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Municipal Regulation of Shellfish Sale by Fishers to the Public in Rhode Island

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Prepared by Clare Harmon, candidate for *Juris Doctor*, December 2016

Roger Williams University
SCHOOL OF LAW

Marine Affairs Institute



THE
UNIVERSITY
OF RHODE ISLAND

LOCAL REGULATION OF THE SALE OF SHELLFISH BY FISHERS TO THE PUBLIC IN RHODE ISLAND

Any person wishing to sell shellfish must comply with municipal ordinances governing where and how businesses can operate, as well as with all applicable state requirements. Because these requirements differ from town to town, in different locations within a town, and for different types of businesses, case-by-case analysis is needed to determine the specific authorization and permitting requirements that apply.

This memorandum presents the following case study to illustrate how these requirements might play out in the context of one hypothetical direct-to-market shellfish business conducted within the state of Rhode Island. This case study is purely hypothetical and is not legal advice. Any person considering similar activities should obtain legal advice and/or contact the relevant town officials.

CASE STUDY: WICKFORD VILLAGE

A fisher who produces farmed oysters and harvests wild quahogs in Rhode Island waters intends to sell these products directly to the public from a tent located in the parking lot at the end of West Main Street abutting the harbor complex. A seafood retail establishment, Gardner's Wharf Seafood, is located close to the proposed site (Figure 1). The fisher has already obtained all necessary state licenses to sell her shellfish.

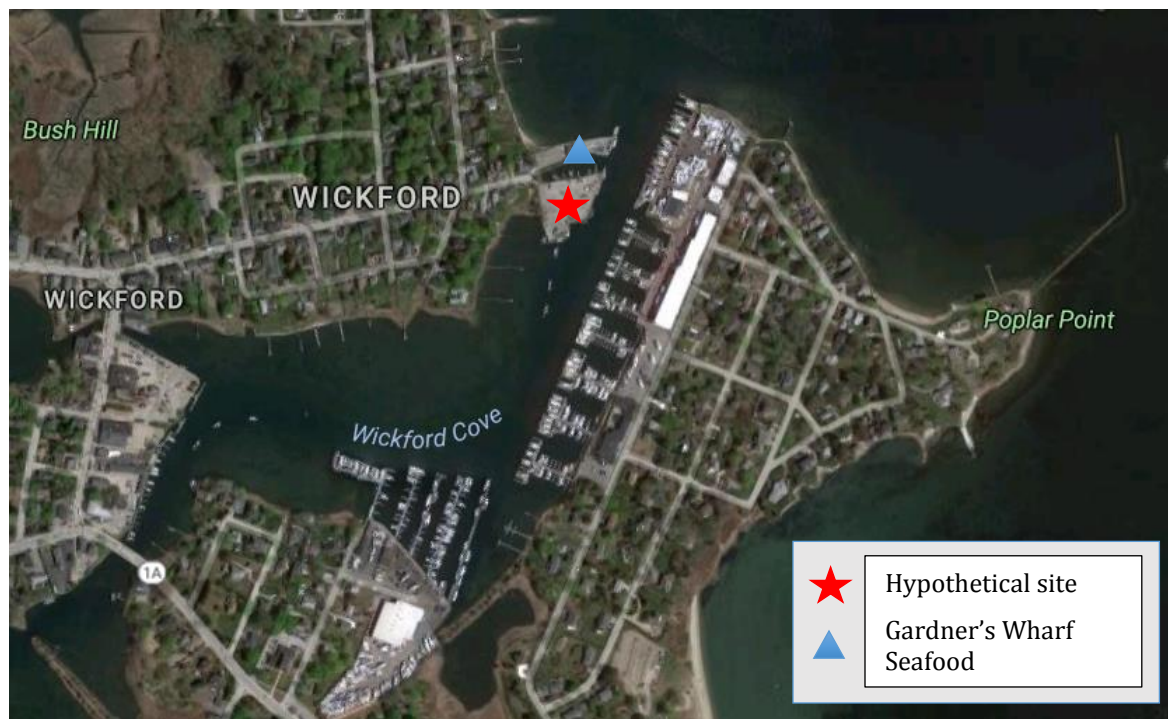


Figure 1. Map of Wickford, RI showing location of hypothetical shellfish sales.

The historic, waterfront Village of Wickford is one of nine villages within the Town of North Kingstown. Businesses in the Village must comply with Town’s ordinances, which include a range of obligations applicable to the sale of shellfish to the public. These include several types of licenses and permits as well as land use restrictions governing where licensed sellers can operate.

1. Peddler’s license

Certain types of businesses must obtain a license from the town. The precise nature of the fisher’s business determines whether a license is required and, if so, which license applies. In this case study, she would be classified as a “hawker” under state law.¹ North Kingstown requires a town peddler’s license to “hawk . . . foodstuffs . . . from any vehicle, cart, pushcart, basket or hand-carried cart within the town.”² The fisher would likely be subject to this requirement and therefore would be required to apply for a peddler’s license from the town council.³

To obtain a license to hawk perishable foodstuffs, the fisher would be required to submit a tax assessor verification form certifying that her tax payments are up to date and proof that she has obtained the applicable state licenses authorizing sale of perishable food items. In addition, she would be required to pay a fee unless her business is a non-profit or farmer’s cooperative.⁴ Licenses must limit the hours during which sales are permitted.⁵

Even if the fisher complies with these requirements, she may not be able to obtain a license because North Kingstown allows only 25 active licenses peddler’s licenses allowing the sale of perishable foodstuffs.⁶ The town maintains a waiting list for licenses should an opening arise.⁷ Alternatively, the ordinance authorizes the town clerk to issue special licenses “to town residents or other persons having a permanent establishment located within the town”⁸ and special event licenses to other persons.⁹ Special events include events such as parades, farmers’

¹ R.I. Gen. Laws § 5-11-1.1 (“‘Hawker’ means any person selling or offering for sale any goods, wares, or merchandise, including any food or beverage, on any public street, highway, or public right of way in the state from a stationary location”).

² North Kingstown Rev. Ord. § 9-141.

³ North Kingstown Rev. Ord. §§ 9-142 (“[e]very person . . . selling any goods . . . on any street or other public way within the town shall make application to the town council for a license.”).

⁴ North Kingstown Rev. Ord. §§ 9-2, 9-143. State law authorizes towns to issue licenses to hawkers and to charge fees for such licenses, provided that hawkers must prove they have been issued a permit to make retail sales by the state Division of Taxation. R.I. Gen. Laws § 5-11-18.

⁵ North Kingstown Rev. Ord. §§ 9-127, 9-142.

⁶ North Kingstown Rev. Ord. § 9-149.

⁷ *Id.*

⁸ *Id.* § 9-150.

⁹ *Id.* § 9-151.

markets, and sales of Christmas trees.¹⁰ Consultation with the town clerk would be required to determine the applicability of these alternatives.

If a peddler's license is not available, the fisher may be able to obtain a special license by combining with other interested sellers to set up a farmers' market under the North Kingstown code of ordinances.¹¹ In this scenario, the organization responsible for the market would be required to obtain a farmers' market permit from the town. A farmers' market permit requires the responsible entity to comply with a suite of requirements, such as appointment of a market manager,¹² payment of fees,¹³ and provision of insurance.¹⁴ Each participating vendor would need to be independently licensed, most likely via a special license or special event license.¹⁵

Farmer's markets are limited to certain types of activities and sales, which may not allow the sale of all types of seafood. To qualify as a farmers' market, a market must be "occasional or periodic," include three or more vendors selling from temporary outdoor spaces, and involve the sale of "home produced or locally grown farm produce, food, and agricultural crafts."¹⁶ More specifically, all "produce, plants, animal products, and other products" sold at the market must be *sold by the producer* or their authorized agent—wholesale vendors are explicitly prohibited.¹⁷ Conversely, no registered farms in the town can be excluded from participating in any market located on public property.¹⁸

The eligibility of the fisher to sell her seafood at a farmers' market in North Kingstown depends on whether she is considered a "producer." As defined by town ordinance, "producers" are those who offer products for sale that they "[grew] or prepared."¹⁹ Aquaculture is considered a farming activity, such that oysters and other cultured shellfish would be considered to be "grown" by a "producer."²⁰ However, wild-caught seafood, such as quahogs, are not generally considered to have been "grown" and thus likely would not be eligible for sale at a farmers' market in town. If so, the fisher would only be able to sell

¹⁰ North Kingstown Rev. Ord. § 9-150.

¹¹ *Id.* § 9-330 *et seq.*

¹² *Id.* at 9-334.

¹³ *Id.* § 9-335.

¹⁴ North Kingstown Rev. Ord. § 21-325(21).

¹⁵ *Id.* § 9-332.

¹⁶ North Kingstown Rev. Ord. § 9-331.

¹⁷ *Id.* § 21-325(21).

¹⁸ *Id.*

¹⁹ "Producer" is defined by ordinance to be "a grower or producer or any person who is offering for sale articles for human consumption . . . which have been grown or prepared by the grower or producer." *Id.* § 9-332

²⁰ *See id.* ch. 21 art. III (land use table) (identifying aquaculture as a land use in the "agriculture" category).

cultured shellfish unless the ordinances were amended to allow the sale of wild-caught seafood.

2. Sanitation license

All businesses that handle food or serve it to the public in North Kingstown must obtain a town sanitation license.²¹ To obtain such a license, the fisher would be required to comply with the town and state sanitation codes.²²

3. Land owner approval

Hawkers must obtain written consent from the owner of the land where they propose to sell products.²³ Hawkiers are prohibited from selling at a location “within 100 feet of any establishment offering for sale similar goods or services,” and sales in “town-owned parks [and] recreational areas” are prohibited unless for charitable purposes.²⁴

In this case study, the location selected for sale is on public land, which is not a park or recreation area. Depending on the precise location selected, it may or may not be within 100 feet of Gardner’s Wharf Seafood, such that the choice of location within the parking lot would determine whether the project can go forward. Assuming that the fisher proposes to use a location more than 100 feet away from Gardiner’s Wharf Seafood, she would be required to obtain written consent from the town to use the location. In this scenario, the location abuts and may be under the jurisdiction of the Wickford harbormaster. The fisher would need to consult with the harbormaster and the town clerk to determine the appropriate form of consent and to obtain the written consent needed to proceed.

4. Zoning

North Kingstown’s ordinances authorize hawking or holding farmers’ markets only in certain locations.²⁵ As a result, the fisher would need to ensure that the specific location where she proposes to sell is in a zoning district where peddlers and hawkers can be

²¹ North Kingstown Rev. Ord. § 8-64.

²² *Id.* § 8-61 *et seq.*

²³ *Id.* § 9-126 (“A licensee who obtains the written consent of the owner of real estate may locate the activity on such real estate and remain stationary at such location; provided, however, that a licensee shall only be allowed to remain stationary on real estate that is located in a zoning district that permits peddling and hawking.”). Hawkiers without consent to remain stationary must be moving at all times except when serving customers. *Id.* Thus, while a peddler’s license authorizes sales on “any street, highway, lane, or alley” in town, *id.* § 9-142, this authorization is not sufficient to authorize stationary sales on public ways.

²⁴ *Id.* § 9-126(h).

²⁵ North Kingstown Rev. Ord. §§ 9-126 (“a licensee shall only be allowed to remain stationary on real estate that is located in a zoning district that permits peddling and hawking”); 9-333 (“Farmers’ markets shall be permitted only in those locations, pursuant to the provisions of zoning ordinances sections 21-22, 21-243, 21-325 and article III, retail business number 9”).

active; if she proposes creation of a farmers' market in that location, the zoning for that location would also need to authorize farmers' markets.

To determine if a market can operate in a certain location, the fisher must determine the zoning district for that location and allowed uses in the district. North Kingstown controls the uses of land that are allowed in each district in a land use table located in the town's zoning ordinance,²⁶ and zoning districts in Wickford village are designated at the level of individual lots, as shown on the town zoning map.²⁷ In this scenario, the fisher would propose to sell from lot 257 on town plat 117, which is located in the "public" zoning district.²⁸ Thus, sales on this lot could occur only if authorized in the public district.

The sale of shellfish may fall into one of several use categories, only some of which are allowable uses in public districts. "Farm markets" are allowed in public districts, as is "[t]he outdoor sale of farm . . . products not grown on site."²⁹ However, "sale of fish and shellfish" is a separately defined use category that is prohibited on public lands.³⁰ The availability of the particular hypothetical location is thus dependent on how the town categorizes the proposed activity. If part of a farmers' market or involving only the sale of cultured shellfish, the activity might be allowed to move forward, subject to other limitations such as signage requirements. However, if the town determines that her sales would properly be placed in the category of "sale of fish and shellfish," the fisher would need to find an alternative site unless the town agreed to vary or amend the zoning for the lot.

In addition to its general land use restrictions, additional restrictions on activities apply in a variety of special or overlay districts, including historical districts.³¹ Within such districts, property owners must obtain a "certificate of appropriateness" from the town historic district commission prior to "construction, alteration, repair, removal or demolition affecting the exterior appearance of a structure or its appurtenances."³² While the hypothetical site is located within the Wickford Historic District,³³ the sale of shellfish would necessitate no construction and therefore does not appear to require a certificate of

²⁶ *Id.* ch. 21. art. III.

²⁷ *Id.* § 9-362.

²⁸ See North Kingstown, *Plat 117 Model Map* (2011), at <http://northkingstown.org/sites/default/files/pdf/nktown/platmaps/Plat117-Model.pdf>.

²⁹ North Kingstown Rev. Ord. ch. 21. art. III. Sale of farm products not grown on site requires development plan review, but this may be waived for good cause. *Id.*

³⁰ *Id.*

³¹ R.I. Gen. Laws § 45-24.1-1.

³² North Kingstown Rev. Ord. § 21-335.

³³ See Town of North Kingstown, *Comprehensive Plan: Wickford Historic District* (2008), at <http://www.northkingstown.org/sites/northkingstown.org/files/pdf-attachments/North%20Kingstown%20Historic%20Map.pdf>.

appropriateness. Nonetheless, consultation with the commission could be beneficial in order to safeguard against possible conflicts.³⁴

CONCLUSION

Local regulation of the sale of shellfish by producers to the public is highly complex and fact-dependent. In the case study presented here, the fisher's ability to move forward is uncertain and depends on several factors, not all of which are under her control:

- exactly what products are proposed for sale (wild-caught versus cultured);
- exactly where the products are to be sold (distance from other seafood businesses, local zoning regulations applicable on a particular property);
- whether the sales are structured as part of a farmer's market or independently as a hawker;
- whether the town has available peddler's licenses or is willing to grant a special license; and
- whether the town and/or harbor commissioner are willing to consent in writing to the activity.

This case study is specific to a particular hypothetical scenario. As a result, the specific licenses, permits, and land use and zoning considerations reviewed in this case study—as well as the decisions that affect whether the project can proceed—will not apply to different activities and/or to different locations. However, the case study is illustrative of general categories of regulatory challenges that fishers may face in seeking to sell seafood directly to the public. By ensuring that licensing, permitting, and land use questions and challenges are identified and resolved early in the project development process, fishers can maximize their ability to move forward successfully with a direct sales of seafood to the public.

³⁴ *Id.* at § 21-335(b).