To Be Argued By:
John P. Courtney, Esq.
10 Minutes Requested

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM: SECOND DEPARTMENT
NINTH AND TENTH JUDICIAL DISTRICTS

- X

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

- against -

JOSEPH J. GRUCCI,

Defendant-Respondent.

- X

: Appellate Term No.: 2001-797-SCR
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: District Court Docket No. 2000-SU-54319
:

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BRIEF OF AMICUS CURIAE, TRUSTEES OF THE FREEHOLDERS AND COMMONALTY OF THE TOWN OF EAST HAMPTON

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John P. Courtney, Esq.
Attorney for the Amicus Curiae
P.O. Box 720 - Main Street
Amagansett, New York 11930
(631) 267-6161

PRELIMINARY STATEMENT AND INTEREST OF AMICUS CURIAE

The Defendant-Respondent's Memoranda of Law in the District Court, and his Briefs on this Appeal, have succinctly set forth the arguments which would otherwise be presented by the Trustees of the Freeholders and Commonalty of the Town of East Hampton (hereinafter the "Trustees"). Consequently, rather than reiterate those arguments, we will attempt to give a little historical background and insight into how the Trustees function. We will also attempt to illuminate the errors and misunderstandings contained in the Amicus Brief of the Attorney General submitted on Behalf of the Department of Environmental Conservation (hereinafter the "DEC Brief").

The interest of the Trustees is one of preservation and respect. Preservation of rights guaranteed to them and the inhabitants of the town over 300 years ago. Respect for historical accuracy and for the rule of law which has confirmed their authority since the founding of this nation.

HISTORY

Unlike Brookhaven and other Long Island towns whose Trustees also serve as town board members, East Hampton has a completely separate board of Trustees. Originally, there were twelve Trustees who were chosen at the annual town meeting for one year terms. Through special legislation, the term was increased to two years and the number of Trustees was reduced to nine. See, Chapter 1001 of the Laws of 1966, Chapter 233 of the Laws of 1972 and Chapter 378 of the Laws of 1975.

East Hampton was settled in 1648 and, until the British conquest of the colony of New York in 1684, was practically self-governed. See, East Hampton Town Records, Volume 1, page 3.

On March 13, 1666, Governor Richard Nicolls granted a Patent to the freeholders and inhabitants of the Town of East Hampton and their patentees. This patent granted the inhabitants "all Havens, Harbors,....., waters,..., fishing, Hawking, Hunting and fowling, And all other Profitts, Commodityes, Emoluments and hereditaments, to the said Tract of Land..." [Emphasis added].

Shortly after he ascended the throne of England in 1685, James the Second embarked on a course of action which deliberately ignored the title and rights granted the inhabitants of East Hampton by the Nicolls Patent. By such action, James the Second was able to force the people of East Hampton to pay the exorbitant sum of 200 pounds for a new Patent. Thus, the patent rights were fully paid for by the Trustees of the Freeholders and Commonalty, not merely the subject of a quitclaim from the King.

After receiving such payment, on December 9, 1686 Governor Thomas Dongan ratified and confirmed the grant contained in the Nicolls Patent and went on to create the Trustees, investing them with the authority to manage and regulate the properties and rights granted under the Nicolls and Dongan Patents. Those rights included "..Fishing, Hawking, Hunting, and Fowling, Silver and Gold Mines Excepted, and all other Franchises, Profits and Commodities and hereditaments..." [Emphasis added]. A copy of the Dongan Patent is annexed hereto and made part hereof.

The Nicolls' and Dongan Patents of Brookhaven township contain language which is nearly identical to East Hampton's Patents.

The inhabitants of the Patent-townships did not obtain the rights enumerated in their Patents as gifts from the king to be revoked or taken back whenever the king or his successor so desired. They purchased such rights for money and cannot be deprived of same without due process and just compensation. People ex rel Howell v. Jessup, 160 N.Y. 249 (Court of Appeals, 1899) at page 268; See, State of New York v. Trustees of the Freeholders and Commonalty of the Town of Southampton, 99 A.D.2d 804 (2nd Dept., 1984).

By Section 2 of the Laws of the Colony of New York, enacted May 6, 1691, the colonial legislature ratified and confirmed the charters, patents and grants theretofore granted, including East Hampton's and Brookhaven's Patents. A copy of that Section is annexed.

From the grant of the Patents until the end of the Seven Years War (the French and Indian War) in 1763, the colonies grew and prospered. Other than the Navigation Acts and the Acts of Trade (which required that all trade be carried on British and colonial ships), the colonies were basically self-governing. Commencing in 1764, Britain, in contravention of the Charters and Patents granted to the colonies, attempted to exercise direct control over the colonies. These attempts, from the Currency Act of 1764 through the Quartering Act of 1774, led directly to The

Declaration of Independence, which listed the grievances of the colonies against King George III. Included among those grievances was the statement that "He has combined with others to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws, giving his Assent to their Acts of pretended Legislation:....For taking away our Charters, abolishing most valuable Laws, and altering fundamentally the Forms of our Governments." (See, www.founding.com/library/index.cfm). The inclusion of that language regarding Charters, Laws and Forms of Governments in the Declaration of Independence demonstrates how seriously our forebears regarded the colonial Patents and any attempts to abridge the property and governmental rights contained therein.

SHELLFISH

The validity of East Hampton's Patents and similar Patents in other Long Island townships has been repeatedly upheld throughout the history of the State. State of New York v. Trustees, supra; Knapp v. Fasbender, 1 N.Y.2d 212 (Court of Appeals, 1956); Howell v. Jessup, supra, and the cases cited in each of the above.

In writing a unanimous opinion in Trustees of Brookhaven v. Strong, 60 N.Y. 56 (1875), the Chief Judge of the Court of Appeals examined into whether the King was empowered under the Magna Charta to grant lands under navigable waters, with the exclusive right of fishery therein as alleged by the Brookhaven Trustees. The Court found that:

"The objection that the general language of the patents should not be construed to include an exclusive right cannot be maintained. In the first place, the land under water is included within the boundaries of the grant. The rule is, that 'when a patent or grant conveys a tract of land by metes and bounds the land under water, as well as other land, will pass if the land under water lies within the bounds of the grant'...; and, as we have seen, the title of land under water confers the right of a several fishery. Besides, the language of the patents, 'all rivers, waters, beaches, creeks, harbors, fishing' and all other 'franchises to said tracts appertaining', is significant of an intention to convey this very right." [Emphasis added] Id., at 71.

The Court examined the colonial legislation of 1691 and saw no reason "why the action of the provincial authorities, including governor, council and assembly, upon this question, should not be regarded as valid and effective as if taken by Parliament itself, and such action may have been induced to remove the very defect now alleged to exist." Id., at 70.

As recently as 1997, the Court of Appeals cited Trustees of Brookhaven v. Strong for the proposition that "when land under rivers is included within the boundaries of a grant, the general language of conveyance is sufficient to transfer to the grantee the bed of the river and associated exclusive right of fishery." [Emphasis added]. Douglaston Manor, Inc. v. Bahrakis, 89 N.Y.2d 472. Admittedly the underwater land at issue in the present case

is not a river but rather Moriches Bay. However, the Court specifically cited the Strong case which involved Great South Bay. It went on to state that "the State's reservation of designated mineral rights, without reserving to the public a right of fishery, additionally supports our analysis and conclusion that Douglaston enjoys a duly conveyed exclusive right of fishery." [Emphasis added] Id., at 483). The Dongan Patents reserved identical mineral rights by use of the words "Silver and Gold Mines Excepted" without reserving to the public a right of fishery or shellfishery.

At the time of the Revolution, the State of New York succeeded only to the rights and sovereignty possessed by the king at that time. See, for example, Public Lands Law, § 4. By the Nicolls and Dongan Patents, the king had granted sovereignty to the Trustees, as representatives of the inhabitants of the various towns, which sovereignty included the right of fishing and the right to manage and regulate same. Since the king no longer possessed sovereignty over such rights at the time of the Revolution, the State of New York could not succeed to such sovereignty and is without authority to manage, control or regulate the right of fishing. The power to manage, control or regulate the right of fishing resides in the Trustees. See, Howell v. Jessup, supra; and People v. Miller, 235 A.D. 226 (2nd Dep't., 1932), affirmed 260 N.Y. 585 (Court of Appeals).

In Howell v. Jessup, supra, the Court of Appeals was called upon to construe the provisions of Southampton Town's

Dongan Patent. The Court cited with approval an earlier holding of Chief Justice Taney construing a similar patent: "It is not a deed conveying private property, to be interpreted by the rules applicable to cases of that description. It was an instrument upon which was to be founded the institutions of a great political community, and in that light it should be regarded and construed" Id., at 259. The Court went on to find that "were there no authorities in existence commanding such a decision, we could, guided by this rule alone, quite readily reach the conclusion that the letters patent were broad enough in terms to grant to the trustees, not only the lands under the waters, but the sovereignty over the waters for the benefit of the freeholders and inhabitants of the town..." [Emphasis added] Id., at 259. The Court held "that the crown had authority to grant not only the land and the lands under the water, but the waters as well at this point, and that the title and the sovereignty over such water and the lands thereunder was by the Andros and Dongan charters vested in and conferred upon the trustees... a sovereignty that enabled them to permit the doing of all things that a government may do for the benefit of its people." [Emphasis added] Id., at 265. The Howell Court stated "[t]he conclusion drawn by us from the enactments and provisions of the organic law is that the title and all rights of control granted to the trustees ... was confirmed by the enactment of the colonial legislature, and continued by provisions of the first and subsequent constitutions." [Emphasis added] Id., at 267.

The State's predecessor having granted a valuable

property right to the inhabitants of the town, and the right to manage, control and regulate such right to the Trustees, the State itself is without the authority to terminate those rights unless it compensates the inhabitants and the Trustees for its taking. Howell v. Jessup, supra; and State of New York v. Trustees, supra. At the very least, a State-imposed licensing requirement enacted without having obtained the approval of the Trustees therefor is invalid and violative of the Trustees' "property rights". See, People v. Miller and Saskas, copy annexed (App. Term, 1991).

In Trustees of the Freeholders and Commonalty of the Town of East Hampton v. Bienstock, et al., unreported, (Suf.Co.Sup.Ct., 1985), aff'd 124 A.D.2d 580 (2d Dept., 1986), lv. den'd 69 N.Y.2d 607 (1987), the Appellate Division, Second Department affirmed Justice McCarthy's decision, a copy of which is annexed. The Court recognized the Trustees' "proprietary right to certain lands and waters of the Town and their right to legislate and control the same..." Id., at 3. It found that the "grant of authority to plaintiff...recognizes a private right of ownership to property administered by plaintiff as a body politic" Id., at 4.

Pursuant to the authority granted to them (as ratified by various Courts over more than a century and as understood by the inhabitants of the town since its founding), the Trustees in East Hampton Town have regulated and controlled their underwater lands for over 315 years. On occasion, they have rented bottomlands for the cultivation of shellfish. Throughout the last

50 years, they have purchased and planted seed clams, oysters and scallops in their waters. In just 2000 and 2001, they purchased over 500,000 seed clams with their own funds, grew them in rafts, and planted them in their bottomlands throughout the town. They have authorized the purchase of an additional 500,000 seed clams for the year 2002.

DEC ARGUMENTS

The DEC now argues that a) the State's police power authorizes it to impose a licensing requirement in this case and b) the State owns the clams.

While the DEC has put forth a theoretical model of a comprehensive regulatory scheme designed to protect the public health, the reality of the situation is far different from that presented. Within the last 10 years, the DEC declared all of East Hampton's waters closed to shellfishing, not because the waters were unsanitary or unhealthful, or because of a heavy rainfall which could increase surface water runoff but, rather, because the DEC lacked the manpower to obtain test samples of the waters and funds to perform the actual testing. When the Town Board and the Trustees offered to obtain the samples and perform such testing, the DEC rejected same. After an extended period and a negotiated settlement, the DEC undid its former declaration and reopened our waters. At present, when the DEC lacks the manpower to obtain test samples (usually in cold or stormy weather), East Hampton's harbormasters will perform that job. Testing by the town, however, is not allowed by the DEC. It is a sad state of affairs that a

bayman's entire livelihood can be eliminated because of budgetary, political or internal problems in a State agency that deals with a vast number of duties and has an expansive and ever-expanding view of its role.

The DEC's argument seems to be premised in the belief that it, and only it, can protect the public health. This expansive view ignores the fact that the public health can be equally well protected by a less intrusive regulatory scheme which does not trample on ancient rights that are now labeled as 'archaic fictions'. See generally, DEC Brief, Appellant's Brief. The Trustees claim the right to regulate the taking and the manner of taking shellfish within their waters. They do not claim the right to regulate the sanitary shellfish laws, or to regulate shellfish wholesalers or the sale of shellfish, whether intra- or interstate commerce.

Section 213-10(M) of the East Hampton Town Shellfish Law (which was jointly developed by the Town Board and the Trustees) prohibits the taking of shellfish (except blue claw crabs, crabs, lobsters, shrimp and shellfish predators) from 'uncertified waters'. 'Uncertified Waters' is defined as "Waters which have been periodically examined for sanitary conditions and which do not meet the minimum standard set by any federal agency regulating the interstate shipment of shellfish", § 213-5.

The East Hampton Town Shellfish Law also requires the licensing of diggers, § 213-6. It prohibits the possession of shellfish for commercial purposes unless they are enclosed in a

bushel bag or other authorized container with a complete and accurate shellfish tag attached, § 213-10(P). 'Shellfish tags' are defined as "Waterproof labels to be attached to bushel bags or other authorized containers, identifying the name of the shellfish harvester, the harvest date, the harvest area, the type and quantity of shellfish and such other information as may be required" § 213-5. These provisions are consistent with federal shellfish sanitation regulations in 21 C.F.R 123.28 that apply, by their terms, only to "processors and shippers," not to harvesters. Contra, DEC Brief at 9.

The DEC raises the specter of unmarketable shellfish which will be subject to federal seizure and destruction if a State-issued licensing requirement is not upheld. Yet, the DEC presents no information to demonstrate that the town and/or the Trustees are incapable of meeting the federal shellfish sanitation program requirements. The fact that the DEC cannot demonstrate such an inability is because the town and the Trustees have met all requirements without the need for DEC intervention. Nor has the DEC pointed to one instance where shellfish taken from Trustee-owned bottomlands has caused anyone to become ill or has been seized by the federal government.

The DEC Brief at page 9 points to Town Law § 130(18) for the proposition that towns did not have inherent power under the New York State Constitution to regulate shellfishing and that power was vested in the State. This argument fails to acknowledge the existence of Town Law § 130(18)(2) which empowers a Town Board

to regulate by ordinance the taking and manner of taking shellfish from lands of, or waters over 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 therefore" [Emphasis added]. Implicit in that section is a legislative acknowledgement that the State cannot delegate the authority to regulate shellfishing on Trustee bottomlands to the Town Board unless the Trustees of the Freeholders and Commonalty request it. If the Trustees do not file the contemplated application, the power to regulate the taking and manner of taking shellfish from Trustee bottomlands remains in the Trustees and not in the State or the Town Board. If this were not the case, there would be no need for Town Law § 130(18)(2).

DEC ARGUMENT THAT THE STATE OWNS THE CLAMS

By criticizing the Court below for carving "out one irrational exception" to the broad principle of State ownership of all wildlife (DEC Brief, p. 9), the DEC is requesting this Court to ignore more than 100 years of legal precedent in order to meet the DEC's current concept of its "expansive" police powers. See, Trustees of Brookhaven v. Strong, supra; Hand v. Newton, 92 NY 88 (Court of Appeals, 1883); Howell v. Jessup, supra; and People v. Miller, supra.

Apparently, the DEC would accuse the United States Supreme Court of similar irrationality for its decision in McKee v. Gratz, 260 U.S. 127 (1922). In that case, Mr. Justice Holmes

found that "it seems not unreasonable to say that mussels having a practically fixed habitat and little ability to move are as truly in possession of the owner of the land in which they are sunk as would be a prehistoric boat discovered under ground or unknown property at the bottom of a canal" [Emphasis added]. Id., at 135.

The DEC would have the same "irrational exception" argument apply to the United States Court of Appeals, Second Circuit, for its decision in United States of America v. Long Cove Seafood, Inc., 582 F.2d 159 (1978). Citing McKee v. Gratz, the Court found that, "Unlike most wild animals, however, clams, mussels and other sedentary or burrowing mollusks do not roam to any significant degree. Hence, they are deemed to be in the possession of the owner, if any, of the land in which they are found" [Emphasis added] Id., at 163.

The DEC also asks this Court to ignore the legislatively imposed limitation on its authority contained in ECL § 11-0105. When the ECL was adopted in 1972, the Legislature saw fit to exempt legally acquired and privately owned shellfish from the provisions of the § 11-0105. 1972 was long after the many court decisions set forth above which established that clams, mussels and other sedentary shellfish had been legally acquired and were held in private ownership by the Trustees, subject to their regulation and control, by virtue of the various Patents. Had the Legislature intended the interpretation now placed on § 11-0105 by the DEC, i.e. that the State owns all wildlife until it has been reduced to possession, it would have been a simple matter to have

said that.

The authority of East Hampton Town's Trustees and the proprietary rights of the inhabitants of the town of East Hampton, as embodied in the Trustees, have been specifically recognized and confirmed by legislation of the State of New York on at least three occasions. See, Chapter 1001 of the Laws of 1966, Chapter 233 of the Laws of 1972 and Chapter 378 of the Laws of 1975.

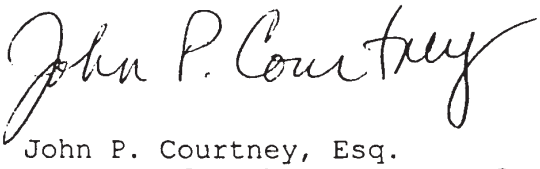
Each of these laws confirms the "proprietary rights" granted the inhabitants by the colonial patents and each recognizes and confirms the "authority" of the Trustees to manage such rights.

By the above laws, the Legislature saw fit to subject the Trustees' authority and proprietary rights to certain items, i.e. the public rights of navigation, riparian rights and the right of the electorate to adopt rules and regulations concerning the management of their property and rights. If the Legislature had intended to subject the Trustees' authority or proprietary rights to the provisions of the Environmental Conservation Law, it was a simple enough provision to include. The fact that such provision was not included (indeed, its opposite was provided for by E.C.L. 11-0105 adopted in the same year as Chapter 233 of the Laws of 1972) is good evidence that the Laws were not intended to accomplish such a result. This omission gives rise to "an irrefutable inference...that what is omitted or not included was intended to be omitted or excluded." See, McKinney's Statutes §§ 213 and 240.

CONCLUSION

For the reasons stated above, this Court should affirm the lower Court's dismissal of the accusatory instrument against Defendant.

Respectfully submitted,



John P. Courtney, Esq.
Attorney for the Trustees of
the Freeholders & Commonalty
of the Town of East Hampton
P.O. Box 720 - 249 Main Street
Amagansett, NY 11930