which involved exercise of a constitutional right in places far more congested than here, the Supreme Court held that “the streets are natural and proper places for the dissemination of information and opinion; and 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). That is the case here as well.

²⁷ See, by analogy, *Adams Outdoor Adver. v. City of Newport News*, 236 Va. 370, 379-80, 373 S.E.2d 917, 921 (1988) (“The use of billboards for noncommercial advertising is essential because alternative media channels are prohibitively expensive and less likely to reach the targeted general public audience.”).

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

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 (emphasis added). Absent authorization by the General Assembly, the right is not subject to local regulation.²⁸

The declaration of the right to hunt is directed primarily against adverse action by localities. It is not directed against the Commonwealth, because the right is subject to regulation by the General Assembly. There are two ways in which a locality may violate the right to hunt, either by passage of an ordinance or through an adverse zoning decision.

In determining whether a county’s land-use decision is constitutionally reasonable or serves a compelling state interest, the public policy as enacted by the General Assembly provides an important guide. Where the General Assembly has set standards and 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, 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

²⁸ Even before the ratification in 2000 of the right-to-hunt 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 (opining that limited authority of locality to regulate the shooting of bows meant that it could not prohibit bow hunting on private property).

powers or adopt ordinances that the legislature expressly authorizes by statute or that are conferred by necessary implication.²⁹

The General Assembly has authorized counties to pass ordinances to prohibit hunting only pursuant to clearly-defined criteria. Hunting may be prohibited in or within a half mile of a subdivision or other heavily populated area if it would be dangerous,³⁰ and on or within 100 yards of a highway,³¹ school, or park.³² A county may prohibit hunting with a shotgun loaded with slugs or a rifle larger than .22 caliber rimfire.³³ A county has no authority to prohibit hunting with a shotgun loaded with shot, which is used in sporting clays.

²⁹ “It is well settled in Virginia and elsewhere that zoning is a legislative power residing in the State, which may be delegated to cities, towns and counties.” *Andrews v. Bd. of Sup’rs*, 200 Va. 637, 639, 107 S.E.2d 445, 447 (1959) (invalidating county action on basis that “[t]here must be provided uniform rules of action, operating generally and impartially, for enforcement cannot be left to the will or unregulated discretion of subordinate officers or boards.”).

³⁰ Va. Code § 15.2-1210 (2004) provides:

Any county may by ordinance prohibit all hunting with firearms or other weapons in, or within one-half mile of, any subdivision or other area of such county which, in the opinion of the governing body, is so heavily populated as to make such hunting dangerous to the inhabitants thereof. Any such ordinance shall clearly describe each area in which hunting is prohibited, and shall further provide that appropriate signs shall be erected designating the boundaries of such area.

³¹ Va. Code § 29.1-526 (2004) provides in part:

The governing body of any county or city may prohibit by ordinance the hunting, with a firearm, of any game bird or game animal while the hunting is on or within 100 yards of any primary or secondary highway in such county or city and may provide that any violation of the ordinance shall be a Class 3 misdemeanor.

³² Va. Code § 29.1-527 (2004) provides:

The governing body of any county, city or town may prohibit by ordinance, shooting or hunting with a firearm, or prohibit hunters from traversing an area while in possession of a loaded firearm, within 100 yards of any property line of a public school or a county, city, town or regional park. . . . Nothing in this section shall give any county, city or town the authority to enforce such an ordinance on lands within a national or state park or forest, or wildlife management area.

³³ Va. Code § 29.1-528(A) (2004) provides in part:

“The governing body of any county or city may, by ordinance, prohibit hunting in such county or city with a shotgun loaded with slugs, or with a rifle of a caliber larger than .22 rimfire.”

Virginia's hunting laws,³⁴ including the denial to localities of any authority over the subject except as narrowly delegated, were enacted to promote uniformity, conservation, safety, and hunter's rights.³⁵ These laws, under which the General Assembly regulates hunting pursuant to the Constitutional guarantee, protect those involved in hunting activities from County attempts to circumvent such laws through zoning decisions.³⁶

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 to make such conduct dangerous to the inhabitants thereof." Va. Code § 15.2-1209 (2004).³⁷ Here, one of the Commonwealth's most rural counties has effectively banned the discharge of firearms in a sporting clays facility planned for 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").

³⁴ Another example is Va. Code § 15.2-1209 (2004), which authorizes a county to "prohibit the shooting of firearms" in heavily-populated areas, but requires it to exempt "the killing of deer pursuant to § 29.1-529 . . . on land of at least five acres that is zoned for agricultural use."

³⁵ *E.g., 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.").

³⁶ Similar policies are explained in *Duff v. Township of Northhampton*, 110 Pa. Commw. 277, 532 A.2d 500, 507 (1987), *aff'd*, 520 Pa. 79, 550 A.2d 1319 (1988), as follows:

The problem of hunting wild game with weapons must be uniform and comprehensive, else chaos, confusion and danger to the public would result. . . . To permit each municipality to pass its own version of the Game Law would prevent the Game Commission from freely utilizing its experienced decision-making powers in determining the appropriate balance between the rights of hunters to hunt, the control of wild game and the safety of the citizens of this Commonwealth.

³⁷ Section 15.2-1209 provides in full:

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.

More generally, the General Assembly has preempted local regulation of firearms. Va. Code § 15.2-915 (2004) provides that a locality may not adopt any ordinance or take any action governing the “purchase, possession, transfer, ownership, carrying” or transporting of firearms or ammunition except as expressly authorized by statute.

Even aside from the above explicit preemption statutes, localities are not deemed to 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.³⁸ Under that rule of construction, local governing bodies have only those powers that are expressly granted, those that are necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.³⁹

. . . [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.⁴⁰

Applying the above rules, Attorney General opinions have consistently opined that local regulation of firearms is invalid unless explicitly authorized.⁴¹ In short, if a county is not empowered to pass an ordinance prohibiting certain activity, it may not do so through a zoning or land-use decision.

³⁸ Citing *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).

³⁹ *Bd. of Sup'rs v. Horne*, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975).

⁴⁰ Moreover, any fair, reasonable doubt concerning the existence of power is resolved by the courts against the municipal corporation, and the power is denied. *Brown*, 229 Va. at 344.

⁴¹ 1998 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 of power, 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).

2. The Planned Shooting Activities are Constitutionally Protected as they are Necessary for Practice and Proficiency.

Not only is the right to hunt simulated game, such as sporting clays, in and of itself encompassed within the hunting arts, the right to hunt simulated game enables the hunter to become proficient, and to learn to hunt safely and humanely when hunting or harvesting live game.

Like every constitutional right, the right to hunt includes that which is necessarily or fairly implied in or incident to the right expressly recognized.⁴² Having a right to hunt and to harvest live game entitles one to take the steps necessary to exercise that right, including learning how to hunt and harvest game safely, humanely, and proficiently. The “right to hunt” describes a continuum of activities that may, but need not, lead to the actual harvesting of game. A warm-up just before hunting live game and periodic practice are both incidental to hunting live game.

The existence of a constitutional right also implies a right to offer services to those who wish to exercise that right. By analogy, the right to a free press includes the right to publish and sell newspapers as well as to read them. Similarly, the right to hunt includes the right to train hunters to shoot proficiently, safely, and humanely.

In 1964, the Virginia Senate resolved generally 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). While it did not

⁴² *E.g., 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,” such as solicitation of a magazine subscription on a public street without a permit) (emphasis added).

specifically mention hunting, this Resolution illustrates the obvious reality that training in safety and proficiency are inherent in any firearms-related activity and thus within protected rights.

As noted *supra*, the focus on the terms “the people have the right” makes clear that individuals may engage in broad conduct. They have a right to become proficient, safe, and ethical by hunting simulated game before hunting live game. By focusing only on the literal act of harvesting live game, Defendant Board ignores the right of hunters to prepare themselves to harvest live game.

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 “Purchase, lease, or otherwise acquire lands and waters for game and fish refuges, preserves or *public shooting* and fishing, and establish such lands and waters under appropriate regulations.”⁴³ Va. Code §§ 29.1-103.4 (2004) (emphasis added). *See also* Va. Code § 29.1-106 (2004) (Board may “establish refuges, sanctuaries and public shooting and fishing preserves”).

To hunt wild game lawfully, one must obtain a license, which may require completion of a hunter education program. Va. Code § 29.1-300.1 (2004). “The Department [of Game and Inland Fisheries] shall provide for a course of instruction in hunter safety, principles of conservation, and sportsmanship, and for this purpose may cooperate with any reputable association or organization having as one of its objectives the promotion of hunter safety, principles of conservation, and sportsmanship.” Va. Code § 29.1-300.2 (2004). Hunter

⁴³ “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.

education may involve shooting practice. *E.g.*, Va. Code § 29.1-300.3 (cost of hunter education instruction may include “range fees, ammunition”).

The right to hunt includes not just the minimal hunter education course required by law, but also more advanced training not required by law. The Department itself sponsors hunting workshops which include shooting practice appropriate for hunting specific game.⁴⁴ A constitutional right is not limited to the minimum standard that may be required by law.

The game code recognizes that hunting need not involve the taking of live game and is an art that can be practiced. Field trials with dogs may or may not involve the shooting of game.⁴⁵ Foxes may be hunted on horseback without firearms.⁴⁶ The law prohibits shooting at live pigeons as a form of target practice,⁴⁷ obviously preferring the shooting of clay pigeons for target practice.

“The Director [of the Department of Game and Inland Fisheries] shall issue licenses for all shooting preserves when such preserves meet the requirements established pursuant to regulations.” Va. Code § 29.1-600. Pursuant thereto, the Department has issued a shooting preserve license to Orion authorizing the hunting of Chukar, Northern Bobwhite, Hungarian

⁴⁴ *E.g.*, Turkey Hunting Workshop, March 19, 2005, Albemarle County, included Shotgun Patterning. <http://www.dgif.virginia.gov/events/documents/TurkeyHuntWorkshopFlyer05.pdf>. Becoming An Outdoors-Woman®, April 22-24, 2005, Appomattox, includes Shotgun Skills Development, including “an opportunity to practice shotgun shooting techniques at the range.” <http://www.dgif.virginia.gov/events/documents/2005BOWbrochure.pdf>.

⁴⁵ Section Va. Code § 29.1-422 (2004) provides in part:

The Board is authorized to grant permits to bona fide field trial clubs and associations to hold field trials with dogs under such regulations it deems proper. . . . 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 permitting him to do so.

⁴⁶ The 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) (2004).

⁴⁷ Va. Code § 3.1-796.126 (2004) 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.”

Partridges and Ring-necked Pheasant. A sporting clays facility would allow hunters to practice the efficient and humane taking of such game.

This Court has already found that a safety warm-up using clay pigeons is an incidental part of a pheasant hunt at the Orion shooting preserve. If Orion is allowed to operate a shotgun sports center, hunters would have the opportunity to hone their skills and practice more than is possible with the warm-up drill.

Even under the Board's restrictive definition that hunting only includes harvesting of live game, there can be no proficient, safe, and humane hunting of live animals without learning how to do so and practicing. That is why the proposed use does "involve" live animals – it enables the hunter to hunt live animals proficiently, safely, and humanely.

The right to hunt wild game must include the right to engage in those practice activities necessary for safety and to obtain proficiency.

C. THE SPORTING CLAYS COURSE IS AN ACCESSORY USE OF THE PROPERTY WHICH IS PERMITTED BY RIGHT IN AN AGRICULTURALLY ZONED AREA.

Count II of Orion's declaratory judgment action (Case No. CH04-0019) asks the Court to declare that Orion may construct and operate a sporting clays facility on its property as a matter of right because it is an accessory use to the main uses of the property. Orion has three prospective uses for its property. The first, the corporate training facility, can be operated pursuant to Conditional Use Permit No. 2003-7(a) that the Defendant Board granted to Orion. Orion can operate its second use, the hunting preserve, as a matter of right because it is zoned as an Agricultural District A-1. *See* Trial Trans., Vol. I, p. 122; Trial Exhibit 2D. The third use, the

sporting clays facility, also should be allowed on the Orion property as a matter of right because it is an “accessory use” to the main uses of the property.

Nelson 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. Whether a use is “customarily incidental” to the main use of the land is an issue of fact, not an issue of law. *See Wiley v. County of Hanover, supra* 209 Va. at 155, 163 S.E.2d at 163 (“Whether [an] activity is ‘customarily incidental’ to the main use . . . and permitted under the terms of the ordinance is a matter to be determined from the evidence adduced.”).

Boone County Area Plan Comm’n v. Kennedy, 560 N.E.2d 692 (Ind. App. 1990), is particularly instructive whether the sporting clays facility is an accessory use. In *Boone*, landowners wanted to build a recreational skeet and shooting range next to their four-bedroom recreational house, which they used during the weekends. Instead of seeking approval for their range from the local planning commission, they filed a declaratory judgment action, asking the trial court to hold that the range would be an accessory use to the recreational home. The planning commission argued that the range would be the main use of the real estate, therefore requiring the landowners to comply with their administrative procedures. The landowners moved for summary judgment on the accessory use issue, and the trial court granted their motion.

On appeal, the first issue was whether the landowners could file a declaratory judgment action without first exhausting the administrative remedies set forth in the local zoning ordinance. The appellate court held that the declaratory judgment action was appropriate because the

landowners would not be subject to the zoning ordinance if the trial court held that the range was an accessory use. The court stated:

The administrative remedies under the Ordinance were not available to the Kennedys because in their view the proposed use was not covered by the Ordinance unless they abandoned their position the Ordinance did not apply. This issue was tailor made for direct resolution by the court below.

Id. at 696.

The second issue before the appellate court was whether there was a genuine issue of material fact that the range was an accessory use to the primary use of the property. The court said that “[a]n accessory use must be subordinate in area, extent, and purpose to the primary use of the lot.”⁴⁸ *Id.* at 696. The parties did not dispute the facts. The landowners had a 40-acre estate that had the four-bedroom house, which they used for recreational purposes on weekends. The range, and its shot fall area, would cover only 15 acres—slightly in excess of one-third of the total acreage of the property.

The appellate court held that the four-bedroom home was the main use of the property, and the range would be an accessory use “by any definition.” *Id.* It further stated:

Recreational purposes are commonly associated with country houses, and the skeet range here proposed is but an incident of the recreational purpose planned for the Kennedys’ country home. It is clearly subordinate in extent, area, and purpose to the primary use of this real estate. Thus, by the Ordinance’s definition and the holding in *Villages, Inc.*, the proposed skeet range is an accessory use and exempt from the Ordinance's provisions. The trial court did not err by so holding.

Id. at 697. The appellate court also addressed the planning commission’s speculation that the landowners may use the range everyday in the future, therefore making it the main use of the

⁴⁸ The local zoning ordinance defined “accessory use” as “incidental and subordinate to, and commonly associated with the operation of the principal use of the lot” *Id.* at 696.

property. The court dismissed the theory because there was no evidence in the record to support it, and even if there was, it would be irrelevant because the issue was “the nature of the use, not the degree of intensity with which the use is pursued.” *Id.* at 696 n.2.⁴⁹

Applying the reasoning in *Boone* to the present case, it is clear from the record that the sporting clays facility is an accessory use to the main uses of the property because it would be subordinate in area, extent, and purpose. Morris Peterson testified that the corporate training facility and the hunting preserve—not the sporting clays facility—would be the main uses of the property because they would be Orion’s largest profit centers. *See* Trial Trans. Vol. III, pp. 534, 552. The County did not offer evidence to rebut Peterson’s testimony on this issue. Further, a review of the Plat introduced as Plaintiff’s Exhibit 2Q indicates that the sporting clays facility would cover only a portion of the 450-acre property.

Mr. Peterson also testified that fewer shots would be fired at the sporting clays facility than at the hunting preserve.⁵⁰ *See* Trial Trans., Vol. III, p. 532, 534, 552. Mr. Slaughter and Mr. Peterson testified that hunters on the preserve would be using “high brass shells” that are louder and have more lead than the shells to be used at the sporting clay facilities. *See* Trial Trans., Vol. I, pp. 67-68, Vol. III, p. 535. Further, Mr. Slaughter testified that the sporting clays facility was designed so that the hunters would shoot in a certain direction so that their shells

⁴⁹ Another instructive case is *Cappelle v. Orange County*, 269 Va. 60, 607 S.E.2d 103 (2005). In *Cappelle*, the Supreme Court of Virginia decided whether a mining company could construct and operate an access road for the transportation of coal that ran through a portion of its lot that was zoned for limited residential use. The Court assumed, without deciding, that the continuous hauling of mined minerals was an accessory use to the principal activity of mining. *Id.* at 65 n*.

⁵⁰ Although this is another fact proving the subordinate nature of the sporting clays facility, the comparative number of shots to be fired at the sporting clays facility is merely illustrative. As the court in *Boone* stated, issue is the “the nature of the use, not the degree of intensity with which the use is pursued.” *Boone*, 560 N.E.2d at 696 n.2.

would fall within the facility, which makes lead reclamation easier. *See* Trial Trans., Vol. I, pp. 77-79. In comparison, the hunts on the preserve have no such restrictions. *Id.*

In addition, Mr. Peterson, who the Court qualified as an expert on shooting safety, testified that the sporting clays facility would support the hunting preserve because hunters could practice safety techniques and better their shooting proficiency at the sporting clays facility. *See* Trial Trans, Vol. III, pp. 528-29, 541. Moreover, John Long, an expert in insurance policies related to hunting preserves, testified that insurance premiums for hunting preserves do not increase if a hunting preserve also operates a sporting clays facility. *See* Trial Trans., Vol. II, pp.262, 269-70. He also said that he always asks whether the hunting preserve has a sporting clays range, or something similar. *See* Trial Trans., Vol. II, pp. 276-77. According to Long, approximately 80 to 90 percent of hunting preserves have a sporting clays facility. *See* Trial Trans., Vol. I, p. 28. When asked why he would want the hunting preserve to have a sporting clays range, Long stated:

Safety, there's no question, and skill. Its amazing, in sporting clays particularly, that simulates – that have what they call a running rabbit shoot, which is a clay pigeon that runs across the ground. And that's something that low-level shooting could be dangerous, and I want to know that these people have experience in some of these things.

See Trial Trans, Vol. I, p. 270. Long's testimony makes it clear that the safety and proficiency skills that hunters practice at a sporting clays facility is subordinate to their hunt on the hunting preserve, and that sporting clays facilities are customarily incidental to hunting preserves.

In addition, the Board does not dispute that “hunting,” even under its limited definition, is conducted on its hunting preserves throughout Orion's property. This form of hunting is protected by Virginia's Constitution, whereas the other uses of Orion's property is protected by

the County's zoning ordinance. Certainly, a right protected by a local ordinance is subordinate to a right protected by the Constitution. Thus, all of the uses of Orion's property necessarily are subordinate to its constitutionally protected use of hunting.

At trial, the Board argued that Orion's sporting clays facility would not be an accessory use because it is the "right arm" of Orion's "sporting estate" business model. *See* Trial Trans., Vol. II, p. 495. However, the Board cannot attack the nature of use of the sporting clays facility according to the singular sporting estate model. Originally, Orion wanted to get a single approval for the construction and operation of an all-inclusive "sporting estate" on the Oak Ridge Estate. Orion's facility at the Oak Ridge Estate was the predecessor—and prototype—of the sporting estate it wants to develop at its current location. *See* Trial Trans., Vol. III, pp. 494-98. Mr. Peterson testified that this all-inclusive sporting estate would include a hunting preserve, hunt club, shooting grounds, a corporate training facility, and event grounds. *See* Trial Trans., Vol. III, pp. 481,495.

However, the Board dictated that Orion apply for two conditional use permits to develop its sporting estate on the Oak Ridge Estate—one for the shooting facility and another for the corporate training facility. It claimed that the County's zoning ordinance does not address developments like the proposed corporate training facility. *See* Trial Trans., Vol. III, pp.498-500. The Board granted a conditional use permit for the shooting facility under § 4-1-19a⁵¹ and granted another permit for the corporate training facility under § 12-5, titled "Uses not provided

⁵¹ Section 4-1-19a states: "Outdoor firing range in conjunction with the county noise control ordinance."

for.” As it did with the Oak Ridge Estate, Orion had to apply for two separate conditional use permits when it wanted to develop its current property.⁵²

Because the County forced Orion to apply for two separate permits, the relationship of the sporting clays facility to the other uses of Orion’s property must be analyzed in the context of the two developments—not in the context of a single sporting estate. To determine the nature of the use of the sporting clays facility in the context of a single sporting estate would allow the Board to approbate and reprobate. *See Holston Corp. v. Wise County*, 131 Va. 142, 159, 109 S.E. 180, 184-85 (1921) (“The county cannot at the same time approbate and reprobate.”). In other words, the County cannot use the situation it created to the disadvantage of Orion. The County required Orion to split up the facility into two permits so it must approach the accessory use issue in that context. It cannot now claim that the sporting clays facility is the main use of the property because it is the “right arm” of the singular sporting estate model when it dictated that Orion divide its business plan. When viewed the in the context of two developments, the record proves by a preponderance of the evidence that the sporting clays facility is subordinate and customarily incidental to the corporate training center and the hunting preserve, hunting, and hunt club uses.

CONCLUSION

For the foregoing reasons, Orion respectfully asks this Court to issue a declaratory judgment that Defendant Board violated its right to hunt under the Virginia Constitution and its rights under the Zoning Ordinance of Nelson County, and that Plaintiff is entitled to operate the proposed sporting clays course as a Constitutional right and/or as a by right accessory use.

⁵² When Orion decided to move its facility to the Union Hill Estate, the County told Orion that it simply could transfer the conditional use permits it already had to the Union Hill Estate. Shortly thereafter, the County changed its position and again required Orion to apply for two new conditional use permits—one for the shooting facility and another for the corporate training facility—to construct and operate its business plan on the Union Hill Estate. *See Trial Trans.*, Vol. III, p. 503-504.

Respectfully Submitted,

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I hereby certify that a true copy of the foregoing Plaintiff's Post-Trial Memorandum was delivered this 16th day of May, 2005, to:

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