

Notes on Conservation IV. Public Access

Public Access

NYTimes 12-4-2012 “IN recent years, fences and barricades have blocked the public right to have access to our seas. We are becoming a landlocked people, fenced away from our own beautiful shores, unable to exercise the ancient right to enjoy our precious beaches.” This is how Senator Ralph Yarborough of Texas characterized the relationship between the American public and its coasts in 1969.

Increase value of shoreline, increase development and damage. Public Trust Doctrine – interpreted differently by each state. Bob Eckhardt 1959 Texas Open Beaches act. 1969 – National Open Beaches act proposed by BE. Fought with Tragedy of the Commons argument. Beaches from public resource to private asset. Dedicate beaches to states for public use.

MVT 6-29-2011 House bill would protect MV rights to public beach.

H254 "Where sea level rise, storms, or other natural processes have caused the landward or

lateral movement of a barrier beach into an area which was previously occupied by the bottom of any great pond or onto any other public land, the portion of the barrier beach relocated into the former bottom of the great pond or onto other public land shall be and remain in public ownership." Quansoo Beach Association – lots sell for \$300K or more.

Woody Guthrie. This Land is Your Land

As I went walking I saw a sign there
And on the sign it said ‘No Trespassing’
But on the other side it didn’t say nothing
That side was made for you and me.

Original 1940 Lyrics

*Was a high wall there that tried to stop me
A sign was painted said: Private Property,
But on the back side it didn't say nothing —
This land was made for you and me.*

This verse was dropped in the 1944 version that was released, but it does occur on a 1944 Smithsonian recording. (Wikipedia)

*There was a big high wall there that tried to stop me;
Sign was painted, it said private property;
But on the back side it didn't say nothing;
This land was made for you and me.^[8]*

Woody Guthrie has a variant:

*As I went walking I saw a sign there
And on the sign it said "No Trespassing."
But on the other side it didn't say nothing,
That side was made for you and me.*

“The grandmother explains that ordinarily they would not go on someone else’s property but the “No Trespassing” sign, being bad manners, practically invited them” (*Hough 1985*)

McMahon 2004 . ACK, MV and Public Trust Doctrine

Public Trust Doctrine – ancient mandate in which sovereign holds unique natural resources in trust for benefit of general public. Adopted by US as a staple of property law. May be federal or state. Most states own land between low and high tide lines in trust for citizens.= the flats

Mass version of public trust doctrine – common law interpretation based on the Doctrine - the Colonial Ordinance of 1641-47 – statute passed by early settlers of Massachusetts Bay Colony to provide private ownership of ocean flats. Law modified the Doctrine, a cornerstone of English common law. Due to economic needs at the time. Unique among states Mass private landowners have fee title down to low watermark.

Current application of Doctrine to beaches of MV and ACK contradicts overall intent of Doctrine. Supreme Court of US and Supreme Judicial Court of MA have reasoned otherwise. Flats belong to landowner and Ordinance is the established common law of the Commonwealth.

He argues should be subject to common law application of doctrine. Recreation = protected trust interest. Decisions by courts are misguided. Argues that state legislature can resolve.

Bulger attempted to amend law concerning public use of private beaches.

Big source of friction ACK and MV. ACK selectboard – One Beach initiative designed to increase public access. Private owners would grant easements in return for tax benefits – reduced property assessments on local level and tax deduction on federal level. Mixed reaction from public and likely legal challenge. ACK officials interested in broad access to beaches. Through easements – would likely result in some eminent domain. Changing the law would support this and would restore *jus publicum* to MV.

But islands not incorporated into Mass until 50 years after The Ordinance adopted. 1692

“Thus, the following things are by natural law common to all – the air, running water, the sea, and consequently the sea-shore. No one therefore is forbidden access to the sea-shore...for these are not, like the sea itself, subject to the law of nations. . . [These] cannot be said to belong to any one as private property. Justinian J. Inst. 2.1.1 1500 yrs ago. First articulation of public trust doctrine. Throughout history – shorelines

special form of property public has certain vested rights. Fall of Roman Empire – Dark Ages owners took shorelines. Magna Carta restored some of public rights in tidelands. Public trust lands held by King in trust for the benefit of the people.

Massachusetts Bay Colony – first to codify the Doctrine and common law tenets of English system with passage of Colonial Ordinance of 1641-47. Provides for private ownership of shoreline down to low-water mark. Designed “to encourage private wharf construction and maritime commerce in light of the colony’s inability to afford these undertakings”. “Created an exception to the application of the common law to satisfy a particular need of a temporal nature” based on “the expectation of a public benefit to be derived from the development of the flats for navigation and commerce”. Public’s rights to engage in fishing, fowling, and navigation along the coast and shorelines of the colony’s great ponds, coves and rivers.

Annulled with rest of the Massachusetts Charter after the Revolution. Now codified in chapter 91 of Mass General Laws.

Dual-sovereignty framework of nation – Doctrine defined differently for fed than states. Federal ultimate trustee of nation’s resources. Supreme Court – Doctrine application can be modified if conditions change such that public benefits change. Recreation now a protected use of trust land.

Mass – applied time-specific exception to common law in Ordinance to lands outside those initially contemplated. MA SJC has gradually eroded public’s *jus publicum* rights by elevating *jus privatum* interests as the dominant legal concern. They and SC ruled that applied to Mass general laws and to ACK and MV as had applied since 1692.

1974 – Legislative bill to public right for on-foot passage along flats during daylight hours. Rejected by SJC. For ponds have ruled otherwise and recognize public rights and broadened to include boating, bathing, skating.

1621 – King James I recognized Plymouth Company as Council for the Affaires of New England. Islands remained uninhabited because “the savage was then too much of a problem for them to try the experiment of isolating themselves on an island populated with them, and thus be out of the reach of help in time of hostile attacks” Banks note 105 at 71.

1654 Mass Bay Colony legislature specifically voted that MV not within its jurisdiction. “independent, self-governing” entity owned by Mayhew. 1664 – granted to NY with Patent of Ny, ME, LI by Charles II.

1673 – NY taken by Dutch. 1674 – Treaty of New Amsterdam – English and Dutch.

1691 – Charter of Wm and Mary – Plymouth and Mass Bay Colony combined, detached from NY and consolidated under Mass. Acts for the Consolidation of Titles within the Islands of Capawock, alias MV and Nan.

“[An island] so universally barren, and so unfit for civilization, that they mutually agreed not to divide it”. Crevecoeur.

Application of Ordinance to ACK and MV contravenes spirit and letter of law. Most of colonial period – ACK and MV independent self-governing entities. Law originally intended to pertain to Boston area for commercial development – private developers to stimulate economy. So not valid to apply to islands. ACK and MV. Trust benefit for tourism would argue to increase access. Bestows special benefits on private landowners and increased private property. ACK owners seem generally amenable – but can withdraw access. MV most owners are unwilling to allow general public use of beaches.

Overall benefit goes to increasing public access not private control.

Courts bear lion share of responsibility for degrading public trust interest. Could be modified by state legislature – codifying the scope of protected trust activities to include recreation.

The rigid application of a flexible interpretation of the public trust doctrine to the privately-held beaches on ACK and MV has resulted in a sort of historical accident. One in which a law meant to protect the public access to unique resources and maximize the public’s benefit from them now operates to do the exact opposite. As public demand for access to trust resources for recreational activities increases, and the stock of these unique treasures continues to wane, this problem is likely to remain at the forefront of property disputes on Nantucket and MV. Therefore, as the sovereign trustee of the public’s rights under the Doctrine, this issue must be addressed by either the federal, state or perhaps local government.”

Courts must abandon rigid interpretation and then state legislature can act.

[To Have and Have Not-Nantucket, Martha's Vineyard, and the Public Trust Doctrine: Remembering the Land That Time Forgot](#) CC McMahon – Boston College Env'tl. Aff. L. Rev., 2004

But look! here come more crowds, pacing straight for the water, and seemingly bound for a dive. Strange! Nothing will content them but the extremist limit of land. . . . They must get just as near the water as they possibly can without falling in. Tell me, does the magnetic virtue of the needles of the compasses of all these ships attract them thither?

—Herman Melville¹

Resident-Only Beaches in Chilmark, MA

<http://buzzardsbay.org/access.htm>

A visitor to our website pointed out that in Chilmark, MA, two town beaches (Lucy Vincent and Squibnocket) are restricted to residents only of the Town of Chilmark, or their guests or tenants. This is enforced even for foot traffic, and the town requires a beach access photo identification card that they issue for a \$10 fee (see the [Town of Chilmark website](#)). This is the only municipality in the Commonwealth that issues

resident-only beach access walk-on permit cards.

With various state and federal laws ensuring equal access to public lands and public facilities, it might seem improbable for any municipality in Massachusetts to attempt to limit public access (not just parking) to a public beach to only residents of that municipality. However, the situation in Chilmark is actually more complicated in that these two "town" beaches are really privately owned lands leased to the town (the town does actually own its own "public" beach elsewhere). According to the town, they assert that limiting access to residents-only is needed for them to ensure they are complying to the terms of the lease.

While a private property owners can certainly limit "public" access to their property to town residents only, this case is curious in that public resources (town personnel and time issuing and managing a permit program) are being expended on a private property managed by a public entity (with taxpayer dollars) that allows only selective access by the public. We have not seen a legal case addressing these particular circumstances.

Interesting court case on access to beaches on Edgartown Great Pond. 19 LCR 176 MISC 04-303223 April 20, 2011ⁱ

And, as already set forth in previous Orders of the Court, any record ownership rights which the Plaintiffs may have previously held in the Beach, essentially, no longer exist because the Beach, as it was located as late as 1938, is now completely submerged under the Atlantic Ocean.

Pamela Kohlberg, as Trustee of the Job's Neck Trust; Andrew Kohlberg, as Trustee of the High Road Realty Trust ("Kohlberg Defendants"); Jeffrey Flynn, Richard Keeler, and Patricia Post, as Trustees of the Pohogonot Trust ("Pohogonot Defendants"); and Short Point Holdings, LLC.

Introduction

The Plaintiffs commenced this action on October 29, 2004, seeking to quiet title to a parcel of real property known as South Beach Ocean Front in Edgartown ("Beach") and seeking a declaratory judgment, pursuant to G. L. c. 231A, confirming their rights to use certain rights of way to that Beach, which ways lie over land owned, of record, by the Defendants. In essence, this case involves the Plaintiffs' claims to record ownership interests in the Beach and in ways to the Beach, or, alternatively, claims to have acquired prescriptive easements to use the Beach and to use the ways known as Wheldon's Path, Pohogonot Road, and the Road to Short Point ("Beach Paths"). There have already been a substantial number of motions filed and Orders issued in this case. The sole matter before the Court, at this point, is whether the Plaintiffs have acquired a prescriptive easement over the aforementioned ways, and to use the Beach. For the reasons more fully set forth below, I find and rule that the Plaintiffs have not met their burden of establishing that

they have acquired any prescriptive easements over the subject ways or the Beach because their use was neither adverse, nor open and notorious, nor did their activities satisfy the minimum required period of twenty-years. Rather, the relevant use was permissive. And, as already set forth in previous Orders of the Court, any record ownership rights which the Plaintiffs may have previously held in the Beach, essentially, no longer exist because the Beach, as it was located as late as 1938, is now completely submerged under the Atlantic Ocean.

Procedural History

The Plaintiffs in this case are John D. Hamilton, Jr., and Andrew H. Cohn, as Trustees of Oyster Pond EP Trust; Richard L. Friedman, Allen W. Norton, and Judith Norton, individually and with Melissa Norton Vincent, as Trustees of the Quiet Oaks Realty Trust; and Albert White, Toni White Hanover, and Shauna White Smith, as Trustees of the Quampacky Trust. The Defendants are Michael D. Myerow, as Trustee of Botar Realty Trust, Rabor Realty Trust, and Tarob Realty Trust ("Myerow Defendants"); Pamela Kohlberg, as Trustee of the Job's Neck Trust; Andrew Kohlberg, as Trustee of the High Road Realty Trust ("Kohlberg Defendants"); Jeffrey Flynn, Richard Keeler, and Patricia Post, as Trustees of the Pohogonot Trust ("Pohogonot Defendants"); and Short Point Holdings, LLC. These originally named Defendants answered the Complaint on December 16, 2004.

This case has a substantial procedural history, which is as follows. On application by the Plaintiffs, the Court granted a Preliminary Injunction on November 24, 2004, enjoining Defendants, during pendency of this litigation, from blocking or otherwise interfering with Plaintiffs' rights to use their alleged rights of way over the Defendants' property. On April 6, 2005, the Pohogonot Defendants filed an Answer and Counterclaims, joining as parties a number of Additional Defendants in Counterclaim. [\[Note 1\]](#)

On May 23, 2006, Plaintiffs, with leave of court, filed their Second Amended Complaint, [\[Note 2\]](#) naming five of the Additional Defendants in Counterclaim as Plaintiffs: Mark B. Norton, Shauna White Smith, Debra White Scott, Lisa White and Toni White Hanover. [\[Note 3\]](#) On assented-to motion of the parties, the Court issued an Order on September 19, 2008, dismissing all claims by and against all of the remaining Additional Defendants in Counterclaim except for Lage, Inc., as general partner of the Jokase Limited Partnership ("Lage"), and Paul E. Konig and Joanne V. Konig, as Trustees of the Paul E. Konig Revocable Living Trust and the Joanne V. Konig Revocable Trust ("Konigs"). On October 9, 2009, the Court allowed a motion of the Defendants to dismiss the claims of the Konigs with prejudice.

On September 1, 2006, Plaintiffs filed a Motion for Partial Summary Judgment on Count I of the First Amended Complaint. The Pohogonot Defendants opposed the motion on October 26, 2006, and filed a Cross Motion for Partial Summary Judgment. On October 30, 2006, the Kohlberg Defendants filed a Motion for Partial Summary Judgment Pertaining to the long Plaintiffs' Alleged Ownership of an Interest in the current 8,200 foot long Beach. On November 2, 2006, the Myerow Defendants also filed a Motion for Partial Summary Judgment Pertaining to the Issue of Beach Rights. Following a hearing, the Court issued a Decision on April 1, 2009, denying the Plaintiffs' motion and allowing the three motions of the Defendants, ruling that the Plaintiffs have no deeded interest in the subject Beach. [\[Note 4\]](#)

On October 30, 2006, the Kohlberg Defendants and Short Point Holdings, LLC, filed a Motion for Partial Summary Judgment Pertaining to Alleged Easements to Use the Road to Short Point. Following a hearing, the Court issued a Decision on April 1, 2009, allowing in part the Defendants' motion, ruling that Plaintiffs do not hold any easement, prescriptive, express or implied, over the Road to Short Point.

On January 22, 2008, the Pohogonot Defendants filed a Motion for Partial Summary Judgment concerning claimed rights to and over Paqua - which is a portion of the Pohogonot Defendants' property. Following a hearing, the Court issued a Decision on October 13, 2009, allowing the Defendants' motion, ruling that the Plaintiffs do not hold any easement, express or implied, prescriptive or otherwise, over Paqua.

On December 2, 2009, the Court took a view of the property in the presence of several of the attorneys and parties. Trial was held from December 7, 2009 through December 15, 2009, December 17 and 18, 2009, and March 1, 2010 through March 4, 2010 - a total of thirteen days. Stenographers Pamela St. Armand, Wendy Thomas, and Mary Tarallo Buduo were sworn to record and report the testimony. Two hundred fifty-eight (258) exhibits were admitted into evidence, as well as numerous chalks.

Findings of Fact

After reviewing the record before the court, including the witnesses' testimony, the exhibits introduced at trial, my observations at the site visit, and the post-trial memoranda submitted by the parties, I find the following facts:

1. South Beach Ocean Front in Edgartown is a beach parcel consisting of approximately 1.7 miles of shoreline on the southwestern shore of Edgartown in Martha's Vineyard located between Job's Neck Point in the East and the Oyster-Watcha Line in the West ("Beach").

2. The southern shoreline of Martha's Vineyard is eroding. From 1846 to 2005, the shoreline eroded at a nearly constant rate. On average, the shoreline eroded five and two tenths feet (5.2') per year near Watcha Pond and seven and two tenths feet (7.2') per year near Edgartown Great Pond (East of the Beach). During this time, the shoreline eroded inland approximately eight hundred and fifty one feet (851') near Watcha Pond.

3. In 1846, the Beach was abutted to the North by three ponds: Oyster Pond, north of the western border of the Beach; Paqua Pond in the west-center; and Job's Neck Pond, north of the eastern border of the Beach.

4. As a result of the eroding shoreline of the Beach, the shorelines of these ponds have migrated northward and have been reshaped. Job's Neck Pond has been fractured into three ponds: (1) Job's Neck Pond; (2) Pohogonot Cove, once connected to the pond, has separated and stands alone abutting the Beach on its northern border, east of the center; and (3) The eastern cove of Job's Neck Pond has similarly separated - now called Little Job's Neck Pond - and stands alone north of the eastern border of the Beach. Isaac's Neck lies between what was formerly Pohogonot Cove on the west and Job's Neck Pond on the east. Short Point lies between Job's Neck Pond on the west and Little Job's Neck Pond on the east. See attached Decision Sketch, showing the subject land and the surrounding area.

5. As a result of erosion, the area on which the Beach was located in 1846 is now submerged in the Atlantic Ocean. In fact, the area on which the Beach was located as late as 1938 is, likewise, submerged in the Atlantic Ocean.

6. Plaintiffs' alleged interest in the Beach derives from a deed dated May 9, 1712 recorded with Dukes County Registry of Deeds in Book 6, Page 283, in which John Butler conveyed to Captain Samuel Smith a parcel of land encompassing, what is today, the Beach. [\[Note 5\]](#)

7. By 1841, Wilmot Smith owned a 50% undivided interest in the Captain Smith land, and the other 50% undivided interest was owned by the eight heirs of Samuel Smith. [\[Note 6\]](#)

8. By deed dated September 21, 1841, recorded in Book 28, Page 229, Wilmot Smith conveyed to four of the eight heirs [\[Note 7\]](#) his 50% undivided interest in an upland parcel known as Paqua and the Beach parcel ("1841 Smith Deed"). [\[Note 8\]](#)

9. The 1841 Smith Deed describes Paqua and the Beach parcel separately.

10. The 1841 Smith Deed describes the Beach parcel as "bounded on the North by the arable land of Paqua and Pohogonot and by the several ponds in the vicinity; on the South

by the Ocean, and extending to Job's Neck Point on the East, and to the Oyster pond opening on the West...."

11. The 1841 Smith Deed describes Paqua as bounded "on the South by the Beach...."

12. By deed dated September 25, 1841, recorded in Book 28, Page 232, the heirs divided and conveyed to Wilmot Smith, their one-half undivided interest in an upland parcel known as Pohogonot ("1841 Pohogonot Deed").

13. The 1841 Pohogonot Deed describes Pohogonot as bounded on the South from Paqua Pond "easterly by [the fence at the edge of the Beach] or Beach to Job's Neck Pond...."

14. Plaintiffs derive their alleged interest in the Beach from Josiah H. Smith, one of the eight heirs. [\[Note 9\]](#)

15. A warranty deed in the plaintiffs' title, dated October 31, 1875, recorded in Book 59, Page 245, describes the conveyance as "all our right and interest in the beach extending from Job's Neck Point to Watcha Line, so-called, however the above may be located. . ." ("1875 Alden Deed").

16. The plaintiffs' title may then be traced to the 11/56th interest held by Allen Norton in November 1888. By deed dated November 7, 1888, recorded in Book 79, Page 483, Allen Norton divided and conveyed to Edmund G. Beetle, his undivided 11/56th interest in Paqua but retained his undivided, 11/56th interest in the Beach parcel ("1888 Norton Deed").

17. The 1888 Norton Deed describes the conveyance as "all my right, title, and interest in said Paqua", except to the beach, extending from Job's Neck Point to Watcha Line so called."

18. On or about 1950, Winthrop B. Norton and George D. Flynn, Jr. commissioned Attorney Harry Perlstein to conduct a title examination to determine ownership interests in the Beach. On December 8, 1950, Attorney Perlstein made his report in a letter addressed to Mr. Norton and Mr. Flynn entitled "Letter of Opinion, Discussion of Deed, Allen Norton to Edmund G. Beetle, Book 79, Page 483, and Examiner's Narrative" ("Perlstein Letter").

19. Upon his death on January 22, 1981, Winthrop B. Norton - who held an 11/56th undivided interest in the Beach parcel - attached to and incorporated by reference in his will, the Perlstein Letter, which was subsequently recorded with the will at the Dukes County Probate Court.

20. More contemporary deeds in the chain of title describe the Beach parcel as "Ocean Beach Land at Oyster Pond, consisting of 9,300 +/- feet ocean frontage from Jobe's [sic] Neck Point to the West Tisbury Town Line."

As can be seen from the case docket sheet, which is more than fifty pages in length, many of the arguments raised by various parties in this case have already been determined by the Court in the several Orders referred to above. The issue currently before the Court is the claim of the various Plaintiffs to have acquired prescriptive easements to use the Beach and the roads leading to it - namely, Wheldon's Path, the Road to Short's Point, and Pohogonot Road. To adjudicate this claim requires looking at the history of this section of Edgartown, the owners of the land, and the activities of people who lived there. Only after doing so can the Court determine whether the members of one family, the Nortons, have established rights under the doctrines of prescription and adverse possession to use the Beach and the roads and ways providing access to it, record title to which has historically been held by members of the Flynn family.

Discussion

At one time, the tract of land involved in this litigation consisted of approximately three thousand acres. It included two ponds, Oyster Pond and Job's Neck Pond, and was bounded on the south by the Atlantic Ocean. There were a few homes and camps on the parcel but, for the most part, it was vast, wooded and unimproved. Not surprisingly, this large parcel was traversed by various paths and ways, including Wheldon's Path. As the Court noted on the site visit, even today, many of the paths are not visible to anyone who is not standing on, or traveling near to, those paths. The same can be said of the 9,300 foot long Beach. It is so long, that it would be quite easy to stand or spread blankets at one end of the Beach and not be seen by others standing or enjoying the ocean at or near the other end of the same Beach.

Another matter, which must be remembered, is that there is constant erosion taking place on Martha's Vineyard. The Beach at issue in the present case is no exception: scientific evidence and testimony at trial established that the Beach has been eroding at a rate of five or more feet per year. The Beach, as it was located in 1938, is now completely submerged under the Atlantic Ocean. As an example of the impact of that erosion, Oyster Pond, which at one time was saline and an inlet of the ocean, is now cut-off from the Atlantic Ocean. Therefore, it has become necessary to "breach the beach" once or twice annually to allow salt water to enter and leave Oyster pond during several tides, thus allowing salt-water marine life such as crabs and oysters to continue to live therein.

Historically, two families have been owners of the relevant land - the Nortons and the Flynns. Over time, the properties were eventually put into various entities, which are essentially the parties to this case. For ease of reference, and also for the claims and actions relevant to this matter, I shall continue to refer to those two families. The Nortons and the Flynns were friends and neighbors for many years. As noted above, in the early 1950's, Winthrop B. Norton ("Sonny") and George D. Flynn, Jr. ("Uncle George") were the patriarchs of their respective families. At trial, a good amount of evidence was introduced to establish that the two friends were not particularly concerned as to the boundary lines between the properties. They shared the properties and allowed each other to make use of the other's. In certain instances, one sold land to the other. On one occasion - a conveyance by Sonny to Uncle George of the parcel known as "Short Point" - the parties agreed that, during the lives of Allen and Sonny, Sonny, Allen Norton, and their families would have permission to use Short Point. [\[Note 10\]](#)

Over time, the two families increased in size. The two patriarchs passed on, but their children, grandchildren, nieces, and nephews began families of their own. This, of course, caused the number of persons using the roads and Beach to increase. Even then, however, and especially in the 1960's and 1970's, the area was so immense that it was possible for one family to make use of a portion thereof without disturbing, or even being seen by, members of the other family. In addition, at that time, everyone was cognizant of both their own privacy and that of others with respect to use of the land. This was especially true in the use of the Beach; the Nortons tended to stay near Little Job's Neck Pond and Job's Neck Pond, keeping their distance from the Flynn houses and the barrier beach at Oyster Pond, where the Flynns usually "hung out." If members of the Norton family wanted to use the portion of the Beach near Oyster Pond, as they did on several occasions, they would contact Uncle George and request permission. It was seldom if ever denied.

In the late 1970's, shortly before his death, Sonny began to prepare to make a will. In that will, he made references to various rights of way which he claimed over Flynn property, including a path running from White Gate and East Gate in the Flynn property to an area called Paqua. This path, which runs along the easterly shore of Wheldon's Cove and Oyster Pond, is not the way or ways which the Nortons now claim over Wheldens Path and Pohogonot Road. Sonny never discussed these claims with Uncle George, nor did Uncle George make any conveyance during his lifetime of any interest in the Beach or in roads or ways leading to it.

Sonny Norton died in 1981, and his property was divided in his will among several heirs. Apparently, because the estate was being deluged by high inheritance and estate tax obligations, the Norton family concluded that it was necessary to sell some of their properties. They began to sell lots along with "prescriptive rights" which, they claimed,

allowed them to use and cross over the Flynn property. These deeds also included fractional ownership interests in the Beach itself. Advertisements in the Vineyard Gazette, placed by a local realtor, spelled out what the Nortons were purporting to sell, mentioning Beach rights and the claimed fractional interests in the Beach.

Richard Friedman, a prominent businessman in the field of real estate, became aware of the Norton properties and eventually purchased land known as the Farm House property from the estate in 1983. [\[Note 11\]](#) The deed to Friedman, which purported to include the conveyance of Beach rights and rights of way over the Flynn property, was the first time that Beach rights and rights of way were conveyed to a person outside of the Norton family. At the closing, Mr. Friedman requested and received from members of the Norton family an affidavit concerning their purported historic use of certain of the ways.

After his purchase of the Farm House parcel, Mr. Friedman, in spite of being asked by Allen Norton not to do so, began to ride on horseback over large portions of the Flynn property. When the Flynns complained, a "ceasefire" was put into effect in 1987 while attorneys for both sides studied the situation and attempted to arrive at a neighborly accommodation. It was agreed that Friedman and members of the Norton family could continue to use the ways in question while the negotiations continued. In 1999, negotiations not having been successful, the Flynns executed, served, posted, and recorded a Notice to Prevent Easement pursuant to G. L. c. 187, § 4. [\[Note 12\]](#) This effectively cut off any possible claim of a prescriptive easement by Friedman because any purported "adverse or hostile" use of the ways by him began in the early 1980's at the earliest, and was terminated by the "posting" in 1999 - notably, a period of less than the required minimum of twenty years.

At trial, considerable evidence and testimony was introduced by the Nortons, Mr. Friedman, and various guests and tenants that they had used the Beach and various ways over a period of time. Any such use which began in the early 1980's was "cut-off" by the G. L. c. 187, § 4 posting. [\[Note 13\]](#) Accordingly, I need not delve into it much further except to point out that the historical relationship between the Norton and Flynn families, going back for many years, requires me to conclude that any use of the parcel was permissive, rather than adverse. In addition, there were certain unusual circumstances that precluded the clock from running on any possible claim of prescription. For example, in a previous order, this Court ruled that any use by the Nortons of the Road to Short Point was not adverse because the Nortons and Flynns had agreed at the time of the sale of Short Point from Allen Norton to a Flynn family member that the Nortons would still be able to use the property.

As stated earlier, the Norton family, for a long time, generally stayed away from Oyster Pond Beach because the Flynns tended to congregate there. Later, for whatever reason,

and especially after the Friedman purchase of property, Plaintiffs began to go more often to the Oyster Pond area. As this was occurring, there were several occasions when members of the Flynn family, and particularly Brad Keeler, questioned the Norton's and Friedman's right to be there, and asked them to leave. Mr. Friedman even complained to the police on at least one occasion when he was "accosted" by a member of the Flynn family while horseback riding in the disputed area.

Conclusion

All the above leads me to the conclusion that the Flynn's allowed and permitted the Nortons and their friends to use the Beach and ways at issue in this case. This permission precluded the uses from becoming rights. Simply put, the Plaintiffs have not met their burden of proof, and thus have not acquired a prescriptive easement to use the Beach, or to use the subject ways to the Beach, or over any of the Flynn property.

Judgment to enter accordingly.

Charles W. Trombly, Jr.

Justice

Dated: April 20, 2011

Resident of Oyster Pond Pushes State Legislation On Barrier Beach Rights

- **Julia Wells**
- *Thursday, July 21, 2011 - 9:45pm*
- See more at: <http://mvgazette.com/news/2011/07/22/resident-oyster-pond-pushes-state-legislation-barrier-beach-rights#sthash.qZzO80nB.dpuf>

A well-known Cambridge businessman and prominent seasonal resident of Edgartown is a key backer of a bill quietly making its way through the Massachusetts legislature that has the potential to affect dramatically the ownership rights on barrier beaches around Great Ponds, the Gazette has learned.

Richard Friedman, a Boston real estate developer and owner of a large estate on the Oyster Pond, paid a registered lobbyist \$135,000 over the past two years, records show, to push a bill on Beacon Hill that is now attracting growing attention among coastal property owners on the Vineyard and beyond. House bill 254, a single paragraph, relates to the barrier beaches that separate the Island's Great Ponds from the ocean, many of which are privately owned and retreating into the ponds as they are eroded on their seaward side. The bill would prevent private ownership from moving with the sand. Because the Great Ponds are public land, any barrier beach that retreated to a place which formerly was the bottom of a pond would become a public beach.

Technically an amendment to Chapter 91, the state law governing navigable waterways in the commonwealth, the bill has broad implications not only for the Vineyard, but also Nantucket and other areas across the commonwealth where there are Great Ponds and barrier beaches.

The bill was originally filed last year but died in committee. It was refiled in January.

Mr. Friedman is a Democratic fund-raiser whose Oyster Pond home was the Summer White House for the Clintons for three years. Last summer he hosted a fund-raiser for Gov. Deval Patrick at his home. A generous contributor to Island causes, Mr. Friedman makes his home available for a variety of summer fund-raisers for nonprofits, including the Vineyard Nursing Association and Vineyard House.

He is appealing a long-running Massachusetts Land Court case that attempted to establish ownership of and access to the barrier beach that borders Oyster Pond and Job's Neck Pond. The case dates to 2004 and involves a complicated title claim and a separate prescriptive easement claim by Mr. Friedman and a group of Oyster Pond landowners against a group of neighboring landowners. The bill is not directly connected to the case but the parallels are striking; among other things the case involves issues of access to barrier beaches and ownership rights on beaches after erosion takes place.

Reached at his Cambridge office yesterday morning, Mr. Friedman confirmed that he supports the bill but had no further comment on it or the court case. "I am for the bill, that's all I would say. Beyond that I don't think I should comment," he said.

Plaintiffs in the case are three trusts whose principals are landholders in what was formerly Winthrop B. (Sonny) Norton's land; Mr. Friedman is a trustee of one of the trusts.

Defendants in the case are six trusts whose principals are landowners in what was formerly Pohogonot Farm. Two of the trusts are controlled by members of the Kohlberg family. Jerome Kohlberg and Nancy Kohlberg, who head the Kohlberg family, own the Vineyard Gazette.

Owned by the late George Flynn, Pohogonot abuts the Norton land; the two properties comprise a vast area of former farmland that fronts the Edgartown Great Pond, Oyster Pond, Job's Neck Pond and a series of smaller ponds. A barrier beach divides the ponds from the ocean. Mr. Friedman bought his land from the Nortons in 1983. The land court decision issued in April and now on appeal rules that Mr. Friedman and others do not have access over the Flynn land to the barrier beach fronting Oyster and Job's Neck Ponds. The decision reads in part like a history of the two storied farmlands in the rural coastal perimeters of Edgartown and chronicles a changing pattern in the culture of land use as the properties were subdivided and sold. Erosion is another subject in the case, which also involved title claims to early 20th century fractional interests in the barrier

beach. With erosion occurring on the south shore at a rate of five feet a year, the judge in the case found that those interests have long since disappeared into the Atlantic Ocean.

The bill, House 4725 last year, was reintroduced as House 254 this year by Rep. Frank I. Smizik, a Democrat from Brookline who is chairman of the House Committee on Global Warming and Climate Change. Mr. Smizik said yesterday he has no connection to Mr. Friedman.

“None,” he said. “This bill will not address his case.”

Records from the Massachusetts Secretary of State’s office show that Mr. Friedman paid lobbyist William F. Coyne Jr. \$75,000 in 2010 and \$60,000 in 2011. Separate disclosure forms filed by Mr. Coyne indicate that at least \$75,000 of that money was used by himself and an associate, Patricia E. McCarthy, to lobby in support of House bill 254 and its predecessor, House bill 4725, on Mr. Friedman’s behalf.

The bill is now in the committee on third reading in the state house. It has a long way to go before it could become law. But sensitivity about the bill is already evident; Rep. Vincent Pedone, a Democrat from Worcester and the chairman of the committee on third readings, was scheduled to travel to the Vineyard today to view the Oyster Pond area and meet with unnamed private landowners who may be affected by the bill. The trip has since been cancelled, Mr. Pedrone’s office confirmed yesterday. Mr. Smizik, the bill’s sponsor, said he understands the trip will not be rescheduled. “[Mr.] Pedone has been holding this bill up, so now we will see what he does,” he said.

Meanwhile, a growing number of property owners on the Vineyard are assembling, some with attorneys, to study and assess the potential impacts of the bill, including legal impacts. And there are two distinct and disparate views of the proposed legislation. Backers of the bill say that it is merely a clarification of the law and would have no far-reaching implications, including for private property owners.

“We are just trying to do what the court cases do say which is that this land would be state land,” said Mr. Smizik, who said he introduced the bill out of direct interest in his role as chairman of the global warming committee. “It’s a way of protecting state property — why should others get control over those properties? We think people will come to these ponds even if by taking a little kayak or boat or something or swimming and going up into the ponds. It should be state property. We’re trying to confirm that. It’s a clarification of the law.”

Opponents take a markedly different view. They claim the bill raises many potentially complicated legal issues relating to property rights and shifting property tax burdens. And there is the question of what point in time the measuring begins to determine if a barrier beach has accreted into a Great Pond and would become public. Does it begin in the

1600s when tidal laws were formed in Massachusetts or yesterday? The bill is silent on this question.

“I am just trying to get to the truth of this,” said Chuck Parish, a Vineyard Haven resident who owns property on Lake Tashmoo and the Vineyard Haven Harbor and has hired an attorney to study the bill and relevant case law.

“It’s important that people take a very close look at this because the consequences could be very serious for the commonwealth,” said Jim McManus, a public relations spokesman who represents the Great Ponds Coalition, a group that has formed to oppose the bill with a Web site (greatpondsma.org). Mr. McManus said names of the members of the coalition cannot be disclosed for reasons of privacy. He also could not disclose who is funding the organization and its Web site.

Unlike most other states in the country, Massachusetts law allows private ownership of beachfront to the mean low water line.

A Great Pond is defined in Massachusetts as any body of water more than 10 acres. The state lists 17 Great Ponds on the Vineyard, but a list compiled by the Martha’s Vineyard Watershed Team for the Martha’s Vineyard Commission names 35 Great Ponds, including barrier beach and tidal ponds.

Chapter 91 protects and promotes public use of tidelands and waterways and is grounded in the public trust doctrine and Colonial Ordinances from the 1600s which held that the air, the sea and the shore belong not to any one person, but rather to the public at large.

- See more at: <http://mvgazette.com/news/2011/07/22/resident-oyster-pond-pushes-state-legislation-barrier-beach-rights#sthash.qZzO80nB.dpuf>

ⁱ <http://masscases.com/cases/land/19/19lcr176.html>