



WATER RIGHTS THROUGH A BUYER'S LENS

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WHO ARE YOU REPRESENTING AND WHY

- Importance of engagement letters – define the scope of your representation
- Are you representing the client solely for the purchase?
- Are you doing the title or is that the bank attorney's responsibility?
- Will you be asked to help with permitting?
- Zoning is usually excluded from most engagement letters – has the client asked for confirmation that the future use is allowed?

REAL LIFE STORIES

- Client searching for the ultimate “work from home” space finds house on the Cape with “beach rights” or
- Lake side cottage with a small dock on a “great pond”
- Lovely house on the North Shore looking out at a beautiful harbor has access to a “common landing”
- House fronts on a sandy beach but the neighbors have an access easement

What do these terms mean? What questions should you, and your client, be asking?

BEACH RIGHTS

- Basic issue – unlike most of the United States, private ownership may go to the low water mark, not the high – Colonial Ordinance of 1641-1647
- Ownership of flats between mean high and mean low is subject to “Reserved Public Rights” for “fishing, fowling and navigation” which does not include sunbathing or beach parties (can swim or float offshore but cannot enter from the beach)
- Is the client’s house actually on the beach or is it advertised as having access to a beach?
- How are those rights conveyed? Deeded easement? (good) Membership in a homeowner’s association that owns a beach lot? (ok) We’ve always used it? (trouble)

READ THE DEED

- Tidal land – “by the shore or flats” – means land between mean high and extreme primitive low water mark – but not more than 1,650 feet
- Fresh water rivers and streams– abutting owners own to the “thread of the stream” meaning the center line measured between the banks, not the actual channel
- Great ponds – low water mark

Note: If the property is in Provincetown – you need to speak with an expert surveyor

CHECK SUBDIVISION PLANS

- Not just the most recent one.....
- Check the original plan – early plans for “summer colonies” included amenities for future owners – bathing beaches, casinos (not gambling but for dances and parties), reserved strips between lots and the water
- Is the client’s lot in the original subdivision or a later addition? Were rights in the original granted to the added lots?

WHAT ARE GREAT PONDS AND WHY ARE THEY DIFFERENT

- Any pond containing more than ten acres in its natural state
- Title to most great ponds is in the Commonwealth for the benefit of the public
- Unlike salt water – provided the exercise of these rights doesn't unreasonably interfere with rights of others, public rights in great ponds include:
 - Fishing and fowling
 - Boating, bathing, ice skating or riding on the ice
 - Right to cut and remove ice for any purpose
 - Right to take water for domestic or agricultural purposes

PRIVATE WATERBODIES

- Read the Deed – is the lot on a private lake? Is the lot in a subdivision with a homeowner's association?
- Does the lot go to the shoreline or not?
- What are the rules?
- What are the dues?
- What permission do you have to get install a dock?
- Are motor boats allowed?

COMMON LANDING

- G.L. c. 88 Section 14 - In every city or town where the tide ebbs and flows there shall be provided on the tidal shore at least one common landing place.
- Ten voters can petition the city council or the select board to lay out additional common landing places and alter existing ones
- Property owner entitled to damages under chapter 79
- File plan and description with the county commissioners and Department of Environmental Management and shall record the plan at the Registry of Deeds
- Structures are subject to Chapter 91

RECENT CASES

- Mazzola v. O'Brien 100 Mass. App. Ct. 424 (2021)
Use of ATV to access beach was not “overburdening” of easement
- Kubic v. Audette 98 Mass. App. Ct. 289 (2020)
Right of access on private way does not include the right to build a massive dock at the end that interferes with other holders of the same access rights
- Fitzgerald v. Harlow Mass. App. Ct UP
Activities of owner not enough to extinguish right to use beach, situation confused by the fact that there were two beaches that could be described as “beach at said Kingston Bay”