

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC.

SUPERIOR COURT

TOWN OF MIDDLETOWN

:

:

V.

: **C. A. NO. N3 98-281A**

:

LEE WEHRLEY

:

DECISION

DIMITRI, J. This matter, once again,¹ comes before this Court on the defendant's motion to dismiss the complaint brought against him by the Town of Middletown.

Facts/Travel

The Town of Middletown, in 1998, enacted an ordinance §§94.31 (I)(1) through (6) regulating the riding of horses at town beaches. In particular §94.31(I)(1) bans completely the riding of any horse during the summer season. The language of that section reads:

§94.31 (I)(1) During the period from the Saturday before Memorial Day to the Sunday after Labor Day, no person shall ride any horse upon Sachuest or Third Beaches.

§§94.31 (I)(2) through 94.31(I)(6) do not prohibit riding on horseback, but apparently are designed to regulate the location, manner, points of entrance and exit to said beaches by those engaging in that activity.

¹ The defendant previously filed and argued his first motion to dismiss before Williams, J. which was denied.

On August 8, 1998 the defendant, Lee Wehrley, (“Wehrley”) (“defendant”) led a group of riders on horseback from the Newport Equestrian Center onto Third Beach in violation of the instant ordinance, specifically, §94.31(I)(1).

Subsequently, Wehrley was summoned to appear at the Middletown Municipal Court, tried, convicted and fined \$250.00. The defendant appealed to the Superior Court where he filed and argued his initial motion to dismiss before Mr. Justice Williams.

Wehrley’s argument before Judge Williams was twofold:

(1) That the ordinance in question was violative of Article 1 §17 of the Rhode Island Constitution, and,

(2) That the ordinance was vague in that it failed to instruct the defendant as to the proscribed conduct. He argued, “The charge does not indicate what are the boundaries of the property lines of the so-called ‘Beach’ on which Wehrley was allegedly riding his horse.” In Defendant’s Supplementary Memorandum in Support of his Motion to Dismiss, p. 3., to substantiate his position on this issue, the defendant cited State v. Ibbison, 448 A.2d 728 (R.I. 1982). This argument was treated by Judge Williams and was found to be without merit. The identical argument is raised again before this Court and will not be revisited since the decision of Williams, J. is now the law of the case, but it is sufficient to state that this Court agrees with that ruling. Further, this Court has reviewed the Ibbison decision and finds that it has no application to the issues presented here.

As indicated above the defendant also argued before Judge Williams that the ordinance in question was violative of Article 1 §17 of the Rhode Island Constitution which states in brief, that “. . . [t]he people shall continue to enjoy and freely exercise . . . the privileges of the shore, to which they

have been heretofore entitled under the charter and usages of this State, including but not limited to passage along the shore.”

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Obviously, the thrust of Wehrley’s argument before Williams, J. was directed at the jurisdiction of the Town to enact such an ordinance in light of Article 1 §17.

In a written decision denying the defendant’s motion, Judge Williams declared that Article 1 §17 “ . . . [e]nsures that people shall be secure in their rights to use and enjoy the natural resources of the state with due regard for their preservation. But this section does not ensure that the exercise of such rights will be totally unburdened by any governmental regulation intended to preserve such natural resources, to secure their existence for future generations and to protect the rights of all people to enjoy this state’s natural beauty. In fact the latter part of Section 17 reserves to the General Assembly the authority to monitor and preserve the natural resources of this state.” (Decision, Williams, J., p. 6).

Judge Williams, quite properly, recognized that the Rhode Island Supreme Court in Hourihan v. Middletown, No. 98-359 (1998) was faced with the same issue and ruled that the regulation prohibiting the riding of horses on town beaches was a valid one pursuant to the authority granted to local communities under G.L. 1956 §45-6-1 (i.e. Home Rule Charter Provision).² The Supreme Court stated, because the ordinances clearly concern the “preservation of the public peace, health, safety, comfort and welfare of the user of beaches of the town, they also fall within the authorization granted by the Middletown Home Rule Charter.” Hourihan v. Middletown, (*supra*, pp. 2, 3).

This case was called for trial before this Judge on January 24, 2000. The defendant,

² 45-6-1 provides in part: “Town Councils . . . may . . . make and ordain all ordinances and regulations for their respective towns not repugnant to law . . . for the well ordering, managing, and directing of the prudential affairs and police of their respective towns.”

resolute in his redundancy, raised the issue of jurisdiction once more. This time, however, an additional element was added. As evidence of his perceived rectitude on the issue of jurisdiction, Wehrley introduced a copy of a Quit Claim Deed conveying, on the 23rd of August, 1985, Third Beach from the United States of America to the grantee, the Town of Middletown. Said deed was accepted into evidence and made part of the court file for the purpose of this motion. The defendant, in his Memorandum, argues that said deed and other authority cited “. . .[s]upport the proposition that the beach ‘mean high tide’ is held in trust by the state for the benefit of all its citizens.” (Defendant’s Memorandum, 2/16/00, p. 1). As additional authority Wehrley cites Jackvony v. Powel, 67 R.I. 218 (1941).

This Court rejects the defendant’s argument on this issue since it finds no language in the aforementioned deed or in the Jackvony decision to support his assertions.

In Jackvony, supra, the Rhode Island Supreme Court held that the Easton Beach Commission’s intention to erect a fence on the shore between the high and low water lines south of Easton Beach and only allow those to pass who would pay a fee, violated Article 1 §17 of the Rhode Island Constitution since it denied to the citizens of this state the right of freely “[p]assing along the shore.”

At the time of the Jackvony decision Article 1 §17 read:

“The people shall continue to enjoy and freely exercise all rights of fishery, and the privileges of the shore, to which they have heretofore been entitled under the charter and usages of this state. But no new right is intended to be granted, nor any existing right impaired by this declaration.”

Although the Jackvony court left open the question of whether the rights provided by Article 1 §17 were subject to reasonable regulation, See Cavanaugh v. Town of Narragansett,

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WC 91-0496, Superior Court Decision, Williams, J., Oct.. 10, 1997, p. 9, it did however suggest that “. . . [A] public right of passage along the shore, at least for certain proper purposes may . . . be subject, very possibly, to reasonable regulation by Acts of the General Assembly in the interest of the people of the State.” Jackvony v. Powel, (supra, p. 227).

In 1986 the Rhode Island Constitutional Convention amended Article 1 §17 to read in part:

“[t]he people shall continue to enjoy and freely exercise all the rights of fishery, *and the privileges of the shore, to which they have been heretofore entitled* under the charter and usages of this state, *including* but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and *passage along the shore*; and they shall be secure in their rights to use and enjoyment of the natural resources of the state with due regard for the preservation of their values; and it shall be the duty of the general assembly to provide for the conservation [of] . . . and to adopt all means necessary and proper by law to protect the natural environment of the people of the state.”

The same Convention also promulgated new language for Article 1 §16 which reads in part:

“[t]he powers of the state and of its *municipalities* to regulate and control the use of land and water in furtherance of the preservation, regeneration, and restoration of the natural environment, and in furtherance of the protection of the rights of the people to enjoy and freely exercise the rights of fishery and the privileges of the shore, as those rights and duties are set forth in Section 17, shall be an exercise of the police powers of the state, shall be liberally construed, and shall not be deemed to be a public use of private property.”

There is little question in the mind of this Court, from the clear language of both articles, that the General Assembly may reasonably regulate the right of passage along our shores and cede such authority to municipalities pursuant to GL 45-6-1

For the reasons stated, and in light of the decision of the Supreme Court in Hourihan v. Middletown, supra, the defendant's motion is denied.