

Real Estate *Update*

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ALM

# Off-Shore Planning

## *Ferry Law Survives Constitutional Challenge*

BY JOHN M. ARMENTANO

Property owners and developers typically believe that the impact of local zoning laws is on real estate, i.e., on land. Generally speaking, local governments, however, also are authorized under New York State law to regulate vessels that operate on the water within their jurisdiction, and, in some circumstances, even off-shore.<sup>1</sup>

Disputes resulting from “land-based” zoning laws are all too common, frequently leading to litigation in the state court system. Yet, in recent years, more and more parties in zoning cases have raised federal constitutional and statutory issues, which have led to a growing number of significant court decisions—including by the U.S. Supreme Court—that to a large extent have “federalized” local zoning law.<sup>2</sup>

Now, a dispute between a ferry service and neighboring towns in eastern Suffolk County on Long Island over a local town law limiting ferry service has led to a landmark decision by the U.S. District Court for the Eastern District of New York analyzing significant federal constitutional issues in the context of “water-based” planning decisions.

The district court, in *Town of Southold v. Town of East Hampton*,<sup>3</sup> examined the dormant Commerce Clause and the Equal Protection Clause before finding that they were not implicated by the ferry restriction that had been adopted by the Town of East Hampton.<sup>4</sup>

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### ZONING AND LAND USE PLANNING



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### Complaint Filed

The *Southold* case arose after the Town of East Hampton<sup>5</sup> adopted a local law that, in pertinent part, barred the construction or substantial expansion of a passenger ferry terminal and the commencement of passenger ferry service without a special permit. The law also prohibited any ferry with more than 2,000 installed horsepower and the capability of operating at a speed in excess of 20 knots, and any ferry that could carry vehicles, from docking at any passenger ferry terminal. Cross Sound Ferry Services, Inc. (“CSF”), which provides vehicular and passenger ferry service between Orient Point on the North Fork of eastern Long Island and New London, Connecticut, challenged the law in federal court.

Significantly, the Towns of Southold and Shelter Island also brought suit against the Town of East Hampton. It is highly unusual, of course, for one town to sue another town, let alone two towns in the same county suing a third town in the county. The court dismissed the claims brought by Southold and

Shelter Island, finding that they did not have standing. The towns complained that they suffered increased traffic, but the court said that that alleged injury was not caused by the East Hampton law, but appeared to have been created years before “by CSF’s commencement of ferry service to and from the North Fork of Long Island.”

### The Dormant Commerce Clause

As Eastern District Judge Sandra Feuerstein pointed out in her decision, the Commerce Clause grants Congress the authority to “regulate Commerce . . . among the several States.” The clause contains both an affirmative grant of power and a negative command, known as the “dormant” Commerce Clause, that prevents a state from “placing burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.”<sup>6</sup> In application, a law can run afoul of the dormant Commerce Clause in two ways. First, a law can violate the dormant Commerce Clause if it “clearly discriminates against interstate commerce in favor of intrastate commerce” and is not justified by a valid factor unrelated to economic protectionism. Second, under the “Pike balancing test,” a law can violate the clause if it imposes a burden on interstate commerce “incommensurate” with the local benefits secured.<sup>7</sup>

The court examined whether the East Hampton law discriminated against interstate commerce. As the court explained, a statute improperly discriminates against interstate commerce, if it accords differential treatment to in-state and out-of-state economic interests that benefits the former and burdens the latter.<sup>8</sup> In this case, the court found, CSF failed to identify any in-state economic interest that was favored by the ferry law. The court noted that the purpose of

the law was not to prohibit interstate travel but to protect against increased traffic and ensure the health, safety and economic vitality of East Hampton. The court stated that this was confirmed by the fact that the law banned all vehicular and high-speed ferries, and not just those serving Connecticut. Thus, it ruled, CSF could not demonstrate discrimination "against articles of commerce coming from outside the State," and the per se invalid test therefore did not apply.

The court next reviewed the balancing test, as established by the U.S. Supreme Court in *Pike v. Bruce Church, Inc.*<sup>9</sup> Under this standard, a nondiscriminatory law will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits. As applied in the Second Circuit, this test entails a three part analysis: the nature of the local benefits advanced by the statute; the burden placed on interstate commerce by the statute; and whether the burden is clearly excessive when weighed against these local benefits.<sup>10</sup>

Here, the court found, the East Hampton law was "clearly" enacted to further a legitimate local purpose: the promotion of the health and safety of East Hampton's residents. As to the second prong—whether there was a qualitatively different burden on interstate commerce than on intrastate commerce—the court pointed out that the CSF had failed to allege such a difference. Finally, it found, in light of the other available travel alternatives to and from East Hampton, including ferry service, that any burden placed on interstate commerce was minimal. Therefore, the court held, any burden on interstate commerce was not "clearly excessive" when weighed against the local benefits, and CSF's dormant Commerce Clause claims had to fail.

### Equal Protection Clause

The first step in evaluating the merits of an Equal Protection claim under the U.S. Constitution<sup>11</sup> is to determine the level of review under which the challenged law will be evaluated. CSF argued that the East Hampton law infringed the constitutionally protected fundamental right to travel and thus heightened scrutiny was required. It argued that the law actually deterred travel,

impeded travel as its primary objective, and used a classification that penalized the exercise of the right to travel.

CSF contended that the law actually deterred interstate travel by banning an entire mode of interstate transport, i.e., vehicular and high speed passenger ferries from East Hampton. The court, however, rejected this argument. It noted that a statute does not interfere with the right to travel, as protected by the federal Constitution, unless it unreasonably burdens interstate travel. Here, the East Hampton law "may make

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*The court found that the law was clearly enacted to further a legitimate local purpose—the promotion of health and safety of East Hampton's residents—and that any burden on interstate commerce was minimal.*

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travel to and from East Hampton less convenient," but it did not infringe on the fundamental right to travel.

CSF also argued that strict scrutiny was appropriate because the primary objective of the ferry law was to impede interstate travel. It pointed to the law's findings and objectives, which stated that the law was passed, in part, in response to "the popularity of very large casinos established on the Connecticut mainland . . . which has greatly increased ferry traffic." The court, however, emphasized that the stated purpose of the law was to protect against increased traffic and ensure the health, safety and economic vitality of East Hampton; the casinos, it stated were additional proof of the need for concern.

Next, the court rejected CSF's contentions that the law employed a classification that penalized the exercise of the fundamental right to travel. It explained that the fundamental right to travel was not implicated in this case, and therefore any classifications imposed by the law did not penalize the exercise of the fundamental right to travel.

Having rejected the heightened scrutiny standard, the court examined the statute to see whether it was rationally related to a legitimate state interest. As the court pointed out, under this standard, if there is any reasonably conceivable state of facts that

could provide a rational basis for believing that the law was rationally related to the goal of protecting the health, safety and welfare of East Hampton's citizens, then the law would pass Equal Protection review. In this case, the court held that there was a rational basis for believing that a law restricting the flow of traffic was rationally related to protecting the health, safety and welfare of the citizens of East Hampton. Accordingly, it found that the law did not violate the Equal Protection Clause.

### Conclusion

Unless reversed on appeal or by the Town of East Hampton itself, the Eastern District's decision in this case means that there will be no ferry service between East Hampton and Connecticut, and that residents of Eastern Long Island who want to travel directly to Connecticut (including to its casinos) either will have to journey up through the Town of Shelter Island to the Town of Southold on the North Fork of Long Island or find an alternative route through other parts of Long Island or New York City, or reach Connecticut via a different mode of transportation. The district court has made it clear that, although inconvenient to those from the South Fork who want to travel directly to Connecticut, and though it is likely to increase traffic on the North Fork, the Town of East Hampton's ferry law does not implicate federal constitutional claims.

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1. See, e.g., Town Law §130.  
 2. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 687 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).  
 3. No. 04-CV-3860 (EDNY, Dec. 21, 2005).  
 4. Local Law No. 40 of 1997 of the Town of East Hampton.  
 5. The Town of East Hampton is comprised of the Village of East Hampton, a portion of the Village of Sag Harbor and a number of unincorporated hamlets, including Montauk. East Hampton is 22 miles long and its width, north to south, ranges from 3/4 of a mile to six miles.  
 6. *Am. Trucking Ass'ns v. Mich. PSC*, 125 S.Ct. 2419 (2005).  
 7. See *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158 (2d Cir. 2005).  
 8. See *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93 (1994).  
 9. 397 U.S. 137 (1970).  
 10. *Grand River*, supra.  
 11. Equal Protection claims under the New York State Constitution are coextensive with claims under the federal Constitution. See, e.g., *Under 21, Catholic Home Bureau for Dependent Children v. New York*, 65 N.Y. 2d 344 (1985).