

# Town of Southold & Cross Sound Ferry Services v. Town of East Hampton United States Court of Appeals, Second Circuit 477 F.3d 38 (Decided Feb. 8, 2007)

David Millstein, Class of 2010

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## LOCAL LAWS REQUIRING FERRY OPERATORS TO OBTAIN SPECIAL PERMIT DEEMED CONSTITUTIONAL.

**Town law was valid exercise of power because the law was not *per se* invalid under dormant Commerce Clause. Issues of fact precluded summary judgment in favor of town, and the law did not violate the Equal Protection Clause.**

Town of Southold & Cross Sound Ferry Services v. Town of East Hampton  
United States Court of Appeals, Second Circuit  
477 F.3d 38  
(Decided Feb. 8, 2007)

In December 1997, the Town of East Hampton (“the Town”) enacted Local Law No. 40, also known as “the Ferry Law,” to combat its burgeoning traffic problem. The Ferry Law restricts high-speed passenger ferries from docking at or passing through the Town’s terminals without a special permit. Cross Sound Ferry Services (“Cross Sound”), together with the Town of Southold (“Southold”), brought action seeking that the Ferry Law be declared unconstitutional.

Cross Sound and Southold brought an action against the Town in the district court, alleging that the Ferry Law violated both the dormant Commerce Clause and the Equal Protection Clause of the federal Constitution. Additionally, they alleged that it violated the Equal Protection Clause of the New York State Constitution. Lastly, plaintiffs alleged that the Ferry Law constituted an improper usage of the Town’s police power in affecting interstate commerce.

The Town of East Hampton responded by moving for summary judgment on the grounds that the plaintiffs lacked standing to bring the suit, that their claims lacked merit, and that the action was nevertheless barred by the statute of limitations. The plaintiffs cross-moved for summary judgment on each claim except for the allegation of improper police power; and moved to strike the Town’s Statement of Undisputed Material Facts. The district court granted the defendants motion, and denied the plaintiffs’ cross motion. The district court then ruled that, although Southold lacked standing to assert its claims, Cross Sound was entitled to third-party standing on behalf of its passengers. Finally, the court ruled that the plaintiffs’ action was not barred by the statute of limitations.

In its final judgment, the district court found that the Ferry Law did not violate the dormant Commerce Clause as it presented no discrimination toward interstate commerce. Next, the district court found that the Ferry Law passed the balancing test set forth in *Pike v. Bruce Church, Inc.*,<sup>1</sup> as it fairly weighed any burden placed on interstate commerce with the benefits it afforded the locality. In regard to the charges of unconstitutionality, the district court found that the Ferry Law did not infringe on the fundamental right of travel. The Ferry Law was found to dictate only minor restrictions on travel that were outweighed by the legitimate public interests fostered by the law.

While the Town elected not to pursue this action further, Cross Sound chose to appeal the district court’s decision. The Commerce Clause of the United States contains what is known as the “dormant Commerce Clause”, an element that seeks to “ ‘preserv[e] a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors.’ ”<sup>2</sup> There are three possible ways in which a local law may be seen as unfairly discriminatory and thus in violation of the dormant Commerce Clause: (1) by discriminating against interstate commerce on its face, (2) by harboring a discriminatory purpose, or (3) by discriminating in its effect. A local law fitting within one of these three categories is be said to be discriminatory *per se*.<sup>3</sup>

<sup>1</sup> 397 U.S. 137 (1970).

<sup>2</sup> Town of Southold & Cross Sound Ferry Services v. Town of East Hampton, 477 F.3d 38, 47 (2d Cir. 2007).

<sup>3</sup> *Id.* at 48.

The district court determined that the Ferry Law did not fit within one of these categories, and was not discriminatory *per se*. The Ferry Law applies to both interstate and intrastate ferries equally—any and all are required to obtain the special permit. Similarly, in passing the law, the Town did not intend to discriminate against interstate traffic. The record suggests that the Town had held a number of meetings, at which it determined that the Ferry Law was required to address its growing traffic and related vehicular pollution problems created by summertime tourists. In-state ferry operators were faced with the exact same problem as out-of-state operators were, and thus the Ferry Law presented no bias. A feature common of laws that were found to be clearly discriminatory was that they conferred a competitive advantage to in-state commerce as opposed to out-of-state.

After finding no clear discrimination in the Ferry Law, the balancing test outlined in *Pike* was applied. The balancing test upholds laws in cases where the burden placed on interstate commerce is outweighed by the benefits it affords local business. Cross Sound argued that the Ferry Law, by requiring ferries to take longer and more expensive alternate routes, shifted the cost of traffic from Town drivers to interstate operators. Cross Sound submitted expert testimony that the restriction would force travelers to and from New England to pick up the higher cost of travel. As such, the district court was found to have erred in finding that Cross Sound offered no evidence of a disparate impact. Similarly, questions of fact remained as to the degree of the unjust burden the Ferry Law placed on interstate traffic. Testimony provided that a direct causal link could be shown between a drop in vehicular traffic and the lowering of vehicular pollutants in the Town.

Cross Sound's Equal Protection Clause argument was also found to be erroneous after examination by the court. The "freedom to travel throughout the United States has long been recognized as a basic right under the Constitution."<sup>4</sup> Strict scrutiny is applied to determine if the municipality has constructed the law to serve a legitimate public interest. The court presents as compelling evidence that the Ferry Law differentiated between ferries, which are restricted by the legislation, and excursion boats, which are not restricted. The distinction, therefore, does not infringe on any individual's right to travel, but rather on the rights of a certain industry. Coupled with the fact that the Ferry Law does not discriminate geographically, applying to in and out-of-state traffic uniformly, it was deemed to not interfere with the constitutional freedom to travel.

Finally, the claim that the Ferry Law represented an improper use of the Town's police power was also rejected. Municipal zoning ordinances are not quashed as long as they bear a substantial relation to the public health, safety, morals, or general welfare of the community to which they apply. New York Legislation at the time of the Ferry Law's enactment represented a clear concern for restriction and regulation of water vehicles in Suffolk County. Additionally, legislation such as Town Law § 263 had been enacted to authorize municipalities the ability to combat street congestion and vehicular traffic. The Ferry Law accordingly was found to relate substantially to public safety concerns.

Based upon this reasoning, the judgment of the district court was vacated in regard to its granting of summary judgment to the Town of East Hampton on its dormant Commerce Clause claim. The case was remanded for further proceedings and was otherwise affirmed.

**David Millstein**  
**Class of 2010**

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<sup>4</sup> *Id.* at 53.