

March 31, 2021

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BY ELECTRONIC MAIL ONLY (dtangeman@truro-ma.gov)

Mr. Darrin K. Tangeman
Town Manager
Truro Town Hall
24 Town Hall Rd.
P.O. Box 2030
Truro, MA 02666

Re: Obtaining Rights for the Town to Access and Use Privately Owned Tidelands for Public Works and/or Public Safety Purposes

Dear Mr. Tangeman:

I am providing this opinion in response to a recent request submitted by the then-Interim Town Manager, Chief Calise, seeking legal guidance relative to the Town's rights to access and use privately owned tidelands for public purposes. In particular, the Chief asked for an explanation of the Town's rights under the Public Trust Doctrine, or otherwise, to access private shorefront areas in order to address serious public safety issues such as beach erosion, or to respond to emergencies. As explained below, the Town may not rely upon public trust rights in order to access and use private, shorefront property for such purposes. Rather, the Town must acquire the rights to access and use the property.

By virtue of the colonial ordinances of 1641- 47, ownership of land bounded by the sea extends to the low waterline, or 100 rods (1650 feet) from the high water mark, whichever is less. Private ownership of this intertidal area, however, is subject to the rights of the public to use the area for navigation, fishing and fowling. See, e.g. *Butler v. Attorney General*, 195 Mass. 79, 82-83 (1907). These public rights, commonly referred to as the public trust rights, are quite limited in scope. The Massachusetts Courts strictly construe the public trust rights of fishing, fowling and navigation, and I have found no cases that recognize any special municipal rights in privately owned tidelands, even to address public health and safety issues. In my opinion, therefore, absent permission by the landowner, the Town's entry onto privately owned tidelands for any purposes other than the exercise of the limited public trust rights of navigation, fishing and fowling, would constitute a trespass.

While there may be legitimate defenses against a trespass claim in the event of the Town's entry in response to a sudden, public emergency situation, undertaking public works projects on private property, such as erosion control, beach replenishment or flood control would not ordinarily qualify as a defense against trespass, in my opinion. Moreover, non-permissive entry could put the Town at risk for assessment of monetary damages. Short of acquiring fee ownership of tideland areas, the Town's options are to obtain permission from the private landowners in the form of

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easements or licenses for the desired access or use rights. The utility of these options, as well as the procedures involved in acquiring them, will normally depend upon the specific circumstances surrounding the Town's needs in each case.

An easement creates a right to use the land of another for a specific purpose. Easements may be temporary (i.e., limited in duration for a specified period), or permanent. Except for easements granted to the Conservation Commission as a gift, Town acquisition of easements through gift, purchase or eminent domain, will require Town Meeting approval.

Unlike easements, licenses to use land do not create any property rights. They are always temporary in nature and may be revoked at the will of the party granting the license. Licenses are also revoked if ownership of the subject property is transferred. Because a license does not create any property rights, it cannot be acquired by eminent domain. Instead, the granting of a license would be a voluntary action, based upon terms negotiated between the municipality and the landowner. A license agreement does not require Town Meeting approval, in my opinion.

Chief Calise has also asked whether the Town might have arguments for claiming either easements by prescription, or easements "by necessity," to access and use private tidelands. In my opinion, a viable claim for prescriptive easement rights would depend upon the Town being able to establish in a court of competent jurisdiction that it has used the identified area of land for the particular purpose, openly, continuously and without the permission of the owner, for at least twenty years. In my further opinion, the concept of easement "by necessity" would be inapplicable to the circumstances described. An easement by necessity can arise only in the context of a conveyance of land that leaves the grantor landowner without reasonable means of access to his/her remaining land. In such a situation, the grantor may claim to have an access easement by necessity over the conveyed land.

Finally, Chief Calise has inquired about the process for determining whether the Town may have acquired easements over private tidelands in the past, and/or for determining whether some intertidal areas in Truro may have been exempted from the colonial ordinance. With respect to the existence of easements acquired by the Town in the past, any such easements should be on record in the Barnstable Registry of Deeds. A preliminary search of town reports and town meeting records may help to narrow the scope of registry research to be conducted by a title examiner.

Research to determine whether portion(s) of the Truro shoreline may have been legislatively exempted from application of the colonial ordinances, would not necessarily serve the purposes described. The likely result of any such exemption would be that ownership of the affected tidelands would be in the Commonwealth rather than in the owner of the abutting upland. Therefore, I suggest that the exemption issue should arise only if the Town seeks to acquire rights to access and use a particular area of the shore. It is at that time that the Town will need to confirm the identity of the



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owner(s) of the identified area by conducting a title search and, if necessary, legislative research. Please do not hesitate to contact me if you have further questions in regard to this matter, or if you require our assistance in obtaining specific easements or licenses for the Town's use.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Jonathan M. Silverstein", with a stylized, flowing script.

Jonathan M. Silverstein

JMS/JCC/cqm
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