

Massachusetts Navigability Report

Summary

“Throughout history, the shores of the sea have been recognized as a special form of property of unusual value; and therefore subject to different legal rules from those which apply to inland property.”¹ In Massachusetts, the public has the right to boat, fish, and fowl in navigable waters.² Even in non-navigable waters, common law grants to the public the right to “passage up and down the stream in boats or other craft, for purposes of business, convenience, or pleasure.”³ Navigable waters are those waters where the tide ebbs and flows and non-navigable waters are those waters above the ebbing and flowing of the tide.⁴ The tidal ebb and flow navigability test is derived from English common law.⁵

State Test of Navigability

Early case law established that navigable waters consist of tide waters where the “tide ebbs and flows.”⁶ Non-navigable waters consist of waters above the ebbing and flowing of the tide.⁷

Commercial use is not required for a finding of navigability as the purpose of navigation is not the relevant inquiry.⁸ Instead and historically, Massachusetts courts have defined the relevant inquiry as the “capacity of the water for use in navigation.”⁹ More recently, the First Circuit Court of Appeals held that a river was navigable even though it required land modifications to make it so and did not support actual commercial traffic.¹⁰ The court used the federal test for navigability to find that “the fact that the Blackstone River required portages [does not] defeat a finding of navigability” nor does the absence of actual commercial traffic; simpler types of commercial navigation suffices.¹¹

Extent of Public Rights in Navigable and Non-Navigable Rivers

Ownership of tidal lands in Massachusetts is unlike that of other states. For most other states, private ownership ends at the high water mark.¹² A “unique feature of Massachusetts land law” provides that “every owner of land bounded on tidal waters . . . enjoys titles to the shore and to the adjacent tidal flats all the way to the low water mark (or one hundred rods, whichever is

¹ *Boston Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356, 358 (Mass. 1979).

² *Opinion of the Justices to Senate*, 424 N.E.2d 1092, 1099 (Mass. 1981); *see* 310 Mass. Code Regs. 9.35(3) (2021) (describing “public rights applicable to tidelands and great ponds”).

³ *Brosnan v. Gage*, 133 N.E. 622, 624 (Mass. 1921).

⁴ *Commonwealth v. Chapin*, 22 Mass. 199, 205-06 (Mass. 1827).

⁵ *See Att’y General v. Woods*, 108 Mass. 436, 440 (Mass. 1871).

⁶ *Id.* at 205.

⁷ *Chapin*, 22 Mass. at 205-06.

⁸ *See, e.g., Woods*, 108 Mass. at 440 (“If water is navigable for pleasure boating, it must be regarded as navigable water, though no craft has ever been upon it for the purposes of trade or agriculture.”).

⁹ *Id.*

¹⁰ *Knott v. Fed. Energy Regulatory Comm’n*, 386 F.3d 368, 373 (1st Cir. 2004).

¹¹ *Id.*

¹² *Sheftel v. Lebel*, 689 N.E.2d 500, 503 (Mass. App. Ct. 1998).

less).”¹³ However, private ownership interest is subject to certain public rights¹⁴ and is “qualified by the public right of navigation.”¹⁵

Massachusetts courts have employed a variety of terms when examining legal rights associated with littoral properties. “Tidal flats” or “flats” refer to “the area between mean high water and mean low water (or 100 rods from mean high water, if lesser).”¹⁶ “Submerged lands” refers to “land lying seaward of flats.”¹⁷ Collectively, tidal flats and submerged lands—all the land lying below the mean high water mark—are referred to as “tidelands” generally.¹⁸

“Tidelands” include both “Commonwealth tidelands” and “Private tidelands.”¹⁹ “Commonwealth tidelands” are defined as “tidelands held by the commonwealth in trust for the benefit of the public or held by another party by license or grant of the commonwealth subject to an express or implied condition subsequent that it be used for a public purpose.”²⁰ “Private tidelands” are defined as “tidelands held by a private party subject to an easement of the public for the purposes of navigation and free fishing and fowling and of passing freely over and through the water.”²¹ These rights have been specifically granted to waters over private soil, where the waters are navigable-in-fact.²² A riparian owner along non-navigable waters “is without power (in the absence of legislative authorization) to use them in such a fashion as to obstruct or hinder the public’s navigation rights.”²³ All tidelands below high water mark are subject to these public rights, “which may be extinguished only, in the case of tidal flats, by lawful filling, or, in the case of submerged land, by express legislative authorization.”²⁴

For non-navigable (i.e., non-tidal) streams, the riparian owner owns to the center of the streambed.²⁵ But if the non-navigable waters that are navigable-in-fact, the public enjoys an “easement or right of passage up and down the stream in boats or other craft for purposes of

¹³ *Id.*

¹⁴ See *Sheftel*, 689 N.E.2d at 505. In Massachusetts, all privately-owned tidal areas are subject to the public trust doctrine, meaning that the land lying between the mean high water and mean low water marks (i.e., “flats” also referred to as “tidal flats”) are subject to a “reserved easement” in the public, “whereby all members of the public retain the right to go upon the flats for purposes of fishing, fowling, and navigation.” *Id.*

¹⁵ *Boston Waterfront Dev. Corp.* 378 Mass. at 636; see also *Ingraham v. Wilkinson*, 21 Mass. 268, 283-84 (Mass. 1826) (holding that “these flats may be occupied by wharves or other erections, provided the passage to lands above is not thereby too much straitened or obstructed.”).

¹⁶ *Opinions of the Justices*, 383 Mass. 895, 902 (1981); see also interfere with the right of public passage “when necessary for a greater public good such as a bridge, dam or mill”); Mass. Gen. Laws Ch. 91, § 1 (“Tidelands”).

¹⁷ *Opinions of the Justices*, 383 Mass. at 903.

¹⁸ *Id.* at 928 (“Tidelands are defined, speaking in general terms, as areas below primitive mean high tide”).

¹⁹ Mass. Gen. Laws ch. 91, § 1 (2021).

²⁰ *Id.*

²¹ Mass. Gen. Laws ch. 91, § 1; 310 Mass. Code Regs. 9.02 (2021).

²² *Brosnan*, 133 N.E. at 624.

²³ *Id.* at 505.

²⁴ *Trio v. Algarvio, Inc. v. Comms’r of the Dept. of Env’tl. Protection*, 440 Mass. 94, 97 (2003). See also *Boston Waterfront Dev. Corp.* 378 Mass. at 636 (highlighting that only the legislature can interfere with the right of public passage “when necessary for a greater public good such as a bridge, dam or mill”); Mass. Gen. Laws Ch. 91, § 1 (2021) (examining the definition of “Commonwealth tidelands” and “Private tidelands” reveals that both include references to public rights).

²⁵ *Ingraham*, 21 Mass. at 284; see also *Brosnan*, 133 N.E. at 624.

business, convenience or pleasure” where the beds are privately owned.²⁶ The riparian owner has, however, the “exclusive right of fishing and gathering ice, subject to regulation for the [public] by the Legislature.”²⁷

State court decisions do not discuss the right to wade or portage on non-navigable waters, though wading and portaging may fall within the scope of the right to boat for pleasure or convenience. Although the public retains an easement for passage over non-tidal navigable-in-fact waters, the public does not have the right to access the private upland property to reach these waters.²⁸ Crossing, without permission, “the dry land of another for the purpose of gaining access to water or flats in order to exercise public trust rights . . . constitutes a trespass.”²⁹

Department of Environmental Protection regulations note that a “project shall not significantly interfere with public rights of free passage over and through the water, which exist in all waterways. Such rights include the right to conduct any activity which entails the movement of a boat, vessel, float, or other watercraft; the right to conduct any activity involving the transport or the loading/unloading of persons or objects to or from any such watercraft; and the natural derivatives thereof.”³⁰

Miscellaneous

Case law has held that a streamside owner “may build upon his tidal land so as to exclude the public completely as long as he does not unreasonably interfere with navigation.”³¹ Moreover, streamside owners may build wharves or other erections down to the mean low water mark so long as navigation is not obstructed.³² It is, however, unclear as to what constitutes an unreasonable interference with navigation.

In addition, state statutory law provides that any water-dependent use project³³ which includes fills or structure for private use that interferes with the public’s rights in Commonwealth tidelands and great ponds shall provide commensurate compensation with the extent of interference caused.³⁴

For additional information on boating and fishing in Massachusetts, visit <https://www.mass.gov/boat-registration> or the state’s Office of Fishing and Boating Access at <https://www.mass.gov/orgs/office-of-fishing-and-boating-access>.

²⁶ *Brosnan*, 133 N.E. at 624; *see also Ingraham*, 21 Mass. at 284.

²⁷ *Sheftel*, 689 N.E.2d at 505; *see also Brosnan*, 133 N.E. at 624.

²⁸ *Sheftel*, 689 N.E.2d at 505.

²⁹ *Id.*

³⁰ 310 Mass. Code Regs. 9.35(2).

³¹ Opinion of the Justices to Senate, 424 N.E.2d 1092, 1099 (Mass. 1981).

³² *See Ingraham*, 21 Mass. at 284.

³³ The term “project” is defined by the Department of Environmental Protection as “any work, action, conduct, alteration, change of use, or other activity subject to the jurisdiction of the Department under M.G.L. c. 91, . . . , which is the subject of a license or permit application.”

³⁴ 310 Mass. Code Regs. 9.35(4) (2021).