

Dennis Wilkey, et al.. v. WED Portsmouth One LLC, et al., No. NC-2021-0352 (May 18, 2022)
<https://www.courts.ri.gov/Courts/SuperiorCourt/SuperiorDecisions/21-0352-5-18-22.pdf>

Holding:

Rhode Island Superior Court granted the Defendants’ Motion to Dismiss Count II (public nuisance; Count III (breach of contract); and Count IV (injunctive relief) in response to the Plaintiff’s Complaint that a wind turbine at Portsmouth High School generate more noise and produces more shadow flickers across nearby property.

Key Takeaways:

1. “A public right is the right to a public good, such as ‘an indivisible resource shared by the public at large, like air, water, or public rights-of-way.’”
2. Excessive noise can constitute a *private* nuisance, but it does not violate a public right.
3. There is no public right to silence. Noise is regulated under the police power by municipalities, and enforcement of noise ordinances is left to municipal authorities.

Facts:

WED Portsmouth One, LLC entered into an agreement with the Town of Portsmouth and installed a wind turbine at Portsmouth High School in 2016 which replaced a smaller turbine that was on the property between 2009 and 2012.

Plaintiffs are several property owners who live between 740 and 1155 feet from the wind turbine. Plaintiffs claim the new wind turbine generates more noise than the previous one and produces shadow flickers across their property.

Plaintiffs filed a complaint advancing four cases of action: (1) private nuisance; (2) public nuisance; (3) breach of contract; and (4) injunctive relief.

Defendants (WED Portsmouth One, LLC and the Town of Portsmouth) filed a motion to dismiss Counts II, III, and IV.

Analysis:

1. Count II: Public Nuisance

The Plaintiff’s complaint argued that the wind turbine is an “*unreasonable interference with a right common to the general public’ to be free of annoyance, flicker, vibrations and flicker.*” The Court determined that they cannot construe freedom from “*annoyance, flicker and vibration*” as a public right because it is not “indivisible, or affirmative such as clean air, fresh water, or unobstructed public waterways.

The court also stated the right to unobstructed flow of light is not recognized in the common law or jurisprudence in Rhode Island or the United States. The Court also stated there is no public right to silence, as noise is regulated under the police power by municipalities and should be enforced by municipal authorities.

The Court’s decision cited Rhode Island Supreme Court’s stated elements of a public nuisance as “(1) an unreasonable interference; (2) with a right common to the general public; (3) by a person or people with control over the instrumentality alleged to have created the nuisance when the damage occurred. *State v. Lead Industries Association, Inc.*, 951 A.2d 428, 446-47 (R.I. 2008)”.

The Court dismissed Count II based on the failure of the Plaintiffs to allege a public right and special damages, as the Plaintiffs are no different than any other homeowner who can see and hear the wind turbine.

2. Count III: Breach of Contract

Plaintiffs argued they are third-party beneficiaries to the Wind Energy Lease between WED Portsmouth LLC and the Town of Portsmouth. The Court decided that the lease clearly states there are no third-party beneficiaries to the contract. The contract stated that any noise or flickering would be enforceable by the Town and not neighboring property owners. Therefore, the Court dismissed Count III.

3. Count IV: Injunctive Relief

The Court dismissed Count IV, stating “*an injunction is a remedy, not a cause for action.*”

The Court permitted the Plaintiffs to amend their complaint to request injunctive relief in addition to damages in Count I (private nuisance),

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