The CRMC and Public Access to the Shore in Rhode Island

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The Rhode Island Coastal Resources Management Council (CRMC) has come a long way since its creation by the General Assembly in 1971. From the early novelty of zoning the state’s coastal waters, (to this day, Rhode Island is the only state to have done so), to standing ready to lead the nation into a new era of offshore wind energy production, the CRMC has continually adapted its regulatory programs to meet new challenges. While there’s a lot to be said for the ability to respond to the emerging demands of a rapidly changing world, it bears repeating that some things haven’t changed. Given the CRMC’s role as trustee of Rhode Island’s public trust resources—our coastal waters, submerged lands, and the shore—it’s fitting that the enabling legislation which established the CRMC opens with this seminal statement: “the people shall continue to enjoy and freely exercise all rights of fishery and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state.” These words are from Article 1, Section 17 of the Rhode Island Constitution and as such they guide the CRMC in carrying out its mission to “preserve, protect, develop, and where possible, restore the coastal resources of the state” with the people’s shoreline privileges in mind. This article examines the historic background and legal framework of your shoreline privileges and describes the ways by which the CRMC provides public access to the shore under the Rhode Island Coastal Resources Management Program.

The Public Trust Doctrine: from Rome to Rhode Island

The next time you’re enjoying the freedom that strolling a beach can inspire, let your mind wander to the ancient city of Constantinople, capital of the Eastern Roman empire and modern day Istanbul. It was here, where the Roman Empire continued for nearly 1000 years after the fall of the city of Rome, that the concept of public ownership of the shore was codified under the Institutes of Justinian. Justinian I reigned as the Roman Emperor from 527-565. Key elements of the Roman Empire’s success were its proximity to the Mediterranean Sea and access to the bounty of fish and other resources it provided such as grain from Egypt which arrived at Roman ports via well established seafaring trade routes. Ensuring freedom of access to the sea and its shores for Roman citizens and the many others who contributed to the Empire thus became an important part of Roman policy. The Institutes of Justinian reflect this by stating: “The shores are not understood to be property of any man, but are compared to the sea itself, and to the sand or ground which is under the sea.” The Institutes go further in describing the legal public character of the shore: “By the law of nature these things are common to all mankind—the air, running water, the sea, and the shore of the sea. No one therefore is forbidden to approach the seashore, provided that he respects habitations, monuments, and buildings.”

From these ancient beginnings, the public trust doctrine continued its march through time as Roman law was absorbed into the laws of nations that emerged from their previous status as subjects of Rome. One such nation, England, served to pass along these principles of Roman law to its colonies, including the Rhode Island Charter Colony. Under English common law the shore was defined as being located between the ordinary high water and low water marks; in Rhode Island, the mean high tide line marks the boundary between private and public property on the shore. In addition to this strip of land, navigable waterways and submerged lands were considered to be held in trust by the sovereign for the benefit of the people. This element of English common law is evident in the Rhode Island Colony Charter under King Charles II where it foreshadows the shoreline privileges contained in the Rhode Island Constitution:

“every or any of them, shall have full and free power and liberty to continue and use the trade of fishing upon the said coast, in any of the seas thereunto adjoining, or any arms of the seas, or salt water, rivers and creeks, where they have been accustomed to fish; and to build and set upon the waste land belonging to the said Colony and Plantations, such wharves, stages and workhouses as shall be necessary for the salting, drying and keeping of their fish, to be taken or gotten upon that coast.”

These public trust rights were upheld by the colony
charter until 1843, when the State of Rhode Island adopted its first constitution. A Constitutional Convention established in 1986 for the purpose of amending and updating the constitution retained the original fishery rights and shoreline privileges under Article 1, Section 17 of today’s Rhode Island Constitution:

“The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore.”

Finally, the state’s role toward the public’s interest in exercising fishery rights and shoreline privileges is stated in Article 1, Section 16 of the Rhode Island constitution:

“Furtherance of the protection of the rights of the people to enjoy and freely exercise the rights of fishery and the privileges of the shore, as those rights and duties are set forth in section 17, shall be an exercise of the police powers of the state, shall be liberally construed, and shall not be deemed to be a public use of private property.”

The CRMC as Trustee of Rhode Island’s Public Trust Resources

How does Rhode Island delegate its authority to protect the state’s public trust resources and promote the public’s fishery rights and shoreline privileges? As an inheritor of the English common law whereby public trust resources—the shore, the sea, and its submerged lands—are held in trust for the benefit of the people, RIGL § 46-5-1.2 states that, pursuant to the public trust doctrine, Rhode Island has historically maintained title in fee simple to “all soil within its boundaries that lie below the high water mark.”

Having determined that the state holds a fee simple ownership interest in Rhode Island’s public trust resources, RIGL § 46-23-6(2)(ii)(A) of the CRMC’s enabling legislation made the agency trustee of these resources by providing it with “exclusive jurisdiction below mean high water for all development, operations, and dredging, consistent with the requirements of chapter 6.1 of this title and except as necessary for the department of environmental management to exercise its powers and duties and to fulfill its responsibilities.” However, it’s another part of the CRMC’s enabling legislation, RIGL § 46-23-6(5)(i) “Rights-of-Way” that provides the fundamental basis to make the public’s constitutional shoreline privileges meaningful in the first place. Under this section, the CRMC is “responsible for the designation of all public rights-of-way to the tidal water areas of the state, and shall carry on a continuing discovery of appropriate public rights-of-way to the tidal water areas of the state.”

The remainder of this article will focus on how the CRMC provides public access to the shore under this statutory method plus two regulatory methods, which collectively comprise the agency’s shoreline public access program.

The CRMC’s Shoreline Public Access Program

“Public Access to the Shore” is a general term used to describe the ways and means by which the public may legally reach and enjoy the coastal areas and resources of the State. Access to the shore is considered to be a coastal and public trust resource. Such access includes:

• **Physical access:** the ability to reach the shoreline from upland areas via typically perpendicular access points such as rights-of-way, boat launching ramps, and fishing piers. Also, physical access is the ability to pass and repass laterally along the shore as guaranteed by the Rhode Island State Constitution.

• **Visual Access:** the provision of unobstructed views of the coast and shoreline areas. Examples of visual access include viewing platforms, observatories, scenic drives, and innovative architectural designs that provide unobstructed views.

• **Interpretive Access:** the provision of signage, plaques, etc., or the use of innovative techniques which serve to educate the public about the historical, ecological, or cultural significance of a site or the industrial/commercial utilization of public trust resources. Interpretive access may also include other methods which impart a sense of public ownership and understanding of public trust resources.
Public Rights of Way

A public right-of-way is a parcel of land over which the public has a right to pass on foot, or if appropriate, by vehicle, in order to access the tidal waters of Rhode Island. While many of the 221 public rights-of-way that have been designated by the CRMC to date are municipal streets that lead to the shore, the following are the six legal methods by which a right-of-way can be created in Rhode Island:

• Roadways which have been laid out, recorded, opened and maintained by a city or town council. These are commonly known as city or town-accepted streets.

• Highways by grant or use (R.I.G.L. Chapter 24-2). This statute provides that all lands that have been quietly, peacefully, and actually used, improved, and considered as public highways for 20 years by a city or town council shall be taken and considered to be public highways as if the lands had been regularly laid out, recorded, and opened by the city or town council.

• Ways that have been approved by recording a subdivision plat. Rhode Island’s subdivision statute authorizes cities and towns to control the subdivision of land within their borders (R.I.G.L. Chapter 45-23). A subdivision, of necessity, requires roads and ways. Sometimes, a subdivision contains roads or ways that lead to the state’s tidal waters.

• Ways that have been offered to the public by dedication and accepted by public use or by official city or town action (implied dedication). This is a common law method of establishing public rights-of-way. In order for there to be a common law dedication, there must be a clear intent by the owner to donate the land and a clear acceptance of that land by the public. Once a parcel of land has been dedicated, the transfer is irrevocable. The landowner’s intent to dedicate the land can be evidenced by the recordation of a plat map showing the right-of-way as public or by language contained in a deed.

• Highways that have been used by the public since time immemorial. This is an old common law concept. The law stipulates that to create a public right-of-way by use, the evidence must show that the use has been general, uninterrupted, continuous, and adverse so as to warrant the inference that the land had been laid out, appropriated, or dedicated by the landowner to the public. An occasional use of land by a few persons living in the area or by abutters to the property without any claim of right is insufficient to establish a public right-of-way.

• Ways that have been obtained by the public’s adverse use. Privately owned paths to the shore that have been used for a period of 10 consecutive years by the public may become rights-of-way, but only if the requirements of the R.I. General Laws are met (R.I.G.L. Chapter 34-7). This method is commonly known as an easement by prescription. An easement is a right to use the land of another in a specified manner. In order to create a public right-of-way by this method the public has the burden of establishing actual, open, notorious, hostile, and continuous use of a way under a claim of right for 10 years. In addition, the law specifically does not allow a public right-of-way to be established by footpaths; the pathway has to have been used by carriages or vehicles.

It is important to note that when the CRMC designates a right-of-way it does not per se “create” a public access site. Rather, as the CRMC’s mandate to “carry on a continual discovery of appropriate public rights-of-way to the tidal water areas of the state” implies, the CRMC must first discover existing rights-of-way that already provide public access to the shore via one of the six methods described above. The designation process is two-fold and includes the discovery phase, which if it produces evidence that a right-of-way exists, then moves to the designation phase, which involves public hearings and a vote by the CRMC full Council to designate—or not. These processes are described in RIGL § 46-23-6(E), which directs the CRMC to consider the following matters in its decisions to designate public rights-of-way:

• Land evidence records;

• The exercise of domain over the parcel such as maintenance, construction, or upkeep;

• The payment of taxes;

• The creation of a dedication;

• Public use;

• Any other public record or historical evidence such as maps and street indexes; and

• Other evidence as set out in § 42-35-10.

In addition, the CRMC’s determination that a public right-of-way does in fact exist at a
particular site must be decided by substantial evidence.

At the time of this writing, the CRMC has designated a total of 221 public rights-of-way to the shore along Rhode Island’s 420 miles of shoreline and at least one right-of-way has been designated in every coastal municipality. With a goal of establishing one right-of-way per every mile of shoreline in the state, the CRMC is about halfway to this goal. To learn how you can assist the CRMC in discovering and designating rights-of-ways please click on the following link which leads to the “Rights-of-Way and Public Access” page on the CRMC’s website.

After designating a public right-of-way, the CRMC will at a municipality’s request provide “Shoreline Public Access” signage which includes those words on one sign and another matching sign that describes a Code of Conduct regarding the use of the right-of-way. The CRMC provides this signage and a recycled plastic signpost free of charge to the municipality which agrees to install the signage at the right-of-way’s landside entrance. The municipality also agrees to maintain the site to prevent, for instance, vegetation from overgrowing the site and making it impassable, while the CRMC has a continuing responsibility to prosecute anyone that interferes with the public use of the right-of-way by obstructing access. Should you be interested in assisting toward keeping a right-of-way clean and accessible please contact the CRMC at (401) 783-3370 to inquire about its “Adopt-An-Access” Program.

Section 335 Protection and Enhancement of Public Access to the Shore

In addition to designating rights-of-way under its enabling legislation, the CRMC provides public access to the shore through its regulatory authority via Section 335 “Protection and Enhancement of Public Access to the Shore” of the Rhode Island Coastal Resources Management Program. Section 335 was promulgated to address the impact on public access to the shore by certain activities that require the exclusive use of public trust resources. In general, these are large scale activities that include:

• Commercial and industrial development and redevelopment projects;
• New marinas and significant expansions to existing CRMC approved marinas; or
• Activities which involve the filling of tidal waters.

In addition to these activities, it is the CRMC’s policy that publicly funded beach nourishment projects shall contain a public access component.

The means by which the CRMC mitigates the public access impacts associated with these activities is requiring that a public access plan be included in any assent (permit) the CRMC grants to allow the activity. Section 335 includes guidelines for public access plans that direct applicants to avoid impacts to public access as much as possible and to compensate for impacts on public access by providing a similar type and level of access. Further, where compensating for lost access onsite is impractical for safety, security, environmental or other considerations, offsite public access may be allowed by the CRMC. Finally, regarding impacts to lateral access along the shore, the CRMC requires that all structural shoreline protection facilities be designed and constructed in a reasonable manner so as to not interfere with such lateral public access. Finally, Section 335 also specifies that public access plans may address public access impacts by providing physical access, visual access, and/or interpretive access.

Public access plans can be extensive or simple. For example, the CRMC required the construction of a public boardwalk along the Bristol Harbor waterfront to mitigate for the public access impacts associated with the neighboring Thames Street Landing and Stone Street Condominiums developments. In this case, a boardwalk was constructed to create a continuous waterfront walkway that extended from Independence Park to the State Street dock to its south. In addition to the boardwalk, new fender systems were installed to the seawall to provide landing spaces for sailors who wished to access Bristol’s vibrant new waterfront by boat. A simpler public access plan was required for the Apponaug Cove Marina, a small privately owned marina in Warwick. In this case a walking trail with signage was constructed to provide safe public access to a traditional fishing spot at Long Point. To date, the CRMC has created public access to the shore through Section 335 at 32 sites in eleven municipalities. To learn more about Section 335 and these sites go to the “Rights-of-Way and Public Access” page on the CRMC’s website.
Metro Bay Special Area Management Plan / Urban Coastal Greenway

Development in coastal areas, individually and cumulatively, has eroded the public’s ability to exercise the right of access to tidelands and other public trust resources in Rhode Island. Nowhere is this likely more true than in the northern industrialized stretches of Narragansett Bay where huge factories and other industrial buildings crowd the shore and in some cases have been built directly atop it. The newest member of the CRMC’s Shoreline Public Access Program, the Urban Coastal Greenway was created to address this problem under the Metro Bay Special Area Management Plan.

The Urban Coastal Greenway (UCG) offers development and re-development projects in Rhode Island’s industrial core the option to create an easement for public access to the shore as compensation for allowing a more compact vegetated coastal buffer zone than required by Section 150 (Coastal Buffer Zones) of the Red Book. The goal of the public access option is to create the Urban Coastal Greenway—a public access pathway along the shores of Cranston, Providence, Pawtucket, and East Providence—that includes vehicular parking and arterial public access from the street side of a coastal parcel to the shore. While the UCG clearly provides a significant public benefit, the allowance of a compact buffer zone increases the useable area of an urban coastal parcel; such parcels typically cannot meet the buffer zone requirements of Section 150 (which target more rural parts of the state) and remain economically viable.

To date, the following projects have contributed to the establishment of the UCG by choosing the public access option:

• American Locomotive (Providence): Public path along the Woonasquatucket River, minimum of eight parking spaces, and public access signage.
• Division Street Hotel (Pawtucket): Public path along the Seekonk River, minimum of eight parking spaces, and public access signage.
• East Point Development Project (East Providence): Public path along the Seekonk River, public parking spaces and appropriate signage, perpendicular pathways with signage leading to the public path and, signage identifying rules for public use of the path.
• Johnson and Wales University (Providence/Cranston) Public access path along Narragansett Bay, public parking spaces and a recreational public access ramp.

In addition, the Urban Coastal Greenway easement at Johnson and Wales University was enhanced after its establishment by the planting of a 1,200 foot long strip of coastal buffer. To learn more about the Urban Coastal Greenway and the Metro Bay Special Area Management Plan please click on the following link which leads to the Special Area Management Plan page on the CRMC website.

Conclusion

Public access to the shore does not occur in a vacuum. Though the CRMC has devised several means by which to get the public to the shore, Rhode Island’s shore is divided by the mean high tide line into public and private parts. The Rhode Island Supreme Court ruled as much in the case of State v. Ibbison 448 A.2d 728 (1982), when it determined that the boundary between private and public lands is the mean high tide line defined as “the line formed by the intersection of the tidal plane of mean high tide with the shore.”

Private interests in the shore, held by private property owners landward of the mean high tide line can collide with the public’s interest in the shoreslands seaward of this line. Assertions have been made that the mean high tide line fails to account for the effect of wind driven waves on ocean facing beaches where such waves typically cause the sea to inundate the mean high tide line, leaving only the private portion of the beach accessible. To remedy this and provide for public access to the shore consistent with Article 1, Section 17 of the Rhode Island Constitution—how can one exercise Constitutional right of passage along the shore if the public portion of the shore is inundated?—some have suggested that a better way to define public trust lands in Rhode Island is to adhere to common law where the seaweed line is traditionally considered to be the dividing line between the private and public portions of the shore.

Another claim is being made in the form of a lawsuit filed by the Rhode Island Attorney General in September in support of the public’s right to use Misquamicut Beach in Westerly, where some private beachfront proprietors have claimed ownership of the beach to the exclusion of the public. Stay tuned, as this case may have important ramifications for your constitutional shoreline privileges. In the meantime, be sure to legally exercise and enjoy your right to access the shore. It’s your beach—enjoy it!

Go Deeper!

Public Access to the Rhode Island Coast: A guide to parks, wildlife refuges, beaches, fishing sites, boat ramps, pathways, and views along the Rhode Island coast—this guide was published by Rhode Island Sea Grant with funding provided by the CRMC and includes information on hundreds of shoreline public access sites in Rhode Island.

For further information on the Public Trust Doctrine, which is the foundation for shoreline public access, read “Putting the Public Trust Doctrine to Work: The Application of the Public Trust Doctrine to the Management of Lands, Waters, and Living Resources of the Coastal States”, 2d Edition, June, 1997, Prepared by the Coastal States Organization. Inc.

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