VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 27th day of October, 2016.

County of York, et al., Appellants,

against Record No. 160104
Circuit Court No. 14-6013

Anthony T. Bavuso, et al., Appellees.

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

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that the judgment below should be reversed.

The narrow issue presented in the current appeal is whether—under the form of state-wide statutes that existed as of June 17, 2014—certain ordinances of the defendant county were invalid because they impose a special use permit requirement for the plaintiffs' oystering activities. That date drives this litigation because it was then that the county re-zoned the plaintiffs' property from a "resource conservation" category (under which the parties dispute the owners' right to engage in agriculture and aquaculture) to a "purely residential" category where this is not permitted. Thus only if the plaintiffs had a valid oystering use in place prior to that date can they claim that they have a vested right to continue their aquacultural activity in the currently residential zone where the property is located. Thus—while effective January 1, 2015 the Code of Virginia was amended making it clear that local laws may not impose a special use permit for aquacultural activities—the validity of the ordinances under prior state law must be decided.

Anthony T. Bavuso and his wife Elyse K. Pyle raise oysters in the water near their residence and engage in activities related to oyster farming on their property. They filed an action seeking a declaration that certain York County ordinances were invalid because they conflict with the Virginia Right to Farm Act, Code § 3.2-300 et seq., as well as Code § 15.2-2288. The trial court agreed. The trial court determined that the terms "agricultural operations,"

"agricultural products," and "production agriculture" under Code § 3.2-301 and Code § 15.2-2288 included "aquaculture," and, therefore, Bavuso and Pyle's oyster culture activity fell within the scope of these statutes. We conclude that at the relevant time, neither Code § 3.2-301 nor Code § 15.2-2288 included "aquaculture" within the definitions of "agricultural operations," "production agriculture," or "agricultural products." Accordingly, we reverse the judgment below.

This case presents questions of statutory construction. We review such questions de novo on appeal. *L.F. v. Breit*, 285 Va. 163, 176, 736 S.E.2d 711, 718 (2013).

On the date the owners' property was re-zoned Code § 3.2-301, part of the Right to Farm Act, provided in relevant part:

> In order to limit the circumstances under which *agricultural operations* may be deemed to be a nuisance, especially when nonagricultural land uses are initiated near existing *agricultural operations*, no county shall adopt any ordinance that requires that a special exception or special use permit be obtained for any *production agriculture* or silviculture activity in an area that is zoned as an agricultural district or classification.

(Emphases added.)

Similarly, Code § 15.2-2288 provided as follows:

> A zoning ordinance shall not require that a special exception or special use permit be obtained for any production agriculture or silviculture activity in an area that is zoned as an agricultural district or classification. For the purposes of this section, production agriculture and silviculture is the bona fide production or harvesting of *agricultural* or silviculture *products*.

(Emphases added.)

We begin with the plain language definition of the term "agriculture." *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007) ("When the language of a statute is unambiguous, we are bound by the plain meaning of that language."). Webster's Third New International Dictionary defines "agriculture" as:

> **1 a:** the science or art of cultivating the soil, harvesting crops, and raising livestock: Husbandry, Farming

> **b:** the science or art of the production of plants and animals useful to man and in varying degrees the preparation of these products for man's use and their disposal (as by marketing)

Webster's Third New International Dictionary 44 (1993). Black's Law Dictionary defines "agriculture" as "[t]he science or art of cultivating soil, harvesting crops, and raising livestock." Black's Law Dictionary 83 (10th ed. 2014).

These definitions are inconclusive. The first of these definitions would exclude aquaculture or the cultivation of oysters because it does not involve cultivating the soil, and oysters are not necessarily considered "livestock." *See* Webster's Third New International Dictionary 1324 (1993) (defining "livestock"); Black's Law Dictionary 1076 (10th ed. 2014) (same). The second definition in Webster's Third New International Dictionary, however, might apply to oysters because oysters are "animals useful to man." We therefore turn to other principles of statutory construction.

"When interpreting and applying a statute, [courts] assume that the General Assembly chose, with care, the words it used in enacting the statute." *Kiser v. A.W. Chesterton Co.*, 285 Va. 12, 19 n.2, 736 S.E.2d 910, 915 n.2 (2013) (internal quotation marks omitted). "[W]hen the General Assembly has used specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the Code, we must presume that the difference in the choice of language was intentional." *Zinone v. Lee's Crossing Homeowners Ass'n*, 282 Va. 330, 337, 714 S.E.2d 922, 925 (2011). The General Assembly has defined similar terms in the Code to specifically include some aspect of aquaculture. *See* Code § 3.2-303 (definition of "agricultural products" includes "aquaculture"); Code § 3.2-400 (defining "agricultural activity" to include "aquaculture activities"); Code § 3.2-6400 ("agricultural products" definition includes "livestock, aquaculture, poultry, horticultural, floricultural, viticulture, silvicultural, or other farm crops."); Code § 3.2-6500 (defining "livestock" to include "shellfish in aquaculture facilities"); Code § 46.2-698 (addressing fees for farm vehicles and defining a farm as, among other things, areas of land used for aquaculture). It is thus abundantly clear that the General Assembly knows how to include "aquaculture" in a

definition that relates to agriculture. The absence of this term from Code § 3.2-301 and Code § 15.2-2288 is conspicuous and strongly suggests that the General Assembly did not intend to include aquaculture activity within the scope of those statutes. *See, e.g.*, *Short Pump Town Ctr. Cmty. Dev. Auth. v. Hahn*, 262 Va. 733, 746, 554 S.E.2d 441, 447 (2001).

We also make note of the fact that the Attorney General, in a 2012 opinion, concluded that aquaculture does not constitute an "agricultural operation" within the intendment of the Right to Farm Act. 2012 Op. Atty. Gen. 11-127, 2012 Va. AG LEXIS 11, *8 (March 9, 2012).

> While it is not binding on this Court, an Opinion of the Attorney General is "entitled to due consideration." This is particularly so when the General Assembly has known of the Attorney General's Opinion, in this case for five years, and has done nothing to change it. "The legislature is presumed to have had knowledge of the Attorney General's interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view."

Beck v. Shelton, 267 Va. 482, 492, 593 S.E.2d 195, 200 (2004) (citations omitted).

In 2014, the General Assembly amended Code § 15.2-2288 as follows:

> A zoning ordinance shall not require that a special exception or special use permit be obtained for any production agriculture or silviculture activity in an area that is zoned as an agricultural district or classification. For the purposes of this section, production agriculture and silviculture is the bona fide production or harvesting of agricultural ~~or~~ *products as defined in § 3.2-6400, including* silviculture products.

2014 Acts ch. 435. The definition found in Code § 3.2-6400, which the 2014 amendment references, includes aquaculture.[1] The amendment to Code § 15.2-2288 also contained a delayed enactment clause. Code § 3.2-301 was not similarly amended.

This legislative change further suggests that, at the relevant time, the terms "agricultural products," "production agriculture," and "agricultural operations" did not include aquaculture. "Legislation is presumed to effect a change in the law unless there is clear indication that the General Assembly intended that the legislation declare or explain existing law." *Chappell v. Perkins*, 266 Va. 413, 420, 587 S.E.2d 584, 587 (2003). Of similar effect is the clause that

[1] York County rezoned the plaintiffs' property prior to the January 1, 2015 effective date specified in the delayed enactment clause. Therefore, the plaintiffs must show that their use is vested under the prior zoning in order to continue their activity. *See* Code § 15.2-2307.

delayed the effective date of the 2014 amendment of Code § 15.2-2288. Ordinarily, if a statutory amendment is merely declaratory of existing law, there is no need for a delay in its effective date. Here, the record does not reveal any reason why the General Assembly would delay this enactment if the amendment truly was declaratory of existing law.

As a "clear indication" of legislative intent, Bavuso points to a description in the "history" section of the General Assembly's website, which states that the bill as introduced "clarifies the definition of agricultural products." Such a description, however, is not part of the legislation itself. It is a description of a bill made by a legislative staffer. It can be considered, as can be, for example, law review articles, but it is in no way dispositive. The General Assembly can, when it wishes to, include in the body of the legislation itself a clause stating that a change is "declaratory of existing law." *See, e.g.*, 2000 Acts ch. 207 (amendment stated that "the provisions of this act . . . are declaratory of existing law"); 1992 Acts ch. 564 (legislation stated "[t]hat the provisions of this act are declaratory of existing law"). Such a clause is part of the statutory text itself, as opposed to a characterization of the text by a staff member.

Bavuso also argues that prior litigation prompted the need for a legislative clarification. This Court previously addressed some aspects of the litigation between Bavuso and the County, and considered another appeal involving the York County zoning ordinances in the context of oyster culture. Neither the circuit court nor this Court addressed whether the terms found in Code § 3.2-301 and Code § 15.2-2288 included aquaculture in general, or oyster culture in particular. *See Carter v. Bavuso*, Record No. 130143 (Jan. 3, 2014) (unpublished); *Carter v. Garrett*, Record No. 130144 (Jan. 3, 2014) (unpublished). The argument would be more persuasive if, for example, two circuit courts had reached opposing conclusions about whether Code § 3.2-301 and Code § 15.2-2288 covered aquaculture. Under the circumstances presented, these cases do not provide a clear indication that the 2014 amendment to Code § 15.2-2288 was meant to be declaratory of existing law.[2]

[2] Bavuso also points to certain litigation in Fairfax County as support for plaintiffs' preferred construction of the statutes at issue. That litigation is not part of the record and does not appear in any legal database, such as the reports of circuit court opinions. Accordingly, it does not inform our analysis.

This combination of circumstances, specifically, the lack of a clear plain language definition; the absence of aquaculture from the relevant definitions found in Code § 3.2-301 and Code § 15.2-2288, when aquaculture is found in so many other similar definitions; an adverse opinion from the Attorney General; and a substantive amendment to a pertinent statute, along with a delayed effective date for that amendment, all point toward the conclusion that the plaintiffs' oyster raising activities were not encompassed by Code § 3.2-301 and Code § 15.2-2288.

We conclude that the York County ordinances at issue were not, at the relevant time, in conflict with Code § 3.2-301 and Code § 15.2-2288. Accordingly, we reverse the judgment of the Circuit Court of York County and enter final judgment for the County.

This order shall be certified to the said circuit court.

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Teste:

Clerk