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PROGRAM MATERIALS

WHO CAN GO WHERE ALONG THE SEASHORE,
A Summary of Property Law on Massachusetts Tidal Flats

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With more than 1,500 miles of ocean waterfront, the ownership of the area between high tide and low tide has long been an important legal issue in Massachusetts. Initially, commerce was the principal value of the waterfront. Subsequently, over time the pure and simple pleasure of being in close proximity to the ocean has taken on great importance. Thus, in the last century, Massachusetts courts have often addressed real estate matters arising from the recreational value of ocean side property.

This article will discuss the Massachusetts Colonial Ordinance which generally assigned ownership of the tidal flats to the owners of adjacent upland. The terms "tidal flats" or "flats" refer to "the area between mean high water and mean low water (or 100 rods from mean high water, if lesser)". This article will also examine the subsequent jurisprudence that has construed

deeds for coastal properties. Finally, this article will look at implied easements to seaside amenities.

The Colonial Ordinance

Under English common law, the shores of the sea below the high water line were owned by the King subject to the rights of public for fishing, fowling and navigation on the flats In the United States, as each state was admitted into the Union, it was deemed to hold title to its tidelands in accordance with the common law. Thereafter, each state has had legislative authority to establish private property rights in the flats resulting in many variations throughout the United States.

Before the founding of the United States, the Massachusetts Colonial Ordinance of 1641-1647 altered the common law regarding ownership of tidal flats in the Massachusetts Bay Colony. As an incentive to induce the construction of wharves, the Ordinance gave waterfront landowners title to the flats adjacent to their properties. It provided that the owner of "land adjoining on the sea or salt water, shall hold to low water mark, where the tide does not ebb more than one hundred rods, but not more where the tide ebbs to a greater distance" Over time, the Colonial Ordinance acquired the force of common law in all of Massachusetts. Thus, the title of the owner of upland adjacent to

tidal water usually extends to the mean low water line or 100 rods from the high water line, whichever is less. Submerged lands below the low water line remain the property of the Commonwealth and can not be conveyed without legislative approval.

Under the Colonial Ordinance, the public retained the rights of fishing, fowling and navigation on privately owned tidal flats. Massachusetts courts have defined "fishing fowling and navigation" in several circumstances. For example, the public has the right to operate boats over flats when they are covered by water; to walk on the flats to get to a publicly owned jetty for fishing; and to dig shellfish on the flats. On the other hand, the public's rights do not include to the right to use the flats for bathing or swimming or the right to walk along the shore for any purpose other than fishing and fowling. Furthermore, the rights reserved to the public under the Colonial Ordinance do not include the practice of aquaculture by which beds are seeded and harvested for shellfish.

In Massachusetts, the public's rights to fishing, fowling and navigation are protected through licensing procedures under M.G.L. c. 91. Any landowner who proposes to build upon or alter land below historic mean highwater mark must first obtain a license from the Massachusetts Department of Environmental

Protection. The general criteria for such licensing is that the proposed use must promote a water dependent use or a public purpose which provides greater public benefit that the detriment to the rights of the public in the affected tidelands.

Boundaries along Salt Water

Because of the ephemeral nature of tide lines, the exact location of a mean low water line has never been easily determined. The season and the weather cause daily variations in the location the low water line. Recently, in an effort to promote certainty, the Massachusetts Appeals Court prescribed the National Geodetic Vertical Datum as the measure to determine the mean low tide line.

Erosion and accretion can also have a significant impact on the ownership of shoreline property. Where accretion has added land to the shore, the line of ownership follows the changing water line. The rule applies to both natural accretions and man made accretions that were not caused by the benefited littoral owner. Thus, where a governmental dredging project deposited sand along a shore, the owner of the adjacent upland owned the newly created flats subject to the public's right to fishing, fowling and navigation. On the other hand, landowners lose title to land lost to the ocean through erosion. In an area of Martha's

Vineyard where the coast had eroded 851 feet between 1846 and 2005, the Land Court held that the owners of a beach parcel which had existed in the 19th century but was now submerged in the Atlantic Ocean completely lost their rights of ownership.

While the Colonial Ordinance connected ownership of the flats to the adjoining upland, Massachusetts Courts have consistently recognized that a landowner may sever the flats from the adjoining upland. "[T]he owner may sell his upland without the flats, or the flats, or any part thereof, without the upland" Lack of precision in deeds conveying water side properties has often required courts to determine whether a conveyance included the adjacent flats.

A deed for a waterfront parcel which describes the water side boundary as simply being by the "sea", without exclusionary language, has consistently been held to grant the flats to the low water line or to the line which is 100 rods beyond the high water line where the tide ebbs further. Likewise, deeds describing the water side boundary as by the "by the harbor" or "by the Squam River" conveyed the flats.

On the other hand, deeds describing the water side boundary "by the beach" conveyed only to the mean high water mark and did not include the flats. Yet the term "beach" has not been considered an absolute term of exclusion. The description as "by the beach

and the sea" was held to convey the flats. Similar uncertainty has arisen about boundaries "by the shore". In one case, the words "by the shore" excluded the flats but in another a court concluded that the intent of the instrument was to include the flats despite the use of "by the shore" to describe the water side boundary.

The use of the term "by the highwater mark" to describe a boundary does not necessarily exclude the flats. In Pazolt v. Director of the Division of Marine Fisheries the first deed in the landowner's chain of title identified the water side boundary as "running by the sea" but subsequent deeds described the boundary as the "highwater mark-Provincetown Harbor." The trial judge determined that the tidal flats had never been separately conveyed and that the flats remained connected to the upland despite the use of the term "highwater mark" in some of the deeds. The Supreme Judicial Court upheld the trial judge's conclusion noting the presumption in the law that "title to the flats follows that of the uplands on which they lie" and that severance of the flats must be proven. The Appeals Court reached a different conclusion in Sheftel v.Lebel when it addressed an express grant of an easement that extended to "mean highwater." After reviewing several deeds and a plan, the Appeals Court held that description "mean highwater" was "evidence of an intent to

separate the upland from the flatland."

The Appeals Court again examined deeds which described a boundary as by the "highwater mark" in Houghton v. Johnson, and concluded that deeds conveyed the flats. The Court stated that term "highwater mark" is not an "absolute" indication of and intent to sever the flats for adjacent uplands. The Court ascertained the grantor's intent from "the words used in the written instrument, construed when necessary in light of the attendant circumstances." The attendant circumstance that the Court emphasized to reach its conclusions was that after the initial deeds, the common grantor never claimed an interest in the flats. In Sheftel a boundary by the "highwater mark" excluded the flats but in Pazolt and Houghton use of the term by the "highwater mark" in deeds did not sever the flats from the upland. In view of the imprecise guidance in the case law, practitioners should prepare deeds for waterfront properties with very explicit language about whether the flats are included in the grant.

Implied Easements to Seaside Amenities Shown on a Plan

For more than a century, real estate developers have been subdividing large tracts of land on the Massachusetts coastline for the purpose of creating "systematic plan[s] of development of…summer and vacation resort[s]." Often, the developers provided

the purchasers of lots with express easements to use a beach shown on a plan.

An interesting body of law has developed regarding implied easements in cases where a common grantor did not create an express beach easement for lot owners. As with any implied easement, to find an implied beach easement, a court must determine the intent of the parties.

> The origin of an implied easement whether by grant or by reservation…must be found in a presumed intention of the parties, to be gathered from the language of the instruments when read in the light of the circumstances attending their execution, the physical condition of the premises, and the knowledge which the parties had or with which they are chargeable.

Courts have sometimes recognized the unique integral nature of recreational amenities in seaside communities to find an intent to create implied easements.

Where a plan of seaside lots showed an open park among the lots, the Court in Bacon v. Onset Grove Ass'n. recognized an implied easement for the lot owners to use the park. To reach its conclusion, the Court pointed out the importance of recreational features to the housing project and considered the historical use of the park over time by the residents. Similarly, in Rahily v. Addision the Court held that a plan of lots for a tract of land on Boston Harbor reflected an intent by

the common grantor to create an implied easement for the lot owners to use a beach shown on the plan. In Labounty v. Vickers where a plan showed a road leading to the high water line of a tidal river, the Court found an implied easement for the lot owners to use the flats at the end of the road for usual beach purposes. The Court in Labounty noted that the lot owners had been using the flats as beach for many years to support its conclusion. More recently in Regan v. Brissey the Court considered a recorded plan and 19th century advertisements promoting a "Pleasant and Healthy Seaside Resort" to find an implied easement for lot owners to use a park shown on the plan. But, courts have not universally recognized an implied beach easement for lots shown on subdivision of shorefront lots. In Houghton v. Johnson the mere existence of a subdivision plan for a large tract of seaside land, without more, was not sufficient to establish an implied easement to the beach for the lot owners. The court emphasized that the "burden of proving the existence of an implied easement is on the party asserting it."

Conclusion

The Colonial Ordinance remains the dominant feature of the common law regarding the ownership of and access to Massachusetts

flats. The owners of waterfront upland are presumed to own the flats adjacent to their properties. Members of the public only have the right to go upon privately owned flats for the limited purposes of fishing, fowling and navigation. While an owner may sever the flats from it adjacent upland, deeds for waterfront properties generally include the flats in the absence of clear exclusionary language. The owners of lots in seaside resort developments often have private easement rights to use beaches and other amenities shown on a recorded plan. In the absence of an express easement grant, courts sometimes recognize implied beach easements for lot owners in seaside subdivisions on the bases of the presumed intent of the parties to the deeds for the lots.

Robin Lacey, *The Economic and Environmental Challenges of Marinas in Massachusetts,* The Office of Massachusetts Coastal Zone Management, Winter 2004-2005. Prior to 1820 the Massachusetts coastline was even longer because Maine was governed as a district of Massachusetts from 1652 until it was admitted as the 23rd state of the Union under the Missouri Compromise in 1820.

Storer v. Freeman, 6 Mass. 435 (1810)
See HYPERLINK

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E.g. Bacon v. Onset Bay Grove Ass'n., 241 Mass. 417 (1922)

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Phillips Petroleum, Co. Id.

A rod is 16 ½ feet.

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Storer, at 438

E.g. HYPERLINK "http://www.lexis.com/research/xlink?app=00075&view=full&searchtype=get&search=417+Mass.+565%2520at%2520571" \o "Clicking this link retrieves the full text document in another window" \t "x" Pazolt v. Director of the Div. of Marine Fisheries, 417 Mass. 565, 570 (1994)

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E.g. HYPERLINK "http://www.lexis.com/research/xlink?app=00075&view=full&searchtype=get&search=417+Mass.+565%2520at%2520571" \o "Clicking this link retrieves the full text document in another window" \t "x" Pazolt v. Director of the Div. of Marine Fisheries, 417 Mass. 565, (1994)

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Barry v. Grela, 372 Mass. 278, 279 (1977)
Wellfleet v. Glaze, 403 Mass. 79 (1988)
Butler v. Attorney General, 195 Mass. 79, 84 (1907)
Opinion of Justices, 365 Mass. at 684-688
HYPERLINK "http://www.lexis.com/research/xlink?app=00075&view=full&searchtype=get&search=417+Mass.+565%2520at%2520571" \o "Clicking this link retrieves the full text document in another window" \t "x" Pazolt v. Director of the Div. of Marine Fisheries, 417 Mass. 565, (1994)
Additionally, much of the Massachusetts seashore is subject to the Massachusetts Wetland Protection Act which restricts alterations of Coastal Dunes, Coastal Banks, Salt Marshes and Salt Ponds. M.G.L. c. 121, § 40.
Spillane v. Adams, 76 Mass. App. Ct. 378, 387-390 (2010)
Burke v. Commonwealth, 283 Mass. 63 (1933)
Michaelson v. Silver Beach Improvement Association, 343 Mass. 251 (1961)
Hamilton v. Myerow, 17 LCR 226 (2009)
Storer v. Freeman, 6 Mass. at 439
Mayhew v. Norton, 34 Mass. 357, (1835); Pazolt at 570
Mayhew v, Norton
Haskell v. Friend, 196 Mass. 198 (1907)
Litchfield v. Ferguson, 141 Mass. 97 (1886); Castor v. Smith, 211 Mass. 273 (1912)
Doan v. Willcutt, 71 Mass. 328 (1855)
Storer v. Freeman 6 Mass. 435 (1810)
Hathaway v. Wilson, 123 Mass. 359 (1877)
417 Mass. 565 (1994)
Pazolt at 570
Sheftel v.Lebel 44 Mass. App. Ct. 175 (1998)
Sheftel at 180
Houghton v. Johnson, 71 Mass App. Ct. 825 (2008)
Id. at 830
Id. citing HYPERLINK "https://www.lexis.com/research/buttonTFLink?_m=a092e05022af0d83adf0b2637d843b11&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b71%20Mass.%20App.%20Ct.%20825%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=17&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b44%20Mass.%20App.%20Ct.%20175%2c%20179%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVtb-zSkAz&_md5=897597f9c04469d2ab0e81f7be3d9443" Sheftel at 179

Bacon v. Onset Grove Ass'n, 241 Mass. 417, 424 (1922)
See e.g. Cheever v. Graves, 32 Mass. App. Ct. 601 (1992).
Regan v. Brissey, 446 Mass 452, 458 (2006) (quotations and citations omitted)
Bacon v. Onset Grove Ass'n. 241 Mass 417
Rahily v. Addision, 350 Mass. 660 (1966)
Labounty v. Vickers, 351 Mass. 337 (1967)
Regan v. Brissey, 446 Mass 452 (2006)
Id. at 455
Houghton v. Johnson, 71 Mass. App. Ct. 825 (2008)
Id. at 834 (citations and quotations omitted)

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