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Waterways Case Underlines Long Island's Legal History

As a general rule, navigable waters are subject to the sole jurisdiction and control of the State of New York.¹ However, the New York Navigation Law excludes “tidewaters bordering on and lying within the boundaries of Nassau and Suffolk counties”² from the definition of navigable waters subject to the authority of the state government. The purpose of this exclusion is to give deference to the colonial land grants—made well before the Revolutionary War—that conferred ownership and control over tidal waterways to certain Long Island townships.

The Town of Southampton is one such township. Its fundamental charter, granted nearly 325 years ago, is the Dongan Patent of 1686.³ An act of the colonial assembly of 1691 confirmed this and other charters,⁴ and a provision in the first New York State Constitution declared that nothing in it would prejudice rights previously granted by such charters.⁵ The statutory exemption contained in the Navigation Law is one of the most recent iterations of the centuries-old rule, and it frequently has been construed as authorizing Nassau and Suffolk counties, and their townships, to legislate and control the use of their waterways.⁶

A recent decision by Suffolk County Supreme Court Justice Peter H. Mayer, in *Brookhaven Baymen's Assoc. Inc. v. Town of Southampton*,⁷ reemphasizes the

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importance—and practical significance even today—of this early American legal history. It also is a reminder of the long tradition of, and continuing desire for, local control on Long Island.

The Southampton Resolution

As the court explained in its decision in the *Brookhaven Baymen's* case, Southampton Town Code §111-30(C) prohibits digging,

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dredging or otherwise changing the bottom of any waters in the town without first obtaining a permit from the town's trustees. On Oct. 6, 2008, Southampton's trustees adopted a resolution allowing shellfishing permits to be issued only to town residents. The Brookhaven Baymen's Association Inc., and four commercial fishermen—none of whom were residents of Southampton—subsequently

went to court and moved, by order to show cause, for a preliminary injunction enjoining the enforcement of the local law. The plaintiffs alleged, among other things, that their efforts to ply their trade had been severely restricted by the law.

The plaintiffs reasoned that the town, as a municipal corporation, derived its authority to make law from Article IX §2(c)(i) of the New York State Constitution, which permits local governments to adopt and amend local laws that are not inconsistent with the “general law.” In their view, the Environmental Conservation Law provisions that regulate fishing and shellfishing were “general laws” that preempted Southampton's local legislation. The court rejected the plaintiffs' arguments.

The court noted that one of the purposes for which a town may act, pursuant to Town Law §130(18)(a)(2), is to regulate “the taking and the manner of taking clams, oysters, scallops and other shellfish from the lands of or from waters over the lands of...the trustees of the freeholders and commonalty of a town in which such trustees are vested with title to such lands and the right of fishing, provided that such trustees shall file with the town clerk an application in writing therefor.” The court found that that was “precisely” the method employed by the defendants—the town, the town board, and the town's trustees—in this instance. Each defendant acted in accordance with its authority and deferred to the other as to subjects beyond their purview in the manner prescribed by statute, according to the court.

In other words, the court ruled, state law did not preempt the right of defendants, as trustees of certain lands and waters of the town, with respect to their authority to regulate. Here, it continued, the Southampton defendants did not seek to prevent the plaintiffs from capturing crabs and conch. Nor was it the intention of the defendants to regulate migratory finfish. The court recognized that the problem, as argued by the town, was with efforts to capture such fish in a manner that would disturb the bottom. By their nature, the court added, crab and conch tend to be bottom dwellers and the methods used to capture them generally involve mechanisms that drag upon the bottomland. Because the trustees own the bottomland, the court declared, they were entitled to regulate the manner in which it was used.

The court concluded that although the prerogative to regulate the right to fish for migratory marine fish was with the state, Southampton retained the right to regulate, as it did by the challenged legislation in this case, the cultivation and harvesting of shellfish. Finding that the plaintiffs failed to demonstrate that they could succeed on their underlying complaint about the unconstitutionality of the Southampton law, the court denied the plaintiffs' requested relief and granted the defendants' request for dismissal.

The 'Hassan' Ruling

As might be expected, this was not the first time that such an issue had reached the courts. Indeed, then-Eastern District Federal Judge George Pratt issued a decision on another Long Island town law in 1980, in *Hassan v. Town of East Hampton*,⁸ that reached a somewhat different conclusion.

That case arose when the plaintiff, a 45-year old disabled veteran whose sole means of support was his disability pension, moved to East Hampton from Rhode Island in November 1977. Although the plaintiff had no shellfishing experience prior to moving to East Hampton, he had completed a two year course in commercial fishing at the University of Rhode Island and had applied for a loan from the Small Business Administration to purchase a fishing boat. His application to the Town of East Hampton for a license to shellfish was denied because he did not meet the ordinance's

one year residency requirement. The plaintiff then went to federal court.

The district court reviewed a number of right to travel and equal protection cases and ruled that the East Hampton town shellfish ordinance impermissibly penalized the exercise of the right to travel in that new residents of East Hampton wishing to obtain a license to shellfish and pursue their living in East Hampton had to wait one year to qualify.⁹ By imposing its conditions only on those persons who had recently taken up residence in the town, the court decided, the East Hampton shellfish ordinance forced some persons who wish to move to East Hampton "to choose between their constitutionally protected right to travel and their right to pursue a livelihood."

Whatever occurs, the decision is an important reminder about the special nature of Long Island's waterways and early history.

Importantly, Judge Pratt declared that the problem with the challenged ordinance was not in the establishment of a residency requirement; rather, he found, the residence requirement and the one year waiting period requirement were "distinct and independent prerequisites"—and only the durational requirement was constitutionally suspect as burdensome on the right to travel.

The district court then held that only where, as in this case, an ordinance required one year of residency as a condition to obtaining a commercial shellfishing license, the classifications established by the ordinance had sufficient impact upon the exercise of the fundamental right to interstate travel to trigger a strict scrutiny standard of equal protection review. Concluding that the Town of East Hampton could not overcome its heavy burden of justification and show that the ordinance promoted a compelling state interest, it then set the ordinance aside as unconstitutional.

Conclusion

The *Hassan* court specifically noted that its case did not present, and it offered no opinion as to, the different analysis that would be required by an ordinance that established

a non-durational residency requirement—which was the situation presented in the *Brookhaven Baymen's* case. In fact, the court in the *Brookhaven Baymen's* case observed that both the plaintiffs and the defendants argued that *Hassan* supported their respective positions concerning the constitutionality of the Southampton residential restriction on the taking of shellfish. The court in the *Brookhaven Baymen's* case pointed out that the *Hassan* court had "specifically declined to address a 'non-durational residency requirement,'" noting that it "nonetheless reiterated the long held legislative posture that 'has clearly and specifically delegated regulatory power over the taking of shellfish to towns which own the underwater land within their borders.'"

At this writing, it remains to be seen whether the *Brookhaven Baymen's* case will be appealed. Whatever occurs, the decision is an important reminder about the special nature of Long Island's waterways and early history.

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1. See Navigation Law §30.

2. See Navigation Law §2(4).

3. For a detailed history, see *State of New York v. Trustees of the Freeholders and Commonalty of the Town of Southampton*, 99 A.D.2d 804 (2d Dep't 1984) (O'Connor, J., dissenting) ("The fundamental charter of the town is the Dongan Patent of 1686. The charter recited a prior grant of 1676...and essentially confirmed it upon noting that the provisions in the prior charter 'for constituting them a towne and giving them privileges and Imunities' had not been 'sufficient in law to convey to them such privileges & Imunities as was designed to be given them.' Therefore, in order to '[re]c[t] the said towne of Southampton***into one Township' Governor Thomas Dongan, as the agent of King James the Second, ratified and confirmed to its inhabitants and their heirs and assignees forever the prior grant of lands, franchises, profits and hereditaments, excepting gold and silver mines, to hold 'of his said Majesty his heires and Successors in free and Comon Soccage according to the Mannor of East Greenwiche in the County of Kent within his Majestyes Realme of England'").

4. See, e.g., *Trustees of the Freeholders and Commonalty of the Town of Southampton v. Mecox Bay Oyster Co.*, 116 N.Y. 1 (1889) ("The charter of Easthampton...and the charter of Brookhaven...have habendum clauses almost identical with the Dongan charter of Southampton. In all of them it was distinctly decided that the title to the common land was in the towns, and as to the land under water of the navigable bays, rivers and harbors...settled the law, that notwithstanding the public right to navigate such waters, the land under the water could be the subject of exclusive ownership, ...by the town.").

5. Id.; N.Y. Const. of 1777, §XXXVI.

6. See, e.g., *Matter of Rottenberg v. Edwards*, 103 A.D.2d 138 (2d Dep't 1984).

7. No 09-4244 (Sup. Ct. Suffolk Co. Aug. 21, 2009).

8. 500 F. Supp. 1034 (E.D.N.Y. 1980).

9. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330 (1972).