

From: Dunham, George
Sent: Thursday, June 30, 2016 10:41 AM
To:
Subject: White Cap Path Access Legal Opinion
Attachments: K&P - Legal Opinion on White Cap Path - 6.28.16.pdf

Hi,

You are receiving this e-mail because you have previously contacted one of the Town departments about the dispute concerning use of White Cap Path. The Town asked for a formal, written opinion from Town Counsel, KP Law, to provide some clarity on this issue. A copy of this written decision is attached.

In short, the opinion says that the matter is a private issue between the owners of the abutting properties and those who may have deeded rights to use the Path. The opinion addresses several issues including: whether the upland boundary of the Town Beach is fixed in its original location or if it has shifted inland to reflect the changes in the shoreline; the deeds and plans that concern rights to use the Path; and how any Conservation Commission Order of Conditions impacts the rights of any property owner. All these issues are addressed in the attached opinion.

Most importantly the opinion clearly states that:

“...while some residents have requested that the Town take action to remove obstructions within White Cap Path that the residents assert interfere with their rights, it is my opinion that the Town lacks authority to enter onto private property for such a purpose, regardless of whether the residents’ assertions are valid. In short, if the disputes between the private parties cannot be resolved by negotiation, those parties may need to seek judicial review of their competing claims.”

To determine where the actual boundary of the Town Beach is now located, we will be completing a professional survey of the Town’s property lines. It’s important to note these lines were clearly delineated before the Sandy storm in February 2013 with hard boundaries, but this storm and several other storms have eroded the shoreline to such an extent that the former bounds no longer exist.

I want to remind everyone that there are 4 access points to Town Beach that are owned by the Town and open to the general public. These include the main access through the Town Neck Beach parking lot at the end of Wood Avenue, the Town parking lot near Horizons restaurant at the end of Town Neck Road, and two public access paths off Freeman Avenue which are posted as public ways to water.

Again, Town Counsel has determined that any dispute between the abutters of White Cap Path and other Town Neck property owners who claim deeded rights to use the Path need to be resolved between the parties. Thank you.

- Bud Dunham
Town Manager



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June 28, 2016

A. Alexander Weisheit
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Hon. Susan R. James and
Members of the Board of Selectmen
Sandwich Town Hall
130 Main Street
Sandwich, MA 02563

Re: White Cap Path

Dear Members of the Board of Selectmen:

You have requested an opinion as to what, if any, action the Town should take with regard to the dispute between the property owners in the vicinity of White Cap Path (the "Path") who claim deeded easement rights to use the Path and the condominium owners on White Cap Path. It is my understanding that Sandwich Shores Condominium and White Cap Path Condominium are located on the properties that abut Town Neck Beach (1-8 White Cap Path), and also abut the Path. Certain private homeowners in the vicinity of the Path claim to have deeded easement rights to use the Path for access to the Town owned portion of Town Neck Beach (the "Town Beach"). Over the past several decades, the shoreline has eroded to the point where much, if not all, of the Town Beach is now under water. You have asked whether the upland boundary of the Town Beach is fixed in its original location by the terms of the Town's deeds or other instruments by which the Town acquired its property, or whether, instead, the extent of the Town's property has shifted inland to reflect the changes in the shoreline.

I have reviewed the deeds and other instruments relevant to the Town's title in the Town Beach and the homeowners' easement rights in White Cap Path, as well as appellate decisions concerning the effect of erosion (and "accretion," i.e., increases in land area) on coastal property boundaries. In particular, it is my opinion that the Supreme Judicial Court's decision in White v. Hartigan, 464 Mass. 400 (2013) confirms that the upland boundaries of the Town's interest in Town Neck Beach are fixed and do not move inland with the rising sea. "A littoral property thus contains a moveable shoreline boundary, but its other boundaries ordinarily are fixed." Id. (citing Lorusso v. Acapesket Improvement Ass'n, 408 Mass. 772, 780-782 (1990)). "Under this doctrine, the Nortons have no interest in the beach as it is presently located, because the beach has eroded beyond the landward boundary set forth in the deed that created their predecessors' title interest in the beach." Id. (citing Lorusso, 408 Mass. at 782) (Emphasis added).

Based on my review, it is my opinion that the upland boundaries of the Town Beach are fixed in their original locations¹, as described in the instruments by which the Town acquired Town Neck Beach. Accordingly, the location of the Town Beach has not changed since the Town acquired the Town Beach in 1909. As a result, it is possible that, in the vicinity of White Cap Path, the property owned by the Town is now below the low-water mark (i.e., under water

¹ The 1909 Notice of Taking references the upland boundary of the Town's interest in the beach as marked by "stone bounds" (i.e., fixed inland boundaries).

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even at low tide). I offer no opinion as to the current location of the upland boundary of the Town Beach as an updated survey of the area would be required to determine this factual issue. If the upland and the area between the high and low water marks that is the usable "beach" is, in fact, part of the condominium property, it is my opinion that this beach area is privately owned and is not subject to a public right of use. Please note that the Colonial Ordinance preserves the public's right to use beach land between mean high water and mean low water for the purposes of fishing, fowling and navigation. However, there is no right to walk along private beach land between the flow and ebb of the tides. See Leahy v. Brown, 18 LCR 579, 585 (Mass. Land Ct. 2010) (citing Opinion of the Justices, 365 Mass. 681, 687-688 (1974)).

I have reviewed deeds and plans that concern rights to use White Cap Path. As these rights are private in nature, and White Cap Path is a private way, the dispute between neighborhood residents and the owners of the condominiums over the use of White Cap Path concerns private property rights in which the Town does not, itself, have a property interest. As Town Counsel, I offer no opinion as to the extent of such private rights. Further, while some residents have requested that the Town take action to remove obstructions within White Cap Path that the residents assert interfere with their rights, it is my opinion that the Town lacks authority to enter onto private property for such a purpose, regardless of whether the residents' assertions are valid. In short, if the disputes between the private parties cannot be resolved by negotiation, those parties may need to seek judicial review of their competing claims.

Concerns have also been raised that the Order of Conditions ("OOC") (SE66-1618) which approved the condominium association's beach renourishment project has allowed obstruction of White Cap Path. I note that the Conservation Commission's responsibility and authority under the Wetlands Protection Act is to determine whether a proposed project is consistent with, and contributes to, the wetland interests that are protected by the Act. By its terms and under DEP regulations, an Order of Conditions "does not grant any property rights or any exclusive privileges; it does not authorize any injury to private property or invasion of private rights." (General Condition No. 2, and 310 CMR 10.05(6)(i)). The Conservation Commission does not act as a "judicial arbiter in a dispute over private property rights." Tindley v. DEQE, 10 Mass. App. Ct. 623, 627 (1980). If there is a dispute as to whether a project proponent has a legal right to carry out the project in a particular location, project opponents must raise that objection in a private judicial action, and not in the context of the wetland permitting. Id.

Very truly yours,



A. Alexander Weisheit

AAW/jmp
cc: Town Manager
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