

Trustees of the Freeholders of Commonalty & the Town of Southampton v Grannis

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[*1] Trustees of the Freeholders of Commonalty & the Town of Southampton v Grannis 2010 NY Slip Op 52184(U) [29 Misc 3d 1237(A)] Decided on December 14, 2010 Supreme Court, Suffolk County Sweeney, J. Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on December 14, 2010
Supreme Court, Suffolk County

The Trustees of the Freeholders of the Commonalty and the Town of Southampton, THE TRUSTEES OF THE FREEHOLDERS and the COMMONALTY OF THE TOWN OF EAST HAMPTON, and THE TOWN OF SHELTER ISLAND, THE TRUSTEES OF THE FREEHOLDERS AND THE COMMONALITY OF THE TOWN OF BROOKHAVEN and the TOWN OF BROOKHAVEN, the TOWN OF OYSTER BAY, THE TOWN OF SOUTHOLD and SOUTHOLD BOARD OF TRUSTEES, BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON, THE TOWN BOARD OF THE TOWN OF HUNTINGTON and THE TOWN OF HUNTINGTON, Plaintiffs,

against

Peter Grannis, in his official capacity as Commissioner, NEW YORK STATE DEPT. OF ENVIRONMENTAL CONSERVATION, Defendant.

09-38761

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Patrick A. Sweeney, J.

In 2009, the New York State Legislature enacted Environmental Conservation Law § 13-0355 which requires that all anglers over the age of 16 obtain a recreational marine fishing license for a fee in order to "take fish from the waters of the marine and coastal district and to take migratory fish of the sea from all waters of the state." The statute was purportedly enacted in response to amendments by Congress to the Magnuson-Stevens Fishery Conservation and [*2]Management Act (16 USC § 1801 et seq.). The Act was amended to add a requirement for the registration of individuals who engage in recreational fishing (see [16 U.S.C. 1881\[g\]\[1\]](#)) in order to "improve the quality and accuracy of information generated by the Marine Recreational Fishery Statistics Survey" (16 USC 1881[g][3[A]]). However, the Act exempted federal registration for all

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recreation fisherman that are "licensed, permitted, or registered under the laws of a State" (16 U.S.C. 1881[g][2]).

Section 13-0355 entitled "Recreational Marine Fishing License" provides in pertinent part as follows:

1. Definitions of license; privileges.

a. A recreational marine fishing license entitles the holder who is sixteen years of age or older to take fish from the waters of the marine and coastal district and to take migratory fish of the sea from all waters of the state, except as provided in

section 13-0333 and 13-0335 of this title. A recreational marine fishing license is effective for a license year beginning January first and ending December thirty-first.

...

2. General Provisions.

a. The privileges of a recreational marine fishing license may be exercised only at the times and places, and in the manner and to the extent, permitted by the fish and wildlife law and applicable regulations of the department.

...

4. Fees. Each applicant for a recreational marine fishing license shall pay to the issuing officer a fee according to the license issued and the residence or other qualification of the applicant, as follows:

LicenseFee

(1) Recreational marine fishing \$10.00

(2) Seven-day recreational marine fishing \$ 8.00

(3) One-day recreational marine fishing \$ 4.00

5. b. Recreational fishing passengers on a marine and coastal district party or charter boat licensed pursuant to section 13-0336 of this title may take fish as if they held a recreational marine fishing license.

6. Recreation marine fishing license data.

a. The department is authorized to collect data on holders of recreational marine fishing licenses, which shall include but not limited to, a licensee's name, address, and date of birth.

b. License holder data collected by the department or available to the department shall be confidential and shall not be disclosed except as required to comply with section 401 (g) of the Magnuson-Stevens fisheries management and conservation act (16 U.S.C. 1881), as may be amended from time to time, or by court order, except that the department may release or make public any statistics in an aggregate or summary form which does not make it possible to identify any person who submits such data. The department may prescribe such procedures as may be necessary to preserve [*3] such confidentiality.

The Federal government pursuant to the Magnuson-Stevens Fishery Conservation and Management re-authorization Act (16 U.S.C. §1801 et seq.) sought to develop recommendations to implement standardized fishing vessel registration as well as an information management system on a regional basis.

The Act provides the following with respect to fishery information:

109-479

(g) Recreational Fishery

(1)Federal Program - The Secretary shall establish and implement a regionally based registry program for recreational fishermen in each of the

8 fishery management regions. The program, which shall not require a fee before January 1, 2011, shall provide for -

(A)the registration (including identification and contact information) of individual who engage in recreational fishing -

(i) in the Exclusive Economic Zone;

(ii) for anadromous species; or

(iii) for Continental Shelf fishery resources beyond theExclusive Economic Zone; and

(B)if appropriate, the registration (including the ownership, operator, and identification of the vessel) of vessels used in such fishing.

(2)State Programs - The Secretary shall exempt from registration under the program recreational fishermen and charter fishing vessels licensed, permitted, or registered under the laws of a State if the Secretary determines that information from the State program is suitable for the Secretary's use or is used to assist in completing marine recreational fisheries statistical surveys, or evaluating the effects of proposed conservation and management measures for marine recreational fishers.

The basic purpose of the Federal legislation is to collect statistical data from the various States presumptively to have accurate fishing statistics for its records, similar to what the Census survey does with respect to the public at large.

The plaintiffs commenced this action for a judgment declaring that any person engaged in recreational fishing in the territorial salt waters of the Towns are exempt from the requirements of ECL 13-0355. The plaintiffs contend that various 17th Century Crown Patents provide them with sole and exclusive right over the fisheries in their respective jurisdictions and therefore the State does not have the authority to require a license within their respective boundaries. This Court previously granted motions on consent permitting the Town of Brookhaven, the Town of Oyster Bay and the Town of Southold to intervene in this case. In addition, a separate action by the Town of Huntington has been joined with this action. This Court granted a motion by the plaintiffs for a preliminary injunction and denied a motion by the defendant to dismiss the complaint. After brief discovery, the [*4]parties appeared before this Court for a trial on November 8, 2010.

At trial, the plaintiffs produced certain witnesses who testified that the Towns have always permitted residents to freely fish within their waters. Two trustees of the Town of Southampton testified briefly regarding the history of the Town and regulations regarding fishing. The parties also entered into a statement of stipulation which provides that the Federal National Angler Registry Program only applies to anadromous fish within the waters of the plaintiff towns and specifies certain species of fish. The State called no witnesses at the trial.

The legislature has the power to regulate and control the right of fishing in the public waters of

the State (see *Lawton v Steele*, 119 NY 226 affd 152 US 133). The original 17th Century Crown Patents, including the Nicolls, Dongan and Fletcher patents, gave certain Long Island townships title to the land within their bounds including the land under water (see *O'Brien v Town of Huntington*, 66 AD3d 160, 164 [2d Dept 2009]; *Melby v Duffy*, 304 AD3d 33 [2d Dept 2003]; *Nance v Town of Oyster Bay*, 23 AD2d 9 [2d Dept 1965]). The townships' ownership and control over these lands and water antedates the State itself and has been repeatedly upheld (see e.g. *Lowndes v Huntington*, 153 US 1;

Trustees of Brookhaven v Strong, 60 NY 56; Rottenberg v Edwards, 103 AD2d 138 [2d Dept 1984]).

Although navigable waters are generally subject to the sole jurisdiction and control of the State of New York (see Navigation Law § 30), the Legislature has excluded "tidewaters bordering on and lying within the boundaries of Nassau and Suffolk counties" from the definition of navigable waters of this state (Navigation Law § 2[4]) to accommodate the colonial land grants which conferred ownership and control over tidal waterways to certain townships (see *Melby v Duffy*, supra). The statutory exemption has consistently been construed as authorizing the Counties of Nassau and Suffolk and their respective townships to legislate and control the use of such lands and waterways (see *Melby v Duffy*, supra ; *Rottenberg v Edwards*, supra).

The patent grants, including the "Dongan Patent" of 1686, gave the respective towns the authority and have sole control " . . . over all the fisheries, fowling, sand, weed, waters within the said town not the property of individuals, and all the property, commodities, privileges and branches granted to them by the Charter of Governor Dongan . . . " (see laws of 1831, c.283).

The plaintiffs allege that the issuance of a fishing license is a matter that is solely within their jurisdiction since the waters and lands are private and proprietary by virtue of the colonial charter. In 1984 the Town of Southampton enacted a set of rules and regulations as to freshwater fishing limiting such fishing to residents and student residents. The State of New York and the Commissioner of Environmental Conservation commenced an action against the Town to the effect that the State pre-empted the Town's rights to legislate fishing with the Town. The Appellate Division, Second Department in *State vs. Trustees of Freeholders and Commonalty of Town of Southampton* (99 AD2d 804, 472 NYS2d 394) reversed the lower Court's grant of summary judgment in the State's favor, finding that " . . . absent some countervailing [*5]

consideration, the State may not interpose the legislation in issue here upon the people of the Town Southampton." The instant case presents a similar issue, albeit, it involves saltwater fishing.

The State's rationale for the saltwater fishing license was simply to collect statistical data for the Federal government. While the State has the right to regulate fishing, this statute has nothing to do with the regulation of fishing per se or anything which would be paramount to deprive the rights of the Towns to control fishing within their jurisdiction. The Towns do not challenge the State's right to enact regulations such as the size of fish caught as well as the number of fish one might be able to keep. However, in this case the State is not attempting to regulate fishing but is seeking only to collect statistical data. As noted in a proposed repeal of the legislation as passed by the State Senate, the Federal Government does not require individuals to be licensed, only that each state provide certain identifying information (see Justification to S6250: Registration system for saltwater recreational fishing).

A stipulation of uncontested facts was agreed upon and submitted to the Court. One of those facts was that the Federal National Angler Registry Program only applies to anadromous fish within the waters of the respective towns and a list of such fish were set forth such as striped bass, white perch, Atlantic salmon, etc. The Magnuson-Stevens Act refers to collection of data solely on "anadromous" fish and the State has stipulated that fact is true. However, the statute which seeks to deprive the towns from their jurisdiction to regulate fishing refers to "migratory fish." The DEC regulation define "migratory fish" as " . . . both catadromous and anadromous species of fish . . . "Clearly the statute went beyond the State's justification for this statute by including fishing which was not mandatory or contemplated by the Federal registry. By so doing the

State was attempting to interfere with the Town's rights to regulate fishing as provided in the respective patents.

The rationale advanced by the State in this action that it may issue a saltwater fishing license to apparently save the taxpayers from a Federal Registry fee which may be higher than the State would charge is not a sufficient reason to interfere with the jurisdiction of the respective Towns.

Concerning the issuance of a salt water fishing license. the statute as applied to the respective plaintiffs is in violation of the rights of the people of the respective Towns and may not be enforced upon those who seek to fish in the waters regulated by the respective Towns.

Settle Judgment.

Dated: December 14, 2010 _____

J.S.C.