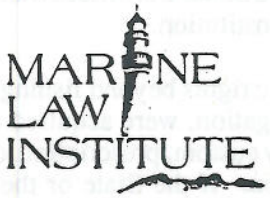
CITIZENS' GUIDES TO OCEAN AND COASTAL LAW

Public Shoreline Access

AND THE

Moody Beach Case



Marine Law Institute
University of Maine School of Law
246 Deering Avenue
Portland, Maine 04102
August, 1990

In March, 1989, the Maine Supreme Judicial Court issued its decision in *Bell v. Town of Wells*,[1] also known as the Moody Beach Case. The case has come to symbolize the conflict between public versus private rights to the shore in Maine, and it has been cited as authority for the proposition that the public has only very limited rights in the intertidal zone (the area between high and low tide).

Public access to and along the shore is a sensitive issue in Maine which, despite its magnificent 3500 mile coastline, has only 27 miles of publicly-owned sandy beaches.[2] Furthermore, an ancient Colonial Ordinance, applicable only in Maine and Massachusetts, extends private property rights to the low water mark, subject to a public easement for fishing, fowling, and navigation.[3] The extent of permitted public uses of private tidelands is therefore an extremely important issue and is directly affected by the Moody Beach Case.

How the Case Arose

Moody Beach is a sandy beach, about a mile long, in the Town of Wells, just north of the Ogunquit town line. About 100 private homes adjoin the beach, and in 1984, 28 of these homeowners filed a "quiet title action" in Superior Court against the Town of Wells, the State Bureau of Public Lands, and various individuals. The owners sought a court declaration to prevent the public from walking, swimming, sunbathing, or using the beach in front of their homes for general recreational purposes. The owners were concerned about the increase in the public's use of Moody Beach and the Town was perceived as unwilling to treat members of the public who were abusing their beach "privileges" as trespassers. The Superior

Court, however, dismissed the case on the grounds that the State may not be sued without its consent (sovereign immunity). The property owners appealed to the Maine Supreme Court.

The First Decision: *Bell I*

In 1986, the Supreme Court ruled in *Bell I*,[4] that the property owners' suit should not have been dismissed on the grounds of sovereign immunity because the State was not an indispensable party to the litigation. In so doing, the Court found that the State was not the trustee of public rights in tidelands in Maine, and therefore the owners were not required to sue the State along with the Town of Wells. The Court also found that the Colonial Ordinance, enacted by the Massachusetts Bay Colonies between 1641-1647, altered Maine's common law by extending private ownership of the beach to the low water mark, extinguishing all public rights in privately owned tidelands, except for fishing, fowling, and navigation.

Bell I had two effects. First, before the case was decided, in response to conflicting claims to Moody Beach, the State Legislature enacted The Public Trust in Intertidal Land Act[5] in 1986. The Act declared that "the intertidal lands of the State are impressed with a public trust," and therefore the public has the "right to use intertidal land for recreation." Second, the ruling in *Bell I* permitted the case to proceed to trial in Superior Court on the issue of whether the extensive public use of Moody Beach had created a public recreational easement by prescription, implied dedication, or local custom.[6]

After a four-week trial in 1987, the Superior Court decided that the public had acquired no easement over Moody Beach by custom or any other common law doctrine, and that the 1986 Public Trust in Intertidal Land Act, guaranteeing public recreational use of intertidal lands, was unconstitutional. This decision was appealed to the Maine Supreme Judicial Court.

The Court's Final Decision: *Bell II*

In 1989, the Maine Supreme Court upheld the lower court ruling and found that:

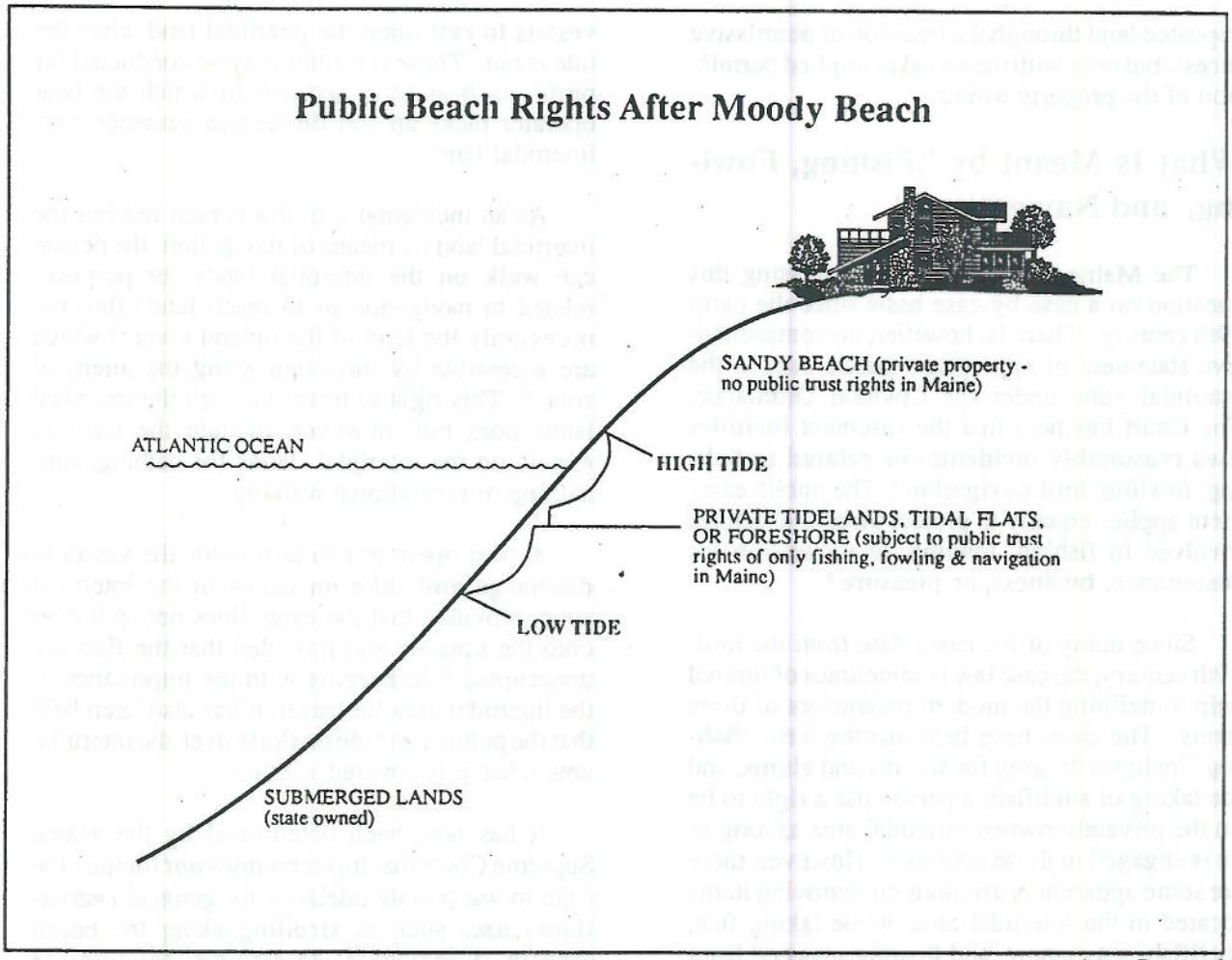
- In Maine, public rights in privately owned tidelands are limited only to those specifically enumerated in the 1647 Colonial Ordinance; that is, fishing, fowling, and navigation. The Court held that although the Colonial Ordinance was never expressly adopted by the State Legislature, and was annulled by the revocation of the Massachusetts Colonial Charter in the late 17th century, it has become part of Maine's common law by custom and usage.

- Since the Colonial Ordinance extends adjoining private property rights down to the low water mark, Maine's Public Trust in Intertidal Land Act caused a physical intrusion to private property by permitting public recreational use of private tidelands. Therefore, the Act was an unconstitutional "taking" of property for public purposes without just compensation, forbidden by the 5th and 14th amendments to the United States Constitution and Maine's State Constitution.

- No public rights beyond fishing, fowling, and navigation, were acquired at Moody Beach by custom, prescription, or implied dedication. If the State or the Town of Wells wishes to extend public uses beyond those prescribed by the Colonial Ordinance, it must purchase the beach or exercise its powers of eminent domain and pay just compensation.[7]

After Moody Beach, What Are the Public's Rights Along the Shore in Maine?

The public still has the right, by virtue of an easement created by the Colonial Ordinance, to use privately-owned **intertidal land**, but only if it is engaged in fishing, fowling, or navigation. The land to which this easement applies is the area between mean high water and mean low water (or to 1650 feet seaward from the high water, if the mean low watermark is even farther seaward). If the shoreline is beach, this is the wet sand area. If the shoreline is marsh, mudflat, or ledge, the intertidal area will commonly consist of gravel beaches or mud flats. (See the following diagram for further illustration.)



Anne Bernard

The lands seaward of mean low water (or 1650 feet from high water) are called "submerged lands." They are owned by the state. Public use is *not* restricted to fishing, fowling or navigation. The public generally has unrestricted use of the water and sea bottom, subject to state regulations. However, public rights to use certain submerged lands may be restricted by leases between the State and private individuals in which the lessee is granted exclusive use of particular submerged lands such as for aquaculture or marinas.

The dry sand area or rocky shore area above mean high water and adjacent uplands are generally privately owned. (Only about 7% of the coastline is in public ownership.) The public has no absolute right to make any use of that privately-owned land for recreation, fishing, fowling, navigation or any other purpose. Neither does the public have a right to pass over privately-owned upland to obtain access to the intertidal area to engage in fishing, fowling or navigation. In Maine, there has been a custom of "permissive access" or "permissive trespass," which the public has relied on to cross privately-owned, unimproved, unposted land with the assumption that they had informal permission of the owner. However, this customary use rarely achieves the status of a legally enforceable right and depends on continued land-owner acquiescence.

Clearly, the public has rights to use the upland if it is publicly owned, subject to any governmental regulations. The public also has a right to use the upland if the public has been granted an easement over private land, such as with a public road or public path. The public may also have a legally enforceable right of use if the upland owner has granted the public the right to use it by license, lease, or otherwise. Finally, as discussed above, even though not a legally enforceable right, the public may be able to cross private, unimproved,

unposted land through the tradition of permissive access, but only with the actual or implied permission of the property owner.

What Is Meant by "Fishing, Fowling, and Navigation?"

The Maine Court has been addressing this question on a case-by-case basis since the early 19th century. There is, however, no comprehensive statement of appropriate public uses in the intertidal zone under the Colonial Ordinance. The Court has held that the easement **includes uses reasonably incidental or related to fishing, fowling, and navigation.**[8] The public easement applies equally to protect those individuals involved in fishing, fowling, or navigation for **sustenance, business, or pleasure.**[9]

Since many of the cases date from the mid-19th century, the case law is sometimes of limited help in defining the modern parameters of these terms. The cases have held that the term "**fishing**" includes digging for **worms** and **clams**, and the taking of **shellfish**; a person has a right to be on the privately-owned intertidal area as long as he is engaged in those activities. However, there are some apparent restrictions on removing items located in the intertidal area; while taking fish, shellfish, sea manure, and floating seaweed from the intertidal zone is allowed, cases have held that the public may not harvest "mussel bed manure" or seaweed cast upon the beach from within that zone.[10] The cases also suggest that the public may not remove sand and empty shells from the intertidal area. The Court has previously found that the public's right to fish does not include the right to erect fish weirs or fasten seine or fishing equipment to private tidelands.[11]

The term "**fowling**" has not received nearly the same judicial scrutiny. It is generally interpreted to mean **bird hunting**. Some commentators have suggested that the meaning should be widened to include bird watching, but there is no indication that the Court would be willing to extend the ordinance beyond the obvious meaning of the word.

The term "**navigation**" has been construed to mean that the public can **sail over** the intertidal lands, can **moor craft** upon them, and can **allow vessels to rest** upon the intertidal land when the tide is out. These activities may be conducted for profit, such as ferry services in which the boat operator picks up and discharges passengers on intertidal land.

As an incidental use, if a person reaches the intertidal land by means of navigation, the person can **walk on** the intertidal lands for purposes related to navigation or to reach lands (but not necessarily the land of the upland owner) which are accessible by travelling along the intertidal zone.[12] This right to travel through the intertidal lands does not, however, include the right to remain on the intertidal lands for bathing, sunbathing or recreational walking.

A boat operator can also moor the vessel to **discharge and take on cargo** in the intertidal zone, provided that the cargo does not spill over onto the uplands and provided that the flats are unoccupied.[13] In keeping with the importance of the intertidal area for travel, it has also been held that the public can **ride or skate over** the intertidal area when it is covered with ice.[14]

It has now been determined by the Maine Supreme Court that this term **does *not* include** the right to use private tidelands for **general recreational uses** such as **strolling** along the beach (except if incidental to fishing, fowling, or navigation), **sunbathing, picnicking, bathing, or frisbee-throwing.**[15]

What Are Private Property Rights in the Intertidal Zone?

The **Moody Beach Case** affirms that in Maine owners of beachfront property or property adjoining tidelands (also called littoral or riparian owners) have private property rights to the low water mark or low tide area subject only to a public easement for fishing, fowling, and navigation as defined above. Thus the public should be aware that littoral or riparian owners may bring an action for trespass against members of the public who enter upon private tidelands without permission except for the purposes of fishing, fowling, and navigation as defined above.[16]

Although the public easement for fishing, fowling, and navigation may, in some cases, be cut

off by selling, filling, or developing private tidelands, public navigational rights may not be unreasonably impeded.[17] Riparian owners have the exclusive right to moor their boats on their privately owned tidelands as long it does not interfere with the public's reasonable use of the area for shellfishing or other public trust uses (fishing, fowling, or navigation).[18]

Finally, owners of private tidelands must still obtain all necessary local, state, and federal permits prior to any tideland development. Environmental laws prevent most construction activities in tidelands except for wharves, piers, and in exceptional circumstances, fill for residential, commercial, or industrial development.

Ways to Address Public Shoreline Access Needs in Maine After Moody Beach

Even before the Moody Beach Case, the problem of securing access to Maine's coastal shoreline was growing increasingly critical as traditional access points were built upon, fenced off, posted, or purchased by new owners who were unwilling to allow old patterns of usage to continue.

Conflicts were increasing as more people tried to use the fewer remaining access points. With the decision in the Moody Beach Case, the problems were compounded by the determination that even if a person is able to reach the shoreline, there is no broad right to use the intertidal area for recreational pursuits. The use has to be limited to fishing, fowling, or navigation.

As a result of the Moody Beach decision, state and local coastal managers have focused their attention on other ways to secure public shoreline access and rights of use. For example, some have explored asking the State Legislature to enact a revised version of the 1986 Public Rights in Intertidal Zone Act (found to be unconstitutional in the Moody Beach decision) which declared that the public had a right to use intertidal land for recreation. In order to address the Court's concerns, at a minimum, a revised Act would have to more clearly limit and define the permissible public recreational activities and provide some mechanism for compensating landowners for the recreational easement.

Other options for securing public access include: land use regulations, purchasing rights of access, trading town lands, negotiating a lease or license, conducting a right-of-way rediscovery project, or receiving gifts which improve public access. All of these methods may be used by towns. State agencies may also be involved in purchasing rights or accepting gifts to improve public access.

Land Use Regulation

There are several land use regulatory techniques that may be used to encourage (or require) new real estate developments to make provisions for public access to and use of the shoreline where such development burdens public access. These methods, however, have no impact in areas such as Moody Beach where the shoreline is already fully developed.

The techniques include incentive zoning, bonus zoning, transfer of development rights systems, exactions, and impact fees. The use of any of these techniques should be supported by a shoreway access or open space component of a comprehensive plan. If the provisions are mandatory, extreme care needs to be taken in drafting the implementing ordinance.

For further information, see "Maine Shore Access/Public Access Series: Planning and Implementing Public Access Strategies," available through the Office of Comprehensive Planning, Department of Economic and Community Development (289-6800), or contact your regional planning council.

Purchasing Rights of Access

As suggested by the Court, one of the ways to secure general recreational shoreline access is for the town (or state) to acquire the land, either by purchasing it from a willing seller or by using eminent domain to take it from an unwilling seller in exchange for the payment of just compensation. Another variation is for the town to purchase only an easement over the land for recreational uses, not the land itself.

The purchase of land (or an easement) is an effective way to guarantee public access. The obvious drawback is the cost. However, for key parcels where a permanent solution is desired, the public may determine that the benefits justify the investment.

There are State programs designed to help communities acquire and develop shorefront land to improve public assess. For example, Waterfront Action grants and Land and Water Conservation Fund grants are available through the Office of Comprehensive Planning, Department of Economic and Community Development (289-6800).

The Bureau of Parks and Recreation in the Department of Conservation (289-3821) administers Boating Facilities Program grants for acquisition and improvement of boat access sites.

In addition, The Land for Maine's Future Board (289-3261) administers a state bond-funded program to acquire lands with state significance, including some lands providing coastal access.

Trading Town Lands

One variation on the purchase of land with money is to trade parcels of town-owned land (or public rights to use land) for desirable access sites or access rights. Some of the land available for trade may be identified in advance in a shoreway access plan and in comprehensive plans, but other opportunities will present themselves as more research is done on land in anticipation of development.

For example, the trade may involve the town releasing its unclear rights to certain land in a proposed subdivision (e.g., an old street that may or may not have been properly dedicated to the public) in exchange for the developer clearly conveying an easement granting shoreway access and shoreline use to a particular group (e.g., licensed clammers and wormers). Other transactions may be a more straightforward swap of one piece of town land for another which is more favorable for shoreway recreational use. In either case, the town will need to work with appraisers and attorneys to evaluate the advisability of a trade.

Lease or License

Instead of actually acquiring an ownership interest in property, a community may be able to negotiate an agreement which allows the public (or some portion of the public) to use land for shoreline access and recreational use. If an agreement can be reached, this option is often less expensive than acquisition.

The document spelling out the rights and responsibilities can be extremely flexible in addressing unique issues including what would trigger a termination of the agreement, specific restrictions on public use, protection from liability, and maintenance responsibilities. However, this may be a relatively short-term solution and is dependent upon the owner's willingness to enter into an agreement. The agreement negotiated (but not accepted at town meeting) by the Town of Wells (see endnote 7) is one example of how this technique could be used.

Right-of-Way Rediscovery Projects

In addition to seeking new points of access, it is important for towns to inventory and safeguard already existing public access rights. A Right-of-Way Rediscovery Project is a systematic community effort to research and reassert existing legal rights of access which have been neglected or are uncertain.

Public rights to roads which run to the shore and shoreline parcels may have been acquired through the years by the town laying out and voting to establish a road, by the town accepting a road which was dedicated (offered) by a private owner or developer, by town purchase of a parcel, through gift, by prescriptive use, or through acquisition by lien for nonpayment of real estate taxes. Sometimes the town loses track of those rights, especially as use patterns change. For example, a public road to an old ferry landing may have fallen into disuse when a bridge was built. But public rights might remain. Careful research in public records may allow the town to document continuing public rights and to reclaim a site for public use.

For further information or a copy of "Maine Shore Access/Public Access Series: Coastal Right-

principle of adverse possession; that is, open, continuous, notorious, and uninterrupted use of private property for a certain period of time (20 years in Maine), under a claim of right adverse to the owner, will create a "prescriptive easement" to continue such use. Such an easement for public use may also be created by "implied dedication" where the owner clearly acquiesces to public use and the public's enjoyment has lasted for such a length of time that the public would be materially affected by a denial or interruption of the enjoyment. *Town of Manchester v. Augusta County Club*, 477 A.2d 1124 (Me.1984). Finally, it has been argued, but not conclusively settled in Maine, that public rights may also be acquired by 'local custom" where public use of the beach or property by common consent and uniform practice is peaceable, free from dispute, and continuous "so long as the memory of man runneth not to the contrary." 462 P.2d 671 (Ore.1969).

7. In fact, in 1989, the Town of Wells had 10 of the 126 lots along Moody Beach appraised to assess the possibility of acquiring the intertidal portion of Moody Beach through the use of eminent domain. That appraisal valued the intertidal area of the 10 lots at $516,000. If representative of values for the other lots, it was projected that it would cost approximately $6.5 million to acquire the entire intertidal portion of the beach. In lieu of proceeding with acquisition of the land, the Town and beachfront property owners negotiated a revocable license that would allow residents and homeowners of Wells, their accompanied guests and specified seasonal residents to make daytime use of the area of Moody Beach below the high tide line for quiet recreational pursuits. This negotiated license was rejected by voters at the town meeting in March, 1990.

8. *Bell v. Town of Wells*, 557 A.2d 168, 169 (Me. 1989).

9. *Barrows v. McDermott*, 73 Me. 441, 449 (1882).

10. *Moore v. Griffin*, 22 Me. 350, 356 (1843); *Hill v. Lord*, 48 Me. 83, 86 (1861), *Marshall v. Walker*, 93 Me. 532, 536-37.

11. *Mathews v. Treat*, 75 Me. 594 (1884).

12. *Andrews v. King*, 124 Me. 361 (1925).

13. *Id.* at 364.

14. *French v. Camp*, 18 Me. 433 (1841).

15. *Bell v. Town of Wells*, 557 A.2d 168, 175-76.

16. *Storrer v. Freeman*, 6 Mass. 435 (1810).

17. *Marshall v. Walker*, 93 Me. 532, 45 A.497 (1900).

18. *Wellfleet v. Glaze*, 403 Mass. 79 (July 20, 1988).

Prepared by the University of Maine School of Law, Marine Law Institute.

Produced by the Sea Grant Communications office through a grant from the National Oceanic and Atmospheric Administration/Sea Grant College Program Award Number NA89AA-D-SG020.

Additional copies are available from Sea Grant Communications, 30 Coburn Hall, University of Maine, Orono, ME 04469 or the University of Maine School of Law, Marine Law Institute, 246 Deering Avenue, Portland, ME 04402.

581-1448

University of Maine
University of New Hampshire
Sea Grant College Program