February 18, 1999

To: The Onset Protective League Executive Committee

From: John T. Monahan, Esq. and Peter W. Teitelbaum, Esq.

Re: Initial Research on the Decision of 1915 and the Decree of 1916

Note: Rather than present you with a typical "lawyer/client memo," that is, one which requires a subsequent phone call from the client to the lawyer to determine exactly what all the legalese means, we have decided to present our findings of law in what we hope will be a more reader-friendly format. We have attempted to anticipate what your questions to us would be, and have provided answers to the questions. We hope that this format will prove to be both educational and easily decipherable.

1. What exactly is the legal status of the land protected by the Decree of 1916?

The land protected by the Decree of 1916 occupies the legal status of a **dedicated public easement**. There are two types of dedicated land; *the first type* is land which is actually turned over to a public corporate body, such as a town or the state, which then becomes the owner of the land. This is what is actually meant by "dedicated public land." The town or state is both the **legal** owner of the land, and the **equitable** owner of the land, meaning that it can use the land as it sees fit, so long as the original person who dedicated the land did not impose some restrictions upon its use. As both legal and equitable owner, legal title rests in the town or state, and in theory, the town or state may alter the use(s) of the land, subject to whatever laws may apply, unless the person who transferred the land to the town or state used specific language restricting the use(s) of the land. This was what happened in the 1975 case of *Dunphy* v. *Commonwealth*, where the survivors of a man who dedicated a park in Rockland, MA, sued the state to prevent a four-acre piece of land forever dedicated as a park from being transformed into a state

hockey rink and parking lot. Since the original owner had dedicated the land to the Town of Rockland, *with its sole use forever* to be for a park, the Massachusetts Supreme Judicial Court found that building a hockey rink would violate the terms of the dedication, because using the land for a hockey rink would be inconsistent with its dedicated use as a public park.

The second type of dedicated land is that of the dedicated public easement. This is what the land described in the Decree of 1916 actually is. A dedicated public easement is actually owned by the legal title holder. In the case of the Decree land, this would be the current heir(s) of the Warr family. (We have not performed a title search to date, since: 1) you have not authorized us to do so, and 2) since the information is likely readily obtainable from Marilyn Knowlton.)

This does not mean, however, that the surviving Warr(s) may actually do anything with the land. In theory, they could, but practically speaking, any use they might have for the land would violate the terms of its dedication as a place for bathing, boating, recreation and open space forever. They may sell the land to another, but any subsequent owner is also bound by the terms of the dedication. There would be no market for such a land sale, because the dedicated public easement on the Decree land renders that land valueless.

2. If the land isn't owned by the public, how does the public have the right to use it?

Under what is known as the dedication doctrine, a landowner may grant to the public certain uses, rights of way, etc.. An easement is merely the right to enter upon the land of another and make use of it in some way. A dedicated public easement, therefore, is the right of the public to enter onto the land of another for defined purposes. The dedication doctrine is actually a branch of contract law: in effect, the original grantor of the land "contracts" with the public so that the public may use the land, and just as a

legislative body, as stated in the United States Constitution, may not "impair" (e.g., interfere with) an existing contract, nor can a legislature alter the terms of the "contract" which creates the dedication of land.

3. What exactly is required for land to be "dedicated?"

A dedication requires two steps: an actual **dedication** of the land for a specific use, as well as an **acceptance** by the public. In the case of the Decree land, the Massachusetts Supreme Judicial Court ("SJC") found that the land was dedicated under two legal theories. In their 1915 decision in *Attorney General* v. *Onset Bay Grove Association*, they noted that the development plan filed in 1878 in the Plymouth County Register of Deeds shows that certain spaces of land had been implied to be reserved as parklands, beaches, etc., for use by the public. Under present law, a development plan is insufficient by itself to prove that a dedication took place; the SJC noted also, however, that the Onset Bay Grove Association ("OBGA") made oral representations to the purchasers of the house lots it sold that the lands later covered in the Decree of 1916 would remain open to public use. Under the law at that time, and through the present, oral representations are sufficient to create an implied dedication, and no "formalities," i.e., recorded deeds, written mention of the dedication in the Purchase and Sale Agreements for the lots, etc., were necessary.

Acceptance of a dedication of land may occur in several ways. A town, or state, may formally accept the dedication, or, as in the case of the Decree land, the public may use the land for a period of time. While the SJC noted in *Attorney General* v.*Onset Bay Grove Association* that the public had been using the land for more than twenty years, there is no fixed legal period of public use which must elapse before a dedication is considered to be accepted.

3. What was the Decree land dedicated for?

The SJC stated in its 1915 that:

> "...it was clearly indicated that, with the exception of one wharf, the whole of the water front was to be left open and unobstructed, and that no part of it was to be sold for or occupied by buildings; that the association dedicated to the public the whole of the shore as a bathing beach, park and open space *forever* (Italics mine)...that the...parks, streets, avenues, paths and shore fronts for bathing, boating and fishing...were dedicated to the public *forever* (Italics mine) for such use by the public..."

In the Decree of 1916 which followed the 1915 SJC decision, the Court ordered that all structures, fences, piers, etc., which had been put up on the Decree land be removed, except for the water standpipe and the wharf, as these structures interfered with the rights of the public to enter and use the land for the above-stated purposes of bathing, boating, fishing, parks and open space. The Decree of 1916, by the way, was actually the court-ordered remedy which put "teeth" into its decision of 1915 in *Attorney General* v. *Onset Bay Grove Association*. Although many people concentrate on the Decree of 1916 as the "source" of the public's rights to use the land, it was merely a follow-up to the 1915 decision, where the legal basis for the dedicated public easement is found.

4. Are the 1915 Decision and the 1916 Decree Still Strong Legal Documents?

They most certainly are. In fact, our research confirmed that beyond a doubt. The *Dunphy* v. *Commonwealth* case noted above states that when a dedication is made **forever**, it means forever. Nor is this notion of "forever is forever" peculiar to Massachusetts law. Massachusetts law concerning dedication follows the "majority" rules, which means merely that most states follow the same general principles regarding dedication. The overwhelming majority of states have found that "forever is forever"; our research of the law in more than twenty states showed that only Louisiana (whose law derives from the Napoleonic Code, rather than the English Common Law, as does the law in every other state) allows their legislature to alter the uses for which land has been dedicated. Oklahoma's Supreme Court, for example, refused to allow a dedicated

roadway to be dug up so that sewer lines could be installed. The Supreme Courts of Kansas, Oregon, Minnesota, among others, have all held that property which has been dedicated for a particular purpose cannot be used for other "inconsistent" purposes. Legally, "inconsistent" would mean that a town cannot turn a park into a hockey rink, or turn a forest into an airport.

In sum, our research actually strengthened our view that the Decision of 1915 and the Decree of 1916 are strong and binding legal documents. It is also worthy to note that it was the Commonwealth's highest court which, in essence, "found" that a dedication for particular purposes had taken place; since the SJC has already spoken on the issue, it is inconceivable to imagine that any court in the Commonwealth would be so foolhardy as to find otherwise.

5. *What is the Town's Role Concerning the Decree Land?*

The Town's role is that of a trustee for the land. The Town, upon the effective finding of a dedicated public easement back in 1915, assumed its role of trustee at that time. As trustee, the town's role is to merely ensure that the Decree land is used only for its dedicated purposes. The Town does **not** own the land; the Town may not use the land as it sees fit; the Town may only act to ensure that the purposes for which the land was dedicated, e.g., bathing, boating, fishing, parks and open space are met. This notion of the Town as trustee over the Decree land is well established by case law and by statute, both in Massachusetts and in other states.

6. Since No One Has Ever Challenged the Town When It Has Violated the Decision and the Decree in the Past, Can Anyone Challenge the Town if It Decides to Further Encroach Upon the Land?

In a word, absolutely. Although Massachusetts courts have not ruled directly upon the issue of whether sitting upon one's rights to challenge a past contrary use of

dedicated public land prohibits one from challenging a current encroachment, other states have found that a municipality's responsibility to the dedicator's intent was **not** excused by the fact that past contrary uses had gone unchallenged. (As noted above, Massachusetts does follow the "majority" rule regarding dedication issues.) In other words, the public's right is forever enforceable, and there is no "statute of limitations" or other legal defense available to the Town when it attempts to put the decree land to a contrary use. In our opinion, this also means that, should you so desire, past violations by the Town of the dedicated uses, such as the Jones' Marina's encroachment on the Decree land, could be reversed.

7. Can the Massachusetts Legislature Do What It Wants With the Decree Land?

No, it may not. As noted in *Dunphy* v. *Commonwealth*, the state may not enter into dedicated land and alter its use. Again, a dedication purpose, when coupled with words like "forever," "in perpetuity," etc., will be found to be the sole use for the land, and the Commonwealth, like the Town, is barred from making inconsistent uses of the land. This, again, is the majority rule among the states, and Massachusetts follows the majority rule.

8. What is the Status of the "Town Pier" on Onset Beach? Can the Town License Private, For-Profit Businesses to Use It?

This is somewhat of an open question, as we have not researched the status of the Pier at this point, since we felt it best to wait until there was more definite word as to its potential development and expansion for private profit before we commenced work in this area. The Pier was one of two structures which were allowed to remain on Decree land back in 1916. Whether this means that the Pier is part of the land, or is a separate, Town-owned structure which was allowed to remain upon the land, is unclear to us at this time.

There is, however, a significant amount of case law among the "majority rule" states which states that municipalities and state legislatures may **not** sell or appropriate lands for the use by or for the benefit of private interests.

Conclusion

In our opinion, the Decision of 1915 and the Decree of 1916 are strong, powerful documents which offer perpetual protection to the covered lands to be used solely for the purposes for which they were dedicated. As to a potential conflict between dedicated uses, for example, a new boat ramp to be installed on what is presently a bathing beach, dedication law is not quite so precise as in other areas. In that regard, other sources of law we have not researched to date, such as environmental law, might prove to be of value in maintaining the Decree land in their present condition. We would be glad to be of service to you in any further action you may wish to take regarding the status of the Decree land.

Very truly yours,

John T. Monahan, Esq.

Peter W. Teitelbaum, Esq.

Addendum to the Legal Opinion of Peter W.Teitelbaum, Esq.

Article 1. Land in Onset was dedicated to the Public via the findings of the Massachusetts Supreme Judicial Court [SJC].

The Warr family does not own the land. It is owned by the Public. The Onset Bay Grove Association could not sell the land nor could the Warr family.

The Court ordered that the land could not be sold, transferred, leased or conveyed.

The deeds are *still in the name of the Onset Bay Grove Association*. They are in the Plymouth County Registry of Deeds in the registered land section. There are copies of the deeds in the Wareham Town Hall. Some are in Book 1914 of the old records.

Article 3. The Town of Wareham accepted the formal dedication of the land at a town meeting in 1917 and thus entered into a legal contract with the Public.

Article 5. The Town became trustee of the land in 1917 when it accepted the dedication.

Article 6. Jones' Marina is now the Stonebridge Marina.

The Town was challenged by the Committee to Save Onset's Beaches beginning in 1985 and on other occasions since. That's why the Onset Boat Ramp is "free." One of the largest, potential money makers for the Town of Wareham is "free." Hasn't anyone wondered why? Perhaps it's because it was proven that the Town doesn't own the land, and the State found out that it hadn't any right to issue any permits regarding it. The Department of Environmental Protection hasn't any authority to issue any permits, for any type of construction, on any part of our dedicated land. It can only enforce the law as it did when the Town decided to cut down the trees on the bluffs a few years back.

Article 8.

The only pier that was allowed to remain, according to the SJC, was the Association Wharf located in front of Kennys. In 1917 the Town tried to buy it but the owners wouldn't sell. The Town then built a 'T' wharf exactly like it, on the

site of our present pier. They built it in defiance of the Court which had ordered that the land there was to remain "open and unobstructed. The present pier, built in 1938, replaced the one built in 1917. Both were built on part of the dedicated land.

Re: Conclusion

Unless things have changed, under Chapter 91 of the Wetlands Protection Act, the Onset Boat Ramp would be considered a structure. According to the SJC, the whole of the waterfront, with one exception, was to be left "open and unobstructed." Those rules would apply to any other obstructions, whether placed there by the Town or by a private individual. As Selectman Teitelbaum has stated, "past violations by the Town of the dedicated uses", "could be reversed."

While it's important to guard our dedicated open spaces and stop their takeover by the Town, it's also important for all of us to find out whether the SJC's ruling applies to our streets. In the case of the People of Onset v the Onset Bay Grove Association, in regards to the streets, avenues, boulevards and pathways, you will find the wording "free use", "dedicated to the public", "duly accepted by same", and also the most important word of all……"forever." Under the law the wording "forever" or "in perpetuity" constitutes a dedicated public trust. Since an owner may dedicate his land for whatever use he wishes, as the Court declared the Onset Bay Grove Association did, it must be accepted and held for that use only. The OBGA owned the open land in Onset, not the Town. If the streets etc. were dedicated to the free use of the public forever, by the OBGA, and the Town accepted the dedication, wouldn't that then mean that it would be against the law for the Town to charge a parking fee? This is part of the argument put forth, by the Concerned Citizens of Onset to the Attorney General, in a letter sent to her on July 23rd. We made reference to the Onset case regarding our rights and sent her all of the related documents. We also sent the petitions containing over 300 signatures.

At this time we haven't any alternative but to wait. Hopefully she'll consider what we sent important enough to act on it. Then again, as many politicians do, she may consider it wastebasket material. That would be regrettable, and a real shame if our only recourse was the internet.