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PUBLIC USE OF COASTAL BEACHES

by

David W. Owens and David J. Brower

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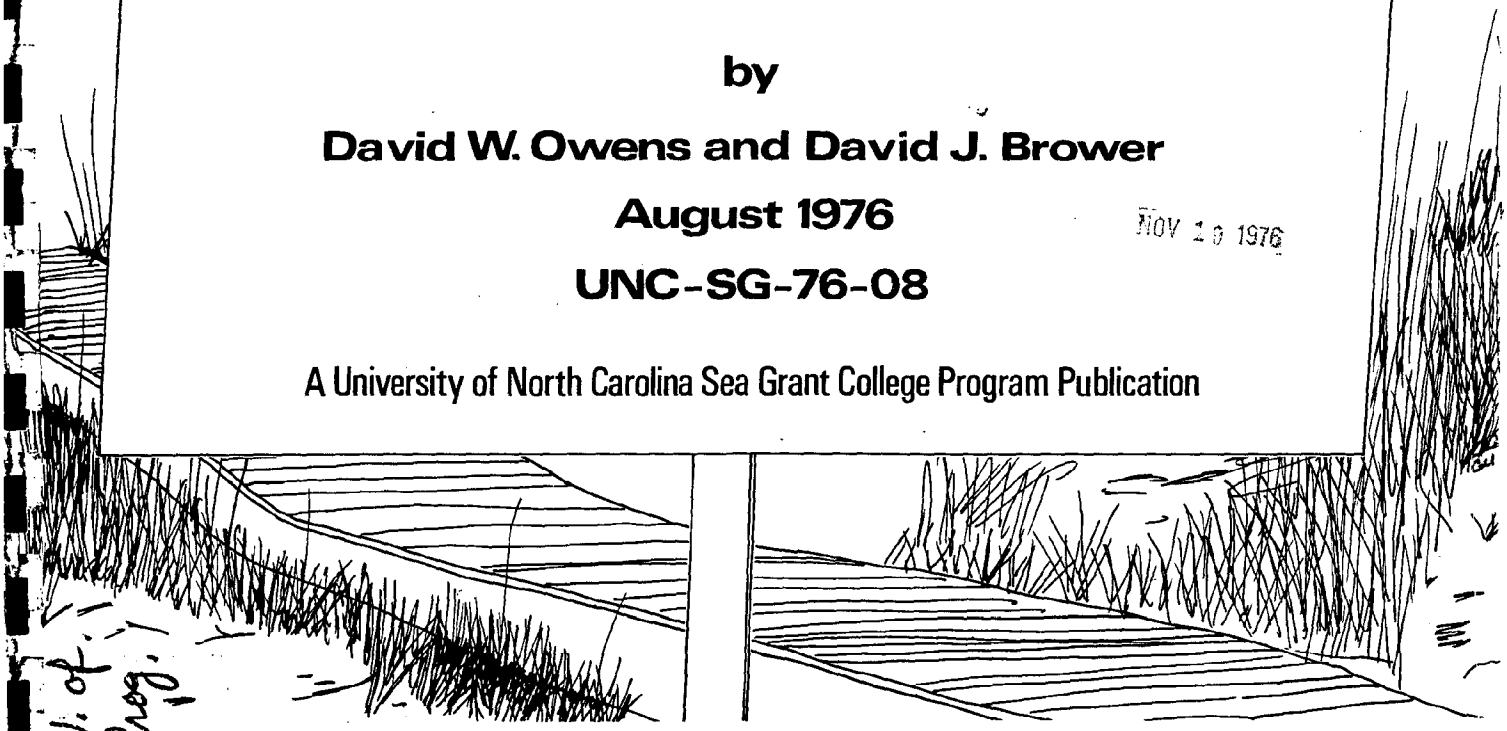

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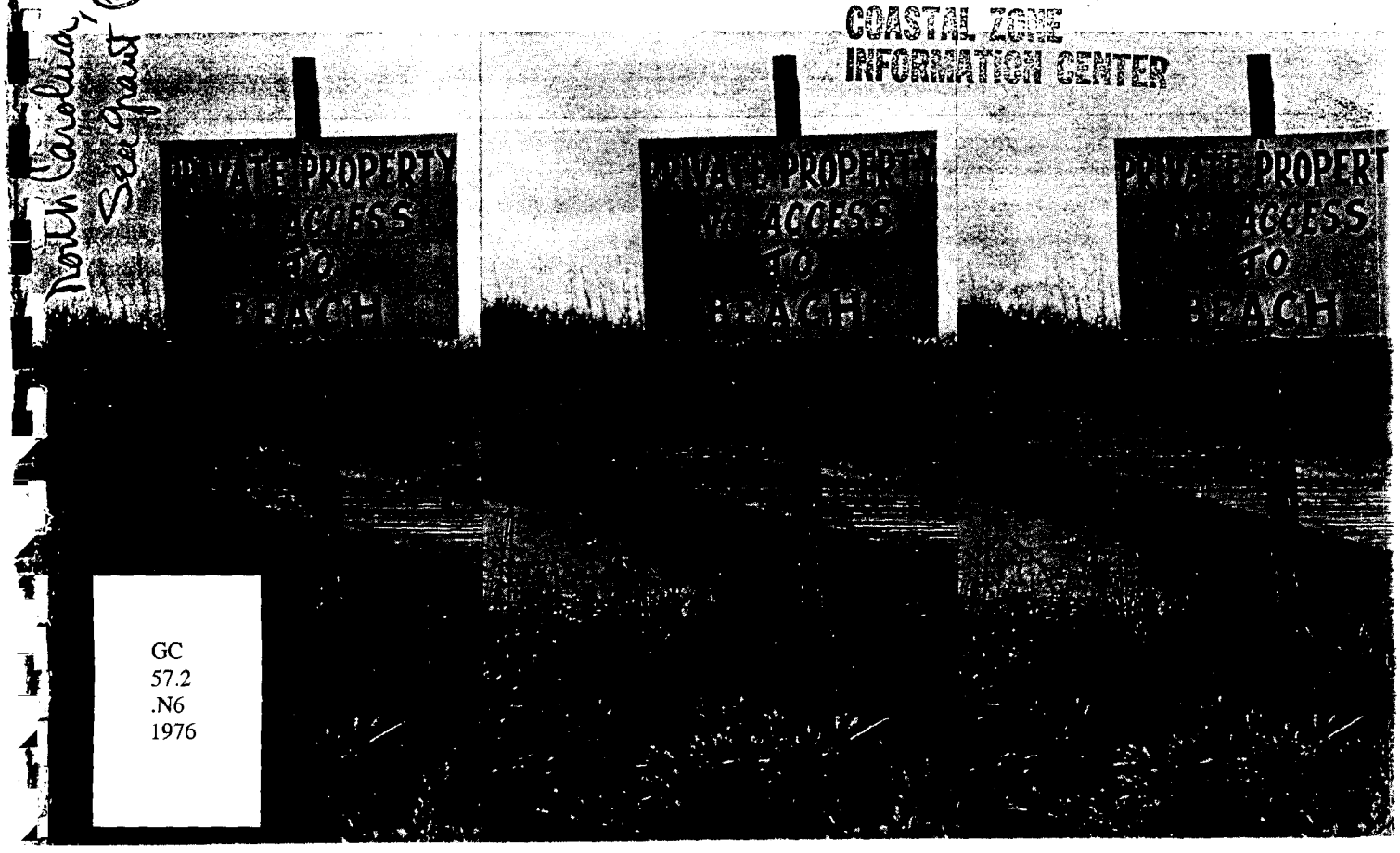

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PUBLIC USE OF COASTAL BEACHES

By

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and

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C O P Y R I G H T

1976

David W. Owens
and
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CHAPTER ONE. INTRODUCTION

I. THE BEACH ACCESS ISSUE

The question of "beach access" has developed into an important social, political and legal issue over recent years in America. While in no sense a new problem, it has been in the last decade that the demand for beach recreation and the supply of beach areas available for public recreation have reached such an imbalance as to create crisis situations in many communities. Private property rights, along with an increased sensitivity to the fragile nature of the coastal environment, has led to an ever-dwindling "beach" that is freely available for public use.

> Note, "Public Access to Beaches," 22 Stanford L. Rev. 564, 564-66 (1970)*

Our coastal beaches are a unique resource, capable of satisfying a substantial quantity and range of recreational interest. Increasing urbanization near coastlines[1] has intensified the need for public beaches. Even as demand rises, the beach space available is diminishing. While some of the lost beach area is put

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[1] In California alone over 13 million people now live within a one hour drive of the ocean. By 1980 this population will increase to 20 million. Comm. on Ocean Resources, Resources Agency of Calif., California and the Ocean 161 (1966).

to industrial, commercial, and military uses, much of it falls into the hands of persons seeking beaches for private recreation.

[There is]...conflict between two kinds of recreation: use of beaches by the public and use of beaches by private persons for their exclusive recreational benefit. Private beach recreation occurs when beachfront homeowners or resort establishments block access to the beaches fronting on their property so they or their paying guests can have exclusive enjoyment of them. Beachfront home ownership and resort development are beneficial, but they need not and should not result in private preemption of scarce beach areas. At a time when noise, crowds, dirt, crime, heat, traffic, and smog make life unpleasant for so many people, the availability of an escape to nature to seek relaxation and renewal of creative energies takes on a new dimension. Recreation in natural surroundings can no longer be considered a luxury reserved for those who can best afford it; it is a social necessity.

***

The public has property rights in most of the coastal tidelands, either because the state owns them or because private owners must allow public exercise of certain uses of them. Tidelands, however, are only a small portion of the beach: They consist of the area from the low tide line to the mean high-tide line. This leaves a large area--the dry-sand portion of the beach above the mean high-tide line but below the vegetation line, and the uplands fronting on the seashore--subject to private control.

Private ownership and control of the dry sand and uplands threatens public enjoyment of the beaches in two ways. First, private littoral[2] owners can restrict the use of the dry-sand area. This part of the beach is essential to recreation. Without it the public is left only the wet-sand portion of the beach to support its normal beach activities--spreading towels and blankets, picnicking, sunbathing, building bonfires, playing sports, and the like. Thus, finding ways to expand public rights into the dry-sand area is one aspect of the beach access problem. Second, owners can isolate many beaches by denying public access across private uplands.[3] Although the public has the right to

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[2]Littoral owners are those who hold land along the seacoast. The term...does not specify the extent of their ownership in the beach area.

[3]Only 414 miles of coastline of the 1154 in California are in public ownership. Access is guaranteed for only about 290 of those 414 miles. The federal government reserves the other 124 miles for national-security uses. Comm. on Ocean-Resources supra note 1, at 22-23. The following tables, adapted from id. at 18, break down the publicly owned portion of the California coastline by type of coastline and by the owning body. [See following page]

walk freely along the tidelands regardless of private upland ownership, geographic barriers (cliffs, jutting headlands, or river mouths) prevent lateral passage in many areas. Where natural barriers or private owners restrict access, the beaches become inaccessible de facto private beaches, and the public's rights in these tidelands are rendered valueless. Providing public passageways into the beaches is thus the second aspect of the beach-access problem.

Private ownership of the "beach" is not the only cause of the "beach access" problem. A good deal of the beach area that is in public hands is not available for public recreation. Some of the land is put to use for governmental purposes that are incompatible with recreational use, such as military installations. An equally serious problem is the exclusionary nature of many locally owned beaches.

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[3] [Continued from previous page]

OWNERSHIP OF CALIFORNIA COASTLINE

Type of Coastline	Miles of Coastline		
	Total	Private	Public
Sandy beach good for swimming	287	179	108
Sandy beach not good for swimming	385	223	162
Rocky shore and pebbled beach	330	241	89
Rocky shore with headlands and cliffs	152	97	55
Total	1154	740	414

PUBLIC OWNERSHIP OF CALIFORNIA COASTLINE

State	173
County	35
Municipal	45
Special Districts	5
Federal: military, lighthouses, etc.	156

Agnello, "Non-Resident Restrictions in Municipally Owned Beaches: Approaches to the Problem," 10 Columbia J. of Law and Soc. Prob., 177, 177-79 (1974)*

Municipalities, as well as private individuals, have undertaken acquisition of the shoreline and have developed and maintained beaches. But unlike private beaches the municipal beach is owned by the public. To meet increasing demands on the seacoast and to respond to increasing pressure on their own beaches, municipalities have sought devices to protect them for their natural beauty and for their public usefulness. A popular and widespread device is to restrict the use of the beach to residents of the municipality either through an absolute prohibition against non-residents or the use of a discriminatory fee schedule. Although such restrictions have proliferated since the 1950's, it is only recently that they have become visible enough to become a legal issue. Different theories of law have been advanced to defeat the restrictions, and the volatility of the issue is such that further litigation is likely.

Underlying the efforts to invalidate residency restrictions in municipally owned beaches are two fundamental social issues in addition to the statistical need for maximum use of existing facilities. Recreational facilities are generally a matter of great public concern and beaches seem to merit special protection for both aesthetic and environmental reasons....

Aside from the idea of a public policy there is also an issue striking at the heart of our social and political structure. The problem of urban-suburban relationships and friction is now a major social and political concern. One common accusation is that the suburbs only take from the cities without giving anything in return. Non-resident restrictions in municipally owned beaches apparently lend support to that argument. Should a municipality be permitted to deny non-residents the use of their beaches? If the answer is yes, logically the same reasoning is available for New York City to prevent non-residents from using its museums, for example. Such a proposition seems outrageous, but the very basic question of urban and suburban responsibilities to each other remains.

These concerns about the adequacy of public access to shoreline recreation areas have been reflected in a number of ways.

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Several states have enacted "beach legislation," an early and prominent example being the "Open Beaches Act" passed by the Texas legislature in 1959. There has also been a good deal of litigation on the issue, with important decisions coming in the last ten years from the state courts of New York, New Jersey, Florida, Texas, Washington, Oregon and California.

The issues and potential resolutions of them are examined in this report. First, methods for firmly establishing public rights that already exist in the beach resource are explored. Secondly, means of acquiring new rights which permit the public to make use of the beach are examined.
Prior to this, however, it is essential to establish a clear set of terminology for discussing these sometimes complicated and often confusing legal doctrines. In considering the public access issue, particular attention must be given to the specific geographic area being considered and the exact nature of public rights being proposed.

II. TERMINOLOGY

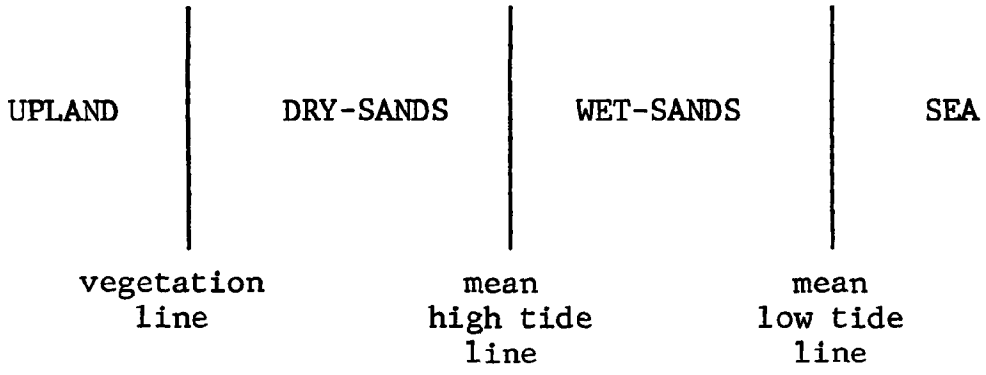
A. GEOGRAPHIC AREAS

1. Areas of Concern

There are three principal types of coastline in the United States--bluffs, wetlands and beaches. Recreational use of the shore is largely confined to "beach" coastlines. In ascertaining

exactly what public ownership and use rights exist, and what the extent of these rights are, it is important to define several discrete portions of the "beach."

First, that area seaward of the mean low tide line is termed the sea, or sea bed (lake or lake bed in non-oceanic situations). The area between the mean low tide and mean high tide lines, which is covered by the daily flow of tides, is termed the wet-sand area. "Foreshore" and "tideland" are generally synonomous with this term. The area between the mean high tide line and the line of vegetation, an area inundated only during severe storms, is termed the dry-sand area. That area landward of the vegetation line is termed the upland. The following diagram illustrates this division.



2. Setting Boundaries

Because the public's rights may differ greatly depending upon which of these areas is involved, the boundaries between them must be capable of precise delineation. As two of the three points of demarcation are tide lines, a brief discussion of tidal features and measurements is useful.

Maloney and Ausness, "The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping," 53 N.C. L. Rev. 185, 195-98 (1974)*

***

Coastal boundaries are generally defined by vertical datums, which are planes of reference for elevations based on the average rise and fall of the tide. Mean high water and mean low water are examples of such vertical datums. The coastal boundary is the intersection of this elevation with the shore and varies as the physical shape of the shore changes. Since observations of the tide provide the information necessary to establish these datums, an understanding of coastal boundaries requires a knowledge of tides and the forces that produce them.

The tide is defined, as: "The periodic rising and falling of the water that results from the gravitational attraction of the moon and sun acting upon the rotating earth."[1] This indicates the strong relationship between the sun and moon and the tides. The individual tide-producing forces vary over the face of the earth in a regular manner, but the different combinations of these forces produce totally different tides. Moreover, the response of various bodies of water to these forces varies because of differing hydrographic features of each basin.

The variations in the major tide-producing forces are a result of changes in the moon's phases, declination to the earth, distance from the earth and regression of the moon's nodes. The variations which occur because of this latter factor will go through one complete cycle in approximately 18.6 years. The other changes have cycles varying from 27 1/3 days (moon's declination) to 27 1/2 days (moon's distance) to 29 1/2 days (moon's phases). These cycles differ in magnitude, and their effect on the tide varies from place to place around the earth. The various combinations of all these changes also result in the daily variations in the tide at a given location.

The forces related to the changes in the moon's phases are strongest twice each month at new and full moon and the tides occuring at approximately these times are known as spring tides. These forces are weakest at the time of the first or third quarter of the moon and the tides occuring then are called neap tides.

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[1] P. Schureman, Tide & Current Glossary 36 (U.S. Coast & Geodetic Survey Spec. Pub. No. 228, rev. ed. 1949).

However, at most places there is a lag of a day or two between the occurrence of the appropriate phase of the moon and corresponding spring or neap tide. The cycle relating to the moon's declination is strongest twice each month when the moon is at the tropics and it is weakest when the moon is over the equator. The tides associated with these changes are called tropic and equatorial tides when they are the strongest and weakest. The tides occurring when the moon is nearest the earth are called perigean tides and those occurring when the moon is farthest from the earth are called apogean tides. A lag of a day or two is also found between the declination and the distance of the moon and the corresponding state of the tide.

There are three characteristic features of the tide at a given place--the time, range, and type of tide. The time of the tide is related to, and can be specified by, the moon's meridian passage. The range of the tide refers to the magnitude of the rise and fall of the tide, and varies from day to day at a given place depending on the relation of the tide-producing forces. The type of tide denotes the characteristic form of the daily rise and fall of the tide. The tide is semidiurnal when two highs and two lows occur each day; and it is mixed when two high and two low occur in a day with marked differences between the two high or the two low waters.

These tidal characteristics vary from one location to another as a result of variations in the tide-producing forces and in hydrographic features. While some generalizations about tidal characteristics can be made, it must be recognized that tidal characteristics are a local phenomenon and the description of the tide in one area may be inapplicable to another area.

The tide observations required for the determination of a tidal datum must be as accurate as possible because the location of the boundary determined from the datum may involve very valuable lands. After the vertical elevation of a tidal datum is established it must be translated into a line on the ground--the intersection of the datum plane with the shore. An error of only tenths of an inch in the tidal datum may result in the line of intersection moving a considerable distance landward or seaward if the shore has a flat slope. Therefore, the accuracy of coastal boundaries has a direct relation with the accuracy of the original tide observations.

The specific tidal datums that define the coastal boundaries provide the elevation of a stage of the tide on an average basis. For instance, mean high water is an average of the high waters. Because the magnitude of the rise and fall of the tide varies from day to day, tidal characteristics derived from daily observations may differ considerably from the average or mean values over a long period of time. Therefore, the average must be based

on long-term observations before it can be considered an accurate value for the tidal datum. When only short-term observations are available, they may be corrected to long-term mean values by comparison with simultaneous observations taken at some nearby location for which mean values have been determined from long-term observations....

Observations over a period of nineteen years are generally used to determine tidal datums because all the cycles related to the phases, declinations and distance of the moon occur within this period. In addition, the seasonal fluctuations of water level will be complete within a year, and the effects of these non-tidal forces can be balanced. When long-term observations are used to determine tidal datums, the datums will be applicable in future years unless the factors producing the tidal character have changed. The primary factor which might change and cause a variance in the datum will be the hydrographic features of the area.

For the practical importance of the tide lines in determining the scope of public rights, see Borax Consolidated, Ltd. v. City of Los Angeles, 296 U.S. 10 (1935), Hughes v. Washington, 389 U.S. 290 (1967) and the discussion of the geographic scope of the public trust doctrine in the wet-sand section of Chapter II. Also see Corker, "Where Does the Beach Begin and to What Extent Is This a Federal Question," 42 Wash. L. Rev. 33 (1966); Gay, "High Water Mark: Boundary Between Public and Private Lands," 18 U. Fla. L. Rev. 553 (1966); Porro, "Invisible Boundary--Private and Sovereign Marshland Interests," 3 Nat. Resources Law. 512 (1970); Roberts, "The Luttes Case: Locating the Boundary of the Seashore," 12 Baylor L. Rev. 141 (1960); Comment, "Fluctuating Shoreline and Tidal Boundaries: An Unresolved Problem," 6 San Diego L. Rev. 447 (1969); Note, "Tideland Ownership--Time for

Reform," 36 U. Cinn. L. Rev. 121 (1967).

The vegetation line has not received the judicial and scholarly attention that the tide lines have been afforded. Congressman Eckhardt's current Open Beaches Bill (H.R. 1676, 94th Cong., 1st Sess.) uses the following definition:

> The term 'line of vegetation' means the extreme seaward boundary of natural vegetation which typically spreads continuously inland. Where such a line is clearly defined, the same shall constitute the line of vegetation. Such line shall not be affected by occasional sprigs of grass seaward from the dunes and shall not be affected by articifial fill, the addition or removal of turf, or by other artificial changes in the natural vegetation of the area. Where such changes have occurred and the vegetation line has thereby been obliterated or has been created artificially, the line of vegetation shall be reconstructed as it originally existed if such be practicable. In all other cases the following shall apply:
>
> (A) Where such clearly defined line of vegetation is not discernible in an expanse of beach of less than 500 feet, 'vegetation line means a straight line between the two nearest clearly marked lines of vegetation at each terminus of such expanse.
>
> (B) Where such clearly defined line of vegetation is not discernible in an expanse of beach of more than 500 feet, 'vegetation line' means a line formed by extending a line of constant elevation from the highest clearly marked line of vegetation throughout the expanse to the point where such line of constant elevation most closely approaches the terminus of the clearly marked line of vegetation on the other side of such expanse and from thence by a straight line to such terminus.
>
> (C) In the case of beaches where no discernible clearly marked vegetation line is available as a benchmark, or where such benchmark is more than five miles away, the term 'vegetation line' means a line two hundred feet landward from, and parallel to the line of mean high tide.

3. Shifting Boundaries

A related topic in which careful definition of terms is necessary involves identifying the processes by which the shoreline changes and the differing legal impacts on the land areas created thereby.

> Maloney and Ausness, "The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping," 53 N.C. L. Rev. 185, 224-26 (1974)*

In most coastal states, tidal boundaries are considered to be ambulatory; that is, the physical location of the mean high (or low) water line may shift because of natural or artificial changes in the location of the shoreline. Accordingly, littoral owners may gain or lose land by virtue of accretion, reliction, erosion, or avulsion.

Before discussing the problem of ambulatory versus fixed boundaries, it may be helpful to consider the meaning of a number of terms commonly used in legal discussions of this problem. Accretions or accreted lands consist of additions to the land resulting from the gradual deposit by water of sand, sediment or other material. The term applies to such lands produced along both navigable and non-navigable water. Alluvion is that increase of earth on a shore or bank of a stream or sea, by the force of the water, as by a current or by waves, which is so gradual that no one can judge how much is added at each moment of time. The term "alluvion" is applied to the deposit itself, while accretion denotes the act, but the terms are frequently used synonymously.

Reliction refers to land which formerly was covered by water, but which has become dry land by the imperceptible recession of the water. Although there is a distinction between accretion and reliction, one being the gradual building of the land, and the other the gradual recession of water, the terms are often used interchangeably. The term "accretion" in particular is often used to cover both processes, and generally the law relating to both is the same.

Erosion is the gradual and imperceptible wearing away of land bordering on a body of water by the natural action of the elements. Avulsion is either the sudden and perceptible altera-

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tion of the shoreline by action of the water, or a sudden change of the bed or course of a stream forming a boundary whereby it abandons its old bed for a new one.

As a general rule, where the shoreline is gradually and imperceptibly changed or shifted by accretion, reliction or erosion, the boundary line is extended or restricted in the same manner. The owner of the littoral property thus acquires title to all additions arising by accretion or reliction, and loses soil that is worn or washed away by erosion. However, any change in the shoreline that takes place suddenly and perceptibly does not result in a change of boundary or ownership. Normally a landowner may not intentionally increase his estate through accretion or reliction by artificial means. However, the littoral owner is usually entitled to additions that result from artificial conditions created by third persons without his consent.

Corker, "Where Does the Beach Begin, and to What Extent Is This a Federal Question," 42 Wash. L. Rev. 33, 74-75 (1966)*

Various subsidiary reasons for an accretion rule have been stated. The least persuasive is usually identified with Blackstone: De minimis non curat lex.[1]...Nevertheless, something can be said

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[1] 2 BLACKSTONE, COMMENTARIES *262 (Lewis ed. 1898):

And as to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make terra firma; or by dereliction, as when the sea shrinks back below the usual watermark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For de minimis non curat lex; and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss. But if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king; for as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry.

for Blackstone's reason....A six-inch strip separating a substantial tract from the water has no more than nuisance value--a detriment to an upland owner without concomitant benefit to the tideland owner, whether the state or its vendee. If six inches is de minimis, when does de minimis cease to be applicable?

Another reason for an accretion rule, recognized by Blackstone, is that because the upland owner must sustain the loss from erosion or the costs of its prevention, he should have the benefit of any accretion. That an upland owner's boundary may be legally fixed against movement by erosion is only a partial answer. Even if one's ownership continues after the sea has claimed his land, the sea is nonetheless a destroyer. Moreover, the navigational servitude of the United States renders "ownership" of tide and submerged lands in some situations relatively meaningless.

This reason is more persuasive when applied to rivers, which move back and forth across a flood plain, than to tidelands. On the ocean shores, accretion or erosion is more likely to be a long-continued and one-way process. It is not a compelling argument that McGillicuddy, whose land is located where accretion continues over centuries, should own those accretions because Jones, whose land is located where erosion is an equally uninterrupted process, is losing his real estate.

A more persuasive reason for an accretion rule is related to the difficulties of proof. Gradual and unnoticed movement of a water line leaves few traces in memory and even fewer enduring records. To establish where a boundary was located in 1889, even if a litigant wins, may be an expensive process. A less expensive rule both for litigants and the state, which provides the courts, is one which declares that the boundary is where the water line now exists--unless someone can establish that (a) the boundary used to be somewhere else, and (b) an avulsive change took place.

Doubtless the most important consideration favoring an accretion rule is access to the water. The dissenting opinion in Hughes persuasively points out that contact with the line of mean high tide "in many instances, may have been the reason for the acquisition of the property."[2] Language reflects the usual importance of access when a water line or body of water is described as "in front of" and not "behind" the upland.

B. PUBLIC RIGHTS

In discussing public rights to shoreline recreation areas it is important to distinguish three types of public rights: rights

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[2] 67 Wash. Dec. 2d at 807, 410 P.2d at 32.

of ownership, use, and access.

The public may own part of the beach resource, as is almost universally the case with the wet-sand area. Or, the public may possess only a right to use the resource, with the underlying ownership of the land remaining in private hands. This type of public right is illustrated by the establishment of prescriptive easements or customary rights in the dry-sand area. Finally, the public may possess or acquire access rights--the right to cross privately owned land in order to reach an area in which public ownership or use rights have been established. This type of public right is generally applicable to upland (and occasionally dry-sand) areas. There are two important instances wherein rights of access become crucial: where long stretches of privately held upland effectively bar the public from reaching the shoreline, which can be termed the access over intervening lands issue; and, where municipally owned beach parks attempt to exclude or discriminate against those who do not live in the municipality, which can be termed the non-resident access issue. Though the latter instance also involves "use rights," the basic issue remains the same--can the public be prevented from reaching and enjoying the shoreline?

CHAPTER TWO. THE WET-SAND: ESTABLISHING EXISTING PUBLIC OWNERSHIP, USE, AND ACCESS RIGHTS

The wet-sand area (the area between the mean high tide and mean low tide lines) is held to be owned by the state in most jurisdictions. According to a survey of the law on this point by Professors Maloney and Ausness,[1] the following chart indicates the locus of the ownership of the wet-sands.

Publicly Owned		Privately Owned
Alabama	New Jersey	Delaware
Alaska	New York	Georgia*
California	North Carolina	Maine
Florida	Oregon	Massachusetts
Hawaii	Rhode Island	New Hampshire
Louisiana	South Carolina	Pennsylvania
Maryland	Texas	Virginia
Mississippi	Washington	

This ownership has often been held to be of a special nature. Rather than owning this property in a proprietary capacity, it is generally held that the state holds the wet-sands in trust for its citizens. Therefore, the state is not free to act in any way it wishes regarding these lands. The interests of the beneficiaries of the trust--the public--are held to be paramount.

To further understand this concept, in this section an examination of the public trust doctrine's historical background

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[1] Maloney & Ausness, "The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping," 53 N.C. L. Rev. 185, 200-03 (1974).

* In a case decided subsequent to the Maloney & Ausness survey, the Georgia Supreme Court held that wetlands are owned by the public.

and adoption by the United States Supreme Court is made. There follows an examination of the scope of the doctrine and its impact on the alienability of wet-sand areas and a brief look at ways in which the trust doctrine can be enforced.

A final section of the chapter examines one attempt to legislatively establish some public use rights in those wet-sand areas that are privately owned.

I HISTORICAL BACKGROUND OF THE PUBLIC TRUST DOCTRINE

The public trust doctrine has a strong link to the civil law. Initially adopted by the Romans, the doctrine became established in the English common law system in the late Middle Ages.

> Note, "State Citizen Rights Respecting Greatwater Resource Allocation: From Rome to New Jersey," 25 Rutgers L. Rev. 571, 576 (1971)*

The Roman Law

> The Roman law held that great flowing waters and the sea and its shores were by nature res communes--things open to common use by all citizens. The sea and its fish being subjects of juris gentium (the law of nations), neither individual nor state could rightfully control them. Great navigable rivers and their banks and harbors were res publicae (things belonging to the public) and hence state property. But the state held title to such interests only as supervisor or trustee of the public rights of navigation and fishery, which included the rights to make fast in ports, and to put in on banks and shores and spread nets thereon. Roman law scholars disagree on whether the seashore to the limit of the highest winter flood was subject to juris gentium. But all agree that no proprietary right could exist in land under

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the sea or navigable rivers, or as to those waters themselves. Use of the seashore was a matter of juris gentium; and, therefore, anyone might have built a shelter on it; but if the shelter were destroyed, the shore under it would again be common. Every citizen possessed an individually assertable right to prevent all construction on the seashore as might interfere with his access to the sea or beach.

Note, "Access to Public Municipal Beaches: The Formulation of a Comprehensive Legal Approach," 7 Suf. U. L. Rev. 936, 941-46 (1973)*

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A brief review of the doctrine's historical development may best illustrate its scope and provide the background to evaluate its impact as it relates to beach access.

The rights of the public in the "foreshore" are deeply rooted in the past. Public rights in unhindered navigation and fishing were protected by Roman Law. Free access to navigable waters and the foreshore was a right guaranteed to every Roman citizen. However, this concept of public rights in navigable waters, the jus publicum, waned somewhat during the Middle Ages. Throughout this period of stifled economic development and severely limited political freedom, demand for public water rights all but disappeared. Control of navigable waters and tidelands was vested exclusively in the monarch. The king retained the right to grant to private parties exclusive rights in fisheries, navigable waters, and tidelands; the public apparently retained no rights.

Gradually, however, the demand for public shoreline resources and, with it, the public rights of free navigation and fishing re-emerged. The signing of the Magna Carta in 1215 manifested the King's formal acquiescence to these demands. That instrument, an expression of basic human freedoms, states:

> All Kydells [weirs] for the future shall be removed altogether from the Thames and Medway, and throughout all England, except upon the seashore.[1]

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[1] Magna Carta, clause 33 (as translated in Thorme, Kurland, Dunham & Jennings, The Great Charter (1965).

The English courts interpreted this clause as prohibiting all obstructions to navigation "so as to clear the streams for the free passage of both people and fish."

During the period of economic and political gestation that followed the signing of the Magna Carta, the jus publicum concept redeveloped slowly, possibly due, in part, to the great abundance of natural resources available in relation to the very limited needs of a sparsely populated agrarian society. At the time of the American Revolution, however, the state of the jus publicum (currently referred to as the public trust doctrine) in England had seemingly undergone an expansive transformation.

> "[A]lthough the king is the owner of this great coast... yet the common people of England have, regularly, a liberty of fishing in the sea, and creeks and arms thereof, as a public common of piscary, and may not, without injury to their right, be restrained of it, unless in such places...where either the king or some particular subject hath gained a propriety exclusive of that common liberty."[2]

Furthermore, although such a "propriety exclusive of that common liberty" could have been obtained by ancient royal grant, the King, since the signing of the Magna Carta, did not have the right "to grant to a subject a portion of the soil covered by the navigable waters of the kingdom, so as to give him an immediate and exclusive right of fishery..."

The American Revolution resulted in the several states acquiring title to all those lands previously held by the King of England, including tidelands held by the King subject to the public trust doctrine. The question naturally arose: How would such an accession to the title to these tidelands by the newly formed states affect that concept? In 1842, the Supreme Court in Martin v. Waddell[3] resolved this issue, concluding that

> when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the

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[2]Martin v. Waddell, 41 U.S. (16 Pet.) 367, 412 (1842), quoting Hale, De Juris Maris (1787).

[3]41 U.S. (16 Pet.) 367 (1842).

> soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government.[4]

Although it was well settled in England that the King could convey tidelands, such conveyances were always held to be subject to the public trust.

There are several excellent works that explore the development of the public trust doctrine. Among them are: Comment, "The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine," 79 Yale L. J. 762, 763-74 (1970). Also see Agnello, "Non-Resident Restrictions in Municipally Owned Beaches: Approaches to the Problem," 10 Colum. J. of Law & Social Prob. 177, 192-197 (1974); David, "The New York Law of the Foreshore at the Beginning of the 18th Century," 11 Cornell L. Q. 209 (1926); Parsons, "Public and Private Rights in the Foreshore," 22 Colum. L. Rev. 706 (1922); Tillinghast, "Tide-Flowed Lands and Riparian Rights in the United States," 18 Harv. L. Rev. 341 (1905); Note, "Tideland Ownership--Time for Reform," 36 U. Cin. L. Rev. 121, 121-27 (1967).

II THE PUBLIC TRUST DOCTRINE IN THE UNITED STATES SUPREME COURT

SHIVELY v. BOWLBY
152 U.S. 1 (1894)

Mr. Justice Gray, after stating the case, delivered the opinion of the court.

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[4] Id. at 410.

This case concerns the title in certain lands below high water mark in the Columbia River in the State of Oregon....

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The only matter adjudged was upon the counter-claim. The judgment against its validity proceeded upon the ground that the grant from the United States upon which it was founded passed no title or right, as against the subsequent deeds from the State, in lands below high water mark. This is a direct adjudication against the validity of a right or privilege claimed under a law of the United States, and presents a Federal question within the appellate jurisdiction of this court....

It was argued for the defendants in error that the question presented was a mere question of construction of a grant bounded by tide water, and would have been the same as it is if the grantor had been a private person. But this is not so. The rule of construction in the case of such a grant from the sovereign is quite different from that which governs private grants. The familiar rule and its chief foundation were felicitously expressed by Sir William Scott: "All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives and rights and emoluments of the Crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away." The Rebeckah, 1 C. Rob. 227, 230....

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By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects. Therefore the title, jus privatum, in such lands, as of waste and unoccupied lands, belongs to the King as the sovereign; and the dominion thereof, jus publicum, is vested in him as the representative of the nation and for the public benefit.

The great authority in the law of England upon this subject is Lord Chief Justice Hale, whose authorship of the treatise De Jure Maris, sometimes questioned, has been put beyond doubt by recent researches. Moore on the Foreshore, (3d ed.) 318, 370, 413.

In that treatise, Lord Hale, speaking of "the King's right of propriety or ownership in the sea and soil thereof" within his jurisdiction, lays down the following propositions: "The right of fishing in this sea and the creeks and arms thereof is originally lodged in the Crown, as the right of depasturing is originally lodged in the owner of the waste whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river." "But though the King is the owner of this great waste, and as a consequent of his propriety hath the primary right of fishing in the sea and the creeks and arms thereof; yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a public common of piscary, and may not without injury to their right be restrained of it, unless in such places, creeks or navigable rivers, where either the King or some particular subject hath gained a propriety exclusive of that common liberty." "The shore is that ground that is between the ordinary high water and low water mark. This doth prima facie and of common right belong to the King, both in the shore of the sea and the shore of the arms of the sea." Hargrave's Law Tracts, 11, 12. And he afterwards explains: "Yet they may belong to the subject in point of propriety, not only by charter or grant, whereof there can be but little doubt, but also by prescription or usage." "But though the subject may thus have the propriety of a navigable river part of a port, yet these cautions are to be added, viz." "2d. That the people have a public interest, a jus publicum, of passage and repassage with their goods by water, and must not be obstructed by nuisances." "For the jus privatum of the owner or proprietor is charged with and subject to that jus publicum which belongs to the King's subjects; as the soil of an highway is, which though in point of property it may be a private man's freehold, yet it is charged with a public interest of the people, which may not be prejudiced or damnified." pp. 25, 36.

So in the second part, De Portibus Maris, Lord Hale says that "when a port is fixed or settled by" "the license or charter of the King, or that which presumes and supplies it, viz. custom and prescription;" "though the soil and franchise or dominion thereof prima facie be in the King, or by

derivation from him in a subject; yet that jus privatum is clothed and superinduced with a jus publicum, wherein both natives and foreigners in peace with this kingdom are interested, by reason of common commerce, trade and intercourse." "But the right that I am now speaking of is such a right that belongs to the King jure prerogative, and it is a distinct right from that of propriety; for, as before I have said, though the dominion either of franchise or propriety be lodged either by prescription or charter in a subject, yet it is charged or affected with that jus publicum that belongs to all men, and so it is charged or affected with that jus regium, or right of prerogative of the King, so far as the same is by law invested in the King." Hargrave's Law Tracts, 84, 89.

In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high water mark, is in the King, except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage; and that this title, jus privatum, whether in the King or in a subject, is held subject to the public right, jus publicum, of navigation and fishing....

It is equally well settled that a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below high water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention.

By the law of England, also, every building or wharf erected, without license, below high water mark, where the soil is the King's, is a purpresture, and may, at the suit of the King, either be demolished, or be seized and rented for his benefit, if it is not a nuisance to navigation. Lord Hale, in Hargrave's Law Tracts, 85; Mitf. Pl. (4th ed.) 145 [Blundell v. Cutterall, 5 B. & Ald. 268, 298, 305]

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The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes or usages of the several Colonies and States, or by the Constitution and laws of the United States.

The English possessions in America were claimed by right of discovery. Having been discovered by subjects of the King of England, and taken possession of in his name, by his authority or with his assent, they were held by the King as

the representative of and in trust for the nation; and all vacant lands, and the exclusive power to grant them, were vested in him. The various charters granted by different monarchs of the Stuart dynasty for large tracts of territory on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under tide waters. And upon the American Revolution, all the rights of the Crown and of Parliament vested in the several States, subject to the rights surrendered to the national government by the Constitution of the United States.

The leading case in this court, as to the title and dominion of tide waters and of the lands under them, is Martin v. Waddell, (1842,)....

It was in giving the reasons for holding that the royal charters did not sever the soil under navigbble waters, and the public right of fishing, from the powers of government, and in speaking of the effect which grants of the title in the sea shore to others than the owner of the upland might have, not upon any peculiar rights supposed to be incident to his ownership, but upon the public and common rights in, and the benefits and advantages of, the navigable waters, which the colonists enjoyed "for the same purposes, and to the same extent, that they had been used and enjoyed for centuries in England, and which every owner of the upland therefore had in common with all other persons, that Chief Justice Taney, in the passage relied on by the plaintiff in error, observed: "Indeed, it could not well have been otherwise; for the men who first formed English settlements could not have been expected to encounter the many hardships that unavoidably attended their emigration to the New World, and to people the banks of its bays and rivers, if the land under the water at their very doors was liable to immediate appropriation by another, as private property; and the settler upon the fast land thereby excluded from its enjoyment, and unable to take a shell fish from its bottom, or fasten there a stake, or even bathe in its waters, without becoming a trespasser upon the rights of another." 16 Pet. 414.

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The governments of the several Colonies, with a view to induce persons to erect wharves for the benefit of navigation and commerce, early allowed to the owners of lands bounding on tide waters greater rights and privileges in the shore below high water mark, than they had in England. But the nature and degree of such rights and privileges differed in

the different Colonies, and in some were created by statute, while in others they rested upon usage only.

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[T]he laws of the original States shows that there is no universal and uniform law upon the subject; but that each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as is considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one State to cases arising in another.

The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands below the high water mark, within their respective jurisdictions.

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...Congress has never undertaken by general laws to dispose of such lands. And the reasons are not far to seek.

As has been seen, by the law of England, the title in fee, or jus privatum, of the King or his grantee was, in the phrase of Lord Hale, "charged with and subject to that jus publicum which belongs to the King's subjects," or as he elsewhere puts it, "is clothed and superinduced with a jus publicum, wherein both natives and foreigners in peace with this kingdom are interested by reason of common commerce, trade and intercourse." Hargrave's Law Tracts, 36, 84. In the words of Chief Justice Taney, "the country" discovered and settled by Englishmen "was held by the King in his public and regal character as the representative of the nation, and in trust for them;"and the title and the dominion of the tide waters and of the soil under them, in each colony, passed by the royal charter to the grantees as "a trust for the common use of the new community about to be established;" and, upon the American Revolution, vested absolutely in the people of each state"for their own common use, subject only to the rights since surrendered by the Constitution to the general government." Martin v. Waddell, 16 Pet. 367, 409-411. As observed by Mr. Justice Curtis, "This soil is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights." Smith v. Maryland, 18 How. 71, 74. The title to the shore and lands under tide water, said Mr. Justice Bradley, "is regarded as incidental to the sovereignty of the State--a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery." Hardin v. Jordan, 140 U.S. 371, 381. And the Territories acquired by

Congress, whether by deed of cession from the original States, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify it, of being admitted into the Union as States, upon an equal footing with the original States in all respects; and the title and dominion of the tide waters and the lands under them are held by the United States for the benefit of the whole people, and, as this court has often said, in cases above cited, "in trust for the future States." Pollard v. Hagan, 3 How. 212, 221, 222.

The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older States in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State, after it shall have become a completely organized community.

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The conclusions from the considerations and authorities above stated may be summed up as follows:

Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore the title and the control of them are vested in the sovereign for the benefit of the whole people.

At common law, the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation.

Upon the settlement of the Colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution to the United States.

Upon the acquisition of a Territory by the United States, whether by cession from one of the States, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several States to be ultimately created out of the Territory.

The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high water mark, therefore,are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution.

The United States, while they hold the country as a Territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters. But they have never done so by general laws; and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the Territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the States, respectively, when organized and admitted into the Union.

Grants by Congress of portions of the public lands within a Territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high water mark, and do not impair the title and dominion of the future State when created; but leave the question of the use of the shores by the owners of uplands to the sovereign control of each State, subject only to the rights vested by the Constitution in the United States.

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ILLINOIS CENTRAL RAILROAD v. ILLINOIS
146 U.S. 387 (1892)

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Mr. Justice Field delivered the opinion of the court.

This suit was commenced on the 1st of March, 1883, in a Circuit Court of Illinois, by an information or bill in equity, filed by the Attorney General of the State, in the name of its people against the Illinois Central Railroad Company, a corporation created under its laws, and against the city of Chicago. The United States were also named as a party defendant, but they never appeared in the suit, and it was impossible to bring them in as a party without their consent. The alleged grievances arose solely from the acts and claims of the railroad company, but the city of Chicago was made a defendant because of its interest in the subject of the litigation. The railroad company filed its answer in the state court at the first term after the commencement of the suit, and upon its petition the case was removed to the Circuit Court of the United States for the Northern District of Illinois. In May following the city appeared to the suit and filed its answer, admitting all the allegations of fact in the bill. A subsequent motion by the complainant to remand the case to the state court was denied. The pleadings were afterwards altered in various particulars. An amended information or bill was filed by the Attorneys General, and the city filed a cross-bill for affirmative relief against the State and the company. The latter appeared to the cross-bill and answered it, as did the Attorney General for the State. Each party has prosecuted a separate appeal.

The object of the suit is to obtain a judicial determination of the title of certain lands on the east or lake front of the city of Chicago, situated between the Chicago River and Sixteenth street, which have been reclaimed from the waters of the lake, and are occupied by the tracks, depots, warehouses, piers and other structures used by the railroad company in its business; and also of the title claimed by the company to the submerged lands, constituting the bed of the lake, lying east of its tracks, within the corporate limits of the city, for the distance of a mile, and between the south line of the south pier near Chicago River extended eastwardly, and a line extended, in the same direction, from the south line of lot 21 near the company's round-house and machine shops. The determination of the title of the company will involve a consideration of its right to construct, for its own business, as well as for public convenience, wharves, piers

and docks in the harbor.

We agree with the court below that, to a clear undertstnding of the numerous questions presented in this case, it was necessary to trace the history of the title to the several parcels of land claimed by the company. And the court, in its elaborate opinion, (33 Fed. Rep. 730,) for that purpose referred to the legislation of the United States and of the State, and to ordinances of the city and proceedings thereunder, and stated, with great minuteness of detail, every material provision of law and every step taken. We have with great care gone over the history detailed and are satisfied with its entire accuracy. It would, therefore, serve no useful purpose to repeat what is, in our opinion, clearly and fully narrated. In what we may say of the rights of the railroad company, of the State, and of the city, remaining after the legislation and proceedings taken, we shall assume the correctness of that history.

The State of Illinois was admitted into the Union in 1818 on an equal footing with the original States in all respects. ...There can be no distinction between the several States of the Union in the character of the jurisdictions, sovereignty and dominion which they may possess and exercise over persons and subjects within their respective limits. The boundaries of the State were prescribed by Congress and accepted by the State in its original Constitution. They are given in the bill. It is sufficient for our purpose to observe that they include within their eastern line all that portion of Lake Michigan lying east of the main land of the State and the middle of the lake south of latitude forty-two degrees and thirty minutes.

It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. [Pollard's Leesee v. Hagan, 3 How. 212]

The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes over which

is conducted an extended commerce with different States and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes....

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The Great Lakes are not in any appreciable respect affected by the tide, and yet on their waters, as said above, a large commerce is carried on, exceeding in many instances the entire commerce of States on the borders of the sea. When the reason of the limitation of admiralty jurisdiction in England was found inapplicable to the condition of navigable waters in this country, the limitation and all its incidents were discarded. So also, by the common law, the doctrine of the dominion over and ownership by the crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, tide waters and navigable waters, as already said, being used as synonymous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide. We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations. Upon that theory we shall examine how far such dominion, sovereignty and proprietary right have been encroached upon by the railroad company, and how far that company had, at the time, the assent of the State to such encroachment, and also the validity of the claim which the company asserts of

a right to make further encroachments thereon by virtue of a grant from the State in April, 1869.

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We do not deem it material, for the determination of any questions presented in this case, to describe in detail the extensive works of the railroad company under the permission given to locate its road within the city by the ordinance. It is sufficient to say that when this suit was commenced it had reclaimed from the waters of the lake a tract, two hundred feet in width, for the whole distance allowed for its entry within the city, and constructed thereon the tracks needed for its railway, with all the guards against danger in its approach and crossings as specified in the ordinance, and erected the designated breakwater beyond its tracks on the east, and the necessary works for the protection of the shore on the west. Its works in no respect interfered with any useful freedom in the use of the waters of the lake for commerce, foreign, interstate or domestic. They were constructed under the authority of the law by the requirement of the city as a condition of its consent that the company might locate its road within its limits, and cannot be regarded as such an encroachment upon the domain of the State as to require the interposition of the court for their removal or for any restraint in their use.

The railroad company never acquired by the reclamation from the waters of the lake of the land upon which its tracks are laid, or by the construction of the road and works connected therewith, an absolute fee in the trace reclaimed... The act incorporating the company only granted to it a right of way over the public lands for its use and control, for the purpose contemplated, which was to enable it to survey, locate, and construct and operate a railroad. All lands, waters, materials and privileges belonging to the State were granted solely for that purpose. It did not contemplate, much less authorize, any diversion of the property to any other purpose. The use of it was restricted to the purpose expressed....

We shall hereafter consider what rights the company acquired as a riparian owner from its acquisition of title to lands on the shore of the lake, but at present we are speaking only of what rights it acquired from the reclamation of the tract upon which the railroad and the works in connection with it are built. The construction of a pier or the extension of any land into navigable waters for a railroad or other purposes, by one not the owner of lands on the shore, does

not give the builder of such pier or extension, whether an individual or corporation, any riparian rights. Those rights are incident to riparian ownership. They exist with such ownership and pass with the transfer of the land. And the land must not only be contiguous to the water, but in contact with it. Proximity without contact is insufficient. The riparian right attaches to land on the border of navigable water without any declaration to that effect from the former owner, and its designation in a conveyance by him would be surplusage.

The riparian proprietor is entitled, among other rights, to access to the navigable part of the water on the front of which lies his land, and for that purpose to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may prescribe for the protection of the rights of the public....

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We proceed to consider the claim of the railroad company to the ownership of submerged lands in the harbor, and the right to construct such wharves, piers, docks and other works therein as it may deem proper for its interest and business. The claim is founded upon the third section of the act of the legislature of the State passed on the 16th of April, 1869....

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The section in question has two objects in view: one was to confirm certain alleged rights of the railroad company under the grant from the State in its charter and under and "by virtue of its appropriation, occupancy, use and control, and the riparian ownership incident" thereto, in and to the lands submerged or otherwise lying east of a line parallel with and four hundred feet east of the west line of Michigan Avenue, in fractional sections ten and fifteen. The other object was to grant to the railroad company submerged lands in the harbor.

The confirmation made, whatever the operation claimed for it in other respects, cannot be invoked so as to extend the riparian right which the company possessed, from its ownership of lands in sections ten and fifteen on the shore of the lake. Whether the piers or docks constructed by it, after the passage of the act of 1869, extend beyond the point of navigability in the waters of the lake, must be the subject of judicial inquiry upon the execution of this decree in the court below. If it be ascertained upon such inquiry and determined

that such piers and docks do not extend beyond the point of practicable navigability, the claim of the railroad company to their title and possession will be confirmed; but if they or either of them are found on such inquiry to extend beyond the point of such navigability, then the State will be entitled to a decree that they, or the one thus extended, be abated and removed to the extent shown, or for such other disposition of the extension as, upon the application of the State and the facts established, may be authorized by law.

As to the grant of the submerged lands, the act declares that all the right and title of the State in and to the submerged lands, constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the company for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastwardly from the south line of lot twenty-one, south of and near to the round-house and machine shops of the company "are granted in fee to the railroad company, its successors and assigns." the grant is accompanied with a proviso that the fee of the lands shall be held by the company in perpetuity, and that it shall not have the power to grant, sell or convey the fee thereof. It also declares that nothing therein shall authorize obstructions to the harbor or impair the public right of navigation, or be construed to exempt the company from any act regulating the rates of wharfage and dockage to be charged in the harbor.

This clause is treated by the counsel of the company as an absolute conveyance to it of title to the submerged lands, giving it as full and complete power to use and dispose of the same, except in the technical transfer of the fee, in any manner it may choose, as if they were uplands, in no respect covered or affected by navigable waters, and not as a license to use the lands subject to revocation by the State. Treating it as such a conveyance, its validity must be determined by the consideration whether the legislature was competent to make a grant of the kind.

The act, if valid and operative to the extent claimed, placed under the control of the railroad company nearly the whole of the submerged lands of the harbor, subject only to the limitations that it should not authorize obstructions to the harbor or impair the public right of navigation, or exclude the legislature from regulating the rates of wharfage or dockage to be charged. With these limitations the act put it in the power of the company to delay indefinitely the improvement of the harbor, or to construct as many docks, piers and wharves

and other works as it might choose, and at such positions in the harbor as might suit its purposes, and permit any kind of business to be conducted thereon, and to lease them out on its own terms, for indefinite periods. The inhibition against the technical transfer of the fee on any portion of the submerged lands was of little consequence when it it could make a lease for any period and renew it at its pleasure. And the inhibitions against aurhorizing obstructions to the harbor and impairing the public right of navigation placed no impediments upon the action of the railroad company which did not previously exist. A corporation created for one purpose, the construction and operation of a railroad between designated points, is, by the act, converted into a corporation to manage and practically control the harbor of Chicago, not simply for its own purpose as a railroad corporation, but for its own profit generally.

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The question, therefore, to be considered is whether the legislature was competent to thus deprive the State of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters; or, in other words, whether the railroad corporation can hold the lands and control the waters by the grant, against any future exercise of power over them by the State.

That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the State holds in lands intended for sale, It is different from the title which the United States hold in the public lands which are open to preemption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them,and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition, is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other

structures in aid of commerce, and grant of parcels which, being occupied, do not substantially impair the public interest in and lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The State can no more abdicate the trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In

the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State.

The harbor of Chicago is of immense value to the people of the State of Illinois in the facilities it affords to its vast and constantly increasing commerce; and the idea that its legislature can deprive the State of control over its bed and waters and place the same in the hands of a private corporation created for a different purpose, one limited to transportation of passengers and freight between distant points and the city, is a proposition that cannot be defended.

The area of the submerged lands proposed to be ceded by the act in question to the railroad company embraces something more than a thousand acres, being, as stated by counsel, more than three times the area of the outer harbor, and not only including all of that harbor but embracing adjoining submerged lands which will, in all probability, be hereafter included in the harbor. It is as large as that embraced by all the merchandise docks along the Thames at London; is much larger than that included in the famous docks and basins at Liverpool; is twice that of the port of Marseilles, and nearly if not quite equal to the pier area along the water front of the city of New York....It is hardly conceivable that the legislature can divert the State of the control and management of this harbor and vest it absolutely in a private corporation. Surely an act of the legislature transferring the title to its submerged lands and the power claimed by the railroad company, to a foreign State or nation would be repudiated, without hesitation, as a gross perversion of the trust over the property under which it is held. So would a similar transfer to a corporation of another State. It would not be listened to that the control and management of the harbor of that great city--a subject of concern to the whole people of the State--should thus be placed elsewhere than in the State itself. All the objections which can be urged to such attempted transfer may be urged to a transfer to a private corporation like the railroad company in this case.

Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time. Undoubtedly there may be expenses incurred in improvements made under such a grant which the State ought to pay; but, be that as it may, the power to resume the trust whenever the State judges best is, we think, incontrovertible. The position advanced by the railroad company in support of its claim to the ownership of the submerged lands and the right to the erection of wharves, piers and docks at its pleasure, or for its business in the harbor of Chicago, would place every harbor in the country at the mercy of a majority of the legislature of the State in which the harbor is situated.

We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of any private corporation. But the decisions are numerous which declare that such property is held by the State, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State. The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.

This follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested. As said by Chief Justice Taney, in Martin v. Waddell, 16 Pet. 367, 410: "When the Revolution took place the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government." In Arnold v. Mundy, 1 Halsted, 1, which is cited by this court in Martin v. Waddell, 16 Pet. 418, and spoken of by Chief Justice Taney as entitled to great weight, and in which the decision was made "with great deliberation and research," the Supreme Court of New Jersey comments upon the rights of the State in the bed of navigable waters, and, after observing that the power exercised by the State over the lands and waters is nothing more than what is called the jus regium, the right of regulating, improving and securing

them for the benefit of every individual citizen, adds: "The sovereign power, itself, therefore, cannot consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the State, diversing all the citizens of their common right. It would be a grievance which never could be long borne by a free people." Necessarily must the control of the waters of a State over all lands under them pass when the lands are conveyed in fee to private parties, and are by them subjected to use.

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Many other cases might be cited where it has been decided that the bed or soil of navigable waters is held by the people of the State in their character as sovereign in trust for public their common use and of common right as an incident to their sovereignty. The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day. Every legislature must at the time of its existence, exercise the power of the State in the execution of the trust devolved upon it. We hold, therefore, that any attempted cession of the ownership and control of the State in and over the submerged lands in Lake Michigan, by the act of April 16, 1869, was inoperative to affect, modify or in any respect to control the sovereignty and dominion of the State over the lands, or its ownership thereof, and that any such attempted operation of the act was annulled by the repealing act of April 15, 1873, which to that extent was valid and effective. There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it.

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In People v. New York and Staten Island Ferry Co., 68 N.Y. 71, 76, the Court of Appeals of New York said:

"The title of lands under tide waters, within the realm of England, were, by the common law, deemed to be vested in the king as a public trust, to subserve and protect the public right to use them as common highways for commerce, trade and intercourse. The king, by virtue of his proprietary interest could grant the soil so that it should become private property, but his grant was subject to the paramount right of public use of navigable waters, which he could neither destroy nor abridge. In every such grant there was an implied

reservation of the public right, and so far as it assumed to interfere with it, or to confer a right to impede or obstruct navigation, or to make an exclusive appropriation of the use of navigable waters, the grant was void. In his treatise De Jure Maris (p. 22) Lord Hale says: 'The jus privatum that is acquired by the subject, either by patent or prescription, must not prejudice the jus publicum, wherewith public rivers and the arms of the sea are affected to public use;' and Mr. Justice Best, in Blundell v. Catterall, 5 B. & A. 268, in speaking of the subject, says: 'The soil can only be transferred subject to the public trust, and general usage shows that the public right has been excepted out of the grant of the soil.' . . .

"The principle of the common law to which we have adverted is founded upon the most obvious principles of public policy. The sea and navigable rivers are natural highways, and any obstruction to the common right, or exclusive appropriation of their use, is injurious to commerce, and if permitted at the will of the sovereign, would be very likely to end in materially crippling, if not destroying it. The laws of most nations have sedulously guarded the public use of navigable waters within their limits against infringement, subjecting it only to such regulation by the State, in the interest of the public, as is deemed consistent with the preservation of the public right."

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Mr. Justice Shiras, with whom concurred Mr. Justice Gray and Mr. Justice Brown, dissenting.

That the ownership of a State in the lands underlying its navigable waters is as complete, and its power to make them the subject of conveyance and grant is as full, as such ownership and power to grant in the case of the other public lands of the State, I have supposed to be well settled.

Thus it was said in Weber v. Harbor Commissioners, 18 Wall. 57, 65, that "upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the general government."

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The opinion of the majority, if I rightly apprehend it, likewise concedes that a State does possess the power to grant the rights of property and possession in such lands to private parties, but the power is stated to be, in some way restricted to "small parcels, or where such parcels can be disposed of without, detriment to the public interests in the lands and waters remaining." But it is difficult to see how the validity of the exercise of the power, if the power exists, can depend upon the size of the parcel granted, or how, if it be possible to imagine that the power is subject to such a limitation, the present case would be affected, as the grant in question, though doubtless a large and valuable one, is, relatively to the remaining soil and waters, if not insignificant, yet certainly, in view of the purposes to be effected, not unreasonable. It is a matter of common knowledge that a great railroad system like that of the Illinois Central Railroad Company, requires an extensive and constantly increasing territory for its terminal facilities.

It would seem to be plain that, if the State of Illinois has the power, by her legislature, to grant private rights and interests in parcels of soil under her navigable waters, the extent of such a grant and its effect upon the public interests in the lands and waters remaining are matters of legislative discretion.

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The able and interesting statement, in the opinion of the majority, of the rights of the public in the navigable waters, and of the limitation of the powers of the State to part with its control over them, is not dissented from. But its pertinency in the present discussion is not clearly seen. It will be time enough to invoke the doctrine of the inviolability of public rights when and if the railroad company shall attempt to disregard them.

Should the State of Illinois see, in the great and unforeseen growth of the city of Chicago and of the lake commerce, reason to doubt the prudence of her legislature in entering into the contract created by the passage and acceptance of the act of 1869, she can take the rights and property of the railroad company in these lands by a constitutional condemnation of them. So, freed from the shackles of an undesirable contract, she can make, as she expresses in her bill the desire to do, a "more advantageous sale of disposition to other parties," without offence to the law of the land.

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The Chief Justice, having been of counsel in the court below, and Mr. Justice Blatchford, being a stockholder in the Illinois Central Railroad Company, did not take any part in the consideration of decision of these cases.

III SCOPE OF THE PUBLIC TRUST DOCTRINE

The original formulations of the public trust doctrine say it applies to the "tidelands." Therefore the question arises as to whether the doctrine might apply to dry-sand areas, which are occasionally covered by the tides, or only to the wet-sands which are daily covered by the tides. The courts have generally restricted it to the latter.

BORAX CONSOLIDATED, LTD., v. LOS ANGELES, 296 U.S. 10 (1935).

Mr. Chief Justice Hughes delivered the opinion of the Court.

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Petitioners claim under a federal patent which, according to the plat, purported to convey land bordering on the Pacific Ocean. There is no question that the United States was free to convey the upland, and the patent affords no ground for holding that it did not convey all the title that the United States had in the premises. The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law. Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law. [Shively v. Bowlby, supra, at 40.]

The tideland extends to the high water mark. Hardin v. Jordan, supra; Shively v. Bowlby, supra; McGilvra v. Ross, 215 U.S. 70, 79. This does not mean, as petitioners contend,

a physical mark made upon the ground by the waters; it means the line of high water as determined by the course of the tides. By the civil law, the shore extends as far as the highest waves reach in winter. Inst. lib. 2, tit. 1, § 3; Dig. lib. 50, tit. 16, § 112. But by the common law, the shore "is confined to the flux and reflux of the sea at ordinary tides." Blundell v. Catterall, 5 B.& A. 268, 292. It is the land "between ordinary high and low-water mark, the land over which the daily tides ebb and flow. When, therefore, the sea, or a bay, is named as a boundary, the line of ordinary high-water mark is always intended where the common law prevails." United States v. Pacheco, 2 Wall. 587, 590.

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The subject was thoroughly considered in the case of Attorney General v. Chambers, 4 De G.M. & G. 206. In that case Lord Chancellor Cranworth invited..."[experts] to assist in the determination of the question as to the extent of the right of the Crown to the seashore..."

Having received this opinion, the Lord Chancellor stated his own. He thought that the authorities had left the question "very much at large." Looking at "the principle of the rule which gives the shore to the Crown," and finding that principle to be that "it is land not capable of ordinary cultivation or occupation, and so is in the nature of unappropriated soil," the Lord Chancellor thus stated his conclusion: "Lord Hale gives as his reason for thinking that lands only covered by the high spring-tides do not belong to the Crown, that such lands are for the most part dry and maniorable; and taking this passage as the only authority at all capable of guiding us, the reasonable conclusion is that the Crown's right is limited to land which is for the most part not dry or maniorable. The learned Judges whose assistance I had in this very obscure question point out that the limit indicating such land is the line of the medium high tide between the spring and the neaps. All land below that line is more often than not covered at high water, and so may justly be said, in the language of Lord Hale, to be covered by the ordinary flux of the sea. This cannot be said of any land above that line." The Lord Chancellor therefore concurred with the opinion of the judges "in thinking that the medium line must be treated as bounding the right of the Crown." Id., p. 217.

In the following selection, Professor Corker examines the issue of setting the landward boundary of the wet-sand area in the context of two judicial resolutions of the question--the Washington court's opinion in Hughes v. State [67 Was.2d 799, 410 P.2d 20 (1966)] and the Supreme Court decision of Borax Consolidated Ltd. v. City of Los Angeles [296 U.S. 10 (1935)].

Corker,"Where Does the Beach Begin, and to What Extent Is this a Federal Question,"42 Wash. L. Rev. 33, 43-71 (1966)*

THE VEGETATION LINE ISSUE

The vegetation line, selected in Hughes, and the line of mean high tide, selected in Borax and Samson Johns, by no means exhaust the possibilities for determining the upland-tideland boundary. As a practical matter, however, the Hughes definition is likely to settle the matter in Washington unless the United States Supreme Court, on the basis of Borax, rejects Hughes. [This was subsequently done in Hughes v. Washington, 389 U.S. 290 (1967)]. Here, we propose to identify as precisely as possible what each court decided, and to compare the two rules, assuming that each court properly exercised its jurisdiction.

The Hughes Decision

An initial problem with the Washington court's Hughes decision is to identify what the court decided with respect to the vegetation line issue. The opinion is murky because sometimes the court uses the terms "mean high tide" and "ordinary high tide" as equivalents, sometimes in contrast, and sometimes with unascertainable meanings.

The Washington court said that Borax is not "apposite" for the following reason:[1]

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[1] 67 Wash. Dec.2d at 802, 410 P.2d at 29. (Second emphasis added.)

> Borax...establishes the rule that mean high tide (the average height of all high waters through a complete tidal cycle) is the criterion for "ordinary high water." The case does not involve the question of accretion.

Although this distinguishes Borax on the issue Borax does not directly involve, it ignores Borax on the issue which Borax purports to decide--the vegetation line issue.

Reading only the opinion of the Washington court, and neither the Borax opinion nor the Hughes dissent, one might suppose that the Washington court had followed Borax. The Hughes opinion concludes by stating its holding in terms of "mean high tide":[2]

> In conclusion, we hold that the state acquired ownership of tidelands in actual propriety November 11, 1889. The property line is the line of ordinary high tide, which we equate to mean high tide on that date.

The impression that the Washington court intended to define "mean high tide" precisely as Borax had defined the term, except for the matter of dates (1889 or the present), is fortified by other passages in the opinion. The opinion in Hughes quotes this passage from the same United States Coast and Geodetic Survey publication which the Borax court employed in an earlier edition:[3]

> In view of the variations to which the height of high water is subject, mean high water [tide] at any place may be defined simply as the average height of high waters at that place over a period of 19 years. [Bracketed word supplied by the court.]

Immediately following this quotation from the Coast and Geodetic Survey, the court in Hughes identified the trial court's error:[4]

> In its finding of fact, the trial court stated: "mean high tide of the Pacific Ocean is defined as the average

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[2] Id. at 803, 410 P.2d at 29. (Emphasis added.)

[3] 67 Wash. Dec. 2d at 797, 410 P.2d at 26. The court's quotation is from Marmer, Dep't Commerce, Coast & Geodetic Survey, Special Pub. No. 135, p. 86 (rev. ed. 1951). Both the first edition (1927) and the second edition of this work are by H. A. Marmer, Assistant Chief, Division of Tides and Currents, U.S. Coast and Geodetic Survey. The first edition provided the concepts employed by the court in Borax, 296 U.S. at 26-27.

[4] 67 Wash.Dec.2d at 797, 410 P.2d at 26. (Emphasis by the court).

> elevation of all high tides as observed at a location through a complete tidal cycle of 18.6 years, and the actual western boundary line of plaintiff's property is where that elevation meets the shore as it exists at any particular time."

Since the italics were added by the supreme court, it might appear that only the italicized portion is designated as erroneous.

These passages, particularly when coupled with the court's holding quoted above, seem to indicate that the Coast and Geodetic Survey, the trial court, the United States Supreme Court, and the Washington Supreme Court are all of one mind about the definition of "mean high tide" and its application in determining the boundary between upland and tideland (except as to the matter of date). However, two further passages appear[5] --the first of which immediately follows the quotation of the trial court's finding--which seem to say: (a) that "mean high tide" and "ordinary high tide" are quite different; and (b) that the Washington court chooses the latter over the former.

> Since the line of "mean high tide" is an average over a period of years of the two daily high tides, one being higher than the other, it is apparent that the higher high tide will wash inland from the line of "mean high tide." This is illustrated by an exhibit showing the observed high tide on January 23, 1963 at the point a few feet south of plaintiff's property to have been 130 feet inland from the line of predicted "mean high tide." The difference in elevation was 3 feet. In the instant case, in front of plaintiff's property the distance between the line of "ordinary hide tide" in 1889, as defined by the state, and "mean high tide," as presently determined by the United States Coast and Geodetic Survey and adopted by the trial court, is 561 feet; the difference in elevation is 14.25 feet....
>
> ***
>
> "Mean high tide" is measurable and determinable.
>
> On the other hand, the "line of ordinary high tide" as used in article 17 of the constitution is not a term of technical exactness. It is indefinite at best and an oversimplification of a phenomenon inherently complex and variable. In the absence of any indication to the contrary, we deem the work "ordinary" to be used in its everyday

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[5] Ibid. (Emphasis by the court).

> context. The "line of ordinary high tide" is not to be fixed by singular, uncommon, or exceptionally high tides, but by the regular, normal, customary, average, and usual high tides. One cannot sit and watch the tide reach its stand at different elevations on each turn as it ebbs and floods without realizing that a line to be fixed by it must be based upon an average. Thus the line of "ordinary high tide" is the average of all high tides during the tidal cycle.

The court concluded that the boundary is the vegetation line, that "line which the water impressed on the soil by covering it for sufficient periods to deprive the soil of vegetation." The relationship of this line to the lines of ordinary and mean high tide can be discovered only by resort to the sketch (reproduced on the following page) which the court helpfully provides, and the explanation found in the statement of facts in the Attorney General's brief.

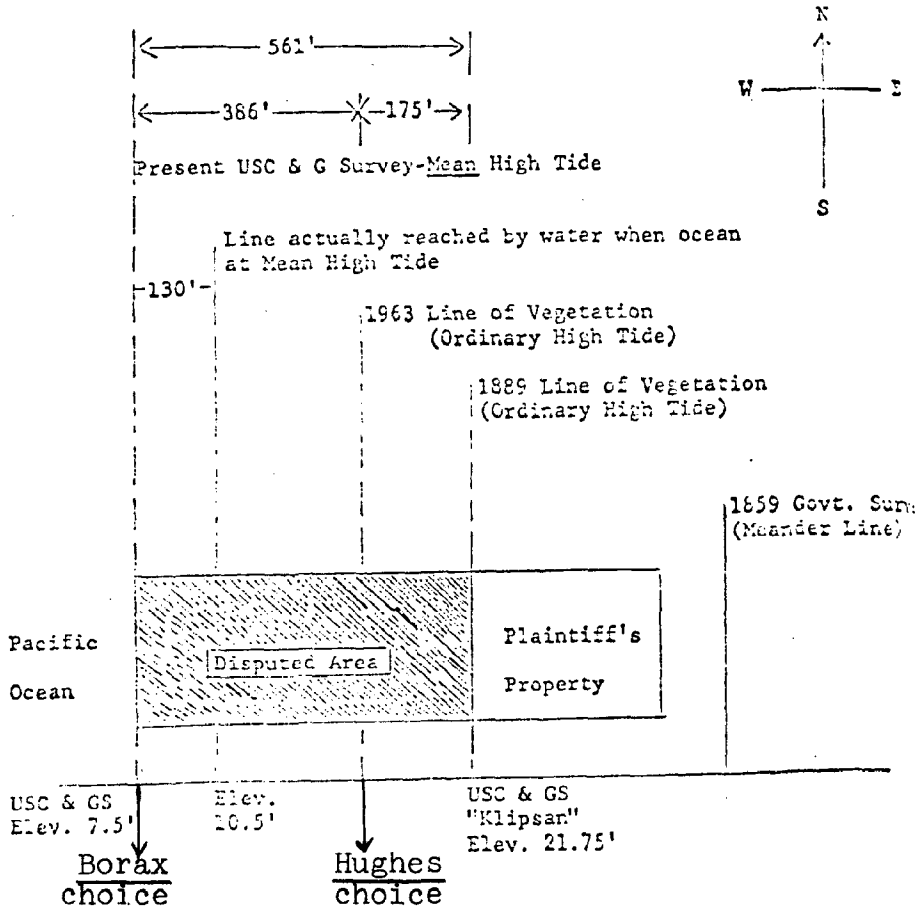
A total of 561 feet separates the line which Mrs. Hughes sought to establish and the line accepted by the court....

The 386 feet is the distance that separates a boundary established by the Borax rule, adopted from the Coast and Geodetic Survey, and a boundary that might be established by the Washington court's vegetation line rule, were there no accretion issue in the case. Regrettably, the court leaves us with a wholly inadequate explanation of what accounts for this difference of 386 feet. [See diagram on next page.]

The difference apparently consists of two components: (1) 130 feet is the difference between mean high tide, as defined in Borax, and the line actually reached by the water when the sea is at the mean high tide elevation. In other words, it is the difference between a line established at high tide by the plane surface of a waveless ocean, which does not exist in nature, and the line established by the waves which wash the shore at that elevation, where Mrs. Hughes' real estate is located. (2) The balance of 256 feet may be accounted for by a vegetation line determined by waves from tides which are higher than the 18.6 year average. This is not necess rily the average of the higher of the two daily high tides, but is fixed by the biological wisdom of plants which have not deposed to specify the precise frequency of intensity of sea water irrigation which makes the habitat unsatisfactory.

The writer has observed what is locally described as the "grass line" at the location of the Hughes property. It can be more appropriately depicted on a large scale map by heavy crayon or water color brush than by the fine line of a pen.

Ascertaining the Landward Boundary of the Wet-sands



In each instance, the state prevailed; in none was an appeal taken. Concerning their determinations of the vegetation line, the Washington Supreme Court tells us:

> Following the decision of this court in Harkins v. Del Pozzi, [citation omitted] the superior court judgments entered thereafter further described the 1889 line as the "line which the water impresses on the soil by covering it for sufficient periods to deprive the soil of vegetation." This added nothing to the line which had already been surveyed and established.

Superior court judgments, unreported and unappealed, are not usually given great weight as judicial precedents. The Hughes court's use of them may be explained by the court's indication that the judgments merely started to use a new explanation, beginning in 1957, to describe the determination of "the line which had already been surveyed and established." The weakness and confusion of the reported precedents, however, lead one to wonder what the Hughes court thought had been the basis for establishing the line.

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Hughes decided that the boundary is the line of vegetation as of 1889. Why this line was chosen remains unclear. How it is to be determined is even less clear. Although the court quoted the precise legal description of the boundary line in front of Mrs. Hughes' property, it leaves us with no idea how to find similar boundaries in the rest of the state. By contrast, the Borax opinion not only defined the boundary line, but also leads us to the Coast and Geodetic Survey publications, which provide a method for locating the line upon the ground applicable to all tidelands.

The Borax Decision

Borax arose when the City of Los Angeles, grantee of tidelands by acts of the California legislature, sued the Borax Company in a state court to quiet the city's title to tideland adjacent to Mormon Island, a valuable and litigation-prone bit of real estate in Los Angeles harbor. Borax Company, which deraigned title to the island under a federal patent issued in 1881, removed to the United States District Court....

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[On appeal to the Ninth Circuit (74 F.2d 901, 1935), Judge Wilbur held that the landward boundary of the wet-sand area is that line which] "is the boundary between tillable land or land available for agricultural purposes and land so frequently

A single plant can be uprooted by hand. Whether one can be planted and nurtured at a lower elevation, the writer does not know....

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The court made a substantial attempt to justify its vegetation line formula in terms of judicial precedent. The result of its effort is not impressive. The major reported judicial precedent cited for a vegetation line boundary is Harkins v. Del Pozzi, [50 Wn.2d 237, 310 P.2d 532 (1957)] a casual consideration of the issue at best.

In Del Pozzi, a superior court, whose decision was reversed on other grounds, had made a finding of fact that "the line of ordinary high water, salt water, or line of mean high tide as the same ebbed and flowed" in a particular location was impossible to determine from the time of statehood until 1910, but from 1910 until 1956, the "mean high tide line" had been located along the westerly boundary of a sandspit, "as more particularly shown in Defendant's Exhibit 35."

The Del Pozzi court's quotation of the entire finding was followed by this paragraph:

> No error is assigned to this finding, and hence, for the purpose of this action, the line of ordinary high tide is as established by exhibit No. 35. [Citation omitted] The line of ordinary high tide is that line which the water impresses on the soil by covering it for sufficient periods to deprive the soil of vegetation and destroy its value for agricultural purposes. Driesbach v. Lynch, 71 Idaho 501, 234 P.2d 446 (1951).

If the first quoted sentence is taken at face value--and there is no reason not to do so--the second sentence is unnecessary to the decision and hence dictum. A more serious deficiency is pointed out by Judge Hill's dissenting opinion in Hughes. Driesbach v. Lynch is an Idaho case involving Lake Pend Oreille. It had little to do with tides.

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...[it] is clear that there was no clear and controlling precedent available to the court in Hughes. The reported cases provide little support for the Hughes result. Despite its citation of authority, the court seems to have relied primarily on the boundary established in seventy-three unreported suits, affecting 322 private ownerships, instituted against the state to establish what the court in Hughes describes as "this boundary."

covered by the sea that it is useless for agricultural purposes." Although this would seem to describe a vegetation line, the court decided that the line should be determined by the average of all high tides measured over the 18.6 year cycle, as described in the Coast and Geodetic Survey's Publication No. 135.

The following passage makes it abundantly clear that the court did not mean that the line should be determined by the actual line of vegetation:

> The appellant [city] ...contends for the rule that the boundary line between the tidelands and upland is determined "by definite mark upon the ground which has been left by the tide." This rule as to definite mark is applicable to the highwater line of streams but not to a boundary line of tidewaters.

As support for the decision, but without citation of authority, and we believe contrary to fact, Judge Wilbur wrote: "This mean high tide line is the one usually referred to by the United States government in its patents and in the work of its various departments delimiting the boundary between the upland and the tideland."

From Judge Wilbur's opinion, it is not clear whether the definition of shore line was intended to be read as a pronouncement of federal law or as a restatement and clarification of California law by a former member of California's highest court. When the United States Supreme Court affirmed the Ninth Circuit court's opinion, it affirmed Wilbur's definition of shore line as a pronouncement of federal law.

The Supreme court granted certiorari on petition of the Borax Company. Basically, two issues were presented to the Court:

1. Was the trial court correct in holding that the federal meander line is the boundary of Borax Company's land?
2. If not "is 'ordinary high water mark', which defines the boundary between upland and tideland, determined
   (a) by the physical marks impressed by the waters upon rocks, earth and vegetation; or
   (b) by the line of the neap tides in accordance with the decisions of the California Supreme Court...; or
   (c) by a contour representing the line of mean high tide, which is .8 foot higher than the mean of the neaps."

The major controversy in the Supreme Court, as below, was whether the 1880 survey determined the boundary of the property patented to Borax Company's predecessor in 1881. Our concern

over Borax is with the issue which assumed somewhat secondary importance: What was the boundary if not the meander line established by the survey?

On this issue, the Borax Company urged the Court to reject the mean high tide line adopted by the Ninth Circuit in favor of the lower neap tide line which appeared to be the rule of decision by the California courts. The Borax Company argued strenuously that the Supreme Court's decisions contemporaneous with the 1880 survey also had adopted the neap tide line as the rule of decision.

Alternatively, the Borax Company urged adoption of a vegetation line which, it argued, the evidence placed seaward of the mean high tide line. Federal surveying practice in 1880, Borax contended, would place the survey line at the vegetation line; the two were mutually consistent and below the mean high tide line.

The Supreme Court affirmed Judge Wilbur's decision, holding that...there was no error in the direction to determine the boundary based on mean high tide as described by the United States Coast and Geodetic Survey.

The Court, in an opinion by Chief Justice Hughes, first declared: "The tideland extends to the high water mark." For this proposition the court cited two cases involving inland lakes (one of them non-navigable) and Shively v. Bowlby, involving the Columbia River at Astoria. In Shively, the court had described tidelands as "lands under tidewaters...incapable of cultivation or improvement in the manner of lands above high water mark."

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...Borax prescribed [as the boundary] the average of all high tides measured over an 18.6 year cycle. The reason for its choice may perhaps be found in the convenience and certainty promised by the Coast and Geodetic Survey's technology and publications, but the Court does not tell us.

Unfortunately, the convenience and certainty of the Borax rule did not have an opportunity for demonstration in the aftermath of Borax. On remand, the district court and court of appeals held that a boundary established by estoppel under California law precluded the City of Los Angeles from claiming to the line of mean high tide. Even if estoppel had not been available, however, translation of the Supreme Court's formula to a line upon the ground would have been impossible without further significant refinement of that formula. Refinement has not been provided by the Supreme Court, either in the Borax opinion or since....

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Borax versus Hughes--Which Rule?

Both the Borax rule (followed in Samson Johns) and the Hughes rule are unsatisfactory in terms of fidelity to a principle supporting the rule. Borax follows the Coast and Geodetic Survey's methodology in fixing a boundary which separates the land dry enough to be maniorable from the land not dry enough to be maniorable. The methodology, however, employs a concept of a waveless ocean as fictitious as the legal dogma that any woman may produce children regardless of age and state of health. The Borax rule offers the prospect of greater certainty than a rule that must be adopted to varying conditions of plant life which depend on climate, soil, and countless other factors in addition to the behavior of the sea.

If there is to be a uniform rule, so that a clerk in the Bureau of Land Management in Washington can determine from a document the appropriate legal description of the real estate..., Borax comes much closer to serving the purpose than Hughes. However, Borax fails to distinguish between upland and tideland in terms of the uses to which upland and tideland are put.

The Hughes opinion might have persuasively demonstrated that the vegetation line more faithfully than the mean high tide line applies the criteria which Lord Chancellor Cranworth and the United States Supreme Court agreed should be controlling. Even in terms of certainty, vegetation line appears to be superior in some locations to mean high tide line. One can look at the vegetation and in many instances approximate a line. Not even the Coast and Geodetic Survey can be sure without great effort,as the history of Los Angeles harbor demonstrates, what is tide, what is seiche, and what is the product of a prevailing offshore wind.

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We are, however, dealing with real property titles, an area where precedent and reliance on precedent are more important than in any other area of the law. The Hughes court rested its decision on a rule of property. The difficulty in its decision is not with the concept of a rule of property, but with the materials from which this particular rule was discovered: an administrative decision, contravening the law declared by the Washington Supreme Court, affirmed by unreported superior court decisions, none of which became publicly visible until 1966, when the rule emerged as a constitutional construction applicable to the entire state. Moreover, it is not even a rule until it becomes clear how boundaries other than that of Mrs. Hughes' property can be determined. We do not learn from the

Hughes opinion how and when her boundary was in fact surveyed and determined, much less the boundaries of tidelands in the rest of the state.

Nevertheless, it seems probable that in terms of precedent and practical reliance on precedent, a better argument can be made for a vegetation line than for a mean high tide line as defined by Borax. Borax was novel in 1935. Since 1935 it has had surprisingly small influence.

In 1947, the second decade following Borax, the Manual of Surveying Instructions published by the United States Department of the Interior, Bureau of Land Management, defined tidelands. Its most specific definition was provided by quotation from Justice Field's opinion in San Francisco v. Le Roy in 1891 [quoting from 138 U.S.656, 671-72 (1891)] :

> The lands which passed to the State upon her admission to the Union were not those which were affected occasionally by the tide, but only those over which tidewater flowed so continuously as to prevent their use and occupation. To render lands tidelands, which the State by virtue of her sovereignty could claim, there must have been such continuity of the flow of tidewater over them, or such regularity of the flow within every twenty-four hours, as to render them unfit for cultivation, the growth of grasses or other uses to which upland is applied.

This definition is inherently ambiguous when applied to the facts of the Hughes case....

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We have concluded that Borax has the obvious advantage if a universal rule must be applied because vegetation is not universal. Even where vegetation is found, its type, characteristics, and distribution differ. However, if a universal rule is not demanded, other criteria favor a vegetation line boundary. The beach, in terms of most of the uses to which the beach is adapted, begins at the line of vegetation. There the upland ends. Even certainty and judicial convenience may be furthered by a vegetation line in many cases. Where vegetation provides a line clearly observable and clearly related to the sea, the boundary is visible, to both the trier of fact and the surveyer. Observation for a day is easier than observation for 18.6 years, or for a substantial period even if less than 18.6 years.

History and reliance on history also favor a vegetation line. So does the practice, which Borax did not purport to supplant, of establishing a vegetation line boundary on inland waters. The difficult distinction between inland and tidal waters is avoided.

A second major issue on the scope of the doctrine is the type of interests protected.

MARKS v. WHITNEY
98 Cal. Rptr. 790, 491 P.2d 374 (1971)

McCOMB, Justice.

This is a quiet title action to settle a boundary line dispute caused by overlapping and defective surveys and to enjoin defendants (herein "Whitney") from asserting any claim or right in or to the property of plaintiff Marks. The unique feature here is that a part of Marks' property is tidelands acquired under an 1874 patent issued pursuant to the Act of March 28, 1868 (Stats. 1867-1968, c. 415, p. 507); a small portion of these tidelands adjoins almost the entire shoreline of Whitney's upland property. Marks asserted complete ownership of the tidelands and the right to fill and develop them. Whitney opposed on the ground that this would cut off his rights as a littoral owner and as a member of the public in these tidelands and the navigable waters covering them. He requested a declaration in the decree that Marks' title was burdened with a public trust easement; also that it was burdened with certain prescriptive rights claimed by Whitney.

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Questions: First. Are these tidelands subject to the public trust; if so, should the judgment so declare?

Yes. Regardless of the issue of Whitney's standing to raise this issue the court may take judicial notice of public trust burdens in quieting title to tidelands. This matter is of great public importance, particularly in view of population pressures, demands for recreational property, and the increasing development of seashore and waterfront property. A present declaration that the title of Marks in these tidelands is burdened with a public easement may avoid needless future litigation.

Tidelands are properly those lands lying between the lines of mean high and low tide (City of Long Beach v. Mansell (1970) 3 Cal.3d 462, 478, fn. 13, 91 Cal. Rptr. 23, 476 P.2d 423) covered and uncovered successively by the ebb and flow thereof. The trial court found that the portion of Marks' lands here under consideration constitutes a part of

the Tidelands of Tomales Bay, that at all times it has been, and now is, subject to the daily ebb and flow of the tides in Tomales Bay, that the ordinary high tides in the bay overflow and submerge this portion of his lands, and that Tomales Bay is a navigable body of water and an arm of the Pacific Ocean.

This land was patented as tidelands to Marks' predecessor in title....

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Prior to the issuance of this patent it was held that a patent to tidelands conveyed no title. It was not until 1913 that this court decided in People v. California Fish Co., 166 Cal. 576, 596, 138 P.79, 87, that "The only practicable theory is to hold that all tideland is included, but that the public right was not intended to be divested or affected by a sale of tidelands under these general laws relating alike both to swamp land and tidelands. Our opinion is that...the buyer of land under these stututes receives the title to the soil, the jus privatum, subject to the public right of navigation, and in subordination to the right of the state to take possession and use and improve it for that purpose, as it may deem necessary. In this way the public right will be preserved, and the private right of the purchaser will be given as full effect as the public interests will permit."

Public trust easements are traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes. See Bohn v. Albertson (1951) 107 Cal. App.2d 738, 238 P.2d 128; Forestier v. Johnson, supra, 164 Cal. 24, 127 P.156; Munninghoff v. Wisconsin Conservation Comm. (1949) 255 Wis. 252, 38 N.W.2d 712; Jackvony v. Powel (1941) 67 R.I. 218, 21 A.2d 554; Nelson v. De Long (1942) 213 Minn. 425, 7 N.W.2d 342; Proctor v. Wells (1869) 103 Mass. 216. The public has the same rights in and to tidelands.

The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another. There is a growing public recognition that one of the most important public uses of the tidelands--a use encompassed within the tidelands trust--is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds

and marine life, and which favorably affect the scenery and climate of the area. It is not necessary to here define precisely all the public uses which encumber tidelands.

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The power of the state to control, regulate and utilize its navigable waterways and the lands lying beneath them, when acting within the terms of the trust, is absolute, except as limited by the paramount supervisory power of the federal government over navigable waters. We are not here presented with any action by the state or the federal government modifying, terminating, altering or relinquishing the jus publicum, in these tidelands or in the navigable waters covering them. Neither sovereignty is a party to this action. This court takes judicial notice, however, that there has been no official act of either sovereignty to modify or extinguish the public trust servitude upon Marks' tidelands. The State Attorney General, as amicus curiae, has advised this court that no such action or determination has been made by the state.

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There is absolutely no merit in Marks' contention that as the owner of the jus privatum under this patent he may fill and develop his property, whether for navigational purposes or not; nor in his contention that his past and present plan for development of these tidelands as a marina have caused the extinguishment of the public easement. Reclamation with or without prior authorization from the state does not ipso facto terminate the public trust nor render the issue moot.

A proper judgment for a patentee of tidelands was determined by this court in People v. California Fish Co., supra, 166 Cal. at pp. 598-599, 138 P. at p. 88, to be that he owns "the soil, subject to the easement of the public for the public uses of navigation and commerce and to the right of the state as administrator and controller of these public uses and the public trust therefor, to enter upon and possess the same for the preservation and advancement of the public uses, and to make such changes and improvements as may be deemed advisable for those purposes."

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Third: Does Whitney have rights as a littoral owner which are improperly enjoined by the judgement appealed from?

Yes. In its memorandum opinion the trail court expressed its views as to the private rights between these parties. It stated that it would find and adjudge that the littoral owner

does not own a private right of access or fishery across all of the tidelands adjoining his property; that, however, he may own a reasonable right of access;....

A littoral owner has a right in the foreshore adjacent to his property separate and distinct from that of the general public (Gould on Waters, 3d ed., § 149). This is a property right and is valuable, and although it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed. A littoral owner can enjoin as a nuisance interference by a private person with this right. A littoral owner has been held to have the right to build a pier out to the line of navigability; a right to accretion; a right to navigation (the latter right being held in common with the general public) and a right of access from every part of his frontage across the foreshore. This right of access extends to ordinary low tide both when the tide is in and when the tide is out.

This littoral right is of course burdened with a servitude in favor of the state in the exercise of its trust powers over navigable waters.

TUCCI v. SALZHAUER
69 Misc.2d 226, 329 N.Y.S.2d 825 (Sup. Ct. 1972),
aff'd mem., 33 N.Y.2d 854, 352 N.Y.S.2d 198 (1973)

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On the second cause of action, to which defendant has interposed a second separate affirmative defense and counterclaim, the sole issue between the parties is the extent to which the plaintiff, under the doctrine of jus publicum, may use that area of beach referred to as the "foreshore" lying between the mean high water mark and the mean low water mark of Hempstead Harbor in front of defendant's property...Plaintiff asserts that the doctrine of jus publicum gives him the right to gain access to the water for fishing and bathing and also for "other lawful purposes, to wit, lounging or reclining on the foreshore" and to bring guests there for the same purpose. Counsel for defendant in his memorandum of law concedes that under the doctrine of jus publicum the right of the plaintiff "across the foreshore is that of traverse for reasonable purposes;" but contends that this right does not authorize plaintiff to use the area for lounging or reclining, or for beach parties.

In Johnson v. May, 189 App. Div. 196, p. 203, 178 N.Y.S.742 (decided in Nov. 1919), the Appellate Division, Second Department

indicated that the jus publicum might, under certain conditions, permit a person to place an umbrella and blanket on the beach and rest on the beach in conjunction with bathing in the adjacent waters. Subsequently, however, the Court of Appeals in Tiffany v. Town of Oyster Bay, 234 N.Y. 15, 136 N.E.224 (decided in July 1922) discussed at length the respective rights in the foreshore of(a) the public, (b) the fee owner (which in that case was the Town of Oyster Bay), and (c) the owner of the adjacent upland. Specifically, with reference to the rights of the public, the court held (p. 20, 136 N.E. p. 225):

> "The foreshore or land under the waters of the sea and its arms, between high and low water mark, is subject, first, to the jus publicum--the right of navigation, and, when the tide is out, the right of access to the water for fishing, bathing and other lawful purposes to which the right of passage over the beach may be a necessary incident. (Barnes v. Midland R. R. T. Co., 193 N.Y. 378, 384, 85 N.E. 1093)."

The right of the public in the foreshore is similarly defined in Warren's Weed, New York Real Property, Vol. 6, under the chapter on Water, at Section 6.03 as follows: "The right of the public in the foreshore...is to pass and repass when the tide is out..." (italics added). It is the opinion of this court that the Tiffany decision (243 N.Y. 15, 136 N.E. 224, supra) definitively established as the law of this State that the right of the public to use the foreshore when the tide is out, is limited to the right merely to pass over it as a means of access to the water; and therefore the intimation in the earlier Johnson v. May decision (189 App. Div. 196, 178 N.Y.S. 742, supra) that the jus publicum may also include a right to lie on the beach has no validity. This doctrine that the use of the foreshore is limited only to the right to pass and repass between the upland and the water was specifically applied by the Appellate Division, Second Department to facts strinkingly similar to those involved herein, in Des Fosses v. Rastelli, 283 App. Div. 1069, 128 N.Y.S.2d 302. In that case, the late Mr. Justice Stoddart at Special Term, Suffolk County, in an opinion published in the New York Law Journal on December 16, 1953 (p. 1475, col. 1) had held, among other relief, that

the plaintiff, who was the grantee of a right of way over the defendant's land "for use as an access and egress to Long Island Sound", had the right to use the beach area bewteen the upland seawall and the water "for beach purposes, such as reclining by bathers", and the judgment entered on this decision included a provision containing this last-quoted language. On appeal, however, the Appellate Division, in modifying the judgment, struck therefrom the said above-quoted language. In its memorandum decision, referring to the language creating the right of way in that case, the Appellate Division stated (p. 1070, 131 N.Y.S.2d p. 243):

> "There is nothing in that language to suggest that the owners and their families and guests in the dominant tenement, the fifteen-acre tract, were to have the right other than that of getting to the Sound where they could exercise rights common to the public."

This court considers that this determination by the Appellate Division in the Des Fosses case renders untenable the plaintiff's construction of the jus publicum asserted in his second cause of action herein.

The parties herein agree that either the State of New York or the Town of North Hempstead is the fee owner of the foreshore in the instant case. That area has not been designated by the fee owner as a public beach; and the aforesaid law defining the jus publicum certainly does not make it such.

Accordingly, it is the decision of this court that the right of the plaintiff to use the foreshore in front of defendant's property under the doctrine of jus publicum may not exceed the following: When the tide is in, to use the water covering the foreshore for boating, bathing, fishing or other lawful purposes; and when the tide is out, to pass and repass over the foreshore as a means of access to reach the water for the same purposes. Plaintiff's second cause of action must be dismissed, since defendant does not challenge plaintiff's right in the jus publicum. Defendant is entitled to affirmative judgment on her counterclaim, enjoining and prohibiting the plaintiff from reclining or inducing others to recline on the foreshore in front of the property; and from using or inducing others to use the same, when the tide is out, other than to pass over it as a means of access between the upland and the waters of Hempstead Harbor.

Note,"Public Access to Beaches: Common Law Doctrines and Constitutional Challenges,"48 N.Y.U. L. Rev. 369, 381-84 (1973)*

Originally, the jus publicum included only navigational and fishing rights. In recent beach litigation, courts have expanded the doctrine to include the rights of recreation and bathing. In Arnold's Inn, Inc. v. Morgan,[1] a New York trial court held that the jus publicum entails the right "to have access across the foreshore to the waters for fishing, bathing or any other lawful purpose."[2] A rationale for such an extension is that the doctrine must change as the public need changes. The public rights of fishing and navigation accrued because these activities were crucial to the populace. As the public need for recreation and bathing facilities becomes more acute, the rights secured by the jus publicum should be adjusted in recognition of the shift in public requirements.

The New Jersey Supreme Court, in its recent decision in Borough of Neptune City v. Borough of Avon-by-the-Sea,[3] found a need for an even more greatly expanded jus publicum. The court held that the doctrine makes impermissible not only the closing of access to the foreshore to nonresidents, but also the charging of differential fees to residents and nonresidents for use of the beach.

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While the Neptune City opinion did much to revive the jus publicum as a legal tool in beach access cases, an inference from the case points out what will become an acute conceptual and practical problem in cases with different fact situations. The decision held that by virtue of the jus publicum the foreshore of the beach had to be available to all on an equal basis and that in order to effectuate the public's beneficial interest in the trust property, there had to be access to the foreshore across the dry sand area. Unless the jus publicum is so conceived, its expansion to include modern recreational

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[1]63 Misc.2d 279, 310 N.Y.S.2d 541 (Sup. Ct. 1970).

[2]Id. at 283, 310 N.Y.S.2d at 547; see Tiffany v. Town of Oyster Bay, 234 N.Y. 15, 20, 136 N.E. 224, 225 (1922); Barnes v. Midland R.R. Term. Co., 193 N.Y. 378, 384, 85 N.E. 1093, 1096 (1908).

[3]61 N.J. 296, 294 A.2d 47 (1972).

uses of the beach would be meaningless in many situations. Rights in the foreshore would be useless if access to it over the dry sand area were denied. The expanded jus publicum will probably therefore contain within it a right of access to the foreshore via conveniently located paths across the dry sand area, especially where the upland is owned by a subdivision of the state and used as a beach park--the prevalent situation with today's restricted municipal beaches.

This still leaves one remaining problem. Although the general public would be allowed to cross the dry sand area to get to the foreshore and the sea, it would not necessarily be allowed to use the dry sand area for recreational purposes such as sun bathing. In Neptune City it was not necessary to expand the jus publicum to allow full recreational use of the dry sand area as that area was already available to the general public. If the dry sand area has not been dedicated, a municipality could arguably restrict it to residents, allowing nonresidents only a right of access across the dry sand to the foreshore. This result runs directly counter to the modern conception of the jus publicum, since full enjoyment of the foreshore and the sea cannot be realized unless full enjoyment of the dry sand area is also allowed. In order to eliminate this inconsistency, the jus publicum must be expanded to include general public recreational rights in the dry sand area.

IV ALIENABILITY OF PUBLIC TRUST LANDS

CITY OF LONG BEACH v. MANSELL
3 Cal.3d 462, 476 P.2d 423 (1970)

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...The state's "ownership" of public tidelands and submerged lands, which it assumed upon admission to the Union, is not of a proprietary nature. Rather, the state holds such lands in trust for public purposes, which have traditionally been delineated in terms of navigation, commerce, and fisheries. The powers of the state as trustee are implied and include everything necessary to the proper administration of the trust in view of its purposes--with certain express reservations such as article XV, section 3.

Although these powers include disposal of trust lands in such manner as the interests of navigation, commerce, and fisheries require, tidelands subject to the trust may not be alienated into absolute private ownership; attempted alienation of such tidelands passes only bare legal title, the lands remaining subject to the public easement. However, the state in its proper administration of the trust may find it necessary or advisable to cut off certain tidelands from water access and render them useless for trust purposes. In such a case the state through the Legislature may find and determine that such lands are no longer useful for trust purposes and free them from the trust. When tidelands have been so freed from the trust--and if they are not subject to the constitutional prohibition forbidding alienation--they may be irrevocably conveyed into absolute private ownership.

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Note, "Public Access to Beaches: Common Law Doctrines and Constitutional Challenges," 48 N.Y.U. L. Rev. 369, 380-89 (1973)*

The Jus Publicum

The jus publicum and the public trust are distinct and separate doctrines, although their purposes and applicability do overlap to some extent. The core of both doctrines is that certain lands are owned and administered by the state or municipal government as trustee on behalf of the general public, and must therefore be administered in such a way as to serve the interests of the entire public, not some limited segment of it. Both doctrines hold great promise as effective legal tools with which to defeat the restriction of municipally owned beaches to residents.

The jus publicum is an English common law doctrine with Roman antecedents. The basic thrust of the jus publicum is that the foreshore of all beach land is held by the state in trust for the general public. Thus, with regard to beach land, a prima facie rule of construction of land grants from the government is that title to the foreshore does not pass with title to the upland unless the grant specifically provides that title runs to the low water mark. Otherwise

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title runs only to the high water mark, and the foreshore, which is left unconveyed, remains in the possession of the grantor, originally the English Crown and later the appropriate state government. The state therefore retains its trusteeship over virtually all beach land below high water mark, although the adjacent upland may be in the hands of the individuals or municipal entities to whom the grant was made.

Even where the original grant to a municipality specifically included the foreshore, that foreshore may well still be impressed with the jus publicum. The New York Court of Appeals has so held, finding that when lands subject to the jus publicum are granted to a political subdivision of the state, that governmental unit takes the land subject to the same jus publicum restrictions that previously limited the ownership of the state and, before that, the Crown.[1] The Supreme Court of the United States has reached the same conclusion, though it did so in the limited context of interpreting a specific colonial land grant.[2] No court has conclusively settled the related issue of whether the government can deed away the foreshore, free of the jus publicum, to a private party, but there is some authority for prohibiting even this outright grant.[3]

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The Public Trust

Another common law doctrine protecting public rights in property is the public trust, which can be described as a more generalized version of the jus publicum.[4] The basic principle of the public trust is that some property

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[1]Town of Brookhaven v. Smith, 188 N.Y. 74, 78-79, 80 N.E. 665, 667 (1907).

[2]See Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).

[3]See J. Angell, A Treatise on the Right of Property in Tide Waters 17-28 (1847); 1 Waters and Water Rights § 40.1, at 247 (R. Clark ed. 1967). Some of the cases cited are: Brickell v. Trammell, 77 Fla. 544, 559, 82 So. 221, 226 (1919); State v. Cleveland & Pittsburgh R.R., 94 Ohio St. 61, 80, 113 N.E. 677, 682 (1916).

[4]The public trust probably developed from the jus publicum. See Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471, 475 (1970). Sax does not use the term jus publicum, but is clearly referring to that doctrine.

rights in certain lands can never be alienated from the general public. Although the scope of the doctrine is much broader than that of the jus publicum, in that it applies to more lands than beach foreshores, its modern applicability is not as yet clearly defined. One reason is that the historical precedents of the public trust are not as certain as those of the jus publicum and thus courts have had broader discretion in applying the doctrine. It should be further noted that since the courts have not uniformly interpreted the public trust, generalizations become difficult and somewhat imprecise. Nonetheless, some generalizations will be necessary and will be made according to the weight of judicial opinion.

Historically, three different rationales have been advanced to support the public trust doctrine. One approach holds that certain resources are so important that their protection is essential in a free society. Property rights in these resources must be vested in the general public, and not be controlled by any particular group or individual. Thus, it has been held "inconceivable that any person should claim a private property interest in the navigable waters of the United States."[5] A similar principle holds that those interests which are the gifts of nature should be reserved for all the people. From this concept arose the early New England laws reserving "great ponds" for general use, with equal access provided to everyone. Finally, there is the theory that certain lands are public in their nature, and should therefore be kept available to the general public.

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[A]nother way in which the public trust can be employed to prevent the restriction of municipally owned beaches to municipal residents. In City of Madison v. Tolzmann,[6] the Supreme Court of Wisconsin held that if land is impressed with the public trust, and the state is trustee for the general public, it is necessarily beyond the power of a lesser governmental entity to alienate or limit use of the land. Thus, a municipally imposed requirement that every boat owner obtain a municipal license and pay a license fee was held invalid because the use of navigable waters was a matter of statewide

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[5]United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 69 (1913).

[6]7 Wis.2d 570, 97 N.W.2d 513 (1959).

concern, upon which only the state could legislate. The decision in effect denied a local government the power to regulate public trust properties in such a way as to favor localized interests.

The New York courts have adopted a similar approach.... The same rationale was used to find that beaches and parks were matters of statewide concern which transcend purely local interests,[7] and that New York City therefore could not sell public park lands, because such lands were held for the benefit of all the people, not just local inhabitants. When a New York village enacted a zoning ordinance which would have eliminated public parks and beaches so as to benefit local residents, the Court of Appeals found broader interests to be preeminent and invalidated the ordinance.[8] Based on similar considerations, several jurisdictions have adopted the rule that because of the public trust, municipalities may not, under any circumstances, exclude nonresidents from their public parks.

In Gewirtz[9] the court did not take such an absolute position. It stated that the power of a municipality to divert the uses of trust properties, such as parks and beaches, is dependent on legislative authorization which must be "plainly conferred," "special" in nature, "specific," "direct" or "express." Absent such plain legislative authorization, a municipality is powerless to limit the use of public trust lands. In some instances, the New York State Legislature has conferred such plain and specific authority on municipalities, including the power to limit the use of such facilities to residents. But such delegations have been made only with regard to facilities which are designed to serve the inhibitants of a limited area, such as a municipal golf course. Several other jurisdictions have agreed with Gewirtz, and thus with its implication that the state legislature, in spite of its capacity as trustee, may do with trust lands basically what it wants, including selling or alienating them, or conferring full power of disposition upon municipalities.

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[7]Atlantic Beach Property Owners Ass'n v. Town of Hempstead, 3 N.Y.2d 434, 440, 144 N.E.2d 409, 412, 165 N.Y.S.2d 737, 741 (1957).

[8]Incorporated Village of Lloyd Harbor v. Town of Huntington, 4 N.Y.2d 182, 186, 149 N.E.2d 851, 855, 173 N.Y.S.2d 553, 558 (1958).

[9]69 Misc.2d 763, 330 N.Y.S.2d 495 (Sup. Ct. 1972).

On the other hand, the Supreme Court of Wisconsin, in Muench v. Public Service Commission,[10] has explicitly rejected this view. The court ruled that a statute which delegated to county boards control over public trust properties was unconstitutional. Since the public trust is a matter of statewide concern, administration of trust repsonsibilities cannot be delegated to a lesser governmental entity, as such entity does not represent a sufficiently broad spectrum of the public, for whose benefit the property is held.

On the alienability issue, also see Agnello, "Non-resident Restrictions in Municipally Owned Beaches: Approaches to the Problem, 10 Colum. J. L. and Soc. Prob. 177, 199 (1974); Rice, "Estuarine Land of North Carolina: Legal Aspects of Ownership, Use and Control," N.C. L. Rev. 779, 804-06 (1968); Riggs, "The Alienability of the State's Title to the Foreshore," 12 Colum. L. Rev. 395 (1912).

V ENFORCEMENT OF PUBLIC TRUST RIGHTS

Note, "California's Tideland Trust: Shoving It Up," 22 Hastings L. J. 759, 768-71 (1971)*

Enforcement of the tideland trust can be readily divided into two categories: (1) enforcement by the state to abate interferences with its management of the trust; and (2) enforcement by private citizens in their beneficiary capacity when the state has been remiss in its duties as trustee. Regarding the former, it has already been pointed out that the state may bring actions to abate nuisances and to remove purprestures on tidelands not freed from the trust; the Attorney General has ample authority and standing to sue for these

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[10] 261 Wis. 492, 53 N.W.2d 514, reh., 261 Wis. 515, 55 N.W.2d 40 (1952).

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purposes. The precise nature of an actionable misuse of the tidelands has not been clearly defined in the decisions to date; rather the courts seem to feel that "each case of this kind is to be determined upon its own merits. Generally, however, anything which obstructs the free use of the tidelands by the public can probably be enjoined by the state.

Unfortunately, existing California cases on private enforcement of the tideland trust provide only skeletal guidelines for future litigation. One of the more illuminating decisions is that of City of Hermosa Beach v. Superior Court.[1] In that case the respondent, suing as a private citizen, was seeking an injunction against the erection of fences and against the construction of a road on a stretch of beach deeded to the city subject to the condition that it be used as a "public pleasure ground." The city answered by requesting a writ of prohibition against further litigation on the ground that citizens lacked standing to bring such actions. In refusing to grant the city's request, the appellate court held that land dedicated to public use, such as the beach property involved here, could be "loosely referred to as a public trust" and that respondent's standing as a "resident and taxpayer" sufficiently qualified her to "bring suit to enforce the duty of a municipality to maintain a park according to the terms of the dedication."

Another pertinent decision is that of Silver v. City of Los Angeles,[2] in which plaintiff brought an action to have declared void, and to set aside, an oil and gas lease between defendant City of Los Angeles, as lessor, and defendant Los Angeles Harbor Oil Company, as lessee. Significantly, the court recognized that a taxpayer in his representative capacity could bring an action against a municipality where there was evidence of "fraud, collusion, ultra vires or a failure on the part of a governmental body to perform a duty specifically enjoined." However, since the parties had stipulated that there was no actual fraud, corruption, bad faith, or undue influence and ultra vires was not pleaded, the only recourse for the court was to find that a cause of action had not been adequately stated.

Totally different considerations, however, enter into environmental litigation. If plaintiffs were to produce

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[1]Cal. App.2d 295, 41 Cal. Rptr. 796 (1964).

[2]57 Cal. 2d 39, 366 P.2d 651, 17 Cal. Rptr. 379 (1961).

evidence that a lease, such as the one in Silver, constituted deleterious over-development or unsound ecomanagement of the trust res, it would seem that an ultra vires act could be established; under such circumstances the court would clearly be presented with a justiciable cause of action wholly within the Silver rationale.

In other states there is growing judicial recognition that:

> self-interested and powerful minorites often have an undue influence on the public resource decisions of legislative and administrative bodies and cause those bodies to ignore broadly based public interests.[3]

Indeed, the courts are gradually beginning to realize that administrative agencies wield unprecedented power and that these entitites do not necessarily function properly without constant and close scrutiny. Accordingly, the courts are intervening in the administrative acpects of government with increasing frequency when members of the public seek judicial review or seemingly arbitrary administrative action perceived to be contrary to the public interest.

As a consequence, other jurisdictions have been receptive to citizens seeking to establish their rights as beneficiaries of public trusts. Even before the turn of the century, the standing of trust beneficiaries received judicial approval. In Davenport v. Buffington[4] the circuit court of appeals was dealing with the sale of public park lands to private interests in violation of an original grant; private citizens were seeking to bar the sale. The court held for the plaintiffs, stating that:

> [T]he enforcement of trusts is one of the great heads of equity jurisdiction. The land in these parks, if it was really dedicated to the use of the public for park purposes, is held in trust for that use, and courts of equity always interfere at the suit of a cestui que trust or a cestui que use to prohibit a violation of the trust, or a destruction of the right of user. The appellee...is one of the cestuis que use for whom these parks are held in trust,and the inevitable conclusion is that his interest in them is ample to enable him to maintain a suit in equity or prevent their diversion to private uses.[5]

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[3]Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471, 650 (1970).

[4]97 F. 234 (8th Cir. 1899).

[5]97 F. at 236-37.

A more recent case is that of Archbold v. McLaughlin,[6] where the plaintiffs sought to have a dedication of land for park purpoees specifically enforced over the objection of officials in the District of Columbia who wanted to construct a highway through the area. In denying a motion by the district officials to dismiss the complaint, the federal district court held that:

> Land dedicated to the use of the public for park purposes if held in trust for that use, and a resident of the city of town in which the park is located may maintain a suit in equity to prevent diversion of the use of such land...[7]

Michigan has codified the public's right to enforce public trusts in the Environmental Protection Act of 1970.[8] The key provisions of the statute enable any governmental agency, person or legal entity to seek equitable relief against any other governmental agency, person or legal entity when necessary to protect the air, water and other natural resources and the public trust therein from pollution, impairment or destruction. The act further provides that the plaintiff has made a prima facie case when he has shown that the defendant has polluted, or is likely to pollute or to destroy the air, water and other natural resources of the public trust therein.

If Californians have a right to any tideland benefits, it must ultimately flow from the public trust protecting those lands. As evidenced by the above cases, and in particular by the Michigan statute, private citizens have a right to enforce public trusts; with their undisputed status as a trust res, the tidelands certainly should receive similar protection.

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[6]181 F. Supp. 175 (D.D.C. 1960), cited with approval in Allen v. Hickel, 424 F.2d 944, 947 n.5 (D.D.C. 1970).

[7]181 F. Supp. at 180.

[8]Mich. Comp. Laws Ann. §§ 691.1201-691.1207.

VI SOURCE OF LAW FOR DEFINING THE WET-SAND AREA

Corker, "Where Does the Beach Begin and to What Extent Is This a Federal Question," 42 Wash. L. Rev. 33, 92-101 (1966)*

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It is clear that the vegetation line issue presents a federal question. Borax...states a proposition from which there can be no dissent:[1]

> The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law.

The boundary at issue in Hughes is a boundary between property granted by the United States and property owned by the State of Washington. If the laws of the United States and the laws of Washington conflict on location of that boundary, the supremacy clause resolves the conflict in favor of the federal right. Were the State of Washington wholly free to decide where the boundary lies, the state could determine that it lies along the crest of the Cascade Mountains.

Decision that the boundary presents a federal question does not, however, dispose of the question whether state law generated by the Washington Supreme Court may be a source of federal law. A unanimous Supreme Court of the United States, less than a year prior to Borax, states this principle:[2]

> The construction of grants by the United States is a federal not a state question, [citations omitted] and involves the consideration of state questions only insofar as it may be determined as a matter of federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances. [Citations omitted.] In construing a conveyance by the United States of land within a State, the settled and reasonable rule of construction of the State

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[1] 296 U.S. at 22.

[2] United States v. Oregon, 295 U.S. 1, 28 (1935). (Emphasis added)

> affords an obvious guide in determining what impliedly passes to the grantee as an incident to land expressly granted.

Does the construction of the Washington Constitution presented by Hughes consistute a "settled and reasonable rule of construction" of the federal law? Is boundary--vegetation line or mean high tide line--"an incident" to the upland granted? Is the fixed or movable character of the boundary "an incident"?

Answers to these questions should determine whether the Washington Supreme Court had jurisdiction to decide the vegetation line issue as it did; they may determine its jurisdiction to decide the accretion issue as it did. The answers to both issues are not necessarily the same. Furthermore, the questions are not necessarily pertinent to the accretion issue. Where the United States has parted with all its interest in land before statehood, it is possible to argue that state law, ex proprio vigore, determine the legal consequences that flow from post-statehood events.

We find no escape from the conclusion that Borax and Hughes are irreconcilable. The mean high tide line of Borax and the vegetation line of Hughes are 386 feet apart, and so long as the United States Supreme Court adheres to Borax, the intervening 386 feet belong to Mrs. Hughes, not to the state of Washington.

One reading of Borax is that the Supreme Court rejected altogether the principle stated in United States v. Oregon [295 U.S. 1 (1935)] that state law may be a guide to the construction of federal grants. Another reading of Borax is that the location of the boundary of a federal grant is not what United States v. Oregon called "an incident to land"; it is the determinant of the ownership of the land itself. A third reading is that California's neap tide rule is not a "settled and reasonable rule of construction." The third reading is the most difficult, because the Borax Court expressly refused to consider California statutes and decisions. It refused to pass judgment on whether the California rule was either settled or reasonable.

On any reading, Borax and Hughes conflict on the vegetation line issue. We say this with deference to the brave effort by the Washington Attorney General to distinguish the cases.... The Court made its view clear that California law was irrelevant.

A second ground of distinction is based on the argument that there was no issue before the Supreme Court in Borax about the area above the line of mean high tide (as Borax used the term) and below the line of vegetation...There is little ambiguity in what the Supreme Court said on this subject. The boundary is the line established by the average of all high tides

over the tidal cycle. The Court did not imply a qualification: "unless the vegetation line is inland from the line of mean high tide." If, on retrial, the district court had discovered a vegetation line 386 feet above the mean high tide line and issued a decree fixing the boundary at the vegetation line, we think it would have disregarded the Supreme Court's mandate.

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On principles which manifestly it was not the intention of the Supreme Court to alter, the states are free to establish any boundary below the high tide line, which marks the limit of what the states may claim. The Borax opinion expressed this principle when the Court wrote: "Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law."

The Court cited for that statement Barney v. Keokuk which declared: "If they [the states] choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections."[3]

The government's brief in Samson Johns, relying upon Borax, asserted the principle thus, with its own emphasis: "But while a State may thus yield rights to riparian owners, it may not take from riparian owners rights given to them by federal law."[4]

The paradox taxes credibility. The Supreme Court in Borax rejected a neap tide rule of state law, more generous to the government's patentee than the line of mean high tide which the Court adopted. Yet in the same decision, it reaffirmed with emphasis the unchallenged and unchallengeable proposition that the state need not claim for itself or its grantees land below the high tide line which marks the maximum of the state's ownership. We can conclude only that the Court did hold that the line of mean high tide established the boundary, but it did so in a decision so flawed with error that reexamination is demanded.

What conclusion should the Court reach as a result of that reexamination? Two possibilities consistent with Hughes are conceivable:

(1) Federal law uniformly requires the patentee's tidal boundary to be at the vegetation line.

(2) Federal law (a) embraces state law in determining a patentee's boundary, and (b) federal law incorporates the law of a state admitted subsequent to the federal patent.

We would reject the first possibility out of hand. If a federally compelled boundary is to be established in disregard of state law, the Borax line is better than the vegetation line, if for no other reason than that vegetation is a sometimes thing.

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[3] 94 U.S. 324, 338 (1877).

[4] Opening Brief for the United States, p. 16. (Emphasis in original).

The second alternative involves three hurdles: (1) embracing state law in federal law with respect to the boundary; (2) doing so nunc pro tunc in the case of pre-statehood patents like that under which Mrs. Hughes claimed; and(3) determining that the vegetation line does not exceed the permissible limits established by a fair and rational federal law.

1. The First Hurdle. Factors favoring the incorporation of state law are persuasive. The major difficulty in establishing a boundary is not the formulation of a verbal formula, but the application of that formula to a line on the ground. Borax comes closest to a universally applicable verbal formula which will work even when there is no vegetation....I]t is unlikely that the Supreme Court will concern itself with tideland boundary problems to the extent necessary to develop and maintain viable rules. Real property boundaries demand the maximum of legal certainty. "Certiorari denied" means merely that the Supreme Court will not decide the controversy today, but leaves the issues for decision on another day in another case between other litigants. Nor, since the problems are constitutional, can they be resolved either by act of Congress or of the state legislatures.

Problems of this type are best resolved by state courts with latitude to apply state rules. The decision should be influenced by practical questions which are not susceptible of uniform answers. What are the characteristics which realistically distinguish beach from upland? A uniform federal rule, uninfluenced by conditions in each state, cannot provide a satisfactory answer. It is bad enough that an answer, flowing from the Washington Constitution, must be uniformly applied throughout a single state.

There is demonstrably no federal interest which demands a uniform upland-tideland boundary in fifty states. Borax, given a maximum application, does not purport to provide any such uniformity. Here are situations to which Borax does not apply:

a. Mexican or other foreign grants....

b. Non-federal uplands. Borax does not apply at all in the original states, or in Texas, which had no federal public lands, except as the United States may acquire lands in such states. It does not apply to school lands, swamp and overflowed lands, or other uplands belonging to the state.

c. Exceptions in favor of the federally claimed right. States may yield their claims to upland owners, in whole or in part. Washington has done so by its judicial rule that the meander line is the boundary if seaward of the line of ordinary high tide

and the patentee's right was initiated before statehood.

d. Res judicata, estoppel, prescription, statute of limitations. These doctrines, mostly based on state law, may alter boundaries originally established by a Borax rule. There has been no suggestion that state laws in these categories are inapplicable to land which has a history of federal ownership.

e. Non-tidal waters. There is no analogue of Borax applicable to inland navigable waters. The same rationale which rejects state law in determining the line of high tide would reject state law in determining the line of high water on non-tidal rivers and lakes. That no such rule has been developed on inland waters suggests strongly that none is needed on tidal waters.

2. The Second Hurdle. The second hurdle is a difficulty present in the Hughes case not encountered in Borax. The Borax patent followed statehood, but the Hughes patent preceded statehood. There was no state and hence no state law in existence at the date of the Hughes patent. An able writer has suggested that this is a conclusive objection to the incorporation of state law, and logically, much can be said for his view.

However, we find nothing repugnant to any eternal verities in the notion that a federal patent may be construed by reference to future state law. True, at the date of a pre-statehood patent the future law is not a "settled and reasonable rule of construction" such as the Court referred to in United States v. Oregon. Nevertheless, the functional need for territorial and later state law to fill interstices is as great in one case as in the other. Federal recognition of changing state law has modern precedent to support it.

3. The Third Hurdle. This brings us to what should be the critical questions: the nature of the vegetation line rule and the effect of its application when incorporated in what is necessarily federal law. We have presented...our reasons for believing that a vegetation line rule is inherently reasonable because it most closely approximates the line one would draw if asked to divide the beach from the upland in terms of the uses to which each is put. Where nature has drawn this line by vegetation, the burden is heavy on whoever asserts he can do it better. A line fixed by average high tides of a non-existent waveless ocean is recommended only by greater universality and perhaps ease of application. If any choice is left to state courts, the vegetation line should be a permissible choice.

There is, however, a problem even if we accept the formula stated in United States v. Oregon as applicable to the location of a boundary. Is the vegetation line a "settled and reasonable rule of construction" of a pre-statehood patent when announced by the Washington court in 1966? The objection to Hughes on this ground can be stated as a quasi-due process objection.

To illustrate the objection, let us assume that the vegetation line of Mrs. Hughes' property in 1889 was, as it is now, 386 feet above the mean high tide line as Borax defined the latter term. If we assume that Borax correctly discovered the law, Mrs. Hughes' predecessor was the owner of a tract of land the moment before statehood with a 386-foot east-west dimension. The moment after statehood, the newly created state had become the owner of that tract. This transfer of ownership has the earmarks of a deprivation of property that not even Congress could expressly authorize or compel.

One answer to this objection is that Borax, rather than Hughes, is the offender. The federal decision contemporaneous with the Washington constitution is San Francisco v. Le Roy, [138 U.S. 656 (1891)] which stated a vegetation line rule. So, a bit more obliquely, did the Washington Supreme Court in Baer v. Moran Bros. Co. [2 Wash. 608, 27 Pac. 470 (1891), aff'd, 153 U.S. 287 (1894)] , which was affirmed by the United States Supreme Court. If a judicial decision can involve unconstitutional retroactivity, Borax is the offender.

To which the response might be that San Francisco v. Le Roy is the product of Justice Field's notion that vegetation line and neap tide line are one and the same thing, even though we know that on the Hughes real estate one is above and the other below the Borax line. Can we conjecture how Justice Field and his brethren would have resolved the problem if confronted by the record in Hughes, proving that neap tide and vegetation lines are in fact hundreds of feet apart?

The answer we prefer eliminates the need for conjecture. There is abundant basis for justifiable reliance on San Francisco v. Le Roy, the definition from which was incorporated in official instructions to Bureau of Land Management Surveyors as late as 1947. There is good reason to deny to a state court the power to frustrate that reliance. At the same time, there should be no objection to a state court's decision which resolves the internal conflict in the federal precedent in favor of a vegetation line, neap tide line, or something intermediate.

The Supreme Court of Washington chose the vegetation line. It should be constitutionally permissible for it to do so. To substitute the judgment of the United States Supreme Court would be unfortunate unless that Court is prepared to devote substantial and continuing attention to what in essence is a local real estate matter.

VII PUBLIC RIGHTS IN PRIVATELY OWNED WET-SAND AREAS

As was noted in the introduction to this chapter, not all states have held the wet-sand area to be in public ownership. The following case illustrates some of the difficulties involved in legislatively attempting to create public use rights in privately held wet-sand areas.

IN RE OPINION OF THE JUSTICES*
313 N.E.2d 561 (Mass. 1974)

To the Honorable the House of Representatives of the Commonwealth of Massachusetts:

The Justices of the Supreme Judicial Court respectfully submit this reply to the question set forth in an order adopted by the House on May 8, 1974, and transmitted to us on May 10, 1974. The order recites the pendency before the General Court of a bill, a copy of which has been transmitted to us with the order. The bill is entitled, "An Act authorizing public right-of-passage along certain coastline of the Commonwealth" (House No. 481).[1]

The bill declares that the reserved interests of the public in the land along the coastline between the mean high water line and the extreme low water line include a "public on-foot free right-of-passage." This "right of passage" is only to be exercised in those areas designated by the Commissioner of the Department of Natural Resources as of critical ecological significance and so posted. It is not to be exercised where there exists a structure or enclosure authorized by law, or an agricultural fence enclosing livestock, if such areas are clearly posted. An attempt to prevent the exercise of this right of passage is made punishable by fine and the burden of proof in any action concerning the exclusion of the exercise of the right is to be on the party seeking to exclude or limit it. Interference with or making unsafe such passage is made unlawful, and a civil remedy is provided to any person affected by such action. Littering while exercising the right of passage is prohibited.

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*Footnotes and citations generally omitted.

[1][The full text of the bill is reprinted at 313 N.E.2d 563.]

The limited tort liability of G.L. c. 21, § 17C, is extended to coastal owners with respect to persons exercising the "right-of-passage" except for injuries caused by a violation of the proposed act.

The bill further provides that it is not to be construed as altering existing statutory or common law property or personal rights or remedies. It then states that any person having a recorded interest in any land affected may "within two years from the effective date of this act" petition the Superior Court under G.L. c. 79 "to determine whether . . . the activities authorized herein constitute an injury for which the owner is entitled to compensation under said chapter 79." Finally, the bill requires the Commissioner of Public Works to record a notice of its adoption, prior to its effective date, in every county where coastline land is required to be recorded. He is also required to give such notice by publication within sixty days after its effective date for three consecutive weeks in newspapers in cities and towns containing affected coastal land.

The order asserts that grave doubt exists as to the constitutionality of the bill if enacted into law and propounds the following question:

"Would the pending Bill if enacted into law violate Article X of the Bill of Rights of the Constitution of the Commonwealth or the Fourteenth Amendment to the Constitution of the United States?"

At common law, private ownership in coastal land extended only as far as mean high water line. Beyond that, ownership was in the Crown but subject to the rights of the public to use the coastal waters for fishing and navigation. When title was transferred to private persons it remained impressed with these public rights. The property inherent in the Crown in England was passed by charter to the Massachusetts Bay Colony and ultimately to the Commonwealth. In the 1640's, in order to encourage littoral owners to build wharves, the colonial authorities took the extraordinary step of extending private titles to encompass land as far as mean low water line or 100 rods from the mean high water line, whichever was the lesser measure. [Storer v. Freeman, 6 Mass. 435 (1810).] This was accomplished by what has become known as the colonial ordinance of 1641-47, which is found in the 1649 codification, The Book of the General Lawes and Libertyes, at p. 50. "Every Inhabitant who is an housholder shall have free fishing and fowling in any great pond, bayes, Coves and Rivers, so farr as the Sea ebbs and flowes, within the precincts of the towne where they dwell, unles the freemen of the same Town or the General Court have otherwise appropriated them. . . . The which clearly to determine, It is Declared, That in all Creeks, Coves and other places

about and upon Salt-water, where the Sea ebbs and flowes, the proprietor of the land adjoyning, shall have propriety to the low-water mark, where the Sea doth not ebb above a hundred Rods, and not more wheresoever it ebbs further. Provided that such proprietor shall not by this liberty, have power to stop or hinder the passage of boates or other vessels, in or through any Sea, Creeks, or Coves, to other mens houses or lands."

Although strictly the ordinance was limited to the area of the Massachusetts Bay Colony, it has long been interpreted as effecting a grant of the tidal land to all coastal owners in the Commonwealth. The language of the ordinance well illustrates the notion, previously alluded to, of reserved public right. It expressly specifies that the public is to retain the rights of fishing, fowling and navigation. Notwithstanding these limitations and the use of such ambiguous terms as "proprietary" and "liberty," there is ample judicial authority to the effect that the ordinance is properly construed as granting the benefitted owners a fee in the seashore to the extent described and subject to the public rights reserved. It is unnecessary to cite more than a few of the many cases to that effect. In Commonwealth v. Alger, 7 Cush. 53 (1851), probably the leading case on the subject, Chief Justice Shaw wrote, "[The ordinance] imports not an easement, an incorporeal right, license, or privilege, but a jus in re, a real or proprietary title to, and interest in, the soil itself, in contradistinction to a usufruct, or an uncertain and precarious interest." Id. at 70. "[It created] a legal right and vested interest in the soil, and not to be revoked and annulled at the pleasure of those who gave it." Id. at 71....

If, therefore, the right of passage authorized by the bill is, as it declares, merely an exercise of existing public rights, and not a taking of private property, it must be a natural derivative of the rights preserved by the colonial ordinance. It has been held proper to interfere with the private property rights of coastal owners in the tidal area for purposes reasonably related to the protection or promotion of fishing or navigation without paying compensation. An "on-foot right-of-passage" is not so related to these public rights. The cases interpreting the right of the public in navigation all deal with the use in boats or other vessels of the area below mean high water mark "when covered with tide water." Thus the right of passage over dry land at periods of low tide cannot be reasonably included as one of the traditional rights of navigation.

We have frequently had occasion to declare the limited nature of public rights in the seashore. For example, a littoral owner may build on his tidal land so as to exclude the public

completely as long as he does not unreasonably interfere with navigation....

We are unable to find any authority that the rights of the public include a right to walk on the beach. In a case presenting a very similar question to that raised by the bill, it was held that the public rights in the seashore do not include a right to use otherwise private beaches for public bathing. [Butler v. Attorney Gen., 195 Mass. 79, 80 N.E. 688 (1907).] "We think that there is a right to swim or float in or upon public waters as well as to sail upon them. But we do not think that this includes a right to use for bathing purposes, as these words are commonly understood, that part of the beach or shore above low-water mark, where the distance to high-water mark does not exceed one hundred rods, whether covered with water or not. It is plain we think, that under the law of Massachusetts there is no reservation or recognition of bathing on the beach as a separate right of property in individuals or the public under the colonial ordinance." [Id. at 83-84, 80 N.E. at 689.]

We have considered an able argument made in the brief of one of the amici curiae that we should interpret the colonial ordinance as vesting in the Commonwealth the right to allow all significant public uses in the seashore. It is contended that while fishing, fowling and navigation may have exhausted these uses in 1647, these public uses change with time and now must be deemed to include the important public interest in recreation. Whatever may be the propriety of such an interpretation with respect to public rights in littoral land held by the State, we think the cases we have cited make clear that the grant to private parties effected by the colonial ordinance has never been interpreted to provide the littoral owners only such uncertain and ephemeral rights as would result from such an interpretation. The rights of the public though strictly protected have also been strictly confined to these well defined areas. "[T]he only specific powers which have been expressly recognized as exercisable without compensation to private parties are those to regulate and improve navigation and the fisheries." [Michaelson v. Silver Beach Improvement Assn. Inc., 342 Mass. 251, 256, 173 N.E.2d 273, 277 (1961).] Since this is not such a project or regulation it cannot be considered merely a manifestation of the reserved rights of the public.

It is next necessary to inquire whether the authorization of the right of passage provided by the bill, while not within the public rights reserved by the colonial ordinance, is nonetheless a proper exercise of the Commonwealth's police power and, as such, does not require that compensation be paid to the private owners. The elusive border between the police power of the State and the prohibition against taking of property without compensation has been the subject of extensive litigation

and commentary. But these difficulties need not concern us here. The permanent physical intrusion into the property of private persons, which the bill would establish, is a taking of property within even the most narrow construction of that phrase possible under the Constitutions of the Commonwealth and of the United States.

It is true that the bill does not completely deprive private owners of all use of their seashore property in the sense that a formal taking does. But the case is readily distinguishable from such regulation as merely prohibits some particular use or uses which are harmful to the public. The interference with private property here involves a wholesale denial of an owner's right to exclude the public. If a possessory interest in real property has any meaning at all it must include the general right to exclude others.

Here the Commonwealth proposes to take easements for the benefit of the public, and compensation is required. The bill seeks to require private owners to permit affirmative physical use of their property by the public....Even commentators who, as a matter of constitutional law, favor the narrowest interpretation of "takings" agree that a "physical invasion" must be so considered.

The bill, therefore, would effectively appropriate property of individuals to a public use and thus is controlled by the constitutional restriction of art. 10 of the Declaration of Rights of the Massachusetts Constitution, and the Fourteenth Amendment to the United States Constitution. These provisions require that such takings be for a public purpose and that reasonable compensation be paid. We think it is evident that the creation of the proposed right of passage would serve the recognized public interest in the providing of recreational facilities. There is considerable question, however, whether the bill as written makes adequate provision for the constitutional requirement of fair compensation.

The bill permits "any person having a recorded interest in any land affected" by the bill within two years to "petition the superior court under the provisions of chapter 79 of the General Laws to determine whether this section or the activities authorized . . . [by the bill] constitute an injury for which the owner is entitled to compensation under said chapter 79." The exact intended meaning of this provision is somewhat unclear but we think that even under the most generous interpretation it is insufficient to satisfy the constitutional requirement of compensation.

By its choice of the word "injury" rather than "taking" or "appropriation," the bill may be making special reference to G.L. c. 79, § 9, which permits compensation to be awarded under

G.L. c. 79 for "injury" to real estate caused "by the establishment, construction, maintenance, operation, alteration, repair or discontinuance of a public improvement which does not involve the taking of private property." "The language of [this statute] reflects the distinction between takings, for which compensation is compelled, and other injuries which are compensated only as a matter of legislative grace." Such an interpretation of the bill, applying the compensation provisions only to indirect injury to the upland property of littoral owners, is plausible given the bill's initial statement that the proposed right of passage represents merely an exercise of reserved public rights. If this interpretation is correct the bill is plainly deficient for failing to provide compensation for the taking of tidal land which we have found implicit in its terms.

Even if we were to construe the "injury" alluded to in the bill to be the taking of the right of passage itself, the method of compensation provided is inadequate....It is not sufficient for a statute to authorize a taking and then provide a possibility of compensation in a later proceeding as this bill would do....

What the bill in effect attempts is to transfer from the Legislature to the courts not merely the decision on the amount of compensation but also the decision whether or not to compensate, that is, whether or not to exercise the power of eminent domain. This would raise serious constitutional questions with respect to the separation of powers....The power of eminent domain is a legislative power. While that power may be delegated to various public and private agencies, particular care must be taken when the delegation crosses the boundaries of the three dpeartments of government. "In Varick v. Smith, 5 Paige, 137, it is said that the legislature is the sole judge as to the expediency of . . . exercising the right of eminent domain . . . either for the benefit of the inhabitants of the state or of any particular portion thereof." Dingley v. Boston, 100 Mass. 544, 558 (1868).

Even if we were to hold that compensation to private owners for the taking of this public easement were provided in the bill it would still be constitutionally defective, for the procedure proposed is inadequate both in the scope of its potential compensation and the notice accorded to property owners of their right to recover damages.

The only property owners given an opportunity to seek damages are those having a recorded interest in affected property. It is obvious that this omits all property owners who hold their title by unrecorded deed or adverse possession. Either manner of acquiring property gives good title. While the grantee under an unrecorded deed may not prevail against those protected by the recording statute, he still possesses a valuable property

interest, and is thus entitled to compensation. Similarly, we have held that one holding title by adverse possession, as well as a holder by adverse possession which has not yet ripened into title, may maintain an action for compensation for a taking by the Commonwealth. Since the proposed bill does not provide compensation for either of these classes of owners it is constitutionally inadequate.

Futhermore, with respect to those owners as well as to those of recorded interests, it is a matter of serious question whether the method of notice to affected property owners is sufficient. Notice prior to the exercise of the power of eminent domain is constitutionally required. The bill provides only constructive notice by recording and publication. A number of our older cases may be read to hold that such constructive notice is adequate. More recent cases of the United States Supreme Court, however, suggest that a more stringent standard is necessary to satisfy the notice requirements of the Fourteenth Amendment....

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For all of the above reasons we believe the bill if enacted into law would violate art. 10 of the Declaration of Rights of the Massachusetts Constitution, and the Fourteenth Amendment to the Constitution of the United States. The foregoing discussion, however, is intended to give indication of the alterations necessary to render the bill constitutionally adequate.

We answer the question "Yes."

Mr. Justice KAPLAN did not participate in this opinion.

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CHAPTER THREE. THE DRY SAND AND THE UPLAND AREAS: ESTABLISHING EXISTING PUBLIC OWNERSHIP, USE AND ACCESS RIGHTS

I IMPLIED DEDICATION

Note, "Public Access to Beaches," 22 Stanford L. Rev. 564, 572-75 (1970)*

By using a beach for many years, paying little or no attention to the property rights of littoral owners, the public may acquire rights in the beach. Lawsuits to confirm those rights may be brought either by state and local governments or by a private party representing the public in a class action. Adverse possestion, prescription, and implied dedication are all familiar legal doctrines which recognize that under certain circumstances rights in land may be obtained through use. In light of a recent California supreme court decision allowing dedication of beaches by only 5 years of public use, implied dedication may prove to be the most effective of these three doctrines in the beach-access area....

Common-law implied dedication comprises a system of judicially created doctrines governing the donation of land to public use. No formalities are necessary; conduct showing intent by the owner to dedicate land and an acceptance by the public completes the dedication. Both intent to dedicate and acceptance may be implied from public use. An owner's inaction may be taken as evidence of acquiescence in public use and thus of his intent to donate the land. The public use itself may be taken as evidence of acceptance.

Once the implicit offer has been accepted, the owner cannot revoke his dedication. The public cannot lose its rights through nonuse or adverse possession. The public normally takes only an easement by implied dedication, with the owner retaining the underlying fee; a few courts, however, have found dedication of a fee simple title in circumstances indicating an intent to give such a title.

Dedication implied from public use has frequently been employed to create roadway easements, and this has undoubtedly been its most common context. Although dedication of other lands (parks, athletic fields, and beaches) has been implied when owners recorded subdivision maps and displayed advertising circulars showing public recreation areas, only roadways historically have been dedicated by public use alone. This situation is changing; courts are beginning to allow dedication of beaches by public use.

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Dedication of beaches by public use is a quite recent phenomenon. Early beach-access cases were hostile to public claims, holding that long unobstructed use of beaches was presumed to be under a revocable license from the owner. This presumption had traditionally applied to open unimproved lands, such as forests and prairies. The early courts, for reasons that are unclear, distinguished sharply between roadways and beaches, applying the open-lands limitation to beaches because of their resemblance to open fields and prairies.

In 1964 a Texas court, reinforced by beach-access legislation, first applied the dedication doctrine to beaches in Seaway Co. v. Attorney General. A statute enacted in 1959 had prohibited obstructing access to stateowned tidelands. Acting under the statute, the state sought a removal order for barriers erected by the Seaway Company on the beach above the mean high-tide line. For over a century before the barriers were built in 1958 the general public had used the beach freely for travel, bathing, picnicking, fishing, swimming, camping, sunning--all the normal recreational uses of a beach. No one had ever interfered with public enjoyment of the area, and the public had never sought permission from anyone to use the beach. The court found this evidence sufficient to support an implied dedication of an easement to the public. The Seaway court rather mechanically applied roadway precedents to the beach context, without discussing their suitability or referring to earlier beach-access decisions in other states.

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The most recent and most important application of implied dedication to beach access is a California supreme court decision holding that public use can dedicate easements in beach areas. A unanimous court wrote a single opinion in two similar beach-access cases... [Gion v. City of Santa Cruz and Dietz v. King].

SEAWAY CO. v. ATTORNEY GENERAL*
375 S.W.2d 923 (Tex. Civ. App. 1964)

Bell, Chief Justice.

This case involves the question as to whether the people of Texas have an easement on, over, along and across a portion of

*Citations and footnotes omitted.

the beach along the Gulf of Mexico on Galveston Island giving them access to the State-owned seashore and waters of the Gulf. The easement asserted in appellees' petition, found by the jury's verdict, and established by the court's judgment based on the jury verdict, encompassed an easement in the public to use the area of the land adjoining the waters of the Gulf of Mexico from the line of mean low tide to the seaward side of the line of vegetation for travel and camping and to make use of the area so the members of the public could fully pursue their rights to swim, fish and boat in and on the Gulf waters.

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Prayer was that appellant be required to remove the barriers and be enjoined from erecting others seaward of the seaward side of the vegetation line which would interfere with the use by the public of the area seaward of the line of vegetation.

The petition asserted that appellant was claiming ownership of the surface of the area where the barriers were located, but that whatever rights it had were subordinate and subject to the right of use of the people as a means of access to and the full use and enjoyment of the sovereign-owned shore and waters of the Gulf of Mexico for swimming, fishing, boating, camping and as a public way for vehicular and pedestrian travel between the City of Galveston and the west end of Galveston Island. The bases of the assertion of these superior rights in the people are these:

1. Before, at and continuously since the Jones & Hall Grant on November 28, 1840, the area between the vegetation line and line of mean low tide has been used by the people without overt challenge, question or interruption until the barriers complained of had been erected and such rights thereby became a part of our honored custom and common law.

2. At and before the Grant such area was dedicated as a public way, and was so designated on the official maps of Texas and the grant to appellant's predecessors in title was necessarily subordinate to such rights in the people.

3. For 25 years next preceding the erection of the barriers public funds had been expended by Galveston County in maintaining the area free of debris and other obstructions, which fact was known, or, in the exercise of reasonable diligence, could have been known, to appellant and its predecessors in title, and they have knowingly accepted the benefits of such expenditures and are estopped from denying such rights in the public.

4. The people by adverse use of the area for more than 10 years next preceding the erection of the barriers have established

an easement by prescription.

5. There has been express dedication of the beach area seaward of West Beach Addition.

6. Subsequent to the making of the Jones & Hall Grant the long use of such area by the public and the long acquiescence by appellant and its predecessors in title reflect that the area has been dedicated to public use.

The barriers were, therefore, alleged to be public nuisances and against public policy.

The effect of appellees' petition is to assert an easement in the public covering the area between mean high tide and the seaward side of the vegetation line based on dedication, prescription and continuous right in the public.

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When we use the term "beach", unless we otherwise specify, we mean the area between mean low tide and the seaward side of the vegetation line. The "line of vegetation" is defined in Section 3, subd. a of Article 5415d [the Texas "Open Beaches Law"] and it is stated to be "the extreme seaward boundary of natural vegetation which spreads continuously inland..." In using the term we are adopting the definition given in Article 5415d because it is the area involved in this suit. We are not unaware of appellant's contention that the beach is only that area between mean low tide and mean high tide and that public rights are restricted to such area.

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In this case the State also seeks to uphold the judgment on a basis of dedication by appellant's predecessors in title, prescription and estoppel, estoppel being based on the act of the owners in allowing expenditures of public funds in maintenance of the beach.

We are of the view that the jury's finding that the beach had been dedicated by appellant's predecessors in title is supported by sufficient evidence.

We will not detail the testimony of witnesses. The statement of facts consists of over 1900 pages and there are some 200 exhibits. In some respects the evidence is conflicting but what we state to be shown in the evidence, in our opinion, finds sufficient support in the testimony. The summary that we give of the facts will be material for the most part not only on the issue of dedication but also on the issues of prescription and estoppel.

The beach is a relatively flat and smooth, or certainly a gently sloping, stretch of sandy land running west along the Gulf of Mexico....In width it of course varies, but, generally

speaking, from the line of mean low tide to the line of vegetation is several hundred feet....The record through testimony of witnesses and through pictures shows a well defined vegetation line along the whole of the west beach, including the particular part here involved. It is elevated a few feet above the beach. Seaward of it is sand. Immediately seaward of it in some places are small sand dunes and then the relatively flat (actually gradually sloping) sandy area suitable for vehicular travel. There is testimony that the beach and line of vegetation are stable and that this same beach and vegetation line are two hundred or more years old....The vegetation line effectively marks the sandy beach from the upland which is covered by a continuous spread of vegetation inland. It marks the ending of the sandy beach almost as effectively as a blfff or fences....Certainly it is a well identified area made by nature. Use made of the beach beyond the memory of living man is disclosed by documentary evidence, attesting to facts. Too, reputation evidence, coming through witnesses who received it from persons now deceased, throws light on the fact and nature of use.

An historical work dealing with the history of Galveston Island, written in 1916 by a Dr. J. O. Dyer, and sufficiently proven as an authoritative work, records that as early as 1836 a ferry from Galveston Island was eatablished at San Luis Pass and there was travel on the beach from the City of Galveston to that point....

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Trial of the case was in April, 1961. We will not specifically notice all witnesses' testimony, but we do want to especially notice the testimony of the older ones. One such witness was a Mr. Cordray, a retired pharmacist, who had lived in Galveston all his life. He was 82 years old at the time of his testimony. He was born in 1879. He, when a boy, went down the beach all the way to San Luis. All through the years there has been use of the beach. He saw people driving and they would use the beach all the way from the water line to the line of vegetation. During the years before the advent of automobiles people went with horses and buggies. There was travel all the way down the beach...When automobiles came in people would drive these vehicles down the beach. He would see many people driving, swimming and fishing. He would see people fishing in the waters and camping on the beach. Those camping and fishing and swimming would pull their vehicles up between the sand dunes to the vegetation line. The people would drive down near the water most of the time. He never asked permission from anyone to make use of

the beach. No one ever tried to stop him from using it. He figured he had a right to use it. This type of use had continued to his knowledge ever since he was a boy. There was a life guard station near San Luis. He and other people used to go down there. The only way to get there...Without going over a private road through fenced pastures was to ride down the beach....Old-timers, now deceased, told him of the operation of a stage line in the past though he was not told just when it operated. He was told the stage carried mail and passengers. His father who came to Galveston in 1837 and who died there in the 1890's, was one person who told him of the stage line.

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There were numerous other witnesses for appellees but their testimony covers the period from about 1919 to the date of trial. From their testimony we learn that they were just ordinary members of the general public from Galveston and Houston who gained their knowledge concerning use of the beach from use they and their families made of it and from observing use made of it by the public generally. The effect of their testimony is that general use of the beach...was made by them and others as members of the public. People used the beach from the water line to the sand dunes to drive to the west end of the Island and return. While it is true that they generally drove near the water where the sand was packed the height of the water varied from time to time so the sand would be packed nearer the line of vegetation and thus people would drive along the waters near the sand dunes. Some witnesses testified there was a "low road" and a "high road". When the tide produced high waters on part of the beach, gravel was up near the sand dunes. This situation would require and permit travel up above the line of mean high tide. The waters would pack the sand, from time to time, up to the sand dunes. Travel on the beach was, of course, heavier on weekends and holidays and particularly during the summer months and the springtime. Too, the farther west one goes the more sparse he will find travel and other use. There is sufficient evidence also to show that each year, particularly in the summer months, in the springtime, and on holidays and weekends, the members of the public generally parked their automobiles, since the advent of automobiles, at various places on West Beach and personally went into the water to fish and swim. They also played at various places on the beach up to the line of vegetation. Also there was overnight camping and tents were pitched at various places on the beach even up between the sand dunes to the line of vegetation. Automobiles were parked up toward the sand dunes and between them on occasions

so the people and their property would be safe from high tides and high water. In the wintertime there would be much less fishing, but there would be some fishing even then. We do not recall there is evidence of swimming in the wintertime, but it is a matter of common knowledge that climatic conditions are certainly suitable for swimming in the Gulf waters for six months of the year. The evidence may be accurately characterized as showing yearly, continuous and indiscriminate use by members of the general public, when they chose to do so, for the purposes above described with the members of the general public seeking no permission from the landowners or anyone else. Too, the record is devoid of any instance of the requirement of permission by any of the owners of the land or their representatives. All of appellees' witnesses testified they asked permission of no one and assumed they had a right to make the use of the beach that they did and never heard of anyone being required to obtain permission. The truth of the matter is that the use of the West Beach by the public generally for travel, for camping, for use in connection with swimming and fishing and picnicking has been so prevalent since the widespread use of automobiles, in about 1920, as to almost be the subject of judicial notice.

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One witness testified while he was a boy there was one fence across the beach,we believe at Section 11, that was there from 1911 to 1915. He did not know how long it had been there prior to 1911. It had an unlocked gate in it to permit passage along the beach. This fence was destroyed in the 1915 storm and was not rebuilt...Except for the one fence across the beach, as above stated, there has never, so far as the evidence shows, been anything such as the barriers erected in about 1958 to interfere with use of the beach.

Evidence was introduced showing expenditures by Galveston County of some $82,000.00 from 1929 to the date of trial for maintenance of beaches. There is no showing as to what amount was spent on any particular part of any particular beach. However, there is testimony by county employees of work done over this period of time to keep all beaches, including West Beach all the way to San Luis Pass, open so it could be used for travel and free of debris left by users of the beach. Logs that came up on the beach and lodged were removed. Many such logs were pushed up into the area between the sand dunes next to the line of vegetation and left to be used by campers as firewood. Evidence showed patrolling of the beach by traffic officers and the issuance of traffic tickets to speeders. When we refer to maintenance, we do not mean the County graded the

road or placed shell, gravel or other surfacing materials. They did not. If there were washouts, they would be repaired by filling in with beach material....

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We hold that under all the evidence an implied common law dedication by appellant's predecessors in title is shown of the area seaward from the seaward side of the line of vegetation to the line of mean high tide.

It is well established in this State that there may be a dedication of land to public use. Implied dedication need not be shown by deed nor need public use be shown for any particular length of time. It is sufficient if the record shows unequivocal acts or declarations of the land owner, dedicating the same to public use, and where others act on the faith of such dedication, the land owner will be estopped to deny the dedication, or make any future use of the property inconsistent with any purpose for which the land was dedicated. It is of course necessary that there should be an appropriation of the land by the owner to public use. By this last statement is meant the land owner must be shown to intend to dedicate the land to public use. In the case of implied dedication this intent is not, or at least need not be, manifested by an expression to that effect, but may be manifested, and usually is, by some act or course of conduct. The intent on the part of the owner, however, is not a secret intent, but is that expressed by visible conduct and open acts of the owner. If the open and known acts are of such a nature as to induce the belief that the owner intended to dedicate the way to the public and individuals act on such conduct, proceed as if there had been in fact a dedication and acquire rights that would be lost if the owner were allowed to reclaim the land, then the law will not permit him to assert that there was no intent to dedicate, no matter what may have been his secret intent. The act of throwing open property to the public use, without any other formality, is sufficient to establish the fact of dedication to the public; and if individuals, in consequence of this act, become interested to have it continue so, the owner cannot resume it....

The evidence we have detailed shows the owners, beginning with the original ones, have thrown open the beach to public use and it has remained open for over a hundred years. There is absolutely no evidence of closing it to public use until the erection of the barriers complained of in this case. They were erected in 1958. There is the evidence of one fence, which we spoke of above, that was there from about 1911 to 1915, down the beach some distance from appellant's property. However, it had

an unlocked gate premitting passage by users....[I]f the various prior owners did not intend to dedicate the beach, they could easily have done as has been done in the erection of the present barriers. They could have erected barriers of such construction that at most they would have been damaged or destroyed by storms and then repaired or replaced at relatively small expense. Such would have been evidence of the absence of intent to dedicate. Or, as has been true in some decided cases, they could have erected signs showing use by the public was purely permissive. Rather than any such conduct, however, successive owners have, without any protest, allowed members of the public generally to use the beach each year. While it is true there were few who used it during the winter months, the thing of significance is that whoever wanted to use it did so continuously for these many years when they wished to do so without asking permission and without protest from the land owners. Too, the County expended funds on the beaches, including West Beach, from 1929 to the erection of the barriers, keeping debris cleared so the beach could be used by the public. It was so open the owners must have known of it. Too, the patrolling of the beach by law enforcement officers was carried on openly and for such length of time the owners should have known of it, and it is the duty and right of officers to patrol only public roads in the enforcement of the law....

Appellant urges that the owners also used the beach. This alone is not fatal to a finding on implied dedication....It would seem to us this would be but evidentiary and the weight to be given such use by the owner would depend on its nature, extent and all surrrounding circumstances. The use by owners shown is small as compared to use made by the public without permission from the owners. Too, the members of the public were not confined to residents of the community....When their cattle were let out so they could get away from mosquitoes, they were not confined within their owner's land because there were no fences to confine them within the limits of their owner's lands, but they could wander at will up and down the beach on others' lands. It was like turning them out on a "Common"....For there to be a dedication there must be acceptance by the public. The evidence above detailed shows acceptance by the public.

Appellant urges there can be no dedication because there has been no acceptance by Galveston County as required by Article 6626, V.A.T.S.

Article 6626 applies to express dedication only. It has been held that for there to be an implied dedication acceptance by public authority is not necessary. User by the public generally suffices....

GION v. CITY OF SANTA CRUZ
DIETZ v. KING*
2 C.3d 29; 84 Cal. Rptr. 162, 465 P.2d 50 (1970)

THE COURT.--We consider these two cases together because both raise the question of determining when an implied dedication of land has been made.

Gion v. City of Santa Cruz concerns three parcels of land on the southern or seaward side of West Cliff Drive....The three lots contain a shoreline of approximately 480 feet and extend from the road into the sea a distance varying from approximately 70 feet to approximately 160 feet. Two of the three lots are continuous; the third is separated from the first two by approximately 50 feet. Each lot has some area adjoining and level with the road (30 to 40 feet above the sea level) on which vehicles have parked for the last 60 years. This parking area extends as far as 60 feet from the road on one parcel, but on all three parcels there is a sharp cliff-like drop beyond the level area onto a shelf area and then another drop into the sea. The land is subject to continuous, severe erosion. Two roads previously built by the city have been slowly eroded by the sea. To prevent future erosion the city has filled in small amounts of the land and placed supporting riprap in weak areas. The city also put an emergency alarm system on the land and in the early 1960's paved the parking area. No other permanent structures have ever been built on this land.

Since 1880, the City of Santa Cruz has had fee title to a road at some location near the present road...In 1932, after moving the road to its present location, the city gave a quitclaim deed for the land previously covered by the road, but no longer used as a road, to G. H. Normand, the owner and developer of the surrounding property. The area presently under dispute, therefore, includes an old roadbed. Most of the area, however, has never been used for anything but the pleasure of the public.

Since at least 1900 various members of the public have parked vehicles on the level area, and proceeded toward the sea to fish, swim, picnic, and view the ocean. Such activities have proceeded without any significant objection by the fee owners of the property. M. P. Bettencourt, who acquired most of the property in dispute in 1941 and sold it to Gion in 1958 and 1961, testified that during his 20 years of ownership he had occasionally posted signs that the property was privately owned. He conceded, however, that the signs quickly blew away or were torn down, that he never told anyone to leave the property, and that he always granted permission on the few occasions when visitors

*Citations and footnotes omitted.

requested permission to go on it. In 1957 he asked a neighbor to refrain from dumping refuse on the land. The persons who owned the land prior to Bettencourt paid even less attention to it than did Bettencourt. Every witness who testified about the use of the land before 1941 stated that the public went upon the land freely without any thought as to whether it was public or privately owned. In fact, counsel for Gion offered to stipulate at trial that since 1900 the public has fished on the property and that no one ever asked or told anyone to leave it.

The City of Santa Cruz has taken a growing interest in this property over the years and has acted to facilitate the public's use of the land. In the early 1900's, for instance, the Santa Cruz school system sent all the grammar and high school students to this area to plant ice plant, to beautify the area and keep it from eroding. In the 1920's, the city posted signs to warn fishermen of the dangers from eroding cliffs. In the 1940's, the city filled in holes and built an embankment on the top level area to prevent cars from driving into the sea. At that time, the city also installed an emergency alarm system that connected a switch near the cliff to an alarm in the firehouse and police station. The city replaced a washed out guardrail and oiled the parking area in the 1950's, and in 1960-61 the city spend $500,000 to prevent erosion in the general area. On the specific property now in dispute, the city filled in collapsing tunnels and placed boulders in weak areas to counter the eroding action of the waves. In 1963, the city paved all of the level area on the property, and in recent years the sanitation department has maintained trash receptacles thereon and cleaned it after weekends of heavy use.

The Superior Court for the County of Santa Cruz concluded that the Gions were the fee owners of the property in dispute but that their fee title was "subject to an easement in defendant, City of Santa Cruz, a Municipal corporation, for itself and on behalf of the public, in, on, over and across said property for public recreation purposes, and uses incidental thereto, including, but not limited to, parking, fishing, picnicking, general viewing, public protection and policing, and erosion control, but not including the right of the City or the public to build any permanent structures thereon." This conclusion was based on the following findings of fact:

"The public, without having asked or received permission, has made continuous and uninterrupted use of the said property for a period of time in excess of five (5) years preceding the commencement of this action, for public recreation purposes.

"The City of Santa Cruz, through its agents and employees, has continuously for a period in excess of five(5) years preceding

the commencement of this action, exercised continuous and uninterrupted dominion and control over the said property, by performing thereon, grading and paving work, clean-up work, erosion control work, and by maintaining a planning program, and by placing and maintaining safety devices and barriers for the protection of the public using said property.

"Plaintiffs and plaintiffs' predecessors in title had full knowledge of the dominion and control exercised over said property by the City of Santa Cruz, and of the public user of said property throughout the period of said public user, for a period of time in excess of five (5) years preceding the commencement of this action."

In Dietz v. King, plaintiffs, as representatives of the public, asked the court to enjoin defendants from interfering with the public's use of Navarro Beach in Mendocino County and an unimproved dirt road, called the Navarro Beach Road, leading to that beach. The beach is a small sandy peninsula jutting into the Pacific Ocean. It is surrounded by cliffs at the south and east, and is bounded by the Navarro River and the Navarro Beach Road (the only convenient access to the beach by land) on the north. The Navarro Beach Road branches from a county road that parallels State Highway One. The road runs in a southwesterly direction along the Navarro River for 1,500 feet and then turns for the final 1,500 feet due south to the beach.... [Of this 3,000 feet, the final 2,200 feet is land owned by the Kings. The remainder was owned by two other private parties.]

The public has used the beach and the road for at least 100 years. Five cottages were built on the high ground of the ocean beach about 100 years ago. A small cemetery plot containing the remains of shipwrecked sailors and natives of the area existed there. Elderly witnesses testified that persons traveled over the road during the closing years of the last century. They came in substantial numbers to camp, picnic, collect and cut driftwood for fuel, and fish for abalone, crabs, and finned fish. Others came to the beach to decorate the graves, which had wooden crosses upon them. Indians, in groups of 50 to 75 came from as far away as Ukiah during the summer months. They camped on the beach for weeks at a time, drying kelp and catching and drying abalone and other fish. In decreasing numbers they continued to use the road and the beach until about 1950.

In more recent years the public use of Navarro Beach has expanded. The trial court found on substantial evidence that "For many years members of the public have used and enjoyed the said beach for various kinds of recreational activities, including picnicking, hiking, swimming, fishing, skin diving, camping, driftwood collecting, firewood collecting, and related activities." At times as many as 100 persons have been on the beach. They

have come in automobiles, trucks, campers, and trailers. The beach has been used for commercial fishing, and during good weather a school for retarded children has brought its students to the beach once every week or two.

None of the previous owners of the King property ever objected to public use of Navarro Beach Road.... [One previous owner testified] that she and her husband encouraged the public to use the beach. "We intended," she said, "that the public would go through and enjoy that beach without any charge and just for the fun of being out there." She also said that it "was a free beach for anyone to go down there," "you could go in and out as you pleased," and "[w]e intended that the beach be free for anybody to go down there and have a good time." Only during World War II, when the U.S. Coast Guard took over the beach as a base from which to patrol the coast, was the public barred from the beach.

In 1960, a year after the Kings acquired the land, they placed a large timber across the road at the entrance to their land, Within two hours it was removed by persons wishing to use the beach. Mr. King occasionally put up No Trespassing signs, but they were always removed by the time he returned to the land, and the public continued to use the beach until August 1966. During that month, Mr. King had another large log placed across the road at the entrace to his property. That barrier was, however, also quickly removed. He then sent in a caterpillar crew to permanently block the road. That operation was stopped by the issuance of a temporary restraining order.

The various owners of...[other portions of the road]have at times placed an unlocked chain across the Navarro Beach Road on that property. One witness said she saw a chain between 1911 and 1920. Another witness said the chain was put up to discourage cows from straying and eating poisonous weeds. The chain was occasionally hooked to an upright spike, but was never locked in place and could be easily removed. Its purpose apparently was to restrict cows, not people, from the beach. In fact, the chain was almost always unhooked and lying on the ground.

From about 1949 on, a proprietor of the Navarro-by-the-Sea Hotel maintained a sign at the posts saying, "Private Road--Admission 50¢--please pay at hotel." With moderate success, the proprietor collected tolls for a relatively short period of time. Some years later another proprietor resumed the practice. Most persons ignored the sign, however, and went to the beach without paying. The hotel operators never applied any sanctions to those who declined to pay. In a recorded instrument the present owners of the Navarro-by-the-Sea property acknowledged that "for over one hundred years there has existed a public

easement and right of way" in the road as it crosses their property. The...owners of the first stretch of the Navarro Beach Road never objected to its use over their property and do not object now.

The Mendocino County Superior Court ruled in favor of defendants, concluding that there had been no dedication of the beach or the road and in particular that widespread public use does not lead to an implied dedication.

In our most recent discussion of common law dedication, we noted that a common law dedication of property to the public can be proved either by showing acquiescence of the owner in use of the land under circumstances that negate the idea that the use is under a license or by establishing open and continuous use by the public for the prescriptive period. When dedication by acquiescence for a period of less than five years is claimed, the owner's actual consent to the dedication must be proved. The owner's intent is the crucial factor. When, on the other hand, a litigant seeks to prove dedication by adverse use, the inquiry shifts from the intent and activities of the owner to those of the public. The question then is whether the public has used the land "for a period of more than five years with full knowledge of the owner, without asking or receiving permission to do so and without objection being made by anyone." As other cases have stated, the question is whether the public has engaged in "long-continued adverse use" of the land sufficient to raise the "conclusive and undisputable presumption of knowledge and acquiescence, while at the same time it negatives the idea of a mere license."

In both cases at issue here, the litigants representing the public contend that the second test has been met. Although there is evidence in both cases from which it might be inferred that owners preceding the present fee owners acquiesced in the public use of the land, that argument has not been pressed before this court. We therefore turn to the issue of dedication by adverse use.

Three problems of interpretation have concerned the lower courts with respect to proof of dedication by adverse use: (1) When is a public use deemed to be adverse? (2) Must a litigant representing the public prove that the owner did not grant a license to the public? (3) Is there any difference between dedication of shoreline property and other property?

In determining the adverse use necessary to arise a conclusive presumption of dedication, analogies from the law of adverse possession and easement by prescriptive rights can be misleading. An adverse possessor or a person gaining a personal easement by prescription is acting to gain a property right in himself and the test in those situations is whether the person

acted as if he actually claimed a personal legal right in the property. Such a personal claim of right need not be shown to establish a dedication because it is a public right that is being claimed. What must be shown is that persons used the property believing the public had a right to such use. This public use may not be "adverse" to the interests of the owner in the sense that the word is used in adverse possession cases. If a trial court finds that the public has used land without objection or interference for more than five years, it need not make a separate finding of "adversity" to support a decision of implied dedication.

Litigants, therefore, seeking to show that land has been dedicated to the public need only produce evidence that persons have used the land as they would have used public land. If the land involved is a beach or shoreline area, they should show that the land was used as if it were a public recreation area. If a road is involved, the litigants must show that it was used as if it were a public road. Evidence that the users looked to a governmental agency for maintenance of the land is significant in establishing an implied dedication to the public.

Litigants seeking to establish dedication to the public must also show that various groups of persons have used the land. If only a limited and definable number of persons have used the land, those persons may be able to claim a personal easement but not dedication to the public. An owner may well tolerate use by some persons but object vigorously to use by others. If the fee owner proves that use of the land fluctuated seasonally, on the other hand, such a showing does not negate evidence of adverse user. "[T]he thing of significance is that whoever wanted to use [the land] did so...when they wished to do so without asking permission and without protest from the land owners."

The second problem that has concerned lower courts is whether there is a presumption that use by the public is under a license by the fee owner, a presumption that must be overcome by the public with evidence to the contrary. Counsel for the fee owners have argued that the following language from F. A. Hihn Co. V. City of Santa Cruz is controlling: "...where land is uninclosed and uncultivated, the fact that the public has been in the habit of going upon the land will ordinarily be attributed to a license on the part of the owner, rather than to his intent to dedicate. This is more particularly true where the user by the public is not over a definite and specified line, but extends over the entire surface of the tract. It will not be presumed, from mere failure to object, that the owner of such land so used intends to create in the public a right which would practically

destroy his own right to use any part of the property."

We rejected that view, however, in O'Banion v. Borba. With regard to the question of presumptions in establishing easements by prescription we said: "There has been considerable confusion in the cases involving the acquisition of easements by prescription, concerning the presence or absence of a presumption that the use is under a claim of right adverse to the owner of the servient tenement, and of which he has constructive notice, upon the showing of an open, continuous, notorious and peaceable use for the prescriptive period. Some cases hold that from that showing a presumption arises that the use is under a claim of right adverse to the owner. [Citations] It has been intimated that the presumption does not arise when the easement is over unenclosed and unimproved land. [Citations] Other cases hold that there must be specific direct evidence of an adverse claim of right, and in its absence, a presumption of permissive use is indulged. [Citations] The preferable view is to treat the case the same as any other, that is, the issue is ordinarily one of fact, giving consideration to all the circumstances and the inferences that may be drawn therefrom. The use may be such that the trier of fact is justified in inferring an adverse claim and user and imputing constructive knowledge thereof to the other. There seems to be no apparent reason for discussing the matter from the standpoint of presumptions."

No reason appears for distinguishing proof of implied dedication by invoking a presumption of permissive use. The question whether public use of privately owned lands is under a license of the owner is ordinarily one of fact. We will not presume that owners of property today knowingly permit the general public to use their lands and grant a license to the public to do so. For a fee owner to negate a finding of intent to dedicate based on uninterrupted public use for more than five years, therefore, he must either affirmatively prove that he has granted the public a license to use his property or demonstrate that he has made a bona fide attempt to prevent public use. Whether an owner's efforts to halt public use are adequate in a particular case will turn on the means the owner uses in relation to the character of the property and the extent of public use. Although "No Trespassing" signs may be sufficient when only an occasional hiker traverses an isolated property, the same action cannot reasonably be expected to halt a continuous influx of beach users to an attractive seashore property. If the fee owner proves that he has made more than minimal and ineffectual efforts to exclude the public, then the trier of fact must decide whether the owner's activities have been adequate. If the owner has not attempted to halt public use in any significant way, however, it

will be held as a matter of law that he intended to dedicate the property or an easement therein to the public, and evidence that the public used the property for the prescriptive period is sufficient to establish dedication.

A final question that has concerned lower courts is whether the rules governing shoreline property differs from those governing other types of property, particularly roads. Most of the case law involving dedication in this state has concerned roads and land bordering roads. This emphasis on roadways arises from the ease with which one can define a road, the frequent need for roadways through private property, and perhaps also the relative frequency with which express dedications of roadways are made. The rules governing implied dedication apply with equal force, however, to land used by the public for purposes other than as a roadway. In this state, for instance, the public has gained rights, through dedication, in park land, in athletic fields, and in beaches.

Even if we were reluctant to apply the rules of common law dedication to open recreational areas, we must observe the strong policy expressed in the Constitution and statutes of this state of encouraging public use of shoreline recreational areas.

Among the statutory provisions favoring public ownership of shoreline areas is Civil Code section 830. That section states that absent specific language to the contrary, private ownership of uplands ends at the high water mark. The decisions of this court have interpreted this provision to create a presumption in favor of public ownership of land between high and low tide.

There is also a clearly enunciated public policy in the California Constitution in favor af allowing the public access to shoreline areas: "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water..." (Art. XV, § 2.)

Recreational purposes are among the "public purposes" mentioned by this constitutional provision. Although article XV section 2 may be limited to some extent by the United States Constitution it clearly indicates that we should encourage public use of shoreline areas whenever that can be done consistently with the federal Constitution.

Other legislative enactments that indicate the strong public policy in favor of according public access to the coast include (1) article I, section 25 of the California Constitution (guaranteeing the right to fish); (2) Government Code sections 54090-54093 (relating to discrimination in beach access); (3) Government

Code sections 39933-39937 (implementing Cal. Const. art. XV § 2, and requiring municipalities to maintain access to navigable waters); (4) Fish and Game Code section 6511 and Public Resources Code section 6008 (restrictions on sales and leases of public lands in Humboldt Bay in order to preserve public access); (5) Public Resources Code section 6210.4 (requiring the state to reserve convenient access to navigable waters in connection with the sale or other disposition of shoreline lands); and (6) Public Resources Code section 6323 (forbidding structures on artificially accreted lands so that such accretions will remain an unobstructed and open beach).

This court has in the past been less receptive to arguments of implied dedication when open beach lands were involved than it has when well-defined roadways are at issue. With the increased urbanization of this state,however, beach areas are now as well-defined as roadways. This intensification of land use combined with the clear public policy in favor of encouraging and expanding public access to and use of shoreline areas leads us to the conclusion that the courts of this state must be as receptive to a finding of implied dedication of shoreline areas as they are to a finding of implied dedication of roadways. (For a similar result see State ex rel.Thornton v. Hay (1969) 254 Ore. 584.)

We conclude that there was an implied dedication of property rights in both cases. In both cases the public used the land "for a period of more than five years will full knowledge of the owner, without asking or receiving permission to do so and without objection being made by anyone." In both cases the public used the land in public ways, as if the land was owned by a government, as if the land were a public park.

In Gion v. City of Santa Cruz, the public use of the land is accentuated by the active participation of the city in maintaining the land and helping the public to enjoy it. The variety and long duration of these activities indicate conclusively that the public looked to the city for maintenance and care of the land and that the city came to view the land as public land.

No governmental agency took an active part in maintaining the beach and road involved in Dietz. v. King, supra, but the public nonetheless treated the land as land they were free to use as they pleased. The evidence indicates that for over a hundred years persons used the beach without regard to who owned it. A few persons may have believed that the proprietors of the Navarro-by-the-Sea Hotel owned or supervised the beach, but no one paid any attention to any claim of the true owners. The activities of the Navarro-by-the-Sea proprietors in occasionally collecting tolls had no effect on the public's rights in the property because

the question is whether the public's use was free from interference or objection by the fee owner or persons acting under his direction and authority.

The rare occasions when the fee owners came onto the property in question and casually granted permission to those already there have, likewise, no effect on the adverse user of the public. By giving permission to a few, an owner cannot deprive the many, whose rights are claimed totally independent of any permission asked or received of their interest in the land. If a constantly changing group of persons use land in a public way without knowing or caring whether the owner permits their presence, it makes no difference that the owner has informed a few persons that their use of the land is permissive only.

The present fee owners of the lands in question have of course made it clear that they do not approve of the public use of the property. Previous owners, however, by ignoring the wide-spread public use of the land for more than five years have impliedly dedicated the property to the public. Nothing can be done by the present owners to take back that which was previously given away. In each case the trial court found the elements necessary to implied dedication were present--use by the public for the prescriptive period without asking or receiving permission from the fee owner. There is no evidence that the respective fee owners attempted to prevent or halt this use. It follows as a matter of law that a dedication to the public took place. The judgment in Gion is affirmed. The judgment in Dietz is reversed with directions that judgment be entered in favor of plaintiffs.

The Gion decision has evoked a great deal of commentary in legal periodicals. See, e.g., "Armstrong, Gion v. City of Santa Cruz: Now You Own It--Now You Don't; or The Case of The Reluctant Philanthropist," 45 L.A.B. Bull. 529 (1970); Berger, "Gion v. City of Santa Cruz; A License to Steal?," 49 Cal. St. B. J. 24 (1974); Berger, "Nice Guys Finish Last--As Least They Lose Their Property: Gion v. City of Santa Cruz," 8 Calif. Western L. Rev. 75 (1971); Gallager, Jure, and Agnew, "Implied Dedication: The Imaginary Waves of Gion-Dietz," 5 Southwestern U.L. Rev. 48

(1973); Shavelson,"Gion v. City of Santa Cruz: Where Do We Go from Here?,"47 Calif. St. Bar J. 15 (1972); Comment,"This Land Is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches,"44 So. Cal. L. Rev. 1092 (1971); Comment,"A Threat to the Owners of California's Shoreline," 11 Santa Clara Law 327 (1971); Comment,"Public or Private Ownership of Beaches: An Alternative to Implied Dedication," 18 U.C.L.A.L. Rev. 795 (1971); Note,"Access to Public Municipal Beaches: The Formulation of a Comprehensive Legal Approach," 7 Suffolk U.L. Rev. 936 (1973); Note,"Californians Need Beaches--Maybe Yours!," 7 San Diego L. Rev. 605 (1970); Note,"Implied Dedication in California: A Need for Legislative Reform," 7 Calif. Western L. Rev. 259 (1970); Note,"The Common Law Doctrine of Implied Dedication and Its Effect on the California Coastline Property Owners,"4 Loyola U.L. Rev. 438 (1971); Note,"Public Access to Beaches,"22 Stan. L. Rev. 564 (1970); 59 Calif. L. Rev. 231 (1971); Note,"Public Access to Beaches: Common Law Doctrines and Constitutional Challenges," 48 N.Y.U.L. Rev. 369 (1973).

An examination of this commentary reveals an overall sympathy with the result reached in Gion, but a great deal of controversy surrounding the particulars of the decision. On the legal doctrine of implied dedication, the conflict centers on three points: the "intent"to dedicate on the part of the

dry-sand owner; the issue of whether public use of a beach should be presumed to be by permission of the owner; and, whether "implying" a dedication constitutes an unconstitutional taking of private property for public use without payment of compensation. A broader debate centers on questions of the policy basis of the court's decision, the impact of the case on the availability of dry-sand areas for future public use, and the future use of the device for establishing public rights to shoreline recreation. This debate is summarized in the following selections.

A. Intent to Dedicate

Note, "Public Access to Beaches," 22 Stan. L. Rev. 564, 577-76 (1970)*

The language of implied-dedication cases often obscures the real basis for the decisions. Although the doctrine ostensibly allows the owner himself to determine the extent of public rights in his property, courts often find a dedication despite the owner's strong denial of any intention to give away his land. In most cases the donative intent implied from an owner's inaction in the face of public use is wholly fictitious; in fact the courts are recognizing a claim opposed to the owner's interests.

Seaway exemplifies a court in search of a fictitious donative intent. Its discussion of the conduct necessary to establish dedication shows that the owner's actual or "secret" intent is of no significance if the public use has been long and continuous and the owner has not attempted to prevent it. Once long use is demonstrated, the owner must show that he had tried to curtail that use. Since the owner must protect his land or lose it, the interests of the public and the owner are actually opposed. Thus the donative-intent fiction--the assertion that the visible

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conduct of the owner expresses his intent--is only a device that enables the court to avoid grappling with the underlying conflict of interests.

An alternative holding in Seaway, basing the easement on prescription by more than 10 years of adverse public use, emphasizes the weakness of the donative-intent fiction. Adverse use was demonstrated by the same evidence from which the owner's intent to dedicate had been inferred. When identical evidence creates an identical easement under either theory, is clear that proof of adverse use is sufficient to support a holding of implied dedication and that the owner's attitude toward public rights in his land is functionally irrelevant.

The California supreme court decision in Dietz v. King and Gion v. City of Santa Cruz explicitly recognizes that determination of the adverse character of the public use, rather than the owner's intent, is the significant inquiry. The court, however, was not fully candid, for it labeled the taking by adverse use "implied dedication," rather than admitting that is was really applying rules of prescription. Perhaps the court was thinking uneasily of California precedents declaring that the public cannot gain rights by prescription, or of a California statute precluding a prescriptive easement wherever owners have posted signs stating that use is permissive. The court could, however, have found precedents in other jurisdictions for applying prescription to the acquisition of public rights, as the Texas court did in Seaway. Moreover, the statute should not have deterred the court from doing so, since the statutory standard is an entirely reasonable one for beach-access cases. To strip away a fiction, to obtain thereby a more rational result, and yet to refrain from accurately describing that result betrays excessive judicial modesty.

Note,"Public or Private Ownership of Beaches: An Alternative to Implied Dedication," 18 U.C.L.A.L. Rev. 795, 798-801 (1971).*

In both Gion and Dietz the court held that there had been an implied dedication of an easement for recreational purposes because the public had used the land for more than five years with "knowledge of the owner, without asking or receiving permission to do so."

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By so deciding, the California Supreme Court has given new life to a long standing,[1] but rarely used,[2] legal doctrine....

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Although the court in Gion describes the result of its decision as a dedication, the landowners whose land was dedicated undoubtedly characterized the disposition as a taking rather than a giving. So characterized, such a disposition, to withstand the prohibition of the fifth and fourteenth amendments against uncompensated takings, must either be justified as an exercise of the police power or must be doctrinally defined as something other than a taking. This latter feat of legerdemain has often been performed in the field of property law and hence the Gion use of the fiction of implied dedication is not surprising.

At common law, the fiction of a lost grant was employed to justify an individual's acquisition of an easement by adverse use. American courts early disposed of the fictional lost grant device and recognized the policies supporting private prescription as a sound basis for achieving the same result. Justification for the doctrine of prescription was readily found in the policy favoring improvement of property and expansion of the frontier. By helping those who helped themselves, the law encouraged productive activity at the expense of the less vigilant. In the same manner, when courts describe the public acquisition of an easement by adverse use as a donation or dedication to be implied in law, that fiction ought also to be based on sound policy grounds. To the extent that the underlying policy of implied dedication is persuasive and to the extent that dedication also withstands attack on practical grounds, continued use of that fiction by the courts remains unobjectionable. If the fiction is not justified by policy or if the practical difficulties created are substantial, implied dedication should be discarded or severely restricted as a means of allocating beachfront property.

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[1]The United States Supreme Court recognized implied dedication nearly 150 years ago. Barclay v. Howell's Lessee, 31 U.S. (5 Pet.) 498 (1832).

[2]The California Supreme Court noted in Gion that it had not considered the doctrine of implied dedication since 1954. 2 Cal. 3d at 38, 465 P.2d at 55, 84 Cal. Rptr. at 167.

Gallagher, "Jure, and Agnew, Implied Dedication: The Imaginary Waves of Gion-Dietz," 5 Southwestern U.L. Rev. 48, 52-55 (1973)*

The vital principle of dedication is the necessity of the fee owner's intent to dedicate--the animus dedicandi. As early as 1854, in City of San Francisco v. Scott, the California supreme court was confronted with the doctrine of common law dedication and the methods available for establishing this intent. The city brought suit against Scott for his obstruction of an alleged public highway within the city. The defendant had removed a structure from his lot which was located at the end of a public street. The lot then presented the appearance of an extension of the highway. At that time Scott expressly declared that he did not intend his lot to become such unless he received just compensation. Despite this declaration, the public used his lot for a period of four to five months before Scott took the action complained of, obstruction of the way.

On the basis of this short-lived use the city claimed and the trial court found that the vacant, defined lot had become part of the public road by dedication. In reversing, the supreme court explained that there were three methods by which the common law doctrine of dedication could be applied: (1) by deed or overt act of the landowner; (2) by a presumption arising from public use over a period of time; and (3) by acquiescence of the landowner in the public use.**

With reference to the second method, the court stated that there was no precise time limit established from which dedication would be presumed. In some cases twenty years had been necessary to raise the presumption, while in others a shorter time period was sufficient.

In Scott, the use had been for such a limited time that the court would not apply a presumption of an intention to dedicate.

Of the three methods mentioned in Scott, Gion-Dietz was concerned only with method two, implied in law dedication.

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The trial court [in Schwerdtle v. Placer County, 108 Cal. 589, 41 P.448 (1895)] concluded that the public use for...a

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**These three methods can best be expressed as: (1) express (overt act); (2) implied in law (adverse public use); (3) implied in fact (acts and acquiescence of the owner)....

long period of time as a matter of law resulted in a dedication. The supreme court affirmed, holding that where the claim of the public was based upon long, continued, adverse use, that use as against the landowner, established the conclusive presumption of consent and therefore dedication, as well as the conclusive presumption of knowledge and acquiescence, negativing the idea of a license.

The court also recognized that where a dedication is sought to be established by use over a short period of time [though not the problem in this case] the actual consent (by deed or overt act) or acquiescence of the owner is essential. Absent these elements of acquiescence of actual consent no dedication could be proven. However, when actual consent or acquiescence is present, time is immaterial because upon public use [acceptance] the rights of the public vest immediately.

Schwerdtle clarified the implied in law method expressed in Scott. Adverse use by the public conclusively establishes the presumption of dedication to the public use, the law implying the requisite intent of the landowner....

Using this analysis, Gion represents implied in law dedication and Seaway implied in fact dedication.

B. Public Use by License?

Courts, prior to Gion and Seaway, had generally refused to imply dedications of"open and unenclosed" lands. One exception to this general rule allowed public rights to arise in the case of roadways. The extension of this exception to dry-sand beaches has not been without critical comment and controversy.

> Degnan,"Public Rights in Ocean Beaches: A Theory of Prescription," 24 Syracuse L. Rev. 935, 962-63 (1973)*

In the California cases, the beach owners argued that the use of the beach land, since the land was unenclosed, was

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presumptively permissive. Although the argument was rejected, it has a substantial place in cases involving prescription. The cases concern woodland, open fields, farmland, prairie and other land unfenced or undeveloped. Where an adjacent owner or the public has used an identifiable roadway or path across such land in a way that would normally result in prescription, prescription will be blocked by the presumption that such use of unenclosed land is permissive. The presmption appears to rest on three grounds. Owners of open woodland or fields, it seems to be felt, should not be expected to treat most uses as adverse and it would be unreasonable to require the owner to fence his land or guard against trespassers. A second ground is the judgment that it would be unfortunate if owners were forced to exclude the public. In the United States with its great land areas and even in England, courts affirm that harmless trespasses should not be discouraged and that it would be unfair to penalize the generous owner. A third reason, implicit in the cases, is the desire to protect private ownership and to allow for the development of land. The acquisition of easements by prescription could place premature limitations on the land and fix for all time certain patterns of land use.

The perception that the use is permissive, seems inapplicable to ocean beaches. In areas of open land, a general custom of use might lead naturally to the inference of permissive use, but the same openness with respect to the beach leads to another inference. The recreational easement in the beach would not impede future development or allocation of land uses. The beach is not some open tract potentially available for a variety of uses, but an identifiable strand along the ocean, somewhat analogous to a public way. Most important, the land use would not be fixed, since the nature of rights in the shoreline requires that the easement by prescription by (sic) a relative one, subject to the riparian rights of the upland owner to the allocation of uses of the shoreline.

Note, "Public Access to Beaches," 22 Stanford L. Rev. 564, 579-80 (1970)*

The early cases offer no satisfactory reason for refusing to permit creation of beach easements through public use. They declare that an owner's "mere neighborly courtesy" should not be grounds for taking away his right to use his land as he sees fit....The traditional open-lands limitation...militates against

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a finding of dedication in situations where light use of isolated property was unlikely to put the owner on notice against the public claim. Beach owners in these early cases did have notice that the public was freely enjoying their land. It seems likely, though actual criteria were never articulated, that the courts in the early cases felt that the public interest in acquiring beaches was not sufficient to justify applying the less stringent roadway standards to them.

The Seaway court, apparently unaware of the cases in other jurisdictions denying public rights in beaches, did not adequately explain why beaches should be dedicated by use. The Texas beach in controversy had been used for motor traffic along the shore as well as for recreation, and the court applied roadway precedents to the beach without hesitation. The motor traffic does not distinguish Seaway from the earlier cases, however, since the easement created gave not only a right of vehicular passage but a right of public recreation as well. The court considered the open-lands limitation briefly, but only for its original restricted purposes--to determine whether the owner had notice of both the existence and extent of the public use. The Seaway court never admitted that it was applying dedication to a new context; its language does not explain the difference between its result and the results of earlier decisions.

Gallagher, Jure, and Agnew,"Implied Dedication: The Imaginary Waves of Gion-Dietz," 5 Southwestern University Law Review 48, 57, 63-66 (1973)*

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It has been said that stronger proof of dedication is required where the land involved is open country, where the public is in the habit of going at will without any clearly defined roadways. Such a view goes to the sufficiency and weight of proof of the elements which establish the long, continuous adverse use from which the law will imply the owner's intent to dedicate. Such a view, however, does not necessarily call for creation of a presumption of a license when public use extends over such open country or unenclosed land.

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Many legal writers have viewed Gion-Dietz critically because the California Supreme Court did not find for the landowners on the basis that there was a presumption of a license when use

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by the public was over land which was open and unenclosed. The main contentions are that the effect of Gion-Dietz was to present some new, expanded approach to the doctrine of implied dedication, which failed to recognize established precedent upon which the landowner had rightfully depended. Therefore, the court had allegedly placed some new and unjust burden on the landowners to defeat the dedication.

It would seem, however, that the contrary is true and that landowners were not justified in relying on the supposed precedent. The critical contentions are unfounded in the law as shown by the three reasons which follow.

First, the court in O'Banion v. Borba and Union Transportation Co. v. Sacramento County not only informed the legal community at large as well as private landowners that there were two distinct methods of establishing implied dedication--implied in fact (acts and acquiescence of the owner) and implied in law (adverse public use)--but that the character of the use, and hence dedication, would not depend or rest upon presumptions. The cases were to be decided upon all the facts and circumstances presented at trial. Therefore, anyone who sat idly by during the sixteen years (as an inside limit) after Union, or for the twenty-two years (as an outside limit) after O'Banion, did so in spite of California supreme court precedent that effectively stated that presumptions would not be used in implied dedication cases.

Second, the two cases heavily relied upon by the complaining critics as having established a presumption of a license, Hihn and Cortelyou, are very different from Gion-Dietz. The Hihn dicta, by the court's own language, was dealing only with implied in fact dedication and made no mention of implied in law dedication.

Cortelyou substantially buttresses this conclusion because, on the record, the issues in that case that relate to the Hihn dicta dealt only with whether the acts of the owner were sufficient for implication of an intent to dedicate. The Hihn dicta was cited as a good example of acts of the owner not always leading to the same results. To summarize, then, any presumption of a license [whether a supposition by critics or not] that may have existed in case law prior to Gion-Dietz would only have been a presumption existing when the public was claiming a dedication implied in fact. And, as has been previously pointed out, the implied in fact method was not and is not an exclusive means of establishing a dedication. Three distinct methods had been recognized as early as 1854. Thus, because Gion-Dietz was decided upon the implied in law method, the court, even without O'Banion and Union, would have been correct in not recognizing a presumption of a license. The very method to which a

presumption of a license may have applied (implied in fact) was not in issue.

Third, even if a presumption did in fact exist in case law and had been previously applied in both methods of implied dedication, and even if O'Banion and Union were nonexistent as precedent in this jurisdiction, such a presumption would be of no legal consequence in Gion-Dietz.

In its strictest sense it would have been a presumption which favored the landowner and operated against the public by either affecting their burden of producing evidence (going forward with the evidence) or their burden of proof (persuasion). However, these burdens are already borne by the public. What operative effect, then, would such a presumption have?

C. Implied Dedication as a Taking

Berger, "Nice Guys Finish Last--At Least They Lose Their Property: Gion v. City of Santa Cruz," 8 Cal. Western Law Rev. 75, 93-95 (1971)*

"NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE, WITHOUT JUST COMPENSATION"

The fifth amendment may sound like a strange thing to quote when discussing a case in which the supreme court held that property had been given by its owners to "the public" for its recreational pleasure. If the Gions and Kings gave away their property, there was obviously no need to discuss the government's duty to pay for it. Or was there?

Mr. Justice Holmes probably said it best (albeit in a different context):

> Of course this is a pure fiction, and fiction always is a poor ground for changing substantial rights.

A. Gion Dietz Ignores the Fifth Amendment

Stripping away the legal fictions and the omnipresent presumptions, private property was taken for public use without the payment of any compensation, much less just compensation. Even the most ardent supporters of Gion-Dietz were troubled by this aspect of the case....

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The point of all this is simple: No one can seriously argue with the supreme court's avowed policy of opening as much beach property to public use as possible. The problem is the means chosen to effectuate this goal. Fairly read, Gion-Dietz pursued an abstract policy goal, without adequate thought given to the rights of the Gions and the Kings, nor to the mechanics of implementing the decision.

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The Constitution requires that "the public" pay when it takes someone's property for "public use." The burden of acquiring public beaches, in the words of the Supreme Court, "in all fairness and justice, should be borne by the public as a whole."

Note, "This Land is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches," 44 So. Cal. L. Rev. 1092, 1117-19 (1971)*

If the court's holding that public recreational use of private beach land created an implied dedication by adverse use is viewed as an unforeseeable and unprecedented change in the law which was applied retroactively, then there may well have been a taking requiring compensation. This appears to be the situation in Gion-Dietz because in California for almost 100 years the doctrine of "implied dedication," as applied to a public use for other than roads, required a showing of actual intent on the part of the owner to dedicate the property. Implied dedication by adverse user was utilized only when a governmental entity sought to vest control over roads in the public and was otherwise unapplicable to uninclosed and undeveloped land. Thus, prior to Gion-Dietz, no owner could have realized that permitting the public to use his open and uninclosed beach for recreational purposes could have divested him of any interest in that land. Further, the Gion-Dietz opinion applied its new dedication rule retroactively: "[p]revious owners,...by ignoring the widespread public use of the land for more than five years have impliedly dedicated the property to the public."

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Thus, it appears that the creation and retroactive application of a doctrine as unprecedented as that announced by the Gion-Dietz court constitutes a "taking" without due process of law.

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Note, "Public Access to Beaches: Common Law Doctrines and Constitutional Challenges," 48 N.Y.U.L. Rev. 369, 374 (1973)*

Dedication through adverse use can look very much like a governmental taking of land. Once constructive intent is found, however, the implied dedication becomes, in the eyes of the law, a gift to the public. This legal sleight of hand is what removes such dedicated lands from the fifth and fourteenth amendment prohibitions against the taking of land without compensation.

Taking a closer look at what such a beach owner has actually lost, it can be seen that in reality he has lost relatively little--his possibility of exclusive enjoyment of the property. Since by definition implied dedication requires prolonged, uncontested public use of the land, the lack of exclusivity must not have previously been a problem to the owner. He and his guests still have full access to the beach, for whatever purposes they formerly used it and under the same conditions of mixed public/private use. The owner has also lost his ability to alienate the property unencumbered by public rights, but the courts have found this loss to be relatively insignificant when compared to the policies in favor of general public access to beaches.

D. Policy Basis of Implied Dedication

It is clear that the California Court in the Gion case reached its result in large part because of a strong public policy favoring free public use of the dry-sand area. The court cited a number of statutes supporting this policy. Several commentators have noted this policy basis of the decision.

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> Note, "This Land Is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches," 44 So. Cal. L. Rev. 1092, 1106-09 (1971)*

The court relied upon several legislative acts to support its policy objective of creating more public beaches through implied dedication:

> Even if we were reluctant to apply the rules of common law dedication to open recreational areas, we must observe the strong policy expressed in the Constitution and statutes of this state encouraging public use of shoreline recreational areas. [2 Cal.3d at 42].

These statutes, however, can also be construed as representing a complete statutory scheme, thus making further assertions of policy not expressly authorized by the legislature unwarranted. Indeed, the specificity of the scheme indicates thorough legislative coverage of this area. For example, the court relied upon section 6511 of the Fish and Game Code, and section 6008 of the Public Resources Code as typical provisions "in favor of according public access to the coast." While these statutes, and the others cited by the court, as well as Article XV Section 2 of the State Constitution, do evidence an intent to maintain free access over navigable waters and appear to require that various access points to the water be available, there is no reason to suppose that they require the giving of free license to the public to roam the dry sands of private beaches. The court also relied upon section 6323 of the Public Resources Code which forbids "structures on artificially accreted lands so that such accretions will remain an unobstructed and open beach." In citing this statute the court neglected an important part of this section which limits it to "accretions belonging to other than the littoral owner," which thus reaffirms the primacy of private ownership of the dry sand by the upland abutting owner.

Additionally, the court, in arriving at its conclusion, failed to give sufficient weight to legislative statements which would have indicated a contrary policy. The California Legislature has clearly stated that the dry sands of California's beaches are to remain the property of the littoral owner.... Cal. Civ. Code Section 830 . This statute also indicates a strong presumption in favor of private ownership of the dry sand area. Such a

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legislative intent is further recognized in section 662 of the California Evidence Code: "The owner of legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof." More importantly, the Gion-Dietz court paid little heed to enactments protecting private property rights. To maintain the sanctity of these rights the legislature has established elaborate schemes which control the exercise of eminent domain, and has rigidly defined the doctrine of prescription to avoid unjust seizures of property by private parties....

Finally, the decision to acquire more beach property for the public is arguably one that should be left to the legislature--the traditional body for determining the need for recreational facilities. Indeed, had the legislature acted it probably would have developed a narrower doctrine than that created by the Gion-Dietz court, whose holding is so sweeping that it can be applied to all undeveloped and uninclosed land. Further, the legislature's failure to act is an indication that it does not believe that more public beaches are needed at this time.

Note, "Public or Private Ownership of Beaches: An Alternative to Implied Dedication," 18 U.C.L.A. L. Rev. 795, 804-05 (1971)*

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[Another] objection to implied dedication as a means of acquiring public beaches is the probability of inefficiencies and inequities resulting from the application of the doctrine. Implied dedication has the same practical effect as does condemnation in a eminent domain proceeding. Yet, to the extent that the administrative controls which have been developed to insure efficient and just use of the power of eminent domain are lacking in implied dedication, less desirable results can be expected from the use of dedication. One indication of the value of such administrative controls is that private condemnation has been authorized only in exceptional circumstances but any member of the public can attempt to establish an implied dedication. It is the legislature, not the judiciary, which is primarily charged with the duty of respecting private rights while exercising the power of eminent domain, but implied dedication is a creature of the courts.

Efficiency of land use is generally acknowledged to depend in large part on planning. Without considering what constitutes "proper" planning, it is apparent that no formal program is involved in an implied dedication claim by a member of the public. Acquisition of beaches by implied dedication foregoes whatever

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benefits can be derived from coordinated action by municipal agencies.

E. Impacts of the Implied Dedication Doctrine on Dry-Sand Owners and the Availability of Recreational Beaches

Note, "Public or Private Ownership of Beaches: An Alternative to Implied Dedication," 18 U.C.L.A. L. Rev. 795, 802-05 (1971)*

What negates a finding of implied dedication--the other end of the spectrum--is not as well defined. The court provided no clear test to determine what actions by the landowner are sufficient to defeat the inference of dedication once the prima facie case has been shown. As such, the court has made it almost impossible for the landowner to know what he must do to protect his property from a successful dedication claim. The court purports to create an "effectiveness" standard by stating that the landowner must have made "more than minimal and ineffectual efforts to exclude the public." However, effectiveness is no test at all, because if the public has in fact been excluded, there will be no public use from which a prima facie claim will be made. There is alternate language in the opinion from which it is possible to infer that if a landowner makes a bona fide effort, even though he fails to completely halt public use of his land, he can successfully defeat a claim of implied dedication. But even if the court was adopting a "bona fide" standard, a landowner is still left with only a very vague notion of what he must do to protect his property.

The awkward position in which the landowner is placed by virtue of the bona fide/effectiveness test of Gion is typified by the court's ruling that "No Trespassing" signs may not provide complete protection to persons challenged with an implied dedication claim: "Although 'No Trespassing' signs may be sufficient when only an occasional hiker traverses an isolated property, the same action cannot reasonably be expected to halt a continuous influx of beach users to an attractive seashore property."

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[T]he California court ignored...judicial and statutory precedent for the sufficiency of such signs and in its place used the nebulous bona fide/effectiveness test. If this view prevails, and more forceful measures are required to preserve one's property rights, the avowed aim of Gion--"expanding public access to and use of shoreline areas"--will be frustrated. Landowners will become more conscious of the necessity to exclude the public from its land in order to preserve property rights. Uncertain about how to protect their lands, they can

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be expected to over-react. Owners will be more likely to confront the Sunday stroller on the beach. Access routes which had been the objects of benign neglect will become the objects of nervous concern. Where signs failed, chain link fences might succeed.

To further accentuate the almost impossible position in which landowners are placed by Gion, as property owners devise more stringent means to exclude members of the public from their lands they will inevitably confront article XV, section 2, of the state constitution, which prohibits interference with the right-of-way to navigable waters by littoral landowners. Thus, as the bona fide/effectiveness ruling of Gion pushes landowners in one direction, at some point conduct designed to meet that standard may be declared unlawful under article XV. In light of the scarcity of case law on article XV, inconstistent application of the provision by lower courts is a distinct possibility. In any event, the existence of this constitutional provision makes the difficult position in which landowners are placed even more precarious in terms of what will be required by Gion and what will be permitted by article XV if the landowner is to protect his property from a claim of implied dedication.

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A more serious criticism of implied dedication is its potential inequity to landowners. To be equitably applied, a policy decision should be uniformly applied. The judiciary is likely to be uniform only when it lays down a broad rule. When the Oregon Supreme Court faced the problem of vanishing public shoreline in State ex rel. Thornton v. Hay, one reason given for the court's decision to impress the entire coast with a public character was that "the northern to the southern border of the state ought to be treated uniformly."

It is extremely unlikely that an implied dedication approach to the problem of beachfront property allocation will result in uniform traatment along the coast. Implied dedication claims by their nature will have irregular success. Landowners otherwise similarly situated will be treated differently because the public used one parcel of beachfront property and not another at some previous time, oftentimes unknown to present owners. If one lot was either inaccessible or unattractive to the public, it will not be subject to a claim of implied dedication. Another nearby parcel which attracted the public may be taken by virtue of that doctrine.

As for the impact on the availability of dry-sand recreation areas, one author describes the impact of Gion in California

as follows:

> Berger, "Nice Guys Finish Last--At Least They Lose Their Property: Gion v. City of Santa Cruz," 8 Cal. Western L. Rev. 75 (1971)*
>
> On the Palos Verdes peninsula in Los Angeles County, major land owners have recently erected a 7-foot high fence topped by three strands of barbed wire in order to keep the public from reaching the beach by crossing their property. It is believed that other owners in that area have dynamited paths leading to the water. In Orange County, one land owner has erected a large fence with cactus planted at its base to discourage barefoot access to the beach over his property. Land formerly used for parking and beach access in San Mateo County is being vigorously plowed to deter unauthorized users. Parts of Sonoma County are beginning to look like beaches of Normandy in 1944, complete with tank traps: automobile transmissions have been planted in the ground to stop vehicular access.

However, as another author has pointed out, this is not a necessary result of Gion, and such owner reaction may be countered:

> Note, "Public Access to Beaches," 22 Stan. L. Rev. 564, 568 (1970)**
>
> Perhaps these decisions will tempt seashore owners to close their beaches or post signs declaring future use to be permissive. To preclude the possibility that silence in the face of closure may jeopardize the public claim, lawsuits should be brought now to confirm public easements wherever they have been created through past use. These easements will severely diminish the development value of beach property, since improvements that

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conflict with recreational use can be enjoined. Once an easement by use has been established, state or local government can assure complete public ownership by condemning the land at its reduced value. If landowner pressure inhibits governmental action, citizens' groups may bring class suits, as in Dietz.

F. The Implied Dedication Concept After Gion

Shavelson, "Gion v. City of Santa Cruz: Where Do We Go from Here?," 47 Cal. St. B. J. 415, 482-83 (1972)*

Although the effect of Gion in future litigation may be affected more by statutory than by case law, the decision raises as many questions as it answers. Thus, a brief discussion of some of these open questions which appear to be of greatest interest to members of the Bar may be worthwhile.

Preliminarily, we may predict that the legislative backlash as reflected in statutes, both enacted and proposed, and in legal periodicals, will cause the courts to proceed cautiously in expanding Gion or applying the doctrine to facts radically different from those involved in Gion and Dietz. The Legislature's reaction (beyond the substantive effects of enacted laws) may be especially significant since Gion relied heavily upon legislative policy to support its conclusion. California courts are not likely, therefore, to follow Oregon's lead in State ex rel. Thornton v. Hay, by applying the English doctrine of custom to find all or any significant segment of the California shore open to public use.

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The difficulties and confusion created by the Gion decision should not be ignored by the Legislature. On the other hand, it is submitted that they are not such as to require outright abrogation. By giving responsible public officials the procedural power to act with flexibility and by allowing the courts to refine the law on a case by case basis, there can be little doubt that a fair balance between public and private equities

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can be achieved. What is needed is a scalpel, not an axe.

Berger, "Gion v. City of Santa Cruz: A License to Steal?," 49 Cal. St. B. J. 25, 25-30, 83 (1974)*

It is submitted that while Gion-Dietz itself suffers from grave constitutional infirmities, subsequent experience in trial courts does not bear out [Assistant Attorney General] Shavelson's prediction that "...a fair balance between public and private equities [will] be achieved."

Quite the contrary. Decisions have been handed down under the impetus of Gion-Dietz which even the judges rendering them have termed "confiscation."

Neither the practicing bar nor the legislature should be lulled into believing (as beachfront owners had been previously) that the courts would try to balance "public and private equities." In fact, the courts--at the urging of numerous governmental entities, including the Attorney General's office--have been applying Gion-Dietz with a vengeance.

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On at least two occasions, Gion-Dietz has been likened to a natural diaaster. One erudite observer compared it to a hurricane, another to an earthquake. Neither was far wrong. Like other natural diaasters, it struck suddenly, without warning, and left devastation in its wake.

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A brief review of two recent Low Angeles cases should illustrate the point.

City of Long Beach v. Radford[1] was an eminent domain action brought to acquire Mr. and Mrs. Radford's modest, 1932, frame, beachfront home in order to expand the public beach on the Alamitos Peninsula. Long Beach claimed that a Gion-Dietz easement existed over the entire Radford property including the Radfords' home. As trial counsel for Long Beach put it:

> "...the city has by virtue of the facts in this case come under the doctrine of the Gion case and claims, believes it has an easement for recreational purposes over the Radford property, and I mean by that the entire Radford property all the way up to Ocean Boulevard, which easement was acquired by public use and maintenance of the city for more than five years prior to 1934."

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[1] Los Angeles Superior Court Case No. SOC 21023.

Long Beach presented testimony from its trashpickers, lifeguards and tractor operators that every summer day the Radford beach had 75 people on it; on weekends this use increased to 150, and on summer holidays 250--so thick you could hardly walk. (If the reports of the numbers of people were accurate, the characterization would have been quite apt: the Radfords' property was only 40 feet wide, and it was approximately 600 feet from the street to the ocean.) Aerial photographs taken on summer holidays by the city (but not presented by the city at trial), however, revealed no one on the Radfords' property at 2 p.m. on either Labor Day or the fourth of July, 1970.

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Fortunately, the trial judge refused to go quite as far as the overzealous city officials desired. However, he expressed his duty, in light of Gion-Dietz as follows:

> "I might make clear to counsel that I had a great amount of familiarity with the Union Transport case [relied on in Gion-Dietz], and I have had some difficulty in understanding the Gion case in view of my prior knowledge in the area.
>
> "I, unfortunately, am in the position of having to follow my superiors, even in the light of the decisions that I don't fully understand and perhaps may not fully--well, I hate to say agree with, but I guess I have to say that."

So saying, the court granted the City a Gion-Dietz easement over part of the Radfords' beach.

If anything, the confiscation in County of Los Angeles v. Berk[2] was even more high-handed. There, the County had traded a parcel of beach front property to the Berks' predecessor in interest in exchange for an adjoining parcel. The County quitclaimed any interest it may have had in the exchanged land. Then, when the Berks attempted to build on their property, the County filed suit and had the development enjoined on the basis of an asserted Gion-Dietz easement over the same property which the County had quitclaimed only a few years before.

Was the trial judge unaware of the draconian injustice being inflicted on the Berks? Not a bit. He simply felt powerless (in the face of Gion-Dietz) to stop it:

> "I am very concerned that this kind of holding constitutes a legal confiscation...I am afraid Mr. Berk and the lenders are really victims of an era where there has been a sudden change in the law."

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[2]Los Angeles Superior Court Case No.999043.

Far from "refin[ing] the law on a case by case basis," the courts have been applying it to the hilt, suppressing their own self-expressed doubts and feelings of guilt.

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The blunt fact is that government lawyers--judged by their acts, rather than their words--do not believe the courts will take any steps to soften the harsh forfeitures sanctioned by Gion-Dietz. And the judgments being handed down by trial courts after Gion-Dietz can only embolden those who view their job as expanding the public domain over the supine bodies of innocent, law-abiding citizens.

II PRESCRIPTIVE EASEMENTS

CITY OF DAYTONA BEACH v. TONA-RAMA, INC., 271 So.2d 765 (Fla. Ct. App. 1972)*

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The primary issue delineated by the pleadings calls for a judicial declaration as to the ownership of a parcel of land forming a part of the Atlantic Ocean beach and consisting of the soft sand area lying easterly of the established bulkhead line paralleling the beach on the west and the mean high water mark of the ocean which forms the border of the soft sand area on the east. The parcel in question is approximately 150 feet deep east and west and is adjacent to and southerly of an existing pier extending into the ocean. The soft sand area of the beach does not support vegetation and, although not normally covered by tidal action of the ocean, is occasionally covered by the sea during hurricanes, northeastern windstorms and extreme high tides.

As the purported record title owner of the parcel of land in question, appellants McMillan and Wright, Inc., applied to the City of Daytona Beach for a building permit authorizing it to construct an observation tower to be operated in connection with and as a part of its pier recreational facilities. The location of the tower is immediately south of and adjacent to the existing pier and within the soft sand area of the beach. After much deliberation and an extensive investigation of the legal aspects of the application, a resolution was adopted by the City approving the application and authorizing the issuance of the requested permit.

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*Citations and footnotes generally omitted.

Objection to the construction of the observation tower and a challenge to the City's right to grant a building permit for such construction were promptly registered by appellees as citizens and taxpayers of the community. After test borings were made but before construction of the tower was commenced, this action was instituted seeking declaratory relief as to ownership of the land on which appellants planned to construct the tower and an injunction to restrain any further action by appellants in the furtherance of its construction plans.

A fair and objective consideration of all the evidence before the trial court establishes the following undisputed facts. For more than twenty years prior to the institution of this action the general public visiting the ocean beach area had actually, continuously, and uninterruptedly used and enjoyed the soft sand area of the beach involed in this proceedings as a thoroughfare, for sunbathing, picnicking, frolicking, running of dune buggies, parking, and generally as a recreation area and playground. The public's use of the area in question for the purposes hereinabove stated was open, notorious, visible, and adverse under an apparent claim of right and without material challenge or interference by anyone purporting to be the owner of the land. The City of Daytona Beach has constantly policed the area for the purpose of keeping it clear of trash and rubbish and for preserving order among the users of the beach; has controlled automobile traffic using the hard sand area of the beach and enforced a prohibition against parking by vehicles on the area in question; and has otherwise exercised the police power of the City over the area for the convenience, comfort, and general welfare of all persons using and enjoying the beach area.

Appellants, purporting to be the record title owners of the parcel of land in dispute, testified that the public's use of the soft sand area owned by them was not inconsistent with nor did it adversely affect their use of the parcel in the operation of their pier so they had no reason to prohibit or interfere with the public's use of the area during the preceding years. They testified also that in washing down the pier or replacing piling from time to time they did exercise the authority of requiring people in the area to move back a safe distance so as not to interfere with this work.

From these facts the trial court found that there had accrued in favor of the public a prescriptive right to an easement for thoroughfares, bathing, recreation, and playground purposes in and over the soft sand area of the beach lying between the bulkhead line on the west and the high water mark on the east. Based upon such findings the trial court concluded that, because of the existence of such prescriptive right, the

City of Daytona Beach had no lawful authority to issue a building permit authorizing appellants, McMillan and Wright, Inc., to construct on the soft sand area any permanent structure in conflict with the public right. The court therefore mandatorily enjoined McMillan and Wright, Inc., to remove the skytower built by it on the soft sand area during the pendency of this litigation and to restore the land to its original status as it existed prior to the commencement of such construction.

We have carefully considered the totality of the evidence which was before the trial court in its consideration of the motion for summary judgment filed by the respective parties. Although there appear several instances of disputed facts in the affidavits and depositions filed in the cause, such issues are more colorable than real and are not sufficiently substantial to create an issue which must necessarily be resolved by trial. The undisputed evidence supports the findings made by the trial court, and appellants have failed to demonstrate that such findings are either erroneous or constitute an abuse of discretion. It is our view that the sporadic exercise of authority and dominion by the owners over the parcel in question was not sufficient to preserve their rights as against the prescriptive rights which accured to the benefit of the public by its use of the beach area.

Appellants further contend that the trial court applied to the facts found by it in this case incorrect principles of law when it concluded that there had accrued to the public a prescriptive right to the soft sand area of the beach involved in this case. With this contention we are unable to agree. In the cases of City of Miami Beach v. Miami Beach Improvement Co. and City of Miami Beach v. Undercliff Realty & Investment Co., the Supreme Court of Florida recognized that under proper factual circumstances the public may acquire a prescriptive right in beach or oceanfront land as against the rights of the record title holder.

In setting forth the elements necessary to be proved in order to establish a prescriptive right in land, the Supreme Court in Downing v. Bird[1] said:

> "In either prescription or adverse possession, the right is acquired only by actual, continuous, uninterrupted use by the claimant of the lands of another, for a prescribed period. In addition the use must be adverse under claim of right and must either be with the knowledge of the owner or so open, notorious, and visible that knowledge of the use by and adverse claim of the

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[1] Downing v. Bird (Fla. 1958), 100 So.2d 57, 64, 65.

> claimant is imputed to the owner. In both rights the use of possession must be inconsistent with the owner's use and enjoyment of his lands and must not be a permissive use, for the use must be such that the owner has a right to a legal action to stop it, such as an action for trespass or ejectment.
>
> "While there are slight differences in the essentials of the two actions, they are not great. In acquiring title by adverse possession, there must of course be 'possession'. In acquiring a prescriptive right this element is use of the privilege, without actual possession. Further, to acquire title the possession must be exclusive, while with a prescriptive right the use may be in common with the owner, or the public."

Based upon the foregoing authorities, we conclude that the trial court applied correct principles of law to the facts found by it in holding that the public has acquired a prescriptive right to the continued use and enjoyment of the soft sand area constituting the parcel of land involved in this case and that appellant City of Daytona Beach was without lawful authority to grant to appellent, McMillan and Wright, Inc., as owners of the land, a building permit to construct the observation tower which forms the basis of this dispute.

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ON PETITION FOR REHEARING, SPECTOR, Chief Judge.

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Our initial decision herein was and is in no way influenced by the appellees' notions that the need to preserve beaches for public recreation in any way authorizes the taking of such beaches from their lawful owners.

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We deem it important to emphasize that our decision is not the product of any new legal principle. The concept of prescriptive easements is one long recognized by the courts of this and other jurisdictions.

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Thus, it is by virtue of this ancient doctrine that the public's right to a prescriptive easement has arisen in the beach area involved. The nature and extent of use by the public cannot be denied. It has been used by a multitude of people for many, many years. It has been regularly patrolled by police in Daytona Beach. The city has installed garbage and trash barrels along the beach. The record even shows that the city has installed showers for use of the bathing public on the easterly side of the seawall. The extensive use of the beach by such huge numbers

of bathers clearly supports the trial court's finding that a prescriptive easement exists here.

Not all use of beaches or shorelines gives rise to a prescriptive easement. Neither occasional use by a large number of bathers nor frequent or even constant use by a smaller number of bathers gives rise to a prescriptive right in the public to use privately owned beaches.

There are many beaches along our entire shoreline that area [sic] resorted to by local residents and visitors alike without giving rise to prescriptive easements. It is only when the use during the prescribed period is so multitudinous that the facilities of local governmental agencies must be put into play to regulate traffic, keep the peace and invoke sanitary measures that it can be said that the public has acquired a prescriptive right to use privately owned beaches. These elements and circumstances were found to exist in the case at bar by the trial court.

We share appellees' concern with the problems posed by the development of our privately owned shorelines. Nonetheless they are privately owned. Confiscation is not permitted under the state or federal constitutions....

As clarified above, we adhere to our initial opinion....

On appeal to the Florida Supreme Court, this decision of the Court of Appeals was overruled, the Court voting 4-3 that the public's prescriptive rights were not superior to the owner's right to build an observation tower.

CITY OF DAYTONA BEACH v. TONA-RAMA
294 So.2d 73 (1974)*

ADKINS, Chief Justice.

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Defendant has owned waterfront property in Daytona Beach, Florida, for more than 65 years and operated on the property an ocean pier extending 1,050 feet over the Atlantic Ocean as a recreation center and tourist attraction. Defendant provided such attractions as fishing space, helicopter flights, dances and skylift.

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*Footnotes and citations omitted.

The tract of land upon which the pier begins extends 102 feet north and south along the ocean front and approximately 1,050 feet landward of the mean high water mark. This area of approximately 15,300 square feet is an area of dry sand and is covered by water only on rare occasions during extremely high tide and during hurricanes. Defendant secured a permit for and constructed the observation tower which precipitated this litigation. The circular foundation of the tower is 17 feet in diameter and the diameter of the tower is four feet. It occupies an area of approximately 225-230 square feet of the 15,300 square feet of land to which defendant holds record title. The observation tower is an integral part of the pier and can only be entered from the pier.

***

Building permit was issued by the City for construction of the tower after public hearings. After the permit was issued, the tower was constructed at a cost of over $125,000.

Plaintiff operated an observation tower near the site of the pier of defendant and protested the issuance of the permit. When work in connection with the erection of the tower had progressed to completion of test borings and other arrangements, plaintiff commenced this action against defendant for a declaratory judgment and injunctive relief to prevent the erection of defendant's public observation tower. Among other contentions, plaintiff alleged that by continuous use of the property for more than 20 years, the public had acquired an exclusive prescriptive right to the use of the land of defendant. The application of plaintiff for a temporary injunction was denied and the tower was completed. Thereafter, the parties moved for summary judgment and at the hearing thereon testimony taken on application for temporary injunction, stipulated facts, and affidavits were submitted. The trial court entered a summary judgement in favor of plaintiff and directed the defendant to remove the observation tower within 90 days. Upon appeal, the judgment of the trial court was affirmed and the case certified to us as being one which passes on a question of great public interest.

The facts presented before the trial court were not sufficient to support a summary judgment which, in effect, deprived a land owner of meaningful use of a large portion of the land for which he paid, which he presently occupies in part, and on which he pays taxes.

We recognize the propriety of protecting the public interest in, and right to utilization of, the beaches and oceans of the State of Florida. No part of Florida is more exclusively hers, nor more properly utilized by her people than her beaches. And the right of the public of access to, and enjoyment of,

Florida's oceans and beaches has long been recognized by this Court.

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[In White v. Hughes it was held]

> "There is probably no custom more universal, more natural or more ancient, on the sea-coasts, not only of the United States, but of the world, than that of bathing in the salt waters of the ocean and the enjoyment of the wholesome recreation incident thereto. The lure of the ocean is universal; to battle with its refreshing breakers a delight. Many are they who have felt the lifegiving touch of its healing waters and its clear dustfree air. Appearing constantly to change, it remains ever essentially the same. [190 So. 446, 448 (1931)]

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It is possible for the public to acquire an easement in the beaches of the State by the finding of a prescriptive right to the beach land....

***

If the use of an alleged easement is not exclusive and not inconsistent with the rights of the owner of the land to its use and enjoyment, it would be presumed that such use is permissive rather than adverse. Hence, such use will never ripen into easement...

In the case sub judice, the land in issue is occupied in part by the Main Street pier, a landmark of the Daytona Beach oceanfront for many years, and the land and pier are owned by the defendant. The pier is used as a recreation center and tourist attraction. It is utilized for fishing and dances, and offers a skylift and helicoptor flights by the present owner.

That portion of the land owned by defendant which is not occupied by the pier has been left free of obstruction and has been utilized by sunbathing tourists for untold decades. These visitors to Daytona Beach, including those who have relaxed on the white sands of the subject lands, are the lifeblood of the pier. As such, they have not been opposed, but have been welcomed to utilize the otherwise unused sands of petitioner's oceanfront parcel of land.

The skytower, which was substantially completed when the trial judge's order halted it, consists of a metal tower rising 176 feet above the ocean and a 25-passenger, air-conditioned gondola which was to be boarded from the pier to rise, rotating slowly, to the top for a few minutes, and then descend. The tower utilizes a circle of sand only 17 feet in diameter. A building permit was issued in October, 1969, and the project was completed, representing an investment of over $125,000, by the time the hearings were held.

The trial judge held that the land upon which the tower was constructed was "[a] public thoroughfare, public bathing beach, recreation area and playground."

Upon this finding, the trial judge declared that the lands had been rendered public by prescriptive right. The District Court of Appeal, First District, affirmed, thus approving the destruction of the $125,000 investment and dooming any meaningful use of the property by the owner. In effect, the owner of the land is paying taxes for the sole benefit of the public.

As noted above, such prescriptive right has been recognized by this Court, and under proper circumstances is just. However, such a situation is not presented in the case sub judice.

***

The use of the property by the public was not against, but was in furtherance of, the interest of the defendant owner. Such use was not injurious to the owner and there was no invasion of the owner's right to the property. Unless the owner loses something, the public could obtain no easement by prescription.

Even if it should be found that such an easement had been acquired by prescription, the defendant-owner could make any use of the land consistent with, or not calculated to interfere with, the exercise of the easement by the public. The erection of the sky tower was consistent with the recreational use of the land by the public and could not interfere with the exercise of any easement the public may have acquired by prescription, if such were the case.

The beaches of Florida are of such a character as to use and potential development as to require separate consideration from other lands with respect to the elements and consequences of title. The sandy portion of the beaches are of no use for farming, grazing, timber production, or residency--the traditional uses of land--but has served as a thoroughfare and haven for fishermen and bathers, as well as a place of recreation for the public. The interest and rights of the public to the full use of the beaches should be protected.

***

Testimony was presented that the public's presence on the land and its use of the land was not adverse to the interest of defendant, but rather that the defendant's Main Street pier relied on the presence of such seekers of the sea for its business. Thus, the issue of adversity was clearly raised and the evidence failed to show any adverse use by the public. In fact, the construction of the sea tower was consistent with the general recreational use by the public. The general public may continue to use the dry sand area for their usual recreational activities,

not because the public has any interest in the land itself, but because of a right gained through custom to use this particular area of the beach as they have without dispute and without interruption for many years.

The decision of the District Court of Appeal is quashed and this cause is remanded to the District Court with instructions to further remand the same to the trial court for the purpose of entering final judgment for defendant.

It is so ordered.

BOYD, Justice (dissenting)

I respectfully dissent.

Historians estimate that the North American continent has been inhabited by man for at least ten thousand years, and that, at the time Columbus discovered America, twenty-five thousand Indians lived in Florida.

One does not have to be a Chamber of Commerce publicity director to assume that these earliest of Floridians enjoyed the beautiful sandy beaches at Daytona. They were followed by countless Europeans, and, for many decades, the City of Daytona Beach has exercised dominion over the beaches, as if the beaches were owned and controlled by the City government. Thus, the case before us obviously presents a unique situation in which the land has been treated by the public and local government for many decades as publicly owned land. The public has used it for swimming, hiking, auto driving, and related purposes for a period much longer than twenty years, without interruption. The City has furnished police, sanitation, life guard, and other municipal services, normally provided to City-owned beach property, during said time. With the exceptions of being registered in the public records as privately owned, and the payment of taxes, the property has had all the attributes of a publicly owned beach continuously for more than twenty years. Surely, when the present owner purchased the land in question, it was common knowledge that the public had, for centuries, used both the wet and dry sand near the ocean for recreational purposes.

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If this building be permitted to stand, then the owner might well next decide to erect a gargantuan hotel on the property, and the adjoining property owners, demanding equal protection of the law, might then begin to construct a series of hotels along the waterfront--similar to the series that now exists along the East side of Collins Avenue in Miami Beach. This would form a concrete wall, effectively cutting off any view of the Atlantic Ocean from the public. A repetition of the concrete wall created by such buildings would be extremely detrimental to the people of this State and to our vital tourism industry.

In my opinion, the trial court and the District Court of Appeal, First District, were correct in ordering the structure removed, for the reason that it encroaches upon the prescriptive rights of the public.

The record shows that the building was constructed, with a building permit granted by the City of Daytona Beach, apparently in good faith by the owner of record, who has been paying taxes on the property, and whose equitable rights should not be completely ignored. The trial court should require an accounting of all costs expended and all income received from this recreational structure, and if the money received thus far from the investment has not reimbursed all of those who have invested in the facility in good faith, they should be allowed to recoup their investments before removal of the structure. The equitable principles involved in the elimination of a nonconforming use would apply here.

The majority opinion ably defines the law generally applicable to beach properties. The intermittant, occasional use of dry sand beach property by individuals or groups for recreational purposes does not establish prescriptive easements. If such were the law of this state, countless thousands of beach lots would have questionable titles. I dissent to the majority opinion only because the property here in question is totally unique in character by its treatment and use as a public beach for many decades. Only property having the same unique characteristics should be affected by any decision against this owner.

I offer no comment or opinion as to how far back from the wet sand the owner should be denied building privileges, but I don't think the government can collect taxes while denying the owner some reasonable use of the property not in conflict with the prescriptive rights of the public.

Therefore, I respectfully dissent to the majority opinion, and would affirm the decision of the District Court of Appeal, First District.

ERVIN, Justice (dissenting).

I concur with much of the reasoning and the conclusions of Justice Boyd reflected in his excellent dissent.

It is clear to me that the majority has no sound basis in law to substitute its judgment on the instant facts for the prescriptive easement findings of the trial judge affirmed by the District Court. The cases are legion that factual findings upon issues such as are presented in this case, i.e., primarily whether a public easement had accrued should not be appellately disturbed.

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While I think that under the particular facts of this case the finding below of a prescriptive easement in favor of the public to the instant beach area should be affirmed, I believe a broader view of the law is applicable which if pronounced by this Court would afford more realistic protection of the public's rights not only in the subject beach area but to hundreds of miles of Florida beaches which have been used by Florida inhabitants from time immemorial....

I think the law of custom applies...

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This precedent of the Court majority is a regrettable and unfortunate one which will serve to render more uncertain the rights of the general public to enjoy Florida's prescriptive public beach areas which historically they have so long enjoyed. It will encourage, as Justice Boyd so ably points out, further private, commercial intrusions and obstructions upon public domain areas which have been used as such since time immemorial.

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With Florida's population burgeoning and its recreational needs multiplying by leaps and bounds, the State's courts can ill afford any longer to be profligate with its public areas and allow them to be frittered away upon outmoded pretexts for commercial exploitation.

SEAWAY CO. v. ATTORNEY GENERAL
375 S.W.2d 923 (Tex. Civ. App. 1964)*

We are also of the view that the jury's finding of an easement by prescription finds evidence to support it and such evidence is sufficient.

An easement by prescription may be created by user. Such user must be adverse to the owner, must be continuous and must be for at least 10 years. Expressed otherwise, the user must be under a claim of right in the users and not a permissive use under the owner and must continue for the requisite period of time. We think the above facts clearly show continuous user for the purposes above discussed for far more than the 10 year period required.

Appellant, while contending there was not seen sufficient user, particularly contends the user was not adverse because the

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*Footnotes and citations omitted.

owner used the property at the same time it was being used by members of the public. As we understand the law, use by the owners and others at the same time raises the presumption that user by others is permissive only but there may be present in a given case sufficient evidence to show user by the others under a claim of right. Mere joint use is not determinative. If the nature of the use is such as to show to the owner that the users are claiming under a right independent of any permission from him, there is the requisite adverseness. The jury found there was not permissive use....Here appellant's property is but a small link in a road used by the public generally. It was not a strip by itself forming the entire road traveled from the claimant's property solely across appellant's property to reach a public road. It was but one link in a way also used across other persons' lands to go to and fro from the 13 Mile Road and in many instances on to the City of Galveston and San Luis. It could under such circumstances be said the owner's use was not in his right as owner but as a member of the public. Use for a road has been going on, as shown by the evidence, ever since before the time of the patent. The use by appellant's predecessors in title in turning their cattle out on the beach is of the same character as use of the road. It can reasonably be said, under the facts of this case, they were turned out into a commons and use in this fashion by the owner was not in assertion of rights of ownership, but in assertion of a right as a member of the public to use the beach. When the cattle were on the beach they were not confined to the owner's land but could roam at will up and down the beach. Further in this case the persons who used the beach were not merely neighbors of the owners, nor were they merely persons in the community, as was true in the cases relied on by appellant. As shown by the evidence,the persons who have used the beach from the beginning have been residents of Galveston and elsewhere in the State. Many witnesses who testified were from Houston. Thousands of people were shown to have used the beach, not only for a drive but for camping and in connection with fishing, boating and swimming. Evidence shows they used it at will without asking permission and there is no evidence of any objection by owners. By public laws routes for travel along the beach were, as above shown, established. Too, public advertising showed the availability of the beach to the public. In addition, patrol of the beach by law enforcement officers is shown. Further, whatever maintenance of the beach has been necessary, since 1929, has been done by employees of Galveston County and public funds have been expended for the purpose. All of these facts, we think sufficient to show the adverse nature of the use by the public.

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Appellant also asserts in effect the evidence does not show what part of the beach was used and to establish an easement by prescription the same route, in case of a road, must be used. We think the evidence shows, as we have above detailed, the whole of the beach from the line of mean low tide to the sand dunes has been used for actual travel and in between the dunes to the vegetation line has been used in connection with travel such as for parking vehicles and for camping and in connection with fishing and swimming done by those who traveled. As above noticed, this has not been a desultory use as is the case in those cases relied on by appellant. It has not been a use across an open prairie where one travels helter-skelter. Nor has it been travel where for some time one travels on a given route and later travels another route distantly removed from the first route. The physical nature of the beach and the use made definitely define the route. The line of vegetation and the line of low tide mark the route. Since the high tides are daily throughout the year, it means that anyone making use of the beach at high tide must use that part near the vegetation line. Evidence shows daily systematic use of the whole area. This requirement of a definite route is required so the owner may have notice of not only the fact of adverse claim but the extent of it. The nature of the terrain and the use made gave sufficient notice to the owner of the extent and location of the route claimed....Here the line of mean low tide and the line of vegetation, two of nature's monuments, effectively mark the route used.

Comment, "Easements: Judicial and Legislative Protection of the Public's Rights in Florida's Beaches," 25 U. Fla. L. Rev. 586, 588-89 (1973)*

In beach property cases Florida courts have departed from a long-standing judicial attitude that strongly disfavored prescription. Even so, when considering the doctrine of prescription as a judicial method for protecting the public's interests in Florida's beaches, two inadequacies necessitate a search for more expedient solutions. First, there is the obvious problem that arises from the difficulty in meeting the Downing requirements and establishing factual evidence of twenty years adverse use. Establishing public easements through prescription requires a specialized type of use:

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> Not all [public] use of beaches or shorelines gives rise to a prescriptive easement. Neither occasional use by a large number of bathers nor frequent or even constant use by a smaller number of bathers gives rise to a prescriptive right in the public to use privately owned beaches. [City of Daytona Beach v. Tona-Rama, Inc., 271 So.2d at 770]

In addition, prescriptive easements, by their nature, can be utilized only on a tract-by-tract basis. Thus, the court in Daytona Beach, on rehearing, stressed the particularity of its decision as applying only to the property in litigation and not to all Florida beaches. This piecemeal approach is too time-consuming to be of assistance to the public.

Degnan, "Public Rights in Ocean Beaches: A Theory of Prescription," 24 Syracuse L. Rev. 935, 935-36, 940,952, 955-60, 965-66 (1973)*

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When the public acquires an easement in a beach for walking, sunbathing, picnicking and viewing, the privately owned land is subjected to the public right. Although the owner's right to the use of his land had been an exclusive one and the public use had originally been a trespass, the owner can no longer reserve the beach for himself or for the guests of his motel or beach club. Title to the land has remained in him, but use of the land for recreational purposes must now be shared with the public. Stated from the public's point of view, the public at large has an easement or right to use the ocean beach for uses connected with swimming and other recreation.

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The position taken here is that prescription by the public in ocean beaches should be recognized, but this extension of the law of prescription raises serious questions and demands a theory of such prescription. The cases give rise to an uneasy feeling that a court-declared policy concerning t e public nature of beaches lies behind the finding of prescription. The cases may be a backdoor way of taking private property by subjecting it to public use in the name of prescription.

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The problem [discussed here] is treated as one of prescription and not of "implied dedication." Although implied dedication functions with a basic concept different from prescription (there

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must be an "intent" to dedicate on the part of the owner) and although this difference in concept can cause differences in result (the adverseness of the use may not be stressed, for example), the real difference between prescription and dedication as it was used in the California beach cases is one of form and not substance.

***

Two basic elements of prescription or adverse use can be discerned....The use, first of all, is by someone in whom the use can eventually become a right. Secondly, the use is so adverse and contradictory to the owner's rights that it sets up a conflicting claim or interest in the person exercising the use. The Restatement calls this an adverse use, while many courts state that it is a use amounting to a claim of right, an apt way of describing the two elements, particular person or claimant, who is exercising the kind of use which ought to sustain a finding of a right of use inconsistent with the owner's rights.

***

A theory of prescription by the public of rights in ocean beaches requires a showing (1) that the right is a limited one; (2) that there are reasons for recognizing the use as adverse or amounting to a claim of right; and (3) that these reasons offer principles for distinguishing other public uses and lands that are not apt for public prescription. In these considerations, the central theme is the special nature of ocean beaches in their relation to the foreshore and especially in their character as the principal feature of the shoreline. The meaning of the public use and the nature of the easement resulting from it are drawn from the character of the ocean beach.

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Ordinarily an easement, including one acquired by prescription, is a perpetual right to use the land of another. The effect of the easement is to block other uses of the land to the extent that they interfere with the use that is the subject of the easement. An easement for a street or road, for example, has the effect of dedicating the land to this use. One of the major difficulties in extending prescriptive easements springs from this quality of easements. Once acquired, the public easement would block other uses of the land....

When the public uses an ocean beach, its rights in the beach should rise no higher than its rights in the foreshore and the sea. These latter rights are subject to the owner's riparian rights of wharfage and of access to the sea. The interrelation of upland, foreshore and sea evidenced by the doctrine of riparian rights and by the rights to navigate and fish is the context of any recreational easement acquired by the public. If on the ocean

beach, the riparian owner exercised his right of wharfage, the public's rights to the foreshore, and a fortiori to the beach, would be subject to that right. A more difficult question is whether the public easement for recreational uses ought to be subject to the owner's rights to use the land for other purposes, such as the economic development of the shoreline. Normally, the owner of beach land would be free, assuming conformity with zoning laws and other regulations and the state's decision to grant or license the foreshore, to use the land for a nuclear power plant or as a base for a deepwater port, to use two examples which cause concern. These uses go far beyond the right of wharfage and they might be blocked by a public recreational easement. The question, however, is not whether such uses ought to be blocked, but whether the easement by public prescription should carry this burden. It should not, and the reason goes to principles governing the allocation of the uses of the shore of the sea.

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Today state agencies and the courts seem to be moving toward a more rational control of that policy in the public interest, and coastal zoning laws have been enacted by some states to regulate land uses. Given the need to allocate shoreland between economic and other uses, the question is how to accomplish it. The least rational method of permanently allocating the uses of beach land, even wild and open beach, would be through the declaration of a public easement of recreation following upon a public use. If such an easement were to bar other uses, the land would be forever dedicated to recreation. The result, while it might be a desirable one applied to most of the beaches, would tie up the use of the land without regard to public needs or rational policies concerning allocation of the shoreline.

So long as the beach is devoted to the uses associated with public rights in the foreshore and the sea, swimming, open space and so on, the public's recreational easement should not be interfered with. If the beach owner built a beach club on the beach, for example, the use would interfere with the public's easement of recreation. The public's easement of recreation should mean at the minimum that it cannot be defeated by recreational uses of the landowner that amount simply to a denial of the public right. If the owner were able to obtain a grant of the foreshore, from the state or private owners, and if, subject to federal and state regulation, the entire beach were then devoted to a use not connected with recreation, the public's recreational easement should not bar the use. On this level, the allocation of beach uses should stem from public policies regulating coastal land uses for the purposes of both environmental protection and economic development; it should not stem from prescription.

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When members of the public use a privately owned beach for recreation, they are carrying on a familiar usage. The beach is next to the sea in which the public has the right to swim, fish and navigate and part of the beach, the foreshore, is already owned by the public and can be used freely by it. The land used, the dry sand beach, is especially adapted to uses connected with the see [sic] and it may be adapted to little else. The stretch of beach invites walking, viewing, sunbathing, and swmmming and shows little if any evidence of property lines. In these circumstances, the use is made by the public in general, and is made in non-recognition of the rights of the owner. One part of the beach, the foreshore, is already owned and used by the public and the use of the rest of the beach can be seen as appurtenant in a sense to the public's use of the foreshore. The entire beach, however, both foreshore and upland, forms the standard for public use of a beach. The model or measure for the use, as in the prescription of public streets, is the ocean beach itself, where the public gathers for general use of the beach and where, in many areas, it has pursued this usage for years....

In the prescription of streets and roads, a public street is identified primarily by public travel along a defined way, although the ability to identify a road bed is also important. In the use of beaches for recreation, it is the character of the strip of shore known as an ocean beach that defines the use made of it. The ocean beach is the standard or model for the public use of beaches in four principal ways. First, the ocean beach is an identifiable strip of sand or shingle adapted by its location and its nature to uses connected with the sea. Second, the public's uses of an ocean beach for swimming, sunbathing, viewing, boating, strolling along the edges of the water, and fishing, are those identified with the sea and with a beach or strand on the ocean. Third, the use of an ocean beach is by the public as such, because use of the upland beach is joined with the exercise of the public's rights in the sea and the foreshore. Fourth, the use of the ocean beach is a limited one, in that the use is for recreation related to the sea, is relative to other public and private rights in the sea and the shore, and is confined to the relatively narrow stretch of sand peculiarly adapted to the use. That this model or standard is not redundant is evident when the use of other beaches is considered.

Many lesser tidal beaches on bays, inlets and the shores of tidal rivers, although they have some of the characteristics of ocean beaches, may not be apt subjects for public prescription. The problem can be seen in terms of a spectrum ranging from the

shores of fresh water lakes at one end, through the shores of tidal rivers and bays, to the ocean beach at the other end of the spectrum....

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What kind of use is required? The California cases and the earlier case in Texas appeared to rely on fairly heavy, concentrated activities such as swimming, sunbathing, parking cars. How constant and heavy should the uses be? Would it be enough, for instance, that some of the public used the beach for strolling every evening, although there was little swimming or sunbathing? If the use took place in the nineteenth century, will a use more typical of that age give rise to the full recreational easement of the California cases? When there have been continuous public uses of the beach connected with the sea, the courts should not be narrow in interpreting them as giving rise to an easement of recreation. When public rights are declared as the result of the adverse use of a beach by the public, the cause lies more in the nature of beach land than in judgments favoring the right of the public. The owner of ocean beach land owns it at the risk that it will be used for the use for which it is particularly adapted. It is the character of ocaen beaches that makes the public use almost inevitable, and the public's use of the beach a claim of right.

The method of prescription for securing public rights to ocean beaches suffers from the disadvantages of a case by case approach, as the Oregon Supreme Court noted. There are variations in the public use of beaches and in the availability of evidence, and of course rights by prescription depend upon the willingness to bring suit and the ability with which a case is tried. On the other hand, prescription can protect the continuance of public uses against efforts to close off the beaches. Courts may be reluctant to declare a general public right to use beaches, but the recognition of a public recreational easement in ocean beaches, based upon an adverse use, is well within the law of prescription. The easement fits the nature of the ocean beach itself, where the public, in both England and the United States, has repeatedly asserted its claim to the beaches by using them for recreation. The measure of the public use of an ocean beach springs from the character of the beach itself. Not only is the strip of sand peculiarly adapted to recreational uses connected with the sea, but when the public uses the privately owned beach, its use is related to its rights in the sea and the foreshore. Like those rights, its use is also subject to other rights, public and private, in the sea and shore. The result is a clear, limited adverse use.

III CUSTOMARY RIGHTS

STATE EX REL. THORNTON v. HAY
254 Ore. 584, 462 P.2d 671 (1969)*

GOODWIN, Justice.

William and Georgianna Hay, the owners of a tourist facility at Cannon Beach, appeal from a decree which enjoins them from constructing fences or other improvements in the dry-sand area between the sixteen-foot elevation contour line and the ordinary high-tide line of the Pacific Ocean.

The issue is whether the state has the power to prevent the defendant landowners from enclosing the dry-sand area contained within the legal description of their oceanfront property.

The state asserts two theories: (1) the landowners' record title to the disputed area is encumbered by a superior right in the public to go upon and enjoy the land for recreational purposes; and (2) if the disputed area is not encumbered by the asserted public easement, then the state has power to prevent construction under zoning regulations made pursuant to ORS 390.640.

The defendant landowners concede that the State Highway Commission has standing to represent the rights of the public in this litigation, ORS 390.620, and that all tideland lying seaward of the ordinary, or mean high-tide line is a state recreation area as defined in ORS 390.720.

From the trial record, applicable statutes, and court decisions, certain terms and definitions have been extracted and will appear in this opinion. A short glossary follows:

ORS 390.720 refers to the "ordinary" high-tide line, while other sources refer to the "mean" high-tide line. For the purposes of this case the two lines will be considered to be the same....

The land area in dispute will be called the dry-sand area. This will be assumed to be the land lying between the line of mean high tide and the visible line of vegetation.

The vegetation line is the seaward edge of vegetation where the upland supports vegetation. It falls generally in the vicinity of the sixteen-foot-elevation contour line, but is not at all points necessarily identical with that line. Differences between the vegetation line and the sixteen-foot line are irrelevant for the purposes of this case.

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*Citations and footnotes generally omitted.

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The extreme high-tide line and the high-water mark are mentioned in the record, but will be treated as identical with the vegetation line.... cite these variations in terminology only to point out that the cases and statutes relevent to the issues in this case, like the witnesees, have not always used the same words to describe similar topographical features.

Below, or seaward of, the mean high-tide line, is the state-owned foreshore, or wetsand area, in which the landowners in this case concede the public a paramount right, and concerning which there is no justiciable controversy.

The only issue in this case, as noted, is the power of the state to limit the record owner's use and enjoyment of the dry-sand area, by whatever boundaries the area may be described.

The trial court found that the public had acquired, over the years, an easement for recreational purposes to go upon and enjoy the dry-sand area, and that this easement was appurtenant to the wet-sand portion of the beach which is admittedly owned by the state and designated as a "state recreation area."

Because we hold that the trial court correctly found in favor of the state on the rights of the public in the dry-sand area, it follows that the state has an equitable right to protect the public in the enjoyment of those rights by causing the removal of fences and other obstacles.

It is not necessary, therefore, to consider whether ORS 390.640 would be constitutional if it were to be applied as a zoning regulation to lands upon which the public had not acquired an easement for recreational use.

In order to explain our reasons for affirming the trial court's decree, it is necessary to set out in some detail the historical facts which lead to our conclusion.

The dry-sand area in Oregon has been enjoyed by the general public as a recreational adjunct of the wet-sand or foreshore area since the beginning of the state's political history. The first European settlers on these shores found the aboriginal inhabitants using the foreshore for clam-digging and the dry-sand area for their cooking fires. The newcomers continued these customs after statehood. Thus, from the time of the earliest settlement to the present day, the general public has assumed that the dry-sand area was a part of the public beach, and the public has used the dry-sand area for picnics, gathering wood, building warming fires, and generally as a headquarters from which to supervise children or to range out over the foreshore as the tides advance and recede. In the Cannon Beach vicinity, state and local officers have policed the dry-sand, and municipal sanitary crews have attempted to keep the area reasonably free from man-made litter.

Perhaps one explanation for the evolution of the custom of the public to use the dry-sand area for recreational purposes is that the area could not be used conveniently by its owners for any other purpose. The dry-sand area is unstable in its seaward boundaries,unsafe during winter storms, and for the most part unfit for the construction of permanent structures. While the vegetation line remains relatively fixed, the western edge of the dry-sand area is subject to dramatic moves eastward or westward in response to erosion and accretion. For example, evidence in the trial below indicated that between April 1966 and August 1967 the seaward edge of the dry-sand area involved in this litigation moved westward 180 feet. At other points along the shore, the evidence showed, the seaward edge of the dry-sand area could move an equal distance to the east in a similar period of time.

Until very recently, no question concerning the right of the public to enjoy the dry-sand area appears to have been brought before the courts of this state. The public's assumption that the dry sand as well as the foreshore was "public property" had been reinforced by early judicial decisions. These cases held that landowners claiming under federal patents owned seaward only to the "high-water" line, a line that was then assumed to be the vegatation line.

In 1935, the United States Supreme Court held that a federal patent conveyed title to land farther seaward, to the mean high-tide line. Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10 (1935). While this decision may have expanded seaward the record ownership of upland landowners, it was apparently little noticed by Oregonians. In any event, the Borax decision had no discernible effect on the actual practices of Oregon beachgoers and upland property owners.

Recently, however, the scarcity of oceanfront building sites has attracted substantial private investments in resort facilities. Resort owners like these defendants now desire to reserve for their paying guests the recreational advantages that accrue to the dry-sand portions of their deeded property. Consequently, in 1967, public debate and political activity resulted in legislative attempts to resolve conflicts between public and private interests in the dry-sand area:

ORS 390.610 "(1) The Legislative Assembly hereby declares it is the public policy of the State of Oregon to forever preserve and maintain the sovereignty of the state heretofore existing over the seashore and ocean beaches of the state from the Columbia River on the North to the Oregon-California line on the South so that the public may have the free and uninterrupted use thereof.

"(2) The Legislative Assembly recognizes that over the years the public has made frequent and uninterrupted use of lands abutting, adjacent and contiguous to the public highways and state recreation areas and recognizes, further, that where such use has been sufficient to create easements in the public through dedication, prescription, grant or otherwise, that it is in the public interest to protect and preserve such public easements as a permanent part of Oregon's recreational resources.

"(3) Accordingly, the Legislative Assembly hereby declares that all public rights and easements in those lands described in subsection (2) of this section are confirmed and declared vested exclusively in the State of Oregon and shall be held and administered in the same manner as those lands described in ORS 390.720.

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The state concedes that such legislation cannot divest a person of his rights in land, and that the defendants' record title, which includes the dry-sand area, extends seaward to the ordinary or mean high-tide line.

The landowners likewise concede that since 1899 the public's rights in the foreshore have been confirmed by law as well as by custom and usage. Oregon Laws 1899, p. 3, provided:

> "That the shore of the Pacific ocean, between ordinary high and extreme low tides, and from the Columbia river on the north to the south boundary line of Clatsop county on the south, is hereby declared a public highway, and shall forever remain open as such to the public."

The disputed area is sui generis. While the foreshore is "owned" by the state, and the upland is "owned" by the patentee or record-title holder, neither can be said to "own" the full bundle of rights normally connoted by the term "estate in fee simple."

In addition to the sui generis nature of the land itself, a multitude of complex and sometimes overlapping precedents in the law confronted the trial court. Several early Oregon decisions generally support the trial court's decision, i.e., that the public can acquire easmments in private land by long-continued user that is inconsistent with the owner's exclusive possession and enjoyment of his land. A citation of the cases could end the discussion at this point. But because the early cases do not agree on the legal theories by which the results are reached, and because this is an important case affecting valuable rights in land, it is appropriate to review some of the law applicable to this case.

One group of precedents relied upon in part by the state and by the trial court can be called the "implied-dedication" cases. The doctrine of implied dedication is well known to the law in this state and elsewhere. Dedication, however, whether express or implied, rests upon an intent to dedicate. In the case at bar, it is unlikely that the landowners thought they had anything to dedicate, until 1967, when the notoriety of legislative debates about the public's rights in the dry-sand area sent a number of ocean-front landowners to the offices of their legal advisers.

A second group of cases relied upon by the state, but rejected by the trial court, deals with the possibility of a landowner's losing the exclusive possession and enjoyment of his land through the development of prescriptive easements in the public.

In Oregon, as in most common law jurisdictions, an easement can be created in favor of one person in the land of another by uninterrupted use and enjoyment of the land in a particular manner for the statutory period, so long as the user is open, adverse, under claim of right, but without authority of law or consent of the owner. In Oregon, the prescriptive period is ten years. The public use of the disputed land in the case at bar is admitted to be continuous for more than sixty years. There is no suggestion in the record that anyone's permission was sought or given; rather, the public used the land under a claim of right. Therefore, if the public can acquire an easement by prescription, the requirements for such an acquisition have been met in connection with the specific tract of land involved in this case.

The owners argue, however, that the general public, not being subject to actions in trespass and ejectment, cannot acquire rights by prescription, because the statute of limitations is irrelevant when an action does not lie.

While it may not be feasible for a landowner to sue the general public, it is nonetheless possible by means of signs and fences to prevent or minimize public invasions of private land for recreational purposes. In Oregon, moreover, the courts and the Legislative Assembly have both recognized that the public can acquire prescriptive easements in private land, at least for roads and highways....

Another statute codifies a policy favoring the acquisition by prescription of public recreational easements in beach lands. See ORS 390.610. While such a statute cannot creeate public rights at the expense of a private landowner the statute can, and does, express legislative approval of the common-law doctrine of prescription where the facts justify its application. Consequently, we conclude that the law in Oregon, regardless of the generalizations that may apply elsewhere, does not preclude

the creation of prescriptive easements in beach land for public recreational use.

Because many elements of prescription are present in this case, the state has relied upon the doctrine in support of the decree below. We believe, however, that there is a better legal basis for affirming the decree. The most cogent basis for the decision in this case is the English doctrine of custom. Strictly construed, prescription applies only the the specific tract of land before the court, and doubtful prescription cases could fill the courts for years with tract-by-tract litigation. An established custom, on the other hand,can be proven with reference to a larger region. Ocean-front lands from the northern to the southern border of the state ought to be treated uniformly.

The other reason which commends the doctrine of custom over that of prescription as the principal basis for the decision in this case is the unique nature of the lands in question. This case deals solely with the dry-sand area along the Pacific shore, and this land has been used by the public as public recreational land according to an unbroken custom running back in time as long as the land has been inhabited.

A custom is defined in 1 Bouv. Law Dict., Rawle's Third Revision, p. 742 as "such a usage as by common consent and uniform practice has become the law of the place, or of the subject matter to which it relates."

In 1 Blackstone, Commentaries *75-*78, Sir William Blackstone set out the requisites of a particular custom.

Parapharsing Blackstone, the first requirements of a custom, to be recognized as law, is that it must be ancient. It must have been used so long "that the memory of man runneth not to the contrary." Professor Cooley footnotes his edition of Blackstone with the comment that "long and general" usage is sufficient. In any event, the record in the case at bar satisfies the requirements of antiquity. So long as there has been an institutionalized system of land tenure in Oregon, the public has freely exercised the right to use the dry-sand area up and down the Oregon coast for the recreational purposes noted earlier in this opinion.

The second requirement is that the right be exercised without interruption. A customary right need not be exercised continuously, but it must be exercised without an interruption caused by anyone possessing a paramount right. In the case at bar, there was evidence that the public's use and enjoyment of the dry-sand area had never been interrupted by private landowners.

Blackstone's third requirement, that the customary use be peaceable and free from dispute, is satisfied by the evidence which related to the second requirement.

The fourth requirement, that of reasonableness, is satisfied by the evidence that the public has always made use of the land in a manner appropriate to the land and to the usages of the community. There is evidence in the record that when inappropriate uses have been detected, municipal police officers have intervened to preserve order.

The fifth requirement, certainty, is satisfied by the visible boundaries of the dry-sand area and by the character of the land, which limits the use thereof to recreational uses connected with the foreshore.

The sixth requirement is that a custom must be obligatory; that is, in the case at bar, not left to the option of each landowner whether or not he will recognize the public's right to go upon the dry-sand area for recreational purposes. The record shows that the dry-sand area in question has been used, as of right, uniformly with similarly situated lands elsewhere, and that the public's use has never been questioned by an upland owner so long as the public remained on the dry sand and refrained from trespassing upon the lands above the vegetation line.

Finally, a custom must not be repugnant, or inconsistent, with other customs or with other law. The custom under consideration violates no law, and is not repugnant.

Two arguments have been arrayed against the doctrine of custom as a basis for decision in Oregon. The first argument is that custom is unprecedented in this state, and has only scant adherence elsewhere in the United States. The second argument is that because of the relative brevity of our political history itis inappropriate to rely upon an English doctrine that requires greater antiquity than a newly-settled land can muster. Neither of these argumenss is persuasive.

The custom of the people of Oregon to use the dry-sand area of the beaches for public recreational purposes meets every one of Blackstone's requisites. While it is not necessary to rely upon prededent from other states, we are not the first state to recognize custom as a source of law. See Perley et ux'r v. Langley, 7 N.H. 233 (1834).

On the score of the brevity of our political history, it is true that the Anglo-American legal system on this continent is relatively new. Its newness has made it possible for government to provide for many of our institutions by written law rather than by customary law. This truism does not, however, militate against the validity of a custom when the custom does in fact exist. If antiquity were the sole test of validity of a custom, Oregonians could satisfy that requirement by recalling that the European settlers were not the first people to use the dry-sand area as public land.

Finally, in support of custom, the record shows that the custom of the inhabitants of Oregon and of visitors in the state to use the dry sand as a public recreation area is so notorious that notice of the custom on the part of persons buying land along the shore must be presumed. In the case at bar, the landowners conceded their actual knowledge of the public's long-standing use of the dry-sand area, and argued that the elements of consent present in the relationship between the landowners and the public precluded the application of the law of prescription. As noted, we are not resting this decision on prescription, and we leave open the effect upon prescription of the type of consent that may have been present in this case. Such elements of consent are, however, wholly consistent with the recognition of public rights derived from custom.

Because so much of our law is the product of legislation, we sometimes lose sight of the importance of custom as a source of law in our society. It seems particularly appropriate in the case at bar to look to an ancient and accepted custom in this state as the source of a rule of law. The rule in this case, based upon custom, is salutary in confirming a public right, and at the same time it takes from no man anything which he has had a legitimate reason to regard as exclusively his.

For the foregoing reasons, the decree of the trial court is affirmed.

DENECKE, Justice (specially concurring).

I agree with the decision of the majority; however, I diagree with basing the decision upon the English doctrine of "customary rights." In my opinion the facts in this case cannot be fitted into the outlines of that ancient doctrine.

In my opinion the doctrine of "customary rights" is useful but only as an analogy. I am further of the opinion that "custom," as distinguished from "customary rights," is an important ingredient in establishing the rights of the public to the use of the dry sands.

I base the public's right upon the following factors: (1) long usage by the public of the dry sands area, not necessarily on all the Oregon beaches, but wherever the public uses the beach; (2) a universal and long held belief by the public in the public's right to such use; (3) long and universal acquiescence bythe upland owners in such public use; and (4) the extreme desirability to the public of the right to the use of the dry sands. When this combination exists, as it does here, I conclude that the public has the right to use the dry sands.

Admittedly, this is a new concept as applied to use of the dry sands of a beach; however, it is not new as applied to other public usages....

A. Background of the Thornton v. Hay Case

As the following selection evidences, there often exists in these beach access cases an important underlying interrelationship between private actions, public pressures, legislative enactments, and judicial decisions.

McLennan, "Public Patrimony: An Appraisal of Legislation and Common Law Protecting Recreational Values in Oregon's State-Owned Lands and Waters," 4 Envir. Law 317, 356-64 (1974)*

The status of ownership and user rights to this [dry-sand] portion of the beach, though conjecturally public under ancient Roman law, was by no means well settled in Oregon prior to 1967. The popular myth which had surrounded the designation of the wet sands first as a public highway and then as a recreation area had consecrated, in the public mind, the entire beach as a public pleasuring ground. Many upland owners shared this belief and felt they could do nothing to discourage public use of their frontage property even should they wish to. Most tax assessors ignored the beach portion of the owner's property for assessment purposes. When Mr. Hay, a motel owner in Cannon Beach, in 1966, enclosed a portion of the dry-sand in front of his motel with logs for the exclusive use of his patrons, the publicity shocked the entire state.

The impact of this publicity reverberated while the 1967 Oregon Legislative Assembly was in session. Citizens and TV stations rushed to save the beaches. House Bill 1601, languishing in committee, had been introduced at the request of the state Highway Department in an effort to codify into law the public belief about public rights in the dry-sand beach. It simply stated that the Legislature "recognizes that over the years the public has made frequent and uninterrupted use...seaward of the vegetation line...sufficient to create easements in the public through dedication, prescription, grant or otherwise" and "declared vested in the State of Oregon...all rights of the

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public...in any land... between ordinary high tide and the vegetation line." Many attorneys believed that the proposed legislation amounted to an unconstitutional taking of upland property without due process of law.

As public clamor increased, conflicting opinions and competitive interests emerged. Upland owners, aware for the first time that they might be relinquishing property, sought some advantage. Legal theories filled the news columns with talk of implied dedication, prescriptive easements, grants and adverse possession. Undaunted, Mr. Hay built a more permanent fence.

The original bill was completely replaced, replaced again, and amended further before final passage. In the form in which it passed, the legislation provided that where "use has been sufficient to create easements in the public...all public rights and easements...are confirmed and declared vested exclusively in the State of Oregon...,"to be held and administered in the same manner as the intertidal beach.[1] Such interests were not to be alienated except as provided by law and the Highway Commission was directed to undertake court proceedings to protect, settle, and confirm such interests. To settle the dispute about the location and description of the vegetation line, an arbitrary 16-foot line was established as an elevation line approximating the vegetation line, except at estuaries, where it was delineated as 300 feet inland from the 5.7 foot elevation. The Highway Commission was directed to survey the coast and report to the 1969 Legislature a permanent boundary line. To "protect the safety of the public using such areas, and to preserve values adjacent to and adjoining such areas, the natural beauty of the seashore and the public recreational benefit," erection of any appurtenance, structure or improvement between extreme low tide and the 16-foot line was prohibited except by permit.

Two suits consolidated for trial--one by the state for an injunction to restrain construction of a road and revetment on the beach,the other appealing the administrative ruling denying a permit--raised the question of the constitutionality of the legislation.[2] The trial court found the legislation constitutional, based upon findings that though the defendant was owner of fee title of record on the beach to mean high tide, the public by recreational use of the beach beginning about the year 1889, had acquired an interest in the beach prior to enactment of the Beach Bill. The theory, based upon a Texas case, was that the

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[1]Ch. 601, § 2, [1967] Ore. Laws 1448.

[2]State v. Fultz, No. 14-601 and No. 14-642 (Clatsop County, Ore. Cir. Ct., Aug. 26,1968).

public had acquired an easement by "implied common law dedication." To defendant's contention that his predecessor in title lacked notice of public use--a necessary element of implied dedication--the court responded that such an owner might be charged with constructive knowledge that his beach was being used by the public by virtue of its location. Also rejected was the defense that the legislation was unconstitutional in that it attempted both to work a sudden change in established property law and to avoid eminent domain procedures. The court found as a fact"that the principal, if not only use of an ocean beach is for recreation."

In the meantime, when Mr. Hay's fence was destroyed by a winter storm in December 1967, he replaced it without obtaining a permit. The State sought an order to remove the fence.[3] The judge who had decided the previous Beach Bill case reiterated his earlier decision, finding an even greater public use (especially an automotive use) of the beach and noting the expenditure of public funds for the removal of logs, police protection, traffic control and lifeguard service. The court ruled that this use--over a period of more than 60 years--had been "open and notorious, without objection of any owner prior in the chain of title to defendants, under a claim of right and without permission having been sought or given." The court noted that predecessors in title to the upland, though the westerly boundary ran to ordinary high water, had platted the upland only to the sandy beach and had made no attempt to plat the sandy area.

The defendant's principle argument--that implied dedication does not apply to public use of vacant, wild and unimproved land--was conceded as a matter of law but found inapplicable. The court held that ocean beaches in Oregon do not fall in those categories but "are in a class by themselves distinguishable from all other classes of property" because they do not support agriculture or other forms of husbandry, are occasionally covered by water, and permanent structures cannot practically be maintained. The defendant's argument that the fence was a preexisting use, was rejected on a finding that the Beach Bill was not a zoning law, to which that doctrine might have been applied.

The Oregon Supreme Court, in an opinion written by Justice Alfred T. Goodwin, affirmed the trial court...[4]

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[3]State ex rel. Thornton v. Hay, No. 27-102 (Clatsop County, Ore. Cir. Ct., Jan. 3, 1969).

[4]State ex rel. Thornton v. Hay, 254 Ore. 584, 462 P.2d 671 (1969).

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Mr. Hay then moved to activate a suit earlier commended in Federal district court to convene a three-judge district court, seeking to enjoin the State Highway Commission from enforcing the statute on constitutional grounds.[5] He contended that the combination of the Oregon court's action in creating an unpredictable change in state property law, by holding that a public recreational easement existed under the doctrine of custom, together with the statute vesting such an easement in the state, resulted in an unconstitutional taking.

The essence of Hay's argument was that it is "constitutionally impermissible for the Oregon court either to dredge up an inapplicable ancient English doctrine that has been universally rejected in modern America or to create out of whole cloth a unique doctrine of property law that has the effect of confiscating a valuable, privately-owned property interest and placing it, by operation of statute, in the state of Oregon on the sole basis of extreme public desirability." The argument relied heavily on a concurring opinion in a recent United States Supreme Court case, which overturned the Washington state supreme court, and placed ownership rights in accretions of beach lands with the upland owner.[6] The concurring opinion had suggested that the Washington court's development of real property law should only be accepted as conclusive so long as it "conform[s] to reasonable expectations," and that a decision which works an unpredictable change "inevitably" would present a federal question. Hay insisted that American usage has not been sufficient to meet the "time immemorial" test, and moreover, that custom antedating conveyance of the government patent in 1893 is without legal significance unless the federal conveyance is held to be subject to such an interest, and that such a holding would be unprecedented.

The State replied that if erroneous application of common law principles of real property presents a substantial federal question, the federal courts would soon become appellate courts for every unsuccessful state court litigant. The State disparaged the theory that a sudden change in property law denied Mr. Hay his reasonable expectations of ownership, as unreconcilable with his pleading that he could not have intended to dedicate the area because he did not know he owned the land.

Without embracing the doctrine of custom, the federal court dismissed the action, concluding that:

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[5] Hay v. Bruno, 344 F. Supp. 286 (D. Ore. 1972).

[6] Hughes v. Washington, 389 U.S. 290 (1967).

> there was no unpredictable result here. The action of the Supreme Court of Oregon was consistent with and is supported by a number of decisions from other jurisdictions which confirm the right of a state under similar circumstances to protect and preserve its beaches for the benefit of the people...

Stating that on a claim of federal right it "was not bound by the reasoning of the State Court, even when that Court was construing its own statute," the federal court said that Hay's rights were not violated even though the state's legal reasoning might be wrong or contrary to previous decisions.

In the interval, the Oregon Supreme Court had affirmed the holding of the trial court in the first beach case decided, Oregon v. Fultz,[7] again basing its decision on the doctrine of custom enunciated in State ex rel. Thornton v. Hay.

All this litigation arose pursuant to facts subject to the 1967 BEACH BILL. The 1969 legislature, having received the survey of the coast required by the 1967 measure, amended the legislation. The intent and assertion of public rights remained the same, the administrative scheme was refined, and legislative considerations to govern future acquisitions were inserted.[8] By a series of points established and described according to the Oregon coordinate system, an engineering equivalent of the natural vegetation line was laid out.

B. Requisites of the Customary Rights Doctrine

An extended discussion of the seven requisites for the finding of customary rights may be found in Note, "The English Doctrine of Custom in Oregon Property Law: State ex rel. Thornton v. Hay," 4 Envir. Law 383, 395-410 (1974). There it is contended that the Thornton decision failed to require strict compliance with several of these elements.

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[7] 261 Ore. 289, 491 P.2d 1171 (1971).

[8] Ore. Rev. Stat. § 390.630 (1971).

C. Scope of the Thornton Decision

It seems clear that the Oregon Court intended to apply the doctrine to the entire state coastline, rather than just to the Hay property. Because of this perceived avoidance of case-by-case litigation to establish public rights in the dry-sand area, a number of commentators have enthusiastically embraced the customary rights doctrine. See, e.g., "Comment, Easements: Judicial and Legislative Protection of the Public's Rights in Florida's Beaches," 25 U. Fla. L. Rev. 586, 590-92 (1973).

However, other writers have criticized this broad reading of the Thornton dicta.

> Note, "Public Access to Beaches," 22 Stanford L. Rev. 564, 584-85 (1970)*
>
> The scope of the court's custom ruling in Thornton is unclear. The case may be read either broadly as a binding declaration of the rights of all littoral owners or narrowly as applying only to the litigant before the court. The difference is important, since the broad interpretation may be subject to serious criticism.
>
> A broad reading of the decision emphasizes established statewide public usages in Oregon beaches. In choosing custom as the basis for its decision, the court said,
>
> > Strictly construed, prescription applies only to the specific tract of land before the court, and doubtful prescription cases could fill the courts for years with tract-by-tract litigation. An established custom, on the other hand, can be proven with reference to a larger region. Ocean-front lands

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> from the northern to the southern border of the state ought to be treated uniformly.

One could easily infer from this language that the decision purports to confirm public rights in every beach of the state.

The broad reading to find a statewide custom would definitely expand the English doctrine, for the English practice restricted customary rights to narrowly confined geographic localities. The court in Thornton recognized that such a ruling would be an extension, but it apparently felt that a custom was equally valid whether local or general.

Moreover, the court's use of the evidence on the broad reading is highly questionable. Apparently no evidence was offered that referred to beach property other than that owned by Hay, yet the court wrote freely about general public enjoyment of all Oregon beaches. If the court found a statewide custom, it must have done so by judicial notice. Since the rights of numerous littoral owners are at stake, this seems to be a misuse of judicial discretion. It should at least be necessary to prove the existence of even a well known usage in the particular area where beach access is in dispute.

If read broadly, the decision may be an unconstitutional deprivation of the property rights of littoral owners. To declare ex parte a new public right absent any evidence to support it and without giving the owners with whose property interests that public right conflicts a chance to be heard is to violate fundamental due process principles.

A narrower reading of the decision removes these difficulties. On the narrow interpretation, the case holds that the doctrine of customary rights applies to individual beaches only if the state can prove long public usage of the beach accompanied by the other elements of a valid custom. This reading makes the decision binding only upon the owner actually before the court; it allows other littoral owners the opportunity to show that an established customary usage did not attach to their land. This interpretation of the case has some textual support, for the court referred to the trial-court record in deciding whether the particular usage was reasonable and peaceable.

The evidentiary problem dispppears on the narrow reading, since Hay had conceded long public use of the disputed area. The court's comments about statewide usage are dicta, although they may help to make proof of custom easier in future beach cases. Other littoral owners will be given a full and fair hearing on their claims, thus eliminating the constitutional due process objection. Finally, the application of custom to a single stretch of beach is consistent with the English practice. These

considerations make the narrower reading the most tenable interpretation of the case. The decision provides an alternative method to dedication and prescription for claiming easements by public use; it does not decide that all Oregon ocean beaches belong to the public.

The customary-right approach will probably be less productive in future beach-access litigation than the California theory of "dedication" by adverse use. Finding a public usage uninterrupted since the dawn of an area's political history is obviously a stiffer requirement than showing 5 years of public use. Private beachfront development, scarcely begun in Oregon, will most likely preclude a showing of customary usage in more populous states. Custom will be most helpful where, as in Thornton, littoral owners have been unaware of their title in the beaches.

D. Distinguishing Customary Rights from Other Doctrines Based on Public Use

Note, "The English Doctrine of Custom in Oregon Property Law: State ex rel. Thornton v. Hay," 4 Envir. Law 383, 390-92 (1974)*

The trial court in the Thornton decision relied in part on the doctrine of implied dedication. The Oregon supreme court abandoned implied dedication in favor of the English doctrine of custom. The court reasoned that express or implied dedication rests conceptually on an intent to dedicate, an intent that the court found lacking in the Hays' situation.

The public can acquire rights immediately under the doctrine of dedication once an intent to dedicate and an acceptance by the public has been shown. In contrast, persons can acquire rights under the English doctrine of custom only after long, immemorial use. A second important distinction between English custom and dedication is that dedication can vest rights in the whole public, an infinite class, while a particular English custom, according to the weight of authority, vests rights in persons of a certain locality or of a certain class.

The supreme court in Thornton did not accept the state's argument that the public had acquired a recreational easement in the Hays' land through the doctrine of prescription. The owners argued that the general public was not subject to actions

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in trespass and ejectment. The statute of limitations becomes irrelevant when an action does not lie, and hence the public could not acquire rights by prescription.

In Oregon and the majority of common-law jurisdictions in the United States, prescriptive user can vest easements in favor of one person in the land of another. The user must be uninterrupted for the statutory period, open, adverse, under claim of right, but without authority of law or consent of the owner. Ten years is the prescriptive period in Oregon.

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...Coke...stated the main difference between English custom and prescription:

> A difference was taken, and agreed, between a prescription which always is alleged in the person, and a custom, which always ought to be alleged in the land...

Technically, the basis of this distinction in English law rests upon the fiction that interests acquired through prescription originated in grants to individuals which were subsequently lost. The lost grant doctrine could not apply to the public because it was too indefinite to be a grantee. However, the principle of a lost grant is not necessary to establish a custom. Hence in England, if a claim by prescription is not available to a person, a claim by custom by the inhabitants of a town might be successful.

The Oregon supreme court in the Thornton case recognized that the landowners could not feasibly sue the public, but that the lost grant fiction has been "properly ignored in cases dealing with roads and highways, because the utility of roads and the public interest in keeping them open outweighs the policy favoring formal over informal transfers of interests in land."

IV IMPLIED RESERVATION

Where the public has owned the dry-sand area previously, the argument can be made that a grant of this area to private parties was made only with an implied reservation of a recreational use easement running to the public.

Burka, "Shoreline Erosion: Implications for Public Rights and Private Ownership," 1 Coastal Zone Management J. 175, 177, 179 (1974)*

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Implied reservation of public rights is a theory related to the public trust approach. The central assumption here is that the initial grant of title to littoral property from the state did not include the right to exclude the public, and that the right of public access to the state-owned beach was impliedly reserved on behalf of the public.

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***The Texas court in Seaway rejected the doctrine of implied reservation for want of any supporting evidence,[1] but the issue remains unsettled, for Texas has a statutory presumption[2] not at issue in Seaway which shifts the burden to the littoral owner to prove that his title includes the right to exclude the public from the beach. This implied reservation would be retained by the state in all littoral grants as a type of easement by necessity for the benefit of the public. One writer[3] has pointed out that in those shoreline states whose jurisprudence was influenced by the civil law,[4] the Mexican law concept of a legal servitude--a special right of way by implication--could be used to protect public rights. Legal servitudes could arise by prescription for "subsistance or convenience" of the public, an important departure from the common law, which recognizes an implied easement only in the event of an absolute necessity. It is entirely possible that Mexican law offers an much more fertile field than the common law for finding the existence of an access right retained by the state in trust for the public.

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[1] 375 S.W.2d at 929.

[2] Tex. Rev. Civ. Stat. Ann. art. 5415d §2 (1962).

[3] Comment, "California Beach Access: The Mexican Law and the Public Trust," 2 Ecol. L. Q. 571 (1972).

[4] The civil law is more favorable to public use of the seashore than the common law. Under Mexican law the seashore extends up to the line of extraordinary high tide--the highest ordinary tide excluding storm tides--and is burdened with a right of commons similar to the common law public trust. Id. at 597. Individuals may build and maintain a house on the shore provided that the structure does not interfere with public use. Id. at 605; Cf. Galveston City Surf Bathing Co. v. Heidenheimer, 63 Tex. 559 (1885).

Town and Yuen, "Public Access to Beaches in Hawaii: 'A Social Necessity,'" 10 Hawaii B. J. 3, 25 (1973)*

Although the Restatement of Property[1] does not distinguish easements by necessity from easements created by other forms of implication, a different problem may be encountered when the easement by implication is claimed as a reservation to the conveyor rather than as an adjunct of the conveyed estate. This problem may arise where a state or county government attempts to convey away or has conveyed away a road which has been used for beach access. Can the public retain a right of access over the old road by implied reservation?

Given this fact pattern where the public seeks to retain existing rights of use, plaintiffs may choose to argue for a way by necessity based on the implied intent of the grantor, and not on the basis of necessity alone. In this instance, the identity of the common grantor becomes a requirement. It is easily established from the facts, e.g., a public highway is the dominant tenement and the beach road in question, formerly a public road, is the servient tenement.

Plaintiffs might now use Kalaukoa v. Keawe[2] to support their argument. The court in that case considered a way of necessity "merely a way created by an implied grant or reservation, the necessity being only evidence of the intention of the parties to make a grant or reservation." The court held that strict necessity alone is sufficient evidence of an intent to reserve the way, as where the only means of access is over land conveyed or reserved by the grantor. Reasonable necessity, as where another way is very difficult or expensive, is sufficient evidence where "coupled with additional evidence of a way actually used and which is apparent and of a continuous nature."

The argument that a way of necessity cannot be implied in favor of a stranger to the grant would not be applicable in this instance. This is because the public as the former owner of the road is not a stranger to the grant.

Another argument which plaintiffs must now overcome is the constitutional rule that the terms of a grant should be construed strictly against the grantor. The recent trend, however, is to allow such easements to be reserved by the conveyor under substantially the same circumstances as permit them to be created in the conveyee.

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[1] 5 Restatement of Property, 2799, § 476 (1974).

[2] 9 Hawaii 191 (1893).

The Hawaii Supreme Court seems to have adopted this view, holding that intent is the test of whether or not an easement passed with the land or was impliedly reserved. The court in Tanaka v. Mitsunaga[3] held that the easement does not pass if "the language of the conveyance shows clearly an intention otherwise, or if the circumstances are such as to exclude the language of the conveyance as inclusive of an easement." The implication is never made however, in the absence of intent to reserve such an easement.

To determine the existence of such an intent courts must examine such factors as the terms and consideration of the conveyance, the extent of necessity, the reciprocal benefits to conveyor and conveyee, the manner in which land was used prior to conveyance, the extent to which land was used prior to conveyance, the extent to which the manner of use was known, and as discussed below,whether such conveyance may be in derogation of a public trust.

V THE PUBLIC TRUST DOCTRINE

Some writers have argued that the public trust doctrine, traditionally used to establish public rights in the wet-sand area, can also be used in the dry-sand area.

> Note,"The English Doctrine of Custom in Oregon Property Law: State ex rel. Thornton v. Hay," 4 Envir. Law 383, 415-16 (1974)*

The Oregon supreme court's adoption of the English doctrine of custom in 1969 brought comfort to those concerned about saving recreational land and concerned those who were comfortable with the traditional doctrines of securing property rights. The problems of fitting the Thornton facts into the outlines of the doctrine were too great for Justice Denecke who specially concurred in the result, but would have based the decision on the doctrine of jus publicum and the existence of the following requisites:

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[3] 43 Hawaii 119, 124 (1959).

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> (1) long usage by the public of the dry sands area, not necessarily on all the Oregon beaches, but wherever the public uses the beach; (2) a universal and long held belief by the public in the public's right to such use; (3) long and universal acquiescence by the upland owners in such public use; and (4) the extreme desirability to the public of the right to the use of the dry sands.

Justice Denecke admits that this concept "as applied to use of the dry sands of a beach" is new; "however, it is not new as applied to other public usages" such as public boating on a lake regardless of who owns the bed of the lake, and public fishing in navigable waters regardless of who owns the land on both sides of the water.

Historically the public trust doctrine maintains that certain interests, such as navigation and fishing, were inalienably reserved for the public's benefit and, hence, could not be granted by a sovereign. And, second, that certain property, such as seashores, highways, and running waters, were perpetually dedicated to the public use. Although the doctrine was adopted by early English courts, it is distinguishable conceptually from the English doctrine of custom, in at least two important respects.

First, the public trust doctrine is based on the premise that certain property interests have always belonged to the public, while the English doctrine of custom vests public rights in property interests not formerly encumbered. The distinction is between a legalistic conclusion in the first instance and a process of reasoning in the second instance. A custom might have existed from time immemorial and appear to have always physically encumbered property interests; however, the custom may not have force of law unless the other six requirements are established. Only after a reasoning process made by the court and jury will a custom vest with legal force and encumber formerly unencumbered property.

A second distinction between the two doctrines, or perhaps a corollary to the first distinction, is that custom in order to vest rights in property requires human action which is legally evaluated in terms of standards, the doctrine's requisite elements. The public trust doctrine requires no such human action to determine whether public rights exist in certain property interests. Human conduct becomes of significance under the doctrine when governments attempt to dispose of trust properties and the public seeks redress under the doctrine.

In American jurisdictions, the public trust doctrine has developed irregularly in response to varied circumstances,

resulting in different concepts of the doctrine. Hence, while historically the doctrine presumes that the seashore is public trust property, Justice Denecke would require the establishment of certain requisites before the doctrine operates to vest public rights in the dry-sand beaches.

However, the doctrine has usually been held to apply only to the wet-sand area. The one exception to this has been in the area of non-resident access to municipally owned dry-sand areas. This is distinguishable from a broad use of the trust doctrine above the mean high tide line in that in those cases the underlying fee interest was held by a public body rather than being privately owned. And even this minor extension of the doctrine has not been without critical comment.

> Note,"Access to Public Municipal Beaches: The Formulation of a Comprehensive Legal Approach," 7 Suffolk U. L. Rev. 936, 949-50 (1973)*

The current pressing need of society for recreational facilities extends far beyond the needs sought to be protected by the creators of the public trust doctrine. However, the "fundamental viewpoint of the modern meaning and application of the public trust doctrine" must recognize the right of the public to use those lands held in trust for the public, i.e., tidelands, for recreational purposes.

A realistic formulation of a comprehensive doctrinal approach to establish a legal right to beach access for all, however, necessarily entails a frank recognition of the limited scope of this doctrine. It seemingly affords foreshore rights only to state cutizens. Additionally, the rights retained by the public traditionally were applicable only to navigable waters and tidelands. A "beach," however, is composed of the foreshore and the dry sand area--that strip of beach forming the landward boundary of the foreshore. This dry sand area, although contiguous with the foreshore, is not within the

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definition of tidelands so as to come within the doctrine. Apparently under a traditional application of the public trust doctrine, the right of a public user does not extend to the dry sand area. Consequently, under this doctrine, use of municipally owned beachland by non-residents may be limited by the municipality to the foreshore area, a highly unsatisfactory location for beach users as high tide approaches.

The doctrine, although a rich source of public user rights in shoreline recreation resources, is not sufficiently broad in its applicability to provide alone the comprehensive doctrinal approach necessary to obtain the recognition of a legal right to beach access for all. However, it at least requires that the state maintain the beach foreshore in trust for state public use, and a state may not abdicate this responsibility. In this respect "[t]he failure to carry out the obligations of the trust amounts to a breach of constitutionally protected rights which no court can permit." Thus, the doctrine may well provide the conceptual foundation for any approach to a recognition of a right of beach access for all. Used in conjunction with other legal theories, e.g., the doctrine of irrevocable dedication and the equal protection clause, it could prove to be an effective weapon in the "assault upon the citadel" of restrictive municipal beach access policy.

IV LEGISLATIVELY ESTABLISHED PRESUMPTIONS OF PUBLIC RIGHTS

There are those who feel judicial action alone is insufficient to protect the public's rights in dry-sand beaches. A close reading of the "open beach" cases from California (Gion-Dietz), Oregon (Hay), and Texas (Seaway) reveal a critical legislative role leading to judicial declarations of public access rights. There have been efforts to adopt "open beaches" acts in a number of states. Several have been modelled after the Federal bill introduced in the last several sessions of Congress by Congressman Bob Eckhardt (D-Tex).

H.R. 1676
(94th Cong., 1st Sess.)
Introduced Jan. 20, 1975
A BILL

To amend the Coastal Zone Management Act of 1972 to establish a national policy with respect to the beach resources of the Nation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.) is amended by redesignating section 315 as section 316, and by adding immediately after section 314 the following new section:

"SEC. 315. (a) For purposes of this section--

"(1) The term "sea" includes the Atlantic, Pacific, and Arctic oceans, the Gulf of Mexico, and the Caribbean and Bering Seas, and the Great Lakes.

"(2) The term "beach" means that area which lies seaward from the line of vegetation to the sea.

"(3) The term "line of vegetation" means the extreme seaward boundary of natural vegetation which typically spreads continuously inland. Where such a line is clearly defined, the same shall constitute the line of vegetation. Such line shall not be affected by occasional sprigs of grass seaward from the dunes and shall not be affected by artificial fill, the addition or removal of turf, or by other artificial changes in the natural vegetation of the area. Where such changes have occurred and the vegetation line has thereby been obliterated or has been created artificially, the line of vegetation shall be reconstructed as it originally existed if such be practicable. In all other cases the following shall apply:

"(A) Where such clearly defined line of vegetation is not discernible in an expanse of beach of less than 500 feet, 'vegetation line' means a straight line between the two nearest clearly marked lines of vegetation at each terminus of such expanse.

"(B) Where such clearly defined line of vegetation is not discernible in an expanse of beach of more than 500 feet, 'vegetation line' means a line formed by extending a line of constant elevation from the highest clearly marked line of vegetation throughout the expanse to the point where such line of constant elevation most closely

approaches the terminus of the clearly marked line of vegetation on the other side of such expanse and from thence by a straight line to such terminus.

"(C) In the case of beaches where no discernible clearly marked vegetation line is available as a benchmark, or where such benchmark is more than five miles away, the term 'vegetation line' means a line two hundred feet landward from, and parallel to, the line of mean high tide.

"(4) The term 'area caused by wave action' means the area to the point affected by the highest wave of the sea, not a storm wave, and such term includes scattered stones washed by the sea.

"(5) The term 'public beaches' means those beaches which, under the provisions of this section, may be protected for use as a common.

"(6) The term 'matching funds' includes funds or things of value provided by any State which have been made available to the State for the purpose of matching the funds provided by the Federal Government for purchasing beach easements as, for instance, areas adjacent to beaches donated by individuals or associations for the purpose of parking. The value of such lands or other things used for matching Federal funds shall be determined by the Secretary. State matching funds shall not include any moneys which have been received as grants by the State under any Federal law.

"(7) The term 'shore of the sea' means any shore (and the land adjacent thereto) of any State.

"(8) The term 'State' means any coastal State as defined in section 304 (c) and the Trust Territory of the Pacific Islands.

"(b) By reasons of their traditional use as a thoroughfare and haven for fishermen and sea ventures, the necessity for them to be free and open in connection with shipping, navigation, salvage, and rescue operations, as well as recreation, Congress declares and affirms that the beaches of the United States are impressed with a national interest and that the public shall have free and unrestricted right to use them as a common consistent with State and national conservation policies to the full extent that such public right may be extended without violating such property rights of littoral landowners as may be protected absolutely by the Constitution. It is the declared intention of Congress to exercise the full reach of its constitutional power to protect the public's right to use the beaches.

"(c) No person shall create, erect, maintain, or construct any obstruction, barrier, or restraint of any nature which interferes with the free and unrestricted right of the public, individually and collectively, to enter, leave, cross, or use as a common the public beaches.

"(d) (1) An action shall be cognizable in the district courts of the United States without reference to jurisdictional amount, at the instance of the Attorney General or a United States district attorney to:

"(A) establish and protect the public rights to beaches

"(B) determine the existing status of title, ownership, and control, and

"(C)condemn such easements as may reasonably be necessary to accomplish the purposes of this title.

"(2) Actions brought under the authority of this section may be for injunctive, declaratory, or other suitable relief.

"(e) The following rules applicable to considering the evidence shall be applicable in all cases brought under subsection (d):

"(1) a showing that the area is a beach shall be prima facie evidence that the title of the littoral owner does not include the right to prevent the public from using the area as a common.

"(2) a showing that the area is a beach shall be prima facie evidence that there has been imposed upon the beach a prescriptive right to use it as a common.

"(f) (1) Nothing in this section shall be held to impair, interfere, or prevent the States--

"(A) ownership of its lands and domains,

"(B) control of the public beaches in behalf of the public for the protection of the common usage or incidental to the enjoyment thereof, or

"(C) authority to perform State public services, including enactment of reasonable zones for wildlife, marine, and estuarine protection.

"(2) All interests in land recovered under authority of this title shall be treated as subject to the ownership, control,

and authority of the State in the same measure as if the State itself had acted to recover such interest. In order that such interest be recovered through condemnation, that State must participate in acquiring such interest by providing matching funds of not less than 33 1/3 per centum of the value of the land condemned.

"(g) (1) In order further to carry out the purposes of this title, it is desirable that the States and the Federal Government act in a joint partnership to protect the rights and interests of the people in the use of the beaches. The Secretary shall administer the terms and provisions of this section and shall determine what actions shall be brought under clauses (A) and (B) of subsection (d) (1), and, with the concurrence of the State concerned, shall determine what actions shall be brought under clause (C) of subsection (d) (1).

"(2) The Coastal Zone Management Advisory Committee established pursuant to section 311 of this title shall advise, consult with, and make recommendations to the Secretary on matters of policy concerning the administration of this section.

"(h) The Secretary shall place at the disposal of the States such research facilities as may be reasonably available from the Federal Government, and, in cooperation with the other Federal agencies, such other information and facilities as may be reasonably available for assisting the States in carrying out the purposes of this title. The President may promulgate regulations governing the work of such interagency cooperation.

"(i) The Secretary is authorized to make grants to States for carrying out the purposes of this title. Such a grant shall not exceed 66 2/3 per centum of the cost of planning, acquisition, or development of projects designed to secure the right of the public to beaches where the State has complied with this title and where adequate State laws are established, in the judgment of the Secretary, to protect the public's right in the beaches.

"(j) The Secretary of Transportation is authorized to provide financial assistance to any State, and to its political subdivisions for the development and maintenance of transportation facilities necessary in connection with the use of public beaches in such State if, in the judgement of the Secretary, such State has defined and sufficiently protected public beaches within its boundaries by State law. Such financial assistance

shall be for projects which shall include, but not be limited to, construction of necessary highways and roads to give access to the shoreline area, the construction of parking lots and adjacent park areas, as well as related transportation facilities. All sums appropriated to carry out title 23 of the United States Code are authorized to be made available to carry out this subsection."

SEC. 2. The Coastal Zone Management Act of 1972 is further amended--

(1) by striking out "305 or 306" in section 313 thereof and inserting "305, 306, or 315";

(2) by amending section 315 by--

(A) striking out "and" at the end of clause (a) (2);

(B) striking out the period at the end of clause (a) (3) and inserting in lieu thereof ";and"; and

(C) by adding immediately after clause (a) (3) the following new clause:

"(4) such sums, not to exceed $30,000,000 for each of the fiscal years 1976, 1977, and 1978 for grants under section 315 (i) of this article."

A. Constitutionality of a Federal "Open Beaches" Bill

Black, "Constitutionality of the Eckhardt Open Beaches Bill," 74 Columbia L. Rev. 439 (1974)*

[This article is addressed to H.R. 10394, 93d Cong., 1st Sess. (1973), an earlier, but substantially similar, form of the bill reproduced above.]

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The bill sets out to counter the enclosure movement, which threatens drastically to cut down the number and quality of beaches available to the public. Section ... [315(b)] expresses the national interest in maintenance of the "free and unrestricted right" of the American public to use the beaches of the United States, insofar as this use is consistent with the rights of

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littoral owners, and section...[315(c)] makes obstruction of this right unlawful. Section...[315(d)] empowers the federal courts to hear and determine suits brought by the United States for establishing and protecting this public right, and for other closely connected purposes, including condemnation where necessary or desired. Additional procedures, including modes of state-federal cooperation, are authorized in subsequent sections.

Thus, the dominant strategy of the bill is very simple. It accepts, as given, the substantive state-law position regarding beach ownership and public rights over beaches, but it "declares and affirms" that the beaches of America shall be open for public recreational use wherever state law does not preclude this result. It then makes any obstruction of public right, other than in conformity to state law, unlawful as a matter of federal law. And it goes on to provide a machinery of federal jurisdiction and of federally financed litigation to vindicate the rights so declared and protected. The basic theory is that of a federal law reaching to touch (but not to disturb) state substantive law, coupled with an appropriate remedial apparatus to uphold the national interest.

This strategy rests in large part on the suppositions, first, that state law, as a matter of substance, gives a great deal of protection to public access and use and, secondly, that the fifth amendment would in any case restrain Congress from decreasing public access to beaches which state law makes private--except, of course, by condemnation, which is provided for separately. The principal national contribution is therefore to be the provision of remedial machinery and litigation resources for procuring judicial declaration and protection of judicially ascertained public rights. This is of crucial importance in this field, since private encroachments on public beaches may ripen into prescriptive right, unless timely legal action is taken.

CONSTITUTIONALITY

It might be thought that the constitutionality of such a bill is obvious, It can hardly be questioned that the whole American public has a substantial or even vital interest in access to adequate marine beach facilities and, with good warrant, we have grown accustomed to assuming that any congressional step that implements an authentic and massive national interest will find justification under the Constitution, as long as none of the expressly prohibitory material in that document is implicated. Still, it cannot be amiss to spell out the constitutional grounds on which this bill rests.

A. Substantive Federal Interests

Let us first consider where the unquestioned national substantive interest in free public access to beaches may fit into the categories of the Constitution.

To begin with, there is the familiar ground of the commerce clause, which we tend to use for everything. The main point to make here is that the commerce-clause ground for upholding this bill is not a mere pretext, as it is, for example, with regard to the Mann Act, the Lindberg Law, or the Stolen Automobiles Act. It is the visible fact that interstate movement of goods and people is massively affected by the availability and location of usuable beaches. Trains and airplanes travel from Duluth and Salt Lake City to Florida, full throughout the winter. The Martha's Vineyard ferry, through the whole summer, carries New York and even Illinois license plates. Commodities in economically significant quantity move toward the great ocean and Gulf recreational areas. A national concern in the openness and adequacy of the beaches that are the center of all this activity could easily be rested on the commerce clause alone.

But I suspect that, as a matter of rhetoric though not of law, we may have overworked the commerce clause. The recital of its very obvious connection with beach availability has the sound of a lesson learned by rote--a valid lesson, but a trite one nonetheless. I would prefer, therefore, to pass on to what I may call a more fundamental and more apt constitutional ground for upholding this bill. Briefly but sufficiently, this is that the "public," for purposes of the "public" easements and "public" dedications that are the technical forms under which beaches are lawfully open, is the "public," or the people, of the United States.

Here a word of explanation may be helpful. To say that a beach is, as a matter of law, "public," is usually to say that there exists with respect to it either a public easement or a public dedication. The existence, the modes of coming into existence and the exact contours of these are matters of state law, with some variance from state to state. The state-law issues have just lately been well and fully treated, and it is not the task here to treat them again. My only point now is that each of these concepts--"public" easement and "public" dedication--requires the identification of the relevant "public," and that both in fact and in law the relevant public is the whole American people.

I first say "in fact" because both these two legal phenomena commonly arise through the fact of long and immemorial usage by "the public;" and it seems next to impossible that this using "public," as to any particular beach, will not have included,

through the decades and even centuries, people from other states than the one in which the beach is situate. If it enacts the Eckhardt bill, Congress in effect will have made this nearness to impossibility into a conclusive presumption--not a conclusive presumption that any particular beach is "public," but a conclusive presumption that, if it is generally "public," the "public" is the American people. It is hard to see how such a presumption could harm anyone, or "take" anyone's "property," and equally hard to imagine any significant case in which it would not be in accord with the facts.

I say, secondly, "in law," because if (as seems highly unlikely) the statutory or common law of any state were to make its beaches "public" to its own residents but not to those of other states, that law would, I submit, violate the federal Constitution. As to citizens of other states, I should suppose it would rather plainly violate the first clause of article IV, section 2, wherein it is decreed that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." It is hard to think of any privilege this clause would cover if not the "privileges" of bathing in the ocean and strolling on the shore. I think, moreover (and here I consciously bridge over a good deal of what seems to me futile word-shuffling) that a "privilege" granted by article IV may also be, at least in such a case as this, a "privilege" protected at the same time by the first section of the fourteenth amendment.

Some people shy at the invocation of these "privileges" because they are textually linked to "citizenship." Without broaching a general theory on this, I would say that if any state sought to restrict its public beaches to American "citizens" alone, solid Supreme Court precedent may be relied upon, a fortiori, to invalidate such a senseless discrimination. The true position seems to me to be that, where one part of the Constitution guarantees something to citizens, and where not the suspicion of a rational ground exists for distinguishing between citizens and aliens, then both of the due process clauses guarantee the same thing to aliens.

But, though I regard these textual bases as quite firm, I would prefer, at last, to put the whole matter on the Crandall v. Nevada [73 U.S. (6 Wall.) 35 (1868)] ground, broadly surveyed. We are a nation; nothing can be lawful that is inconsistent with full nationhood. We would be a mere caricature of a nation if it were thinkable that a part of the national shoreline could, for example, be "public" for Virginians but, under Virginia law, closed to everybody else.

Let me strongly emphasize, however, that I am not talking against or about any real state law, whether statutory or common.

No state, as far as I know, has ever uttered such a ridiculous law. On the contrary, most if not all the littoral states advertise for inlanders to come bathe in water and sun. What I am actually putting forward is a theory of national interest in the subject matter--a national interest that can serve not only for the imaginary invalidations of improbable water laws, but also for affirmatively supporting the constitutionality of congressional intervention.

Mode of Federal Effectuation

Now if these constitutional bases are solid, or if any of them is solid, the only remaining question is whether the bill is vulnerable to constitutional objections based upon its mode of going to work to vindicate the national interest. That mode of going to work consists, as we have seen, in providing a federal forum for determining and declaring the legal status of marine beaches, while the substantive questions are in some sense referred ultimately to state law. The objection might be that such an approach is impermissible, on the ground that it brings into the federal judicial jurisdiction cases which "arise under" state law rather than under federal law, in disregard of the implied command of article III of the Constitution.

If this question arose nakedly in regard to this bill, I would have no hesitation in concluding that the step of bringing litigation into the federal courts, while deferring to state substantive law, is entirely proper and entirely satisfies the "arising under" clause when, as here, the subject matter is one over which Congress has general power under the Constitution....

I would only add that the matter covered by the Eckhardt bill is especially suited for treatment in this manner. There is, as I have shown above, a constitutionally-based national interest, assertible by Congress, in seeing that all public beaches remain public. No change in substantive law is now sought; all that is wanted is just exactly an expeditious pressing of litigation to preserve what the American public already has under the applicable substantive law. The step of providing the means for conducting such litigation is tailored to fit the felt need; it is a step precisely instrumental to the national interest. How could there be anything wrong in Congress' providing a means so apt to this national need, coupled with the maximum deference to state substantive law?

But the question under this bill need not remain thus at large. Several more well-travelled routes lead to a recognition of the constitutional validity of the means this bill chooses.

First and most obviously, this bill <u>does</u> set up federal substantive law, even though this federal law is deferent to state law, for section [315(b)] says that "with the full reach of its

constitutional power" Congress "declares and affirms" that the beaches of the United States shall be open, saving only "such property rights of littoral landowners as may be protected absolutely by the Constitution." This provision is itself federal law, reaching out, it is true, to meet such state law as may create property rights absolutely protected by the federal constitution, but federal law up to that line--a line, incidentally, defined not by state law alone, but by state law in coaction with the federal Constitution. Lest there by any doubt about this, section [315(b)] goes on to make affirmatively unlawful, now very clearly as a matter of federal law, any obstruction of the public rights recognized and given a federal character by section [315(b)]. Litigation brought under section [315(d)(1)(A) and (B)] is brought to uphold the very rights created by sections [315(b)] and [315(c)], and therefore quite directly "arises under" federal law.

Secondly, if the relevant "public," with respect to the easement and dedications that make beaches "public" is (as I have argued above) the whole American people, then the United States, as parens patriae, plainly may sue in its own courts to vindicate this rights of its citizens and of the other residents it has admitted. A closely related theory would say that, if the obstruction of a public beach is a public nuisance or any other wrong against the public, and if the "public" meant is the whole American people, then the national government, again quite plainly, may sue to prevent the obstruction. Under both these variations of this approach (and perhaps even under the federal substantive law theory stated in the paragraph just before this), it is true not only that the suit "arises under" federal law (here, federal constitutional law) but also that the United States is properly a party, bringing into play another article III empowerment.

Thirdly, suits under section [315(d)(1)(A) and (B)] are ancillary and sometimes pendent to federal proceedings to condemn a public easement of enjoyment in those beaches over which such easement does not already exist. There are two ways in which this works. As to any particular beach, common sense advises that the first thing necessary to know, before spending the taxpayers' money to get the beach for public use, is whether the public already has the right to use it under the applicable law; a judicial proceeding is the only way to get a binding answer to this question. As to beaches in general, along any stretch of shoreline, the only sensible way to find out how much beach you need to condemn for public use is to be advised--with the degree of certainly afforded only by judicial proceedings--how many and what sort of beaches along that same stretch of shore are already public under law. Rational condemnation proceedings are therefore quite impossible, in the particular case or as to a whole region,

without the authority to bring proceedings to ascertain and to vindicate the public rights as it already stands prior to condemnation. To all such proceedings, the United States is the one invariable and indispensable plaintiff, and all such proceedings "arise under" federal law, so that article III doubly covers the situation.

In sum, then, under any of the theories discussed above, the bill's mode of effectuating the national interest seems to me undoubtedly constitutional.

Presumption of Public Access

There remains for consideration the validity of section [315(e)], which provides:

> The following rules applicable to considering the evidence shall be applicable in all cases brought under [Subsection (d)]:
>
> (1) a showing that the area is a beach shall be prima facie evidence that the title of the littoral owner does not include the right to prevent the public from using the area as a common;
>
> (2) a showing that the area is a beach shall be prima facie evidence that there has been imposed upon the beach a prescriptive right to use it as a common.

After a full roundup of the cases, a leading modern authority calls it "extremely unlikely that there are now serious constitutional limits on the effect that may be given to presumptions in civil cases."* Nevertheless, it is well to point out that the elements rationally supporting a presumption such as that stated in section [315(e)] are present. It is unquestionable that the littoral owner, claiming the right to obstruct a beach and to make it his own, is far better positioned than the public can be with regard to access to the evidence concerning prior use. The question whether, on the whole, the beaches of America have been used by the public from time immemorial is a question about general custom and social history suitable for congressional determination. If Congress, in effect, makes that determination by enacting section [315(e)], than no court would fault it unless it were clearly wrong. It seems very unlikely that evidence could be produced to show generally that the custom as to our beaches has traditionally been one of private right and exclusion.

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*C. McCormack, Handbook of the Law of Evidence § 345 (2d ed. 1972).

As to this section [315(e)] presumption, it need only be said that the burden of going forward with evidence and the burden of persuasion must rest somewhere. A judgment by Congress that they ought to rest on the party claiming a right to exclude the public from a beach is reasonable, in the constitutional sense, and it seems quite unlikely that any court would invalidate it. The presumption is not, of course, conclusive; the littoral owner who produces clear evidence of his right to exclude will doubtless prevail, leaving the Government either to abandon the matter or to condemn and pay for the public easement.

Federal-State Framework

The rest of the bill sets up a framework for federal-state cooperation, the constitutionality of which can scarcely be in doubt. In this regard it is worth noting that, besides deferring to state substantive law, the bill provides that beaches established as open as a result of suits brought under section [315(d)] shall pass into the ownership and control of the state.

CONCLUSION

In main outline, then, this bill seems to me past all doubt constitutional, both as to its assertion of a constitutionally based federal interest in the openness of the national beaches, and as to its bestowal of jurisdiction and authorization of public suits to vindicate public rights to this openness. Moreover, the creation of a rebuttable presumption in favor of public access and the establishment of a framework for federal-state cooperation are also well within Congress' constitutional powers. Finally, as a matter of public policy, I think it is a good and much-needed bill, but others have already made that case better than I can do.

For a general defense of the bill by its principal author, see Eckhardt, "A Rational National Policy on Public Use of the Beaches," 24 Syracuse L. Rev. 967 (1973). A hearing record for an earlier but similar version of this bill has been rpinted by Congress (Serial No. 93-25, 1974). The hearings, held October 25-26, 1973, were on H.R. 10394 and H.R. 10395 (93rd Cong., 1st Sess.).

An important recent enactment of Congress that will affect beach access is the first comprehensive ammendments of the Coastal Zone Management Act of 1972 (P.L. 92-583). This bill makes two important additions to the CZMA respecting beach access.

First, a beach access element is added to state coastal zone management programs. Henceforth, state coastal planning programs will have to include "A definition of the term 'beach' and a planning process for the protection of, and access to, public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological, or cultural value." Funding for these studies would be provided by the basic CZMA Section 305 management program development grants.

Secondly, this Act expands the section of the original CZMA that provided for establishment of estuarine sancturies to include acquisition of islands and lands for beach access purposes. The Act will allow federal grants of up to 50 percent of the costs of acquisition of lands to provide for "access to public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological, or cultural value, and for preservation of islands." $25,000,000 per year, for five years, is to be allocated to this program.

B. State Legislative Proposals

Note,"Public or Private Ownership of Beaches: An Alternative to Implied Dedication," 18 UCLA L. Rev. 795, 814-19 (1971)*

It is recommended here that the legislature declare that beaches are impressed with a public character, as are the oceans, and that the owner of littoral lands may not interfere with public recreational use of the beaches any more than with public use of the oceans. The boundary between beach and uplands should be the line of vegetation, or the line of extreme high tide. No new structures should be permitted on beaches without approval of a government agency responsible to a regional or statewide constituency. This proposal should be implemented by declaring dry sand beaches subject to an easement in the public for recreational purposes. The fee would be retained by the owner. The landowner, and not the public, would be able to make non-recreational use of the property such as mining or drilling. The government agency mentioned above would resolve conflicts which may arise when private use interferes with public recreational use. For recreational purposes, the fee owner would have the same rights as a member of the public. The easement could be tailored to satisfy public needs with minimum inconvenience to the fee owner. An easement limited to daylight hours or seasonal use is an example.

To lessen the burden of landowners who recently purchased beachfront property at "private beach" prices, the effective date of the resolution should be postponed. The change could be effective at a fixed future date, such as seven years later, or upon the first transfer by the present fee owner. The certain date seems to be more desirable because it would result in uniform change throughout the state and would not affect a landowner's decision of whether or not to alienate his property, as the second method undoubtedly would. The ban on construction should be effective immediately to preclude a last-minute construction rush.

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A partial justification may be found in the polic power. The argument has been made that beaches provide an essential safety valve for the tensions of urban life, and to make beaches available for public recreation is a proper function of the police power. The most commonly experienced exercise of the police power is

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zoning regulation. However, since the proposal recommended here amounts to more than a limitation of permissible uses, satisfactory justification cannot be found solely in the traditional zoning rationale.

Perhaps the strongest justification is suggested by Justice Stewart's concurring opinion in Hughes v. Washington [389 U.S. 290 (1967).] In that case the majority reversed the state's claim to ownership of accreted beach property because it conflicted with the federal doctrine that accretions to land bordering on navigable waters belong to the landowner. Plaintiff Hughes traced her title to a federal grant, so federal law was applicable. Justice Stewart concurred on the grounds that the state's action violated the constitutional prohibition against uncompensated takings. However, in his concurring opinion, he indicated that a state is not precluded by the fifth and fourteenth amendments from developing and administering substantial changes in property law. The defect in the state supreme court decision was due to the "sudden change in state law, unpredictable in terms of the relevant precedents." For this reason, Justice Stewart argued, such innovation violated the fourteenth amendment. The evil which befell the state's plan was the fact that the taking of lands which had accreted over the years unreasonably violated the expectations of landowners because of its retroactive nature. Of the two criticisms advanced by Justice Stewart, retroactivity and unreasonableness, the latter seems to be the more valid test because all changes in property law have some retroactive effect. A change is less reasonable, according to Justice Stewart, the more rudely it shocks expectations. But the expectations of landowners are continually revised involuntarily. The decision in Gion undoubtedly diminished the expectations of California littoral landowners. The proposal suggested here would no more change the expectations of current fee owners than would a drastic new zoning law or a successful implied dedication claim. Furthermore, the seven-year postponement in the recommendation would permit a gradual reevaluation of landowner expectations.

Professor Powell has written: "[P]roperty rights have received more narrowing redefinitions in a relatively few years than any prophet of fifty years ago could have believed possible."[1] After enumerating twenty-four areas in which the rights of landowners have been curtailed in recent years, he concluded that the essential question in all of these cases is whether the claimed private right is consistent with the public welfare. If the claimed right is inconsistent with the public welfare, then it

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[1]Powell, "The Relationship Between Property Rights and Civil Rights," 15 Hastings L. Rev. 135, 147 (1963).

is held to be no right at all and the constitutional scheme is not violated. Because notions of public welfare constantly (but gradually) change, the scope of permissible activities of landowners must also change. Under the Powell formulation, the determinative question, as applied to the subject of this Comment, is whether littoral landowners can be allowed to exclude others from the use of the beach consistent with the public welfare. It was long ago decided that it would be inconsistent for littoral landowners to control use of the sea. When considered in light of the great need for public beachfront property, the fact that only a recreational easement is taken seems to meet the reasonableness test of Justice Stewart's formulation.

As previously noted, the plan suggested here would do more than forbid one of several uses to which land might be put, and therefore this taking cannot be said to be completely analogous to the taking which results from zoning regulations. But this test of Justice Stewart encompasses more than the traditional zoning justification. The fact that one is prohibited from exercising the right of exclusive possession of land does not require the conclusion that such a restriction is an impermissible change in property law. The right to exclude others, or jus prohibendi, although usually enjoyed along with the right to use or dispose of property, is not an essential element of ownership. The owner of the bed of navigable waters may not interfere with navigation through the water which covers his land. Although a landowner was originally presumed to own the air space above his property without limitation, the advent of airplanes required a redefinition of ownership rights so that flights through one's air space could not be prohibited.

Denial of the right of exclusive possession does not necessarily preclude the right to recover for substantial and unjust interference with one's remaining property rights. Inverse condemnation, which already permits landowners to recover for excessive noise from low-flying aircraft, can be applied to beachowners. Only public use of the beach which is injurious to the landowner's enjoyment of his property behind the vegetation line should allow recovery. An example is frequent noisy beach-parties which deprive the landowner of his sleep. But compensation should not be allowed for a single, silent stroller on the beach, any more than for a silent, high-flying aircraft. To reduce the need for lengthy inverse condemnation litigation, the legislative declaration authorizing public use of beaches should expressly require substantial governmental responsibility for tort liability and beach management in the now-public dry sand area.

In this respect, also see Comment, "Easements: Judicial and Legislative Protection of the Public's Rights in Florida's Beaches," 25 U. Fla. L. Rev. 586, 592-96 (1973).

In 1971 the legislature of the Virgin Islands enacted a law to protect the public character of the territory's beaches. In addition to the provisions that follow, the Act created an Open Beaches Committee. This group was directed to conduct a comprehensive study of Virgin Island shorelines, including a survey of the public-private ownership boundary, maps of public access routes, and a use classification of all beaches that specifically identifies areas best suited for environmental protection. The beach access provisions of the Act follow.

BE IT ENACTED by the Legislature of the Virgin Islands:

SECTION 1. A new Chapter 13 is added to Title 12 of the Virgin Islands Code, to read as follows:

"Chapter 13. Open Shorelines

§ 401. Declaration of policy

The sea has long dominated the history of the Virgin Islands. It has, until the advent of the air age, been the only route to the outside. The sea has brought to these islands all of the seven flags that have reigned over them. It has also been a constant source of food and recreation. The threshold to the sea that surrounds us is the shoreline. The shorelines of the Virgin Islands have in the past been used freely by all residents and visitors alike. The seashore has been a place of recreation, of meditation, of physical therapy and of rest to Virgin Islanders past and present. To fishermen the sea and its shores are a way of life. The second half of the twentieth century has brought adverse changes to the Virgin Islands Shorelines. There has been uncontrolled and uncoordinated development

of this area, together with attempts, sometimes successful, to curtail the use of these areas by the public.

The Legislature recognizes that the public has made frequent, uninterrupted and unobstructed use of the shorelines of the Virgin Islands throughout Danish rule and under American rule as recently as the nineteen fifties. It is the intent of the Legislature to preserve what has been a tradition and to protect what has become a right of the public.

§ 402. Open beaches and shorelines; shorelines defined

(a) It is hereby declared and affirmed that the public, individually and collectively, has and shall continue to have the right to use and enjoy the shorelines of the Virgin Islands as 'Virgin Islands" is defined in section 2 (a) of the Revised Organic Act of the Virgin Islands.

(b) For the purposes of this Chapter 'shorelines of the Virgin Islands' shall mean the area along the coastlines of the Virgin Islands from the seaward line of low tide, running inland a distance of fifty (50) feet; or to the extreme seaward boundary of natural vegetation which spreads continuously inland; or to a natural barrier; whichever is the shortest distance. Whenever the shore is extended into the sea by filling or dredging, the boundary of the shorelines shall remain at the line of vegetation as previously established.

§ 403. Obstruction of shorelines prohibited

No person, firm, corporation, association or other legal entity shall create, erect, maintain, or construct any obstruction, barrier, or restraint of any nature whatsoever upon, across or within the shorelines of the Virgin Islands as defined in this section, which would interfere with the right of the public individually and collectively, to use and enjoy any shoreline.

§ 404. Permits for shoreline construction

The Commissioner of Conservation and Cultural Affairs may issue permits for shoreline construction upon the following conditions:

(1) that the construction will not violate the provisions of section 403 of this chapter.

(2) That any structure erected on the shoreline will be open to the free passage of the general public;

(3) That such construction will not jeopardize the public need for healthful, safe, and esthetic surroundings and environment; scenic beauty; recreational uses or potential uses; natural resources of the shoreline; or the present and prospective need for conservation and development of the shoreline and its resources;

(4) Similar construction is impossible on alternative sites above the line of vegetation of the shoreline;

(5) That the permitee shall pay just compensation under the terms and conditions of the permit.

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§ 407. Penalties

Violation of any provision of this chapter shall be punishable, upon conviction, by a fine of not more than $500 or imprisonment for not more than 30 days, or both. Each day of violation shall be a separate offense."

SECTION 2. A new subsection (f) is added to section 205 of Chapter 21 of Title 31, Virgin Islands Code, to read as follows:

"(f) No portion of a 'shoreline' as defined in section 402 of chapter 13 of Title 12 of this Code shall be sold, leased or otherwise disposed of by the Government of the Virgin Islands; excepting only leases for concession stands when such leases are approved in accordance with this section."

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C. The Texas Open Beaches Bill

In 1959, the Texas legislature passed an "open beaches" bill which has served as a focus for most of the discussion on the question of legislatively established presumptions. Tex. Stat. Ann. § 5415(d) (Vernon Supp. 1972). The sponsor of that statute was Congressman (then State Representative) Robert C. Eckhardt, the principal sponsor of the National Open Beaches bill reproduced above. The following commentary by Mr. Eckhardt, Mr. Newman (Assistant Texas Attorney General), and Mr. Ratliff (private attorney) reflects the impacts of this bill in Texas in the thirteen years after its adoption.

Texas Law Institute of Coastal and Marine Resources, The Beaches: Public Rights and Private Use (Conference Proceedings, Jan. 15, 1972)

Newman, "The State's View of Public Rights to the Beaches"

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Any discussion of the rights of the public in and to the beaches of this State must begin with the Texas Supreme Court decision in Luttes v. State, although it dealt a severe blow to the rights of the public. Amazingly, not until 1959, approximately 12 years ago, when this decision became final, was the question of the fee ownership of the beaches of this State settled. In Luttes, the State contended the line of vegetation divided State and private ownership. The State, acting through the Attorney General, argued that this was the true edge of the sea, that it was a simple line visible to all and easy to follow, and that such a holding would preserve for the public the ownership of the beaches, which they had used since time immemorial. The

Supreme Court, however, rejected this contention and held the boundary of private ownership to be the line of mean high tide, essentially that point reached by the waters of sea at high tide on an average day. Thus, Luttes stands for the proposition that fee ownership of the sandy areas of the beaches of this State are, for the most part, under private ownership. Only that area of the beach from mean higher high tide seaward is owned by the State, and much of the time this beach area is covered by Gulf waters.

In 1959, immediately following this decision, the public's rights to the beaches of this State reached their all time low. Apparently, the public and private landowners had assumed the beaches were owned by the public as the beaches essentially had been open prior to this decision. Private landowners began erecting barricades, wooden pilings, and similar barriers across the beaches. In many areas, fences were extended to the line of mean high tide, preventing vehicular traffic along the beaches. The Legislature, under the leadership of Congressman Eckhardt, quickly responded by enacting the original Open Beaches Act during a special session in July of 1959. Because of amendments and additional provisions, the present Open Beaches Act is lengthy and complicated; however, public rights and the enforcement authority of the Attorney General were established by the original Act. This has not been changed by subsequent legislation.

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Eckhardt, "The Texas Open Beaches Bill"

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...Let me talk about the main points of that Act. First, of course, it directs the Attorney General to protect the people's right. Secondly, the Act defines the people's right as a right of ingress and egress to that portion of the beach owned by the State and also to that part of the beach impressed with a presumption of a right of use by the people. Thirdly, the Act provides for a presumption of prescriptive right to the area between low tide and, generally, the vegetation mark. Fourthly, there is a presumption that private title to littoral land does not include the right to exclude the public from using the beach. Those are two different presumptions.

Actually, there are three approaches to the whole question. The first is the policy determination of the Act that there is a state policy permitting ingress and egress to both the state-owned beach and to that portion of beach where there is a prescriptive right, if the presumption is not overthrown by a showing that the prescriptive right does not exist. This intent is brought out by a negative provision of the Act, which is that

the free and unrestricted right of ingress and egress over areas landward of the vegetation line would be deemed fully satisfied by access roads or ways now existing and available to the public. So the Act does not give a right of ingress and egress over littoral land which is behind the vegetation line. It seems to me therefore, that the right of ingress and egress crosses any land seaward of the vegetation line, whether or not the presumption applies. This is an important policy provision of the Act that doesn't go so much to the question of the nature of the title and to the question of broad use--whether you can camp there or not--but just to the right to be there.

To recapitulate, the Act's four points are: (1) the Attorney General's responsibility and duty to defend the public right which was upheld in the Seaway case; (2) the creation of a state policy that irrespective of title and irrespective of general right to use, the public is to be permitted ingress and egress over land seaward of the vegetation line; (3) the presumption, or the prima facie showing, that by virtue of the land being a beach, the public has a prescriptive right to its use; and (4) a presumption that a state grant of littoral property to private ownership retained the public right to use the beach.

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Seaway is satisfactory in a situation like West Beach of Galveston Island because witnesses could testify to a long and continued use of that beach. It might not be sufficient, however, to protect some of the slightly more remote beaches as, for instance, Bolivar Peninsula Beaches. There might not be a similarly clear long use to establish a prescriptive right or an implied dedication. In these areas, the Attorney General will, then, I assume, lean on the presumption of implied prescription, and that is exactly the reason why the Act includes this provision for a prima facie showing of the right of the public to use the beach by virtue of the fact that it is a beach.

We had considerable argument over this point in the Committee, and the Bill was sent to the Attorney General's Office for examination.... [The Attorney General's] first reaction was that you can't create a presumption on this basis because there is no reasonable ground for the presumption. The fact that this is a dry sand beach has no relationship to its public use.... It seems to me that this is certainly not true with respect to the beaches. The fact that the beach is a sandy beach, immediately indicates that the beach has been useless for anything but matters related to the sea, and that persons using that beach are persons who are there for recreation, fishing, drying nets or various purposes other than, for instance, grazing

which was the littoral landowner's ordinary use. The presumption did have a reasonable base....

Thus, once you show that the land was a sandy beach you don't have to come in and show a long line of history in which people have used it. It becomes necessary then for the private owner to prove it was not used as most beaches are ordinarily used by people in general.

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The second presumption is that unless rebutted, grant of the land from the sovereign must be construed as not including the right in the grantee to exclude the public from the usage of the beach. Now at such point it should be necessary for the private landowner to show it was customary in those days for persons who owned the land to use the beach against the right of any member ot the public, or against fishermen, or against persons in coastal shipping who might land on the beach. I think a very good case can be made that this is not in fact true, that the beaches were used for drying nets by fishermen, that there was really no intention to grant the land so as to exclude customs of this nature.

Let me ponnt out that this comes close to the Oregon case of State ex rel. Thornton v. Hay. Thornton goes on the theory of ancient custom....

The Texas Open Beaches Act is a little different from the Oregon approach. The Act establishes a state policy with respect to construing title where it has not previously been construed. It not only gives the public the right of the usage of the beach where the presumption is shown, but it also gives a correlative interest to the landowner to establish his right. It defines a line where a line did not exist before, or at least where a line had not been precisely drawn before. For this reason it is entirely proper for the legislature to act in that area. The Act does not deprive a person of property without compensation since certainty is established with respect to a line which had previously been in doubt. Indeed, the Oregon decision, which recognizes a rather sweeping ancient right to the people as against a littoral owner indicates that this question is far from being clearly settled.

Newman, "The State's View of Public Rights to the Beaches"

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The principal problem facing...officials [charged with enforcing the Act] lies in those provisions of the Act where it is stated the public has a right of use or easement over that area between the line of vegetation and mean low tide on the seaward coast of the Gulf of Mexico "in the event the public has acquired a right

of use or easement to or over such area by prescription, dedication,or has retained a right by virtue of continuous right in the public." This provision limits the public's right to those areas where it has acquired a right of use or easement by prescription, dedication, estoppel and continuous right. It is often difficult to resolve whether such a right of use or easement has been established; this necessarily involves a question of fact for a jury determination. The enforcing official cannot merely show a barricade or obstruction between the line of mean low tide and the vegetation line, but must prove further that the public in fact has acquired an easement to the area in question by reason of dedication, prescription, estoppel and continuous right. This is a difficult task, requiring much investigation and the expenditure of large sums of money. One must determine what use the public has made of the beach in the past, secure ancient documents to show the beach has been used by the public for many years and obtain witnesses to testify as to the nature of that use. It is an enormous undertaking.

Our Office has participated in several beach cases in Galveston involving the Open Beaches Act, and another is pending. Although I did not participate in the first case, Seaway Co. v. State, I understand it required five weeks of jury trial.... The case was a massive production.

Seaway established a public easement by prescription or dedication across the area of the beach there involved so that landowners had to move certain beach obstructions.

Although the State won this case and established a public easement by prescription or dedication to the beach there involved, the Attorney General's Office now is faced with having to retry almost the identical facts involved in Seaway. The original case involved only a small portion of West Beach. Before one can say the public has an absolute right of use or easement over all Gulf Coast beaches, literally thousands of cases must be tried. It is impossible to estimate the number of tracts of land located on the Gulf Coast where the fee to the beach is vested in private ownership. There can be no absolute public right to use Texas' beaches until vast sums of money are allocated to sue under the Open Beaches Act to establish public easement or right of use. Present resources are just not adequate....

Section II of the Act creates a presumption that the public has acquired a right of use or easement over that area of beach land lying on the seaward coast of the Gulf of Mexico between the line of mean low tide and the line of vegetation. The major import of the presumption of a public right to use beaches on the open Gulf is to form a foundation to establish regulations

for beach use. Otherwise, it would be legally impossible to regulate the use of the beaches because the location of the public beach area would not be apparent. Section I of the Act provides this power for beaches wherein the public has acquired a right of use or easement. Section II then creates a presumption that all beaches are public so their use can be regulated under the provisions of the Open Beaches Act.

The primary function of our office is to bring actions to determine whether the public in fact has acquired rights to the beaches. I personally feel this presumption has little application or worth to such suits. If a private landowner contests the public's right to use the beaches, our Office must introduce the same positive, concrete, proof required in common law proceedings concerning prescriptive easements and implied dedication. We just cannot win on a presumption.

Ratliff, "Private Use and Public Rights"

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The statutory presumption that the public has a right to use the beach to the line of vegetation raises a question of constitutionality. To determine whether the presumptions in the statute are legal, you must resort to the general law regarding the constitutionality of shifting the burden of proof and other items such as this. A long line of authority indicate the State in civil matters may allocate the burden of proof as it desires. It cannot create an irrebuttable presumption but can place th [sic] onus of going forward with the evidence on the defendant although normally the plaintiff has this burden in civil cases.

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The general law in most states has been that to be valid, a presumption must have some rational connection between the facts proven and the facts thought to be presumed. The fact proved must be sufficient that a jury, without more evidence, could infer the ultimate facts thought to be proven. The presumptions in the Open Beaches Act raise two questions of rationality: (1) Is there a rational connection between the fact that there is an open sandy beach area before a vegetation line and the ultimate fact that the public has some sort of right in that beach area? (2) Is there a rational connection between the proven fact that there is land between mean low water and the vegetation line and the ultimate fact that the owner's title does not entitle him to keep people off the area between the vegetation line and mean high water. Congressman Eckhardt and I apparently have some disagreement as to whether there is

such a rational connection between the proven fact and the facts thought to be established by the presumption.

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The Open Beaches Act has caused numerous problems for developers and littoral landowners. The most troublesome thing is that a title policy for land adjacent to a beach specifically excludes insurance against any rights the public may assert by virtue of the Open Beaches Law.

Furthermore, after Seaway any developer has to be on his guard about what he allows the public to do. A developer with a large amount of acreage, absent the Seaway case and perhaps, absent the Open Beaches Law, might be fully willing for that entire area to be used until it was ready for development. Under the Open Beaches Law and the Seaway case, that is dangerous because as Seaway pointed out, if the owner in fact throws his land open to the public and allows the public to use it, an implied dedication to the public can arise.

Another problem that arises in the Seaway case is the decision about estoppel. In that case it was proved that the owners of the property had let the county spend about $89,000 to clean at least a part of the beach involved in that litigation. So the landowner at this point in time is faced with a situation where absent extremely expensive litigation, he has to let the public onto the area at least back to the vegetation line, and after the public leaves the area, it is absolutely devastated. He then can sustain the expense of cleaning the beach area, or he can take the more dangerous course and allow a governmental subdivision to clean it up for him. When he does that, he walks into the estoppel theory of the Seaway case....

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Insofar as the Open Beaches Law and the developer are concerned, many of the problems of developers do not arise from what the law says, but from what people commonly understand the law to mean. Certain members of the public generally to not understand that there are in fact, definite limitations on the areas presumptively subject to public use. A man setting out to fish probably does not pull out his own copy of the Open Beaches Law and read it. Even if he could find the line of low water and was pretty good at estimating an identifiable vegetation line, the chances of his staying within those bounds are remote....

Nothing in the Open Beaches Law allows any member of the public a permanent or semi-permanent acquisition of any portion of the public domain by structures or otherwise. From the point of view of a land developer, this misapprehension is quite undesirable. A purchaser is most reluctant to buy an expensive

tract of land with a veritable tent city between it and the Gulf, particularly where some tents and campers might remain for extended periods of time. In many instances this situation is contrary to the whole policy of the Act because passage becomes difficult when the tide runs higher.

The Texas Supreme Court in the course of one case made the extremely surprising statement that any member of the public had a right to build a semi-permanent bath house on the public domain. This is clearly contrary to both the common law and the civil law. If that is the law, it is extremely bad law, not only from a riparian owner's point of view, but also from the public's point of view, because a single individual or group of individuals is appropriating to his very exclusive use part of the public domain.

Commercial establishments on the beaches also cause problems, although this is one problem the legislature has tried to solve. The Parks and Wildlife Department can license commercial establishments on beaches. These businesses are supposed to be rolling and moving, but Parks and Wildlife apparently construes this to allow operations from sunup to sundown. Invariably every summer season the developer faces the problem of someone who drives up with a trailer, sets up concrete blocks and knocks the wheels off, and he's there for the summer. Then the developer must go to court to try to remove him from the land. The law of other jurisdictions clearly would place this outside the scope of the public beach law. Again, this is contrary to the policy of the public beach law itself because, assuming the Attorney General has won his case, this eatablishment appropriates the public's right.

Dune destruction is another outgrowth of the public use of the land. The dune buggy cults and the land developer are in constant battle, and the developer seldom wins. Along broad stretches of the Texas coast, the dunes are about the only protection for the barrier islands. These dunes are unstable at best, and any sort of cover on one arresting its migration is easily destroyed in one dune-busting session. Once the dune is busted up, it begins to migrate again, leaving a large tidal wash area subject to wash over at a relatively low tide. By no stretch of the imagination does the public beach law reach far enough to permit this, but it stands as a barrier to voluntary compliance because the dune buggy cult says it has a right to be there without the developer running them off.

VII STANDING TO ASSERT PUBLIC RIGHTS TO DRY-SAND AND UPLAND AREAS

While the law of standing has generally been greatly liberalized in recent years, problems still remain in many state courts when asserting public use rights in dry-sand and upland areas. The following Florida case is illustrative.

UNITED STATES STEEL CORP. v. SAVE SAND KEY, INC.*
303 So.2d 9 (Fla. 1974)

The Attorney General of this State and respondent, Save Sand Key, a non-profit Florida corporation organized for the specific purpose of securing for the public use as much as possible of Sand Key, a gulf-front island in Pinellas County owned by petitioner, United States Steel Corporation, filed a complaint for declaratory and injunctive relief against petitioner. In its action, Save Sand Key sought to enjoin United States Steel from interfering with certain rights of the public generally, including individual members of the plaintiff corporation, to use a portion of the soft sand beach area of Sand Key. Such rights to the public use of United States Steel's lands were alleged to have been acquired by the public by prescription, implied dedication and/or general and local custom. Inter alia, respondent alleged that petitioner recently commenced construction of rental and high-rise condominium apartment buildings based upon its development plan for Sand Key, that petitioner has fenced portions of Sand Key around its present construction sites which alleged effectively and substantially prohibits and interferes with the rights of the public to the full use and enjoyment of the tract. Respondent by its complaint sought injunctive relief from any future acts which interfere with, impair or impede the exercise of the public's rights and from an alleged public nuisance in the form of a purpresture blocking enjoyment of those rights.

United States Steel moved to dismiss the complaint as filed by Save Sand Key, Inc. alleging, inter alia, that Save Sand Key had no standing to sue because it did not allege a special injury differing in kind from injury to the general public and because the respondent (plaintiff below) corporation was not itself claiming any right or title to the United States Steel's

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*Citations generally omitted.

lands and was therefore not a real party in interest.

Upon consideration of the briefs, the arguments, the statutes and the authorities governing the issue, the trial court determined that Save Sand Key, Inc. lacked standing to bring this lawsuit. In his order dismissing the complaint as to Save Sand Key, Inc., the trial judge explained:

> "Paragraph 6 alleges: 'Save Sand Key, Inc. is a nonprofit Florida corporation organized for the specific purpose of securing for public use as much as possible of Sand Key . . .' The question before the Court is whether a group of people can organize a private nonprofit corporation and seek relief for members of the public in the name of that corporation. This precise question was before the Court in Sarasota County Anglers Club, Inc. v. Burns, [Fla.Appl,] 193 So.2d 691 (1st DCA-1967), certiorari denied, [Fla.,] 200 So.2d 178 (1967). In this case, an identical-type corporation was organized and suit was filed against the Board of Trustees of the Internal Improvement Fund and a landowner in Sarasota County. Plaintiffs prayed 'for a declaratory decree and injunctive relief . . . abating the alleged purpresture and nuisance, and that the land in question be declared to be impressed with a public easement for boating, bathing, navigation, fishing and other public uses . . .' (page 692). The appelate court held, on page 693: 'The plaintiffs are not in a position to maintain this action.' This case is controlling precedent in Florida as to the question of standing of Save Sand Key, Inc. Further, the Court is persuaded by Florida Rule 1.210, RCP, [30 F.S.A.] that the parties who would be injured would be the proper persons to bring an action upon the facts alleged by Plaintiff Save Sand Key, Inc.; they would be the 'real party in interest'."

As indicated by the decision of the District Court of Appeal, Second District, the court refused to dismiss the Attorney General permitting him to pursue the action insofar as it pertains to the alleged public nuisance; however, the Attorney General has taken a voluntary non-suit.

The District Court of Appeal reversed the order of dismissal and specifically stated:

> "Necessarily, of course, that must be the holding of the lower court in this case. But we perceive a more profound and complex problem here. The full question to be answered in this case is whether an organization such as appelland which asserts certain vested property rights in the public generally, and thus derivatively in its members individually, can sue to enforce or protect those rights on behalf of those members who

are personally aggrieved by an intrusion thereon, even though such rights are non-special and are enjoyable in common with every other member of the public."

Sub judice, the District Court explicated:

"We think it's time to say, therefore, that the 'special injury' concept serves no valid purpose in the present structure of the law and should no longer be a viable expedient to the disposition of these cases. . . .

"Summarizing our conclusions, then, we hold first, that a person who is entitled to enjoyment of a right or who directly and personally suffers or is about to suffer an injury may sue for relief or redress whether or not such right or injury is special to him or is shared in common with the public generally. Secondly, we hold that a bona fide non-profit organization may sue for and on behalf of some or all of its members who have been or will be directly and personally aggrieved in some manner relating to and within the scope of the interests represented and advanced by such organization. Finally, we hold, within the rationale of City of Daytona Beach v. Tona-Rama, supra, [now pending in Supreme Court][1] that facts and circumstances are alleged which, if true, are sufficient to support a finding that there exist enforceable prescriptive rights in the public to the soft sand area of Sand Key."

The District Court also expressly receded from and overruled those portions of Askew v. Hold the Bulkhead--Save Our Bays, 269 So.2d 696 (Fla.App.2d, 1972) which conflicts with its instant decision.

With all due respect, we comment that it is not the province of the District Court of Appeal to recede from decisions of this Court. A much better solution would be to follow the decisions of the Supreme Court and then certify the cause as being one of great public interest in order to facilitate a re-examination of the decision of this Court in question.

We adhere to our decision in Sarasota County Anglers Club, Inc. v. Kirk, supra, wherein, upon certification by the District Court of Appeal, First District, of their decision in Sarasota County Anglers Club v. Burns, 193 So.2d 691 (Fla.App.1967), we adopted their opinion as the decision of this Court, and, therefore, we reverse the instant decision of the District Court and approve the order of dismissal by the trial court for lack of standing to sue on the part of the appellee.

Sarasota County Anglers Club, Inc. v. Burns, 193 So.2d 691 (Fla.Appl1967), 200 So.2d 178 (Fla.1967), a suit strikingly similar in nature to the instant cause involved in a declaratory judgment action by the Anglers Club, a private non-profit

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[1] [Reprinted in this work at pp. 122-32.]

corporation identical in type to respondent corporation acting in behalf of its members, and a private citizen against the Trustees of the Internal Improvement Fund, a landowner and the town of Longboat Key, seeking to enjoin fill operations at Longboat Key to the detriment of the club and others interested in fishing, bathing, and boating in the area, seeking that the land in question be impressed with a public easement for boating, bathing, navigation and other public uses, and praying for a decree declaring the dredge-fill permit to be illegal and void. Finding that the plaintiffs were not in a position to maintain this action, the trial court dismissed the complaint. Upon appeal the District Court of Appeal affirmed the order of dismissal by the trial court and succinctly stated,

> "Suffice it to say that we agree with the chancellor in his finding and holding that the plaintiffs are not in a position to maintain this action....[W]e must agree with the chancellor that the plaintiffs have failed to show in what manner they have been damaged as private citizens differing in kind from the general public, and, therefore, have no right to sue."

Upon certification of the decision to this Court, we held:

> "The history, factual background, questions presented and disposition are clearly set out in the opinion of the District Court. Argument having been heard and the court having considered the records and briefs, it is our opinion that the ruling of the District Court is correct and it is adopted as the opinion of this court." Sarasota County Anglers Club v. Kirk, Fla., 200 So.2d 178.

Sub judice, as in Sarasota County Anglers Club v. Burns, supra, there is no statutory authority for this cause of action wherein respondents, inter alia, seek to assert property rights in real estate owned by petitioner and no special injury differing in kind from that suffered by the public generally was alleged.

Although the District Court in the cause sub judice purports to recede from its earlier but recently decided decision of Askew v. Hold the Bulkhead--Save Our Bays, Inc., supra, we prefer and agree with their earlier decision enunciated therein. Askew v. Hold the Bulkhead--Save Our Bays, Inc. dealt with an attempt of a citizen's group to halt the construction of certain improvements within Oscar Scherer State Park, which park was donated to the State by the will of Elsa Scherer Burrows "for public recreation and as a wild life sanctuary." The trial court dismissed the citizen's group as having no standing, but allowed a private citizen to maintain the action. The District Court affirmed as to the group's lack of standing, but reversed as to

the private citizen, holding him to be likewise without standing to sue. In so holding, the District Court stated:

> "Neither of appellees has alleged or shown that one or the other of them will suffer a special injury or that either has a special interest in the outcome of this action. In order to maintain this kind of action, absent a sufficient predicate to a proper class suit (and there is no such predicate here), it is well settled that a plaintiff must allege that his injury would be different in degree and kind from that suffered by the community at large.
>
> "If it were otherwise there would be no end to potential litigation against a given defendant, whether he be a public official or otherwise, brought by individuals or residents, all possessed of the same general interest, since none of them would be bound by res judicata as a result of prior suits; and as against public authorities, they may be intolerably hampered in the performance of their duties and have little time for anything but the interminable litigation.
>
> [We again exclude from this rationale a proper 'class action.']"

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We adhere resolutely to our holding in Sarasota County Anglers Club, Inc. v. Kirk, supra, and other decisions of this Court relative to the concept of special injury in determining standing.

Accordingly, the decision of the District Court is quashed and this cause is remanded with directions to reinstate the order of the trial court.

It is so ordered.

ADKINS, C. J., DEKLE, J., and HENDRY, District Court Judge, concur.

ERVIN, J., dissents with opinion.

BOYD and McCAIN, JJ., dissent and concur with ERVIN, J.

ERVIN, Justice (dissenting):

I think the majority decision is flatly contrary to the rights of citizens to corporately organize (legally assemble) in a nonprofit corporation under the First Amendment to the United States Constitution for the purpose of protecting the general public's rights in common to the use and enjoyment of public property. The citizens of this state have long been accorded in common, under the inalienable trust doctrine, the use and enjoyment of navigable waters, tidelands, and sovereignty areas for bathing, boating, fishing and other recreational uses.

When there is neglect or refusal on the part of public officials (in this instance the Trustees of the Internal Improvement Fund or the Attorney General) to protect those rights in any area of the state, I see no legal reason why aggrieved or affected citizens of the local area cannot corporately organize for the peaceful protection of the public domain which they have so long enjoyed from disturbance from conflicting private interests and, if necessary, have standing to bring appropriate legal action in the process.

It is well recognized now that environmental protection, including protection of marine, animal and bird life and protection from dredging and filling in submerged bottom areas is highly essential to the general public's use and enjoyment of public areas under the inalienable trust doctrine.

Just as the standing of Senators Horne and Karl met with our approval in Department of Administration v. Horne (Fla.1972), 269 So.2d 659, to sue as citizen taxpayers to protect the public 's monies, I see little reason why the Respondent does not have standing to sue to protect the public's tidelands, including the recreational areas therein which the public has long enjoyed.

I agree with the Second District that

> "a bona fide non-profit organization may sue for and on behalf of some or all of its members who have been or will be directly and personally aggrieved in some manner relating to and within the scope of the interests represented and advanced by such organization. . . ."

This case repeats the old story which I alluded to in City of Daytona Beach v. Tona Rama, Fla., 294 So.2d 73, Opinion filed March 25, 1974, of pretexts of one sort or another to favor the private sector, whether of standing to sue or otherwise, over the general public in disputes concerning the general public's traditional rights to enjoy public lands.

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The federal rule of standing basically involves a two-step analysis: (1) Does the challenged action cause the party injury in fact? and (2) Is the party's interest arguably within the zone of interests sought to be protected by the statutory or constitutional provision in question? See United States v.

SCRAP, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972); and Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970).

There are indications that a number of state courts will be adopting similar rules. See, e.g., Wisconsin's Environmental Decade v. Public Service Commission, 69 Wis.2d, 1, 230 N.W.2d 243 (1975).

VIII SPECIAL CONSIDERATIONS IN UPLAND AREAS

Absent special circumstances, the ownership of upland areas (that area landward of the vegetation line) is almost universally held to be in private ownership. Disputes usually center on whether the public owns and/or has the right to use dry-sand areas.

However, the upland area can be quite important in several ways. First, its use is often necessarily incident to use of the wet-sand and dry-sand beaches. Beach-goers may use the area to park their cars or change clothes. Such was the case for part of the land involved in the Gion decision. There, the upland area used by the public for parking was held to be impliedly dedicated to public use. The upland is more frequently important in a second respect--for providing access to those beach areas where public rights have been established. After all, except where access is gained over water, the upland must be crossed in order to reach the dry-sand and wet-sand beaches. Therefore, effective public use of beach resources often depends upon existence of a right to cross privately owned uplands--a right of access.

This important point has long been recognized by the law, as the following selection indicates.

Waite, "Public Rights to Use and Have Access to Navigable Waters," 1958 Wis. L. Rev. 335, 360-63.*

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It is all very well to have demonstrated that the public does have rights in navigable waters, and that at least some remedies exist for their enforcement. But the individual citizen's enjoyment of the rights depends on his ability to gain access to the water. . . .

For centuries, governments have been trying to distribute the use of water found in lakes and streams equitably among their citizens. The fact that the resource is limited in quantity and localized in occurrence, whereas the persons desiring its use are relatively unlimited in number and are generally found to be living on non-riparian as well as riparian land, coupled with the importance of the resource to the community, insure that this problem of distribution will always be of interest to men living on a social environment. Considering the differences among societies as to weather and degree of specialization of labor, it is not surprising to find the problem of water distribution being met with different solutions in different parts of the world. The solution of a given sovereignty is itself subject to change as the facts of group life themselves change. Thus, in the arid regions of the Middle East where availability of water is a matter of life and death free access of water is a tenet of the Moslem religion, dominant in the region. The civil law expresses the religious precept in the "right of thirst" which allows one to take water to quench one's thirst or to water one's animals. Where the water is in a lake or river, the right also includes an easement to cross the land or pathways of another to reach the water. The right to fish is similarly recognized in everyone in all waters, irrespective of ownership.

The creation by law of a right of the public to obtain access to water even if it required crossing privately owned land to do so was not confined to desert countries peopled with believers in a religion different from our own. In 1641 the colony of Massachusetts reserved great ponds tothe public for the express purpose of hunting and fishing.[1] In 1647 the ordinance

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[1]THE BODY OF LIBERTIES OF 1641, § 16, reprinted in WHITMORE, THE COLONIAL LAWS OF MASSACHUSETTS 37 (1889). The text of the colonial statute, as well as that cited in note 98, infra, is quoted in Slater v. Gunn, 170 Mass. 509, 513, 49 N.E. 1017, 1019 (1898).

was amended to forbid towns to appropriate to particular persons great ponds containing more than 10 acres of land, and to authorize persons to cross another's property on foot to reach the so-called great ponds, as long as they didn't cross corn or meadow land. Judicial interpretation has included within the right of hunting and fishing the right to put the water to any use of which it is capable.[2] The owner of the shore of a great pond has no greater right to use the water than has any other member of the public. Furthermore, although the location of his land along the shore of the pond increases the value of his right by making his access to it certain, such value is not property in the constitutional sense. And he may be prohibited from using the water for any purpose, even if the use is granted exclusively to another. The provision of the Ordinance of 1641-7 allowing passage across another's land to reach a great pond seems no longer effective. At least a decision in 1898 upheld a verdict based on trespass for the reason that the increase in public means of access and in the value of land since the enactment of this provision of the Ordinance had been so great that the provision was no longer applicable.[3]

Today, by statute,[4] if at least ten citizens of the commonwealth petition the department of public works that in their opinion public necessity requires a right of way for public access to any great pond, a public hearing will be held on the matter. If the board that holds the hearing finds that a right of way already exists, the board petitions the appropriate court for registration of the easement. If it finds no right of way exists, it submits a report with recommendations to the legislative body of the commonwealth for further action. The statute makes no mention of compensation to the owner of the land over which a public right of way might be acquired, and it would seem, from the fact already mentioned that the value of a riparian's right to use the water of a great pond is not property, that no compensation would be given for any reduction in that value resulting from the creation of the public means of access. Remembering that the

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[2]Sprague v. Minon, 195 Mass. 581, 81 N.E. 284 (1907). "There is no doubt that the control of the great ponds in the public interest is in the Legislature that represents the public. It may regulate and change these public rights, or take them away altogether to serve some paramount public interest." Id. at 583, 81 N.E. at 285. Slater v. Gunn, 170 Mass. 509, 49 N.E. 1017 (1898).

[3]Slater v. Gunn, 170 Mass. 509 N.E. 1017 (1898).

[4]MASS. ANN. LAWS c. 91, § 18A (1954).

public rights in the use of the great pond have eliminated any private right to the use of the ponds, it would be entirely feasible for the courts to deny compensation of any sort to the riparian owner when a public right of way to the pond was acquired, on the theory that private title to the shore was held subject to a paramount right of the public to reach the water which was necessary to the exercise of the public right to use the pond.

Nor is this issue of solely historic interest. The California court, in the Gion-Dietz decision, found public rights in upland areas under the implied dedication doctrine. Others have suggested use of the concepts of prescriptive easements, easements of necessity, and implied easements of access to reach similar results. As the following selections indicate, legislatures have also become involved with the issue of providing access over uplands.

> McLennan, "Public Patrimony: An Appraisal of Legislation and Common Law Protecting Recreational Values in Oregon's State-Owned Lands and Waters," 4 Envir. Law 317, 364-69 (1974).*

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Ultimately, the public's right to use beaches and the surface waters of rivers and lakes is only as good as its right to gain access to these pleasuring grounds and to make such use of river banks and lake shores as is necessary. If the decision that the public had acquired an easement warmed the heart of every beachcomber, it chilled to the marrow many private owners of lands, whose lands, over the years, had been put to recreational use, or which might in the future become attractive for the purpose.

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In spite of the Oregon Court's choice of the vegetation line as the boundary, and the doctrine of custom as a means of making it applicable to the entire Oregon beach but inappropriate for other lands, some people apparently believe that the public easement can be made applicable to "abutting, adjacent or contiguous" land. The Attorney General sought to test the possibilities of this theory when a private condominimum [sic] developer in Cannon Beach obtained vacation of a dedicated street which had served over the years as a means of access to the beach.[1] Dismissal by the trial court on jurisdictional grounds was affirmed by the Oregon Court of Appeals. Brought subsequently by the State Highway Commission, the case has been decided at the trial court level against extending a public easement landward,[2] and is upon appeal.

Some landowners were not content to leave the question to the courts, however. Expressing concern over a California court decision that, by public use over many years, the public had acquired an easement by implied dedication to gain access to a beach, representatives of the Oregon Cattlemen's Association and Boise Cascade Corporation appeared before the legislature in 1973, seeking to turn the recent court trend. They proposed amending a statute which holds landowners harmless for injuries to recreationists on beach uplands, agricultural, and forest lands. The original bill sought to nullify past use as well as prevent the acquisition of easements by recreational use in the future. Eventually their proposal was grafted to another bill and enacted.[3] The measure declares as public policy state protection of private owners from extinguishment of any interest in their land and from the acquisition by the public of any right to use or continue to use such land for recreational purposes. It provides that an owner or possessor of land who "directly or indirectly invites or permits" recreational use shall not give "any right to continued use." Permitted recreational use does not raise a presumption of intent to dedicate to the public the right to continued use. The above provisions, however, are not to be "construed to diminish any public right acquired by dedication, prescription, grant, custom or otherwise existing before the effective date" of the act.

The ocean shore, which includes the public easement up to the vegetation line, was specifically excluded from the operation of the act. But it is difficult to see what other private

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[1] State ex rel. Johnson v. Bauman, 7 Ore. App. 489, 492 P.2d 284 (1971). Id.

[2] State v. Bauman, No. 28-831 (Clatsop County, Ore. Cir. Ct., filed Mar. 12, 1973). [aff'd, 16 Or. App. 275, 517 P.2d 1202 (1974)]

[3] Ch. 732, [1973] Ore. Laws 1756.

property outside of incorporated towns is excluded from the Act by the following definition of "land":

> *** agricultural land, range land, forest land, and the lands adjacent or contiguous to the ocean shore, *** including roads, bodies of waters, watercourses, private ways,***

In any instance, where public use comes into conflict with private property rights, what we have, ordinarily, is a real property dispute. Is the private owner's fee simple estate bounded by the high tide line or the vegetation line? By the high water mark or the low water mark? At what point can the private owner build a fence or lock a gate without infringing upon public rights? Which roads or trails through forest or rimrock lands may a hunter or fisherman use with impunity? These are not easy questions. There are, moreover, changing circumstances which dictate that the private owner assert his ownership interest to the full now, whereas in the past he was tolerant. Usage has grown steadily. The public is often boorish, destructive, and disorderly. Lands that in the past were remote, good only for growing timber or as a summer range for cattle, and could tolerate the incursion of a few fishermen or hunters each year, have now become prized, second-home development sites. Landowners who formerly were merely sitting out a sixty-year wait for a timber harvest, or reaping a pittance in grazing fees, now appreciate what is to be gained by subdividing and selling such lands by the lot. And if they can sell exclusivity as well, from their point of view, so much the better, and more lucrative will be their endeavor.

If, according to the act, it has become the state's duty to protect private interests, it remains to be seen who can or will protect the general public's right to recreational use as is contemplated for example in the case of public trust rights of navigation, fishery and recreation. Is this policy in contravention of Article I, § 20 of the Oregon Constitution: "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens"? Among other issues raised by the statute is the need for prompt establishment of public easements long enjoyed over trails and roads to reach hunting and fishing grounds on federal lands. It is doubtful that many legislators realized how dependent recreationists are on such byways. Evidence of public use, particularly in remote parts of the state, is difficult to accumulate. Unless such rights are asserted soon, while memories are yet fresh, it appears unlikely that previously acquired public rights ever will be

identified and established as easements. Other issues presented are (1) the creation of a distinctive law with respect to recreational use, which is outside of the common law of implied dedication and prescriptive easements; and (2) the possibility that commercial recreational use, such as professionally guided ventures, might be excluded from the operation of the act because they are commercial.

Also, on the leglislative front, the new state Game Code adopted in 1973[4] repealed the Angler's Access Statute, which in its most recent form had read:

> 498.125. Navigable rivers, sloughs or streams between the lines of ordinary high water thereof, of the state, and all rivers, sloughs and streams flowing through any public lands of the state, are public highways for the purpose of angling, hunting or trapping thereon. Any rights or title to such streams, or the land between the high water flowlines or within the meander lines of navigable streams, are subject to the right of any person owning an angler's, hunter's or trapper's license of this state to go upon and angle, or hunt or trap therein or along their banks.
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The old angler's access statute itself presents some interesting questions. Is it no more than a restatement of the public trust doctrine? And if so, may the legislature effectively repeal it, or are the public rights not subject to legislative discretion and divestment? To the extent that it purported to give additional rights as against a private landowner, does it amount to an unconstitutional taking? Is it subject to attack as granting to a class of citizens (anglers and hunters who hold a license) a privilege not granted equally to all citizens? And, as always, by what test of navigability was it to become determinative?

Absent the statute, the common law suggests some limits on the public trust right to use navigable waters in terms of affording access or use of banks. A person properly making a navigational use, which today would probably include recreational use, of navigable waters has only an incidental right "to meddle with or touch upon the bank" which is in private ownership.[5] The right is founded upon necessity, and includes the right to come to land at intermittent points where the business of navigating cannot be performed. In other words, a few spots of non-navigability do not render an otherwise navigable stream non-navigable. On the other hand, where the navigational purpose (to

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[4] Ch. 723, § 130 [1973] Ore. Laws 1730.

[5] Weise v. Smith, 3 Ore. 446 at 451 (1869).

float logs) cannot be accomplished without using the bank, a stream was found not navigable so as to give the stream user use of the bank.[6] Where the navigator cannot navigate, and cannot go beyond without trespass, the stream is no longer navigable.[7] Moreover, the public is unable to acquire a prescriptive right to use private property bordering navigable water as a public landing.[8] One authority has asked whether access to a stream or lake, and use of the surface water and the bank up to the high water line, may be bootstrapped by the existance of a public easement for another purpose wuch as a dedicated but unimproved street, or possibly a power line. It was the Attorney General's opinion that this could not be done in the case of an artificial lake created on private property by the damming of appropriated water, even though the new lake may be reached by boat from a public road adjoining the mouth of a creek emptying into the lake. The Oregon Court of Appeals may provide insight on this question in deciding the Cannon Beach case mentioned above.

Two planning schemes adopted by the state legislature need to be mentioned at this point. The first, enacted in 1971, created the Oregon Coastal Conservation and Development Commission (OCCDC) and directed it to prepare by January, 1975, a report including "a proposed comprehensive plan for the preservation and development of the natural resources of the coastal zone."[9] The scope of this planning is from the territorial boundary on the west to the crest of the coastal mountain range. The product of the commission, made up of 24 coastal government representatives and 6 public members, hopefully will serve to inhibit the construction of wall-to-wall condominiums fronting the beach which would effectively exclude the public from much of the wet sand and dry sand alike.

Of greater and presumably more lasting import is the passage, in 1973, of legislation requiring the adoption by local and state agencies of comprehensive plans to conform with goals

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[6]Lebanon Lbr. Co. v. Leonard, 68 Ore. 147, 150, 136 P. 891, 892 (1913).

[7]Guilliams v. Beaver Lake Club, 90 Ore. 13, 30, 175 P. 437, 442 (1918).

[8]Chapman v. Dean, 58 Ore. 475, 115 P. 154 (1911).

[9]ORE. REV. STAT. §§ 191.110 to 191.180 (1971).

and guidelines established on the state level.[10] In developing the goals and guidelines, a newly created Land Conservation and Development Commission and its related department were instructed to give priority consideration to:

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> (c) Estuarine areas;
> (d) Tide, marsh and wetlands areas;
> (e) Lakes and lakeshore areas
> (f) Wilderness, recreational and outstanding scenic areas;
> (g) Beaches, dunes, coastal headlands and related areas;
> (h) Wild and scenic rivers and related lands;
> (i) Flood plains and areas of geologic hazard;
> (j) Unique wildlife habitats;

The above-mentioned study and plan of the OCCDC will be subject to the approval of this Commission.

Obviously, if goals and guidelines giving priority consideration to these areas are adopted at the state level, and mandated into state agency planning for Oregon's state-owned lands and waters, the forthcoming comprehensive plans may have a very protective and beneficial effect on recreational resources in Oregon.

The high cost of purchasing rights of access across privately owned wetlands and uncertainty as to the firmness of legislative support for such rights has led to a search for alternative means of protecting public rights to reach their shoreline resources. In California, potential claims to right might be based on article XV, section 2 of the California Constitution which provides:

> Access to Navigable Waters, Sec. 2. No individual, partnership, or corporation claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to

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[10] Ch. 80, [1973] Ore. Laws 127.

> destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.

One author has suggested that this provision, read in conjunction with the public trust doctrine and California's Mexican law heritage, can be used to protect the public's right to have access to wet-sand areas. See Dyer, "California Beach Access: The Mexican Law and the Public Trust," 2 Ecology Law Quarterly 571 (1972).

Another author, skeptical of the applicability of the public trust doctrine to upland areas, suggests potential use of the easement by necessity:

> Agnello, "Non-Resident Restrictions in Municipally Owned Beaches: Approaches to the Problem," 10 Columbia J. of Law and Soc. Prob. 177, 209-11 (1974)*

The public trust doctrine, by its terms, is limited in application to the narrow strip of land known as the foreshore. Consequently, it is extremely doubtful that the argument could successfully be made that the public has the right, under the public trust doctrine, to use the upland, dry sandy beach, for access to the foreshore. No cases holding to this effect can be found. One possible argument for a public right to use the upland for access to the foreshore is to find an easement by necessity in the upland. Such an easement has two general requirements: prior common ownership and actual necessity.

The requirement of a prior unity of ownership assumes subsequent severance into dominant and servient estates. In the beachfront context the foreshore would be the servient estate and the upland would be the dominant one. Since the

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easement may lie dormant through several transfers and be exercised later by any titleholder, this requirement seems, at first glance, to be satisfied by the lands having once been held by the English Crown or the several states under the public trust doctrine. However, this is not easily established as law. A California court has said:

> [T]he mere fact that all of the land was originally part of the public domain and hence owned by a common grantor, cannot confer the peculiar right out of which a way from necessity arises.[1]

The Supreme Court of Texas has also said:

> Looking to the authorities, they seem rather harmonious in refusing to apply the doctrine where the tracts were under the same ownership only before title passed from the sovereign.[2]

The federal courts have expressed the same concern. The underlying consideration behind such statements is the broad rights that such a doctrine would grant to so many pieces of land.

In each of the cited cases both tracts were owned by private parties, severance having taken place long ago. For this reason the California court could not find a "relation of grantor and grantee." Because title to the foreshore, in most cases, remains in the state under the public trust doctrine, the logical question is whether such a relation does exist and whether by retaining title in the state of one of the tracts the problems presented in the above cases were avoided. These questions have not been dealt with in the case law.

Even if the requirement of common ownership can be satisfied the requirement of "necessity" must be met in order to establish the easement. Although the doctrine of easement by necessity is based on a public policy which is favorable to the full utilization of land, the states have not been uniform in balancing this policy against the rights of the dominant owner. The traditional rule, as expressed by early cases, has been that an almost absolute physical necessity is needed and when the land is accessible by way of navigable water the easement will not be found regardless of how inconvenient such access might be. However, such a strict rule has not been broadly applied and courts have been willing to weigh inconveniences in the balance and require that only a reasonable necessity be shown. Nonetheless, access by way of water has generally barred the finding that an easement by necessity exists unless the situation is such that

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[1]Bully Hill Copper Mining & Smelting Co. v. Bruson, 4 Cal. App. 180, 183, 87 P. 237, 238 (1906).

[2]State v. Black Bros., 116 Tex. 615, 627, 297 S.W. 213, 218 (1927).

navigation is virtually impossible.

Despite this generally accepted rule a few recent cases have shown a trend to grant an easement by necessity even where there is access by way of navigable water. In Redman v. Kidwell[3] the court emphasized that the doctrine of necessity must adjust to changing conditions. Although access by water may have been reasonable and practicable a century ago it is not longer so. In Hancock v. Henderson[4] the court defined this modern approach:

> The more modern view, for sound reasons of social policy, is that a way of necessity may exist over the land of the grantor even though the grantee's land borders on a waterway, if the water route is not available or suitable to meet the requirements of the uses to which the property would reasonably be put.[5]

In the case of the oceanfront beach it does not seem reasonable to require potential bathers to reach the foreshore by way of the ocean. This could require the use of boats, rafts, or swimming, sometimes for great distances. For the vast majority of people, travel by water is not today a practicable mode of transportation. In a modern society the car is often the only feasible means of getting from one place to another, and to require utilization of the waterway would practically deny the public the use of the foreshore to which it may be entitled. In this situation, all that is required is an easement by foot, but of course this would defeat the whole purpose of residency restrictions. Both the public trust doctrine and the doctrine of easement by necessity were developed in an era when navigation was the major means of travel. Perhaps one of them should be made to reflect the changing world. Although there is nothing in the public trust doctrine to suggest a measure of responsiveness to these changes the recent trend in the easement cases may be more helpful.

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[3] 180 So. 2d 682 (Fla. App. 1965), appeal dismissed, 189 So. 2d 631 (1966).

[4] 236 Md. 98, 202 A.2d 599 (1964).

[5] Id. at 103, 202 A.2d at 602.

CHAPTER FOUR. ACQUISITION OF PUBLIC OWNERSHIP, USE, AND ACCESS RIGHTS IN THE BEACH RESOURCE

In many instances, there will be insufficient existing public rights in the beach resource. Courts and legislatures may reject or restrict usage of the concepts laid out in the previous chapter, or a political decision may be made not to pursue their use. Or, the existing rights that are established may prove to be inadequate. For example, litigation may only establish rights in the wet-sand area, with the dry-sand and upland remaining in private hands, thereby leaving the public no means of access to the wet-sands. It is particularly likely that such a need for acquisition will exist where the government wishes to develop an entire "beach area" for recreational purposes, as upland and dry-sand areas will be needed for parking, camping, rest rooms, or picnic facilities. In other instances there may just be a greater demand for beach recreation than can be supported by those areas in which public rights have been established. In either case additional use and access rights must be acquired. In such instances, the additional rights may be acquired either through purchase or through noncompensatory means.

I. PURCHASE OF RIGHTS

In most instances, state and local governments clearly have the power to purchase rights in property in order to promote public recreation. This is reflected in the fact that states and localities have long been involved in the operation of public parts. Occasionally state statutes specifically deal with the issue of acquiring public rights of access to waters in which public rights exist. An example is this provision from the Wisconsin statutes:

> 23.09 (8) WAYS TO WATERS. The county board of any county may condemn a right of way for any public highway to any navigable stream, lake or other navigable waters. Such right of way shall be not less than 60 feet in width, and may be condemned in the manner provided by ch. 32; but the legality or constitutionality of this provision shall in no-wise affect the legality or constitutionality of the rest of this section.
>
> (9) PUBLIC ACCESS TO WATERS. The governing body of any county, town, city or village which, by resolution, indicates its desire to acquire or improve lands for the purpose of providing public access to any navigable lake or stream wholly or partially in the county, town, city or village may make application to the department [of natural resources] for the apportionment of funds for state aid to counties, towns, cities or villages for that purpose. Such application shall state the name of the lake or stream and the location thereof and shall include an estimate of the total cost of the project. The department shall thereupon investigate the proposed project and it shall consider the distance the lake or stream lies from the nearest public highway, the existing access thereto, the terrain of the proposed project and whether it is of a practical nature from the standpoint of labor, development and cost, and whether it will best serve the public interest and

> need of the state as a whole, it may give preliminary approval to such project. Thereupon the county, town, city or village shall prepare and submit plans and specifications and cost analysis of the project to the department for final approval. Upon final approval, the department shall encumber a sum equal to one-half of the approved cost estimate of such project. When the project is completed, the department shall pay to the county, town, city or village such encumbered sum or an amount not greater than one-half of the actual cost of such project, whichever is the lesser. The actual cost of such project shall be determined by the department by audit of the municipality's cost records before such payment is made to the county, town, city or village.
>
> (10) CONSERVATION EASEMENTS AND RIGHTS IN PROPERTY. Confirming all the powers hereinabove granted to the department and in furtherance thereof, the department may acquire any and all easements in the furtherance of public rights, including the right of access and use of lands and waters for hunting and fishing and the enjoyment of scenic beauty, together with the right to acquire all negative easements, restrictive covenants, covenants running with the land, and all rights for use of property of any nature whatsoever, however denominated, which may be lawfully acquired for the benefit of the public. The department also may grant leases and easements to properties and other lands under its management and control under such covenants as will preserve and protect such properties and lands for the purposes for which they were acquired.

However, because there is often a much greater demand for than supply of beach recreation resources, purchase of lands for this purpose can be prohibitively expensive. This is particularly true in those areas where public beaches are perhaps most needed--near urban areas where existing public beach facilities are inadequate.

In order to deal with this problem, some authors have suggested alternatives to the traditional "free" publicly owned

beaches and the use of privately owned fee charging beaches.

Note, "This Land Is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches," 44 S. Calif. L. Rev. 1092, 1125-30 (1971)*

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The Gion-Dietz method of creating more public recreational facilities at the expense of private property has been approved by some commentators because of the "need" for such facilities and the inability of governments to pay just compensation. One reason why governments cannot or will not buy more beach resources is that nearly all public beaches offer "free" admission. There is an attempt to offset the high cost of acquisition, maintenance, and life-guard services with parking fees, concession charges, and grants-in-aid from the state and/or federal government; but these revenues must be augmented considerably by the government's general fund to provide even adequate beach services. Financing is often not available for the purchase of new facilities; many cities, counties, and states are already struggling to avoid bankruptcy. Nevertheless, the argument that government cannot easily afford to pay compensation for beach property "taken" by the public, and therefore is excused from doing so, directly conflicts with the principles of the fifth and fourteenth amendments and with traditional economic theory: "[A]ny measure which society cannot afford or . . . is unwilling to finance under conditions of full compensation, society cannot afford at all."[1]

There is, however, an alternative means for acquiring beaches by the public that does not employ the unfair method of beach acquisition characterized by the Gion-Dietz decision; a means which would allow government to afford full compensation and provide even better beaches: the implementation of reasonable user charges. Such a tax levied directly upon the persons

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[1]Michelman, "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," 80 Harv. L. Rev. 1165, 1181 (1967).

using a facility is being looked to more and more as a means of financing the cost of recreation. The equitable nature of the concept is striking; those who use the facility pay for it.

Under the present system, the cost of maintaining a public beach is paid largely through taxes collected by the governmental entity sponsoring it. Hence, people coming from outside the taxing area to use the beach receive a "free ride" as they do not pay the full cost of using the facility. This inequity is only partially cured by grants-in-aid from higher government. User charges, however, would eliminate this problem.

The price mechanism enhances correct allocation of natural resources, capital improvements, and labor.

> A shift in tastes, reflected by increases in the demand for, or an increase in the willingness to pay [higher prices] for, a commodity, will signal to entrepreneurs that higher returns may be possible through increasing production of such commodities as compared with alternative employment of their productive resources. . . . In this way, prices of both inputs and product outputs, and hence returns to investment, represent signaling devices which result in a flow of resources continuously adjusting to correspond with changes in relative preferences among consumption goods and services.[2]

Thus, if the public desires beaches enough to pay a reasonable return for them, the government will be given an impetus to develop more beaches. Also, the inverse will occur: the market will restrict the number of beaches available to just that amount the public is willing to pay for and use. This same effect also provides a means for controlling beach congestion. Under the present system of beach management all that can be done to prevent overcrowding is to close the facility when its full capacity has been reached. If, however, a pricing system were established the controlling government could "allocate" the public by raising or lowering prices at given beaches.

Finally, user charges may enhance beach quality and diversity. If public beaches begin to charge fees that reflect the cost of administration and maintenance, then private beaches will be encouraged to compete for the beachgoer's dollar. Competition for customers between the various beaches, public and private, might well result in cleaner facilities, better restrooms, and beaches offering different types of services. For example, to provide the greatest access for the greatest number, present public beaches are hidebound with a myriad of regulations restricting the beachgoing public. But since less regulation and

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[2][Krutilla and Knetsch, "Outdoor Recreation Economics," 389 Annals 63, 64 (1970).]

the specialization of facilities are one method of competition, beaches which cater to certain interest groups now restricted in their use of many beaches--skin divers, surfers, beach campers--might develop.

There are, however, several objections to the user charge system. First there is a serious problem in implementing an effective system for collecting the charges. Beaches would have to be fenced so tolls could be collected and it has been noted that beachgoers do not respect fences. Difficulties would, however, vary depending upon beach topography. Beaches with limited access would be far easier to administer than a typical big-city beach running the length of several blocks. An honor system could be tried as a method for assessing fees. The Forest Service has used such a system for collecting recreational charges and has reported considerable success. Minimal fencing and toll booths might suffice for collecting public beach user fees. Occasional spot checks for violators and assessment of fines would probably keep the number of people who do not pay to a minimum.

A second argument that could be raised against the implementation of user fees is that since beach recreation benefits the whole society (an emotionally healthy populace supposedly results from the opportunity to engage in outdoor recreation) all should assume its cost. There is, however, no evidence that such recreation actually leads to the improved condition of the general psyche of society.

> We suspect there are as many emotionally ill-adjusted wandering through the woods or lying on the beaches as there are cooped up in apartments, before TV sets: and, conversely, there may well be as many well-adjusted who never go near the outdoors as who do.[3]

Outdoor recreation is often compared with free public schools as a general public schools as a general public good that should be encouraged by free access. But states recognize a difference between the two: every child must attend school, while no such requirement is made for public recreation. General participation in public recreation is limited; the vast majority of the public use such facilities infrequently at best. Furthermore, despite the acknowledged importance of education, no one has proposed expropriating private property to support schools. Similarly, there seems to be no reason why private property should be used, without compensation, to provide public recreation.

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[3] [M. Clawson & J. Knetsch, Economics of Outdoor Recreation 276-77 (1966)].

Finally, it may be argued that free public beaches are a form of income distribution which, if discontinued, would be harmful to the poorer people in society. However, present studies reveal that public beaches, are used mainly by the upper and middle classes and least by the poor.

> Disadvantaged economic groups are often unable to use existing facilities because they do not own automobiles and because public transit facilities to marine recreation areas are unavailable. With the exception of in-city mass transit facilities such as the subways to Coney Island and the Rockaways in New York there is inadequate public transportation to most state parks and national seashores.[4]

Thus, the present public beach system is highly regressive; it is provided for the middle and upper classes by taxes which are paid, in part, by the poor. If one is truly interested in providing recreational facilities for the underprivileged, then this end could better be accomplished by providing direct subsidies to the poor or by implementation of a beach voucher system.

An alternative to adoption of user fees to finance public use of the beach resource is the closely related concept of relying on privately owned, fee sharing beaches. The selection above also discussed this possibility[5]:

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....While private beaches open to the public are not a new idea[6]--there are many on the East Coast, and it is virtually the only

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[4][Panel Reports of the Commission on Marine Science, Engineering and Resources, section IV, at 246.]

[5][At 1130-33.]

[6]For a penetrating discussion of current beach problems including: financing via user charges and other market solutions see Ellickson, Materials on Problems of Governing The Coastal Zone (unpublished, 1971) University of Southern California Law Center.

system in many Mediterranean resort areas,--few have been established in California. This is probably because of the wide availability of free public beaches.

The development of a private beach market would result in at least some areas of the coast being better managed and regulated. It has been argued that when property is communally owned--possessed by the government--it will be abused by the public. The limbo status of being owned by all, yet no one, produces this ill effect. Users, not having a personal interest in the resource, do not consider the impact their activities will have on other participants or future generations:

> [The] owner of a private right to use land acts as a broker whose wealth depends on how well he takes into account the competing claims of the present and the future. But with communal rights there is no broker, and the claims of the present generation will be given an uneconomically large weight in determining the intensity with which land is worked.[7]

To remedy this problem of abuse the government has imposed a panoply of regulations upon property used by the public, often resulting in over-regulation. While these rules permit more people to use the facility they may so confine its use that enjoyment is considerably diminished. The problem is compounded when multiple governmental units have jurisdiction over a resource--like recreation--and each level promulgates its own set of regulations; such is presently the case with many California beaches. The result is chaotic:

> There are a proliferation of policies, a multitude of agencies, ten score activities, and an interest group or clientele for each activity....it is the very overabundance of concern and fragmentation of responsibility that complicate, and in part even create, "the outdoor recreational problem."[8]

Since one may compete for the beach-going public's dollar through more permissive regulations and specialized activities, the private beach owners would offer a wide range of options when deciding on how their beaches would be used. If an owner's clientele were willing to pay for anything from nudism to dune buggies, rules could be written to permit such use. Thus, the market would create a variety of beaches to satisfy the wide range of individual tastes.

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[7] [Demsetz,"Toward A Theory of Property Rights," 17 Proceedings of the Amer. Econ. Ass'n 347, 355 (1967).]

[8] Outdoor Recreation Resources Review Commission: A Progress Report to the President and to Congress by the Outdoor Recreation Resources Commission (1969) at 62.

It should be noted that the private sector would not be encouraged to develop unless the user fees charged by nearby public beaches reflect the true cost of beach acquisition and maintenance. Such expenses would constitute a major part of the cost of establishing private beaches, and if not reflected by charges made by the public sector, private beaches would be unable to compete. However, a survey of 60 private beach operators revealed that even if the user fees reflect these costs prices need not be unreasonably expensive:

> The fees vary. Several operators make no charge for parking, entrance, swimming, or picnicking, but rely entirely on income from amusement rides and food sales. One operator charges only for boat rental ($2 per day), or for use of his boat ramp ($1) if the visitor brings his own boat.
>
> Most of the operators in this sample who answered the question charge only a single fee for use of the property and, when applicable, an additional charge for boat rental. Frequently, the single fee is for parking (ranging from $0.25 to $1 per car per day) or to enter the grounds (ranging from $0.35 per adult and $0.20 per child to $0.75 per adult and $0.50 per child). Still other operators charge only for swimming; one charges $0.50 per person and another charges $0.52 for adults and $0.26 for children. One beach operator bases the charge on the use of picnic tables; he charges $0.75 per day per table.[9]

It is proposed, therefore, that the legislature look to such alternatives as user fees and privately owned recreation beaches open to the public. Further, the courts, instead of allowing the public to take Gion-Dietz easements without paying for them, should "push" the legislature towards providing landowners their just compensation which would be available through such alternative means of finance.

Another technique that governments might want to consider is further use of existing publicly owned coastal facilities. The proposed California Coastal Plan, in its policy recommenda-

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[9] [U.S. Department of Agriculture, Private Outdoor Recreation Facilities, A Report to the Outdoor Recreation Resources Review Commission by the Economic Research Service. Ch. VII "Commercial Beaches," at 24 (1962).]

tions for providing public access to the coast, makes such suggestions*:

> RETAIN SURPLUS LANDS IN PUBLIC OWNERSHIP. If publicly owned land and water areas are declared surplus, they shall be retained in public ownership for public use except where such use would be inappropriate. Any leasing or development of such areas shall be in accordance with an approved subregional or local coastal plan (see Policies 161 and 162) or shall be approved by the coastal agency as consistent with the Coastal Plan.
>
> ENCOURAGE INSTITUTIONAL DEVELOPMENT THAT PROVIDES PUBLIC ACCESS TO THE COAST. Institutions that have the potential for encouraging public use and preserving coastal resources (e.g. marine laboratories, libraries, museums, city halls, and colleges) shall have priority for location in the oceanfront area over residential and other uses that would exclude public access (except for agricultural and coastal-dependent developments). Approval of such institutional developments shall depend on (1) the amount of public access generated (e.g., public spaces, not private offices, on the ocean side of a building); (2) the degree to which the proposed development takes advantage of a coastal location by providing coastal amenities; (3) the way it combines public use with the protection of natural resources; and (4) its visual impact and the relationship to surrounding uses.
>
> MAXIMIZE PUBLIC USE OF FEDERAL LANDS. Maximum public use of Federal lands, consistent with national security, public safety, and resource protection, shall be encouraged. Specifically, the Federal government shall be encouraged to open suitable areas of military land for public recreation (as has been done for parts of the Golden Gate National Recreation Area and at San Onofre on Camp Pendleton in San Diego County).
>
> INCLUDE MULTIPLE USES IN MAJOR FACILITIES. Each application for a major coastal energy or public service facility shall evaluate the potential for multiple, public-oriented uses of the site proposed, and shall

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*California Coastal Commission, California Coastal Plan 156-57 (Dec. 1975).

incorporate such uses to the extent feasible and consistent with security, public safety, and resource protection.

II. NONCOMPENSATORY PROCUREMENT OF RIGHTS IN THE BEACH RESOURCE

Governments will often be faced with the problem of having neither sufficient beach access nor sufficient sums of money with which to purchase additional use and access rights. In such circumstances, governments often turn to the police power--more specifically, zoning and subdivision ordinances.

It has been accepted for some time that developers, when subdividing land for residential sale, can be required to install necessary roads, water and sewer facilities and to dedicate land to the government for necessary school and park sites. A state can specifically require subdividers developing shoreland areas to dedicate land for public access to the public waters. An example is this Wisconsin statute:

> 236.13 (3) LAKE AND STREAM SHORE PLATS. All subdivisions abutting on a navigable lake or stream shall provide public access at least 60 feet wide providing access to the low watermark so that there will be public access, which is connected to existing public roads, at not more than one-half mile intervals as measured along the lake or stream shore except where greater intervals and wider access is agreed upon by the department of natural resources and the head of the planning function, and excluding shore areas where public parks or open-space streets or roads on either side of a stream are provided. No public

> access established under this chapter may be vacated except by circuit court action.
>
> (10) LAKE AND STREAM SHORE PLATS. The lands lying between the meander line, established in accordance with s. 236.20(2)(g), and the water's edge, and any otherwise unplattable lands which lie between a proposed subdivision and the water's edge shall be included as part of lots, outlots or public dedications in any plat abutting a lake or stream. This subsection applies not only to lands proposed to be subdivided but also to all lands under option to the subdivider or in which he holds any interest and which are contiguous to the lands proposed to be subdivided and which abut a lake or stream.

Most states do not, however, have such specific standards on subdivision exactions to provide public access to the beach resource. The following discussion notes some of the issues likely to arise in such jurisdictions.

> Note, "Public Access to Beaches," 22 Stanford L. Rev. 564, 567-72 (1970)*
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> ***
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> Private development of uplands along the coastline may often impair public beach access. Ideally, coastal lands should be developed in a manner that both increases their value and allows public recreational use. Land-use planning, administered by public regulatory authority, is one kind of control that can implement these purposes. This section presents a traditional kind of land-use mechanism[1]--subdivision exaction--as one possible

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[1]Although this section deals only with subdivision control, other developments have been conditioned upon dedication of land to the public. See, e.g., Southern Pac. Co. v. City of Los Angeles, 242 Cal. App. 2d 38, 51 Cal. Rptr. 197 (2d Dist. 1966) (upholding a city zoning ordinance that required dedication of a piece of land for street widening as a condition precedent to approval of a building permit)....

method of ensuring beach access for the public while allowing upland development.

Housing development provides an apt occasion for land-use control for access, both because it represents a substantial threat to public beach access and because control of subdivisions has received much recent attention. Land-use devices regulate both the internal makeup of subdivisions and their impact on neighboring areas. Conditional approval of subdivision plans in the preconstruction stage, the primary regulatory method, provides a power of control over the subdivider that can easily be applied to secure a public easement through any planned subdivision which threatens to block upland access to the beaches. Typically a state statutory scheme requires that developers obtain approval from a local planning board before they may subdivide their property. The local boards reject subdivision plans that do not meet the standards required by the state statutes and by local ordinances promulgated under them. Approval has often been conditioned upon dedication to the public of lands for streets, sidewalks, sewers, and other utilities within the subdivision. The local boards have increasingly attempted to force the developer to bear part of the cost of providing school and recreational facilities for the new residents by requiring dedication of land for parks and schools or by requiring payment of fees into special funds for these purposes.

A requirement that developers dedicate public easements for beach access where the subdivision would block existing or potential access would fit into the present statutory framework. The state enabling acts that authorize exactions for park and recreational purposes appear broad enough to sustain local ordinances requiring dedication of beach access.[2] Under existing statutes, however, the local boards are under no compulsion to enact ordinances for beach access. In addition, local boards are more susceptible to pressures from developers than are state legislatures. For these reasons, new state statutes that require beach-access easements as a necessary condition to approval of every subdivision threatening beach access are a desirable addi-

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[2] See, e.g., CAL. BUS. & PROF. CODE §11,546 (West Supp. 1970): "The governing body of a city or county may by ordinance require the dedication of land, the payment of fees in lieu thereof, or a combination of both, for park or recreational purposes as a condition to the approval of a final subdivision map . . . ." Arguably, "recreational purposes" extends to beach access.

tion to the present statutory system.[3]

Developers have occasionally challenged the subdivision exaction as an unconstitutional taking of private property without just compensation. As exercises of the state's police power, subdivision controls must be reasonably related to the health, safety, and general welfare of the public. Requiring dedication of streets, sidewalks, and sewers meets with little opposition, but developers object vigorously to recreational exactments. The develper argues, for example, that the need for streets is uniquely attributable to the new housing, but that the need for recreational space is a community-wide demand that existed before the growth of the subdivision. He argues that he should not bear the costs of satisfying a demand attributable to the general public rather than just to his new residents. This argument is made more strenuously in beach-access cases, since both developer and future residents might prefer to keep the public

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[3]For an example of such a statute see proposed California Assembly Bill No. 941, as introduced during the 1969 Regular Session:

"(a) No city or county shall approve either the tentative or the final map of any subdivision fronting upon the coastline which subdivision does not provide or have available reasonable access from public highways to land below the ordinary high-water mark on any ocean coastline or bay shoreline within the subdivision.

"(b) Reasonable access, as used in subdivision (a), shall be determined by the city or county in which the subdivision lies.

"(c) In making the determination of what shall be reasonable access, the city or county shall consider:

"(1) That access may be highway, foot trail, bike trail, horse trail, or any other means of travel.

"(2) The size of the subdivision.

"(3) The type of coastline or shoreline and the various recreational, educational, and scientific uses, including, but not limited to, diving, sunbathing, surfing, walking, swimming, fishing, beachcombing, taking of shellfish and scientific exploration.

"(4) The likelihood of trespass on private property and reasonable means of avoiding such trespasses.

"(d) Nothing in this section shall require a city or county to disapprove either a tentative or final subdivision map solely on the basis that the reasonable access otherwise required by this section is not provided through or across the subdivision itself, if the city or county makes a finding that such reasonable access is otherwise available within a reasonable distance from the subdivision."

The bill died in committee.

away from "their" beaches. Indeed, the greatest demand for the beach facility might come from outside the subdivision.

No settled constitutional doctrine has been created in response to the developers' arguments. The narrowest test for the existence of a valid exaction requires a showing that the exaction is for a public expense uniquely and specifically attributable to the developer's activity. In Pioneer Trust & Savings Bank v. Village of Mount Prospect,[4] the case that originated the test, an Illinois court denied an exaction for school and playground use. The developer of a 250-unit subdivision was excused from dedicating 6.7 acres of land to the city because it appeared to the court that the demand for schools and recreational space derived from the total activity of the community rather than from the subdivision.

A second court, in Jordan v. Village of Menomonee Falls,[5] interpreted the Pioneer Trust formula to allow exactions whenever the local board could establish a rational nexus between its exaction and the public needs created by the new subdivision. It upheld an exaction of money paid into a school and park fund on the ground that the subdivision contributed to population growth in the community and thus increased the need for parks and schools.

The uniquely-and-specifically-attributable-cost formula has not been followed in all cases. A Montana court, for example, in Billings Properties, Inc. v. Yellowstone County,[6] purported to follow the formula of Pioneer Trust and Jordan, but in fact sidestepped the test completely. The court found that the state legislature, merely by creating a statute authorizing exactions for parks and playgrounds, had foreclosed any question of whether the need for the facility was attributable to the subdivision.

In addition, street-dedication exaction cases have adopted a less restrictive test than that used in Pioneer Trust. In Ayres v. City Council,[7] a subdivider was required to dedicate for street use a strip of land 20 feet wider than was necessary simply to connect the subdivision with existing highways. The wider street was needed because the subdivision would be part of a planned areawide traffic flow. The court rejected the

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[4] 22 Ill. 2d 375, 176 N.E.2d 799 (1961).

[5] [28 Wis. 2d 608, 137 N.W.2d 442 (1965), appeal dismissed, 385 U.S. 4 (1966).]

[6] 144 Mont. 25, 394 P.2d 182 (1964).

[7] [34 Cal. 2d 31, 207 P.2d (1949)]

distinction between facilities benefiting only residents and those that benefit the general public. It declared that the planning board may properly project the potential traffic flow over new streets, whether generated from inside the subdivision or by the total activity of the community, in determining what must be dedicated.

These cases share a common justification for subdivision control: Because the development has created new costs, it is reasonable to require the developer, or the future homeowners if he can pass his costs along to them, to pay these costs. The cases do not agree, however, on standards for determining what may be charged to the subdivider. The uniquely-and-specifically-attributable-cost test ignores all costs that cannot be measured in terms of public services that are required for the new residents. Ayres recognizes, on the other hand, that one of the significant costs of subdivision development is fitting the subdivision into the general plan, both present and future, of surrounding areas.

Requiring beach access is analogous to requiring streets of the width made necessary by a citywide traffic flow. While it is true that most of the demand for access comes from areas outside the subdivision, the existence of the subdivision aggravates the beach-access problem. First, it may cut off existing access to the beaches; second, even where no access previously existed, the new development will raise land values and create a pattern of land use that will make it more difficult and expensive to purchase beach easements in the future.

Access through subdivision exaction has several advantages. It is inexpensive and easy to administer. It reaches areas about to undergo extensive development, where the potential for conflict in land use is high. It does not necessarily require previous public use of the area, and it forces developers to pay costs that would otherwise be borne by the public. The major disadvantage of subdivision exaction is that it applies only to land facing immediate development. The pattern of access gained depends upon the activities of private developers rather than upon any program of planned priorities in recreational development of beaches. Thus it is only a partial measure, a last-minute device to save access in areas where access would be lost before an acquisition program could reach it. Even so, given the prospect of numerous housing developments along the coast, subdivision control can preserve a substantial amount of beach access into areas that would otherwise become de facto private beaches.

The use of subdivision exactions to provide beach access in areas undergoing development is one of the major policy recommen-

dations made by the California Coastal Zone Conservation Commissions in their recently proposed California Coastal Plan*:

> PROVIDE PUBLIC ACCESSWAYS TO THE COASTLINE. Public access from the nearest public thoroughfare to the shoreline and along the coast shall be provided in new developments as specified below.
>
> REQUIRE ACCESS THROUGH NEW DEVELOPMENTS. New developments shall provide public accessways to the shoreline except in those individual cases where it is determined that public access is inappropriate, such as where (1) adequate access exists nearby, (2) the topography makes access dangerous, (3) the proposed development is too small to include an accessway, (4) the coastal resources are too fragile to accomodate general public use, (5) public safety or military security precludes public use, or (6) the public accessway would adversely affect agricultural uses. In developments where the provision of a public accessway is determined to be inappropriate, the project sponsor shall pay "in lieu" fees (to be established in regulations by the coastal agency, after public hearings, or in approved subregional or local coastal plans) to a fund for the acquisition, maintenance, and operation of public access at a suitable location elsewhere. To the maximum extent feasible, in-lieu fees shall be spent in the general area in which they are collected and in areas where access is called for in subregional and local coastal plans.
>
> GUARANTEE THAT ACCESS IS PERMANENT. In public, semi-public, commercial recreation, and visitor-serving developments (such as colleges, museums, restaurants, and hotels) that allow public access to their grounds as a part of their normal operations, public access to the shoreline shall be guaranteed by the recording of a restriction covering the reserved accessway. In private developments, public access shall be ensured (1) either by dedication of fee title or an easement for the reserved accessway to a public agency, or (2) by the recording of a deed restriction, at the owner's option. Dedicated accessways shall not be required to be opened to public use until a public agency or

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*California Coastal Zone Commissions, California Coastal Plan 154-55 (Dec. 1975).

private association agrees to accept responsibility for maintenance and liability for the accessway.

PROVIDE BLUFFTOP PATHS AND LINEAR PARKS. A coordinated system of paths and linear parks shall be provided on coastal bluffs, where consistent with other Coastal Plan policies, linking these areas with community trail and park systems, such as the Coastal Trails System recommended in Policy 145.

EXPAND ENABLING LEGISLATION FOR REQUIRING DEDICATIONS. It is recommended that legislation be enacted to (1) amend the Subdivision Map Act (Government Code, Section 66410 and following) to provide for review and approval by the coastal agency of local determinations that "reasonable public access is otherwise available within a reasonable distance from the subdivision;" (2) extend the statute of limitations on government acceptance of coastal access dedications in the Subdivision Map Act or other appropriate statutes from the present three years to ten years; and (3) continue the access dedication requirements of the Coastal Act (Public Resources Code, Section 27403[a]) and make such requirements for access dedication, where applicable, a condition of local government permits for development.

AUTHORIZE STATE AGENCY TO ACQUIRE AND MAINTAIN ACCESSWAYS. A State agency (e.g., Department of General Services, State Lands Division, Department of Parks and Recreation, or a coastal conservancy agency) shall be authorized to (1) receive and adequately maintain and police public accessways and to hold liability for these areas; (2) receive the payment of a fee in lieu of the dedication of access if actual access is not appropriate; and (3) exercise the power of eminent domain and expend the in-lieu fees to acquire, maintain, and operate public access in areas where access cannot otherwise be secured.

Some authors have suggested use of traditional zoning regulations to aid in the acquisition or maintenance of public access to coastal resources. See, for example, Note, "Californians Need Beaches--Maybe Yours!" 7 San Diego L. Rev. 605, 622-24 (1970). Such ordinances can prevent intensive private develop-

ment (e.g., high-rise motels), and perhaps even prevent any structural development on the dry-sand or upland dune areas. The constitutionality of a restrictive ordinance of the latter type was upheld by the New Jersey Supreme Court in Spiegle v. Borough of Beach Haven, 46 N.J. 479 (1966). The ordinance is reprinted in the opinion, 46 N.J. at 484-88. A later case, involving the same parties, reached the issue of whether such a restriction constituted a "taking" of the landowner's property by the government. In that case,[1] New Jersey's Superior Court ruled that if a residence could safely be built in the area, prohibition of any construction would be an unconstitutional taking. However, if a residence could not safely or economically be constructed there, then there is no "taking" problem. On this latter point the court noted[2]:

> [The landowner's] expert witness...maintained that a residential structure, either a single or multi-family house, could safely be built on this property, as well as anywhere on the beach area--even into the surf. He acknowledged that usch a house would have to be erected on pilings of timber or steel rising about 12 feet in the air. Although it would be necessary to construct a connecting sewer line across or under the beach, install a pump (because of the elevation of the house), and run the sewer line upward into the structure, and a similar procedure utilized for all other utilities, he felt this also could be safely accomplished and was feasible from an economic standpoint. However, he offered no opinion

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[1] Spiegle v. Borough of Beach Haven, 116 N.J. Super. 148 (1971).

[2] Id. at 165-66. For further action relative to this dispute, see Susti v. Borough of Beach Haven 132 N.J. Super. 158 (1975).

as to the cost involved.

On the other hand,...[the city's] expert, while conceding that from a strictly engineering standpoint a structure designed for residential purposes could be safely erected on beachfront property lying east of the building line, maintained that it could not safely or economically be supplied with utilities, particularly sewerage connection.

In his view, any residential structure on the Spiegle site would be economically unfeasible to construct and impractical to maintain because of the hazards from wind and water to which it would be subjected. Such a residence, he observed, would be vulnerable not only to ...catastrophic storms...but also to any storm which he referred to as a "normal northeaster" in which the wind velocity reached 50 to 60 miles per hour and the average tides ran to 12 or 14 feet.

Since utility services would have to extend from the street over or under the exposed beach area to the structure, these lines could be ruptured from hurricane or heavy storm conditions, thus depriving the building of the habitability necessary for safe human occupancy. Furthermore, the disruption of the sewer lines could result in their becoming filled with sand, thus endangering the borough's entire sewerage system. Likewise, a rupture in the water lines might result in the municipal water tank being drained. Rupture of a gas line (if the house were served with gas) would also create a dangerous condition. ...[The expert] maintained that it would not be practical to afford protection of the utility lines on the plateau area of the beach and that road service could not be provided or feasibly sustained.

Our review of the evidence as to the physical characteristics of this tract and the hazardous conditions to which it might be subjected because of its location satisfies us that although it may be possible from a strictly engineering standpoint to erect a residential structure on the site with supporting utilities, it would not be safe or economically feasible to do so from a common sense standpoint. As with any health or safety regulation, the interest of one property owner must be subjected to some degree to the welfare of the general public. Weighing the interest of the property owner against that of the public, we are satisfied that this tract has no present beneficial use for residential construction, absent an outlay of money out of all reasonable proportion to the use to be derived from it and the imposition of an

unreasonable hazard on the public. We conclude that plaintiffs are entitled to no compensation as to this property.

CHAPTER FIVE. SPECIAL PROBLEMS RELATIVE TO A DYNAMIC SHORELINE

Coastal shorelines are rarely a static quantity. Rather, through natural processes of accretion, erosion, avulsion, and relection, the exact position of the shoreline is constantly shifting. Today's dry-sand beach could well be next year's ocean bed and vice versa. This dynamic nature of the shoreline can have important impacts on public use and ownership rights.

Burka, "Shoreline Erosion: Implications for Public Rights and Private Ownership," 1 Coastal Zone Management J. 175, 179-84, 188-89 (1974)*

Public beach access rights and the erosion of the ocean shoreline have both been identified as major coastal zone problems. The literature of coastal zone management abounds with articles on both topics. Thus far, however, authors have treated the two subjects independently, despite an oft-cited axiom of coastal zone management that "everything affects everything else." The purpose of this paper is to show that the loss of public beaches through erosion raises fundamental issues of law and administration which have not been fully explored by legal scholars or planners.

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In no area of coastal zone management is the futility of man's efforts more evident than in his struggle to control the shape of the shoreline. He has erected concrete barricades against the sea; he has constructed jetties far out into the ocean; he has piled rocks in the water; he has tried to trap precious sand with groins of every design; and he has even diverted the course of rivers. His few successes in shaping the contours of the seashore are insignificant compared to the untold acres of beach which have been lost because of man's activities.

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Erosion is as inevitable and natural as the next wave. The turbulent sea water breaking on the beach stirs up the bottom,

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loosens sand particles, and carries the sand back down the slope to the sea. As the incoming waves strike the shoreline, they hit at an angle, setting up a longshore current which moves along the shoreline in shallow water. Sand particles suspended in the water are carried down drift by this longshore current, where they later are deposited to replace sand lost through wave action. Also carried along in the littoral drift are sediments transported to the sea by rivers and streams.

Occasional storms drastically alter the normal erosion-deposition process, removing far more sand than ordinary waves, but under normal conditions, the stability of a beach depends on the rate of supply or loss of sand. The process of erosion occurs continuously, but so do the elements contributing to accretion. Only if the sand lost through wave action exceeds the sand supplied through swells and littoral drift will the beach suffer net erosion. Beach stability is analogous to the household budget: if more goes out than comes in, there is a net loss.

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It is widely acknowledged that shoreline erosion poses a serious threat to public use of the seashore. Most of the attention, however, has been focused on loss of the beach itself rather than on loss of public rights. Certainly there is a need for developing methods for coping with the loss of beach, but it is equally necessary to develop a legal framework which will protect long-established public rights to beach area which have become subject to erosional losses.

Assume that a beach area has become subject to public rights between the line of mean high tide and the line of vegetation. When the beach erodes, the water will cover an area previously subject to public rights. Eventually the wash of the waves will cause the vegetation line to recede inland and once-vegetated land will slowly be converted to beach. But the legal status of this newly-created beach area is quite different from the old beach.

At this point it is important to know under what theory the public has established its right to use the beach. Prescription? Then the public has no right to use the new beach area until the prescriptive period has expired. Implied dedication? The careful landowner, no doubt following advice of counsel, will carefully avoid any acts which might be construed as dedicating the area to the public. Custom? The new area hasn't been used by the public at all, much less since time immemorial. Perhaps the public trust approach could be extended to apply to erosional beaches, but the fact remains that prescription and/or implied

dedication have been the primary source of public rights in such populous states as Texas, California, and Florida. Having been alerted to the danger of allowing public use, it is highly unlikely that littoral owners will acquiesce in public encroachment on the new beach area.

The legal position of the public is further weakened by the fact that public access rights are easement rights, and a basic principle of easement law is that destruction of the servient estate--the land burdened by the easement--may result in termination of the easement. If applicable to public beaches, this means that public rights can be washed out to sea along with the grains of sand that once constituted the beach. No cause for optimism is evident in the leading beach case involving prescription, Seaway Co. v. Attorney-General, where a jury finding that there had been no net erosion of the area in question for 200 years was a key element in the appellate court's finding of a prescriptive easement.

No American appellate court has ruled on the status of public rights on eroding beaches, but a Texas trial court did face the issue of the effect of accretion on the public easement.[1] The case grew out of a complicated series of events beginning in 1917, when a Galveston Island landowner conveyed what was then the beach to the United States government for use as a military reservation.

Not far from this 384-acre tract was the south jetty, a breakwater which protected the navigation channel into Galveston Bay. The jetty trapped sediment transported in longshore currents and caused alluvion to be deposited on the seashore, so that by 1959, the beach had advanced seaward 2,208 feet at the east end of the tract, 1,832 in the middle, and 1,391 at the west end. This buildup was gradual and imperceptible, and as the shore moved seaward, the public continued to use the strip of beach between the water and the advancing vegetation line until the United States government barricaded the beach during World War II from the winter of 1941-42 to the summer of 1946. The public was excluded from the beach during that period of time, but the beach continued to accrete seaward. In 1959, the United States conveyed the land to the plaintiff corporation, which brought an action for declaratory judgment against the State of Texas to determine both the title to the accretions and the status of public rights, if any.

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[1] Galveston East Beach, Inc. v. State of Texas, No. 97,893 (10th Dist. Ct., Galveston County, Tex., 1964).

The parties stipulated that in and before 1917 the public had an easement at a place where the beach then existed. The trial court found that this easement followed the shoreline as the line of mean low tide changed from time to time because of the natural forces of accretion and/or erosion. The easement followed the sea, covering an area from mean low water to 350 feet inland, the point where the parties agreed the vegetation line was located. In reaching its decision, the trial court relied heavily on a 1905 English precedent,[2] where the court held that a right to dry nets on a beach attached to a new beach area added to the old beach by accretion. The Galveston court described the area subject to public rights as a "shifting and rolling easement"; other sources refer to it as a "floating" or "moving" easement.

Although the state succeeded in establishing the existence of a public easement, it failed to persuade the court on the title question. Neither side was satisfied by the outcome in the trial court, but neither could really risk an appeal of the decision, and so the venturesome doctrine of a shifting and rolling easement remained untested at the appellate level. This failure to establish a precedent is probably irrelevant, for the theory of a rolling easement is too perfectly tailored to the seashore to be ignored by the courts. If it didn't exist, they would have to invent it.

If there is a problem with the concept of a floating easement, it is that the doctrine is more painful when applied to erosion than to accretion. Indeed, where accretion has occurred, a floating easement is necessary in order to prevent a totally unjustifiable windfall to the landowner. Without it the owner would not only gain additional realty, he would also be able to exclude the public. As further accretions occur, the original public easement would become useless to the public but more valuable to the landowner, resulting in a double benefit to him at the expense of the public. With the imposition of a floating easement, the landowner still receives title to the accretion (and acquires more useful land as the vegetation line follows the water seaward), while the public remains in the same position.

Erosion obviously is a very different matter. Someone is going to have to lose, and if the public is to remain in the same position, then the landowner will have to bear the loss. Nevertheless,

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[2]Mercer v. Denne, (1891) 2 Ch. 538 (1905).

a court should apply the shifting and rolling easement concept in the case of erosion, just as the Galveston trial court did with accretion. The reasons are based not only in law but also in policy. First, the floating easement accurately reflects what happens on the beach: the public does not go to the same place every time, but rather goes where the beach goes as it responds to winds, tides, and the unceasing forces of erosion and accretion. The public carries neither law books nor surveying instrument when it uses the beach, and any court which treats the easement as fixed is creating a legal fiction that simply has no basis in fact. Second, the law has always regarded accretion and erosion as two sides of the same coin. What applies to one generally applies to the other; thus, the littoral owner gains title to land formed by accretion but correspondingly loses his claim to land lost through erosion.

Finally, the reciprocal nature of accretion and erosion strongly suggests that any "damage" to the landownwer is in fact illusory. He or his predecessors took possession of the property with full knowledge that the beach is a changing environment. He knew he would gain from accretion and suffer from erosion, and elected to take the calculated risk. He is entitled to sympathy, perhaps, but not protection; no court should give legal standing to his claim that he was, in effect, unlucky.

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If the multitude of coastal zone management programs and proposals in the United States share a common denominator, it is their commitment to a multiple use concept of the coastal zone, involving balanced participation by both the private and public sectors. Shoreline erosion poses a formidable challenge to persons involved in coastal resources management, because it requires planners and policy makers to abandon this approach of balancing interests and, in effect, take sides. Balancing is possible when the shoreline is accreting or when it is stable; in both instances development of the upland behind the vegetation line is compatible with public use of the beach.

When the shoreline starts to disappear, however, public and private rights are on a collision course. Development of the upland area adjacent to the line of vegetation suddenly becomes an obstacle to public enjoyment of the seashore. If the beach had the freedom to retreat inland indefinitely, public rights could follow the beach under the theory of a shifting and rolling easement. But the beach rarely has that freedom. It may already be bordered by development; even if it is not, no private owner is going to stand idly by and watch the destruction of his land without making some attempt to stabilize the shoreline with a bulkhead or seawall. These structures may stop the

erosion of the upland, but they hasten the destruction of the beach used and enjoyed by the public. Who prevails--the public or the private owner? Ultimately someone must make a decision, keeping in mind that the failure to decide is a decision in itself.

Once the commitment is made to preserve the public character of the beach, the next step must be to establish the legal basis of public rights. This process begins with the recognition of public access rights to the privately owned beach. The shifting and rolling easement will protect the public against the loss of these access rights when the beach begins to erode, and the Katenkamp doctrine[3] will protect the public against loss of the beach itself caused by poorly-located or ill-designed shoreline protection structures.

Favorable court rulings, however, will not by themselves protect public rights. Even while settling some issues, they raise others. The recognition of a shifting and rolling easement, for example,will surely be a warning to landowners to erect some type of stabilization structure which will cut off the landward retreat of the beach. If the courts then determine, as they should, that these shoreline protection devices contribute to erosion and must be relocated, a landowner may run afoul of public rights in other ways; for example, faced with the fact that the land cannot be developed and sold, an owner may turn to short-term commercial use of the property in a manner which interferes with public enjoyment of the beach. Operating a stable on a heavily-used recreation beach would fall into this category.

The limitation of court decisions, however, is not the problems they raise but the problems they ignore. The shifting and rolling easement and judicial-review of the location of shoreline protection structures are highly significant and useful legal concepts where the beach borders on littoral upland which is relatively undeveloped. Where development is intense and shoreline protection devices have been in place for long periods of time, these concepts are of only passing interest, for no court is going to require the removal of houses, motels, or whole cities to make room for the onrushing public easement. And where the beach has completely disappeared, or the public has no access rights, they are wholly irrelevant.

Persons involved in coastal zone management must avoid the temptation to regard court decisions as setting policy. Courts settle disputes; governments make policy. Judicial recognition of public rights should instead serve as a foundation upon which

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[3][Katenkamp v. Union Realty Co., 6 Cal.2d 765, 59 P.2d 473 (1931). The case held that a landowner protecting his property against the sea has a legal obligation to guard against adversely affecting his neighbor.]

policy is built. The function of the courts is to protect rights acquired by the public through long continued use of the beach, while planners and administrators must strive to make these rights meaningful and, where possible, to enhance them.

What are the essential elements of state policy concerning shoreline erosion? Undoubtedly the most important tool will be land use controls aimed at activities which increase the rate of erosion. Virtually all beach construction should be eliminated. The front line of dunes must be maintained. No seawall or bulkhead should be constructed without the approval of the state regarding both the location and the design of the proposed structure. Development on the seaward side of barrier islands should be restricted by a setback line which would allow sufficient room for natural processes to operate. Where erosion has reached the critical stage, subdivision development should be prohibited in order to protect unsuspecting purchasers.

Erosion obviously has serious implications for government agencies concerned with public recreation. Beach parks should incorporate enough upland to absorb erosional damage. Similarly, where the public does not have access rights, the state should purchase rights for both the beach and the front line of dunes.

Finally, the state may elect to provide assistance to the littoral owner besieged by erosion problems. A state might cede its right to gain title to beachfront property by erosion and instead agree to share the cost of reclaiming the land with the littoral owner, as long as the area restored is subject to public rights. The federal government could also assist with the financing of these restoration projects.[4]

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[4]This is the North Carolina approach. [See N.C. Gen. Stat. Section 146-6(b),(c) (1964).]

Several state courts have addressed these and related issues:

> Maloney and Ausness, "The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping," 53 N.C. L. Rev. 185, 232-37 (1974)*

In People v. William Kent Estate Co.,[1] a California appeals court decided a suit to quiet title brought by the lessee of a sandspit. The sandspit was bounded on one side by the Pacific Ocean, the tideland being owned by the State. The court found that the United States Coast and Geodetic Survey could establish the mean high tide line. The real problem was that the beach itself shifted perhaps as much as eighty feet between the summer and winter seasons.

Kent commented authoritatively on the determination and meaning of the mean high water line, but did not solve the problem. The seasonal fluctuation could hardly be "gradual and imperceptible" so as to classify the change in the beach shoreline as accretion or reliction, declared the court. Therefore the issue was retried in an attempt to establish a more definite or certain boundary. Since the proceeding was eventually dismissed on appeal as moot, the attempt was unsuccessful.

A similar Florida case, Trustees of Internal Improvement Fund v. Ocean Hotels, Inc.,[2] was an action to remove a seawall erected by the lessee hotel owner to prevent a part of its hotel from being undermined by the sea. This case also presented the problem of determining a boundary on a beach "which, through the natural processes of erosion and accretion, undergoes a predictable, seasonal loss and replenishment of approximately 90 feet of beach sand." The trial court approached the problem directly. It summarily dismissed the fluctuating boundary concept as being unacceptable as a property law standard. The possible solutions, as the court saw them, were to accept either the seaward mean high water line (summer line), the landward mean high water line (winter line), or the mean of the two. The mean of the summer and winter line was rejected as too costly to determine and an invasion of the public trust concept for at least part of the year. The summer line would likewise be violative of the public trust. Consequently, the trial court accepted the winter line as the boun-

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[1] 242 Cal. App. 2d 156 Rptr. 215 (1st Dist. Ct. App. 1966).

[2] 40 Fla. Supp. 26 (Palm Beach County Ct. 1974).

dary. This solution was found to satisfy the State's interest in allowing the public the use of the beach. Ocean Hotels is currently on appeal.[3]

In spite of the Kent and Ocean Hotels decisions, the use of a fluctuating boundary in such fact situations seems justified. The mean high water line is ascertainable. There is usually no great difficulty in determining the location of the line with respect to the shore at any given time. In light of the Hughes[4] and Bonelli[5] decisions, the ambulatory shoreline is a more acceptable property boundary than the winter line used by the Ocean Hotels court. Hughes relied on the supremacy of federal law over state law when a federal question is involved. The "winter line" approach is not a part of the federal common law; moreover, federal law clearly rejects such an argument as that of the trial court in Ocean Hotels, that water boundaries must be fixed to be certain. Further, the "winter line" clearly deprives the upland owner of title to the summer beach which he would hold under common law accretion principles. This may be an unconstitutional taking of property without compensation, as Justice Stewart argued in Hughes. His "taking" argument was specifically recognized by the majority in Bonelli as defeating the state's claim to the disputed land. Thus the "winter line" may be unconstitutional on the ground that federal law is supreme when a federal question is involved or on the ground that the use of that line is a taking of property without compensation.

There are other legal means available to protect public rights to beaches without doing violence to the ambulatory boundary concpet. Even where title has been confirmed in the upland owner, the public may have acquired a prescriptive easement in the dry sand area or a right to use the dry sand area by "custom." Construction on the disputed area can be limited by set-back requirements established under the police power. These requirements are much more likely to be upheld, as are other zoning laws, as not being a taking than the fixed winter line approach of the trial court in Ocean Hotels.

An additional judicial tool for protecting the rights of the public in the area of seasonal ambulation between summer and winter mean high water lines is suggested by the recent holding of Wilbour v. Gallagher.[6] That case held that the owner of lands

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[3] Appeal docketed, No. 74-255, Fla. 4th Dist. Ct. App., Feb. 27, 1974.

[4] [389 U.S. 290 (1967). See discussion of the case, supra, in the wet-sands section.]

[5] [414 U.S. 313(1973).]

[6] 77 Wash. 2d 306, 462 P.2d (1969).

periodically covered by navigable waters of a fresh water lake may not interfere with public navigational rights by artificially filling such lands or erecting permanent structures thereon during a period of low water. In Wilbour the waters of Lake Chelan were periodically raised and lowered artificially in connection with power production. Defendants, whose lands were partially submerged annually for three months, filled the submerged parts of their property so that it could be used throughout the year. The Washington Supreme Court, holding that their fills constituted an obstruction to navigation, ordered them abated. The rationale of the case seems equally applicable to lands periodically covered by the seasonal ambulation of tidally affected waters.

In addition to the possible state recognition and enforcement of a navigational easement of the Wilbour type, recent federal cases indicate a strong possibility of federal recognition of a similar federal easement. In United States v. Sunset Cove, Inc.,[7] the Federal District Court for the District of Oregon seemingly extended the jurisdiction of the Corps of Engineers to include dry sand areas within the limits of migration of a meandering navigable coastal river. By analogy this principle can arguably be extended to the ambulation of a sand beach between its summer and winter limits, thus giving the Corps authority to require permits under the Rivers and Harbors Act. Federal regulatory power has been also extended under the Federal Water Pollution Control Act in United States v. Holland,[8] which involved a dredge and fill operation on land "periodically inundated [by the tides but] above the mean high water line...." The land held to be under federal jurisdiction was mangrove wetland, but the federal pollution control authority could well be extended to the beaches as far as the waves wash to restrain construction or development on an ambulatory shoreline.

Another problem is artificial accretion. As a general proposition, the law with respect to accretion or reliction applies whether they result from natural or artificial causes. This is not to say, however, that an artificial accretion caused by the littoral owner will be vested in him. But, if the artificial accretion is not caused by him, in general it will be awarded to him.

Suppose, however, the accretion results from a legislatively authorized beach nourishment project. Arguably such projects may be legally justified under the police and general welfare powers to protect endangered lands. Does this fact provide a valid legal basis for fixing the boundary on the landward side of the accreted

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[7] 5 E.R.C. 1023 (D. Ore. 1973). This case is currently on appeal to the Ninth Circuit Court of Appeals.

[8] 373 F. Supp. 665 (M.D. Fla. 1974).

land? Under such legislation in Florida,[9] once an erosion control line is established in connection with a beach nourishment project, title to all lands seaward of the line vests in the State. The common law of accretion no longer applies, although the person who owned to the mean high water mark before the line was established retains his riparian right of access, and, if the agency responsible for maintaining the restored beach allows it to recede to the landward side of the erosion control line, the common law of erosion takes effect as to such land. The line can be established only where severe beach erosion has occurred. The constitutionality of the legislation with respect to the title to the accreted land has been questioned, but no square holding on the issue has yet been forthcoming in Florida. However, a Massachusetts beach nourishment project, which included no provision for access by riparian farmers over the accreted land was held not to vest title in the state despite the public benefit that resulted.[10] Perhaps an argument in favor of the Florida-type legislation can be constructed from the language of Justice Marshall in the Bonelli case concerning protection of "navigational or related public interests," which, the Court continued, "should not be narrowly construed because it is denominated a navigational purpose." Arguably one such public purpose could be the prevention of beach erosion and the restoration of public beaches on land formerly beneath navigable waters. A more clearly acceptable approach to the beach erosion problem, however, might be to allow the law of accretion to apply and the littoral owner to gain title to the accreted beach lands, but legislatively to impose a public easement of access on the accreted lands along with imposing building restrictions on such land to guarantee that easement on the publicly financed additions.

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[9] FLA. STAT. §§ 161.011-.211, 161.25-.45 (1972).

[10] Michaelson v. Silver Beach Improvement Ass'n, 342 Mass. 251, 173 N.E.2d 273 (1961).

CHAPTER SIX. NONRESIDENT ACCESS TO MUNICIPAL BEACHES

May a city that owns and operates a municipal beach restrict the use of that beach to its own residents? As one author notes, restrictive practices are making this an increasingly important issue:

> Note, "Access to Public Municipal Beaches: The Formulation of a Comprehensive Legal Approach," 7 Suf. U. L. Rev. 936, 938-40 (1973)*
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> In defensive reaction to the vast and ever increasing demand by the public at large for shoreline recreational facilities, shorefront municipalities are apparently attempting to discourage nonresidents from using their municipally owned, public beaches.[1] Of those shoreline municipalities that have not already banned nonresidents entirely, many have instituted the practice of charging all non-residents of the community exorbitant daily user fees. One writer has suggested that this practice of charging non-residents higher fees, is in reality, a "'prohibition of use,'" effectively leaving municipally owned shoreline recreational facilities to the exclusive use and enjoyment of local residents.
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> The practical physical problem of providing sufficient seashore recreational facilities so as to adequately meet the needs of the public at large is thus compounded by the exclusionary policies of shorefront municipalities. The physical accessibility of shoreline recreational facilities does not appear to be the major obstacle to meeting the public's need for outdoor recreation. The greater population centers are for the most part located within close proximity to the shoreline. Thus, shoreline recreational facilities are geographically within easy reach of the city dweller. Yet, despite this, much of these resources are, in fact, closed to him by the nearby shorefront municipalities. In light of this situation, then, the establishment of a legal, nonrestrictive right of access to most of the nation's shoreline resources appears to be the sine qua non in both countering the exclusionary policies of shorefront municipalities and meeting the society's need for additional outdoor recreation facilities. Supporting the desirability of establishing such a right, the Outdoor Recreation Resources Review Commission, created by Congress to study and evaluate the outdoor

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[1] See Darnton, Suburbs Stiffening Beach Curbs, N.Y. Times, July 10, 1972, at 1, col. 1. The author explains that, at least for the New York City dweller, it has become virtually impossible to find an inexpensive and pleasant place to enjoy the beach within a day-trip from that city. Id. at 25, col. 1.

recreation resources and opportunities of the nation, has concluded that "[p]ublic policy at all levels of government should be directed toward eliminating these [prohibitive] barriers to outdoor recreation."

Several states have moved to legislatively prohibit discrimination against nonresidents at locally owned beaches. For example, a California statute provides that:

> Any beach or seashore recreation area owned, leased, operated, controlled, maintained or managed by a city or county which is open to the use of residents of such city or county shall be open to all members of the public upon the same terms, fees, charges and condidditions as are applicable to the residents of such city or county. [Cal. Pub. Res. Code section 5162]

Recently, two state courts have addressed the issue of discrimination against non-residents at municipally owned beaches. In both cases the municipal restrictions were invalidated. The first, the Neptune City case, deals with a New Jersey community's attempt to impose higher beach fees on non-residents. The second, the Gewirtz case, involves a New York community's attempt to totally exclude non-residents from a city owned public beach.

BOROUGH OF NEPTUNE CITY v. BOROUGH OF AVON-BY-THE-SEA*
61 N.J. 296, 294 A.2d 47 (1972)

HALL, J.

The question presented by this case is whether an oceanfront municipality may charge non-residents higher fees than residents for the use of its beach area. The Law Division sustained an amendatory ordinance of defendant Borough of Avon-By-The-Sea (Avon) so providing. 114 N.Y.Super. 115, 274 A.2d 860 (1971). The chal-

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*Citations omitted.

lenge came from plaintiffs Borough of Neptune City, an adjacent inland municipality, and two of its residents....The question posed is of ever increasing importance in our metropolitan area. We believe that the answer to it should turn on the application of what has become known as the public trust doctrine.

Avon, in common with other New Jersey municipalities bordering on the Atlantic Ocean, is a seasonal resort-oriented community. The attraction to the influx of temporary residents and day visitors in the summer months is, of course, the ocean beach for bathing and associated recreational pleasures and benefits. According to the stipulation of facts, Avon's year-round population of 1850, resident within its approximately seven square block area, is increased in the summertime to about 5500 people (not counting day visitors), with the seasonal increase living in four hotels, 40 rooming and boarding houses and innumerable rented and owned private dwellings.

The municipality borders on the ocean for its full north-south length. Ocean Avenue, a county highway, is the easternmost street. Municipal east-west streets end at Ocean Avenue. Between it and the ordinary high water line or mark of the ocean waters are located an elevated boardwalk and a considerable stretch of sand, dry except in time of storms and exceptionally high tides. This stretch, as well as the boardwalk, is owned and maintained by the municipality and has been for many years. Although the derivation of the borough's title is not contained in the record, there is no dispute that the same area has been dedicated for public beach recreational purposes--in effect, a public park--and is used for access by bathers to the water, as well as for sunning, lounging and other usual beach activities. The tide-flowed land lying between the mean high and low water marks, as well as the ocean covered land seaward thereof to the state's boundary, is owned by the State in fee simple. There has been no alienation in any respect of that land bordering Avon; even if this state-owned land had been conveyed to Avon, it would be required to maintain that land as a public park for public use, resort and recreation. [N.J.S.A. 12:3-33,34.]

Years ago Avon's beach, like the rest of the New Jersey shore, was free to all comers. As the trial court pointed out, "with the advent of automobile traffic and the ever-increasing number of vacationers, the beaches and bathing facilities became overcrowded and the beachfront municipalities began to take steps to limit the congestion by regulating the use of the beach facilities and by charging fees." It also seems obvious that local financial considerations entered into the picture. Maintenance of beach fronts is expensive and adds substantially to the municipal tax levy if paid for out of property taxes. Not only are there the costs of lifeguards, policing, cleaning, and the like, but also involved are capital expenses to prevent or repair erosion

and storm damage through the construction of jetties, groins, bulkheads and similar devices. (Construction of the latter is generally aided in considerable part, as it has been in Avon, by state and other governmental funds.) In addition, the seasonal population increase requires the expansion of municipal services and personnel in the fields of public safety, health and order. On the other hand, the values of real estate in the community, both commercial and residential, are undoubtedly greater than those of similar properties in inland municipalities by reason of the proximity of the ocean and the accessibility of the beach. And commercial enterprises located in the town are more valuable because of the patronage of large numbers of summer visitors. (Avon does not have, in contrast with many other shore communities, extensive boardwalk stores and amusements.)

Legislative authority to municipalities to charge beach user fees, for revenue purposes, was granted by two identical statutes--the first, L.1950, c. 324, p. 1083, N.J.S.A. 40:92-7.1, applicable only to boroughs, and the second, L.1955, c. 49, p. 165, N.J.S.A. 40:61-22.20, applicable to all municipalities. The latter reads as follows:

> The governing body of any municipality bordering on the Atlantic ocean, tidal water bays or rivers which owns or shall acquire, by any deed of dedication or otherwise, lands bordering on the ocean, tidal water bays or rivers, or easement rights therein, for a place of resort for public health and recreation and for other public purposes shall have the exclusive control, government and care thereof and of any boardwalk, bathing and recreational facilities, safeguards and equipment, now or hereafter constructed or provided thereon, and may, by ordinance, make and enforce rules and regulations for the government and policing of such lands, boardwalk, bathing facilities, safeguards and equipment; provided, that such power of control, government, care and policing shall not be construed in any manner to exclude or interfere with the operation of any State law or authority with respect to such lands, property and facilities. Any such municipality may, in order to provide funds to improve, maintain and police the same and to protect the same from erosion, encroachment and damage by sea or otherwise, and to provide facilities and safeguards for public bathing and recreation, including the employment of lifeguards, by ordinance, make and enforce rules and regulations for the government, use, maintenance and policing thereof and provide for the charging and collecting of reasonable fees for the registration of persons using said lands and bathing facilities, for access to the beach and bathing and recreational grounds so provided and for the use of the bathing and recreational facilities, but no such fees shall be charged or

collected from children under the age of 12 years.

In passing we should say that we see no legislative intent therein to authorize discrimination in municipal beach fees between residents and non-residents. The statute amounts to a delegation to a municipality having a dedicated beach (dry sand area) of the state's power over that area and the tide-flowed land seaward of the mean high water mark; the proviso indicates an affirmation of the state's paramount interest and inherent obligation in insuring that such seaward land be equally available for the use of all citizens.

Until 1970 Avon's ordinance, adopted pursuant to the quoted statute, made no distinction in charges as between residents and non-residents. The scheme then and since is that of registration and issuance of season, monthly or daily identification badges for access to and use of the beach area east of the boardwalk. (The boardwalk is open and free to all.) The amounts of money involved are substantial. In 1969, 32,741 badges of all categories were issued and the revenue from beachfront operations totalled $149,758.15, which went into the borough's general revenues.

The distinction between residents and non-residents was made by an amendment to the ordinance in 1970, the enactment which is attacked in this case. It was accomplished by making the rate for a monthly badge the same as that charged for a full season's badge ($10.00), by restricting the sale of season badges to residents and taxpayers of Avon and the members of their immediate families, and also apparently by substantially increasing the rates for daily badges (from $1.00 and $1.25 to $1.50 and $2.25). A "resident" is defined as any person living within the territorial boundaries of the borough for not less than 60 consecutive days in the particular calendar year. The result is considerably higher charges for non-residents under the definition than for permanent residents, taxpayers and those staying 60 days or more. Residents of Neptune City, for example, using the beach daily, would pay twice as much for the season (two monthly badges) as residents of Avon.

Plaintiffs attacked the ordinance on several grounds, including the claim of a common law right of access to the ocean in all citizens of the state. This in essence amounts to reliance upon the public trust doctrine, although not dominated by plaintiffs as such. Avon, although inferentially recognizing some such right, defended its amendatory ordinance on the thesis, accepted by the trial court, that its property taxpayers should nevertheless not be called upon to bear the expense, above non-descriminating beach user fees received, of the cost of operating and maintaining the beachfront, claimed to result from use by non-residents and that consequently the discrimination in fees was not irrational or invidious. All recognized that an oceanfront

municipality may not absolutely exclude non-residents from the use of its dedicated beach, including, of course, land seaward of the mean high water mark; a trial court decision, Brindley v. Lavallette, 33 N.J.Super. 344, 348-349, 110 A.2d 157 (Law Div.1954), had so held, although not by reliance upon the public trust doctrine. We approve that holding.

Avon's proofs, based on 1969 figures, sought to show a deficit of about $50,000 between user fees received in that year and the costs of operation and maintenance of the beach. The cost figures were derived from estimates of the portions of budgetary line items said to be attributable to the beach as well as from projections on an annual basis of expected future capital expenses. Plaintiffs urge that some of these allocations are unsound. Moreover, there was no showing that the same costs would not be incurred even if only residents (under the definition) used the beach, nor was it demonstrated that the 1970 discriminatory fee schedule closed the alleged financial gap.

We prefer, however, not to treat the case on this basis, but rather, as we indicated at the outset, to approach it from the more fundamental viewpoint of the modern meaning and application of the public trust doctrine.

That broad doctrine derives from the ancient principle of English law that land covered by tidal waters belonged to the sovereign, but for the common use of all the people....

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The original purpose of the doctrine was to preserve for the use of all the public natural water resources for navigation and commerce, waterways being the principal transportation arteries of early days, and for fishing, an important source of food....

There is not the slightest doubt that New Jersey has always recognized the trust doctrine. The basic case is Arnold v. Mundy, 6 N.J.L. 1 (Sup.Ct.1821), where Chief Justice Kirkpatrick spoke as follows:

> Every thing susceptible of property is considered as belonging to the nation that possesses the country, and as forming the entire mass of its wealth. But the nation does not possess all those things in the same manner. By very far the greater part of them are divided among the individuals of the nation, and become <u>private property</u>. Those things not divided among the individuals still belong to the nation, and are called <u>public property</u>. Of these, again, some are reserved for the necessities of the state, and are used for the public benefit, and those are called "<u>the domain of the crown or of the republic</u>;" others remain common to all the citizens, who take of them and use them, each according to his necessities, and according to the laws which regulate their use, and are called <u>common property</u>. Of

> this latter kind, according to the writers upon the law of nature and of nations, and upon the civil law, are the air, the running water, the sea, the fish, and the wild beasts. But inasmuch as the things which constitute this common property are things in which a sort of transient usufructuary possession, only, can be had; and inasmuch as the title to them and to the soil by which they are supported, and to which they are appurtenant, cannot well, according to the common law notion of title, be vested in all the people; therefore, the wisdom of that law has placed it in the hands of the sovereign power, to be held, protected, and regulated for the common use and benefit. But still, though this title, strictly speaking, is in the sovereign, yet the use is common to all the people.
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> ...[S]till this power, which may be thus exercised by the sovereignty of the state, is nothing more than what is called the jus regium, the right of regulating, improving, and securing for the common benefit of every individual citizen. The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.

Similar expressions are found throughout our decisions down through the years.

It is safe to say, however, that the scope and limitations of the doctrine in this state have never been defined with any great degree of precision. That it represents a deeply inherent right of the citizenry cannot be disputed. Two aspects should be particularly mentioned, one only tangentially involved in this case and the latter directly pertinent. The former relates to the lawful extent of the power of the legislature to alienate trust lands to private parties; the latter to the inclusion within the doctrine of public accessibility to and use of such lands for recreation and health, including bathing, boating and associated activities. Both are of prime importance in this day and age. Remaining tidal water resources still in the ownership of the State are becoming very scarce, demands upon them by reason of increased population, industrial development and their popularity for recreational uses and open space are much heavier, and their importance to the public welfare has become much more apparent. All of these factors mandate more precise attention to the doctrine.

Here we are not directly concerned with the extent of legislative power to alienate tidal lands because the lands seaward of the mean high water line remain in state ownership, the municipal-

ity owns the bordering land, which is dedicated to park and beach purposes, and no problem of physical access by the public to the ocean exists. The matter of legislative alienation in this state should, nonetheless, be briefly adverted to since it has a tangential bearing. As the earlier quotations indicate, it has always been assumed that the State may convey or grant rights in some tidal lands to private persons where the use to be made thereof is consistent with and in furtherance of the purposes of the doctrine, e.g., the improvement of commerce and navigation redounding to the benefit of the public. However, our cases rather early began to broadly say that the State's power to vacate or abridge public rights in tidal lands is absolute and unlimited, and our statutes dealing with state conveyances of such lands contain few, if any, limitations thereon.

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The observation to be made is that the statements in our cases of an unlimited power in the legislature to convey such trust lands to private persons may well be too broad. It may be that some such prior conveyances constituted an improper alienation of trust property or at least that they are impliedly impressed with certain obligations on the grantee to use the conveyed lands only consistently with the public rights therein. For example, the conveyance of tide-flowed lands bordered by an ocean dry sand area in private ownership to the owner thereof may well be subject to the right of the public to use the ocean waters. And, whether or not there was any such conveyance of tidal land, the problem of a means of public access to that land and the ocean exists. This case does not require resolution of such issues and we express no opinion on them. We mention this alienation aspect to indicate that, at least where the upland sand area is owned by a municipality--a political subdivision and creature of the state--and dedicated to public beach purposes, a modern court must take the view that the public trust doctrine dictates that the beach and the ocean waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible.

We have no difficulty in finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities. The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit. The legislature appears to have had such an extension in mind in enacting N.J.S.A. 12:3-33,34, previously mentioned. Those sections, gen-

erally speaking, authorize grants to governmental bodies of tide-flowed lands which front upon a public park extending to such lands, but only upon condition that any land so granted shall be maintained as a public park for public use, resort and recreation.

Other states have readily extended the doctrine, beyond the original purposes of navigation and fishing, to cover other public uses, and especially recreational uses. In Massachusetts it was held many years ago that "it would be too strict a doctrine to hold that the trust for the public, under which the state holds and controls navigable tide waters and the land under them, beyond the line of private ownership, is for navigation alone. It is wider in its scope, and it includes all necessary and proper uses, in the interest of the public." [Home for Aged Women v. Commonwealth, 202 Mass. 422, 89 N.E. 124, 129 (1909)]. Wisconsin, where the doctrine covers all navigable waters, has long held that it extends to all public uses of water including pleasure boating, sailing, fishing, swimming, hunting, skating and enjoyment of scenic beauty. Courts in several other states have recently recognized the vital public interest in the use of the sea shore for recreational purposes and have, under various theories consistent with their own law, asserted the public rights in such land to be superior to private or municipal interests. Modern text writers and commentators assert that the trend of the law is, or should be, in the same direction.

We are convinced it has to follow that, while municipalities may validly charge reasonable fees for the use of their beaches, they may not discriminate in any respect between their residents and non-residents. The Avon amendatory ordinance of 1970 clearly does so by restricting the sale of season badges to residents, as defined in the ordinance, resulting in a lower fee to them. In addition the fee for daily badges, which would be utilized mostly by non-residents, may have been as well discriminatorily designed with respect to the amount of the charge. Since we cannot tell what fee schedule the municipality whould have adopted when it passed this ordinance in 1970 if it had to do so on the basis of equal treatment for all, we see no other course but to set aside the entire amendatory enactment.

We recognize, however, that Avon has operated under the present schedule since 1970 and that the present beach season is about half over. Other oceanfront municipalities may well have similar enactments. Also Avon very likely has operated its budget and financial affairs on the basis of the beach user fees expected to be collected under the present schedule in reliance upon the trial court decision. To attempt now to turn the clock back to the non-discriminatory schedule (with considerably lower charges) specified in the pre-amendment ordinance would only create hopeless practical confusion and some unfairness to the

municipality and its taxpayers. We therefore determine that the judgment to be entered pursuant to this opinion should operate prospectively only....

We ought also to say that we fully appreciate the burdens, financial and otherwise, resting upon our oceanfront municipalities by reason of the attraction of the sea and their beaches in the summer season to large numbers of people not permanently resident in the community. The rationale behind N.J.S.A. 40:61-22.20 certainly is that such municipalities may properly pass on some or all of the financial burden, as they decide, by imposing reasonable beach user fees, which we have held here must be uniform for all. We think it quite appropriate that such municipalities may, in arriving at such fees, consider all additional costs legitmately attributable to the operation and maintenance of the beachfront, including direct beach operational expenses, additional personnel and services required in the entire community, debt service of outstanding obligations incurred for beach improvement and preservation, and a reasonable annual reserve designed to meet expected future capital expenses therefor. They may also, we think, very properly regulate and limit, on a first come, first served basis, the number of persons allowed on the beach at any one time in the interest of safety.

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FRANCIS, J. (dissenting).

I cannot agree with the result reached by the majority.

It is undisputed that anciently and currently the sovereign --here the State of New Jersey--owns the fee title to the portion of the ocean beach front seaward of the mean high water mark. Nor can it be denied that the beach area landward of the mean high water mark is owned by the upland title holder. I agree that the people have the right to use and enjoy the ocean in common of the beach area seaward of the mean high water mark; such is the public trust doctrine. In the absence of

circumstance or some reasonable regulation by the State, it is undoubtedly true that no person using <u>that strip</u> as an incident of his temporary enjoyment of the ocean can be considered a trespasser. Reference has been made to the fact that in the past agencies of the State have either given or sold certain riparian grants purporting to convey to the upland owner title to the land for a specified distance seaward of the mean high water mark. It has been suggested that the land described in such grants (at least the portion thereof remaining in its natural state) would be subject to the common public right to use and enjoy the strip between the mean high water mark and the ocean. But that problem is not before us now.

However, the majority opinion here states views upon a subject of serious consequence to ocean front communities and to the owners, private or public, of beach front land above the mean high water mark. The basic question may be couched in these terms: Since the people generally have the common right to use and enjoy the ocean and the portion of the beach below the mean high water mark, of what utility is that right if access from the upland does not exist or is refused by the upland owner? Although the majority opinion disclaims any positive ruling on the subject, it seems to imply that exercise of the common right carries with it by way of implementation, the right to use and enjoy any beach upland for purposes of recreation and access to the ocean.

In my view, the common right is not so pervasive. Of course, generally speaking reasonable access to the ocean and to the land strip which is in the public domain cannot be denied, but the law does not require that such access be without limitation or qualification. In localities where ocean front municipalities do not own or operate public beaches, and all ocean front property is in private ownership, such municipalities, as a legitimate exercise of their right of eminent domain, could provide for reasonable public access....In my judgment a private owner could legally fence in his entire beach area upland of the mean high water mark, if he was moved to do so.

Communities like Avon which have only a few blocks of ocean front are aware that their publicly owned and maintained beaches risk overcrowding to the detriment of local residents and taxpayers unless some reasonable limitations are imposed on use by non-residents. In my view it is neither arbitrary nor invidiously discriminatory for the local governing body which owns, operates and maintains a public beach in the interest of its residents to charge a higher daily, weekly or monthly fee to non-residents who seek the privilege of using the beach. Avon has the right, I think, to fence in its beach to the mean high water mark, if it wishes and restrict the use thereof to its own residents and taxpayers with or without an admission fee. If it wishes to open this upland beach (owned by it) to use by non-residents, I see nothing in N.J.S.A. 40:92-7.1 or N.J.S.A. 40:61-22.20 which prohibits the municipality from imposing reasonable limits on the invitation by means of a charge of higher use fees to the non-residents. Accordingly, I see no merit in the contention that the inequality between the fees Avon charges for use of its upland beach to its own residents and taxpayers, and those charged to non-residents, renders illegal the fees imposed upon the non-residents.

For the reasons stated, I would affirm the judgment of the trial court. Justice MOUNTAIN joins in this dissent.

GEWIRTZ v. CITY OF LONG BEACH*
69 Misc. 2d 763, 330 N.Y.S.2d 495 (Sup. Ct. 1972),
aff'd. mem., 358 N.Y.S.2d 957 (App. Div. 1974)

L. KINGSLEY SMITH, Justice.

The complaint in this action seeks a judgment against the City of Long Beach declaring that the provisions of Local Law No. IX/70 are illegal, unconstitutional, null and void and of no force and effect and that such Local Law No. IX/70 is contrary to reservations, covenants and restrictions in prior instruments of record.

Local Law No. IX/70, which is the subject of this action, was enacted by the Council of the City of Long Beach on November 4, 1970. It was entitled "A local law amending the City Charter Re Beach Park." By the terms of Local Law No. IX/70, Section 98 of the City Charter was amended to read as follows:

"Section 98. BEACH PARK.

1. The land owned with all the improvements thereon by the city of Long Beach extending from the northerly line of the Boardwalk as now or hereafter constructed or if extended east and west, southerly to the high water line of the Atlantic Ocean, and from the westerly to the easterly boundary of the said city, is hereby created a public park <u>for the residents of the City of Long Beach and their invited guests</u>. [Italics inserted to indicate new matter added by the amendment.]

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At all times prior to 1970 the Ocean Beach Park had been open for use by residents and non-residents.

A previous attempt by the Council of the City of Long Beach to restrict the use of its Ocean Beach Park to residents of the City and their invited guests became the subject of litigation in 1970. On April 7, 1970 the Council adopted Ordinance No. 967/70 for the purpose of amending the provisions regulating who was permitted to use the Ocean Beach Park and the conditions under which persons could make use of such facilities. Briefly stated, prior to the 1970 amendment no person, except children 12 years of age or under, were permitted to use the area unless they had paid admission charges fixed by other portions of the Code and no one was permitted to use the area for any purpose between the hours of 8:00 p. m. and 9:00 a. m. except employees engaged in the operation of the Ocean Beach Park.

Ordinance No. 967/70 retained the original provisions set forth in Sections 6-105 but added, in a separate subdivision, language which restricted the use of the Ocean Beach Park and the waters adjacent to it to residents of the City of Long Beach and

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*Citations omitted

their invited guests. That Ordinance was challenged in the case of Kalin v. The City of Long Beach (Nassau County Index No. 4711/70) which...was ultimately treated and tried as an action for a declaratory judgment....In that earlier case the Court held that the attempt,...was not an acceptable method of converting the public park from a facility open to the public at large to one open only to the residents of the City of Long Beach and their invited guests....The Court in the earlier case expressly stated that it did not reach the challenge to the constitutionality of Ordinance 967/70 nor did it find it necessary, in view of its holding that such Ordinance was invalid, to determine other issues relating to such matters as ownership of accreted lands and the claim of extinguishment of a right of way by adverse use.

Following the determination made in the earlier case, the Council of the City of Long Beach sought to achieve the goal of a restricted beach by enacting Local Law IX/70 on November 4, 1970 and it is that latest enactment which has been the subject of challenge in the present action.

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....In the present action the defendants have not questioned the standing of the plaintiffs....

The plaintiffs...are non-residents of the City of Long Beach and are residents and taxpayers of the State of New York....

A summary of the essential allegations set forth in the complaint of the plaintiffs follows. The beach front within the corporate boundary lines of the defendant, City of Long Beach (hereinafter referred to as "City") was acquired by the City in the period 1935 to 1937 by conveyances which recited that the premises were subject to reservations, covenants and restrictions as well as rights and conditions contained in prior instruments of record affecting the premises. Simultaneously with the acquisition of such beach area the City applied for Federal funding for beach and ocean front improvements including demolition of the old and the erection of a new boardwalk, construction of stone jetties and supplementing the beach front with sand fill. In 1935 the Federal Government, through one of its agencies, issued a commitment for a grant and loan subject to its rules and regulations and that on October 19, 1935 the common council of the City adopted a resolution accepting the offer of the Federal Government. Preliminary to such Federal funding, the United States Engineers Office granted permission to the City for the proposed beach and ocean front improvements upon condition that the City would not attempt to forbid the full and free use by the public of all navigable waters at or adjacent to the work or structure....By the enactment on April 7, 1936 of Local Law No. IV/36 the City

created a public park known as "Ocean Beach Park of the City of Long Beach" out of the beach....However, Local Law No. IV/36 did not grant to the City the power to regulate the classes of persons entering the beach park nor the power to discriminate between residents and non-residents of the City. After the enactment of Local Law No. IV/36 and pursuant to an ordinance duly adopted the beach and its improvements were opened to the general public upon payment of a nominal fee collected by the City from persons entering the public park. On November 4, 1970 the City Council amended Local Law No. IV/36 by enacting Local Law No. IX/70 providing, among other things, that no person who was not a resident of the City or an invited guest of such a resident was to be permitted in or upon the beach park or to wade, bath or swim in the waters adjacent thereto.

The remainder of the complaint sets forth allegations designed to spell out the claim of the plaintiffs that Local Law IX/70 is unconstitutional, ultra vires, illegal, discriminatory and violative of instruments of record.

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The answer of the City of Long Beach is essentially a general denial of those allegations of the complaint which charge that Local Law IX/70 is unconstitutional, ultra vires, illegal, discriminatory and violative of instruments of record.

The claim is made by the plaintiffs that the beach has been irrevocably dedicated by the City to the use of the public at large. The City denies this and asserts that from the beginning it intended "to create and operate the beach park for the benefit of its own residents" and that the "use of the beach by non-residents * * * has not been adverse but has been pursuant to a license or permission granted by the City of Long Beach." The issue of whether there has been a dedication by the City which precludes it from taking action limiting the use of the Beach to residents and their invited guests is thus squarely presented.

It is the general rule that a municipal corporation can dedicate property to public use just as a private person or corporation may do. The power of the City of Long Beach to acquire the beach and the boardwalk and to dedicate the area to public use is clear.

It is important to note that the instruments of conveyance by which the City acquired title to the beach and boardwalk area did not contain conditions or restrictions requiring that the property so acquired be devoted to a specified public use. Had grantors desired to convey property to the City with a condition or restriction that such property continue to be used for park purposes for the benefit only of residents of the City, such a conveyance could have been accepted by the municipality and it would have there-

after been bound by the condition or restriction so imposed. That is not the situation in this case. The City acquired its title to the beach and boardwalk area free of any such conditions or restrictions. It was thus in a position to determine the specific purpose for which this property would be utilized.

The essential elements necessary to establish a dedication are an offer by an owner, either express or implied, to appropriate land or some interest or easement therein to public use and an acceptance of such offer, either express or implied when acceptance is required, by the public. Thus, this has been said:

> "Accordingly, a dedication is generally defined as the devotion of property to a public use by an unequivocal act of the owner, manifesting an intention that it shall be accepted and used presently or in the future. The intention of the owner to dedicate and acceptance thereof by the public are the essential elements of a complete dedication. Thus it is vital to a dedication of property to public use that it is to be forever and irrevocable after acceptance, and that it be for a public use. [[11 McQuillin-The Law of Municipal Corporation[3rd Ed. (Revised)], § 33.02, pp. 627-630]].

The question of whether there was an intention on the part of the City to dedicate the municipally-owned beach and boardwalk to public use does not pose a problem in this case. The intent of the City in 1936, as manifested by its official actions, was to dedicate the beach and boardwalk to public use as a park. With title acquired from former owners, the governing body of the City took official action by enacting Local Law IV/36. That Local Law "created a public park" out of the municipally-owned ocean beach front property and directed the City Council to make provision by ordinance for the supervision and maintenance of the public park and for the collection of a reasonable charge from users of the public park to be prescribed by the same ordinance. Subsequently, the City followed the direction contained in Local Law IV/36 and adopted an ordinance containing provisions for the supervision and maintenance of the public park and for the collection of charges from those using it....

It is difficult to conceive of any method better calculated to express the intent to dedicate its ocean beach front property to public use as a public park than the Local Law which the City enacted in 1936 and the implementing ordinance which it thereafter adopted. These actions by the City manifested unequivocally an intention to dedicate the municipally-owned property to public use as a public park.

Generally speaking, to complete the dedication process, it is necessary that there be an acceptance of a proffered dedication. Certainly, this is true when the offer to dedicate is one made ex-

pressly or impliedly by a private person or a private corporation. The situation is somewhat different when the dedicator is the municipality. The rule that there must be an acceptance to complete a dedication has been applied in connection with a dedication of land by the state to a city for park purposes. On the other hand, it has been held that when a formal dedication of a street is made by the State or by a municipality, no acceptance is necessary. Reason suggests that when it is the municipality which is making the dedication, the element of acceptance really is not required, or if the element of acceptance is to be insisted upon, it may be implied from the very act of dedication by the municipality.

There are various ways in which acceptance by the public may be established. In addition to acceptance shown by express act, there may be an implied acceptance arising from acts of a municipality or its officers and also from use by the public for the purposes for which the property was dedicated. Acceptance has been found in the actions of a municipality or governmental unit which had been done on behalf of the public in making improvements to and maintaining the particular facility. In this case the City can be regarded as having played a dual role in the dedication process. As the owner of the beach front area, it manifested the requisite intent to devote its property to public use as a public park by declaring that intent in the form of the 1936 Local Law. When it thereafter adopted the ordinance mandated by the Local Law and proceeded to supervise, maintain and improve the ocean front facilities, which it had itself declared to be a public park, the City can be regarded as having accepted the facilities on behalf of the public.

Acceptance can also be found in evidence of actual and continued public use....

In this case, the uncontradicted evidence establishes more than three decades of continuous use of the ocean beach front facilities by the public at large after those facilities were declared to be a public park by the City itself in 1936. Throughout that period no attempt was ever made by the City to limit the class of lawful users of its public park to those who were residents of the City or their guests. Indeed, the City manifested clearly a policy of maintaining its ocean beach park facilities for the benefit of the public at large not only by permitting the facilities to be used by residents and non-residents alike, but also by adopting schedules of admission charges which imposed different rates for residents and non-residents. It was not until 1970 that the City for the first time attempted to limit the use of its public park facilities to resident users and their invited guests. It is noteworthy that in practical application the City's policy of restricted use operates only with respect to a portion of what is actually embraced within its ocean beach park. That

is to say, while the language of Local Law IX/70 is couched in terms which literally exclude everyone except residents and their invited guests from the public park in its entirety, this is not actually the fact. The uncontradicted evidence establishes that it is only the beach portion of the public park from which non-residents are excluded. This is accomplished by setting up controlled points of entry along the beach through which residents and their invited guests are admitted upon presentation of prescribed credentials. The boardwalk, which is elevated above and runs parallel to the beach, has remained open to the public at large and no attempt has been made to restrict its use to City residents and their invited guests. Whatever the practical explanation may be for this difference in policy, there nevertheless is an inherent inconsistency in the adoption of an exclusionary policy in respect of the beach portion of the public park and a non-exclusionary policy for the boardwalk portion.

If the element of acceptance is necessary in this case for a completed dedication to use of the public park and its facilities by the public at large, it is found both in what the City itself has done in operating and maintaining its public park and also in the use which the public at large has made of such facilities over a period of more than thirty years.

Once a dedication has become complete, it is irrevocable. This principle of irrevocability applies equally to completed dedications by governmental entities and municipalities. In support of its contention that the beach has never been dedicated to the use of the public at large either expressly or by implication, the City has urged that a resolution adopted by the City Council in 1936 supports the claim that in creating the public park it was the City's intention to create and operate a park for the benefit of its own residents. An examination of that resolution shows that it was a resolution adopted for the purpose of creating a commission to guide the City in planning for the operation of the beach area and the boardwalk as a public park. It is true that one of the preambles of that resolution contains language to the effect that it is necessary to plan the method of operation of maintenance "so that the City of Long Beach, its taxpayers and residents may enjoy to the fullest extent possible the benefits to be derived therefrom." The use of that language in a preamble to a resolution for the creation of an advisory body can hardly be said to exclude the idea that members of the public at large will have access to the park facilities. The actions of the City in the years following the adoption of that resolution clearly point to a policy of a public park open to all....

The Court finds that when the City created "a public park" out of its municipally-owned ocean front property, it intended to create and to maintain a facility open to use by the public at

large. The Court further finds that these premises designated by the City itself as a "public park" were maintained, improved and operated so as to afford untrammeled access to the public at large from 1936 to 1970 subject only to the payment of fees in accordance with a schedule established from time to time by the Council of the City of Long Beach. In addition, the Court finds that from the time the "public park" was established until 1970 the public at large used the facilities. In the light of this history of a public park open to the public at large, the Court finds that there has been a completed dedication of the ocean beach facilities to the use of the public at large and that such dedication is irrevocable.

Inasmuch as the Court has found from the evidence an irrevocable dedication of the public park facilities, the Court deems it unnecessary to discuss, although it has considered, the cases cited by the plaintiffs in support of the theory of implied dedication flowing from acquiescence in continued public use....

The claim is made by the defendant-City that since the property in question was not acquired from the State of New York or for any special purpose, the City is free to do with such property what its legislative body determines should be done. If this argument is valid, it would logically follow that such power would include authority to dispose of the park property or to devote it to some other use. The argument assumes that the property was not acquired for any special purpose and that it has not been dedicated for public use as a park. While it is true that the instruments of conveyance by which the City acquired title to the property did not contain specific conditions or restrictions requiring that the property acquired be used for a specific public governmental use or purpose, the evidence shows that even before acquisition of the property was fully complete, the City had taken steps to obtain federal funds to finance measures designed to lessen the erosion of the beach and to reconstruct the boardwalk. The action thus taken when combined with what was done by the City within a short time after title to the area was acquired, i.e., the creation of a public park out of the land so acquired, strongly suggests that in reality the property was acquired with the purpose in mind of devoting it to a special public use. In any event, the Court has found that the City made an irrevocable dedication of the property to public use as a park. Once this was accomplished, the City's freedom of action was circumscribed. In this state the principle is well established that public park property may not be alienated without express legislative permission.

When the City dedicated this property to use as a public park and thereafter devoted it to the use of the public at large

for upwards of thirty years, it put itself in the position of holding that property subject to a public trust for the benefit of the public at large. Public parks occupy a special position insofar as the public at large are concerned and this is borne out by numerous expressions to that effect found in the decisions of this state. Attempts to divert public park property to other uses have often been restrained.

The power of a municipality to permit encroachments upon park purposes or to alienate public parks depends upon legislative authority which, it has been said, must be "plainly conferred", "special" in nature, "specific", "direct" or "express." In short, the legislative authority to change the use of property held for park purposes or to sell such property must be plain. In this case no such plain legislative authority has been granted to the City to discontinue, sell or delimit the class of users of its public park. If anything, the power appears to have been withheld by the legislature....If it was the intention of the legislature to confer authority to change the use of the public park or to alienate it, the requisite authority could have been conferred in plain and unmistakable terms.

The legislature has seen fit, in certain instances, to grant authority ot local governmental subdivisions to limit the class of users to local inhabitants. Instances of such expressly conferred legislative authority are found in the case of so-called self-supporting improvements in Towns and Villages. In the case of Towns the definition of the term "self-supporting improvements" includes a bathing beach or recreational facility and parking areas in connection therewith....By definition the term "self-supporting improvement" means, in the case of a Village, any recreational facility and parking areas in connection therewith.... It is important to note, in connection with the foregoing legislative authorizations not only that they are specific and plain but that the power of limiting use to local inhabitants is conferred in connection with improvements created and designed to serve the inhabitants of a limited area.

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It is thus clear that municipally-owned property that has been dedicated to use as a public park is held in trust for the public at large and may not be diverted to other uses or sold without express legislative authority. The same principle of a trust for the public prevents the municipality from taking action which operates to exclude the public at large from such a public park and to limit use of the public park to local inhabitants unless the municipality has been granted express legislative authority to do so. To hold otherwise would be to permit the municipality to achieve a result which violates the public trust principle since as to those who are excluded from the public park the

exclusionary policy is as much a diversion of use as would be the case if the municipality changed the use of the park or sold it.

The view that land which has been dedicated to use as a public park may not be diverted to another use or alienated finds support in the decisions of other states.

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Genuine support for the exclusionary policy adopted by the City is not found in the case of Campbell v. Town of Hamburg, 156 Misc. 134, 281 N.Y.S. 753. In that case dedication of a small public park came about as the result of a conveyance of the property in question by a private owner to the Town by a deed which contained subsequent, restrictive covenants running with the land and which specifically required that the premises should be maintained and used by the Town of Hamburg in perpetuity as a park for the use and benefit of the citizens and residents of that township. The true basis for restricting use of the park in that case to the inhabitants of the Town is found in the terms of the deed of dedication itself and the acceptance of the deed, in the form tendered, obligated the Town to restrict the use of the park to those persons specified by the grantor. Consequently, the language in the opinion to the effect that any municipality has a basic property right to prevent the usurpation by strangers of that which the municipality has created and is maintaining for its own citizens and residents, is certainly broader than the requirements of the decision. It is observed that no citation of authority for the stated principle is contained in the opinion.

The case of Schreiber v. City of Rye, 53 Misc.2d 259, 278 N.Y.S.2d 527 is not regarded as a controlling authority on the question of the City's right to limit the use of its public park to residents. In Schreiber a municipal swimming pool and golf course was involved. So far as appears from the opinion, the swimming pool and golf course were, from their inception, designed and created to serve only the inhabitants of the municipality. Furthermore, it appears that at no time had the public at large ever used these facilities. In these circumstances it could hardly be found that these municipal facilities had been dedicated for public use by the public at large. Therefore, there is nothing inconsistent between the holding in Schreiber and the principle that a public park dedicated to use of the public at large may not be restricted to the inhabitants of a single locality.

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Having found that there has been a completed dedication of the Ocean Beach Park to the use of the public at large and that

such dedication is irrevocable the Court finds that it was beyond the governmental power of the Council of the City of Long Beach to restrict the use of the beach forming part of the Ocean Beach Park to residents of the City and their invited guests without specific legislative authorization. Accordingly, the plaintiffs are entitled to judgment declaring that Local Law No. IX/70, to the extent that it purports to so restrict the use of the beach, is invalid.

The Court has considered the other grounds which the plaintiffs have asserted as supporting their claim that the attempt to restrict use of the beach area is invalid. However, in view of the conclusion reached by the Court for the reasons indicated, the Court deems it unnecessary to make a determination in respect of such other grounds.

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These cases point to several critical questions in addressing the issue of whether a municipality may exclude nonresidents from its beaches. First, the Neptune City case raises the issue of whether the public trust doctrine should be applied to protect nonresidents' use rights in dry-sand and upland areas. Second, the Gewirtz decision raises the concept of municipal dedication of shorefront parks to use by the general public. Finally, governmental attempts such as these to restrict the enjoyment of a public benefit to one part of the general public (those residing within the city) will certainly raise constitutional issues, particularly that of potential denial of the equal protection of the law.

I APPLICABILITY OF THE PUBLIC TRUST DOCTRINE

Note, "Water Law--Public Trust Doctrine Bars Discriminatory Fees to Nonresidents For Use of Municipal Beaches," 26 Rutgers L. Rev. 179, 180-88 (1972)*

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The Avon decision radically alters the course of the public trust doctrine in New Jersey. Although the opinion notes the unclear status of the doctrine in the state, it does little to clarify it. Despite leaving many future problems unresolved, the opinion does reveal a significant change in the scope and direction in New Jersey.

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In addition to including beach upland within the definition of trust properties, [as opposed to just the wet-sand area] Avon expands the public rights which the doctrine protects. Traditional public rights encompassed by this doctrine are navigation and fishery, to which Avon adds recreational uses "including bathing, boating and associated activities."

Avon prohibits municipalities from charging discriminatory fees to those who use its beach and ocean waters. The basis for this holding appears to be that there is a right of nondiscriminatory access to lands within the purview of the public trust doctrine.[1] Although some prior New Jersey cases refer to a right of access, Avon clearly establishes this right. The court does not explain, however, why the right of access prevents municipalities from reasonable discrimination between resident and nonresident beach users. A reasonable explanation is that the court has extended the common law notion that impediments to public trust property are impermissible.

The public trust doctrine, for example, has long provided that the public has a right to unhampered navigation in public waters. Many jurisdictions hold that any physical obstructions such as piers, wharves, or landfills which protrude into these waters, impeding public navigation, are prohibited.

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[1] See I Waters and Water Rights §§ 38-38.3 (Clark ed. 1967) for a discussion of public access to public waters.

Under Avon, it appears, an impediment need no longer physically intrude upon the trust property, nor need it be physical in nature. The imposition of a discriminatory fee constitutes an impediment. Once the court determined that the Avon beach was subject to a public trust for access and recreation, the higher fee charged to nonresidents, like a physical impediment, had to be removed.

In addition to denying the use of discriminatory fees, the court warns that communities like Avon may not totally exclude nonresidents. To support this proposition, the court approves the holding in Brindley v. Borough of Lavallette.[2]

In Brindley, the court invalidated an exclusionary ordinance which limited use of the town beach to residents. Although the decision was not based on the public trust doctrine, other jurisdictions have relied on this doctrine to invalidate exclusionary measures.

To summarize, the Avon decision has changed the content of the public trust doctrine in New Jersey. To the traditional public rights of navigation and fishery, recreation and access have been added. The decision also has expanded the lands subject to the trust doctrine to include municipal beach upland which has been dedicated to public use.

Before Avon, the public trust doctrine in New Jersey allowed the legislature absolute and final authority over the disposition of trust lands. Thus, the superior court in Avon readily declared that the legislature had at least the power to "circumscribe" any common law rights the public may have held in the beaches in question.

The supreme court held that the public trust doctrine affirmatively prohibits such discrimination and that "any contrary state or municipal action is impermissible." It notes "in passing" only that the legislation which authorized boroughs to charge fees was not intended to allow discriminatory charges. The legislation was therefore not determinative.

Avon indicates that the absolute legislative authority over disposition of trust lands "may well be too broad." In dicta, the court will not hesitate to protect the public right in trust lands through assertion of the trust doctrine, notwithstanding any contrary legislative action.

There is precedent for courts to intervene when a legislature has outrageously breached the public trust. A clear case of legislative abuse leading to direct intervention, however, is rare. A more common example of judicial action occurs when a legislature has been unclear in its mandate. In such circumstances, the judiciary can protect trust property by denying inconsistent use of it. It can also leave the decision of trust resource alloca-

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[2][33 N.J. Super. 344, 110 A.2d 157 (Law Div. 1954).]

tion to an appropriately representative decision making body. This technique of "judicial indirection" in public trust decisions has been the major use of the doctrine to date. "... [E]ven those courts which are the most active and interventionist in the public trust area are not interested in displacing legislative bodies as the final authorities in setting resource policies."

It is remarkable that the Avon court affirmatively used the public trust doctrine to protect public rights without concern for the dictates of the state legislature. The court itself suggests there were other possible grounds for decision. Avon is powerful precedent for judicial protection of public trust rights. A direct clash with legislative disposition of public trust lands has not arisen. Under Avon, however, courts may more readily intervene to protect such public trust rights.

While Avon will have far-reaching effects, the decision is most likely to have immediate repercussions on privately owned shorefront property. Although the holding is limited to the public's right of access to and use of beach upland owned by municipalities, the implication is that the entire New Jersey shoreline, perhaps including the upland area, may be subject to the public rights of access and use.

Presumably, a reasonable right of access to reach the traditionally protected shoreline seaward of the high tide line would not severely threaten the upland owner. He could still fence in his upland property, as Justice Francis suggests, except across public access routes. It is the possibility of a public right of access to and use of the private owner's beach upland which is most threatening.

The particular facet of the trust doctrine which the court employed to place municipal beach upland under the public trust and from which "it has to follow" the public cannot be excluded nor hindered by discriminatory fees, is unexplained. It is, therefore, difficult to know the effect Avon may have on future court decisions regarding private beach upland....

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There are indications in Avon...that the court did not intend ...a narrow reading of the decision. The court, in dicta, intimates that former legislative grants may be held, in the future, to have constituted improper alienations of trust lands. If the court should so hold, then any titles purporting to deed trust lands to private owners might be invalid and the land would presumably be held by the state in trust for the people....

Rather than abrogate property owners' rights to such land entirely, the Avon decision can be read to imply that private owners took their properties subject to the public's rights. In addition

to access across privately owned properties, these rights might include use of the upland beachfront. Justice Francis in his dissent sees both these developments as the result of Avon. He forewarns that Avon "[implies] that exercise of the common right carries with it by way of implementation, the right to use and enjoy any beach upland for purposes of recreation and access to the ocean."

The dissent sees no difference between upland owned by a municipality and that owned by a private individual. The court itself makes no clear distinction. Avon, therefore, absent a narrow reading...could set a precedent for the court to find not just that the public has a right of access to the seaward strip of beach and the ocean, but that, since municipal upland is subject to public access and use, every private beach owner holds title subject to the same rights of the public. Justice Francis is opposed to this abrogation of the private landowner's property rights.

The New Jersey Supreme Court, through use of the public trust doctrine in Avon, has taken a giant step forward towards protecting public rights in natural resources. Although sparse in analysis, the opinion lays the groundwork for future expansion of the public trust doctrine.

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For a full discussion of the public trust doctrine, see the material on the wet-sand area in Chapter II. Also see Agnello, "Non-Resident Restrictions in Municipally Owned Beaches: Approaches to the Problem," 10 Colum. J. L. and Soc. Prob. 177, 192-209 (1974); Note, "Access to Public Municipal Beaches: The Formulation of a Comprehensive Legal Approach," 7 Suf. U. L. Rev. 936, 941-50 (1973); Note, "Public Access to Beaches: Common Law Doctrines and Constitutional Challenges," 48 N.Y.U. L. Rev. 369, 380-85 (1973).

II THE DEDICATION CONCEPT AS APPLIED TO MUNICIPAL BEACHES

Note, "Public Access to Beaches: Common Law Doctrines and Constitutional Challenges," 48 N.Y.U. L. Rev. 369, 377-79 (1973)*

The state, or any of its political subdivisions, may dedicate lands to public use. Generally, a municipal corporation can make an offer to dedicate land owned by it just as a private owner may. Moreover, since a proferred dedication may be accepted by a municipality on behalf of the public, and since such acceptance may be manifested simply by conduct of the proper public officials, a municipality may be held to have both dedicated and accepted dedication of land as a result of engaging in conduct consistent with an intent to do so.

In Gewirtz v. City of Long Beach,...plaintiff challenged an ordinance of defendant City of Long Beach which restricted the use of Long Beach's municipally owned beach to residents of the city and their invited guests. Long Beach had acquired title to the beach by grants and conveyances made between 1935 and 1937, at which time it was opened for use by the general public upon payment of a nominal fee. The beach park, which was operated, maintained and supervised by the city, was restricted to residents in 1970.

The court held that the city had irrevocably dedicated its beach park to public use, and that therefore the ordinance which prohibited use of the beach by nonresidents was void. Starting with the general proposition that a municipal corporation, like a private individual or corporation, may dedicate property to the public, the court had no trouble finding on the facts before it the essential elements of a dedication. There was no need to imply a fictitious intent to dedicate, since the court found an express intent, manifested by the official actions of the city in creating, supervising and maintaining as a public park its municipally owned beach.

The court considered several alternate theories to find the acceptance required for dedication. With a municipal corporation, acceptance may not be necessary, or if necessary, may be implicit in the act of dedication by the municipality, which is the representative of the public. Actions by the governmental unit per-

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formed on behalf of the public, in maintaining and improving the facility, could also amount to a public acceptance of the dedication. Acceptance may also be demonstrated, as in implied dedication, by actual and continuous public use. The Gewirtz court found that the maintenance and improvement of the beach park by the city and continuous public use for over 30 years constituted acceptance. The court thus found a completed and irrevocable dedication.

Dedication is always made to the public at large, and not to a limited public, such as the residents of a municipality. Where the intent to dedicate is found, a dedication restricted to a select portion of the public will be judicially reformed. Thus, the court ruled that it was beyond the governmental power of the City of Long Beach to revoke the dedication and restrict the use of the beach to city residents.

In evaluating the significance of the Gewirtz case for future beach access litigation, it must be remembered that this decision was heavily dependent on the factual setting of the case. For an express dedication, as in Gewirtz, there must be a finding of both an intent to dedicate by the city and an acceptance by the public. Where a beach has always been clearly restricted to residents, the possibility of proving a municipal intent to dedicate the beach to the public at large is minimal, and the Gewirtz rationale would not be available....

Agnello, "Non-Resident Restrictions in Municipally Owned Beaches: Approaches to the Problem," 10 Colum. J. L. and Soc. Prob. 177, 222-24 (1974)*

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The problem with [the California implied dedication cases of Gion/Dietz[1]]...is that the end result is essentially a taking of private property without compensation, the means of which are a distortion of the law of dedication. In the most recent case dealing with a restricted municipally owned beach, a New York court faced this issue. In Gewirtz v. City of Long Beach the court,

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[1][See the discussion of these, and the Seaway case, in the section on implied dedication, supra, Chapter II.]

probably aware of the twists in the above cases, searched for an express intent to dedicate on the part of the municipal owner. In this way it remained, ostensibly at least, within the traditional dedication doctrine by requiring both intent and acceptance.

The City of Long Beach had owned and maintained an ocean beach since 1936 and in 1970 had restricted its use to residents by way of an ordinance. In holding the restriction invalid the court found an express dedication in the original Local Law which created the beach in 1936 and described it as a "public park." Despite the fact that the law said that it had "created a public park for the residents of the City of Long Beach and their invited guests" the court said that "it is difficult to conceive of any method better calculated to express the intent to dedicate its ocean beach front property to public use as a public park." The court, although not stating it, may have been influenced by the fact that the beach was open to all comers under the Local Law for thirty-five years when, in 1970, it expressly restricted its use to residents. The act of later restricting the beach may have been strong evidence, in itself, of a prior intent to dedicate. In any case, the court specifically found an express intent to dedicate as manifested by the words "public park."

Such a precedent may be a strong foundation for finding an express declaration of intent in many other municipally owned beaches. Gewirtz is the first case to do so with municipally owned beaches. It is not uncommon to find the inclusion of the words "public park" when the municipality refers to its beach. In 1936 the farthest thing from the minds of the city officials was the possibility of this result. This was because they either never anticipated the eventual restriction of the beach or the possibility that they would not be allowed to do so in the future. The court made no real inquiry into the actual intent as of 1936 and completely ignored words that could have tilted the scales in the other direction. The result, however, is far-reaching because once the beach was actually used by the public the offer embodied in the words "public park" was accepted and the municipality could no longer revoke it with an attempt such as the 1970 residency ordinance. But statements about the far-reaching effect of this decision may be misleading or overestimated because municipalities, in the future, could merely omit the magic words. The same applies to municipalities which were fortunate to omit those words in the past. By its nature Gewirtz is limited to its particular facts. In any event the case is definitely a long step in providing workable precedent for forcing municipalities to open their beaches to all of the public.

In analyzing the municipal beach situation there are two points of focus where dedication to the general public may be

found. It may be that prior to the municipality's gaining title to the beach the former owner can be said to have already dedicated it, either expressly or impliedly. In that case the municipality took the land subject to the dedication and it, like any other subsequent owner, cannot defeat it. On the other hand, the dedication may arise during the municipality's fee ownership. In both cases the municipality is powerless to interfere with a right that an unorganized public, more inclusive than mere residents, has acquired. Then a residency restriction cannot work to defeat the rights of non-residents in the beach. The development of the law has been in defining what will constitute a completed dedication. The results in Seaway, Gion, and Dietz indicate that a trend toward dissolving the traditional requirements of dedication is beginning. But put in perspective they are really exceptions to the general rules. Gewirtz seems to confirm this in that it looked to the traditional formulas and specifically ignored Seaway, Gion, and Dietz. In addition, the Gion/Dietz decision should be cautiously used as a precedent because of the unusually strong state legislative policy behind it. If Gewirtz is an indication of the future, bearing in mind that it is the only dedication precedent invalidating a municipally owned beach restriction against non-residents, its value lies in its attempt to work within the framework of the traditional dedication doctrine. Courts are more likely to follow this route than to abandon completely the past, or to confuse it almost beyond recognition.

III THE EQUAL PROTECTION CLAUSE

Agnello, "Non-Resident Restrictions in Municipally Owned Beaches: Approaches to the Problem," 10 Col. J. L. and Soc. Prob. 177, 184-91 (1974)*

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The Equal Protection Clause of the fourteenth amendment has undergone rapid and expansive development in the last forty years. From a weak and rarely-invoked tool of constitutional challenge against state action restricting the rights of individuals, the clause has become a major instrument for the vindication of personal rights.

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In the course of that development, a formal means of analysis has evolved by which asserted infringements of equal protection are judged. The analysis basically involves a two-tiered test of judicial inquiry; (1) does the challenged classification impair a fundamental right[1] of the disadvantaged class, or is the classification itself inherently "suspect";[2] (2) assuming that the first test is answered in the negative, is there a rational basis for the classification chosen by the state? In instances where a suspect classification or the infringement of a fundamental right has been found, a strict scrutiny has been applied requiring that the state demonstrate a compelling interest in the classification chosen. This has proven impossible in practice, with the consequence that all such applications have resulted in the invalidation of the classification. Where the rational basis test is applied, on the other hand, very few instances of invalidation have occurred.

The Burger Court has shown a general reluctance to expand the scope of strict scrutiny as established by the Warren Court and labelled as "new" equal protection. Although the Burger Court has specifically added alienage to the list of suspect categories this has been the only exception to a general denial of further expansion of scope. This is sharply contrasted with the area of "economic and social welfare" where states still retain broad discretion to classify so long as they have a reasonable basis for doing so. Despite the Court's refusal to advance the new equal protection outside of the neatly defined boundaries established by the Warren Court, it has not failed to maintain the use of strict scrutiny in those areas already established as suspect or fundamental. The emerging trend is that the new equal protection of strict scrutiny will not be cut back, nor will it make any significant advances.

On the other hand, the Court has not automatically applied the rational basis test of the old equal protection merely because certain classifications are not subject to strict scrutiny. By holding the line on suspect classifications and fundamental interests the Court has struggled with eliminating the two-tier system of judicial review. Professor Gunther has attributed this even newer approach to equal protection as a product of both a general discontent with the two-tiered approach and a willingness to intervene and invalidate state classifications without using strict

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[1][These include voting, criminal procedure rights, interstate travel, marriage and procreation, and, to some extent, education.]

[2][These include race, nationality, and political allegience.]

scrutiny.[3] Justice Powell recognized the prior approach and tried to blur the distinction by creating a new line of inquiry that would be universally applicable. In Weber v. Aetna Casualty & Surety Co. he said:

> The essential inquiry in all the foregoing cases is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental rights might the classification endanger?[4]

The results of these two inquiries are then weighed against each other. As a result the Court has not hesitated to intervene even without the use of strict scrutiny. But the cases are entirely unclear as to the exact scope and direction indicated by such a universal test. Not totally abandoning the use of the new equal protection while giving the language of the old equal protection some meaningful impact, the Court may be groping for a new standard.

Residency restrictions have been given strict scrutiny by the Supreme Court but in each instance some other right was involved. Residency requirements for welfare benefits were deemed invalid in Shapiro v. Thompson[5] under a test of strict scrutiny but only because they interfered with the fundamental right to uninhibited interstate travel. From this it is possible to argue that residency restrictions of any kind will interfere with interstate travel. Residency restrictions in municipal beaches will prevent many from exercising that right when they would otherwise do so. Likewise, residency restrictions in voting requirements have also received strict scrutiny when their effect was an absolute denial of the franchise. But nowhere were residency restrictions strictly scrutinized independently of fundamental rights. Nor have there been any fundamental interests, other than interstate travel, even remotely related to public rights to the ocean and its beaches. The problem with making an argument that residency restrictions are an inherently suspect classification, or that public rights in the ocean are fundamental ones, is that equal protection is such a formal doctrine. The case of a restricted municipally owned beach really does not fit into the traditional mold and there are no precedents on point. As a result it is nedessary to build a whole new line of equal protection and convince a court, that seems to have already drawn the line, of its validity. In discussing economic exclusionary zoning, Professor

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[3] Gunther, "Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 Harv. L. Rev. 1, 17-20 (1972).

[4] [406 U.S. 164, 173 (1972)].

[5] 394 U.S. 618 (1969).

Sager noted that exclusive neighborhoods, unlike racial ghettos, do not stir the national concern.[6] Perhaps the same problems confront restricted municipal beaches and will make the proposition all the more difficult to sell.

The question of invalidating these restrictions must fall to the second tier of equal protection analysis if a persuasive case for demanding strict scrutiny cannot be found. The test is whether or not it is arbitrary or unreasonable. Because municipalities are legally the agents of the state their ordinances are as restricted by the Constitution as state statutes are. As such they are subject to the fourteenth amendment as a state action. Although the federal courts will be bound by a state court's decision that the ordinance is within the scope of power conferred on the municipality they are free to decide whether it still violates the Constitution. However, this second tier of equal protection carries a strong presumption of constitutionality. This is no less so when a municipal ordinance is involved which classifies according to residency. The United States Supreme Court has reviewed the constitutionality of municipal ordinances on many occasions and each time the municipality has been afforded the presumption that any reasonable set of facts which will sustain the classification will be found. As a result municipal ordinances are rarely invalidated as violative of equal protection . The closest that the Supreme Court has come to the area of residency restrictions is to find that the strong presumption of constitutionality still applies even when the ordinance has discriminatory effects against non-residents in practice. In order to attach a violation of equal protection to these municipal beach ordinances it must be persuasively argued that the residency classification does not bear a reasonable relationship to their purpose. Four possible justifications for such an ordinance are suggested.

The first justification could be that non-residents impose a greater financial burden on the municipality because they do not, as do residents, have to pay taxes from which the maintenance, as well as the purchase, costs must be paid. At first glance it would seem reasonable to exclude non-residents on this basis but it has been observed that such reasoning backfires in many instances where the municipality has received state or federal aid to improve or maintain the beach. Without such aid it is hard to see how the permissive attitude of the courts will not find this to be a reasonable basis for the classification.

A second possible justification is that the beaches will physically deteriorate and become unattractive from overcrowding if opened to all the people, and if anyone has to be excluded it

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[6]Sager, "Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent," 21 Stan. L. Rev. 767, 791 (1969).

is only reasonable that it be non-residents. Although this may be rational enough to sustain the validity of the ordinance, the conclusion that residents should be the ones not excluded is not totally logical. Outside of physical proximity and taxes there seems to be no logical basis for giving residents preference in the matter. The idea of physical proximity is more dubious than the fact of paying taxes and serves no purpose when a non-resident is willing to travel, sometimes great distances, to use the ocean. In addition, there have been no statistics presented to show that opening the beaches to non-residents will, in fact, cause the overcrowding predicted.

A third justification could be that there is a lack of parking facilities to accomodate the great influx of non-residents. Although such a justification will largely depend on individual circumstances, it can at least be said that such a problem can be met by various means, one of which is to increase entrance fees to pay for either new or existing facilities. On the other hand, such a justification assumes that the municipality must provide such facilities, a question beyond the scope of this article.

A final possible justification is that non-residents should be excluded so as to keep out generally bad influences and obnoxious behavior. Such a concern involves the problem of drugs, hippies and habits of littering alleged to be the products of the inner cities. The expression of this justification goes to the heart of the problem of urban and suburban tensions and responsibilities. Of course such a justification assumes a higher degree of civility on the part of residents and such generalizations are without factual basis.

Given any one of these justifications for the residency restrictions, or the combined effect of all of them, it would not be unlikely that the federal courts will find that the residency restriction is reasonably related to the problem it is designed to solve. State courts, on the other hand, offer more promise for invalidating such restrictions on equal protection grounds because they are not concerned with interfering with state rights and the problem of federalism that concerns the federal courts. Although it is the universal rule in state courts that municipal ordinances carry the same presumption of constitutionality as found in the federal courts, several states have expressly found residency classifications to be arbitrary and invalid.

In New Jersey, the courts have long recognized that "such distinctions between inhabitants of our state, based upon no other ground than the place of actual residence, are a restraint of trade, invidious, unjust and illegal." In Brindley v. Borough of Lavallette these words were specifically applied to invalidate an ordinance which restricted a municipally owned beach to resident use. Thus, by way of the equal protection clause New Jersey

forbids a municipality from restricting the use of its beach to residents of the municipality. The court said, "[D]iscrimination against non-residents in an ordinance invalidates it, excepting possible special circumstances which would justify the discrimination." A municipal beach is not one of those special circumstances. Because of the nature of the Brindley case it is a vastly significant development and precedent for courts of other jurisdictions to analyse and follow....

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These same justifications for a municipally restrictive policy are also considered and rejected as unreasonable in Note, "Public Access to Beaches: Common Law Doctrines and Constitutional Challenges," 48 N.Y.Y. L. Rev. 369, 391-93 (1973). A similar conclusion on the unreasonable nature (and thus unconstitutionality) of differential beach fees for nonresidents is made in Note, "Access to Municipal Beaches: The formulation of a Comprehensive Legal Approach," 7 Suf. U. L. Rev. 936, 969-71 (1973).

BIBLIOGRAPHY

PART I. JUDICIAL MATERIAL

A. Federal Decisions

Barclay v. Howell's Lessee, 31 U.S. 498 (1832)

The case involves a dispute over whether a strip of land adjacent to the Monongahela River in Pittsburgh had been dedicated to public use.

The court noted that the critical factor was whether the public had a right to use the land, no actual use by the public being necessary in cases of express dedication. Further, if the property is dedicated to the public for a particular purpose, and the city uses it for an entirely different purpose, the court may compel the original use to be restored. However, in any event, the use remains in the city--it does not in such circumstances revert to the original owner.

Where the property has been used by the public for a number of years with the knowledge of the owners and the owners did not contest that use, a dedication of a use easement to the public may be implied.

Borax Consolidated, Ltd. v. City of Los Angeles, 296 U.S. 10 (1935)

This case establishes, as the common law rule, the mean high tide line as the landward boundary of the wet-sand area. This line is to be established by examining the average height of all high water at that place over a considerable period of time. This period was set at 18.6 years, a figure representing the length of an astronomical cycle affecting tides.

Noting that the wet-sand area is generally subject to the sovereignty of the State, the Court concludes that determination of rights and interests in the wet-sand area is a matter of local (state) law.

Hughes v. Washington, 389 U.S. 290 (1967)

In reversing Hughes v. State, the court holds that where a littoral owner traces her title to a federal grant prior to statehood, federal, not state, law controls the issue of setting the seaward boundary of private property ownership.

The federal law applied is that the upland owner acquires a right to any natural and gradual accretion formed along the shore. The Borax decision is held to be controlling on choosing the mean high tide line for the exact boundary.

Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892)

This case involves determination of title to certain land on the Chicago lakefront which had been reclaimed from Lake Michigan and the title to certain submerged land on the lake bed claimed by the private railroad company.

The Court held the English common law doctrine of the public trust to be applicable in the United States. The Court held that lands covered by tide waters belong to the states. The state holds this title in trust for the people of the state, so that they may enjoy navigation, commerce, and fishing therein without obstruction or interference from private parties. Any attempted disposition of this title by the state which might substantially impair this public interest in the lands and waters is, if not void on its face, subject to revocation at any time. A state cannot discharge its trust to the public by relinquishing control of these lands, except in those limited cases where disposition of some state interest promotes the public's interests as enumerated above.

Martin vs. Waddell, 41 U.S. 367 (1842)

The principal matter in dispute here was the right to oyster harvesting in the "mud-flats," rivers, and bays of New Jersey.

It is stated by the Court that the ownership of all lands covered by the ebb and flow of navigable waters (which

Martin vs. Waddel (Cont.)

includes wet-sand areas and river and sea beds) was originally held by the King as jus publicum and this ownership vested in the several states upon the Revolution. As this land was held in the public trust for common use, all grants of such land are to be strictly construed. That is, it will not be presumed that any part of the public domain passes to private ownership unless "clear and especial words" are used to denote such an intention.

The Court holds that those lands covered by navigable waters granted by the Crown to the proprietors were intended to be, in their hands, "a trust for the common use of the new community about to be established" and were not the private property of the proprietors, subject to sale for their private gain.

Pollard's Lessee v. Hagan, 44 U.S. 212 (1845)

In this decision, the Court held that when new states are admitted to the Union, the title to the wet-sands therein becomes vested in the state.

Shively v. Bowlby, 152 U.S. 1, (1894)

At English common law, title to all land below the high tide mark (unless a private party had obtained rights in it by express grant, prescription, or usage), remained in the Crown as jus publicum. Upon the Revolution, these rights vested in the several states. Thereafter, as the United States obtained additional territories, the ownership of the wet-sand area remained in the United States in trust for the public until states were formed in those territories.

Each state can reserve control over the wet-sands or grant rights therein to private parties, whichever it considers to be in the best interests of the public.

B. State Court Decisions

Adams v. Elliott, 128 Fla. 79, 174 So. 731 (1937)

In this case, an upland owner who had constructed a pier over the wet-sand area was held liable when plaintiff's automobile struck an unlighted piling supporting that pier. The court held that the upland owner may use the wet-sand area, but he can only do so in a manner which does not obstruct reasonable public use (as here, use of the wet-sand as a highway, as authorized by statute).

Allen v. Allen, 19 R.I. 114, 32 A. 166 (1895)

Here the Rhode Island Supreme Court holds that the public has a right to take shellfish from the wet-sand area as a part of the public right of fishery, even where the wet-sand area is owned by a private party.

Arnold's Inn, Inc. v. Morgan, 63 Misc.2d 279, 310 N.Y.S.2d 541 (Sup. Ct. 1970)

This case involves an upland owner who filled in wet-sand area adjoining his upland property. An adjacent upland owner's claim of money damages was denied, but the town, which was the owner of the wet-sand area, was granted an injunction directing the defendant to remove the fill. The upland owner's claim that he had acquired a prescriptive right in the wet-sand by virtue of his fill was denied.

Barnes v. Midland R.R. Co., 193 N.Y. 378 (1903)

This early New York case examines the nature and extent of riparian rights of upland and dry-sand owners.

Bloom v. State Water Resources Comm'n, 157 Conn. 528, 254 A.2d 884 (1969).

This case recognizes the high tide line as the boundary between public and private ownership in Connecticut.

Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 294 A.2d 47 (1972)

In this opinion, the court voided an oceanfront municipality's ordinance that charged non-residents higher fees than its residents for use of its dry-sand beach area. The decision was based on the public trust doctrine.

The court stated that the doctrine required dry-sand areas owned by a municipality and dedicated to public use be open to non-residents on a non-discriminatory basis. The public trust doctrine was also held to protect recreational uses such as bathing and swimming, as well as traditionally protected public rights of navigation and fishery.

Brindley v. Borough of Lavallette, 33 N.J. Super. 344, 110 A.2d 157 (L. Div. 1954)

This decision voids a local ordinance which sought to exclude non-residents from the use of a municipally owned dry-sand area. The court declares that special circumstances must be shown to justify such discrimination and where, as here, none are shown, the ordinance must fall. The locality was allowed, however, to regulate the use of the area and charge fees for admittance.

Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 177 S.E.2d 513 (1970)

This case holds that the title to the ocean wet-sand area of North Carolina is vested in the State and is reserved for

Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach (Cont.)

the use of the public. The landward boundary line of this public ownership is the mean high tide, not the extreme high tide (vegetation line).

The court further holds that when the sea gradually covers a litttoral landowner's property, title to that land covered by the flow of the tides becomes vested in the public; public construction of a sea wall on that property is not a taking of private property, as the property has passed into public hands as a result of the encroachment of the waters.

City of Daytona Beach v. Tona-Rama, Inc., ___ Fla. ___, 294 So.2d 73 (1974)

In this case, the owner of a dry-sand area in Daytona Beach sought to build an observation tower on his property. The right to construct the tower was challenged on the basis that the public had acquired an exclusive prescriptive right to the use of this property. The trial court supported this contention and the District Court of Appeal affirmed and ordered the tower (which had been constructed during the trial and appeal) removed. The Supreme Court overruled these holdings.

The court held that while it was possible for the public to acquire a use easement in the dry-sand area, the requisites for finding a prescriptive easement were not met in this case. This was held to be so on the grounds that the public's use was not inconsistent with the rights of the owner, thus the use was not adverse and was deemed to be by the owner's permission.

The court noted that the public had acquired customary rights in the dry-sand area and therefore could not be prevented from continuing to use the property for recreational purposes. However, the tower was allowed to remain as it was seen to be consistent with such general recreational use taking up only a small amount of the space previously used for sun-bathing and recreation.

City of Hermosa Beach v. Superior Court, 231 Cal. App.2d 295, 41 Cal. Rptr. 796 (1964)

This decision upholds the standing of a private citizen (who was a resident of the city and a taxpayer) to enjoin the City's placement of fences on and construction of a road over a dry-sand area which had been dedicated to the City as a "public pleasure ground." The deed conveying the property to the city had contained a restriction against vehicular traffic on the land.

City of Long Beach v. Mansell, 3 Cal.3d 462, 476 P.2d 423 (1970)

This case involves a determination of ownership of the wet-sand area and the effect a dynamic mean high tide line has on that title.

Here, where private development had been allowed and encouraged by the City over a 60-70 year period, in an area where it was unclear whether the land was in public or private hands, the City was held to be estopped from claiming public title through a California Constitutional provision which prohibited alienation of wet-sand areas located within two miles of incorporated localities.

City of Manhattan Beach v. Cortelyou, 10 Cal.2d 653, 76 P.2d 483 (1938)

In this case the municipality contended that an extensive dry-sand area had been dedicated to public use, either by express dedication or through a dedication which could be implied by the acts of the owner.

The court held there had been no express dedication based on the filed subdivision plat as the city contended as the owner's intention to dedicate must be clearly and unequivocally manifested. Here the map was ambiguous on the point, so there was no express dedication. On the second point, the court noted that while the developer's representations to perspective buyers about the free use of the beaches might create private prescriptive use easements in those persons, it created no use rights for the city or the general public.

County of Hawaii v. Sotomura, 517 P.2d 57 (Hawaii 1973)

In this decision the Hawaii court ruled that the boundary between public and private ownership is the vegetation line (rather than the "debris line" used by the trial court). Therefore, both wet-sand and dry-sand areas are owned by the public in Hawaii.

The court also held that where this line gradually changed as a result of erosion, the state obtains title to all land on the seaward side of the vegetation line.

Coxe v. State, 144 N.Y. 396 (1895)

This decision holds that wet-sands in New York are subject to the public trust and can only be alienated if such action serves a "public purpose."

Dincans v. Keeran, 192 S.W. 603 (Tex. Ct. Civ. App. 1917)

The Texas Court of Appeals declares that the public has a coequal (with the upland owner) right to use the wet-sand area for hunting, camping,and fishing. The owner cannot enjoin reasonable use for such purposes by the public.

Elmer v. Rodgers, 106 N.H. 512, 214 A.2d 750 (1965)

In this case the general public was allowed to acquire a prescriptive easement of access over privately owned upland to reach a lake shore beach.

F. A. Hihn v. City of Santa Cruz, 170 Cal. 436, 150 P. 62 (1915)

This case deals with the claim of a municipality to ownership of the dry-sand area through the doctrine of adverse possession. The city based this claim on the construction of

F. A. Hihn v. City of Santa Cruz (Cont.)

a road and small park on part of the land and widespread public recreational use of the remainder.

The court held that the city had acquired at least a use easement by adverse possession for those publicly improved portions of the land (the road and park). However, they refused to find city ownership of a prescriptive right in the open dry-sand area, saying it had been used by the public generally, as opposed to sole use by city inhabitants. As use by a particularized group is required for prescription, the claim of the city failed. Although the dedication issue was not raised by the litigants, the court expressed the opinion that public use of open land would ordinarily be attributed to the permission of the owner, rather than to a claim of right on the part of the public. Therefore the court refused to imply in fact a dedication of the land to public use.

Gewirtz v. City of Long Beach, 69 Misc.2d 763, 330 N.Y.S.2d 495 (Sup. Ct. 1972), aff.d. mem., 358 N.Y.S.2d 957 (App. Div. 1974)

This decision voids a 1970 ordinance of the City of Long Beach which attempted to restrict the use of a municipally owned dry-sand area to residents ot the city and their invited guests.

The court held that the land, when acquired by the city in 1936, had been dedicated to public use for a recreational beach. For three decades, non-residents had legally used the dry-sand area. Thus it was held that having placed the area in a public trust for all persons, the city could not later divert its use to an exclusive park limited to city residents and their guests.

Gion v. City of Santa Cruz, Dietz. v. King, 2 Cal.3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970) (En Banc)

In this case the California court held that the public, through use, had acquired a recreational easement in privately owned dry-sand and upland areas. The two cases involved dry-sand beach areas, upland parking areas, and an unimproved access road.

The court held that where the general public has used land without significant objection or interference from the owner for more than five years, an inference will be made that the owner intended to dedicate this land to public use. Previously this principle had been applied only to land for roads. However, the court noted that beach areas are now as easily definable and distinct as roads historically have been, and that there are strong public policy considerations favoring public use of shoreline recreation areas.

Further, the court rejected the previously adopted presumption that public use of unenclosed land was by permission of the owner. It held that an owner must affirmatively prove he granted the public permission to use the land or made bona fide attempts to prevent public use in order to negate a finding of an intent to dedicate to public use.

Graham v. Walker, 78 Conn. 130, 61 A. 98 (1905)

Here the Connecticut Supreme Court refuses to recognize the English doctrine of custom, saying the reasons for its adoption in feudal England have no relevance in a state established in modern times.

Hughes v. State, 67 Was.2d 799, 410 P.2d 20 (1966), rev'd sub nom., Hughes v. Washington, 389 U.S. 290 (1967)

This Washington Supreme Court decision deals with the question of determining the dividing line between privately owned uplands and state owned "tidelands."

The Washington Constitution set this boundary at the "line of ordinary high tide." The court interpreted this to

Hughes v. State (Cont.)

mean the vegetation line, thus placing the wet-sand and dry-sand areas in public ownership. It further held that this line was fixed at statehood, therefore all accretions since that date belong to the state.

[Eds. note: See Hughes v. Washington for reversal.]

In re Ashford, 50 Hawaii 314, 440 P.2d 76 (1968)

This decision holds that a pre-statehood grant of shoreline property ran only to the vegetation line, leaving the dry-sand and wet-sand areas in public ownership.

This holding is based on the tradition, custom and usage of old Hawaii, which construed such a grant as was made here to carry title only to the "upper reaches of the wash of the waves." This was deemed by the court to be the vegetation or debris line, a line some 30 feet above the mean high water line at this point on the coast.

Johnson v. May, 189 App. Div. 196, 178 N.Y.S. 742 (1919)

In this case the plaintiff was not allowed to set up an umbrella and make recreational use of the wet-sand area immediately adjacent to the defendant's dry-sand commercial beach.

King v. Oahu Ry. & Land Co., 11 Haw. 717 (1899)

The Hawaii court applied the public trust doctrine to all land below the high water mark in this decision. Alienation of such land is prohibited except when done to promote the interests of the public therein or results in no substantial impairment to the public interest.

Marks v. Whitney, 6 Cal.3d 251, 491 P.2d 374 (1971)

The plaintiff in this quiet title action held a potent title to the wet-sand area abutting the defendant's upland property.

The court held that the plaintiff's wet-sand ownership is subject to a reserved public trust easement. While saying it was unnecessary to precisely define all the public uses which encumber the wet-sand area, the court said the doctrine was flexible as to the public uses encompassed and that these uses have been held to include at least public rights of navigation, commerce, and fishing, with some courts including hunting, bathing, swimming, boating, general recreation, and ecological preservation. Therefore, the plaintiff was not allowed to fill and develop the wet-sand area or in any other way diminish or infringe the jus publicum therein.

McCarthy v. City of Manhattan Beach, 41 Cal.2d 879, 264 P.2d 932 (1953), cert. denied, 348 U.S. 817 (1954)

In this decision, the California court upheld a local zoning ordinance which restricted use of the plaintiff's dry-sand area to "beach recreation" with no permanent improvements being allowed.

Money v. Wood, 152 Miss. 17, 118 So. 357 (1928)

This case adopts the high tide line as the boundary between public and private ownership in Mississippi.

Nudd v. Hobbs, 17 N.H. 524 (1845)

This case upholds an easement of access (held by all residents of the town of Hampton)across an upland owner's property in order to reach the seashore. The public right of way was impliedly based on the doctrine of customary rights.

Nudd v. Hobbs (Cont.)

However, the court held that the public could not acquire a right to take sea-weed from the littoral owner's property by virtue of a customary right.

Oregon v. Fultz, 491 P.2d 1171 (1971)

The court holds that dry-sand areas in Oregon are subject to a public recreational use easement (under the State ex rel. Thornton v. Hay declaration of customary rights). Therefore the owner was not allowed to construct a road and revetment in this area without the prior approval of the state highway engineer.

People v. William Kent Estate, 242 Cal. App.2d 156 (1st Dist. Ct. App. 1966)

This California case dealing with tidal boundary setting held that seasonal changes in tide lines are not to be considered in setting boundaries. The case adopts the mean high tide line as the boundary between public and private ownership.

Perley v. Langley, 7 N.H. 233 (1834)

This is perhaps the earliest American case dealing with the concept of customary rights. The case recognizes this common law doctrine and distinguishes it from prescriptive easements. Customary rights are held by all members of a locality, while prescriptive rights must be claimed by an individual. Also, customary rights can only extend to an easement of use (as for passage or drying nets) while a prescriptive right must be asserted to justify the taking of the products of the soil (as here, hauling away sand).

Seaway Co. v. Attorney General, 375 S.W.2d 923 (Tex. Civ. App. 1964)

This case, brought by the Attorney General pursuant to the Texas Open Beaches Act, held that a privately owned dry-sand area was subject to a public use easement. The decision was based on the doctrines of dedication and prescriptive easements.

It was found that from the time of the grant of the dry-sands to private parties in 1840 until the time of this suit the public had continuously, without the permission of nor protest from the owners, used the dry-sand area as a public way and for fishing, swimming and camping. The court held this sufficient to show both a dedication to public use by the owner and the establishment of a public use easement by prescription. Under either theory, the owner was required to remove barriers constructed across the dry-sand and wet-sand areas.

Shepard's Point Land Co. v. Atlantic Hotel, 132 N.C. 336, 44 S.E. 39 (1903)

In this case the North Carolina Supreme Court adopted the public trust doctrine for the wet-sand area, saying the state held title to this area and holds it in trust for the use of the people.

Spiegle v. Borough of Beach Haven, 46 N.J. 479, 218 A.2d 129 cert. denied 385 U.S. 831 (1966)

This is a challenge to a local ordinance which prohibited any private building in the dry-sand area and greatly restricted what could be built in the immediately adjacent upland area (a "dune area"). There only access boardwalks, sand fences, small unenclosed pavilions, and approved bulkheads could be built.

The court upheld the ordinance as a valid exercise of the police power against challenges that it constituted a

Spiegle v. Borough of Beach Haven (Cont.)

a taking of private property without compensation and that it was unreasonable for indefiniteness in standards and purpose.

Spiegle v. Borough of Beach Haven, 116 N.J. Super. 148, 281 A.2d 377 (1971)

In this second challenge of Beach Haven's dune ordinance, the plaintiff made a claim for compensation for deprivation of beneficial use of their dry-sand and immediately adjacent upland property.

The city's contention that the public had already acquired a prescriptive use easement in this property was rejected. The court said that with such unimproved beach property, occasional use by the public is presumed to be by permission of the owner if there has been no deprivation of any beneficial use by the owner.

As for the taking issue, the city was ordered to compensate the plaintiff for those lots which reasonably could be deemed safe for construction of residential structures. For those lots closer to the ocean, where buildings would be unsafe and economically infeasible, the property was deemed suitable for "beach purposes" only and no compensation was required.

State v. Bauman, No. 28831 (Ct. App. Ore. Jan. 21, 1974, Ore. S. Ct. review denied April 1, 1974) [4 E.L.R. 20311]

In this case the state asserted a public recreational easement in an upland sand dune. The Oregon Court of Appeals refused to extend the Thornton v. Hay customary rights doctrine to land above the vegetation line. A contention of prescriptive easement was rejected on the ground of insufficient public user and the owner's restrictive and exclusionary activities precluded use of the implied dedication doctrine.

State ex rel. Thompson v. Parker, 132 Ark. 316, 200 S.W. 1014 (1918)

In a case involving public use rights around a navigable lake, the Arkansas court ruled that the public has a right to hunt and fish in the wet-sand area, noting that the state holds title up to the "high-water mark" and holds this area in trust for such use.

State ex rel. Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969)

This decision holds that the owner of a dry-sand area could not place fences or other improvements thereon to prevent public use of that dry-sand area.

While noting that the case could be rested on a theory of prescriptive easements, the court refused to do so. Rather, the decision is based on the English doctrine of custom in order to give the decision broader geographical applicability. The court held that the customany use of the dry-sand area by Oregonians met the six requisites of the doctrine: ancient use (used so long that "the memory of man runneth not to the contrary"); without interruption; peacable and free from dispute; reasonable; certain; and obligatory.

Trustees of Brookhaven v. Smith, 188 N.Y. 74 (1907)

This case examines the scope of riparian rights an upland or dry-sand owner has in the wet-sand area.

Tucci v. Salzhauer, 69 Misc.2d 226, 329 N.Y.S.2d 825 (Sup. Ct. 1972), aff'd mem., 33 N.Y.2d 854, 352 N.Y.S.2d 198 (1973)

The court held that where a person holds a pedestrian easement of access over another's upland and dry-sand areas,

Tucci v. Salzhauer (Cont.)

for purposes of reaching the water, the right-of-way may be cleared of vegetation and other obstacles by the easement holder so as to make it safe for passage. However, the land may not be altered any more than is reasonably necessary for that purpose.

As to the extent of public use rights in the wet-sand area under the public trust doctrine, the court held it could only be used for access to the water and not for recreational purposes.

Van Ruymbeke v. Patapsco Indus. Park, 261 Md. 470, 276 A.2d 61 (1971).

This case recognizes the high tide line as the boundary between public and private ownership in Maryland.

White v. Hughes, 139 Fla. 54, 190 So. 446 (1939)

This case involves conflicting public uses of the publicly owned wet-sand area. Here the plaintif bather was injured when struck by defendant's automobile.

The court held that bathing and recreation were the primary uses of Florida's wet-sand areas, all of which is owned by the state and held in trust for the people. This use was held to be superior to the use of the area for a public highway, with bathers having the "right of way" to use the area for swimming, access to the water, rest and recreation.

C. English Decisions

Blundell v. Catterall, 106 Eng. Rep. 1191, 5 B. & Ald. 268 (1821)

This early English case concluded that the public has no use rights in privately owned wet-sand areas.

Brinckman v. Matley, 2 Chancery Div. 313 (1904)

Here the court held that the public could use the wet-sand area to fish or launch a boat, but the public holds no right to use the area for recreational purposes.

Llandudno Urban Dist. Council v. Woods, 2 Chancery Div. 705 (1899)

This case held that the public could not use the wet-sand area for holding public meetings as a matter or right. The court suggested, however, that the owner of the area should permissively allow such use.

II. BOOKS, TREATISES, AND GOVERNMENTAL REPORTS

Angel, J. A Treatise on the Right of Property in Tide-waters (2d ed. 1847).

Bailey, G. & P. Thayer. California's Disappearing Coast: A Legislative Challenge (1971).

Bode, R. & W. Farthing. Coastal Area Management in North Carolina: Problems and Alternatives (North Carolina Institute of Civic Education, 1974).

Bradley, E. and J. Armstrong. A Description and Analysis of Coastal and Shoreline Management Programs in the United States, (Univ. of Mich. Tech. Rep. No. 20, 1972).

Buckland, W. A Textbook of Roman Law from Augustus to Justinian (2d ed. 1932).

Dewsnup, R. Public Access Rights in Waters and Shorelands (National Water Commission, Legal Study 8-B, 1971).

Ditton. The Social and Economic Significance of Recreation Activities in the Marine Environment (Univ. of Mich. Sea Grant Program, Tech. Rep. No. 11, 1972).

Ditton. Water Based Recreation: Access, Water Quality, and Incompatible Use Considerations -- An Interdisciplinary Bibliography (Council of Planning Librarians, Exchange Bibliography No. 193, 1970)

Ducsik, D. Shoreline for the Public: A Handbook of Social, Economic, and Legal Considerations Regarding Public Recreational Use of the Nation's Coastal Shoreline (1974) [257 pp]

Ducsik (Cont.)

In this book Ducsik examines the growing demand for coastal recreation and the diminishing supply of suitable public recreation areas. A brief summary is made of the common law doctrines and statutory proposals for establishing public rights in wet-sand and dry-sand areas. Concepts surveyed include prescriptive easement, customary rights, implied dedication, the public trust doctrine, and the statutory approach of the National Open Beaches Bill. He then examines the issues of purchase of use and access rights and the acquisition and protection of these rights through police power regulations.

Ellickson. Materials on Problems of Governing the Coastal Zone (Unpublished, Univ. of S. Calif. Law Center, 1971).

Gould, J. A Treatise on the Law of Waters (1900).

Interim Beach Study Committee. Footprints on the Sands of Time: An Evaluation of the Texas Seashore, 60th Texas Legislature (1970). [74 pp]

Loveland, R. Hall's Essay on the Rights of the Crown and Privileges of the Subject in the Sea Shore of the Realm (1875).

Moore, S. A History of the Foreshore and the Law Relating Thereto (3d ed. 1888).

National Water Commission. Water Policies for the Future (1973).

New England Marine Resources Information Program, Univ. of Rhode Island. Outdoor Recreational Uses of Coastal Areas (No. 1, 1969)

Outdoor Recreation Resources Review Commission. Outdoor Recreation for America (1962).

Owens, D. Public Rights in Shoreline Recreation Areas: A Selectively Annotated Bibliography (Council of Planning Librarians, No. 894, 1975).

Shalowitz, A. Shore and Sea Boundaries (Coast and Geodetic Survey Pub. No. 10-1, (1962).

This two-volume work is a comprehensive technical document which thoroughly covers the methodology of measuring the tidal lines that establish the boundaries between wet-sand and dry-sand areas.

The George Washington University. Shoreline Recreation Resources of the United States: Report to the Outdoor Recreation Resources Review Commission (1962).

U.S. Dept. of the Interior, National Park Service. Our Vanishing Shoreline (1955).

PART III. LEGAL PERIODICALS

Agnello, "Non-resident Restrictions in Municipally Owned Beaches: Approaches to the Problem," 10 Colum. J.L. & Soc. Prob. 177 (1974). [51 pp]

This article considers the problem of establishing use rights to municipally owned beaches by nonresidents of that municipality and examines potential legal doctrines that may be used to resolve this problem.

The first question considered is whether municipalities have the power to restrict use of their shoreline recreation facilities, a question largely resolved by individual state enabling legislation.

Where such a power can be found, the author suggests several legal theories that may be used to invalidate non-resident restrictions. The first possibility is an equal protection argument. Assuming the "strict scrutiny" test is unlikely to be applied, the author presents the case for holding that residency classifications for beach use do not bear a rational relationship to permissible governmental purposes and cites the Brindley decision as adopting this reasoning. Secondly, the public trust doctrine is considered. While the scope of the doctrine varies from state to state, and is given only limited application in several, it is thought that the doctrine may develop into a major protective device in this area. Other doctrines considered include easements of necessity, dedication to public use, and customary rights. The choice of doctrine is seen to be largely dependent upon the circumstances of the particular use and the law of the jurisdiction in question.

Armstrong, "Gion v. City of Santa Cruz--Now You Own It, Now You Don't (or the case of the reluctant philantropist)" 45 L.A. Bar Bulletin 529 (1970). [8 pp]

This analysis of the California case establishing public use rights in upland and dry-sand areas examines the case law on dedication and prescription in California prior to the doctrine and the impact of the decision on that law.

Armstrong (Cont.)

The author notes that as the owner's intent to dedicate is ficticious and implied by the courts, "prescriptive dedication" may well be a taking of private property for public use without compensation. He concludes that if the state wishes to pursue a policy of preventing exclusive use of beach areas, the public should pay for what it takes.

Ausness, "Land Use Controls in Coastal Areas," 9 Cal. W. L. Rev. 391 (1973). [38 pp]

Berger, "Gion v. City of Santa Cruz: A License to Steal?" 49 Cal. St. B. J. 24 (1974). 8 pp

This article examines the impact of the Gion case (finding a public recreational easement in dry-sand and upland areas) in California trial courts in the first four years following announcement of the decision.

The author contends that rather than balancing public and private equities, the trial courts are applying the Gion doctrine in a rigorous manner which effectively takes private property for public use without compensation. He recommends a comprehensive legislative program for the acquisition of shoreline recreation areas which would compensate littoral property owners when their land is so used, but expresses serious doubt that such a program will be forthcoming.

Berger, "Nice Guys Finish Last--At Least They Lose Their Property: Gion v. City of Santa Cruz," 8 Cal. West. L. Rev. 75 (1971). [27 pp]

This analysis of the California implied dedication case (Gion Dietz) is written from the perspective of owners of upland and dry-sand areas.

Berger (Cont.)

The author contends that private property was confiscated on the strength of a presumption of an intent to dedicate which clearly did not exist. While lauding the concept of opening beach use and access to the public, the author contends the judiciary should not attempt to accomplish this result through a policy which not only denies just compensation, but in fact denies any compensation to the littoral landowner. In noting further that the effect of the decision will in all likelihood be a reduction in the amount of dry-sand area freely open to the public, the author concludes that the decision was "ill-conceived, ill-advised, and ill-considered."

Berlin, Roisman, and Kessler, "Law in Action: The Trust Doctrine," in Law and the Environment 166 (M. Baldwin and J. Page eds. 1970).

Black, "Constitutionality of the Eckhardt Open Beaches Bill," 74 Colum. L. Rev. 439 (1974) [9 pp]

This article examines the constitutionality of H.R. 10394 (93d Cong., 1st Sess., 1973). The bill declares a national interest in the maintenance of a "free and unrestricted right" of the public to use the beaches of the United States insofar as is consistent with the rights of littoral owners, makes obstruction of this right unlawful, and allows the United States to bring suits in the federal courts to enforce this public right.

The author concludes this approach is constitutional as there is a valid constitutionally-based national interest in the subject, and public suits to uphold these public rights are justifiable. Further, the establishment of a rebuttable presumption of public access and use rights is thought to be reasonable in that a party seeking to exclude the public should have the burden of production and the burden of persuasion in showing that no such public rights exist.

Burka, "Shoreline Erosion: Implications for Public Rights and Private Ownership," 1 Coastal Zone Management J. 175 (1974). [21 pp]

This article examines the effects of shoreline accretion and erosion on public use and access rights in the wet-sand and dry-sand areas.

The author notes that where the shoreline changes, as with erosion, public rights established by prescription, dedication, or custom may be lost, as water will cover the area previously subject to public rights and the new dry-sand area (which was previously upland) will not have been used by the public sufficiently to have created public use rights there. He suggests courts class public rights in dry-sand areas as "shifting and rolling easements," following the line of mean high tide wherever it goes. He also recommends that private upland owners not be allowed to combat erosion in any manner which contributes to the deterioration of dry-sand areas in which the public has use rights.

Caldwell, "Rights of Ownership or Rights of Use?--The Need for a New Conceptual Basis for Land Use Policy," 15 Wm. & Mary L. Rev. 759 (1974). [17 pp]

Cohen, "The Constitution, The Public Trust Doctrine, and the Environment," 1970 Utah L. Rev. 388. [7 pp]

This article states a case for use of the public trust doctrine for protection of substantive environmental values. It is argued that the doctrine should be the basis for establishing the government as the guardian of all nonrenewable natural resources, expanding the scope from traditional protection of wet-land areas. The author contends these environmental rights should be given constitutional protection as unenumerated rights under the Ninth Amendment, thereby giving private litigants an effective tool for use in the fight against pollution.

Comment, "Access to Public Lands Across Intervening Private Lands," 8 Land & Water L. Rev. 149 (1973). [25 pp]

This article examines the statutory and common law methods through which the public can obtain access over privately owned lands for the purpose of reaching public lands. The methods examined include the Unlawful Enclosure of Public Lands Act, easements of necessity, customary rights, prescriptive easements, and implied dedication.

The author concludes that these concepts provide no general right to cross private land to reach public areas.

Comment, "Acquisition of Easements by the Public Through Use," 16 S. Dak. L. Rev. 150 (1971).[16 pp]

This article examines and distinguishes three methods of acquiring public use rights in privately owned lands: implied dedication, prescription, and custom.

The author distinguishes implied dedication and prescription primarily on the quantum of public use and degree of the owner's cognizance of that use. To get implied dedication, there must be public use of such a degree that a reasonable man would believe the owner intended to give this land to the public. He concludes that implied dedication has widespread judicial acceptance, but that courts vary as to the evidence required to show an intent to dedicate. There is seen to be some judicial hostility towards prescription and doubt is expressed as to whether custom will be adopted by courts outside of Oregon and New Hampshire.

Comment, "California Beach Access: The Mexican Law and the Public Trust," 2 Ecology L.Q. 571 (1972). [41 pp]

This note examines public use and access rights in California's wet-sand and dry-sand areas.

The author notes the growing demand for shoreline recreation areas and contends that judicial doctrines being used to establish and protect public rights (such as that of

Comment, "California..." (Cont.)

implied dedication adopted by the California court in Gion) are subject to legislative emasculation. Therefore, the author suggests that public use rights be based upon Mexican law, which recognized a seashore common. He contends these public rights survived cession of California to the United States by Mexico, and have been protected by the California Constitution and the public trust doctrine to the present time.

Comment, "Coastal Controls in California: Wave of the Future?" 11 Harv. J. Legis. 463 (1974). [46 pp]

Comment, "Coastal Land Use Development: A Proposal for Cumulative Area-Wide Zoning," 49 N.C.L. Rev. 866 (1971). [23 pp]

Comment, "Coastline Crisis," 2 Pacific L. J. 226 (1971). [19 pp]

Comment, "Easements: Judicial and Legislative Protection of the Public's Rights in Florida's Beaches," 25 U. Fla. L. Rev. 586 (1973). [11 pp]

This article evaluates four methods of establishing public use rights in Florida's dry-sand areas: prescription; implied dedication; custom; and legislative action.

The use of prescription is criticized on two grounds. First, proving twenty years of adverse use by the public presents many factual difficulties and secondly, the doctrine can only be applied on a case-by-case basis. With implied

Comment, "Easements..." (Cont.)

dedication, the period of public use is reduced to five years, but the case-by-case difficulty remains, as does an additional problem--the probability of littoral property owners fencing off their land in order to remove any implication of an intent to dedicate to public use. Therefore, custom, which does not share these faults, is seen as the preferable judicial approach.

However, the author contends the most satisfactory approach is a legislative redefinition of property rights (as distinguished from ownership) through a statute declaring the dry-sands to be impressed with an easement for public recreational use. A short model statute to accomplish this is offered.

Comment, "Fluctuating Shorelines and Tidal Boundaries: An Unresolved Problem," 6 San Diego L. Rev. 447 (1969). [23 pp]

This comment examines the problems involved in establishing the boundaries which divide the publicly owned wet-sands and the privately owned dry-sands. It covers the various technical tidal lines, the legal problems caused by the seasonal variations in the points at which they strike the shore, and the rights of the state and upland owners in the wet-sand area.

Comment, "Hawaiian Beach Access: A Customary Right," 26 Hastings L. J. 823 (1975). [25 pp]

This article examines the issue of assuring public access over intervening privately owned uplands to publicly owned dry-sand and wet-sand areas.

The author recommends use of the doctrine of customary rights to establish these ways of access. Where alternative means of access are available, the concept of public abandonment of the right of access can be used to protect the interests of upland owners. These two doctrines can be used in conjunction to balance public and private interests.

Comment, "Implied Dedication: A Threat to the Owners of California's Shoreline," 11 Santa Clara Law 327 (1971). [16 pp]

This comment on the California case establishing public use rights in dry-sand and upland areas (Gion-Dietz) criticizes the court's reasoning and suggests methods through which littoral landowners can protect their private property rights.

On the implied dedication concept as applied to beach areas, the author contends the court unjustifiably substituted the public's intent to use the area as a public beach for the owner's requisite intent to dedicate his land to public use. He suggests that an intent to dedicate should not be presumed absent some affirmative donative act by the owner or his knowing acceptance of substantial public improvement.

The author suggests several ways in which the littoral landowner can prevent an implied dedication. He can simply prohibit any public use of the property or take steps to assure public use is by permission rather than by dedication. The latter could be accomplished by posting signs to that effect or by leasing the property to the city or state for a nominal sum until the owner has some exclusive use for the property.

Comment, "Land Use Regulation for Protection of Public Parks and Recreational Areas," 45 Texas L. Rev. 96 (1966). [36 pp]

Comment, "Public or Private Ownership of Beaches: An Alternative to Implied Dedication," 18 U.C.L.A. L. Rev. 794 (1971). [26 pp]

The author examines the California implied dedication cases (Gion - Dietz) and discusses several deficiencies relating to adoption of this concept as a device for establishing public use rights in the dry-sand area: first, it relies heavily on a fictitious gift by the owner; secondly, there is

Comment, "Public..." (Cont.)

no positive test provided to guide landowners who wish to maintain the private character of their dry-sand areas; thirdly, as it is applied in on ad hoc basis with no overall planning or management, it is an inefficient and inequitable way to allocate beaches to the public; and finally, the landowner factually faces a severe evidentiary disadvantage in implied dedication proceedings.

Even if some of these points could be resolved, the author contends public recreational needs would be better served through the use of a legislative declaration of a public recreational easement in the dry-sand area. The proposed easement could be designed to satisfy public needs (by, for example, prohibiting either construction on the dry-sand area or any measures undertaken to exclude the public) with minimum interference with the fee owner(for example, limiting the easement to daylight hours or seasonal use).

Comment, "Public Recreation on Nonnavigable Lakes and the Doctrine of Reasonable Use," 55 Iowa L. Rev. 1064 (1970). [9 pp]

Comment, "Saving the Seashore: Management Planning for the Coastal Zone," 25 Hast. L. J. 191 (1973). [21 pp]

Comment, "The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine," 79 Yale L. J. 762 (1970). [28 pp]

This analysis of the public trust doctrine as it relates to the wet-sand area begins by tracing the doctrine's historical development through the Roman doctrine of common public ownership, the retreat to near private ownership in

Comment, "The Public..." (Cont.)

feudal times, and the reassertion of public rights in the period following Magna Carta. The article also catalogues the several competing public interests which may be asserted in this area--navigation, ports, free passage, commerce, fishery, collection of sand, gravel, shellfish, and seaweed, bathing, conservation, and aesthetics--and examines the common law basis of each.

It is contended that the current situation of the law of the wet-sand area is unsatisfactory, as the protection afforded the public interest by the trust doctrine has lagged behind an exploding demand/supply ratio. The article concludes that either through trusteeship of a wider range of use and access rights (an expanded easement theory) or a trusteeship "in the public interest"(a renewed common ownership theory), the state should become an active trustee, with the courts further protecting the public's interests through enforcement of cost-benefit balancing.

Comment, "The Tideland Trust: Economic Currents in a Traditional Legal Doctrine," 21 U.C.L.A. L. Rev. 826 (1974).[66 pp]

Comment, "Water Recreation--Public Use of 'Private' Waters," 52 Calif. L. Rev. 171 (1964). [14 pp]

Comment, "Waters and Watercourses--Right of Public Passage Along Great Lakes Beaches," 31 Mich. L. Rev. 1134 (1933). [14 pp]

This article examines the extent of public use rights in the wet-sand areas of oceans, inland lakes, and the Great Lakes.

Comment, "Waters..." (Cont.)

The author concedes that 19th Century English cases allowed no public rights of passage in the wet-sands, restricting public rights to fishing and navigation. He contends, however, that American courts have long upheld rights of passage, even where ownership of the wet-sands is in private hands.

Corker, "Where Does the Beach Begin and to What Extent Is This a Federal Question," 42 Wash. L. Rev. 33 (1966). [86 pp]

This article analyzes the Washington Supreme Court decision in the Hughes case and the United States Supreme Court decision in the Borax case on two points--establishment of the tideland/upland boundary and the fixed or movable character of this line. The author then goes on to examine whether federal or state law is to control these issues.

On the first issue, the Hughes case constructed the Washington Constitution's boundary of "the line of ordinary high tide" to mean the vegetation line, thereby including both the wet-sand and dry-sand areas in the state owned "tidelands." While the Borax line of mean high tide can be more universally applied, the author finds the vegetation line rule superior on logical, practical and historical grounds.

The Hughes decision also held that this line became fixed on statehood (1889) and that all accretions belonged to the state. While accretion ownership was not an issue in Borax it is clear that the federal rule establishes a moving boundary to be established by the current mean high tide line (except when movement has been caused by sudden avulsions). The author contends both policy and case authority support the latter proposition.

On the choice of law issue, it is concluded that federal law should incorporate state courts' selections of the "tidelands" boundaries, and certainly accept their resolution of the accretion issue.

The author concludes that the final decision as to where this boundary is to be drawn should be a legislative determination, based on broad policy considerations which the judiciary is ill-equipped to handle.

[Eds. note: After this article was printed, the United States Supreme Court overruled the Washington Hughes case.]

Courdert, "Riparian Rights: A Perversion of Stave Decisis," 9 Colum. L. Rev. 217 (1909). [21 pp]

Curtin, "Requiring Dedication of Land by Developers," 1974 Planning, Zoning, and Eminent Dom. Inst. 57. [26 pp]

David, "The New York Law of the Foreshore at the Beginning of the 18th Century," 11 Cornell L. Q. 209 (1926). [4 pp]

This note presents historical evidence to show that title to the wet-sand area was prima facie in the Crown in colonial New York. It is further asserted that a grant of the uplands to a private party did not carry the appurtent wet-sand area with it, and, in fact, the latter was occasionally transferred to an entirely different party.

Degnan, "Public Rights in Ocean Beaches: A Theory of Prescription," 24 Syracuse L. Rev. 935 (1973). [32 pp]

This article examines the validity of establishing a public recreational easement in the dry-sand area of ocean beaches. The Oregon court's use of the custom doctrine is examined, but the focus is on use rights obtained by prescription rather than the establishment of general public rights.

It is concluded that public prescription of a limited recreational easement in appropriate dry-sand areas is proper for the following reasons: it is necessary for the enjoyment of the publicly held wet-sand and sea water areas; the dry-sand area is a limited and readily demarcable zone, unlike open fields and woods; the public's use of this area has often been of a general, long-standing nature and made in non-recognition of the rights of upland owners; and, the easement proposed to be granted would be of a limited (to recreational

Degnan (Cont.)

use) and relative (not fixed for all time against all uses which might be asserted by the upland owner) nature. Such an approach suffers the disadvantage of having to be pursued on a case-by-case basis, but it is seen to have the advantages of being flexible, more readily accepted by the judiciary, and clearly supportable by existing case law.

Douglas, "Coastal Zone Management--A New Approach in California," 1 Coastal Zone Management J. 1 (1973). [25 pp]

Eckhardt, "A Rational Policy on Public Use of Beaches," 24 Syracuse L. Rev. 967 (1973). [21 pp]

In this article, Congressman Eckhardt (D-Texas) expounds upon the need for a national approach to the resolution of issues relating to the extent of public use rights in the dry-sand area. The purposes of such federal legislation include clarifying the clouded common law on this subject and facilitating the establishment of free public use rights in the dry-sand area on a national basis.

The Congressman's Public Access to Beaches Bill (H.R. 4932, 93d Cong., 1st Sess.) is therefore designed to assert the full Constitutional power held by Congress to guarantee to the public a free and unrestricted right to use the dry-sand area as a common, to the full extent such rights may be extended consistent with the property rights of littoral landowners. Key sections of the bill are reprinted with this article.

Eckhardt, "The Texas Open Beaches Act," in The Beaches: Public Rights and Private Use, Texas Law Institute of Coastal and Marine Resources, Conference Proceedings (Jan., 1972). [10 pp]

This article on the Texas Open Beaches Act (originally enacted in 1959) by its principal author sets out the basic

Eckhardt (Cont.)

provisions of the statute. It explains why these provisions are included and what they are intended to accomplish. Finally, the article offers the author's opinions as to how several key technical provisions should be interpreted by attorneys and the courts.

Forer, "Preservation of America's Park Lands: The Inadequacy of Present Law," 41 N.Y.U. L. Rev. 1093 (1966). [31 pp]

Fraser, "Title to Soil Under Public Waters--A Question of Fact," 2 Minn. L. Rev. 313 (1918). [26 pp]

Gallagher, Jure, and Agnew, "Implied Dedication: The Imaginary Waves of Gion Dietz," 5 Southwestern U.L. Rev. 48 (1973). [35 pp]

This article on the California case establishing public recreational use rights in dry-sand and upland areas examines the prior case law on dedication to public use in California, analyzes the decision in light of this history, and examines several legislative enactments and proposals designed to deal with the Gion situation.

The authors contend that much of the criticism of the case is based on a mistaken conclusion that it held mere public use for the prescribed period would establish a dedication. They contend that, to the contrary, the court requires the public use to be adverse--that is, the government must necessarily show that members of the general public made use of the property in the belief that the public had a right to such use.

They further note that criticism of the case on the grounds that the court implied a clearly nonexistent intent

Gallagher (Cont.)

to dedicate to public use on the part of the owner is equally unfounded. Such a criticism would be valid were this an implied in fact dedication, but Gion involves an implied in law dedication and thus the actual intent of the owner is irrelevant. In this latter case, the law as a matter of policy,will find the necessary intent where there is shown to be widespread and long-standing continuous use by the general public with belief that they had a right to so use the property.

Gay, "High Water Mark: Boundary Between Public and Private Lands," 18 U. Fla. L. Rev. 553 (1966). [24 pp]

This article examines the technical complexities involved in defining the "high water mark" (which is the boundary between the publicly owned wet-sands and the generally privately owned dry-sands) and how this boundary may be described. It then examines the legal impacts these lines have and how they affect the property rights of both the state and upland owners.

Glenn, "The Coastal Area Management Act in the Courts: A Preliminary Analysis," 53 N.C. L. Rev. 303 (1974). [41 pp]

Heyman & Gilhool, "The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions," 73 Yale L. J. 1119 (1964). [39 pp]

Jacobson, "Expropriation by Forced Dedication: The Problem of Uncompensated Public Takings of Private Lands," 6 J. Beverly Hills B.A. 10 (Jan.-Feb. 1972).

Janney, "Recreational Beaches: The Right to a Scarce Resource," 3 Md. L. Forum 121 (1973). [14 pp]

This article examines the East Coast barrier island system and explores governmental attempts to balance conflicting interests of public use, private ownership, and environmental quality as they relate to the beach area. Ocean City, Maryland, is used as a case study.

While programs of acquisition and land use regulation are considered, the author contends that judicial resolution of the conflicting rights is currently the best means of establishing public use rights in the dry-sand area. The common law doctrines of dedication to public use, customary rights, prescription, and the public trust are examined, with the case law relating to each doctrine being summarized. The author recommends use of a merged doctrine of prescription and implied dedication to guarantee public access to and use of the dry-sand area in Maryland.

Johnson, "Riparian and Public Rights to Lakes and Streams," 35 Wash. L. Rev. 580 (1960). [37 pp]

Johnson & Austin, "Recreational Rights and Titles to Beds on Western Lakes and Streams," 7 Natural Resources J. 1 (1967). [52 pp]

Johnston, "Constitutionality of Subdivision Control Exactions: The Quest for a Rationale," 52 Cornell L. Q. 871 (1967). [54 pp]

Knibb, "National Recreation Areas: Evolving Legislative Answer to Land Use Conflicts," 6 Lincoln L. Rev. 1 (1970). [21 pp]

Leighty, "The Source and Scope of Public and Private Rights in Navigable Waters, 5 Land & Water L. Rev. 391 (1970). [50 pp]

Levin, "Environmental Quality and Public Land Acquisition," 1971 Zoning and Eminent Domain Inst. 155. [32 pp]

Lewis, "Capsule History and the Present Status of the Tidelands Controversy," 3 Nat. Resources Law 620 (1970). [17 pp]

MacDonald, "Shoreland Zoning in Maine," 1 Coastal Zone Management J. 109 (1973). [6 pp]

McKnight, "Title to Land in the Coastal Zone," 47 Calif. St. B. J. 408 (1972). [31 pp]

This article examines the complexities involved in determining title to land (considering both ownership and use rights) in submerged land, wet-sand, dry-sand, estuarine, and adjacent upland areas. Issues considered include: the differing sources of title; upland owners' rights in wet-sand areas, waters, and submerged lands; uncertain physical boundary lines; impact of public trust use restrictions; public rights of navigation and fishing; and public rights in upland and dry-sand areas created by public use and implied dedication.

McLennan, "Public Patrimony: An Appraisal of Legislation and Common Law Protecting Recreational Values in Oregon's State-Owned Lands and Waters," 4 Envir. Law 317 (1974). [65 pp]

This article discusses issues relating to legal aspects of public recreational use of Oregon waters, submerged

McLennan (Cont.)

beds of water bodies, wet-sand areas, dry-sand areas, and appurtenant uplands.

As to the wet-sand area, the history of legislative activity leading up to the 1965 designation of the wet-sands as a state recreation area is discussed, with the conclusion made that this area is well protected in Oregon through state ownership of most of the wet-sands, with counties owning most of the remainder.

In relation to the dry-sand area, the factual and legislative background of the Oregon Supreme Court's 1969 finding of a customary public right to recreational beach use is presented, as is an analysis of the decision and its impacts.

In concluding, the author notes two major conflicts which must be faced in dealing with recreational use of shoreline areas--that between competing recreational uses and the continuing need to strike a balance between private property rights and public use rights.

Maloney & Ausness," The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping," 53 N.C. L. Rev. 185 (1974). [89 pp]

This article examines the techniques for establishing tidelines, the rights held by public and private parties in the wet-sand area, and the effect of the shifting nature of the tidelines upon these rights. A statute is proposed which: defines the "mean high water line" and declares it to be the boundary between private and public ownership; specifies the techniques by which this line is to be measured; and establishes a mapping program to effectuate the setting of these boundaries.

Mandelker & Sherry, "The National Coastal Zone Management Act of 1972," 7 Urban L. Annual 119 (1974). [19 pp]

Nelson, "State Disposition of Submerged Lands Versus Public Rights in Navigable Waters," 3 Nat. Resources Law 491 (1970). [21 pp]

Newman, "The State's View of Public Rights to the Beaches," in The Beaches: Public Rights and Private Use, Texas Law Institute of Coastal and Marine Resources, Conference Proceedings (Jan., 1972) [7 pp]

This presentation recounts the efforts of the Texas Attorney General's Office in representing the public's interest in the enforcement of the protections the Texas Open Beaches Act provides in the wet-sand and dry-sand areas.

The author notes that marshalling the proof required to show the establishment of public rights in these areas is a costly and time consuming project, often requiring ancient documents, numerous witnesses, and substantial investigation.

"Non-resident Beach Fees: Do the Beaches Belong to the People," 13 The Municipal Attorney 236 (1972). [2 pp]

This brief news article covers the New Jersey use of Borough of Neptune City v. Borough of Avon-by-the Sea, which struck a local ordinance requiring higher beach admission fees to be paid by non-residents of the locality. The ruling was based on a finding that the area in question was subject to a public trust.

[Ed. note: This article was reprinted from the New York Times.]

Note, "Access to Public Municipal Beaches: The Formulation of a Comprehensive Legal Approach," 7 Suffolk U. L. Rev. 936 (1973). [37 pp]

The focus of this note is the elimination of public beach access and use restrictions imposed upon nonresidents by shore front municipalities. To this end, the doctrines of public trust, dedication to public use, and equal protection are examined.

The public trust doctrine, while having firm historical and case law support, is seen as having two basic limitations--

Note, "Access... (Cont.)

its protection may extend only to in-state residents and it has traditionally been applied to the wet-sand area only. The doctrine of "irreversible dedication" is not limited to intra-state citizens and can be applied to the dry-sand area, but the author contends the requisite factual elements need to show a littoral owner's intent to dedicate to public use make this also an inadequate tool for assuring equal access and use rights by nonresidents.

Therefore, the author recommends, in addition to use of the above tools, reliance on the equal protection doctrine, contending that any practice of a municipality which tends to limit nonresident access and use of municipal beaches is violative of the Equal Protection Clause of the Fourteenth Amendment.

Note, "An Ordinance Providing a Residency Differentiated Fee Schedule for Use of a Municipal Beach is Invalid as a Violation of the Public Trust Doctrine," 42 U.Cin. L. Rev. 554 (1973). [10 pp]

This casenote on the New Jersey court's voiding of a local ordinance requiring non-residents to pay a higher beach user fee than residents of the town (Borough of Neptune City v. Borough of Avon-By-The-Sea) criticizes the scope of that decision.

The author contends the court was unwise and unjustified in either logic or precedent when it applied the public trust doctrine to a dry-sand area, as opposed to its traditional use in wet-sand areas. While noting that a "parkland" public trust theory (which requires a previous dedication of the land to a public use and a threat to that use by governmental action) might be applicable, he contends the "tidelands" public trust is ill-suited to solve the problems raised by this case.

Note, "Californians Need Beaches--Maybe Yours!" 7 San Diego L. Rev. 605 (1970). [22 pp]

This article examines judicial and legislative possibilities for establishing public use rights in the dry-sand area.

The focus of the article is the California decision (Gion-Dietz) which implied an intent to dedicate to public use on the part of the owner when the public had openly used the beach area for the prescribed time. The doctrine of custom, used to open dry-sand areas in Oregon (Thornton v. Hay), is also examined and is seen to have several advantages over the implied dedication concept: it is quicker; broader in geographic scope; and, perhaps more equitable. Legislative solutions raised include purchase of use rights (and the financing thereof) and use of the police power to regulate free public access below the vegetation line.

Note, "California's Tideland Trust: Shoring It Up," 22 Hast. L. J. 759 (1971). [23 pp]

This article explores potential use of the public trust doctrine to protect broad public interests in the wet-sand area.

After examining the development and scope of the doctrine in California, the author contends its protection should be extended beyond the judicially recognized public interests in commerce, fishery, and navigation to include protection of environmental quality.

[Eds. note: The California Supreme Court's decision of Marks v. Whitney was announced after publication of this note.]

Note, "Coastal Wetlands in New England," 52 Boston U. L. Rev. 724 (1972). [39 pp]

This study of wetland protection in New England covers the issues of wet-sand ownership, land use regulation in marsh areas, and the impact of the taking issue on that regulation.

Note, "Coastal Wetlands..." (Cont.)

On the ownership issue, the author notes that the state owns the wet-sand area in Connecticut and Rhode Island. In Massachusetts and Maine, the wet-sands were granted to private parties (subject to limitation of being no more than 100 rods from the mean high tide line) as a result of action by the Massachusetts Colonial Legislature to stimulate commerce. The situation in New Hampshire is thought to be uncertain.

Note, "Coastal Zone Management--The Tidelands: Legislative Apathy vs. Judicial Concern," 8 San Diego L. Rev. 695 (1971). [39 pp]

Note, "Common Law Doctrine of Implied Dedication and Its Effect on the California Coastline Property Owner: Gion v. City of Santa Cruz," 4 Loyola U. L.A. L. Rev. 438 (1971). [11 pp]

This case note on the California implied dedication case examines the factual setting in which the case was brought, the basis of the court's decision, and its impact on both the littoral owner and the availability of beach areas open to the public.

The author notes several questions unanswered by the court--such as the exact nature of public use required and the extent of activity by the owner necessary to rebutt the presumption of an intent to dedicate--and concludes that the decision needs to be "clarified, defined, and limited" in future litigation.

Note, "Conveyances of Sovereign Lands Under Public Trust Doctrine: When Are They in the Public Interest?," 24 U. Fla. L. Rev. 285 (1972). [23 pp]

This note examines the nature of public interests in both the wet-sand area and the beds of navigable waters.

Note, "Conveyences..." (Cont.)

The Florida Constitution includes a section providing that these lands are to be held by the state in a public trust, with sale or private use authorized only when in "the public interest." Therefore, the author notes, even when a conveyance of these lands is made, the state retains an interest in the property which can be used to prevent the grantee from using the land in a manner detrimental to the public interest.

The remainder of the article is largely devoted to a discussion of how the Florida courts, executive and administrative agencies have interpreted and given meaning to this "public interest" limitation.

Note, "Does Public User Give Rise to a Prescriptive Easement or Is It Merely Evidence of Dedication," 6 Texas L. Rev. 365 (1928). [12 pp]

Note, "Easements of Necessity to Reach Public Lands," 13 Wy. L. J. 51 (1958). [6 pp]

Note, "English Doctrine of Custom in Oregon Property Law: State ex rel. Thornton v. Hay," 4 Envir. Law 383 (1974). [35 pp]

This note explores use of the doctrine of custom in establishing public use rights in the dry-sand area. After examining the factual background of the case which applied this doctrine to Oregon beaches in 1969, there follows a discussion of the concept's definition, distinguishing characteristics, and elements. As to the latter, the public's use must have the following characteristics: (1) date from antiquity; (2) be continuous; (3) be peaceable and free from dispute; (4) be reasonable; (5) be obligatory; (6) show certainty of use,

Note, "English..." (Cont.)

persons making the use, and locality of use; and (7) be consistent with other laws.

The author concludes that a preferable course of action would be a judicial declaration that the dry-sand area is impressed with a public trust, pointing out two distinctions between this doctrine and that of custom. First, with public trust the premise is that the public has always held the interest, rather than acquiring it through long-standing customary use, thereby removing the requirement to prove each of the above listed elements. Secondly, its application requires no prior human activity to determine its existence, as is the case with custom. For these reasons, it is contended that future expansion of public recreational rights in the dry-sand area should be rested on public trust rather than custom.

Note, "Environmental Law--Expanding the Definition of Public Trust Uses," 51 N.C. L. Rev. 316 (1972). [10 pp]

This note examines Marks v. Whitney, the California decision which held that the wet-sand areas of the state were impressed with a public trust easement and the scope of this servitude includes, in addition to traditional public rights of navigation, commerce, and fisheries, uses for ecological preservation and scientific study.

The author recommends, as a stop-gap measure pending comprehensive coastal zone management legislation, that the legislature, in its role of trustee for the public of the public trust easement, declare preservation of the wetlands to be the most beneficial use of these areas. Thereafter, inconsistent uses would be allowed only if they did not substantially impair this use. By exercising this reserved power as trustee, potential "takings" problems which might otherwise be raised by regulatory programs would be avoided.

Note, "Florida's Sovereignty Submerged Lands: What Are They, Who Owns Them and Where Is the Boundary?" 1 Fla. St. L. Rev. 596 (1973).[10 pp]

Note, "Implied Dedication in California: A Need for Legislative Reform," 7 Cal. West. L. Rev. 259 (1970). [13 pp]

This case note on the Gion decision briefly examines the law of dedication and concludes that the Court successfully wove together prior holdings to achieve the desired result. However, as the real issue is seen to be one of public policy, the author recommends legislative action on this issue in the form of an "Open Beaches Bill" patterned after the 1959 Texas legislation. Such legislative reform would be designed to obtain greater public access while diminishing involuntary dedication and the undesirable fencing off of dry-sand and upland areas which followed the Gion decision.

Note, "Land Use--Mandatory Dedication for Park and Recreational Facilities," 26 Ark. L. Rev. 415 (1972). [8 pp]

Note, "Maryland's Wetlands: The Legal Quagmire," 30 Maryland L. Rev. 240 (1970). [27 pp]

This analysis of the 1970 Maryland Wetlands Act examines the issues of the title to beds of navigable waters and wet-sand areas, riparian rights of abutting upland owners, the impact of the statute on both these two issues, and the public trust doctrine as developing in the Maryland courts.

Note, "Public Access to Beaches," 22 Stanford L. Rev. 564 (1970). [23 pp]

This note focuses on methods through which, without the necessity of purchase or condemnation, the public can obtain the use of the dry-sand area and access to the beaches across intervening privately owned uplands. The devices analyzed are subdivision exactions and easements founded on public use.

Note, "Public Access..." (Cont.)

To assure access across intervening privately owned uplands, the author recommends state statutory schemes which would require developers to dedicate beach access easements as a necessary condition to subdivision approval. Previous public use of the beach is not required. The major limitation of this device is seen to be its applicability only to those areas currently being developed, thereby precluding any program of planned priorities in the recreational development of beaches.

Two legal doctrines through which the public may acquire use easements in the dry-sand area based on past use are described and analyzed. The first, implied dedication, might be used in instances where the public has used the area for a set period of time, believing it had a right to do so, and the owner has not taken sufficient steps to restrict public use. In these circumstances, the California Court (in the Gion-Dietz case) was willing to imply an intent by the owner to dedicate future use of his land to the public. It is contended that use of this tool is justified only where there is a great public need for beach land coupled with an owner's inaction in the face of previous public use. The second legal device is that of customary rights. This doctrine affirms public use rights in those dry-sand areas which have been subject to uninterrupted public use since the dawn of the area's political history. This temporal public use requirement is much more rigorous than that used with the implied dedication doctrine. Though recently revived by the Oregon court, the customary rights concept is seen as correctly used only when applied to individual land owners (as opposed to a blanket declaration of public rights in an entire coastline), thereby further limiting its efficacy as a tool for establishing public use rights in the dry-sand area.

Note, "Public Access to Beaches: Common Law Doctrines and Constitutional Challenges," 48 N.Y.U. L. Rev. 369 (1973). [26 pp]

This note explores several legal devices available for obtaining public recreational use rights in the dry-sand area.

In instances where the beach is privately owned, the common law doctrine of implied dedication and customary rights are examined, with the author concluding that the implied dedication doctrine, as enunciated by the California court in the Gion and Dietz cases, seems to be the more promising tool for securing public use rights.

In relation to the issue of establishing the rights of non-local residents to use municipally owned beaches, the common law doctrones of dedication to public use, jus publicum, and the public trust are analyzed, as well as a potential constitutional basis for assuring equal use rights by non-residents--the equal protection doctrine. While all four devices are seen as useful in certain situations, the author lists several potential limitations upon the widespread applicability of these common law doctrines: the dedication to public use doctrine is very closely related to the particular factual setting; jus publicum may be limited to wet-sand areas or held inapplicable to privately owned beaches; and, public trust lands may be subject to sale or alienation by the state legislature, given an explicit legislative intention so to do.

Note, "Public Lands--The Public Trust Doctrine Includes a Right to Equality of Access to Municipal Beach Area," 4 Loy. U. Chi. L. J. 603 (1973). [9 pp]

This casenote covers the New Jersey decision which voided a local ordinance that charged higher fees to non-residents for use of the town's municipal beach (Borough of Neptune v. Borough of Avon-By-The-Sea).

The author praises this step by the New Jersey court (and other decisions by the Massachusetts and Wisconsin courts) toward an expanded, modern flexible public trust doctrine.

Note, "Public Ownership of Land Through Dedication," 75 Harv. L. Rev. 1406 (1962). [11 pp]

Note, "Real Property: Easements by Prescription in Oklahoma," 24 Okla. L. Rev. 266 (1971). [9 pp]

Note, "Reconciling Competing Public Claims on Land," 68 Colum. L. Rev. 155 (1968). [11 pp]

Note, "Regulation and Ownership of the Marshlands: The Georgia Marshlands Act," 5 Ga. L. Rev. 563 (1971). [21 pp]

Note, "State Citizen Rights Respecting Greatwater Resource Allocation: From Rome to New Jersey," 25 Rutgers L. Rev. 571 (1971). [140 pp]

This article explores the development and nature of public rights in the wet-sand area and the surface and beds of navigable and tidal waters.

The history of the public trust doctrine is related, beginning with its antecedents in Roman law and detailing its development and relationship to political and economic factors in feudal England. The author then covers its adoption and character in the United States in a series of 19th Century Supreme Court cases(Martin, Pollard, Illinois Central, and Shively). There follows an examination of how New Jersey courts have resolved questions of title to the lands in question, the extent of public rights in the resources, and use of the public trust as a device to prevent pollution.

The author recommends less judicial restraint in the protection of public trust rights. He contends these rights consist of a judicially cognizable interest in these resources held by individual citizens. In this respect, it is argued that the government has no proprietary rights (or power of alienation) in the resource, only the authority to protect, maintain, and improve them in the promotion of their natural and common use.

Note, "Techniques for Preserving Open Space," 75 Harvard L. Rev. 1622 (1962). [22 pp]

Note, "The Public Trust in Public Waterways," 7 Urban L. Annual 219 (1974). [28 pp]

Note, "Tideland Ownership--Time for Reform," 36 U. Cin. L. Rev. 121 (1967). [22 pp]

This note examines the issue of ownership of the wet-sand area. In addition, the question of defining the landward boundary of public ownership and the extent of rights in the wet-sand areas held by owners of adjacent upland areas are discussed. The author's study concludes that serious confusion exists in many states on these points.

The author recommends retained state ownership of ocean wet-sand areas for recreational purposes, but suggests that tidal marshes "unimportant for navigation, fishing, or recreation" be placed in private hands for future development. A proposed statute creating an administrative agency to implement this policy is set forth.

Note, "This Land Is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches," 44 So. Cal. L. Rev. 1092 (1971). [42 pp]

This note on the Gion-Dietz decision condemns the court's finding of a permanent public recreational use easement in privately owned dry-sand, upland, and upland access routes on an implied dedication basis. The implied dedication concept is seen to be a "peculiar doctrine" unnecessarily and unwisely expanded from its previously exclusive application to a roads context.

The author foresees serious problems relating to the court's failure to delineate who had tort and maintenance responsibility

Note, "This Land..." (Cont.)

for the dedicated area, the uncertain nature of the underlying fee owners' remaining rights, and the failure to indicate the extent of public maintenance and use required to give rise to an intent to dedicate on the one hand and the measures the littoral owners must take to exclude the public to prevent a dedication on the other. Also, retroactive application of the doctrine is thought to amount to an unconstitutional taking of private property without compensation. The use by landowners of the inverse condemnation concept is urged as a tool for acquiring compensation whenever an implied dedication action is brought.

The author recommends, as alternatives, governmentally owned beaches financed by reasonable user charges and privately owned beaches open to the public for a fee.

Note, "Water Law--Public Trust Doctrine Bars Discriminatory Fees to Non-Residents for Use of Municipal Beaches," 26 Rutgers L. Rev. 179 (1972). [10 pp]

This casenote examines the decision of Borough of Neptune City v. Borough of Avon-By-The-Sea and its implications for public rights of use and access to New Jersey shoreline recreation areas.

It is contended that the Avon decision, which prohibited Avon from using a differential fee schedule which charged nonresidents more than residents for passes required for use of a municipal beach, expanded the public trust doctrine in two respects. First, it added recreation and access to previously protected public rights of navigation and fishing. Second, it is applied to a dry-sand municipal beach, not just to the wet-sand area. The author notes that there are indications that the court would be willing to apply these concepts to privately owned dry-sand areas, thereby providing public use and access rights in all of the New Jersey shoreline.

Parsons, "Public and Private Rights in the Foreshore," 22 Colum. L. Rev. 706 (1922). [30 pp]

This article examines the development of the jus publicum concept in feudal England as the Crown asserted dominion over all "tide-flowed" land and discusses its implications for American law governing wet-sand areas.

The author makes these conclusions: American jurisprudence and socio-economic conditions are so different from pre-colonial England that the jus publicum/jus privatum distinction is no longer valid; that the state holds fee title to all wet-sand areas, subject to having granted title away; that upland owners have a recognizable, but not absolute, right to use the wet-sands; and, that the public has an absolute privilege of passage along the wet-sands, and the right to use it for fishing and bathing (but not in "wanton derogation" of the upland owner's rights).

Porro, "Invisible Boundary--Private and Sovereign Marshland Interests," 3 Nat. Resources Law. 512 (1970). [9 pp]

This article states the need for an intensified effort to define "tidelands" in order that demarkation between publicly owned "tideland" and privately owned upland may be made. In so doing, a review is made of English and American law on the subject and the various tide lines which may be used as the boundary.

"Public Rights and the Nation's Shoreline," 2 ELR 10184 (1972). [11 pp]

This comment summarizes the litigation on the beach access issue as of 1972. Doctrines discussed include implied dedication, prescriptive easements, the public trust doctrine, and customary rights. The author stresses the importance of marshalling forceful public policy arguments in these cases.

Ratliff, "Private Use and Public Rights," in The Beaches: Public Rights and Private Use, Texas Law Institute of Coastal and Marine Resources, Conference Proceedings (Jan., 1972) [10 pp]

This article presents the views of littoral land owners and upland developers on the Texas Open Beaches Act, a statute designed to aid in the establishment of public use rights in dry-sand and wet-sand areas.

The author contends the legislatively established presumption of a public right to use the dry-sand area is unconstitutional because there is not the requisite rational connection between the proven fact (a dry-sand beach) and the fact to be established by presumption (the existence of public use rights). Other problems identified include the effect of the Act on title insurance coverage and public misapprehension of the scope of the Act (which it is contended has led to, among other things, dune destruction by over-enthusiastic dune buggy drivers). The author suggests adoption of an established line a set distance from the low-water line to clearly demark areas of private ownership and public use.

"Real Property," 28 U. Miami L. Rev. 1, 17 (1973). [7 pp]

This note on the City of Daytona Beach v. Tona-Rama, Inc. in a Florida property law survey contends that courts may well in the future be willing to use the prescriptive easement co ept as a device for protecting public use and access rig in shoreline recreation areas.

[Eds. te: This comment is on the Court of Appeals decision w was subsequently overturned by the Florida Supreme Court.]

Reis, "Policy and Planning for Recreational Use of Inland Water," 40 Temple L. Q. 155 (1967). [38 pp]

Rice, "Estuarine Land of North Carolina: Legal Aspect of Ownership, Use and Control," 46 N.C. L. Rev. 779 (1968). [34 pp]

This article studies the historical treatment of ownership of wet-sand and estuarine areas in North Carolina. The author traces the development of the public/private division of ownership of such areas from the concepts of medieval England, through the colonial period and early state regulation, up to the present time, examining throughout legislative and judicial attitudes towards title and the incidents of ownership in these areas.

Riggs, "The Alienability of the State's Title to the Foreshore," 12 Colum. L. Rev. 395 (1912). [27 pp]

This article examines the nature of upland owners' rights in wet-sand areas and the question of what rights in the wet-sands the state can legitimately convey to private parties.

The author notes that some state courts allow no alienation of the wet-sands, while others do so but limit the private rights by saying the owner's interest remains subject to the jus publicum--a public right to use the land for fishing and navigation. The author contends that New York law allows the state to convey absolute title to the wet-sands to private parties, completely terminating the jus publicum.

Roberts, "The Luttes Case: Locating the Boundary of the Seashore," 12 Baylor L. Rev. 141 (1960). [34 pp]

The Texas case analyzed in this article established the seaward boundary of Mexican and Spanish land grants along the coast as the line of mean higher high tide, as opposed to the common law line of mean high tide established in the Borax case. This line is the average height of the tide at the higher of the two daily high tides.

Roberts (Cont.)

The author contends this was a wise and necessary decision. He dismisses as impractical the state's suggestions that this boundary line between public and private ownership should be set at either the average height of the one highest tide of the year or, alternatively, at a visible line set at the "wave beat shelf," a drift line, or the vegetation line.

Sax, "Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," 68 Mich. L. Rev. 473 (1970). [96 pp]

The article considers the public trust doctrine as a tool for citizen use in developing a comprehensive legal approach to resource management programs. In developing the conceptual basis for the doctrine, the Roman, English, and American antecedents of the modern public trust doctrine are examined. After studying the early state court decisions and the Supreme Court decision in Illinois Central Railroad Company v. Illinois, the article concludes that the doctrine, while not absolutely preventing the transfer of public trust property into private hands, sets a standard of considerable judicial skepticism toward any governmental conduct which restricts the public's use rights or subjects the public use to the interests of private parties.

Following an exhaustive review of judicial application of the public trust doctrine in Massachusetts, Wisconsin, and California, it is noted that the doctrine has traditionally only been applied to wet-sand areas and the waters of the sea, large lakes, and navigable rivers and streams. The author argues for a much broader scope of application--one which would include virtually all governmental regulatory activity in the natural resource field. The primary role of the judiciary here is seen to be one of democratization. This is thought to be necessary to prevent self-interested powerful minorities from unduly influencing the public resource decisions of legislative and administrative bodies to the detriment of a diffuse majority.

Schoenbaum, "Public Rights and Coastal Zone Management," 51 N.C. L. Rev. 1 (1972). [41]

This article sets out the scope of public rights in coastal areas and examines ways in which coastal zone legislation can be designed to accommodate and accentuate those rights. A model coastal management act is offered.

The author concludes that public ownership extends to all tidal and "navigable-in-fact" waters in North Carolina (including the wet-sand areas of these waters). In addition, public rights of a non-ownership nature are seen to be created by the public trust doctrine, though these rights have often been poorly enforced in the past.

Schoenbaum, "The Management of Land and Water Use in the Coastal Zone: A New Law Is Enacted in North Carolina," 53 N.C. L. Rev. 275 (1974). [28 pp]

Shavelson, "Gion v. City of Santa Cruz--Where Do We Go from Here?" 47 Cal. St. B. J. 415 (1972). [7 pp]

This brief article by the attorney who successfully argued the state's case in favor of implied dedication in the Gion case outlines the legislative response to the decision and speculates as to the decision's future in the courts.

He notes that the critical feature of the decision was its repudiation of the presumption that public use of open and uncultivated land was attributable to the permission of the landowner. He predicts that the California courts will be very cautious in extending the Gion decision (specifically that they will not adopt the custom doctrine as in Oregon) and recommends legislation to clear up the difficulties and confusion of Gion, but not to abrogate it.

Simonton, "Ways by Necessity," 25 Colum. L. Rev. 571 (1925). [32 pp]

Stone, "Public Rights in Water Uses and Private Rights in Land Adjacent to Water," 1 Waters and Water Rights 177 (R. Clark ed. 1967).

"Supreme Court of California, 1969-1970," 59 Calif. L. Rev. 30, 231 (1971). [11 pp]

This analysis of the California decisions (Gion - Dietz) which establish public use and access rights in dry-sand and upland areas points out several difficult problems which the decisions raise but do not resolve.

First, what actions by owners are necessary to override an application of a dedication? Secondly, how are the boundaries of the area of a public dedication to be set when the area of public use is, as is often the case, without precise definition? Third, the issue of discontinued public uses and the permanence of previously acquired public rights remains to be answered. Finally, as the public acquires a recreational use easement and the owner retains the underlying fee interest, who is responsible for maintenance and who bears liability for torts in connection with the property? While it is clear the public bears this burden where it has assumed a proprietary role (as in Gion), where government has not been involved (as in Dietz) this question seems entirely open.

Taylor, "The Seashore and the People," 10 Cornell L. Q. 303 (1925). [28 pp]

Teclaff & Teclaff, "Saving the Land-Water Edge from Recreation, for Recreation," 14 Ariz. L. Rev. 39 (1972). [26 pp]

This article examines the ecological impact of recreation on shoreline areas, the history of governmental attitudes toward public use of the shoreline, the legal constraints to public use, and potential solutions to the conflict between recreational use and environmental protection.

Tillinghast, "Tide-Flowed Lands and Riparian Rights in the United States," 18 Harv. L. Rev. 341 (1905). [23 pp]

This article examines the English common law on the status of public and private rights in and ownership of the wet-sand area, as well as the early American law on the subject. It is noted that in some states the upland owner had an exclusive right to wharf out over the wet-sand to the water, a right which could not be taken from the upland owner without compensation. In other states which were not established as colonies (New York was a royal province), this common law rule was not followed. There the state was thought to more fully own the wet-sands, and could thereby either grant them away at pleasure or completely restrict their use (even by the upland owner) without paying compensation.

Town & Yuen, "Public Access to Beaches in Hawaii: A Social Necessity," 10 Hawaii B.J. 5 (1973). [23]

This article examines seven potential doctrines which can be used to assure public access to Hawaii dry-sand areas: ancient Hawaiian custom and practice; customary rights; implied dedication; prescriptive easements; easements of necessity; implied reservation; and the public trust doctrine.

In Hawaii the dry-sand beach was held to be owned by the public in the decision of In Re Ashford, the decision being based on ancient Hawaiian tradition, custom, practice and usage. The focus of the article is on assuring access to this publicly owned resource. Each of the doctrines listed above is explained, with each theory being applied to Hawaiian access problems. The author concludes that selection of a particular doctrine is dependent upon the facts of the individual situation and suggests that, if possible, all seven concepts should be asserted.

Waite, "Public Rights to Use and Have Access to Navigable Waters," 1958 Wis. L. Rev. 335. [41 pp]

This article examines the nature and extent of public use rights on the surface of navigable lakes and streams in Wisconsin and the rights of the public to obtain access to those areas where public rights do exist.

On the latter point, the author concludes that there is no general public right of access across private land to reach waters in which the public has use rights. He suggests use of the power of local governments to open public roads and mandatory dedication provisions in subdivision regulations as potential solutions to the problem.

Waite, "The Dilemma of Water Recreation and a Suggested Solution," 1958 Wis. L. Rev. 542. [68 pp]

Wiel, "Natural Communism: Air, Water, Oil, Sea, and Seashore," 47 Harv. L. Rev. 425 (1934). [33 pp]

Yiannopoulos, "Public Use of the Banks of Navigable Rivers in Louisiana," 31 La. L.Rev. 563 (1971). [23 pp]

PART IV. NEWSPAPERS AND POPULAR PERIODICALS

Bunker, "America's Shoreline is Shrinking," Boston Herald Traveler, October 18, 1970, at 23.

Cummings, "Maine for Sale: Everybody's Buying," Portland Sunday Telegram, August 23, 1970.

Cummings, "The Late Great State of Maine," Portland Sunday Telegram, August 30, 1970.

Cummings, "Where Went the Maine Coast," Portland Sunday Telegram, August 16, 1970.

Darnton, "Suburbs Stiffening Beach Curbs," N.Y. Times, July 10, 1972, at 1, col. 1.

"Do the Beaches Belong to the People?" N.Y. Times, July 30, 1972, Section 4, at 6, col. 1.

Fradkin, "Fences Go Up to Keep Public from Beaches," L.A. Times, Mar. 21, 1971. Section C, at 1, col. 6.

Fradkin, "State Promises Aid in Enforcing Public Access to Beaches," L.A. Times, Feb. 25, 1970, Section A, at 3, col. 3.

"Suit Threatened on Connecticut Beach Restrictions," N.Y. Times, Oct. 1, 1972, Section 1, at 60, col. 2.

Toner, "Where Have All the Beaches Gone?" Miami Herald, April 22, 1973.

Webster, "Few Seaside Beaches Left Open in Developers' Rush," N.Y. Times, March 29, 1970, at 54.

Wolff, "We Shall Fight Them on the Beaches" Harpers Magazine, Aug., 1973.

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