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ZONING AND LAND USE PLANNING

An Old Law and Even Older Patent Resolve Modern Clamming Disputes

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The Long Island Sound is one of the gems of New York State, recognized for its beauty, for its peacefulness, and, especially farther out on Long Island's North Fork, for its connection to the Atlantic Ocean. The Sound is used for recreation by boaters, swimmers, and others who are drawn to its beaches and vistas. It also is used for a wide range of commercial activities. And, in that regard, the Sound—alone or in conjunction with the various bays, coves, harbors, and inlets that border the coast of Long Island's North Shore—often becomes the subject of litigation.

Consider, for example, a case pending as of the time of this writing in Supreme Court, Nassau County, that was brought by the Town of Oyster Bay against the New York State Department of Environmental Conservation (DEC) and Frank M. Flower & Sons, Inc. (FMF). *Town of Oyster Bay v. New York State Depart-*

ment of Environmental Conservation, No. 606781/22 (Sup. Ct. Nassau Co.). Here, the town challenged FMF's right to dredge clams under a DEC permit from uncertified waters in Mill Neck Creek, an estuary on the North Shore of Long Island that feeds into Oyster Bay Harbor, which is a tributary of the Long Island Sound, and to transplant them to any of four certified

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relay (cleansing) areas located in Oyster Bay Harbor.

Pursuant to the Andros Patent of 1677—a colonial patent that Governor General Edmund Andros, acting on behalf of James, Duke of York, who had title to Oyster Bay from King Charles II, issued to the town's predecessors-in-interest in 1677—the town owns the underwater lands of Mill Neck Creek. The town leased

those underwater lands to FMF. The underlying basis for the town's action was that Mill Neck Creek is an environmentally sensitive area and that FMF's activities will cause harm to the estuary. The town also raised several legal issues, including whether the DEC should have obtained the town's consent before it issued the permit to FMF. Notably, late last month, the trial court denied the town's motion for a preliminary injunction, and the case's ultimate resolution remains to be seen.

The Andros Patent

Another recent case with similarly interesting facts and questions of law was filed in August 2010 in Supreme Court, Suffolk County, naming both the Town of Oyster Bay and New York State and seeking a declaratory judgment as to the ownership of underwater lands between Oyster Bay Harbor and the Long Island Sound. The case subsequently was transferred to Supreme Court, Nassau County. *Murphy v. Town of Oyster Bay*, No. 624/12 (Sup. Ct. Nassau Co.).

The plaintiff, Bryan Murphy, was licensed by the DEC to harvest shell-

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fish from marine waters owned by New York State. On Jan. 1, 2010, the plaintiff received a citation from the Town of Oyster Bay for unlawfully shellfishing in waters owned by the town without a license issued by the town. The plaintiff received a similar citation on March 25, 2010. The plaintiff contended that the underwater lands where he was shellfishing actually were a part of the Long Island Sound that was owned by New York State and for which he had an appropriate permit from the DEC. Therefore, the plaintiff asserted, the town-issued citations were unenforceable. The town disputed that contention.

To resolve the case, the trial court examined the Andros Patent, which granted all land in an area “Bounded on the North by the [Long Island] Sound, on the East by the Huntington Limmits on the South part by the sea and part by Hempstead Limmits, and on the West by the Bounds of Hempstead aforesaid.” (The northern portion of the Town of Hempstead became the town of North Hempstead in 1784.)

The state moved for summary judgment, arguing that the border between the Long Island Sound and Oyster Bay is an imaginary geodesic line connecting headlands located at Rocky Point and Whitewood Point. The town opposed and, among other things, cross-moved for summary judgment, arguing that the proper headlands for defining the border between Oyster Bay and the Long Island Sound are located farther north than the state asserted.

By order dated Jan. 12, 2016, the Supreme Court granted the state’s

motion for summary judgment, denied the town’s cross motion for summary judgment, and granted judgment in favor of the plaintiff. Thereafter, the court issued a judgment that declared that the boundary line between Oyster Bay and the Long Island Sound is the line running east from Rocky Point in Oyster Bay to Whitewood Point on Lloyd’s Neck, and that the state owns all of the underwater lands north of that line.

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The town appealed to the Appellate Division, Second Department, which affirmed. *Murphy v. Town of Oyster Bay*, 171 A.D.3d 1079 (2d Dept. 2019).

The Second Department’s Decision

In its decision, the Appellate Court explained that, in 1776, New York State, as the sovereign successor to the English Crown, became the owner of all underwater lands within its jurisdiction, except where the Crown had previously parted with title. The court added that the town, as successor-in-interest to the grantees named in the Andros Patent, owns the underwater land beneath Oyster Bay—and that the extent of

the town’s ownership depends on the language of the Andros Patent.

The court pointed out, however, that the Andros Patent’s declaration of the northern maritime border is silent as to which headlands define the extent of “the Sound,” and that the state and town did not agree about that border. The court noted that the town and the state had presented maps to the trial court depicting undisputed geographic features, lexicographic authorities in support of their competing interpretations of the Andros Patent, and evidence showing that they recently asserted competing claims to the waters where the plaintiff was shellfishing.

The court emphasized that the state, in support of its motion for summary judgment and in opposition to the town’s cross motion for summary judgment, had proffered materials establishing that its preferred boundary satisfied the three-part definition of a juridical bay as commonly understood and applied under conventional international law. See *United States v. Maine*, 469 U.S. 504, 513-519, 522 n. 14 (1985).

By contrast, the appellate court added, the town’s evidence “consisted for the most part of expert affidavits purporting to apply those same principles” but that demonstrated that the town’s proposed alternative boundary “only satisfied two of the three components necessary for satisfying of the definition of a juridical bay.”

The court found that the record contained no factual matter that might support a different conclusion

and, in particular, that the record did not include evidence showing “some different historical understanding of Oyster Bay or bays more generally, or personal accounts of mariners or other witnesses” that, if credited, might support the town’s proposed headlands.

Accordingly, the court decided that the state’s proposed boundary line was “the only fair interpretation of the Andros Patent.” It concluded that the trial court had appropriately resolved the dispute as a matter of law, and it agreed with the trial court’s declaration about the boundary line between Oyster Bay and the Long Island Sound, and its conclusion that the state owns all of the underwater lands north of that line.

The 1881 Statute

The town moved for leave to reargue and/or renew in the Appellate Division, but the appellate court denied the town’s motion.

Thereafter, the town applied to the trial court for an order vacating its prior order and judgment and declaring the town’s northern boundary “at the center of Long Island Sound at the States boundary with the Commonwealth of Connecticut” based on the boundary established by the New York State Legislature in Chapter 695 of the Laws of 1881.

After the trial court denied that request, the town moved to reargue.

In November 2020, the trial court granted the town’s motion to reargue. In doing so, it re-examined its prior analysis of the 1881 statute, which provides:

Section 2. The boundary lines of the several towns in the Counties of Queens and Suffolk that adjoin Long Island Sound are hereby extended northwardly into Long Island Sound at right angles to the general trend of the coast at their several respective points, until they intersect the boundary line between the states of New York and Connecticut as lately established by the Commissioners of the said states and confirmed by the respective legislatures thereof. [Prior to 1899, Queens County included the area that later became Nassau County.]

Section 3. The jurisdiction of the legally constituted officers of Queens and Suffolk counties, and of the respective towns of said counties bordering on Long Island Sound, is hereby extended over the waters of said sound to the Connecticut state line.

In its November 2020 decision, the trial court explained that it had previously focused on “ownership” of the underwater lands. Now, however, the court distinguished “ownership” of the underwater lands from “jurisdiction” over them. It reasoned that the determinative issue was jurisdiction, not ownership. Put differently, because the plaintiff sought to enjoin the town from exercising any jurisdiction over the area in dispute, the plaintiff was “calling into play the applicability of Chapter 695 of the Laws of 1881.”

The court said that although its conclusion that the town did not have any right, title and interest beyond what was given by the Andros Patent might be correct with respect to ownership, that was “not relevant

with respect to the jurisdiction” that the town sought to establish.

Focusing on the 1881 law, the court then decided that the town had jurisdiction to issue summonses for illegal shellfishing in the Long Island Sound “up to and including the Connecticut border.” It added that, in the interests of justice, it would not restore the summonses the town issued to the plaintiff in January and March 2010.

Finally, the court concluded that its holding did not have any effect on its prior holding that the state owns “all of the underwater lands north of [the boundary line between Oyster Bay and Long Island Sound...running east from Rocky Point to Oyster Bay to Whitewood Point on Lloyd’s Neck].”

Conclusion

As the decisions discussed in this column indicate, determining the ownership of underwater lands or the waters on the North Shore of Long Island may require examining colonial patents and statutes that are over a century old. The practical impact of those determinations also may require careful parsing of the applicable language regarding “ownership” and “jurisdiction.” Only then may an issue regarding the use of the waters on the North Shore of Long Island be finally resolved.