



MEMORANDUM OF LAW

To: Alyson Eberhart, New Hampshire Sea Grant

From: Bryce Burgwyn, 2019 Summer Research Associate, National Sea Grant Law Center (Supervising Attorney: Terra Bowling, Research Counsel II, National Sea Grant Law Center)

Re: Dune Grass Planting on New Hampshire Beaches (NSGLC-19-04-05)

Date: June 12, 2019

Advisory Request Summary

A private oceanfront property owner in New Hampshire planted dune grass above or landward of the mean high water mark. The Town of Rye Beach Committee challenged the placement of the dune grass, asserting that it illegally blocks public access to an area of the beach. Under New Hampshire law, private oceanfront property owners own the territory landward of the mean high water mark, and the area seaward of the mean high water mark is held in public trust by the state.

In May 2019, New Hampshire Sea Grant requested information from the National Sea Grant Law Center about the impact of the dune grass planting on the public trust doctrine, public access to beaches, and prescriptive easements in New Hampshire. Please note, the information below is legal research provided for education and outreach purposes and does not constitute legal advice or representation of New Hampshire Sea Grant or its constituents.¹

Concerns Raised by the Town of Rye Beach Committee

In 2018, members of the Town of Rye Beach Committee (committee members) observed that dune grass had been planted in front of oceanfront houses near F Street and G Street in Rye, NH.² At a meeting, committee members stated that they believed homeowners had planted the grass to prevent the public from entering the area.³ Some committee members believed that the newly planted dune grass impeded the public from using an

¹ This product was prepared by the National Sea Grant Law Center under award number NA18OAR4170079 from the National Oceanic and Atmospheric Administration, U.S. Department of Commerce. The statements, findings, conclusions, and recommendations are those of the author and do not necessarily reflect the views of NOAA or the U.S. Department of Commerce.

² See Beach Committee Meeting Minutes, Town of Rye Beach Committee (July 25, 2018), <http://www.town.rye.nh.us/pages/FOV1-0004558B/2018/07-25-18%20Minutes.pdf>.

³ See *id.*



area that they had used for decades.⁴ The area in front of F and G Streets is adjacent to an established perpendicular public beach access walkway marked as E Street, between 2206 and 2216 Ocean Boulevard.⁵ The committee members did not indicate any concerns about the dune grass obstructing public perpendicular access to the public trust beach. Following a site walk with New Hampshire Department of Environmental Services (NH DES), committee members believed that the dune grass was planted “well beyond the property owners [sic] eastern boundary.”⁶

The Concept of Public Trust Property

The concept of public trust property dates back to ancient Roman times, and was adopted in the United States in the colonial period, as part of the English common law.⁷ In 1894, the U.S. Supreme Court explained the classic rationale for the public trust doctrine: some lands, such as the lands under tidal waters, are of such great value to the public that the potential for improvement of the tidal lands by individuals is less valuable than the public right to use the land for fishing, navigation, and commerce.⁸ Under modern law, the scope of the public trust doctrine has been expanded to include recreation, conservation, scenic enjoyment, and other activities.⁹ The broadened scope of public trust activities has created opportunities for conflict between competing public trust values, such as recreation and conservation.¹⁰

As members of the public, oceanfront property owners have the same rights as other members of the public to tidal public trust beach areas.¹¹ Additionally, oceanfront private property owners have exclusive rights to their private property adjacent to the public trust area, and the public does not have an automatic right to cross private land to reach public trust land.¹² Lateral, parallel access to areas of the public trust beach, however, is a public right.¹³ Most states, including New Hampshire, recognize that when the public continuously uses an area of private property for a period of time, the public may acquire a right, called a prescriptive easement, to use that area.¹⁴ However, if the public uses the

⁴ *See id.*

⁵ Map of Rye, NH, *Google Maps*, <https://www.google.com/maps/@42.9887857,-70.7607619,93m/data=!3m1!1e3> (last visited June 4, 2019).

⁶ Beach Committee Meeting Minutes, Town of Rye Beach Committee (Nov. 1, 2018), <http://www.town.rye.nh.us/pages/FOV1-0004558B/2018/11-01-18%20Minutes.pdf>.

⁷ *See* Donna R. Christie & Richard G. Hildreth, *Coastal and Ocean Management Law* 20 (2007).

⁸ *See id.*

⁹ *See id.*

¹⁰ *Id.* at 21.

¹¹ *See id.* at 32.

¹² *Id.*

¹³ *Id.* at 42.

¹⁴ *Id.* at 43.



area with permission from the private property owner, a prescriptive easement will not arise.¹⁵

The Boundary Between Private Property and Public Trust Property

In New Hampshire, the legal boundary between coastal private property and public trust property is the mean high tide line.¹⁶ In 1995, the New Hampshire legislature codified beaches, including both freshwater and marine coastal shorelines, as areas held in public trust subject to littoral rights recognized at common law.¹⁷ The legislature defined the high water mark as “the furthest landward limit reached by the highest tidal flow, commonly referred to as the highest spring... tide occurring during the 19-year... cycle” excluding abnormal storm events, and further stated that it did not intend to affect the title of private property owners of land contiguous to public trust land.¹⁸ However, the New Hampshire Supreme Court subsequently held that the legislature’s statutory definition of the high water mark constituted a violation of the Fifth Amendment of the U.S. Constitution and the New Hampshire constitution, and redefined mean high tide as the legal high water mark and boundary between private and public trust property.¹⁹

Establishing a Prescriptive Easement

In New Hampshire, in order to establish a prescriptive easement, “a plaintiff must prove by a balance of probabilities twenty years’ adverse, continuous, uninterrupted use of the land claimed in such a matter as to give notice to the record owner that an adverse claim was being made to it.”²⁰ Evidence must demonstrate “the owner knew or ought to have known that the right was being exercised, not in reliance upon the owner’s toleration or permission, but without regard to the owner’s consent.”²¹ Essentially, the public’s use does not have to be hostile, but must be without consent from the property owner. The scope of a prescriptive easement is defined by the character and nature of the use that created it, and must be for a definite, certain, and particular line of use.²²

In the recent case *Jesurum v. WBTSCC Limited Partnership*, a private property owner planted hedges and placed boulders blocking the public’s access to a public trust beach. The New Hampshire Supreme Court found that the public had acquired a prescriptive easement across private land to access the public trust area beach, and the property owner’s actions disrupted the public’s use. However, the type of access in *Jesurum* is different from the type of access alleged by the Rye Beach Committee members. In the

¹⁵ *Id.*

¹⁶ *Purdie v. Attorney General*, 732 A.2d 442, 446 (N.H. 1999).

¹⁷ N.H. REV. STAT. ANN. § 483-C:1 (2019).

¹⁸ *Id.*

¹⁹ *See Purdie*, A.2d at 445, 447.

²⁰ *Jesurum v. WBTSCC Limited Partnership*, 151 A.3d 949, 956 (N.H. 2016) (citing *Greenan v. Lobban*, 717 A.2d 989, 992 (N.H. 1998)).

²¹ *Jesurum*, 151 A.3d at 956 (quoting *Sandford v. Town of Wolfeboro*, 740 A.2d 1019, 1021 (N.H. 1999)).

²² *Id.* at 957 (citing *Cote v. Eldeen*, 403 A.2d 419, 420 (N.H. 1979)).



Rye scenario, the public did not cross the area that the private property owner planted with dune grass in order to access a public trust beach. The committee members are concerned about members of the public already present on the public trust beach being excluded from the disputed area, rather than their ability to access the public trust area.

Whether or not a prescriptive easement could be established for parallel access to the dune grass area depends on the public's specific use of the area. In another case, *Greenan v. Lobban*, the court found that the plaintiffs had not established a prescriptive easement for lateral access to a lakefront beach area above the natural high waterline, because they were not able to show by preponderance of the evidence that their use was not permissive.²³ In that case, the plaintiffs had maintained a friendly relationship with the defendants for years, but their relationship deteriorated, and the defendants posted "no trespassing" signs. The burden of showing that use was adverse and not permissive falls on the person or people making the claim to the easement.²⁴

In the case of the dune grass, even if the court were to find that the public had established a prescriptive easement in the area where the dune grass is now planted, the private property owner would not necessarily be required to remove the grass. The court, for instance, could find that the grass did not unacceptably disrupt the public's use. The court's determination would depend on the specific nature of the public's use.

Wetland Permit Requirements for Planting Dune Grass

Updated New Hampshire wetlands regulations, conditionally approved in May 2019, will streamline the permit application process for dune grass planting projects. New Hampshire state regulations define "tidal buffer zone" as the area extending landward 100 feet from the highest observable tide line, which can contain wetlands, transitional areas, and natural and developed upland areas.²⁵

Private property owners are limited in the activities they may undertake in the tidal buffer zone, and projects may be classified as major or minor, impacting ease of the permitting process. Under current regulations, restoration of altered or degraded wetlands usually constitutes a minimum impact project.²⁶ Addition of native vegetation to enhance wetlands does not require a permit.²⁷ Projects in sand dunes, except for repair of existing structures require a major project permit, which could be construed as applying to creating new sand dunes by placing vegetation, thereby creating a wetland.²⁸ However, as of May 17, 2019, the New Hampshire Department of Environmental Services has conditionally approved updates to wetlands regulations which clarify permit requirements and state that classification as a major project based on resource type impacted (i.e., sand

²³ See *Greenan*, 717 A.2d at 989.

²⁴ See *id.* at 992 (citing *Town of Warren v. Shortt*, 652 A.2d 140, 142 (N.H. 1994)).

²⁵ N.H. CODE R. ENV-WT 101.101 (Lexis Advance through April 1, 2019).

²⁶ N.H. CODE R. ENV-WT 303.04 (Lexis Advance through April 1, 2019).

²⁷ N.H. CODE R. ENV-WT 303.05 (Lexis Advance through April 1, 2019).

²⁸ N.H. CODE R. ENV-WT 303.02 (Lexis Advance through April 1, 2019).



dunes) does not apply to projects funded with public funds and conducted under the supervision of an environmental agency, including the University of New Hampshire.²⁹ Therefore, once the new wetlands regulations are formally implemented, property owners will be informed that they are only required to follow the minor wetland project application procedures for dune grass planting.

I hope you find the above information useful. Please contact us with any follow-up questions. Thank you for bringing your question to the National Sea Grant Law Center.

²⁹ See Proposed Wetlands Rules OLS Notice Number 2018-187, ENV-WT 400 Wetlands: Delineation and Classification of Jurisdictional Areas; Classification of Projects, New Hampshire Dept. of Env. Services (Apr. 19, 2019) <https://www.des.nh.gov/organization/commissioner/legal/rulemaking/documents/env-wt400-careq-cmplt.pdf>.