

Difficult Decisions – Surveying Tidelands, Submitting ANR Plans

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Marsh, swamp, beach

O'Donoghue v. Commonwealth 93 Mass. App. Ct. 156 (2018)

In an action to quiet title to beach lots in Marshfield, the Land Court's determination that title to the beach remained in the town was upheld by the Appeals Court. The decision partially turned on the legal definition of "beach" and whether this definition included the uplands claimed by the plaintiffs. Land Court found that the beach, as understood in colonial times, included the land below the mean high water mark, the coastal dunes and the wetlands or marsh behind the dunes.

It's the Commonwealth's burden to show the actual division between beach and upland.

Land Court Guidelines - 2009

Limits of Water Bodies – Section 2.1.3.2.2

The mean high water mark of all tidal waters and the low water mark of any lake, pond or river or the middle line and sidelines of any stream or brook are the only water lines ordinarily required. Where title instruments indicate other water lines are determinative or where contest with respect to the location of any water line is anticipated, additional data concerning the water levels or courses may be required. Examples include contour lines near old dams, the top or bottom of a riverbank, the middle of a channel of a river or tidal stream, the thread of a brook or the edge of a marsh or upland. The location of the low water mark or 100 rod line is necessary when lines over flats or foreshore are to be determined.

Land Court Guidelines

Flats and Foreshore – Section 2.1.3.2.4

When determination of flats and foreshore is important, all physical record features that limit and lie within or adjacent to the flats (including but not limited to, licenses, harbor lines, bulkhead lines, pier lines, filled areas, beaches, rambles, marsh, bogs, mean high water mark, mean low water mark, extreme low water mark, 100-rod line, channels that contain fresh flowing water at low tide, all structures within the flats, jetties, seawalls and groins) shall be located.

Marsh, rambles, groins

Home Ground – Language for an American Landscape, Editor – Barry Lopez

Marsh – primarily grasses, rushes, reeds and cattails

Swamp – dominated by trees

Meadows – uncultivated grassland often along a river or marshy region - has at least 50% of its surface some sort of grass

Bank – high ground abutting a waterway, lake, streambank, or roadbank – angle of repose of 35° to steeper incline

Marsh, rambles, groins

Rambles – woodland suitable for walking, or bed of shale above a coal seam

Groins – construction of wood or stone running from the sand under the beach into the sea and designed to prevent soil erosion, protect a river mouth from sedimentation or protect a pier or harbor from wave action

Tidal flats can be included in lot area to meet minimum lot requirements under zoning. Landward boundary of tidal flats is the line of high water at ordinary tides.

Wetlands – Under federal law – 33 C.F.R. Section 328 3(b) “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.” Generally includes swamps, marshes, bogs, wet meadows, mud flats, natural ponds and river overflows.

Permits

Army Corps of Engineers – General permit for Massachusetts expires 2/4/20

Permit required for beach nourishment, boat ramps, breakwaters, bulkheads, groins, jetties, levees, piers and wharves

Exemptions –

- normal farming activities like plowing, minor drainage, and harvesting for food, fiber and forest products
- Emergency reconstruction of recently damaged breakwaters, groins, and causeways

Review guideline – are there “practicable alternatives” to a proposed wetlands project?

Chapter 91 – role of surveyor

Jurisdiction – work below existing PRESENT high tide line

- 310 CMR Section 9.02 – use average high tide over nineteen year period
- Determine if site is on formerly filled tidelands, seaward of the historic low water mark
 - What are “historic tidelands”
 - Whether all or portion of the site is located on private tidelands (Chapter 91 won’t apply to upland portions of the site even if the site is described as one parcel)

Tidelands - Sources

Spillane v. Adams – 76 Mass. App. Ct. 378 (2010) -Mean low water as established by National Geodetic Vertical Datum

Tidelands regulations – mean low water 310 C.M.R. §9.02

Historic Shoreline Change Project – Mass – EEA/CZM

Chapter 91 Mapping Project – started in 2006

Presumptive High and Low Water Marks – look at Registry of Deeds, Mass DEP Division of Wetlands and Waterways, local historical societies, maritime museums (Peabody Essex Museum), nautical charts (Boston Athenaeum), Mass State Archives, National Archives, County Atlases

Check for special legislation on tideland grants

Landlocked tidelands? Filled before 1/1/84 and separated from flowed tidelands by a public way

Subdivision Control Law – G.L. c. 41

§§81K-81GG

Exemption – plan of subdivision recorded in Registry of Deeds before subdivision control law was in effect in the city or town. Lots shown on such plan, and any rights of way and appurtenant easements, that were sold and held in common ownership separate from that of the remainder of the subdivision are grandfathered – but the rest of the unsold subdivision is NOT.

Land Court started requiring approval of Planning Boards on registered land plans in 1952

ANR PLANS

Bruno v. Zoning Board of Tisbury 93 Mass. App. Ct. 48 (2018)

Two lots in Tisbury, one containing a main house and the second, a guest house, created by an ANR plan submitted to the Planning Board in 2001 by the common owners.

The guest house lot did not contain the required minimum lot size. The lots remained in common ownership until 2005 when the main house lot was sold to plaintiffs.

The former owners continued to improve the guest house, adding bedrooms and other amenities without permits. The plaintiffs complained to the Town in 2013 but their complaints and subsequent enforcement requests to the Zoning Board were dismissed on the grounds that the six year statute of limitations in M.G. L. c. 40A Section 7 barred the Town from enforcing the zoning bylaws.

On appeal to the Land Court, the plaintiffs sought the removal of the guest house under both Section 7 and 17 of Chapter 40A. Land Court held that the statute of limitations ran from the date of the ANR plan, not the conveyance of any lot shown on the plan and thus, the complaint was barred under Section 17.

The Appeals Court disagreed on the Section 17 finding. Zoning violations under ANR plans do not commence for enforcement purposes until the lot is actually conveyed. The complaint was not time barred.

G.L.c. 41 Section 81L

The division of land into two or more lots all having frontage on a public way for the distance required under the local by-law is not considered a subdivision

Endorsement by the Planning Board is not required if the lots are fronted by an unconstructed public way or a way that provides only “illusory access” – favorite example – claim that lots fronting Mass Bay were on a “public way” or on a statutory private way

Endorsement not required if access is practically impossible

Test for planning board– if access could be better but is manageable – approve

As in *Bruno* – endorsement does not mean that lot is buildable

Is it really a public way?

Public ways are created three ways

- Layout and acceptance
- Prescription (unusual)
- Dedication and acceptance before 1846

Way shown on an approved subdivision plan?

Way in existence on effective date of subdivision control law having **IN THE OPINION OF THE PLANNING BOARD** – sufficient width, suitable grades, and adequate construction to provide vehicular access appropriate for the use of the site and for the installation of municipal services for the use

Dispute over title to private way is not a reason to withhold approval

ANR Plans - process

Submit Form A to planning board and file notice with town or city clerk

Planning Board has 21 days to approve, BUT check local bylaw. No public hearing is required

If plan doesn't show a "subdivision", approval shall happen "forthwith"

Planning Board vote should be detailed enough so a reasonable person would understand that the decision was yes or no

If Planning Board fails to act or to notify applicant and the town or city clerk, the board is deemed to have determined that approval under the subdivision control law is not required and the town clerk shall certify the plan

Kitras v. Planning Board of Aquinnah – 70 Mass. App. Ct. 561

Planning Board's failure to comply with Section 81U resulted in construction approval but final approval was not automatic. If the Town Clerk refuses to issue the certificate, recourse is mandamus.

Erroneous Endorsement

Goldman v. Planning Board of Burlington – 347 Mass. 320 (1964)

ANR plan endorsed by Planning Board in 1959 showed 14 lots fronting on Locust Street. Plaintiff developer purchased four lots in March, 1962 and obtained building permits in April, intending to flip lots to another developer. In May, building inspector revoked permits because lots did not front on a traveled way. Developer submitted a second plan, showing the same four lots but fronting on a renamed street, which was actually an unpaved cart path.

Erroneous Endorsement

Did endorsement of the first plan dividing land on Locust Street require endorsement of the new plan?

Court's response – “whatever the plaintiff's rights under the plan recorded in 1960 might be, they do not include the right to require a new plan to be endorsed “approval not required”. The new plan required a new look – the 1960 determination that the way was adequate is not conclusive on the board when it sees the new plan.

“If the board thinks a mistake has been made, it may not be forced to repeat and enhance the effect of the mistake when a different plan is submitted”.

81X Plans

No new lot lines or ways

Use statement when correcting older plan using a new survey or when confirming a metes and bounds description not based on recorded plan

No freeze for zoning and regulatory purposes– unlike ANR plans which give you a three year freeze on changes to zoning bylaws, and wetlands and Title 5 regulations