Public Rights/ Private Property:

Answers to Frequently Asked Questions on Beach Access

Brought to you as a public service by:

Attorney General Tom Reilly

One Ashburton Place
Boston, MA 02108
(617) 727-2200
www.ago.state.ma.us

Summertime. The living is easy. Fish are jumpin'. And right now somewhere along the Massachusetts coast, two people are arguing over whether one of them may walk along the other's beach.

Few issues in Massachusetts can be counted on as such a regular source of conflict. One reason for this is that in the face of the overwhelming desire for people to use our beaches, our laws are not very "friendly" toward beach access. This is because, some 350 years ago, our forefathers gave away much of the public's rights to use the coastline in an attempt to spur the development of wharfs and maritime commerce. On top of that, our laws in this area are complex, confusing, and – to an extent that is surprising in light of centuries of court battles – uncertain.

The result is conflict. Those who own property along the coast clash with those who want to walk along it, often without either really knowing what their rights and obligations are. Indeed, sometimes police officers and other public officials called in to deal with this conflict are themselves unclear about the respective rights and responsibilities.

The purpose of this pamphlet is to try to help people understand the law in this area, to the extent that it has been settled. We have tried to provide simple answers to commonly-asked questions about the ownership of the coast. Our hope is that by informing the public of the law, we can move beyond needless conflicts and toward more consensual solutions to the beach access issue. In particular, we have highlighted ways that coastal owners who want to let the public gain access through or along their property can do so while avoiding liability and at the same time preserving their own property rights.

Of necessity, we can state what the public's rights are only in general terms. There are many complications that may arise in individual circumstances.

Questions & Answers

Q: "Someone told me that beaches are privately owned in Massachusetts all the way down to the low tide line. How can that be?"

A: Each state has its own laws regarding who owns the beach. In most coastal states, the public owns the land seaward of the high tide line, and in some states public ownership extends even higher. Massachusetts is different, however. The Massachusetts courts have consistently ruled that in the 1640s, we gave away title to the land between the mean high tide line and the low tide line to the adjacent upland owners. Therefore, this area – known as the "intertidal zone" or "wet sand area" – is generally privately owned in Massachusetts.

Q: "So you're saying that if I own the adjacent upland land, I therefore own the adjacent wet sand area?"

A: Probably, but not necessarily. It is possible that the interest in the wet sand area was separately conveyed ("severed") from the uplands parcel at

some time in the past. A final answer to this question may require a complete title search, and even then you might not have a definitive answer. If this issue cannot be resolved by the available evidence, the upland owner is presumed to own the adjacent wet sand area. The boundary issues can be resolved in Land Court.

Q: "You said that I can own down to the 'low tide line,' but the low tide line changes every day. What low tide line are you talking about?"

A: Because the precise tide lines change daily, the average or mean low tide line is used. There is an ongoing dispute, however, as to whether you should use the so-called "mean low tide" line or the "mean extreme low tide line." The former is the average of all low tides, while the latter is the average of extreme low tides "resulting from usual causes and conditions."

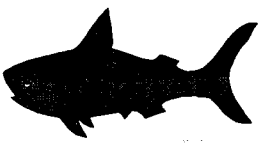
Q: "How do you deal with the fact that over time the coastline builds up in certain areas and washes away in others?"

A: The short answer to this question is that the property lines move with the low tide line. Therefore, as land is extended by the natural buildup of sand (known as "accretion"), the private property owners generally enjoy a windfall. But when the opposite happens ("reliction"), the private property owners generally lose ownership of that portion of the land taken by the sea. The fact that property lines change with the whims of the oceans is one of the things that makes private ownership of this area different from private ownership of inland property.

Q: "If I own the wet sand area, why are members of the public claiming they can use it?"

A: Private ownership of the wet sand area is subject to certain public rights that were reserved when the land became private in the first place. Because the public-at-large retains a property interest in the wet sand area, the private owners' property interest in this area is similar to that of people who own private property in other areas subject to public easements (for example, people who abut town roads typically own to the middle of the road, subject to the public's right of passage).

Q: "What are the rights that were reserved to the public?"



A: The original laws that granted private ownership reserved the rights of "fishing, fowling, and navigation." Court cases have also held that reserved public rights include the "natural derivatives" of these uses. There are hundreds of years of court cases that attempt to flesh out precisely what these various words mean.

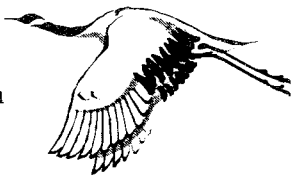
Q: "Does 'fishing' include shellfishing?"

A: Yes. That means that members of the public may take shellfish from the wet sand area of privately owned property and they may walk along the wet sand area to gain access to the shellfish.

Q: "Does the public's right to use the wet sand area for fishing include the right to do aquaculture, such as quahog farming?"

A: The Massachusetts Supreme Judicial Court concluded that the public's right to fish in the wet sand area does <u>not</u> include a right to occupy such areas

with aquaculture pens. As a result, someone who wants to perform these aquaculture activities in wet sand areas must obtain the permission of the private owner in addition to applicable state and local licenses.



Q: "What is 'fowling'?"

A: "Fowling" certainly includes the hunting of birds. Our office takes the position that the term also includes other ways that birds can be "used," such as birdwatching. This issue has not yet been addressed by the courts.

Q: "Does 'navigation' include swimming?"

A: Yes, but. According to the courts, swimming in the intertidal zone is included within the reserved public right of navigation, but only so long as your feet don't touch the bottom! And you don't have a right to walk along the wet sand area solely for the purpose of gaining access for swimming.

Q: "What about walking below the low tide line?"

A: Private property owners cannot interfere with the public's right to walk along the submerged lands that lie seaward of the low tide line. With few exceptions, they don't own that land; the public does.

Q: "Since members of the public have the right to fish, fowl, and navigate in the wet sand area, then they can do whatever fishing, fowling, and navigation they want to do there, right?"

A: So far, we've just been talking about ownership issues. Just as a private property owner's rights are subject to reasonable regulation, the same is true of the public's reserved rights. Thus, for example, the government may require shellfishermen to obtain all applicable state and local permits and to comply with applicable shellfishing regulations. And, of course, members of the public who exercise their public rights to use the wet sand area must comply with other laws, such as the prohibition on littering and the creation of nuisances.

Q: "I've heard people say that all I really need to do to 'be legal' is to carry a fishing line in my pocket?"

A: Carrying a fishing line or a fishing pole would render your walking along the wet sands area legal only if you actually intended to fish.

Q: "Does the public have a right to use off-road vehicles over the wet sand areas to gain access for fishing?"

A: The Supreme Judicial Court has never ruled on whether driving an off-road vehicle across private wet sand areas for the purposes of gaining access to fishing areas is included within the public's right to fish. In any event, the use of off-road vehicles may be regulated by the government.

Q: "Like many of my fellow property owners, I don't mind the public walking along my wet sand area even if they are not 'fishing, fowling, or navigating,' so long as by allowing this, I don't lose any property rights in the process. Is there some way that I can be a 'good citizen' and still retain my property rights?"

A: Yes. What you appear to be worried about is the legal concept known as "prescription" or "adverse possession."

This is the idea that if someone uses your property for a sufficiently long time, they may be able to claim a property interest in it. For someone to be able to make this claim, however, their use has to be without your permission. Therefore, openly allowing the public to walk across your land (e.g., by "posting" such permission) is perhaps the best way of defeating someone's ability to accrue such a right. Posting the land in this manner, of course, would not affect any access rights that anyone had already obtained before the posting.

Q: "O.K., that may solve one problem, but how about liability?"

A: Under existing state law, a property owner who allows the public to use his or her land for recreational purposes without charging for such use is shielded from liability for injuries sustained during that use so long as the property owner did not bury hidden boobytraps or otherwise act with such "fault" that his or her conduct constituted "wilful, wanton or reckless conduct." Here again, the best way for coastal property owners to protect themselves may be to allow the public to walk across their land.

Q: "Wasn't there a state law passed a few years ago that gave the public a right to walk along the wet sand area even if they weren't fishing, fowling, or navigating"?

A: Not exactly. You're referring to chapter 176, section 4 of the Acts of 1991. That law states that the public is to have a general right to walk along the wet sand area during dawn to dusk hours. Such a right is not effective, however, unless the state Department of Environmental Management (DEM) acquires it on behalf of the public through formal eminent domain proceedings involving the specific properties affected, where the private property owners from whom the right was acquired would be compensated.

Q: "How much compensation would a private landowner be due if the state "took" a general easement right pursuant to the 1991 law?"

A: The property owner would be owed the amount, if any, that the market value of his or her land was reduced by the fact that the public now had a general right to walk across the wet sand area, not just to do so for fishing, fowling, and navigation.

Q: "You've talked so far about access along the beach. How about access from inland areas to the beach?"

A: Generally speaking, the land inland of the mean high tide line is owned by private parties, just like other land. Members of the public therefore do not have a right to walk across this land unless they individually or collectively have obtained such a right, or if, in particular circumstances, such rights were reserved when the land was initially granted to a private party. Rights of access can be purchased or taken by eminent domain, or they may be acquired by long term use (e.g., by the doctrine of "prescription" mentioned above).

Q: "How can I resolve whether the public has a right to cross a particular parcel of private property to get to the sea?"

A: Unfortunately, resolving whether the public – or some subset of the public – has a right to use a given path can often be very difficult, requiring an intensive examination of the particular facts and evidence at issue. It can also be very expensive for both sides, especially if a full trial is needed to resolve the issues. As with the wet sand area discussed above, private property owners who want to protect their property rights, but who otherwise don't mind others walking across their land, can accomplish this by "posting" their permission. This would not, of course, affect any access rights that the public had already obtained before the posting.

Q: "What is the Coastal Access Legal & Mediation Service?"

A: The interagency Coastal Access Legal & Mediation Service (CALMS) is a joint effort of the Department of Environmental Management (DEM), the Executive Office of Environmental Affairs (EOEA), the Massachusetts Coastal Zone Management Office (MCZM), and the Office of the Attorney General (OAG). Its mission is to assist in the resolution of local disputes arising from public vs. private access to coastal properties in Massachusetts, as well as preventing such disputes from developing in the first place. The program acts as a central clearinghouse for pro bono legal and/or mediation assistance to towns, nonprofit organizations, groups, and individuals through a network of volunteer professionals.

For further information, or assistance with public access issues, contact the Coastal Access Legal and Mediation Services (CALMS) program, by calling Geordie Vining at the Department of Environmental Management (617) 973-8784, or Michelle Vaillencourt at Coastal Zone Management (617) 626-1218, or go to: http://www.state.ma.us/dem/programs/coastal/coastal.htm.

Office of the Attorney General
Environmental Protection Division
One Ashburton Place
Boston, MA 02108
www.ago.state.ma.us