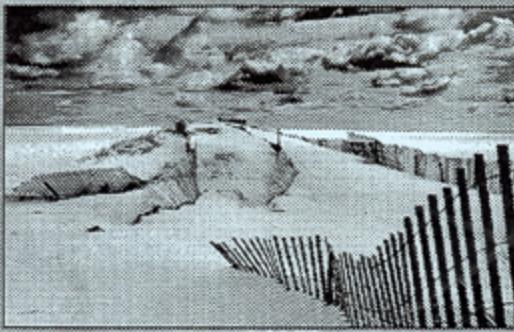
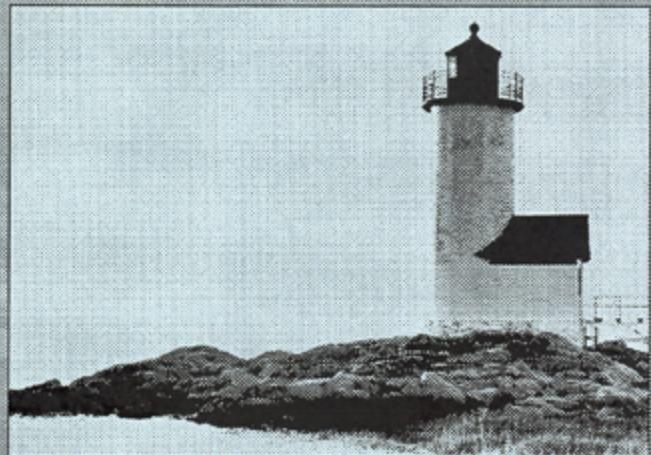


# Preserving Historic Rights of Way to the Sea

A Practical  
Handbook for  
Reclaiming  
Public Access  
in Massachusetts



JUNE 1999, SECOND EDITION

MASSACHUSETTS COASTAL ZONE MANAGEMENT

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# **PRESERVING HISTORIC RIGHTS OF WAY TO THE SEA**

**A Practical Handbook for Reclaiming Public Access  
in Massachusetts**

**Massachusetts Coastal Zone Management Office  
Executive Office of Environmental Affairs**

**June 1999  
(Second Edition)**

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## **OTHER CREDITS**

Cover Design:

Arden Miller, MCZM Graphic Artist

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## PREFACE

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For hundreds of years, the lifeline of Massachusetts cities and towns was their access to the sea. Culture and livelihoods revolved around the water, spawning generations skilled in trading, fishing, shipbuilding and navigation. Although modern needs have largely shifted from industry to recreation, coastal access still remains vitally important to our quality of life. Yet, despite 1500 miles of gorgeous coastline, Massachusetts provides relatively little public access to the sea. About 75 percent of the coast is privately owned and much of the remaining 25 percent, though publicly owned, is inaccessible. To complicate matters, when Massachusetts residents do reach the shoreline, state law often severely limits their permitted activities. The Commonwealth stands nearly alone among coastal states in recognizing private ownership down to the low tide mark. In times of tight public budgets and sky-high coastal land values, what can concerned citizens do?

One answer lies in the preservation of historic rights of way to the sea. In almost every coastal community, public access ways exist in a variety of forms, from footpaths and landings to roadways that provide access from shore roads to the sea. In many communities, these public roads and paths have been lost, forgotten or possibly hidden by other uses. By rediscovering historic public access ways, communities can revive boat landings, scenic viewpoints, fishing access and even coastal trails. By preserving historic rights of way, communities permanently increase shorefront access and guarantee for future generations their heritage of public coastal use.

How can historic access ways be found and preserved? The best answer lies in the involvement and stewardship of ordinary citizens. This handbook describes how interested citizens can reclaim, preserve and protect historic rights of way to the sea. Preservation projects have already been pursued with significant success in at least two Massachusetts towns. Residents of Rockport and Gloucester proved that rights vested in the public 50, 100 or 200 years ago need not be lost due to public indifference or private encroachment. Whether your town preserves just one historic way or an entire system of paths and access ways, preservation of historic ways to the sea is an invaluable legacy for future generations.



## INTRODUCTION

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### **The Nature of Massachusetts' Public Access**

Presently, only about one quarter of the state's coastline, about 363 miles, is publicly owned. A closer look reveals that a substantial portion of these public lands are not truly accessible due to terrain, environmental concerns and other reasons, according to the 1990 Massachusetts Coastal Land Inventory. Furthermore, the state's truly usable public coastline tends to be concentrated in a relatively small number of access-rich communities located in the southeastern portion of the state, far from large population centers. The end result is a great demand for, but significant scarcity of, public access to the sea.

A generation ago, most residents knew of traditional, locally used places to clam, launch a boat, swim, fish or gaze at the ocean. Fifty years ago, informal agreements, local custom and traditional patterns of use satisfied much of the local demand for access. Informal access, where members of the public pass over private property to reach the sea, is a long-standing tradition in every coastal community. Such passageways exist harmoniously when the public respects the concerns of private property owners.

Yet in the last few decades, due to accelerating population and development, many traditional access ways have been built upon, disguised, fenced off, posted or purchased by new owners who won't tolerate the old patterns of use. Escalating coastal land prices exacerbate the problem by making both new and old owners more protective of their holdings. In addition, the surge in the popularity of the shore for recreational use and the emergence of new leisure-time uses such as wind surfing, sea kayaking, walking, jet skiing and SCUBA diving are causing coastal property owners to rethink their access policies. Although many historic access points still exist, conflicts with owners and threats of closure are becoming more pervasive.

### **Drawing on History to Solve Today's Problems**

Since many coastal communities were historically unable to buy lengthy segments of shoreline, towns provided access for the local public by obtaining footpaths, landings and other rights of way between shore roads and the water's edge. Although generally of modest proportions, these historic town ways were rather numerous, as evidenced by recent inventories in the North Shore communities of Gloucester, Rockport and Marblehead. Together these towns laid out a combined total of nearly 100 ways to the sea. Most fell into the category of access points, but a few traversed extensive stretches of otherwise private waterfront property. The most dramatic example of such a way is the Atlantic Path in Rockport, which travels over two miles along Rockport's rugged shoreline.

Over the years, many of these historic rights of way to the sea have been lost or forgotten. The circumstances of their disappearance are as varied as their modes of creation. Some ways vanished from private deeds when transfers of ownership took place, due to a lack of public vigilance and accurate record keeping. Other access ways may still be "on the books" but presently hidden and unknown, as a result of concealment by abutting property owners. Many coastal landowners may be unaware that a public right of way abuts their property. A few, however, are expert in the art of access intimidation. Cars parked to obstruct passage, gardens designed in strategic locations, crushed stone laid to make vehicular ways look like driveways, plantings obscuring where private lawns end and public paths begin, signs warning of fictitious hazards; the ruses are varied, ingenious and often effective.

It is this subtle wealth of historic rights of way that offers so much promise for today's coastal communities. Gloucester alone has revived 38 public landings and ways to the sea. The Town of Rockport has preserved numerous access points in addition to the impressive Atlantic Path. The goal of a preservation project is to rediscover and, where possible, reassert public claims to these varied, hidden and almost forgotten ways.

## **The Role of Coastal Access Advocates**

The preservation of historic rights of way cannot be achieved in Massachusetts without the involvement of citizen advocates and dedicated public officials. The preservation process is not easy and often requires long hours at the registry of deeds, town hall, the bargaining table and even the courthouse. Yet the potential rewards are weighty: trail networks, reinvigorated landings, access for fishing, and beaches for strolling. These can be the permanent result of a successful preservation effort.

Although the work of concerned citizen advocates is the backbone of community efforts to preserve historic ways, there will be times when technical and legal assistance is absolutely necessary. While this handbook is intended to minimize the time required (and thus the expense) of experts-for-hire, it is essential that timely advice be obtained when necessary. This handbook will help you identify those instances when such expertise is imperative. The handbook also suggests possible funding sources, if volunteer legal and technical help are not available.

## **The Goal of the Handbook**

This handbook seeks to clarify and de-mystify the preservation process and thus enable citizens and municipal officials to locate and revive historic ways to the sea. It takes the reader step-by-step through the preservation process; from research and discovery, through negotiation, to the legal and physical preservation of the access ways. The handbook seeks to

inform both experienced planners and civic novices of the basic law and legal processes affecting preservation projects. The handbook provides the tools to make any interested citizen, municipal official, lawyer or planner an effective access advocate for historic public rights. The handbook will also be useful for coastal landowners who are affected by historic rights and who seek an equitable and workable coexistence with public users. While few Massachusetts communities to date have mounted concerted efforts to preserve their historic rights of way to the sea, it is hoped that this handbook will spark interest in preservation efforts and ease the way for advocates and landowners.

First, a word about the terms used in this handbook. Throughout the book, an effort to establish historic rights of way to the sea may alternately be termed a “rediscovery,” “reclamation,” “restoration” or “preservation” project. Any specific project may be all of the above. For example, historic rights may have to be “rediscovered” before they can be preserved. Sometimes rights must be “reclaimed” from encroaching uses before they can be reestablished. Occasionally ways and landings must be “restored” both physically and legally in order to be rendered usable. For clarity, this handbook most often uses “preservation” as an umbrella term encompassing all the meanings just expressed. The “preservation of historic rights of way” carries with it a positive connotation not only of the establishment of rights, but of the enduring stewardship of those rights physically, legally and socially within a community.

## **How to Use the Handbook**

To assist towns in their preservation efforts, the handbook provides background information, detailed instruction and a discussion of relevant legal concepts. Part I, which includes Chapters 1 and 2, sets forth the background material necessary to understand the preservation process. Chapter 1 introduces the reader to the essentials of coastal property law. Chapter 2 examines the diverse forms of historic ways along the Massachusetts coast and the varied legal methods of creating them.

Part II provides the “nuts and bolts” of implementing a preservation project. Chapter 3, the handbook’s central and pivotal chapter, supplies the process-oriented instructional material, including a step-by-step description of an historic rights of way preservation project. A detailed discussion of the legal methods of gaining (and losing) public access follows in Chapters 4 and 5, with special attention paid to Massachusetts law. Following Part II is a Glossary that provides definitions of legal and technical terms found in the text.

Readers should not overlook the handbook’s numerous appendices. Foremost is Appendix A, which contains a Case Study of the Town of Rockport’s Right of Way Rediscovery Program. Appendices B and C contain technical and legal materials essential to the research, investigation and legal phases of the reclamation process. Also invaluable are

the laws and citations, suggested funding resources and bibliography contained in Appendices D, E and F.

All statutory citations contained in the text refer to the Massachusetts General Laws (“M.G.L.”). Frequently cited laws can be found in the appendices. Throughout the handbook, readers will also find references to Massachusetts case law. Particularly illustrative cases are briefly described and their citations provided. While this handbook is not intended to be a legal treatise, the reader may find these references helpful in acquiring a general understanding of the legal concepts affecting the public’s right of access.

This handbook is not intended, nor should it be used, as legal advice. Readers are advised to consult an attorney knowledgeable in coastal property law and, ideally, experienced in the doctrines presented in this Handbook.

**PART I:**

**THE LEGAL ESSENTIALS**



# CHAPTER 1

## A PRIMER ON COASTAL PROPERTY LAW

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This chapter examines the law governing both the public's *ownership* and the public's *right to use* coastal property. Section A discusses the public trust doctrine in Massachusetts and explains how this doctrine affects private ownership of coastal property. Section B explores the different ways that the public may own or have rights to use coastal land and access ways. An understanding of these legal concepts is a prerequisite to initiating any preservation project.

### A. The Public Trust Doctrine and Shoreline Ownership

No discussion of Massachusetts coastal law is complete without a discussion of the public trust doctrine. The peculiarities of its application in Massachusetts make the preservation of historic access ways to the sea all the more important. Each coastal state has its own laws governing ownership of its beaches and tideland. “Tideland” is the legal term for all land beneath the waters of the ocean, including lands that are always submerged as well as those in the intertidal area (i.e., between the high and low tide marks). In every coastal state, the use of tidelands is governed by a concept in property law known as the public trust doctrine, which dates back centuries to ancient Roman law. The doctrine states that all rights in tidelands and the water itself are held by the state “in trust” for the benefit of the public. In most states, this means that private ownership ends and public ownership begins at the high water mark.

The Massachusetts Bay Colony originally followed this rule, until its legislators decided to transfer ownership of the intertidal area to coastal landowners to stimulate private wharf construction on the so-called “flats” while keeping property abutting water open to public use. This general land grant was accomplished by the Colonial Ordinances of 1641-1647, which in effect moved the line between public and private property to the *low* water mark (but not farther seaward of the high water mark than 100 rods, or about 1650 feet). Intertidal lands in Massachusetts are presumed to belong to the upland property owner, unless legal documentation proves otherwise for a given parcel (as is true for certain segments of Provincetown, for example).

Although the Colonial Ordinance changed the ownership of most intertidal flats from public to private, it did not transfer all property rights held by the state. For one thing, no rights to the water itself (as distinct from the underlying lands) were relinquished by the Ordinance. Moreover, there was specifically reserved for the public the right to use intertidal land for three purposes -- *fishing, fowling and navigation*. This reserved right includes the right to walk or otherwise pass freely anywhere within the intertidal shore in order to fish, fowl or navigate. The Colonial Ordinance ensured that these public rights remained free to all inhabitants, and put an end to the increasing private and exclusive use of the shoreline. In addition to the traditional scope, these ancient rights have contemporary applications. According to the Attorney General's Office, fowling generally includes the right to bird watch and navigation includes the use of personal watercraft. For a more complete discussion of these public rights, see: *Public Rights/Private Property: Answers to Frequently Asked Questions on Beach Access*. Office of the Attorney General, Environmental Protection Division.

While it is usually true that coastal landowners own down to the mean low tide line, there are important exceptions. To determine who owns any particular tideland, it is always necessary to look at the language of the relevant deed or deeds. Occasionally the deed of an individual property defines the boundary of the property as the *mean high tide line*, or as the beach or upland, in which case the state often owns the land seaward of the high tide line. (In certain cases, the tideland will still be privately owned, as when a developer retains the intertidal zone for himself or for the benefit of the lots in a subdivision.) If the deed simply says that the property is "bounded by the sea" or that the property extends "to the water," such general terminology has been interpreted to extend private ownership to low water, subject, of course, to the public trust privileges of fishing, fowling and navigation in the intertidal zone. A researcher should follow the chain of title further back, in case the grantor only owned to the high water. A grantor can only convey what he owns, and a grantee does not get title to low water if the grantor's title did not extend that far – regardless of what the deed says.

Because the general rule in Massachusetts is that the public *cannot* freely use the intertidal zone for recreational purposes due to its private nature, access ways that extend to the shore become critically important to communities who seek to provide sufficient public access to their shoreline.

## **B. Public Property Rights in the Shore and Uplands**

Public access rights exist in two ways: by public ownership of land and by the

public's right to use land that is privately owned. While simple, this distinction has important legal consequences. Both types of public rights are discussed below.

## **1. Public Ownership of Land in Fee Simple**

States, counties, cities and towns routinely own property for the benefit and use of the public. For example, public land may exist in the form of parks, beaches, open space and public landings. The Commonwealth, counties and municipalities often own these lands “in fee simple,” meaning that they hold all rights of ownership. In plain language, the property is owned “outright.” Most homeowners are familiar with fee simple ownership, for homeowners typically own their properties in fee simple.

How does public ownership come about? There are several different methods. Counties and municipalities may acquire properties by purchase or gift. Public ownership in fee simple can also result when taxes are not paid on a particular parcel of land, and the town acquires the property through a tax taking. In addition, cities and towns have the power of eminent domain to “take” property from private owners for public use in accordance with state law (G.L. Chapters 79 and 80A). Lastly, municipalities may own areas such as town commons, which were never granted out in the colonial period, and have remained the property of towns since the 1600’s.

## **2. Easements**

When investigating historic ways to the sea, one often finds that the public owns a *right of use* of a particular access way, but not the access way in its entirety. The state or municipality need not own land *in fee simple* in order for the public to have the right to use it. This section describes how the public can enjoy rights of passage over particular parcels of property, not by virtue of owning the property, but by simply owning an *easement*.

### **a. General Background**

The legal right of an individual or group of individuals to use land owned by someone else for a particular purpose is called an “easement.” Examples of common easements are easements for access, for installation and maintenance of utility lines and for the repair and maintenance of public structures. An easement is a type of property interest, and owning an easement gives the easement owner certain rights. When a particular property is subject to

an easement, the owner of the underlying (burdened) property may not use the land in a way that unreasonably interferes with the use of the easement.

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*Illustration #1: An Easement to the Sea*

*Mary, a generous shorefront property owner, granted the public an easement to walk on a path across her property to reach the beach. Mary may still use her path in any way she pleases and may even place unlocked gates across it, as long as the public's right of passage is not unreasonably hindered by her actions.*

---

Another characteristic of easements is that they can be bought and sold independently of the land on which they are located. The seller of a piece of property can also create an easement when the underlying property is sold. The seller may “reserve a right” to use part of the property he or she is selling.

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*Illustration #2: Reserving an Easement to the Sea*

*A shorefront property owner owns a property called Sandyacre. She decides to subdivide Sandyacre into two lots so that only one lot will have frontage on the beach. The owner wants to keep lot 1 and sell lot 2 (the waterfront lot) to a buyer. To preserve access to the ocean for herself, the owner sells lot 2 to a buyer, but reserves an easement for herself to cross lot 2 so she can reach the ocean.*

---

Easements like the Sandyacre easement “run with the land,” meaning simply that they do not end when the property changes hands. In the Sandyacre example, the owner of lot 1 will have an easement across lot 2 even if a new person buys lot 2. This durability, or enduring quality, of easements is a very important quality to keep in mind when examining ways to the sea across private shorefront property. Private owners often claim (erroneously) that any easement ended when they purchased the property.

Another quality of easements is that an easement will remain intact even if the underlying property is transferred without specific mention of the easement in its deed. Take, for example, the Sandyacre easement described above. The Sandyacre easement would remain across lot 2, even if lot 2 was sold (and resold and resold) without specific mention of the easement in lot 2’s deed. Thus, if one suspects that an easement exists, but there is no easement mentioned in the current deed of the property, it is essential to search previous deeds of the property for mention of the easement, and may require going back to an original grantor to determine the origin, extent, and purpose of the easement (Kenny v. Marin, 350 Mass. 534 (1966)).

## b. Public Easements

Understanding easements is important to a successful preservation effort, because so many historic ways to the sea are in the form of public easements. Public easements are easements that permit the general public (or the residents of a particular municipality) to use private property. They are owned by a public entity, such as the state, county or municipality, or may be owned by a private organization such as a non-profit association (e.g., The Trustees of Reservations or Massachusetts Audubon Society). Public easements are held for the benefit of the public.

Public easements exist in many different forms. A very common public easement is a footpath across private property to the sea. Public roadways terminating at the shore are also public easements. Obviously, not all easements running to the sea in the form of footpaths and roads are *public* easements. Those commonly found in coastal subdivisions are usually *private* easements. These easements simply provide non-shorefront property owners with access to the subdivision's private beach. Compare this with the following example of public easements found in a North Shore coastal town.

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*Illustration #3: Beverly's Scenic Access Ways to the Sea*

*Just north of Beverly Harbor, in a residential neighborhood, several public roads run perpendicularly from Route 127 toward a seawall above the beach. The City of Beverly posts signs at each of these ways indicating that the street is a public access way to the sea. The signs serve an essential function since some of these ways have the appearance of a private road or driveway. The public ways provide coast-seekers with a scenic viewpoint from which to enjoy a picnic or simply a quiet moment.*

---

## c. Public Easements v. Non-Durable Public Rights

It is important to distinguish public easements from non-durable public rights to use another person's land. For instance, by entering into a contract with a private property owner, a municipality can secure public access to the coast. However, the contract is good only as long as the original property owner owns the property. In other words, the contract, or license, does not "run with the land" like an easement. While public rights may continue after the property changes hands, the public must rely on the new private property owner to preserve the access rights. Because the municipality is powerless to control the transfer of land, there is a significant risk that public access rights will be lost when the property is sold. In contrast, because easements "run with the land," they survive a number of circumstances,

such as the death of the original property owner, the sale of the property and the whim and fancy of successive owners of the land.

#### **d. Permissive Use**

When a private property owner gives permission to town residents or others to cross her property, this ordinarily confers no “rights” to the public. The public use is at the sole discretion of the property owner and is not, of course, a right owned by any member of the public. The property owner, in most cases, can withdraw her permission at any time. This situation is very different from an easement, or even a license, where the public holds certain legally enforceable rights to use the property of another person or entity.

## CHAPTER 2

### A PRIMER ON HISTORIC RIGHTS OF WAY

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Locating the historic rights of way to the sea in your community is perhaps the most significant part of the preservation process. In order to uncover historic ways, you must learn to recognize them. Historic ways take various forms, from easily recognizable public landings and town streets to unpaved roads and barely visible foot trails. It is important to understand how these ways differ, for their differences may determine the actions necessary to preserve them. To this end, Section A of this chapter examines many common forms of ways and illuminates their distinguishing characteristics.

Section B of this Chapter examines the various legal means by which rights of way are created. Why is it important to understand how a right of way was established? The knowledge of how a particular way was created provides important clues to the public or private nature of the way. Understanding how a way was created helps researchers locate documents essential to proving the public nature of particular access ways.

#### **A. Common Types of Rights of Way: Ways and Landings**

Historic access ways to the sea commonly exist in the form of ways and landings. The following sections identify the different types of ways and landings, including: public ways, private ways, ancient ways, public landings and common landings.

##### **1. Ways**

Ways to the sea (in the form of paths or roads) may be privately owned, may be owned in their entirety by cities and towns (fee simple) or the public may own simply the right to use the way (an easement). In either of the latter two cases, the public's right of access, once its nature is determined, can often be reclaimed and preserved for permanent, public enjoyment.

### **a. Public Ways**

Roads and streets are likely to constitute a large proportion of the historic access ways to the sea in any particular community. Many successful preservation efforts have resulted from the discovery of vehicular ways that run to the shore (so-called "paper streets"). Once a particular right of way to the sea is proven to be a legal "public way," public rights can be secured. For instance, old maps may reveal roads that were laid out to the shore but which have since fallen into disuse. If such roads are legally established as public ways, then the community can probably reestablish access.

The legal term "public way" actually describes four different types of ways that the public has rights to use: state highways, county highways, town ways and statutory private ways. It is important to understand the differences between them and to determine which label applies to the way at issue prior to attempting to prove that the way is public. (The different kinds of ways and the laws governing their creation are described in detail in Chapter 4.) Note, however, that even if a road is found to be a legally created public way, the public's rights may have been given up by a town through abandonment or discontinuance (See Chapter 5).

### **b. Private Ways**

In Massachusetts, there exist "private ways" that are not available for public use. Private ways are in all respects private, being laid out, constructed and maintained by private individuals for their private purposes. The public uses such ways only with the consent of the owner. The most common places to find private ways are in subdivisions. According to the Massachusetts courts, if a road has never been laid out by a public authority, dedicated and accepted, or established by prescription, the road is private. (These legal concepts are also discussed in detail in Chapter 4.)

### **c. Ancient Ways**

The term "ancient ways" has no precise legal definition and is used generally by communities to refer to an assortment of old ways, historic footpaths, cart paths and wagon trails. The term is most often used for ways for which no record of a vote or laying out can be found. Ways shown on maps, in photographs, or mentioned in deeds or town votes that have existed for generations may be said to be "ancient ways", however, there is no specific time period that a way has to exist to be an ancient way.

Ancient ways have no special legal status in Massachusetts. In fact, courts have been decidedly reluctant to confer public status on ways based solely on their age. To date, *no* Massachusetts court has ever declared a way to be public solely on the basis of its presence on ancient maps or its mention in ancient records. As a Massachusetts court noted, “[a]ge by itself is a neutral factor, there being ancient private, as well as ancient public ways....” (Fenn v. Town of Middleborough, 7 Mass. App. Ct. 80 (1979)).

## **2. Landings**

Landings are shoreline rights of way traditionally intended for landing and launching boats, but which may also be used for fishing, strolling or even picnicking. Historically, landings were developed for transportation purposes when travel by boat was the most reliable and efficient means of travel. Over time, improvements in roads and other modes of surface transportation brought about a decline in the reliance on landings. Nevertheless, public landings remain important windows of access to the sea, because they provide access for the public trust rights of fishing, fowling and navigation. Landings may be in the form of easements, or the public may own the land outright (fee simple ownership).

### **a. Public Landings**

A public landing is any landing that the public has the right to use. A city, town or county may either own the landing outright or they may own an easement in the landing place. Some landings were established in Colonial times by the acts of towns reserving property for that purpose at the initial division of land. Others may have been established by a taking through the power of eminent domain. A public landing place cannot be discontinued by a town or by the county commissioners.

### **b. Common Landings**

Common landings are a distinct subset of the more general category of “public landings.” Common landings are owned by municipalities and may be used by all members of the public. State law (G.L. Chapter 88, Section 14) requires that all coastal cities and towns provide at least one “common landing” place on a tidal shore above the low water mark. The statute also provides that a city council or board of selectmen may, upon petition of ten or more voters, lay out additional common landings.

Common landings are given particular protection under state law. Obstructing a common landing is considered a public nuisance, and the state or municipality may bring legal action to abate the nuisance (G.L. Chapter 88, Section 19). Municipalities may make and enforce rules for the use of common landings. They may build structures and lease space, as long as their actions are consistent with the *public* use of the landing. For example, a town may lease space on a common landing to a boat builder, *if* that use does not interfere with use of the landing by any member of the public.

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*Case #1: Provincetown Selectmen in Deep Water over Landing Lease!*

*In 1936, the Selectmen of Provincetown leased the only deep-water wharf in town to a steamship company for its exclusive use. When the lease was challenged by a competing steamship company, the court ruled that the town was prohibited from granting such a lease because it effectively prevented other members of the public from using the town's common landing. In its decision, the court stated that the town could no more grant the exclusive use of a common landing than it could grant to individuals the exclusive right to travel over portions of its town ways. Stated the court, it was as if the town attempted "to grant to a single taxicab proprietor the exclusive right to carry passengers on town ways. The purported lease is of no effect as against the paramount rights of the public."*

*Cape Cod S.S. Co. v. Selectmen of Provincetown, 295 Mass. 65 (1936).*

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Not all landings that are owned by a municipality are “common landings.” A town may acquire a landing by purchase, eminent domain, tax taking or gift. In order for such a landing to become a “common landing,” the town must lay out the landing according to the statutory requirements of G.L. Chapter 88 (including a vote of the town officials, notice and recording).

## **B. Common Means of Establishing Rights of Way**

Rights of way can be legally established by a variety of means. When searching for historic rights of way to the sea, it is essential to know the different methods by which public ways and landings can be established. If you understand these methods, you will know where to search for the evidence that can determine the public nature of the way. The following briefly summarizes the most common means of establishing public rights of way. A detailed discussion including the legal subtleties of these methods is contained in Chapter 4.

## **1. Lay Out and Acceptance**

Every right of way researcher should be thoroughly familiar with the process of lay out and acceptance. The creation of public roads, public highways and public landings is most commonly accomplished by the process of "laying out" by public authorities.

### **a. Public Ways**

The lay out procedure for all public ways is composed of the following steps: (1) municipal officials give notice of their intention to lay out a public way; (2) the lay out plan (with the boundaries and measurements of the way) is filed in the office of the town clerk; (3) the town accepts the lay out plan at town meeting, or it is accepted by a similar voting body; and (4) the lay out is recorded at the county registry of deeds. However, some older layouts merely required a filing in the town clerk's office, or at the county engineers. After lay out, public authorities may use their power of eminent domain to take private property, and private property owners may be compensated. This highly structured process is governed by state statute (G.L. Chapters 79, 81 and 82). Proof of lay out for any particular way entails demonstrating that all the procedural requirements of the relevant statutes have been met. However, challenges to the validity of layouts fall under G.L. Chapter 79, sec. 18, and most challenges are barred when not brought within the time period in effect at the time of the layout.

### **b. Landings**

Public landings are created by lay out in much the same manner as public ways. The statutory procedure for the laying out of common landings (set forth at G.L. Chapter 88, Sections 14-17) is similar to that for the laying out of town ways. As with public ways, procedural requirements must be followed for the lay out of a landing to be valid, including notice, filing and a vote of acceptance.

## **2. Dedication**

Many public ways were created by dedication, and the preservation researcher might find that some of these public ways provide access to the sea. Dedication has been described by the Massachusetts courts as "the gift of land by the owner, for a way, and an acceptance of the gift by the public, either by some express act of acceptance, or by strong implication arising from obvious convenience, or frequent and long continued use, repairing, lighting or

other significant acts, of persons competent to act for the public in that behalf" (Hemphill v. Boston, 62 Mass. 195 (1851)).

In 1846 the Massachusetts Legislature passed a statute declaring that a public way can no longer be created in the Commonwealth by dedication and acceptance. The intent of this statute was to prevent cities and towns from being saddled with the responsibilities (and accompanying liabilities) for the maintenance of highways which were not laid out and constructed in a manner prescribed by law (G.L. Chapter 84, Sections 23 and 24). Subsequently, the courts have limited the application of the statute to public ways that are highways. Dedication is still in effect for other public ways such as foot paths, landings, parks and commons, because for such public ways, cities and towns are not responsible for maintenance and liability as they are for highways.

### **3. Usage**

The following three methods of creating public rights of way involve the public's acquiring rights of use (easements) through long term usage of a particular way. Each is briefly described below. For an expanded discussion of these legal doctrines, see Chapter 4.

#### **a. Implied Dedication**

Long term public use of a way coupled with the silence and passive acquiescence of a landowner can result in the implied dedication of a way. Under the doctrine of implied dedication, courts find an intent to dedicate in the failure of a landowner to interrupt or object to the use of her property, or by representations made by the owner. Although a public highway can no longer be created by dedication, other public ways and landings may be created by implied dedication, and no "official acceptance" such as a vote of the town is necessary. Use of a property by the public is considered "acceptance" of the dedication. Once accepted by the public, an owner cannot revoke the dedication.

#### **b. Prescription**

Under the legal theory of prescription, continued public use of land for an extended period of time may also give rise to public rights of use (G.L. Chapter 187, Section 2). If

members of your community, or the public generally, have been using a road, path or landing on private property for a long time in order to gain access to the sea, you may be able to establish an “easement by prescription” to the sea. In order to claim an easement by prescription, the public must make “continuous and uninterrupted use” of a property for at least 20 years in a manner that is “adverse to the owner” (without his permission) and in a way that is “open and visible.” In some instances it may also be necessary to provide evidence of “corporate action,” (i.e., action by a municipality that exhibits control over the way, such as maintenance). The specific requirements that must be met regarding the type of public use, length of use and the actions of municipal officials are described more fully in Chapter 4.

#### **c. Custom**

Rights to use land owned by someone else may also be acquired through use by the legal doctrine known as “immemorial custom” or “immemorial usage.” In order to establish an easement by immemorial custom, the public use of the property must have lasted from “time immemorial” and without interruption. Moreover, the use must be reasonable, peaceably enjoyed and consistent with other customs and laws. This theory is similar to prescription in that it looks to past use of the site in question to prove the existence of present public rights. But it is fundamentally different from prescription because it lacks the formal requirements of at least 20 years of open, non-permissive usage. Also unlike a prescriptive easement, custom may be established simply by proof of public use without the need to show any official acts on the part of a city or town. Lastly, the theory differs from both implied dedication and prescription because it can be used to acquire rights of use to large areas and does not require a tract by tract determination. A more detailed discussion of custom can be found in Chapter 4.

### **4. Acquisition of Ways by Municipalities**

The following three methods of creating public ways involve the outright acquisition of such ways by municipalities.

#### **a. Purchase or Gift**

A municipality may acquire outright ownership of land or an easement across land through purchase or gift. The gift or purchase is usually evidenced by a deed from the owner to the town or other public body which is recorded at the registry of deeds. The

extent of the public's rights in the property is ordinarily clearly spelled out in the deed. The municipality must accept the gift or authorize the purchase through some formal action, depending on the particular ordinances of the municipality. Different types of access can be created by purchase or gift. For example, towns occasionally purchase land for roads and receive gifts of land for parks and landings.

### **b. Tax Acquired Property**

Municipalities may acquire ownership of property in fee simple when private property owners fail to pay real estate property taxes. The process generally proceeds as follows: if a private property owner fails to pay real estate taxes, the town places a lien on the property for non-payment of taxes, and if the owner fails to remove the lien in a timely manner, the town acquires the property. The land acquired through this method usually consists of single parcels of land and not roads, since municipalities generally do not tax land under roads. Evidence that the municipality acquired the property should be in the form of a municipal tax lien recorded at the registry of deeds.

### **c. Eminent Domain**

The state, counties, cities and towns have the power of eminent domain to take land for the purpose of laying out public highways and roads. The state's power of eminent domain to take land for state highways is set forth in G.L. Chapter 81, Sections 7, 7A, 7C, 7G and 7M; the authority of county commissioners to make eminent domain takings for county roads is set forth at G.L. Chapter 82, Section 7 and the power of cities and towns to take town roads is prescribed at G.L. Chapter 82, Section 24. All takings must be recorded at the appropriate registry of deeds pursuant to G.L. Chapter 79, Section 3. Failure to record an order of taking can invalidate the taking. Furthermore, under G.L. Chapter 40, Section 14, the taking and appropriation of money damages must be approved by a two-thirds majority of the city council or town meeting. However, it is important to ascertain what the requirements for a taking were at the time of the taking. Some layouts were not recorded at the registry of deeds; instead, they were filed with the town clerk or the county engineer's office. Most of the ways a researcher will encounter will be hundreds of years old, and the time allowed for challenging the validity of a layout has long since passed.

County commissioners, city councils and town boards of selectmen also have the power of eminent domain to take land for the creation of common landings pursuant to G.L. Chapter 88, Sections 14 and 15. A plan and description of each common landing must be filed at the registry of deeds, with the city or town clerk, with the county commissioners and with the Massachusetts Department of Environmental Management. The records of land taken by cities and towns for public ways to the sea or for common landings should be located at the registry of deeds and in the records of the town meeting or city council at the time of the taking.

### **C. Other Common Types of Municipal Ownership**

There are several subcategories of public ownership in fee simple. Generally, municipal buildings, public works facilities, and other similar properties are owned in the same manner as private property. These municipally owned properties may be bought and sold according to the provisions for purchase and sales of municipal property.

Public charitable trust properties are properties, usually donated or sold to a municipality, with a provision that the property is to be used for a specific public purpose forever. These may include libraries, hospitals, parks, public paths, etc. If it is specified that they are to be used for certain purposes “for the public forever”, they are subject to a public charitable trust. Public charitable trust properties may not be sold, nor their use changed, without the approval of the Attorney General. No vote of a town, or of the Legislature, may impair a public charitable trust. Municipalities may seek approval for a sale or change of use if the original purpose may no longer be served by the gift. For instance, a small three-room house with no parking facilities for use as a public library may no longer be practical or usable as a public library for a growing town. In that case, the Attorney General may agree to allow a town to sell the property, provided it uses the money to purchase books for the new library, which is much larger with adequate parking facilities and adequate systems for heating, lighting and computers.

Municipalities may have conservation or natural resource property that is subject to the requirements of Article 97 if a conveyance, lease, or even a changed use or change in the agency holding the land is contemplated. Article 97 requires a two thirds vote of both houses of the Legislature before any disposition or change of legal or physical control can take place. (See Chapter 5, Section F).



**PART II:**

**THE NUTS AND BOLTS OF IMPLEMENTATION**



## CHAPTER 3

### HOW TO CONDUCT AN HISTORIC RIGHT OF WAY PRESERVATION PROJECT

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For those who recognize a need for increased public access in their community, their first questions will be: Where do I begin? What resources do I need? Where can I go for help? This chapter provides the nuts and bolts of implementing a project; from committee-building to the confirmation of public rights.

The process can be boiled down to ten essential steps:

- Step 1: Assemble a public access committee.
- Step 2: Identify historic access ways.
- Step 3: Prioritize the identified access ways for research according to the apparent ease of research and to the importance of the access ways to the community.
- Step 4: Develop a strategy for research and a reasonable timetable for completion.
- Step 5: Conduct the research.
- Step 6: Evaluate the findings and develop a strategy to establish the public rights of access.
- Step 7: Seek support for your strategy from local public officials.
- Step 8: Negotiate with landowners to secure public rights.
- Step 9: Prevent future loss of public rights.
- Step 10: Plan for care and maintenance of the rights of way.

The following sections describe each step in detail. Further information on executing the process is found, as noted, in the handbook's appendices.

#### A. Step 1: Assemble a Public Access Committee

The most essential element of an historic preservation project is the coalescing of a small core of dedicated volunteers willing to spend considerable time researching and documenting public rights. The success of a project depends on the depth of knowledge and level of commitment of the members of this group, not on the number of people

involved. A great deal can be accomplished by a few people who are willing to make a significant commitment of time to the project.

## **1. Members and Expertise**

The committee may be composed of any and all interested citizens. The following suggestions for the make-up of the committee are included to target some specific areas of expertise. It is recommended that the committee include municipal officials or former officials who are familiar with town records and processes; older members of the community who can recall past patterns of public access; fishermen or others who are dependent upon access for their living; local history buffs or members of the local historical society; members of environmental or public access organizations; and one or more people with a research background (although not necessarily a background in deed research).

The inclusion of an attorney, title abstracter or surveyor on the committee would be very helpful, but it is not absolutely necessary. These services may need to be secured at a later date to confirm the findings of the committee and to advise municipal officials on appropriate legal actions.

## **2. Officially-Sanctioned Access Committees**

In some communities, the board of selectmen or city council creates a public access committee and actively encourages its work. Such municipal involvement can be very beneficial, because an invested town government will presumably be committed to supporting and implementing the findings of its committee. In addition, a town-sanctioned committee may find that town staff is more willing to devote time to helping the committee with its research.

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### *Illustration #4: Gloucester Public Access Committee*

*In 1987, the City of Gloucester established the Public Landings Project to rediscover and reclaim the city's numerous, but neglected public landings. To this end, the Gloucester Public Landings Advisory Committee was established. Under strong and focused leadership by a city-funded organizer, the committee was able to identify and reclaim numerous public landings. The committee, comprised of resident volunteers, remained active for several years and was instrumental in protecting and maintaining many of Gloucester's landings.*

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Official status, nevertheless, is not necessary for success. In some communities, the committee arises out of the interests of concerned citizens or through the efforts of another

body such as the conservation commission or historical society. Such committees may need to spend more time educating their local government about their efforts. Successful research can be accomplished by either type of committee since the bulk of the relevant information is a matter of public record, available to anyone who knows how to track it down.

Whether a public access committee is town-sanctioned or not, it is important that the committee keep selectmen or city councilors apprised of their plans and progress. Periodic briefing of town officials and timely solicitation of their input will establish the foundation of a good working relationship. This relationship will be tremendously useful when the committee later returns to the officials for their approval of a proposed plan of action. Ultimately, the approval of municipal officials will be critical to the preservation project, so it is essential to build an open and trusting relationship, based on mutual respect and shared goals.

## **B. Step 2: Identify Historic Access Ways**

### **1. Make a List of Suspected Public Access Ways**

After formation, the first task for the committee is to make a list of all suspected public access ways within their community. This list should include: (1) historic access ways where there is some uncertainty of public rights, and (2) other access ways that may not currently be used for public access but where there is a suspicion that public access rights currently exist or might have existed at one time. The list should be as inclusive as possible.

The purpose of making this list is to focus the research on specific access ways to assure that the effort is manageable and so attention can be concentrated on those sites where public rights are most likely and/or meaningful. In making this list, the bulk of possible access ways will probably involve roads, ways or paths extending from a public road to the shore. Paths running along the shore may also be included.

The committee should, however, avoid focusing just on roads and ways. The committee should be on the lookout for forgotten shoreline parcels of land owned by the town (perhaps tax-acquired or unbuildable deeded parcels), public landings (perhaps long in disuse), easements over non-roads for public use (perhaps over undeveloped land as part of a subdivision), public access commitments in exchange for beach nourishment resulting from dredging, specific reservations of easements for particular groups (such as commercial fishermen) when property was conveyed by a prior owner and other miscellaneous grants of rights to the public.

## **2. Sources of Information**

There are many sources that should be consulted in compiling the list of suspected public access ways to the sea. As a start, committee members should consult the following sources: tax records, the registry of deeds, town and city maps, old maps, town maintenance records, town engineering records, records of the harbormaster, local history books and guides, historical society records, recollections of long-time residents, field inspections, old inventories and municipal ordinances and by-laws. These sources are described in detail below.

### **a. Tax Records**

A trip to the local tax assessor's office is a good place to begin. Town and city tax assessors may be particularly helpful to researchers looking for public access ways. Tax assessors have a record of who pays the taxes on each parcel of land within the municipality. Usually (but not always) the individual who pays taxes on a particular parcel of property owns that property. Thus tax assessors may be able to identify coastal sites where ownership is unclear or where they suspect town ownership. They should have records of all tax-exempt property (exempt from tax because the town or another non-taxed entity owns it). Since municipalities do not collect real estate taxes for publicly owned lands, proof that an owner does not pay taxes on a piece of land is evidence indicating public ownership (although non-payment of taxes alone cannot conclusively determine that a particular piece of property is publicly owned).

Tax records also reveal publicly owned land that the city or town has acquired through tax takings for the non-payment of taxes. While public ownership of these properties does not mean that the public automatically has a right to use them for access purposes, an arrangement for public access may be made before the property is sold at auction. For example, the town could reserve an access easement for its residents across the property when it conveys it to a purchaser. Alternatively, the town could sell an easement across the property to a conservation organization and sell the remainder to another.

The tax assessor also has possession of the town tax maps. These maps are an invaluable resource for identifying access ways since they show assumed property lines and other useful details. Current tax maps should be reviewed for unidentified strips of land or rights of way approximately 15 to 50 feet in width that extend from public roads to the water, and for

designated public roads that the tax maps show as extending all the way to the water. Public landings may also be specifically identified on the maps.

*Do not*, however, rely upon tax maps for the final word on boundaries, locations of roads, ways, easements, etc. Looking at the assessor's maps is only the *first step* in the investigation. To confirm any public ways, easements or parcels indicated on the assessor's maps, the official records, such as actual deed descriptions or town records on laying out and acceptance of a road, must be found. In the event of any discrepancy, the official records will be controlling. Assessor's maps often are not drawn accurately, for their purpose is not to determine the exact location or the legality of such ways and easements. Assessor's maps and records have the book and page number of the deed and the name of the last owner, which will be helpful in the next research step.

### **b. Registry of Deeds**

At least one member of the committee should become intimately familiar with the local registry of deeds. Some of the most important records for a right of way researcher will be found there. At the registry are records that document the history of land ownership and the configuration of parcels over time. The ability to locate the deeds of specific properties and to trace their title is essential to the rediscovery process.

To compile the inventory of historic access ways, consult the following two sources of information found at the registry. These sources will identify likely locations of access ways such as easements, roads that run to the water and landings. Later steps will bring researchers back to the registry for in-depth title searches to determine whether the identified access ways are indeed public.

Researchers should be aware that each registry of deeds contains two sections: (1) a repository for recorded deeds and plans for non-registered land; and (2) a division of the Land Court, where the documents for registered land are held. It is necessary to visit both sections in the course of the investigation for each maintains its own set of maps, plans and documents, including plan books and atlases. For more information on the registered land system, see Appendix B.

### **i. Plan Books**

Plan Books are found at the registry of deeds and contain private surveys prepared by surveyors. They are usually indexed under the name of the landowner, surveyor and in each town by street name. If a street is suspected of being a public access way, check for surveys of that particular street in the plan books.

### **ii. Atlases**

The atlases consist of copies of old tax maps made up by the local tax assessor's office of each town or city and laid out with whole blocks or town sections to an atlas page. The atlas books are organized by town and year. The completeness of the map collection varies from registry to registry. It is certainly a worthwhile exercise for the researcher to peruse the atlas books for their particular town, taking note of any ways, paths or landings providing access to the sea.

### **c. Town and City Maps**

A variety of maps may be kept by the town clerk at the town hall. Older town maps may also be found in a document repository, such as the local public library, historical society, or historical commission. The labeling of a way as a "public way" on an *official town map* can be important evidence of public rights in the way. Researchers should ask the town or city clerk for a copy of the official map(s) of the municipality.

### **d. More Old Maps**

Any available old maps of the town (old road maps, old maps of landing places, etc.) should be reviewed for possible roads or ways extending to the water. Particular note should be made of the location of old ferry landings, fish houses and similar artificial shoreline features to which town roads were frequently established. Special note should also be made of common lands to which the public may still have claims. These maps will not be proof of public rights, but they will provide good clues to sites for further research.

#### e. Town Maintenance Records

The committee should check with their municipality's Department of Public Works to see if the Department is currently maintaining (or has historically maintained) any coastal access ways. Any type of municipal action, including trash pick-up, clearing of vegetation, road repair, repair of fencing or signage and snow removal should be noted. Proof of town maintenance of a particular parcel of land, road or path is important evidence when claiming the public nature of a right of way. The Department of Public Works may also maintain a list of public town ways. This list is important to research, especially any old versions.

An official list of town ways should also indicate the town meeting and article number which approved the acceptance of a way. Original minutes of these meetings, or the meetings of town officials at which ways were discussed or voted upon, may have important information. A past owner may have asserted that a way was public, or his intention to grant or dedicate the way to the public. This will be useful in determining how the way may have become public (by dedication or prescription, for instance).

#### f. Town Engineering Department

The committee should also consult the town engineering department for its knowledge of public ways. Engineering departments are often the repositories for historic aerial photographs that may reveal old roads and paths. The town engineer may also maintain a list of all municipal public ways. Be sure to inquire whether a list exists that contains the corresponding dates of layout and acceptance for all public ways and landings. Some towns maintain such lists, and it is a fortunate access advocate who digs one up!

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##### *Illustration #5: A List to End All Lists*

*While searching for historic access ways to the rivers of Danvers, a lucky researcher found a 30-year old list at the Danvers Engineering Department that designated town roads as either public or private. Next to many of the public roads on the list was the date on which the Selectmen took action to lay out the road. These references to town actions, which occurred as long as 80 years ago, were invaluable in determining the exact location and nature of the way.*

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### **g. Records of the Town Harbormaster**

A visit to the town harbormaster may also be fruitful. The town harbormaster is likely to have personal knowledge of landings and other access ways currently in use and will perhaps be able to locate traditionally used access ways, as well. If possible, committees should also consult former harbormasters for additional information on landings. At one time there were also Life Saving stations located along the coast, which were later taken over by the Coast Guard. The records of this organization may assist you.

### **h. Local Historical Books and Guides/ Records of the Historical Society**

Examine books written about your city or town for references to historic pathways, landings or ancient maps. If your town has a local historical society, its members may be able to direct the committee to guidebooks, maps, photographs and other historic documents. Occasionally, old aerial photographs can be found that reveal historic public rights of way. People active in the society should be consulted for their personal knowledge of historic ways, as well as their knowledge of historical documents.

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#### *Illustration #6: Guidebook Reveals Pathways in Rockport*

*One community north of Boston discovered a guidebook written during the 1800s describing several footpaths along the shore. Some of the paths described were "ancient ways" which the community later sought to preserve against encroachment by private property owners. The old guidebook's description helped them to build successfully a legal argument for public rights in the pathway using the theory of immemorial use and custom.*

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### **i. Recollections of Long-Time Residents**

Older town residents are another extremely important source of information to tap when identifying traditional access ways. Elderly residents may remember public access ways that are currently lost to modern memory. When gathering recollections of older residents, it is important to create an accurate and precise legal record of their memories. The most effective and efficient legal device for recording such recollections is an affidavit. Residents who have themselves used an "ancient way" or know firsthand of the community's long-term use of a pathway or landing should be asked to sign an affidavit attesting to this use and describing its use by others. Examples of model affidavits are found in Appendix C. Affidavits are also discussed more fully below at Section E.2.

#### **j. Field Inspection**

The committee may be able to use field inspections to supplement the clues it gets from documents and individuals. For example, old stone walls or lines of trees running to the shore, parallel to each other and 1 or 2 rods wide (1 rod equals 16.5 feet), might indicate an old road. Also, investigators might find a marked difference in vegetation (i.e., young growth) on a strip of land of constant width running to the water, bounded or not bounded by stone walls. An old road may have been kept free of tree growth for many years before it fell into disuse and thus may now be characterized by less mature growth than the surrounding woods. If a committee wants to try to use field recognition, it will have to develop its own criteria of characteristics based on local patterns of development and vegetation.

#### **k. Old Studies, Inventories, Plans, etc.**

The committee should review any prior related research, such as open space studies, state coastal access inventories, or any earlier town efforts to identify ways to the shore. To locate prior studies, contact the local town or city planner. For open space plans, contact the Division of Conservation Services within the Executive Office of Environmental Affairs. Researchers may reach the Division of Conservation Services by calling (617) 727-9800 ext. 209.

### **1. Municipal Ordinances, Resolutions and By-Laws**

Information concerning the public status of ways and landings may be obtained from the minutes of town meetings, records of town meeting votes, resolutions and committee minutes and reports. For example, the delegation to a town committee of a task such as the laying out of a public way would be an important piece of evidence to establish public rights. Annual Town Reports are usually kept in the town clerk's office and the town library. These are important sources of information; they list all expenditures, road work done, town meeting votes accepting roads, perambulations, and setting of bounds. They provide the time period in which minutes and reports of discussions and newspaper articles regarding those activities occurred. The town clerk may be helpful in locating these records.

### **m. Massachusetts Highway Department and County Commissioners**

In the usual course of events, the Massachusetts Highway Department (MHD) lays out only *state* highways (see Chapter 4). Sometimes, however, highways laid out by the MHD are turned over to towns and counties and become *town ways* and *county highways*. When this occurs, the records of lay out of these town ways and county highways would still reside at the MHD. Thus, if researchers are having difficulties locating the lay out for a particular way, they should check with the MHD to determine whether the town way or county highway was originally laid out by the MHD. The County Commissioner's Office or the County Engineer's Office may also be a useful source of information concerning the lay out of county highways. Lastly, the MHD and County Commissioner's Office may be able to provide historic aerial photographs of the roads in question. Many county records are being sent to the state archives as the counties are absorbed by the state.

### **n. Massachusetts Archives**

The Massachusetts Archives is also a good source of historic information on public ways and landings. The archives is the state's repository of notable records. Records of the state legislature and state government, birth and death records, and federal census records are kept at the archives. In addition, the archives' collection contains several sources helpful to right of way research including ancient maps dating back to the very first settlements, early records of town governments and community parishes, old probate records of several counties, and WPA studies of communities. Recently, while researching the historical use of ways and landings in Rockport at the archives, researchers discovered a WPA study of landings and coastal access ways that helped document public use over a long period of time. It is also worthwhile to check the State House library. Many old records and maps are kept there. The location of the way in question may have been the subject of legislation in the past. It is worth looking through the indexes of the Acts and Resolves (under "cities and towns"). Keep in mind, as you go further back in time, any name changes of the way or the town. An Act or Resolve as to a way, landing or common may resolve the issue.

The Massachusetts Archives, part of the Secretary of State's Office, is located at Columbia Point. Call ahead for hours of operation: (617) 727-2816.

### **C. Step 3: Prioritize the Inventoried Rights of Way for Research**

After compiling a list of suspected public rights of way, the next step for the committee is to select the access ways to be researched first. Access ways that appear the easiest to resolve should receive the highest priority. These might include access ways where the committee is almost certain of public rights and for which documentation will be easy to obtain. Such access ways might include common landings or roads to the shore that appear to have been properly laid out. High priority should also be given to access ways critical to the town for recreation or commercial access. Lastly, traditional access ways where a change of ownership is likely or threats of closure to the public are currently being made are also worthy of the committee's immediate attention.

### **D. Step 4: Develop a Strategy and Timetable for Research**

Once the committee sets its priorities and the researchers are familiar with the sources of information available, it is necessary to devise a plan of action. Since the details of each access way can be fairly complex, it is generally best for one person to concentrate on one access way and follow that way through all the records. A person may handle more than one access way, but it is generally inadvisable to divide the research on one way between different people. Setting a firm completion date is difficult, since it is impossible to predict exactly where the research on any particular access way will lead. Setting a target date is wise, nevertheless, because it gives members an incentive to complete their work in a timely fashion.

After the committee has selected the access ways for investigation and developed a research strategy and timetable, it is appropriate for the committee to report back to its municipal officials and inform them of their progress and their intentions. The list of selected potential access ways should be shared with municipal officials, including the town planner and town counsel. Town officials may come forward with information helpful to the committee or may raise red flags concerning certain sites with troublesome histories. In any event, the officials will appreciate being informed of the direction and progress of the committee.

### **E. Step 5: Conduct the Research**

After an access way is targeted for investigation, the research will likely follow the process of: (1) collecting relevant information from the tax assessor's records; (2) conducting the research at the registry of deeds to uncover a suggestion of public

rights through a reservation of rights, grant of an easement or creation of a road; and (3) following up as necessary with research in town records to verify municipal actions that the deeds suggest were taken. Research may move back and forth between sources as new leads are uncovered or as the area searched widens.

It is very important to do all research systematically so that: (1) it is complete, and the researcher can explain the findings clearly; and (2) the results can be later verified by an attorney or surveyor. In order to increase the efficiency of the verification process, researchers should make copies of all key documents and note where they were found. Many documents will be consulted in the course of locating the "key" documents. Notes should be kept describing each relevant document. For deed research, information should be recorded on Deed Information Sheets (Appendix B.2) and Index Sheets (Appendix B.3). Appendix B.1. explains the use of both of these aids. It is highly recommended that all the researchers use these forms to ensure that critical information is consistently compiled.

If researchers run into difficulties at the registry of deeds, they may want to take advantage of the free advice of volunteer attorneys from the "Lawyer for a Day" program sponsored by the Massachusetts Conveyancers Association. At least once a month, some county registries host a volunteer attorney who can answer general questions. For days and hours when this service is available, call your county registry of deeds. Appendix B contains the telephone numbers, location and other useful information about the registries in each coastal county.

Lastly, it is critical for the committee to set up a repository for its research documents. After research has been completed on a particular access way, the documents gathered should be filed in a secure and central location. The town or city planner may be able to provide storage or file space. Alternatively, one highly organized and responsible member of the committee may volunteer to act as record keeper. The importance of this function can not be underestimated. Lost documents mean wasted time and effort and, consequently, a delay in reaching your goals.

## **1. Researching Rights Created by the Laying Out, Dedication, Purchase or Acceptance of a Way, Landing or Common**

In the most common scenario, the tax assessor's records will give the researcher the information he or she needs to locate the relevant records at the registry of deeds. From the assessor's maps, the researcher will find lot numbers that are indexed to the likely owner's name. As well as revealing the likely owner, the assessor's maps or assessor index will often indicate the location of the owner's deeds (by Book and Page number for recorded land or Certificate number for registered land). Once a

researcher obtains the current owner's name, the Book and Page number of the deed, or the Certificate number, the researcher can proceed to the registry. (For specific title research instructions, see Appendix B.)

At the registry, the researcher will track records back in time, carefully reading deed descriptions and looking for any mention of roads, easements, cart paths or other possible public rights. If the registry records refer to specific public roads (or just to roads) or landings, the researcher will continue researching at the registry to try to determine when and how the road or landing was created.

If the time period can be somewhat narrowed, the researcher must then go back to town records to try to confirm that the municipal officers took the appropriate actions and laid out the way or landing according to the procedures required by statute. The town clerk will probably be helpful in directing researchers through the repository of town records. Researchers should look for evidence that plans of the lay out were properly filed, that the required notice was given, and that the necessary votes were taken as specified in the statutes. In order to verify compliance with statutory requirements, researchers should be familiar with the statutes set forth in Appendix D. If any of the statutory requirements were not complied with, but no owner at the time of the layout challenged its validity within the statutory time allowed, then the layout is valid.

## **2. Researching Rights Created through Long Public Use by Prescription, Implied Dedication or Custom**

If no evidence is uncovered that indicates that a public entity has rights to an access way through purchase, conveyance, dedication, gift or lay out, researchers must gather evidence on which to build a case that an easement exists by virtue of usage, based on the legal doctrines of prescription, implied dedication or custom. It would be useful for researchers to read sections C and D of Chapter 4 of this handbook in order to review the specific elements of each of these legal theories.

For each of the theories, researchers will need to gather as much evidence as possible documenting the long-term public use of the access way. It is important to establish with a high degree of *specificity*: (1) what kind of use the access way received; (2) who in particular used the way; (3) how long the way was used; (4) whether the users had any interactions with the owner(s) of the property; and (5) whether there is any evidence that the owner was aware of the use. Researchers must interview users of the way and prepare affidavits. (For guidance, see Appendix C.)

It is important also to research the actions of the owner of the property over which a purported access way passes. The researcher should attempt to answer the following questions: (1) Did the owner attempt to prevent all use? (2) Did the owner permit some selected people to use the property (i.e., neighbors)? (3) Did the owner tacitly or expressly permit the use? (4) Did the owner permit the use when requested to do so? (5) How did prior owners treat the way and those who used it? The landowner's actions will have a great bearing on whether a claim of prescriptive rights or implied dedication will ultimately be successful.

In addition, it is essential to dig up any evidence in town records, maps, guidebooks, old photographs or other historical documents that might indicate that the access way was considered public and that its use occurred over a certain period of time. Consult the list of sources set out in Section B, above, and make sure that each source is thoroughly researched.

For those cities and towns claiming rights by prescription, the Department of Public Works must be checked for evidence of "corporate action" concerning the access way. Finding evidence that the town maintained the access way in any manner (i.e., trash pick-up, fence repair, posting of signs, snow removal) may be key to winning the case for prescriptive rights. Interviews with both present and former maintenance personnel may be necessary. Researchers may also want to look for maintenance appropriations in municipal budgets for evidence of corporate action at the location. Find out what an owner did regarding public maintenance. Did the owner contact the city or town and demand repairs or maintenance (asserting it was a public responsibility?). Who did the owner speak to, and when? Were any letters written, or assertions made, in public meetings or to the local papers? Did the owner order the workers off the property?

#### **F. Step 6: Evaluate the Findings and Develop a Strategy to Establish Public Rights of Access**

Once the research has been completed, the committee should map out a strategy that will best establish and protect public access rights. The committee's strategy will necessarily depend on the particular features of each access way and the quantity and quality of evidence. Also key is the attitude of the private landowner or site abutter. Whether they are amenable to a negotiated settlement or whether they will fight the town tenaciously is highly relevant to the formation of a strategy. Although no two preservation projects are alike, it is useful to consider the following guidelines.

## **1. When Evidence of Public Rights Is Clear**

The ideal situation occurs when an investigation of a way or landing reveals a clear public right to use the land. Finding your city or town's deed to the property and a reference in the private property owner's or abutter's deed to the public right of way is one such ideal case. Nevertheless, the committee's work is not over upon making such a finding. There are still some important decisions to be made and critical steps ahead.

The first step is for the town or city counsel to confirm the committee's findings of conclusive public rights. This must occur before the municipality takes any action in reliance on the findings. (Usually, a private attorney working with the committee will have already reviewed and confirmed the research results.) After the town or city counsel confirms the findings, the committee should recommend that the boundaries of the access way be clearly marked on the ground, that any encroachments be removed, and that the town maintain the access way. The committee should recommend that public use be encouraged through signs, maps or other means.

Before the city or town takes any public action to secure the access way, the town should contact abutters to notify them of their findings and address any concerns they might have. Signage, carefully delineating the public's rights, is important to protect both public and private interests and to encourage their peaceful coexistence. The important actions outlined in this paragraph are more fully discussed at Step 10, below.

There may be cases where public rights are conclusively shown, but the access way is not very useful for the public (perhaps because of difficult terrain, a remote location or shallow water). In that event, the committee may want to recommend that the town sell the public rights in the way and use the proceeds to purchase access elsewhere, or swap the land to acquire a site that is more appropriate. Alternatively, the committee might want to recommend improvements that might make the site more useful. (For information on state funding sources for access improvements, see Appendix E.) A recommendation should take into consideration whether the land or easement is owned by the city or town in its corporate capacity or in trust for the public. If it is public trust property, any change will have to comply with the requirements for dealing with public trust lands.

## **2. When Evidence of Public Rights Is Not So Clear**

The committee may find that public rights to use a way or landing are clouded by

conflicting claims of ownership and that some legal action is required to clarify them. The exact legal strategy selected should be devised in consultation with the city or town attorney considering the evidence gathered by the committee, the cooperativeness of abutters and the committee's legal budget or ability to attract pro bono legal assistance. Bringing a lawsuit to assert public rights should be considered the option of absolute *last resort*, due to the expense, time required and uncertainty of outcome. Before choosing a legal fight, opportunities for negotiated agreement should be seriously pursued for they are likely to produce as much gain at a lower price than a prolonged court battle. In either case, doing the research and having the documentation will ensure the best chance for a successful outcome.

In addition, when confronting landowners unwilling to acknowledge a claim of public right, the committee must consider the possible chilling effect a legal action may have on other landowners in the community, especially if the committee plans to assert a claim of prescriptive rights or public rights by dedication or custom. Following the assertion of such a claim, landowners may be less willing to allow informal use of their properties in fear that their generosity might ripen into a permanent public easement.

When public rights are not crystal clear, the committee should consider the following options: continue the research, negotiate a voluntary agreement with landowners, encourage continued use of the site or acquire the site or an easement of passage. These options are discussed in detail below.

#### **a. Continue the Research**

The committee may recommend that funds be appropriated for an attorney, title examiner, or surveyor to continue the research. It is possible that essential documents revealing public rights were not properly recorded or filed, and thus were not found in the course of ordinary research. A professional researcher may be able to uncover additional documents of record that would prove or disprove the claim, may be able to develop an alternative theory to prove public rights of record, or may be able to resolve remaining issues by locating the boundaries on the ground. The committee may be able to obtain help from an attorney on a pro bono basis (see Appendix E) or the town attorney may offer assistance.

#### **b. Negotiate a Voluntary Agreement with the Landowner**

If the committee feels that the affected landowner might be receptive, the

committee should consider approaching the owner to negotiate a voluntary agreement to allow the public to use the access way. This may be in the form of a voluntary easement across the property (permanent, recorded) or a less desirable written agreement with the present owner to allow access (temporary, not recorded on the deed). Model forms of voluntary easements and access agreements can be found in Appendix C.2 and C.3. Be careful when drafting such agreements that any public rights that may exist are not “given away” by an apparent admission in the agreement. Use language such as: “This agreement does not affect any underlying property rights of the parties; whatever rights existed at the time of this agreement continue and survive this agreement.”

The fact that landowners may receive certain financial benefits from the donation of an easement certainly sweetens the pot for some property owners. The benefits are most dramatic for those landowners who (probably long ago) paid very little for their coastal property (see Section d., below). Other benefits include public recognition for preserving an important historical asset for the community and the possible linkage of the landowner's property with a coastal path, either along or above the coastline.

#### **c. Encourage Continued Public Use of the Site**

Depending upon the strength of the argument for public rights and the pattern of actual use of the site, the committee may recommend that the legal issue be left unresolved but that the town continue to encourage public use of the site. In that way, the town can preserve or strengthen any claim to rights by prescription, custom or implied dedication.

The committee could also recommend that the town mark boundaries, maintain the access way and generally treat the access way as if it was public. The town could be encouraged to perform acts of maintenance in order to build up a record of “corporate action” at the site. This strategy would place the burden on the private owner to challenge public use of the site while preserving the public's legal claim to the access way. If public use is challenged, the town could assert public rights in court or could consider the options discussed below.

#### **d. Acquire the Site or an Easement of Passage**

The committee could pursue an acquisition strategy, depending on the importance of the site to the community and the availability of funds. If this option

is pursued, it is important for the committee to be aware of the potential benefits of such a sale to the landowner, so that a willing seller might more easily be found.

In certain situations, the sale of an easement or landing may provide significant tax savings to the property owner. Depending on the nature of the easement, owners of property encumbered by an easement may be assessed less taxes than they were before the easement. The financial incentives to the landowner for selling or donating an easement to the public will vary, depending upon the landowner's income, tax bracket, and the amount of capital gain the owner stands to realize from the property's sale.

Furthermore, the presence of a public easement may, in some cases, *enhance* the value of the storefront property. For example, if a coastal easement runs along a scenic shoreline, a property owner whose property is crossed by the easement would have the ability to walk freely up and down the shoreline. This could be an impressive amenity when you consider that the average coastal property owner does *not* have the legal right to even walk the shore in front of a neighbor's house. Each situation will be different. The committee must determine, on a case-by-case basis, how a particular easement impacts a specific property. In the majority of cases, the presence of an easement will have neutral or negligible impact on the overall value of the property.

Another form of sale that can bring significant tax savings to a landowner is the "bargain sale." Bargain sales of land for public use can be a relatively inexpensive way for a town to acquire coastal land. The technique takes advantage of state and federal tax laws under which landowners can actually save money by selling their property for less than it is worth on the open market. A bargain sale is a particularly attractive option when the landowner has a large income and originally paid much less for the property than it is now worth. The bargain sale approach can be attractive to towns that want to acquire property for public access to the sea, but who cannot afford to pay market price.

### **3. Other Options for the Committee to Consider**

The following options represent more unusual approaches to preserving historic rights of way, but they should be considered should the proper situation arise.

### **a. Land Swap**

If public rights are confirmed at an access way that is undesirable to the town, those rights might be swapped with a more desirable access way where the public's rights are less clear. The likelihood of a landowner agreeing to a swap is probably low, but this option should always be considered should the right two access ways present themselves. More likely, the town could sell the property rights to the undesirable access way, thereby creating funds for acquiring another easement in a more desirable location.

Another way that towns can employ "land swaps" to increase public access is to trade a parcel of inland town-owned land for a desirable coastal access way or parcel. Ideally, the sites would be of equal value and both the private landowner and the town would receive properties more suited to their needs. The downside of such swaps is that towns would probably incur the appraisal expenses for each property and would in many cases have to obtain formal approval of the trade by voters at town meeting. There is also a fair risk that such swaps would generate a certain amount of controversy and perhaps claims of favoritism.

Although "land swaps" have not been particularly popular in Massachusetts, the state of Maine has used the device to increase public access in a number of circumstances.

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#### *Illustration #7: Hey, Wanna Swap?*

*In Maine, a recent land trade between the coastal town of Stonington and property developers was used to the town's advantage to promote public access for shore harvesters. In 1974, the town acquired the rights of way to several lots in a residential subdivision due to the nonpayment of taxes. In 1988, the town swapped these rights of way for conservation easements to the sea for the exclusive use of licensed clammers and wormers. As a result of the swap, shore harvesters gained permanent access to the sea in the subdivision.*

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*Source: Planning and Implementing Public Shoreline Access, Maine Department of Economic and Community Development, (1990).*

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### **b. Encourage the Owner to Grant a Conservation Restriction to the Local Land Trust**

A conservation restriction is a type of easement that may be used to increase coastal access. When a landowner grants a conservation restriction, the owner

typically retains title to his land, but conveys an easement to the town or other governmental or authorized private organization. The easement limits the purposes for which the property may be used to one or more "conservation purposes." These purposes include, but are not limited to, preserving land areas for public recreation or open space and protecting habitat for fish and wildlife. The restrictions usually cause a decrease in the value of the property, and thus can provide owners with significantly lower property taxes immediately and capital gains tax savings on any future sale.

Conservation restrictions are commonly used to preserve land in a relatively undeveloped state which in many cases will be suitable for limited public access. There are instances, however, where conservation restrictions are so stringent that public access is essentially prohibited. Towns and non-profit organizations interested in gaining conservation restrictions should examine the proposed language of the restriction to ensure that some provision for public access is included where appropriate. Like other forms of easements, a conservation restriction becomes part of the title of the property (so that future owners must abide by it) and is recorded at the registry of deeds.

In order for the landowner to qualify for a tax deduction, the conservation restriction must meet certain federal and state standards. For example, conservation restrictions usually require "proof of management" of the easement. Certain nonprofit associations such as the Trustees of Reservations, Massachusetts Audubon Society or a community land trust may be able to provide the necessary management of conservation properties. Their conscientious stewardship can result in sensitive areas being opened up for limited public use.

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*Illustration #8: How Eleven Cape Towns Encourage Conservation Restrictions*

*In eleven towns on Cape Cod, the town conservation commission administers a program whereby the owner of a parcel of land may give up development rights on his parcel in exchange for a permanent property tax deduction of up to 85 percent. This reduction is in addition to any federal tax deductions that accompany the donation of these development rights to a registered charity or government entity. If the owner allows public access to his land as well, up to 95 percent of the property tax is abated. Appendix E contains more detailed information on this program.*

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*Source: The Compact of Cape Cod Conservation Trusts, "Conservation Restrictions on Cape Cod: A Tool to Protect Land Privately." March 1992.*

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## **G. Step 7: Obtain the Endorsement of Municipal Officials**

After completion of its research and the development of a proposed strategy, the

committee should present its findings to the board of selectmen or city council. The committee should request the municipality's support in pursuing their recommended strategy. Since the next step is negotiation with the landowners or abutters, it is important that the committee and the selectmen or city councilors reach consensus. The committee should not be discouraged if the decision makers are not satisfied with the conclusions presented. The committee should be prepared to do additional research and return to the board or council with new evidence or more options to consider.

It is essential to obtain the support of municipal officials at this time. Many of the above strategies require the participation of the town counsel and/or town engineer. Obviously any type of acquisition strategy or proposed landowner agreement must first be approved by municipal officials. Even when public rights are perfectly clear, the municipality must take some action to reclaim the access way, such as recording and signage. Thus the committee and municipal officials must reach a meeting of the minds before proceeding further.

## **H. Step 8: Negotiate with Abutting Landowners to Secure Public Rights of Way**

Obviously, the stronger the evidence of public rights in an historic access way, the easier the negotiations with abutting property owners. If public rights are clear, your committee need only tactfully inform the abutters and answer their questions and concerns. When title is not so certain, the committee must make more formal preparations and carefully contemplate their approach. Consider the following:

### **1. Have the Support of your Elected Officials**

In Step 8, above, the committee should have gained the support of the community's elected officials for obtaining public rights to the access way. Their support will strengthen the committee's negotiating position, especially if the town is willing to offer funds, make improvements to the access way or guarantee maintenance.

### **2. Be on Firm Legal Ground**

The committee should have fully assessed its legal position regarding the potential access ways through consultations with the town attorney and perhaps an attorney

working for the committee. It is essential to have a firm grasp of the strength of the public's case before initiating negotiations. It's guaranteed that if a landowner opposes the access way, they will discover any legal weaknesses in your case, so you'd better be prepared!

### **3. Prepare a Public Relations Plan**

The committee should choose a spokesperson and be prepared to explain their activities and goals in an articulate manner. How and when to use the press to the committee's best advantage are questions that should be carefully considered by the committee. A public relations strategy that's too aggressive can anger and alienate property owners, while a passive strategy can be ineffective and miss important opportunities to educate the public.

It's up to the committee to cultivate relationships with the local press and to inform them of the committee's mission. Meeting personally with the reporter(s) covering this issue is an important step. There is often much misinformation and inflamed fears surrounding the issue of public access, so it is the responsibility of the committee to remain calm and sound a reasoned voice. It is also recommended that the committee issue written press releases whenever possible, for they help to eliminate errors (which can further aggravate matters) and aid reporters.

### **4. Work Slowly and Be Prepared to Compromise**

The committee should sit down with the affected landowners and discuss the situation, without any expectation that the property owners will sign on the dotted line by the end of the meeting. It is *essential* that the committee embrace a positive and non-confrontational approach. Members must realize that landowners may need a little time to get used to the concept of a public access way. Proceeding slowly might let them come around to the idea without feeling bullied. In any event, property owners aren't likely to take any action until they receive advice from their attorney.

Nevertheless, there may be opportunity at your first meeting with the landowners to stress the positive aspects of public access. The committee might want to discuss the historical importance of the particular site to the community. If any publicly funded improvements of the access way are planned, these might be mentioned. If a group (or the town) has already come forward to commit to maintenance of the access way, the committee might want to inform the landowner. In addition, if there

are examples of the happy coexistence of private property owners and public access ways already existing in the community, the committee should point to these success stories.

## **5. Accentuate the Positive**

The committee will undoubtedly be focused (and properly so) on the creation of access ways for the benefit of the whole community. Nevertheless, when meeting with affected landowners, it is useful, for negotiation purposes, to focus on the potential *benefits* that the creation of an access way can bring to landowners. A few of these were mentioned above in Sections G.2. and 3. For example, in certain cases, donations of easements can bring significant tax savings to property owners. In other instances, as when easements are linked to create a coastal path, the landowner can enjoy greatly increased access across adjacent properties.

## **6. Shoot for the Moon**

Admittedly, the typical coastal landowner in Massachusetts may not be eager to concede that part of his or her property is open to public use, but it doesn't hurt to ask. Before the committee discusses lesser options with the landowner, the optimum scenario for the community should be placed on the table.

## **7. Be Prepared to Deal with Landowners' Concerns**

All landowners have some common concerns about public rights of way being established on, through or abutting their property. It is wise for the committee to consider these concerns *before* their first meeting with the landowner. The better prepared the committee is to deal with these common questions, the more smoothly the negotiations will proceed. Landowner concerns tend to fall into four broad categories: diminished property value, loss of privacy, maintenance and increased liability and insurance premiums. It may be helpful to arrange a meeting with owners of property along other pathways (it need not be a coastal pathway) who can attest to the improved quality of life and security once secluded spots are opened to the public.

### **a. Diminished Property Value**

Whether a public right of way across a particular property diminishes or augments

the property value of the affected land must be determined on a case by case basis. While some properties may lose value due to the establishment of a public access way, others will gain. In the majority of cases, property values are not significantly affected in either direction.

#### **b. Loss of Privacy**

The opening of an access way to the public often raises unfounded fears on the part of landowners that their properties will be deluged with access seekers. Public use of paths and landings is usually far lighter in volume than a concerned landowner might imagine. In most cases, new access ways will simply lead from a public road to the sea. Once at the water, the public will have no rights to use the beach or intertidal zone on either side of the access way (except for fishing, fowling or navigation). While the opening of a new *beach* may indeed draw crowds, the opening of simple access ways will generally attract quiet and non-intensive neighborhood use. The lack of parking facilities at most historic access ways will also necessarily reduce the number of users of the ways.

The committee may suggest a signage solution so that the boundaries of the right of way are clear and trespassing expressly discouraged. Creative landscaping or fencing also present solutions. The committee may look to grant programs to help fund such improvements on public access ways (See Appendix E).

#### **c. Maintenance**

Before meeting with the landowner, the committee should determine what maintenance activities the local public works department will regularly perform at the site. If the town is reluctant to do any more than the bare minimum, the committee may want to find a community group that will agree to adopt the site. Creating a "friends" of the way or landing can be an effective way to guarantee regular clean-up and "TLC." The adopting group may even be motivated to improve a site through the application for grants.

#### **d. Liability and Insurance Issues**

Landowners are often concerned that pedestrian traffic across their property will result in increased insurance premiums and expensive claims and lawsuits. The

committee can allay most of their fears by explaining the application of the Recreational Use Statute (G.L. Chapter 21, Section 17C). Under the statute, "a private landowner who opens land to public recreational use without a fee is not liable for injuries to persons or property due to public use unless the owner's conduct is willful, wanton or reckless." This protection should reassure those landowners who might be willing to allow public use of their beach or a path to the water, but are concerned about liability.

Since the enactment of the Recreational Use Statute in 1972, there have been only a handful of lawsuits brought in Massachusetts against landowners by people injured in recreational situations. None of these cases have held the landowner liable, none have involved a private landowner (only towns or public agencies) and none have involved recreational activity along the shoreline.

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*Case#2: Interpreting the Massachusetts Recreational Use Statute*

*In 1995, the Supreme Judicial Court ruled that the Metropolitan District Commission (MDC) was not liable for the injuries of a bicyclist who was hurt after hitting an open, uncovered drain in a dark tunnel on a bikeway along the Charles River. The court noted that the lights in the tunnel had been broken for about 13 years and that the drain cover was frequently missing due to vandals. The MDC could reasonably be expected to be aware of both of these hazardous conditions. The court ruled, however, that the MDC's actions, or in this case, their failure to act to correct the conditions, did not constitute willful conduct. The court stated that the "...intention to cause harm must be shown. Indifferent or reckless wrongdoing is not deliberate or intentional wrongdoing." Since the court did not find that the MDC's conduct was willful, the MDC was not liable under the Massachusetts Recreational Use Statute.*

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*Sandler v. Commonwealth, 419 Mass. 334 (1995).*

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Similarly, there have been very few recreation-related insurance claims submitted against landowners who opened their land to public recreational use. To determine the frequency and size of such claims, the Massachusetts Department of Environmental Management recently conducted an informal survey of private state and regional land trusts owning significant amounts of land open to recreational users. The results were extremely encouraging. The Trustees of Reservations, the nation's oldest land trust, owns 76 reservations open to the public, including some shorefront properties. Despite their wealth of land, *no* lawsuits have ever been filed against the Trustees, and land managers could recall only two minor insurance claims, each of which were amicably settled and did not affect the Trust's insurance premiums. Similarly, the Essex County Greenbelt Association, which owns over 100 properties open to the public, has experienced *no* litigation or insurance claims. The same is true for the Plymouth County Wildlands Trust, which owns approximately 55 preserves open to the public. These landowners all advertise the public nature of

their properties through maps, booklets, signs, etc. All agree that they are not in a vulnerable position due to the state recreational use statute and their holding of insurance policies. Similar studies in other states support the Massachusetts analysis.

Furthermore, the establishment of a public easement ordinarily has no effect on a landowner's insurance premiums. If a landowner presently has a standard homeowner's insurance policy (comprehensive personal liability insurance), that policy will supply ample coverage for almost any claim that might arise from public passage. With a standard policy, the carrier assumes all the costs, time and energy of dealing with a claim or defending against a lawsuit. Since insurance companies consider the risk so minimal, it is not even necessary for a landowner to notify an insurance company of the existence of an easement across the property. It is interesting to note that a landowner has far less liability and far greater protection on the portion of property open to the public than on the strictly private portion.

Despite all of the above, some landowners may still have concerns about liability. In that event, the committee might look to their municipality or an interested nonprofit to add the landowner to its policy as a "named insured." This practice is growing more common throughout the country. (It is relatively rare in Massachusetts, however, since the Commonwealth, being a self-insured entity, is unable to do this.)

Nevertheless, it *is* possible for Massachusetts towns to add private landowners to their policies. In general, cities and towns are sometimes willing to shield private landowners from liability because: (1) the overall risks are so small, relative to other public services provided; (2) they are already equipped with insurance addressing recreational use and premiums would not change; and (3) they recognize that the benefits of public rights of way far exceed the risks and costs. Such coverage for private landowners would have to be addressed on a case-by-case basis in each municipality.

## **I. Step 9: Prevent Future Loss of Public Access Rights**

After the confirmation of public ownership or the reaching of an agreement allowing public access, the committee must take steps to ensure that these rights are preserved. Different steps are necessary depending on the nature of the right of way.

### **1. Protecting Publicly-Owned Landings and Rights of Way**

For publicly owned town landings and rights of way, measures should be taken to

ensure that all deeds are properly recorded, that legal boundaries accurately reflect the physical configurations and that abutters are not encroaching on public rights. The services of a professional surveyor and an attorney will be necessary.

In addition, all rights of way should be easily visible and inviting to the public. Regular maintenance, clear signage and inclusion on official community maps are all ways to make the area "feel" publicly accessible. As stated above, it is advisable that regular town maintenance be supplemented by the committee or a community group willing to adopt the right of way. Often, there are problems with removal of signs by landowners who are not happy with the establishment of the public access way. For a more complete discussion of the important issue of maintenance, see the following discussion in Step 10.

## **2. Protecting Public Easements**

Special vigilance is needed to preserve and protect public easements. The first job of the committee is to ensure that all public easements are acknowledged in the landowner's deeds and plot plans recorded at the registry. Town maps, including the tax assessor's maps, should depict the easements as well. Whenever property with one of these easements changes hands, the town should check that the easement is acknowledged in the new landowner's deed. If not, legal action should be immediately taken to correct the deed. Legal and surveying assistance may also be necessary to determine the exact boundaries of the easement. In addition, legal assistance will be needed to properly record the easement.

Public easements across private property are vulnerable to extinguishment and abandonment (discussed in detail in Chapter 5). Maintenance efforts at these ways need to be vigilant to guard against obstruction that prevents use of the way, for if an obstruction is allowed to remain long enough, the easement may be extinguished. For all easements, the act of walking the way reasserts the public's rights and prevents private landowners from claiming that the easement has been "abandoned." Some communities host annual "perambulation" days on which members of the community walk all the public footpaths to reassert public rights. Perambulations also have the important function of publicizing the town's pathways and encouraging local stewardship.

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*Illustration #9: Nahant's Historic Perambulation*

*The coastal town of Nahant celebrates (and safeguards) its heritage of historic public ways by conducting an annual perambulation of its ancient walkways and trails. Local residents, accompanied by*

*members of Nahant's Planning Board, walk the scenic trails each spring, traversing such colorful namesakes as the "Dead Man's Walk" and the "Cliff Walk." The perambulation, organized by the Nahant Woman's Club, is a family affair, drawing at least 50 participants of all ages each year. The walk is publicized in the local paper and serves to remind residents of the presence and importance of their centuries-old public ways.*

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Lastly, the committee should make sure that there is clear signage delineating the public easement and that the easement itself looks inviting to users. The easement's inclusion on the town's public access map is also advised. (A more detailed discussion on signage and maps is found in Step 10, below.)

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#### *Illustration #10: Marblehead Makes Its Access Ways Inviting*

*In 1995, the Town of Marblehead received a Coastal Access Grant from the Massachusetts Department of Environmental Management to erect signs at several public access ways in a very exclusive neighborhood. Before the grant, the existing public rights of way suffered from encroachment by the abutting owners. Most ways were indistinguishable from the rolling lawns they bordered. Town residents were unaware of the public rights of way, and even if some were knowledgeable, they were intimidated by the wholly private appearance of the ways. The DEM grant enabled the town to erect signs depicting the international symbols of "access" and "sea" and paid for repairs to sea walls and stairs to the beach. The result is readily recognizable access ways that invite the public to walk safely to the water's edge.*

*For more information on DEM's Coastal Access Small Grants Program, see Appendix E.*

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### **3. Protecting Public Rights of Way from Development**

#### **a. Securing a Place in the Building Process**

The committee should draw up a plan to protect public access ways in the event that the land they occupy is developed. Under these conditions, pathways are susceptible to encroachment, obstruction and rerouting. The committee should devise a proactive scheme for protecting public access ways, in conjunction with the local planning board, building inspector and conservation commission. Because the permitting process differs from town to town, the committee must familiarize itself with the process in their municipality to determine where safeguards may be built into the system.

One way to guard against infringement of public rights is to make disclosure of public pathways part of the local planning board review process. When areas involving pathways are developed, applicants should be required to show the path on their site plans. The plans should be reviewed by the rights of way committee or

planning department to ensure that new development doesn't alter or diminish the way.

Another way to protect public access ways is to make the approval of the rights of way committee a condition of a building permit. Just as a homeowner or developer may have to obtain permits and approval from the building inspector, planning board and conservation commission, a town could make it mandatory that the rights of way committee check building plans for any conflicts with existing access ways. If the rights of way committee does not have official status in a town, this scheme would, of course, not be an option. In any event, such a plan would require support from the selectmen and probably a town vote to change the procedure for acquiring a building permit. For towns with an extensive system of public trails and landings, this scheme offers the greatest protection.

### **b. Creating Maps that Safeguard Public Rights of Way**

Regardless of the exact process devised by the committee, the production of maps indicating the location of all public access ways within a municipality is a *critical* element of any safeguarding scheme. The Rights of Way Committee of the Town of Rockport produced such a book of maps, and their map book should be a model for all towns conducting preservation projects. Rockport's map book is readily available to the building commissioner, building inspector, planning department and conservation commission. Whenever building is contemplated in Rockport, town officials and members of the Rights of Way Committee (and any interested citizen) can quickly and easily ascertain whether the construction impacts a public right of way.

Rockport's map book consists of tax assessor's maps that have been reproduced, reduced and marked with all known or suspected public access ways. Assessor's maps were used so that every town parcel can be easily found and recognized. The production of the map book required great effort and moderate expense, but the end product is indispensable. The map book, entitled "Town of Rockport Rights of Way Committee Maps" is an excellent model for other towns to follow and can be viewed at the Rockport Town Hall. Funding for the map book was supplied by the Friends of the Rights of Way Committee in Rockport. Funding for similar mapping projects in other towns may be available from a state grant program (see Appendix E).

## **J. Step 10: Plan for Care and Maintenance of the Rights of Way**

The final step of a rights of way preservation project is to ensure that public ways are adequately maintained. This important step always requires a great deal of sustained effort and sometimes substantial funding. Depending on local conditions, maintenance of access ways will involve the following tasks, at a minimum.

### **1. Clearing the Right of Way**

It is essential that rights of way be cleared on a regular basis so that passage is reasonably safe and enjoyable. In some instances, only the trimming of bushes and trees is needed. Depending on the condition and location of the right of way, footbridges, boardwalks or resurfacing may also be required. After initial maintenance, regular inspection of the access ways must be conducted to ensure that safe conditions persist.

Who will do the heavy lifting? The optimum situation is when a municipality steps forward to maintain the access ways. In most cases, however, maintenance is accomplished through a coordinated effort of public and private citizens. For instance, volunteer workers may organize and conduct seasonal clearing and clean up, while the municipality supplies the tools, garbage bags and debris removal services.

Maintenance responsibilities place a great demand on the committee. To lighten the load and encourage community stewardship, committees should encourage increased citizen involvement. School groups, neighborhood associations, youth clubs (such as scouting organizations, 4H clubs, etc.) and religious organizations could be asked to participate. Schools often require students to perform community service, and helping to maintain a public trail may be a perfect activity (with the proper supervision). As mentioned earlier, a “friends” group can also be very helpful in organizing maintenance activities. Positive publicity or plaques at the site might provide incentives for local groups.

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*Illustration #11: With a Little Help from Your “Friends”*

*For years, the Friends of the Rights of Way Committee in the Town of Rockport has been extremely helpful and supportive of the activities of the Rights of Way Committee, including in the area of trail maintenance. The Friends raise money through membership dues and annual fundraisers that involve activities such as lectures and cruises. This organized effort has paid off handsomely. Among other achievements, the Friends of the Rights of Way Committee has funded the production of Rockport’s exemplary map book.*

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## 2. Signage

The committee should oversee the design and maintenance of the signs designating the public access ways. Often, town officials and abutting landowners have strong opinions as to the wording of access signs, so committees should consult with the affected parties before signs are created or placed. In addition, committee members should conduct regular inspections of the signs to ensure that none have been removed or altered by vandals. All instances of sign desecration should be reported to town officials.

In addition to signage, it is helpful to publish a list of public access ways and make the list available to residents and visitors upon request. Some municipalities have such a list available at Town Hall.

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### *Illustration #12: Gloucester's Public Landings Brochure*

*In 1988, the City of Gloucester, as part of their Public Landings Project, published a brochure listing 38 public landings in Gloucester. Each entry describes the location of the landing, its characteristics and the available parking. The Gloucester Public Landings Advisory Committee expended great effort to rediscover public landings and to remove private encroachments. The city had a history of private property owners encroaching on their public landings. The philosophy behind distributing these free brochures was aptly stated in a report summarizing Gloucester's recent efforts:*

*It is important that the public be informed of where the public landings are and how they can be used, because with increased use comes less opportunity for encroachment. A cycle of use and improvements will greatly enhance the City's efforts to protect these properties... Increased awareness and use of the public landings by the public will lead to fewer new encroachments and to quicker reporting of existing encroachments. Public involvement will be a crucial component of a successful plan.*

*The brochures are widely distributed in Gloucester thanks to the cooperation of the Chamber of Commerce. On the suggestion of the Public Landings Advisory Committee, the brochures are made available at the city's visitor center.*

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*Source: Witek, Peg. "Public Landings: A Plan to Reclaim, Protect, and Enhance Public Access to the Water." June 1988.*

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### **3. Public Education**

Lastly, it is important that the committee educate the public about appropriate behavior on public rights of way. In particular, users should be reminded to respect the rights of the abutters. The committee may reinforce this message through signage on the rights of way or by adding appropriate text to trail maps.

## CHAPTER 4

### PRESERVING HISTORIC RIGHTS OF WAY: THE LEGAL DOCTRINES

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This chapter describes several legal methods by which communities can preserve historic rights of way to the sea. Discussed first is the most straightforward method of preserving historic rights of way: proving ways to the sea are indeed “public ways” by virtue of their statutory lay out. Discussed next is the application of several common law theories, including dedication, prescription and immemorial custom.

First, however, a word of warning. The use of the common law theories of prescription and dedication requires fact-specific, parcel-by-parcel determination. The decision to proceed should be made only after a careful evaluation of the situation. Digging up the necessary information and presenting it to a court can be a time consuming and costly affair. Even if extensive legal resources are readily available, the possibility of a chilling effect on other landowners must be carefully considered. Shorefront owners who have been tolerating people on their land, so long as they behave properly and are limited in number, may change their minds if they are reminded that this behavior may result in loss of their right to exclude more numerous or less suitable visitors. Detailed local knowledge and consideration of the possible consequences is thus essential before proceeding with legal action.

Massachusetts courts recognize three ways of proving a way is a public way: (1) proof that the way was laid out as a public way according to the statutory requirements found in G.L. Chapters 81 and 82 (discussed in Section A); (2) proof that the way was dedicated to public use and accepted by the town (discussed in Section B); and (3) proof that the public acquired prescriptive rights to use the way (discussed in Section C).

#### **A. Proving a Way Is a Public Way by Reason of Statutory Lay Out**

Laying out is the most common way of creating public ways. The process is governed by state statute and differs slightly depending on the type of public way being created. In general, the lay out process requires the Massachusetts Highway Department, county commissioners, town selectmen, city councilors or their appointees to determine the proposed course of a way and notify all affected property

owners. For the lay out of county highways, a public hearing is required. For town ways and statutory private ways, selectmen must file a plan containing the boundaries and measurements of the way with the town clerk, and the lay out must be accepted by a town's legislative body. Eminent domain proceedings to take interests in private property may follow a lay out, when necessary.

## **1. Understanding the Different Types of Public Ways**

Before addressing further the question of statutory lay out, it is important to understand the differences between the four different types of public ways. The four public ways are: state highways, county highways, town ways and statutory private ways. When attempting to prove that a way is public by showing it was laid out in accordance with statutory requirements, it is necessary to determine which label applies, for different statutes govern the lay out of each. The four ways are described briefly below.

### **a. State Highways**

State highways are typically main roads and major highways that are laid out by the Massachusetts Highway Department (formerly the Massachusetts Department of Public Works). State highways are generally not relevant to the discovery of rights of way to the sea, since main roads and major highways do not usually provide access to the shore. The state owns the land for state highways in its entirety (as opposed to possessing only an easement). Lay out, alteration, acquisition of land and easements, discontinuance, construction, maintenance and repair of state highways are controlled by G.L. Chapter 81.

### **b. County Highways**

County highways are laid out by county commissioners in accordance with G.L. Chapter 82. Although county highways also tend typically to be main roads, one can occasionally find county highways that provide access to the water. If the lay out of a county highway is approved, the commissioners take an easement across the land, most often by eminent domain, and file a description of the plan and bounds of the way with the town or city clerk. The procedural requirements are set out in Chapter 82 for the laying out of a county highway.

Specifically, the lay out requirements for a county highway include a hearing, the publishing and posting of notice of the hearing, and the mailing of notice to the owners of land affected by the lay out. Copies of the lay out plan must also be made available prior to final approval of the plan. If after the hearing, the county commissioners find that “public convenience and necessity” require the lay out, the commissioners may take property by eminent domain, as necessary. The commissioners’ final step is to file a description and plan of the location of the highway with each town clerk in each affected town. In addition, the order of taking, or if a purchase and sale, the deed, will be filed at the county registry of deeds. Some county layouts were only filed with the county engineer’s and the town clerk, depending upon the statute which authorized the layout. Most challenges to the validity of takings, or public improvements, for failure to strictly comply with procedures are subject to the time limitations contained in G.L. c. 79 sec. 18 (historically, one to three years), and must be brought by the owner at the time of the taking.

Many ancient county layouts – particularly those that were laid out along beaches – were often made by a jury vote. If discovered on ancient maps or an historical account of a county layout along a beach or upland, research may have to go back to the original jury vote and description of the layout.

Once the county highway is established, the county commissioners are responsible for the alteration, relocation and discontinuance of the highways in accordance with G.L. Chapter 82. The town shares the expenses of constructing county highways and is solely responsible for their maintenance and upkeep. However, a town may not discontinue a county highway.

### **c. Town Ways**

Right of way researchers will most often be interested in town ways, for town ways are the roads that most frequently provide access to the shoreline. Town ways are similar to county highways in that they are easements across the land they cover, but they are laid out by the town, rather than by the county. General Laws Chapter 82, Sections 21 through 24, governs the creation of town ways.

In brief, selectmen lay out a proposed way in accordance with Section 21. Selectmen then must provide a “notice of intention to lay out” to affected property owners by mail or posting pursuant to Section 22. The lay out plan must next be filed with the town clerk and approved at town meeting according to the procedural requirements of Section 23. According to Section 24, within 120 days of the town

meeting vote, the selectmen must purchase the land or adopt an order of taking by eminent domain for the lay out, if an order of taking is required. An order of taking is not required if the way is given to the town, as frequently occurs when private subdivision roads become town ways. If the town takes property or an interest in property by eminent domain, a record of the taking will be filed at the registry of deeds. And, of course, if the town purchases the property, the deed will be recorded at the registry of deeds.

It is important to note that courts today require stringent adherence to the statutory process for a way to be adjudged a public “town way.” Procedural steps of the statutory process must be followed and documented or the lay out and acceptance of a town way may be deemed invalid. However, different procedures were in place at different times, so it is important to examine the procedures in effect at the time of the layout. Most challenges to the procedure or the validity of the layout must be brought by the owner at the time of the taking, is subject to time limitations of G.L. c. 79 sec. 18 (historically from one year to the current three years).

#### **d. Statutory Private Ways**

The name “statutory private way” gives rise to much confusion, for statutory private ways are not truly private ways (i.e., ways that are closed to public use). Statutory private ways are very much like town ways, except they are laid out by town selectmen upon the petition of a private party. The cost of lay out, land acquisition and repair are born entirely by the party proposing the way (G.L. Chapter 82, Section 24). The town has no obligation to maintain the way, although it may agree to maintain it for public convenience. Even though the way is laid out at the request of a private party, *the public obtains an easement to pass on the way*. Like county highways and town ways, statutory private ways are *easements* over the land they cover. Despite its confusing appellation, the statutory private way is a fruitful source of public access if the way terminates at the shore. Statutory private ways must be distinguished from true private ways, which are built and maintained on private property by private landowners and over which the public has *no* right of passage.

### **2. Proof of Lay Out for State Highways, County Highways, Town Ways and Statutory Private Ways**

Massachusetts courts require strict adherence to *all* statutory requirements for notice and the filing of a plan so that owners will know whether their land is affected.

The burden rests on the party who claims that a way is public. The process for notice and filing a plan *must* be followed or the court will find that the lay out or acceptance is invalid.

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*Case #3: The Case of the Way that Wasn't*

*Consider the predicament of unfortunate Ms. Loriol. Ms. Loriol owned land at the end of a way known as Fairfax Street. The Keenes owned land adjoining Ms. Loriol, on either side of Fairfax Street. The Keenes blocked off Fairfax Street so Ms. Loriol could not use it to get to her property. She sued, claiming that Fairfax Street was a public way.*

*It was uncontested that a map of Fairfax Street leading to Ms. Loriol's property had been recorded in 1913 and that in 1929, the Town voted to "accept" Fairfax Street. The Town, however, did not state which portions of Fairfax Street they were accepting or whether the entire street was accepted. No plan of Fairfax Street was filed with the town clerk as required by G.L. Chapter 82, Section 23 and no "notice of intention" was given as required by Section 22.*

*The court stated that the giving of notice and filing of a layout as required by Sections 22 and 23 were not mere procedural technicalities. According to the court, these requirements are safeguards against inconsiderate or capricious action on the part of municipal authorities. Consequently, the court ruled that Fairfax Street was not a public way because these important statutory requirements were not followed.*

*Loriol v. Keene, 343 Mass. 358 (1961).*

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Collecting all the records necessary to demonstrate that a particular lay out complied with statutory requirements may be difficult, depending on how long ago the lay out occurred, and how diligent, accurate and thorough town recording was at the time. Information critical to your case may be misfiled, archived in inaccessible boxes or buried in dusty volumes of handwritten town meeting notes. Unfortunately, most of the relevant documents, including notice of lay out and lay out plans, will *not* be found at the registry of deeds, because there is no statutory requirement to file them there. There is, however, a statutory requirement that all orders of taking by eminent domain be recorded at the appropriate registry of deeds (G.L. Chapter 79, Section 3). Therefore, if a taking occurred, there should be a record of it at the registry.

Appendix D sets forth the procedural requirements of General Laws Chapter 82, Sections 21 through 24 (town ways) and of General Laws Chapter 82, Sections 1 through 7 (county ways). Guidance on how to find the records pertaining to the lay out of public ways is discussed in Chapter 3.

Remember that it is also worthwhile to find proof that a "statutory private way" has been laid out by a public authority according to all the statutory requirements of G.L. Chapter 82, Sections 21 through 24 (i.e., notice, filing of lay out, acceptance). As explained previously, the public has an easement of passage over statutory private

ways, so a statutory private way leading to the shore would constitute a *public* way to the sea.

### **3. Proof of Lay Out of Common Landings**

Section 14 of G.L. Chapter 88 states that “all the provisions of law relating to the laying out and alteration of town ways shall apply to the laying out or alteration of common landing places.” Thus the procedural requirements discussed in Section A.1.c., above, for town ways are relevant to the establishment of common landings. Lay out of a common landing requires notice, filing of a lay out plan, and acceptance by town meeting vote. Furthermore, the courts have held the laying out of a common landing to the same procedural standards.

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*Case #4: No Vote for Boats*

*After the town of Hull acquired a wharf, a commercial boat owner sued the town for the right to use the landing. The court ruled that the landing did not become a common landing place in the absence of a vote to that effect by the town selectmen. The town had never voted at any town meeting to set aside the property as a common landing place. The court stated that the mere fact that the town had acquired title to a parcel of real estate upon which there was a wharf did not give every individual a right to dock his vessel there any more than the acquisition of a driveway would give every individual a right to drive upon it!*

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*Wilson Line of Mass. v. Selectmen of Hull, 322 Mass 296 (1948).*

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Thus, those seeking to preserve a common landing should research the city or town's compliance with the statutory procedures and gather as much evidence as possible showing compliance with the notice and filing requirements set forth in G.L. Chapter 88, Section 14. The relevant statutory sections pertaining to common landings are set forth in Appendix D.

How do you find your community's common landings? According to G.L. Chapter 88, Section 14, all Massachusetts cities and towns are required to file a plan and a description of each of their common landings with: their city or town clerk, their county commissioners, the Massachusetts Department of Environmental Management and the county registry of deeds. Unfortunately, this requirement has often been ignored (or may not have been a requirement at the time). When researching historic common landings, it is prudent to check all of the above repositories of information. If the boundary of a known common landing is uncertain, citizens can invoke their rights under G.L. Chapter 88, Section 16 and require the county commissioners to ascertain the correct location of the landing and erect the necessary bounds (although it is uncertain at this time which agency will

assume that responsibility in the counties which have been absorbed by the state.)

## **B. Proving Dedication**

Many public ways were created by dedication, and the preservation researcher might find that some of these public ways provide access to the sea. Dedication has been described by the Massachusetts courts as "the gift of land by the owner, for a way, and an acceptance of the gift by the public, either by some express act of acceptance, or by strong implication arising from obvious convenience, or frequent and long continued use, repairing, lighting or other significant acts, of persons competent to act for the public in that behalf" (Hemphill v. Boston, 62 Mass. 195 (1851)).

In 1846 the Massachusetts Legislature passed a statute declaring that a public way can no longer be created in the Commonwealth by dedication and acceptance. The intent of this statute was to prevent cities and towns from being saddled with the responsibilities (and accompanying liabilities) for the maintenance of highways which were not laid out and constructed in a manner prescribed by law (G.L. Chapter 84, Sections 23 and 24). Subsequently, the courts have limited the application of the statute to public ways that are highways. Dedication is still in effect for other public ways such as foot paths, landings, parks and commons, because for such public ways, cities and towns are not responsible for maintenance and liability as they are for highways.

### **1. Statutory Restrictions on Dedications of Public Ways**

Because dedication was once a widely used method of establishing public roads, it should not be ignored when seeking to determine the public or private nature of a way. The doctrine of dedication even has some advantages over other common law doctrines. Proof of a public way by dedication requires no minimum period of time of public use, unlike the 20 year requirement for prescription (Abbott v. Cottage City, 143 Mass. 521 (1887)). Furthermore, unlike prescription, the general public can acquire rights of way by dedication without the need to show corporate action on the part of a municipality.

### **2. Elements of Dedication**

There are two parts to every valid dedication: the intent to dedicate and the

acceptance of the dedication. The following sections examine these required elements.

### **a. The Intent to Dedicate**

The intention of the owner to set apart property for the use of the public is the foundation of every dedication. Massachusetts courts have held that to prove a dedication, the owner's acts and declarations must be deliberate, unequivocal and decisive, manifesting a clear intention to permanently abandon property to a public use (*Longley v. City of Worcester*, 304 Mass. 508 (1940)). Once the intent of the owner to dedicate property to public use is manifested, the dedication may only be withdrawn if the public has not accepted it. Once the dedication is accepted by the public, it may not be withdrawn, and all future owners are bound by it. In cases where a developer has made representations to purchasers, the community, or the public at large, the courts have required a less stringent standard.

Intent is commonly expressed in deeds or other formal documents evidencing a gift, but such formality is not required. Courts have found that dedication may be implied by acts of the landowner that clearly manifest an intention to dedicate.

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#### *Case #5: The Case of the Dedicating Developer*

*A developer subdivided a large parcel bordering on the sea and marked spaces on the plan for various public spaces including parks, groves and a beach. The developer widely advertised this plan and used it for enticing home buyers. After most of the lots had been sold, the developer started to build on the lots that he had set aside as parks and open space. The Massachusetts Supreme Judicial Court found that the owner, by his promises and advertised plans, had dedicated these areas to the public. The court noted that "simple honesty" required that the seller be held to the promises on which his buyers had relied and enjoined him from building on the public lots. The court also found that the general public, through use of the open space, had accepted the dedication. Thus, the court ruled that the beach, parks, etc. were open to the general public, not simply the lot owners who had bought in reliance on the developer's promises.*

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*Attorney General v. Onset Bay Grove Assn.*, 221 Mass. 342 (1915).

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### **b. The Acceptance of the Dedication**

Acceptance is the second essential part of every valid dedication. Proof of public acceptance of the dedication must be established before a way is deemed to be a "public way" or before a dedicated property is deemed "public property." Acceptance may either be explicit, such as a town resolution formally accepting the

property as a gift, or implied from subsequent public use or public maintenance of the way.” Use by the public effects an immediate acceptance. There are no requirements of formal acceptance, and except for highways dedicated prior to 1846, dedication places no obligation upon a community for maintenance.

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*Case # 7: A Landing for All*

*Dedication and acceptance were found in a case in which a town landing was laid out "for the public use for the inhabitants of Gloucester" and was used by the general public, not just the inhabitants. The court held that this language was sufficient to make out an offer and acceptance as to the town residents - an offer by the town as landowner and an acceptance by the town as spokesman for its inhabitants - and that long-term use by out-of-towners was sufficient to establish an acceptance by the general public.*

*Attorney General v. Tarr, 148 Mass. 309 (1889).*

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It may be difficult to prove that a highway was dedicated for public use and accepted because town records prior to 1846 may not be well preserved or very thorough. This difficulty is relieved in part by the willingness of courts to presume that a dedication of a way was accepted when it was intended for public use and it was used for 40 years with the assent of the private owners (Valentine v. City of Boston, 39 Mass. 75 (1839)).

### **3. Dedication of Private Ways for Public Paths**

While it is no longer possible to create a public road or highway by dedication, the owner of a private way may still open and dedicate a *path* for public use (Tyler v. Sturdy, 108 Mass. 196 (1871)). The essential elements of a valid dedication of a private pathway to the public are the same as they were for the dedication of public ways before the enactment of the statute prohibiting the dedication of roads and highways. In other words, there must be an *offer* of dedication by the owner. While the offer to dedicate may be made in a number of ways (express or implied), the acts or declarations of dedication must be deliberate, unequivocal and decisive in their manifestation of the required intention. Secondly, an offer to dedicate private land to public use is not effective until *accepted* by the public, either expressly by official acts or by use by the public. Acceptance by the public does not require use by large numbers of people nor use for any specified period of time. Acceptance is immediate and complete once the public commences use. In addition to paths, private landowners may also dedicate open space, sea rocks, park land, etc. to the public. Once accepted by the public, the dedication cannot be withdrawn, and runs with the land.

## C. Proving Public Rights by Prescription

Under the legal theory of prescription, continued public use of private land for an extended period of time can also give rise to public rights of use in the land. If members of your community have been using a road, path or landing on private property for a long time in order to gain access to the sea, you may be able to establish an "easement by prescription" to the sea.

Massachusetts General Law (G.L. Chapter 187, Section 2) and Massachusetts court decisions have established the elements of proof necessary to create an easement by prescription. It is necessary to satisfy a four-part test. Massachusetts courts require a person or group of people to demonstrate by a preponderance of the evidence that use of the easement has been: (1) adverse (without permission of the owner); (2) open and notorious; (3) continuous; and (4) for a period of at least 20 years. Proof of each of these four elements is essential to the success of the claim. In addition, if a municipality is claiming an easement by prescription for the benefit of town residents or the general public, there may be a fifth requirement that the town demonstrate that it engaged in "corporate action" with respect to the easement. The state has never been held to the requirement of corporate action, although this has not been tested under modern common law. Each of these required elements is described in detail below.

### 1. The Use Must Be Adverse (Without the Permission of the Owner)

A person or group claiming a prescriptive right must first prove that use of the easement was "adverse" and without the permission of the owner. Massachusetts courts have held that land is used adversely or "without permission of the owner" when a user trespasses and gets away with it because the owner fails to prevent the trespass. It is essential that the trespasser fail to recognize the authority of the property owner to either prevent or permit use of his property. If the owner can provide evidence that he gave explicit permission, the claim of "adversity" fails. And if the user can not show adversity, the claim of prescriptive easement will consequently fail also.

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*Illustration #13: Adverse and Permissive Use*

*a. Adverse Use*

*Patty has been crossing Doug's shorefront property for years. Doug has repeatedly asked Patty not to cut across his property, but she ignores his pleas and continues to use a path across it. Her use is adverse.*

*b. Permissive Use*

*The residents of a coastal town have been using a private road to reach a beach. Each time a resident uses the road, a road attendant collects a nominal fee. This use is not adverse because the road users have acknowledged the owner's right to control the land by paying an entrance fee to use the road.*

*c. Adverse Use*

*Julie has been using a landing at the end of her street. She has never asked anyone for permission. The adjacent landowner, who owns the landing, has not bothered to give Julie explicit permission, nor has the landowner effectively stopped Julie's use by physically blocking her entry, by filing suit, or by filing suit, or by posting a notice. Julie's use is adverse.*

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## **2. The Use Must Be Open and Notorious**

The person or group of people claiming a prescriptive easement must prove that adverse use of the easement was "open and notorious." Use which is open and notorious must be the kind of use that would be known to either the landowner or someone who might reasonably be expected to communicate their knowledge to the landowner. The purpose of the "open and notorious" requirement is to ensure, to some reasonable degree, that the landowner is put on notice that his property is being used so that he can protect his interest. A user who attempts to conceal his use of the land cannot later claim "open and notorious" use.

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*Illustration #14: Open and Notorious Use*

*Paul uses a landing under the mistaken assumption that it is a public landing. He parks his truck in front of the landing, leaves his boat pulled up on the beach and often stores his lobster traps and kayak on the landing. The owner of the landing could easily see his daily use of the landing as well as the equipment he leaves out in the open. Even if the owner lived in another state, the owner could easily learn of Paul's use. Paul's use is therefore open and notorious.*

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## **3. The Use Must Be Continuous and Uninterrupted**

The third requirement for a person or group claiming a prescriptive easement is that use of the easement must be continuous and uninterrupted. Continuous use means regular, more than occasional, use. It is not necessary that the easement receive everyday, year round use. Massachusetts courts have held that seasonal use of an easement is sufficient to satisfy the continuous use requirement. For example, seasonal use of a driveway to a summer residence was sufficient to show that use of the driveway was continuous (*Mahoney v. Heebner*, 343 Mass. 770 (1961)). Weekend use is also sufficient to show continuous use (*Kershaw v. Zecchini*, 342 Mass. 318 (1961)). On the other hand, use of a vacant lot from time to time as a shortcut from one property to another is insufficient to establish an easement by prescription (*Uliasz v. Gillette*, 357 Mass. 96 (1970)).

Acquisition of a prescriptive easement also requires uninterrupted use. Uninterrupted use demands that the use not be interrupted by an act of the landowner that prevents use of his land. Thus if a landowner decides to fence off his road to prevent trespass, and the landowner actually *does* prevent further use, this would prevent users from obtaining a prescriptive easement over the road.

#### **4. The Use Must Be for 20 Years**

The person or group claiming an easement by prescription must show that the adverse use occurred continuously over a 20 year period. For example, in order to obtain a prescriptive easement across private property to the sea, a user must not only show how frequently the right of way was used, and that it was done openly and without permission, but that all of these things occurred continuously over a period of at least 20 years. If a *group* of people are claiming a prescriptive easement, it is not necessary to find any specific user who individually used the way for over 20 years. The requirement only demands that the combined use of the way by a group of people has spanned 20 years. Affidavits (sworn statements) of older citizens who can attest to long-term use of the easement are often used to prove long-term use. In one Massachusetts case, old photographs of beach goers were admitted into evidence, for it was obvious by the swim attire that the use occurred more than 20 years ago (Daley v. Swampscott, 11 Mass. App. Ct. 822,(1981)).

#### **5. Towns Must Show Evidence of Corporate Action**

A town or other municipal entity seeking to establish an easement by prescription must show evidence of corporate action over the easement. Corporate action simply refers to official acts of the town. For example, public maintenance activities such as mowing grass, collecting garbage, clipping vegetation or plowing snow are all corporate acts that evidence public ownership. Town records of corporate acts are often easier evidence to gather than evidence of an individual's use of land. A recent case in Massachusetts has shown that a town in its corporate capacity may acquire beach rights by prescriptive easement for its residents, provided the town's acts of control over the beach are corporate acts.

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*Case #8: If It Walks Like a Duck...*

*In Swampscott, the town and its inhabitants used a portion of a private beach for more than 20*

*years under the mistaken notion that the beach was public. Various departments of the Town of Swampscott had performed numerous actions in order to maintain the beach for the town residents. The town cleaned, maintained and patrolled the beach, as well as provided lifeguards, posted signs and removed fences. These town actions satisfied the court that the town demonstrated the required corporate action. In short, if a town treats the land like a town beach for 20 years without objection by the owner, it will likely obtain a town beach in the form of an easement by prescription.*

*Daley v. Swampscott, 11 Mass. App. Ct. 822 (1981).*

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#### **D. Proving Public Rights by Immemorial Custom**

Rights to use land owned by someone else may also be acquired through use by the legal doctrine known as "immemorial custom" or "immemorial usage." This theory is similar to prescription in that it looks to past use of the site in question to prove the existence of present public rights. Unlike a prescriptive easement, however, custom may be established by proof of public use without the need to show any official acts on the part of a city or town.

The task of establishing public rights by immemorial custom, however, may be formidable. Use of the site must have been generally accepted by the community, free from dispute about the right of use and not called into question as inappropriate "since time immemorial." Courts look for proof of public use that is "ancient." The use also must have been continuous through the community history so that it truly became a "local custom." Use that is contested by property owners and fraught with controversy cannot ripen into a public right by immemorial custom.

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##### *Case #9: The Case of the Customary Landing Place*

*In 1963, four landowners sought to register their titles in Land Court. The City of Beverly claimed that their titles were affected by a public landing and an alleged ancient way. The court examined evidence of use, town records of corporate action and ancient maps to determine whether public rights existed. The court discovered town layouts of 1775 and 1803 that determined the precise location of the landing at the end of a public way. The statement of selectmen in 1775 that "said way has been improved time out of mind without molestation" was also considered by the court as evidence of immemorial use. In addition, the topography of the site, located in a protected cove with good accessibility to the beach and water, were consistent with its historic use as a landing. Finally the court also noted that the city at times had cleaned the beach and had maintained a rubbish barrel there since 1935. The historic customary use of the landing was sufficient to allow the court to affirm public rights by the doctrines of immemorial usage and prescription. The court, however, refused to find similar rights to access the landing via an associated ancient way, apparently due in part to the lack of a clearly defined pathway and spotty historic evidence as to its layout and use.*

*Puffer v. City of Beverly, 345 Mass. 396 (1963).*

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The doctrine of custom has been most successful in Massachusetts for establishing public landings. It should always be considered, nevertheless, for use in proving public ways, with the understanding that the evidence of public use must be very clear, the pathway physically well-established and the use of the way clearly documented in historical records. It is interesting to note the language of G.L. Ch. 187 sec. 3, "Notice of intention to prevent acquisition by custom," which clearly recognizes the possibility of acquiring a right of way or easement by custom.

### **E. Proving Public Rights by Dedication or Implied Dedication**

In addition to explicit dedication and acceptance, long term public use of a way coupled with the silence and passive acquiescence of a landowner can result in the implied dedication of a way. Under the doctrine of implied dedication, courts find an intent to dedicate in the failure of landowners to interrupt or object to the use of their property, or by the landowners representations on which the public relies. Use of the property by the public is considered "acceptance" of the dedication.

In a significant California case, the required intent for implied dedication was found when an owner failed to object to the long standing and obvious public use of his property.

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*Case #6: Dedicated to the Ones that Love ... To Swim*

*In 1970, the City of Santa Cruz brought an action to declare that a beach and picnic area was public property. Since 1900, the public had used the area for bathing and picnicking with no significant objection from the owners. Over the years, the City sent students to engage in erosion prevention projects, installed fire alarms and guard rails, placed trash cans and paved portions of the area. The court concluded that where public use continued for over five years with full knowledge of the owners, without permission or objection, there was implied dedication.*

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*Gion v. City of Santa Cruz, 2 Cal. 3d 29 (1970).*

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Although no Massachusetts court, to date, has applied this doctrine in such sweeping terms, it is possible that the theory may some day emerge in this state, given the right set of facts.

### **F. Recognizing Permissive Recreational Use**

Communities can increase public access by entering into voluntary agreements with private coastal landowners to allow the public to use their properties for public

recreation. In order to encourage private landowners to allow free public recreational use of their land, the Massachusetts legislature passed a law limiting the liability of private landowners for injuries incurred by people using their land for recreation (Massachusetts Recreational Use Statute, G.L. Chapter 21, Section 17C). Thus, if a coastal property owner allows the public to walk across her lot to reach the sea, and a member of the public injures himself or his personal property in the process, the property owner would not be responsible for medical expenses, property damages, etc., unless the private property owner deliberately engaged in willful, wanton or reckless conduct that created a high degree of probability that substantial harm would result. Some examples of unlawful, wanton or reckless conduct include allowing unleashed attack dogs to roam the beach, intentionally setting traps or physically assaulting users. The same statutory protection against liability applies if a private property owner leases her land to the state or municipality for public recreational use.

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*Illustration #15: A Generous Landowner*

*Landowner Mary lives on a large estate next to a public beach in Anytown, Massachusetts. Mary has never objected to people spilling over onto her considerable property and using her beach. Nevertheless, Mary's nephew, Rich, is afraid that if someone is injured on her beach, Mary will be sued and his substantial inheritance might be diminished. Rich, therefore convinced Mary to erect "No Trespassing" signs to stop strollers and stragglers from entering onto her property.*

*Luckily, Mary's niece, Grace, is knowledgeable about the Massachusetts' Recreational Use Statute. Grace explained to Mary that the statute protects her from liability if someone is injured on her beach. Thus educated, Mary sends Rich to the beach to pull up the offending signs.*

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Property owners who allow the public to use their land for recreational purposes need not worry that public use of their land will produce a public easement under the common law theories of custom or implied dedication. Giving permission for public access pursuant to the recreational use statute is clear evidence that the owner claims title and is allowing public use by permission or license and, at least partially, to avoid liability, rather than to dedicate. Custom and implied dedication apply only to use that has been unexplained, unrecognized, and free from dispute "since time immemorial." If public use has not already met those criteria, there is no danger of loss, because the property owner is in a position to explain (in no uncertain terms) that he or she had no intention of dedicating the property.



## **CHAPTER 5**

### **LOSING PUBLIC RIGHTS OF WAY**

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Even after public rights of way to the sea are created by laying out and acceptance, dedication and acceptance, prescriptive use, implied dedication or immemorial custom, there are circumstances under which the public can lose these rights. These are: 1) abandonment; 2) adverse possession or prescription; 3) discontinuance; and 4) conveyance or grant. In addition, not-yet-realized public easements may be defeated by private property owners through the timely posting of property and by land registration.

It is important to highlight that abandonment and discontinuance of state highways, county highways, town ways and statutory private ways are governed by statute and are discussed below in Section C. These public ways cannot ordinarily be extinguished by the common law methods of abandonment and prescription.

#### **A. Abandonment of Easements**

Massachusetts courts have established that an easement may be extinguished or lost by abandonment. Nevertheless, the courts have said that nonuse alone, no matter how long continued, is not enough to establish abandonment. Abandonment must be shown by acts indicating an intention never again to make use of the easement in question. For public easements owned by towns for the use of town residents, the intent to abandon must be the *town's* intent, not that of the resident users. For a claim of abandonment to be upheld by a court, it is necessary to show that the owner of the easement conclusively and unequivocally manifested either a permanent intent to relinquish the easement or pursued a purpose wholly inconsistent with its further existence.

It is well settled law that abandonment is *not* proved by conduct that interferes with the use of the easement only *temporarily* or *only in part*. Also, conduct that is equivocal in character does not suffice to prove abandonment.

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*Case #10: The Case of the Berry Persistent Easement*

Imagine you own land on Cape Cod that you want to develop. The only problem is that your deed is burdened by an age-old easement allowing a certain Ms. Konner to take sand from your property for her cranberry bogs. The problem is, Ms. Konner has no cranberry bogs, nor does she seem to have any intention of creating any. Years ago her property was used for cultivating cranberries (that's why the previous owner of your property sold the easement for removal of sand), but over the last 50 years, prior owners dismantled the dikes and flumes and caused Ms. Konner's soil to be contaminated by salt water. Furthermore, Ms. Konner has built a lovely ornamental pond on her property that is wholly inconsistent with the harvesting of cranberries. Thus you believe there is no purpose remaining in this bothersome easement, so you go to court and claim that it has been extinguished by abandonment.

Imagine your disappointment when the court does not agree. Although it is undisputed that Ms. Konner would have to spend thousands of dollars to revive the bog, the court found that commercial impracticality even coupled with nonuse was not enough to support abandonment. The court found that the purpose of the easement (the taking of sand for the bog) had not wholly ceased to exist. Further, Ms. Konner had control over the conditions that prevented the exercise of her rights. The court noted that, although it would not be an economically sound decision, the defendant could decide some day to revive the cranberry bog. The court thought that this possibility and the fact that it was wholly within the easement holder's control was sufficient to defeat the claim of abandonment.

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*First Bank of Boston v. Konner, 373 Mass. 463 (1977).*

In contrast, courts *do* find abandonment when the limited purpose for which an easement was created has totally ceased to exist.

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*Case #11: A Whale of a Case (Don't Blubber Over Lost Easements)*

The Town of Barnstable in the 1800's reserved easements in certain areas of its peninsula known as Sandy Neck for the operation of "try-yards" (areas where whalers boiled or "tried" blubber to extract its oil). In 1935, the owner of the land at Sandy Neck sought to rid his land of the town's easements by arguing that the easements had been abandoned. The court found that the easements, which were created for the limited purpose of whaling, were extinguished upon the total and apparently permanent disappearance of the whaling industry from the vicinity. The court stated that "When a right in the nature of an easement is incapable of being exercised for the purpose for which it is created, the right is considered to be extinguished."

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*Makepeace Bros. v. Barnstable, 292 Mass. 518 (1935).*

Courts have also found that nonuse coupled with an easement owner's failure to clear the natural cover of trees and brush from the easement did *not* constitute abandonment of a right of way. Unless the easement owner also showed intent permanently to abandon the easement, such disregard for the state of the easement did not constitute abandonment (Desotell v. Szczygiel, 338 Mass. 153 (1959)).

Easement holders are cautioned, however, that although the courts have stated that mere nonuse is not sufficient proof of abandonment, there is always a possibility that a judge might take a contrary view. Every case is unique. Consequently, it is never wise to subject an easement to a charge of nonuse, especially since it leaves the easement vulnerable to adverse possession or prescription.

## **B. Loss of Easements by Adverse Possession**

Easements may be lost by adverse possession. For instance, an owner of land having a public easement across it can extinguish the easement by adverse possession. All of the elements discussed previously with respect to obtaining an easement by prescription apply to the acquisition of title by adverse possession. The difference is that a person claiming under the doctrine of adverse possession seeks to establish *ownership*, not merely the right to use the property.

In order to acquire title by adverse possession, one must prove 20 uninterrupted years of open, notorious, adverse, non-permissive and *exclusive use* (Ryan v. Stavros, 348 Mass. 251 (1964)). Unlike easements by prescription, title by adverse possession requires “exclusivity.” “Exclusivity” generally requires that no one else is ever on the property *without the possessor’s consent*. It does not mean that no one other than the possessor of the land is ever on the property.

The adverse use, in order to start the clock on adverse possession, must be clearly wrongful to the owner of the easement. Thus, the acts of the landowner must be incompatible or irreconcilable with the purpose of the particular easement. For instance, the erection of permanent structures, such as a building or a wall, or other obstructions seriously interfering with the easement holder's right of use, would be sufficient to extinguish or destroy the easement (Desotell v. Szczygiel, 338 Mass 153 (1958)).

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### *Case #12: The Case of the Of-fence-sive Behavior*

*In this case, a landowner was rewarded for his aggressive attempt to defeat an easement, and an easement holder suffered by not vigilantly protecting his right of passage. Here's how it happened:*

*A landowner whose property was burdened by an easement of passage erected an unbroken boundary fence, thus preventing entry by the easement holder. The erection of this fence, after 20 years, was considered continuous adverse use sufficient to extinguish the easement. The court held that the boundary fence had the unambiguous effect of impeding passage and was adverse, wrongful and actionable. Therefore the easement owner's right of passage was extinguished by the landowner's blockage and the*

*easement owner's failure to bring action within the prescriptive period (20 years) to have the fencing removed.*

*Yagjian v. O'Brien, 19 Mass. App. Ct. 733 (1985).*

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In contrast, the erection of movable fences or gates is often considered *compatible* with the continued use of the easement and usually does not meet the requirements for adverse use. For example, where a landowner erected an unlocked gate on his property across an easement allowing access to a lake and beach area, the court did not find adverse use. The Massachusetts court explained that "unlocked gates or barways may have the practical effect of burdening or delaying passage, but, by their very nature, they are consistent with, and contemplate, passage. The cases on this subject have tended to weigh slight inconvenience to the (easement) owner's use of the way against the (landowner's) freedom to use his property in a reasonable manner and to strike an equitable balance (Yagjian v. O'Brien, 19 Mass. App. Ct. 733 (1985)).

According to statute (G.L. Chapters 81 and G.L. Chapter 82), public ways (state and county highways, town ways and statutory private ways) and common landings *cannot* be lost by adverse possession in Massachusetts (Commonwealth v. Little, 5 Dane Abr. 407 (1796)). Additionally, state-owned lands under the control of the Department of Environmental Management (state parks, for instance) or the Metropolitan District Commission are also not subject to claims based on adverse possession. Lastly, public easements over registered land cannot be extinguished by adverse possession (LaSalle College v. Leonard, 32 Mass. App. Ct. 373 (1992)).

## **C. Discontinuance and Abandonment of Public Ways and Common Landings**

Public ways can only be discontinued and abandoned by the acts of county commissioners and town and city councils according to procedures set forth in the relevant statutes. The process of discontinuance is discussed below for the different types of public rights of way: state highways, county highways, town ways, statutory private ways and common landings.

### **1. Discontinuance and Abandonment of State Highways**

Massachusetts G.L. Chapter 81, Section 12 sets forth the procedure by which state highways can be discontinued. Upon their discontinuance, state highways become town ways. State highways rarely run to the shore, so the discussion will focus on the discontinuance and abandonment of county highways and town ways.

## **2. Discontinuance and Abandonment of County Highways, Town Ways and Statutory Private Ways**

County highways may be discontinued by county commissioners pursuant to G.L. Chapter 82, Section 1. Town ways and statutory private ways may be discontinued by town meeting, according to G.L. Chapter 82, Sections 21. The discontinuance of public ways is governed by specific procedures, including notice and hearing requirements, as set forth in Chapter 82, Section 32A. That section also provides that all discontinuances be filed with the city or town clerk.

There exists some confusion about the distinction between a "discontinuance" and an "abandonment". Many towns vote to "discontinue and abandon" town ways, while some do one or the other. Because generally only an easement for public passage in the way is acquired by towns and counties when they lay out a public way, there is no provision in Chapter 82, Section 32A for abandonment. Thus, use of the word "abandonment" is probably superfluous, and a more accurate term is "discontinuance." Abandonment has been interpreted to mean abandoning the obligation of maintenance.

Following a discontinuance, the public's easement of passage disappears and the land beneath the easement returns to the original landowner, free of the easement. After a discontinuance, a town's obligation of maintenance ceases. Private abutting landowners on a discontinued way may still have the private right of passage to use the way for access to their respective properties. However this use is at their own risk and expense. Lastly, some courts have held that an alteration of a county highway or town way automatically constitutes a discontinuance of the portions of the former layout no longer needed. In some cases, however, a town vote and public hearing is still necessary to effect a discontinuance. Where a county way was laid out over a town way which was never discontinued, and the county way is discontinued, the way has been held to revert to a town way until legally discontinued by the town. The law is not settled in this area.

## **3. Discontinuance of Common Landings**

According to G.L. Chapter 88, Section 17, any common landing place can be discontinued by vote of a town meeting. Any resident who is aggrieved can contest the discontinuance by appealing to the county commissioners, who must hold a hearing on the appeal of the discontinuance. According to the statute, the proceedings of the county commissioners shall, so far as is practicable, be in accordance with the law regarding the discontinuance of a way by county

commissioners. Consequently, the extensive notice and recording requirements applicable to the discontinuance of county ways must be similarly followed when common landings are discontinued (See G.L. Chapter 82, Section 32A). This only applies if it was laid out according to that statute. Any other public landing place is not a town way, and cannot be discontinued by a town or the county commissioners. (See G.L. Chapter 82, Section 30).

#### **D. Posting of Signs**

Massachusetts law provides a remedy for landowners who want to protect their property from becoming burdened by prescriptive easements. According to G.L. Chapter 187, Section 3, a landowner who is concerned that someone may be attempting to acquire an easement over his land may: (1) post a notice of his intention to prevent the acquisition of such an easement in a conspicuous place on the land for six successive days, or (2) serve a copy of the notice on a prospective easement acquirer in the same manner as serving a summons in a civil action. The posting or serving of the notice will prevent a particular person or persons from acquiring a prescriptive easement for any length of time thereafter. Although not required by law, landowners are usually advised to post or serve such notice every 20 years. The landowners may also choose to file the original notice, endorsed with a certificate of an officer qualified to serve civil process, in the appropriate registry of deeds within three months of the service or posting. The recorded certificate will then constitute conclusive evidence of the service or posting (G.L. Chapter 187, Section 3). Researchers should check for such notices at the registry of deeds, if they believe that an easement may have been created by prescription. Such a notice will not serve to cut off rights if they have already been acquired. If the prescriptive use continued for twenty years before the notice was posted, the notice has no effect against any rights thus acquired.

Another way a landowner may prevent an easement from developing on his property is through application of Massachusetts' Recreational Use Statute (G.L. Chapter 21, Section 17C). This method was discussed more fully in Chapter 3, Section F. To invoke the protection of the recreational use statute, a landowner might post a sign indicating that a portion of his property is open to *permissive* recreational use, but that users should respect the private nature of the property. This method strikes an opportune compromise between private ownership and public use, by providing public access without giving up private property rights.

## **E. Registration of Land**

Another method used by landowners to permanently prevent the acquisition of an easement by prescription is to file a registration case in Land Court under G.L. Chapter 185. (See G.L. Chapter 185, Section 53.) The filing of a petition by the landowner to register title to his land immediately “interrupts” the adverse use of that land. Thus if the adverse use has not already continued for 20 years, the claim of prescription will be defeated. The landowner’s petition is effective as of the filing date, even where notice of the petition is not received by the adverse user until after satisfaction of the 20-year prescriptive period.

Nor is registered land subject to easements by prescription or adverse possession (G.L. Chapter 185, Section 53). Land registration is a means by which a landowner can petition the Land Court to establish a certain and indefeasible title. The purpose of the registration process is to attain finality and unassailability of title to land. Massachusetts law provides that every person receiving a certificate of title from the Land Court holds registered title free of all encumbrances (i.e., easements, mortgages, liens, etc.) except those noted on the certificate (and certain encumbrances enumerated by statute (G.L. Chapter 185, Section 46)). Appendix B includes a more detailed description of the registration system. Suffice it to say, if you encounter registered land in your search for historic rights of way, the advice of counsel is recommended.

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### *Case #13: The Registration Blues*

*Town residents openly used a private way leading to the sea in a residential subdivision continuously and without permission for over 20 years. After 20 years of adverse use, the residents believed they had gained an easement by prescription over the private way. The residents of the subdivision, however, all owned registered land, and their titles included the land occupied by the private way. Thus an easement by prescription was permanently defeated.*

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*Bruggeman v. McMullen, 26 Mass. App. Ct. 963 (1988).*

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## **F. Conveyance or Granting of Public Property (Protection under Article 97)**

Public easements and public lands may be lost when a town conveys the land or grants a lease to use the property. In Massachusetts, however, there are significant safeguards protecting public land and easements that have been acquired for conservation purposes or for the protection of natural resources. In 1972, Article 97 of the Articles of Amendment to the Constitution of Massachusetts was approved by ballot question. Article 97 established for the citizens of the state the right to “clean

air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic and aesthetic qualities of their environment.” To that end, Article 97 required that all public lands and easements held for the furtherance of the public’s right to “the conservation, development and utilization of ...natural resources” cannot be “used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote” of both houses of the state legislature.

In a 1973 Opinion, the Massachusetts Attorney General defined the “natural resources” protected under Article 97. These natural resources include the following items, among others: ocean, shellfish and inland fisheries; rivers, streams, flood plains, lakes, ponds or other surface or subsurface water resources; seashores; dunes; marine resources; wetlands; open spaces; natural areas; parks or historic districts or sites. Lands and easements taken or acquired to conserve, develop or utilize any of these resources are thus protected by Article 97.

The Attorney General also concluded that the “dispositions” of land and easements for which a two-thirds vote of the legislature is required include: transfers of legal or physical control between agencies of government, between political subdivisions and between levels of government. Outright conveyances, takings by eminent domain, long-term and short-term leases, the granting or taking of easements, changes in the use of property and all means of transfer or change of legal or physical control are covered by Article 97.

Therefore, if a town-owned pier, park or pathway to the sea is converted to another use, sold or leased, the public may have rights under Article 97 to require that such action be authorized by a two-thirds vote of the legislature. Thus it may be difficult for a municipality to sell conservation land or easements or transfer such land to other uses. Article 97 therefore provides an additional safeguard that land devoted to a public use involving natural resources will remain available for public use.

## CONCLUSION

### THE IMPORTANCE OF PRESERVING HISTORIC WAYS *TODAY*

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Communities need to act now to preserve historic ways to the sea, because public rights may be in grave danger of abandonment or extinguishment. Access ways that are not used or recognized by the public may be lost forever, if they are not reclaimed in a timely manner. Even if an historic way appears trivial or useless, preservation is justified, because future uses can not always be foreseen. For instance, it may seem inconsequential to reclaim an historic right of way originally used by fishermen if the area is now closed due to pollution. Nevertheless, there may be new and different uses for the access point, and there may exist a possibility of environmental remediation. Similarly, a seemingly unimportant access way may some day play a pivotal role creating in a coastal hiking network, when linked up with other public pathways.

Thus it is never too soon, nor is any historic right too small, to pursue preservation. The preservation process itself, which necessarily includes gathering together concerned citizens, working with municipal officials, researching the local coastline and applying for grants, leads not only to preservation of historic ways, but to an increased stewardship of the coastline in other ways as well. A preservation project may serve as the first step in compiling a comprehensive coastal access plan or may spark the launching of related enhancement projects, such as coastal cleanups, local education efforts, “adopt-a-beach” and “adopt-a-stream” programs.

There is no question that the effort is great, but the rewards of a preservation project are well worth the effort. The value of an access way to the sea is unquantifiable, priceless, and almost impossible to describe. Henry Beston, author of *The Outermost House* said it simply and well: “For the gifts of life are the earth’s and they are given to all, and they are the songs of the birds at daybreak, Orion and the Bear, and the dawn seen over the ocean from the beach.”



## GLOSSARY OF TERMS

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**Abandonment:** An easement in real property may be abandoned by an intentional relinquishment thereof, evidenced by unequivocal acts inconsistent with the further assertion of any rights thereunder. This rule applies equally to public and private easements. The abandonment of a public easement is, however, separate and distinct from the vacation thereof. Vacation of a public easement, such as a highway, generally requires some formal action by public authorities, usually pursuant to statute.

**Acknowledgement:** A formal declaration made before a notary or attorney by the person who has signed the document. For a deed, it is a recitation that the deed was executed as the person's free act and deed. It is located at the end of a standard deed.

**Adverse Possession:** A method of acquisition of title to real property by possession for a statutory period under certain conditions. To acquire title, there must be proof of nonpermissive use that is actual, open, notorious, exclusive and adverse for the statutorily prescribed period.

**Along (or to, on, by or at) the Road:** In a deed description, this phrase is construed to mean along (or to, on, by, or at) the *centerline of the road* unless the description is specially qualified or a contrary intent is clear from the deed. (Note that private ownership to the centerline of the road does not necessarily defeat public rights of access. The public rights could be based on an easement rather than ownership in fee simple.)

**Along (or to, by or at) the South (east, northwest, etc.) Side of the Road:** This phrase is construed to mean along (or to, by or at) the side of the road. (Note that private ownership to the sides of the road on both sides suggests that the land under the road may well be owned by a public entity (state, county, town) but is not conclusive on the issue of public rights of access.)

**Ancient Ways:** Ways that have been used for decades and appear on ancient maps and documents as paths, town roads, highways, or public rights of way.

**Bounded by the Sea (or any tidal water):** This phrase is construed to mean to the low water mark or out to 100 rods (1650 feet) from the high water mark, whichever is less.

**Certificate of Title:** Upon entry of a judgment of registration pursuant to G.L. Chapter 185, the Land Court issues a certificate of title to be filed in the registry district of the Land Court in the county in which the land is located. (See Registered Land.)

**Chain of Title:** The recorded history of documents that affect the title to a parcel of land. A title researcher traces the links in the chain through conveyances, encumbrances, mortgages, liens, etc. to determine whether there are any defects in the chain that affect the strength of the ownership claim of the current record owner.

**Cloud on Title:** An adverse claim, encumbrance, undischarged mortgage, unreleased lien, defect in a prior deed, etc. That makes clear title to property uncertain.

**Common Landing:** A landing owned by a municipality and established pursuant to G.L. Chapter 88, Section 14. State law requires that all coastal cities and towns provide at least one common landing place on a tidal shore above the low water mark (G.L. Chapter 88, Section 14).

**Custom:** See **immemorial custom**.

**Dedication:** The appropriation of land, or an easement therein, by the owner, for the use of the public, and accepted for such use by or on behalf of the public. Such dedication may be express (formally declared) or by implication (arising by operation of law, facts or the owners conduct). This appropriation does not reserve any rights to the owner that are not compatible with the full exercise and enjoyment of the public uses to which the property or easement has been devoted.

**Deed:** A written document used by a property owner (grantor) to transfer or convey to a grantee an ownership interest in real property. There are many different types of deeds depending upon the type of grantor, circumstances of the conveyance and covenants made by the grantor.

**Discontinuance:** A formal method by which a town may discontinue in whole or in part public rights and/or responsibilities in public ways or public easements. Discontinuance of public roads and landings is governed by statute.

**Easement:** A limited property interest that a person or other entity (or the public) holds in land that is owned by another. The holder of an easement has certain limited rights to use or enjoy land owned by another or to keep the owner of the land from using it in a particular way. The exact nature of those rights is usually set forth

in the deed that created the easement. There are some easements, however, that are created by operation of law, confirmed in court rather than by deed, such as prescriptive easements and easements by implication.

**Easement by Prescription:** An easement that has been created by prescriptive use for the statutory period (see **Prescriptive Use**).

**Eminent Domain:** The power of the state, counties, cities and towns to take land for public purposes, such as for the purpose of laying out public highways, roads and landings. Takings by eminent domain are governed by G.L. Chapter 79; G.L. Chapter 80A; Chapter 81, Sections 7, 7A, 7C, 7G, 7M; G.L. Chapter 82, Section 7; G.L. Chapter 82, Section 24; and G.L. Chapter 88, Sections 14-15.

**Fee Simple:** The most extensive and complete legal interest in land that one may possess under law. For practical purposes, "fee simple" may be interpreted as meaning absolute ownership, subject only to land use controls such as zoning and building restrictions.

**Grantee:** The person who receives from the grantor a conveyance of real property or an interest in real property. Grantee commonly refers to the purchaser in a sale of property. (It will be the second listed name on standard deed forms.)

**Grantor:** The person transferring title to real property or an interest in real property. Grantor commonly refers to the seller in a sale of property. (It will be the first listed name on standard deed forms.)

**Grantor-Grantee Index:** A set of record books in the county registry of deeds listing all recorded instruments and the book and page number where they can be found. Some registries maintain separate index books for grantors and for grantees; others combine them into one book. The books cover a specified time period and list the deeds alphabetically by grantor and/or grantee. For each deed listed, the books specify the name of the grantor, the name of the grantee, the type of instrument, the town of the affected real estate, the date of recording and the book and page where it is recorded.

**Immemorial Custom/Usage:** A common law doctrine to create easements. The theory requires that the usage must have lasted from "time immemorial," without interruption and as a right. Moreover, it must be reasonable, certain, peaceably enjoyed and consistent with other customs and laws.

**Intertidal Zone:** The zone between the mean high and low water marks. In Massachusetts, the intertidal zone, although it may be privately owned, is subject to public trust rights of fishing, fowling and navigation.

**Laying Out:** A process by which the state, county or a municipality creates public ways. The lay out process is governed by state statute. Generally, laying out requires county commissioners, town selectmen, city councilors or their appointees to determine the proposed course of the way and notify all private property owners whose property is affected. For the lay out of county highways, a public hearing is required. For town ways and statutory private ways, selectmen must file a plan with the boundaries and measurements of the way with the town clerk, and the lay out must be accepted by a town's legislative body. See Appendix D.

**Plan Books:** Large books located at the registry of deeds in which approved subdivision plans, plans of land by licensed land surveyors, early town maps and similar drawings and maps are recorded. They are indexed by town, subdivision name and date of recording and frequently are referred to in legal descriptions in deeds. References to them are to "Pl. Bk." or "Plan Book" and then a specific page.

**Prescriptive Use:** A means by which the public may acquire rights to continue to use a piece of property. For the user to acquire such prescriptive rights, the general public must make continuous and uninterrupted use of property for at least twenty years in a manner that is under a claim of right, adverse to the owner, with his knowledge and acquiescence, or by use so open, notorious, visible and uninterrupted that knowledge and acquiescence will be presumed.

**Private Ways:** Private ways are ways over which the public has no right of passage. A way is a private way if it has never been dedicated and accepted, laid out by public authority or established by prescription. The public uses private ways only with the consent of the owner.

**Public Easement:** A public easement is an easement over privately-owned land for the purpose of public access to land or water not otherwise connected to a public way.

**Public Landing:** A public landing is any landing that the public has the right to use. It is distinguished from a "common landing," which is a public landing created

pursuant to statutory authority and thereby accorded certain protection by law.

**Public Way:** The term "public way" encompasses four different types of ways that the public has rights to use: state highways, county highways, town ways and statutory private ways.

**Right of Way:** The right or privilege to pass over a designated portion of land owned by another person. The right can be private (e.g., granted by one neighbor to another) or public (e.g., the public right to use certain streets).

**Rod:** A measure of length containing 16.5 feet. Frequently used in reference to the width of roads laid out by towns and in older property descriptions.

**Statutory Private Way:** A statutory private way is an easement over which the public has a right to travel that is created pursuant to G.L. Chapter 82, Section 24. The ways are laid out by town selectmen upon the petition of a private party. The cost of layout, land acquisition and repair are born entirely by the party proposing the way. The town has no obligation to maintain the way, though it may agree to maintain it for public convenience.

**Title Search:** A title search is an examination of public records to determine if there are any defects in the chain of title. It involves checking back to the original source of title (or some more recent point that has been accepted by title standards as being sufficient to ensure the high probability of clear title (i.e., 50 years in Massachusetts)) and then "running the title" forward, looking for defects in the links or encumbrances on the chain. A full title search is a relatively exhaustive search of relevant public records. In most cases, right of way researchers will not be conducting full title searches. The emphasis will be on the extent of public rights and geographic limits of private ownership, not on the quality of the private title to privately owned land.

**To (or along) Low Water:** This phrase is legally interpreted to mean to (or along) the low water mark or to (or along) a point (or line) 100 rods (1650 feet) below the high water line, whichever is less.

**Town Ways:** Town ways are laid out by the town according to G.L. Chapter 82, Sections 21-24, which require strict notice requirements and approval of the lay out by vote at town meeting. Town ways are easements across the land they cover.



## APPENDIX A

### CASE STUDY: THE ROCKPORT RIGHTS OF WAY COMMITTEE

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#### **Rockport's Tradition of Coastal Access**

The Town of Rockport is situated at the tip of Cape Ann along the north shore of Massachusetts. Its name describes the town's picturesque rocky shoreline, long prized by artists and famous for its scenic vistas and quarries of fine granite. In total, the Rockport coastline stretches for nearly eight miles from Folly Cove and Halibut Point at the north, southward to the sandy shores of Long Beach.

Rockport is one of the most "access rich" communities in Massachusetts with approximately four miles, or 50%, of its coastline either publicly owned or accessible by public rights of way. This ratio is significantly greater than the aggregate statewide ratio of publicly accessible land of only 19% (363 miles of the state's 1342 miles of coastline are publicly owned (27%), of which only approximately 252 miles are actually accessible (19%)).

The scenic Rockport coast is particularly well-suited for pedestrian use: pathways wind along rocky shores, sandy beaches stretch along the southern coast, and a picturesque harbor completes the center of town. Many public rights of way to the sea provide "radial access" across private storefront property to landings and lookouts, coastal pathways, and the ocean itself.

Rockport's pathways are part of a larger, interconnected system of ancient cartpaths and footpaths linking landings, beaches and coastal and inland pathways. Common in many Massachusetts coastal communities, such networks of ancient pathways originally developed as a means to access town landings and the shore for daily business. In Rockport (formerly part of the Town of Gloucester), access to the sea was so critical to the settlers that the original land grants by the Town of lots to private citizens conditioned ownership upon allowance of "water privileges" which allowed passage across private lots for the purpose of hauling goods to and from the shore. Historically, town landings were important transportation points in a time when roads were unreliable and inaccessible during the harsh New England winters and the muddy season. Both people and goods traveled by boat to avoid the difficult journey along poor roads. Pathways running both parallel and perpendicular to the shore linked town streets and residences to the landings. Cartways and pathways were important links to the shore for fishing as well, and thus played an essential role in the Rockport economy.

As in many communities, the use of coastal rights of way in Rockport gradually eroded over time as the community became less dependent on its landings for transportation, coastal residential development began to obscure the pathways, and daily use of the shore shifted from fishing and transportation to recreation. Less frequent use of pathways and landings caused them to become overgrown, and the overgrowth, in turn, obscured the paths even further. Compounding this natural decline were the efforts of some landowners who used fences, vegetation, or rocks, to disguise or obstruct rights of way. Other landowners threatened people attempting to use rights of way with signs or, in one reported case, with gunfire. A few other established rights of way were forgotten when property changed hands and a reference to a right of way was omitted from a deed. In a few cases, rights of way were lost when property owners challenged their existence in court and won because few records existed to prove their public status or insufficient evidence of prescriptive rights or custom existed.

Today, after a successful preservation effort, this trend has been reversed. Today Rockport's town landings remain important windows of public access to the sea for fishing, landing and launching small craft, scenic vistas, nature study, and picnicking. The right of ways leading to the landings connect the neighborhoods with the shore and other inland pathways and greatly enhance the quality of neighborhood life.

### **Grassroots Support for Rights of Way**

In 1961, state legislation requested Massachusetts coastal towns to report their public rights of way to the shore to the Massachusetts Department of Public Works, Division of Waterways. Rockport reported that 16 rights of way existed at that time. Today, after a successful preservation program, Rockport has documented and preserved approximately 45 rights of way to the sea.

The gradual decline of rights of way concerned Rockport residents long before an organized preservation program emerged. Rockport's movement to preserve its rights of way originated in late 1960s when the Town began an effort to identify public pathways and landings. The Rockport Conservation Commission formed a Public Rights of Way Subcommittee to examine the status of public rights of way belonging to the Town. A total of 41 coastal and inland rights of way were investigated as part of this study, at least 31 of which provided some degree of coastal access. The Subcommittee reported its findings to the Conservation Committee in 1968, but little was done to implement its recommendations at that time.

Not until the 1980s did a concerted effort to preserve Rockport's rights of way emerge. In 1985, a series of public meetings were held by an ad hoc Rights of Way Committee to discuss the condition of Rockport's rights of way. As more residents learned about the historic public rights of way, concern grew and other community organizations and leaders became involved. In 1986, the Cape Ann League of Women Voters organized the participation of several community groups and neighborhood associations including the Old Garden Beach Association, the Village Improvement Society, the Halibut Point Association, the Rocky Neck Area Association, the Thatcher Island Association, the Rockport Garden Club, and the Sandy Bay Historical Society in a week-long event with MCZM called "Coastweek '86". This event provided a forum for people with common concerns about the coast to share ideas and experiences. For example, one of the events at Coastweek '86 was a narrated slide show by Rockport resident and historian Harry Walen on historic rights of way in Rockport.

By 1987, public concern over the deteriorated condition of rights of way had mounted, and residents united to demand that the town commit to preserving them. Several residents petitioned the Town Council to establish a new town committee dedicated to preserving the ways, and at Town Meeting in May 1987, the Board of Selectmen appointed a temporary Rights of Way Committee to tackle the problem.

### **The Rockport Rights of Way Committee**

As a temporary committee, the Rockport Rights of Way Committee (the "ROW Committee") was primarily a volunteer effort and was largely unfunded by the Town. Two years later, in March 1989, Town Meeting elevated the ROW Committee to permanent town committee status. As a permanent committee, the ROW Committee is empowered to represent the Town of Rockport and use Town resources to carry out its work.

Building on the earlier work of the 1968 Rights of Way Subcommittee, the ROW Committee studied, investigated, and inventoried Rockport's rights of way. Over the course of seven years, they improved and preserved approximately 45 rights of way and landings, posted town signs at 19 rights of way, developed a process for preserving rights of way, and enhanced outdoor recreation in Rockport. The story of the Rockport ROW Committee and its accomplishments contains important lessons for other coastal communities undertaking a right of way preservation effort which may enable other communities to avoid "reinventing the wheel."

## The ROW Committee's Preservation Process

The ROW Committee's very first step in their preservation effort was to prioritize its work: what needed their attention, what could they realistically achieve, and where should they begin? The ROW Committee chose to begin by compiling an inventory of established and suspected rights of way.

"Established" public rights of way refers to ways clearly documented in deeds or official maps as public property. In Rockport, these consisted of common landings, other public landings, "paper streets", and footpaths or segments of shoreline dedicated to public use.

In contrast, "suspected" rights of way may require investigation or legal action to confirm public rights. In Rockport, some of the rights of way investigated were well-worn pathways that had existed as long as residents could remember, but for which no clear ownership records could be located. Others were pathways which at one time were known as public ways, but in recent time had become overgrown, encroached upon, or otherwise not widely used.

After compiling an initial inventory, the ROW Committee set out to discover the physical condition and legal status of each right of way. They began with the 1968 Rights of Way Subcommittee report and updated it by gathering information from town maps, deeds, historical records, the site, and long-time Rockport residents. Once the ROW Committee had ascertained the condition and legal status of a given right of way, it determined what steps were necessary and feasible to confirm public rights of use. Generally, the ROW Committee followed a process which breaks out into roughly six steps.

### Step One

The ROW Committee investigates encroachments it discovers on public rights of way, or responds to inquiries about impediments to public access at suspected rights of way.

### Step Two

Where reports concern established rights of way, the ROW Committee advises people to continue using the right of way, depending on its physical condition. The ROW Committee investigates the encroachment, confronts the alleged encroacher, informs them that the right of way is open to the public as indicated by Town maps and deeds, and seeks their cooperation in allowing public access.

Where a suspected right of way is concerned, the ROW Committee only advises continued use of the right of way pending further investigation when clear evidence exists that public rights to use the way exist. The ROW Committee will confront the alleged encroacher and inform them that public rights to use the way may exist and are being investigated.

### Step Three

People who report access problems at established or suspected rights of way attend a public meeting of the ROW Committee and describe the encroachment for the public record. When suspected rights of way are the subject of the report, they are also asked to compile and present a list of other people who have used, or currently use, the right of way in question. In addition, people are asked to supply the ROW Committee with an affidavit describing the access encroachment (See Appendix C).

### Step Four

The ROW Committee conducts a thorough investigation of town records for evidence relating to the right of way in question. Helpful sources consulted include:

- long-time residents;
- lists of town-owned properties and tax-exempt properties;
- fire maps maintained by the fire chief;
- town records, especially maps from the planning board and the assessor's office;
- the collections of libraries and historical societies;
- deeds and plans (at the county registry of deeds);
- probate records;
- maps produced for businesses, especially insurance maps;
- records of neighborhood associations;
- newspapers.

This stage of the right of way preservation process has often been the most labor intensive and time consuming for the ROW Committee. However, the time invested pays off because the quantity and quality of information about a right of way may make or break a legal action to confirm public rights.

### Step Five

Assisted by legal counsel, the ROW Committee evaluates the strength of information collected about public rights in a particular way. After discussing strategy and ascertaining how receptive private landowners are to public access, the ROW Committee decides whether legal action is required and/or feasible to confirm public rights.

An appropriate course of action is then identified and the Town decides whether to pursue it. A strategy may be as simple as a letter to a landowner seeking an acknowledgment of public rights, or as complex as filing a complaint in court asserting public rights to the right of way. Most often, the ROW Committee seeks a negotiated agreement with the private landowner to secure access.

### Step Six

Once public rights to use a right of way have been confirmed, the ROW Committee takes steps to ensure that future confusion over their existence does not occur. Several measures are important to achieve this. Most important is recording the deed or plan granting and describing the public right to use the way at the Registry of Deeds. Also critical is the posting of a street sign indicating that the way or landing is open to the public. The ROW Committee maintains its own index of rights of way using assessor's maps. Parcels and rights of ways are color coded to indicate how public access is allowed (e.g., ownership, easement, permission, or none). In addition, official town maps, the town right of way inventory, and especially the assessor's map, are amended to record the right of way as a public way. These measures help ensure that future property owners will not be able to deny its existence or prevent the public from using it.

In addition, the ROW Committee takes steps to ensure that rights of way do not become hidden or obscured and hence "forgotten" in the future. When possible, the ROW Committee seeks funding for rights of way maintenance and assistance from the public works department. When Town funding or maintenance assistance has been unavailable, the ROW Committee seeks volunteers to cut vegetation along the public rights of way and inspect them for intentional obstructions.

The ROW Committee followed these six steps for as many rights of way as it could, beginning with those they judged as the highest priority. Its experience in preserving and reclaiming rights of way demonstrates that a uniquely tailored approach is required for each right of way, depending on the particular problems encountered at each. The particular features of each right of way determine the legal steps necessary to confirm public rights to use it.

Following is a description of the ROW Committee's efforts to preserve or reclaim several Rockport rights of way. Each presented a slightly different challenge for the ROW Committee required a slightly different process for resolution.

#### Town Landings

The ROW Committee had a relatively easy time confirming public rights at Town Landings. Generally, the Town possessed deeds for all its Town Landings as well as many of the rights of way leading to them. For this reason, the ROW Committee did not have to engage in an extensive search for evidence of public use in order to confirm public rights to use the landing. Once a deed was located, the ROW Committee ensured that the landing was identified on Town maps as a Town Landing. A site investigation and survey were conducted when necessary to confirm the boundaries and discover whether any encroachments existed. They were then cleared of vegetation and posted with town signs.

#### Old Garden Landing and Path

At Old Garden Landing and Path, the ROW Committee's challenge was not so much to confirm public rights, as to balance competing public uses of the landing and to prevent them from interfering with the abutting private residential properties. The rocky shores of Old Garden Landing and Path are a favorite location for SCUBA enthusiasts of eastern New England. Neighborhood residents and their neighborhood association generally had regarded SCUBA divers as a nuisance at Old Garden Landing and Path because their equipment consumed a large portion of the landing's beach area, and because they suspected SCUBA divers of raiding offshore lobster traps. Intensive SCUBA use of Old Garden Landing and Path prevented other members of the public from enjoying the landing for walking, sunbathing, fishing. The Old Garden Beach Association hired a lifeguard to police the beach and posted signs about use of the area.

To resolve this clash of public uses, the ROW Committee decided that its best strategy would be to limit access to the landing. By restricting parking at the Old Garden Beach parking lot to Rockport residents only, the Town discouraged use by the many non-resident SCUBA divers who traveled to Rockport in large groups from inland communities. Unfortunately, the parking restriction does not distinguish between non-resident SCUBA divers and other non-residents who would use the landing for other purposes. Thus, its overall effect is to discourage all public use of the landing by non-residents. This strategy illustrates the compromise of general public rights too often reached when a Town wants to promote public access, but must at the same time, accommodate the concerns of nearby residents.

### Steep Bank Landing

In 1936 the Town of Rockport petitioned the Essex County Commissioners to lay out the boundaries of Steep Bank Landing as they could not be readily ascertained. The petition was granted and the boundaries laid out. In 1960 the condition of the landing had deteriorated as a result of coastal erosion, but the Town obtained state funding to repair the damage so use could continue. During the 1980s, an abutter to the landing sought to disguise the landing as a portion of his own property by placing a flagpole upon the landing and landscaping it as though part of his yard. In 1989, the ROW Committee surveyed the landing and excavated the original Essex County markers which had been placed there to mark the boundaries. The Committee requested the abutter to refrain from encroaching on the way and landing.

During a coastal storm in 1991, severe erosion of the bank made the way to the landing nearly impassable. The Town received funding from the Federal Emergency Management Agency to repair it, however, the work was not sufficient to restore the way and landing to their original condition. Currently, the abutters continue to attempt to intimidate people by posting private property signs along the way. The ROW Committee maintains a public way sign marking the way to the landing and remains vigilant in protecting this site.

### The Atlantic Path

The "Atlantic Path" or "Atlantic Walk" was the ROW Committee's highest priority for preservation and its first undertaking. This pathway begins near the historic Ralph Waldo Emerson Inn at Cathedral Avenue and leads northward along the coast around Andrews Point to Hoop Pole Cove, Halibut Point, the Halibut Point State Reservation, and Folly Cove. It is the longest lateral coastal walkway in Massachusetts, stretching for nearly four miles and touching fifty properties along the coast.

By reviewing historical records and guidebooks, the ROW Committee learned that the public has used the Atlantic Path for over 100 years. One local guidebook published in 1873 describes a walking trail along the coast from Pigeon Cove to Halibut Point referred to as the "marginal path." The ROW Committee also discovered another description of the Atlantic Path in a book by Rockport resident and historian Harry Walen entitled *Alluring Rockport*, which details a similar coastal walk from Pigeon Cove to Halibut Point he discovered from historical research.

One of the ROW Committee's first tasks was to gather information from the community about use of the Atlantic Path. The ROW Committee already had approximately 200 affidavits of Rockport residents signed in 1983 in response to one resident's obstruction of the Atlantic Path. In these affidavits, the residents attested to their own knowledge, and the common knowledge of the community, that Rockport residents and their guests have a right to use the Atlantic Path as it crosses the private properties between Hoop Pole Cove and Cathedral Avenue. These affidavits are important evidence of the Path's use and Rockport's strong tradition of coastal access and, though alone they are not enough to prove public rights, they will be considered among all other evidence by the court in making its decision.

With this background information in hand, the ROW Committee set out to ascertain the precise legal status of the Atlantic Path at each lot it crossed. The Town paid for the services of an attorney to assist the ROW Committee research the title of each property along the Atlantic Path. The ROW Committee enlisted the help of an attorney who generously offered to conduct the title examinations at a reduced rate with the assistance of a volunteer intern. This was a significant savings to the ROW Committee and helped stretch its limited legal budget a bit farther.

The title investigation revealed that many deeds to the properties along the Path contained a reference to the Atlantic Path or to public rights to use a path across the property. Eighteen titles were found to explicitly recognize the Path in deeds. Eleven additional lots were town, state, or other public property and, therefore, available for public use. Only 13 private properties did not include a reference to the Atlantic Path which unequivocally bound the owners to permit public use of the Atlantic Path. In some cases, the public right to use the Atlantic Path was evident in the deeds of former property owners, but became unclear when the property changed hands and subsequent deeds failed to refer to any public rights to use the Atlantic Path.

After ascertaining the legal status of the Atlantic Path for each parcel, the ROW Committee approached the owners seeking their assent to its existence and the public right to use it. In some cases, they encountered little or no resistance to public use of the Atlantic Path.

In others, property owners recognized public rights, but disagreed about the proper location of the Atlantic Path. In a few cases, the owners flatly refused to acknowledge the Path and refused to allow public use.

Eventually, the ROW Committee successfully secured public rights to use the Atlantic Path in all but two of the 13 locations where its legal status as a public right of way was not clearly established in deeds. A combination of persuasive negotiation, persistence, and determination by the ROW Committee permitted this achievement. The ROW Committee's willingness to negotiate and accommodate the concerns of private owners regarding the public "intrusion" was rewarded. For example, on one property where the legal status of the Atlantic Path as a public easement was clear, but where coastal erosion had rendered sections of the Atlantic Path impassable, the Town was willing to relinquish public ownership of adjacent sea rocks in order to reroute the Atlantic Path with a new deeded public easement across an upland section the property.

Another example of successful negotiation to secure access occurred at the first property the Atlantic Path crosses at Cathedral Avenue. Though neither the deed nor the recorded plans to this lot memorialized the Atlantic Path as a public path, its owners appreciated the historic significance of the Atlantic Path and its value to the community for coastal access. At the same time, however, they were also concerned with guarding the privacy of their home if public use of the Atlantic Path intensified, and ultimately refused the ROW Committee's request to convey by deed public rights to use the Atlantic Path. However, after a series of negotiations they reached an agreement whereby the landowners would allow access and the posting of a sign for the Atlantic Path where it enters their lot. The sign announced the beginning of the path, and asked people to be considerate of the private property it crosses. In addition, they supplied a letter to the town expressing their intention not to interfere with public use of the path, and recognizing long time uncontested use of their property by the public. This agreement was a very significant accomplishment for the ROW Committee, but represents much less than they had initially hoped to achieve because it ensures public use of the Path only as long as the property is owned by the people who made the agreement with the Town. It is essentially an agreement that the town may license people to use the path over this land. (See Chapter 2, Section B.2.c.). Once the property changes hands, the ROW Committee will need to reach a new agreement for public access with the new owners.

In other cases, the level of negotiation and compromise necessary to secure public use of the Atlantic Path was much less. For example, the owner at the extension of Gale Avenue (a so-called "paper street") had intentionally obscured the right of way to the Atlantic Path with an accumulation of storm debris. The ROW Committee merely had to notify the abutter of the obstruction to the way and request the Department of Public Works to remove the debris.

Today Gale Avenue is marked with a ROW Committee sign stating that it is a "Way to the Atlantic Path."

In a similar instance, the extension of Lynnwood Avenue leading to the Atlantic Path was obscured by abutters who had planted a garden across it. The ROW Committee approached the abutters, notified them of the public way, and reached an agreement allowing the garden to remain, provided that it was altered to permit access through the way. Posting a sign was key to promoting access at this right of way where otherwise people would assume the way was part of someone's private garden.

For the most part, the ROW Committee successfully used negotiation and compromise to secure public access from the beginning of the Atlantic Path at Pigeon Cove, around Andrew's Point and Hoop Pole Cove, all the way to the northernmost property along the Atlantic Path abutting the Halibut Point State Park. But continuing access across two properties along the northern section of the Path was particularly challenging. In one case, the landowners had landscaped their yard to reroute the Path to pass farther from their home and across a difficult rocky outcrop, even though their deed showed the Path's proper location on the upland. After unsuccessful discussions with the landowners to restore the Path to its prior location, the Town went to court and secured a restraining order to prohibit the owners from obstructing the Path.

At the northernmost property on the Path, the ROW Committee encountered serious resistance to preservation of the Atlantic Path. This lot is a crucial link on the Path because it links the Path to town conservation land and the Halibut Point State Park. This property was one of the 13 properties whose deeds did not specify public rights to use the Atlantic Path. Because the route of the Atlantic Path across this parcel passes very close to their residence, the owners, viewed the Atlantic Path as an invasion of their privacy.

Initially, the ROW Committee tried to negotiate for permanent access across the lot, but after nine months of negotiations, the Row Committee abandoned the hope of achieving an agreement. On January 11, 1993, the Row Committee passed a motion resolving to take all action necessary to secure a public right of way across the property. In May 1993, the landowners, the Hoopers, filed suit against the Town, the Board of Selectmen, and the ROW Committee in Land Court to confirm that the public did not have a right to use the Atlantic Path to cross their property. In July 1995, the landowners sued the Attorney General as representative of any general public rights which may have existed in the Path. (Hooper v. Town of Rockport and the Commonwealth of Massachusetts, Land Court Misc. No. 193549).

The case was tried before a justice of the Land Court over a period of about 13 days. The town and the state argued that the public had rights to use the Path by prescription, dedication, custom and use from time immemorial, and grant. (See Chapter 4). In April 1996,

almost three years after the filing of the lawsuit, the Land Court ruled in favor of the Hoopers and declined to find any public rights to use the Path across this lot. At the time of this publication, it is not known whether the decision will be appealed.

Elsewhere on the Path, once the ROW Committee secured public rights to use a section of the Atlantic Path, it worked to improve the physical condition and posted signs marking to the Path. The ROW Committee enlisted the help of Rockport neighborhood associations, particularly the Andrews Point Association, in cutting vegetation and clearing rocks and storm debris from the Path. The ROW Committee also organized numerous excursions to walk sections of the Atlantic Path, cutting and clearing vegetation and debris as they went. In these ways the Town exercised "corporate action" over the Path.

#### Footpath to the Long Beach Footbridge

Long Beach comprises the southernmost section of Rockport's coast. Though Long Beach is a Town Beach, public access is complicated by the mixed public-private ownership of its only access road, Glenmere Road. Most of the length of Glenmere Road is a public way, but one section in the middle is actually owned by the abutter who charges a nominal "toll" to summer beachgoers for crossing his private section of road. Because the toll has the effect of reducing the overall number of Long Beach users, neither neighborhood residents nor the Town object to its imposition, though legally they could insist that the public pass for free.

Long Beach is also accessible to pedestrians via a right of way from Thatcher Road across a footbridge spanning the Saratoga Creek. Thatcher Road is a private way over which the town has a right of way and abutters have deeded access rights. The Town constructed the footbridge in 1823 for residents to cross the creek to Long Beach, and has maintained it ever since. In 1991, for example, the footbridge was destroyed in a coastal storm and subsequently repaired with public funds obtained from the Federal Emergency Management Agency. For many years, the town has had problems with one abutter interfering with use of the footbridge by other abutter's with deeded access rights and the public. Taking advantage of the 1991 storm, the private abutter declared the footbridge closed after it was destroyed and posted a sign announcing, "The public is no longer allowed to use this right of way." Residents at Long Beach with deeded property rights to use the footbridge brought the matter to the attention of the ROW Committee. Upon investigation, the ROW Committee discovered that the way had been blocked by a car and that rocks near the footbridge had been spray-painted to read "PRIVATE." In addition, the ROW Committee discovered that the way had become considerably narrower than its original twelve foot width due to improper maintenance by the Town.

To clarify both the public and private rights to use the footpath leading to the Long Beach footbridge, the ROW Committee first gathered information to show that the public had rights to use the way and the footbridge. Because the Town had built and maintained the footbridge for approximately 170 years, corporate action demonstrating dominion and control was clear. The ROW Committee next attempted to negotiate an agreement with the abutter to resolve the controversy. They reached an oral agreement whereby the abutter was to expressly grant to the town a right of way to use the footpath to the Long Beach footbridge. In exchange, the Town would agree to limit use of the right of way to a pedestrian walkway only, and would post a sign at Thatcher Road reading, "Footpath to Long Beach Footbridge, For Pedestrians Only." After a considerable effort, the Town was unable to formalize this agreement in writing. The ROW Committee then sought permission from the Board of Selectmen to erect a sign marking the footbridge as a public way, but was denied by a vote of 2-2 with one abstention. Refusing to accept defeat, the Committee took their request to town meeting where they succeeded in getting a vote approving the posting of a sign to mark the Saratoga Creek Footbridge.

#### Way to Cogswell Farms Landing

At Cogswell Farms Landing, the ROW Committee faced a challenge of enforcing public rights to access a former Essex County Landing. This landing was originally the point of departure for Cogswell Farms cattle that grazed on Milk Island. At that time, a 32 foot wide right of way led to the landing. In 1958, acting on a petition of the abutting landowner, the state legislature voted to relinquish public rights in the landing. Town Meeting subsequently voted to accept the relinquishment and in exchange received a smaller six foot wide way deeded to the inhabitants of Rockport for fishing, fowling, and nature study.

When the ROW Committee investigated the Way, they found it had become obscured as a result of the abutter's gate and fence which inhibited public access. The Way was also completely overgrown with vegetation, as a result of the Town's failure to regularly maintain it. Though the ROW Committee posted a sign on the gate to mark the Way, it was immediately removed by the abutter.

The ROW Committee and the Board of Selectmen began a series of negotiations with the abutter to the way and made clear their intention of enforcing the Public right to use the way. On July 27, 1989, the Board of Selectmen passed a motion to remove the gate at the Way to Cogswell Landing unless the abutter agreed to replace and maintain, at his own expense, the Town sign which he had previously removed from the Way. This vote evolved into a compromise by which the Town agreed to allow the gate to remain provided that the Way remained unobstructed for public use and the sign remained. In July 1992, the Way was cleared

by the ROW Committee with the aid of local volunteers and is now open for public use. The sign still marks the way and landing, but has had to be replaced by the ROW Committee three times.

The ROW Committee's experience at Cogswell Farms Landing illustrates a compromise reached under political constraints. In the end, the ROW Committee settled for a less than the Town was legally entitled to by permitting the gate to remain at the entrance to the Way, but it achieved a compromise that secured continued public access without a hard-fought court battle.

### **Key Elements of ROW Committee Success**

The achievements of the ROW Committee over a seven year period are a testament to citizen involvement and activism. What began as a handful of citizen at the grassroots level matured into a serious town commitment to preserving historic rights of way to the sea. In the face of considerable private landowner opposition, the ROW Committee succeeded in confirming public rights to use approximately 45 coastal rights of way. Three elements seem to have been particularly important to their success: strong leadership, broad community support, and dedicated volunteers.

The success of the ROW Committee has been due in no small part to the tireless energy, persistence and leadership of its founder and chairperson, Ann Sheinwald. As Chair of the ROW Committee from 1987-1996, Sheinwald led the effort to inventory, preserve, and reclaim Rockport's rights of way. The continuity and strength of her leadership were keys to the success of a committee comprised entirely of volunteers. Her ability to stimulate interest in rights of way preservation at both the local and state levels, to motivate and educate decision-makers on right of way preservation, and then to orchestrate an organized town effort, was the cornerstone of the ROW Committee success.

Sheinwald worked hard to win the support of the Rockport community and the town government. In doing so, she found that the several Rockport Neighborhood Associations were particularly important to the ROW Committee. These groups assisted the ROW Committee by cutting vegetation to maintain the rights of ways in their neighborhoods, and by sponsoring public activities at the ways which asserted public right to use them. In general, the neighborhood associations were very supportive of ROW Committee efforts to preserve and reclaim ways because their members often stood to benefit the most from coastal access improvements in their neighborhood. However, the ROW Committee learned that they often favored access for neighborhood residents only rather than the public in general. For example,

the associations often supported posting "resident only" parking signs near landings or erecting a gate at the entrance to a way to decrease its visibility.

Community support became particularly important for the ROW Committee when town funding fell short of the ROW Committee's needs. When that happened, residents formed the Friends of the Rockport Rights of Way Committee ("FORROW") to fill the gap. This group was an independent non-profit organization created in 1989 to support the ROW Committee preservation effort. As a private organization, FORROW could perform functions which the ROW Committee could not as an official Town committee. FORROW sponsored fundraising events, helped to clear right of ways, organized picnics and outings at the landings, and published a guide to Rockport's landings and public rights of way.

Behind Sheinwald stood a group of dedicated committee members willing to devote countless hours to attend public meetings, advise residents, maintain rights of way, and perform the time consuming research and record-keeping necessary to reclaim the rights of way. Many more people in addition to the immediate members of the ROW Committee were also supportive in its efforts. In particular, the support of one Rockport Selectman, Frederick Tarr, was key. As a Selectman, Tarr worked to ensure that right of way preservation was a Town priority. As a Rockport native and resident, Tarr had enjoyed Rockport's coastal and inland paths for many years and understood the long tradition of public pathways in the community. For over 20 years, he has helped to educate the public about Rockport's rich history of public pathways by guiding group walks through the town's inland and coastal footpaths every Sunday morning. Tarr marks and clears the paths during these walks, and encourages his guests to bring their own clippers to assist him in maintaining the ways.

Another key person to the ROW Committee's success has been Christina Wolfe, an attorney who donated countless pro bono hours to researching titles, searching town records for evidence of corporate action and lay out, and advising the ROW Committee members on the legal status of ways and landings. Without her significant and generous contribution, right of way preservation would have been a much less affordable undertaking.

The volunteers were especially helpful in accomplishing a secondary objective of the ROW Committee - promoting public awareness and use of the pathways. One way the ROW Committee worked to enhance public awareness of rights of way was to encourage and organize guided walks along Rockport's pathways and social outings at rights of way. For example, a local Girl Scout troop walked the Atlantic Path, a women's tennis club held a coffee hour at Steep Bank Landing, several residents held Wednesday evening picnics at the Andrew's Point Rocks near the Dawn Avenue right of way. The ROW Committee promotes walking the pathways for several reasons. First, public participation educates the community about the existence of the pathways, local history, and the community's natural resources. Second,

walkers help maintain the pathways by cutting them periodically, a significant savings to the Town in maintenance costs. Third, and most importantly, walking the pathways asserts the public right to use them by preventing the property owner whose land they cross from claiming that the pathway has been abandoned.

The most important aspect of public awareness was erecting signs to identify the rights of way as public ways so that people would feel comfortable using them. In many cases, the signs encourage use of ways where, otherwise, proximity to private property would discourage people from using them. Note that the posting of signs is an instance of "corporate action." Signs were erected to mark 19 rights of way. In conjunction with posting signs, a map and guidebook to Rockport rights of way is being developed to show people where to find the rights of way.

## **ROW Committee Challenges**

Despite the general community support, the ROW Committee's road to success was without an occasional pothole. Even though community support for their undertaking was generous, it did not translate into an equivalent amount of political capital. The lack of town financial assistance frequently limited the ROW Committee's ability to achieve its goals. Opposition to devoting funds to the ROW Committee centered around concerns that right of way preservation would be too expensive and would divert limited Town funds from other essential municipal concerns such as crime prevention and education. In addition, there was the frustrating political reality of opposition from landowners who viewed preservation of rights of way as an invasion of their privacy. Initially, however, their opposition was tempered by stronger community support for preservation that made complete opposition to the ROW Committee an unpopular political position for the Board of Selectmen.

A lack of funding often frustrated ROW Committee work. Right of way preservation involves fairly expensive and time consuming work such as legal assistance, surveying, and physical improvements. The shortage of town funding forced the ROW Committee to make frugal choices on the expensive aspects of its preservation efforts, like legal assistance. Whenever possible, the ROW Committee relied on volunteer assistance and pro bono representation. ROW Committee members perform as much of the time intensive investigative work as they can handle themselves, such as title searches, checking maps, inspecting ways and landings, searching and uncovering markers on property, and clearing right of ways. Prior to the litigation over the Atlantic Path, the ROW Committee estimates that Rockport spent a total of only \$50,000 on legal expenses to safeguard rights of way to the sea over a 30 year period.

FORROW was a partial solution to the funding problem. FORROW was deliberately created as an independent support organization free from legal constraints that restrain official Government committees. It provides work parties and funding support when officially requested, but reserves its funds for non-official activities that cannot be publicly funded. Even where FORROW was able to ease the ROW Committee's financial burden, its participation in the preservation effort at times frustrated the ROW Committee. Because the ROW Committee was directly accountable to the Town and acted in an official capacity for the Town, FORROW lacked this mandate and represented only the wishes of one segment of the community concerned with right of way preservation.

## **Conclusion**

After a successful effort to preserve Rockport's rights of way, the ROW Committee is turning its attention to Rockport's inland pathways. Ideally, the ROW Committee hopes to eventually link the inland and coastal rights of way to form a network of pathways through Rockport's quarries and wooded areas, with connections to Gloucester pathways and a regional trails network.

The ROW Committee deserves high praise for successfully pioneering the preservation of historic ways to the sea in Massachusetts. This dedicated group of citizens has successfully documented and preserved approximately 45 rights of way. Despite a few frustrations and losses along the way, a key achievement is that access advocacy is now a "going concern" in Rockport, where advocacy for public access rights has been institutionalized to a degree found nowhere else in Massachusetts coastal communities.



## APPENDIX B

### A GUIDE TO TITLE SEARCHES

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1. A Guide to Title Searches
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3. Index Sheet (Sample) – **Not available electronically**
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5. Internet Resources
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## APPENDIX B.1

### A GUIDE TO TITLE SEARCHES

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Many of the records most valuable to an historic reclamation project will be found at the registry of deeds. There are 21 different registries within Massachusetts; one for each county. Although each registry has its idiosyncrasies, the basic research method outlined below will be applicable at all registries.

To complicate matters slightly, Massachusetts has a system of land registration. Under that system, most instruments affecting title to registered land are filed in the corresponding registry district of the Land Court. Accordingly, Massachusetts has a dual system of record keeping: the registries of deeds for instruments affecting unregistered land and the registry districts of the Land Court for instruments affecting registered land. At each registry of deeds, researchers ordinarily find a large room for the records of unregistered land and a smaller, separate room delegated to the records for registered land. (Researchers can recognize registered land by its multi-digit certificate number. Recorded land will always be referenced by book and page.) A more detailed description of land court and the land registration system will follow below.

In order to understand the records contained at the registry, the researcher needs a basic understanding of the nature of land transfers, the language of deeds and the mechanics of recording. These concepts are reviewed below.

#### **A. TYPES OF LAND TRANSFERS**

Ownership of real estate can be transferred in several ways. The most common are the following:

1. By voluntary conveyance through deed (including warranty deeds, quit claim deeds with and without covenant, mortgage deeds, easement deeds, etc.);
2. By involuntary conveyance such as through municipal tax liens;
3. By right of survivorship upon the death of a joint tenant (such as property owned jointly by a husband and wife transferring automatically to the wife on the death of the husband); and
4. Upon death of a person who is not a joint tenant, by will or intestate succession.

The records of transfers by deed and liens will be contained in the registry of deeds for the county in which the property is located. Transfers to a surviving joint tenant occur automatically, but in a subsequent transfer by the surviving joint tenant, there will probably be a recitation about the death of the predeceasing joint tenant and, for transfers, occurring more recently, a certificate of discharge of inheritance tax lien. The records concerning transfers by will or intestate succession will be contained in the probate court for the county of residence of the deceased if the estate was submitted for probate. Depending upon the date of death, certain records may also appear in the registry of deeds of the county in which the property is located.

The researcher will generally not have to be too concerned with the details of individual transfers since the researcher's focus will be on how those conveyances affect public rights. But the researcher will need to be able to follow the chain of transfers affecting certain parcels of land back through time to get to the earlier deeds, because they may contain important information. It is likely that the most relevant information in county records will be found in deeds and liens (not in probate records or records affecting transfers by survivorship), because these contain the most detailed descriptions of the land and interests involved, and it is in these descriptions that relevant changes in the description will usually appear first (e.g., only a portion of the property may be conveyed or an easement may be granted). These descriptions may contain important information such as the precise bounds of the land affected by the deed, whether the parcel abuts a public road and whether it is subject to encumbrances such as an easement for public passage over the land.

## **B. COMMON TERMS**

There are certain basic terms with which the researcher should be familiar prior to undertaking research at the registry of deeds. They include the following: chain of title, deed, grantee, grantor, grantor-grantee index, plan books, right of way and title search. These and others are defined in the Glossary.

## **C. HOW TO FIND INFORMATION AT THE REGISTRY OF DEEDS**

The information at the registry of deeds is relatively easy to find once the researcher understands the filing system used. The following are the basic steps that one would follow in searching the records for a particular parcel of land to see whether there is any hint of public title, easement or reservation for public access running across that property or adjacent to that parcel.

1. Prior to arriving at the registry of deeds, obtain specific information about the present owner and the probable location of the parcel. That information can be obtained through the records of the *tax assessor*. By looking at the assessor's index map for the town, you can determine the map and lot number of the parcel that you want to research. Using the map and lot number, you can determine the name of the person most recently taxed for that property (e.g., Robert F. Ames). Make sure that you note the full names of all people listed. If there has been a conveyance within the last year, that person may no longer be the owner, but the information is still sufficient to access the relevant records at the registry of deeds.

The tax assessor's records will probably also contain information about the year the owner (Ames) was first taxed on that property and will usually contain reference to the *Book and Page number* at which the deed to "Ames" is recorded in the registry of deeds. Also, unless you are intimately familiar with the particular site and the surrounding area, it is helpful to make a sketch of the area from the tax map, including any distances and boundaries that appear on the map. While the tax map is not always completely accurate, it can usually be of considerable help in making sense of descriptions given in deeds.

2. Go to the county *registry of deeds*. If the assessor's records noted a Book and Page number, find that numbered deed book and turn to the page listed. If the assessor's records are correct, you should find the deed to "Ames" for the relevant parcel of land. The deed may affect other parcels of land as well. If the assessor's records appear to be incorrect or do not include a Book and Page reference, you will need to use the *grantor-grantee index books* at the registry to find the reference. The index books list all of the names of grantors and grantees in alphabetical order for all deeds recorded at the registry during a specific time period.

The researcher should find the index book (grantee index if they are organized in separate books) for the initial letter of the present owner's last name ("A" for Ames) that includes the year (e.g., 1972) that "Ames" was first taxed on that property. (If the year "Ames" was first taxed is not available from the tax assessor, the researcher would need to start with the most recent set of indices (for the current year) and then work back in time. The researcher would look in the index under the present owner's name (Ames, Robert F.) for deeds in which Robert F. Ames or Robert Ames is the grantee (buyer). For each such deed listed, the researcher would need to turn to the deed in the relevant deed book at the listed page. That description should then be read carefully to make sure that the deed applies to the parcel being researched. (It could instead be the deed for another parcel of land also purchased by "Robert Ames" at approximately the same time.) This process should be repeated until the appropriate deed affecting the parcel being researched is found.

Be aware that there is a lack of standardization among the indexing systems of the registries. This lack of standardization may hamper your search, especially if you are

searching by computer. If you have trouble finding your subject's name in the index books, consider the following:

- a. *Misspellings.* Misspellings have been known to occur. Researchers should be creative in their searches and look under alternate spellings (i.e., for Ames, check Aimes, Aymes, etc.). The spelling of unusual names should be checked even more closely (i.e., DePaula).
- b. *Punctuation Marks.* An owner such as "A.A.A. Inc." may be also listed as "AAA Inc."
- c. *Numbers in the Owner's Name.* Owners with numbers in their titles may raise particularly vexing indexing problems. If the owner's name is "3rd Avenue Realty Trust," the name may be indexed under "A" for "Avenue" or "T" for third, as well as "3" for "3rd." Usually, if the owner's name begins with a number, the name will be indexed under the first letter of the number (e.g., "42nd Street Realty Trust," will most often be indexed under "F" for "forty").
- d. *Alphabetizing.* Because of lack of standardization, some indexes may place "Newell" before "New England;" others will place "Newell" after "New England." Researchers must check indexes carefully.

3. The researcher should fill out a deed information sheet for the deed to the current owner, "Robert F. Ames." (See Appendix B-2 for a sample sheet.) That sheet will contain in summary form the information needed to document the chain of title and to allow a reviewing attorney to determine if there are any obvious defects in the deed. In completing the sheet the researcher should be careful to fill in all of the information requested since it will aid the researcher in keeping track of the information and will allow a reviewing attorney to review the research more easily when assessing the strength of the claim of public rights. Particular note should be made of references to roads, ways, easements or similar indications of pedestrian or vehicular passageways on or adjacent to the parcel being researched. Note should also be made of any references to subdivision plans.

4. The researcher should then shift to researching under the name of the person who conveyed the property to the present owner (e.g., David C. Bach). The immediate goal is to find the deed that conveyed the property to "Bach." The first place to check for this information is the deed from "Bach" to "Ames". At the end of the description, it may contain a statement that this is the same land (or a portion of the land) conveyed to "Bach" by deed of "Dorothy Clark" dated \_\_\_\_ and recorded in the said registry of deeds in Book \_\_\_\_, Page \_\_\_\_\_. If so, that listed book and page is the first place to check for the deed from "Clark" to "Bach." If a reference to "Bach's" source of title is missing (or inaccurate) the researcher will need to repeat the process outlined in step 2, searching under the name

"Bach, David C." starting with the year in which the conveyance was made from "Bach" to "Ames" and looking for deeds in which "Bach" was the grantee.

Once the deed from "Clark" to "Bach" is found, a deed information sheet should be filled out for that deed. The researcher should pay particular attention to determining whether the deed description is the same as that contained in the deed from "Bach" to "Ames." If any discrepancies are found, the researcher should determine whether this deed actually affects the site being researched. (For example, it may actually be another parcel being transferred from Clark to Bach, or could be a larger parcel of land that contains the parcel that Bach later transferred to Ames.) If it does affect the site, the researcher should make careful note on the information sheet of the differences in the description.

5. Step 4 should be repeated for each prior owner until the researcher has gone back in time as far as is necessary. The initial searches for each site should go back at least 50 years. If a hint of public title, easement or reservation is found during that time, the search should be extended farther back in time as is necessary to gather relevant information. Depending on how important the site is, the researcher may want to extend the initial search back farther than 50 years looking for a hint of public title, easement or reservation.

6. As stated in Step 4, it is possible that the researcher, at some point in the backward research, may encounter a deed that omits reference to its grantor's title. For example, the researcher may find that in the deed from Bach to Ames, there is no reference to the deed that gave Bach his title. The researcher must then examine the grantee index under the name of the grantor in the earliest deed found (Bach) to see if there is any entry of a deed to such a person. The researcher must check the grantee index backward from the date of the deed to a length of time approximating the maximum span of Bach's life. If Bach does not appear as a grantee in the index, the only other way he could have obtained a record title is by descent or by devise, in other words by inheritance. In that event, the researcher must check the *registry of probate*.

In the registry of probate for each county, there is an alphabetical index organized by years (e.g., A -F, 1930-40) of all persons who have died (decedents) whose estates have passed through that county's probate court. This index will disclose the town in which each listed decedent resided and the year when the petition to settle his estate was filed. Each listing in the index will also have a docket number identifying a file containing all the documents entered in the estate.

The researcher at the registry of probate has a real "Columbo" task. He or she must find the decedent who gave title to the last grantor found. In the example above, the

researcher is looking for a person who gave title by devise or descent to Charles Bach. Unfortunately, the only thing a researcher knows when he goes to the registry of probate is the name of the last grantor (Bach) and the description of the property. To make things more difficult, there is no index at the registry of probate based on the location of land or the names of heirs or devisees. Thus a researcher's only hope is to find, by a shrewd guess or hunch, in the alphabetical index at the registry, a decedent who might be an ancestor of the last grantor. Thus, the researcher will check in the index books for the name, Bach, and hope to find someone who has bequeathed property to the Bach named on the last deed. If, however, the surname is a common one, the researcher may have a tremendous task.

Even if the researcher is lucky enough to find an estate listing "Bach" as an heir or devisee, the researcher still must determine whether the particular property at issue was involved in that estate. If there was a will in the estate, it probably will not describe any real estate with sufficient specificity (i.e., by metes and bounds). Fortunately, Massachusetts law requires the filing of an inventory of the assets of the decedent. The researcher may therefore find in the inventory a description of the decedent's real property located in the state. It is likely, however, that such property will be described only in general terms. Usually, the inventory, nevertheless, will show a researcher whether the search is on the right track.

If a researcher thinks that the decedent is the likely grantor, then the researcher must go back to the registry of deeds and check the grantee index under the name of the decedent and see if there is a deed to him of the property at issue. If the researcher finds such a deed, then the researcher can continue the backward search described in Steps 2 through 5. If the name cannot be found in the grantee index, the researcher should return to the registry of probate and continue the search.

It may be, however, that the researcher can find no clue in the registry of probate. This can happen if the last grantor was willed the land by a friend or if the estate of the decedent was probated in another county. Without knowing the name of the friend or the county in which the estate was probated, the researcher would have no notion of where to look. In this situation, the researcher must continue to play detective and search more obscure sources.

Due to the difficulty of research at the registry of probate, some researchers like to exhaust all other avenues before going to the registry of probate. One fruitful method of investigation is to check the deeds of the parcels of land adjoining the property in question. By so doing, researchers may pick up references (particularly in earlier deeds) to the adjacent property. For example, the deed to an adjoining parcel may describe the adjacent lot to the north lot as "bounded southerly by land of Charles Clark." In that event, the researcher could then search the indices at the registry of deeds under the name, "Charles Clark." If

this method is unsuccessful, researchers may want to try old atlases, old tax assessors' maps, and older residents of the neighborhood where the parcel of land is located to retrieve the name of a prior owner of the parcel.

7. In some instances, the researcher will need to check for conveyances made by a particular owner. For example, the researcher may have a reason to believe that a particular owner granted an easement over the parcel for the benefit of the public. In order to get this information, the researcher will need to trace the owner's name forward in the index as "grantor" for the period of time during which that owner owned the land. This would involve using the *grantor index* (if grantors and grantees are indexed separately). The researcher should fill out an index sheet (See Appendix B-2) that notes the name searched, the index books consulted, the book and page number in which that owner appears as a grantor and the type of instrument and the location of the affected land. Each entry in which the owner is the grantor should be listed on this sheet, taking care to fill in all of the requested information. For the current owner, the "Interim Index" if any and "Day Book" should also be consulted for the most recent transactions.
8. The index sheet listings for that owner will then need to be reviewed to determine which of the documents need to be pulled and read by the researcher. In a full title search, each of the recorded documents in which the owner is listed as grantor (and also those in which the owner is listed as grantee) would be located and examined. However, for purposes of this project, the researcher is only looking for documents which would affect public rights to the property. Assuming that the document is properly listed in the index, the researcher should not need to look at the actual recorded document for any instruments that are listed in the index as affecting property located in a different town (but note that some index listings may indicate that an instrument affects land in more than one town), or any mortgages, discharge of mortgage, partial release of mortgage, assignment of mortgage, U.C.C. financing statement or any lien by an entity other than the town. Please note, however, that it is extremely important to look at the other instruments, especially municipal tax liens, all easements (to determine the precise grantee, and more detailed information if the grantee is the town or another public entity other than a utility company) and all deeds that convey out ownership interest in any parcel of land located in the town being researched.
9. All of the information gathered during this process should be reviewed to determine whether there is any information to suggest public title, reservation or easement on the researched parcel (or over the abutting land in the case where the site is being researched because of the expectation that it abuts a town way or public easement). The legal theories in support of public rights should be reviewed in order to determine what additional

information needs to be gathered to make a conclusive determination of public rights. For example, if the information suggests the existence of public rights in the form of a road or easement, town records on laying out and acceptance or dedication and acceptance will need to be consulted to verify and supplement the deed information. These basic legal concepts are described in more detail in Chapter 4 of the Handbook (See also Appendix D).

10. Regarding registered land: The above directions apply equally to registered land. Instead of a book and page number, researchers may find, perhaps at the tax assessor's office, a certificate number. The researcher must then go to the registered land section that contains large volumes of Certificates of Title and other registered instruments. As necessary, the researcher should consult the Grantor or Grantee index for registered land. Encumbrances, such as easements, mortgages, attachments and takings by eminent domain, are noted on a *memoranda of encumbrances* attached to the certificate of title. All easements and takings listed in the memoranda of encumbrances should be closely examined. In tracing registered land back in time, it is likely that the researcher will eventually be referred back to recorded land (i.e., the transactions that took place before the land was registered).

The purpose of registering land is to quiet the title, giving a degree of security and certainty to the landowner. Generally, the owner of registered land, and the subsequent purchaser, hold title free of all encumbrances *except* those noted on the certificate. Therefore, if easements are found in deeds prior to the registration of title, but are not found in the memoranda of encumbrances, it is likely that rights to that easement have been lost. The certificate of title does not protect against all matters, however. According to G.L. Chapter 185, Section 46, registered land is still subject to any highway, town way, or any private way laid out under G.L. Chapter 82, Section 21, if the certificate of title does not state that the boundary of such way has been determined.

## **D. UNDERSTANDING DEED DESCRIPTIONS**

In doing research at the registry of deeds, understanding the description of the land affected by the instrument is crucial. Unfortunately, a few of the descriptions will be difficult to understand. They may describe the land only in relation to other land without giving references to how to find descriptions of the abutting land (e.g., from land of Ames to land of Bach to land of Clark) or may use as corners of the parcel natural monuments that may no longer exist (e.g., a 1910 deed running from the large rock with a painted "A" to the stump of the 6" maple tree to the corner of Down's barn). The researcher will have to try to make the most of the description, focusing attention on the part of the description that would abut or contain possible public rights. The other problem with deed descriptions is that they are not always free from error. Sometimes human error alters a description (e.g. a typist copies it incorrectly from a prior deed) or grantors are confused about the extent of

their holdings and convey out more than they have.

Most deed descriptions are much more helpful in describing where the parcel is located on the face of the earth. At first, it may take a little practice to focus on the precise language of the description. But with a little persistence and reference to other sources, the researcher should be able to understand the location of the land affected by the deed. Reading the description slowly, phrase by phrase and drawing a diagram of the parcel described will help. Precision in identifying the boundaries to the best of the researcher's ability, within the deficiencies of the description itself, is the only way to determine whether the deed affects the right parcel of land.

In reading a deed to determine whether it affects the parcel of land in question, the first place to focus is the beginning of the description. Usually the parcel is first described as being in a particular town and county. Frequently, the deed will also identify the parcel as being on a particular side of a street or road. If this initial information identifies the parcel as being remote from the site under research, there is no need to delve any further into the specific description of the parcel. (Caution: you should scan the deed to make sure that only one parcel is described in the deed; sometimes more than one parcel is affected by a single deed, but separate parcels will usually be in separate description paragraphs.)

There are two major techniques commonly used in modern deeds for specifically describing the land affected by the deed. The first is by *referring to a plan or map* that has been or will simultaneously be recorded in the registry of deeds. This will most often be the case in a conveyance of land that has been surveyed and subdivided or the conveyance of land that is part of a condominium or other common interest community. For example, the description will refer to a certain lot number of a named subdivision, surveyed by a named surveyor on a certain date and recorded in Plan Book X, Page Y of the Z County registry of deeds.

The researcher should note that *Plan Books* are different than the books in which deeds are recorded. Plan Books are large books that contain only maps and plans. Whenever a Plan Book is referenced, the researcher should examine the plan, paying particular attention to the written notes on the plan as well as to the parcel boundaries, roads (whether there is any notation of where they are private or public) and other easements or pedestrian ways drawn on the plan. Researchers may find that it is often more difficult to locate a referenced plan than a referenced deed. Plans have a way of disappearing from their proper place in the registry. One experienced researcher recommends looking in the back or front of the Plan Book where a missing plan may have been stashed by a previous researcher.

The other technique commonly used for describing the land affected by the deed is by *metes and bounds*. This consists of a detailed description of the shape and boundaries of the parcel, usually starting at a specified point and giving the direction and length of each boundary line in succession, until it returns to the point of beginning. In describing boundaries, the description can refer to natural or artificial "monuments" such as stone walls, rocks and trees, iron pins and adjacent land of a specified person. It can also refer to "courses and distances" of boundary lines such as "north 70 degrees 20 minutes East" or "following said road 200 feet to a point." Deeds frequently combine references to monuments, courses and distances.

If the deed description is based on a boundary survey, the description will very likely use a combination of angles and distances. Angles are usually described in degrees, with 360 degrees being equal to one full rotation (or complete circle). Each degree is equal to 60 minutes ('') and each minute is equal to 60 seconds (""). If, for example, the direction of a line is stated as "North 44 degrees 30 minutes 15 seconds East" the location of that line would be found by starting with the line which is due north from the beginning point of that call, and then rotating clockwise (to the east) from north. The calls will be expressed as angles east or west of north or south. In interpreting a metes and bounds description, one must pay close attention to the direction of travel (the direction in which the description is proceeding around the perimeter back toward the point of beginning). For example, the bearing N xx degrees yy minutes E describes the same line as S xx degrees yy minutes W going in opposite directions of travel.

Various rules of construction have been developed for resolving ambiguities in deed descriptions in order to give effect to the expressed intent of the parties. The technical rules of construction control so long as nothing inconsistent appears in the deed. In general, if the terms are conflicting, more weight in interpreting the description is given to the following types of references; in descending order, natural monuments, artificial monuments, courses, distances, description of tract by name, statements of quantity.

Other rules of construction address issues such as descriptions bounded by monuments with width (to the center of the monument); by a road (to the center of the road); by a stream (to the center of the stream); by an artificial pond (to the center of the stream as before the flooding); and by a natural pond (to the low water mark). (See G.L. Chapter 183, Section 58.) For land on tidal waters, Massachusetts cases have held that, unless previously expressly conveyed out, the owner of uplands adjoining tidal waters owns to the low water mark, not exceeding one hundred rods below the high water mark. The flats are held to pass with the conveyance of the uplands unless a contrary intent is expressed in the deed.

**APPENDIX B.2**  
**DEED INFORMATION SHEET**

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1. Access Site \_\_\_\_\_ Town \_\_\_\_\_
2. Name of Researcher \_\_\_\_\_
3. Full Name of Grantor(s) \_\_\_\_\_
4. Grantor's capacity (if any, e.g., executor) \_\_\_\_\_
5. Full Name of Grantee(s) \_\_\_\_\_
6. Book/Page (or Certificate No.) \_\_\_\_\_
7. Type of Instrument (WD, QCw/C, QCw/outC, etc.) \_\_\_\_\_
8. Description of Parcel Affected by Conveyance (Make particular note of any differences between this description of what is being transferred to this grantee and the description contained in the deed where this grantee conveyed the property as the grantor.)  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(or check here  if this is exactly the same description as you have already detailed in the Information Sheet for Book \_\_\_, Page \_\_\_.)

9. Is There Any Suggestion of Public Right, Title or Easement on this Parcel or Adjacent to It? (If the possible access way is adjacent to the parcel, describe in detail any references in the deed to the boundary that you think might be a public road, town way or public easement.)  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

10. Reference in this Deed to Other Documents:

Deed to Grantee: Bk \_\_\_\_\_ Page \_\_\_\_\_. Ref. to Plan: Pl.Bk.\_\_\_\_\_ Page\_\_\_\_\_

Other References to Source of Title: \_\_\_\_\_

11. Statements About Relationship of People Mentioned (e.g., X is the surviving joint tenant of Z, Z having died on x/y/zz.)

12. Date Deed Was Signed by Grantor: \_\_\_\_\_

13. Date Deed was Acknowledged by Notary/Atty/Jp: \_\_\_\_\_

14. Date Deed was Recorded in Registry of Deeds: \_\_\_\_\_

15. Date Deed was Registered (if applicable): \_\_\_\_\_

16. Spousal Joinder (Check one or describe) : Grantors were husband and wife \_\_\_\_\_; Spouse not grantor, but signed deed \_\_\_\_\_; Deed says grantor not married \_\_\_\_\_; Grantor not a person (estate, business, etc.) \_\_\_\_\_; Other \_\_\_\_\_

17. Continuation from Above (please specify), Sketch of Parcel or Other Observations:

## APPENDIX B.3

## INDEX SHEET

\* This column is to be completed for each instrument you look up in a deed book. You don't need to look at the actual deed if the index shows the deed affects a different town (unless it has "&" after the town), if the person whose name you are searching is the grantee rather than the grantor (which you will run into if the registry has a combined grantee-grantor index), or if the index says the instrument is a mortgage, discharge of mortgage, partial release of mortgage, assignment, U.C.C. financing statement or lien by an entity other than the town.

## APPENDIX B.4

### A GUIDE TO THE REGISTRIES OF DEEDS FOR MASSACHUSETTS COASTAL CITIES AND TOWNS

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The following list contains information for all the county registries of deeds in Massachusetts that service coastal cities and towns. For each county, information regarding the corresponding land court divisions and registries of probate are also included. The list is organized alphabetically by county.

#### **A. BARNSTABLE COUNTY REGISTRY OF DEEDS**

- 1. Towns Included in this Registry:** Barnstable, Bourne, Brewster, Chatham, Dennis, Eastham, Falmouth, Harwich, Mashpee, Orleans, Provincetown, Sandwich, Truro, Wellfleet, Yarmouth
- 2. Location:** Route 6A, Main Street, Barnstable, MA 02360
- 3. Telephone Number:** (508) 362-2511
- 4. Hours of Operation:** 8:00 A.M. - 4:30 P.M., Monday through Friday
- 5. Registry of Deeds:**
  - a. Photocopying:** Obtain copies of documents by completing an order form and bringing it with the book to the registry counter. Copying costs are \$.75 per page for deeds and \$1.00 to \$2.00 per plan.
  - b. About the indices:**
    - i. Plans are indexed by towns under the street names.
    - ii. The current Grantor and Grantee indices are available on computer and in book form.
    - iii. For grantors with numbers in their title, the number will be indexed by the first letter of the number as written. (For example, 56 Realty Trust is indexed under "F" for "fifty.")
    - iv. Entries for Towns will be listed under the first letter of the town's name. (For example, "B" for "Town of Barnstable.")
- 6. Registry of Probate** is located in the same building as the registry of deeds.
- 7. Land Court Division (for registered land):** Located in the same building as the registry of deeds. Researchers can obtain copies of documents (\$.75 per page) by filling out a form with the document number. The copies may take from 15 minutes to two hours. Some old documents are available only on microfilm.

#### **B. BRISTOL COUNTY (FALL RIVER DISTRICT) REGISTRY OF DEEDS**

- 1. Towns Included in this Registry:** Fall River, Freetown, Somerset, Swansea
- 2. Location:** 441 North Main Street, Fall River, MA 02720
- 3. Telephone Number:** (508) 673-1651 and (508) 673-2910
- 4. Hours of Operation:** 8:00 A.M. - 5:00 P.M., Monday through Friday
- 5. Registry of Deeds:**
  - a. Photocopying:** Obtain copies by filling out a form and bringing the book to the registry counter (\$.75 per page). Copy machines are also available and cost \$.25 per page.
  - b. Indices:**
    - i. Plan Indices are listed under the street name.
    - ii. The current grantor and grantee indices are on computer and available in books. Some old records are available only on microfilm.
- 6. Registry of Probate:** The registry of probate is located in the Bristol Northern District Registry of Deeds, 11 Court Street, Taunton, MA. The telephone number is (508) 822-0502. It is open Monday through Friday, 8:30 A.M. - 5:00 P.M.
- 7. Land Court Division (for registered land):** Located in the same building as the registry of deeds.

### **C. BRISTOL COUNTY (SOUTH DISTRICT) REGISTRY OF DEEDS**

- 1. Towns Included in the Registry:** Acushnet, Dartmouth, Fairhaven, New Bedford, Westport
- 2. Location:** 25 North Sixth Street, New Bedford, MA 02740
- 3. Telephone Number:** (508) 993-2605
- 4. Hours of Operation:** 8:30 A.M. - 5:00 P.M., Monday through Friday
- 5. Registry of Deeds:**
  - a. Photocopying:** Fill out an order form and obtain copies for \$.75 per page at the registry counter.
  - b. Indices:**
    - i. Plan Indices are listed under the street name.
    - ii. Current Grantor and Grantee indices are available on computer.
    - iii. Find number entries by looking up the first letter of the number. (For example, "2nd Ave. Trust" would be found under "S" for "second.")
- 6. Registry of Probate:** All probate records for Bristol County are located in the Bristol North Registry of Deeds, 11 Court Street, Taunton. The telephone number is (508) 822-0502. Open Monday through Friday, 8:30 A.M. - 5:00 P.M.
- 7. Division of Land Court (for registered land):** Located in the same building as the registry of deeds.

### **D. DUKES COUNTY REGISTRY OF DEEDS**

- 1. Towns Included in this Registry:** Chilmark, Edgartown, Gay Head, Gosnold, Oak Bluffs, Tisbury (Vineyard Haven), West Tisbury
- 2. Location:** Courthouse, 81 Main Street, P.O. Box 5231, Edgartown, MA 02539
- 3. Telephone Number:** (508) 627- 4025
- 4. Hours of Operation:** 8:30 A.M. - 4:30 P.M., Monday through Friday
- 5. Registry of Deeds:**
  - a. Photocopying Information:** Copies may be ordered at the registry.
  - b. Indices:**
    - i. Current Grantor and Grantee indices are on computer.
    - ii. Plans are indexed by the name of the town.
    - iii. Assessors maps are available, but the corresponding owners names are not indicated on the maps.
    - iv. Numbered entries are indexed by the first letter of the number.
    - v. Towns are indexed under the name of the town.
- 6. Registry of Probate:** Located in the same building as the registry of deeds.
- 7. Division of the Land Court (for registered land):** Located in the same building as the registry of deeds.

## **E. ESSEX COUNTY (SOUTHERN DISTRICT) REGISTRY OF DEEDS**

- 1. Towns Included in this Registry:** Amesbury, Beverly, Boxford, Byfield, Danvers, Essex, Georgetown, Gloucester, Groveland, Hamilton, Haverhill, Ipswich, Lynn, Lynnfield, Manchester, Marblehead, Merrimac, Middleton, Nahant, Newbury, Newburyport, Peabody, Rockport, Rowley, Salem, Salisbury, Saugus, Swampscott, Topsfield, Wenham, West Newbury.
- 2. Location:** 36 Federal Street, Salem, MA 01970
- 3. Telephone Number:** (508) 741-0200
- 4. Hours of Operation:** 8:00 A.M. - 4:30 P.M., Monday through Friday
- 5. Registry of Deeds:**
  - a. Photocopying:** Copies may be made by self-service machines at \$.35 per copy. Large plans may be ordered at the desk for substantially more.
  - b. Indices:**
    - i. Plans are available from 1741 to date. Plans are filed under the name of the street, owner and surveyor.
    - ii. The current Grantor and Grantee indices are computerized.
    - iii. Assessors' Maps and Atlases: There are many on file, but some are in poor condition.
    - iv. For number entries, the number is spelled out.
    - v. If there is a "the" in the title, it should be ignored.

vi. The "City of Beverly" is listed as "Beverly, City of"

6. **Registry of Probate:** Located in the same building.
7. **Division of the Land Court:** Located in the same building.
8. **Volunteer Legal Assistance:** "Lawyer for a Day" program (free legal counseling on general matters concerning the registry) is available at the Essex Registry of Deeds. Call ahead to find out when assistance is available.

## **F. NANTUCKET COUNTY REGISTRY OF DEEDS**

1. **Town Included in the Registry:** Nantucket
2. **Location:** Town & County Building, 16 Broad Street, Nantucket, MA 02554
3. **Telephone Number:** (508) 228-7250
4. **Hours of Operation:** 8:00 A.M. - 4:00 P.M., Monday to Friday
5. **Registry of Deeds:**
  - a. **Photocopying:** Machines are available for making copies at \$.50 per copy. Copies of large plans can be ordered from the Register.
  - b. **Indices:**
    - i. Current grantor and grantee indices are available on computer. Grantor index begins in 1659.
    - ii. Assessors' maps and atlases are available.
    - iii. Entrees beginning with a number are indexed under the first letter of that number.
    - iv. Towns are listed under the first letter of the name of the town.
6. **Registry of Probate:** Located in the same building as the registry of deeds.
7. **Division of Land Court (for registered land):** Located in the same building as the registry of deeds.

## **G. PLYMOUTH COUNTY REGISTRY OF DEEDS**

1. **Towns Included in the Registry:** Abington, Bridgewater, Brockton, Carver, Duxbury, East Bridgewater, Halifax, Hanover, Hanson, Hingham, Hull, Kingston, Lakeville, Marion, Marshfield, Mattapoisett, Middleborough, Norwell, Pembroke, Plymouth, Plympton, Rochester, Rockland, Scituate, Wareham, West Bridgewater, Whitman
2. **Location:** 7 Russell Street, Plymouth, MA 02361-3535
3. **Telephone:** (508) 830-9200
4. **Hours of Operation:** 8:30 A.M. - 4:30 P.M., Monday through Friday
5. **Registry of Deeds:**
  - a. **Photocopying:** Copies may be ordered through the Copy Department or from copy machines at the registry.

**b. Indices:**

- i. Current Grantor and Grantee indices are computerized.
- ii. Grantor and Grantee name rules and formats are available at the registry counter.
- iii. Assessors' Maps: Available for all towns.
- iv. Atlases: Atlases for the years 1879 and 1903 are available for Plymouth County.
- v. Plans: There is a Miscellaneous Plans Index that includes atlases, loose plans, and miscellaneous maps.

**6. Registry of Probate:** Located in the same building as the registry of deeds.

**7. Division of Land Court (for registered land):** Located in the same building as the registry of deeds. Grantor and grantee indices are computerized.

## **H. SUFFOLK COUNTY REGISTRY OF DEEDS**

**1. Towns Included in the Registry:** Allston, Boston, Brighton, Charlestown, Chelsea, Dorchester, Hyde Park, Mattapan, Revere, Roxbury, South Boston, Winthrop

**2. Location:** One Pemberton Square (the "Old Court House"), Government Center, Boston, MA 02108-1772

**3. Telephone:** (617) 725-8575

**4. Hours of Operation:** 7:00 A.M. - 4:45 P.M., Monday through Friday (Sept. through May), 9:00 A.M. - 4:15 P.M., Monday through Friday (June through Aug.)

**5. Registry of Deeds:**

**a. Photocopying:** Machines are available for photocopying at \$.25 per page.

**b. Indices:**

- i. Plan indices: Pre-1860 plans are filed under both the street name and surveyors name. Post-1860, plans are filed only under the street name.
- ii. Assessor maps: No assessors' maps are available.
- iii. Atlases are available, but many are not in good condition. The newest atlas is dated 1938.
- iv. Numbered entries are indexed by the first letter of the number.

**6. Registry of Probate:** Located in the same building as the registry of deeds.

**7. Division of Land Court (for registered land):** Located in the same building as the registry of deeds.

## APPENDIX B.5

### INTERNET RESOURCES

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#### **Registry of Deeds**

Barnstable County Registry of Deeds  
<http://www.bcrd.co.barnstable.ma.us/>

Essex County Registry of Deeds  
<http://www.salemdeeds.com/index.asp>

Nantucket Registry of Deeds  
<http://www.nantucket.net/town/departments/registry.html>

Northern Middlesex Registry of Deeds  
<http://www.tiac.net/users/nmrd/>

Plymouth County Registry of Deeds  
<http://regdeeds.co.plymouth.ma.us/>

Suffolk County Registry of Deeds  
<http://www.suffolkdeeds.com>

#### **Commonwealth of Massachusetts**

Official website of the Commonwealth of Massachusetts  
<http://www.mass.gov/>

Coastal Access Legal & Mediation Service (CALMS)  
<http://www.state.ma.us/dem/programs/coastal/cap-crs.htm>

Department of Environmental Management (Now the Department of Conservation and Recreation)  
<http://www.mass.gov/dcr>

Department of Environmental Protection  
<http://www.mass.gov/dep>

Executive Office of Environmental Affairs  
<http://www.mass.gov/envir/eoea.htm>

Massachusetts Coastal Zone Management  
<http://www.mass.gov/czm>

Office of the Attorney General  
<http://www.mass.gov/ag/>

The Massachusetts Coast Guide: Access to Public Open Spaces Along the Shoreline  
[http://www.appgeo.com/atlas/project\\_source/czmat/czmat\\_fr.html](http://www.appgeo.com/atlas/project_source/czmat/czmat_fr.html)

**Federal Government**

U.S. Environmental Protection Agency  
<http://www.epa.gov/>

US EPA, Region I (New England)  
<http://www.epa.gov/region01/>

NOAA Office of Ocean & Coastal Resource Management  
<http://www.nos.noaa.gov/ocrm/>

**Assessor's Offices**

Tax Assessor's Database  
<http://pubweb.acns.nwu.edu/~cap440/massachusetts.html>

Boston Assessor's Office  
<http://www.ci.boston.ma.us/assessing/search.asp>

Essex County Registry of Deeds  
<http://207.244.88.10/index.asp>

Greenfield Assessor's Office  
<http://www.townofgreenfield.org/page15.html>

Mashpee Assessor's Office  
<http://www.capecod.net/mashpee/assess>

Methuen Assessor's Office  
<http://www.cityofmethuen.com/assess.htm>

Reading Assessor's Office  
<http://www.ziplink.net/~reading1/assessor.htm>

Scituate Assessor's Office

[http://www.town.scituate.ma.us/pkg\\_0416982122/assessorspage.htm](http://www.town.scituate.ma.us/pkg_0416982122/assessorspage.htm)

Shrewsbury Assessor's Office

<http://www.ci.shrewsbury.ma.us/assessor/assessor.htm>

Walpole Assessor's Office

<http://www.walpole.ma.us/thdassesorproperty.htm>

Waltham Assessor's Office

<http://www.city.waltham.ma.us/assess/QUERYFRM.htm>

Watertown Assessor's Office

<http://www.townonline.com/watertown/realestate/assessments/index.html>

### **Non-profit and other organizations**

American Association for State and Local History

<http://www.aaslh.org/>

Association of Records Management Administrators, Boston Chapter, Inc.

<http://www.armaboston.org>

Association of College and Research Libraries

<http://www.conncoll.edu/acrlnec>

Boston Public Library

<http://www.bpl.org>

Bostonian Society

<http://www.bostonhistory.org>

Coastal Conservation Association of New Hampshire

[http://www.surfcaster.com/cca\\_nh/Default.htm](http://www.surfcaster.com/cca_nh/Default.htm)

Coastal Resources Center (University of Rhode Island)

<http://brooktrout.gso.uri.edu/>

The Conservation Fund

<http://www.conservationfund.org/conservation/>

Conservation Law Foundation  
<http://www.clf.org/>

East Coast Greenway  
<http://www.greenway.org/greenway.htm>

Envirolink  
<http://www.envirolink.org>

Environmental Federation of New England  
<http://www.greenfornewengland.org/>

Environmental League of Massachusetts  
<http://www.environmentleague.org>

Environmental Web Directory  
<http://www.webdirectory.com/>

John F. Kennedy Presidential Library & Museum  
<http://www.cs.umb.edu/~rwhealan/jfk/index.htm>

Land Trust Alliance  
<http://www.lta.org/>

The Lighthouse Preservation Society  
<http://www.maine.com/lights/lps.htm>

The Massachusetts Archives  
<http://www.magnet.state.ma.us/sec/arc/>

Massachusetts Audubon Society  
<http://www.massaudubon.org/>

The Massachusetts Historical Society  
<http://masshist.org/>

Massachusetts Land Trust Coalition  
<http://www2.shore.net/~mltc/>

Massachusetts Library Association  
<http://world.std.com/~masslib.htm>

Massachusetts Library & Information Network  
<http://www.mlin.lib.ma.us>

Massachusetts State Library  
<http://www.state.ma.us/lib.htm>

Massachusetts Studies Project  
<http://k12s.phast.umass.edu/~masag.texts.html>

Military Historical Society of Massachusetts  
<http://www.mhsm.org>

The Nature Conservancy/Massachusetts Chapter  
<http://www.tnc.org/infield/State/Massachusetts/>

New England Archivists  
<http://www.lib.umb.edu/newengarch>

New England Heritage Center  
<http://www.bentley.edu/undergraduate/catalogue/resource/resou042.htm>

New England Historic Genealogical Society  
<http://www.nehgs.org>

New England Museum Association  
<http://www.nemanet.org>

New England Quarterly  
<http://www.whc.neu.edu/history/NEQ.html>

Northeast Document Conservation Center  
<http://www.nedcc.org>

The Trustees of Reservations  
<http://www.ttor.org/>

Trust for Public Land  
<http://www.igc.apc.org/tpl/>

World Wide Wetlands, Hydrology, and Coastal Links  
<http://www.geog.ucl.ac.uk/~jthompson/worldwet.html>

## APPENDIX B.5

TO: Researchers of Public Rights of Way  
FROM: Irene L. Guild, Assistant Attorney General  
DATE: June 5, 1999

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In researching, you usually begin with the present and work back. The further back you have to go, the more important historical context is. Understanding how people lived, what industries existed, what the political climate was, is important to a researcher who has been unable to find a recent record document evidencing public rights. (Obviously, if you have a recent record document, you need go only far enough back to ensure that the grantor owned the property interest being granted). Look for old histories or maps showing the owners of a certain parcel. If the owners were proprietors or commoners, you can find the ancient record documents from the grantor-grantee index to determine if public rights were granted or reserved very early on. The following is a simple and brief early history and its impact on property ownership.

In the mid 1600's, allotments of land were made by committees appointed by the General Court, and later, by Proprietors. Colonial Laws prohibited Indian deeds, which were required to be approved, or affirmed, by the Legislature. The colonies did not trust King James to honor their property documents, and in 1688, James II was deposed, and William and Mary came into power. In order to gain their position, they were forced to sign a Bill of Rights and submit to a new form of secular government where Parliament was supreme, and the monarchy powers were limited. As part of "the deal", William and Mary signed a bill which secured the right of the colonial government to grant land to towns (and the towns to grant lands to individuals). Organizations of Proprietors or Commoners were also the recipients of land grants, with the responsibility of making land grants to inhabitants, and setting aside roads, commons, landings, and other public spaces. Proprietors, by statute, were "dissolved" ten years after they had distributed all of the land, and the town would receive all of the public lands that had been set aside. The conveyances and setting aside of public land by the Proprietors, Commoners, and early townships were by votes, which were duly recorded in Proprietors or Commoners Books. The conveyances recorded therein are proof of title, laying out, or setting aside of public and private lands.

Numerous grants were made, often with provisions for public access. These rights of access to the sea and great ponds included rights of fishing, navigating, water, transporting goods, ice, firewood, gathering seaweed, taking wood from forested land grants, and the right to cross private property, for which the landowners may or may not have been compensated, either directly, or through the right to erect gates and collect tolls. Landowners were often required to erect fences and gates across ways to keep livestock in

and predators out, and persons who used these rights of way were required to close the gates when they passed through.

It was not unusual to have disagreements between owners and the public. On occasion, the disagreements resulted in court judgments, or a petition would be brought in the Legislature to establish the rights of the parties. Historical documents may contain records of disputes, or speeches made by the various interested factions. Churches were the center of the communities, and often politics were played out -- and recorded -- in church histories. Records of dedications of schools, town commons, lands for new parishes, are all likely sources of evidence of who dedicated what to the public, as they were great occasions for celebration of the great generosity of the community landowners.

As you perform your research, be curious. Do not take anything for granted; ask questions and be interested. Do not accept no for an answer too easily. Always ask where other resources might be found, or who might know something about the information you are seeking. ALWAYS leave a number where you can be reached. You'd be surprised how often people remember things later, or they talk to other people who have information. Sometimes your interest and excitement get others curious, and they research on their own and discover something. Make sure that they can reach you to tell you about what they have found. (Even if it is not something you can use, it is something you can check off as having been checked out.)

Also, until you have researched every possibility, never never make any pronouncements that there are no public rights. Until you have researched every possible angle, the only conclusion you should make, is that the issue needs further research. If you choose not to continue with the project, at least you have left the door open for the next group that may want to continue where you left off. Only when you are sure you have exhausted every avenue, and have come up with nothing, may you safely determine that you have examined the issue and found nothing indicating public rights exist.

The following is a checklist of sources for researching public rights. It is not an exhaustive list; I am always finding new sources. Two good places to locate other sources are the Massachusetts Historical Records Advisory Board and the Boston Public Library, reference section.

**VERY IMPORTANT:** To avoid having to go back over ground already covered, keep lists of everything you have looked at and where it is located.

**VERY IMPORTANT:** Keep a Master List of all of the names relevant to the area you are researching, and the dates those names were used. This includes prior owners, names of streets (which may change several times over two or three hundred years), and "local

names". Often, developments were proposed and renamed; church communities broke off and new parishes were formed, and old towns were divided into several new towns over time. You will find such a list very helpful when you locate a document or photo showing "Newbury Street", if you know that Main Street used to be Pleasant Street, and before that it was Newbury Street. Or that the Fifth parish broke off from the First Parish in 1730, and that the minister's name was Paul Jones. For instance, if you know that Dedham once extended all the way to the center of Natick, before Wellesley ever existed, then you know that early research for Natick must be done at the Norfolk Registry of Deeds. You also know not to discount references to Dedham during that time – it may be what is now the center of Natick!

## PRIMARY RESOURCES

Deeds and Probate Records. these are the best records for proving an easement. They should be checked thoroughly, and the bulk of the research and effort should be applied here first. Book and page numbers are listed in assessor's records. Follow the chain of title back, checking each document for mention of uses of the property. Abutters' deeds should also be checked -- very often, the mention of a right of way or easement gets dropped from early documents. Since many lots originate from much larger parcels, following the chain of title back will often result in finding past deeds and probates of abutters. Pay attention to the notes in the margins of the deeds – these may be recorded easements. Add any names and dates in the chain of title, including names of abutters, to your master list of names. If you find documents that are helpful, get certified or attested copies so they will be trial-ready.

Plans. Often, the deed and probate records will reference a plan. These may be located in the Registry of Deeds, Probate, town records, county records, state archives, local historical societies, or in the records of the descendants of the original owners. Some may be located in historical sections of museums. U.S.G.S. maps may also show rights of way. Local surveyors may have old plans. Remember that list of names? While you are at the Registry of Deeds, peruse the plan section, which has books listing chronologically plans by street, name of owner, and surveyor. The same surveyors will come up again and again in an area. Find out who took over their offices and what happened to their old records. Bring blank attestations for the records keeper to fill out, attesting to the authenticity of any of their records they copy for you.

Caveat: Plans and maps showing rights of way are not determinative, and often the way is not labeled either public or private. Plans are useful to show the length of time a way has

existed, and its location over time, but other evidence is needed to prove the public nature of the way.

Land Court. If any Registration, Confirmation or other action has taken place in land Court, research those records. Often, Land Court cases involve extensive title searches and detailed plans. Even if the property does not abut the area you are researching, a judgment that a way or path is public will be conclusive (i.e., Raboth Road in Kingston). Also, a title examination is always done in conjunction with a Registration or Confirmation case. If there is a registered parcel near the one you are researching, look at the original file at the Land Court. This will have a title examination which may show a common grantor with the parcel you are researching; it may also show objections filed by the town, referencing the authority for the assertion of public rights. While you are at the Land Court, look at the Land Court county atlas which has the parcel you are researching. If any of the nearby properties are outlined in color, with a number written in (up to five digits long), ask for those registration cases, which will have title examinations and objections. Keep in mind that a certificate of title may not mention easements which benefit the property, particularly in subdivisions. Here also, it is good to get attestations or certifications of records kept at the Land Court. This is important for all documents.

Photographs. Courts have found long-continued public use from old photographs. Photographs with identifiable landmarks, showing historical public use (evidence by changing clothing and hair styles, horse and buggies and automobiles from other eras) have been used successfully. Also, aerial photographs which may have been taken by the military, the government, the highway department, etc., can be very helpful. Old books may contain additional resources for photographs. Don't overlook histories (centennials, etc.) of local churches, communities, industries, etc., which may show people using easements as a regular route to get to work, church, or fishing or swimming.

#### Town or City Records.

Planning board, ZBA, Building Inspector, Town Clerk, Highway Department records, etc., are all rich resources. Many old records are kept in town or city vaults. If you have no idea where to begin, ask to look at the annual town reports, which may be found at the town clerk's office, the library, or the local historical society. A good overview of each year's activities can be found in them, including discussions of each department's activities during the year, monies expended, names of department members, and names of people who were paid money for services or land, and any big events in that occurred (disasters, storms, buildings erected, celebrations, etc.). Use the town reports to decide where and what time periods to concentrate your research on. They also contain yearly summaries of votes of town meeting (including votes to lay out, accept or discontinue public ways); town surveyors or public works or engineers (to narrow down when work was done on a street, or

when plans were likely to have been filed, or to prove that work was done by the town to maintain and improve a way). Under the selectmen's annual report, you may find reports of perambulations, setting of bounds, or surveying, and who was paid to do it.

Once you have narrowed the time frame for your search, look through the agendas of meetings, and locate minutes of meetings that dealt with the area you are researching. Under the narratives provided by each department, you may find discussions of a great storm that wiped out roads or landings. A physical destruction by natural (or unnatural) forces does not eliminate the legal existence of a way or landing. Look for old street layouts, licenses, agreements by subdividers that the public has the right to use certain areas (often this was, and still is, used as an incentive by an owner to gain subdivision approval). It is very important to remember two things when going through these records. One is that the records are public records, and you have the right to see them. The second is that they are the official records of the community and the public, and you have the obligation to ensure that the records are left in exactly the same place and condition that you found them in. Be respectful of historical documents, the people who keep and maintain them, and those who will come after you. Make lists of everything you find and their location, in case you later determine something needs to be looked at again. Cross reference everything you find with your master list of names and dates.

County, state and federal records, plans, street layouts, takings, and maintenance records are important documents. Don't forget grants and loans to cities and towns for public projects, such as access, park, facilities, etc. Emergency funds for disasters, storm damage, dock repairs - all are documentation of public ownership or use. F.E.M.A., M.E.M.A., Army Corps of Engineers, etc. are good resources. Often, the local papers printed information about the event and the subsequent application for funds, which were also reported in the annual town reports.

Archives - State, Local, and Federal. the oldest records are kept in archives. Note that the state archives contain very old probates and court records. Also, during the 1930's-40's, the Federal government did inventories of city and town records, and made detailed lists of what records were found where they are kept under each town or city's name. These records are at the state archives. The federal and town census lists the residents, what they owned, their occupations, etc. If a property you are researching was owned by Jones, but Smith actually lived there, the census list is a place where you can get that information.

Acts and Resolves. Requires tedious searching of indexes of large volumes. However, a Legislative pronouncement that a certain area is designated as public, or accepting a dedication, etc., is conclusive. Get your master list of names and dates, and enlist some volunteers with an interest and time to do this, if you can. It is simple to do, and a school class could do it as a learning/community service project. Just make sure to keep a

check list of all books looked at so none are missed, because this is one research project you do not want to have to re-do! (It would be nice if all of those old records could be put on searchable disks...)

## SECONDARY SOURCES

Local libraries often have history sections with old documents, local histories, photos, newspapers, telephone books, centennial documents, genealogies, etc. It is good to interest your local librarian in your search. She or he will talk to other members of the community, the historical society, and browse among the “old” card catalogues and indexes, if you can get her interested. The Boston Public Library, the New England Genealogical Society, the Peabody-Essex Institute, and like institutions are excellent resources.

State and local historical and genealogical societies, university history programs and collections, the Mass. Historical Society, Mass. Foundation for the Humanities, Bay State Historical League, Historic Mass. Inc., Mass. Historical Commission, New England Archives, New England Historic Genealogical Society, The Athenaeum, State House library and archives, Boston Public Library...the list is endless.

Look for records of great ponds, or state or local parks in the area. If the paths go near or connect to property used by the public, record rights may have been established by the public Access Board, legislation, or there may be records of use or common ownership with a reservation of a right to use the paths.

Old case law. Check the index of each Mass. Report/Mass. Appeals Court book. Remember your master list of names and places? Use it here. That is why I put this last, because this is another portion of research that you do not want to go back and repeat.

Helpful hints. Look under the town or city name, keeping track of the date that the area had name changes. For instance, after 1840, look under Rockport, from 1840-1850, look under Rockport and Gloucester (a case begun in 1839 may not have reached an SJC decision until after the area became Rockport); pre-1840, look under Gloucester. Also Check:

Proprietor's of Gloucester  
Commoners of Gloucester  
Inhabitants of Gloucester  
Town of Gloucester  
Citizens of Gloucester  
Residents of Gloucester  
Selectmen of Gloucester  
Mayor of Gloucester

First Parish of Gloucester  
Fifth parish of Gloucester  
names of former owners of locus  
former street names of locus  
names of businesses in the area  
names of mayors, selectmen, planning board members, building inspectors, etc.  
names of subdivisions, parks, etc.  
“calf’s meadow”

Another excellent resource for historical information are old book stores in the area. Often you can find older books on history, industry, or genealogies of prominent families.

Also check any local chambers of commerce or similar organizations.

Local hiking/biking/trails/conservation/open space groups may have access to information; at the least, you will have a group of ready volunteers whose use may assist your case. Some examples are Rails to Trails, Bay Circuit Alliance, The Trustees of Reservations, Cape Cod Commission, Nantucket Land Council, various land bank groups, MassBike, Appalachian Mountain Club, GORP, New England Mountain Bike Association, Wheelmen, Essex County Trail Assoc., etc.

Lastly, do not overlook that marvel of this decade -- the Internet. Not only can you directly communicate with many of the resources, but often there are lists of the information contained in a facility. People researching their family histories have queries out on the 'Net, listing local names, place names, and family genealogies. More recently, old histories, manuals, maps, and even aerial photographs can be found. In Massachusetts, the Massachusetts Historical Records Advisory Board assists in the preservation of historical records. They have a mailing list of resources – many of them on the Internet – which will give you an endless supply of possible resources. They are also strong advocates of digitization of records – both to preserve existing records and to make the information available to the public – preferably in the Internet. The Boston Public Library, New England Genealogical Society, Massachusetts Historical Society, and the Worcester Athaneum (housing the largest collection of colonial-era documents in the nation) are good resources.

In a recent case, I was having difficulty finding historical information on an area known as West Ox Pasture in Rowley. The library was only open a few hours late in the afternoon, and the town officials, while very helpful and cordial, all had part time schedules. I used a popular search engine to look for Rowley and West Ox Pasture, and was rewarded with a site staffed by people volunteers willing to look up information. Each volunteer listed the books and materials they had access to. I queried the volunteers, and was amazed to get back the following response:

“The West Ox Pasture. A large tract of land known as the West Ox Pasture, was laid out between the Bradford Street and Batchelder Plain lots on the east...nearly one square mile of territory and was owned by Mr. Thomas Nelson, Mr. Ezekiel Rogers, Thomas Barker, George Abbott...”

Needless to say, this information saved me weeks of researching the titles back to the original proprietors. I went to the Registry of Deeds in Salem, searched the grantor-grantee index, and looked at the original documents on film, all in one morning. I also discovered the names under which the two groups of proprietors held ownership, so I could then research those. I also have located terrific resources by the same method - local and regional historical societies or groups that I otherwise would never have been aware of.

In another case, I was looking for information on the term “fowling”. I came across a lawsuit in Canada, where Her Majesty the Queen was the Appellant in a case involving an Indian who was taking and selling valuable wood from the Queen’s royal forests. He argued that he had the right to do so as a result of a treaty which had never been rescinded. There were pages and pages of transcripts of negotiations between the Indians and the Governor of Massachusetts, over what rights would be granted, or retained, by the Indians (Canada was once part of Massachusetts). Not only did I gather some valuable information, but the negotiations in their original written English would have taken me weeks to transcribe – and I had it all in typewritten form that I could cite in Court.

## **APPENDIX C**

### **GUIDE TO DRAFTING LEGAL DOCUMENTS**

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#### CONTENTS

1. Sample Affidavits
2. Sample Easement
3. Sample Landowner Agreement (License)

**APPENDIX C.1**  
**SAMPLE AFFIDAVIT #1**

---

**COMMONWEALTH OF MASSACHUSETTS**

[County] Town of Seatown, MA

**AFFIDAVIT**

KNOW ALL PERSONS BY THESE PRESENTS, that the undersigned, a resident of Seatown, Plymouth County, Commonwealth of Massachusetts, for 85 years, personally appeared before me, a NOTARY PUBLIC, and, after being duly sworn, deposed and said:

1. that the undersigned is and has been a resident of Seatown, Massachusetts, hereinafter called Seatown, for the number of years set forth above;
2. that during the time the undersigned has been a resident of Seatown it has been common knowledge that Seatown and its residents and guests have an easement over, across and through that property situated between CRAB COVE and FIRST AVENUE, known as SEATOWN PATH and SEATOWN WALK PATH and the rocks and land between said SEATOWN PATH and the ATLANTIC OCEAN, for walking, recreation and viewing uses.
3. that during the time the undersigned has been a resident of Seatown, aforesaid, residents and guests of the town have continuously, openly and adversely used said Seatown PATH and the land situated between the path and the ATLANTIC OCEAN for said purposes and it has been well known in said town that said path and land have been so used and subject to such public use.
4. that it is general knowledge within the community that the SEATOWN

PATH and land between the path and the ATLANTIC OCEAN are available for the above stated public uses and rights and have been used for such purposes for as long as anyone can remember.

5. that the path and land are shown on the TOWN OF SEATOWN ASSESSORS MAPS, Map No.       , and custom and common use have established the path and common use of the land between the path and the Atlantic Ocean for the benefit of the public.

Subscribed by the undersigned on this \_\_\_\_\_ day of [month/year].

---

Signature

Printed Name and Address

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COMMONWEALTH OF MASSACHUSETTS  
[County] [date]

Then appeared before me the said John Doe, having been duly sworn stated the foregoing statement is true and correct to the best of his information and belief.

Date: \_\_\_\_\_

---

NOTARY PUBLIC

My Commission expires:

---

APPENDIX C.1  
SAMPLE AFFIDAVIT #2

---

COMMONWEALTH OF MASSACHUSETTS

[County] Town of Seatown, MA

AFFIDAVIT OF JOHN DOE

I, John Doe, having been duly sworn state:

1. My address is 250 Shore Road, Coastaltown, Massachusetts.
2. I was born in 1925 and have lived in the Dove Point section of Coastaltown all my life.
3. When I was 17 years old I went to work at the Cape Mary Fish Market where I worked until I retired in 1985.
4. Over the years I have served the Town of Coastaltown on various town boards and committees. They are: Recreation Commission, Board of Planning, Building Code Committee, and Recycling.
5. I currently serve as a docent at Hansome Hall, which belongs to the Coastaltown Historical Society.
6. I am also a member of the friends of Bass Point Association and the Dove Point Association.
7. From the time I was seven or eight years old until I was 15 years old I played along the Coastaltown Path from Temple Avenue up to Bass Point including the property

which I now understand belongs to David D. and Charlene Landowner.

8. The Coastaltown Path from Temple Avenue to Bass Point was a good, well-defined path until some recent storms.

9. As a child I used the path when I went fishing with my brothers. We went crabbing for fish bait. We went blueberrying. We walked.

10. In those days I used the path mostly in the summers. The area around Atlantic Avenue and the shore path and rocks was a busy place. There were people in the summer cottages and the rooming houses. The shore path was well used.

11. I recall a stone wall near the property which now belongs to Jeffrey Abutter. Some of the fields were used as cow pastures. The stone wall went across the shore path but there was a break built in to the wall large enough for a person to get through but not a cow.

12. I also recall that people used to fowl in the Beaver Cove area with live decoys.

13. After I started working, mainly because I did not have time, I did not use the path as much, although I still used it to go fishing.

14. I recall when Joseph Smith built the cottage on what is now the Landowner property. I used to fish for bass right in the area.

15. When he built his cottage, I still used the path over his land, only now the path veered behind his house, away from the ocean.

16. Once my children were born and big enough to take walks, around the late '40s and early '50s, I started using the path again very frequently. I took them for walks with their cousins.

17. There were at least two marshy areas on the path as it crossed what is now the Landowner property. I recall that when I was a child we used stepping stones to get across. Sometime in the '60s or '70s planks were placed over at least one of these areas.

18. Until the 1978 storm I walked the Coastaltown Path, but have not walked large portions of it since.

18. In 1983, Jeffrey Abutter tried to block the path and I went and took some photos

to show what he had done (attached). As a result of this blockage some 200 people signed affidavits and I understand that Town Counsel then sought an injunction which resulted in the path being unblocked.

19. I never received permission from anyone to walk any portion of the path, nor did anyone stop me from walking the path.

Signed under the pains and penalties of perjury this \_\_\_\_\_ day of \_\_\_\_\_, 1994.

---

John Doe

COMMONWEALTH OF MASSACHUSETTS

[County]

[date]

Then appeared before me the said John Doe, having been duly sworn stated the foregoing statement is true and correct to the best of his information and belief.

Date: \_\_\_\_\_

---

NOTARY PUBLIC

My Commission expires: \_\_\_\_\_

## APPENDIX C.1

### SAMPLE AFFIDAVIT #3

---

#### COMMONWEALTH OF MASSACHUSETTS

[County]

Town of Seatown, MA

#### AFFIDAVIT

KNOW ALL PERSONS BY THESE PRESENTS, that the undersigned, a resident of Seatown, Plymouth County, Commonwealth of Massachusetts, for 85 years, personally appeared before me, a NOTARY PUBLIC, and, after being duly sworn, deposed and said:

1. that the undersigned is and has been a resident of Seatown, Massachusetts, hereinafter called Seatown, for the number of years set forth above;

2. that during the time the undersigned has been a resident of Seatown it has been common knowledge that Seatown and its residents and guests have an easement over, across and through that property situated between CRAB COVE and FIRST AVENUE, known as SEATOWN PATH and SEATOWN WALK PATH and the rocks and land between said SEATOWN PATH and the ATLANTIC OCEAN, for walking, recreation and viewing uses.

3. that during the time the undersigned has been a resident of Seatown, aforesaid, residents and guests of the town have continuously, openly and adversely used said Seatown PATH and the land situated between the path and the ATLANTIC OCEAN for said purposes and it has been well known in said town that said path and land have been so used and subject to such public use.

4. that it is general knowledge within the community that the SEATOWN PATH and land between the path and the ATLANTIC OCEAN are available for the above stated public uses and rights and have been used for such purposes for as long as anyone can remember.

5. that the path and land are shown on the TOWN OF SEATOWN ASSESSORS MAPS, Map No. \_\_\_, and custom and common use have established the path and common use of the land between the path and the Atlantic Ocean for the benefit of the public.

Subscribed by the undersigned on this \_\_\_\_\_ day of [month/year].

---

Signature

Printed Name and Address

COMMONWEALTH OF MASSACHUSETTS

[County]

[date]

Then appeared before me the said John Doe, having been duly sworn stated the foregoing statement is true and correct to the best of his information and belief.

Date: \_\_\_\_\_

---

NOTARY PUBLIC

My Commission expires:

---



## MODEL DEED OF EASEMENT



I/We, \_\_\_\_\_, of \_\_\_\_\_ as \_\_\_\_\_ ("GRANTORS"), in consideration of [\$\_\_\_\_ or "as a gift"] hereby GRANT to the Commonwealth of Massachusetts, acting by and through its Department of Environmental Management at 100 Cambridge Street, Boston, Massachusetts, 02202 ("GRANTEE"), pursuant to authority of Sections 1 and 3 of Chapter 132A of the General Laws, its successors and assigns,

with QUITCLAIM COVENANTS,

a permanent easement along the entire shoreline of the GRANTORS' land situated in the Town of \_\_\_\_\_, County of \_\_\_\_\_, said property being described in [deed] from \_\_\_\_\_ to us recorded at the \_\_\_\_\_ Registry of Deeds in Book \_\_\_\_\_, Page \_\_\_\_\_; said land over which the easement is granted also being shown as Lot \_\_\_\_\_ on a Plan of Land entitled \_\_\_\_\_, which Plan is recorded at \_\_\_\_\_ Registry of Deeds at Plan Book \_\_\_\_\_ at Page \_\_\_\_\_.

Said easement is further described and limited as follows:

1. Easement rights are granted only for that portion of the premises that lies within the area seaward of mean high water and inland of extreme low water, wherever such limits may be located from time to time. [Change description if larger easement area.]
2. The use of the easement is limited to the right of the public in general to enter and use the said portion of the GRANTORS' land for the exclusive purposes of strolling, walking, hiking, and other activities of a reasonably similar nature and kind, between the hours of sunrise and on-half hour after sunset, and so long as well-behaved only, subject to the exclusions set forth in this instrument. [Change description if other rights granted.]
3. For purposes of this easement, any member of the public within the easement area may be considered no longer "well-behaved" and may be ejected from the easement by either the landowner(s) or proper local authorities if such person acts in an excessively loud or obnoxious manner, or engages in any conduct prohibited by law, or conduct which would subject such person to ejection from any public or commercial premise.
4. The terms of this easement shall inure to the benefit of and be binding upon the parties hereto, their respective successors and assigns.

Wherefore I/We, on behalf of ourselves, our successors, and assigns, have set our hand(s) and seal(s) this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

GRANTOR(S)

[Accepted:

COMMONWEALTH OF MASSACHUSETTS  
Department of Environmental Management

By: \_\_\_\_\_]

[Notarization]

## APPENDIX C.3

### SAMPLE LANDOWNER AGREEMENT

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#### LICENSING AGREEMENT FOR USE OF "SEA PATH"

WITNESSETH, that [name of landowner] of [address] is the owner of land in [city/town,] Massachusetts, shown on Land Court Plan [ ] recorded at the [County} Registry of Deeds. Said owner, hereinafter referred to as the Lessor, desires to cooperate with the [city/town] and the Commonwealth of Massachusetts, hereinafter referred to as the Licensees, in providing access for a "Sea Path" as delineated below.

THE LESSOR, in consideration of the payment of one dollar (\$1.00) by the [city/town], hereby grants permission for the public to enter the property along the shore of the coastline for the exclusive purpose of strolling, walking, or hiking between the hours of sunrise and one-half hour after sunset. This on-foot free right-of-passage shall encompass the beach and intertidal area from extreme low water line to the mean high water line. This grant of access does not and is not intended to convey to the public the right to engage in other nonstrolling beachgoing activities, such as sunbathing, picnicking and pet walking.

Members of the public which do not abide by these limitations or are otherwise acting in a loud or unseemly manner may be ejected by the landowners or local or state authorities.

This license shall be effective for a period of one year from the date of execution, and may be renewed annually by mutual agreement between lessor and licensee.

IN WITNESS WHEREOF, the parties have executed this agreement in triplicate at [city/town] Massachusetts, this day of [month] 1995

LESSOR \_\_\_\_\_

By its duly authorized agent

## APPENDIX D

### RELEVANT STATUTES AND CITATIONS TO CASE LAW

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#### **CONTENTS**

##### **1. Relevant Statutes**

1. G.L. Chapter 21, Section 17C: Massachusetts Recreational Use Statute
2. G.L. Chapter 79, Sections 3, 4, 16, 18: Eminent Domain Power
3. G.L. Chapter 81, Sections 5-7, 12, 22: Regarding State Highways
4. G.L. Chapter 82, Sections 1-7, 21-24, 29 -32A, 33-: Regarding County Highways, Town Ways and Statutory Private Ways
5. G.L. Chapter 88, Sections 14-19: Regarding Landing Places
6. G.L. Chapter 91, Section 23
7. G.L. Chapter 183, Section 58: Regarding a way and water as a boundary
8. G.L. Chapter 187, Section 2: Easements by Prescription
9. G.L. Chapter 187, Section 3: Regarding Notice of Intention to Prevent Acquisition by Custom or Prescription
10. Article 97 of the Articles of Amendment to the Constitution of Massachusetts

##### **2. Citations to Relevant Case Law**

## APPENDIX D.1

### RELEVANT STATUTES

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#### **1. MASSACHUSETTS GENERAL LAW, CHAPTER 21, SECTION 17C**

**Section 17C. Public use of land for recreational purposes; landowner's liability limited; exception**

An owner of land who permits the public to use such land for recreational purposes without imposing a charge or fee therefor, or who leases his land for said purposes to the commonwealth or any political subdivision thereof shall not be liable to any member of the public who uses said land for the aforesaid purposes for injuries to person or property sustained by him while on said land in the absence of willful, wanton or reckless conduct by such owner, nor shall such permission be deemed to confer upon any person so using said land the status of an invitee or licensee to whom any duty would be owed by said owner. The liability of an owner who imposes a charge or fee for the use of his land by the public for recreational purposes shall not be limited by any provision of this section. No contributions or other voluntary payments not required to be made to use such land shall be considered a charge or fee within the meaning of this section.

#### **2. MASSACHUSETTS GENERAL LAW, CHAPTER 79, SECTIONS 3-4**

### **CHAPTER 79. EMINENT DOMAIN**

**Section 3. Recordation of taking order; procedure to acquire possession**

The board of officers by whom an order of taking has been adopted under section one shall within thirty days thereafter cause a copy thereof, signed by them or certified by their secretary or clerk, or, in case of a taking by or on behalf of a city by a board of officers having no secretary or clerk, certified by the city clerk, to be recorded in the registry of deeds of every county or district in which the property taken or any of it lies. The copy of an order of taking made under chapter one hundred and fifty-nine in connection with proceedings

thereunder to abolish grade crossings by the department of highways, or by the department of public utilities, may be filed and recorded without the payment of any fee therefor. Upon the recording of an order of taking under this section, title to the fee of the property taken or to such other interest therein as has been designated in such order shall vest in the body politic or corporate on behalf of which the taking was made; and the right to damages for such taking shall thereupon vest in the persons entitled thereto unless otherwise provided by law.

If the person in possession of property which has been taken in fee, or in which an easement has been taken, by eminent domain under this chapter refuses to permit the body politic or corporate by which the taking was made to enter thereon and take possession thereof or to exercise its rights under the taking after thirty days' notice in writing sent to him by registered mail or posted upon the property so taken or in which an easement has been so taken, the board of officers having the direction and control of the public improvement in connection with which the taking was made may issue its warrant to the sheriff of the county in which the property is situated or to his deputy directing him to make entry on the property so taken and to take possession thereof or of the easement therein which has been taken, on behalf of said body politic or corporate, and such sheriff or his deputy shall forthwith execute said warrant using such force as he may deem necessary for the purpose.

#### **Section 4. Taking registered land**

If land of a registered owner, or any right or interest therein, is taken by eminent domain, the board of officers by whom the taking is made shall file for registration in the proper registry district a description of the registered land so taken, giving the name of each owner thereof, referring by number and place of registration in the registration book to each certificate of title, and stating what estate or interest in the land is taken, and for what purpose. A memorandum of the right or interest taken shall be made on each certificate of title by the assistant recorder. If the fee simple of part of the registered land is taken a new certificate shall be entered to the owner for the land remaining to him after such taking. All fees on account of any memorandum of registration or entry of new certificates shall be paid by the body politic or corporate which takes the land. If the body politic or corporate which takes the land acquires the fee simple of all or part of the registered land, a new certificate shall be entered to the body politic or corporate making the fee simple taking.

## **Section 16: Time for filing petition**

A petition for the assessment of damages under section fourteen may be filed within three years after the right to such damages has vested; but any person, including every mortgagee of record, whose property has been taken or injured, and who has not received notice under section eight or otherwise of the proceedings whereby he is entitled to damages at least sixty days before the expiration of such three years, may file such petition within six months after the taking possession of his property or the receipt by him of actual notice of the taking, whichever first occurs, or, if his property has not been taken, within six months after he first suffers actual injury in his property.

## **Section 18: Time for filing petition when validity of taking is contested**

If a suit, in which the right of a body politic or corporate to effect a particular public improvement or to make a particular taking is drawn in question, is brought within the time for filing a petition to the proper tribunal for an award or assessment of the damages caused by such improvement or taking, or within six months after the determination of an earlier suit involving the same question, brought within the time for filing such petition, which failed for want of jurisdiction, defect of form or other like cause not decisive of the merits of the controversy, the petition may be filed within six months after the final determination of such suit.

## **3. MASSACHUSETTS GENERAL LAW, CHAPTER 81, SECTIONS 5, 6, 7, 12, 22**

### **Section 5. Filing of highway plan; right to abandon or discontinue; width of highway**

If the department determines, after public notice and a hearing of all parties interested, that public necessity and convenience require that a way should be laid out or be taken charge of by the commonwealth, it shall file in the office of the county commissioners for the county where the way is situated a certified copy of a plan thereof and a certified copy of a certificate that it has laid out and taken charge of said way in accordance with said plan, and shall file in the office of the clerk of each town where the way is situated a copy of the plan showing the location of the portion lying therein and a copy of the certificate that it has laid out and taken charge of said highway in accordance with said plan, and thereafter

said way shall be a state highway, and shall be constructed by the department at the expense of the commonwealth; but any state highway so laid out and constructed may be abandoned or discontinued as provided in section twelve. The width of a state highway shall be such as the department deems necessary. If the width of a state highway be less than that of the way previously existing, that portion of the way which lies between the boundary or location lines of the state highway and the boundary lines of the way previously existing shall remain a public way unless the department determines that it should be abandoned, or the county commissioners of the county, or the city or town in which the way is situated, having jurisdiction of the way, abandon at any time said portion in the manner provided by law for the alteration, relocation or discontinuance of public ways.

#### **Section 6. Alteration of location**

The department may alter the location of a state highway in a city or town by filing a plan thereof and a certificate that the department has laid out and taken charge of said state highway, as altered in accordance with said plan, in the office of the county commissioners for the county where said highway is situated, and by filing a copy of the plan or location as altered in the office of the clerk of such city or town.

#### **Section 7. Acquisition of land outside limits of existing highway**

If it is necessary to acquire land for the purposes of a state highway outside the limits of an existing public way, the department may take the same by eminent domain on behalf of the commonwealth under chapter seventy-nine. When injury has been caused to the real estate of any person by the laying out or alteration of a state highway, he may recover compensation therefor from the commonwealth under chapter seventy-nine. The mayor, if so authorized by the aldermen, or the selectmen, if so authorized by the town, may stipulate in writing in behalf of the city or town to indemnify and save harmless the commonwealth against all claims and demands for damages which may be sustained by any persons whose property has been taken for, or has been injured by the laying out or alteration of, any highway which the department proposes to lay out and construct or alter as a state highway, and thereupon such city or town shall be liable ultimately for the amount of any verdict against the commonwealth for such damages, and for costs, and the amount thereof may be recovered by the commonwealth in contract.

## **Section 12. Discontinuance or abandonment**

The department, with the concurrence of the county commissioners, may discontinue as a state highway any way or section of way laid out and constructed under the provisions of section five by filing in the office of the county commissioners for the county and in the office of the clerk of the town in which such way is situated a certified copy of a plan showing the way so discontinued and a certificate that it has discontinued such way; and thereafter the way or section of way so discontinued shall be a town way. Said department may also abandon any land or rights in land which may have been taken or acquired by it by filing in the office of the county commissioners for the county and in the office of the clerk of the town in which such land is situated a certified copy of a plan showing the land so abandoned and a certificate that it has abandoned such land, and by filing for record in the registry of deeds for the county or district in which the land lies a description and plan of the land so abandoned; and said abandonment shall revest the title to the land or rights abandoned in the persons in whom it was vested at the time of the taking, or their heirs and assigns.

## **Section 22. Prescriptive rights of adjoining owners**

No length of possession, or occupancy of land within the limits of a state highway by an owner or occupant of adjoining land shall give him any title thereto, and any fences, buildings or other objects encroaching upon a state highway shall, upon written notice by the department, be removed within fourteen days by the owner or occupant of adjoining land, and if not so removed, the department may either remove the same to such adjoining land or such encroaching objects, other than a building used for residential purposes, may be removed by the department forces and shall be placed in the nearest maintenance area of the department. Notice by certified mail, return receipt requested shall be given to the owner stating where such encroaching object is located and further stating that if not claimed within three weeks said object may be destroyed.

**4. MASSACHUSETTS GENERAL LAWS, CHAPTER 82, SECTIONS 21-24,  
29-33**

**Section 21. Authority to lay out ways**

The selectmen or road commissioners of a town or city council of a city may lay out, relocate or alter town ways, for the use of the town or city, and private ways for the use of one or more of the inhabitants thereof; or they may order specific repairs to be made upon such ways; and a town, at a meeting, or the city council of a city, may discontinue a town way or a private way.

**Section 22. Notice of intention**

Seven days at least prior to the laying out, relocation or alteration of a town way or private way a written notice of the intention of the selectmen or road commissioners of the town to lay out, relocate or alter the same shall be left by them, at the usual place of abode of the owners of the land which will be taken for such purpose, or delivered to such owner in person or to his tenant or authorized agent. If the owner has no such place of abode in the town and no tenant or authorized agent therein known to the selectmen or if, being a resident in the town, he is not known as such to the selectmen or road commissioners, such notice shall be posted in a public place in the town seven days at least before the laying out, relocation or alteration of such way. This section shall not apply to cities.

**Section 23. Filing and acceptance of plan**

No town way or private way which has been laid out, relocated or altered by the selectmen or road commissioners shall, except as hereinafter provided, be established until such laying out, relocation or alteration, with the boundaries and measurements of the way, is filed in the office of the town clerk and, not less than seven days thereafter, is accepted by the town at a town meeting. This section shall not apply to cities.

**Section 24. Taking by eminent domain; damages**

If it is necessary to acquire land for the purposes of a town way or private way which is laid out, altered or relocated by the selectmen, road commissioners or other officers of a

town under this chapter, such officers shall, within one hundred and twenty days after the termination of the town meeting at which the laying out, alteration or relocation of such town way or private way is accepted by the town, acquire such land by purchase or otherwise, or adopt an order for the taking of such land by eminent domain under chapter seventy-nine or institute proceedings for such taking under chapter eighty A. Any person sustaining damage in his property by the laying out, alteration or relocation of a town way or private way shall be entitled to recover the same under said chapter seventy-nine, unless such damage was sustained in connection with a taking made in proceedings instituted under said chapter eighty A, and any person sustaining damage in his property by the discontinuance of a town way or private way or by specific repairs thereon shall be entitled to recover the same under said chapter seventy-nine. If no entry has been made upon land taken under said chapter seventy-nine for the purpose of a town way, or if the location has for any other cause become void, a person who has suffered loss or been put to expense by the proceedings shall be entitled to recover indemnity therefor under said chapter seventy-nine. If a private way is laid out, relocated, altered or discontinued by a town, or if a town makes specific repairs thereon, or if a town way is discontinued, the persons upon whose application such way is laid out, relocated, altered or discontinued or upon whose application specific repairs are made thereon shall, before such way is entered upon for the purposes of construction, or is closed up, give such town security satisfactory to the selectmen that they will indemnify such town for all damages and charges which it is obliged to pay by reason thereof, and all such damages and charges shall be repaid to the town by the persons making such application; provided, however, that in case of the discontinuance of a town way the selectmen may order a part of the damages to be paid by the town. The first sentence of this section shall not apply to cities.

### **Section 29. Private ways; laying out, relocation or alteration by commissioners**

If the laying out, relocation or alteration of a private way is desired in a town for the use of one or more persons who are not inhabitants thereof, or if the laying out, relocation or alteration of a private way lying partly in one town and partly in another is desired, the county commissioners may cause such way to be laid out, relocated or altered, in the manner provided in section twenty-six.

### **Section 30. Discontinuance by commissioners**

Upon the application in writing of a person aggrieved by the refusal of a town to

discontinue a town way or private way, the county commissioners may order such way to be discontinued. If a town way has been laid out, relocated or altered by the county commissioners, it shall not within two years thereafter be discontinued, relocated or altered by the town; and if such way has been discontinued by the county commissioners, the town shall not within two years thereafter lay out the same again.

### **Section 31. Costs for hearing petitions; recognizance**

If an application is made to the county commissioners under sections twenty-six, twenty-seven, twenty-nine or thirty, [FN1] they may cause a recognizance to be given to the county such as is required in applications for highways; and like proceedings may be had on such recognizance. They shall also cause notice to be given, before they proceed to view or to hear the parties, as in the case of highways.

### **Section 32. Report of laid out, relocated or altered roads; recordation**

When a town way or private way is laid out, relocated or altered by the selectmen or road commissioners or by the county commissioners, they shall in their report or return thereof specify the manner in which such way is laid out, relocated or altered and shall transmit to the town clerk a description of the location and bounds thereof, which shall within ten days be recorded by him in a book kept for that purpose; and no town shall contest the legality of a way laid out by it and accepted and recorded as provided in this chapter. Sections twenty-six to thirty-two, [FN1] inclusive, shall apply to cities.

### **Section 32A. Abandonment of municipal ways**

The board or officers of a city or town having charge of a public way may, after holding a public hearing, notice of which shall be sent by registered mail, return receipt requested, to all property owners abutting an affected road and notice of which shall be published in a newspaper of general circulation in the city or town once in each of two successive weeks, the first publication to be not less than fourteen days before the day of the hearing and by posting in a conspicuous place in the office of the city or town clerk for a period of not less than fourteen days before the day of the hearing, upon finding that a city or town way or public way has become abandoned and unused for ordinary travel and that the common convenience and necessity no longer requires said town way or public way to be maintained in a condition reasonably safe and convenient for travel, shall declare that the

city or town shall no longer be bound to keep such way or public way in repair and upon filing of such declaration with the city or town clerk such declaration shall take effect, provided that sufficient notice to warn the public against entering thereon is posted at both ends of such way or public way, or portions thereof.

### **Section 33. Footways**

Cities and towns may lay out footways for the use of the public in the manner provided for the laying out of town ways.

## **5. MASSACHUSETTS GENERAL LAWS, CHAPTER 88, SECTIONS 14 - 19**

### **Section 14. Laying out or alteration of common landing places; erection and maintenance of structures thereon**

In every city or town where the tide ebbs and flows there shall be provided on a tidal shore thereof at least one common landing place and where no common landing place exists the city council or board of selectmen shall lay out at least one common landing place and may from time to time alter the same, but the layout or alteration of such landing place shall not extend below low water mark. In any such city or town the city council or board of selectmen may, upon petition of ten or more voters of the city or town, lay out additional common landing places and alter the same or those already existing, but no layout or alteration of such landing place shall extend below low water mark. All the provisions of law relating to the laying out and alteration of town ways shall apply to the laying out or alteration of common landing places. Any person who is damaged in his property by such laying out or alteration may recover damages under chapter seventy-nine. In any city or town where a common landing place exists or where a layout or alteration is made in accordance with the provisions of this section, the city council or board of selectmen shall file a plan and a description of each such common landing place or layout or alteration with the city clerk or town clerk, with the county commissioners of the county where said city or town is located, and with the department of environmental management and shall record the same in the registry of deeds for said county. A city or town may erect and maintain structures on any such common landing place in keeping with the public nature thereof, but any such structures extending into tidewater shall be subject to the provisions of chapter

ninety-one. The city council or board of selectmen shall make rules and regulations governing the operation and use of structures on a common landing place and may appoint a custodian thereof and fix his salary, or it may, on behalf of the city or town, lease said structures.

### **Section 15. Failure to lay out; appeal to county commissioners**

Any person aggrieved by the failure of the selectmen of a town to lay out suitable landing places therein, after petition therefor, or by the failure of a town to accept a common landing place laid out by the selectmen, may, if an inhabitant of such town or of an adjoining town, within six months after such petition to the selectmen or after such failure of the town, appeal by petition in writing to the county commissioners, who, unless sufficient cause to the contrary is shown, may lay out suitable common landing places, or may approve a landing place laid out by the selectmen, and may direct the laying out of such landing places to be recorded by the clerk of the town, and such laying out or approval shall have the same effect as a laying out by the selectmen and an acceptance by the town. The proceedings of the county commissioners upon such an appeal shall, so far as is practicable, be the same as those provided by law in regard to the laying out of highways by county commissioners.

### **Section 16. Ascertainment of location of common landing place**

Upon the representation of ten or more inhabitants of a county to the county commissioners that the exact location of a common landing place in such county cannot be readily ascertained, they shall, after giving the notice required in laying out highways, ascertain the correct location of such landing place, erect the necessary bounds thereof and make a record thereof as in laying out highways.

### **Section 17. Discontinuance; appeal**

A town at a meeting called for the purpose may discontinue any common landing place laid out under this chapter. Any resident of the town, or of an adjoining town aggrieved by such discontinuance may, within six months thereafter, appeal to the county commissioners, who shall give notice to the clerk of the town in which such landing place is situated, and to the clerks of every adjoining town, of a hearing on such appeal and of the time and place appointed therefor, at least thirty days before the time appointed for the hearing, and they shall also cause copies of the petition, or abstracts thereof, and of the

notice, to be posted in two public places in each of said towns, and to be published three weeks successively in such newspaper as they shall order; the posting and the last publication to be fourteen days at least before any view, hearing or adjudication on such appeal. The proceedings of the county commissioners shall, so far as is practicable, be in accordance with the law regarding the discontinuance of a way by county commissioners, and the decision of the county commissioners shall be final.

### **Section 18. Recognizance for costs**

Before any action is taken upon an appeal under section fifteen or seventeen the appellants shall cause a sufficient recognizance to be given to the county, with sureties to the satisfaction of the county commissioners, for the payment of all costs and expenses to the county which shall arise by reason of the proceedings on such appeal, if the appellants do not prevail.

### **Section 19. Use of common landing places**

The city council of a city and the selectmen of a town may make rules and regulations concerning the use of a common landing place laid out under this chapter; provided, that no such rule or regulation shall be effective unless it shall have been published in one or more newspapers, if there be any published in the city or town in which the public landing is located, otherwise in one or more newspapers published in the county in which the city or town is situated. Any person convicted of a violation of any such rule or regulation shall be punished by a fine of not more than twenty dollars.

## **6. MASSACHUSETTS GENERAL LAWS, CHAPTER 91**

### **Section 23. Unauthorized work in public waters; public nuisances**

Every erection made and all work done within tide water, or within the waters of a great pond or outlet thereof, or on or within the banks of the Connecticut river, or the Merrimack river, below high water mark, not authorized by the general court or by the department, or made or done in a manner not sanctioned by the department, if a license is required as hereinbefore provided, shall be considered a public nuisance. Whoever creates such nuisance, (a) shall be punished by a fine of not more than twenty-five thousand dollars for

each day such nuisance occurs or continues, or by imprisonment for not more than one year, or both such fine and imprisonment; or (b), shall be subject to a civil penalty of not more than twenty-five thousand dollars for each day such nuisance occurs or continues. The attorney general or the district attorneys within their respective districts shall, at the request of the department, institute proceedings to enjoin or abate such nuisance, or to restrain the removal of material from any bar or breakwater of any harbor.

## **7. MASSACHUSETTS GENERAL LAWS, CHAPTER 183, SECTION 58**

### **Section 58. Real estate abutting a way, watercourse, wall, fence, or other monument**

Every instrument passing title to real estate abutting a way, whether public or private, watercourse, wall, fence or other similar linear monument, shall be construed to include any fee interest of the grantor in such way, watercourse or monument, unless (a) the grantor retains other real estate abutting such way, watercourse or monument, in which case, (i) if the retained real estate is on the same side, the division line between the land granted and the land retained shall be continued into such way, watercourse or monument as far as the grantor owns, or (ii) if the retained real estate is on the other side of such way, watercourse or monument between the division lines extended, the title conveyed shall be to the center line of such way, watercourse or monument as far as the grantor owns, or (b) the instrument evidences a different intent by an express exception or reservation and not alone by bounding by a side line.

## **8. MASSACHUSETTS GENERAL LAWS, CHAPTER 187, SECTION 2**

### **Section 2. Easements by prescription**

No person shall acquire by adverse use or enjoyment a right or privilege of way or other easement from, in, upon or over the land of another, unless such use or enjoyment is continued uninterruptedly for twenty years.

**9. MASSACHUSETTS GENERAL LAWS, CHAPTER 187, SECTION 3**

**Section 3. Notice of intention to prevent acquisition by custom**

If a person apprehends that a right of way or other easement in or over his land may be acquired by custom, use or otherwise by any person or class of persons, he may give public notice of his intention to prevent the acquisition of such easement, by causing a copy of such notice to be posted in a conspicuous place upon the premises for six successive days, and such posting shall prevent the acquiring of such easement by use for any length of time thereafter; or he may prevent a particular person or persons from acquiring such easement by causing a copy of such notice to be served upon him or them as provided by law for the service of an original summons in a civil action. Such notice from the agent, guardian or conservator of the owner of land shall have the same effect as a notice from the owner himself. A certificate, by an officer qualified to serve civil process, that such copy has been served or posted by him as above provided, if made upon the original notice and recorded with it, within three months after the service or posting, in the registry of deeds for the county or district in which the land lies, shall be conclusive evidence of such service or posting.

**10. CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS,  
ARTICLES OF AMENDMENT, ARTICLE 97**

**Art. XCVII. Annulment of Forty-ninth Article of Amendment and adoption of new Article**

Article XLIX of the Amendments to the Constitution is hereby annulled and the following is adopted in place thereof:--

**Art. XLIX. Right of people to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment**

The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.

The general court shall have the power to enact legislation necessary or expedient to protect such rights.

In the furtherance of the foregoing powers, the general court shall have the power to provide for the taking, upon payment of just compensation therefor, or for the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes.

Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two-thirds vote, taken by yeas and nays, of each branch of the general court.

## APPENDIX D.2

### CITATIONS TO RELEVANT CASE LAW

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The following citations to Massachusetts cases present a sampling of the state court decisions relevant to right of way law. The cases are grouped by topic and include a brief quotation or statement indicating the relevance of the decision. Particularly useful articles are also noted. This list is by no means exhaustive. Its purpose is to give legal practitioners a head start on their research concerning any of the particular issues highlighted below.

#### A. Abandonment/Extinguishment of Easements

1. *First National Bank of Boston v. Konner*, 373 Mass. 463 (1977). Nonuser alone, no matter how long continued will not suffice to extinguish an easement. It is necessary to show “acts by the dominant owner conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its further existence.”
2. *Desotell v. Szczygiel*, 338 Mass. 153 (1958). It is well settled that abandonment is not proved by proof of acts which interfere with the use of the easement only temporarily, or only in part.
3. *Yagjian v. O'Brien*, 19 Mass. App. Ct. 733 (1985). Easement owner's right of passage was extinguished by a landowner's successful blockage and the easement owner's failure to bring action within the prescriptive period (20 years) to have the blockage removed. Excellent discussion of gates and unlocked barways not extinguishing an easement, versus unbroken fencing.
4. *Makepeace Bros. Inc. v. Barnstable*, 292 Mass. 518 (1935). An interest in the nature of an easement is not terminated when the purpose for which it is created is neither totally nor permanently impossible of enjoyment.
5. *Ivons-Nispel, Inc. v. Lowe*, 347 Mass. 760 (1964). "Persons of the local community" and the 'general public' are too broad a group to acquire prescriptive easement to use private beaches for bathing and recreational purposes.

6. *Shaughnessey v. Leary*, 162 Mass. 108 (1894). A transfer of ownership does not put an end to an already existing easement nor to the running of time for a prescriptive easement. “The registry laws do not extinguish easements created by prescription in favor of purchasers without notice.” *Johnson v. Knapp*, 146 Mass. 70 (1888).

7. *Stagman v. Kybos*, 19 Mass. App. Ct. 590 (1985). To extinguish an easement or prevent prescription, an owner must bar access by blocking the way himself or have it done at his direction on his behalf, and the blocking must be deliberate. Unintentional blocking, or blocking by stranger to the dispute, is not sufficient.

8. *Davenport v. Danvers*, 336 Mass. 106 (1957). Town’s lapse of use for eighteen years was not intentional abandonment nor extinguishment, where adverse possession had already ripened; the general intermittent use created prescriptive rights as broad as the use.

9. *Jamaica Pond Aqueduct Corp. v. Chandler*, 121 Mass. 3 (1876). The use of another way does not operate in law to extinguish a right of way.

10. *Pope v. Devereux*, 71 Mass. (5 Gray) 409 (1855) (citing *Dyer v. Sanford*, 50 Mass. (5 Met.) 395 (1845)). Parol agreement to give up public easement is not valid; the easement belongs to the public, and only the legislature may give up such public rights.

11. *2 Thompson on Real Property Section 347, fn. 48 and 49*. Placing obstructions across an easement which merely make the public’s use less convenient doesn’t interrupt the continuity, absent proof that the use was actually interrupted. It must be a permanent (not temporary) and substantial obstruction.

## B. Adverse Possession and Prescription

1. *Tyler v. Sturdy*, 108 Mass. 196 (1871). “By the common law of England, foot ways for the use of the public. . . might be created by dedication or prescription.”

2. *Stagman v. Kybos*, 19 Mass. App. Ct. 590 (1985). “[A] pattern of regular return by car for the weekends,” warrants a determination that the use was continuous.

3. *Labounty v. Vickers*, 352 Mass. 337 (1967). Where it was argued there could be no prescriptive easement because the land was undeveloped, wild and unenclosed, the court found the land was suited for “usual beach and bathing purposes,” and plaintiff’s claim could not be defeated on the grounds that the land was “undeveloped and wild.”

4. *McKenna v. Boston*, 131 Mass. 143 (1881). Where there has been “an actual public use [of a way], general, uninterrupted, and continued for twenty years, that makes [the way] a public highway.”

5. *Fenn v. Middleborough*, 7 Mass. App. Ct. 80 (1979). “In general, it may be said that an existing way . . . is not a “public” way . . . unless it has become public in character in one of three ways: (1) a laying out by public authority in the manner prescribed by statute [citation omitted] ; (2) prescription; and (3) prior to 1846, a dedication by the owner to public use, permanent and unequivocal [citations omitted] coupled with an express or implied acceptance by the public. Because the 1846 statute put an end to the creation thereafter of public ways by dedication and acceptance [citation omitted], it has only been possible since that time to create a public way by a laying out in the statutory manner or by prescription.”

6. *Daley v. Swampscott*, 11 Mass. App. Ct. 822 (1981). “There is no doubt that a municipality may acquire an easement by prescription to use land located within its limits for a specific public purpose [citations omitted]. The test by which a municipality acquires a prescriptive easement is basically the same as that for an individual -- any unexplained use for more than twenty years which is open, continuous, and notorious is presumed to be adverse and conducted under a claim of right. [citations omitted]. . . In addition to these requirements, it is also necessary for a municipality to establish that its acts of disseisin constitute “corporate action. . .” [citation omitted]. . . What appears to be necessary is proof sufficient to satisfy a trier of fact that the municipality has exercised dominion and control over the land in its corporate capacity through authorized acts of its employees, agents or representatives to conduct or maintain a public use thereon for the general benefit of its inhabitants.”

7. *Scott v. City of Worcester*, 257 Mass. 520 (1926). Public use and maintenance of a private sidewalk , without objection by the owner or assessment by the city established a public easement.

8. *Ryan v. Starros*, 348 Mass. 251 (1964). Painting of curbstones, cleaning and maintaining area, and placing sawhorses for a few hours on two occasions did not terminate a prescriptive easement.

9. *Schuffels v. Bell*, 21 Mass. App. Ct. 76 (1985). The court found prescription even though plaintiffs were unable to show that their own use was enough to establish prescription. The court found “long . . . continuous and uninterrupted adverse use” had been made in the past, and “the question was not whether [the plaintiffs’ sporadic use] would be sufficient in itself to give them a prescriptive easement. . .the prescription arose much earlier.”

10. *Bodfish v. Bodfish*, 105 Mass. 317 (1870). Continuous use does not mean “constant use.” “Mere intermission is not interruption. . .use, of such character and at such intervals, as afforded a sufficient indication to the owner of the land that the right of way was claimed against him...in each of the twenty consecutive years...even though the defendant had not given evidence of actual use in each year of the twenty...may be such as to satisfy the jury that the use was continuous, even though direct evidence of actual use as to one or two years in the series may be wanting.”

11. *Davenport v. Danvers*, 336 Mass. 106 (1957). Where the predecessor owners never took steps to prevent the acquisition of prescriptive rights and the adverse use had been exercised for over twenty years prior to the defendant’s ownership, adverse possession had already ripened and any objection was too late. If “[s]uch activities as were carried on are in their nature conspicuous and certainly must have been well known to the whole of a small semi-rural community,” the owner is charged with notice. *Lawrence v. Houghton*, 296 Mass. 407 (1937); *Bigelow Carpet Co. v. Wiggin*, 209 Mass. 542 (1911) (Where “[t]he use was open, continuous and so persistent. . .the jury could find from these circumstances alone that they knew of it. . .even if actual knowledge may not be shown.”)

12. *Matthys v. First Swedish Baptist Church of Boston*, 223 Mass. 544 (1916). If an encroachment is perfectly visible, very little is required to establish adverse possession. *Cummings v. Franco*, 335 Mass. 639 (1957) (where use is obvious, a purchaser takes title subject the easement).

13. 2 *Proof of Facts* 3d 197 Section 9, footnote 7; 39 *AmJur 2d, Highways, Streets and Bridges*, Section 30 (1968). Detours and minor variations in the course of a right of way due to the nature of the area, encroachments, obstructions, rains, floods, and other natural conditions, do not affect the definiteness of the right of way as long as the origin, terminus, course, location and use of the right remain substantially unchanged.

14. Another source that provides excellent background information is “Establishment of Prescriptive Easement”, 2 *Am Jur Proof of Facts* 3d 197 (1968).

## C. Dedication and Acceptance

1. *Abbott v. Cottage City*, 143 Mass. 521 (1887). “The principle of dedication. . .has been recognized in the State as in force here before the St. of 1846, c. 203 and as still in force in cases not within the terms of that statute.” Dedication is complete immediately upon use by the public. It does not require use for any length of time, nor does it require a vote of a town. It is unnecessary to show any public act of acquiescence by a town. Once a gift has been accepted by the public, an owner is estopped to revoke or deny the gift, and “[n]o conveyance, even with warranty, affects a dedication once made.”

2. *Commonwealth v. Coupe*, 128 Mass. 65 (1880). Ways by dedication “are created by the permission or gift of the owner, and, upon the acceptance of such gift by the public authorities, it becomes a way, and the owner cannot withdraw the dedication.”

3. *Tyler v. Sturdy*, 108 Mass. 196 (1871). “Public footways may be created by dedication in this Commonwealth.”

4. *Attorney General v. Onset Bay Grove Assn.*, 221 Mass. 342 (1915). The court found implied dedication after a developer made representations and advertised that an open space in his subdivision would be kept open as a park. “Simple honesty” required that the seller be held to the promises on which his buyers had relied, and thus, the court enjoined him from building on the public lots. The general public, through use of the parks, had accepted the dedication, and no vote or official acceptance by public officials is required.

5. *Gion v. City of Santa Cruz*, 2 Cal. 3d 29 (1970). The California Supreme Court found that where public use continued for over five years with full knowledge of the owners, without permission or objection, there was implied dedication.

6. *Attorney General v. Tarr*, 148 Mass. 309 (1889). The court found dedication and acceptance by the general public where a town landing was laid out “for the public use for the inhabitants of Gloucester” and was used by the general public.

## D. Immemorial Custom

1. *Puffer v. City of Beverly*, 345 Mass. 396 (1963). Historic customary use of a landing was sufficient to affirm public rights by the doctrine of immemorial usage and prescription.

2. *Perley v. Langley*, 7 N.H. 233 (1834). “A mere easement—as a way. . .may be claimed by custom.” (citing *Coolidge v. Learned*, 25 Mass. (8 Pick) 505 (1829)).

3. *State Ex Rel. Thornton v. Hay*, 254 Or. 584 (1969). The entire area “has been used by the public...according to an unbroken custom running back in time as long as the land has been inhabited...[and] is so notorious that notice of the custom on the part of persons buying land along [it] must be presumed.”

## E. Durability of Easements

1. *Kenny v. Marino*, 350 Mass. 534 (1966). The absence of a reference to the right of way in intervening deeds did not release or impair an easement. “The well settled rule [is] that appurtenant easements pass by grant without specific mention.”

2. *Parson v. New York, New Haven, & Hartford R.R.*, 216 Mass. 269 (1913).

An easement created by express grant is unbounded as to time, and if the owner of the easement acquires another way of access, it “does not warrant the inference of extinguishment of the earlier way created by express grant.”

## F. Statutory Lay Out

1. *Loriol v. Keene*, 343 Mass. 358 (1961). The giving of notice and filing of a lay out, as required by statute, are not mere procedural technicalities. These requirements are safeguards against inconsiderate or capricious action on the part of municipal authorities.

2. *Wilson Line of Mass. v. Selectmen of Hull*, 322 Mass. 296 (1948). The mere fact that the town acquired title to a parcel of real estate upon which there was a wharf did not give every individual a right to dock his vessel without the specific lay out of the wharf by the town according to the statutory standards found in G.L. Chapter 88.

3. *Flagg v. Flagg*, 82 Mass. (16 Gray) 175 (1860). A private way established for the use of one or more individuals of a town, or for the proprietors, under St. 1786, c. 67, sec. 1, is not discontinued by the unity in one person of title to and possession of all the land through which the same is located.

## G. Chapter 91 Licensing

1. *Opinion of the Justices to Senate*, 383 Mass. 895 (1981). Submerged lands granted by the Legislature remain subject to M.G.L. c. 91 regulations and the Colonial Ordinances of 1641-1647. Such a grant is “subject to the condition that it be used for the public purpose or purposes of the authorizing legislation and, if it is not so used, the Commonwealth has a right to enter and repossess the property.” Likewise, the maintenance of a wharf without a license is a public nuisance, *Fuller v. Andrew*, 230 Mass. 139, and “action against an owner was justified even though there was no direct knowledge on her part that the wharf had been erected by another without a license.” *Commonwealth v. Capitol Theatre*, 325 Mass. 146 (1949).

2. *Attorney General v. Baldwin*, 361 Mass. 199 (1972). Work done which violates or fails to comply with a Ch. 91 license is a public nuisance which the court can order removed. Where “public land has been made available for private purposes and its subsequent development results in a public nuisance...”(t)he purpose of the statute is, not only to punish all encroachments upon this portion of the public domain, but to furnish means for their prevention or removal...to prohibit all invasions of the rights of the public.” Further, “all persons who join or participate in the creation or maintenance of a public nuisance are liable jointly and severally.”

3. *Woodbury v. Municipal Council of Gloucester*, 318 Mass. 385 (1945). “An obstruction to navigation in tidal waters constitutes a public nuisance unless authorized by an appropriate governmental agency...a license granted to a person to use a public way, even if he owns the fee...is revocable...[b]ut such a licensee has a right to expect that he will not be disturbed in the use so long as he complies with the conditions of the license and so long as the Legislature makes no change in the law.” A license holder is not obliged to utilize the license, and may abandon the right “at any time before the expiration of his license, and in that event the municipal council could grant a new license to another.”

4. *Town of Wellfleet v. Glaze*, 403 Mass. 79 (1988). A license must not impair private property rights, and a fee owner of the intertidal zone may not interfere with the public’s reasonable use of its public easement for fishing, fowling and navigating(which includes shellfishing). A license for shellfishing, although issued to a private party, “is granted to serve the public interest in replenishing the shellfisheries, not for the private benefit of the licensee...private interference with the public’s easement is treated in equity as a public nuisance.” While the Attorney General is the proper person to maintain an action for abatement of a public nuisance, municipalities may also do so if they have damages, are responsible for regulation over the matter, if the issue is one in which the inhabitants are “peculiarly interested,” or the wrongdoing violates the rules and orders of its officers.

## H. Proprietors, Commoners Records

1. *Green v. Putnam*, 62 Mass. (8 Cush.) 21 (1851). The long settled law of the Commonwealth that proprietors had authority to alien their lands by vote; such votes, recorded in a book such as "Proprietor's" or "Commoners" records, are competent evidence of the transfers, are great sources of title, and are "the highest and best evidence of it." This case contains a good history of the passing of titles from the government to the proprietors, and holds that such documents are to be construed liberally.

2. *Inhabitants of Nantucket v. Mitchell*, 271 Mass. 62 (1930). Land was conveyed to proprietors of common and undivided lands in trust for purposes of a public footpath and beach; they held it as public trust property. In a registration petition, petitioner showed open, exclusive and continuous occupation under a deed and claim of right. Deed was subject to earlier Proprietors deed and public trust, owner's use and occupation was found to be beneficial to public, and permission is to be inferred, where the title to land is in a public body like the Proprietors.

3. *Wrentham v. Norfolk*, 114 Mass. 555 (1874). "Liberal rules are adopted in the construction of ancient grants, in order to carry out the intention of the parties."

4. *Bates v. Town of Cobasset*, 280 Mass. 142 (1932). Votes of proprietors are sufficient to convey title, and a town is deemed to have accepted roads that were constructed and maintained when it accepted common lands from the proprietors. Ancient grants are to be liberally construed, and it is improbable that grants in 1640 were intended to be to the municipality to be held as municipal, rather than public, lands.

5. *Reed v. Mayo*, 220 Mass. 565 (1915). All reasonable presumptions are to be taken in favor of the validity of such ancient grants.

6. *Ipswich v. Proprietors*, 218 Mass. 487 (1914). Good discussion of the nature of title held by Commoners and the rights of the organization of Proprietors.

## I. Evidence

1. *Inhabitants of Enfield v. Woods*, 212 Mass. 547 (1912). Declarations of a

general or common reputation as to matters of public or general interest are admissible, and “a declaration by the deceased declarant that he had heard the fact ‘from old persons’ now deceased is competent evidence of a general or common reputation...it is equally competent...where each declarant heard of the fact from one person only...in like manner, a general or common reputation is made out where many although not all are shown to have made individual assertions of fact...to be admissible, declarations must be declarations of the public or general right and not of the particular exercise of it...’Valuation lists’ are admissible because if a parcel of land is not entered on them it is not taxed; and if not taxed, no tax on it could have been paid.” Proof that taxes were not paid “is some evidence that he was not in possession as owner during that time...because both in legal contemplation and in practice a person in possession of land as owner of it pays taxes on it...[and has] some tendency to show that the possession of the town during that time was exclusive.”

2. *Blake ve. Everett*, 83 Mass. (1 Allen) 248 (1861). Parol evidence is admissible to show how long a witness has known of the use of a way claimed by prescription.

3. *Daley v. Swampscott*, 11 Mass. App. Ct. 822 (1981). Public records such as ancient city records, relating to ownership or location help determine whether a public easement exists. Once a presumption of a prescriptive easement arises, the owner has the burden of rebutting the presumption.

4. *Spencer v. Rabidou*, 340 Mass. 91 (1960). Evidence of permission must amount to more than mere acquiescence.

5. *Brown v. Sncieder*, 9 Mass. App. Ct. (1980). The uncommunicated mental attitude of a possessor is irrelevant, it is the acts of adverse use which are determinative. State of mind is not material, because it is the use that controls. Adverse use is consistent with friendly relations between the users of the easement and the property owner. 2 *Proof of Facts* 3d 197, page 220, footnote 71 (1968).

6. 2 *Proof of Facts* 3d 197 Section 10, footnote 14-18, (1968). Surveys, aerial or other photos, maps and plats may be used to help identify the location and bounds of prescriptive easements.

## J. Title – Don’t Take a Deed at Face Value

1. *Howland v. Greenfield*, 231 Mass. 147 (1918). It is long-standing law that regardless of what a deed says, a present owner (“successor in interest”) cannot acquire

anything that the previous owner (“predecessor in interest”) did not own, and the land is subject to whatever public easements, rights, etc. (called “burdens” or “appurtenant rights”) that the previous owner was subject to.

2. *Markiewicus v. Town of Methuen*, 300 Mass. 560 (1938). Present owners tried to sue the town when they discovered their land was subject to a public sewer easement. They lost, because their predecessor had allowed the land to be subjected to the easement, and “plaintiffs could acquire no greater estate than that possessed by their predecessors,” regardless of whether they knew of the easement.

3. *Robert v. O’Connell*, 269 Mass. 532 (1930). When the plaintiff took his title, his grantor had already lost property rights by the defendant’s adverse possession. Plaintiff’s grantor could only convey what was left, regardless of what the deed purported to convey.

4. Even if a deed does not mention any easement (even if no deed for the last hundred and fifty years has mentioned an easement), if there is an easement in an ancient deed which has never been legally removed, the property is subject to the easement. This holds true even though no one has used the easement (mere non-use does not constitute abandonment), and even though there are no visible signs of an easement on the ground.

5. *Attorney General v. Revere Copper Co.*, 152 Mass. 444 (1890). A deed which violates a statute or the law is void and has no effect. Here, a 1770 deed from the town proprietors of a great pond, which is held for the public in trust, even though the town owned it, violated the Code of 1647 (Colonial Ordinance, prohibiting the conveyance of great ponds).

## K. Public Layouts, Highways, Easements, etc.

1. *Howland v. Greenfield*, 231 Mass. 147 (1918). It is well settled that where a public easement is taken, “only the person who at the date of taking owns the land or some interest therein has any claim to damages” or standing to question the validity of a taking. The right to challenge a taking does not pass to a new owner under a deed, and a later owner may not question the validity of a taking when the prior owner, for seventeen years, never questioned the regularity of the proceedings.

2. *Markiewicus v. Town of Methuen*, 300 Mass. 560 (1938). Present owners challenged the validity of the forty-year old proceedings in a town’s taking of a public sewer easement. The court found that the takings were not made as required by law (no written notice to

owners and the plan of the layout filed with the town clerk was not signed, had no identification or filing date, and no boundaries or measurements), so that “it was impossible to ascertain the precise land to be taken.” The prior owner had a right at the time to question the validity, but the right was lost by estoppel because he had knowledge of the construction, never questioned what portion of his land was taken, and he did not question the validity of the taking. The present owners may not challenge the validity of the taking.

3. *Kenrick v. Boston & A.R. Co.*, 202 Mass. 1 (1909). Owners were time-barred from challenging a taking because entry for construction (which starts the time for filing suits) had been made and the entry need not have been on plaintiff’s property. What was done upon entry was trifling. A small amount of loam was dug up leaving a slight depression in the ground, some small heaps of earth were removed to even the surface, which only half-filled the tipcart it was carried away in, and no charge was made for the work. The court ruled that on this set of facts, “[t]here can be no question that there was an entry made on behalf of the town as required by the statute. . .for the purpose of constructing the street. . .entry for the purpose of constructing any part of the laying out shall be deemed a taking possession of all of the lands included in the laying out.”

4. *Haskell v. New Bedford*, 108 Mass. 208 (1871). Once the statute of limitations has run for challenging the validity of layouts, their validity may not be challenged; “rights appropriated by the authority of the legislature to public use can be taken advantage of by the owner only, and, if he once assents to the taking, cannot afterwards be availed of by himself or those claiming under him.”

5. *Boyce v. Town of Templeton*, 335 Mass. 1 (1956). A town way, over which a state or county highway is laid out and later discontinued, reverts back to a town way until discontinued by the town.

6. *Downey v. H.P. Hood & Sons*, 203 Mass. 4 (1909). Plaintiffs or their predecessors in title were presumptively compensated for damages, and had constructive notice by recorded plan and deed description, even though the way had not been built.

7. *Reed v. Mayo*, 220 Mass. 565 (1915). Chain of title and mortgages referred to road running through land as a town road. “On these facts, unaided by the effect of the town meeting records...this ancient way was a town way...the making of repairs by the town is evidence of the existence of a way located and appropriated to public use.”

## L. The Public Trust

1. *Boston Waterfront Development Corp. v. Commonwealth*, 378 Mass. 629 (1979). "The land below low water line can be granted by the State only to fulfill a public purpose, and the rights of the grantee to that land are ended when that purpose is extinguished. . .legislative acts must be for a public purpose. . .where a corporation was granted, even irrevocably, the use of certain previously public property for a public purpose, there was an implied condition in the grant that the company could not retain the granted locations without using them for the purpose for which they were granted...where the use of public or publicly-granted land changes over time, the Legislature must approve the changed use." If such grants are not used for the authorized purpose, "the Commonwealth has a right to enter and repossess the property."

2. *Commonwealth v. Tucker*, 19 Mass. (2 Pick) 44, (1823). A public landing place is not a town way; neither the town nor the county commissioners can discontinue it. *Bennett v. Clemence*, 88 Mass. (6 Allen) 10 (1863); *Kean v. Stetson*, 22 Mass. (5 Pick) 492 (1827).

3. *Barry v. Grela*, 372 Mass. 278 (1977). The public has the right to walk across the privately-owned intertidal zone to get to a jetty located on another property to fish.

## G. Liability of Landowners Making Land Available to the Public for Recreational Purposes (G.L. Chapter 21, Section 17C)

1. *Anderson v. Springfield*, 406 Mass. 632 (1990). G.L. Chapter 21, Section 17C, a statute limiting the liability of "an owner of land" who permits recreational use of such land by the public free of charge, was applicable to claims against a city arising from an individual's alleged injury on a municipally-owned softball diamond. The court found that Section 17C applies to municipalities and other governmental entities to the same extent as to private landowners.

2. *Sandler v. Commonwealth*, 419 Mass. 334 (1995). Evidence of the persistent failure of a municipal entity to remedy defects in a tunnel on a traveled bikeway did not warrant a finding of wanton or reckless conduct as would justify tort liability under G.L. Chapter 21, Section 17C for injuries received by a person riding a bike who hit an uncovered 8-inch drain in the unlit tunnel. The court found that the persistent failure to repair defects in the tunnel

did not present a level of dangerousness that warrants liability under Section 17C.

3. *Forbush v. Lynn*, 35 Mass. App. Ct. 696 (1994). The willful, wanton or reckless conduct by a municipality that resulted in serious personal injury to a child while he played in a public park was not conduct for which the municipality was immune from liability.

## APPENDIX E

### GUIDE TO STATE PROGRAMS ASSISTING COASTAL ACCESS

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## APPENDIX E.1

### MASSACHUSETTS COASTAL ZONE MANAGEMENT

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Massachusetts' coastal program is implemented through several agencies within the Executive Office of Environmental Affairs (EOEA), with the Massachusetts Coastal Zone Management Office (MCZM) serving as the lead policy and technical assistance agency. MCZM brings together a small, dedicated staff of technical specialists in marine sciences, policy, law, and public outreach, along with regional coordinators who serve as liaisons to communities and local organizations. MCZM is an effective state-federal partnership with strong links to local governments.

MCZM's mission is to provide policy leadership, assistance, and education to the network of agencies, communities, and individuals who are collectively responsible for the stewardship of coastal resources, in order to promote well-informed decisions, protect the integrity of natural systems, and respond effectively to human needs.

MCZM receives advice from the Coastal Resources Advisory Board (CRAB) appointed by the Governor and the Secretary of EOEA. CRAB is made up of 16 citizen representatives of statewide educational, business, and public interest organizations, as well as government agencies with a role in the coastal program.

MCZM's current major efforts include:

**Federal Consistency Review** — MCZM reviews federal activities in the Massachusetts coastal zone to ensure that they are consistent with state coastal policy. Overall, MCZM's review gives the Commonwealth the power to ensure that federal actions meet state standards.

**Port/Harbor Planning Programs** — To insure that waterfront areas in the Commonwealth grow in a safe, environmentally sound, and economically prosperous manner, MCZM encourages the creation or expansion of water-dependent facilities in developed port and harbor areas. MCZM also helps communities to develop harbor plans to promote sustainable development, including assessing dredging needs and siting options for disposal of dredged materials.

**Coastal Water Quality Protection** - Good water quality is necessary for fishing, shellfishing, aquaculture, swimming, and most of the other activities that draw people to the coast. Through the Coastal Nonpoint Pollution Control Program, MCZM is working with federal and state agencies, local officials, industry representatives, environmentalists, and the public to develop enforceable measures to restore and protect coastal waters from nonpoint source (NPS) pollution, the number one pollution problem in U.S. coastal waters.

**Special Natural Areas Protection** — MCZM provides technical assistance for delineation and designation of coastal Areas of Critical Environmental Concern (regionally significant coastal wetlands), identifies potential coastal wetland restoration sites, and coordinates and participates in the resulting wetlands restoration efforts. MCZM played significant roles in designating Stellwagen Bank as a National Marine Sanctuary and the Waquoit Bay National Estuarine Research Reserve.

**Shoreline Public Access** — To help the public get to and enjoy the coast, MCZM supports a variety of initiatives that promote public access, including development of this handbook.

**Technical Assistance** — MCZM's staff of scientists, planners, attorneys, regional coordinators, and other specialists focuses on providing technical assistance to local decision-makers and concerned citizens. MCZM's areas of technical expertise include harbor planning, dredging, tidelands protection, water quality management, special natural areas designations and planning, geology and coastal hazards identification and mitigation, and public access to the coast.

**Education and Public Information** — To help people understand coastal issues, as well as the impact their individual actions have on the health of our coast, MCZM maintains a public education and information program. For example, MCZM produces *Coastlines*, a bi-monthly newsletter that includes articles on technical issues and regulations affecting the coastal zone, and includes a calendar of coastal events. Another major MCZM public outreach effort is COASTSWEEP, the statewide beach cleanup that thousands of people participate in each September. MCZM has a home page available through Internet at <http://www.magnet.state.ma.us/czm/>.

**Data Acquisition, Management, and Access** — MCZM maintains a digital and paper data library that contains a variety of materials that are available to coastal specialists and decision-makers. These include historic and contemporary aerial photographs, orthophotographs, historic shorelines, and eelgrass inventories. MCZM is equipped with geographic information system and aerial photo-mapping technology.

### Regional Technical Assistance Program

Coastal management at the local level is a vital part of the MCZM program. To directly serve the coastal communities throughout the state, MCZM established a regional technical assistance program through four regional offices.

MCZM's regional offices together with the communities within the legal coastal zone boundary that they serve are listed below.

**North Shore Regional Office** serves the coastal communities in Essex County, covering the coast from Salisbury to Revere.

**Boston Harbor Regional Office** covers the coastal communities of Boston, Braintree, Chelsea, Cohasset, Everett, Hingham, Hull, Milton, Quincy, Weymouth, and Winthrop.

**South Coastal Regional Office** covers the coastal communities from Scituate to Seekonk, excluding Cape Cod and the islands.

**Cape Cod/Islands Regional Office** serves the 15 towns of Barnstable County, along with Martha's Vineyard, Nantucket, and the Elizabeth Islands.

Clearly, MCZM encompasses a wide variety of programs and activities. The purpose of all these different MCZM components is the same — to soundly and proactively manage the coastal zone of Massachusetts. The true role of MCZM is to ensure that its programs and activities work effectively with the efforts of other state agencies, as well as local, regional, federal, and international groups, to develop and implement state policy that makes a positive difference for the Commonwealth's coast.

## APPENDIX E.2

### MASSACHUSETTS COASTAL ZONE MANAGEMENT ACCESS ADVISORY PROGRAM

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For nearly two decades the Massachusetts Coastal Zone Management Office (MCZM) has been a source of expert technical assistance on all aspects of coastal property and public trust law as it relates to coastal access. This assistance is provided through the cooperative efforts of several MCZM staff, with primary responsibility assigned to the tidelands policy coordinator and the general counsel. Other staff professionals who make important contributions to the Access Advisory Program are the four regional coordinators, the municipal harbor planning coordinator, and the public outreach coordinator. This team offers regular consultation services and sponsors periodic training events, such as workshops and conferences emphasizing "how to" skills on a variety of access-related issues. The team has also produced a considerable body of reference materials including several *guidance documents* discussing the legal, regulatory and planning aspects of access advocacy; and a series of *access inventories* containing maps of public access sites and descriptions of recreational facilities and activities.

Currently, MCZM provides access advisory services in the context of a larger, coordinated initiative within the Executive Office of Environmental Affairs (EOEA) that seeks to enhance **pedestrian** enjoyment of the coast, ideally by creating a network of coastal trails for strolling, hiking, jogging, and the like. With MCZM at the forefront of this initiative are two other agencies, both having legal authority to acquire easements and other entitlements for public passage across storefront properties that otherwise remain privately-owned. These are:

- \* **the Coastal Access Program of the Department of Environmental Management (DEM)**, which acquires Sea Path easements for public strolling along water's edge and awards small grants for local and regional projects to enhance coastal access more generally; and
- \* **the Waterways Regulation Program of the Department of Environmental Protection (DEP)**, which obtains public access along or to the shoreline as a condition of nearly every license granted pursuant to Massachusetts General Laws, Chapter 91, for private or nonwater-dependent use of Commonwealth

tidelands (including many filled areas in addition to submerged lands beyond the low water mark).

To complement these state-level activities, the present focus of MCZM's Access Advisory Program is to encourage and support corresponding **municipal** initiatives to create public walkways to and along the shoreline.

In this regard, three special projects are underway in 1996. The first involves a concerted outreach effort to encourage communities to preserve historic rights of way to the sea -- a broad category encompassing a variety of places in which the public has a right of use and/or passage, including public ways, public landings, and footpaths across privately-owned shorelands. Frequently, historic access rights still exist in law but have been obscured in practice and are no longer useable by (or even known to) the public. To help communities rediscover their "lost" access ways, MCZM has developed this handbook and will conduct an associated series of workshops to stimulate interest in access advocacy and provide initial training on the right of way preservation process. In addition, MCZM will establish and coordinate a network of attorneys willing to provide communities with free legal assistance in protecting historic access rights. (See Appendix E.3 for further information.)

Secondly, outreach to coastal communities is occurring in the form of a Chapter 91 training project, aimed at increasing municipal capabilities for effective participation in the waterways licensing process with respect to access-related issues. In the course of this project MCZM is developing instructional materials including:

- \* fact sheets and other literature explaining all access requirements and related provisions of the waterways regulations, with examples of their application to actual cases by the Waterways Regulation Program of DEP; and
- \* guidance materials on how local zoning ordinances and Municipal Harbor Plans can be integrated with the c. 91 regulatory process to implement local access goals.

In carrying out this project MCZM is working closely with several communities who intend to address access issues in the context of a municipal harbor plan, such as Newburyport, Gloucester, Beverly, Chelsea, Boston, Hull, Provincetown, Edgartown, and New Bedford. MCZM and DEP staff also are available to hold training seminars to acquaint other municipalities with the powerful tools this program offers on behalf of enhancing pedestrian access along and to the shoreline.

MCZM's third technical assistance project to enhance coastal access involves

development of a "State Register of Protected Coastal Accessways", in order to keep track of all shoreline access entitlements that have been secured for the public as a result of municipal initiatives as well as the regulation and acquisition activities of various EOEA agencies. The Register project -- undertaken with direct assistance from the MassGIS Program, also within EOEA -- will provide an electronic database and maps of great value for coastal trail planning at both the state and local levels. The Register also will be an important tool in future enforcement and dispute resolution activities on behalf of public access rights.

## APPENDIX E.3



### The Coastal Access Legal & Mediation Service

#### *"What is the Coastal Access Legal & Mediation Service?"*

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

#### *"Who can apply? What sort of cases are eligible for the service?"*

- ▶ Practically anybody can apply for assistance from CALMS. Examples include (but are not limited to) municipalities and their various boards, commissions, and committees; city solicitors and town counsels; regional planning agencies; land trusts; neighborhood or civic associations; other nonprofit organizations; unincorporated citizen groups; and individuals.

There are generally two types of aid offered through CALMS: 1) legal assistance from attorneys and 2) mediation assistance. While these two tracks are not mutually exclusive, and the same case may involve both services, there are different criteria and approaches for each one. Please note that the legal assistance component of CALMS promotes public access (where appropriate and not ecologically harmful). Applicants need to be advocates for the public, representing the public's interest in some way. The mediation assistance element of CALMS, on the other hand, helps resolve conflicts that impact public access to the coastline. The universe of applicants is therefore expanded to include landowners and others who are not advocates for the public. In such cases, a joint application including both or all parties to the dispute is recommended as the best approach.

#### *"What sort of legal and mediation assistance is available?"*

- ▶ Pro bono legal services potentially available to you through a CALMS referral include interpretation or preparation of deeds and other legal documents such as letters, easements, licenses, or affidavits; assistance with title searches; analysis of the extent of public access rights; strategizing legal or other approaches; negotiations; representation in court; assistance with gifts of rights-of-way.
- ▶ Pro bono mediation services potentially available to you consist of a neutral third party who will provide a structured process for people to identify and communicate the issues at the root of their conflicts, and to help them work together to explore options and achieve negotiated settlements. This may operate as the mediation of a dispute between two or more parties, or the facilitation of neighborhood meetings. *(over)*

### ***"How does the service work?"***

- CALMS has a roster of attorneys and mediators willing to volunteer their services to help resolve coastal access disputes. Applicants discuss their cases with one of the CALMS staff, and then fill out an application form describing the case and the specific type of assistance desired. (*Please note that applications become part of the "public record" and available for anyone to review.*) In some situations, a group meeting is arranged to review, discuss, and guide the direction of potential cases. The CALMS steering committee then reviews the request to ensure that sufficient information has been gathered, and that the case is appropriate for the service. In determining a case's fit with CALMS, the committee will consider whether: the dispute has a substantial public access component, the potential approach is consistent with other state initiatives and policies, state property or public access rights enforced by a state agency are involved, and applicants are coming to the table in good faith. More information may be requested, and the committee may identify other avenues to pursue in order to address the issues raised. If the case is deemed appropriate for referral, the committee makes a general referral to the network of professionals, and matches individual attorneys or mediators (as appropriate) with the applicant. If mediation assistance is requested, private sector professionals from community mediation programs are available as well as a DEM Dispute Resolution Specialist. Applicants receiving a referral regularly update CALMS as the circumstances evolve, and provide a brief written report and evaluation at the conclusion of the case. (Note that none of these attorneys or mediators "represent" the Commonwealth -- they are, instead, available as skilled individuals to help you reconcile an irksome problem.)

### ***"What exactly is mediation?"***

- Mediation is a voluntary, confidential process in which people from opposing sides agree to work together with the guidance of a neutral mediator in order to find solutions to their disputes. The process can be an alternative to litigation, or a pragmatic approach after litigation has proven unable to resolve significant issues. The process can minimize ill will and repair relationships. At the same time, engaging in mediation does not reduce any party's legal rights or alternatives. Any documents prepared by a qualified mediator or contained in a mediator's case file are confidential under the state mediation confidentiality statute, M.G.L. 233, section 23C. Any communications made by the mediation participants in the presence of the mediator are held confidential by the mediator.

### ***"Where can I get more information?"***

- If you are interested in more information, want to discuss your situation, or would like to receive an application form, please call Geordie Vining at 617/727-3160 x528.

◆

APPENDIX E.4



Coastal Access Legal & Mediation Service

REQUEST FOR ASSISTANCE

*(Please note that this application and any attachments will become "public records," and available for the public to review.)*

► Municipality \_\_\_\_\_ Date \_\_\_\_\_

► Please check the type of assistance you are currently requesting:

LEGAL ASSISTANCE FROM AN ATTORNEY  
 MEDIATION ASSISTANCE FROM A NEUTRAL MEDIATOR

►

Applicant Information

Applicant: .....

Organization: .....

Address: .....

Phone number: .....

Fax number: .....

Email address: .....

Attorney, Consultant, Engineer, etc. (if any), plus addresses: .....

Phone number(s): .....

►

Additional Parties Involved in Dispute  
(Please attach other pages as needed)

Names/Titles

Addresses/Phone #s

Roles

Attorney/Consultant



## Coastal Access Legal & Mediation Service

### REQUEST FOR ASSISTANCE

*(Please note that this application and any attachments will become "public records," and available for the public to review.)*

**PLEASE USE ADDITIONAL PAGES TO RESPOND TO THE FOLLOWING:**  
(Please type, and provide detailed answers to each question)

1. **Contact information:** Please fill out all the information on the other side of this page.
2. **General description:** Please provide a written description of the issue for which you are seeking assistance, and your involvement to date.
3. **Public coastal access:** Please describe the public coastal access nature of this project (vs. a dispute between two private parties over access, or a dispute around access to a freshwater shoreline).
4. **Type of assistance:** Please specify in more detail the type of assistance you anticipate requiring.  
(For example, legal assistance may consist of interpretation or preparation of deeds or other legal documents, title searches, assistance with gifts of rights-of-way, analysis of the extent of public access rights, strategizing legal and/or other approaches, or representation in court. Mediation assistance may entail mediating a dispute between two or more parties, or facilitating a neighborhood meeting.)
5. **Litigation:** Has there been prior litigation around this issue (if so, please describe)? Are you currently conducting or anticipating litigation in court around this issue?
6. **State agencies:** Is there a specific state agency involved in this case, or a problem with a state licensing entity (if so, which ones)?
7. **Assistance from other state programs:** Are you requesting or receiving assistance from other state programs (e.g., the DEM Coastal Access Grants Program) to help resolve this issue (which ones)?
8. **Other parties:** Please describe, to the best of your knowledge, the concerns of the other parties you have listed on page one of this form, and the extent of their involvement. Are there others who will be affected by the outcome of this situation? If so, whom and how?
9. **Supporting materials:** In addition, please include supporting material such as: 1) maps showing locus and site; 2) photographs; 3) copies of deeds; 4) other relevant legal documents.

***Please return to:*** CALMS, c/o Geordie Vining, *Department of Environmental Management,*  
*100 Cambridge St., Room 1404, Boston, MA, 02202*  
***TEL:*** (617) 727-3160 x528 ***FAX:*** (617) 727-2630



# COASTAL ACCESS GRANTS PROGRAM

## Fact Sheet



### Program Purpose:

The Massachusetts Department of Environmental Management (DEM) awards grants to support local and regional projects that improve and enhance the general public's recreational access to the coast. The program's focus is on non-mechanized access for the general public, as opposed to only local residents or deeded private access. The "coast" is generally characterized as the shoreline that is in direct contact with the open sea plus the major bays, sounds, and harbors, although projects targeting saltwater estuaries and salt marshes will also be considered. In addition, the program generally focuses on public access to and along the coastline rather than boat access to the water.

#### *Principal categories of funding include:*

- 1) establishing new public coastal access opportunities;
- 2) developing local shoreline access plans;
- 3) reclaiming historically public ways to the sea;
- 4) enhancing or restoring existing access points or facilities;
- 5) developing educational initiatives around public coastal access.

### Eligible Applicants:

Massachusetts cities and towns, regional planning agencies, local, regional, and statewide nonprofit groups. Maximum grant award: \$5,000. Applications are generally due towards the end of the calendar year, and must be completed by the following fall.

### Project Selection Criteria:

- Project would support, enhance, improve, and/or promote the general public's access to the coast.
- Proposal provides coherent, thoroughly researched, and realistic set of tasks, timetable, and budget.
- Proposal demonstrates need for and importance of project.
- Proposal shows organizational and/or community support.

### *Additional Guidelines (not all of the following must be met in order to receive funding):*

- Project would leverage other resources, especially if proposal seeks maximum grant award.
- Project would function as a model for others.
- Project would support a Sea Path legal intertidal right-of-way.
- Project would implement a portion of a local or regional plan.
- Project would enhance one of the 14 coastal "Areas of Critical Environmental Concern."
- Preference will be given to communities and organizations not funded in the past.
- Preference will be given to communities in underserved regions of the coastline.

For more info., contact: *Geordie Vining, Coastal Access Planner*

*DEM, 100 Cambridge Street, Room 1404, Boston, MA, 02202*  
*(617) 727-3160 x528 FAX: (617) 727-2630 EMAIL: [geordie.vining@state.ma.us](mailto:geordie.vining@state.ma.us)*

## APPENDIX E.6

# SEA PATH PROGRAM

## *Fact Sheet*



### *What is the Sea Path Program?*

- The Sea Path Program promotes and supports the establishment of community pathways or public rights-of-way along the coastline, focusing on the intertidal zone. It is one component of the Department of Environmental Management's (DEM) Coastal Access Program, which includes a small grants program, a technical assistance program making connections with free attorneys and mediators, coastal land acquisition, and other related assistance. Contact Geordie Vining, Coastal Access Planner, for more information at 617/727-3160 x528.

### *What Are "Sea Paths"?*

- Sea Paths are rights-of-way along stretches of "intertidal zone" -- the wet area between high and low tide -- where people can walk beside the ocean. The fundamental thread running through all segments of a Sea Path is the right to walk along the shoreline. A Sea Path may include publicly-owned parcels that allow swimming, sunbathing, picnicking, etc., (and some private landowners may also choose to allow such recreational activities) in both the wet and dry sand areas -- but the basic right-of-way along privately-owned shoreline is for the use of walkers, strollers, and hikers. Sea Paths are planned, implemented, and managed at the local and regional level through a community-based planning process.

### *Why Are Sea Paths Needed?*

- Informal access and "beach sharing" still occur in a number of coastal communities, but experience has shown that ownership and attitudes can be quite susceptible to change. As the coastline becomes more developed, the clear statewide trend has been away from allowing informal walking access.

In terms of legal rights and public vs. private ownership, the Mass. coastline is one of the least "open" in the country. The public legally has full use of the intertidal zone in at least 19 coastal states.

Every coastal community is different, but in general there is a limited supply of accessible shoreline. Surveys show that a significant percentage of Mass. residents want enhanced access to the coast.

The Sea Path Program addresses this complex situation by supporting a locally-driven planning process, and compensating landowners for the acquisition of limited rights-of-way for the public.

An organized formal Sea Path can actually promote *better* management of privately owned shoreline areas in terms of public use by those who do not currently have a clear understanding of their rights and responsibilities.

### *How Does the Program Work?*

- Municipalities, regional planning organizations, or local organizations determine the need for a Sea Path, and gain financial and technical assistance from DEM's Sea Path Program at the various stages of research, planning, community organizing, negotiation, and management. The primary goal is to facilitate the acquisition or donation of rights-of-way, and ensure that systems are in place to maintain Sea Paths for the long term.

Walking along the coast is one of the best ways for people to develop a personal connection with the coastal environment and the "Bay State." Sea Paths enrich people's lives -- by guaranteeing that current informal opportunities to walk beside the sea exist in the future, or by establishing new such opportunities.

**APPENDIX E.7**  
**MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL MANAGEMENT**  
**GREENWAYS GRANT PROGRAM**

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This section contains information concerning the Greenways Grant Program, administered by the Massachusetts Department of Environmental Management.

**DEPARTMENT OF ENVIRONMENTAL MANAGEMENT**  
**Greenways Program**

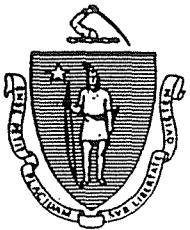
DEM's Greenways Program promotes the creation of greenways and trails at the local, regional, and state levels. The Program provides small grants, information, technical assistance and coordination services to organizations and communities developing greenways throughout the Commonwealth. DEM also works to create and protect greenways of statewide significance through planning and technical assistance, as well as through direct land protection efforts. Examples include the Taconic Crest Trail, the Bay Circuit, and the Blackstone River Corridor. Other components of DEM's Greenways Program include coordinating the Massachusetts Greenways and Trails Council, a coalition of organizations interested in promoting, creating, and using greenways throughout the Commonwealth; and working toward creating a statewide greenways and trails plan for Massachusetts.

**DEM's Greenways and Trails Demonstration Grants Program**

The Department of Environmental Management (DEM) awards grants up to \$3,000 to non-profit organizations, municipalities, and regional planning associations to support innovative greenway and trail projects throughout Massachusetts. The Program favors projects which are imaginative, feasible, and demonstrate innovative techniques or strategies that can serve as models for other greenway and trails initiatives. DEM coordinates this program with the Massachusetts Greenways Council. Principal categories of funding include: Greenways and Trails Planning and Research; Public Education and Community Outreach; Greenway and Trails Mapping and Ecological Assessment; and Greenway and Trail Construction, Maintenance, and Expansion.

Creating greenway and trail networks is an effective means of protecting, connecting, and providing access to the many unique places that make Massachusetts a special place to live. In addition to linking landscape features, greenway projects often connect people with the land and with one another. DEM's Greenways and Trails Demonstration Grants Program is intended to foster these connections and further community-based greenways and trails initiatives across the Commonwealth.

*For more information contact Jennifer Howard, DEM's Greenways Planner at 136 Damon Road, Northampton, MA 01060; tel (413) 586-8706.*



COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS  
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT



DIVISION OF RESOURCE CONSERVATION  
100 CAMBRIDGE ST., BOSTON, MA 02202 617-727-3160 FAX 727-2630

November 6, 1995

William F. Weld  
GOVERNOR

Argo Paul Cellucci  
LT. GOVERNOR

Trudy Coxe  
SECRETARY

Peter C. Webber  
COMMISSIONER

Dear Friend:

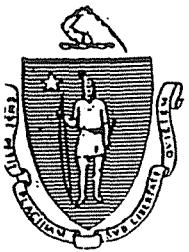
I am pleased to announce the Department of Environmental Management's (DEM's) fourth annual Greenways and Trails Demonstration Grants Program. Based on the success of the Program over the past three years, DEM will again award grants to non-profit organizations and municipalities to support innovative greenways and trails projects throughout Massachusetts. The Program favors projects which are imaginative, feasible, and demonstrate innovative techniques or strategies that can serve as models for other greenway and trails initiatives. This year there is a special emphasis on projects that highlight our rivers and streams, and on promoting environmental literacy.

Creating greenway and trail networks is an effective means of protecting, connecting, and providing access to the myriad of unique places that make Massachusetts a special place to live. In addition to linking landscape features, greenway projects so often connect people with the land and with one another. DEM's Greenways and Trails Demonstration Grants Program is intended to foster these connections and further community-based greenways and trails initiatives across the Commonwealth.

Enclosed with this letter is a copy of the 1996 grant application package. Please contact Jennifer Howard, DEM's Greenways Planner at (413) 586-8706 if you have any questions or need assistance.

Very truly yours,

Peter C. Webber  
Commissioner



# ANNOUNCING



## *Massachusetts' 1996 Greenways and Trails Demonstration Grants Program*

Department Of Environmental Management

### Grant Program Overview

The Department of Environmental Management (DEM) awards grants up to \$3,000 to support innovative greenway and trail projects throughout Massachusetts, and particularly those projects which will serve as models for other greenway and trail initiatives. DEM coordinates this program with the Massachusetts Greenways Council. Principal categories of funding include: Greenways and Trails Planning and Research; Public Education and Community Outreach; Greenway and Trails Mapping and Ecological Assessment; and Greenway and Trail Construction, Maintenance, and Expansion.

### 1996 "Special Focus" Areas

Based on the wide range of innovative projects generated by last year's "Special Focus Areas", the Program will again give special consideration to projects that:

- ▶ Involve community youth and promote "environmental literacy" -- an awareness, understanding, and appreciation of the environment and the interconnectedness of natural resources, ecosystem functions, and human activity.
- ▶ Highlight rivers in some way -- examples include promoting river protection, improving access, and generating support for rivers through education and outreach.

### Eligibility

Local, regional, and statewide nonprofit organizations, and cities and towns developing innovative greenway or trail projects are eligible to receive grant funds. Grant recipients from previous years may apply again, however priority is generally given to projects and organizations that have not received funding from the program in the past.

### Important Grant Cycle Dates

FOUR (4) copies of your application must be received by 5:00 p.m. on January 12, 1996. Grant awards will be announced by the end of February 1996. All grant funds must be expended by September 30, 1996. A final report including a brief narrative, receipts documenting expenditures, and project photographs, final products, press clippings and any other materials generated by the grant is required to close out the grant. Specific guidelines for this report will be provided to grant recipients.

## Greenway and Trail Project Ideas and Evaluation Criteria

**Project Ideas:** The following suggestions are intended to inspire your creativity, not to limit your options. Proposed projects can be as creative as your greenway plans require.

**Examples of projects eligible for 1996 funding include but are not limited to greenway and trail projects that:**

- ▶ offer innovative approaches to resolving greenway linkage problems via mapping, surveying, ecological assessments, workshops, negotiating with landowners
- ▶ inform the public about greenways and their benefits through the use of imaginative public education tools e.g. brochures, school programs, interpretive displays, newsletters, local radio programs, or audio-visual productions
- ▶ involve community members in greenway activities e.g. volunteer events, working with school children to create a trail, or clean up a stretch of river
- ▶ integrate natural, historic, archeological, or recreational features into a greenway system
- ▶ advance the development of greenway networks, expanding and linking corridors to form an alternative infrastructure
- ▶ protect, restore or enhance natural and cultural features associated with greenways
- ▶ enhance recreational access to greenways and trails (where appropriate), e.g. improvement to/construction of parking areas, canoe put-in/take-outs, signage.
- ▶ solve stubborn greenway management/maintenance issues
- ▶ advance a particular greenway effort through resource inventories, plan preparation or mapping
- ▶ provide access to other community amenities via the greenway
- ▶ provide access opportunities for people of all ages and abilities

**Evaluation Criteria:** The following criteria will be used to evaluate proposals.

**Does the proposal:**

- ▶ advance the creation and implementation of greenway and trail networks
- ▶ highlight rivers in some way
- ▶ promote environmental literacy
- ▶ describe a realistic greenway project which can be accomplished in the time given
- ▶ clearly show how the project can serve as a model for other greenway efforts
- ▶ demonstrate broad community and financial support for the project
- ▶ clearly demonstrate the need for the project and its importance to local/regional greenway efforts

## APPENDIX E.6

### MASSACHUSETTS DEPARTMENT OF FISHERIES, WILDLIFE AND ENVIRONMENTAL LAW ENFORCEMENT PUBLIC ACCESS BOARD

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This section contains a description of the goals and functions of the Public Access Board. While the Board's primary goal is to construct boat ramps, a small percentage of its activities involve other types of public access improvements, as well. If your community can identify a public access way in need of improvement for recreational purposes, such as for boating or fishing, it may be worthwhile to contact the Public Access Board. The Board may then advise you as whether the site meets the Board's minimum criteria for funding.



# Public Access Board

1440 Soldiers Field Road • Brighton, Massachusetts 02135  
(617) 727-1843

FAX (617) 727-7214

John P. Sheppard, Director

Massachusetts is blessed with over 1500 miles of seashore and hundreds of lakes, ponds, and streams which make the Commonwealth an exceptional destination for all types of fishing and boating.

The Public Access Board (PAB) is charged with providing access to these many waterways. Presently, the agency oversees boat and canoe launch sites at over 170 coastal and inland locations in Massachusetts, giving residents and visitors extensive opportunities to enjoy fishing, canoeing, sailing, waterskiing, and recreational boating.

The Public Access Board is the smallest of four agencies within the Department of Fisheries, Wildlife & Environmental Law Enforcement. In addition to the construction of access sites, the Board also provides engineering, construction, and technical services to the other agencies in the department-- the Division of Law Enforcement (Environmental Police), the Division of Fisheries & Wildlife, and the Division of Marine Fisheries.

## Facilities and Operations

The Public Access Board manages the construction, repair, and operation of state boat ramps, canoe and car-top launch sites, parking areas, and approach roads. The Board oversees facility design and construction, which is usually done by private contractors or municipal public works departments. Public Access Board funds are also used to construct fish piers, purchase shoreline fishing areas, and to help maintain the state's snowmobile trail system. Ultimately, the Board is working to locate boat launch facilities at close enough intervals throughout the state so that none of them will be overused.

## Facility Management and Fees

Unlike most state agencies providing recreational facilities, the Public Access Board has no regional staff to assume direct daily management of sites. Therefore, cleanup and general maintenance of sites is performed by personnel from state agencies such as the Division of Fisheries and Wildlife, the Division of Forests and Parks, the Metropolitan District Commission, and the Highway Department, as well as by city and town workers.

Most state boat ramps are open free of charge to the general public. However, some heavily used sites are authorized by the Board to collect user fees in order to recover the costs of site maintenance and daily management. All sites which collect such fees must charge the same amount to all users, and the facilities must be open to the boating public on equal terms. Unlike Public Access Board sites, boating facilities acquired and constructed entirely with municipal funds may charge higher fees to out-of-town users or restrict usage to town residents.

### Project Funding

Appropriations for the acquisition, construction, and maintenance activities of the Board come from several sources. The agency collects a small percentage of state gasoline tax revenues based on the amount paid by motor boat users. The Board also receives state bond appropriations, and federal reimbursements are provided for some projects by the U.S. Fish & Wildlife Service under the federal Sport Fish Restoration Act.

### Selecting New Sites

Public Access Board staff review requests for boat launching facilities and conduct site investigations to determine the feasibility of developing new access sites. The minimum criteria that must be met for the Board to consider a proposed facility are as follows:

- \* the proposed project must be on a publicly owned water body
- \* there must be a demonstrated recreational need for the project
- \* the project must be consistent with the mission of the Department of Fisheries, Wildlife & Environmental Law Enforcement
- \* personnel must be available to assist with general upkeep of the facility
- \* the topography must be appropriate for development of a boat or canoe launching facility. If no development is contemplated, the land must be suitable for foot passage to the shoreline

Your suggestions and comments as to selection of sites, or any other phase of the Board's activity, are welcomed. Correspondence should be addressed to:

Public Access Board  
Department of Fisheries, Wildlife &  
Environmental Law Enforcement  
1440 Soldier's Field Road  
Brighton, MA 02135

(617) 727-1843

The Board offers "Public Access to the Waters of Massachusetts," a 150-page guide to state boat ramps in the Commonwealth, to all interested constituents. Send a \$3.00 check or money order payable to the Commonwealth of Massachusetts, along with a notice of return address, to the Board's main office. The guide gives a description of the type, size, and condition of each site, tells what class of boats the sites serve, and gives the number of parking spaces available at each facility. Easy to read road maps also provide directions to each site.

---

John P. Sheppard, Director  
Public Access Board

John C. Phillips, Commissioner  
Department of Fisheries, Wildlife &  
Environmental Law Enforcement

Trudy Coxe, Secretary  
Executive Office of Environmental Affairs

William F. Weld, Governor  
Commonwealth of Massachusetts

COVER PAGE

The Public Access Board

Avenue / Gateway / Passageway / Passage / The Way / to  
Massachusetts' Recreational Waters

MAP PAGE

Getting Underway--

State Boat and Canoe Launch Areas in Massachusetts

## APPENDIX F

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Department of Environmental Management.

**COMMONWEALTH OF MASSACHUSETTS**

Argeo Paul Cellucci, Governor  
Jane Swift, Lieutenant Governor

**EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS**

Bob Durand, Secretary

**DEPARTMENT OF ENVIRONMENTAL MANAGEMENT**

Peter C. Webber, Commissioner

**COASTAL ZONE MANAGEMENT**

Peg Brady, Director

**OFFICE OF THE ATTORNEY GENERAL**

Thomas F. Reilly, Attorney General

