

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 2022-P-0346

Matthew Haney, Trustee of the
Gooseberry Island Trust
Plaintiff/Appellant,

v.

Mashpee Wampanoag Tribal Council, Inc., and
Mashpee Wampanoag Tribe

Defendants/Appellees

REPLY BRIEF OF THE PLAINTIFF/APPELLANT

MATTHEW HANEY

PAUL REVERE, III,
BBO #636200
revererii@aol.com
226 RIVER VIEW LANE
CENTERVILLE, MASSACHUSETTS 02632
(508) 237-1620

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ARGUMENT

I. The Wampanoags. Brief Fails To Recognize That All of Gooseberry's Claims Derive From Competing Property Rights Claims To the Use of Private Tidelands and State Waters

In its brief, the Mashpee Wampanoag Tribe ("Wampanoags") argue that: (i) the Plaintiff Matthew Haney as Trustee of the Gooseberry Island Trust's ("Gooseberry") claims are nothing more than run of the mill tort claims which are subject to sovereign immunity; and (ii) the immovable property exemption from sovereign immunity does not even exist. In making these arguments, the Wampanoags simply fail to acknowledge that all of Gooseberry's claims are property matters arising from the Wampanoag's engaging in aquacultural activities on private tidelands of Gooseberry to which there is no dispute are owned by Gooseberry or engaging in activities on state lands contrary to their license which impact private lands of Gooseberry. Each of these actions serve as a basis for jurisdiction of the Massachusetts courts under the immovable property exception.

Under Massachusetts law, the Commonwealth of Massachusetts holds title to lands beneath the mean low water mark and private property owners own land the land above mean low water adjacent to their property. *Home for Aged Women v. Commonwealth*, 202 Mass. 422, 427 (1909) ("The waters and the land under them beyond the line of

private ownership are held by the State, both as owner of the fee and as the repository of sovereign power"). Here, Gooseberry owns all of the land down to mean low water around Gooseberry Island. Pursuant to G.L. ch. 130, Sec. 57, the commonwealth has authorized municipalities to grant the exclusive right to engage in shellfish propagation in coastal waters of the commonwealth, of tidal flats or land under coastal waters" but that statute provides no authority to "impair the private rights of any person" or to authorize aquaculture on private land or private tidelands owned by others. *Pazolt v. Dir. of Div. of Marine Fisheries*, 417 Mass. 565, 571-573 (1994).

The Complaint in this matter contained four counts each relating to the invasion of private tidelands as follows: (i) trespass; (ii) declaratory judgment; (iii) private nuisance; and (iv) public nuisance. A close reading of each of the claims shows that they are primarily property claims arising out of a dispute over rights in private tidelands and, secondarily, a dispute over the Wampanoags aquacultural operations under a state license that prohibits impacts on private lands.

In particular, Count I - Trespass provides:

21. The Corporation, the Tribe, and their agents have no right to use or occupy the island or private tidelands owned by Gooseberry.

22. The Corporation, the Tribe, and their agents have no right to place racks or cages on private tidelands of the island owned by Gooseberry.

23. The Corporation, the Tribe, and their agents have no right to leave piles of shells, trash, and other debris on the island and private tidelands owned by Gooseberry as part of their aquaculture activities on the licensed area.

24. No individual has granted a right to use and occupy the island and private tidelands owned by Gooseberry to the Corporation, the Tribe, and their agents.

WHEREFORE, Gooseberry requests that this Court enter judgment as follows:

a. Declaring that:

i. The Corporation, the Tribe, and their agents have no right to use or occupy the island or private tidelands owned by Gooseberry; no right to place racks or cages on private tidelands of the island owned by Gooseberry; and no right leave piles of shells, trash, and other debris on the island and private tidelands owned by Gooseberry as part of their aquaculture activities on the licensed area; and

ii. The Corporation, the Tribe, and their agents are liable to Gooseberry for the fair market value of their use and occupancy, placement of racks or cages, and leaving piles of shells, trash, and other debris on the island and private tidelands owned by Gooseberry including specifically the cost of trash removal.

Appendix at pp. 10-11 (emphasis supplied).

Similarly, Count II - Declaratory Judgment provides:

26. Gooseberry and the Corporation and the Tribe have a dispute as to the location of the shellfish propagation license issued to the Corporation/Tribe by the Town of Mashpee.

27. Gooseberry and the Corporation and the Tribe have a dispute as to whether the Corporation/Tribe has a lawful shellfish propagation license as it is not a "person" under G.L. ch. 130.

28. Gooseberry and the Corporation and the Tribe have a dispute as to whether the shellfish propagation license authorizes the use of racks or cages and to place them in a manner which impedes Gooseberry's ability to navigate to and from the island owned by Gooseberry.

29. Gooseberry and the Corporation and the Tribe have a dispute as to the location of the license on land owned by Gooseberry above mean low water on the island.

30. Gooseberry and the Corporation and the Tribe have a dispute as to the Corporation, the Tribe, and their agents using Gooseberry's private tidelands on the island to access the area of the shellfish propagation license area.

31. Gooseberry and the Corporation and the Tribe have a dispute as to whether aquaculture is the practice of an aboriginal fishing or an aboriginal shell fishing rights which the Corporation and the Tribe asserts allows it to use private tidelands of Gooseberry's island.

WHEREFORE, Gooseberry requests that this Court enter judgment:

a. Declaring and defining the location of the shellfish propagation license issued to the Corporation and the Tribe by the Town of Mashpee;

b. Declaring that the Corporation and the Tribe are not the lawful holder of the shellfish propagation license as they are not a "person" under G.L. ch. 130;

c. Declaring that the shellfish propagation license shellfish does not authorizes the use of racks or cages, and to place them in a manner which impedes Gooseberry's ability to navigate to and from the island owned by Gooseberry;

d. Declaring that the Corporation and Tribe do not have a right to engage in shellfish propagation pursuant

to the shellfish propagation license on land owned by Gooseberry above low water on the island;

e. Declaring that the Corporation and Tribe cannot use Gooseberry's private tidelands on the island to access the area of the shellfish propagation license;

f. Declaring that aquaculture as practiced by the Corporation, the Tribe, and their agents at or near the license area is not the practice of an aboriginal fishing or an aboriginal shell fishing right; and

g.

h. Providing such other relief as the Court proper and just.

Appendix at pp, 12-14 (emphasis supplied).

Additionally, Count III - Private Nuisance provides:

33. The Corporation, and the Tribe, and their agents have improperly used the land in the area of the shellfish propagation license in a manner that has substantially and unreasonably interfered with Gooseberry's use and enjoyment of the island that it owns in Popponesset Bay by, among other things, placing racks or cages on the private tidelands of the island owned by Gooseberry, and leaving piles of shells, trash, and other debris on the island and private tidelands owned by Gooseberry as part of their aquaculture activities on the licensed area.

34. The interference is substantial and unreasonable as it interferes with Gooseberry's use of the island as the actions of the Corporation, the Tribe, and their agents require Gooseberry to remove racks or cages, trash, and other debris, and to disperse shells piles on the island.

35. The Corporation, the Tribe, and their agents claim a right to exclusively shellfish and engage in aquacultural activities in the area of the shellfish propagation license and the activities result in the unreasonable interference with Gooseberry's use of the island.

WHEREFORE, Gooseberry requests that this Court enter judgment as follows:

a. Declaring that Corporation, the Tribe, and their agents' actions constitute a private nuisance.

b. Issue an Order enjoining the Corporation, the Tribe, and their agents and requiring them to cease and desist from activities in the area of the shellfish propagation license and in the vicinity of the island in a manner which causes a nuisance on the Plaintiff's island and to abate any impacts from prior activities.

Appendix at pp. 14-15 (emphasis supplied).

Finally, Count III - Public Nuisance provides:

37. The Corporation, the Tribe, and their agents have improperly used the land in the area of the shellfish propagation license and surrounding area in a manner that has substantially and unreasonably interfered with the public use of Popponesset Bay and its tidelands by, among other things, placing racks or cages in the area of the shellfish propagation license when they have no authority to do so interfering with the navigation rights of the public and placing said objects in a manner that causes them to become free and float in the waters of the bay until they come to rest on the private tidelands of waterfront property owners.

38. The Corporation, the Tribe, and their agents have improperly used the land in the area of the shellfish propagation license and surrounding area in a manner that has substantially and unreasonably interfered with the public use of Popponesset Bay and its tidelands by leaving piles of shells, trash, and other debris on the island and private tidelands owned by Gooseberry as part of their aquaculture activities on the licensed area which interfere with the public's rights to fish, fowl, and navigate safely in the private tidelands of Gooseberry and other waterfront property owners, and other areas of Popponesset Bay.

39. The interference is significant, substantial and unreasonable as it interferes with Gooseberry's use of

the island and the public's use of tidelands and waters of Popponesset Bay.

40. Gooseberry as owner of an island near the area of the shellfish propagation license is uniquely and specially harmed by the activities of the Corporation, the Tribe, and their agents in the area of the shellfish propagation license **as the activities interfere with navigation to and from the island and result in racks or cages, trash and other debris coming to land or be placed upon the private tidelands of Gooseberry on the island.**

WHEREFORE, Gooseberry requests that this Court enter judgment as follows:

a. Declaring that the Corporation, the Tribe, and their agents actions constitute a public nuisance.

b. Issue an Order requiring the Corporation, the Tribe, and their agents to cease and desist from activities in the area of the shellfish propagation license and in the vicinity of the island in a manner which causes a nuisance on the Plaintiff's island and to abate any impacts from prior activities.

Appendix at pp. 15-17 (emphasis supplied).

As can be seen from the foregoing recitation, Gooseberry's claims are not ordinary tort claims, but derive solely from the Wampanoags' assertion that they may invade and destroy Gooseberry's private property and the natural resources on it or use a state licensed area in a manner that violates Gooseberry's private property rights. Each of these actions serve as a basis for jurisdiction of the Massachusetts courts as they are limited solely to actions involving a dispute over a claim of right to land under the immovable property exception.

CONCLUSION

The Superior Court Decision should be reversed and this matter remanded for further proceedings.

Respectfully Submitted,

/s/Paul Revere, III

Paul Revere, III
(BBO #636200)
Law Offices of Paul Revere, III
226 River View Lane
Centerville, Massachusetts 02632
(508)237-1620
revereiii@aol.com

Date: September 20, 2022

MASS. R. APP. P. 16(K) CERTIFICATION

I, Paul Revere, III, certify that the foregoing Brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. App. P. 16(6)(a) (pertinent findings in or memorandum of decision); Mass. R. App. P. 16(f) (reproduction of statutes, rules and regulations); Mass. R. App. P. 16(h) (length of briefs); Mass. R. App. P. 18 (appendix to brief); and Mass. R. App. P. 20 (form of briefs, appendices, and other papers).

/s/Paul Revere, III

Paul Revere, III

CERTIFICATE OF SERVICE

Pursuant to M.R.A.P. 13(d), I certify that on September 20, 2022, I served this Brief and Appendix by electronically filing it with a copy to defendant's counsel of record.

/s/Paul Revere, III
Paul Revere, III

ADDENDUM

STATUTES

G.L. 130, Sec. 57

The city council or mayor of any city, or the selectmen of any town, may upon written application, accompanied by plans sufficient to show the intended project and project area to be licensed, and after public notice and hearing pursuant to section sixty, grant to any person a shellfish aquaculture license.

Said license shall authorize said licensee in such city or town at all times of the year, in, upon, or from a specific portion of coastal waters of the commonwealth, of tidal flats or land under coastal waters: (1) to plant and grow shellfish, bottom/off bottom culture; (2) to place shellfish in or under protective devices affixed directly to the tidal flats or land under coastal waters, such as boxes, trays, pens, bags, or nets; (3) to harvest and take legal shellfish; (4) to plant cultch for the purpose of catching shellfish seed; and (5) to grow shellfish by means of racks, rafts or floats.

After receipt of a written application by the city council or selectmen, and after the notice and public hearing requirements of this section are satisfied and the licensing authority approves the application, the director shall, after inspection of the intended project area, certify that issuance of a shellfish aquaculture license and operation thereunder will cause no substantial adverse effect on the shellfish or other natural resources of the city or town. Upon such certification by the director, the city council or selectmen may issue the license, provided, however, that no license shall be issued for any areas then or within two years prior thereto, closed for municipal cultivation under the provisions of section fifty-four. Failure of the director to so certify shall be deemed a denial of the shellfish aquaculture license. The director's certification or refusal to certify shall be reviewable in accordance with section fourteen of chapter thirty A.

Licenses under this section shall be granted or denied in writing within sixty days after receipt of the written application and shall be issued upon forms supplied by such cities and towns and upon such terms and conditions and subject to such terms, conditions or regulations as the city council or selectmen issuing the same shall deem proper, but not so as to impair the private rights of any person or to materially obstruct navigable waters, and said license shall describe by metes and bounds the waters, flats or creeks covered thereby. Shellfish aquaculture licenses pursuant to this section shall be subject to any rules and regulations promulgated by the director, including those concerning the use and scope of predator controls in the intertidal

zone, and said licenses may be further conditioned by the director as he deems necessary and appropriate, including species to be propagated and the source and movement of seed shellfish.

Said license shall be for a period of not more than ten years and may be renewed for similar periods. Said license may be revoked by the city council, selectmen or the director for failure to comply with any terms, conditions or regulations set forth by these entities, or for lack of substantial use of the licensed area. Said licensee shall have the right to the exclusive use of the lands and waters for the purposes of growing shellfish thereon, and the licensee shall plainly mark the boundaries of said area. The selectmen or city council shall permit, as a condition of the license, such public uses of said waters and lands as are compatible with the aquacultural enterprise.

Whoever without the consent of the licensee, unless otherwise permitted by the terms and conditions of said license: (1) takes shellfish from the licensed lands or waters or from said racks, rafts or floats; (2) disturbs the licensed area or the growth of the shellfish thereon in any way; (3) discharges any substance which may directly or indirectly injure the shellfish; (4) willfully injures, defaces, destroys, removes or trespasses upon said racks, rafts, or floats; or (5) willfully injures, defaces, destroys, removes or trespasses upon said protective devices affixed directly to the tidal flats, such as boxes, trays, pens, bags, or nets shall be liable in tort for treble damages and costs to the licensee injured by such act.

Nothing in this section shall be deemed to affect the validity, conditions, or terms of any license granted under the corresponding provisions of earlier laws and in full force upon the effective date of this section. Nothing in this section shall excuse the licensee from complying with other laws of the commonwealth, including environmental laws and laws concerning interference with navigation.

Said shellfish aquaculture license may be transferred pursuant to section fifty-eight and all rights and privileges enjoyed by the licensee shall be assumed by the transferee.

Any license issued under the provisions of this section shall, upon the death of the licensee, continue in full force and effect, subject to the same terms, conditions, and regulations imposed upon the original license, for the balance of the unexpired term, or one year whichever is longer, for the use of the members of the immediate family of the deceased licensee. For the purposes of this section, immediate family shall mean the spouse, son, daughter, mother, father, brother and sister of said deceased licensee.

Nothing in this section shall be deemed to affect the validity, conditions, or term of any license granted under corresponding provisions of earlier laws and in full force upon the effective date of this section.