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Beach Ownership and Public Access in Massachusetts

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BEACH OWNERSHIP
AND PUBLIC ACCESS
IN MASSACHUSETTS
BY
MARK HARLOW ROBINSON

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE OF
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ABSTRACT

Population pressure in the coastal zone has greatly increased the demand for shore-based recreation. Many states have acknowledged this need and have used various methods to increase public access to the shoreline. In Massachusetts, however, these methods have met with little success due to extensive, both in terms of power and geography, private property rights along the shore.

There is no single source of the law relating to shore ownership and public shore use in Massachusetts because the issue is grounded in the slowly-evolving commonlaw of the state. Consequently, few citizens in the Commonwealth understand the legal regime relating to shore lands. This confusion is compounded by the fact that Massachusetts' regime is unique in the nation, so most people do not know their rights to use the shore are severely restricted.

This paper will describe characteristics of Massachusetts' peculiar legal system relating to shore ownership and public rights in an attempt to clarify a complex situation. The history of the system will be examined to discover how Massachusetts' coastal law evolved and how it operates today.

Once the regime is understood, later chapters will study various tools used in other states to open up the beaches for more public use and explain why many of them are of little value to Massachusetts. Methods that could be used to increase public access in the Commonwealth will also be explored and recommendations made concerning their use. The implications of promoting increased public use of the coast will also be addressed.

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CHAPTER I

INTRODUCTION

"Everyone enjoys the waterfront. I don't think anyone should own a beach, it's un-American. But it's not un-Massachusetts."

-- Oak Bluffs Selectman Edmond G. Coogan, in The Vineyard Gazette, Edgartown, Mass., July 24, 1981.

CHAPTER I

INTRODUCTION

Public access. Few other terms are mentioned so often within coastal zone management circles today. Yet no other term contains such complex implications: Which public? All the public? The wealthy public? The neighborhood public? The out-of-state public? And what types of access? Access to where? At what cost?

To many people the Massachusetts coast does not exist. Documents may say the shore wanders for 1200 miles from the ledges of Cape Ann to the sands of Nantucket. But only one-quarter of that stretch is punctuated by some form of public access,¹ where one can verify that the Atlantic Ocean meets the Commonwealth. "Going to the beach" is the most popular form of recreation in Massachusetts,² but enthusiasts often find there is no beach to go to.

Gaining access to the shoreline is a social issue, but it is defined by law and politics. Massachusetts has honed a legal and political sophistication that is almost impenetrable, so answers to coastal access questions, complex anywhere, become riddled here with nuances, qualifications and "split hairs." As a result, most citizens have no idea what legal regime governs the shoreline in Massachusetts. In many coastal states, efforts are made to publicize citizens' rights to use the beaches for recreation. In Massachusetts, the "Cradle of American Liberty," public officials are ominously quiet on this topic,

as though afraid their citizens will learn just how limited shore access rights are in the state.

This paper will examine the private and public rights in shorelands in Massachusetts. It will detail the events of Massachusetts' long history that led to the current situation, anomalous in the nation, in which the state's general populace has fewer rights to use the shore than at any time since Europe's feudal era. It will note the successes (few) and failures (many) of recent measures taken to broaden these rights. Finally, the paper will explore alternative means to return to Massachusetts' citizens their shoreline.

Whenever appropriate, this analysis will attempt to present public access problems from a local perspective; that is, with regard to the distinctive needs of coastal cities and towns in the Commonwealth. Access problems impinge most directly on those nearest the resource who wish to use it. In Massachusetts, towns are sometimes referred to as "sovereign principalities" because they are accorded a large degree of autonomy, or home rule, by the state in the management of their affairs. This autonomy, like each town's other resources, is jealously guarded. Its strength means that towns can play the primary role in securing public access. But it can also determine how that access is to be apportioned.

CHAPTER II

DEFINITIONS

Land areas around the shore go by many different names. They may be defined in legal, biological, geographical and practical terms. This paper will use the terms normally used by coastal zone managers and the Massachusetts courts when referring to specific shore areas. Listed below are the most common terms and graphic depictions of each area are on the following pages.

TIDELANDS: (synonymous with waters navigable-in-law in Massachusetts); land under salt water from the mean high water mark to the limit of state jurisdiction (3 miles from high water); includes the flats and submerged lands; under territorial waters

FLATS: (known in other states as the "wet sand area"); land between mean high water mark and the extreme low water mark in Massachusetts; called the intertidal zone in biological terms; now, usually in private ownership

SUBMERGED LANDS: land beyond the extreme low water mark out to the 3 mile limit of territorial waters; in Commonwealth ownership

UPLAND: land above the beach; at a higher elevation than the upper edge of the extreme high water mark or the lower edge of dune vegetation

BEACH: used generally to refer to coast or shore; also refers to the "dry sand area" or land between mean high water and extreme high water; land between the flats and the upland.

HIGH/LOW WATER MARK: high or low tide line

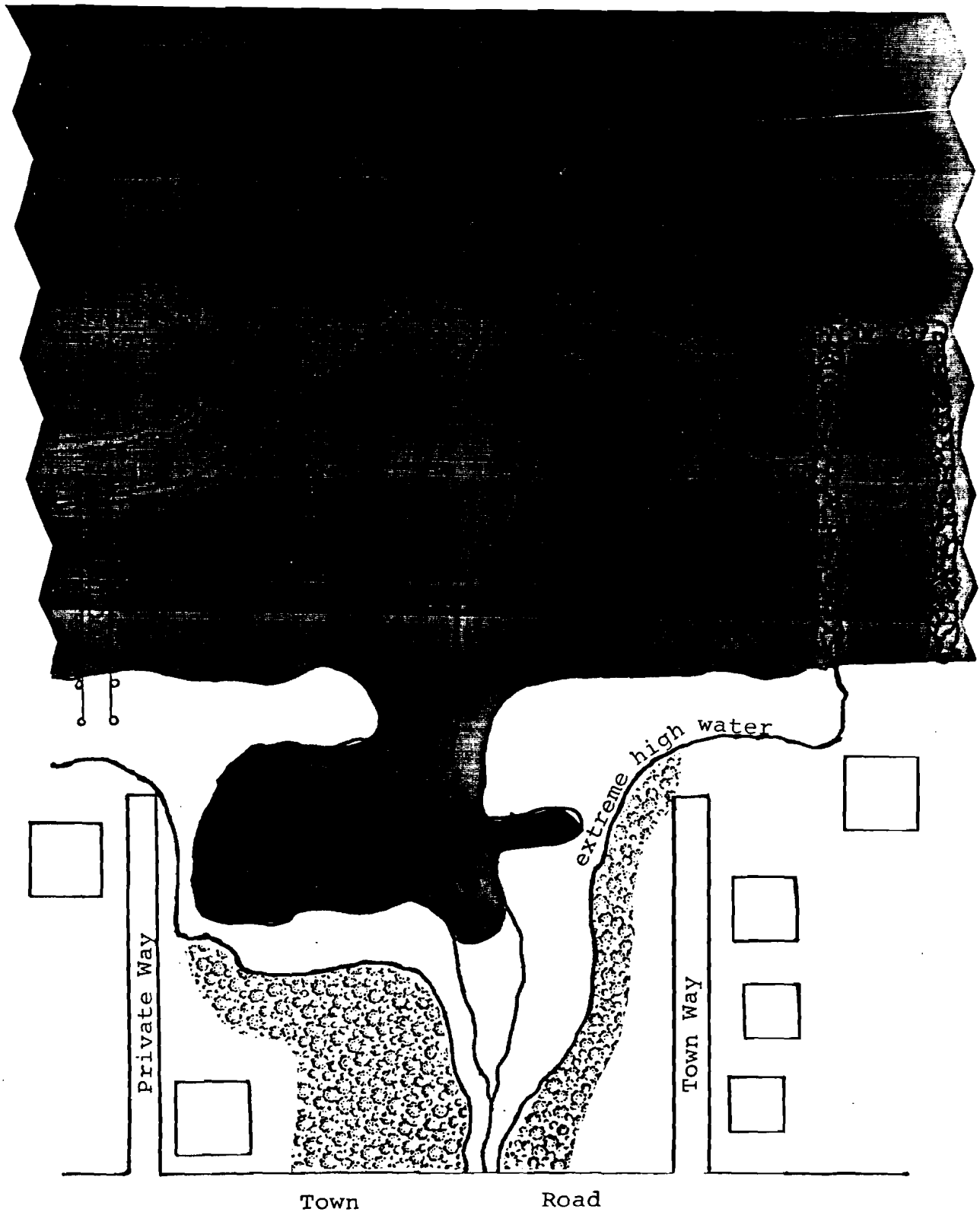


Figure 1. The Tidelands in Massachusetts Law (shown in shaded area)
100 rods = 1650 feet

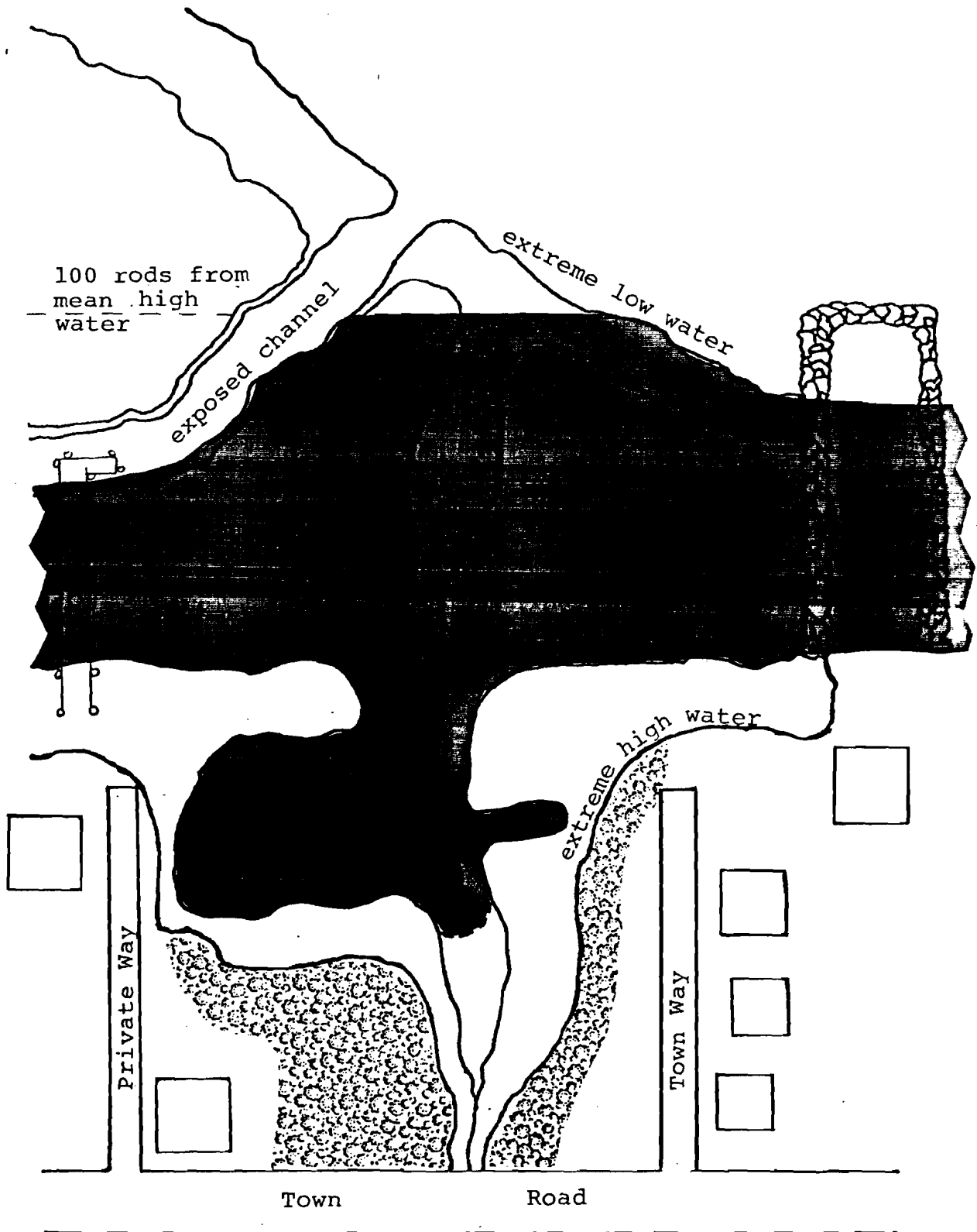


Figure 2. The Flats in Massachusetts Law (shown in shaded area)
 100 rods = 1650 feet

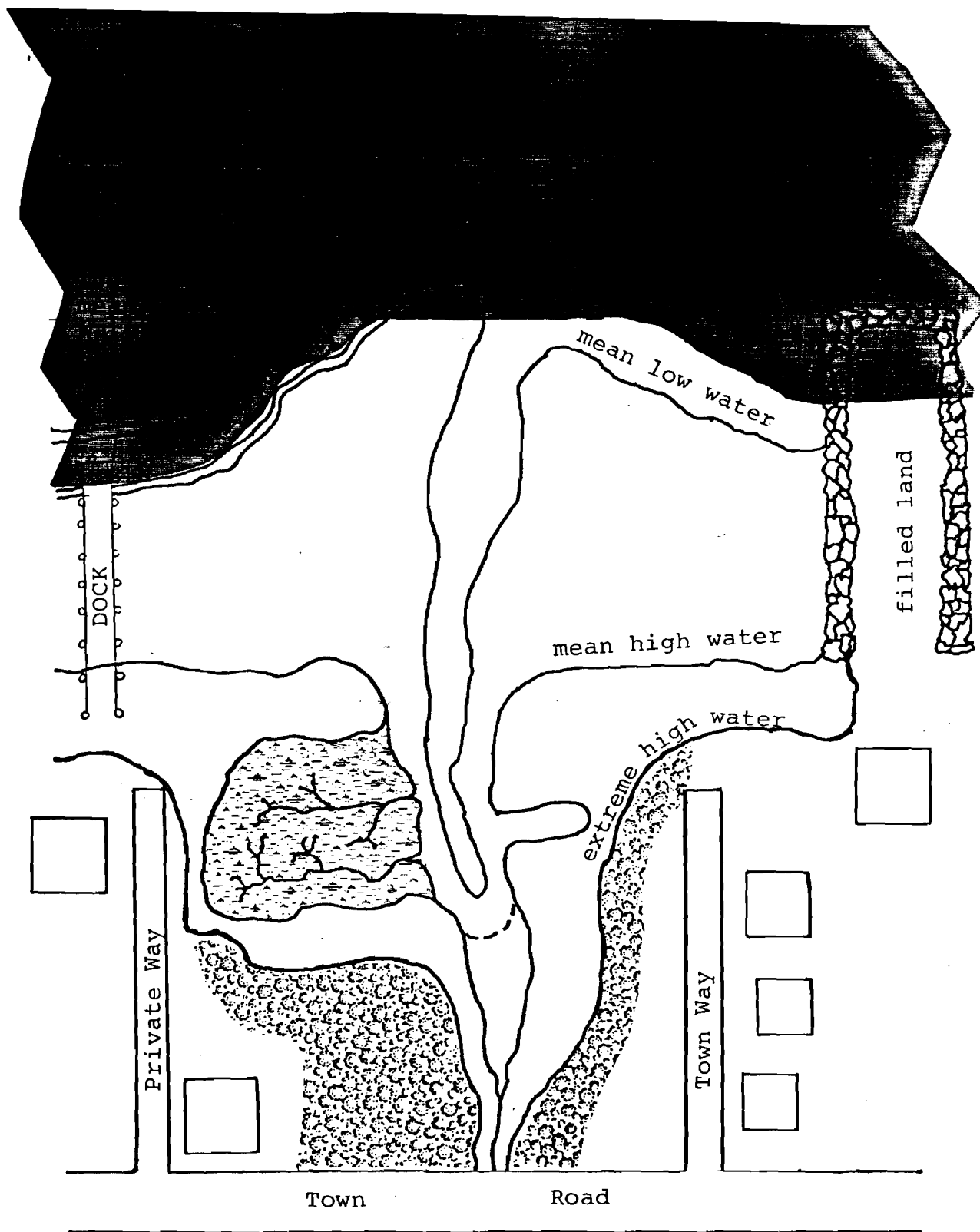


Figure 3. The Submerged Lands in Massachusetts Law (shown in shaded area) 100 rods = 1650 feet

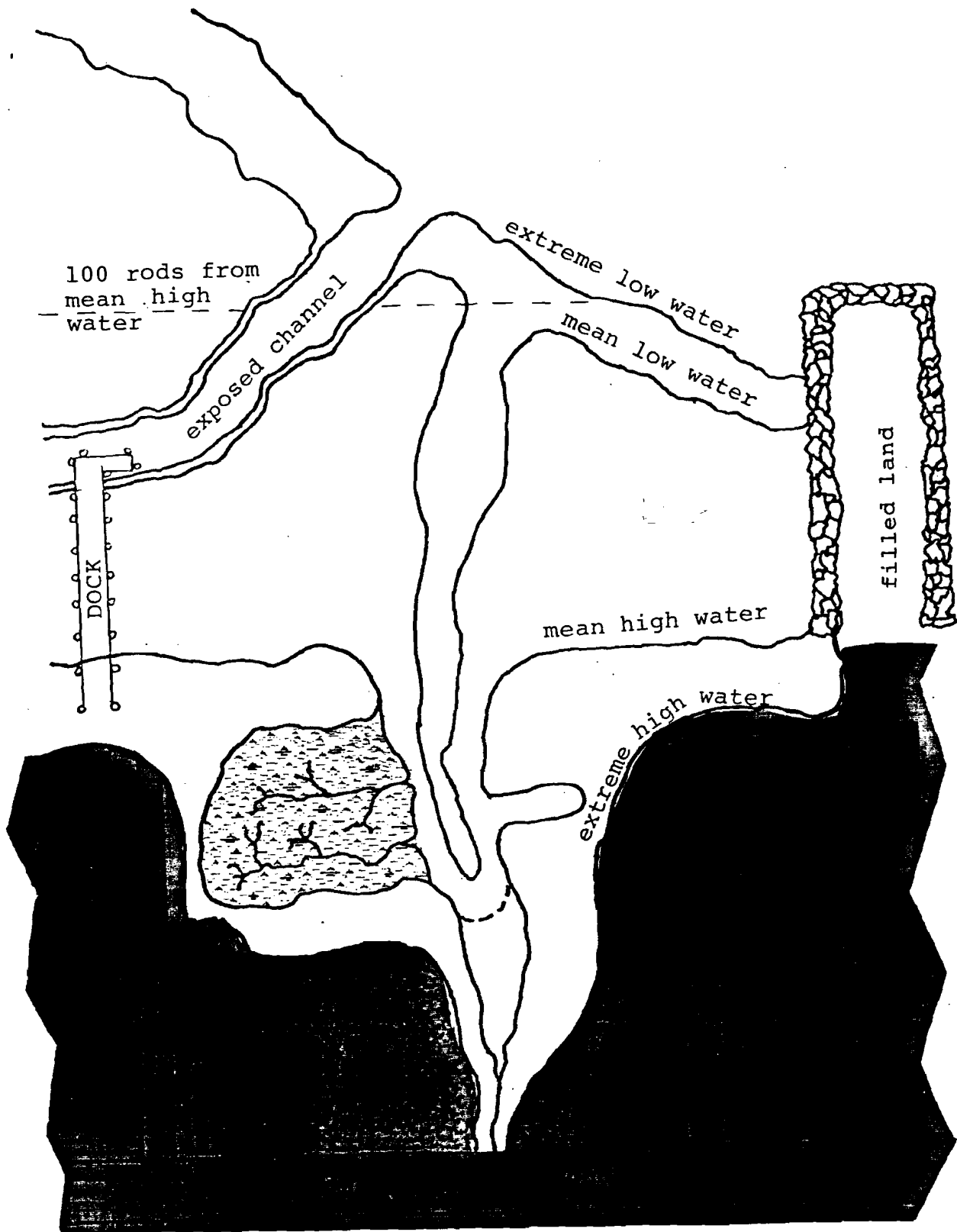


Figure 4. The Upland in Massachusetts Law (shown in shaded area)

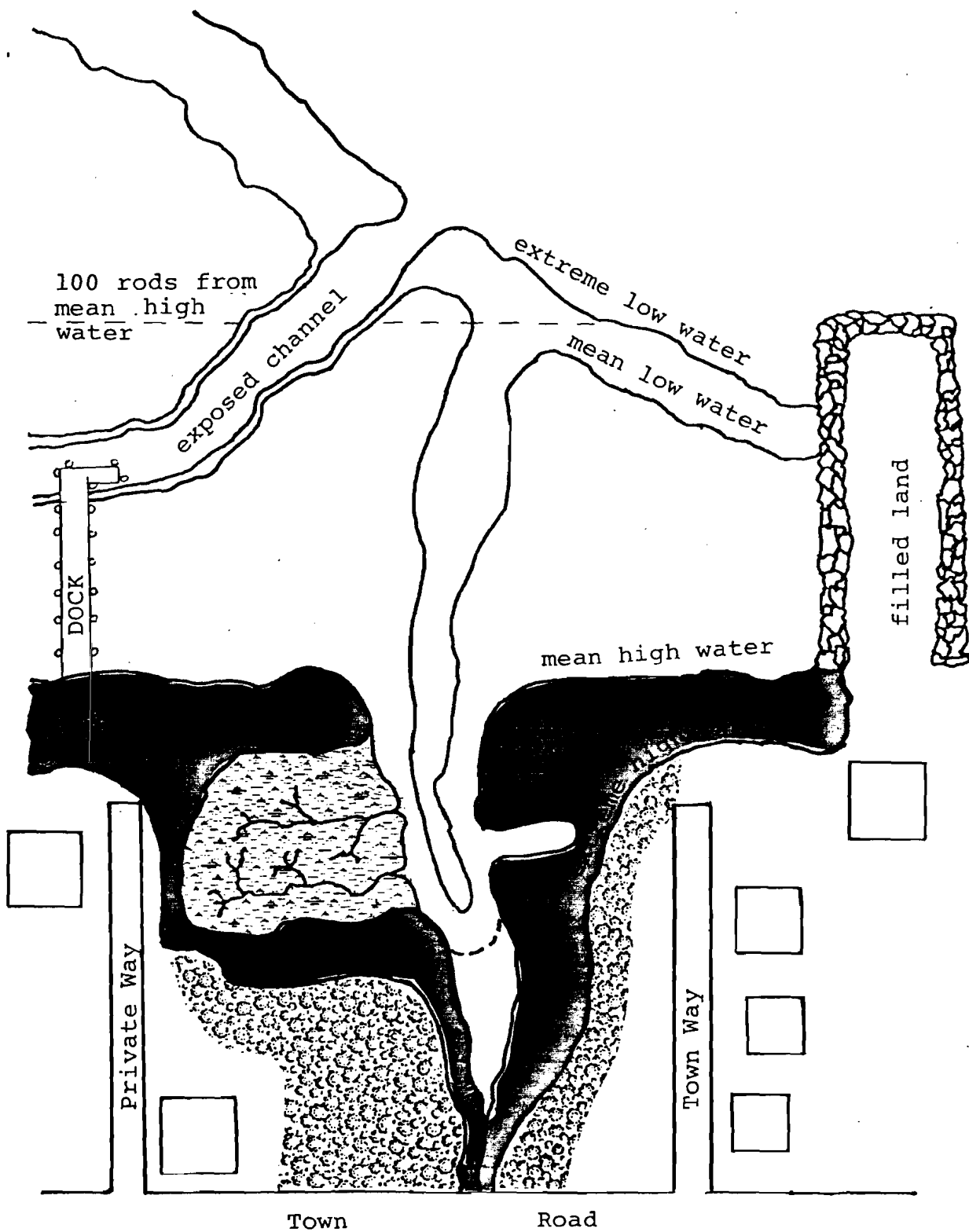


Figure 5. The Beach in Massachusetts Law (shown in shaded area)

CHAPTER III

HISTORICAL PATTERNS OF SHORE OWNERSHIP AND USE

"Nemo igitur ad littus maris accedere prohibetur."
("Nobody is therefore prohibited to come to the sea shore.")

--Institutes of Justinian,
Roman Emperor

CHAPTER III

HISTORIC PATTERNS OF SHORE OWNERSHIP AND USE

Introduction

Most coastal access problems stem from one compressed fact: the beach can be owned. The basic characteristic of personal ownership of property is the right of the landowner to exclude others. Ownership means exclusion, beaches can be owned, and three-quarters of all shorefront in Massachusetts is privately-owned. Any attempt to meet the growing need for shore-based public recreation will involve changing these three facts. One must reduce the exclusiveness engendered by ownership or subtract beaches from private appropriation in order to change the proportion of public versus private shorefront.

Owning beaches is not unique to Massachusetts. Almost every state allows its coastline to be held as private property. In 1970, 78 per cent of the total U.S. shoreline was owned privately, a figure that exactly matched Massachusetts' proportion.³ But Massachusetts' situation varies not in degree, but in kind. In other states, private title runs down only to the limit of the high tide line and land seaward of that mark is held by the state for all its citizens. Public access in these states usually involves securing paths from the upland behind the beach to the state's land between and beyond the tides.

In Maine, New Hampshire, Virginia, Pennsylvania, Delaware and Massachusetts,⁴ however, private title is recognized as legitimate in extending to the low tide line. In these six states, all of the usual

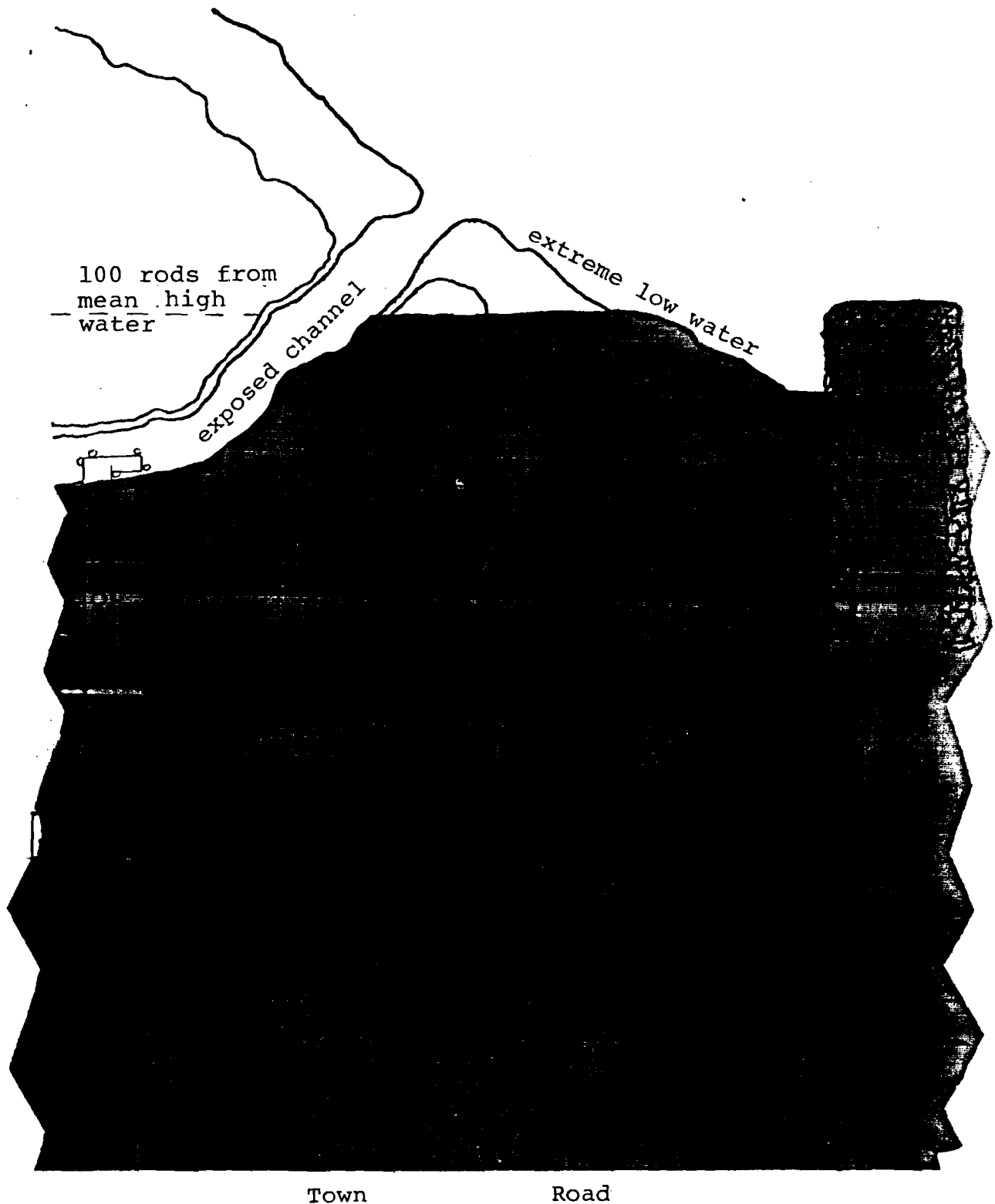


Figure 6. Limit of Fee Simple (or full title) property ownership in Massachusetts. Hatched area on filled land held in fee simple with the condition that the land be used for a public purpose.

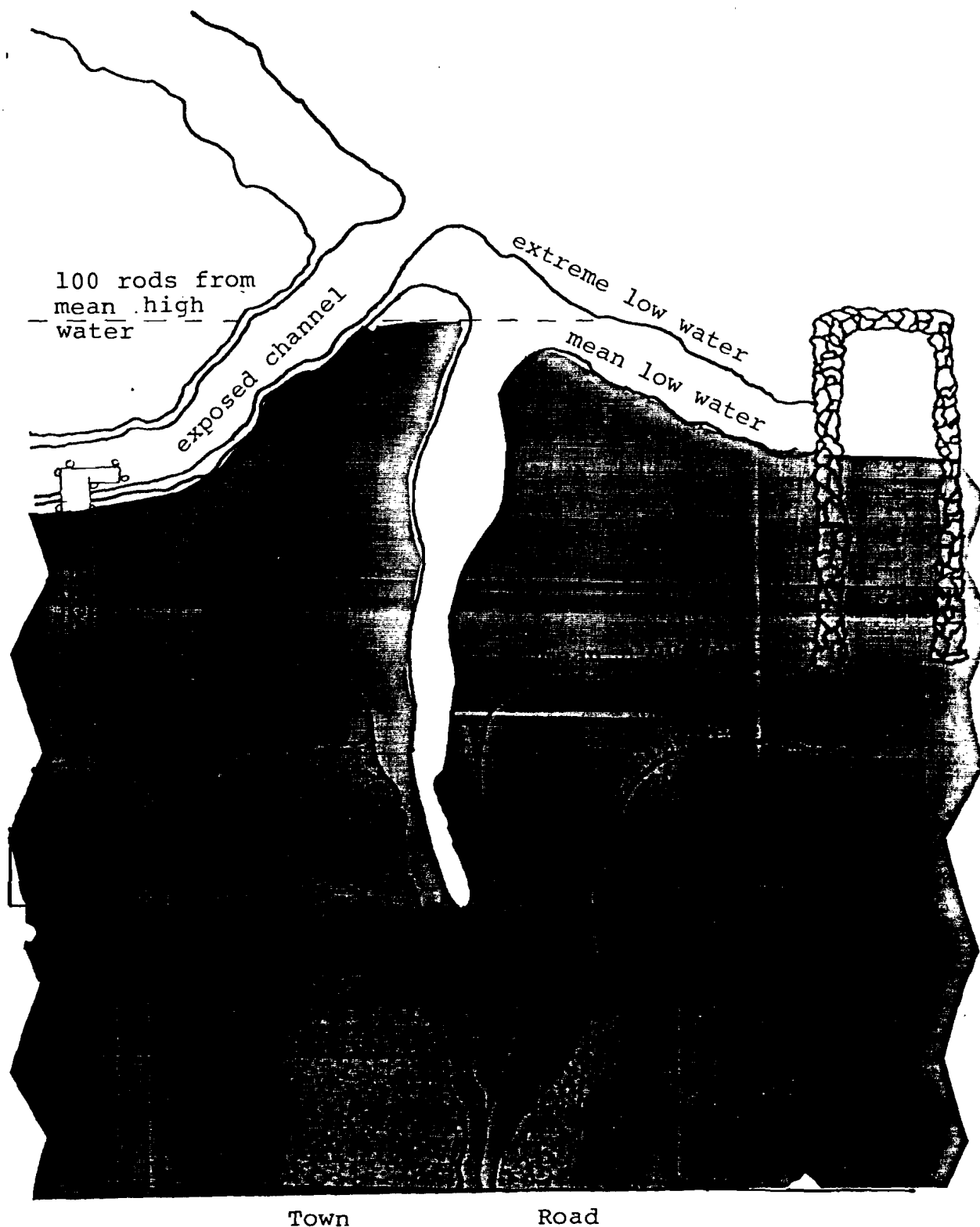


Figure 7. Limit of Fee Simple (or full title) property ownership in Maine and New Hampshire. (Also typical in Pennsylvania, Delaware, and Virginia, though these latter states do not recognize the 100-rod limit.)

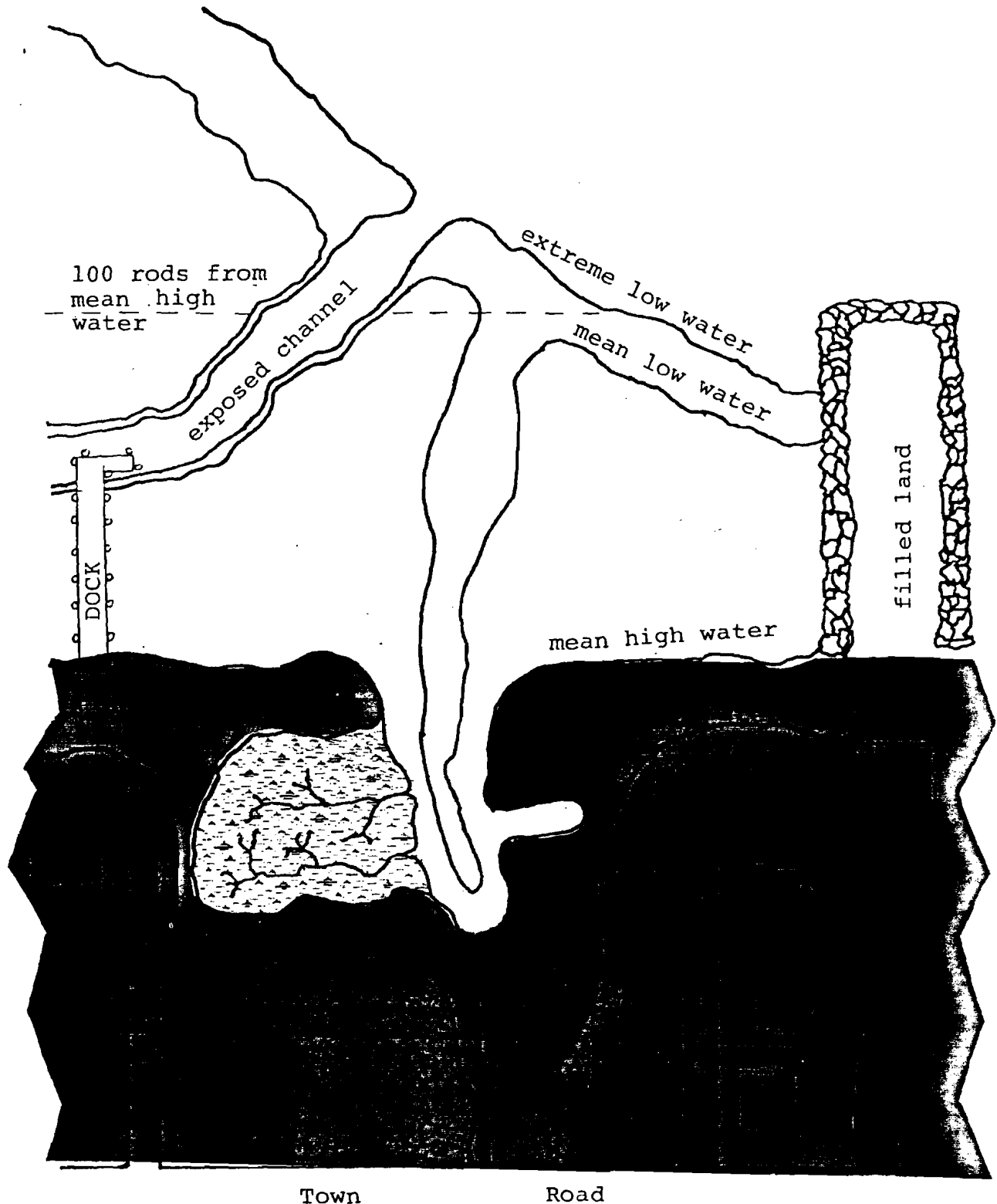


Figure 8. Limit of Fee Simple (or full title) property ownership in other coastal states.

public access problems are compounded by this further appropriation. What is the point in gaining access to the sea if the public cannot use the adjacent land?

The fact that the flats, or the land between the tides, can be held privately in Massachusetts is virtually unknown to most citizens. The single biggest misconception people have is the notion, "We can cross this man's beach as long as we walk below the high tide line." This "right" seems so self-evident to most people that even the researcher, whose studies have convinced him otherwise, begins to doubt his learning. How can so many people all have the wrong idea? The only reason more disputes between landowners and trespassers do not flare is because the belief is so prevalent that even many landowners do not know they own to the low tide line and that they may exclude strollers.⁵

To examine how we arrived at this situation, we must study shore ownership patterns in previous jurisdictions.

Before Massachusetts

We pick up the thread with the Romans. Whatever tyranny their Empire imposed on Europe, it was not evinced in the Justinian Code's chapter on seashores. The shore was owned by no one, but open to all.⁶ Fishermen could spread their nets or even build huts on the beach.

The Decline brought fall to the abyssal depths of feudalism. Peasant rights were surrendered to manor lords who, in turn, bowed before kings. In England, shores of the island realm were vested in the king as a property owner.⁷ This ownership brought with it the right of the king to convey or grant parcels of shore property to individual

subjects.⁸

By the time of the Magna Carta in 1225, however, it became clear that the king had duties towards his coast in addition to his rights of personal gain with it.⁹ He assumed responsibility for safeguarding the public's right to use the flats for the important economic pursuits of fishing and maritime commerce. The king acted as the guardian or trustee for the public in this zone, even if it meant diminishing his royal prerogatives of property.

The crucial notion of a public trust in tidelands was reborn after a long lapse since Justinian's era. The king could still grant away his title to tidelands, but only if the public's right to fish and navigate in the area remained intact.¹⁰

Massachusetts--First Pilgrims and Puritans, 1620-1640

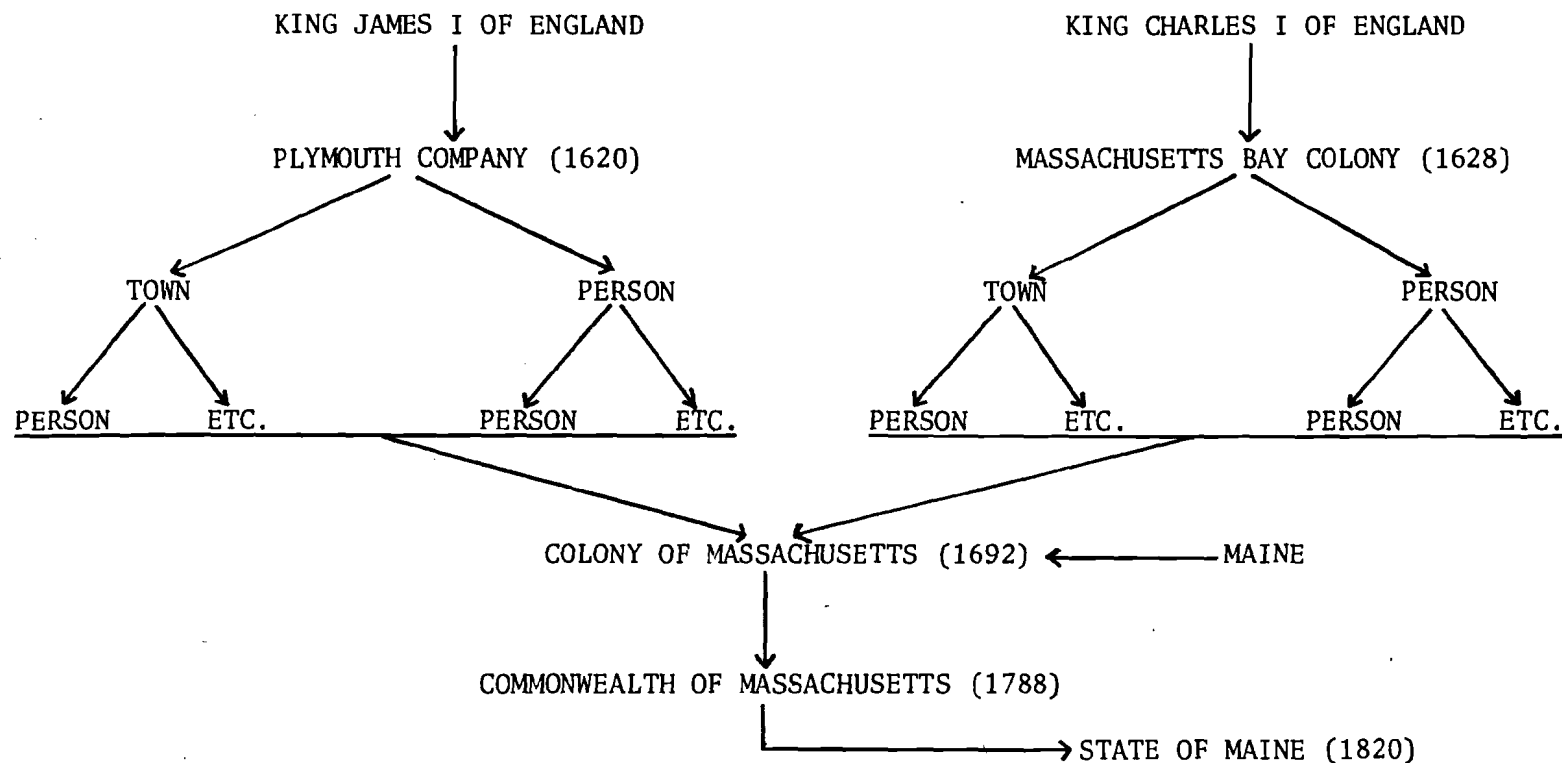
The Plymouth Colony was a chartered trading company that received a grant from King James I of England to settle in America in 1620. The king's grant turned over to the company all of his own rights and duties in the soil and waters around Plymouth where the Pilgrims finally settled.¹¹ The colony could grant land to individuals along the shore, but had to guarantee public use of tidelands for fishing and shipping.

In 1630 Winthrop and his Puritans arrived to settle the shores of Massachusetts Bay to Plymouth's north.¹² The Massachusetts Bay Company had the same far-reaching powers to dispose of land as the Pilgrims had from Plymouth south around Cape Cod. Again, though, the Company had to uphold the public trust (fishing, shipping) like any group representing the English sovereign.¹³

As more immigrants arrived in Boston and Plymouth, the population fanned out to outlying districts. If enough people wanted to settle in the same area, the colonial assemblies would grant them status as towns and delegate the disposal of individual pieces of property to them.¹⁴ A grant of land along the shore by a town to a person, however, was limited to the high tide line because this was the common practice in the settlers' native England and the colony retained title to the flats.

The local governments served as extensions, not as substitutes, for the colonies' general governments. If a town did not protect the fishing and navigation rights of the public in the flats, the colonial governor would override the local action. The colonial legislature could still grant any land not directly appropriated by the towns. In rare instances the colony would fix a boundary of the low tide line in a deed along the shore, granting the flats to the owner.¹⁵

The Plymouth and Massachusetts Bay Colonies were distinct entities at this time. The laws of one had no enforcement application in the other. Nevertheless, both colonies drew upon a similar socio-political background and the "basic law concerning seashores, tide waters and great ponds had similar development in the Plymouth Colony"¹⁶ and around Boston. It should be noted that the territory of the Massachusetts Bay Colony included what would eventually become Maine, and Plymouth's sphere of influence included Cape Cod and the Buzzards Bay region.



This figure demonstrates the derivation and distribution of land titles in Massachusetts. After European discovery, the King of England owned the lands of New England. He granted titles to the chartered trading companies in the 1620's, which, in turn, granted properties to towns, or groups of freemen, or to separate individuals. No landowner today can claim a "King's Grant."

Figure 9. Derivation of Property Titles in Massachusetts

The Colonial Ordinance: 1641-1647

The Massachusetts Bay Colony soon outstripped her elder neighbor Plymouth in population and power. After ten years of settlement and growth, the colonial government in Boston decided to codify the ad hoc rules of law its General Court (legislature) had enacted as well as aspects of the common law inherited from England. The Book of the General Laws and Liberties, or, more commonly, the Colonial Ordinance, is a fascinating document. It details many more laws than liberties, as might be expected in a theocracy which had no qualms about mixing church and state. Nestled in among edicts banning Jesuits, killing witches and "rebellious sons", and setting bread weights are codifications of the most pertinent aspects of the English common law, adapted for use in the wild New World. Prominent among these rules is an affirmation of the public trust concept.

The Colonial Ordinance: 1641 Provisions

In 1641 a passage in the Colonial Ordinance read:¹⁷

Every inhabitant who is a householder shall have free fishing and fowling in any great ponds, bays, coves and rivers so far as the sea ebbs and flows within the precincts of the town where they dwell, unless the freemen of the same town, or the general court have otherwise appropriated them, provided that this shall not be extended to give leave to any man to come upon others' property with out their leave.

Beacuse this paragraph is so central to any discussion of the public trust in tidelands in the Commonwealth, we will examine it in detail and how it has been judicially interpreted over the years. It should be kept in mind that the Colonial Ordinance still holds sway in Massachusetts property law.

QUESTION: Who has these rights?

ANSWER: "Every inhabitant who is a householder..."

The terms "inhabitant" and "householder" are litigated even today. "Inhabitant" does not refer strictly to domicile or residence, but implies citizenship and "municipal rights and duties."¹⁸ In any event, the phrase seems to suggest the public right of fishing and fowling is limited only to coastal town residents and, furthermore, extends only within their own town boundaries, ("...within the precincts of the town where they dwell,"). In 1641 it was rare for any colonist to live anywhere but in a seaside town, so the language initially caused little problem. Nevertheless, in 1856 the judges of the state ruled that the right was open to any citizen of the state.¹⁹ (Today there is increasing pressure to broaden the right to include any citizen of the United States, but discussion of the complexity of that issue must be deferred.)

QUESTION: What are these rights?

ANSWER: "...free fishing and fowling..."

Wild creatures belong to no one until they are captured by an individual. The colony, and later the Commonwealth, however, is said to hold the animals within its territory in trust for its citizens. Fowling refers to hunting birds. It is unclear whether the common law of England recognized express fowling rights on the shore,²⁰ but the colonists were free to adopt that practice. Massachusetts seems to be unique among the states in specifically including fowling as a protected public right.

Fishing is part of the traditional public trust. Most jurisdictions, including Massachusetts, make no distinction between

shellfish and finfish for purposes of the trust, despite the fact that shellfish can be rooted to the soil, which can be held privately.²¹

Both fishing and fowling can be regulated by the legislature and by the towns exercising police powers. In this sense, the right is not "free" and license fees have been imposed for the harvesting of most species, particularly shellfish.

The omission of rights of free navigation should be glaring here. Apparently, navigation rights were so obvious that they did not need mention in the 1641 discussion of the public trust. In any event, navigation was expressly included in the 1647 amendments to the Ordinance.

QUESTION: Where may these rights be exercised?

ANSWER: "...in any great ponds, bays, coves and rivers so far as the sea ebbs and flows..."

Great ponds are large freshwater bodies found only within the Massachusetts, Maine and (through usage) New Hampshire legal regimes. They have their own access-related problems, but it is not primarily a coastal issue and will not be discussed here.

Basically, the language refers to any land that is touched by salt water, whether it be open seacoast or sheltered inlets, such as bays and coves. Coastal streams and rivers up which salt water penetrates at high tide are called navigable waters too, up to the point where they are influenced by the ebb and flow. Massachusetts is one of only a few states that differentiates between waterways navigable-in-law and those navigable-in-fact. Navigable-in-law means only those stretches of a river or stream that are influenced by the ocean tide,²² Navigable-in-fact streams are those capable of commerce

by floating objects, such as boats or logs.²³ Freshwater streams (non-navigable-in-law) can be owned without being subject to the public trust (fishing and fowling) and only if navigation is practical (navigable -in-fact) must the owner allow the public to use it for such purpose. The distinction is important because the public trust applies differently to each category:

TABLE 1

THE PUBLIC TRUST IN WATERWAYS IN MASSACHUSETTS

	Navigable-in-law (salt water)	Nonnavigable-in-law (fresh water)
Navigable-in-fact (can float boats and logs)	fowling/fishing-YES navigation-YES	fowling/fishing-NO navigation-YES
Nonnavigable-in-fact (cannot float boats or logs)	fowling/fishing-YES navigation-NO	fowling/fishing-NO navigation-NO

Implicitly, the trust permits "free fishing and fowling" seaward to the three-mile limit of state sovereignty. Again, it should be reiterated that the Colonial Ordinance at the time applied only to those in the Massachusetts Bay Colony. Eventually, it would be acknowledged to control the entire state when Plymouth merged.

QUESTION: When can the rights be freely exercised?

ANSWER: "...unless the freemen of the same town, or the general court have otherwise appropriated them..."

The indefinite pronoun "them" here refers to the fish and fowl. The appropriation by the town or legislature implies imposition of legitimate regulations on the taking of heretofore wild creatures.²⁵ Once appropriated to government control, the fishing and fowling are no longer considered free. Quotas, size limits and fees are examples

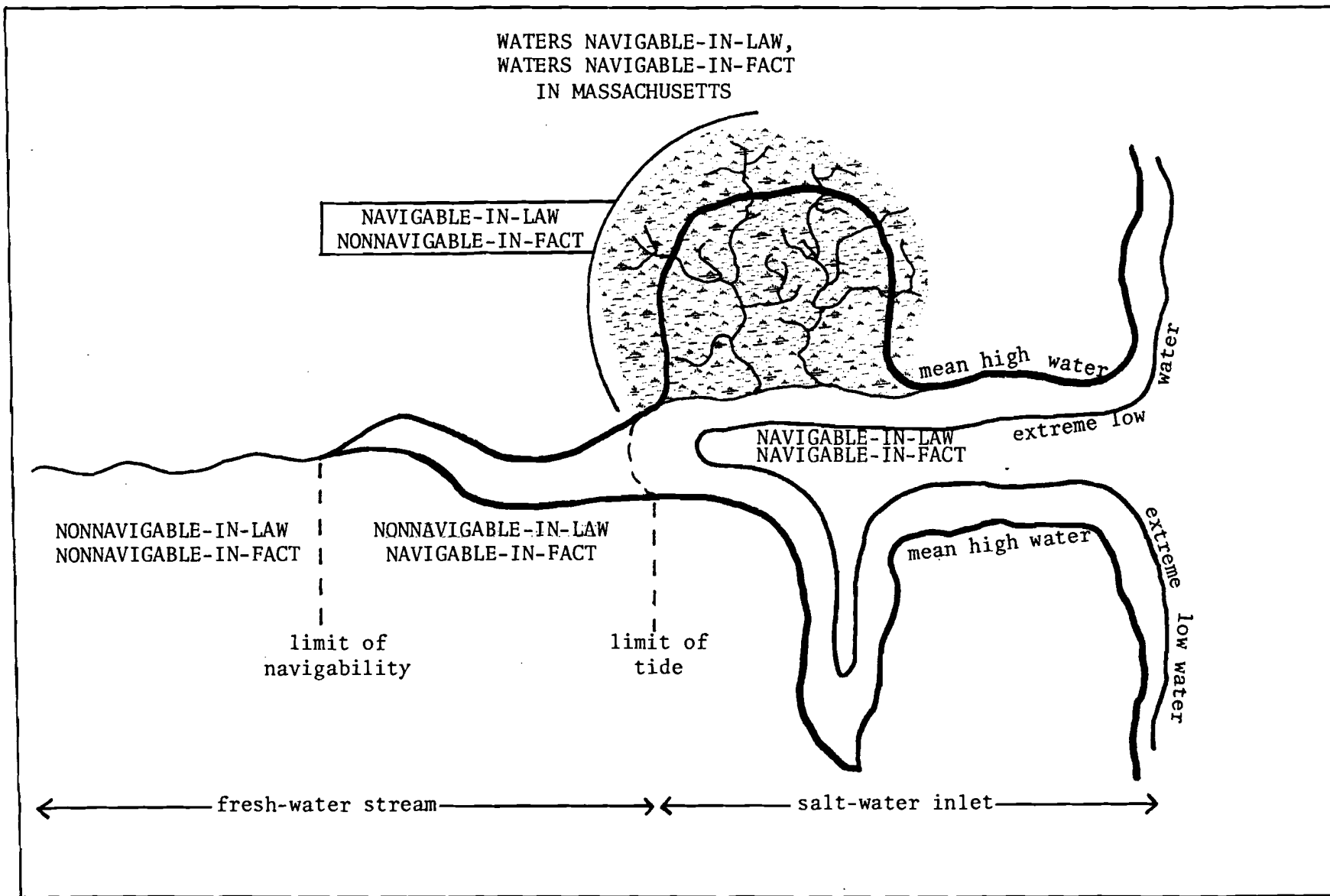


Figure 10. Waters Navigable-in-law and Waters Navigable-in-fact in Massachusetts. (See Table 1 for application of the public trust rights of fishing and fowling in each area.)

of legitimate restrictions placed on the harvest.

The appropriation may take another form.²⁶ The legislature has the power to vest exclusive rights to a wildlife stock to an individual if it can show that the public interest is served.²⁷ For example, an unproductive shellfish bed may be granted to a person who promises to improve it. (Shellfish grants are not uncommon today, notably in the Cape Cod towns of Wellfleet, Chatham, Falmouth and Barnstable.)²⁸

QUESTION: How can these rights be exercised?

ANSWER: "...this (free fishing and fowling) shall not be extended to give leave to any man to come upon others' property with out their leave."

The colonists had the right to use the waters and the flats for their fishing and fowling, but they would have no guarantee of easy access across the upland behind the beach to reach the shoreline. Given that citizens had liberty to walk parallel to the tideline in pursuit of fish and fowl, fishermen and hunters could be cited for trespass if they crossed private property perpendicular to the beach, without the leave or permission of the owner.

Theoretically, a situation could have evolved wherein a town's entire shoreline could have been vested in private hands with no public access points at all. The public would have to approach the flats by boat or from another town. It was not until 1908 that the legislature required each coastal town to provide "at least one common landing place,"²⁹ by eminent domain if need be.

The confusion and frustration enveloping perpendicular access was recently demonstrated in the Cape Cod town of Barnstable. The town contracted with a Boston consulting firm to develop a "master

plan" to guide local economic growth.³⁰ The Boston "experts" recommended, among other things, the town could encourage "development of the shellfish industry" by insuring that "shellfishermen are aware of the provision that they be able to reach the water through privately-owned land if they are carrying fishing equipment."³¹ Fortunately, the error went no further than the first public meeting before correction, thereby averting more confusion and potential class warfare.

This problem of upland or perpendicular access is the biggest one confounding lawyers and recreation planners today. It will be examined at greater length shortly. This one dependent clause prohibiting trespassing, however, should be compared to the law of the ancient Romans, which read, "Nobody is prohibited to come to the sea shore."³²

* * *

Despite the qualifications enumerated above, the basic thrust of this entire passage in the 1641 Colonial Ordinance is simple. It merely restated the rules the colonists were accustomed to in England. Public uses of the sea and shore were being transplanted to the New World too. The towns, acting as agents of the legislature, and the legislature itself, served as property owners of tidelands and protectors of public rights there, just as the king and his Parliament had in England.

Simply because most of the tidelands were still in the public domain did not mean citizens could use them as they pleased. The tidelands' title was held by the General Court, which could set strict rules on how the shores were used. Implicitly, any person on a public

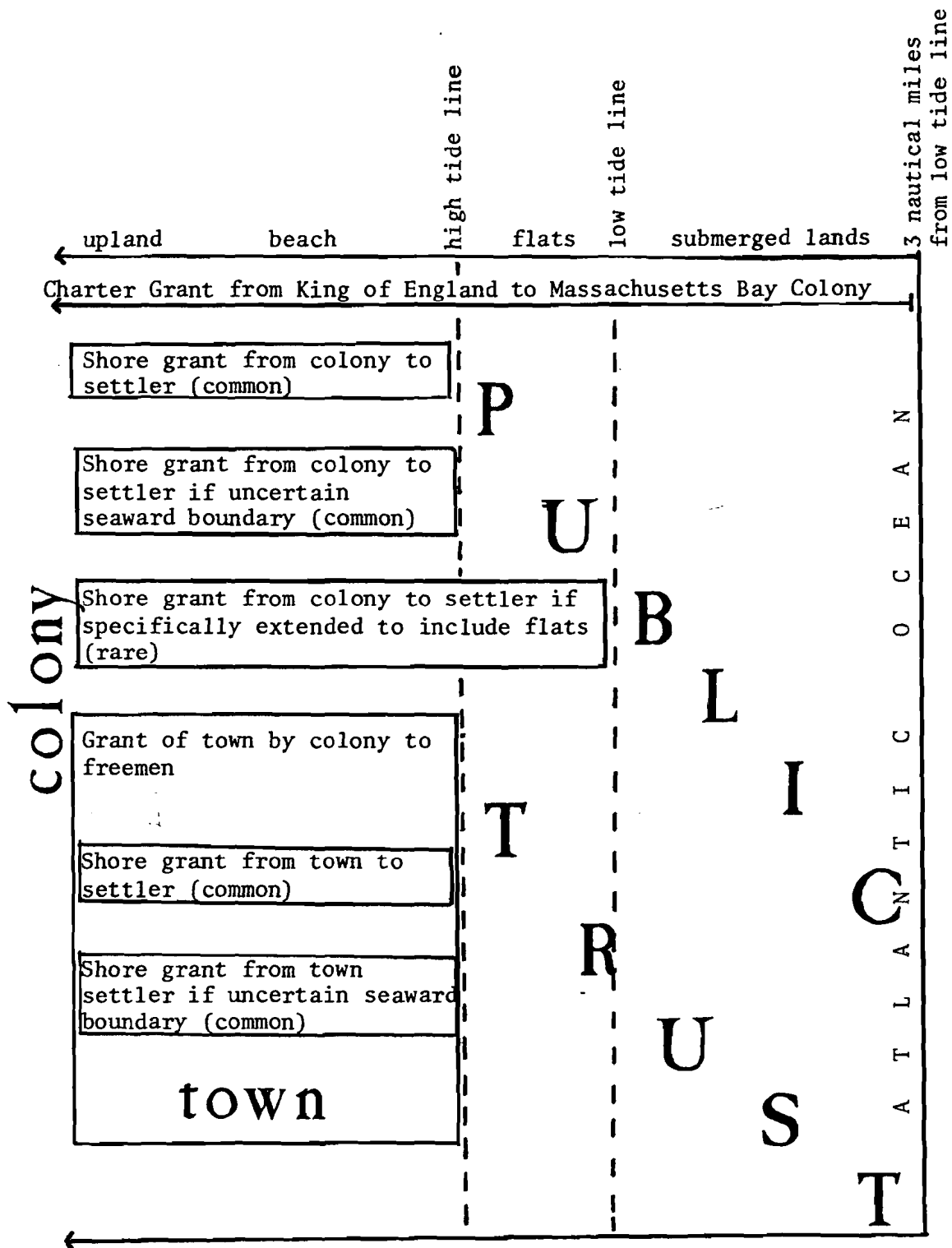


Figure 11. Shore Ownership in Massachusetts, 1620-1647. Individual parcels of property were typically granted only to the high tide line by the colony or town. Boxes indicate parcels of property.

tideland had to limit his actions to enjoyment of the three public trust rights (fishing, fowling, navigation) or he was technically trespassing. He had no legal right simply to stand on the public flats without a reason. The Puritan may not have been able to envision other coastal activities anyway.

The Massachusetts General Court had deeded away several parcels of flats into private hands, but these landowners held their deeds subject to the public's right to fish, fowl and navigate on and over their flats and beyond. Few shoreowners minded; the beaches were wide open in a practical sense anyway. The cod, crabs and clams that drew the settlers in the first place were still teeming. The sea continued to heave up its bounty effortlessly.

The Colonial Ordinance: 1647 Amendments

Throughout the 1640's various additions were made to the Colonial Ordinance. Penalties were imposed for "tippling strong waters after nine at night," shuffleboard was banned and poor people were "disposed of" into certain towns "for the ease of the Countrie." Such rules and others were deemed necessary so the community could pursue undisturbed its reverence for God and its respect for Mammon.

In 1647 the following passage was inserted into the Ordinance directly beneath the vow of the public trust:³⁴

It is declared, that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor, or the land adjoining shall have propriety to the low water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further:

Provided, that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks or coves, to other men's houses or lands.

The Massachusetts Bay Colony thus became the first sovereign power since medieval days to engineer a general divestiture of public shoreland. The General Court had extended all private shoreland titles down to the low tide mark. The flats were in private hands.

QUESTION: To whom did this grant apply?

ANSWER: "...the proprietor, or the land adjoining..."

Proprietor means property owner. The landowner who held title to the beach above, or adjoining, the flats was now granted title to the flats also. The proprietor need not be a private individual because the towns too held land adjoining flats. Town title was also extended to low tide where the upland had not yet been sold to private citizens.

The conveyance of title to flats operated retroactively as well as for future transactions. Future deeds were presumed to extend to low tide unless there was very specific language to the contrary.

QUESTION: Where was the granted land located?

ANSWER: "...in all creeks, coves, and other places about and upon the salt water, where the sea ebbs and flows, ... where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further."

Essentially, this passage describes the flats, or that part of the shore between high tide and low tide. Flats need not be on the open seacoast, but can be a portion of a riverbank exposed at low tide. It is customary to consider only the horizontal component of an ebb tide (the soil left bare), but the propriety also applies to vertical portions of landforms, like rock ledges, exposed by a receding tide. (In this context, "flats" is a misnomer, but it is a convenient term. Besides, vertical bands of landforms can little benefit public trust uses.)

3 nautical miles
from low tide line



Figure 12. Shore Ownership in Massachusetts, post-1647. (Shore grants were extended to the low tide line. The public trust remained intact in the flats and beyond until the shoreowner enclosed his flats. Boxes indicate parcels of property.

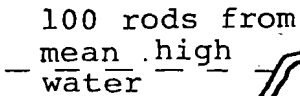


Figure 13. After 1647 the flats could be owned privately. The flats could be separated from the adjoining property and sold as a distinct parcel, although this practice was and is rare. In the case illustrated above, Landowner Y bought Landowner Z's flats so Y could construct a dock.

Adjudication eventually abscribed definite meaning to the phrase "low water mark." The pre-1647 legal regime always intended "high water mark" to imply ordinary or mean high water, as it controlled cases in England. The 1647 change not only gave colonists title to the low water mark, but judges interpreted it to be the extreme low water mark.³⁵ The only specific qualification limited extension of private title to the first hundred rods (1650 feet) of flats, if the sea ebbed farther than that. This provision was necessary because there are very broad flats in Plum Island Sound in Ipswich and in the east side of Cape Cod Bay.

An overlooked feature of this general conveyance was the appropriation of salt marshes. Salt marshes are divided into low marshes and high marshes. Low marshes include plant species like Spartina alterniflora, which require daily wetting by the salt flood. Spartina patens is characteristic of high marshes (slightly higher elevations), which can survive with only intermittent flooding by extreme high tides.

Under a high water mark title boundary system, the more productive low marshes remained in the public domain. An extreme low water boundary between private and state lands, however, places all salt marshes de facto into private hands. Although the immense productivity and ecological significance of salt marshes has only recently become common knowledge, they were always important to the colonists. They served as shellfish beds, gamebird habitats and hayfields for the public. Nevertheless, they were gradually filled or "improved" to make valuable real estate. Who can say if the modern degradation of marshes would have proceeded so steadily had clear private title not been

given by the government?

QUESTION: What exactly was conveyed by the General Court?

ANSWER: "...propriety..."

The legislature imposed few qualifications on this blanket grant. The upland owners were given fee simple, or clear title, to the soil of the flats.³⁶ They were not given title to the waters over that soil. This "liberty" gave the proprietor the same right to mold the flats to suit his own pleasures as he had to use the upland. One of the rights of full ownership of land includes the power to exclude unwanted outsiders. Ownership implies exclusion which implies enclosure. A proprietor could fill his flats, build over them, set stakes or nets in them.

QUESTION: Were not the powers conferred by this grant limited in any way? Does not the grant clearly interfere with the public trust?

ANSWER: "...such proprietor shall not...hinder the passage of boats...to other men's houses or lands."

Thus, navigation formally joins fishing and fowling as the third jewel in the public trust diadem. The proprietor must give due regard to public navigation if he desires to enclose his flats. If he wants to build a wharf for his own private use, it must not obstruct the right of others to navigate on the waters over his soil to reach some destination beyond his property. The test for obstruction seems to relate to the location of the proposed enclosure, such as a wharf. A long dock jutting over the flats of a narrow tidal stream (navigable-in-law and in-fact) would probably hinder navigation past it.³⁷ A dock at the head of a dead-end creek, whose entire surrounding land rests in one proprietor, would render the question of reaching another man's house moot and would probably be allowed. A wharf on the open seacoast

would probably be allowed because there is ample space for the public to avoid it. (State police powers have since been invoked to regulate enclosures on flats generally.)³⁸

Because the General Court did not remove from the Ordinance the guarantee of continued fishing and fowling on the flats, the problem was left up to later judges to reconcile the clear public trust in flats with the clear private right to exclude the public implicit in the conveyance of the flats. The courts held that the public had the right to fish and fowl on private flats until the owner decided to enclose them for his own use.³⁹

QUESTION: Why? Why did the Colony feel it necessary to grant away its flats?

ANSWER: ?

This question is the most important and the most unsatisfying when seeking a suitable answer.

Religion and economics motivated most Puritan actions. Because the Puritan's God was not a benevolent One, but a vengeful Being, it is doubtful charity was given much consideration in making the title extensions. We must then look at financial motives.

It is beyond the scope of this paper and colonial documents are scanty, but it would prove useful to compare a list of the Genral Court representatives in 1647 with a list of their property holdings. Undoubtedly, many of them lived on the shore or operated businesses there. (It would have been hard to own property on skinny Boston Neck at the time and not about the sea.) Enhancing the limits of their own shorelands by a general conveyance may have been the first instance of "lining their own pockets" the Great and General Court indulged in.

If personal gain cannot be proven as a motive, this granting may

still have been grounded in a subtle social policy. The legislature was almost omnipotent; it could make any laws "not repugnant" to those of England in 1647. Because the English Crown could and did grant individual parcels of flats to private citizens in the home country (even if it was on rare occasions), so could the colonial legislature in Massachusetts Bay. And the Colony had already granted several flats to private control in an ad hoc fashion. Perhaps by making a blanket relinquishment of the flats, the legislators were rewarding the early founders of the Colony by giving them a preference over the influx of new immigrants.

The newcomers expected to retain their English public trust rights and would soon be enjoying the use of the flats in front of the homes of the original settlers. The newcomers would be served notice that in the Massachusetts Bay Colony the scales were tipping in greater favor of the shoreowners. This policy could be said to continue the enduring practice of the "haves" protecting their interests against the "have-nots".

'Although other analysts have not cited the colonists' personal greed as motivating the seawards extension of title, most reviewers acknowledge general economic objectives as a stimulus. The early history of Massachusetts is the story of maritime Massachusetts and its three most significant industries--shipping, fishing and shipbuilding.⁴⁰ Wharves were essential for this sea-based commerce. The public treasury could not fund the construction of docks, bulkheads and warehouses, so the Colony decided to encourage the expenditure of private capital on these improvements.⁴¹ Although no legislative history exists for these 1647 amendments, later legal interpretations have speculated that the

granting of flats from public to private control was meant to lend security to shoreowners wishing to "wharf-out."⁴² In 1647 private wharves had already been built, but most of them were on the government-owned flats and so were legitimized only by licenses from the legislature that could be revoked at any time. By relinquishing public title to flats, the legislature may have simply acted to "define and make certain a somewhat indefinite usage which had already grown up."⁴³

Other reviewers have cited common sense and practicality as reasons for transferring flats to private ownership:⁴⁴

The shore is of little practical value to the sovereign. The owners of the lands along the shore alone are ordinarily in a position to make a valuable use of the shore and to construct improvements on it.

Further:⁴⁵

Among the multitude of improvements and works of art of a public nature, which command observation in the towns and cities of the Atlantic States, are the artificial embankments which have been made by enterprising individuals or corporate companies, in and upon the soil (of the flats) which, in its natural condition, would have exhibited nothing more attractive or valuable, than the offensive spectacle of an extended waste... (emphasis in original).

It is arguable, however, whether private appropriation of the flats was truly necessary to foster "wharfing-out." Maritime commerce never suffered in other American ports, from Newport to New York to Charleston, South Carolina, as they grew to rival Boston's early preeminence. In these other states, private titles were not generally extended past the high water mark. While wharfing-out was justified in the name of commerce and commerce was necessary for the public interest, these benefits accrued only indirectly to the citizens of the Massachusetts Bay Colony. The wharfowners reaped the primary reward by

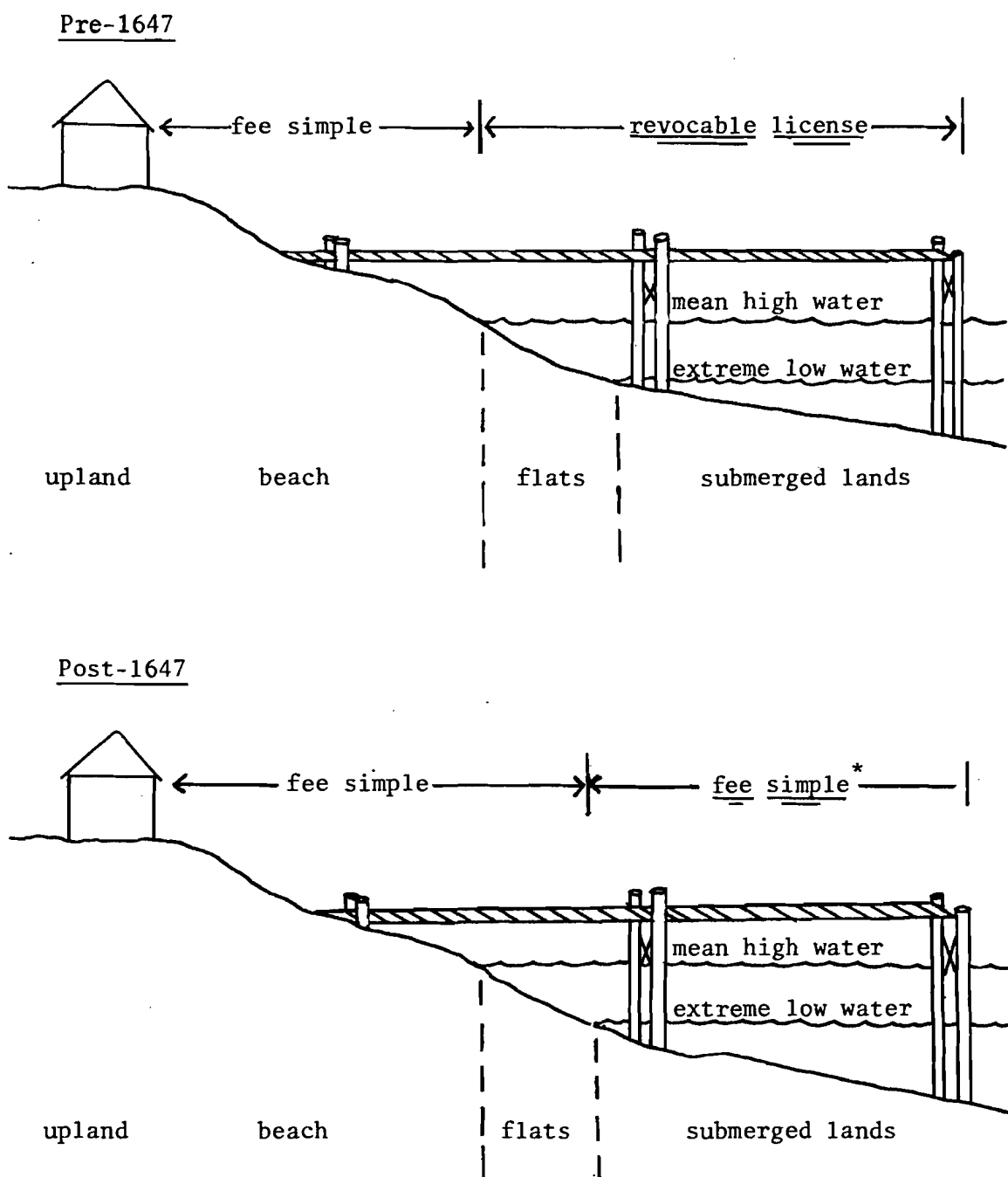
gaining control of the heretofore public flats. Nor was the public given privileges of landing at these private wharves, absent an emergency.

Many observers who believe the promotion of wharfing was responsible for the shore title extensions in 1647, though, have ignored an important technical consideration. To be of continuous value a wharf must extend beyond the low water mark; otherwise, ship approaches and departures are limited to periods of high tide. A grant giving clear private title to the flats beneath a wharf could not be fully appreciated by the colonial landowner since he still had to rely on a revocable license from the government for the most valuable portion of his pier, that which jutted beyond the low tide line. (The law pertaining to wharves below the low water mark became an entirely separate subject for litigation. It culminated in the important 1979 suit, Boston Waterfront Development Corporation v. Commonwealth, which has been discussed in depth elsewhere.)⁴⁶

All of these points belie the consensus that argues the 1647 amendments to the Colonial Ordinance were intended to encourage wharfing-out.⁴⁷ Whatever the true reason for the deed extensions, it cannot be denied that the transfer of flats from public to private control profoundly affects the shore access issue today. Even property owners with no intention of wharfing-out enjoy the primary benefits of the transfer, though they must respect the limited public trust.

Other Early History

Through the late-1600's the Massachusetts Bay Colony exercised varying degrees of control over the settlements of Maine. In 1692 the Province Charter united Maine, the Massachusetts Bay Colony and the



* (In Boston Waterfront Development Corporation v. Commonwealth Mass. Adv. Sh. (1979), 1992, the Supreme Judicial Court ruled that structures in submerged lands were held by fee simple with a condition subsequent. The definition of that condition was said to be "for a public purpose," related to maritime trade and commerce.)

Figure 14. Legal Relation of Flats to Wharves in Massachusetts

Plymouth Colony. The Colonial Ordinance became the settled rule of property for all three regions after that date.⁴⁸ Massachusetts ratified the United States Constitution and became a state in 1788, agreeing to share control over navigation with the national government. In 1820 Maine split from the Commonwealth and became a state in its own right.⁴⁹ Maine continues to uphold the Colonial Ordinance, but has developed its own interpretation of it over the years.⁵⁰

CHAPTER IV

EXISTING PATTERNS OF SHORE OWNERSHIP AND USE

The Colonial Ordinance and its judicial interpretation over the centuries have built the general framework governing coastal public access. The social implications of that legal regime now need to be investigated. The types of access demanded vary depending on the setting. In urban areas access to swimming beaches is not practical due to high land values and preemption by industrial or commercial land uses. It is also not often desirable due to nearshore pollution. Rather, emphasis is placed on securing "pedestrian access" to the waterfront in the form of walkways to and along the wharves and bulkheads. "Visual access" is a new concept being pursued through zoning ordinances to prevent high-rise structures from blocking citizens' views of the water.⁵¹ Urban coastal access in Massachusetts has been discussed at length elsewhere,⁵² so this study will focus on access problems in smaller towns. Some access shortages, such as public boat launching ramps, are common in both city and village.

Ownership of the coast determines the types of access allowed on the beach and who may enjoy them because it is a prerogative of property. Shores may be owned by public, private and semi-private organizations. Of the 1200 miles of shoreline in Massachusetts, 90 miles are owned by the federal government, 175 miles are held by the state and municipalities, and the remaining 935 miles is vested in private or semi-private ownership.⁵³ Semi-private entities include

beach associations (a group of private individuals, for example) and non-profit conservation trusts.

Public Ownership

Federal

In 1961 at the urging of President John F. Kennedy, the U.S. Congress established the Cape Cod National Seashore. It governs fifty miles of the finest recreational shoreline on the Atlantic Coast and stretches along the Outer Cape from Chatham to Provincetown. The swimming beaches are plentiful and there is abundant parking available at a nominal fee (one dollar per day) applicable for all visitors. Several towns, however, still operate municipal beaches within the Seashore's jurisdiction, Wellfleet and Orleans in particular, and the towns have some restrictions on parking at these sites.

The National Seashore has had contradictory effects on access. The Seashore attracts over one million visitors annually.⁵⁴ Certainly, it relieves a great amount of additional overcrowding pressure on the small municipal beaches of Barnstable County. At the same time, though, the Seashore serves as a magnet or focal point for Cape Cod, attracting tourists from all over the country whose notions of available recreation on the Cape would otherwise be vague. Vacationers know they can go to the beach at the National Seashore, so any uncertainty in their minds as to what summer resort to visit is resolved.

The National Seashore has also taken 27,000 acres out of potential development, and hence concentrates population pressure in the small areas of town control not governed by the Seashore and in other towns of the Cape. So, while the Cape Cod National Seashore

provides a tremendous opportunity for public access, it has also exacerbated development problems in nearby areas, attracting more people who need more access. The net effect has not been measured.

The Seashore itself is not without access problems. In 1981 the National Park Service imposed strict limits on the use of off-road vehicles (ORV's) within the National Seashore's boundaries. This move came after a five-year study conducted by the University of Massachusetts on the ecological effects of ORVs in a beach/dune environment. The study concluded ORVs damage dune vegetation, exacerbate erosion and disrupt wildlife nesting areas.⁵⁵ The beach buggies were banned outright in certain areas and their numbers restricted in other areas by a "first-come, first-served" permit system.

The ORV dispute resurrected old arguments about whether the National Seashore had been established primarily to meet recreation or conservation needs. There are few true access points along the Seashore's fifty-mile length and ORVs represent the only practical means of opening up the entire beach. Local residents, testifying that they had used beach buggies to reach isolated surf-fishing spots since the 1920s, found themselves in an unusual alliance with out-of-state sportmen's clubs to fight the restrictions.⁵⁶ When the Commonwealth was asked its opinion on the restrictions, it responded without a consistent voice, allowing individual agencies to testify on behalf of its own "constituents."⁵⁷ Restrictions on ORVs on town beaches, notably Sandy Neck in Barnstable, have also grown in recent years, sometimes to promote conservation, but also to reduce conflicts with on-foot coastal access.⁵⁸

Other major federal coastal properties in Massachusetts include

the Monomoy Island and Parker River National Wildlife Refuges. Monomoy is an uninhabited sand island dangling off the elbow of Cape Cod and is an important migratory waterfowl area. There is no provision for public access to the sixteen miles of Monomoy Island, though private boats can land there for the day and some Chatham entrepreneurs ferry people to the Island during the summer.

The Parker River Refuge includes Plum Island and its extensive salt marshes on the Upper North Shore of Massachusetts. Established in 1942 it emphasizes conservation, not recreation. Nevertheless, many types of access are permitted, including fishing, hunting and ORVs (by permit). Swimming is not prohibited, but no facilities are provided. In all the federal coastal lands, the towns have primary jurisdiction over the harvesting of shellfish.

State

The Commonwealth, of course, was the original owner of all the shoreline through its predecessors, the Plymouth and Massachusetts Bay Colonies. But the state entered the twentieth century owning few major coastal properties and none for recreational uses. The state's own indifference to its shoreline acreage may well have prompted the early development of strong private conservation groups in the Commonwealth, such as the Trustees of Reservations.⁵⁹ In any event, the state has had to fight hard, frequently resorting to its eminent domain power, and spend enormous sums to win back coastal property from private appropriation. State acquisition of salt-water beaches only began in earnest 25 years ago, as the following figure illustrates.

TABLE 2.

STATE-OWNED SALTWATER BEACHES IN MASSACHUSETTS⁶⁰

1. Horseneck State Beach, Westport
 - purchased in 1957 after hurricane; many different landowners were bought out
 - shore length: 2 miles
2. Scusset State Beach, Sandwich
 - owned by the Army Corps of Engineers; leased by the state since 1957
 - shore length: 0.5 miles
3. Fort Phoenix State Beach, Dartmouth
 - purchased in 1963 from Xavier Corp.
 - shore length: 0.5 miles
4. Salisbury state Beach, Salisbury
 - acquired from Mass. Dept. of Public Works in 1968
 - shore length: 3.5 miles
5. South Cape State Beach, Mashpee
 - taken by eminent domain from the New Seabury Corp. for \$6.3 million in 1982
 - shore length: 2 miles; 430 acres (including upland)

South Cape Beach, the most recent addition to the state beach collection, was delayed for fifteen years due to negotiations and insufficient budget appropriations. None of these state beaches is in an urban area, which means they are of limited value to urban populations dependent on mass transportation. A plan by the state Department of Environmental Management to bus city dwellers to the beaches has never been implemented due to lack of funds.⁶¹

The state's Public Access Board is a strange bureaucratic organization. It consists of a one-man staff and infrequent meetings of the state's environmental agencies.⁶² The Board's involvement with coastal access has generally been limited to the construction of boat

ramps, which usually are transferred to towns for operation and maintenance. Its statewide budget was \$885,000 in 1980, of which one-third was allocated to inland hiking trails and snowmobile paths in state parks.⁶³ Its annual budget varies wildly depending on specific projects under consideration.

Towns

The majority of the 175 miles of shoreline now owned by the state and local governments in the Commonwealth is held by towns. A hundred years ago, however, public beaches were unknown. Coastal residents at the time had informal access through private property along the shore through customary use and the level of use was so limited that private landowners rarely objected. Summer visitors were mostly accommodated at the large inns and hotels that commanded the shore in those days and these lodging places invariably had their own private beaches for their own tourists' use. Coastal access was so non-controversial that it was not until 1908 that the state legislature decided to require each seaside town to provide a public landing.

But as the tourist economy evolved after World War II, towns responded to the new need for public beaches. The coastal inns died out and were replaced by individual homes and subdivisions. Meanwhile, motels catering to shore visitors were built farther inland where land prices were lower and where the new federal highway system guaranteed traffic volume to fill vacancies. Allowing greater numbers of people to use fewer acres of undeveloped beaches meant more protests from private shoreowners and the public alike.

In the decade from 1950 to 1960 most towns began to buy land along the beach for recreation.⁶⁴ That acquisition process continues today, but the purchase opportunities are fewer and the prices higher. Still, many towns feel they cannot afford not to buy available beaches. As one town official summed up the situation:⁶⁵

Anyone would be interested in seeing the town get hold of it (a beach for sale). Once it's gone, it's gone. They're not making any more beach. I don't see how we can question the value of beachfront.

The towns have achieved varying amounts of success in obtaining access points along their coasts. A survey was made of ten Cape Cod towns to determine the ratio of town-owned access points to miles of tidal shoreline. The results should be interpreted with caution because no differentiation was made between long stretches of swimming beach with plenty of parking and street-wide town landings with no parking. Nevertheless, these sites represent points where citizens can at least have some form of direct contact with their coast.

TABLE 3.

TOWN-OWNED SALTWATER ACCESS POINTS, 1980⁶⁶

TOWN ^a	# of Access ^b Points	Miles of Tidal ^c Shoreline	Access Points/ <u>10 miles</u> Shoreline
Barnstable	43	100	4
Bourne	17	40	4
Brewster	10	8	12
Chatham	29	50	5
Dennis	26	30	9
Falmouth	30	55	5
Harwich	18	11	16
Mashpee	8	26	3
Sandwich	6	27	2
<u>Yarmouth</u>	33	39	8

TABLE 3. (continued)

^a(Cape Cod towns whose shoreline is mostly within the jurisdiction of the Cape Cod National Seashore were excluded from this survey.)

^b(boat ramps, beaches, ways to water, town docks, conservation areas contiguous to public roads; does not include state or federal or private access facilities)

^c(includes inlets, tidal creeks, marshes)

Even the towns which managed to secure a large number of access sites run into problems when the size and distribution of those sites is inadequate. The single biggest problem associated with small scattered access points is the lack of adjacent parking space.⁶⁷ Few coastal towns in the Commonwealth (and none on Cape Cod) have intra-town mass transit service, so automobiles are used almost exclusively to move around.

In a 1982 statewide opinion poll, the Massachusetts Coastal Zone Management Program found that 88 per cent of all beachgoers arrived by car; 11 per cent walked.⁶⁸ Without ample parking, therefore, even the best public beaches in the state will remain underutilized. Because land values are so high adjacent to the shore, space for parking at beaches is as costly to acquire as the beaches themselves. And many planners would argue that parking is an environmentally-inappropriate land use for such choice property.

Running a shuttle bus from a parking lot in a shore town's interior to its beaches is frequently lauded in theory, but rarely practiced due to logistical problems and insufficient capital. The town of Falmouth requested a state Coastal Zone Management grant to fund a prototypical three-year beach bus shuttle system for \$25,000 in 1980 and, although the agency commended its intent, state money was

denied and the project was abandoned.⁶⁹ The CZM opinion poll cited above also found that 73 per cent of beachgoers who drive there would be willing to try such shuttle buses.⁷⁰

The "limited beach parking" syndrome breeds inequitable consequences. First, many public landings, boat ramps and small town beaches, wedged in between private property, are apt to be enjoyed primarily by neighborhood residents within walking distance of the site. If no parking at all is available, use by residents of other areas of even the same town is effectively denied.⁷¹ That public facilities are used more often by proximate neighborhoods than by other community residents is not unique to beaches; town playgrounds are also more apt to serve nearby residents. But beaches are different because their limited parking renders them incapable of satisfying additional demand.

The physical characteristics of local beaches and their lack of parking engenders discrimination-in-fact, if not, conclusively, in-law. The practice escalates in scale: neighborhoods do not want town intruders, towns want to shut out out-of-towners, Massachusetts citizens want to exclude out-of-state residents, and "everyone wants to shut out people from New Jersey."⁷²

This exclusion again manifests the struggle between the haves and the have-nots. In this case, it is the coastal towns which have the "public" beaches and all outsiders are have-nots. In Massachusetts only ten of fifty coastal towns place no restrictions on non-residents using municipal beaches.⁷⁴ Ten others have adopted strict rules totally excluding out-of-towners. The remaining towns set aside some of their beaches for residents, while opening others to all or adopt user fees that are higher for non-residents.

Falmouth Enterprise
Falmouth, Mass., Tuesday, August 31, 1982

LETTERS from READERS

Nobska Beach

I would like to publically express my disappointment after driving to Falmouth from the Berkshires and finding Nobska Beach had become a restricted beach. I have been using Nobska for thirteen years any time I was lucky enough to find myself in the Falmouth area. I would be quite willing to pay a fee to use the beach. To close off one of Falmouth's best beaches from occasional use by persons not lucky enough to be renting property in Woods Hole is not fair. I am sure that residents of Woods Hole would not find a similar arrangement upon visiting scenic sights in the Berkshires.

Jeffrey S

Lowell Lane
Huntington

(This letter needs little comment. Note, though, that the writer is quite willing to pay for the right to use the beach.)

Figure 15. Non-Resident Exclusion Letter in Media

The concept of beach fees for municipal beach use dates only to the late-1960s. A survey of Cape Cod towns in 1962 revealed that no town imposed any beach fees on either residents or non-residents.⁷⁵ By 1982, however, the situation had changed dramatically as the figure below illustrates for representative Barnstable County towns.

TABLE 4.

BEACH PARKING FEES, BARNSTABLE COUNTY, 1982⁷⁶

TOWN	Year-round resident/ Taxpayer--Annual fee	Seasonal residents or non-taxpayers			
		Season	2-weeks	1-week	Daily
Barnstable	\$ 3	\$	\$	\$ 10	\$ 3
Brewster	5	25	10		2
Chatham	2	25		15	2
Dennis	5	50		7	
Eastham	0	5			5
Falmouth	2	50	20	15	4
Harwich	3	25	15	10	
Mashpee	5	50	16	10	3
Orleans	0	35	25	15	4
Sandwich	2	----Non-residents Excluded----			
Wellfleet	2	10			3
Yarmouth	4	20			4
(average)	3	30	17	12	3

N.B. (Each town has a different permit schedule; some issue permits for various durations, from one day to the whole season.)

Some towns have worked some flexibility into their system to provide for varying vacation durations, from the day-tripper to the summer resident. But the enormous differential between resident and non-resident fees is obvious; in an average town it costs the outsider as much to use a public beach for one day as it does for the resident to use it for one year.

Town officials are quick to point out that the beaches are free to all--it is the parking that users must pay for. Because of the

aforementioned inseparable relationship between beaches and their parking, though, that distinction is so much "hair-splitting".

There are legitimate reasons for instituting disparate user fees, related to maintenance and acquisition costs, but for local leaders to rationalize, as some do, that "visitors will just accept the big fee as a necessary vacation expense," or that "tourists are loud, lewd and dirty on the beaches," is to offer lame and lazy excuses.



Photograph 1. This part of Rockport Harbor is off-limits to non-residents. (Famous artist setting, "Motif No. 1," is in background. Note the effect inflation has had on parking fines.)

The true political reason this discrimination flourishes is because it is not opposed. Ducsik argues that local politicians are poor stewards of the general welfare because their outlook is too parochial and subject to pressure from local vested interests.⁷⁷

Politically, the only group town officials have to satisfy are local voters, so beaches are apt to be restricted for their own use.

Non-residents have no political rights in a town's government and so have no power to sway local policy. Outsiders can only apply legal pressure, but again theory outleaps practice. The existence of permanent "beach rights" advocacy groups goes unknown (except for nudists who have specific interests.) The closest group in terms of interest is the Massachusetts Beach Buggy Association, but its members are too busy battling non-motorized beachgoers to join forces with them to support a general right for outsiders to use the beaches. Pedestrian beachbathers come from geographies too diverse and are together for too short a time in the summer to organize themselves effectively.⁷⁸ No organization means no funds to prosecute town beach discrimination in a class action suit. Only a few ad hoc beach rights groups have been formed.

The issue of non-resident access to other coastal resources, such as shellfish, is too broad to cover here and has been ably examined elsewhere.⁷⁹ Suffice it to say that user fee differentials may not go unchallenged for much longer, though most towns are reluctant to relinquish them and several communities have actually widened the discriminatory gap.⁸⁰

Private Ownership

Individuals

Of the 935 miles of Massachusetts coastline in private hands, most is owned by individuals. They, of course, are the biggest "haves" of all. Their common law rights to shape shoreline are greater than in other state in the nation, although state regulatory powers have significantly modified their omnipotence.⁸¹ That public trust rights have always been interpreted conservatively certainly suits private

shoreowners' interests. The discrimination practiced by individual property owners is as parochial as can be; private beach use is limited not to the town, not to the neighborhood, but to the tiny sphere of family and guests. It is a privilege of property.

Private beach ownership was mentioned earlier, but one phenomenon must be discussed here. Most of the problems involving beach trespassers (those whose presence is not incidental to public trust uses) tend to be adjacent or near public access points. Shoreline stretches that are unbroken by public access points tend to remain inviolate to trespassers, perhaps because even if members of the public are unsure about their rights parallel to the waterline, they are fairly certain they cannot cross developed private property to reach the beach. Or perhaps the reason for few disturbances is the power projected by shoreside mansions.

In any event, it is those properties adjacent to public access ways that are the scene of most trespassings.⁸² Often such encroachment by the public is innocent enough--the town beach is too small, so a few towels are spread on the private side of the boundary. In most states this activity would be permitted, so long as they occur below the high tide line. Not in Massachusetts.

Beach Associations

Beach associations are semi-private groups, whose composition ranges from lot owners in small shore subdivisions to community organizations empowered to operate municipal beaches. A common practice on Cape Cod throughout its rapid residential development in this century has been for subdividers of coastal property to enhance each lot's value by deeding beach rights to the buyer even if the property

is set back from the beach. This benefit is conveyed either by granting each buyer an easement to use the beach while the development corporation retains the actual title or fee to the beach, or, alternately, by deeding each buyer fee simple to a section of the beach. (For example, each of twenty lot owners owns 1/20 of the subdivision's beach.)⁸³

Each deed must be examined separately to determine if a particular owner has specific beach rights because it is not uncommon for one subdivision neighbor to have a beach easement and another not,⁸⁴ which can lead to bad feelings if neighborhood harmony is disrupted. While the outside public has no rights to use this beach, at least a few more people's beach needs are satisfied than would be if the beach were vested in an exclusive owner.

Municipal beach associations are strange organizations, ostensibly established to promote efficiency in operating a local public beach, in lieu of direct town maintenance, they effectively serve to legitimize non-resident exclusion from town beaches. By being quasi-public, they often receive free police enforcement of parking rules, which some reviewers suggest is an inappropriate subsidy.⁸⁵ Membership in these groups is limited to town taxpayers or residents and they seem to act as an alternative for towns that are afraid non-resident exclusion will be challenged if their beaches are run directly by the town government.

Conservation Trusts

Massachusetts has long been a leader in environmental protection. Numerous private conservation trusts have been formed at the state and local level and they enjoy strong credibility, particularly among

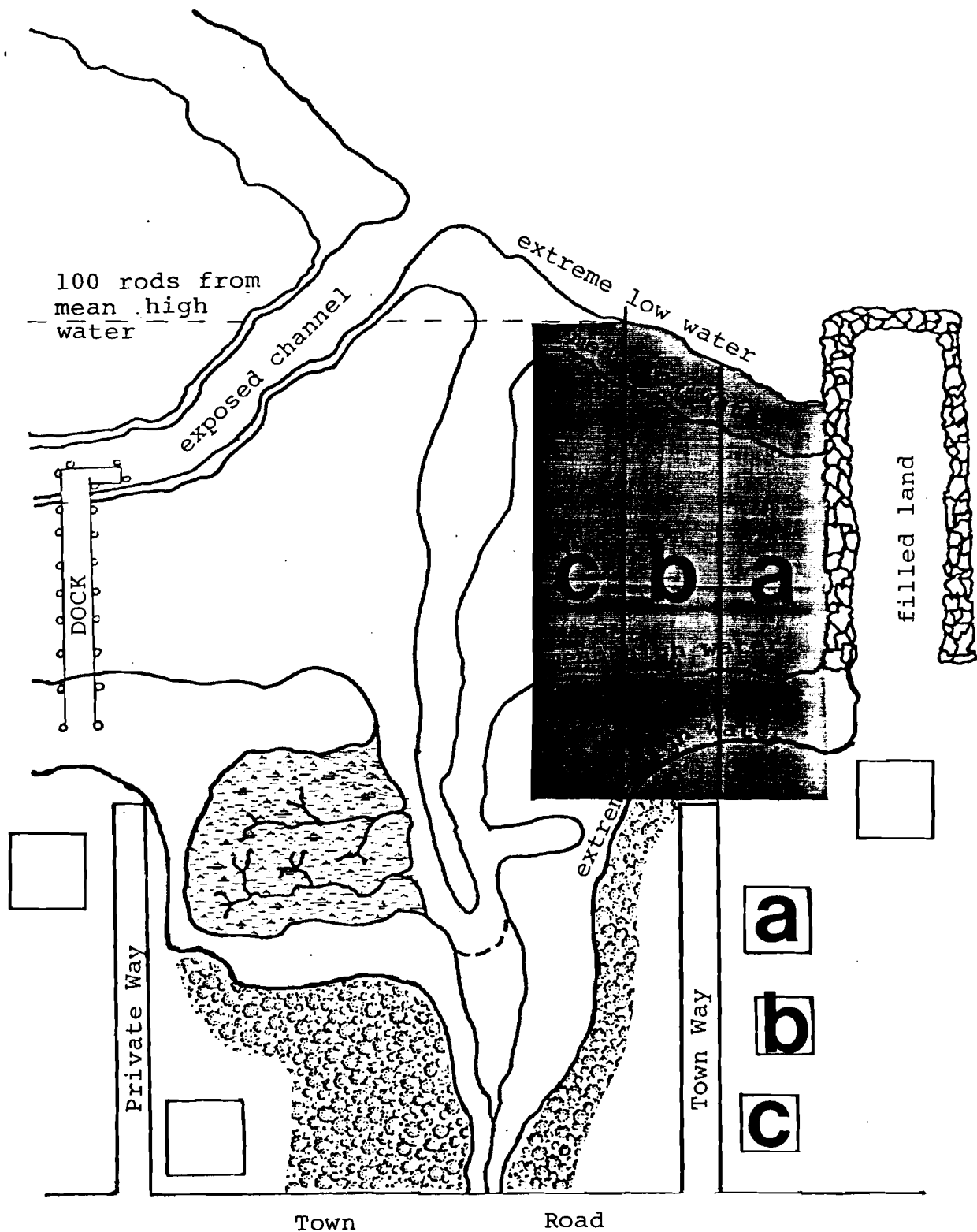


Figure 16. Typical Subdivision Beach Association in Massachusetts. (Homeowners A, B, and C each own $\frac{1}{3}$ of the beach and flats at the end of their street; C may need an easement over part of B's beach to reach his own beach.)

people who are willing to donate their land for preservation, but do not trust their towns or other government entities.⁸⁶

Two of the largest private trusts in the Commonwealth are the Trustees of Reservations and the Massachusetts Audubon Society. The Trustees was founded in 1891 and became a national model for private groups holding land undeveloped in perpetuity. Its most important coastal property is Coataue on Nantucket Island. Coataue is a long cusped, undeveloped barrier beach, separating Nantucket Harbor from Nantucket Sound. It is also the largest expanse of good beach close to Nantucket Town proper. The Trustees allow access to all, though there is a fee for ORV use. No differentiation is made between Nantucket residents or visitors.

Massachusetts Audubon is among the wealthiest and most influential of Audubon societies across the nation. On Cape Cod it holds over 400 acres of property, all coastal or coastal-contiguous, in conservation trust.⁸⁷ The Audubon does not promote access to its lands, but allows it. Most refuges are open free to members and to visitors for a fee. Sampsons Island, a barrier island in Cotuit Bay, is maintained by Audubon as a tern nesting area. Free access to Society members is allowed, but other visitors (all of whom must arrive by boat) must buy a season's pass and live in the precincts of Barnstable near Cotuit. Thus, not even residents of the entire town can gain equal access. A patrol officer is engaged each summer to protect the terns and restrict access.⁸⁸

Like any other property owners, however, conservation trusts must not interfere with public trust rights. On Sampsons Island and Coataue, the respective towns regulate shellfishing on the trusts' flats.

CHAPTER V

TOOLS TO INCREASE PUBLIC ACCESS

"My opinion is that life is too short to determine the question of these landing places and that it would prove an endless source of litigation to... locate the same and define their lines."

-- City Clerk John J. Somes, on the status of Gloucester's public landings, 1892.

CHAPTER V

TOOLS TO INCREASE PUBLIC ACCESS: TAKING STANDS TO OPEN SANDS

It should be evident that there is an imbalance in the allocation of beach resources between private property owners and the public in Massachusetts. And despite the trends in most states in the U.S., which advocate stronger public rights in the coastal zone, the Commonwealth remains shackled by its past. Massachusetts judges, in the name of stare decisis or legal precedent, are still paying homage to the property rules of 1647. There have been sporadic attempts by various generations to challenge these ties, but more often than not court decisions have swept the public back onto cramped government beaches.

In examining the various legal and political tools available to increase public beach rights, it is useful to evaluate each measure against two standards: What particular types of access will the strategy enhance? What segments of the population will benefit?

Public Trust Protection and Expansion

The public trust doctrine applies only to the flats and submerged lands of the shore. Unless access can be gained to the coast, the benefits of the public trust rights along the shore go unenjoyed.

Nevertheless, assuming the public has reached the shore, can it

indulge in any use but fishing, fowling and navigation? Massachusetts justices have replied affirmatively when asked general questions, but when pressed on specific uses have vehemently denied them.

The irony of this contradiction runs deep. It was the original colonists themselves who, perhaps unwittingly, inserted the first flexibility into the public trust. English law had always acknowledged navigation and fishing as guaranteed rights, with navigation dominant over fishing when uses collided.⁸⁹ Even if fowling rights were implicit in England, the Massachusetts Puritans were the first public trust protectors to expressly include seabird hunting in their 1641 Colonial Ordinance. This first expansion of the trust, however, was also the last in the Commonwealth's experience.

Public Trust Protection and Expansion by Legal Means

The irony resumes in 1857 when, in settling a suit in favor of the state to prevent encroachment on submerged lands, the Massachusetts Supreme Judicial Court (SJC) ruled:

The king (and by extension the state--ed.) held the seashore as well as the land under the sea; that he held the public juris for the use and benefit of all subjects for all useful purposes, the principal of which were navigation and the fisheries.⁹⁰

"All useful purposes" indeed. Fifty years later, the SJC got a chance to put its words into effect.⁹¹ One Paul Butler, a Gloucester beachowner, sought to confirm his shoreland title in court. The state Attorney General responded by insisting the public trust be protected on Butler's flats. The Attorney General listed the obligatory "fishing, fowling and navigation" rights and then slipped in a phrase regarding passing over the flats for "general purposes," including bathing.

The lower court rejected the "general purposes" clause and, on appeal, the SJC affirmed the decision. Public sunbathing on private flats or trespassing with intent to swim was therefore forbidden. This rule of law applied not only on Butler's property, but, by extension, on any private shores of the state. The SJC decided to classify swimming as navigation, so it allowed that form of recreation in the waters above the flats, as long as the swimmer never touched the flatowner's soil.

Several years later the SJC again issued a seemingly clear statement of broad public trust rights. The Home for Aged Women sued the Commonwealth to regain direct access to the Charles River in Boston, which had been blocked by fill to create a dam.⁹² While not directly discussing the flats, but at least the submerged lands of the tidal river, the Court said:⁹²

We think it would be too strictly doctined to hold that the trust for the public...is for navigation alone. It is wider in scope, and it includes all necessary and proper uses in the interests of the public.

"All proper uses" sounds much like "all useful purposes" in the previously mentioned case.⁹³ Ironically, the New Jersey Supreme Court in 1972 would comment favorably on this language and draw upon the Home for Aged Women case to bolster expansion of the New Jersey public trust.⁹⁴

The reason some states have opted to broaden their public trust is to keep the doctrine flexible enough to meet new societal needs. Seventeenth-century colonists did not recognize swimming as a need because the idea was simply preposterous. There was neither time nor desire to swim or sunbathe in those days. People today, however, are more apt to work to live than live to work and recreation is seen as an

important public good.

Public Trust Protection and Expansion by Legislation

Another fifty years passed before Massachusetts again tried to enlarge its public trust, this time by legislation. In 1970 an ad hoc legislative committee was formed to study the entire beach situation in Massachusetts.⁹⁵ Before it issued its final report in 1975, the committee floated bills for several years designed to authorize the public's right to traverse private flats along the shore even if not engaged in fishing or fowling. In effect, the bills would have added strolling rights to the public trust. Before the bills progressed too far in the legislative hopper, the committee thought it wise to seek an opinion by the Supreme Judicial Court on the proposal's constitutionality.

The Court replied that public strolling rights meant interference with the property owners' right to exclude general trespassers.⁹⁶ The SJC said that "taking" this traditional property right without compensating the landowners would be unconstitutional. The judges were afraid to upset the colonial rules, which a flexible public trust would imply, ignoring the Court's own previous "all useful purposes" language to the contrary:⁹⁷

The Colonial Ordinance has never been interpreted to provide the littoral (shore) owners only such uncertain and ephemeral rights as would result from such an interpretation (allowing public strolling rights.)

The legislative committee dropped the bill from consideration,⁹⁸ but it still insisted on issuing a fiery report in 1975, calling for across-the-board liberalization of private and municipal beach policies.⁹⁹

Expansion of the public trust was briefly reprised in 1981. As in other suits in which the discussion of the doctrine was in general terms (not in relation to specific uses as in Butler and the 1974

"strolling rights" opinion,) the Supreme Judicial Court was willing to introduce flexibility. The Court commented, "...the littoral owner owns them (flats) subject at least to the reserved public rights of fishing, fowling and navigation, (emphasis added)"¹⁰⁰ The SJC refused to speculate what other uses might be reserved to the public.

Public Trust Protection by Regulation

The SJC does permit other uses, but they are ones related to the traditional three public trust rights. Swimming has been mentioned as a form of navigation and the state also recognizes the right of public mooring of boats on private flats because it is navigation-related.¹⁰¹ Most boats, though, are moored below low tide to be maneuverable at all times. And at least one Massachusetts district court has determined that towns may not discriminate against non-residents in allocating mooring berths in the Commonwealth's submerged lands.¹⁰²

In the Commonwealth of Massachusetts enforcement of the public trust, limited though that trust may be, is delegated primarily to the state Division of Waterways.¹⁰³ The Division issues licenses for any project altering the existing features of any tidelands (flats and submerged lands), whether publicly-owned or privately-held. In doing so, the Division must certify that certain environmental standards (i.e., clean water) are upheld and that public trust rights are not abridged. It would seem the filling of flats might be banned as a gross interference with the public trust, but it is not. The public's right to fish and fowl on flats exists by common law (as codified in the 1641 Colonial Ordinance) only until the flats are "enclosed" by the landowner. (Enclosing flats without hampering navigation was discussed in Chapter IV, The Colonial Ordinance: 1647 Amendments.)

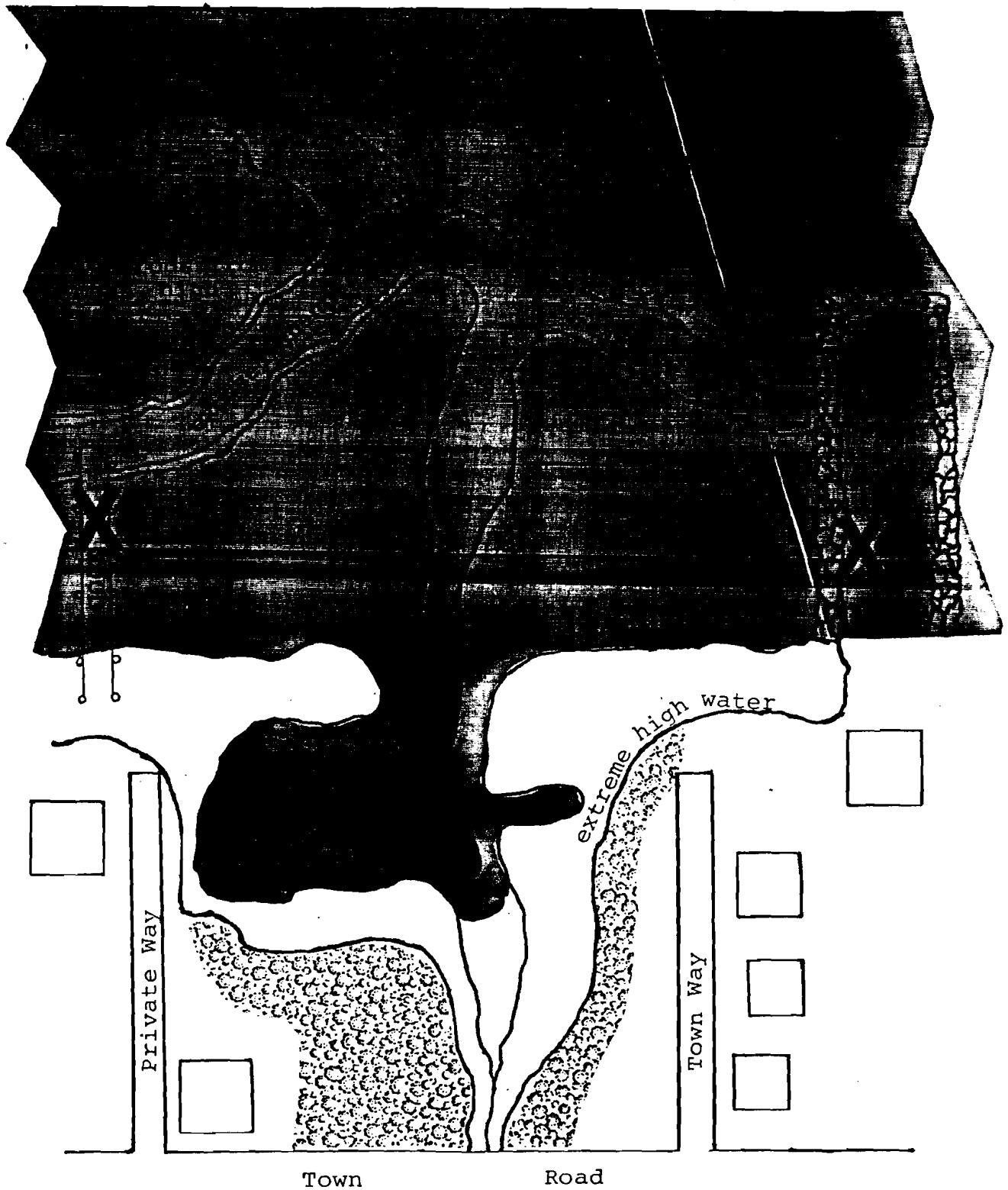


Figure 17. Limits of the Public Trust Rights of Fishing and Fowling in Massachusetts (shown in shaded area). X's mark enclosures on flats. Owners must provide access over, under or around these obstructions to pursue fish and fowl on foot.

Obviously, once flats are enclosed, the fisherman or hunter can no longer practice his art there, but he does still retain the right to cross the enclosed flats to reach unenclosed flats where he can stop and ply his trade.¹⁰⁴ For instance, if a shoreowner wants to build a dock over his flats, he has to construct it so a person can easily climb over it or under it to pursue fish and fowl. A property owner wishing to fill flats or build groins may do so, subject to environmental standards,¹⁰⁵ but he must provide alternative access over or around his fill and pay the state a fee assessed per volume of the fill for such displacement.¹⁰⁶ (See Appendix C for regulations.)

While the public trust doctrine has little impact on parts of the beach above the flats, its effectiveness as a tool to increase public access lies in its otherwise broad application parallel to the shoreline. Benefits secured under its power accrue to all citizens of the Commonwealth and throughout the state, not only to specific properties under dispute.

Giving and Taking Beaches: Custom, Prescription and Dedication

Three other common law concepts, besides the public trust doctrine, have been used successfully in other states to increase coastal public access. The doctrine of custom was used to open up not only the flats, but also the dry-sand area above the high tide line all along the Oregon coast in 1969.¹⁰⁷ Custom legitimizes a traditional use into a legally accepted practice. It is not recognized as a valid doctrine in Massachusetts because the original colonists set up governing rules of law so early.¹⁰⁸ Custom will not be discussed here.

Prescription and dedication are twin edges of the same sword that can sever a landowner from the private enjoyment of his beach. Both doctrines have been used effectively, though conservatively compared to other states, in the Commonwealth to secure public access. Unlike the public trust doctrine, which applies only to flats and beyond, prescription and dedication can cut a long public swath through all elevations from the upland to the sea and the all-important parking rights can be gained as well.

In relation to the landowner's property, prescription implies a taking, while dedication suggests a giving. They are most often used to confirm legally a continuing de facto use of a private beach. They are the legal expression of the popular notion of "squatters' rights." Because they imply opposite intents (giving/taking), one or the other, but never both concepts simultaneously, can be used to support a lawsuit; either the outsiders are usurping a private beach because they believe the owner intended to give them use of it (dedication) or because they believe they took it through long use of it in spite of the owner's wishes (prescription).

Prescription is defined as a nonpermissive use that is open, continuous, uninterrupted and adverse to the owner of the property. It is a deliberate act of trespassing. Nevertheless, because the tests are rigorous for an intruder to prove prescriptive rights (because the burden is on him), Massachusetts courts are willing to recognize them if the tests can be met. "Open" means with the knowledge of the owner of the beach that it is being used. "Continuous" is defined in Massachusetts as twenty consecutive years. "Uninterrupted" is an important aspect in beach cases because the shore is only intermittently used during the off-season, but strictly summer use has been declared sufficient to meet

the test.¹⁰⁹ "Adverse" means hostile to or against the best interests of the owner. Easements, or use rights, and outright title to the land can be won through prescription.

The two most important beach prescription cases in Massachusetts to date were fairly recent ones. In 1964 the Supreme Judicial Court was asked, on appeal, to settle a claim by neighbors in the Cape Cod town of Dennis that they had acquired rights to use Ivons-Nispel's "private" beach nearby.¹¹⁰ Ivons-Nispel had only bought the beach in 1953 and when he sought to confirm his land title in 1957 he learned that his neighbors and others had been using the beach for many years previous to his purchase date. Irene Lowe was the only person who could prove twenty years beach use that was "open and adverse" and she won the right to continue using the beach. The Court found that "the general public" could not pass the evidence tests so the easement was not broadened to other people.

In 1981 the Massachusetts Appeal Court held that a municipality could acquire beach rights by prescription. A beach in Swampscott, which the city had maintained, cleaned and posted signs on for thirty years, was disputed when the owner sought to confirm his title.¹¹¹ The Court asserted the prescriptive tests had been met after the testimony of many different witnesses. Curiously, it limited extension of the beach rights to inhabitants of Swampscott.

Once the intruder has shouldered his burden of proof for gaining prescription, the burden then shifts onto the landowner. Ironically, the only way for a landowner to negate a proven easement is to prove that the public use was permissive, that he purposefully allowed them to use his beach.¹¹² If he can prove he gave this permission then he can

revoke it like any other license.

A delicate problem arises. Once permission is shown, the owner can encounter difficulties maintaining the fine distinction between his revocable license and an implied intent to donate his land to public use. California in the 1970's opened several private beaches to public use through implied dedication¹¹³ and set a far-reaching precedent. Dedication assumes the same tests as prescription involving regular use with one important difference--no time minimum for use is required (compared to the twenty year standard for prescription.)

Because dedication means intent to donate, public use is usually all that is necessary to suggest acceptance of the gift. In Massachusetts, however, public use must be coupled with acceptance by a public authority.¹¹⁴ Once the gift is made, it cannot be revoked like the permission of the landowner in a prescription case. The proof is still on the intruders to show the landowner meant to part with his land, either by express consent or by silent acquiescence in public use.

Dedication is broader than prescription because more people can gain beach benefits under its employment. Similarly, it can be used by non-residents to confirm their rights to use a town beach that wants to switch to "town residents only" status. There have been many dedication cases in Massachusetts, but most of them involved non-beach lands, typically public highways.¹¹⁵ Several nineteenth-century cases have involved public landing dedications.¹¹⁶ (Public landings are discussed separately below.)

It becomes evident that a pivotal time in the Commonwealth's public access history was the home building boom after the Second World War. At that time large chunks of coastal property were improved by

developers. Undoubtedly, many local people were accustomed to using these open tracts. If more prescription and dedication suits had been pressed then regarding these lands, there might be more public or not-fully private shorelands now. Legally speaking, prescriptive rights can be extinguished if not prosecuted immediately upon a landowner's challenge and while dedicated uses cannot be revoked, they must be established first.

To sum up the difference between prescription and dedication, the following table may be useful:

TABLE 5

CHARACTERISTICS OF PRESCRIPTION AND DEDICATION

Prescription	Dedication
A taking from owner	A gift from owner
Nonpermissive	Express or implied permission
Easements or title can be acquired	Easements or title can be acquired
Initial burden of proof on intruder	Initial burden of proof on intruder
Evidence of use for 20 years	Express - Immediate acceptance upon public use and by public authority Implied - Acceptance after regular use
Applicable to limited segments of population--town, neighbors	Applicable to general public unless specifically limited
Can be extinguished upon claimant's death	Irrevocable
Can apply through all shore zones (uplands to flats)	Can apply through all shore zones from the upland to the flats
Individual cannot use it to gain rights in public lands	Can be used by group of people to confirm rights in public lands

In many states developers and subdividers of beachfront property are required by local planning boards to set aside parcels of open space within their developments.¹¹⁷ These compulsory dedications can take the form of establishing a public beach within a private development area. Towns justify compulsory dedications by reasoning the subdivision means more population pressure on existing town recreational resources and so the developer must augment those resources. The taking without compensation issue is skirted because subdivision plat approval by zoning boards is seen as a privilege, not a right of the developer. He usually stands to benefit financially if he can subdivide his property.

State law prohibits mandatory dedications in Massachusetts.¹¹⁸ The legislature could change this law, but until it does compulsory dedication of beaches is not an option to increase public access. The only power Massachusetts towns have is to require the developer to set aside open space for three years and allow the town the right to buy it. If the town does not exercise its purchase option within three years, the landowner is released from obligation.¹¹⁹

The basic limitation regarding prescription and dedication as leverage to open more coastline is that each individual parcel must be litigated separately. Long reaches of beach remain inviolate. Also, contrary to most states, Massachusetts places higher standards of proof on intruders who claim they have a right to use a private beach. The state legislature could modify these high standards, as was suggested in their special committee's 1975 report on beaches.¹²⁰ This step has not been taken. But legislation could play a major role in opening

beaches.

Legislation

Like other tools to increase public access, the legislative route has been successful elsewhere. In 1959 Texas passed an Open Beaches Bill, firmly establishing the right of its citizens to use all beaches and shifted the burden onto landowners to prove why the public should be excluded.¹²¹ Around 1970 U.S. Representative Robert Eckhardt of Texas tried to persuade the U.S. Congress to adopt the Texan model, but failed in repeated years before giving up in 1975.

We have already examined the "strolling rights" bill declared unconstitutional by the Massachusetts Supreme Judicial Court in 1974. (See "Public Trust Protection and Expansion by Legislation.") A 1982 poll by the state Coastal Zone Management program indicates there is still support for such a bill. Almost 60 per cent of respondents favored an amendment of the state constitution guaranteeing access rights to all beaches for recreation. Most people in favor reasoned that inherent justice demanded such access because "the beaches should belong to all."¹²² Interestingly, the most vigorous supporters came from the New Bedford/Fall River area, which is also the part of the state with the oldest population and the lowest per capita income. The "have-nots" still seem to want the beaches.

Other legislative initiatives that could be explored include providing tax incentives for developers who all public access in a coastal subdivision.¹²³ This approach would emphasize the "carrot" of tax breaks rather than the "stick" of compulsory dedications and would probably have a better chance at passage. Legislative power could also

be used to reduce or eliminate the fee differential between residents and non-residents using municipal beaches. This route has been tried unsuccessfully to equalize recreational shellfish permit fees issued by the towns.¹²⁴

The advantage of securing public access through legislation lies in its across-the-board nature, applying to all parts of the state. Of course, any legislation is at the mercy of special interests before its adoption and court challenges afterwards.

Conservation Restrictions

Tax incentives are useful tools that come in many forms. The ones that have been used most successfully on the local level are tax abtements for land conservation restrictions. A landowners places a recorded restriction on his deed that prevents development of the parcel for varying lengths of time, including perpetuity. He can retain title to the property and use it for other purposes, but he cannot improve it with buildings.

The Town of Barnstable's restriction program is typical. Administered by the Conservation Commission, landowners relinquish their development rights in return for a 75 per cent tax reduction. Importantly, if they also allow public access to the area, they receive a 90 per cent abatement. Conservation restrictions must be acknowledged by the Commonwealth's Division of Conservation Services before they can take effect.¹²⁵

Commercial Beaches

Most analysts of public access assume stances invoking the

"justice" of free and open beaches. Consequently, short shrift is given to any notions of economics and commerce involved in satisfying the public demand for shorefront. Nevertheless, consideration should be given to using market forces to adjust the inequity in present beach resource allocation.

Simply, private shoreowners should be encouraged to open their beaches for a profit. Many people would be willing to pay to use a quality beach away from the crowds. The capital expenses to convert an undeveloped beach into a recreation area should not be significant to the landowner because the chief resource--the beach itself--is already there. Some upland parking, a small bath house and some concession stands (which turn the real profit) would be sufficient.

Commercial beaches exist in other eastern states¹²⁶ and at least one has existed in Massachusetts. The legislature's Special Commission on Beaches uncovered it in a 1972 field hearing:¹²⁷

It seems a proprietor (in Swansea) controls most of a particular beach. She owns a concession stand, she charges for parking and a run-down boat landing. Moreover, she throws her debris in the water. Residents all year round are afraid of this woman.

The Swansea situation brings up an important point: the people who are most apt to own good big beaches, which would prove the most useful for commercialization, are likely to be already wealthy, as illustrated by their ability to buy such prime real estate in the first place. Why would the rich want their privacy invaded even if for profit? They probably would not, but if an individual's shore holdings were large enough he might be willing to let an entrepreneur lease and operate an isolated portion as a commercial beach.¹²⁸

Investigating Historic Rights of Way

In most states, where free passage along the flats (and sometimes even above the high water mark) for many different uses is guaranteed, the typical access problem is gaining perpendicular access, or access from the upland to the beach. Public beaches are not the only mode of entry to the sea. Town boat ramps, landings, and narrow paths or walkways to the water may also be in the public control by fee simple deeds or easements.

In many Massachusetts towns there are numerous public ways to the water, but there are three problems with them. First, because they are narrow (often no wider than the street that ends at the water) there is limited parking associated with them and the tiny beach acreage cannot accommodate many people. Second, they do not lead anywhere. Once one has reached the water's edge at a town landing, he can only leave its confines if he departs on a boat or by walking parallel to the shoreline with a fishing rod, clam rake or shot gun in hand. Finally, most people do not know where the ways are.

It was stated earlier that not until 1908 were towns required to create at least one common landing site within their corporate boundaries. But public landings existed before this date. In Commonwealth v. Tucker¹²⁹ in 1823 the Supreme Judicial Court acknowledged many public landings existed by immemorial usage.¹³⁰ The SJC also said landings were a special type of public way in that they could not be discontinued by a town. Nor can a private citizen acquire title to a public landing via prescription for his exclusive use.¹³¹ Nevertheless, irregular practices have been performed on town landings throughout the Commonwealth, interfering with the public's right to use them forever.

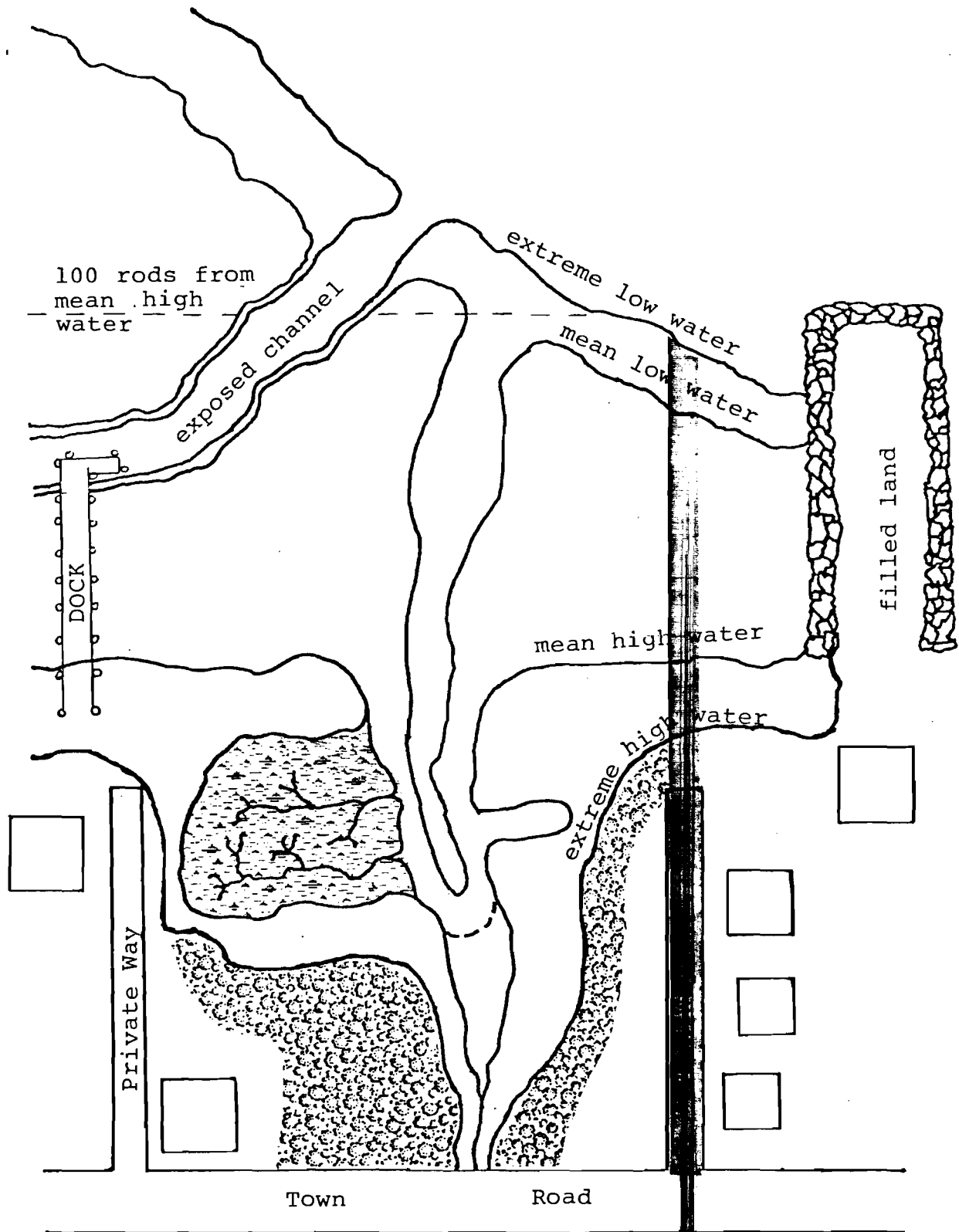


Figure 18. Typical Boundaries of a Town Way to Water in Massachusetts (shown in shaded area). There is limited parking and no access to adjacent flats unless for public trust uses.

In 1980 the City of Gloucester made a comprehensive search for existing and historic public landings or coastal accessways on its waterfront. Gloucester had tried at various intervals in its distinguished maritime past to conduct a similar investigation, but city officials were never confident that their efforts were conclusive. The frustration that often resulted is expressed by this comment by the Gloucester City Clerk in 1892:¹³²

My opinion is that life is too short to determine the question of these landing places and that it would prove an endless source of litigation to undertake to prove the locations of the same and define their lines.

The 1980 survey concerned itself only with the two miles of Gloucester's downtown or Inner Harbor waterfront. Thirty public ways to water were found with varying degrees of legal status:¹³³

TABLE 6

GLOUCESTER INNER HARBOR WAYS TO WATER

Public landings currently used with confirmed title...	9
Public landings used historically, title could be confirmed.....	15
Sites with uncertain title, need to be researched further.....	6
<hr/>	
Total existing and potential landings.....	30

The methodology for investigating these ways that Gloucester used was to build a consensus on each one's status by cross-referencing various data sources. The more often a landing appeared as publicly-owned property in various local records, the more secure its title seemed:¹³⁴

TABLE 7

DATA SOURCES USED TO IDENTIFY GLOUCESTER LANDINGS

City Clerk Records (many missing)
 1977 Town Landing Places Map (incomplete)
 City Assessors Maps
 1979 Classification of Roads Index
 1975 Property Map (scale not precise)
 Tax Exempt Records (fairly reliable)
 1977 Property Reference Inventory and Index (incomplete)
 1971 Housing Authority Urban Renewal Maps
 County Registry of Deeds (title confirmed for nine sites)
 1975 Capital Improvements Report (inaccurate base)
 Harbormaster (anecdotal)
 Site Visits

In several instances a particular data source based its own information on another one whose accuracy or completeness could not be guaranteed; hence, the consensual approach was used for title confirmation. Another major problem the research team encountered was the disappearance of crucial early records.¹³⁵

Still, many references were found to indicate that strange practices had obstructed landing use. Interference ranged from encroachments (1820: "Zebulon Stanwood has fenced in with stone wall and poles all the landing place...") to removing stone boundary markers. Illegal and unauthorized sales of landings by the town to individuals¹³⁶ were also discovered (1863: "Selectmen instructed to convey to the purchaser all the right and interest the Town may have in such landings.")

After completing their research, the team recommended that appropriate landings be "permanently and visibly defined" so public use could

be resumed and that any encroachers be required to pay rents or else vacate the sites. Unfortunately, like so many local projects, the team was disbanded and no implementation action was taken.¹³⁷

Other towns have had similar experiences. On Cape Cod, Falmouth and Barnstable conducted ways to water inventories in the past five years. In 1979 Barnstable encountered problems with private landowners when the town decided to post signs locating disguised public pathways to Nantucket Sound through exclusive neighborhoods.¹³⁸ Adjacent homeowners were upset because the ways cut across (what they thought were) their neatly-groomed private lawns and because the town conducted the posting just prior to the busy Labor Day weekend. One resident complained that publicizing the way would increase the "litter, broken bottles, camping and nudity" adjacent to private beaches. Other residents complained about the lack of enforcement on spill-over parking until the car of a resident's guest was towed away.¹³⁹

Falmouth has avoided confrontations by compiling a comprehensive list of town ways to water, but not visibly posting them as such. In other words, the public must make the effort to visit town hall and obtain a certified list to learn where access is available instead of driving by and seeing, by a posted sign, where access is allowed.¹⁴⁰ The burden is on the public to inquire.

Obtaining additional coastal access through investigation of disused town ways and landings may be easy to plan for, but hard to implement. Landowners accustomed to encroaching on ancient ways to water may protest vigorously if the town acts to resume its use by posting the way. Each site may draw different reactions. But there

CHAPTER V

TOOLS TO DECREASE PUBLIC ACCESS

"We'll tow it with him in it if he doesn't move."

-- Barnstable policeman, commenting to
tow-truck driver on how to handle a
driver-occupied car parked illegally
at a town beach, July 1981.

CHAPTER V

TOOLS TO DECREASE PUBLIC ACCESS: "GOOD FENCES MAKE GOOD NEIGHBORS"

Public access is a laudable goal, but there are special situations in which there are good, legitimate reasons why public access should not be encouraged. Few of these reasons are based on social justice, but there are other equally valid goals and ideals worth pursuing.

First, there are the environmental consequences of opening beaches to large numbers of people. In the last ten years even such environmentally-conservative groups as the U.S. Army Corps of Engineers have come to realize that the coastline is a fragile, yet dynamic landform.¹⁴³ A plausible argument can be made that beaches do not have the same "carrying capacity", or ability to accommodate a given number of people, as an equal amount of upland acreage would have for recreation. Inland playgrounds are not subject to erosion; terns' nests are not built on inland drag car raceways. Carving out sand dunes to create asphalt parking lots to serve recreational beaches makes no ecological sense. Foot traffic as well as ORVs can cause erosion on the face of a bluff or dune.

The majority of Massachusetts citizens are aware of these considerations and, regardless of where they live, they support (by 90 per cent to 10 per cent) coastal ecology protection.¹⁴⁴ In fact, by a 57 per cent to 26 per cent margin the state's public prefers to see the

remaining undeveloped coastline used for conservation, even at the loss of additional recreation for themselves.¹⁴⁵ From a public standpoint, the cheapest and most effective way to conserve coastal lands is to keep them in private ownership (coupled with strict development controls). Landowners have a vested interest in maintaining their land and provide an enforcement presence that no government can match.

Another reason to discourage public access is to protect the valid economic interests of the property owners. The recent trend in many states to relax the doctrines of dedication and prescription represent efforts of the courts to avoid the issue of "taking without compensation"¹⁴⁶ and find a cheap way to relieve public recreational demand. Changing the rules governing private property ownership by restricting the private right to exclude outsiders reduces the true value of that property without compensating owners.

The argument for maintaining the status quo says if more beaches are needed for the public, let the public buy them honestly. The fact that citizens would support such a seemingly "motherhood" issue as securing more public access (in the form of a beach strolling rights bill) by only a 60 per cent to 40 percent margin indicates that many people still have a healthy regard for the private appropriation of coastal property even at the expense of their own pleasure.¹⁴⁷

Finally, there is a practical reason for not encouraging access. It backfires. Landowners who sense the legal system is no longer safeguarding their property rights will take matters into their own hands, defending their beaches physically. The California court's flexibility on the dedication doctrine has led many landowners there to eject people from their private beach to ensure that no dedication or

prescription case can be made against them.¹⁴⁸

It might serve both sides of the access issue best by preserving the present regime of de facto public access, which occurs now at many sites without owner objection. He might continue to permit that access as long as he is sure he can revoke the trespassers' privilege at any time it gets out of control. If he fears a prescription/dedication lawsuit, he will be less likely to allow de facto access.

Preventing Trespassing on Private Property

Physical Methods of Exclusion

The simplest means to ward off unwanted intruders is to post "No Trespassing" signs. Signs do have a psychological impact; even if they do not stop intruders, they may at least induce guilt in them. But signs are a measure of false security. Signs have little value as evidence of an owner's intent to exclude trespassers. In the California



Photograph 2. "No Trespassing" signs, like this one at Cotuit Harbor, may make intruders feel guilty, but are flimsy evidence during an access lawsuit.

dedication cases,¹⁴⁹

The owners occasionally posted signs that the area was private, but the signs quickly blew down and were generally ignored...occasionally posting a no trespassing sign, (is) not enough to show the owner really did not want to give away his land.¹⁵⁰

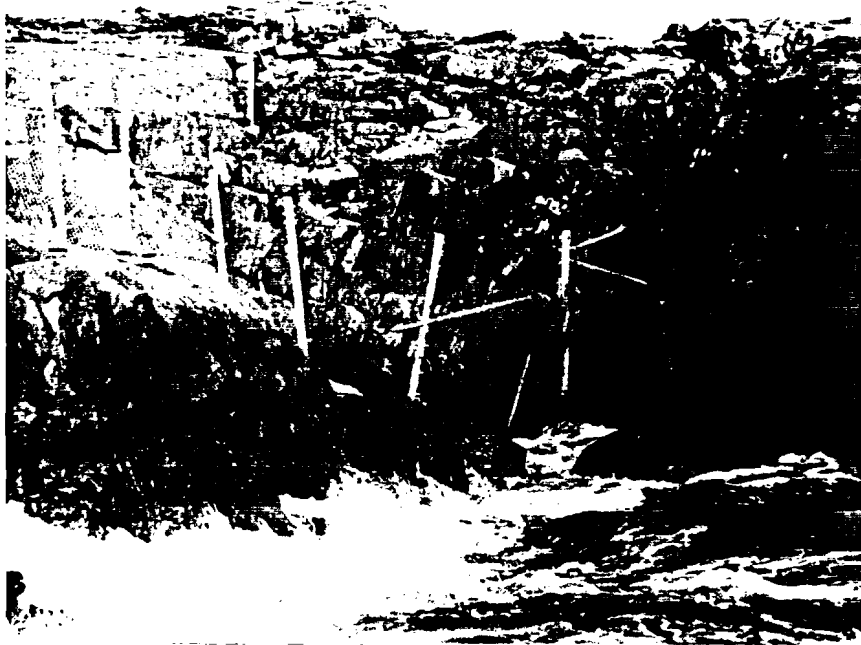
Likewise in a 1981 Massachusetts case, the Town of Swampscott acquired public rights in a private beach despite "no trespassing" signs.¹⁵¹ The Court said, "There was evidence that despite the words 'private beach' having been painted on the petitioners' seawall sometime in 1975 or 1976 people still continued to use the beach."¹⁵¹

The next level of physical exclusion would be barriers or fences. The Colonial Ordinance gives the landowner the right to enclose his flats just like any upland owner (although always mindful of the public trust.) A consistent definition of enclosure has not been litigated. The colonists may have originally intended enclosures to be limited to fishing nets and weirs, which the landowner could place on his flats even to the exclusion of others' fishing and fowling rights.¹⁵²

Today, many observers interpret "enclosure" to mean a reasonable use of the waterfront intended to enhance navigation or maritime commerce.¹⁵³ Thus, a dock or filled bulkhead used for wharfing are legitimate uses under this meaning. Others recognize uses that need not be water-dependent, as long as they serve some vague "public interest," such as retail shops on filled land.¹⁵⁴

So, while fences seem like "enclosures" that could be extended around the entire bounds of a landowner's upland and flats, it is doubtful the courts would countenance them because they fulfill neither a maritime nor a public purpose. Environmental regulations would also oppose them. Fences could extend to the high tide line, but their

effectiveness for excluding trespassers would have to be measured by the topography for each site. Fences could be more successful on a vertical ledge with little tidal range than adjacent an open flat.



Photograph 3. Fences, like this chain link one on a private granite ledge in Gloucester, have been extended at least to the high water mark. (Note the de facto access by trespassers through fence. Site is adjacent to a public way to water.)

While signs and fences may ward off would-be intruders, how can a landowner physically eject real interlopers? He calls the police. Repeated calls for official enforcement is good evidence that the landowner has no intent to dedicate his beach to public use. The law must respond:¹⁵⁵

Does (Police) Chief Ehrhart think he's justified spending taxpayers' money on almost daily trips to (eject the public from) a small private beach? "If the person who complains is justified, then he has a right to privacy on his own property," he (Ehrhart) replied.

But the whole question of shore ownership is so perplexing that even law officers are sometimes stumped.¹⁵⁶

Barnstable Police Sgt. Theodore Nickerson...said he could not force the people off the beach unless he had evidence that the 30 owners of the property had all agreed the area should be barred from public use. "There was a question in my mind whether or not the no trespassing sign was legally posted," he said. "It didn't feel right to me."

Judicial Methods of Exclusion

Whenever a landowner feels insecure about his property title he can confirm it through legal proceedings in the state Land Court in Boston. The trial will determine the precise boundaries that the owner claims and decides if his property is subject to any easements or use rights of others. Land title registration is often done before a sale or subdivision of the property.

Title registration is somewhat of a gamble on the part of the landowner. He is bound by law to announce his intentions to each abutter and to the general public by circulating legal notices. Anyone who thinks he may have an interest in the land, such as someone who has been using the private beach for some time, may challenge the landowner's full property rights. Outsiders may materialize "out of the woodwork" to contest the registration. Once the Land Court issues its findings and absent any appeal, the confirmed deed is recorded in the county Registry of Deeds.¹⁵⁷

The total number of land registration cases throughout Massachusetts has remained fairly steady recently, averaging about 250 cases each year.¹⁵⁸ An increasing proportion, however, involve coastal properties,¹⁵⁹ suggesting increasing conflict between private landowners and trespassing beach users. Registration is also used to clarify often vague language

in a deed relating to the lot's seaward boundaries. The benefit of the doubt is usually awarded to the landowner. For example, when the deed reads "bounded by the shore," the property line is accepted as the extreme low water mark.

Restricting Town Beaches to Townspeople

Most often town officials are sincere in their desire to open up more local beaches for recreation. At the same time, they are concerned not with access for its own sake, but primarily to satisfy residents' needs. The fee discrimination or outright exclusion practiced against non-residents are not grounded solely on whim. Public beaches cost money to maintain and operate and the most prevalent form of new acquisition is by local purchase from a willing seller. Non-residents complain all admission fees should be equal because they already pay state and federal taxes and these governments frequently subsidize beaches, directly through grants for recreational property and indirectly by funding dredging projects and erosion control on the coast. But town residents contribute to all these same outside taxes too. And they are assessed local property taxes as well.

Other non-residents say they would not mind paying higher fees because they pay no local taxes, but they would like to be sure their money is applied to the specific resource for which they paid. For instance, if non-residents knew their shellfish permit fees were set aside to help fund a shellfish propagation program or beach permit costs would buy new bath houses, they would be less upset. But Massachusetts law forbids this system and all town revenues from licenses must be placed in the general town treasury. There can be no separate funds.

Photograph 4.

Non-residents are
excluded from parking
at a town dock in
Barnstable on
Cape Cod...



Photograph 5.

...and on Cape Ann
at one of Gloucester's
pocket beaches,
Plum Cove.

Shellfish and beach budgets are left solely up to votes at the town meeting each spring.

In fact, due to the large degree of autonomy granted to town governments in the Commonwealth, towns are free to pursue any exclusion policies they please, subject, of course, to anyone's right to sue them at any time. For example, towns presently can totally exclude non-residents from their commercial shellfishery. Because this exclusion is being tested in court right now, towns are considering a shift to allowing non-residents access to commercial permits, but at the same scale of fee discrimination (roughly, 5:1) practiced against recreational shellfishermen from out-of-town. In Chatham, resident commercial licenses cost \$25 in 1982. In 1983, the resident fee was raised to \$200, in anticipation of allowing non-residents to dig commercially for \$1000.¹⁶⁰

It would be impossible for a town to change a beach's policy that allowed non-residents access, even if at higher admission costs, to one of total exclusion due to the dedication doctrine that outsiders could invoke.¹⁶¹ But no cases have ruled that exclusion of non-residents from a beach that has always been restricted to residents only is unlawful.

When new town beaches are being considered, a purchase agreement could include express words from the grantor, restricting the use of the beach to town residents. Town officials should also refrain from classifying their beaches as "public parks" because this term has special weight in Massachusetts law and usually implies wide accessibility.¹⁶² Finally, towns could abstain from seeking state and federal subsidies for beach acquisition because, though alluring, such

financial aid comes as a sugar-coated pill that turns bitter when swallowed. Towns have unhappily learned when it was too late that the strings attached to state and federal aid severely limit their autonomy in setting discriminatory access policies.



Photograph 6. If restricted to town residents from the beginning, beaches can remain closed to outsiders, but they cannot revert to exclusion once non-residents have been let in.

CHAPTER VLI

CONCLUSION AND RECOMMENDATIONS

Shore ownership and public access involve extremely complex issues in Massachusetts. They are likely to remain so. The practical applications of riparian law are in evidence everywhere, in "No Trespassing" signs, beach parking stickers, and private docks over public waters. But the legal underpinnings of this regime are infrequently publicized and poorly understood. The outcome of this situation is that Massachusetts property owners and the public alike are abused by their confusing and archaic coastal law system.

Public access to coastal recreation resources is an obviously worthy goal and, in general, should be encouraged. There are circumstances, though, that should modify the pursuit of this public good. For better or worse, Massachusetts property owners have been accustomed to enjoying broad private rights in shore lands, relative to other states, and so Massachusetts must proceed more conservatively in increasing public rights in that zone. In addition, due to the few remaining acres of undeveloped shoreline in Massachusetts, allegiance to recreational access must not be blind to environmental considerations. As usual, balanced management of uses, instead of outright exclusion, should be supported.

Recommendations to increase coastal access without excessive conflicts include:

- 1) Conduct a widespread publicity effort by state agencies, such as the Coastal Zone Management Program and the Attorney General's office, to inform citizens of the coastal law regime.

Clarifying popular misconceptions may have either a net positive or negative effect on increasing public access. People will be more apt to exercise their true public trust rights because they will know what those rights are and where they can practice them. On the other hand, de facto public access for other uses may be stemmed by property owners. But if the public knows how limited its rights are along the coast of the state, this knowledge might act as a catalyst for change.

2) Encourage the state Attorney General's office to lend support and legal aid to any group of citizens or public authority that wishes to sue for dedicated or prescriptive rights to use a private beach. The Attorney General already monitors land title registrations. He should actively seek out those groups that may have an interest in the registered shoreland.

3) Require towns by state law to have at least one public beach (with adequate parking) available for non-resident use. Non-residents should continue to pay a higher fee to use these beaches to offset local expenditures. Any attempt to abolish differential fees for access by the state legislature should be coupled with a guaranteed increase in state subsidies for town beach acquisition and operation.

ENDNOTES

Chapter I

¹Massachusetts Special Legislative Commission on the Availability and Accessibility of Public Beaches, Public Beach Access and Use in Massachusetts, "Final Report," Mass. House Doc. 75 (1975): p. 6611.

²Lewis A. Carter, The Outdoor Recreational Resources of Barnstable County, Massachusetts, (Boston: State Printing Office, 1963), p. 11.

Chapter III

³U.S., Department of Defense, Army Corps of Engineers, Report on the National Shoreline Study, 1971, p. 43, quoted in Dennis W. Ducsik, Shoreline for the Public, (Cambridge: MIT Press, 1974), p. 43.

⁴This number represents only a consensus among the reviewers. Nowhere does the confusion surrounding beach ownership issues manifests itself more clearly than in a comparative survey among the states. Even the full-time researchers seem perplexed. Few studies can even agree on which states recognize private land title to the low tide mark as a general rule. Such a basic question of fact is apparently open to interpretation.

States that typically extend private titles to the low tide line, (as identified in eight law review articles and books on shoreline ownership written in the twentieth century):

<u>State</u>	<u>Number of Citations</u>
Massachusetts. . . .	8
Maine.	8
New Hampshire. . . .	8
Virginia	8
Delaware	6
Pennsylvania	6
Florida	2
Connecticut.	2

⁵David Drake, Counsel, Massachusetts Coastal Zone Management, quoted in "Battle over Brewster Beach Dates to 1647," Boston Globe, August 28, 1982, p. 3.: "There are a lot of people who may have the right (to own the flats between the tides) without knowing it."

⁶Joseph K. Angell, A Treatise on the Right of Property in Tide Waters and in the Soil and Shores Thereof, (Boston: Harrison Gray, 1824), p. 16.

⁷Ibid., p. 17

⁸Thus, the concept of the "King's Grant" was born. King's Grant is a term that is tossed about casually whenever a Massachusetts property owner, not knowing the true law, seeks justification for excluding people from his private beach, (e.g., "Brewster King's Grant Beach Access Dispute Going to Court," See Appendix A.) The only people who could legitimately claim to hold King's Grants in Massachusetts were the original founders of the Plymouth and Massachusetts Bay Colonies in the 1620s. All subsequent settlers derived their property titles directly from these two chartered companies. Again, present landowners are mistakenly employing features of other states' experiences, such as Maryland or New Jersey, where early settlers could gain grants of land directly from the English king.

⁹Note, "The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine," 79 Yale L. J. 762, 765 (1970) asserts that the Magna Carta itself did not secure public trust rights. But the document unquestionably served as a philosophical foundation for the gradual hardening of the English public trust into common law.

¹⁰Dennis Ducsik, Shoreline for the Public: A Handbook of Social, Economic and Legal Considerations Regarding Public Recreational Use of the Nation's Shoreline, (Cambridge: MIT Press, 1974), p. 90.

¹¹Commonwealth v. Roxbury, 75 Mass. 451, 465.

¹²What of the pre-colonial English settlers, itinerant fishermen known to have inhabited the Massachusetts shore before 1620? They had no legal title to the land they occupied; their presence implied only a revocable license from the English king to use the New World. The Puritans, upon arrival in Boston, took pains to ensure the fishermen's presence would not disturb the land's title they received from the king.

Tillinghast, "Tideflowed Lands and Riparian Rights in the United States," 18 Harvard L.R. 341, 355, (1905) says:

Thus, grants were made confirming the titles of such men as Maverick, Braxton, and Thompson, who had settled about Boston harbor before the arrival of Winthrop and his companions, to such lands as they had already occupied, and one of them, Walford, who would not recognize the new government, was banished.

(Iconoclast to the end!)

¹³Commonwealth v. Charlestown, 1 Pick 180, 183 (1822): "...The people of the colony, in their politic capacity, succeeded to all the territorial rights, franchises and immunities which had ever belonged to the sovereign power of the parent country."

¹⁴Ibid., p. 185.

¹⁵1 Rec. of Mass. 291, quoted in Tillinghast, "Tideflowed Lands," p. 355.

¹⁶Moses M. Frankel, Law of Seashore Waters and Water Courses: Maine and Massachusetts, (Forge Village, Mass.: Murray Printing, 1969), p. 9.

¹⁷The Laws and Liberties of Massachusetts, (1648 Edition; reprint ed., Cambridge: Harvard University Press, 1929), p. 35.

¹⁸Harvard College v. Gore, 22 Mass. 370.

¹⁹Lakeman v. Burnham, 7 Gray 437.

²⁰Massachusetts Water Resources Commission, Compilation and Summarization of the Massachusetts General Laws, Special Laws, Pertinent Court Decisions, etc. Relating to Water and Water Rights, (Boston: State Printing Office., 1970), p. 11.

²¹Weston v. Sampson, 62 Mass. 345, 355.

²²Concord Co. v. Robertson, 66 N.H. 1, quoted in Frankel, Law of Seashore, p. 18.

²³Great ponds are over ten acres in size and belong to the state.

²⁴Barker v. Bates, 30 Mass. 255.

²⁵Coolidge v. Williams, 4 Mass. 140.

²⁶Tillinghast, "Tideflowed Lands," p. 355. This analyst's interpreted the passage to suggest fishing and fowling wer free until the town or legislature had appropriated the flats to private owners:

This ordinance thus recognizes the fact that the General Court and some of the towns had previously made special grants or disposition of the shore below the high water mark.

This reading could have held true in 1641 when very little of the flats were in private hands. But by 1647 all titles were extended to low water mark and so all flats were appropriated. Because the legislature meant to affirm the public trust, not extinguish it, in tidelands through the Ordinance it cannot have meant to deny free fishing in appropriated flats, but rather to restrict free fishing in appropriated fisheries.

²⁷Commonwealth v. Vincent, 108 Mass. 441, quoted in Frankel, Law of Seashores, p. 129.

²⁸Marine Research, Inc., Shellfish Managment Proposals for Barnstable County, Massachusetts, (Falmouth, Mass: 1981), p. 65.

²⁹Massachusetts General Laws (M.G.L.) ch. 88, sec. 14. The courts earlier acknowledged landing places had sometimes existed by "immemorial usage", but the towns had no right to create them. See Kean v. Stetson, 22 Mass. 492.

³⁰Lozano, White and Associates, Planning for Growth: Goals and Opportunities in the Town of Barnstable, (Boston: 1983)

³¹Ibid., p. 30.

³²Institutes of Justinian, quoted in Angell, Treatise on Tide Waters, p. 16.

³³Blundell v. Catterall, 1 Sarg. and Lowb. 268, quoted in Angell, p. 160.

This case was settled in England around 1800. Three of the four judges ruled the public trust included no other actions, here sea bathing, than those specifically in effect (fishing, navigation). They decided there was certainly no flexibility in the trust on flats granted into private hands, and none even in the king's remaining flats:

...the king's subjects have not a general right of using or appropriating the soil of the sea shore, or of the sea itself, as they please, even when the soil remains the king's, (emphasis mine), and (even) where that use or appropriation... is not a nuisance..."

By transference, read "Massachusetts Bay Colony" here for "king" as the owner of the public tidelands (Butler v. Attorney General, 195 Mass. 79, cited this precedent to reach the same conclusion in 1907.)

³⁴The Laws and Liberties of Massachusetts, p. 35.

³⁵Sparhawk v. Bullard, 42 Mass. 95. The extreme low water mark's position is a question of fact determined by long-term observation (19.5 years of data on the tidal cycle.)

³⁶Coolidge v. Williams 4 Mass. 140, 144.

³⁷Kean v. Stetson 22 Mass. 492.

³⁸See Chapter VI - "Tools to Decrease Public Access: Private, Physical Exclusion." See also M.G.L. ch. 91.

³⁹Weston v. Sampson 8 Cush. 355.

⁴⁰See, generally, Samuel Eliot Morison, The Maritime History of Massachusetts: 1783 - 1860, (1920; reprint ed., Boston: Northeastern University Press, 1981.)

⁴¹Commonwealth v. Charlestown 18 Mass. 179.

⁴²Ibid.

⁴³Frankel, Law of Seashore, p. 10.

⁴⁴Note, "Title to Seashore and Soil under Navigable Rivers," 33 Harvard L.R. 458 (1920).

⁴⁵Angell, Treatise on Tide Waters, p. 127

⁴⁶Richard H. Murphy, Jr., "Boston Waterfront Development Corporation v. Commonwealth: Title to Land Seaward of the Historic Low-water Line," 16 New England L. R. 109 (1980); Jane F. Carlson, "The Public Trust and Urban Waterfront Development in Massachusetts: What is a Public Purpose?" 7 Harvard Environmental Law Review 71 (1983).

⁴⁷Tillinghast, "Tideflowed Lands", denies without explanation the flats were conveyed to promote wharfing-out.

⁴⁸Frankel, Law of Seashore, p. 15.

⁴⁹The School of Law of the University of Maine, Maine Law Affecting Marine Resources: State, Public, and Private Rights, Privileges and Powers, vol. 2, (Portland, Me.: University of Maine Law School, 1970), p. 306.

⁵⁰E.g., Maine recognizes the low water mark for property boundaries as the ordinary low water mark, not Massachusetts' extreme low water interpretation. See Ibid., p. 193.

Chapter IV

⁵¹In Denver, Colorado city dwellers are worried about losing their magnificent views of the Rocky Mountains west of their streets due to high-rise construction. (Boston Globe, March 5, 1983, p. 6.) Imagine how easy it is for Bostonians to lose sight of their flat Atlantic!

⁵²Marjorie O'Malley, "Public Access Opportunities To and Along the Massachusetts Coast," (Master's Thesis, Boston University, 1982).

⁵³Special Legislative Commission on the Availability and Accessibility of Public Beaches, Public Beach Access and Use in Massachusetts, (Hereafter cited as Special Commission on Beaches), 75 House 6611 (Mass.)

⁵⁴Massachusetts Department of Environmental Management, Massachusetts Outdoors: Statewide Comprehensive Outdoor Recreation Plan, (Boston: State Printing Office, 1976), p. 117.

⁵⁵Paul Godfrey and Stephen P. Leatherman, "The Impact of Off-Road Vehicles on Coastal Ecosystems in Cape Cod National Seashore: An Overview, (Amherst, Mass.: UMass. Environmental Institute, 1979).

⁵⁶Orleans (Mass.) Cape Cod Oracle, December 20, 1980, p. 2.

⁵⁷Ibid.; Coastal Zone Management supported the conservationist thrust of the restrictions, while the Division of Marine Fisheries and the Division of Marine and Recreational Vehicles were opposed.

⁵⁸See also, "The Back Bay Wildlife Refuge Sand Freeway Case," 5 Environmental Reporter 10148 (1975), in which the U.S. Interior Department won a court battle to limit ORV use on the Outer Banks of Virginia.

⁵⁹The Trustees of Reservations was the first group of its kind in the nation. It was founded in 1891.

⁶⁰Personal Communication, Todd LaFleur, Department of Environmental Management (Mass.), February 24, 1983.

⁶¹Personal Communication, Marjorie O'Malley, Massachusetts Coastal Zone Management, March 1, 1983.

⁶²The Directors of Divisions of Fisheries and Wildlife, Marine and Recreational Vehicles, Marine Fisheries, Forest and Parks, and Waterways.

⁶³Personal Communication, Robert Austin, Massachusetts Public Access Board, March 1, 1983.

⁶⁴Lewis A. Carter, The Outdoor Recreational Resources of Barnstable County, Massachusetts, (Boston: State Printing Office, 1963), p. 12.

⁶⁵Yarmouthport (Mass.) Register, June 24, 1976, p. 3.

⁶⁶Original statistical analysis on data culled from Mark H. Robinson, Cape Cod Oil Spill Contingency Plan, (Boston: Massachusetts Coastal Zone Management, 1981).

⁶⁷Special Commission on Beaches, 74 House 5302 (Mass.).

⁶⁸See Appendix B.

⁶⁹Edward J. Reilly, Director, Massachusetts Coastal Zone Management, Letter to Eric Turkington, Falmouth (Mass.) Selectman, April 4, 1981.

⁷⁰See Appendix B.

⁷¹In June 1982, the Town of Barnstable Selectmen were persuaded to restrict parking to "town residents only" at a small municipal beach in the Cotuit precinct. Several of the Cotuit villagers unsuccessfully demanded parking be restricted to "Cotuit residents only."

⁷²By tradition, Cape Codders view New Jersey tourists as pariahs on parade.

⁷³"Non-resident" here is described as someone who pays no local property tax or does not have a year-round lease.

⁷⁴Special Commission on Beaches, 75 House 6611, 6613.

⁷⁵Carter, The Outdoor Recreational Resources of Barnstable County, pp. 33-46.

⁷⁶Data from respective town selectmen, February 26, 1983.

⁷⁷Ducsik, Shoreline for the Public, pp. 75-78.

⁷⁸In the landmark suit in New Jersey, Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296 (1972), it was a neighboring municipality that sued (and won) against Avon's discriminatory beach fees. Cape Codders already have opinions on New Jersey.

⁷⁹Mark H. Robinson, "Hard Times: Threats to Home Rule in Shellfish Management: The Cape Cod Situation," (Master's paper, University of Rhode Island, 1982).

⁸⁰Special Commission on Beaches, 75 House 6611, 6613.

⁸¹In particular the Wetlands Restriction Act, the Wetlands Protection Act and Waterways permits (M.G.L. c. 91, s. 130).

⁸²See Appendix A.

⁸³Richard L. Price, "Settlement and Beach Resource Allocation on Cape Cod," (unpublished; Woods Hole Oceanographic Institution, 1980).

⁸⁴Personal Communication, Jean C. Bonney, Barnstable Resident, March 4, 1983.

⁸⁵Special Commission on Beaches, 75 House 6611.

⁸⁶Personal Communication, Donald Connors, Attorney, Choate and Hall, Boston, February 6, 1983.

⁸⁷Carter, Recreational Resources of Barnstable County, 1963; and, Robinson, Cape Cod Oil Spill Contingency Plan, 1981.

⁸⁸Personal Communication, Carl Owen, Agent, Massachusetts Audubon Society, July 20, 1982.

Chapter V

⁸⁹Angell, Treatise on Tide Waters, p. 94.

⁹⁰Commonwealth v. City of Roxbury 75 Mass. 451, 453.

⁹¹Butler v. Attorney General 195 Mass. 79.

⁹²Home for Aged Women v. Commonwealth 202 Mass. 422. (What a nursing home needed a wharf for is unknown--perhaps it wanted to form an octogenarian crew squad.)

⁹³Commonwealth v. City of Roxbury 75 Mass. 451.

⁹⁴Borough of Neptune City v. Borough of Avon-by-the-Sea 61 N.J. 296. (New Jersey's public trust specifically includes "bathing, swimming, and other shore activities." Florida also specifically mentions bathing. Wisconsin and Washington State protect "recreation" as a public trust. See, Agnello, "Non-resident Restrictions in Municipally-Owned Beaches," 10 Columbia J.L. Soc. Prob. 177, 205 (1974).

⁹⁵Special Legislative Commission on the Availability and Accessibility of Public Beaches, Public Beach Access and Use.

⁹⁶"Opinion of the Justices," 313 N.E. 2nd 561.

⁹⁷Ibid., p. 567.

⁹⁸Mass. House No. 481 (1974).

⁹⁹Specific recommendations of the commission:

1) Codify existing common law beach rights (dedication, prescription) into statutes shifting burden of proof from public onto landowner.

2) Provide equal footing for non-residents in any public beach.

3) Eliminate fee discrimination in recreational shellfish permitting system.

¹⁰⁰"Opinion of the Justices," Mass. Adv. Sh. (1981), p. 1369.

¹⁰¹Weston v. Sampson 62 Mass. 347.

¹⁰²"Brewster Man Wins Dennis Mooring Suit," Yarmouthport Register, November 6, 1979, p. 26.

¹⁰³M.G.L. c. 91, s. 1-63; 310 CMR 9.00.

- ¹⁰⁴ 310 CMR 9.22, (2, 3,) See Appendix C.
- ¹⁰⁵ Wetland Protection Act, 310 CMR 10.00.
- ¹⁰⁶ 310 CMR 9.08.
- ¹⁰⁷ State ex rel Thornton v. Hay 254 Ore. 584 (1969).
- ¹⁰⁸ William A. Fairbank, "Who Owns the Beach?: Massachusetts Refuses to Join Trend of Increasing Public Access," 11 Urban L. Ann. 283, 291 (1976).
- ¹⁰⁹ Ivons-Nispel, Inc. v. Irene Lowe 347 Mass. 760.
- ¹¹⁰ Ibid.
- ¹¹¹ Daley v. Swampscott Mass. App. Ct. Adv. Sh. 959 (1981).
- ¹¹² Ibid.
- ¹¹³ 28 Cal. 3rd 29; 84 Cal. Reprtr. 162.
- ¹¹⁴ Neburyport Redevelopment Authority v. Commonwealth 401 N.E. 2nd 118, 120 (1980): ("no evidence other than use by public to show acceptance by any public authority...not sufficient for dedication.")
- ¹¹⁵ Special Commission on Beaches, 75 House 6611.
- ¹¹⁶ Ibid.
- ¹¹⁷ Frank E. Maloney, et al, "Public Beach Access: A Guaranteed Place to Spread Your Towel," 29 U. Florida L. R. 853, 867 (1977).
- ¹¹⁸ M.G.L. c. 41, s. 81Q.
- ¹¹⁹ Personal Communication, Edward Donnelly, Town Planner, Yarmouth, (Mass.), March 4, 1983.
- ¹²⁰ Special Commission on Beaches, 75 House 6611 (change prescription test from 20 years public use and municipal maintenance to 20 years public use and only 5 years municipal maintenance.)

¹²¹Texas Sta. Ann. s. 5415(d) quoted in David Owens and David Brower, Public Use of Coastal Beaches, (Chapel Hill, (N.C.): University of North Carolina, 1976), p. 182.

¹²²See Appendix B.

¹²³O'Malley, "Public Access Opportunities," p. 104.

¹²⁴See, for example, Mass. H 1849 (1981) ("...any fees so established shall be uniform for all residents of the commonwealth...")

¹²⁵M.G.L. c. 184, s. 31.

¹²⁶Owens/Brower, Public Use of Coastal Beaches, p. 212.

¹²⁷Special Commission on Beaches, 74 House 5302, p. 13.

¹²⁸Massachusetts law presently exempts landowners from liability for injury to any person using land for recreational purposes. M.G.L. c. 21, s. 17C. This exemption probably would not hold at a for-profit beach.

¹²⁹Commonwealth v. Tucker 2 Pick. 47.

¹³⁰(This phrase may suggest the custom doctrine, but it is more likely an assertion of long adverse possession..)

¹³¹Special Commission on Beaches, 75 House 6611. But it was the fear of the town losing its title to its ways to water that prompted the Town of Barnstable to post all its ways in 1979. See Yarmouthport (Mass.) Register, September 6, 1979, p. 8.

¹³²Gloucester City Clerk J.J.Somes in a letter, 1892, quoted in "Town Landings and Ways to the Water: Research Approach," Gloucester Planning Department, January 1980.

¹³³Ibid.

¹³⁴Ibid.

¹³⁵Even when original town records are available, frequently they have never been indexed or typeset for legible reading.

¹³⁶ Gloucester Landings and Ways to the Water".

¹³⁷ Personal Communication, Charles Martell, Assistant Planning Director, Gloucester Planning Department, February 27, 1983. (The research team had been hired under the federal CETA Program.)

¹³⁸ Yarmouthport (Mass.) Register, September 6, 1979, p. 8. (Rhode Island had similar implementation problems. See Dennis Nixon, "Public Access to the Shoreline: The Rhode Island Example", Coastal Zone Management Journal 4 (1/2):p. 65 (1978).

¹³⁹ Yarmouthport Register, September 6, 1979, p. 8.

¹⁴⁰ Personal Communication, John Hendrickson, Town Engineer, Falmouth, (Mass.), February 25, 1983.

Chapter VI

¹⁴³In the late-1970s the Army Corps of Engineers announced it would no longer use manmade structures to halt sand movement along parts of the Carolina coast.

¹⁴⁴See Appendix B.

¹⁴⁵Ibid.

¹⁴⁶Edna H. Travis, "Assault on the Beaches: 'Taking' Public Recreational Rights to Private Property," 60 B.U. L. Rev. 933 (1980).

¹⁴⁷See Appendix B.

¹⁴⁸Berger, "Nice Guys Finish Last--At Least They Lose Their Property: *Gion v. City of Santa Cruz*," 8 Cal. Western L. Rev. 75 (1971) quoted in Owens/Brower, Public Use of Coastal Beaches, p. 118:

On the palos Verdes peninsula in Los Angeles County, major land owners have recently erected a 7-foot high fence topped by three strands of barbed wire in order to keep the public from reaching the beach by crossing their property. It is believed that other owners in that area have dynamited paths leading to the water. In Orange County, one land owner has erected a large fence with cactus planted at its base to discourage barefoot access to the beach over his property. Land formerly used for parking and beach access in San Mateo County is being vigorously plowed to deter unauthorized users. Parts of Sonoma County are beginning to look like beaches of Normandy in 1944, complete with tank traps: automobile transmissions have been planted in the ground to stop vehicular access.

¹⁴⁹David J. Brower, *Access to the Nation's Beaches: Legal and Planning Perspectives*, (Chapel Hill, (NC): North Carolina State University, 1978), p. 24.

¹⁵⁰Ibid.

¹⁵¹*Daley v. Swampscott Mass. App. Ct. Adv. Sh.* 959 (1981): ("There was evidence that despite the words 'private beach' having been painted on the petitioners' seawall sometime in 1975 or 1976 people still continued to use the beach.")

¹⁵²Remember though, that fishing rights are subservient to the public navigation right in the public trust trinity, so fixed gear could not obstruct sailing.

¹⁵³Personal Communication, David Drake, Counsel, Massachusetts Coastal Zone Mangement, February 27, 1983.

¹⁵⁴This dialogue arose after the important "Quirico decision" in 1979 (Boston Waterfront Development Corporation v. Commonwealth) in which the court said fill in tidelands must serve a "public purpose," but the court has so far declined to define that phrase.

¹⁵⁵Orleans (Mass.) Cape Codder, July 27, 1982, p. 3. See Appendix A.

¹⁵⁶Cape Cod Times, September 10, 1982, p. 3.

¹⁵⁷M.G.L. c. 185.

¹⁵⁸Personal Communication, Charles Twombly, Deputy Recorder, State Land Court, Boston, February 27, 1983.

¹⁵⁹Special Commission on Beaches, 75 House 6611.

¹⁶⁰Orleans (Mass.) Oracle, March 17, 1983, p.1.

¹⁶¹Gerwitz v. City of Long Beach 330 N.Y.S. 2nd 495 (1972).

¹⁶²Special Commission on Beaches, 75 House 6611, (M.G.L. c. 45 covers public parklands.)

APPENDICES

APPENDIX A

PUBLIC ACCESS IN THE POPULAR MEDIA

APPENDIX A

PUBLIC ACCESS IN THE POPULAR MEDIA

News accounts of beach access issues are replete with inaccuracies and often tend to reinforce misconceptions about shore ownership and the public trust. Reporters should not feel undue guilt, though, because many times the "experts" , including attorneys, they quote err just as much. A lengthy article appeared in the weekly (Orleans, Mass.) Cape Codder newspaper last July about a well-publicized incident involving public encroachment on a private beach adjacent a town landing in Brewster.

Several residents allowed themselves to be arrested for trespassing in order to determine their rights to use the beach through legal proceedings. But the defendants admitted facts in pre-trial hearings in late-1982 when they feared their case had little chance of success and they were discharged without a criminal record. One defendant admitted his companions were only seasonal residents, which made it harder to stand firm together in support of their rights.

A quick study of the popular account will illustrate the types of inaccuracies committed by the reporter and his interviewees. (Numbers refer to column lines in article reproduced in Appendix A, "Brewster 'King's Grant' Beach Access Dispute Going to Court," Orleans Cape Codder, July 27, 1982, p. 3).

Line 9 - "the low high water mark"

Comment; presumably implies mean high water mark, but very confusing diction.

11, 21-23 - "(a King's Grant, some people call it)"

Comment: King's grants do not exist in Massachusetts; See footnote 8 on page 32 of text.

18 - "1650 feet from high water mark"

Comment: 1650 feet is 100 rods, the correct limit of private flats where the sea ebbs further.

34 - "(grants) have come down from a (King) George"

Comment: The grants came only from James I and Charles I and only to the Plymouth and Mass. Bay Colonies, respectively. See Figure 5a.

41 - "intervening legislation...stopped them (grants)"

Comment: No legislation has modified the public trust in Massachusetts.

57 - "our sailboat moored in fron of their house and they asked us to move it"

Comment: Landowner exceeding his authority here; mooring on flats permitted as a right of navigation.

60-1 - "below the high water mark I'm concerned about"

Comment: Trespassers wrongly believes he has bathing rights in flats.

70-6 - "planted themselves in beach chairs"

Comment: Public encroachment beyond confines of town landing.

122-4 - "right to privacy on his own property"

Comment: Police must respond to eject trespassers.

132 - "submerged land not taxed"

Comment: Taxes low because flats unbuildable, but flats enhance adjacent values.

149 - "state attorney general in 1907 ruled"

Comment: Reference is to Butler v. Attorney General, in which the Supreme Judicial Court ruled (Attorney General was only a party in the suit) bathing is not in the public trust.

160-1 - "boat can't be moored in such an area"

Comment: Boats can be moored on flats. See footnote 101 in Chapter V.

166-68 - "50 of us with fishing rods"

Comment: This use would be justified if persons engaged in the act of fishing or crossing flats to fish elsewhere; cannot stop on flats and not fish.

169-86 - "using the beach through adverse possession"

Comment: neighbors could probably win case, but without pursuing suit immediately, they lose their evidence of uninterrupted use

196-212 - "nothing inviolate about a deed"

Comment: Attorney here fails to understand that 1647 Ordinance presumes that shoreowners own the adjacent flats; it is not an unusual practice.



Sign designates eastern boundary of public land at the Point of Rocks town landing on Cape Cod Bay in Brewster. Abutting the landing to the east lies the beach owned by Mr and Mrs Michael Kassner.

TCC/Shemeligian

Brewster 'King's Grant' Beach Access Dispute Going To Court

By Robert Shemeligian

If Orleans attorney Frank Richards gets his way, what will be decided soon in the 2nd District courthouse will be more than a simple case of trespassing on a private beach on Cape Cod Bay.

Mr Richards is representing a Brewster couple who, with others, staged an "informal protest" two weeks ago on a bay beach just east of the town landing at the end of Point of Rocks Road.

The residents were below the low high water mark, they say. For more than a year now, the police have kicked them off the beach; kicked them off the shoreline at medium and low tides, kicked their children out of the water.

The reason for the police action is simple, chief James Ehrhart said. The owners of the beach property, Mr and Mrs Michael Kassner of Lincoln, have deeded ownership (a King's grant, some people call it) to a triangle of land jutting out to a point 1,650 feet from the high water mark into the waters of the bay.

The grants (there are others) purportedly come down from the 18th century, when Cape Cod was part of a colony under King George.

The Kassners' deed to their summer property—which without the grant totals almost an acre—states they own from the high water mark "thence in the same course 1,650 feet more or less to the waters of Cape Cod Bay."

"This is an issue that was titillating to me," Mr Richards said. "From what I hear now, it's a simple trespassing case. If I can, I'm going to try to go beyond that."

King George Did It

Mr Richards said he's been hearing about King's grants for 31 years. He suspects they've come down from a George who held the English throne before the infamous king in power during the American Revolution.

Many years have gone by since the original grants, Mr Richards said. "They have to go a long way back to substantiate them. I believe that in the meantime there's been intervening legislation, and at some point they stopped them. When did they stop them? It's a tough question, and it would cost a lot of money to find out."

The history of these grants, and other laws which apply to access between low and high water is so complicated that attorneys say they have to spend a day in a law library even to begin to understand them. But what's been happening to residents in the Point of Rocks section of Brewster is clear enough.

"Since last summer when they (the Kassners) moved here, the police keep coming and ask us to leave," said 15-year-old Amy Booth, a summer resident of Point of Rocks Road. "When there's little kids in the water they tell them to leave. The don't want people on their rocks (in the water at high tide), so they kick them off. We had our sailboat moored in front of their house, and they asked us to move it."

Amy's father, Charles Booth, was more succinct. "I don't give a damn about their private beach. It's below the high water mark that I'm concerned about."

All the frustrations of Mr Booth and other residents culminated on Saturday, July 10. It was hot and humid—a perfect day for the beach. The Point of Rocks landing is only 40 feet wide, and surrounded by

eel grass lining the shore. Not what one would call a picturesque beach.

But just to the east, the land dips in a wide half-moon of sandy beach. High on the bluff above it is the Kassners' house.

As they usually do, the residents started wandering east to the Kassners' beachfront property. About 15 of them congregated at the water's edge at medium tide. Some planted themselves in beach chairs in water. Mr and Mrs Kassner were seated higher up the beach, just below the bank.

The Police Account

Police lieutenant Brian Allen gave the following account of what happened that day.

"The Kassners called the police. Officer (Carl) Cooperider responded, and saw a group of approximately 15 people on the Kassners' property, some of whom were in the water. He (the officer) politely asked the people to leave, and they refused."

Lieutenant Allen was told of the situation when he checked in with the officer by radio. He decided to assist, and drove up in another cruiser.

He asked the people to leave, and again they refused. He then walked up the beach to the Kassners and "confirmed that they wanted the people off the property, even if it meant arresting them for trespassing." The Kassners told the police to go ahead.

The bathers were not easily moved. "They were adamant about not leaving unless there was some solution," Lieutenant Allen said. "Some of them have been residents for 20 years. I suggested that rather than arresting them for trespassing and taking them in (to the station), we could get it resolved (another way) and the people agreed and dispersed."

Lieutenant Allen asked the police if any would agree to allow the police to seek complaints on a trespassing charge, a misdemeanor, in Second District Court. They could then fight it out there. Mr Booth and his wife Deborah and Carleton Jones of Old North Road agreed.

Mr Jones said he agreed to the charge because he thinks his neighbor, Mr Booth, is right, and he should be supported.

Owner Puzzled

"I frankly don't understand why they want to do this," Mrs Kassner told The Cape Codder. "We'll all know a lot more when we go to court. We would like to be on good terms with our neighbors but we don't want trespassers."

Mrs Kassner spoke from her office in Lincoln, where she lives and works. The couple is renting their summer home now and Mrs Kassner said she and her family hope to occupy it later this summer.

When they come back, if the issue isn't resolved in court, many neighbors say they expect to start seeing the police again during beach weather, sometimes two or three times a day on weekends.

Does Chief Ehrhart think he's justified spending taxpayers' money on almost daily trips to a small private beach?

"If the person who complains is justified, then he has a right to his privacy on his own property," he replied.

The Kassners have asked an attorney to represent

them in court, but so far, they say, he hasn't gotten back to them.

Mrs Kassner said she and her husband bought the house on Foster Road, just east of the landing in February, 1981. According to the deed, they paid \$145,000 for the house and acre lot.

Submerged Land Not Taxed

A bonus with the house, they thought at the time, was deeded ownership to several more acres jutting to a point way out in the bay. The couple does not pay taxes on this land, according to town records. But Mrs Kassner, who is herself a realtor, said any taxes on that land would be quite low, since it is unbuildable.

Selectman Lawrence Doyle said he understands that people with King's grants can own land under water without paying taxes on it. "No they don't (pay taxes), but it may increase the value of the land. I've heard of this before. There are others like it where the land court awarded it. The law is the law, but in this case, I don't understand what the law is."

Attorneys have said the same thing. There are myriad laws dealing with rights and ownership between low and high water, they say. Many of them go back to Colonial times.

The state attorney general in 1907 ruled: "Under the law of Massachusetts there is no reservation or recognition of bathing on the beach as a separate right of property in individuals or the public under the Colonial Ordinance (of 1641-47)" although "there is a right to swim or float in and upon public waters as well as to sail upon them." This does not include a right to use the water for "bathing."

One interpretation of this ruling is simple enough: one can own the land underneath water, but not the water. Hence, people can swim by (as long as their feet don't touch bottom) or sail by, but a boat can't be moored in such an area.

Another Possible Solution

Several residents of the Point of Rocks area in Brewster say they are aware of another section of state law which gives anyone the right to "pass for fishing or fowling" along any shoreline, public or private. "At one point, we were so mad, we were going to try to get about 50 of us with fishing rods and walk all over that property," one resident quipped.

Instead of constantly carrying fishing gear, there is another way at least some of the residents of that area could obtain legal access to the Kassners' beach. In Massachusetts, if someone can convince a court, he's been using a beach without permission for 20 years, and that use has been "notorious" and open, then he can obtain a court grant to continue using the beach through "adverse possession."

One summer resident of Old North Road two years ago hired a local attorney to investigate the possibility of legal action to gain adverse possession of the Kassners' beach through a court ruling.

The problem was, William Claffin told The Cape Codder, only nine local residents could have gained legal access to the beach. What if one of those nine wants to bring a friend or a family member to the beach? Does one go to the public beach and one to the private beach?

Because of this fact, and the substantial legal fees needed to obtain the easements, the issue was subsequently dropped. But Mr Claffin said he still feels the same way.

"I feel very certain we would have won our case," he said. "But these days I feel, 'You own a summer house on Old North Road, and why go to the Cape to get aggravated.'"

Mr Richards said more land than one would believe was taken simply because it was abandoned.

"A lot of old-timers used to go to Barnstable (Registry of Deeds) and find pieces of land that no one was paying taxes on, and draw up a deed from John Smith to John Smith. Then they'd pay taxes for 20 years on the parcel, and then would describe the piece they wanted to take by adverse possession, have a survey done, and then have the title abstracted."

Mr Richards was not suggesting that the Kassners stole their property. He simply questioned the validity and ramifications of one of the covenants on the deed: the one that gives them ownership below high water.

"What do you own? If you have some control, then how much control do you have? Hell, sharp dealers are sharp dealers, and there's a lot of romantic attachment to owning a grant such as this, but there's nothing inviolate about a deed."



APPENDIX B

Coastal Zone Management Opinion Survey, 1982

COASTAL ZONE MANAGEMENT OPINION SURVEY, 1982

In 1982 the Massachusetts Coastal Zone Program conducted a statewide telephone survey to determine public attitudes regarding the management of coastal resources. Below is an excerpt concerning questions asked on public access issues.

20. Do you plan to go to a Massachusetts salt-water beach this summer?

	<u>Coastal Respondents (%)</u>	<u>Noncoastal Repsondents (%)</u>
YES	77	74
NO	21	22
Undecided	2	2

24. By what form of transportation did you travel there (beach)?

Car/motorcycle88
 Bus..... 1
 Train..... 1
 Bicycle..... 1
 Walking.....11

25. If a new parking lot at your beach were constructed beyond easy walking distance to the water, would you be willing to take public transportation such as a van service from the parking lot to the beach? (asked of people who drive to the beach)

YES.....73
 NO.....21
 Undecided..... 6

26. Do you feel that there are enough salt-water beaches open to the general public at this time?

YES.....59
 NO.....28
 Undecided.....13

What types of uses you would like to see the remaining pieces of undeveloped coastline be used for?

Conservation...57
 Recreation.....26
 Housing..... 6
 Marinas..... 3
 Industrial/..... 3

28. There's a growing trend to construct high-rise buildings on the shoreline, permanently blocking the average person's view of the water and related scenery. In order to preserve scenic coastal vistas, should the state regulate private construction and development along the coast?

YES.....85

NO.....10

Undecided.. 5

29. When hotels, condominiums and office buildings are constructed at the water's edge, they often block the physical access of the general public to the waterfront areas and the shoreline. Should developers of large coastal properties be required to give the general public direct physical access to the waterfront and shoreline?

YES.....76

NO.....16

Undecided.. 8

30. At present, the law in Massachusetts is that private owners of coastal beachfront property may deny the general public access to those beaches. As a result, the general public doesn't have access to the vast majority of Massachusetts coastal beaches. Would you favor an amendment to the state constitution that would guarantee the public the right of access to all coastal beaches for recreational use?

	<u>Coastal Respondents</u>	<u>Noncoastal Respondents</u>
YES	48	59
NO	41	40
Undecided	9	2

31. Why do you feel this way?

Respondents in favor of amendment guaranteeing access:

"Absolute justice; the beaches belong to all"...76

"There is overcrowding at current beaches".....12

"Some private beaches should be opened"..... 9

"Present beachowners should be grandfathered;
if the beach is sold the access should apply".3

31. (continued)

Respondents opposed to amendment guaranteeing access:

"The state would be violating private property"...59

"There are already enough public beaches"..... 4

"There would be maintenance, vandalism problems"..19

"Opening beaches would add to erosion"..... 4

APPENDIX C

Public Trust Protection by
Massachusetts Division of Waterways Regulations

310 CMR: DEPARTMENT OF ENVIRONMENTAL QUALITY ENGINEERING

9.22: continued

structure to the applicant's property line, the density of existing structures, and the likelihood of future structures and increased navigational uses.

(b) In the case of any structure which extends perpendicular to the shore, the Department shall consider requiring its placement away from the applicant's property line. This section includes mooring piles.

(2) Reserved Public Rights. In the foreshore, the reserved public rights are:

(a) The Right to Fishing. the right to take or attempt to take any fish, the right to protect their habitat and their nutrient source areas in order to have fish available for taking, and the right to pass freely along the foreshore for the purpose of fishing;

(b) The Right to Fowling. The right to take or attempt to take any fowl, the right to protect their habitat and their nutrient source areas in order to have fowl available for taking, and the right to pass freely along the foreshore for the purpose of fowling; and

(c) The Right to Navigation. The right to conduct any activity which entails the movement of a boat, vessel, float, or other watercraft; any activity involving transport or the loading of goods or objects to or from any such watercraft; or the access to the water from the foreshore and to the foreshore from the water to engage in any such movement; transport, storage or loading.

(3) Public Lateral Access.

(a) All projects which will obstruct lateral access below the high water mark shall be constructed as to allow for public passage in the exercise of the reserved public rights.

(b) Such lateral access shall not be required for projects, such as an industrial facility, when there would be a clear risk to public safety in permitting free public access along the shore, or when otherwise restricted by Federal, State or Local law.

(c) If, due to the construction of a project, the land landward of the low water mark is eliminated (for instance, by bulkheading or erosion at the face of the structure) lateral access shall be otherwise provided by the licensee.

(4) Projects In Commonwealth Tidelands. The Department shall protect the Commonwealth tidelands, and any project that is harmful to the public ownership of the Commonwealth tidelands or that would significantly impair the value of those tidelands to the public shall not be allowed.

(5) The Department may, in making its determination regarding harm to public ownership from any project in Commonwealth tidelands in addition to other provisions of these regulations, consider such factors as:

(a) The extent to which the project blocks the public view of the coast and the ocean or is incompatible with the existing characteristics of its neighborhood;

(b) Its shadowing or noise impacts;

(c) Its impacts on wind velocity; or

(d) The degree to which it affects public access to the water from the shore or from the water to the shore.

(6) The Department shall not license any project in or over Commonwealth tidelands if it would have a significant adverse effect on a public recreational facility.

(7) The Department shall not license any project that would remove, displace, damage or destroy any known underwater archeological resources, or those uncovered during construction unless the applicant has complied with the provisions of G.L. c. 91, s. 63.

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