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1995 Supreme Court of Rhode Island Survey : Land Use

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Land Use. *Greater Providence Chamber of Commerce v. State*, 657 A.2d 1038 (R.I. 1995). The state's interest in property under the public trust doctrine is extinguished when the land is granted away through an express legislative act or when the property owner, under the express or implied approval of the state, fills and improves such property.

The public trust doctrine is a common law doctrine that grants the state title to all tidewaters and shoreline land below the mean-high-water mark,¹ "in a trustee capacity for the use and benefit of all citizens."² The Rhode Island Supreme Court, in *Greater Providence Chamber of Commerce v. State*³ clarified its previous holding in *Hall v. Nascimento*⁴ and determined that the public trust doctrine may be extinguished when the state legislature expressly grants title in applicable property to another,⁵ or when the state expressly or impliedly grants approval to a landowner to fill property below the mean high-water mark and the landowner subsequently improves the property in reliance of the state's approval.⁶

FACTS AND TRAVEL

The plaintiffs in *Chamber of Commerce*, landowners, Greater Providence Chamber of Commerce, Rhode Island School of Design (RISD), Narragansett Electric Company, and Providence Gas Company,⁷ in response to the court's holding in *Hall v. Nascimento*, sought in the Superior Court a declaratory judgement concerning

1. The mean high-water mark is the "point on the shore which the average high tide will reach." Black's Law Dictionary 677 (6th ed. 1990).

2. *Greater Providence Chamber of Commerce v. State*, 657 A.2d 1038, 1042 (R.I. 1995).

3. 657 A.2d 1038 (R.I. 1995).

4. 594 A.2d 874 (R.I. 1991). In *Hall*, the court found that the public trust doctrine was still in force in regard to shoreline property that had been filled below the mean high tide mark by the Army Corps of Engineers. The court, in overturning the trial court's award of title to the property owner, based its holding on the fact that the property owner's title did not abut the former mean-high tide line, which foreclosed any littoral rights in filled land to the property owner, in the absence of any legislative grant or state approval. *Id.*

5. 657 A.2d at 1040.

6. *Id.* at 1044.

7. Capital Properties, Inc., Citizen's Savings Bank, Fleet National Bank, Johnson & Wales University, Rhode Island Hospital Trust National Bank, New England Legal Foundation and Newport Realty, Inc. filed amici curiae briefs in support of the plaintiffs. *Id.* at 1039, n.1.

the application of the public trust doctrine to plaintiff's property filled below prior mean high-water lines.⁸ The defendant, State of Rhode Island,⁹ agreed with the plaintiffs on a statement of facts.¹⁰

Title to the RISD and the Chamber of Commerce property, known as the "Cove Lands" properties,¹¹ neither of which border on navigable tidal water, was conveyed to the City of Providence by the State of Rhode Island through the Cove Lands Grant on May 14, 1870, which was authorized by the Rhode Island General Assembly.¹² The Providence Gas Company property, located along the Providence River on filled land between the prior mean high-water mark and the harbor-line,¹³ was filled in 1907, 1909, and 1914 pursuant to permits obtained by Providence Gas Co. from the Rhode Island Board of Harbor Commissioners.¹⁴ The Narragansett Electric Co. property, located on filled land on the Providence

8. *Id.* at 1039.

9. Coastal States Organization, Inc., Conservation Law Foundation, and Save the Bay, Inc. filed amici curiae briefs in support of the state and the application of the public trust doctrine. *Id.* at 1039, n.1.

10. *Id.* at 1039.

11. The Cove Lands are properties that were created by the filling of the Great Salt Cove, a tidal saltwater cove that encompassed several hundred acres of downtown Providence up until its gradual filling, which commenced in the early 18th. century.

12. 657 A.2d at 1040. The Act states:

That the General Treasurer of this State be, and hereby is, instructed to execute a conveyance to the City of Providence, of all the right, title and interest that the State has in and to the Cove Lands,(so called,) in said city; being the lands now or heretofore flowed by tide water above Weybosset Bridge, in said city, said conveyance to be made and executed under the direction and to the satisfaction of the Attorney General of the State, whenever the city of Providence shall pay to the State the sum of Two Hundred Thousand Dollars, in a satisfactory bond, to be approved by the Governor, payable in five years, without interest, provided that said bond be executed within six months from the passage of this resolution.

1870 R.I. Acts & Resolves 213 (Addendum).

13. 657 A.2d at 1041 "The harbor lines were drafted in cooperation between state and local authorities to establish the point beyond which fill, wharves, and other structures would create an obstruction to navigation, commerce, and fishery." *Id.* at 1044.

14. *Id.* at 1041.

River between the mean high-water mark and the harbor line, was filled between 1857 and 1886.¹⁵

Upon agreement to these facts, the parties filed a joint petition requesting a declaratory judgement as to whether the public trust doctrine applied to these properties.¹⁶ The superior court, pursuant to Rhode Island General Laws section 9-24-25,¹⁷ certified this question to the Rhode Island Supreme Court for determination.¹⁸

BACKGROUND

The roots of the public trust doctrine are very old and widespread.¹⁹ While originating in Roman Law, it was English common law that brought the doctrine to the common law of Rhode Island.²⁰ The public trust doctrine was vested within the original thirteen colonies after the American Revolution subject only to the United States Constitution,²¹ and as other states entered the Union, the same right to public trust in tidelands was granted to them.²²

The purpose of the public trust doctrine in Rhode Island and many other jurisdictions is to protect the "unique resource that tidal waters constitute"²³ for fishery, commerce and navigation.²⁴

15. *Id.* The court notes that there was no indication of express approval of the filling activity by the State of Rhode Island on the record before the Superior Court. *Id.*

16. *Id.* at 1039.

17. R.I. Gen. Laws § 9-24-25 states:

Whenever any civil action, legal or equitable in character, is pending in a district court or in a superior court, and the parties shall file in the clerk's office an agreed statement of facts in such action, the court shall certify the action to the supreme court to be there heard and determined. After having decided the action, the supreme court shall send back the papers therein, with its decision certified thereon, to the court from which the action was certified, which shall enter final judgment upon the decision.

R.I. Gen. Laws § 9-24-25 (1985).

18. 657 A.2d at 1039.

19. See Richard R. Powell & Patrick J. Rohan, Powell on Real Property 5B § 79.02(3) (1994); *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 Yale L.J. 762 (1970).

20. 657 A.2d at 1042.

21. *Shively v. Bowlby*, 152 U.S. 1, 57 (1894); *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892).

22. *Shively*, 152 U.S. at 57.

23. *Chamber of Commerce*, 657 A.2d at 1042.

24. *Id.* at 1044.

This purpose is usually thought to be best achieved by the state holding the lands below the mean high-water mark in public trust for the benefit of all citizens.²⁵

The public trust doctrine has been addressed by the Rhode Island Supreme Court on several occasions in the last century.²⁶ As the court noted in *Chamber of Commerce*, while "Rhode Island decisional law . . . [has] never cast aside the public-trust doctrine,"²⁷ the court's decision in *Hall* in 1991 in no small measure required clarification by *Chamber of Commerce* because *Hall* provided little guidance as to the court's reasoning in future cases that varied from the facts in *Hall*.

ANALYSIS AND HOLDING

In *Chamber of Commerce*, the court bifurcated its holding, addressing the RISD and Chamber of Commerce property as "Cove Lands" property, and treating the Providence Gas and Narragansett Electric Co. property as "harbor line" property.²⁸ The court found that the public trust doctrine was not applicable to the Cove Lands because title to the lands had been expressly granted by the Rhode Island Legislature.²⁹ The court noted that the Cove Lands were the subject of special legislation in the mid-19th century which prohibited construction on the cove without city consent, as well as legislation that revoked any grant of cove lands that had not been previously accepted.³⁰ The court noted that because the legislation regarding the development of the Cove Lands was unforgiving to private owners' implied common law riparian rights, "an express legislative grant was necessary and appropriate to convey an interest in the Cove Lands free of the public trust doctrine."³¹ Thus, the court held that the Cove Lands deed was valid,

25. *Id.* at 1042.

26. See *Hall v. Nascimento*, 594 A.2d 874 (R.I. 1991); *State v. Ibbison*, 448 A.2d 728 (R.I. 1982); *City of Providence v. Comstock*, 65 A. 307 (R.I. 1906); *Providence Steam Engine Co. v. Providence & Stonington Steamship Co.*, 12 R.I. 348 (1879).

27. 657 A.2d at 1042.

28. *Id.* at 1039.

29. *Id.* at 1041.

30. *Id.* at 1040.

31. *Id.*

and RISD and Chamber of Commerce own their property in fee simple absolute.³²

With respect to the "harbor line" properties, the court compared the circumstances surrounding the Providence Gas Co. and Narragansett Electric Co. with the circumstances and holding of *Hall*, and found that the public trust doctrine was not applicable to both power companies' properties.³³ The court, in reaching this conclusion, determined that the public trust doctrine may be extinguished even absent an express legislative grant, but in those cases a two part test must be applied.³⁴ The public trust doctrine will be extinguished and the owner will take in fee simple absolute if she can show that: (1) the filling of the shoreline was done with the express or implied approval of the state, and (2) that she improved³⁵ the filled land in reliance upon state approval to fill the land.³⁶

In analyzing the two power companies' properties under this test, the court concluded that the Providence Gas property met the first test because it had valid permits issued by the state to fill in its shoreline.³⁷ Secondly, Providence Gas, in constructing its plant, had considerably improved its property in reliance upon state approval, thereby passing the second test.³⁸ In addressing the Narragansett Electric property, the court noted that there was no express approval on record to fill the property.³⁹ The court determined that the state must have impliedly approved of the filling, for the process took years and was done publically within a busy harbor.⁴⁰ Secondly, because the power company had also improved its property, the court ruled that it had passed the two part test.⁴¹

32. *Id.* at 1041.

33. *Id.* at 1043-44.

34. *Id.* at 1044.

35. Improvement of real estate is a "valuable addition made to property . . . amounting to more than mere repairs Generally has reference to buildings, but may also include any permanent structure or other development, such as a street, sidewalks, sewers, utilities, etc.." Black's Law Dictionary 520 (6th ed. 1990).

36. *Chamber of Commerce*, 657 A.2d at 1044.

37. *Id.* at 1043.

38. *Id.* at 1043-44.

39. *Id.* at 1041.

40. *Id.*

41. *Id.* at 1043-44.

Thus, the court in *Chamber Commerce* determined that the public trust doctrine may be extinguished in shoreline property if there is an express grant of property from the state or, the owner can show express or implied approval of the state for the filling and the owner has improved the property in reliance of the state's approval.⁴²

CONCLUSION

While the ambiguity of the court's decision in *Hall*⁴³ may have left some littoral owners uncertain as to their interest in property that has for centuries been filled below original high-water marks, the court in *Chamber of Commerce* unequivocally set specific tests that every landowner may apply to determine if the public trust doctrine applies to portions or all of his or her property.

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42. *Id.* at 1044.

43. *See supra* note 4.