

Nancy Civetta

From: Gregg J. Corbo <GCorbo@k-plaw.com>
Sent: Wednesday, January 11, 2023 10:42 AM
To: Nancy Civetta; Carolyn M. Murray
Cc: Richard Waldo
Subject: RE: WSD documents re Egg Island regulations

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Hi Nancy.

It is my opinion that the Appeals Court's decision in the Spillane case did not change the law with respect the rights of owners of land abutting the sea. This is, however, a complicated question that should be decided on a case-by-case basis.

Pursuant to G.L. c. 130, §57, the Town has the authority to issue licenses "in, upon, or from a specific portion of coastal waters of the commonwealth, of tidal flats or land under coastal waters: (1) to plant and grow shellfish, bottom/off bottom culture; (2) to place shellfish in or under protective devices affixed directly to the tidal flats or land under coastal waters, such as boxes, trays, pens, bags, or nets; (3) to harvest and take legal shellfish; (4) to plant cultch for the purpose of catching shellfish seed; and (5) to grow shellfish by means of racks, rafts or floats." The statute further specifies that, although licenses can be granted for the "tidal flats", licenses cannot "impair the private rights of any person".

Generally, owners of land abutting the sea have title to the shore to the mean low water mark. Town of Wellfleet v. Glaze, 403 Mass. 79, 82 (1988). This is the area known as the tidal flats. Going back to the Colonial Ordinances that formed the Commonwealth, private ownership in the tidal flats has always been subject to the right of the public to conduct fishing, fowling and navigation. Id. Thus, in the Glaze case, the Supreme Judicial Court held that the public right to fishing includes the right to dig for shellfish and that it is within the power of the Legislature to authorize towns to issue licenses for shellfishing on privately owned tidal flats. Glaze, 403 Mass. at 84.

Subsequent to the Court's decision in Glaze, however, the Supreme Judicial Court held that aquaculture is not incidental to or reasonably related to or a natural derivative of the public's right to fish and that the Town does not have the authority to issue allow private parties to conduct aquaculture on the tidal flats owned by another. Pazolt v. Director of Div. of Marine Fisheries, 417 Mass. 565, 571-573 (1994).

Based on language in the statute and the holdings in these case, it is my opinion that the Town has the authority to issue aquaculture grants for areas located within the tidal flats, as long as those grants do not interfere with the rights of private property owners.

Please feel free to contact me if there are any further questions in this regard.

Gregg J. Corbo, Esq.

KP | LAW

101 Arch Street, 12th Floor

Boston, MA 02110

O: (617) 654-1764

F: (617) 654 1735

gcorbo@k-plaw.com

www.k-plaw.com

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From: Nancy Civetta <Nancy.Civetta@wellfleet-ma.gov>
Sent: Wednesday, January 11, 2023 7:21 AM
To: Gregg J. Corbo <GCorbo@k-plaw.com>; Carolyn M. Murray <CMurray@k-plaw.com>
Cc: Richard Waldo <Richard.Waldo@wellfleet-ma.gov>
Subject: RE: WSD documents re Egg Island regulations

Thank you very much, Gregg, for getting back to me so quickly. I am trying to find that map and have reached out to MADMF and ACOE for assistance.

What about the question regarding mean low water and upland owners' rights? The BOS will also want an opinion on that for context on other grant requests moving forward.

In appreciation,
Nancy

Nancy Civetta
Shellfish Constable
Town of Wellfleet
C: 617-901-7193
O: 508-349-0325
E: nancy.civetta@wellfleet-ma.gov
300 Main St.
Wellfleet, MA 02667
Check for news and updates on [Facebook](#).

From: Gregg J. Corbo <GCorbo@k-plaw.com>
Sent: Tuesday, January 10, 2023 6:09 PM
To: Nancy Civetta <Nancy.Civetta@wellfleet-ma.gov>; Carolyn M. Murray <CMurray@k-plaw.com>
Cc: Richard Waldo <Richard.Waldo@wellfleet-ma.gov>
Subject: RE: WSD documents re Egg Island regulations

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Hi Nancy.

I have been looking at these materials, and, unless I am missing something, it seems clear to me that the regulation, on its face, does not allow the issuance of a grant "in the area above mean low water on Egg Island." Given how clear this language is, it is not necessary to look into why this provision was added. [City of Boston v. U. N. A. Corp.](#), 11 Mass.App.Ct. 298, 301 (1981) (The general rule of statutory construction is that a statute that is not ambiguous cannot be interpreted by resort to legislative history).

The Appeals Court in [Spillane v. Adams](#), 79 Mass.App.Ct. 378 (2010), determined that "mean low water" should be determined using data from the National Geodetic Vertical Datum (NGVD). This standard is still applied today. [See, Deckelbaum as trustee of Huey Trust v. Hailey](#), 2022 WL 15085699 (Land Court 2022). Therefore, I recommend that you determine the mean low water mark for the area in question using the NGVD data. If the proposed extension is above that mark, it is my opinion that the application must be denied.

If you believe that the regulation does not accurately reflect where aquaculture should or should not be allowed, I recommend that you propose an amendment to the regulations. Unless and until the regulation is amended, however, I recommend that it be applied as written.

I am available to discuss tomorrow. Before 11:00 works best. I can be reached at (617) 257-0474. Thanks.

-Gregg

Gregg J. Corbo, Esq.
KP | LAW
101 Arch Street, 12th Floor
Boston, MA 02110
O: (617) 654-1764
F: (617) 654 1735
gcorbo@k-plaw.com
www.k-plaw.com

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From: Nancy Civetta <Nancy.Civetta@wellfleet-ma.gov>
Sent: Monday, January 9, 2023 12:32 PM
To: Carolyn M. Murray <CMurray@k-plaw.com>; Gregg J. Corbo <GCorbo@k-plaw.com>
Cc: Richard Waldo <Richard.Waldo@wellfleet-ma.gov>
Subject: WSD documents re Egg Island regulations

Dear Carolyn and Gregg,

Attached are the documents regarding the interpretation of the Town of Wellfleet's Shellfishing Policy and Regulations Section 7.4 on pages 20 and 21 in attached copy of regulations:

7.4. Location of Areas Licensed for Aquaculture (Grants)

Grants may be located in the following areas:

Area 1: On tidal flats off Mayo Beach and Chequessett Neck from the eastern boundary of the Town property at Powers Landing to the Town Pier and at least three hundred (300) feet northward of a line from the seaward end of the Breakwater to the easternmost tip of Great Island, **except in the area above mean low water on Egg Island.**

In particular, the Selectboard is interested to know whether as currently worded above, they could approve the grant extension proposed by Nick Sirucek. Packet attached.

In addition, given *Spillane v Adams* (attached) we believe that the upland owners of Sea Shells Condominiums do not have any claims here as their property would end at mean low water. You can see this using this -viewer that uses Mean Lower Low Water (screenshot attached):

<https://acolneaq.maps.arcgis.com/apps/webappviewer/index.html?id=44580fb87bdb479e87b21ced5b7176ca>

or this one that uses Mean Low Water (screenshot attached):

<http://maps.massgis.state.ma.us/images/dep/omv/wetviewer.htm>

I had the photos done by drone in August at a 0.0 tide.

I am happy to get on a call to go over the documents provided and provide context to this request. My cell is 617-901-7193.

The Selectboard would like to review this at their meeting next Tuesday, Jan. 17.

Thank you,
Nancy

Nancy Civetta
Shellfish Constable
Town of Wellfleet
C: 617-901-7193
O: 508-349-0325
E: nancy.civetta@wellfleet-ma.gov
300 Main St.
Wellfleet, MA 02667
Check for news and updates on [Facebook](#).