Coastal Law Series

ACCESS TO WATERS AND UNDERWATER LANDS FOR AQUACULTURE IN NEW YORK

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April 1984

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Sea Grant Law Program, Jaeckle Center
for State and Local Government Law
Faculty of Law and Jurisprudence
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This report is based in part on prior reports and memoranda on various legal aspects of aquaculture development, prepared by the author; by Professor Robert I. Reis, Co-Project Director of the Sea Grant Law Program; or by Sea Grant Scholars connected with the Program, including Laurence D. Behr, Rosella Brevetti, Thomas Gick, Leonard M. Gulino, Suzanne J. Harrington, Jeremy L. Nowak, Melanie K. Pierson, Glenn Pincus, Cheryl Siragusa, Jeffrey L. Taylor, and Barbara L. Wagner.

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ACCESS TO WATERS AND UNDERWATER LANDS FOR AQUACULTURE IN NEW YORK

I. Introduction

This is a report on a study of legal aspects of problems of obtaining access for aquaculture to New York waters and underwater lands, with emphasis on Long Island Sound, the Atlantic Ocean off Long Island's south shore, and their various adjacent bays and estuaries.

A. Definition of "Aquaculture"; Scope of the Study

The term "aquaculture," in its broadest sense, is defined as "the growing of aquatic organisms under controlled conditions."[1] "The aquaculture activities which take place in brackish water or seawater are termed mariculture."[2] Depending on the context, aquaculture may be defined more narrowly on the basis of (1) the types or species of organisms cultivated -- including animals, plants or both; (2) "the degree to which environmental conditions associated with the culture

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1. Bardach, J.E., J.H. Ryther and W.O. McLarney, Aquaculture: The Farming and Husbandry of Freshwater and Marine Organisms 2 (New York: Wiley-Interscience, 1972) (cited hereafter as Bardach). The National Aquaculture Act of 1980 defines "aquaculture" as the "propagation and rearing of aquatic species in controlled or selected environments, including, but not limited to, ocean ranching (except private ocean ranching of Pacific salmon for profit in those States where such ranching is prohibited by law)." 16 USC § 2802(2) (1981). "Aquaculture," one of the activities subject to the land use regulations promulgated under the New York Tidal Wetlands Act (Environmental Conservation Law, art 25 [McKinney Supp 1982]) is defined in the regulations as "the cultivation and harvesting of products that naturally are produced in the marine environment, including fish, shellfish, crustaceans and seaweed, and the installation of cribs, racks and in-water structures for cultivating such products, but shall not mean the construction of any building, any filling or dredging or the construction of any water regulating structures." 6 NYCRR § 661.4 (1977). For definitions in the aquaculture laws of various other states see the discussion in Part V below of the types of aquaculture covered.

2. Clay, G.S., et al, Ocean Leasing for Hawaii II-1 (prepared for the Aquaculture Development Program, Department of Planning and Economic Development, State of Hawaii) (1981) (cited hereafter as Clay). Gerald Bowden issues a caveat in noting the general, "clearly sensible," distinction based on the difference between fresh water and sea water habitats: "[C]urrent usage tends to blur the distinction. The reader is cautioned, therefore, not to draw any saline inferences from seemingly interchangeable use of the words aquaculture and mariculture." Coastal Aquaculture Law and Policy 2 (Westview Press, Boulder, Colo, 1981) (cited hereafter as Bowden).

technique are artificially manipulated or controlled by man";3 or (3) the nature of the entity sponsoring the activity, whether private or public. We will use the term "aquaculture" here to denote activities in both fresh and salt water environments, unless otherwise indicated by the context.

On a global basis the organisms used in aquaculture fall into plant and animal categories. The animal varieties are divided into fish (finfish or vertebrates); mollusks (shellfish or bivalve culture, e.g., oysters, clams, mussels); and crustacea (e.g., shrimps, crabs, lobsters).4 Examples of subcategories of marine plants are seaweed and plankton.5

Selection of the principal locale of the study, the coasts and nearby waters of Long Island, has been dictated by nature. Extending in length 120 miles, the Island "is surrounded by a shoreline (including barrier islands) of approximately 1,475 miles, 46% of New York State's designated coastline."6 The commercial finfishing and shellfish industries of the Island have a long history. "Its many saltwater bays fed by small freshwater streams are highly favorable for shellfish farming."7 Long Island has become world famous for its oysters, and until recently its hard clam industry, centered in Great South Bay off

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3. Long Island Regional Planning Board, Assessment of Existing Mariculture Activities in the Long Island Coastal Zone and Potential for Future Growth 2 (1979) (cited hereafter as Long Island Mariculture Report).

4. Clay II-1 - II-2; O. W. Terry, Aquaculture 11-12 (New York Sea Grant Institute, MESA New York Bight Atlas Monograph 17, 1977) (cited hereafter as Terry). The "aquatic species" covered by the definition of "aquaculture" in the National Aquaculture Act of 1980 include "any species of finfish, mollusk, crustacean, or other aquatic invertebrate, amphibian, reptile, or aquatic plant." 16 USC § 2802(3) (1983). As used in New York's Fish and Wildlife Law (article 11 of the Environmental Conservation Law), "'fish' means all varieties of the super-class Pisces"; "'food fish' means all species of edible fish"; and "'shellfish' means oysters, scallops, and all kinds of clams and mussels." Environmental Conservation Law § 11-0103(1a, b), (9) (McKinney 1973). And see the definitions of "food fish" and "shellfish" in the regulations relating to the licensing of marine hatcheries (6 NYCRR § 48.1 [1981]).

5. Clay II-1; Terry 13.

6. United States Office of Coastal Zone Management, National Oceanic and Atmospheric Administration, Department of Commerce, and New York Department of State, Final Environmental Impact Statement and the New York Coastal Management Program II-2-1 (August 1982) (cited hereafter as New York Coastal Management Program).

7. L.E. Koppelman, P.K. Weyl, M. G. Gross, and D.S. Davies, The Urban Sea: Long Island Sound 123 (Praeger Publishers, New York, 1976) (cited hereafter as The Urban Sea). Between 1970 and 1980 Great South Bay production of hard clams was reduced by half (565,600 to 286,634 bushels—figures supplied by the New York Sea Grant Institute).

Long Island's south shore, "put New York first among states."[8]

The principal focus being on existing or potential aquaculture development in the Long Island area, this report is concerned primarily with varieties of edible finfish capable of cultivation in seawater or brackish waters, oysters, clams and, potentially, blue mussels and bay scallops[9] (to be referred to generally as shellfish); and seaweed.

The study has proceeded on the assumption that state policy generally favors private rather than public sectors cultivation and marketing of aquaculture products.[10] However, governmental support programs may include limited aquaculture or aquaculture-related activities. Thus, the Town of Islip has undertaken projects in Great South Bay to augment the natural supply of hard clams, including a transplant or spawner program in which clams are imported from colder areas, and the growing of hard clams in a sheltered environment to provide an additional stock of seed clams.[11] This report is not directly concerned with activities conducted by government agencies to enhance resources for recreational or commercial fishing uses.

B. The Need for Public Support

Two additional assumptions underlie this study and report: (1) nationally there is both a need and potential for development of aquaculture; and (2) the need cannot be fulfilled or the potential realized without government intervention and support.

The need and potential are expressed in the following Congressional findings stated in the National Aquaculture Act of 1980, enacted for the purposes of promoting aquaculture in the United States by "(1) declaring a national aquaculture policy; (2) establishing and implementing a national aquaculture development plan; and (3) encouraging aquaculture activities and programs in both the public and private sectors of the economy":

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8. Id.

9. Terry 19.

10. In the National Aquaculture Act of 1980 Congress declared that the "principal responsibility for the development of aquaculture in the United States must rest with the private sector." 16 USC § 2801(a)(6) (1983).

11. Statement by Stuart C. Buckner, Department of Environmental Control, Town of Islip, New York, Shellfish Management in the Town of Islip, in Report of Proceedings of the Symposium, Mariculture in New York State 15-17 (O.W. Terry and D.M. Chase, eds) (symposium held at Southampton, New York, October 22, 1977) (cited hereafter as Mariculture Symposium).

(1) The harvest of certain species of fish and shellfish exceeds levels of optimum sustainable yield, thereby making it more difficult to meet the increasing demand for aquatic food.

(2) To satisfy the domestic market for aquatic food, the United States imports more than 50 per centum of its fish and shellfish, but this dependence on imports adversely affects the national balance of payments and contributes to the uncertainty of supplies.

(3) Although aquaculture currently contributes approximately 10 per centum of world seafood production, less than 3 per centum of current United States seafood production results from aquaculture. Domestic aquacultural production, therefore, has the potential for significant growth.

(4) Aquacultural production of aquatic plants can provide sources of food, industrial materials, pharmaceuticals, and energy, and can assist in the control and abatement of pollution.[12]

Accordingly, Congress declared that it is "in the national interest, and it is the national policy, to encourage the development of aquaculture in the United States," to assist the "United States in meeting its future food needs and contributing to the solution of world resource problems."[13]

Similarly, the New York State Legislature, in authorizing the New York Sea Grant Institute "to undertake a study to prepare and develop a statewide aquaculture plan", found "that there is significant potential for growth in the aquacultural industry of New York; that this potential provides an opportunity for local economic development and expansion in the commercial cultivation of marine and fresh-water finfish, shellfish and plants for human consumption to provide another local food source for consumers."[14] This statement is consistent with the existing declaration in New York's State's Coastal Management Program,[15] and in the Department of State regulations implementing the Waterfront

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12. 16 USC § 2801(a),(b) (1983).

13. 16 USC § 2801(c) (1983).

14. 1983 NY Laws ch 104, § 1.

15. New York Coastal Management Program II-6-51 and -52.

Revitalization and Coastal Resources Law, of a state policy to "[f]urther develop commercial finfish, shellfish and crustacean resources in the coastal area by encouraging the construction of new, or improvement of existing on-shore commercial fishing facilities, increasing marketing of the State's seafood products, maintaining adequate stocks, and expanding aquaculture facilities."[16] The year before the enactment of that legislation two committees of the New York State Assembly had characterized aquaculture as a "growth industry."[17]

C. Competition for Coastal and Offshore Resources; Description of Aquaculture Operations and Siting Requirements

The obstacles to aquaculture development recited by Congress in the National Aquaculture Act include "diffused legal jurisdiction," and the fact that many areas suitable for aquaculture "are subject to land-use or water-use management policies that do not adequately consider the potential for aquaculture and may inhibit the development of aquaculture."[18] By implication, they embrace the finding of the New York legislature of a "lack of secure access to underwater lands, water columns and coastal wetlands," demonstrating a "need for realistic state aquaculture planning, balancing the legitimate interests of the recreational, commercial fishing, shellfish and aquacultural industries, with the common property resources of the state."[19]

Competition among different user interests for space on the coasts or in coastal waters does not always mean conflict. In the ranking by the Long Island Regional Planning Board of the compatibility of various estuarine uses with aquaculture, commercial fisheries, some urbanization activities, swimming and some other recreational activities, and research and education land uses scored "high," while "water transportation activities, sand mining, and waste discharge activities"

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16. 6 NYCRR, Part 600 (1982) implementing Executive Law §§ 915, 919 (McKinney 1982). Department of State regulations under section 919 require that, for their direct actions which do not have a significant effect on the environment, state agencies certify that the action is consistent with that policy.

17. See New York State Assembly Conference on Growth Industries for New York's Future, Albany, New York, January 23-25, 1980 (organized by the Standing Committee on Commerce, Industry and Economic Development and the Legislative Commission on Science & Technology), Report of Proceedings. (Hereafter cited as Growth Industries Report.)

18. 16 USC § 2801(a)(7),(8) (1983 Supp). And see United States Fish and Wildlife Service, Aquaculture in the United States: Regulatory Constraints Pt I, II-1 et seq (Prepared by Aspen Research and Information Center, March 16, 1981) (hereafter cited as Regulatory Constraints Report).

19. 1983 NY Laws ch 104, § 1.

were deemed to be generally incompatible with aquaculture.[20] These are necessarily generalizations. Specific types of aquaculture operations in juxtaposition with other particular activities may create conflicts despite a perception of general compatibility. The conflict may be generated by tangible physical, environmental factors, or by intangible constraints on particular activities based on political or legal considerations. The following descriptions of aquaculture operations and their siting requirements relate to the physical, environmental factors.

1. Animal Aquaculture

a. Shellfish and Crustacea

Differentiated by location in relation to the shoreline and water surface, there are four basic types of operations in the cultivation of shellfish or crustacea (in the latter category, lobsters in particular).

i. Bottom Culture

"In nature, mature [American] oysters lying on the sea bottom are stimulated by summer temperatures to release their eggs or sperm into the surrounding waters. The eggs are fertilized in suspension and the larvae float, later swim, free in the waters, for up to several weeks. . . . The tiny fraction that survive eventually attach themselves, or set, on almost any available solid surface and, if conditions happen to be favorable at that spot, they grow over a period of years to adult size."[21] Human manipulations, which according to Bardach "barely qualify as «culture," consist of planting seed oysters; possibly thinning the crop; relocation from the setting area to a growing area or periodically to successive growing areas — each time increasing the amount of bottom land occupied; and "predator and siltation" control of the beds or growing areas.[22] The beds "should be located on a hard bottom in 1 to 12 m of water where tidal currents are strong."[23]

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20. Long Island Mariculture Report at 118-120. Dr. William A. Muller, the Editor of The Long Island Fisherman, observed that "bottom leasing does not interfere with navigation";. . . . [F]infish farms might be limited to salt ponds . . . or . . . 'dead end' areas of estuaries." "[M]ost shellfish cultivation is best done in fairly deep water so that surf fishermen, swimmers, and water skiers should not be significantly affected." Mariculture and the Compatibility of Multiple Users Interests, Mariculture Symposium 91.

21. Terry 15.

22. Bardach 693; and see Terry 15. "Seed oysters are young, one inch oysters, commonly referred to as spat." Bowden 7.

23. Bardach 693. Bowden notes (at 7): "Firm beds insure against excessive loss of oysterseed. . . . Oysters grown on soft bottoms tend to become covered by mud or silt and are very difficult to harvest."

The use of surface waters and adjoining coastal land is required for the passage of boats carrying laborers who plant the seeds manually (shoveling them over the sides of boats), maintain or relocate the beds or growing areas, or harvest the oysters; or to provide space for mechanical spreaders of seed oysters in larger beds, or mechanical dredges for harvesting in deeper waters.[24]

The period of maturation for bottom cultured oysters is about three years.[25]

The New York state legislature recently amended the statute of 1973 which authorized the Department of Environmental Conservation to issue permits for shellfish cultivation to include "on-bottom" as well as "off-bottom" culture.[26]

ii. Onshore Hatcheries

"Since shortages of natural spawn are the rule in the northeast, the emphasis among successful culturists is on hatchery production of seed oysters."[27] The use of hatcheries by commercial shellfish producers on Long Island is relatively new, having been initiated about 1962.[28] The facilities and techniques vary among the few operating on Long Island. Generally, oysters are developed in tanks, often within greenhouses to foster the growth of algae (the food base) in natural light.[29] Two Long Island commercial shellfish companies devote their hatcheries to hard clam culture.[30] The companies usually complete the process by transferring the seed oysters or seed clams to beds on bottom land or to off-bottom facilities, ponds or lagoons for maturation.[31] Hatcheries may be used, however, to produce seed oysters or clams for sale to and processing by other producers.

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24. Bowden 7.

25. Id; and Bardach 693.

26. Environmental Conservation Law § 13-0316 (McKinney Supp 1983), as amended by 1983 NY Laws ch 467. This statute allows the permit holder to buy and possess "shellfish of less than legal size for purposes" of such culture. See text accompanying notes 142 et seq, infra.

27. Bardach 688.

28. Terry 18.

29. Id.

30. Statement by H. Butler Flower, Shellfish Mariculture in New York State, in Mariculture Symposium 19-20.

31. Id; and Terry 18-19.

iii. Off-Bottom Culture

"Off-bottom culture" denotes the "many practical systems which fall somewhere between culturing oysters to maturity on the sea bottom under relatively natural conditions and growing them entirely by tank culture on land. . . . One such method is to support the growing crop by a structure placed on the sea bottom. Another is to suspend oysters in trays or bags from a raft or similar floating support."[32] Bowden describes the mechanics of the system, referring to California usage: "Culched seed oysters are attached to ropes or galvanized steel wires that hang from racks which float on the water or are situated on top of the leased beds. . . . A typical structure is 10-15 feet in length and width, containing 8-12 vertically hanging wires. Each wire is approximately ten feet in length and holds 10-15 spat-covered shells. Floating racks or rafts are affixed to the water bottom by cable. In the case of wooden racks, supports, which extend 3-5 feet into the mud bottom, hold the structure firmly in place."[33]

Off-bottom culture entails higher, initial capital costs, but these may be offset to some extent by savings in maintenance and harvesting costs, and acceleration of the growth process to about 15-18 months.[34] "The main advantages of raising oysters off the bottom are better water circulation (which increases the oysters' food and oxygen supply), less silting, and relative freedom from bottom-dwelling predators . . . ."[35]

Off-bottom culture demonstrates the multi-dimensional character of space in open waters. The possibilities of dividing the bed, water column and surface among different owners or users may raise unique legal problems, some of which will be explored later in this report.

iv. Pond Culture

Techniques so labelled use seawater or brackish water ponds located upland, and sometimes connected with the sea or bays by lagoons or channels. They permit the use of off-bottom devices in relatively controlled water environments. "The pond is usually warmer than open water (an advantage during most of the year [in Long Island]), can be fertilized more effectively for better growth of algae, may have lower salinity (which inhibits some common predators), and is sheltered from

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32. Terry 19.

33. Bowden 8; and see Bardach 697-703.

34. Terry 19; Bowden 8.

35. Terry 19.

storms."[36] At one time, one of the most modern and successful aquaculture firms on Long Island located a hatchery over a lagoon on land leased from a power company adjacent to a one of its electricity generation plants, using "the thermal seawater effluent discharged to the lagoon to accelerate the maturation of American oysters by 1.5 - 2.5 years. . . . After 6 weeks in the hatchery, the oyster seed [was] placed in trays located in the lagoon. . . . After 2 - 4 months, the seed [was] removed from the lagoon and planted primarily on . . . leased bay bottom."[37] Another entrepreneur hopes to use shallow natural ponds and deep dredged lagoons on its privately owned land, connected by channels to a bay, to cultivate oysters and scallops.[38]

Terry points up a special problem in the use of tidal ponds for shellfish culture. "In theory tidal ponds are part of the seabed and as such publicly owned. In practice, however, many are effectively in private ownership. This is particularly apt to be true of ponds that are artificial in origin; their ownership has been assumed by local government to be the same as that of the upland from which they were dredged—entirely private."[39]

b. Finfish Culture

Again differentiated by relationship to the shoreline or water surface, methods of finfish culture vary. The term "ocean ranching" is generally reserved for "a method which involves the release of artificially propagated juvenile fish into marine waters to grow on natural foods to harvestable size, e.g., salmon ranching," followed by harvesting through capture "by conventional fishing gear."[40] As practiced or contemplated in the Long Island area, however, finfish aquaculture is confined to nearshore operations using pen rearing methods. Using this technique, the only existing finfish cultivator on Long Island grows striped bass and northern puffer in cages suspended in the bay adjacent to upland occupied by the firm.[41] The cages are attached to the bottom land. It takes from 16 to 18 months to grow striped bass, the main crop, to a one foot length (weighing from 1/2 to

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36. Terry 20.

37. Long Island Mariculture Report 63.

38. Id 82-85.

39. Terry 21.

40. Clay II-3.

41. Long Island Mariculture Report 70, 79; and statement by Dr. Robert Valenti, Fish Farming—the State of New York and Multi Aquaculture Systems, Inc., Mariculture Symposium 76-79.

3/4 lb.).[42]

Space requirements for finfish aquaculture require access to upland sites adjacent to the water based facilities, for such facilities as tanks, hatcheries, freezers, warehouses, pump houses, offices and workshops.[43]

c. Plant Aquaculture

Iain C. Neish includes among the "most significant uses of marine plants" various forms of algae for human food; various products of "brown seaweeds as plant foods or animal feed supplements"; and the "extraction of structural polysaccharides" (cell wall materials like cellulose found in terrestrial plants).[44] Potential new uses now being evaluated include the biodegradation of marine plants for conversion to combustible gases (e.g., methane) or liquids (e.g., alcohol).[45]

Various species of seaweed, such as the giant kelp (Macrocystis pyrifera) in the Pacific off California, have long been harvested from natural beds for their potash, algin[46] and iodine contents. The search for new fuel sources to supplement dwindling fossil fuel resources has spurred studies of the potential of large-scale cultivation of seaweed for the production of methane gas.[47] Natural beds cannot supply the quantities of seaweed needed to produce significant amounts of methane. Thus, new techniques for cultivating seaweed in artificial beds are being developed and tested.

Various types of structures have been designed for seaweed cultivation. All involve a floating framework from which is suspended a

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42. Id.

43. See R. Porterfield, "Innovative New York Fish Farm Cultures, Markets Striped Bass," Aquaculture Magazine 20 (November-December 1981), for a description and picture of onshore facilities of Multi Aquaculture Systems, Inc., at Amagansett, Long Island.

44. Statement, by I. C. Neish, Marine Plant Agronomy — The Basis of a Developing Industry, Mariculture Symposium 23.

45. Id.

46. "Alginic acid (polysaccharide) extracted from kelp is commonly used as a suspending and stabilizing agent in manufactured food products like ice cream." Terry 29.

47. Id 29-30.

mesh to which the plants can be attached.[48] These artificial beds would be placed in waters deeper than those in which seaweed, because of its need for sunlight, normally grows. The designs differ in their size. Small models, moored to the ocean bottom in relatively shallow waters, have already been tested in the waters off California. The larger facilities envisioned would not be moored to the bottom, primarily because of the expense of mooring in deep ocean waters. Facilities of up to 1,000 acres could be kept in position by propulsors powered by wind or waves. The largest, most commercially practicable facilities, possibly about 100,000 acres in size, would be allowed to drift freely in the circles of ocean currents. They would include living quarters and a plant for processing the seaweed.[49]

During the past few years studies have been undertaken regarding the feasibility of conducting a demonstration seaweed cultivation project in or near Long Island Sound.[50] The Long Island Regional Planning Board has assumed that "[t]here are two alternative test site structures: floating bay and artificial substrate. The potential scale of the test structure itself ranges from an area 30 square meters to 90 square meters. Additional buffer area requirements dictate a minimum test site area of 2,500 square meters (50m x 50m; 0.6 acres)."[51] The structures would be raft-like and moored to the bottom rather than free-floating. A shoreside location may also be required to serve as a "staging area for assembly and deployment of the test structure,"[52] the

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48. The authority for this discussion of models for seaweed cultivation (with particular reference to cultivation of giant kelp off California) is H.A. Wilcox, The U. S. Navy's Ocean Food and Energy Farm Project, 2 Policy Analysis and Information Systems 125 (1978); and a letter from Mr. Wilcox to the Sea Grant Law Program staff, September 5, 1979.

49. Reporting on the work of the Marine Sciences Research Center at Stony Brook in the research project mentioned below, the Research Foundation of the State University of New York notes: 'Estimates are that one seaweed 'farm,' occupying only about a 10 by 10 mile area of ocean surface, could produce enough seaweed to satisfy the current natural gas demand for the entire New York metropolitan area including Long Island." 2 Chronica, SUNY Research '82, p S2 (March-April 1982).

50. Energy from Marine Biomass Program. The sponsors and participants included the New York State Department of Energy; the New York State Energy Research and Development Authority; the Research Foundation of the State University of New York; the New York Sea Grant Institute; the General Electric Company; the Long Island Regional Planning Board; the Marine Sciences Research Center at the State University of New York at Stony Brook; and the Sea Grant Law Program of the Faculty of Law and Jurisprudence, State University of New York at Buffalo.

51. Long Island Regional Planning Board, Site Evaluation Scenarios for Locating a Biomass Test Site in Long Island Coastal Waters 3-6 (November 20, 1980).

52. Id 21.

design and location of which in relation to the test site would depend on the design of the project.[53] Shoreline sites would be required for access by small boats used in the project.[54]

D. Government Ownership and Government Regulation

The scope and definition of a particular ownership interest or cluster of interests in coastal or offshore lands held by particular individuals, entities or groups may be narrowed or broadened by public regulatory action. Thus, the interest in shoreland held by an individual proposing to use it for an aquaculture venture may be limited by municipal restrictions, or if allowed under a rezoning decision may be confirmed and in a sense enlarged. So far as the regulated landowner is concerned, the regulation benefitting him may be said to confer a "right" on him, a right counted with other items in his package of ownership interests. And if zoning or other regulation denies him access to his own land for aquaculture, his loss of a "right" to so use his land looks to him like the loss of an ownership right.

Though closely identified with ownership problems, and properly considered together with them, siting regulations affecting existing or potential development of aquaculture in New York will be reported on separately in a companion paper.

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53. Id 21-22.

54. Id 22.

II. Nature of Government Interests in Waters and Underwater Lands

A. Land, Water, and the Concept of "Property"

Man's relationships to waters are governed by special rules generally slotted in the field of law called "property law." There are differences in the legal qualities of land and water. In the sense of ownership, water in its natural state, or flowing or "running water, unrestrained in its natural course, belongs to the negative community and is nobody's property; its particles or aggregate drops, in species or as a substance, being outside the domain of what can constitute property; just as no one can be said to own the air, the sea water, the rain or the clouds or the moon or stars, or the pearl at the bottom of the sea, the wild animals in the forest, or the very fish swimming at large in the running stream itself."[55] Accordingly, "the water itself, the corpus of the stream, never becomes or, in the nature of things, can become, the subject of fixed appropriation or exclusive dominion, in the sense that property in the water itself can be acquired, or become the subject of transmission from one to another."[56] Though the "corpus of naturally running water is . . . not the subject of private ownership," the law may nevertheless recognize rights, called "usufructuary rights" or "water rights," in its use or flow.[57] In short, neither "sovereign nor subject can acquire anything more than a mere usufructuary right" in flowing waters.[58]

Applying the term "property" in its broad, legal context, it can nevertheless include usufructuary or water rights not subject to exclusive or sovereign dominion. "Property is intangible. It is a set of rights created by society to serve a variety of social functions."[59] The Restatement of Property uses the word "property . . . to denote legal relations between persons with respect to a thing," such as land;

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55. Wiel, Running Water, 22 Harv L Rev 190, 199 (1908).

56. Sweet v City of Syracuse, 129 NY 316, 335, 27 NE 1081, 1084 (1891), holding that an act authorizing the city to take water from Skaneateles Lake was not subject to a provision of the state constitution requiring a two-thirds vote of the legislature to appropriate "property for local or private purposes" (presently art III, § 20).

57. Wiel, supra note 55.

58. Sweet v City of Syracuse, supra note 56.

59. Bowden 175.

not the thing (the land) itself.[60] The Restatement avoids common misconceptions regarding the meaning of the word "property" by describing what a person derives from the relations between persons with respect to a thing as an "interest" in the thing.[61] More precisely, the Restatement uses the word "interest" in that sense "both generically to include varying aggregates of rights, privileges, powers and immunities and distributively to mean any one of them."[62]

Although some laymen and lawyers may consider a "water right . . . to be real property or land,"[63] for various purposes, following the lead of the Restatement, we prefer to label the right an "interest in" rather than "property in" the water.[64]

The Restatement of Property uses the term "complete property" to denote the "totality of these rights, privileges, powers and immunities which it is legally possible for a person to have with regard to a given piece of land, or with regard to a thing other than land, that are other than those which all other members of society have as such."[65] It describes the person who has that totality of interests as the "owner" of the "thing," of the physical object, following popular usage of the term "owner."[66] It uses the same term to denote the person who has numerous but less than the total aggregate of interests.[67] The words "owner" or "ownership" may be used even though the total or lesser aggregate of interests is decreased, as say where the "owner" of land

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60. Restatement of Property, Introductory Note to Chapter 1, 3 (1936).

61. 1 Restatement of Property § 5, and comments a-d.

62. Id § 5.

63. 1 Waters and Water Rights 345 (R.E. Clark ed 1967).

64. Members of the public at large may have the privilege of boating in navigable waters, without interference by others, but this is rarely called a "property" right. Yet, some writers refer to "property" rights in describing the riparian rights of the owner of the bank of a river, such as the right of access or to wharf out. Id at 67. Use of the term "interest" is intended to avoid this kind of semantic confusion.

65. 1 Restatement of Property, § 5, comment e.

66. Id § 10 comment b. The Restatement of Property uses the word "title" as signifying "ownership or, when used with appropriate limiting words, a claim of ownership"; as distinguished from alternative usage of title to denote "the operative facts which result in such ownership or on which the claim of ownership is based." Id comment c.

67. Id comments a, b.

grants another a security interest in the land.[68]

Both in the Restatement of Property and in ordinary usage the word "have" or its cognate terms, rather than "own," indicates a narrowly limited number of interests, as say where a person has the privilege of crossing another's land.[69]

B. Horizontal Division of Interests in Water Bodies

Conceptually it is difficult to separate the use of the seabed for anchoring aquaculture facilities or for seeding animals or plants from the use of the waters immediately above them; or to separate the use of the water surface from a floating object, say a vessel or raft, from the use of the water represented by the object's draft. If the person engaged in aquaculture has ownership or leasehold rights in the water bed, by application of general common law treatment of interests in "land" he would appear to have all rights to use the waters above, subject to public rights in the case of navigable waters.[70] For generally the "word land includes not only the soil, but every thing attached to it whether attached by the course of nature, as trees, herbage and water, or by the hand of man, as buildings and fences."[71]

However, in connection with the use of water bodies held for aquaculture, the interests of the person holding the space are sometimes divided into horizontal planes, namely, bottom lands, the water surface, and the water column in between. This is generally achieved by specific statutory treatment. Examples will be given in the discussion of the nature of interests granted in aquaculture leasing, in Part V of this report.[72]

C. "Private," "Public," and "Common" Ownership

In addressing the public policy issue "whether an individual should be allowed to make a profit from a natural resource, such as the ocean, which is part of the common patrimony of all mankind," Bowden distinguishes three forms of "property" (we would say "ownership"): private, public, and common.[73]

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68. Id comment c.

69. Id comment a.

70. B.H. Wildsmith, Aquaculture: The Legal Framework 106-07 (Emond-Montgomery Limited, Toronto, Canada, 1982) (hereafter cited as Wildsmith).

71. Mott v Palmer, 1 NY 564, 572-73 (1848).

72. And see Wildsmith 107.

73. Bowden 176.

Bowden describes private property as "a set of rights derived from sovereign grant or sanction which are claimed by private individuals or groups."[74] He observes that the objects of private property have no intrinsic worth; they "are valuable only insofar as they can be used with legal sanction."[75]

Bowden defines "public property" as being "like private property except that it is held by a public agency."[76]

"Common property can be defined as rights in a natural resource which are held by a class of users whose rights are co-equal. Each member of the class may place a different level of use demands on the resource, but no single member may limit another's access or use rights."[77]

We have seen the Restatement of Property's oblique reference to this category in the definition of a totality of interests as being in regard to things "other than those which all other members of society have as such."[78] This reflects the notion, adverted to earlier, that no one owns the air, running waters in their natural state, or the sea, summed up in the maxim "everybody's property is nobody's property."[79] But that notion is not co-extensive with the concept of "common property." For "[c]ommon property is not 'everybody's property.' The concept implies that potential resource users who are not members of a group of co-equal owners are excluded." The concept of 'property' has no meaning without this feature of exclusion of all who are not either owners themselves or have some arrangement with owners to use the resource in question."[80]

The frequently overlooked distinction to be observed here is between things not owned at all (res nullius) and things commonly owned (res communes), a distinction based on the existence or nonexistence of

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74. Id.

75. Bowden 176.

76. Bowden 177.

77. Id 177-178.

78. § 5 comment e; see supra text accompanying note 65.

79. Ciriacy-Wantrup and Bishop, "Common Property" as a Concept in Natural Resources Policy, 15 Natural Resources J 713 (1970); and see Bowden 178; Wiel, Natural Communism: Air, Water, Oil, Sea, and Seashore, 47 Harv L Rev 425 (1934); and Butler, The Commons Concept: An Historical Concept with Modern Relevance, 23 Wm & Mary L Rev 835 (1982).

80. Ciriacy-Wantrup, supra note 79, at 715.

a sovereign power or other sanctioning institution capable of defining a class of potential interest holders.[81] Thus, Bowden reminds us, "where the resource is beyond the reach of sovereign power, it is wrong to use the term common property since no property of any sort has been created. Thus manganese nodules in the deep ocean and the ozone layer of the earth's atmosphere may be free access goods but they are not property at all."[82] More directly pertinent to a subject related to this study is the similar proposition that "fish in the high seas--beyond the 200-mile Fisheries Conservation Zone--are not subject to any property claim until caught."[83]

In the description of some doctrines the word "public" may mean "common" or include elements of "common ownership," rather than meaning simply "government ownership." "Public trust" doctrines are illustrative. Thus, the ownership of lands underlying navigable waters is generally in the state, but subject to a "public" right of navigation; or, put another way, the state holds the land in trust for the public for the purposes of navigation. "Public" is used here to denote both government ownership and the "common" navigational rights of users of the waters.

The distinctions between private, public and common forms of ownership are clouded by overlapping concepts, as well as by the use of the elusive terms "property" or "public" in reference to the "common" variety. Thus, "public property," meaning property owned by a public agency, may be classified at the same time as common property if open to the members of the public, as in the case of a public park. Yet, other government-owned resources may be held like private property, such as trees in national forests which may be sold to individuals but may not be gathered freely by members of the public.[84]

Similar to the public park example, in contemporary American law the fish swimming in some large water bodies are regarded as public property (that is, owned by a government), but the right of licensed fishermen to extract them is treated as a common right or "common property."[85]

There will be occasion later to examine in greater detail the implications of "common" and public rights concepts, particularly in

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81. Id; and Bowden 179.

82. Bowden 179.

83. Id. And see Tang, Jurisdictional Issues in International Law: Kelp Farming Beyond the Territorial Sea, 31 Buffalo L Rev 885-907 (Fall 1982).

84. Christy, Property Rights in the World Ocean, 15 Nat Resources J 695, 697 (1975).

85. Bowden 177.

discussing the public trust theory. To a limited extent, we will deal with one of the public policy issues central to problems of access to submerged lands and waters for aquaculture, the issue in Bowden's California study "whether an individual should be allowed to make a profit from a natural resource, such as the ocean, which is part of the common patrimony of all mankind."[86] That and related policy questions are currently the subjects of more comprehensive studies by other specialists.

The reference to public ownership of fish in open waters invites mention of yet another classification of resources, of particular pertinence to the instant study, the distinction between stationary and fugitive resources. Bowden explains:

> The sea is similar to air in the sense that it is stationary and thus always a common property resource so long as the state is able to exercise control over it. Fish, on the other hand, are like wild land animals in the sense that they are a fugitive resource. Fugitive resources tend to be treated as public rather than common property because to assert a claim one must first find the fish. Thus the sea is a common property resource but the fish in it are public property until they are caught.[87]

In the ensuing discussions we will use the term "government ownership" rather than "public ownership" or "public property," and sort out the characteristics of the owner from the nature of the rights of citizens to use the objects of the ownership, to help clarify the distinction between "public property" and "common property."

D. Levels of Government with Relevant Ownership Interests; Locations, in General

For the most part, the operations of firms engaged in shellfish cultivation are located in various bays on the north shore, south shore and within Long Island; and to a lesser extent outside of the bays in the waters of Long Island Sound to the north and of the Atlantic Ocean to the south.[88] The underwater locations in the bays are largely owned by the towns, subject in some cases to ownership interests granted to private parties. The state has ceded lands under the Peconic Bays and Gardiner's Bay and their tributaries to Suffolk County for the purpose of promoting shellfish cultivation. Suffolk County owns about 525 acres

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86. Bowden 174.

87. Bowden 179. And see People v Miller, 235 AD 226, 257 NYS 300 (2d Dep't 1932); and Fleet v Hegeman, 14 Wend. 42 (1835).

88. Long Island Mariculture Report 8-9.

of underwater lands in Great South Bay and Narrow Bay on the south shore of the Island.[89] The state or a state agency owns underwater lands, in the Sound, within the three-mile limit in the Atlantic, and in the bays subject to any overriding town or county interests. The federal government owns some land off the south shore devoted to or that might possibly be devoted to shellfish cultivation.[90]

The only commercial finfish aquaculture operation in the area, that of Multi Aquaculture Systems, Inc., is conducted on Napeague Bay at Amagansett in the Town of East Hampton, Long Island.[91] Potential sites for future development would probably lie close to onshore facilities, hence may require access to underwater lands owned by towns.

A report on technical studies conducted for the Marine Biomass Project of the New York Sea Grant Institute suggests that the proximity of point source discharges of pollutants into Long Island area waters may be a factor in the selection of a site for seaweed cultivation.[92] Some of the existing or potential point source locations that might be considered are near the shores of Long Island towns, which discharge treated wastes into adjacent waters.[93] Other considerations as well may argue for placing a demonstration seaweed facility in near-shore waters, such as ease of access and shelter from the brunt of ocean storms. The potential effect of these factors on efforts for designating a cultivation site necessitates consideration of the nature of the proprietary interests of Long Island towns in underwater lands.

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89. Suffolk County, Office of the Executive, Open Space Policy 12 (May 1980).

90. Long Island Mariculture Report 9.

91. Id.

92. Work Statement for Sea Grant Institute, No. GE-BIO-438 (Rev B) 37-38 (November 26, 1979).

93. 2 Long Island Regional Planning Board, Long Island Comprehensive Waste Treatment Management Plan 19-21 (1978).

III. Ownership and Disposition of State Lands in Long Island Sound and the Marginal Sea

This part discusses the ownership interests of New York State in underwater lands in that part of Long Island Sound within its boundaries and in the surrounding waters of the Atlantic Ocean; and state grants of some of those interests to others. It deals mainly with legislative delegation to state officers or agencies of authority to make such grants. However, brief mention will be made of direct grants made by special legislative acts. Various significant implications of such statutory grants to Long Island towns will be noted in the section concentrating on town ownership and disposition of underwater lands.

To some extent the towns, as political subdivisions of the state, hold and may dispose of underwater lands as delegees of state power. Accordingly, some common law and constitutional constraints on the conveyance or leasing of underwater lands to private parties, such as those stemming from public trust or similar doctrines, apply alike to the state and to the towns. Those doctrines, too, will be taken up in the particular context of town land disposition powers.

A. Basis of State Ownership

New York is one of the original 13 states. "[W]hen 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."[94] The assumption of ownership by New York State of lands formerly held by the British Crown was confirmed by the New York State Legislature in section 4 of the Public Lands Law.[95]

With particular reference to Long Island Sound the New York Court of Appeals in Mahler v Norwich and New York Transportation Co. explained:

> The right of the king to the waters of these inland seas and bays, and his authority to grant or withhold them in his royal charters, was settled by the supreme court of the United States, in the case of Martin v Waddell (16 Peters 367). The question, whether the waters of the sound were embraced in the royal grant to the Duke of York, is one which we are not called upon to determine. If they were, they passed under the subsequent grants to

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94. Martin v Waddell, 41 US (16 Pet.) 367, 410 (1842).

95. McKinney 1951.

> the states of New York and Connecticut. If they were not, they remained in the king, until his rights were divested by the revolution. The states contiguous to these, as to our other inland seas and bays, then succeeded to his dominion over their waters, and their property in them became absolute, subject to the public right of navigation.[96]

As a compromise to resolve a dispute over Connecticut's west boundary, the area of the Sound was divided between Connecticut and New York pursuant to a compact of 1879, approved by Congress April 27, 1881.[97] The precise boundary, running roughly east and west through the middle of the Sound, is set out in section 2 of New York's State Law.[98] Earlier the court in the Mahler case had made a similar finding, that "each of the contiguous states succeeded to territorial dominion from its shore to the middle of the Sound," based on "the settled rule applicable to neighboring states bounded by a territorial inland sea."[99]

Prior to 1953 the United States Supreme Court ruled that the states had an ownership interest in the bottoms of only inland navigable waters, and in tidelands lying between the high and low water marks.[100] In 1953, however, Congress enacted the Submerged Lands Act, providing:

> It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective states or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest

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96. 35 NY 352, 355-356 (1866).

97. 1931 Op Att'y Gen (NY) 156, 157. The border with Connecticut runs through the center of the Sound. The location of the eastern limit of New York jurisdiction is now being litigated before the Supreme Court of the United States in Rhode Island v United States.

98. McKinney 1952.

99. 35 NY at 356.

100. United States v California, 332 US 19 (1946).

thereof.[101]

The seaward boundary of each original coastal state was recognized by the same Act as "a line three geographical miles distant from its coast line."[102]

After the passage of the Submerged Lands Act, attempts by various states to exercise control over the rich resources of the Outer Continental Shelf beyond the three mile limit led to a suit by the federal government against the Atlantic coastal states. In United States v Maine,[103] the Supreme Court upheld the claim of the United States to sovereign rights over the seabed and subsoil in the Atlantic Ocean lying more than three miles seaward from the ordinary low water mark and from the outer limits of inland coastal waters. Long Island Sound was recognized as an inland water for the purposes of the federal government's claim.[104]

These legal developments have established New York's ownership of the lands beneath Long Island Sound within its borders, and of the Atlantic Ocean up to a line three miles from the coast and from the eastern end of Long Island Sound. Beyond that, as determined by the Supreme Court in United States v Maine and as declared by Congress in the Outer Continental Shelf Lands Act of 1853,[105] the seabed is under the exclusive dominion of the federal government.

There are exceptions to New York's ownership of the lands beneath Long Island Sound and the marginal sea. Certain underwater lands in this area, probably insignificant for aquaculture, have been ceded to the federal government in scattered sections of article 3 of the New York State Law. More important are the numerous interests of municipalities and private parties in lands beneath various bays, harbors, coves and inlets tributary to Long Island Sound, held pursuant

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101. 43 USC § 1311(a) (1976).

102. Id § 1312.

103. United States v Maine, 420 US 515 (1975).

104. 420 US at 517.

105. 43 USC §§ 1331–43 (1976).

to legislative action or colonial patents.[106] Discussion of these holdings is reserved for a later section of this report.

B. Grants of Interests in State Underwater Lands, in General

The New York State Legislature has the power to grant interests in state-owned lands to private parties, subject to the restrictions of the "public trust" doctrine, discussed below. It may also delegate to other state or local governmental agencies the power to make such grants. The three most important statutory provisions effecting such delegations to state agencies are found in section 3 of the New York Public Lands Law.[107] A fourth provision, of more questionable application to the siting of aquaculture facilities, is found in section 75 of the same law.[108]

1. Short-Term Leases, and Rights and Easements

Section 3 of the New York Public Lands Law provides in part:

> 1. The office of general services shall have the general care and superintendence of all state lands, the superintendence whereof is not vested in some office or in a state department or a division, bureau oragency thereof.
>
> 2. The commissioner of general services may, subject to such rules as he may promulgate with the approval of the state director of the budget, from time to time, lease for terms not exceeding five years, and until disposed of as required by law, all such state lands which are not appropriated to any immediate use. . . . The commissioner also may grant rights and easements in perpetuity or otherwise in and to all state lands, including lands under water, at a price to be determined by the commissioner, and in case of a subsequent sale of such

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106. Derived from the generic meaning of the term "patent" as a "grant of some privilege, property, or authority, made by the government or sovereign of a country to one or more individuals," the term is defined in the present context as an "instrument by which a state or government grants public lands to an individual." Black's Law Dictionary 1013 (5th ed 1979). The term "patent" will be used interchangeably here with "grant" or "conveyance" in references to government dispositions of relatively absolute ownership interests in land to individuals (as distinguished from grants of lesser interests such as leases or easements).

107. McKinney Supp 1983.

108. Id.

lands the same may be sold subject to any rights and easements previously granted.[109]

Subdivision 2 of section 3 appears to create two means by which aquaculturists might acquire interests in state-owned underwater lands: (1) by a five-year lease, possibly renewable for additional five-year terms; and (2) by a grant of a right or an easement in an underwater parcel. However, it will be noted that subdivision 2 specifically mentions underwater lands in regard to grants of rights and easements, but not in regard to leases. This invites the inference that the legislature intended to exclude underwater lands from the leasing provision. This would be a reasonable inference, were it not for the circumstances in which the "including lands under water" clause came to appear in the statute.

At one time, subdivision 2 of section 3 of the Public Lands Law read substantially as does the excerpt from the current subdivision 2 quoted above, but made no mention of underwater lands, either in relation to leases or grants of rights and easements.[110] The statute merely authorized the creation of such property interests in "such state lands." In 1934, subdivision 2 was amended to authorize grants of rights and easements "in and to such state lands and lands under water to the owners of the adjacent uplands."[111] The purpose of this amendment, according to its proponents, was to permit owners of Long Island shorefront property to build piers and docks for their yachts and boats, without the expense and lengthy procedure involved in obtaining a grant of underwater land under section 75 of the Public Lands Law.[112] Thus, the provision relating to lands under water did not appear in the original subdivision 2, and cannot be regarded as showing a conscious legislative decision to bar leases of underwater lands under subdivision 2.

Under these circumstances, the statute should be construed as it was before the mention of underwater lands was included, to determine if the original delegation of authority to grant leases, rights and easements in state lands is broad enough to encompass underwater lands. For the purposes of subdivision 2, no reason comes readily to mind for distinguishing state-owned lands that happen to be under water from those that are not. Indeed, it appears that in 1934 the former Land Office itself believed that the phrase "such state lands" included lands under water, but thought it "advisable to have the authorization [to

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109. McKinney Supp 1983.

110. 1928 NY Laws ch 578, § 3(2).

111. 1934 NY Laws ch 240, § 2.

112. See letter of Thomas R. Hazelum, Secretary, New York State Land Office, April 16, 1934, in Governor's Bill Jacket on 1934 NY Laws ch 240.

grant rights and easements in underwater lands] written directly into the law."[113] Moreover, the state lands covered by subdivision 2 are inclusively defined in subdivision 1 as "all state lands," except those controlled by an agent of the state other than the Office of General Services. Thus according to its plain language prior to the added reference to underwater lands, subdivision 2 should be read to allow the leasing of underwater lands. The mere addition of a specific reference to underwater lands in the sentence referring to grants of rights or easements should not alter this result.

The other types of interests in state lands available under subdivision 2 of section 3 of the Public Lands Law--a grant of a right or easement in perpetuity or otherwise--could provide a private aquaculturist with sufficient rights in underwater lands for mooring his facilities to bottom lands. An advantage offered by such a grant is that it is not limited to a term of five years, as is a subdivision 2 lease, but can be for any duration. Also, subdivision 2 further provides that a grant of this type can be made in "all state lands," including those under the superintendence of a state agency other than the Commissioner of General Services, if the concerned state agency requests in writing that such a grant be made.[114]

2. Long-Term Leases

Subdivision 4-a of section 3 of the Public Lands Law provides for the grant of leases of up to 99 years to any responsible person or corporation upon sealed bids:

> Notwithstanding any other provision of this chapter or other statute, the commissioner of general services, upon the application of any person or corporation, may lease to the highest responsible bidder furnishing the required security after advertisement for sealed bids has been published in a newspaper or newspapers designated for such purpose, for a term not to exceed ninety-nine years, to such applicant interests in real property including but not limited to air rights, subterranean rights and others, when such are not needed for present public use.[115]

The 1971 amendment adding the subdivision to section 3 of the

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113. Id.

114. That subdivision includes a proviso that "where the superintendence of state lands is vested in some office or in a state department or a division, bureau or agency thereof or in a public authority created or continued under the public authorities law the commissioner may grant, release or relinquish such rights and easements upon the written request of" an appropriate officer of the unit. McKinney Supp 1983.

115. McKinney Supp 1983.

Public Lands Law also effected companion amendments to the Highway Law[116] and Real Property Tax Law, the latter providing that interests granted under subdivision 4-a would be subject to local real property taxes.[117] The enactment included the following legislative declaration:

> Valuable lands in this state have been forever removed from the tax rolls of our various municipalities as the state has acquired real property for public purposes. The proper development of air rights as well as development under the subsurface area and adjacent, unused surface properties would provide sources of exceptional revenues to the municipalities to serve as a substitute for the loss of taxes for the realty involved. Intelligent and practical development of air rights are a necessity for future planning in our large metropolitan areas and in our smaller communities so that commercial buildings, multiple dwellings, commercial parking areas, recreation areas and unlimited diversified uses can be created which would provide tax revenue to the municipality.[118]

This declaration, and comments made at the time the bill adding subdivision 4-a was before the Governor, suggest that the primary if not the exclusive object was to allow new commercial development, with high tax potential, using air rights and subsurface rights over, under or adjacent to highways.[119] Underwater lands were not mentioned by those who wrote on the 1971 legislation. If they were included, they would not likely be suitable for aquaculture.

In 1980 the legislature added section 34-b to the Public Lands Law empowering the Commissioner of General Services to convey the "right, title and interest of the state . . . in and to the air space and air and subsurface rights, easements therein and lands adjacent thereto," to municipal corporations to allow them to obtain revenues from leasing

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116. 1971 NY Laws ch 1016, § 3. The companion addition of subdivision 38 to section 10 of the Highway Law applied to "property rights in air space, unused surface or subsurface space" in state-owned land under the jurisdiction of the Commissioner of Transportation. In commenting on the legislation the Attorney General noted discrepancies in the use of the term "subterranean" rather than "subsurface," and the absence of any reference to "surface" space in section 4-a of the Public Lands Law. Memorandum of June 22, 1971, in Governor's Bill Jacket on 1971 NY Laws ch 1016.

117. Real Property Tax Law § 564(2) (McKinney Supp 1983).

118. See note in McKinney Supp 1983, Book 45 at 11.

119. See, e.g., memoranda of the State Division of the Budget, Department of Transportation, and Attorney General in Governor's Bill Jacket on 1971 NY Laws ch 1016. The Attorney General noted that the only areas mentioned in the heading of the 1971 bill were "air space, subsurface areas and lands adjacent thereto." Memorandum of June 22, 1971.

such interests.[120]

If the clause "but not limited to air rights, subterranean rights and others" in section 3(4-a) of the Public Lands Law were construed to allow the state itself to lease any of its lands, including underwater lands, it may be significant that the clause is omitted from the companion provisions of section 34-b authorizing municipal leasing of air and subsurface space and lands adjacent thereto.[121]

3. Grants of Underwater Lands to Adjacent Upland Owners

Another provision by which one class of private parties may obtain interests in underwater lands is found in subdivision 7 of section 75 of the Public Lands Law. It provides, in part:

> The commissioner of general services may grant in perpetuity or otherwise, or lease for terms up to twenty-five years, to the owners of the land adjacent to the land under water specified in this section, to promote the commerce of this state or for the purpose of beneficial enjoyment thereof by such owners, or for agricultural purposes, or for public park, beach, street, highway, parkway, playground, recreation or conservation purposes, so much of said land under water as he deems necessary for that purpose. No such grant or lease shall be made to any person other than the proprietor of the adjacent land, and any such grant or lease made to any other person shall be void.[122]

The permissible purposes of a grant under this subdivision would, arguably, include aquaculture operations. They would "promote the commerce of this state," and should be within the scope of a grant for the purposes of "beneficial enjoyment," which is "[t]he enjoyment which a man has of an estate in his own right and for his own benefit, and not

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120. 1980 NY Laws ch 829. See McKinney Supp 1983, Book 45 at 31, for legislative findings similar to those accompanying the 1971 amendment adding subdivision 4-a to section 3 of the Public Lands Law.

121. The Office of General Services remarked that it was "unnecessary" to add subdivision 4-a to section 3 of the Public Lands Law, because the Commissioner of General Services already had the power to "grant rights and easements in perpetuity or otherwise in and to all State lands" under subdivision 2 of the same section. Memorandum of June 18, 1971, in Governor's Bill Jacket on 1971 NY Laws ch 1016. The writer overlooked the fact that a lease under subdivision 2 could be negotiated but would be limited to five years, while a lease under subdivision 4-a required bidding but could be for a term of from five to 99 years.

122. As amended by 1983 NY Laws ch 628, authorizing the commissioner to lease, as well as grant, such lands.

as trustee for another."[123] Seaweed cultivation might also be considered an agricultural purpose within the meaning of this provision. It should be noted that grants for the other enumerated purposes--public park, beach, street, highway, parkway, playground, recreation or conservation--are restricted to counties, cities, towns and villages, under the same section 75.[124]

Other provisions of section 75 may negate its utility for aquaculture purposes. Difficulties may be occasioned by the limitation to "land under water specified in this section." Subdivision 6 of section 75 describes the relevant lands under water in the vicinity of Long Island: "Adjacent to and surrounding Long Island, and all that part of the former or present county of Westchester lying on the East river or Long Island sound, but not beyond any permanent exterior water line established by law."[125] The phrase "any permanent exterior water line established by law" probably refers to "legally established pier and bulkhead lines." This latter phrase is used in subdivision 5 of the same section to describe the outer limit of grantable land adjacent to Staten Island, where such lines "extend more than five hundred feet beyond low water mark" (which is otherwise the outer limit around Staten Island).

The effect of this limitation on access for aquaculture activities depends upon several factors, including the water depth in a particular locality; the desirability of locating aquaculture facilities near the shore; and the existence or non-existence of such exterior water lines in a particular location. If no such water lines have been established at a place suitable for locating a particular facility, apparently there is no restriction on how far from the shore the rights may be granted under section 75(7).

4. Authorization of Use through a State Agency Other than the Office of General Services

To the extent that a state agency might serve as an intermediary for private aquaculture activities, or engage directly in such pursuits to conduct experiments, subdivision 4 of section 3 of the Public Lands Law may provide a means of access to state owned underwater lands. That subdivision provides in part:

> Notwithstanding any other provision of this chapter or other statute, the commissioner of general services, upon the application of any state department, or a division,

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123. Black's Law Dictionary 142 (5th ed 1979).

124. Subsec 10 (McKinney Supp 1983).

125. McKinney 1951.

> bureau or agency thereof, or upon the application of any state agency, may transfer to such state department, division, bureau, or agency, or state agency, the jurisdiction over any lands, including lands under water . . . upon such terms and conditions as the commissioner may deem just and proper and upon the consent of the department, or a division, bureau or agency thereof, or any state agency, already having jurisdiction over such lands . . . .[126]

A transfer of jurisdiction under this subdivision would not automatically authorize private use of the transferred land. Rather, the state department or agency assuming jurisdiction under a subdivision 4 transfer would still be bound by its statutory powers, which may or may not include the power to create private ownership interests in state-owned lands. Certain agencies have rather broad power to create such interests in furtherance of their lawful purposes. For example, the New York State Energy Research and Development Authority has the power to "enter into contracts, leases or other arrangements permitting any person to use any property or facility under the jurisdiction of the authority; permitting such person to build or add facilities or improvements upon such property or facility."[127]

C. Early Franchises for Shellfish Cultivation on State Underwater Lands

It is reported that "during the heyday of Long Island's oyster industry," franchises or leases for private shellfish cultivation were held on about 50,000 acres of state-owned underwater lands in or near Long Island Sound, but only about 1,695 acres under such franchises or leases were in effect as of 1980.[128]

Franchises were first authorized by the state legislature in 1887.[129] Though the franchises were deemed to be no more than "personal property," they were held in perpetuity as long as a specified annual state tax was paid.[130] The authority to grant the franchises was delegated to the Commissioners of Fisheries, and the grantees were

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126. McKinney Supp 1983.

127. Public Authorities Law § 1855(7) (McKinney 1981).

128. Suffolk County, Office of the Executive, Open Space Policy 12 (May 1980). These are located in Long Island Sound and Raritan Bay. Long Island Mariculture Report 8.

129. 1887 NY Laws ch 584.

130. Id §§ 5, 6. The tax was a minimum of $1 per acre of unoccupied land and 25 cents per acre of occupied land.

limited to state residents.[131] This did not limit the power of the Commissioners of the Land Office to grant interests in underwater lands to upland owners, but a measure of protection was given to holders of shellfish cultivation franchises located on the lands so conveyed.[132] The statute expressly excluded lands owned, controlled or claimed under colonial or legislative grants by any towns or individuals in Suffolk, Queens, Kings and Richmond counties; and lands in Gardiner's and Peconic bays previously ceded to Suffolk county.[133]

The system of granting such franchises ended in 1893 when the legislature substituted a provision enabling the state to lease state underwater lands for shellfish cultivation.[134] The new provisions were similar to those governing the granting of franchises, except that the leases were to be made on a bid basis and were limited to 15 year terms.[135]

D. Leases or Permits for Shellfish Cultivation under the Environmental Conservation Law

1. Leases

The modern version of the 1893 statute is found in section 13-0301 of the Environmental Conservation Law, enacted in 1972. It authorizes the Department of Environmental Conservation to "lease state owned lands under water for the cultivation of shellfish," with the exception of lands within 1,000 feet of high water mark in specified areas along the shores of Gardiner's and Peconic bays, and except lands within 500 feet of high water mark elsewhere.[136] The leased plots must comprise at least 50 acres, though lands leased for off-bottom culture may be as small as 5 acres.[137] The leases are for 10 years; are let at public

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131. Id §§ 3,4.

132. Id § 8.

133. Id § 9.

134. 1893 NY Laws ch 321, adding a new article to the Game Law; and repealing 1887 NY Laws ch 584.

135. Id, Game Law § 197.

136. McKinney 1973.

137. Subsec 5 (McKinney Supp 1983). The five acre provision for off-bottom leases was added in 1973 by the enactment adding a new section 13-0316 authorizing the granting of permits for off-bottom shellfish cultivation. The interplay of the two sections will be noted under the subheading "Permits" below.

auction; and may be given only to persons who resided in the state at least one year prior to making the application.[138] The statute contains other restrictions or provisions, including, among others, restrictions on the leasing of certain natural shellfish beds; the fixing of a minimum one dollar per acre rental; and provisions for renewals and transfers of leases.[139]

The statute anticipates and deals with potential conflicts with ownership interests that might be granted by the Commissioner of General Services. It bars him from granting lands for shellfish cultivation; gives the public access, for the taking of shellfish, to underwater lands granted by him for other purposes; and protects the interests of persons holding shellfish leases, granted by the Department of Environmental Conservation, on underwater lands conveyed by the Commissioner of General Services to others.[140] With the exception of the exemption of lands within specified distances from shores, this statute, unlike its predecessors, did not explicitly exclude lands owned, controlled or claimed by towns or by Suffolk county.

As of 1983 the Department of Environmental Conservation had not yet leased any underwater lands off the coasts of Long Island for shellfish cultivation under the authority of that statute.[141]

The salient provisions of the department's shellfish cultivation leasing law, section 13-0301, will be referred to in the comparative treatment of the subject of aquaculture leasing in Part V of this report.

2. Permits

In 1973 the legislature added section 13-0316 to the Environmental Conservation Law to authorize the Department of Environmental Conservation to issue permits (1) for the operation of marine hatcheries, and (2) "for off-bottom culture of shellfish."[142] We have noted that in the same act the legislature amended section 13-0301(5) to lower from 50 to five the minimum size of off-bottom shellfish leases granted by the department. In addition the 1973 revision exempted off-

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138. Subsecs 3, 4, 6 (McKinney 1973).

139. Subsecs 1, 7, 8 (McKinney 1973).

140. Subsec 14 (McKinney 1973). In the event lands occupied under a prior shellfish lease granted by the commissioner come within the later grant to another, the holder of the shellfish lease may take shellfish for a period of two years from the date of the grant or until the expiration of the lease, whichever is earliest. Id.

141. Suffolk County, Office of the Executive, Open Space Policy 12 (May 1980).

142. 1973 NY Laws ch 253, § 3. The duration of the permits was limited; each permit expires on December 31 of the year of issuance.

bottom shellfish growing from provisions of section 13-0309(6) prohibiting the treatment of shellfish by a "process known as drinking, floating, pumping or swelling."[143] The legislation was sponsored by the Department of Environmental Conservation, which explained:

> Modern shellfish farming methods—within the broad concept of aquaculture—include the technique of growing oysters and other marine shellfish off the bottom. The shellfish are suspended in suitable holders hung from floating rafts. The shellfish are thus kept away from bottom-dwelling predators such as drills and starfish and from the smothering effects of silt. In addition, the shellfish are exposed to a greater volume of water from which they may strain the minute organisms they depend on for food. The growth of the shellfish is greatly enhanced; they reach the market earlier than those grown on the bottom, with less mortality and other loss, and with shape and form more appealing to the consumer. . . .
>
> The industry is presently prevented from practicing off-bottom culture because of existing laws. One law, § 13-0301, of the Environmental Conservation Law, forbids the leasing of state-owned underwater lands for shellfish culture in lots of less than 50 acres. The industry advises us that such lots are too large for off-bottom culture and would place an undue burden on them if they could not lease smaller plots. Another provision, Section 13-0309(6), forbids "floating" of shellfish. The intent of this provision is to prevent the placing of shellfish in containers in brackish freshwater where they would increase in size and weight by retaining water in their tissues. This wording is generally interpreted, however, as including off-bottom culture from floating rafts.[144]

Under the law initially enacted, in order to qualify for an off-bottom shellfish permit, the applicant had to show that he "owns or is the lessee of at least five acres of underwater lands above which off-bottom culture of shellfish is practically feasible."[145] With the law in that posture, it is reasonable to read the permitting and leasing sections together as requiring the applicant for an off-bottom permit for shellfish growing over "state owned lands under water"[146] to have

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143. Id §§ 1, 2.

144. Memorandum of Henry L. Diamond, Commissioner of Environmental Conservation, in Governor's Bill Jacket on 1973 NY Laws ch 253.

145. 1973 NY Laws ch 253, § 3.

146. Environmental Conservation Law § 13-0301 (McKinney 1973).

leased at least five acres of bottom lands from the Department of Environmental Conservation. Presumably the off-bottom technique normally requires some use of the bottom land, whether to rest the facility on the bottom or anchor it in the soil.[147] Why else would the industry have regarded the 50 acre restriction in the leasing section as a barrier to be overcome by a lowering of the minimum to five acres?

In the same 1973 session the legislature later amended section 13-0301 to delete the requirement that the applicant for an off-bottom permit own or hold a lease on at least five acres of bottom land.[148] Did that mean that the applicant would have to show that he already held a lease on some bottom ground, even though less than five acres; or that the off-bottom permit itself would grant him the necessary license to use the bottom? There are two facets to the problem: (1) Would the department's permit alone grant the applicant a right to use state owned underwater lands, if he did not in addition hold some lease or other user right from the state, or would he have to obtain a lease from the Department of Environmental Conservation or a lease or other form of user right from some other state agency? (2) If the underwater lands were owned, or their use controlled, by a municipality,[149] would the state permit allow the use of the water bed without local permission, by way of a lease, license or some other type of local authorization?

The memorandum of the sponsor of the amendment deleting the bottom acreage precondition does little to resolve these problems. The memorandum stated that the purpose of the new section was "[t]o enable a person who owns or leases less than five acres of underwater land to obtain a permit for off-bottom culture of shellfish."[150] "Less than five acres" could mean some acreage but less than five acres, or could be construed to qualify an applicant who did not own or lease any bottom acreage at all.[151]

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147. Telephone interview with Stephen A. Hendrickson, Department of Environmental Conservation Marine Resource Specialist, Stony Brook, New York, August 17, 1983 (hereafter cited as the Hendrickson interview).

148. 1973 NY Laws ch 632.

149. Later in this part we will mention the ceding by the state of lands under Gardiner's and the Peconic bays to Suffolk county for the purpose of county leasing for shellfish cultivation (1969 NY Laws ch 990); and in Part IV we will review ownership rights in underwater lands held by various Long Island towns under royal grants.

150. Memorandum of Henry L. Diamond, Commissioner of Environmental Conservation, dated Sept 1, 1973, in Governor's Bill Jacket on 1973 NY Laws ch 632.

151. Similarly ambiguous is the commissioner's statement that there "is no logical reason for requiring that, in order to obtain an off-bottom culture permit, five or more acres of land be owned or leased." Id.

The problem of statutory construction is further compounded by the requirement in section 13-0316, both as initially framed and later amended in 1973, that the applicant for an off-bottom permit shall have obtained "any necessary permits or licenses required under any state or federal law." If the deletion of the bottom land prerequisite meant that the applicant did not need to have a lease on the water bed under his proposed operation, and that, accordingly, the section 13-0316 permit itself would give the applicant exclusive access to the site, we would end up with the Department of Environmental Conservation (1) possibly having to issue two permits for sites on the navigable waters of the state, one under section 13-0316, the other under section 35-a of the Navigation Law, empowering the commissioner of the department to authorize the placing of any "floating object having no navigational significance" in "navigable waters of the state;"[152] and (2) apparently authorized to issue section 13-0316 permits in navigable waters whose beds are owned by or have been ceded to municipalities, in addition to any permits the municipalities may require.[153] If this interpretation is correct, the duplication of permitting requirements for obtaining access to waters for off-bottom culture suggests that once the bottom land stipulation was removed, the only significant function of section 13-0316 was to overcome the possible prohibition in section 13-0309 against the use of floating processing devices.

In framing its regulations under section 13-0316, the Department of Environmental Conservation did not take the position that the off-bottom permit alone gave the applicant the right to use the bed of the water body. The regulations state: "No off-bottom culture of shellfish permit shall be issued unless the applicant shall have provided the department with satisfactory confirming documentation of the applicant's title to, or appropriate grant, lease or other legal control, of all underwater lands where off-bottom culture of shellfish shall be undertaken."[154] This clarifies the requirement for the applicant for an off-bottom permit on a site owned by a town. He and the town would have

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152. McKinney Supp 1983. It should be noted that for the purposes of the Navigation Law the term "floating objects" is defined as "any anchored marker or platform floating on the surface of the water other than aids to navigation" (§ 2[28], McKinney Supp 1982); and that the definition of "navigable waters of the state" under the Navigation Law excepts "all tidewaters bordering on and lying within the boundaries of Nassau and Suffolk counties" (§ 2[4], McKinney Supp 1983). Some problems of construing the New York laws restricting activities in navigable waters are examined in the companion report on regulatory legislation affecting aquaculture. The regulations of the Department of Environmental Conservation under section 13-0316 of the Environmental Conservation Law define "off-bottom culture of shellfish" as "the raising, breeding, growing or containment of shellfish on, or in, any raft, rack, float, cage, box or other similar device or structure in any waters of the marine and coastal district." 6 NYCRR § 48.1(c) (1982).

153. See Navigation Law § 2(4), referred to in the immediately preceding note.

154. 6 NYCRR § 48.3(6) (1981).

to comply with any state or local laws or ordinances governing the disposition of bottom lands. The regulation also indicates that where state owned underwater lands are involved, the applicant's existing interest in the bottom land would have to come from a state agency duly empowered to grant it. That truth was faced by the Department of Environmental Conservation in administering a Temporary Marine Use Assignment Program, under which it has granted a few Off-Bottom Culture of Shellfish Permits for planting in state waters.[155] The department attempted to solve the problem by obtaining a delegation of authority from the Office of General Services, guardian of unassigned state underwater lands, to authorize the use of bottom lands by off-bottom permit holders.[156]

The matter has been further complicated by the 1983 amendment to section 13-0316 of the Environmental Conservation Law authorizing permits for on-bottom as well as off-bottom shellfish cultivation, and adding the precondition that the applicant shall have "obtained the written authorization of the person or political subdivision having title or legal control of the underwater lands on or above which such on-bottom or off-bottom culture shall take place."[157] If the bottom land is owned by a municipality and has not been leased out to a private person, the question may arise whether the amended section 13-0316 itself authorizes the municipality to give the approval without having to grant a lease on the bottom land. An additional feature of the amended statute needing clarification is the absence of any reference to authorization to use bottom lands owned by the state. The provision for obtaining the written authorization of the "person or political subdivision" with title or control does not apply to the state. The state itself is not one of its political subdivisions, nor is it a "person" within the meaning of that term in the Environmental

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155. Memorandum of Margaret Becker, June 24, 1982, of a meeting with Edward Saxby, Chief, and James Marotta, Bureau of Land Management, Division of Land Utilization, New York State Office of General Services; and Hendrickson interview. The permit conditions are laid down in an accompanying "Off-Bottom Culture of Shellfish Temporary Marine Area Use Assignment Document."

156. Raising the further question of the source of the delegated authority. The power of the Office of General Services or the Commissioner of General Services to grant such user rights, whether through delegation or directly, does not fit neatly into the scheme of the Public Lands Law for disposition of underwater lands owned by the state. See supra text accompanying notes 107-127.

157. 1983 NY Laws ch 467.

Conservation Law.[158]

The anticipated revision of the regulations of the Department of Environmental Conservation required to reflect the 1983 amendment may help resolve the problem, but possibly nothing short of statutory revision will make it disappear altogether.

E. Leasing Authority of Suffolk County in Gardiner's and the Peconic Bays

The state legislature has ceded the lands under the Peconic bays and Gardiner's Bay and their "tributaries" to Suffolk county for the purpose of the promotion of shellfish cultivation.[159] The term "tributaries" was probably meant to encompass any adjoining smaller bodies of water, rather than just inflowing rivers and streams which are not useful for shellfish cultivation. Moreover, the word tributary is sometimes used in reference to bays.[160]

Under the original cession in 1884, the county was authorized to grant submerged lands to private parties for oyster cultivation. The grantee's failure to so use land resulted in its reversion to the county.[161] Amendments enacted in the 1969 law expanded the original cession to encourage the cultivation of all species of shellfish, not just oysters, but limited the interests the county may transfer to others by changing the county's authority from the making of "grants" to the making of leases for 10-year periods.

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158. Section 1-0303(18) of the Environmental Conservation Law defines "person" generally as including any "department or bureau of the state," but says that for the purpose of article 13, among other provisions of the law, "person" does not include the state or any public corporation. McKinney Supp 1983.

159. 1969 NY Laws ch 990, preserving provisions of 1884 NY Laws ch 385, as amended by 1906 NY Laws ch 640, and 1923 NY Laws ch 191, not inconsistent with the 1969 version. Reference to the 1969 superseding law hereafter will be deemed to include the earlier consistent provisions.

160. Town of Southampton v Heilner, 84 Misc2d 318, 323, 375 NYS2d 761, 766 (Sup Ct, Suffolk Co, 1975) (Peconic Bay referred to as a "tributary of the Atlantic Ocean"). But see the discussion of the location in the context of the 1969 law, in the Appendix attached to this report.

161. 1884 NY Laws ch 385, § 3.

Suffolk county was required by the 1969 law to "cause an accurate survey to be made of such lands, and a map or maps to be prepared therefrom," to determine the locations of existing private interests.[162] Preliminary mapping for this purpose, undertaken by the Suffolk County Real Property Tax Service Agency on behalf of the county,[163] reveals the breakdown of oyster lot rights in the bays summarized in Exhibit 1 attached to this report.

Problems of interpretation and application may arise if the 1969 law is implemented, including the question whether Hog Neck Bay, Southold Bay and Orient Harbor are included in the areas ceded to the county, and whether the State Commissioner of General Services may grant ownership interests in bottom lands of Gardiner's and the Peconic bays despite the cession to the county. These and other questions are taken up in the detailed analysis of the 1969 and predecessor acts found in the Appendix attached to this report.

A potential conflict arising from the granting by the department of off-bottom shellfish culture assignments in these bays has been temporarily resolved by an informal arrangement for county review of the department's permitting activities.[164]

F. State Parklands

Caumsett State Park and Sunken Meadow State Park, both located on the north shore of Suffolk county, include sizable tracts of underwater land within their boundaries. Jurisdiction over these areas is in the New York State Office of Parks and Recreation.[165]

The State Parks Commissioner could grant limited interests in underwater lands under special conditions for aquaculture activities by either of two methods. Section 13.05 of the New York Parks, Recreation and Historic Preservation Law gives not only the commissioner but also any "other state agency" the authority "to grant to any person . . . a license or an easement for any public purpose . . . upon such terms and

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162. 1969 NY Laws ch 990, § 3.

163. Suffolk County, Office of the County Executive, Annual Environmental Report 28 (July 1983).

164. Id. Pending adoption by the county of a mariculture program for the bays. Under the plan, "copies of applications for off-bottom culture of shellfish permits or applications for amendments or renewals of existing permits affecting land described in" the 1969 law are to be sent by the department to the county for its comments, and the county is to receive appropriate documentation of the ensuing disposition of the applications by the department.

165. Parks, Recreation and Historic Preservation Law § 13.01 (McKinney 1983).

conditions and under such regulations and restrictions as the commissioner or such state agency shall deem just and proper."[166] Or the commissioner, under section 3.09(6) of the same law, may "[e]ncourage, promote and engage in cooperative recreational, educational, historic and cultural activities, projects and programs undertaken by any federal, state or local governmental agency or private philanthropic or non-profit interest for the benefit of the public,"[167] and presumably may devote park lands to those purposes.

The first of these powers, the power to grant licenses or easements to any person, is restricted to use for a "public purpose." The New York courts have held that constitutional public purpose requirements are satisfied by legislation authorizing the government acquisition, development and transfer of land or improvements for ultimate private ownership or operation where the primary objective is the achievement of some community goal.[168] In Courtesy Sandwich Shop v Port of New York Authority, the New York Court of Appeals upheld the public purpose of a statute authorizing condemnation of private property for the erection of structures, portions of which would be devoted to private purposes that would incidentally help finance the World Trade Center.[169] The court noted the recognized governmental concern in fostering harbor activities--the "public purpose" of the World Trade Center--and concluded that "any use of the property sought to be condemned that is functionally related to the centralizing of all port business is unobjectionable even though private persons are to be the immediate lessees."[170]

Both the federal and state governments have declared that it is in the public interest to promote aquaculture development generally, and shellfish cultivation in particular.[171]

The public purpose to be served by the cultivation of seaweed for energy conversion has been endorsed by the state. In the statute

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166. McKinney 1983.

167. Id.

168. Courtesy Sandwich Shop, Inc. v Port of New York Authority, 12 NY2d 379, 240 NYS2d 1, 190 NE2d 402 (1945); Matter of Mayor of City of New York, 135 NY 253, 31 NE 1043 (1892); New York City Housing Authority v Muller, 270 NY 333, 1 NE2d 153 (1936), and Cannata v City of New York, 11 NY2d 210, 227 NYS2d 905, 182 NE2d 395 (1962) (condemnation of land for slum clearance and redevelopment); Murphy v Erie County, 28 NY2d 80, 320 NYS2d 29, 268 NE2d 771 (1971) (county stadium leased to a private entity).

169. Supra note 168.

170. 12 NY2d at 388, 240 NYS2d at 5, 190 NE2d at 404.

171. See supra text accompanying notes 12-17.

creating the New York State Energy Research and Development Authority the legislature declared that

> the need for obtaining and maintaining an adequate and continuous supply of safe, dependable and economical power and energy is a matter of serious concern to the people of the state; that accelerated development and use within the state of new energy technologies to supplement energy derived from existing sources will promote the state's economic growth, protect its environmental values and be in the best interests of the health and welfare of the state's population; and that such development and use requires special efforts to foster research, development, and demonstration in the methods of production and use of new energy technologies.172

Biomass conversion for the production of methane gas is one of the state-recognized "new energy technologies."173

Depending on the nature and degree of government participation in programs for granting easements or licenses for animal or plant aquaculture development, a case may be made out for so using underwater lands of the Caumsett and Sunken Meadow State Parks.

Were an ownership interest greater than an easement or license—say a lease for a term of years—deemed essential to conduct an aquaculture demonstration project in state park waters and underwater lands, it might be granted through an exercise of the commissioner's power to encourage and engage in cooperative educational activities for the benefit of the public, conferred by section 3.09(6) of the Parks, Recreation and Historic Preservation Law. By regulation the parks commissioner has in effect included research activities within the scope of this grant of power, and requires a permit for the conduct of "research and educational projects."174

Assuming that the project, say one to demonstrate the utility of growing seaweed for biomass conversion, is legitimately includable in the commissioner's power to promote public-benefit educational activities, it would have to serve a "philanthropic or non-profit interest" as required by section 3.09(6) of the Parks, Recreation and Historic Preservation Law. If the participation of a private profit-making organization were to create a problem on this score, it could be obviated either by an outright transfer of jurisdiction of the land to another state agency through subdivision 4 of section 3 of the Public

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172. Public Authorities Law § 1850-a (McKinney 1981).

173. Id § 1851(10) (McKinney 1981).

174. 9 NYCRR § 376.1(m) (1982).

Lands Law,[175] or by cooperation with another state agency acting as sponsor or supervisor of the project.

If the parks commissioner were to transfer to another state agency jurisdiction over a desired underwater tract, the agency assuming jurisdiction would be free to create any ownership interest in a private party that it is authorized to grant by any other law. If, however, the commissioner merely cooperates with another state agency acting in a sponsorship capacity, the only private ownership interest that could be created, other than an easement (which the parks commissioner could grant even without the participation of another agency), would be a five-year lease issued by the state Commissioner of General Services under subdivision 2 of section 3 of the Public Lands Law; or a longer term lease under subsection 4-a of that section.[176] The granting of the latter, longer term type of lease would be subject to conditions laid down by subdivision 4-a, including competitive bidding, adequate consideration, approval by the attorney general, and, possibly, municipal zoning control.

It could be argued that the grant of power in section 13.04 of the Parks, Recreation and Historic Preservation Law, allowing the parks commissioner or any other state agency to grant easements, was intended to be the exclusive means of granting ownership interests in state parklands. However, if the legislature intended such a restrictive treatment of state parklands, it would undoubtedly have excepted such lands from general authorizations to other state agencies to grant interests in state lands under specified conditions or for specified purposes. The section 13.04 easement provision should be viewed as a means of granting ownership interests in state parklands in addition to, not to the exclusion of, other legal means of doing so. The requirement in section 3.09(6) of that law that the parks commissioner cooperate with projects that are "for the benefit of the public" protects the state parklands from improper exploitation.

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175. See supra text accompanying note 114.

176. See supra text accompanying notes 118-21.

IV. Town Ownership and Disposition of Lands in Long Island Bays and Harbors

A. Introduction

The towns of North Hempstead and Oyster Bay in Nassau county and the towns of Huntington, Brookhaven, Riverhead, Smithtown and Southold in Suffolk county border on Long Island Sound. The towns of Hempstead and Oyster Bay in Nassau county, and Babylon, Islip, Brookhaven and Southampton in Suffolk county border on the Atlantic Ocean to the South of Long Island. Bordering on Gardiner's and the Peconic bays in eastern Long Island are the Suffolk county towns of Riverhead, Southampton, Southold, Shelter Island and East Hampton.

The answer to the question whether a particular town may grant an aquaculture entrepreneur exclusive rights to particular underwater lands in one of these or connected water bodies depends on several interrelated factors. The sources, scope and nature of the ownership interests obtained by the town must be explored. The grant on which the town bases its ownership may contain limitations on its power of alienation. The local government as a corporate entity, or certain of its agencies, may have statutory or constitutional authority to alienate the interests, but the authorizing instrument may place limits on the exercise of the power. The limits may be inapplicable to lands derived from particular sources. The extent of the right of disposition may depend on the character of the town's holding or use of the land. Common law doctrines may restrict the right of alienation in order to preserve particular public interests.

Before pursuing these inquiries, preliminary observations are in order regarding some fundamental attributes of municipal corporations, which help explain both (1) the derivation of their powers, including the power to acquire and dispose of land, and (2) the nature of their holding of land.

1. Derivation of Municipal Power

"In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self government which is beyond legislative control of the State."[177]

> Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real

177. City of Trenton v State of New Jersey, 262 US 182, 188 (1923).

property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State.[178]

2. Dual Nature of Municipal Corporations: Governmental and Proprietary Aspects

The "essential and distinguishing characteristic of the municipal corporation" is seen to be "its duality of purpose."[179]

> A municipal corporation possesses two classes of functions being on the one hand a subdivision of the state endowed with governmental powers and charged with governmental duties and responsibilities, and on the other, a corporate body, capable of much the same acts as private corporations and having the same special and local interests and relations, not shared by the state at large. In its dual character and functions it is in one respect governmental, public, or legislative, and in the other, corporate, proprietary, private, quasi-private, business, commercial or municipal.[180]

The courts have resorted to the governmental/proprietary distinction to support their decisions in a variety of situations.[181] Though said to have been "judicially adopted in order to avoid supposed injustices" from claimed immunity of municipalities from tort liability for "governmental" acts,[182] the distinction has been extended to situations involving the status or use of municipal property. Thus, the stamping of municipal property as "governmental" or "proprietary" has been deemed significant in deciding whether the property is subject to execution of judgment against the municipality;[183] whether the state

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178. Hunter v Pittsburgh, 207 US 161, 178 (1907).

179. C.S. Rhyne, Municipal Law 3 (1957). And see 2 McQuillin, The Law of Municipal Corporations § 10.05 (3d ed 1979).

180. Id 68.

181. F.I. Michelman and T. Sandalow, Government in Urban Areas 193-95 (1970).

182. Brush v Commissioner of Internal Revenue, 30 US 352, 362 (1937).

183. Meriwether v Garrett, 102 US 472, 513 (1880); Merritt-Chapman & Scott Corp. v Public Utility District, 319 F2d 94 (2d Cir 1963).

must pay compensation for taking the property;[184] or whether the municipality's use of property located within the boundaries of another local government must comply with the other government's land use controls.[185]

More to the point here, the distinction has also been applied in determining whether or under what restraints municipal property may be alienated by voluntary sale or lease, or lost through adverse possession.[186] Accordingly, the court in People ex rel Swan v Doxsee,[187] in denying the right of trustees of lands of the Town of Islip to grant a 10-year lease of a part of a dock, acquired for public use, to a private company for occupation by an icehouse, explained:

> A municipality may hold property either in its corporate capacity as an ordinary proprietor or solely for the public use. Whether it can devote any part of its property even temporarily to a private use depends entirely upon the capacity in which it holds title. . . .
>
> The general rule, as laid down in Meriwether v Garrett (102 US 513), is as follows: In its streets, wharves, cemeteries, hospitals, court-houses, and other public buildings, the corporation has no proprietary rights distinct from the trust for the public. It holds

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184. City of New Rochelle v State of New York, 34 Misc2d 454, 457, 228 NYS2d 279, 283 (Ct Cl 1962), declaring that the state must award compensation for property held by the municipality "in a proprietary capacity, not for the benefit of the general public but rather for the advantage of its own inhabitants." Section 3 of the General Municipal Law, added in 1960 to end confusion resulting from inconsistent judicial classifications of governmental and proprietary functions, provides: "Where property of a municipal corporation, school district or district corporation is taken in the exercise of the power of eminent domain for a purpose substantially different from that for which it is held by such municipal corporation, school district or district corporation, just compensation to the municipal corporation, school district or district corporation shall be made in the same manner, to the same extent and subject to the same limitations as though it were private property." McKinney 1977; 1960 NY Laws ch 180.

185. See County of Westchester v Village of Mamaroneck, 22 AD2d 143, 255 NYS2d 290 (2d Dep't 1964), aff'd, 16 NY2d 940, 264 NYS2d 925, 212 NE2d 442 (1965).

186. See College Point Industrial Park, Urban Renewal Project II, New York City v City of New York, 72 AD2d 745, 746, 421 NYS2d 258, 259-60 (2d Dep't 1979), stating that a riparian owner might acquire title by adverse possession to underwater land "held merely in a proprietary capacity," which the city had been authorized by statute to dispose of because it had "no navigable value" and served "no municipal need."

187. 136 AD 400, 403, 120 NYS 962, 964-65 (2d Dep't 1910), aff'd, 198 NY 605, 92 NE 1098 (1910); and see American Dock Co. v City of New York, 174 Misc 813, 21 NYS2d 943 (Sup Ct, NY Co, 1940), aff'd, 261 AD 1063, 26 NYS2d 704 (1st Dep't 1941), aff'd, 286 NY 658, 36 NE2d 696 (1941).

> them for public use, and to no other use can they be appropriated without special legislative sanction. It would be a perversion of that trust to apply them to other uses.

Other cases in which the governmental/proprietary distinction has been used to determine the relevance of statutory restrictions on municipal disposition of property will be mentioned in the ensuing discussion of that subject.

So, too, we defer elaboration of the implications of the public "trust" character attributed by the Meriwether Court to lands held in a non-proprietary or governmental capacity.

3. Ground Rules for Municipal Acquisition and Disposal of Lands

The black letter law on the subject is informed by the two elementary features of municipal corporations, their dependence on legislative largesse (except to the extent they are favored with constitutional home rule powers), and the dual nature of their functions and activities.

a. The Power To Acquire Land

"At common law, a corporation has power to acquire such land as may be necessary for or reasonably incidental to carrying out the purposes of its creation."[188] Although in England a succession of "mortmain" statutes had rendered corporations "incapable of purchasing lands without the king's license," American states generally did not reenact such statutes and have not assumed them to be in force; and "the only legal check to the acquisition of lands by corporations, consists in those special restrictions contained in the acts by which they are incorporated, and which usually confine the capacity to purchase real estate to specified and necessary objects."[189] The same general doctrine applies to municipal corporations. "A municipal corporation, enjoying corporate rights and privileges, may acquire needed property, real or personal, for its use and benefit as a local governmental organ. And by statutory or charter provisions the power to purchase or hold property for municipal purposes is generally expressly conferred, as by a provision that the municipal corporation shall, or may, have power to purchase and hold real and personal property for all corporate needs and

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188. 5 Tiffany, The Law of Real Property § 1376 (3d ed 1939).

189. 2 Kent's Comm. 328-29 (11th ed 1867). The mortmain statutes "were introduced during the establishment and grandeur of the Roman church, to check the ecclesiastics from absorbing in perpetuity, in hands that never die, all the lands of the kingdom, and thereby withdrawing them from public and feudal charges." Id 328.

purposes, and may sell and convey the same, etc."[190]

b. The Power of Disposition

> The general rule, which is well settled, is that municipal property held in a governmental capacity, i.e., for a public use, cannot be sold without legislative authority but must be devoted to the uses and purposes for which it was intended . . . . But the rule is otherwise as to property held in a private capacity and not devoted to any special public use.
>
> With respect to property held in a proprietary capacity, the doctrine is generally recognized that by observing all existing legal requirements and restrictions, a municipality may sell or otherwise dispose of such property, in good faith, upon adequate consideration, and upon any reasonable and lawful terms. Otherwise stated, where there is no statute or charter provision, the general proposition has often been asserted that a municipal corporation possesses the power to dispose of any property which it has a right to acquire. "Independent of positive law, all corporations have the absolute jus disponendi of lands and chattels, neither limited as to objects, nor circumscribed as to quantity." . . . . Indeed, so necessarily incidental is this power that it has been held that a corporation cannot be created possessing the power of holding, without the power of disposing; and that a clause in the charter, restricting the alienation of their property, without consent of the chancellor, is void. . . .
>
> These general expressions, however, are reducible to the proposition that all property of the municipal corporation of a private nature may be sold. But the chief authority for this point of view is the public interest. While it is a recognized rule of the common law that municipal corporations may, insofar as they possess private rights, dispose of their property without special authority from the state, this limitation exists: That property possessed and used by municipal corporations as public agencies of the state for the purpose of governmental administration cannot be alienated by them without special authorization. All property held by the city in fee simple, without limitation or restriction as to its alienation, may be disposed of by the city at any

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190. 10 McQuillin, The Law of Municipal Corporations § 28.02 (3d ed 1981).

time before it is dedicated to a public use.[191]

c. The Ground Rules Restructured

It will facilitate the unscrambling and understanding of these summary statements if they are viewed in the light of three fundamental propositions:

(1) Municipalities may receive the powers of land acquisition, management and disposition from state constitutions; but for the most part the powers are those delegated by the state legislature.

(2) Though lacking express statutory delegation, the powers may be implied as being incidental to other conceded powers.[192]

(3) The powers so derived may be limited by constitutional restraints, by restrictions found in state enabling laws, and by various common law doctrines. Foremost among the restrictive common law doctrines are those limiting municipal action to public uses or public purposes, including "public trust" principles.

The courts and commentators do not always reason within this framework and as a result occasionally assume that under some circumstances municipalities have inherent power to acquire and dispose of land without the support of, and in some cases despite limitations in, statutory or constitutional enabling laws. A 1918 opinion of the New York Court of Appeals is illustrative. In upholding a lease by the trustees of lands of the Town of Islip of beach property on the foreshore of Great South Bay, the court found that the lands were derived from colonial patents to the Town of Huntington and subsequently ceded to the Town of Islip, and, accordingly, "were held by the town in private as distinguished from public ownership"; and concluded:

> It needed no legislative authority to enable it to deal with them as its interests might require. It could devote them to the use of the inhabitants in common. It could convey them or lease them.[193]

This statement was later cited by lower courts as authority for approval of leases of underwater lands, similarly derived from colonial

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191. 10 McQuillin, The Law of Municipal Corporations § 28.37 (3d ed 1981), citing for the quoted matter Wyatt v Benson, 4 Abb Pr (NY) 182, 187.

192. For a discussion of the scope and limitations of the implied power doctrine in a case involving municipal lands, see Matter of City of Buffalo, 68 NY 167 (1877).

193. Town of Islip v Estates of Havemeyer Point, 224 NY 449, 452, 121 NE 351, 352 (1918).

grants, by the Town of Huntington[194] and Town of Islip.[195] The statement appears to have been taken out of context by the Court of Appeals, and goes too far. The relevant issue in the case cited by that court for the proposition was whether a city could sell land in a closed street, and in stating that it could do so the earlier court was invoking the doctrine requiring special legislative sanction for alienating streets impressed with a public trust. This does not mean that municipalities have inherent power to dispose of "proprietary" lands not subject to trust constraints. Given the dependent status of municipalities in our governmental system,[196] that power must be found in some express or implied delegation from the state legislature, if not delegated directly to the municipality by the people in the state constitution.[197]

4. Constitutional Powers

On its surface, article IX of the New York state constitution appears to vest powers in local governments to alienate their property, including lands. A general grant of home rule powers, applying for the first time to the towns through an amendment that took effect in 1964, confers on a local government the power to enact "local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government."[198] An additional specific grant empowers a local government to adopt or amend a local law dealing with the "acquisition, care, management and use of its highways, roads, streets, avenues and property," whether or not relating to its property, affairs or government.[199] These grants are confirmed by section 10 of the Municipal Home Rule Law, enacted to implement the constitutional home rule provisions.[200]

Municipal purchase and alienation of land clearly come within the general grant of local legislative powers relating to "property, affairs

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194. Sammis v Town of Huntington, 186 AD 463, 467, 174 NYS 610, 612 (2d Dep't 1919).

195. Bevelander v Town of Islip, 17 Misc2d 819, 820, 185 NYS2D 508, 509 (Sup Ct, Suffolk Co, 1959).

196. Kings County Fire Insurance Co. v Stevens, 101 NY 411, 416 (1886). The public trust doctrine is discussed below.

197. See supra text accompanying notes 177-78.

198. Article IX, § 2(c).

199. Id.

200. § 10(1)(i), (ii)a(7) (McKinney 1969, and 1983 Supp).

or government,"[201] and might conceivably be construed as coming within the special powers of "acquisition" and "management" of property. However, in the exercise of these powers local governments would nevertheless be subject to other types of restrictions, discussed below.

5. General Statutory Authorization To Acquire by Purchase, Lease or Condemnation, and Dispose of, Town Lands

We find nothing in the Duke of York's Laws[202] or laws of the Colonial General Assembly either expressly authorizing or limiting the acquisition or disposition of lands acquired for the towns subsequent to the original patents. Under current law, town boards

> may acquire by lease, purchase, in the manner provided by law, or by acquisition in the manner provided by the eminent domain procedure law, any lands or rights therein, either within or outside the town boundaries, required for any public purpose, and may, upon the adoption of a resolution, convey or lease real property in the name of the town, which resolution shall be subject to a permissive referendum.[203]

The Town Law provisions for acquiring real property "in trust" for "public use" constitute, in part, a statutory version of a common law "dedication" doctrine.

> The owner's offer, either express or implied, of appropriation of land or some interest or easement therein to public use, and acceptance thereof, either express or implied (when acceptance is required), constitute dedication. 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

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201. 24 Op St Compt 969, 970 (1968), and other prior opinions there cited.

202. The Duke of York's Laws 1665–75, found in 1 Colonial Laws of New York 6 et seq (1894).

203. Town Law § 64(2) (McKinney Supp 1983); derived from earlier statutes granting powers of land acquisition to different classes of towns, dating back at least to the general Town Law of 1909. See 1909 NY Laws ch 63, enacting chapter 62 of the Consolidated Laws, and, in particular, section 434 of the then Town Law authorizing the acquisition of lands for improvements in towns adjoining New York City; and sections 134-a, 135, 143-m, 143-p and 143-r, added to that version of the Town Law in later years.

> dedication of property to public use that it is to be forever and irrevocable after acceptance, and that it be for a public use.[204]

The doctrine has been extended to permit a municipality to itself simultaneously effect both an offer and acceptance of a dedication to a public use of property already owned by it, in which case the acceptance need not be express but may be implied by acts of the municipal authorities.[205]

6. Special Laws Authorizing Long Island Towns To Acquire and Dispose of Lands

Despite the general implied or express statutory authority of towns to acquire lands, and for various reasons not always apparent on their face, special statutes have authorized town acquisition of underwater lands from time to time. Thus, in 1903 the Town of Islip was empowered to purchase docks and acquire sites for and build docks "at Islip and Bay Shore," with the stipulation that title "be taken for the use of said town, in the name of the trustees of town lands" created in 1857.[206]

In 1914 the state legislature authorized the electors of the Town of Shelter Island to determine at a town meeting "that the town acquire for public purposes by purchase or condemnation any or all lands under water, situated within the limits of such town," including lands under specified creeks, bays or harbors, which had been granted by Governor Nicolls to particular individuals in a 1666 patent.[207] The possible significance of the derivation of the lands from colonial grants, the modifier "public purposes," and lack of language indicating a specific trust objective will be examined later in the discussion of the right of disposition of these lands.

Under the Nassau County Civil Divisions Act, all towns in Nassau county are authorized "to acquire title to real property for public use," wherever located, by purchase or eminent domain, "for the purpose of dredging and making navigable the creeks, streams, bays, harbors and

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204. 11 McQuillin, The Law of Municipal Corporations §33.02 (3d ed 1983).

205. Gewirtz v City of Long Beach, 69 Misc2d 763, 330 NYS2d 495 (Sup Ct, Nassau Co, 1972), aff'd, 45 AD2d 841, 358 NYS2d 957 (2d Dep't 1974), appeal denied, 35 NY2d 644 (1974), holding that without specific legislative authorization the city could not restrict access by nonresidents to a beach park dedicated by the city to such use.

206. 1903 NY Laws ch 455; referring to 1857 NY Laws ch 503, ceding state lands to the town (within areas ceded earlier by the Town of Huntington) to be in the charge of trustees to be elected by annual town meetings.

207. 1914 NY Laws ch 152.

inlets and constructing and maintaining seawalls, bulkheads, jetties, drains[,] culverts, dams, and otherwise improving the coast and seashore," and "to protect the property within the town from floods, freshets and high water."[208] Though not articulated, this power would probably require the acquisition and use of underwater lands for some types of coastal improvements, and this special legislation may have been deemed necessary to confirm the right of access to such lands for these purposes. Or this and other special laws noted above may have been deemed necessary to extract a legislative determination that the particular municipal projects are for public purposes, hence compatible with constitutional, statutory or common law requirements that the acquisition be for a "public use" or "public purpose."

B. Sources, Extent and Nature of Town Ownership Interests in Underwater Lands

1. Lands Granted by Colonial Patents

Through patents issued by colonial English or Dutch governors prior to statehood, a number of these towns became owners of underwater lands within their boundaries. In many instances these grants were preceded by earlier acquisitions from Indian Sachems on Long Island.[209] Titles "based purely on grants from the Indians, as opposed to grants from the early Dutch and English governors, were not cognizable in law."[210]

In 1691, the General Assembly of New York "ratified and confirmed" rights and privileges previously granted by the English governors to the

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208. 1939 NY Laws ch 273, § 245.0, as last amended by 1945 NY Laws ch 338.

209. E.g., lands subsequently included in the towns of Huntington, Oyster Bay, East Hampton, Brookhaven and Smithtown. Kavenagh, Vanishing Tidelands: Land Use and the Law in Suffolk County, NY 1650-1979, 14, 97, 102-3 (New York Sea Grant Institute 1980) (cited hereafter as Kavenagh). And see Trustees of the Freeholders and Commonalty of the Town of Southampton v The Mecox Bay Oyster Company, 116 NY 1, 8, 22 NE 387, 389 (1889), noting acquisitions in that town of Lands from the Indians.

210. Comment, Colonial Patents and Ocean Beaches, 2 Hofstra L Rev 301, 305 n 15 (1974). And see Trustees of the Freeholders and Commonalty of the Town of Southampton v The Mecox Bay Oyster Company, 116 NY 1, 6-8, 22 NE 387, 388-89 (1889). "The English possessions in America were not claimed by right of conquest but by right of discovery. For according to the principles of international law, as then understood by the civilized powers of Europe, the Indian tribes in the new world were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered." Martin v Waddell, 41 US 367, 409 (1842). In 1684 the General Assembly of New York declared that 'noe Purchase of Lands from the Indians shall bee esteemed a good Title without Leave first had and obtaineid from the Governour." 1 Colonial Laws of New York 149 (1894) (L 1684, ch 9).

"Cittys, Towns, Mannors and ffreeholders,"211 in the province of New York, and deemed them to be "good and effectual" against the kings and their successors.212

Upon attaining statehood, New York, in its first constitution, confirmed the colonial patents indirectly in declaring that "such parts of the common law of England . . . and of the acts of the legislature of the colony of New York, as together did form the law of the said colony" on April 19, 1775, "shall be and continue the law of this state."213 Until 1963 the various New York state constitutions also explicitly confirmed, and protected holders of, the colonial patents.214 Although they declared that the "people of this state, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State," they stated that "nothing contained in this Constitution shall affect any grants of land within this State, made by the authority of the . . . king or his predecessors, or shall annul any charters to bodies politic and corporate, by him or them, made," prior to October 14, 1775.215 The later provision was repealed by a constitutional amendment approved in November 1962 and effective January 1, 1963, apparently for the reason that "the provision lacks the teeth one might expect to find,"216 since

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211. A "freeholder" is "[o]ne having title to realty; either of inheritance or for life; either legal or equitable title," or a "person who possesses a freeholder estate; i.e., the owner of a freehold." Black's Law Dictionary 598 (5th ed 1979).

212. "An Act for the Setling, Quieting and Confirming unto the Cities, Towns, Mannors and ffreeholders within this Province, their several Grants, Pattents and Rights Respectively," 1 Colonial Laws of New York 224-225 (1894) (L 1691, ch 2). Kavenagh observes that as a result of the 1691 Act the "Dongan patents to Brookhaven, Southampton, and Easthampton were secured to them; Oyster Bay and Southold could continue to trust in their Andros patents as could Smith of Smithtown and the private lands patentees in what would later be Islip." Kavenagh 37. And see Lowndes v Huntington, 153 US 1, 27 (1894); People ex rel Howell v Jessup, 160 NY 249, 266-67, 54 NE 682, 687-88 (1899).

213. 1777 constitution, art XXXV.

214. Id, art XXXVI; similar provisions are found in the 1821 constitution, art 7, § 14; 1846 constitution, art 1, § 18; and 1894 constitution, art 1, § 17. The protection against impairment of royal grants made before independence may reflect the desire of the framers of the 1777 constitution to win the favor of wealthy landowners. See Sutherland, The Tenantry of the New York Manors, 41 Cornell LQ 620, 624 (1956).

215. 1894 constitution, art I, §§ 10, 12, 17.

216. State of New York, Special Legislative Committee on the Revision and Simplification of the Constitution, Inter-Law School Committee Report on the Problem of Simplification of the Constitution 44 (May 1958); see also Memorandum of the Association of the Bar of the City of New York, reprinted in 1960 New York State Legislative Annual 194-195.

it "is not a restraint upon legislative power, but simply a declaration that the Constitution itself shall not annul such charters."[217]

Notwithstanding the removal of this saving clause from New York's constitution, ownership rights originally conferred by colonial era grants continue to exist. As recently as 1967 the Town of North Hempstead's right to transfer underwater lands in Manhasset Bay to a private owner was upheld on the strength of grants of these lands to the towns' predecessors by the Dutch governor William Kieft in 1644, and by the English colonial governor, Colonel Dongan, in 1685.[218]

The history of these grants is thoroughly reviewed in Kavenagh's book.[219]

a. Dual Nature of the Patents; the Political Dimension

At least some of the patents of the English governors to the Long Island towns were regarded as "charters" granting "both territory and

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217. Demarest v Mayor, etc. of the City of New York, 74 NY 161, 168 (1878).

218. Riviera Association, Inc. v Town of North Hempstead, 52 Misc2d 575, 276 NYS2d 249 (Sup Ct, Nassau Co, 1967), opinion adopted by the Court of Appeals in the companion case of Manor Marine Realty Corp. v Wachtler, 22 NY2d 825, 292 NYS2d 918, 239 NE2d 657 (1968).

219. And see R. Micknas, General Report on Harbors and Bays Around Long Island Pertaining to Shellfisheries (March 1934) (cited hereafter as Micknas), in the files of the Long Island Regional Planning Board; and Division of State Planning, New York State Department of State, State, County and Town Boundaries, Jurisdictions and Ownerships for Lands Underwater in the Marine District of New York State (complementing Map Series #2) (August 1977).

corporate franchises,"[220] not unlike the charters granted by the Dutch to the cities of Albany and New York, and later by the English Governor Dongan.[221] This reflected a tradition, carried over from England, of incorporating municipal governments.[222]

Emulating the style of governance introduced in the English towns, the Dutch followed suit, incorporating nine towns in New Netherland.[223]

The political character of the patents or charters has been cited as a basis for town ownership of underwater lands. The court in

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220. Lowndes v Huntington, 153 US 1, 19 (1894), referring to the Dongan, Nicolls and Fletcher patents. The combined Colonial grants of governmental powers and property rights to trustees for Long Island towns as well as to local officials for New York City were frequently acknowledged by the New York courts. See, e.g., Matter of the Mayor, etc. of the City of New York v Post, 182 NY 361, 368, 75 NE 156, 158 (1905); Trustees of the Freeholders and Commonalty of the Town of Southampton v The Mecox Bay Oyster Co., 116 NY 1, 3-4, 8, 22 NE 387, 388 (1899); People ex rel Howell v Jessup, 160 NY 249, 259, 54 NE 682, 685 (1899); Denton v Jackson, 2 Johns. Ch. 320, 325 (1817); People ex rel Squires v Hand, 158 AD 510, 135 NYS 192 (2d Dep't 1913). Kavenagh seems to reserve the chartered or incorporated status for towns granted patents by Governor Dongan. He points out that the Andros and Nicolls patents "only vested the towns with 'all the privileges belonging to a town within this government'; that is to say, each town must guide itself by the Duke's Laws as amended and supplemented," while in contrast, the "Dongan patents erected the towns into bodies 'corporate and politic' with all the duties, obligations, and privileges of such a status," in effect imposing "on each town responsibilities and privileges almost equal to many towns and boroughs in England." Kavenagh 37.

221. 1 Colonial Laws of New York 181, 195 (1894).

222. "By the time of James II there existed in England approximately 200 incorporated municipalities, each with its own peculiar privileges, jurisdictions, and rights. Their charters were highly valued by them because they conveyed not only real estate but also immunities, franchises, jurisdictions, and acquittances." Kavenagh 31-32. And see 3 State of New York, Temporary State Commission on State and Local Finances, State Mandates 14-18 (1975) (cited hereafter as State Mandates); and 1 McQuillin, The Law of Municipal Corporations § 1.09 (3d ed 1971).

223. State Mandates 13-14. See Town of North Hempstead v Town of Hempstead, 2 Wend. 110, 111 (1828). The patent of November 16, 1644, by William Kieft, Governor General of the Province of New Netherlands, to six individuals and those who would associate with them, granted "full Power and Authority . . . to Build a Towne or Townes, . . . to erect a Body Pollitique or Civill Combination amongst themselves [initially, the Town of Hempstead], and to nominate certaine Magistrates, . . . annually to present to ye Governor of this Province for the time being, for him the said Governor . . . to elect and establish them, for the Execution of Government [sic], amongst them, as well Civill, Politicall, as Judiciall . . . ." The patent included additional details regarding the appointment of other officers and the performance of regulatory and judicial functions. (Unless otherwise indicated, excerpts from the colonial patents are taken from the copies found in Micknas.)

Trustees of Brookhaven v Strong, a challenge to the control by Brookhaven of lands under Great South Bay, was confronted by the argument that the charters "were intended to confer power to organize governments, and are not to be construed as grants for private purposes."[224] The court countered:

> This point is satisfactorily answered by Mr. Angell in his work on tide waters. He says: "But inasmuch as the king by virtue of his prerogative was authorized to create political power in this as in all countries newly discovered and possessed by his subjects, the colonies on receiving the royal charters were invested with a political character by which they succeeded to all the territorial interests which had previously belonged to the sovereign power of the parent country. These charters, it is to be observed, were in the nature of grants and conferred by the king on the idea that he was proprietor. But as they respectively created governments, they were not construed as other grants were, that is as not excluding arms of the sea, etc., but as including them. And thus the governments of the several colonies had ample authority to alter the established law with regard to their tide waters, or to grant an exclusive property therein at their discretion."[225]

Over time the Duke's Laws,[226] and laws of the Colony of New York and State of New York provided for the appointment or election of town officers to succeed the trustee-grantees in exercising various governmental powers, in effect divesting the trustees of such powers.[227] The state constitution was not a barrier. The provisions of the 1777 and later constitutions declared that the officers to be appointed by the governor of the colony under the terms of the charters "shall

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224. 60 NY 56, 69 (1875).

225. Id., Citing and quoting from J.K. Angell, A Treatise on the Right of Property in Tide Waters and in the Soil and Shores Thereof 37 (probably from the 1826 edition; essentially the same passage appearing in the 1847 edition at 38-39). The case established the exclusive right of the Town of Brookhaven to oyster fisheries in part of Great South Bay.

226. The Duke of York's Laws, 1665-75, for the Colony of New York, "compiled from the statutes for the government of the other English colonies in America, under the direction of Nicolls, the first English Governor." 1 Colonial Laws of New York 7 (1894). See the provision for the election of eight "overseers" for each town (id 55).

227. See, for example, acts of the General Assembly relating to the election of town constables and supervisors (1684 NY Laws ch 6; 1691 NY Laws ch 6; 1703 NY Laws ch 133; 1 Colonial Laws of New York 146-47, 237-38, 539-42 [1894]). For the most part, various provisions of laws of the state legislature relating to the selection of local officers discharging governmental functions have been codified in the Town Law.

henceforth be appointed by the council established by this Constitution for the appointment of officers of this state, until otherwise directed by the legislature."[228] The courts have consistently sustained state legislation altering the rosters and duties of officials designated in the colonial charters or patents.[229]

Despite repeated, judicially approved state legislative tampering with the governmental organization of the towns created by colonial charters, the New York legislature and courts have generally reaffirmed the proprietary interests of the town trustees and their successors in the towns' underwater lands. Even in Huntington, where the board of trustees that succeeded the original board of freeholders and commonalty was merged with the town board, the members of the town board act ex officio as such trustees when dealing with lands held by the

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228. 1777 constitution, art XXXVI (emphasis added).

229. See Demarest v Mayor, etc. of the City of New York, 74 NY 161 (1878), upholding a state law abolishing the New York City Board of Assistant Aldermen (then separate from the Board of Aldermen) and constituting the Board of Aldermen as the Common Council; Knapp v Fasbender, 1 NY2d 212, 151 NYS2d 668, 134 NE2d 482 (1956), upholding a 1952 law defining the powers and duties of the trustees of the Town of Huntington as successors of the original Trustees of the Freeholders and Commonalty of the town (1952 NY Laws ch 816, later amended by 1962 NY Laws ch 1001); Sammis v Town of Huntington, 186 AD 463, 174 NYS 610 (2d Dep't 1919) (noting, with approval, the validity of the transfer of functions of the trustees of Huntington to a successor board); and People ex rel Squires v Hand, 158 AD 510, 135 NYS 192 (2d Dep't 1913), sustaining a 1902 statute reducing the number and changing the terms of the members of the Board of Trustees of Freeholders and Commonalty of the Town of Southampton under royal grants, and noting the creation by an 1818 law of a separate body of Trustees of the Proprietors of the common and undivided land of the Town of Southampton to hold and manage undivided town uplands (control over underwater lands remaining in the first body of trustees) for more on the bifurcated Southampton system, see Beers v Hotchkiss, 256 NY 41, 58-59, 175 NE 506, 512 (1931); Trustees of the Freeholders and Commonalty of the Town of Southampton v The Mecox Bay Oyster Bay Co., 116 NY 1, 13-14, 22 NE 387, 391 (1889); Dolphin Lane Associates, Ltd. v Town of Southampton, 72 Misc2d 868, 339 NYS2d 966 (Sup Ct, Suffolk Co, 1971); Lane v Tilton, 43 Misc 214, 88 NYS 428 (Sup Ct, Suffolk Co, 1904); and Kavenagh 163-64 (noting that the trustees of the proprietors "finally liquidated themselves by selling all their remaining uplands in 1882"). And see D'Addario v McNab, 73 Misc2d 59, 67-68, 342 NYS2d 342, 351 (Sup Ct, Suffolk Co, 1973), applying to Brookhaven a provision of the Town Law authorizing election by a ward system of members of the town board, which had assumed the positions of the original body of trustees under a 1959 statute, over the objection that this unconstitutionally impaired contract rights granted by the Dongan charter: "If the Dongan Patent is a contract as sacred as plaintiff asserts, then the Town now owes to Elizabeth II 197 lambs and 7,880 shillings," the yearly "quit rent" owed to "our soverigne Lord the King" under the patent, in addition to "fourty shillings, currant money."

trustees.[230] Thus, the court in Sammis v Town of Huntington ruled that although a suit by a lessee of underwater town lands for renewal of the lease would lie against the town by virtue of the statute conferring the powers of the original board of trustees upon the town board, the "subject-matter is the proprietary, private property of the town of Huntington, which is not held or managed in its governmental capacity." Hence, the liability under the lease "is not a town charge to be audited under sections 133 and 170 of the Town Law (as amd.), which relate to liabilities against a town in its public capacity, and not as such a covenantor on a lease."[231]

b. Scope of Proprietary Interests of the Towns

The 1644 patent of the Dutch Governor Kieft to named "Patentees," their "Associates," and their respective "heires and successors" granted them lands then in the Town of Hempstead, "with all Havens, Harbors, Rivers, Creekes, Woodland, Marshes," thereon; and the "use and Exercise [of] the free Liberty of Hunting, Hawking, fishing, fowling."

The 1666 grant of the first English Governor of New York, Richard Nicolls, to certain patentees "for and the behalfe of themselves and their, associates, the Freeholders and Inhabitants of the . . . Town of Brookhaven" similarly included "all Havens, Harbours, Creekes, Quarrys, Woodlands, meadows, Pastures, marshes, waters, Rivers, Lakes, fishing, Hawking, Hunting and fowling. And all other Profitts, Commodityes, Emoluments and hereditaments, to the said Land."[232] Patents granted later by Governor Andros, including all the "Islands and Necks" within the specified boundaries, contained the same terms, with minor

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230. See 1872 NY Laws ch 492, as amended by 1929 NY Laws ch 101; and 1952 NY Laws ch 816, as amended by 1962 NY Laws ch 865. The 1962 Act declared that nothing in these acts "shall be deemed to curtail or impair the proprietary rights, titles and interests derived by the board of trustees from colonial charters or subsequently acquired by them." And see Knapp v Fasbender, 1 NY2d 212, 151 NYS2d 668, 134 NE2d 482 (1956), noting statutory confirmation of the proprietary interests of the pre-existing trustees of Huntington in lands in Huntington Harbor; and People v Anton, 105 Misc2d 124, 431 NYS2d 807 (Dist Ct, Suffolk Co, 1980) (Trustees of Town of Huntington own land under Huntington Harbor). See Dolphin Lane Associates, Ltd. v Town of Southampton, 72 Misc2d 868, 339 NYS2d 966 (Sup Ct, Suffolk Co, 1971) (underwater lands of Shinnecock Bay owned by Trustees of Freeholders and Commonalty of the Town of Southampton).

231. 186 AD 463, 467, 174 NYS 610, 612-13 (2d Dep't 1919).

232. Similar language is found in the 1666 Nicolls patent to the founders of the Town of Huntington. See Lowndes v Huntington, 153 US 1, 19-20 (1894).

variations.[233]

Governor Dongan's 1688 grant to trustees to hold and manage unappropriated lands "to the use, benefit, and behoof [profit, service, or advantage]" of the freeholders of the Town of Huntington was somewhat more elaborate, including "all and singular the houses, messuages, tenements, buildings, mills, mill dams, fencing, enclosures, gardens, orchards, fields, pastures, woods, underwoods, trees, timbers, feedings and common pasture, meadows, marshes, swamps, plains, rivers, rivulets, waters, lakes, ponds, brooks, streams, beaches, quarries, creeks, harbors, highways and easements, fishing, hawking, hunting and fowling, mines and minerals (silver and gold mines excepted), and all franchises, profits, commodities, and hereditaments whatsoever to the said tract of land and premises belonging . . . ."[234] Patents of the next Governor, Benjamin Fletcher, also included those specifics.[235]

The courts have construed these grants as conferring upon the towns as governmental entities, or on their trustees on behalf of town inhabitants, complete ownership interests in underwater lands within the boundaries of the patents. "The ownership of the town lands was in the town, in its corporate capacity, and not in the patentees named in the grant, nor in the inhabitants of the town."[236] Referring to the Dongan charter of the Town of Southampton and subsequent confirmatory state legislation, the Court of Appeals in the Mecox Bay opinion summed it up:

> We have, then, not only an uninterrupted user, under the patents, by the town and its inhabitants for over two centuries recognizing the right of the town to control and manage the waters of the town and their productions, and

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233. See the 1667 Andros patent to trustees for the Town of Oyster Bay, in Mickness 21A-22B; noted in Rogers v Jones, 1 Wend. 238 (1828); People ex rel Howell v Jessup, 160 NY 249, 258-59, 54 NE 682, 684-85 (1899); and Town of Oyster Bay v Stehli, 169 App Div 257, 154 NYS 849 (2d Dep't 1915), aff'd, 221 NY 515, 116 NE 1079 (1917). And see references to the 1676 Andros patent to settlers of the Town of Southampton in Trustees of the Freeholders and Commonalty of the Town of Southampton v The Mecox Bay Oyster Co., 116 NY 1, 2, 22 NE 387, 387 (1889), and Andros patent of the same year to settlers of the Town of Southold in Town of Southold v Parks, 41 Misc 456, 458, 84 NYS 1078, 1079 (Sup Ct, Suffolk Co, 1903), aff'd, 97 AD 636, 90 NYS 1116 (2d Dep't 1904), aff'd, 183 NY 513, 76 NE 1110 (1905).

234. From the version in Kavenagh 37-38. Similar language is found in the Dongan grant to the 1686 founders of the Town of Hempstead.

235. See patent of 1694 to settlers of the Town of Huntington; and see references to this patent in Lowndes v Huntington, 153 US 1, 20-21 (1894), and Town of Babylon v Darling, 207 NY 651, 653, 100 NE 727, 727-28 (1912).

236. Lawrence v Town of Hempstead, 155 NY 297, 300, 49 NE 868, 868 (1898).

> to exercise over them all the rights which flow from ownership and possession of title, but the distinct recognition by the legislature of the state on two occasions that the title thereto was in the town.[237]

The specific listing in the patents of several incidents of land ownership--including, among others, the familiar "fishing, hawking, hunting and fowling"--might have been unnecessary as a matter of law. They may have been included to allay any doubts that the patents granted to the town and its inhabitants those particular "rights which flow from ownership and possession of title." Moreover, the references to usages and products of waters may reflect an intent to confer exclusive user rights on the inhabitants of the respective grantee towns, barring nonresidents from enjoying those resources. Kavenagh surmises that the Indian deeds to the early settlers were written by colonial Englishmen, using "unsophisticated and often pseudo-legal terms in an effort to emulate the accepted legal jargon of trained lawyers in the mother country"; the "English assumed that the instrument of conveyance included literally everything within the stated boundaries"; and the grantees of confirmatory patents from the colonial governors accepted the description of various rights in land "as an itemization of what they knew they already had de facto."[238]

More troublesome than questions as to the extent of the land rights granted are questions as to the territorial extent of the different water bodies or wetlands granted to the towns. Kavenagh concludes:

> It goes without saying that woodland, meadows, and pastures can be taken to mean upland, that is, above the high tide of any body of water. As for havens and harbors, they can be dispensed with easily enough. Both are sheltered areas that offer ships a safe anchorage from the elements, although haven connotes a slightly less protected inlet or recess in the shoreline than harbors. . . . Similarly, creeks and rivers terminate at that point where their banks and water flow can no longer be clearly associated with their own characteristics but become merged with a larger body of water into which they

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237. The Trustees of the Freeholders and Commonalty of the Town of Southampton v The Mecox Bay Oyster Co., 116 NY 1, 14, 22 NE 387, 391 (1889); quoted with approval in People ex rel Howell v Jessup, 160 NY 249, 263, 54 NE 682, 686 (1899). Similarly, see Trustees of the Freeholders and Commonalty of the Town of Southampton v Morrisey, 191 Misc 920, 925, 83 NYS2d 681, 685 (Sup Ct, Suffolk Co, 1947). See also, in relation to ownership of lands granted to the patentees of the Town of Hempstead, Town of North Hempstead v Town of Hempstead, 2 Wend. 110 (1828). Limitations on complete control and management of these lands, by virtue of public trust doctrines or reservations in grants made under state laws, are discussed below. Cf State v Trustees of the Freeholders and Commonalty of the Town of Southampton, --AD2d--, 472 NYS2d 394 (2d Dep't 1984).

238. Kavenagh 21.

flow, including other creeks, rivers, harbors, bays, lakes, or the ocean. Again, this terminal point must be designated on a site-by-site basis.

In any event, all the colonial charters on Long Island extended the boundaries of towns only to the outer limits of the mouths of all such waters and no farther, unless an abutting larger body of water was specifically named as being included. Therefore, all boundaries along the north shore ended at the high water mark of Long Island Sound . . . .[239]

c. The Trusteeship Factor

Some of the Dongan patents and at least one Fletcher patent designated individuals as "trustees" to hold and manage unappropriated lands for the use of the freeholders of the towns. Kavenagh states that "only Brookhaven, Easthampton [sic], Southampton, and Huntington fall within this category," by virtue of patents from Governor Dongan.[240] Governor Fletcher's confirmatory grant of 1694 to Huntington also acknowledged the status of the trustees for that town.

The fact that some of the colonial patents designated trustees to hold the land, but others did not, invites speculation as to the reasons for the differentiation, and inquiry whether the trusteeship factor makes any difference today. Where boards of trustees have operated separately from town boards, questions regarding the division of their powers and responsibilities have arisen.[241] And even where the separation no longer exists, and the functions of the trustees have been absorbed by regular town officers, we have seen that some ground rules governing general town functions may not apply to their activities as

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239. Kavenagh 21. He then notes his disagreement with the contrary assertion by the writer of the Hofstra Law Review comment that "these grants, in many cases, extend out into Long Island Sound so that title to the underwater lands is held, not by the State, as is customary, but by the towns." Colonial Patents and Open Beaches, 2 Hofstra L Rev 301, 303 (1974). The Supreme Court in Lowndes v Huntington, 153 US 1, 22-23 (1894) declared that the "northern boundaries in all these charters is given as 'the Sound.' . . . . Into it flow many rivers, and open many bays, harbors, and inlets; but the fact of a connection between them and it does not make them a part of the Sound."

240. Kavenagh 48 (note 25 referring to text at page 38). As successors to some of the land granted originally to the trustees of Brookhaven and Huntington, trustees appointed by later statutes held land for the towns of Babylon and Islip, respectively.

241. See, e.g., Riviera Association, Inc. v Town of North Hempstead, supra note 218; Knapp v Fasbender, supra note 229; and Wihstutz v Town of Babylon, 220 NYS2d 849 (Sup Ct, Suffolk Co, 1960) and 220 NYS2d 852 (Sup Ct, Suffolk Co. 1961), (not officially reported).

trustees.[242] But does the trust status give the trustees any more or less flexibility than the town board has in conveying or leasing the land for aquaculture purposes? That question will be addressed later in the section on land disposition. However, we pause briefly here to note some of the legal attributes of these trusts, and make some references to Kavenagh's treatment of the subject.[243]

In trustee arrangements generally, legal title to property held in the trust is in the trustees, and the beneficiaries hold equitable interests. There are various types of trusts, the principal classification dividing private trusts for the benefit of particular individuals from charitable trusts usually established for the benefit of an indefinite group of subjects of the charity.[244] The designation in the colonial patents of individual trustees to have and to hold the lands for the freeholders probably falls into the charitable trust category. That is the position taken by Kavenagh.[245] A "charitable trust is a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose."[246] "Charitable purposes" include trusts for "governmental or municipal purposes," or "for the promotion of purposes which are of a character sufficiently beneficial to the community to justify permitting property to be devoted forever to their accomplishment."[247]

Kavenagh speculates that Governor Dongan may have "concentrated the control of town property, and accountability for it, in the hands of" trustees to avoid "the possibility of a few accumulating large land holdings against his wishes, since the trustees were bound by law to act

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242. See Sammis v Town of Huntington, supra note 231; and Wihstutz v Town of Babylon, supra note 241.

243. Kavenagh 37 et seq.

244. To be valid, a private trust must identify a particular beneficiary within a given period of time, and its duration is limited by law. The beneficiaries of a charitable trust may be indefinite or not definitely ascertainable, and may continue for an unlimited period. Restatement of Trusts (Second) §§ 364-65; and see H.T. Tiffany, A Treatise on the Modern Law of Real Property and Other Interests in Land 186 (abridged ed 1940). See section 8-1.1(a) of the New York Estates, Powers and Trusts Law, stating that a "disposition for religious, charitable, educational or benevolent purposes," is not "invalid by reason of the indefiniteness or uncertainty of the persons designated as beneficiaries." McKinney 1981.

245. Kavenagh 39.

246. Restatement of the Law of Trusts (Second) § 348.

247. Id. §§ 373-74.

in the interests of the entire community," and would probably not be allowed "to grant large tracts of land to a few among [the freeholders] to the exclusion of the others."[248] Those or other trustee excesses or failures to perform their functions could be remedied by action of the attorney general of the province, given his function of monitoring charitable trusts.[249]

We have not found recorded instances in which the colonial attorney general or the holders of that office since independence have had occasion to intervene in the affairs of these Long Island trustees as supervisor of charitable trusts. But from Kavenagh's discussion of the special fiduciary obligations of trustees and of the authority of the attorney general to enforce them, we infer that in his judgment such intervention in future is a possibility.

The question, if it ever arises, whether the Attorney General may intervene in the affairs of trustees designated by the colonial patents is just one of several issues that may turn on whether there is a real distinction between such patents and those that do not include express trust terms.[250] Some of those issues will be touched on below in the discussion of the powers of Long Island towns to alienate lands under water.

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248. Kavenagh 41. Or "far more practical and immediate justification might have been the greater success with which Dongan could collect quit-rents or taxes under a trust arrangement," by taking advantage of the security of the property held by the trustees. Id.

249. Id. The Attorney General of New York represents the beneficiaries of charitable trusts, and otherwise exercises supervisory powers over such trusts, including appearances in proceedings seeking judicial modification of trust terms, a subject to be discussed later. Estates, Powers and Trusts Law §§ 8-1.1(f), 8-1.4 (McKinney 1981 and 1982 Supp).

250. See Town of North Hempstead v Town of Hempstead, 2 Wend. 110, 134 (1828), in which the court implied that the Kieft grant to patentees for the freeholders of North Hempstead was made by them as "trustees" for the inhabitants of the towns enjoying the status of "cestui que trust." Procedural issues may arise where judicial attention is directed to the affairs of these town trustees. Chapter 816 of the Laws of 1952, in confirming the title of the Board of Trustees of the Town of Huntington to certain lands in the town, declared that the acts of the Board "shall be subject to review by the Supreme Court under the provisions of Article 79 of the Civil Practice Act," and declared such trust "to be an express trust within the meaning of Section 1307" in that article. Those provisions, now found in article 77 of the Civil Practice Law and Rules, generally allow a special proceeding to "be brought to determine a matter relating to any express trust" (§ 7701). In promoting this legislation the Huntington Town Board and Board of Trustees noted that the provision was intended to permit direct access to the court for opinions regarding the construction of the trust, whether or not there was an actual controversy to be litigated. Memorandum of the Town Board and Board of Trustees in Governor's Bill Jacket on 1952 NY Laws ch 816.

2. Subsequent Acquisition Authorized by Colonial Grants

Some, if not most, of the colonial grants to settlers of Long Island towns expressly authorized the grantees to acquire additional lands, presumably to be held under the same terms conditioning the initial grants. The 1666 Nicolls grant to patentees for freeholders of the Town of Brookhaven included "all that Tract of Land, which already hath beene or that hereafter shall be Purchased, for and on the behalfe of said Towne, whether from the native Indyan Proprietors, or others within the Bounds and Limitts" of the town. A similar provision is found in the confirmatory grant to Brookhaven made 20 years later by Governor Dongan, and in a like Dongan grant made the same year to Southampton. In designating individuals as "Trustees of the Freeholders and Commonality of the Town of Brookhaven" to hold the Brookhaven lands, the later Dongan patent explicitly authorized the trustees to "Receive and Possess" not only the lands initially granted, but also "Other Mess[u]ages Lands [and] Tenements," impliedly authorizing the trustees to acquire lands thereafter to be held in their trust capacity.[251]

The 1676 Andros patent to individuals for the Town of Southold declared that lands within the designated town boundaries not included in the grant shall nevertheless "have Relation to the Town in Generall, for the well Government thereof and if it shall so happen that any Part or Parcell of the said Lands within the Bounds and Limits afore described bee not already Purchased of ye Indyans it may bee Purchased (as occasion) according to Law." The Andros patent of the following year to individuals for the Town of Oyster Bay contains similar wording. The 1685 Dongan grant to patentees for the freeholders of the Town of Hempstead makes no reference to lands acquired thereafter, but granted to them "all the privileges and immunities belonging to a town within this government."

Technically, following independence the legal basis for the exercise of the powers of acquisition and disposition of land incorporated in colonial patents to trustees or freeholders for the towns lies in state legislative and constitutional confirmations of the grants themselves.

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251. The 1686 Dongan grant to Southampton trustees contains a similar clause. So does the 1694 grant by Governor Fletcher to trustees for Huntington, in addition to the "hereafter" purchased clause. The 1952 law confirming legal title in the Board of Trustees of the Town of Huntington as successor to the Trustees of the Freeholders and Commonalty specifically ratified "powers to acquire, hold, manage, lease, control, convey, grant and dispose of property both real and personal for the benefit of the residents and taxpayers of the Town of Huntington heretofore exercised by said Board of Trustees." 1952 NY Laws ch 816, § 2 (emphasis added). In writing to the Governor on the proposal the Town Board and Board of Trustees stated that the trustees under the crown grants had "conveyed, leased, acquired, improved and managed the trust property," suggesting acquisitions subsequent to the initial grants. Governor's Bill Jacket on 1952 NY Laws ch 816.

If specific authorization to acquire additional lands were not included in the patents, generally it would be easily demonstrated that the conferring on the grantees of the general attributes of bodies corporate and politic impliedly included that power.

3. Legislative Grants or Authorizations

The blanket confirmations of colonial patents by the colonial General Assembly and early state constitutions have been noted.[252] In addition, three types of legislative grants or authorizations to particular Long Island towns are relevant to this study: (1) grants confirming titles or other interests conferred by prior colonial patents; (2) grants of state interests in other underwater lands, for the most part limited to shellfish cultivation; and (3) statutes directly granting exclusive shellfish cultivation rights to inhabitants of particular towns, in some cases subject to obtaining town licenses.

a. Confirmatory Grants

To settle conflicts of the proprietors and other freeholders of the Town of Southampton regarding the control of common, undivided uplands,[253] the legislature in 1818 authorized the proprietors to elect a new and separate board of from six to 12 trustees "to manage all the undivided lands, meadows and mill streams," in the town; and granted to these trustees of the proprietors the "same power to superintend and manage" them "as the trustees of the freeholders and commonalty [patentees under the Dongan patent] now have, and . . . full power to sell, lease, or to partition, and to make . . . rules and regulations, and by-laws for managing the said lands."[254] An 1831 clarifying statute confirming the retention by the original board of trustees of the freeholders and commonalty of control over underwater lands was more explicit.[255] The members of the original board were given "the sole control over all the fisheries, fowling, sea weed, waters and productions of the waters within the said town, not the property of individuals, and all the property, commodities, privileges and franchises granted to them by the charter of Governor Dongan," except as otherwise provided by the 1818 Act and "not now belonging to individuals

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252. See supra text accompanying notes 211-217.

253. Kavenagh suggests that the source of the conflict was the fact that lands allotted to the original proprietors and their successors carried with them shares in the undivided lands, while those who came to Southampton later acquired "no rights in the commonage other than what the proprietors allowed them for use only." Kavenagh 163.

254. 1818 NY Laws ch 155. See supra note 229, mentioning the subsequent liquidation of the board created by the 1818 Act.

255. 1831 NY Laws ch 283.

nor to the proprietors."[256]

In 1857, the state legislature deemed it necessary, or at least desirable, to enact a special law confirming the title and interest of Islip lands previously ceded by the Town of Huntington following the settling of the boundaries of the two jurisdictions.[257]

A confirmatory grant in favor of the Town of Southold may be inferred from the 1893 Act empowering the electors of the town to elect trustees who would be authorized "to manage, lease, convey or otherwise dispose of all or any part of all such common lands, waters and lands under water, or rights or other interests therein, subject as to lands under water, to the public right of navigation and to the riparian rights of adjoining upland owners, as the town of Southold acquired and now holds by virtue of any colonial patent or charter."[258] Similar language is found in a similar statute authorizing the electors of the Town of East Hampton to elect "twelve freeholders as trustees, who shall continue to be known as the Trustees of the Freeholders and Commonalty of the Town of East Hampton"; but that statute explicitly confirmed the "authority and proprietary rights" of the trustees "as granted to them by colonial patent or charter."[259]

The 1920 law placing all the common lands of the Town of Oyster Bay "under the authority and control of the town board" repealed prior laws that had authorized the "electors of the town . . . to determine whether they will lease, or otherwise regulate their common lands, beaches and marshes," but did not contain language explicitly confirming title granted by Governor Andros to patentees on behalf of the freeholders.[260] It may be that on that occasion the legislature saw no need to add to earlier blanket constitutional and statutory confirmations of colonial grants, including the one to the Town of Oyster Bay.

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256. Id § 5.

257. 1857 NY Laws ch 503.

258. 1893 NY Laws ch 615, as amended by 1952 NY Laws ch 404.

259. 1966 NY Laws ch 1001. The confirmations of land ownership and disposition rights in these statutes appear to have been incidental to their main purpose of altering various details regarding the election and office of the trustees, and were added as a precautionary measure to allay any doubts regarding the trustees' proprietary interests or authority. See also the statutes relating to the creation or abolition of separate boards of trustees for the Town of Huntington: 1872 NY Laws ch 492; 1952 NY Laws ch 816 (see supra note 251); and 1962 Laws ch 865.

260. 1920 NY Laws ch 157, repealing 1822 NY Laws ch 70, and amendments found in 1852 NY Laws ch 210; 1 Rev Stats ch XI, tit. 7, §§ 18-21 (7th ed 1882); and 1886 NY Laws ch 51. The 1920 law did ratify and confirm all leases theretofore made by the town board.

b. Town Ownership Interests Derived from State Grants of Underwater Lands

Special state laws granting to the towns interests in bottom lands of navigable water bodies normally limit the grantees to particular uses deemed compatible with the state's obligation to protect public user rights.[261] These limited grants are typified by statutes granting underwater lands to the towns of Huntington "for the purpose of oyster cultivation,"[262] and Smithtown "for the promotion of oyster and shellfish culture."[263]

Variations are found in the ceding of the state's right, title and interest in certain lands of Long Island Sound to the Town of Smithtown "for the protection of clamming";[264] and the state's exchange of land with the Town of Islip to enable the state to construct a parkway on town lands, resulting in authorization to the Board of Commissioners of the Land Office to "grant and convey" certain underwater lands to the town "for the protection of shell-fish lying in such waters and for other purposes, on such terms and conditions as to [the commissioners] may seem just."[265] The purpose of "protection" of shell-fishing might be construed as limiting the authorization to an exercise of regulatory power, barring the towns from exercising the right to lease the lands for shellfish cultivation. The contrary may be indicated by use of the terms "cede" and "grant and convey," based on the argument that these words of transfer of ownership interests would be superfluous if nothing but a grant of police powers was intended. On the other hand, the added authorization in the Islip statute to "grant and convey" land "for other purposes" might be construed as a delegation to the town of the power to lease or otherwise dispose of the land for shellfish cultivation or any other purpose--at least a purpose compatible with public use restrictions.

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261. See discussion below of similar constraints on alienation of bottom lands by the towns. And see Public Lands Law § 34-b, relating to leasing of air and subsurface rights, text accompanying note 120 supra.

262. 1888 NY Laws ch 279—lands under Huntington Bay which had been claimed by the Town of Huntington under colonial patents, a claim apparently contested by the state.

263. 1895 NY Laws ch 952—lands under certain river and creek tidewaters and under Smithtown or Stony Brook Harbor. The 1888 Huntington statute said that the "right, title and interest" of the state, were "hereby ceded" to the town; the 1895 Smithtown statute, that they were "granted, conveyed and released" to the town. Although one might speculate that "cede" was chosen in view of Huntington's claim of ownership (see supra note 262), the use of the word "ceded" in other statutes suggests that these terms are used interchangeably by the New York legislature. See the 1910 grant to the Town of Smithtown referred to infra in note 264.

264. 1910 NY Laws ch 343.

265. 1929 NY Laws ch 206, as amended by 1930 NY Laws ch 535.

An exception to the general proposition that these legislative grants are limited to stated purposes appears on the face of a special law authorizing the Office of General Services to "grant to the town of North Hempstead all the right, title and interest of the people of the state of New York" to specified lands under Hempstead Harbor.[266] The statute did not include a purpose limitation. The history of the measure reveals that the town wanted to use the land to build an incinerator plant, and improve bathing facilities of the town.[267] The absence of a restriction on town use of the land may be explained by the additional fact that the objective of the enactment was to settle a controversy between the town and state over ownership of the land. The town claimed ownership under colonial patents.[268] Apparently the state authorities preferred to settle the matter by legislation, in lieu of costly litigation, "to eliminate the present confusion as to title."[269]

c. State Authorized Shellfish Licenses

On a few occasions the state legislature has directly granted the residents of particular towns the right of exclusive access to underwater lands for shellfish cultivation, subject to specified restrictions. Possibly the earliest of these, an 1866 statute, made it "lawful for any person being an inhabitant of the towns of Islip or Huntington . . . for the period of six months, to plant oysters in any of the public waters of the Great South bay, within either of the said towns; and upon complying with the provisions of this act . . . he shall be entitled to and have the exclusive ownership and property in all oysters upon the beds where the same were planted, and the exclusive right to use the said beds for the purpose aforesaid."[270] The law restricted the right of each inhabitant to two acres of land not the site of natural oyster beds, required the occupant to mark the area, stipulated the planting of no less than 400 bushels per acre, and provided for forfeiture in the event of abandonment of the use or ceasing to be an inhabitant of the town.[271] Persons planting oysters under this law were protected by the imposition of penalties for

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266. 1962 NY Laws ch 508.

267. Memorandum of the Town Board of North Hempstead to Counsel to the Governor, in Governor's Bill Jacket on 1962 NY Laws ch 508.

268. Id.

269. Id, Memorandum of Louis J. Lefkowitz, Attorney General.

270. 1866 NY Laws ch 306, § 1, amended by 1872 NY Laws ch 666.

271. Id §§ 2, 6.

unlawful disturbance of their beds by unauthorized persons.[272]

Later similar statutes added administrative mechanisms, such as the condition of prior certification by specified town officers that the person seeking the right was an inhabitant of the town, and that "the land selected does not contain a planted bed of oysters, or is not planted by any person other than such applicant."[273] In addition, the persons exercising the rights were required to pay an annual rent to the town for the right to use the designated land.[274] An 1874 law (as later amended) authorized the planting of oysters in the portions of Great South Bay lying within the Towns of Islip and Babylon,[275] established a board of "Oyster Commissioners" for the towns to grant the certifications, and charged them with the responsibilities of surveying and mapping the areas to be so allotted, and of locating lots for individual applicants.[276] An 1897 law providing for the granting of the right to plant oysters or clams in the public waters of the Town of Hempstead designated the town board as the agency issuing the certificates, and stated that the certificates were to be designated licenses, and were renewable from year to year.[277]

An early variation of the pattern is found in an 1857 law providing that the "owners and lessees of land bounded upon" a specified part of Shinnecock Bay in the Town of Southampton "may plant oysters or clams in the waters of said bay, opposite their respective lands, extending from low water mark into said bay not exceeding four rods in width"; requiring the marking of the site so used; and prescribing civil penalties for the unauthorized taking of oysters or clams from such areas.[278]

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272. Id § 3.

273. 1871 NY Laws ch 639, § 3 amended by 1887 NY Laws ch 183, § 41, granting the right to plant oysters in the public waters of the towns of Jamaica and Hempstead, in the County of Queens. It may be noted in passing that the law prohibited dredging for oysters in these waters. Id § 9.

274. Id § 4.

275. 1874 NY Laws ch 549, as amended by 1878 NY Laws ch 142, and NY Laws 1886 ch 593, § 41.

276. Id. §§ 2, 6.

277. 1897 NY Laws ch 338, § 4, as amended by 1909 NY Laws ch 515.

278. 1857 NY Laws ch 497.

C. Restrictions on Town Disposition of Underwater Lands

For the purpose of clarification, rather than intending to reflect any hierarchical order or assignment of relative importance, the discussion of limitations on the authority of Long Island towns to convey or lease underwater lands will be organized as follows: (1) procedural requirements in general statutory authorizations; (2) restrictions in special statutes or other grant instruments; (3) public purpose or public use limitations, based on constitutional, statutory or common law rules; (4) federal or state preemptive regulatory laws; and (5) restrictions resulting from conflicts with rights of owners of nearby shores.

1. Procedural Requirements, in General; Statutory Authorizations

The courts on a few occasions have been faced with the question whether the provisions of section 64(2) of the Town Law, authorizing town boards to "convey or lease real property in the name of the town" by resolution "subject to a permissive referendum," apply to the leasing of underwater lands derived from colonial patents.[279] In the most recent of the series, Riviera Association, Inc. v Town of North Hempstead,[280] the owner of land on the shore of Manhasset Bay brought a taxpayer's action to enjoin the town from selling a parcel of town land located partially on the foreshore and partially under water for use by the buyer as the site of a restaurant and parking lot. The contract of sale was "subject to 'riparian rights, if any, of abutting upland owners' and to 'permissive referendum if required by law.'"[281]

In passing on one of the principal issues raised by plaintiff--whether the lands in question were impressed with a public trust

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279. McKinney Supp 1982. The sentence containing this provision says that the town board of any town "[m]ay acquire by lease, purchase, in the manner provided by law, or by acquisition in the manner provided by the eminent domain procedure law, any lands or rights therein, either within or outside the town boundaries, required for any public purpose, and may, upon the adoption of a resolution, convey or lease real property in the name of the town, which resolution shall be subject to a permissive referendum."

280. Note 218 supra. In addition to asserting taxpayer status, the complainant claimed riparian rights in the filled in foreshore part of the parcel, and in the waters below his boat slip on another part of the parcel. The court said that "arguments based upon plaintiff's riparian rights are irrelevant," for the town was the owner of the parcel in question and "plaintiff's riparian rights continue notwithstanding the placing of the fill." 52 Misc2d at 577, 276 NYS2d at 251-52.

281. Id at 576, 276 NYS2d at 251.

preventing the town from alienating it--Mr. Justice Meyer[282] assumed that unless barred by the public trust doctrine the proposed conveyance would be valid as an exercise of the town board's power under section 64(2) of the Town Law to "convey[283] real property in the name of the town . . . subject to a permissive referendum."[284] He observed that the town held "the lands in question in its corporate capacity notwithstanding that the original grants [by the Colonial Governors Kieft and Dongan] were to named individuals and their successors," and the "Town Board and not the 'board of trustees' has been given power of sale over town lands."[285] The court may have been referring to the "board of trustees" established for the town by a 1900 statute, and vested by that law with the "care, custody and control of the common fisheries and common lands belonging to" the town, as well as the power to "lease" such lands and fisheries.[286] The fact that this delegation of authority to the board of trustees stopped short of the power of sale may have accounted for the court's conclusion that the town board, not the board of trustees, was the appropriate agency for conveying the lands in issue.

The Riviera opinion does not answer the question whether the "proprietary" nature of the town's holding of underwater lands would take them beyond the reach of section 64(2) of the Town Law; there is no indication in the opinion that the argument was advanced by plaintiff's

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282. Then a Justice of the Supreme Court sitting in Nassau County, now a member of the Court of Appeals. Another member of the Court of Appeals, Hon. Sol Wachtler, was a member of the successful defendant board of trustees of the Town of North Hempstead in Manor Marine Realty Corp. v Wachtler, the companion case, cited in note 218 supra.

283. Since then the section was amended to read "convey or lease real property" (1980 NY Laws ch 365) (McKinney Supp 1982).

284. 52 Misc2d at 580, 276 NYS2d at 254. The court's rejection of the public trust argument is discussed below.

285. Id at 578, 276 NYS2d at 252 (emphasis added).

286. 1900 NY Laws ch 502, §§ 1, 3. The Kieft and Dongan grants relied on by the town had been made to the patentees, and their associates, heirs, successors and assigns, not to named trustees as in grants for Brookhaven, East Hampton, Huntington and Southampton. See the wording of the Hempstead patents in Grace v Town of North Hempstead, 166 AD 844, 846, 848, 152 NYS2d 122, 124-25 (2d Dep't 1915), aff'd, 220 NY 628, 122 NE 1040 (1917). However, the 1900 statute established a board of trustees for the Town of North Hempstead with the power to control and lease the common lands and fisheries of the town.

counsel.[287] Nor does it confront the issues whether the result might be different if a separately constituted board of trustees were empowered to convey underwater or shore lands, or had leased them rather than conveying title. Earlier lower court cases that dealt with those or similar questions were not referred to in the Riviera opinion.

In Wihstutz v Town of Babylon,[288] a taxpayer of the Town of Babylon sought to void leases to a private corporation of a beach, located on Great South Bay, for the operation of a restaurant and fishing station. The land in question came within Babylon when that town was carved out of the Town of Huntington by special laws enacted in 1872.[289] These laws "created for the new Town of Babylon a board of trustees with the same proprietary powers then held by the trustees of the freeholders and commonalty of the Town of Huntington" under colonial grants, including "the power 'to hold, manage, control, convey and dispose of the real estate of the Town of Babylon.'"[290] A subsequent conveyance by the Huntington trustees vested title to Babylon's land in the trustees for the town of Huntington.[291]

Although it was not clear from the record whether the Babylon officials who executed the leases had acted in the capacity of members of the town board or of the board of trustees, the court ventured that where the board of trustees "exists as a separate and independent body it has the power to transact its business on its own resolution and is not governed by the provisions of the Town Law governing the acquisition and conveyance of real property," so in exercising such power the board "would not have been subject to a permissive referendum."[292]

The court cited as authority for these statements Knapp v

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287. The Appellate Division in an earlier case had concluded that both the Kieft and Dongan patents to individuals for the Town of Hempstead of lands under Manhasset Bay, later ceded to the Town of North Hempstead, had granted "proprietary" interests in underwater lands. Grace v Town of North Hempstead, 166 AD 844, 850, 152 NYS 122, 126 (2d Dep't 1915), aff'd, 220 NY 628, 220 NE 1040 (1917).

288. 220 NYS2d 849 (Sup Ct, Suffolk Co, 1960, not officially reported).

289. 1872 NY Laws chs 105, 492.

290. 220 NYS2d at 851.

291. Id.

292. Id. In a proceeding on a later motion the defendants unsuccessfully asserted that the questioned leases were later ratified by the Town Board after a 1961 statute had transferred to the Town Board the control over all lands previously held by the board of trustees. 220 NYS2d 852 (Sup Ct, Suffolk Co, 1961, not officially reported).

Fasbender.[293] In Knapp, taxpayers of the Town of Huntington sued to invalidate a resolution of the Town Board putting to the town voters a proposition asking whether they approved prior action of the board of trustees acquiring and improving certain beach and other lands for recreational and parking purposes, and in contracting for the dredging of Huntington's harbors and bays and using revenues from the sale of dredged material to support the improvements. Framing the initial issues, the court said:

> The preliminary question before us then is to decide whether the board of trustees truly possessed the power to enter into such contracts free from the restraints of the provisions of the Town Law . . . which requires a resolution of the town board and the approval of the qualified electors to engage in certain town improvements. If the answer is in the affirmative, the issue of the validity of Proposition No. 1 [the referendum proposition] need not be considered. For if these contracts were proprietary in nature they did not require prior authorization or subsequent approval of the electors . . . . In that event the adoption of the resolution by the town board was needless.[294]

The court then reviewed the 1872 and 1952 statutes[295] creating and continuing a board of trustees of the town and vesting in them powers "to acquire, hold, manage, lease, control, convey, grant and dispose of property" for the benefit of the town residents,[296] powers previously vested in trustees of the freeholders and commonalty of the town originally established by colonial patents. The 1952 confirmatory act declared that "[e]xcept as therein otherwise specifically provided, the provisions of the town law, shall not apply to the acts of said Board of Trustees," and did not specify exceptions invoking referendum provisions of the Town Law.[297] The court did not stop there, but discussed at considerable length the history of constitutional, statutory and judicial recognition of the separate powers of this and similar boards of trustees to acquire, manage and hold "title and sovereignty" over underwater lands and waters conveyed by colonial grants.[298] It

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293. 1 NY2d 212, 151 NYS2d 668, 134 NE2d 482 (1956).

294. Id at 218, 151 NYS2d at 671, 134 NE2d at 484.

295. 1872 NY Laws ch 492, as amended by 1929 NY Laws ch 101; and 1952 NY Laws ch 816.

296. 1952 NY Laws ch 816, § 2.

297. Id § 4.

298. 1 NY2d at 221 ff, 151 NYS2d at 674 ff, 134 NE2d at 486 ff; quoted words at 1NY2d 225, 15 NYS2d 677, 134 NE2d 488 taken by the court from People ex rel Howell v Jessup, 160 NY 249, 265, 54 NE 682, 687 (1899).

concluded that absent a "specific restriction," the legislature could not be deemed to have required voter approval, and noted that other statutes defining the powers of trustees did not contain the condition, and that:

> The reports of adjudicated cases in our courts show that in the early days of the towns of Suffolk County and of the Town of Huntington, approval at town meetings of the actions of the trustees of the freeholders and commonalty of the town was customary. . . . On the other hand, the evidences are many that, with the growth of the population and increases in the number of transactions consummated by the trustees, prior authorization of the electors was seldom sought or obtained. . . . To hold that trustees lacked the power to transact their business on their own resolution is to read into prior legislative acts and the 1952 statute a restriction plainly not a part of the statutes, a restriction contrary to actual practices as revealed by official records and a restriction casting doubt on the security of transfers of titles of great communities in Suffolk County.[299]

In concluding that the 1952 law and prior legislative and judicial determinations established the powers of the board of trustees to enter into the contracts in issue without voter approval, the court issued the caveat that "[s]uch a construction of the statute does not extend the trustees' proprietary powers so as to include important governmental powers or to interfere with the coexisting town board."[300] The court's explanation of the significance of its description of the trustees' powers as "proprietary" is somewhat obscure, possibly because the term "proprietary" was used in different senses in the opinion. At one point the court noted that the 1952 statute had confirmed acts taken by the board of trustees in the exercise of powers under the colonial patents, which included "the power of holding legal title to the common lands in a proprietary capacity for the benefit of the inhabitants of the town."[301] In an earlier stage of the Knapp litigation the Appellate Division had held that the "fact that the trustees as such had or have

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299. 1 NY2d at 231-32, 151 NYS2d at 682-83, 134 NE2d at 492-93. A footnote of the court cited, among the legislative acts referred to, sections 81 and 179 of the Town Law subjecting various acts of town boards to referendum requirements.

300. Id at 232, 151 NYS2d at 683, 134 NE2d at 493.

301. Id at 229, 151 NYS2d at 680, 134 NE2d at 491 (emphasis added).

the power to hold town property does not empower them to acquire real property without compliance with sections 81 and 220 of the Town Law," hence the trustees were "without authority to purchase and maintain the beach," something only the town board could do pursuant to section 64 of the Town Law.[302] The Court of Appeals disagreed, stating that the Appellate Division "was in error to the extent that it held that the board of trustees was without the power to acquire lands for a beach or a recreation project."[303]

For support for this position the Court of Appeals turned to authorities focusing on the use of lands held by boards of trustees similar to the Huntington board. The court noted that the "littoral and the strand of the Southampton and Brookhaven proprietary lands have been used for centuries for recreation, including bathing, boating and fishing"; the "waters and docks have been utilized to anchor and berth boats"; and "[t]hat such use was proprietary is beyond cavil."[304] The court then cited as precedent Trustees of the Freeholders and Commonalty of the Town of Southampton v Betts.[305] The case arose from the bifurcation of responsibilities for the management of lands and waters in Southampton effected by an 1818 Act.[306] Under Andros and Dongan patents title to all Southampton lands was vested in trustees of the freeholders and commonalty of the town, the beneficiaries of the trust being the "original purchasers and proprietors, their heirs and their assigns."[307] The 1818 statute was intended to end, by compromise, "friction . . . in the community as to the respective rights and interests of the proprietors and of those of the [new] inhabitants who had no interest in the unallotted lands of the town."[308] The statute created a new body, called the "Trustees of the Proprietors of the common and undivided land of the town of Southampton" (hereafter referred to as the "Trustees of the Proprietors") and "conferred upon them all rights of management of the 'undivided lands, meadows and mill streams' of the town and the power to 'sell, lease and partition' the same."[309] The 1818 Act reserved to the original trustees for the

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302. Knapp v Fasbender, 278 AD 970, 971, 105 NYS2d 780, 781 (2d Dep't 1951), appeal withdrawn, 303 NY 803, 104 NE2d 361 (1952).

303. 1 NY2D at 226, 151 NYS2d at 678, 134 NE2d at 489.

304. Id at 225, 151 NYS2d at 677, 134 NE2d at 488.

305. 163 NY 454, 57 NE 762 (1900).

306. 1818 NY Laws ch 155.

307. 163 NY at 457, 57 NE at 762.

308. Id, and 57 NE at 763.

309. Id.

freeholders and commonalty "the right of management of the waters within the town and of 'the fisheries, seaweed and productions of the waters,' for the benefit of the town, and to its inhabitants was reserved 'the privilege of taking seaweed from the shores of any of the common lands of the town.'"[310]

The plaintiff board of trustees for the freeholders and commonalty sued to recover a tract of beach land along the Atlantic shore conveyed to Betts by the Trustees for the Proprietors, which Betts had used for the building of summer cottages and a church. Plaintiff claimed that the undivided lands placed under the management of the Trustees for the Proprietors by the 1818 Act "did not include lands inherently of the character of such as usually are held for public use and that there was evidence proving, or tending to prove, that the beach, or seashore, had always been reserved for the public use and, therefore, could not have been comprehended within the lands affected by the act of 1818."[311] The issue was simply one of construction of the 1818 Act, whether the term "common lands" included beach lands such as those conveyed to Betts. On that issue the court concluded:

> The shore lands, or beaches, were just as much common and undivided lands, within the terms of the trust, as were any other lands within the town boundaries. The act of 1818, in transferring the title to other trustees, made no reservation of the beach, or shore of the ocean, and that no such reservation, or any exception, was intended in the general grant is rather made clear, than doubtful, by the particular reservations contained in the provisos of the act.[312]

The Knapp court seized upon, made too much of, and twisted a dictum in the Betts opinion. Responding to the argument in Betts that the undivided lands transferred to the new trustees under the 1818 statute did not include lands held for a public use, the Betts court found:

> [T]he evidence neither supports the theory of the plaintiff's action, nor is of the character which is attributed to it. The evidence shows that this beach, or seashore, as were other beach lands in the vicinity, was used for sea fishing and purposes incidental thereto, for watching for whales and purposes connected with their catch, for bathing and for carting away of wreckage deposited. Boats were hauled up and kept upon the shore; seines were spread out upon it and persons passed, and

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310. Id.

311. Id at 458, 57 NE at 763.

312. Id at 459, 57 NE at 763.

> repassed, and occupied themselves upon it, in ways which would be usual to the inhabitants of a fishing village or settlement. All this, however, was but proof of temporary uses by the inhabitants of the town.[313]

The Knapp court read plaintiff's position in Betts as holding that the "beach property and the uses to which it was put were necessarily governmental in nature and title to it could not have been vested in a nongovernmental body with only proprietary powers, as was the trustees of the proprietors of the undivided lands."[314] The Knapp court then fallaciously cited the Betts court's rejection of the argument as authority for the proposition that in acquiring land for and developing beaches, parks and recreational fields the Huntington trustees would be performing "proprietary" rather than "governmental" functions.[315] Yet the Betts court had merely questioned whether the beach area in suit had been devoted to a public use, except in the most casual sense; and held that even if the area had been so used, the statute transferring ownership to the new trustees nevertheless covered it. The Betts opinion did not bring up and discuss a distinction between "governmental" and "proprietary" uses or holdings of land by any body of trustees.[316] In effect, the Knapp court jumped from a dictum that a beach temporarily used by members of the public was not necessarily a "public use," hence not within the jurisdiction of trustees, to the conclusion that if a beach were made into a public park, thus were being devoted to a public use, the use would nevertheless be "proprietary" in nature, hence within the jurisdiction of the trustees.

Three years after Knapp was decided the question whether a town was subject to the referendum requirements of section 64(2) was squarely

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313. Id at 458-59, 57 NE at 763.

314. 1 NY2d at 226, 151 NYS2d at 678, 134 NE2d at 489.

315. Id, citing cases, hardly apt, holding that in maintaining parks municipalities are engaging in "proprietary" rather than "governmental" functions so as to expose them to municipal tort liability (e.g., Caldwell v Village of Island Park, 304 NY 268, 107 NE2d 441 [1952]); or are required to pay compensation for removing facilities of private public utilities in the course of engaging in "proprietary" functions (e.g., operating a municipal subway, in City of New York v New York Telephone Co., 278 NY9, 14 NE2d 831 [1938]).

316. Had the Knapp court drawn that conclusion, it might have veered off into the related issue whether the use Betts was to make of the beach, the private purpose of building cottages and a church, would have neglected their responsiblities under a trust impressed on the beach land for the benefit of the public. The reader is cautioned to separate problems arising from application of public trust doctrines from problems of ascertaining the extent to which particular statutes transferred lands to trustees of Long Island towns.

before the court in Bevelander v Town of Islip.[317] A taxpayer sued to annul a lease granted by the Town of Islip, without voter approval, to Shellfish, Inc. of 338.5 acres of land under Great South Bay, for the purpose of cultivating shellfish. The court found that the bay bottom land in suit was not within the bounds of any colonial patent to the Town of Brookhaven, which had ceded certain underwater lands to Islip. However, the underwater land in question had been granted to Islip by a state patent containing the following clauses: "On the further condition that the Town Board of the Town of Islip may lease for purposes of shellfishing on such lands as it deems just, any of such lands as shall not in any way interfere with the enjoyment of the adjoining uplands by the owner of said uplands. No such lease shall be made within one thousand feet of the adjoining upland except to the owner of the adjoining upland."[318]

The state grant had been made pursuant to a special law authorizing the state's Board of Commissioners of the Land Office "to grant and convey to the town of Islip, Suffolk county, all the right, title and interest of the people of the state of New York in and to all of the lands of the state of New York lying under water in such town not heretofore granted or conveyed, and excepting lands under water within one thousand feet of upland owned by the state of New York."[319] In addition, the law empowered the Islip town board "to make any and all rules and regulations governing the sale and the use of such lands under water and especially with regard to the shell-fish lying in the waters covering such lands," and stated that "[n]othing herein contained shall be construed in derogation of the right of the town in leasing, selling and conveying or making other dispositions of said lands under water by the town of Islip pursuant to the provisions of any other law."[320]

The court might have reasoned that as liberally interpreted this statute and the state patent issued under it exempted the town from the general referendum requirements of section 64(2) of the Town Law.[321]

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317. 17 Misc2d 819, 185 NYS2d 508 (Sup Ct, Suffolk Co, 1959).

318. Id at 820, 185 NYS2d at 509-10.

319. 1929 NY Laws ch 206, § 2, as amended by 1930 NY Laws ch 535.

320. Id, § 6.

321. Though questionable, in view of the fact that the special Islip law in Bevelander explicitly provided that without voter approval, the town board could exchange certain other lands for those granted by the state, "[n]otwithstanding the provisions of any other law."

Instead, the court accepted the argument of the town "that the leased property is held by the town in a proprietary or private capacity and, therefore, not subject to the afore-mentioned provisions of the Town Law."[322] The court said that this "rationale of municipal property ownership has been adopted by our courts," quoting from the following statement of the Court of Appeals in Town of Islip v Estates of Havemeyer Point, made in discussing the "concept of ownership and power of a township when dealing with lands that devolved under colonial patents":[323]

> These lands were held by the town in private as distinguished from public ownership. It needed no legislative authority to enable it to deal with them as its interests might require. It could devote them to the use of the inhabitants in common. It could convey them or lease them.[324]

The issue in Estates of Havemeyer Point was whether trustees created by statute to take charge of certain lands along Great South Bay exceeded their authority in leasing a portion of a beach on such lands for the erection of buildings by the lessor. The court found the authority in a resolution adopted at a town meeting, and in "power over [the town's] corporate property recognized by statute," and regarded as mere dictum the statement that the trustees had inherent power to lease land held in a "private" capacity.[325]

In subscribing to the rationale attributed to the Estates of Havemeyer Point opinion the Bevelander court was confronted by, and brushed aside, the fact that the land subject to the questioned lease was not derived from a colonial patent, stating: "The land is proprietary in nature and does not change character because the Patent was granted by the State rather than the King or a colonial governor."[326]

The Estates of Havemeyer Point dictum had also been cited in Sammis v Town of Huntington in support of a determination that liability under a lease by the board of trustees of the Town of Huntington of underwater lands, involving "proprietary, private property of the town of Huntington, which is not held or managed in its governmental capacity," was "not a town charge to be audited under sections 133 and 170 of the

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322. 17 Misc2d at 820, 185 NYS2d at 509.

323. Id.

324. 224 NY 449, 452, 121 NE 351, 352 (1918).

325. Id.

326. 17 Misc2d at 822, 185 NYS2d at 511.

Town Law . . . which relate to liabilities against a town in its public capacity, and not as such a covenantor on a lease."[327] The town's Supervisor, Town Clerk and Assessors had been designated ex officio as successors to the trustees who had made the lease. Hence the characterization of the nature of the town's ownership of the land as "proprietary" might be regarded as gratuitous; the result in Sammis might have been justified on the ground that in acting as members of the board of trustees the town officials, rather than the town, were responsible for financial matters arising from dealings with trust lands.

Confusion is invited by focusing on the "proprietary" nature of the land, rather than on the mere fact of the trusteeship, for the term "proprietary" is used in formulating different doctrines in the law of municipal corporations,[328] as, for instance, the doctrine distinguishing "proprietary" from "governmental" functions in tort liability claims.[329] Moreover, concentration on the "proprietary" factor has given rise to the fallacious syllogism that led to the result in Bevelander: In towns with a dual system of government, the functions of the trustees created by colonial patents or, similarly, by special laws, are confined to lands held in a "proprietary" capacity, while governmental functions have been delegated to the town board. The town board deals with and holds property devoted to a public use, such as the town hall or police station, which would be classified as "public ownership" under the Estates of Havemeyer Point formulation. The legislature may not have intended[330] to apply to lands to which trustees hold title various statutes governing the disposition of lands held by town boards.[331] Therefore, if lands have not been devoted to a public use (thus not held in a "governmental" capacity), they are not subject to those statutes--whether or not they are held by trustees or by the town board. The fallacy produces distortion when the land in question, whether derived by a town from a colonial grant to individuals for the town's freeholders and commonalty or from state patents, has not been transferred to "trustees."

The State Comptroller has concentrated on the factor of trust title in responding to inquiries regarding the application of Town Law

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327. Sammis v Town of Huntington, 186 AD 463, 467, 174 NYS 610, 612-13 (2d Dep't 1919). Vestiges of former sections 133 and 170 are now found in article 8 of the Town Law (McKinney Supp 1983).

328. In our view, confusion that misled the Court of Appeals in Knapp v Fasbender. See text accompanying notes 293 et seq.

329. See note 315 supra.

330. Meaning, as so construed by a court.

331. That is, in the towns other than those having separate boards of trustees.

provisions to the disposition of lands by the trustees. In 1970 he was asked whether the Supervisor and Justices of the Peace of the Town of Babylon could lease certain real property of the town without being subject to a permissive referendum. He noted that an 1872 law had designated these officers ex officio trustees of the town to "hold, manage, control and convey and dispose of the real estate" of the town;[332] and that the trustees had the same power as those for the Town of Huntington from which Babylon derived its lands; then cited Knapp v Fasbender for the proposition that the trustees did not require prior voter authorization to deal with their lands.[333]

About a decade later the State Comptroller received similar inquiries regarding the powers of the ex officio board of trustees of the Town of Brookhaven, as statutory successors of trustees under the Dongan patent and other original grants.[334] In his answer to one of them,[335] asking whether the town could convey a part of a particular parcel to a fire district without consideration and without being subject to a permissive referendum, the State Comptroller observed that the part of the parcel in question appears to have been deeded to the town rather than to the board of trustees; the town board and board of trustees were separate entities despite their identical membership; "the functions of the board of trustees are proprietary and not governmental whereas the town board's functions are both";[336] and the fact that at least part of the property in question was being used by the highway department as the site for a fire district substation, "a governmental function, also evidences town ownership."[337] We do not fault this logic. To say that "governmental" use evidences town board control is not the same as saying that "proprietary" use, say by the town board itself, would exempt the property from general provisions of the Town Law relating to transactions in town real estate.

A year earlier the State Comptroller addressed the question whether the members of the Brookhaven town board, acting ex officio as members

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332. 1872 NY Laws ch 105, § 6.

333. 16 Op St Compt 413 (1976).

334. 1959 NY Laws ch 841.

335. Op St Compt No. 79-699 (April 14, 1980).

336. Citing Wells v Warner, 203 NYS2d 214, 216 (Sup Ct, Suffolk Co, 1960, not officially reported), where the court said: "That the two boards are comprised of the identical persons does not alter the fact that the boards are separate and distinct corporate bodies. Their rights, powers and prerogatives are not to be commingled or confused unless and until the legislature abolishes the trustees and devolves their powers, rights and duties on the town board."

337. Op St Compt No. 79-699, at 2.

of the board of trustees, could convey certain land "to themselves as the town board."[338] The Comptroller abstained from attempting "to resolve a matter such as this which is special in nature, local in effect and application and crucial to the security of real property titles."[339] However, under the circumstances, he advised that "consideration might be given to modification of the special act (L 1959, ch 841, § 4) by the Legislature [citing Knapp] or by local law[340] . . . for the purpose of defining the duties and powers of the trustees of the town as to acquiring, holding, managing, leasing, controlling, conveying, granting and disposing of real and personal property."[341]

At first glance the State Comptrollers's advice in that opinion might appear to offer a solution to the problem of coping with potential statutory constraints on the leasing of underwater lands by Long Island towns--the erasing of statutory restrictions through superseding local laws enacted pursuant to home rule powers of the town. Local governments may adopt local laws relating to their "property, affairs or government," if not inconsistent with general state laws or constitutional provisions, and this power extends to laws relating to the alienation of municipal real property.[342] Thus by local law counties[343] and cities[344] have been authorized to privately sell or lease their property despite competitive bidding requirements in state laws which were not general in terms or in effect. But the towns would be met with a "general law" roadblock if they attempted to use their home rule powers to escape the permissive referendum requirement of section 64(2) of the Town Law. Although towns are empowered to amend or supersede either special or general provisions of the Town Law relating to their property, affairs or government, this authority does not extend to the "supersession of a state statute relating to . . . authorization or abolition of mandatory and permissive referendum."[345]

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338. Op St Compt No. 79-751 (November 29, 1979).

339. Id.

340. Citing D'Addario v McNab, 73 Misc2d 59, 342 NYS2d 342 (Sup Ct, Suffolk Co, 1973), sustaining the validity of a provision of the Town Law altering provisions of the Dongan patents giving governmental powers to trustees, and confirming the home rule power of the Town of Brookhaven to provide for a ward system for election of town councilmen, only peripherally related to dealing with real property under such trusteeship.

341. Op St Compt No. 79-751 (November 29, 1979).

342. See supra text accompanying notes 189-200.

343. 24 Op St Compt 969 (1968); 20 Op St Compt 28 (1964).

344. 1980 Op Atty Gen (Inf) 142; Op St Compt No. 81-365 (October 28, 1981); 23 Op St Compt 441 (1967).

345. Municipal Home Rule Law § 10(1)(d)(3) (McKinney Supp 1983).

In none of the cases on these issues has a court questioned the power of the legislature to dictate procedures to be followed in transactions of town boards or boards of trustees of the Long Island towns. Stripped of doctrinaire application of distinctions between "proprietary" and "governmental" activities, and disregarding interesting but not always material judicial excursions into the unique history of land holdings on Long Island, the issue comes down to a question of statutory interpretation: Does section 64(2) itself, or as read together with other statutes, apply to the conveyance or leasing of the subject property?

Section 64(2) is headed "General powers of town boards." One could argue that in authorizing a town board to "convey or lease real property in the name of the town," the statute made no provision authorizing or limiting alienation by a separate board of trustees. The argument is somewhat question-begging because on its face the statute does not expressly confine the real property covered to that under town board control, though one might attempt to infer as much because subsection 3 of section 64 of the Town Law provides that the town board "[s]hall have the management, custody and control of all town lands, buildings and property of the town."[346] It is relatively easy to read out of the statute property to which a town agency other than the town board holds title acknowledged by other statutes, particularly an agency like a board of trustees established to manage and control the lands in question. That appears to be the basis of the State Comptroller's opinions questioning the application of section 64(2) to land held by the Babylon and Brookhaven trustees,[347] or of the courts, State Comptroller or Attorney General placing certain lands of towns or other municipalities outside the reach of that or similar statutes.[348]

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346. McKinney 1965.

347. See supra text accompanying notes 334-41.

348. See McSweeney v Bazinet, 269 AD 213, 55 NYS2d 558 (3d Dep't 1945), aff'd, 295 NY 797, 66 NE2d 580 (1946), Maxwell v Kristensen, 15 Misc2d 875, 183 NYS2d 245 (Sup Ct, Westch Co, 1959), and 1969 Op Atty Gen (Inf.) 146, and 15 Op St Compt 395 (1959), stating that the requirements of the General City Law for disposing of real property acquired at tax sales are superseded by other state or local laws dealing specifically with such properties; Op St Compt No. 78-586 ("Since there is a conflict between section 580 of the [Westchester County] code and Town Law, § 64[2] with respect to referendum requirements on the conveyance of town property, the terms of section 580, which prescribe no referendum requirements, prevail and superseded the terms of section 64(2) which impose such requirements"); and 1982 State Compt 438 (No. 82-344), rendering the opinion that the provisions of a statute governing dispositions of county property generally (§ 215) do not apply to real property held by the county in trust for community college purposes, particularly "since there exists a specific regulatory scheme for the disposal of community college real property" (under the Education Law).

In any case, the power of alienation granted in section 64(2) of the Town Law does not extend to municipal property held for a public use. On the contrary, it is the view of the State Comptroller and Attorney General that a town board may exercise the power only with respect to property "no longer required for municipal or other public use."[349] The opinions do not provide a rationale for this conclusion. They may simply reflect the truism that a municipality must act at all times in the public interest, and conveyance of needed property to a private individual would not be in the public interest.[350] Whatever the rationale, the proposition confining the power of alienation to unneeded property does not rest on doctrinaire application of the "proprietary-governmental" dichotomy to section 64(2).

To recapitulate: Arguably the most authoritative decision on the issue of applicability of the Town Law referendum requirements to conveyances or leases of submerged lands of Long Island towns, despite its oblique manner of dealing with the issue, is Riviera Association, Inc. v Town of North Hempstead.[351] Its lower court opinion was adopted by the Court of Appeals as the basis for the decision in a companion case.[352] The leased lands in suit had been derived by the town from colonial patents. Trustees had been designated by subsequent state law, not by the patents themselves, to manage and control common lands of the town, but had not been delegated the right to sell the lands. At least with respect to sales of town real property, if not to leases, the permissive referendum requirement of the Town Law remained intact.

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349. 1964 Op Atty Gen 67,68, quoting from 10 McQuillin, The Law of Municipal Corporations § 28.42; and see 1981 Op St Compt 4, 5 (No. 81-5), and 1975 Op St Compt 89 (No. 75-641).

350. This does not mean that a municipality may not lease property held for a public use to a private party for a public purpose, normally a purpose calling for some degree of use by some segment of the public. See section 215 of the County Law, specifying different terms for leasing real property "for county purposes," and leasing property determined to be "not required for public use." McKinney 1972. Cf Ocean Beach Ferry Corporation v Incorporated Village of Ocean Beach, Suffolk County, 92 NYS2d 275 (Sup Ct, Suffolk Co, 1949, not officially reported), aff'd, 276 AD 920, 94 NYS2d 826 (2d Dep't 1950), allowing a village to lease a village-owned ferry terminal to a private corporation for a public purpose.

351. See note 218 supra.

352. Id.

It would seem to follow from Riviera that (1) compliance with the referendum provision of section 64(2) of the Town Law is required for a sale or lease of town lands unless the sale or lease is made by a board of trustees with legal status separate from that of the town board, or by the town board itself or other local unit acting under legislative authority superseding the Town Law provision; (2) such legislative authority may be found in statutes confirming the patents or in special statutes creating and defining the powers of the trustees; and (3) absent such authority the mere fact that the lands were derived from colonial grants will not justify disregard of the Town Law requirement.

Based on their facts and the provisions of special statutes underlying actions of the particular towns, the holdings in earlier opinions in the Knapp, Wihstutz, Bevelander, Estates of Havemeyer Point and Sammis cases are consistent with this rationale. Accordingly, the significance of dicta in those cases placing reliance on the "proprietary" nature of the towns' land holdings is questionable. We submit that a mere showing of title from a colonial grant, absent specific or implied statutory authorization superseding the provisions of section 64(2) of the Town Law, may not support a conveyance or lease of town underwater lands for aquaculture without providing for a prior permissive referendum.

2. Restrictions in Special Statutory or Other Grant Instruments on Disposition of Town Underwater Lands

Litigations have ensued, and others may be initiated in future, over the nature or extent of powers granted in statutes, patents or other grant instruments to towns or to their trustees to dispose of underwater lands. Typically, they may raise questions regarding the boundaries or town ownership of lands covered by challenged leases,[353] or the scope of the powers of the leasing entity.[354]

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353. See Trustees of Brookhaven v Strong, 60 NY 56 (1875); and Lowndes v Dickerson, 34 Barb. 586 (1861).

354. See Knapp v Fasbender, 1 NY2d 212, 151 NYS2d 668, 134 NE2d 482 (1956), and supra text accompanying notes 293-316.

The foregoing treatment of the subjects of legislative grants or authorizations demonstrates the need to thoroughly search for, and carefully analyze, the enabling statutes governing the powers of leasing or conveyance of the particular town to determine the extent, if any, it may be authorized to lease out underwater lands for particular types of aquaculture operations. We would doubtless conclude, for example, that a law delegating authority to a town to grant leases for shellfishing would hardly support a lease of underwater lands for the placement of facilities for finfish or seaweed cultivation. But the issue might not be that clear, as, say, if a grant were restricted to use of the submerged land for erecting and maintaining a dock for "fishing" or "boating" and the proposed activity included cages or other structures or facilities used in finfish aquaculture operations.

The patents or other forms of conveyance by which the subject lands have been acquired, or express or implied acts dedicating the land to public use, may also contain limitations requiring close scrutiny. The courts have developed a number of rules of construction in determining the scope of such dispositions of underwater lands. Thus, in developing an approach to resolution of the frequently litigated issue whether a grant of underwater lands was intended to give the grantee the right to exclude the public from an activity generally held to be a common public right, such as the right of fishery,[355] some courts have adopted a rule of construction, going back to the time of the royal grants, stated in Martin v Waddell:

> The dominion and property in navigable waters, and in the lands under them, being held by the king as a public trust, the grant to an individual of an exclusive fishery in any portion of it, is so much taken from the common fund intrusted to his care for the common benefit. In such cases, whatever does not pass by the grant, still remains in the crown for the benefit and advantage of the whole community. Grants of that description are therefore construed strictly--and it will not be presumed that he intended to part from any portion of the public domain, unless clear and especial words are used to denote it.[356]

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355. Related to but not the same as the question whether a public trust limitation prohibited the grant of exclusive use altogether.

356. 41 US (16 Pet.) 367, 411 (1842). And see Lowndes v Dickerson, 34 Barb. 586, 593 (1861).

Other courts suggest a contrary presumption, as in the statement of the Court of Appeals in Langdon v Mayor, etc. of the City of New York, that although a grant of shore land is generally construed as giving no rights below the high water mark--to be construed "as if it were bounded on all sides by dry land"--"when the sovereign grants land under water, which cannot, in its natural state, be subjected to any of the uses to which dry land may be devoted, then a different rule of construction must be applied to the grant, so as to make it effectual for some purpose"; and it may be implied from the circumstances that the grant confers "an exclusive right of fishery, or of navigation," or may "enable the grantee to fill up the land for wharves and docks, or other buildings."[357]

One might question the continued effectiveness of special law restrictions on municipal property disposition, in view of the home rule powers granted by the 1963 constitutional amendment, including the power to legislate locally in regard to town property matters.[358] The answer would appear to depend on the nature of the special law and of its restrictions. If the law itself constituted a grant, or authorized state officials to issue a patent, to a municipality of specified underwater lands, and restricted the municipality's use of the lands, the municipality's acceptance of the grant or patent would be subject to the restrictions. In effect the municipality would be acknowledging a trust responsibility to abide by the terms of the grant or patent, and a violation of the conditions, by means of a local law or otherwise, might result in a reversion of the property to the grantor, the state.[359]

3. Public Purpose and Public Use Limitations

Various doctrines or principles limiting the alienation of lands by state and local governments use the terms "public purpose," "public use," or "public trust." The common denominator "public" can be, as on occasion it has been, a source of confusion. Clarification may be facilitated by differentiating them as follows: (a) the basic precondition that all government acts be in the public interest, derived from constitutional, statutory or common law precepts; (b) doctrines, developed mainly by the courts, but sometimes embodied in statutes or state constitutions, impressing a public trust on various resources held by the state for the benefit of the public at large; and (c) stipulations in grants of real property, incorporated in statutes or instruments made under them, that the use or alienation of property be

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357. 93 NY 128, 143-44 (1883).

358. See supra text accompanying notes 343-46.

359. For example, we doubt that Suffolk county could successfully use its home rule powers to erase the condition of the cession to it of lands below Gardiner's and the Peconic bays that they be used solely for shellfish cultivation leasing. See supra text accompanying notes 159-64.

for a specified public use or uses or public purpose or purposes.[360] We have touched on the latter category in noting generally that statutory or other sources of government land may contain restrictions on its disposition. The following discussion will be confined to the first two categories.

a. Basic Public Interest Requirements

Framed broadly, a postulate of government holds that all its decisions or actions be for a public purpose, for government exists solely to serve its public constituency. "A municipal corporation is a public institution created to promote public, as distinguished from private, objects."[361] The determination of what constitutes a "lawful public purpose" is the prerogative of the state legislature, inhibited only by constitutional restraints.[362] "The universally recognized judicial doctrines that restrict exercises of regulatory authority to those that promote 'the general welfare,' or demand that tax revenues be expended only for a 'public purpose,' may be thought implicit in the standard constitutional injunction against depriving persons of property and liberty without due process of law, or in constitutional grants to legislatures to exercise the power to tax, or they may just be direct judicial implications of constitutional intent claiming no specific textual base."[363] Questions of statutory interpretation, similar to constitutional public purpose issues, may arise from the exercise of

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360. See supra text accompanying notes 165 et seq, referring to the authority of the New York State Parks Commissioner to grant licenses or easements "for any public purpose," there equated with a general common law definition of "public purpose."

361. 2 McQuillin, The Law of Municipal Corporations § 10.31 (3d ed 1979).

362. Cf Light v United States, 220 US 523, 536 (1911): "It is true that the United States do not and cannot hold property as a monarch may for private or personal purposes." (Quoting from Van Brocklin v Tennessee, 117 US 158 [1946].)

363. Michelman, Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy, 53 Indiana LJ 146-147 (1977-78).

municipal power under state enabling acts.[364]

Express constitutional prohibitions against state or municipal spending, borrowing or lending of credit for private purposes may also be implicated. The court in Lake George Steamboat Co. v Blais struck down a lease to a private corporation of a dock and related facilities on land owned by the Village of Lake George, principally on the basis of the "rule that a municipality, without specific legislative sanction, may not permit property acquired or held by it for public use to be wholly or partly diverted to a possession or use exclusively private"—a "public trust" doctrine.[365] Yet the court also brought in the constitutional spending limitation, saying: "We need only add that such a lease granted pursuant to specific legislative sanction must, of course, satisfy the requirements of section 1 of article VIII of our

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364. Id 147. Professor Michelman observes: "The two ideas—the ultra vires idea that the constitutional grant of authority to levy taxes does not encompass levies whose proceeds are directed to nonpublic purposes, and the individual-rights idea that there is a constitutionally protected personal or individual right not to have one's property appropriated for nonpublic purposes—are commingled in the classic case of Loan Ass'n v Topeka, 87 US (20 Wall.) 655 (1875)." Id at 147, n 1. The constitutional constraint may be inferred from the fourteenth amendment to the United States Constitution: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." See Fallbrook Irrigation District v Bradley, 164 US 112 (1896). Or the public purpose requirement may be implicit in a state constitutional delineation of the powers of the state legislature. See Common Cause v State of Maine, 455 A2d 1, 15-16 (1983), sustaining as a public purpose legislation authorizing the City of Portland to grant dry dock and pier leases to a private corporation, noting that the "requirement of public purpose operates as a limitation on the power granted to the Legislature" by the provision of the Maine constitution confirming the legislature's "full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution, nor to that of the United States." And see Poletown Neighborhood Council v City of Detroit, 410 Mich 894, 304 NW2d 455 (1981), holding that a project of acquisition of land to be used for a General Motors assembly plant was a "public purpose" within the meaning of a statute granting powers to an economic development corporation.

365. 30 NY2d 48, 51, 330 NYS2d 336, 338, 281 NE2d 147, 148 (1972).

State Constitution."[366] The dissenting Chief Judge Fuld and Judges Breitel and Gibson issued a caveat that should be heeded by the readers of this report:

> It is useful to emphasize that the disagreement seems to turn on whether a public purpose or a public use is required. The Appellate Division properly held that the lease was valid so long as a public purpose was present, that is, if the purpose of the lease was to provide a public benefit even if by private enterprise.[367]

The dissenters were referring to wording in the state patents under which the village had acquired the land in question, restricting its use to "public park purposes," and for "public docking space."[368]

Embracing, but broader than, the proscription against the use of public resources other than in the public interest is the general proposition that a municipal government may not cause "waste or injury to public property,"[369] against the public interest, or otherwise act imprudently.[370]

b. The Public Trust Doctrine

The public trust doctrine is based on the notion that the state holds certain types of lands, notably lands under navigable waters or on

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366. Id at 52, 330 NYS2d at 339, 281 NE2d at 148. Article VIII, § 1, states in part: "No county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking, or become directly or indirectly the owner of stock in, or bonds of, any private corporation or association; nor shall any county, city, town, village or school district give or loan its credit to or in aid of any individual, or public or private corporation or association, or private undertaking . . . ." Article VII, § 8, contains similar constraints on state actions. See supra text accompanying, and cases cited in, notes 168-70.

367. Id.

368. Id at 50-51, 330 NYS2d at 338, 281 NE2d at 148.

369. Wihstutz v Town of Babylon, 220 NYS2d 852, 854 (Sup Ct, Suffolk Co, 1961, not officially reported).

370. See Fahnestock v Office of General Services, 24 AD2d 98, 99, 263 NYS2d 811, 812 (3d Dep't 1965), where the unsuccessful grounds of attack on a state grant of over 52 acres of underwater lands for use by the Town of North Hempstead, in connection with the construction of an incinerator, included the argument that the grant was "too extensive."

their foreshores, "as sovereign and trustee for the public,"[371] and for the purpose of protecting various interests of the public, such as the right of navigation and fishing; and the state is more restricted in using and disposing of lands impressed with this trust, than in the case of other publicly held lands.[372] The concept is generally referred to as the "jus publicum," though literally the term describes the rights of the beneficiary of the trust, the people, and only by inference, the character of the sovereign's title.

"Three types of restrictions on governmental authority are often thought to be imposed by the public trust: first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses."[373] These positions "have been at the center of the controversy and confusion that have swirled around the public trust doctrine in American law."[374] Moreover, "[c]onfusion has arisen from the failure of many courts to distinguish between the government's general obligation to act for the public benefit," the fundamental constraint on government action discussed above, "and the special, and more demanding, obligation which it may have as a trustee of certain public resources."[375]

The federal courts and courts of the several states, as well as different courts within individual states, have varied in their pronouncements of the nature and extent of those restrictions. Some courts in reviewing New York law have asserted, generally as dictum, that the restriction on the use or alienation of public trust lands goes

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371. Saunders v New York Central and Hudson River Railroad Co., 144 NY 75, 85, 38 NE 992, 994 (1894).

372. For the history and treatment of the doctrine in America, see Deveney, Title, Jus Publicum, and the Public Trust: An Historical Analysis, 1 Sea Grant LJ 13 (1976); Berland, Toward the True Meaning of the Public Trust, 1 Sea Grant LJ 83 (1976) (hereafter cited as Berland); Note, State Citizen Rights Respecting Greatwater Resource Allocation: From Rome to New Jersey, 25 Rutgers L Rev 571 (1971); Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Michigan L Rev 471 (1970); Nelson, State Disposition of Submerged Lands Versus Public Rights in Navigable Waters, 3 Nat Resources Lawyer 491 (1970); Comment, The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine, 79 Yale LJ 762 (1970); Parsons, 22 Colum L Rev 706 (1922); Riggs, The Alienability of the State's Title to the Foreshore, 12 Colum L Rev 395 (1912); Coudert, Riparian Rights; A Perversion of Stare Decisis, 9 Colum L Rev 217 (1909); Kavenagh 185 ff.

373. Sax, The Public Trust Doctrine, 68 Mich L Rev 471, 477 (1970).

374. Id 478.

375. Id.

no farther than the general proposition that all government action must be taken for a public purpose or in the public interest.[376] At the other end of the spectrum, at least one New York court has denied "that the legislature has the power, either by direct action or otherwise, to give or grant to any person rights which are the property of all the citizens of this commonwealth, and which the legislature holds in trust for the common use and does not hold in its own right or as proprietor";[377] while other cases, notably Coxe v State of New York, recognize the state's right to grant underwater lands to private persons if in the public interest, but assign a restrictive meaning to the term "public interest," allowing grants only "for the beneficial use of the grantee, or to promote commerce."[378]

The preferred test in New York, enunciated in the latest case on the subject, focuses on the magnitude of the public's rights protected by the trust status of the land, rather than on the purpose for which the grant is made. That is the essence of the reasoning of the latest New York opinion on the subject to reach the Court of Appeals, the opinion of Mr. Justice Meyer, the trial judge in Riviera Association, Inc. v Town of North Hempstead. He explained:

> The . . . rule of decisional law to which plaintiff refers is that lands under navigable or tidewaters are held on public trust and cannot be alienated except for some public purpose or some reasonable use which can fairly be said to be for the public benefit. Such is the rule declared by Coxe v State of New York . . . , which recognized, as permissible, grants to a municipality, to a railroad for right of way, to corporations and private persons engaged in commerce or navigation, or to owners of adjoining upland either for beneficial enjoyment or for

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376. Appleby v City of New York, 271 US 364, 383-84 (1926): "It is apparent . . . that, under the law of New York . . . , whenever the legislature deemed it to be in the public interest to grant a deed in fee simple to land under tidal waters and exclude itself from its exercise as sovereign of the jus publicum, that is the power to preserve and regulate navigation, it might do so; but that the conclusion that it had thus excluded the jus publicum could only be reached upon clear evidence of its intention and of the public interest in promotion of which it acted." And see Langdon v Mayor, 93 NY 128, 156 (1883) (the "right to grant the navigable waters is as absolute and uncontrollable [except as restrained by constitutional checks] as its right to grant the dry land which it owns. It holds all the public domain as absolute owner, and is in no sense a trustee thereof, except as it is organized and possesses all its property, functions and powers for the benefit of the people"). (Quoted with approval in People v Steeplechase Park Co., 218 NY 459, 474, 113 NE 521, 525 [1916]).

377. Matter of Aquino v Riegelman, 104 Misc 228, 232, 171 NYS 716, 718 (Sup Ct, Kings Co, 1918), aff'd on other grounds, 187 AD 896, 173 NYS 917 (2d Dep't 1917).

378. Coxe v State of New York, 144 NY 396, 407, 39 NE 400, 402 (1895).

commercial purposes, but stated that such a grant could not be made for speculative purposes nor could the State traffic in such lands like an individual. The difficulty is that the statements in the Coxe case upon which plaintiff relies are dictum and that there are cases both earlier and later to the contrary. Thus, in People v Steeplechase Park Co. . . . the validity of a conveyance to one not the upland owner is recognized in the statement that "Where the state has conveyed lands without restriction intending to grant a fee therein for beneficial enjoyment, the title of the grantee, except as against the rights of riparian or littoral owners, is absolute . . . " (emphasis supplied); the opinion in Matter of Long Sault Development Co. v Kennedy . . . states: 'The power of the Legislature to grant land under navigable waters to private persons or corporations for beneficial enjoyment has been exercised too long and has been affirmed by this court too often to be open to serious question at this late day. (Lansing v Smith . . . ; People v NY & Staten Island Ferry Co. . . . ; Langdon v Mayor, etc., of NY . . .). The contemplated use, however, must be reasonable and one which can fairly be said to be for the public benefit or not injurious to the public.' (Emphasis supplied); in Roe v Strong . . . the court stated: 'The title to the soil under navigable waters vested in the Long Island towns under the colonial patents was, undoubtedly, subject to the public right of navigation, and it would seem to follow that the towns could not alienate the title so acquired to the material prejudice of the common right.' (Emphasis supplied); and Langdon v Mayor, etc, of City of New York . . . ; Towle v Remsen . . . and People v New York Staten Island Ferry Co. . . . all recognized an absolute right of conveyance. Each of those statements or holdings may also be characterized as obiter [observations not constituting binding precedent], however: the Steeplechase Park, Langdon, Towle and New York and Staten Is. Ferry cases because the grantee held the upland either by conveyance or by adverse possession; the Long Sault case because it held the grant in question invalid and the Roe case because its holding was that plaintiff had not shown that the Town ever conveyed title.

However, when the cases are viewed in terms of the result reached rather than the statements made, it is at once apparent that the only situation in which a grant to a private person or corporation has been held unauthorized is that in which the grant was of the entire ocean front of a county (Marba Sea Bay Corp. v Clinton St. Realty Corp. . . .), entire control of navigation of a large and important part of a navigable river (Matter of Long Sault Development Co. . . .), all lands under water in four counties (Coxe v State of New York . . .), or of an area

> one mile wide containing 1,000 acres in the harbor of Chicago (Illinois Cent. R.R. Co. v Illinois . . .). That grants of land underwater have been upheld when made for a use beneficial to the public (Saunders v New York Cent. & Hudson Riv. R.R. Co. . . .), or to upland owners (see cases cited in the preceding paragraph) does not necessitate the conclusion that only conveyance for a public purpose or to an upland owner is authorized. Limitation of the town's authority to convey is implied in order to protect the public interest and should be extended no further than is necessary to protect that interest against impairment. This is recognized by the underscored words in the Long Sault quotation set forth above ("not injurious to the public") and in the Supreme Court's statement in the Illinois Central case (p 453) that: 'The control of the State for the purposes of the trust can never by 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.' (emphasis supplied).
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> From the foregoing analysis the court concludes that while conveyance of lands under water for a public purpose is permissible because it accords with the public trust, purpose is not the determinative factor, see Saunders v New York Cent. & Hudson Riv. R.R. Co. . . . ; cf Matter of Fahnestock v Office of Gen. Serv. . . . . Rather, the validity of the conveyance turns on the degree to which the public interest will be impaired, and, therefore, a 'grant of a few hundred feet, for enjoyment in a manner which does not interfere with navigation' (People v Steeplechase Park Co. . . .) may be sustained.[379]

Applying this broader view of the public trust doctrine, and observing that the disputed transfer of underwater lands and adjacent filled-in (formerly underwater) lands in Riviera for possible use for a restaurant or for parking would not "in any way impair public interest in the remaining lands and waters or be injurious in any way to the public interest,"[380] the court found the transfer to be legal. Compared with those purposes, or the purposes of other grants of underwater lands

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379. Supra note 218, 52 Misc2d at 581–83, 276 NYS2d at 255–57.

380. Id at 583, 276 NYS2d at 257.

withstanding public trust challenges,[381] it is reasonable to surmise that normally grants of interests for aquaculture would not substantially impair the public interest in navigation or in other public rights protected by the public trust doctrine.[382] Closer analogies, suggesting an a fortiori case for allowing the installation of aquaculture facilities in underwater lands or on the foreshore, are found in the many precedents upholding the granting of exclusive leases or rights for shellfishing in designated areas over objections of interference with the public or common right of fishery.[383]

4. Federal or State Preemptive Regulatory Laws

The subjects of disposition of ownership interests of town underwater lands and federal and state regulations or activities relating to rights in navigable waters may merge under some circumstances. Thus an attempted town lease for a purpose inconsistent with a federal law, regulation or activity enacted or undertaken under the federal commerce power would fail.[384] The implications of various federal and state regulatory laws will be seen in the companion report on regulations affecting aquaculture development.

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381. People ex rel Howell v Jessup, 160 NY 249, 54 NE 682 (1899) (bridge over lands under water in Great South Bay); Saunders v New York Central and Hudson River Railroad Co., 144 NY 75, 38 NE 992 (1894), and Gould v Hudson River Railroad Co., 6 NY 522 (1852) (railroad facilities or rights of way); and Falmestock v Office of General Services, 24 AD2d 98, 263 NYS2d 811 (Sup Ct, Suffolk Co, 1965) (over 52 acres of underwater lands to be used by the Town of North Hempstead in connection with the construction of an incinerator).

382. The grant of extensive areas for large-scale seaweed culture may pose more of a problem, though if located far enough offshore it would not necessarily impair navigation in any substantial degree.

383. E.g., Hand v Newton, 92 NY 88 (1883); Robins v Ackerly, 91 NY 98 (1883); Bevelander v Town of Islip, 17 Misc2d 819, 185 NYS2d 508 (Sup Ct., Suffolk Co, 1959). Cf Trustees of the Freeholders and Commonalty of the Town of Southampton v Mecox Bay Oyster Co., 116 NY 1, 22 NE 387 (1889); and Trustees of Brookhaven v Strong, 60 NY 56 (1875).

384. The "federal government retains an interest that confers on federal citizens the right to navigate without undue impediment and which confers on Congress the power to regulate the use and improvement of such waterways." Berland 89. Cf Lewis Blue Point Oyster Cultivation Co. v Briggs, 229 US 82 (1913), holding that grants of underwater lands by the shellfish company impliedly reserved the federal right to interfere with the grantees' operations, dredging by the defendant under a federal contract, without requiring the payment of compensation for damages to plaintiff's oyster beds.

5. Significance of Riparian and Littoral Rights

a. Nature of the Rights

By virtue of common law doctrine, to some extent embodied in legislation, the owners of lands along the shores of watercourses and lakes enjoy special rights of access to, and the use of, waters, denoted riparian or littoral rights, respectively. Of necessity, rules have also been developed for reconciling conflicts among different users of the same waters.

"Riparian" is the term used to describe lands located on the banks of a river or stream, or the owner of such lands; "littoral," in reference to lands located on the shores of a lake or sea, or their owners.[385] However, the term "riparian" is commonly used to signify both riparian and littoral ownership, and will be so intended when used here unless otherwise indicated by the context. For the purposes of the chapter dealing with riparian rights, the Restatement of Torts (Second) defines "riparian land" as "a tract of land that borders on a watercourse or lake";[386] "watercourse," as "a stream of water of natural origin, flowing constantly or recurrently on the surface of the earth in a reasonably definite natural channel," and as also including "springs, lakes or marshes in which a stream originates or through which it flows";[387] and "lake," as "a reasonably permanent body of water substantially at rest in a depression in the surface of the earth, if both depression and body of water are of natural origin or a part of a watercourse."[388]

Inasmuch as the rules defining riparian rights were designed to resolve conflicts between upland proprietors over competing uses of the waters flowing by their lands in watercourses or lakes, generally the

> rules do not apply to invasions of interests in seas or oceans, and they apply to bays, harbors and tidal waters only to the extent that those waters are affected by uses of water in watercourses or for the purpose of identifying persons having legally protected interests in the tidal waters. When a flow of fresh water from a river sustains private rights of fishing or oyster harvesting in a bay or

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385. Allen v Potter, 64 Misc2d 938, 316 NYS2d 790 (Sup Ct, Yates Co, 1970), aff'd, 37 AD2d 691, 323 NYS2d 409 (4th Dep't 1971).

386. § 843.

387. Id § 841. And see Barkley v Wilcox, 86 NY 140, 143 (1881): "A natural watercourse is a natural stream, flowing in a defined bed or channel, with banks and sides, having permanent sources of supply."

388. Id § 842.

> estuary, a controversy involving harm to the possessor of the rights by interference with the flow of fresh water will be governed by [riparian rights] principles, but a controversy over the pollution of water is governed by [rules] covering the subject of nuisance.[389]

Despite this locational qualification of the rules governing riparian rights, the courts sometimes apply them, or at least apply them by analogy, in resolving conflicts between or involving proprietors of lands along the shores of oceans, seas, bays, harbors or estuaries not linked with fresh water streams.[390] Often, however, in these situations the parties and courts tend to invoke the law of nuisance.[391]

The courts are not in agreement in enumerating the types of uses protected by riparian status.[392] A report by the Cornell University

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389. Restatement of Torts (Second), Introductory Note and Scope Note to Chapter 41, at 184-85.

390. See, e.g., Town of Brookhaven v Smith, 188 NY 74, 85 NE 665 (1907), noted below; and Seaman v City of New York, 176 AD 608, 609-10, 161 NYS 1002, 1003 (2d Dep't 1916), denying recovery, by the owner of land along Jamaica Bay, against the city for pollution of tidal waters of the bay carried into his building used to store oysters—the court noting that the rights of a "riparian owner upon tidal waters" are limited to rights of access, and are to be distinguished from the rights of riparian owners on streams, who are entitled to the use of passing waters free of pollution. See the text accompanying notes 419-20 infra, in reference to the Huffmire case.

391. See Lummis v Lilly, 385 Mass 41, 429 NE2d 1146 (1982), applying the riparian rule of reasonable use (discussed below) in an action by an owner of oceanfront land against the defendant shoreowner for damages to his beach from the placement of a groin on defendant's property. The question whether the same rule would apply in New York under like circumstances is the subject of another study by the Sea Grant Program of the Faculty of Law and Jurisprudence, State University of New York at Buffalo. If aquaculture activities by a shoreowner were to discharge effluents into waters used by another riparian owner, the Restatement of Torts (Second) notes that he may be subjected to liability if his conduct "(a) constitutes a nuisance, (b) constitutes a trespass, or (c) is negligent, reckless or abnormally dangerous with respect to the use"; and states that the "pollution of water by a riparian proprietor that creates a nuisance by causing harm to another person's interest in land or water is not the exercise of a riparian right" (§ 849).

392. See H.P. Farnham, 1 Law of Waters and Water Rights §§ 62 et seq (1904). The courts are generally vague in their formulations of the doctrine. Typically, the Court of Appeals in Saunders v New York Central and Hudson River Railroad Company, 144 NY 75, 87-88, 38 NE 992, 995 (1894), said that riparian rights "embrace the right of access to the channel or navigable part of the river for navigation, fishing and such other uses as commonly belong to riparian ownership, the right to make a landing wharf or pier for his own use or for that of the public, with the right of passage to and from the same with reasonable safety and convenience."

Water Resources Center, in defining riparian rights, includes, "among other things, the rights: (1) to the ordinary use of water flowing in the streams adjacent to the banks, (2) to take ice, (3) to the natural acretions [sic] in the stream, (4) to sand and gravel in the stream or lake bed [unless the bed is owned by the state], (5) to the islands within the water course, [unless the bed is owned by the state], (6) to erect dams and piers on the upland bordering the water course, (7) to haul and dry nets on the uplands, (8) to sea walls for protection from tide and current, (9) to access from upland to water for boats, (10) to use the waterway in common with the public for transportation, (11) to fish in the waters adjacent to the uplands."393 The report notes that "[s]ome of these rights are exclusively owned by the riparian; others are shared with other riparians; and still others are shared with the public."394

> The authorities refer to four kinds of fishery: First, a several fishery, where he who hath the exclusive right of fishery is presumably the owner of the soil; second, a free fishery, which is an exclusive franchise existing by grant or prescription in public navigable waters in the hands of a subject who hath a property in the fish, and may bring a possessory action for them without making any title to the soil; third, a common of fishery, which resembles the case of other common, and is a right or liberty of taking fish in common with certain others in waters flowing through another man's land; fourth, a common fishery, which may be for all mankind, as in the sea, and not merely in common with certain other persons in a particular stream.395

Were a shoreowner to assert that his riparian rights included the right to fish off his shore free from interference by another riparian owner or nonriparian's use of submerged land, his position would not be any stronger than that of other members of the public enjoying a common right of fishing unless he owned the bed of the water body, or enjoyed an exclusive fishing privilege under a government grant or license.396 As a practical matter the issue would probably not arise in this form

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393. A Study of Selected Aspects of the Powers of New York State Over the Waters of the State 26 (Publication No. 10, March 1966).

394. Id 27.

395. J.M. Gould, A Treatise on the Law of Waters §183 (2d ed 1891).

396. See Weston v Sampson, 62 Mass (8 Cush.) 347 (1851), holding that the right to take clams from flats between low and high water mark is a common law right under Massachusetts law; it does not belong exclusively to the upland owner.

because fishing rights are generally restricted by state law.[397] In any case, the question whether the riparian right of fishing embraces aquaculture, such as the use of the bed of the water body to cultivate shellfish, would remain. We have not found any reported New York case law directly in point on this, but would surmise that without legislative approval the riparian right of fishing would not be extended to operations requiring permanent installations on the water bottom for finfish growing apparatus or exclusive occupancy of the bed for shellfish planting. The fact that the New York legislature, on at least two occasions, has expressly granted upland owners the right to plant shellfish in the waters below their shores would seem to indicate an absence of confidence in the existence of a common law right to do so.[398]

Riparian rights doctrine is more apt to be implicated in other aquaculture situations.

b. Liability for Interference by Riparian Owners with Aquaculture Operations in Public Waters

Were a government to engage directly in aquaculture on underwater land owned by it, where the adjoining upland is privately owned, the question may arise whether activities of the upland owner detrimental to the aquaculture operation are within the owner's legally sheltered riparian rights, or whether he must pay damages to the government. If instead of conducting the aquaculture operation directly the government were to lease the underwater land for private aquaculture enterprise, the issue would be similar: does the upland owner's riparian status immunize him from liability to the lessee? The issue arose in a nineteenth century Connecticut case. Christian Swartz, the owner of land on Long Island Sound at Stamford Harbor, built a wharf and dug a channel extending from high water mark to a point below low water mark towards the channel of the harbor, to enable him to use the waters of the Sound for navigation. Part of the wharf and channel occupied ground allotted by town officials to Arunah M. Prior for the planting and

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397. E.g., in New York, articles 11 and 13 of the Environmental Conservation Law (McKinney 1973, and 1982 Supp).

398. 1857 NY Laws ch 497, § 1: "The owners and lessees of land bounded upon [a specified] part of Shinnecock bay, . . . in the town of South Hampton, . . . may plant oysters or clams in the waters of said bay, opposite their respective lands, extending from low water mark into said bay not exceeding four rods in width." 1859 NY Laws ch 468 contained similar provisions granting rights to owners and lessees of lands lying on Jamaica Bay and its tributary streams, adding a restriction prescribing a one quarter mile limit on the length of the bed. And see references to laws of other states giving preferences to riparian owners in the granting of aquaculture leases, in the discussion in Part V of provisions for protecting competing users of waters and shorelands.

cultivating of oysters. Prior sought damages against Swartz, claiming that "having acquired his title to the grounds through original designations of a competent [town] committee appointed for that purpose, his rights therein could not be affected by adjoining landowners, as the rights of such landowners, in contemplation of the statute, only extended to low watermark; that the statute gave the defendant no right to build a wharf or dig a channel below low watermark, and no right to build any wharf; and that, even if it did, it gave him such right only as subservient to the plaintiff's [Prior's] right to plant and cultivate oysters, and the right to build such wharf could be exercised only by obtaining the plaintiff's consent so to do."[399] The court disagreed, holding that Swartz's common law riparian rights included the right to wharf out beyond low water mark, and that the designation of grounds for Prior's planting and cultivating of oysters did not deprive Swartz of that right.[400]

In analogous cases involving the use of government-owned submerged lands by lessees or grantees for other than aquaculture purposes, the New York courts have similarly subjected the lessees or grantees to riparian rights of neighboring shoreowners. For example, the court in Riviera Association, noted above in the discussion of the public trust doctrine, held that the grantee of town land on or below the shore of Manhasset Bay to be used for a restaurant and parking lot, even though on filled in land, would be subject to the riparian rights of the adjoining upland owner.[401]

The mere fact that a town acquired its underwater lands through colonial grants does not change the result. In Town of Brookhaven v Smith, the town and its lessee of underwater lands in Great South Bay were unsuccessful in their action against the defendant upland owner, Smith, in trespass for building a pier on such lands to be used by Smith and others for docking their pleasure boats, despite their claim

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399. Prior v Swartz, 62 Conn 132, 139, 25 A 398, 399-400 (1892).

400. Id at 139-40, 25 A at 400. The holding in Prior was approved in dicta in subsequent Connecticut suits for damages to plaintiffs' oyster beds. Lovejoy v Town of Darien, 131 Conn 533, 41 A2d 89, 100 (1945) (successful action for damage caused by the town's running an outfall sewer pipe through the beds); and Lane v Board of Harbor Commissioners for New Haven Harbor, 70 Conn 685, 698, 40 A 1059, 1062 (1898) (plaintiff's right to cultivate oysters held subject to the right of the state and federal government to cut a channel through the beds).

401. See supra note 218. Cf Tiffany v Town of Oyster Bay, 234 NY 15, 136 NE 224 (1922), in which the court restrained the town from interfering with the plaintiff riparian owner's access to the ocean by constructing public bath houses paralleling plaintiff's shore line.

of ownership under colonial grants.[402] Justification is found in the "policy of the State, since an early time in the history of our State, . . . directed toward encouraging the private development of waterfronts, subject only to the condition that the use be reasonable and not obstructive of navigation."[403]

If the acts of the riparian owner injurious to the aquaculture property on underwater land leased from the state or a political subdivision were also conducted on underwater land leased by the state, one would expect the issue to turn on whether the second lease was in fact subject to rights of the aquaculture leaseholder. That was the situation in Thomas v Ocean City Automobile Co., where lessees of underwater lands from the state, given the exclusive privilege of planting shellfish on the leased grounds, recovered for damages caused by the defendant's construction of a toll bridge on riparian land held under a subsequent grant.[404]

c. The Public Interest Factor, Where Government is a Competing User

Doctrines governing legal relationships between riparian owners are intertwined with those governing the extent to which actions of a state or municipal landowner may interfere with those of a private riparian owner without paying compensation for the damages, or actions by the riparian owner harmful to the state or municipal interests may be

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402. 188 NY 74, 80 NE 665 (1907). Berland criticizes the result, in favor of defendants based on Smith's littoral right to build the pier, in part on the ground that the case "creates rights in the [pleasure boating riparians] which can only be described as vested, without producing any offsetting benefit to the public at large. That is, while riparians acquire the privilege of erecting piers in and above soils held by the sovereign for the benefit of the public, the sovereign, as trustee for the public, is denied the right of receiving consideration for the privilege conferred on a select few." At 119.

403. Town of Hempstead v Oceanside Yacht Harbor, Inc., 38 AD 2d 263, 266, 328 NYS2d 894, 898 (2d Dep't 1972), barring the town from charging rentals for docks used in the defendant's marina, a use regarded as a reasonable exercise of riparian rights. The court relied heavily on Matter of Del Balso Holding Corp. v McKenzie, 271 NY 313, 3 NE2d 438 (1936), denying the exaction by New York City of rents as a condition of granting permits for the building of piers in the exercise of the riparian right of access to navigable waters. The Del Balso court regarded the provision of the Greater New York Charter expressly reserving riparian rights as declaratory of the common law. But see, contra, Brusco Towboat Co. v State, 284 Or 627, 589 P2d 712 (1978), upholding the right of the state to require users of submerged and submersible lands under navigable waters of the state to enter into leases and pay rental for their use; regarding their riparian rights as revocable; and acknowledging but refusing to follow the New York cases recognizing a proprietary riparian right to be free of such exactions.

404. 108 NJL 143, 156 A 493 (1931).

enjoined. Although riparian rights doctrines are primarily concerned with conflicts between private users of waters, the field also embraces issues involving actions by or detrimental to public owners of shorelands.

> On the one hand, a riparian proprietor's rights and interests in public waters may rise above those of the general public because of his location and superior right of access, and on the other, the existence of public rights to use the waters may impose limits on the exercise of riparian rights. The rules govern the liability of one riparian proprietor to another. They govern as well the liability or nonliability to riparians or persons who exercise public rights and privileges on public waters and the liability of riparian proprietors who interfere with public rights and privileges by acts on public waters that on other streams might be proper exercises of riparian rights.[405]

The bases of authority of the public and private actor may differ. A government's prerogatives may stem from its exercise of the police power, or its power to control, or make improvements for, navigation.[406] Thus some courts have limited a shoreowner's rights by invoking the doctrine that "[a]lthough, as against individuals or the unorganized public, riparian owners have special rights to the tideway that are recognized and protected by law,. . . they have no rights that do not yield to commercial necessities, except the right of pre-emption, when conferred by statute, and the right to wharfage, when protected by a grant and covenant on the part of the state."[407] Judicial determinations of the scope of the excepted "commercial necessities" vary. This limitation on riparian rights is sometimes equated with improvement "for the benefit of navigation."[408] The doctrine of

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405. Restatement of Torts (Second), Introductory Note and Scope Note to Chapter 41, at 184.

406. The state in controlling or making improvements for navigation is sometimes perceived to be exercising its police power. And it is said that the state, "as a riparian owner, except in the exercise of its police power, is subject to the same interpretation of rights and responsibilities as any other riparian owner." St. Lawrence Shores v State of New York, 60 Misc2d 74, 80, 302 NYS2d 606, 613-14 (Ct Cl 1969).

407. Sage v Mayor, Aldermen and Commonalty of the City of New York, 154 NY 61, 79, 47 NE 1096, 1101 (1897). And see Lansing v Smith, 4 Wend. 9 (1829), holding that the plaintiff grantee from the state of shoreland on the Hudson River, who erected a wharf on the land, could not maintain an action against a subsequent grantee for constructing a pier in a boat basin materially impairing the plaintiff's use of his wharf.

408. See Sage v Mayor, supra note 407, at 76, 47 NE at 1100. The city's improvements in Sage consisted mainly of the construction of bulkheads, docks and piers, but included the building of a marginal street.

government supremacy in this field is said to rest "upon the principle of implied reservation, . . . that in every grant of lands bounded by navigable waters where the tide ebbs and flows, made by the crown or the state as trustee for the public, there is reserved by implication the right to so improve the water front as to aid navigation for the benefit of the general public, without compensation to the riparian owner."[409] In New York, the scope of the doctrine is uncertain, and its strength is attenuated, by seemingly conflicting judicial holdings and dicta.[410]

Constitutional requirements that governments accord due process of law or guarantee just compensation for taking private property[411] may render a government riparian owner liable for damages for the same acts private riparian owners might engage in with impunity. The question whether the public act is a legitimate exercise of the police power or a "taking" requiring the payment of compensation is often added to the question whether the act is included in the list of protected riparian rights. These issues have occasionally pitted the holder of a shellfish cultivation lease against a municipality for damages to the shellfish or shellfish beds caused by effluents of a municipal sewer system. The determination depends on the precise facts relating, among other things, to the scope of the complaining party's leasehold interest, construed in the light of the provisions of the enabling law authorizing the leasing; to the nature of the offending act and the injury caused; and to the perceptions of the particular court regarding the scope of protected riparian rights of the municipality.

In Darling v City of Newport News[412] the lessee of oyster planting grounds sued for damage to the grounds and oysters from pollution caused by discharges from the city's sewer system. The court held for the defendant city, reasoning as follows: (1) The pollution of small non-navigable streams, whose waters are owned by the riparian owners, is to be distinguished from the pollution of large tidal, navigable bodies of salt water owned and controlled by the state; and in the latter case, it is up to the state to decide how much pollution it will allow, so long as the owners of land between high and low water mark are not injured.[413] (2) "A municipal corporation situated on an arm of the sea, adjacent to tidal waters, has the right to use such waters for the purpose of carrying off its refuse and sewage to the sea, so long as

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409. Id at 79-80, 47 NE at 1101; and see Lansing v Smith, supra note 407.

410. The New York law on this and related issues is thoroughly analyzed in W.H. Farnham, Modernization and Improvement of New York's Riparian Law (NY State Legislature, December 1974) (hereinafter cited as Farnham).

411. E.g., the fourteenth and fifth amendments to the United States Constitution.

412. 123 Va 14, 96 SE 307 (1918), aff'd, 249 US 540 (1919).

413. Id at 16, 96 SE at 307.

such use does not create a public nuisance, and any injury occasioned thereby to private oyster beds is damnum absque injuria."[414] (3) Plaintiff's lease was made solely "for the purpose of planting and propagating oysters thereon," giving him no more than the right to exclude others from taking oysters from the leased grounds, there being "nothing to indicate that any other public or private right is withdrawn, limited, or curtailed."[415] (4) The legislature, in the statute authorizing shellfish planting leases, could not have intended to destroy "the ancient right of the riparian owners to drain the harmful refuse of the land into the sea, which is the sewer provided therefor by nature."[416] (4) Accordingly, "the oyster planter takes his right to plant and propagate oysters on the public domain of the Commonwealth in the tidal waters" subject to that riparian right.[417]

In his opinion of affirmance, Mr. Justice Holmes noted: "[W]e agree with the court below that when land is let under the water of Hampton Roads, even though let for oyster beds, the lessee must be held to take the risk of the pollution of the water. It cannot be supposed that for a dollar an acre, the rent mentioned in the Code, or whatever other sum the plaintiff paid, he acquired a property superior to that risk, or that by the mere making of the lease, the State contracted, if it could, against using its legislative power to sanction one of the very most important public uses of water already partly polluted, and in the vicinity of half a dozen cities and towns to which that water obviously furnished the natural place of discharge."[418]

While acknowledging that the New York Court of Appeals in Huffmire v City of Brooklyn[419] appeared to sustain the plaintiff's contention, the Virginia court in Darling "observed that the New York statute, under which the owner of the oyster bed claimed there, provided that he should have 'the exclusive property in the oysters so planted and the exclusive use of such oyster beds' (Laws 1868, c. 734), while the Virginia statute employs different language and provides that the oyster beds may be occupied 'for the purpose of planting or propagating oysters thereon,' and that so long as the rent is paid annually in advance the state will

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414. Id at 17, 96 SE at 307, quoting, with approval, from the syllabus of an earlier case decided by the court, Hampton v Watson, 119 Va 95, 89 SE 81 (1916).

415. Id at 18-19, 96 SE at 308.

416. Id at 21, 96 SE at 309, noting also that another statute prohibited the taking of oysters from waters found to be polluted, unless the oysters were first purified and made suitable for human consumption.

417. Id.

418. 249 US at 543-44.

419. 162 NY 584, 57 NE 176 (1900).

guarantee to the renter for 20 years, 'the absolute right to continue to use and occupy such grounds, subject only to the right of fishing in the waters above the said bottom.'"[420]

Though one might think that the policy arguments for refusing to make the city accountable for water pollution in the Newport News case would have applied to New York City in the earlier Huffmire case, the Huffmire court did not raise them. Nor did the Huffmire court invoke the ancient right of a riparian, including a municipal riparian, to use water bodies as natural sewers. Instead, to reach a verdict favorable to the complaining shellfish planter, the Huffmire court applied standard constitutional "taking" reasoning, holding that the "destruction of plaintiffs' oysters by the casting of sewage upon them was as clearly a taking of their property as the physical removal and conversion of same would have been," hence plaintiff was entitled to just compensation.[421] In addition, the court seems to have been influenced by the fact that plaintiff had obtained his oyster planting lease pursuant to state legislation several years prior to the enactment of the statute authorizing the construction of the municipal sewer; and by the provisions of the oyster leasing enabling law explicitly giving the lessees "the exclusive property in the oysters so planted and the exclusive use of said oyster beds."[422]

The significance of the constitutional "taking" factor to the Huffmire holding is borne out by the Appellate Division in Seaman v City of New York.[423] In absolving the city from liability for damage to plaintiff's oyster storage facilities from water pollution caused by the city's sewerage operation, the court observed that "[t]here is in this case no trespass by casting sewage on plaintiff's land, as in the case of Huffmire v City of Brooklyn."[424] At most the water coming into plaintiff's premises was "rendered unfit for human consumption" by the pollution, and the court could find no right in "a riparian owner of tidal waters . . . to have the salt water, as it is carried to and fro by the tide, kept fit for human consumption."[425]

Conflicts of fish farmers and municipalities exercising a riparian right to discharge sewage wastes into waters are much less likely now to

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420. 123 Va at 17-18, 96 SE at 307. A distinction without a difference?

421. 162 NY at 591, 57 NE at 178.

422. Id at 585, 57 NE at 176.

423. 176 AD 608, 161 NYS 1002 (2d Dep't 1916). And see the reference to the case in note 390 supra.

424. Id at 610, 161 NYS at 1003.

425. Id.

require invocation of common law doctrines in view of the pervasive state water pollution controls, administered in New York mainly by the Department of Environmental Conservation.426 This is especially true in respect of shellfisheries in the New York marine district427 and tributary Long Island waters. Section 17-0503(1) of the Environmental Conservation Law provides:

> Sewage, industrial waste or other wastes, or any substance injurious to edible fish and shellfish, or the culture or propagation thereof, or which shall in any manner affect the flavor, color, odor or sanitary condition of such fish or shellfish so as to injuriously affect the sale thereof, or which shall cause any injury to the public and private shell fisheries of this state shall not be placed or allowed to run into the waters of the state in the marine district nor into any waters of Long Island, tributory to the marine district.428

Common law doctrines may nevertheless be employed in litigations seeking remedies other than those provided in the Environmental Conservation Law water pollution control article. Section 17-1101 of the article declares that it is the purpose of the statutory remedies provisions "to provide additional and cumulative remedies to abate the pollution of the waters of the state and nothing herein contained shall abridge or alter rights of action or remedies now or hereafter existing, nor shall any such provisions or any act done by virtue of such provisions, be construed as estopping the state, persons or municipalities, as riparian owners or otherwise, in the exercise of their rights to suppress nuisances or to abate any pollution now or hereafter existing."429 The fish farm operator might conceivably pursue common law remedies, such as a cause of action in nuisance, against a riparian owner whose allegedly polluting activities have been allowed by the state authorities; and in that situation or others riparian

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426. Environmental Conservation Law art 17 (McKinney 1973, and Supp 1982).

427. For the purposes of the water pollution control article, section 17-0105(3) of the Environmental Conservation Law defines the "marine district" as including "the waters of the Atlantic ocean within three nautical miles from the coast line and all other tidal waters within the state, except the Hudson river northerly of the south end of Manhattan Island." McKinney 1973.

428. McKinney 1973. It should be appreciated that some types of sewage effluents may benefit the cultivation of some marine plant or fish species. The Long Island Mariculture Report observes that "high levels of nitrogen and phosphorus (and possibly other plant nutrients) supplied by sewage often lead to enhanced growth of phytoplankton, which in turn can lead to an increase in shellfish growth. Seaweeds are similarly benefited." (At 108).

429. McKinney 1973.

proprietors may attempt to fall back on their riparian privileges.

d. Ground Rules for Reconciling Competing Riparian Interests

i. Construction of Terms of Grants

If the contest is between the owner or lessee of land used for aquaculture, whether a riparian or nonriparian owner or lessee, and another riparian owner, the determination may turn on the judicial construction of the terms of the different instruments under which the parties are asserting their respective rights.[430] State grants of lands underwater commonly contain express reservations of riparian rights.[431] Typically, a state patent issued to the Town of Islip was subject to the conditions "that the Town Board . . . may lease for purposes of shellfishing on such lands as it deems just, any of such lands as shall not in any way interfere with the enjoyment of the adjoining uplands by the owner of said uplands," and that "[n]o such lease shall be made within one thousand feet of the adjoining upland except to the owner of the adjoining upland."[432]

ii. Common Law Rules

Riparian rights being defined as a "right of flow and use" rather than as a right of ownership of the water itself, the common law tests for resolving conflicts between or with parties asserting riparian rights have been subject to change over time as social and economic conditions alter the nature and extent of the need for that flow and use.[433] The changes, in turn, have influenced the development of rules governing the interference by one riparian owner with the use of water by others. In the early, predominately agricultural society of England,

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430. Cf Post v Kreischer, 103 NY 110, 8 NE 365 (1886), construing a grant of underwater land to defendant for the erecting of a dock as allowing the grantee to destroy, with impunity, the plaintiff's oyster beds by dredging only upon showing that the defendants actually appropriated the land for building the dock (the record revealing that the primary object of the dredging was to deepen the waters in front of defendants' premises).

431. See references to laws of other states giving preferences to riparian owners in the granting of aquaculture leases, in the discussion in Part V of provisions for protecting competing users of waters and shorelands.

432. Quoted in Bevelander v Town of Islip, 17 Misc2d 819, 820, 185 NYS2d 508, 509-10 (Sup Ct, Suffolk Co, 1959), upholding a town shellfish lease of lands in Great South Bay to a private company.

433. These references to early English and American history are taken from the Restatement of Torts (Second), Introductory Note Preceding §850; and 5 Powell on Real Property paras 711-712 (rev Roham ed 1981).

waters were used mainly for domestic purposes and for running small mills. Litigations over conflicts among riparian owners were relatively few. The decisions in some early cases turned on whether a particular owner's rights had evolved from ancient usage, giving him a prescriptive right. Others seemed to be based on a rule of first user, while still other decisions invoked the "sic utere" principle that one may not so use his property as to injure others. Litigation over water use increased with the advent of the Industrial Revolution requiring greater use of water for powering machinery and resulting in increased pollution problems. It led to the development by the English courts of the "natural flow theory," under which "the primary or fundamental right of each riparian proprietor of a watercourse is to have the body of water flow as it was wont to flow in nature, qualified only by the privilege of each to make limited uses of the water."434

"In the early days of the Industrial Revolution when many mills and factories were powered by water, the doctrine served a very utilitarian purpose as it passed the water down from one mill dam to the next. In today's economy it is not utilitarian and prohibits many beneficial uses of water although those uses may be causing no one any harm and although the water would run to waste if not so used."435 Emphasis on a policy of promoting the beneficial use of water resources has led to the adoption of the "reasonable use" rule by most American courts, though some "natural flow" language may be found in the opinions. As expressed in the Restatement of Torts (Second), the reasonable use rule declares that a "riparian proprietor is subject to liability for making an unreasonable use of the water of a watercourse or lake that causes harm to another riparian proprietor's reasonable use of water or his land."436

The New York legislature codified the reasonable use rule in part in denying recourse to the courts to vindicate harmless alterations of watercourses. Section 15-0701(1) of the Environmental Conservation Law provides, in part:

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434. Restatement of Torts (Second), Introductory Note and Scope Note to Chapter 41, at 209-10. See Lux v Haggin, 69 Cal 255, 10 P 674 (1886), for an early statement of the doctrine.

435. Restatement of Torts (Second), Introductory Note and Scope Note to Chapter 41, at 210.

436. § 850. The courts of some western states, responding to particular water conditions and uses of that region, have developed yet another theory, the theory of "prior appropriation" resting on the principles "that beneficial use of water is the basis of the right to use water, and that priority of use is the basis of the division of water between appropriators when there is not enough for all." Id, Introductory Note and Scope Note to Chapter 41, at 213.

> An alteration (whether or not it causes water to cover or permeate land previously dry) in the natural flow, quantity, quality or condition of a natural watercourse or lake situated in this state and either on or below the surface of the earth, effected by the use either on or off riparian land, withdrawal, impoundment, or obstruction of the water in such watercourse or lake, or by the addition of water thereto, or by changes in the banks, bed, course or other physical characteristics of such watercourse or lake, is reasonable and lawful as against any person . . . having an interest in such watercourse or lake, unless such alteration is causing harm to him or it, or would cause him or it immediate harm if and when begun. No action for nominal damages or for an injunction shall be maintainable because of such an alteration against any person or corporation, whether a riparian owner or not, on the ground that such alteration is an infringement of the plaintiff's private rights and privileges in the waters of, or with respect to, such watercourse or lake unless such alteration is causing plaintiff harm, or would cause him or it immediate harm if and when begun.[437]

The statute appears to leave open the question whether, in New York, a person who suffers damages from a harmful alteration or use of a watercourse or lake may recover if the perpetrator's actions are found to be reasonable. Although some authorities assume that New York follows the reasonable use rule,[438] so as to make the alteration or use lawful if reasonable, despite the harm caused, inconsistencies in the decisions and opinions of the state's highest court have led some to

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437. McKinney 1973.

438. See Hackensack Water Company v Village of Nyack, 289 F Supp 671, 677-78 (SDNY 1968), stating that the downstream plaintiff did not have a right to undiminished flow of water as a matter of law, and that the issue was whether the upstream municipality's diversion of the water was reasonable as a matter of fact; Kennedy v Moog, Inc., 48 Misc2d 107, 264 NYS2d 606 (Sup Ct, Erie Co, 1965), aff'd in part, rev'd in part on other grounds, 26 AD2d 768, 271 NYS2d 928 (4th Dep't 1966), aff'd, 21 NY2d 966, 290 NYS2d 193, 237 NE2d 356 (1968) (dictum); People v Waite, 103 Misc2d 204, 206-07, 425 NYS2d 462, 464 (Co. Ct., St. Lawrence Co., 1979). And see 63 NY Jur, Waters §193, declaring it the law of New York that "[e]ach riparian owner is entitled, by virtue of his ownership of the soil, to the reasonable use of the water as it passes his premises, for domestic or other purposes, not inconsistent with a like reasonable use of the stream by owners above and below him."

express uncertainties on the point.[439]

To the extent the New York courts resolve conflicting riparian rights by applying the reasonable use test, they might be expected to base their determinations on factors listed by the Restatement of Torts (Second). Section 850A says:

> The determination of the reasonableness of a use of water depends upon a consideration of the interests of the riparian proprietor making the use, of any riparian proprietor harmed by it and of society as a whole. Factors that affect the determination include the following: (a) The purpose of the use, (b) the suitability of the use to the watercourse or lake, (c) the economic value of the use, (d) the social value of the use, (e) the extent and amount of the harm it causes, (f) the practicality of avoiding the harm by adjusting the use or method of use of one proprietor or the other, (g) the practicality of adjusting the quantity of water used by each proprietor, (h) the protection of existing values of water uses, land, investments and enterprises, and (j) the justice of requiring the user causing harm to bear the loss.

Accordingly, if one of the riparian disputants is engaging in aquaculture, the extent to which the record reveals a public interest in promoting aquaculture may be factored in as a social value; and the measure of the entrepreneur's economic investment in the aquaculture

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439. W.H. Farnham, supra note 410, at 55 et seq., and, in particular, his discussion of cases involving the diversion of stream water: those holding that a riparian owner has no right to divert the watercourse for any purpose to the prejudice of another riparian owner (Garwood v New York Central and Hudson River Railroad Co., 83 NY 400 [1881]; Smith v City of Rochester, 38 Hun. 612 (1886), aff'd, 104 NY 674 [1887]; Neal v City of Rochester, 156 NY 213, 50 NE 803 [1898]), in contrast with the dictum in Strobel v Kerr Salt Co., 164 NY 303, 320, 58 NE 142, 147 (1900) (involving the temporary detention of waters by dams to run machinery and provide irrigation, allegedly polluting water used by lower riparian owners):

> Consumption by watering cattle, temporary detention by dams in order to run machinery, irrigation when not out of proportion to the size of the stream, and some other familiar uses, although in fact a diversion of the water involving some loss, are not regarded as an unlawful diversion, but are allowed as a necessary incident to the use in order to effect the highest average benefit to all the riparian owners. As the enjoyment of each must be according to his opportunity and the upper owner has the first chance, the lower owners must submit to such loss as is caused by reasonable use.

business will also be taken into account. The Farnham study concluded that there is uncertainty in New York law as to the relevance of the public interest when determining reasonableness. The conclusion was based on his analysis of the Court of Appeals case that comes closest to the issue, Strobel v Kerr Salt Co.[440] The plaintiff riparian owners of small mills claimed that operations of the Salt Company reduced the flow of and polluted a stream running through their lands, and attempted to enjoin the operations. The trial court, in holding for the Salt Company, relied in part on the public importance of the Salt Company's enterprise and the size of its investment. In reversing and calling for a new trial, the Court of Appeals said:

> While the courts will not overlook the needs of important manufacturing interests, nor hamper them for trifling causes, they will not permit substantial injury to neighboring property, with a small but long-established business, for the purpose of enabling a new and great industry to flourish.[441]

From his analysis of this and other portions of the Strobel opinion, Farnham said that the case could be construed as a recognition of the factor of social value of the riparian actor's conduct, but inapplicable there absent evidence "that the defendant's salt making was of greater public importance in New York than the miscellaneous manufacturing activities of the plaintiffs"; or, to the contrary, could be construed "as establishing a rule that when the reasonableness of a water-based activity is in issue, the relative importance to the public of the activities of the contesting parties will not be considered."[442]

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440. 164 NY 303, 58 NE 142 (1900).

441. Id at 322, 58 NE at 147-48. Cf Boomer v Atlantic Cement Co., 26 NY2d 219, 309 NYS2d 312, 257 NE2d 870 (1970), refusing to enjoin the Cement Company's air polluting operations as a nuisance, in view of the economic importance of the industry to the area, but allowing damages for injury to neighboring properties of the plaintiffs.

442. W.H. Farnham, supra note 410, at 99. The Associate Reporter of the Restatement of Torts (Second) notes that in view of the fact that plaintiffs had established their mills several years prior to the Salt Company's operations, Strobel belongs in the line of cases regarding priority of use as material. Associate Reporter's notes on Restatement of Torts (Second), Appendix §§ 841 to End, at 30. He also observes that "[i]f the use of the water is to be transferred to another who can make a use of greater utility or profitability, it is just to require the new user to pay compensation [to the prior, existing user]"; that "[t]his will take the form of a negotiated price if the new user tries to induce the prior user to give up the right by sale or contract, or the form of damages if the new user simply takes the water"; and that the "justice of requiring the gainer to pay the loser when a wealth-producing asset changes hands is supported by statements in Strobel v Kerr Salt Co." Id at 33.

V. Leasing of Public Underwater Lands for Aquaculture: A Comparative View

We review here selected features of the aquaculture laws of Alabama, Alaska, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, North Carolina, Oregon, Puerto Rico, Rhode Island, South Carolina, Texas, Virginia, and Washington which, in our judgment, may be specially pertinent to any re-examination of the New York statutes authorizing the leasing of public underwater lands for aquaculture.[443] In addition, we refer to pertinent provisions of ocean leasing legislation proposed for Hawaii. These existing or proposed laws are compared with section 13-0301 of the New York Environmental Conservation Law authorizing the granting of shellfish cultivation leases in state waters,[444] and with the special acts ceding lands under Gardiner's and the Peconic bays to Suffolk county for leasing for shellfish cultivation (hereafter referred to as the Suffolk county leasing law).[445] We have raised questions regarding the authority of the Office of General Services to lease state underwater lands for finfish aquaculture,[446] and will not delve further into them here.

We will not review or draw comparisons with the conditions for town leases of underwater lands for shellfish cultivation, prescribed by town legislation or possibly in the terms of colonial grants. However, for purposes of analogy, we will refer now and then to various provisions of some early special laws conferring on the inhabitants of particular towns the right to plant shellfish in town underwater lands, rights more accurately described as licenses or franchises than as leasehold interests.

A. Types of Aquaculture Covered

The leasing authority of the New York Department of Environmental Conservation and of Suffolk county specifically relating to aquaculture leasing of state underwater lands is restricted to shellfish

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443. Some of the foreign state laws covered provide for the granting of licenses or permits in other forms, rather than leases, but their provisions are nevertheless informative for our purposes. Texas has come up with its own term, in the statute authorizing the granting of a "certificate of location" for oyster cultivation. Texas Parks and Wildlife Code §§ 76.012, 612.015 (Vernon 1976).

444. McKinney 1973.

445. 1969 NY Laws ch 990, and provisions of predecessor laws not inconsistent therewith, particularly 1884 NY Laws ch 385, as amended by 1896 NY Laws ch 916; 1906 NY Laws ch 640; and 1923 NY Laws ch 191.

446. See supra text accompanying notes 106 et seq.

cultivation. In possibly ten of the other jurisdictions included in this review, the leased lands may be used for growing both finfish and shellfish:

Alaska: It is not clear whether the authorization to grant leases for "shore fisheries development"[447] goes beyond leasing for the taking of fish with shore gill or set nets; or whether the general power to lease state land, including tide, submerged or shoreland,[448] extends to leasing for aquaculture purposes.

California: Leasing for "aquaculture."[449]

Florida: Leasing "for the conduct of aquaculture activities," defined as the "cultivation of animal and plant life in a water environment."[450]

Hawaii: No specific statements of purpose, but by inference the disposition of public lands may be for "intensive" aquaculture or mariculture.[451] These do not define "aquaculture," but the term is defined in the chapter on aquatic resources and wildlife as "the farming or ranching of any plant or animal species in a controlled salt, brackish, or fresh water environment."[452] We also note that the Hawaii Coastal Zone Management Act was amended in 1979 to exempt from certain Special Management Area permit requirements "the use of any land for the purpose of . . . aquaculture or mariculture of plants or animals."[453]

Maine: Leasing "for aquaculture of marine organisms," "aquaculture" defined as "the culture or husbandry of marine organisms," and "marine organisms," as "any animal, plant or other life that usually inhabits salt water."[454]

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447. Alaska Stat Ann § 38.05.082 (1977).

448. Id § 38.05.070 (Supp 1983).

449. Cal Fish and Game Code § 15400 (West Supp 1983).

450. Fla Stat Ann § 253.67, 253.68 (West 1975).

451. Hawaii Rev Stat §§ 171-13, 171-36 (Supp 1983).

452. Id § 187-1(1) (Supp 1983).

453. Id § 205A-22(3)(B)(viii) (Supp 1983).

454. Me Rev Stat Ann tit. 12, §§ 6001(1),(26), 6072 (Supp 1983); and see section 6673, authorizing the leasing by municipalities, with approved shellfish conservation programs, of flats for shellfish aquaculture.

New Hampshire: The Director of the Fish and Game Department may issue a special license to allow, "for the the purpose of aquiculture [sic], . . . the taking, possession, transportation, rearing and sale of marine organisms."[455] The term "aquiculture" is defined as "the propagation and rearing of finfish, crustaea, shellfish and other aquatic organisms, including plants, and includes the planting, promoting of growth, harvesting and transportation of these species, in, on, or from the waters of this state."[456] A person may also obtain from the director "an aquiculture license . . . to release and recapture domestically reared anadromous fish in state waters."[457] The references to state waters suggests that the licenses themselves authorize occupancy of public waters or water beds.

Oregon: The statute does not specifically refer to aquaculture leasing,[458] but the implementing regulations include "[a]quaculture projects involving the cultivation of aquatic plants and animals for domestic or commercial purposes," among other uses of state owned submerged and submersible lands requiring leases.[459] We may note in passing that the Oregon law authorizes the leasing of state submerged lands "for the purpose of harvesting kelp and other seaweed."[460]

Puerto Rico: Licensing for "cultivating fishes or plants"; "fish" defined as "any marine animal or part thereof," and "plant," as "any plant, seed or part thereof which exists in Commonwealth marine or tidewaters."[461]

Rhode Island: Leasing for "aquaculture activities," "aquaculture" defined as "the cultivation, rearing, or propagation of aquatic plants or animals under either natural or artificial conditions."[462]

Washington: Lease of beds of navigable tidal waters "for the purposes of planting and cultivating oyster beds, or for the purpose of cultivating clams or other edible shellfish, or for other aquaculture

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455. NH Rev Stat Ann § 211.62-eII (Supp 1983).

456. Id, subsec I.

457. Id, subsec III.

458. Or Rev Stat §§ 274.040, 274.915 (Supp 1983).

459. Noted in Brusco Towboat Co. v State, 284 Or 627, 631, 589 P2d 712, 716, n 4 (1978), citing OAR 141-82-010(2).

460. Or Rev Stat § 274.885 (Supp 1983).

461. PR Laws Ann tit. 12, §§ 1352(9),(12), 1361(e) (Supp 1983).

462. RI Gen Laws § 20-10-2, 20-10-6 (Supp 1983).

use," the term "aquaculture" not being defined.[463]

Although the Texas laws acknowledge and require the licensing of "fish farmers" for propagating finfish,[464] and although the "state may permit the use of the waters and bottoms and the taking of the products of the bottoms and waters" under state jurisdiction,[465] we have not included Texas in this list, because the licensees are confined to use of private ponds on their own lands.[466]

Plant aquaculture is permitted in at least six of the ten states: California, Florida, Maine, New Hampshire, Oregon and Puerto Rico.[467]

Hawaii's constitution is probably unique in expressly empowering the state "to manage and control" the state's marine and seabed resources, and in that connection expressly reserving to the legislature the right to establish guidelines for "mariculture" to "protect the public's use and enjoyment of the reefs."[468]

B. Nature of the Property Interests Granted

We have noted the possible division of interests in the bed, water column, and surface of water bodies.[469] The New York statutes on shellfish leasing by the state or Suffolk county do not make the distinction. They refer to "lands under water."[470] Would a lease of submerged lands for shellfish cultivation under the existing New York

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463. Wash Rev Code Ann § 79.96.010 (Supp 1983).

464. Texas Parks and Wildlife Code §§ 48.002 (Vernon 1976).

465. Id § 1.011(d).

466. Id § 48.001. "Private pond," for this purpose, is defined as "a pond, reservoir, vat, or other structure capable of holding fish in confinement wholly within or on the enclosed land of an owner or lessor."

467. See the references to the statutes of these respective states supra in the text accompanying notes 447-63.

468. Art XI § 6, as amended by the State Constitutional Convention of 1978.

469. See supra text accompanying notes 70-72.

470. Environmental Conservation Law § 13-0301(1) (McKinney 1973); 1969 NY Laws ch 990, § 4. Compare the provisions of section 13-0316b, authorizing the Department of Environmental Conservation to "issue permits for off-bottom and on-bottom culture of marine plant and animal life" (as amended by 1983 NY Laws ch 467, adding "on-bottom" culture). Its possible significance to the topic at hand is discussed above (text accompanying notes 142 et seq).

statutes, or for other types of aquaculture under a new statute similarly worded, give the leaseholder the exclusive use of the water column? Of the surface of the water? Assuming, as we do, that the legislature, consistent with the public trust doctrine, could legitimately restrict public rights in waters by authorizing such leases, the New York statutes should be construed as granting to the lessees whatever rights in the water column and water surface are needed to make the leases effective.[471] Yet doubts that might arise in some situations regarding the extent of such rights in the lessee vis-a-vis the public suggest the wisdom of legislative clarification on the point.[472]

A number of statutes raise similar questions in providing for licenses or leases for aquaculture on water "bottoms,"[473] though one might argue that the term "bottoms" would be construed more narrowly than the New York term "lands." The fact that in one of these statutes, that of California, the legislature explicitly reserved certain public rights in the waters of the leased area suggests that the leasing of the "water bottom" might otherwise be interpreted as granting an exclusive use of the waters over the bottoms.[474]

The Alaska statute anticipates and resolves the question whether the lessee of underwater lands has an exclusive right to take fish, or has any other exclusive rights, in the waters above the leased bottom. It states that the "lease of submerged lands conveys no interest in the

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471. McKinney, Consolidated Laws of New York, Book 1, Statutes § 144 (1971): "Statutes will not be construed as to render them ineffective."

472. See Va Code § 28.1-109(15) (Supp 1983), subjecting the lessee's right of exclusive occupancy to the public "right of fishing in waters above the bottoms," suggesting that were it not for this reservation, the assignment of "ground" to the lessee would encompass the water column and water surface.

473. See, e.g., Cal Fish and Game Code § 15400 (West Supp 1983) (lease of "state water bottoms"; but see id § 6700, providing for the leasing for the exclusive privilege of harvesting "kelp in any bed or beds"); Miss Code Ann § 49-15-27 (Supp 1983) ("bottoms"); NC Gen Stat § 113-202 (Supp 1983) (lease of "public bottoms underlying coastal fishing waters"). Cf La Rev Stat Ann § 56.422A (West Supp 1983) ("bedding grounds"), and Wash Rev Code Ann § 79.96.010 (Supp 1983) ("beds" of navigable tidal waters). Cf Texas Parks and Wildlife Code §§ 76.006, 76.007 (Vernon 1976), authorizing the granting of certificates for planting oysters "in the public water of the state," and referring to "land covered by water" in specifying an acreage maximum.

474. Cal Fish and Game Code § 15411 (West Supp 1983): "Lessees under a state water bottom lease may not unreasonably impede public access to state waters for purpose of fishing, navigation, commerce, or recreation. The lessee may, however, limit public access to the extent necessary to avoid damage to the leasehold and the aquatic life culture therein." And see the reference to the Virginia statute reserving fishing rights, note 472 supra.

water above the land or in the fish in the water."[475]

Other state leasing statutes avoid the ambiguity by explicit reference to the "water column" in describing the interests leased,[476] or authorizing the leasing of "areas in, on and under the coastal waters."[477] Massachusetts separates statutory provisions for municipal licensing (1) for the planting, growing and taking of shellfish "in, upon or from a specific portion of flats or land under coastal waters,"[478] and (2) for growing "shellfish by means of racks, rafts, or floats in waters of the commonwealth."[479]

Counterpart to the question whether the lease of the bed of a navigable water body grants an exclusive right to occupy the water column or water surface is the question whether members of the public have a protected right to use the waters for boating, swimming or fishing. The subject will be mentioned below in the discussion of statutory leasing provisions protecting such public rights.

C. Size of Leased Areas

We have noted that in New York, leases of plots on state underwater lands granted by the Department of Environmental Conservation for shellfish cultivation are limited to a 50-acre minimum for bottom culture and five-acre minimum for off-bottom culture.[480] The reduction from 50 to five acres for off-bottom culture was effected by a 1973 amendment.[481] The Suffolk county leasing law prescribes a 50-acre

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475. Alaska Stat Ann § 38.05.082(e) (1977) (presumably other than fish cultivated by the lessee, assuming that the statute authorizes leasing for aquaculture).

476. Fla Stat Ann §§ 253.67–253.68 (West 1975) (submerged lands held by the state for internal improvement purposes may be leased for aquaculture, granting "exclusive use of the bottom and the water column to the extent required by such activities," and defining "water column" as "the vertical extent of water, including the surface thereof, above a designated area of submerged land"), but see id § 370.16 (West Supp 1983), providing for the leasing of "a part of the bottom or bed of any of the water of the state, for the purpose of growing oysters or clams"); RI Gen Laws § 20-10-6 (1982) (lease of "land submerged under the coastal waters of the state . . . and the water column above such submerged lands"; and see the proposed legislation for Hawaii (Clay VII-9)—lease of "state marine waters and the ocean bottom, the vertical water column and the ocean surface for mariculture."

477. Me Rev State Ann tit. 12, § 6072 (Supp 1983).

478. Mass Gen Laws Ann ch 130, § 57 (West 1974).

479. Id § 68A.

480. Environmental Conservation Law §13-0301(5) (McKinney Supp 1983).

481. 1973 NY Laws ch 253.

minimum without exception.[482]

Some of the other state laws surveyed place no size limits on aquaculture leases.[483] Other states specifying the exact acreage, as in New York, include Maine, restricting each lease to five acres, but allowing a lessee to accumulate tracts of up to 200 acres,[484] and Massachusetts, confining the area of operation to 100 feet from the racks, rafts or floats used under leases for off-bottom shellfish cultivation.[485] Several states prescribe minimum and maximum acreage ranges, or maximums only.[486]

The rationale of the New York 50- and five-acre allotments, and Maine's five acre provision, is not obvious. If size limitations are justified at all, the Florida use of a performance standard may be preferable. The size of area of an individual Florida aquaculture lease is limited to the area the applicant has demonstrated to be within his capacity to utilize efficiently and consistent with the public interest.[487] The results of a demonstration aquaculture project may be accepted as evidence of the capacity of the applicant to conduct his operations on a commercial basis.[488] Proposed legislation for Hawaii favors the Florida approach.[489] Another example of an acreage limitation based on a qualitative criterion is found in the prohibition in the Puerto Rico law against the granting of an exclusive aquaculture lease "on an area that in the [granting agency's] opinion would

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482. 1969 NY Laws ch 990,

483. E.g., Ala Code § 9-12-24 (1980); Ga Code § 45-920 (Supp 1982); NJ Rev Stat Ann § 50:1-27 (West Supp 1983); Or Rev Stat § 622.250 (Supp 1983); RI Gen Laws §§ 20-10-3, 20-10-6 (1982); Wash Rev Code Ann § 79.96.010 (Supp 1983) (maximum of 40 acres for cultivating and harvesting oysters, but the leasing authority may, "in its discretion, grant leases for larger parcels" for the "cultivation and harvesting of clams or other aquaculture use").

484. Me Rev Stat Ann tit. 12, § 6072(2) (Supp 1983).

485. Mass Gen Laws Ann ch 130,§ 68A (West 1974).

486. E.g., Del Code Ann tit. 7, § 1906 (West Supp 1983) (50-100 acres); Md Natural Resources Code Ann § 4-1108(d) (1983) (1-30 acres generally, but 5-500, 1-100, or 1-50 acres for other specified areas); NC Gen Stat §113-202 (1978) (1-50 acres generally, but 5-200 in Pamlico Sound); Wash Rev Code Ann § 79.96.010 (Supp 1983) (maximum 40 acres for oyster cultivation).

487. Fla Stat Ann § 253.71(3) (West 1975).

488. Id.

489. Clay VII-12.

propitiate [sic] or tend to propitiate [sic] a monopoly."[490]

New York's style of specifying the exact acreage for each shellfish lease granted by state or Suffolk County authorities suffers from the disadvantage of a lack of flexibility in dealing with different types of applicants or areas; and, in any case, might be especially inapt if carried over to legislation permitting the leasing of submerged lands for finfish culture. However, a policy choice of specification may be dictated by a desire to prevent abuses of discretion by administrative officials not bound by statutory acreage limits. This does not mean that a lack of legislative specification or guidelines leaves the administrators free to establish lease terms on a purely ad hoc basis. The courts would not countenance a system permitting the discriminatory setting of lease durations not based on some uniformly applied rationale grounded in the public interest.

Although the Environmental Conservation Law and Suffolk county leasing law establish the acreage for each leased plot, they place no restrictions on the number of leases or aggregate acreage that may be granted to any one person, firm or corporation. A number of the early special laws authorizing the granting of licenses for shellfish cultivation prescribed maximum sizes.[491] As noted, Maine adds to the per lease acreage figure the stipulation that "[n]o applicant shall be permitted to lease more than 200 acres."[492] Virginia similarly restricts the aggregate holdings of individuals, in addition to per lease limits.[493] Louisiana, Mississippi, South Carolina and Texas leasing laws prescribe limits on aggregate acreage but not on the

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490. Laws of Puerto Rico Ann tit. 12, § 1361 (Supp 1983). And see Cal Fish and Game Code § 15405 (West Supp 1983): "No state water bottom lease [for aquaculture] may . . . [t]end to foster a monopoly."

491. 1863 NY Laws ch 493, § 2, inhabitants of Jamaica and Hempstead (then in Queens county), two acres; 1865 NY Laws ch 343, § 2, and 1871 NY Laws ch 639, § 2, same inhabitants, three acres; 1866 NY Laws 306, § 2, as amended by 1872 NY Laws ch 666, Islip and Huntington, two acres; 1874 NY Laws ch 549, § 1, as amended by 1878 NY Laws ch 142 (for "any inhabitant" of the towns of Islip and Babylon, "a lot not to exceed four acres in extent under the public waters of the Great South Bay in either of said towns where the taking of clams cannot be profitably followed as a business"); 1897 NY Laws ch 338, §§ 2, 9 (public waters within the Town of Hempstead, maximum for six acres per person for planting oysters, and no more than one acre for planting clams).

492. Note 485 supra, and accompanying text.

493. Va Code § 28.1-109(8)–(10) (Supp 1983) (maximum of 250 acres per oyster planting lease, except in Chesapeake Bay, but no "person, firm or corporation shall own or operate more than three thousand acres of oyster grounds," or 5,000 acres, in Chesapeake Bay).

acreage of particular leased plots.[494] The Mississippi law distinguishes the holders of small and large interests in business organizations, in providing "that in the case of an individual there shall not be counted towards such limitation any lands leased by a corporation, partnership or association in which such individual owns ten percent (10%) or less interest and, in the case of a corporation, partnership or association, there shall not be counted toward such limitation any lands leased by an individual stockholder, partner or associate thereof who owns ten percent (10%) or less interest in such corporation, partnership or association."[495]

D. Duration of Leases

1. Initial Terms

The term of shellfish cultivation leases granted by the New York Department of Environmental Conservation or by Suffolk county "shall be ten years."[496] The laws of some of the other states also establish fixed terms varying from one to 20 years.[497] Still others establish maximum

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494. La Rev Stat Ann § 56:432 (West Supp 1983) (generally 1,000 acres per "person, partnership or corporation," increased for lessees owning or operating canning plants in the state, in the amount of 500 acres for the second plant, and 300 acres for the third plant); Miss Code Ann § 49-15-27 (Supp 1983) (5-100 acres for any "individual, corporation, partnership or association"); SC Code Ann § 50-17-710 (Law. Co-op 1977) (a maximum aggregate of 1,000 acres to any person for "shellfish culture for commercial purposes," defined as "any State resident licensed to do business in this State and who makes his livelihood or a substantial portion of his livelihood from the commercial fisheries industries"; and a maximum of two acres for other persons); Texas Parks and Wildlife Code § 76.007 (Vernon 1976) (maximum 100 acres per person).

495. Miss Code Ann § 49-15-27(3) (Supp 1983).

496. Environmental Conservation Law § 13-0301(4) (McKinney 1973); 1969 NY Laws ch 990, § 4. A maximum 15 year lease period in an earlier version of section 13-0301 was changed to a fixed 10 year term in 1965 because it was "felt that a full [ten] year period is desirable to permit the return of capital by shellfish farmers, necessary to develop the leased area." Memorandum of the Joint Legislative Committee on Revision of the Conservation Law, March 18, 1965, in Governor's Bill Jacket on 1965 NY Laws ch 407.

497. Del Code Ann tit. 7, § 1908 (West Supp 1983) (one year); La Rev Stat Ann § 56:428 (West Supp 1983); Md Natural Resources Code Ann § 4-1110 (1983) (oyster cultivation, 20 years); NC Gen Stat § 113-202(j) (Supp 1973) (for oyster and clam cultivation, 10 years); Va Code § 28.1-109(12) (Supp 1983) (oyster planting, 20 years).

terms.[498] The special New York law authorizing the Town of Hempstead to issue licenses for planting oysters or clams prescribes terms of "not less than one nor more than ten years, as the town board may determine in each case."[499] Oregon does not place a limit on the duration of the lease.[500] The proposal for Hawaii distinguishes (1) administrative leases, requiring no more than one acre of state marine waters, and experimental leases, those used for research, scientific or educational activities, from (2) commercial aquaculture leases, setting a five year maximum for those in the first category, and 20 years for commercial leases.[501]

Empirical studies might show that persons investing in aquaculture enterprises may not want leases running less than 10 years. However, it is conceivable that in some situations, particularly where the feasibility of the venture has not been ensured, it may be in the public interest for the government leasing authorities to negotiate a shorter duration.[502] An alternative to statutory specification of lease durations as well as other lease terms, to provide maximum flexibility for establishing different terms for different types of aquaculture, is suggested by the California delegation to the state leasing agency of authority to "adopt regulations governing the terms of the leases."[503]

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498. Alaska Stat Ann § 38.05.070, 38.05.082(c) (1977) (10 years for shore fisheries development leases); Conn Gen Stat Ann § 26-194 (West 1975) (shellfish cultivation, 10 years); Fla Stat Ann §§ 253.71, (West Supp 1983), 370.16(4) (West 1975) (10 years for aquaculture leases of internal improvement trust lands, but leases in perpetuity for shellfish culture in marine areas); Ga Code Ann § 45-920(c) (Supp 1982) (15 years for lease of oyster or clam beds); Me Rev Stat Ann tit. 12 § 6072(12) (Supp 1983) (for aquaculture of marine organisms, 10 years); Mass Gen Laws Ann 130, ch 130 § 68A (West 1974) (local shellfish grants, 10 years); Miss Code Ann § 49-15-27 (Supp 1983) (one year with an option of one year renewals for a maximum total of 25 years); NJ Rev State Ann § 50:1-27 (West Supp 1983) (30 years for shellfish culture); RI Gen Laws §§ 20-10-3, 20-10-6 (1982) (10 years for aquaculture permits); SC Code Ann § 5-17-710 (Law. Co-op 1977) (five years for shellfish culture).

499. 1897 NY Laws ch 338, § 4, as amended by 1909 NY Laws ch 515.

500. Or Rev Stat § 622.250 (Supp 1983) (oyster plats).

501. Clay VII-11.

502. It could be argued that unless the legislature prescribes a 10 year minimum, the leasing authorities might be swayed by opponents of aquaculture to fix smaller terms exposing aquaculture investors to unacceptable risks, thus discouraging growth of the industry by discouraging investment in it, or by inviting failures by persons willing to take the risk of a short life for the venture but unable to overcome it.

503. Cal Fish and Game Code § 15400 (West Supp 1983).

2. Renewals

Generally, in the absence of an agreement in or connected with the original lease, the lessee has no enforceable right to a renewal of the lease.[504] However, the right of renewal may be granted by statute. Section 13-0301(8) of the Environmental Conservation Law provides in part that "l]eases may be renewed within ninety days after expiration, subject to the provisions of this section, upon such terms as may be agreed upon by the department [of Environmental Conservation] and lessee, provided that the rental shall not be less than the rate of the previous rental, and shall not exceed twice the rate of the previous rental.[505]

The value of this provision to the original lessee is questionable. This does not read like the usual covenant giving a lessee a protected renewal option binding on the landlord. The words "may be renewed" seem to give the option to the lessor, the state. That right in the lessor would exist without statutory mention, but the statute performs the necessary function of fixing a floor and ceiling for the renewal term rental. The statute also eliminates any doubt about the right of the state to lease the same acreage to the same lessee for more than the 10 year period prescribed for shellfish leases under this law. The absence of any grant of a renewal right is also highlighted by the statement that the terms of the renewal lease shall be "upon such terms as may be agreed upon by the department and the lessee." It is "well settled in the common law of contracts in this State that a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable," and this "is especially true of the amount to be paid for the sale or lease of real property."[506]

The Suffolk county leasing law does not contain explicit renewal terms, but instructs the county to adopt regulations governing the renewal of its shellfish cultivation leases.[507] The provision appears to authorize a grant in the initial lease of an option of the lessee to compel a renewal; and, in any case, should be construed as approving renewals extending the total term to more than 10 years.

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504. McDonald v Fiss, 54 AD2d 489, 67 NYS 34 (1st Dep't 1900).

505. McKinney 1973. And see 1897 NY Laws ch 338, cited at note 491 supra, authorizing the renewal, upon the expiration of the initial lease, "for a further term of not less than one nor more than ten years." (Is more than one renewal allowed?) Compare the department's Off-Bottom Culture of Shellfish Marine Area Use Assignment Document (para 8), giving the assignee an "exclusive right of renewal" unless notified to the contrary within 120 days of the termination date.

506. Joseph J. Martin, Jr., Delicatessen, Inc. v Schumacher, 52 NY2d 105, 109-10, 436 NYS2d 247, 249, 417 NE2d 541, 543 (1981).

507. 1969 NY Laws ch 990, § 5.

Questions may be raised under either law as to the right of the state or Suffolk county to grant renewals for periods more or less than 10 years.

Provisions granting enforceable renewal rights to aquaculture lessees or licensees for varying terms are found in the laws of a number of states. For example, Rhode Island grants holders of permits for conducting aquaculture in state coastal waters the right to successive five year renewals if they have complied with state laws and regulations in their prior performance.[508] The Commissioner of Maine Resources "shall grant a lease renewal unless the prior lessee has not complied with the lease agreement during its term, substantially no research or aquaculture has been conducted, or the commissioner finds that it is not in the best interest of the State to renew the lease."[509] That is tantamount to an enforceable option. The public interest criterion would not give the commissioner absolute discretion to bar renewal.

The California law conditions the renewal option on the applicant's meeting the highest bid.[510] The proposed Hawaii legislation follows the California version if competitive bidding is required, and adds the provision that if the existing lessee chooses not to match the high bid, the leasing authority "may reassign the lease, subject to the conditions that the new leaseholder purchase the initial leaseholder's unamortized improvements and assets in the lease area, if the initial leaseholder so demands."[511]

The existing Hawaii law governing the leasing of public lands generally takes a contrasting position in prohibiting the granting of

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508. RI Gen Laws § 20-10-3 (1982). And see La Rev Stat Ann § 56:428 (West Supp 1983) (renewal option for successive 15 year periods "provided the lease is capable of supporting oyster populations"); and Miss Code Ann § 49-15-27 (Supp 1983) (option to renew for one year terms up to a total maximum of 25 years); SC Code Ann § 50-17-710 (Law. Co-op 1977) (option to renew for an additional five year term).

509. Me Rev Stat Ann, tit. 12 § 6072 (Supp 1983). And see Va Code § 28.1-109(12) (Supp 1983) (the Commission of Fisheries "shall not renew or extend an assignment where there has been neither significant production of shellfish nor reasonable plantings of shellfish or cultch during any portion of the ten-year period immediately prior to the application for renewal, unless the Commission finds that there was good cause for the failure to produce or plant shellfish or cultch or finds that such assignment is directly related to and beneficial to the production of oyster planting grounds immediately adjacent to such assignment"). Compare Wash Rev Code Ann § 79.96.050 (Supp 1983) (the Department of Natural Resources may issue a renewal shellfish or aquaculture lease for a term not exceeding 10 years if the Department deems it "in the best interests of the state").

510. Cal Fish and Game Code § 15406 (West Supp 1983).

511. Clay VII-11.

lease renewal options.[512]

E. Selection of Lessees; Eligibility

1. Residency Requirements

Leases granted by the Department of Environmental Conservation under section 13-0301 of the Environmental Conservation Law "may be made only to persons resident in the state one year or more immediately prior to application."[513] A year's prior residency in Suffolk county is a prerequisite to obtaining a lease under the Suffolk county leasing law.[514] Similar town residency requirements are prescribed in various statutes entitling individuals to plant oysters or clams in town underwater lands.[515] The constitutionality of statutes or local laws or ordinances barring or discriminating against nonresidents in permitting aquaculture or fishing has been the subject of frequent litigation.[516] In a recent one in New York the federal court invalidated, as a violation of equal protection guarantees, an ordinance of the Town of East Hampton requiring one year of residency in the town as a condition of obtaining a license to engage in shellfishing.[517] The legal issues are complex and warrant a separate, comprehensive study.

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512. Hawaii Rev Stat § 171-36(a)(1) (Supp 1983).

513. Subsec 3 (McKinney 1973).

514. 1969 NY Laws ch 990 § 4.

515. See 1866 NY Laws ch 306 (planting in public waters of Great South Bay within the towns of Islip and Huntington restricted to persons who were inhabitants of these towns for six months); 1871 NY Laws ch 639 (towns of Jamaica and Hempstead, one year); 1874 NY Laws ch 549 (Town of Islip, one year); 1897 NY Laws ch 338 (Town of Hempstead, one year).

516. See People v Lowndes, 130 NY 455, 129 NE 751 (1892), issue not decided, but suggesting that the state might constitutionally exclude nonresidents of the state from planting and taking shellfish in New York; American Commuters Association, Inc. v Levitt, 279 F Supp 40, 47 (SDNY 1967), aff'd, 405 F2d 1148 (2d Cir 1969), stating, as dictum, that "the privileges and immunities clause [of the Federal Constitution] does not guarantee to nonresidents the right to obtain . . . fishing licenses for non-commercial purposes for the same fee as that charged to residents"; Comment, Shellfish Regulation: Conservation and Discrimination, 29 Me L Rev 360 (1978); Lewis and Strand, Douglas v Seacoast Products, Inc.: The Legal and Economic Consequences for the Maryland Oystery, 38 Md L Rev 1 (1978); Power, More About Oysters Than You Wanted To Know, 30 Md L Rev 199 (1970).

517. Hassan v Town of East Hampton, 500 F Supp 1034 (EDNY 1980).

2. Competitive Bidding

Leasing under section 13-0301 of the Environmental Conservation Law "shall be at public auction and to the highest bidder," subject to meeting the requirement of a minimum annual rental of one dollar per acre.[518] Leasing under the Suffolk county leasing law is also "at public auction."[519] Competitive bidding is mandated under the laws of some other states;[520] while, presumably, in other states the authorities may use their discretion in granting applications for leases, though subject to the usual common law or constitutional prohibitions against arbitrary action.

The proposed legislation for Hawaii would authorize the state's Department of Natural Resources to negotiate with applicants for leases to be brought before the Board of Natural Resources for approval, or competitive bidding may be required, as may be determined by the board in its discretion.[521]

3. Preferences

a. Riparian Privileges

Some state laws incorporate preferential factors in the provisions for selecting lessees. A few give preferences to riparian owners.[522] Under Maine law, if more than one person seeks to lease a particular area, preferences are given first to the Department of Marine Resources;

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519. 1969 NY Laws ch 990 § 4.

520. See Alaska Stat Ann §§ 38.05.075, 38.05.75, 38.05.082 (1977) (lease to "highest qualified bidder," but transactions valued at less than $250 may be negotiated without bidding); Cal Fish and Game Code § 15407 (Supp 1983) (aquaculture lease to the highest bidder if it meets the minimum rental fee of not less than $10 per acre fixed by the state); Conn Gen Stat Ann § 26-194 (1975); Del Code Ann tit. 7, § 1906(d) (West Supp 1983); Ga Code Ann § 45-920(c) (Supp 1982); Miss Code Ann § 49-15-27 (Supp 1983) (the Mississippi Commission on Wildlife Conservation "is authorized to exercise its discretion as to which bid is the highest responsible bid, and such leases shall be awarded under such conditions as will insure the maximum culture and propagation of oysters"); Or Rev Stat § 274.040(1) (1981) (minimum fixed administratively); PR Laws Ann § 1361(j) (Supp 1983).

521. Clay VII-9.

522. E.g., Fla Stat Ann § 370.16(1) (Supp 1983) (preference to riparian owners for leases of water bottoms for shellfish planting); Or Rev Stat § 274.040(1) (Supp 1983) (owner of abutting land has "the preference right" to lease submersible lands, but the statute does not say whether the preference can overcome a higher bid); SC Code Ann § 50-17-720 (Law. Co-op 1977) (upland owners on tidewaters "shall have preference in leasing two acres of bottoms adjacent to such highlands for the planting and propagation of oysters . . . if he makes application therefor prior to the grant of a lease to other persons."

second, "to the riparian owner of the intertidal zone within the leased area"; third, "to fishermen who have traditionally fished in or near the proposed lease area"; and fourth, "the riparian owner within 100 feet of leased coastal waters."[523] Virginia grants an exclusive right, not just a preference, to riparian owners holding at least 250 feet of shore front, to plant or gather oysters and clams on areas not exceeding one half an acre located within specified distances from their shores.[524] Alabama, Mississippi, and Texas grant similar rights to riparians.[525]

Special laws of New York granting shellfish planting rights to littoral owners on Shinnecock and Jamaica bays have been noted.[526]

b. The Experience Factor

In addition to Maine, which accords a favored position to persons who have "traditionally fished" in the area,[527] Alaska gives weight to an experience factor in choosing "the most qualified" among applicants competing for shore fisheries development leases of the same area; the leasing official "shall consider the length of time during which the applicant has been engaged in set netting, the proximity of his past fishing sites to the land to be leased, his present ability to utilize the location to its maximum potential."[528] South Carolina distinguishes and favors an applicant desiring to engage in shellfish culture for commercial purposes, defining such person as "any State resident licensed to do business in this State and who makes his livelihood or a substantial portion of his livelihood from the

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523. Me Rev Stat Ann tit. 12, § 6072(8) (1981).

524. Va Code § 28.1-107 (1979).

525. Miss Code Ann § 49-15-9 (1973) (the "sole right of planting and gathering oysters . . . in front of any land bordering on the Gulf of Mexico or Mississippi Sound or waters tributary thereto [within specified distances from the shore] belongs to the riparian owner"); Ala Code § 9-12-22 (1980) (owners of land fronting on rivers, bayous, lagoons, lakes, bays, sounds and inlets given the right to plant and gather oysters, generally within 60 yards from average low water mark); Texas Parks and Wildlife Code § 76.004 (Vernon 1976) (planting and sowing of oysters, generally within 100 yards from the shore of a creek, bayou, lake or cove, or anywhere within the boundaries of the original grant).

526. Supra note 398.

527. See text accompanying note 523 supra.

528. Alaska Stat Ann § 38.05.082(b) (1977), though the provisions may not be relevant to leasing for aquaculture purposes, if the Alaska law permits leasing for aquaculture at all.

commercial fisheries industries.[529] He may be leased up to an aggregate of 1,000 acres of state bottom lands, while a lessee of lands for shellfish culture other than for commercial purposes is restricted to a maximum of two acres.[530]

In contrast, the Georgia system gives an advantage to persons not already engaged in shellfish cultivation, at least on state land. In the event of equal bids, the state must "give preference to persons who do not already lease oyster or clam beds."[531]

F. Assignment or Subletting

Section 13-0301(8) of the Environmental Conservation Law provides that "[l]eases may be transferred with the consent of the [Department of Environmental Conservation] but no new lease issued under this section may be transferred within the first five years from the date of issuance."[532] The Suffolk county leasing law leaves the matter to the county, in providing that the county shall adopt regulations governing the transfer of leases.[533] Absent statutory treatment, the Department of Environmental Conservation could establish its own criteria for permitting assignments or subleases; and Suffolk county might be expected to include them in the regulations it is required to adopt.

Two of the special New York laws relating to shellfish cultivation licensing deny or restrict the right of assignment. The law for Islip and Babylon prohibits the licensee from retaining possession of his lot after he ceases to be a resident of these towns, but authorizes him "to sell and assign his interest in any such lot to any inhabitant of either of said towns for one year."[534] The juxtaposition of the residency and assignment clauses in the one section suggests that the transfer from a resident to a nonresident is the only circumstance in which an assignment is permitted; but one could argue to the contrary. The law for Hempstead states that the license or any rights conferred by it "shall not be assignable, and any contract or instrument, so far as it purports to sell or assign the same, shall be void and of no effect."[535]

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529. SC Code Ann § 50-17-710 (Law. Co-op 1977).

530. Id.

531. Ga Code Ann § 45-920(d) (Supp 1982).

532. McKinney Supp 1973.

533. 1969 NY Laws ch 990 § 5.

534. 1874 NY Laws ch 549 § 8, as amended by 1878 NY Laws ch 142.

535. 1897 NY Laws ch 338, § 4, as amended by 1909 NY Laws ch 515.

Other similar laws demand a forfeiture when the lessee ceases to be an inhabitant of the town for a specified period, and allow him to remove his oysters within that period but do not expressly permit him to assign his lease, leaving unanswered the question whether the forfeiture could be avoided by an assignment made just before the end of the allotted period.[536]

Most of the state laws addressing the subject similarly require official approval of subleases or other transfers without setting forth criteria for approval. Florida bars the transfer of a shellfish lease "by sale or barter until the lease has been in existence at least 2 years and has been cultivated according to [specified] statutory standards . . . except as otherwise provided by regulation."[537] Maine conditions approval of transfers on compliance with statutory requirements governing initial leasing; and if it is found that the transfer "is not intended to circumvent the" provisions for granting statutory preferences, and that the "transfer is not for speculative purposes."[538] The Hawaii statute governing the leasing of public lands generally stipulates particular circumstances under which transfers or assignments may be approved, including the case of commercial, industrial or other business uses with respect to which "the lessee was required to put in substantial building improvements," or where the "lessee becomes mentally or physically disabled," or where "[e]xtreme economic hardship is demonstrated to the satisfaction" of the leasing authority.[539] The proposed Hawaii legislation for aquaculture leasing provides that to be approved, assignments of leases must be "in the public interest."[540]

Rhode Island spells out the consequences of a transfer made without official approval, namely the declaration that the act constitutes a breach of the lease and cause for its termination.[541] Attempts to assign a Maryland lease to a nonresident or to enable the assignee to hold more than the permitted acreage results in a reversion of the

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536. 1863 NY Laws ch 493,§ 6, inhabitants of Hempstead and Jamaica, two years; 1871 NY Laws ch 639, § 7, as amended by 1887 NY Laws ch 183, same inhabitants, six months; 1865 ch 343, § 6, inhabitants of Queens county, two years.

537. Fla Stat Ann §370.16(6) (West Supp 1983).

538. Me Rev Stat Ann tit. 12, § 6072(12-A)(B) (Supp 1983).

539. Hawaii Rev Stat § 171-36(5) (Supp 1983). The statute authorizes the leasing agency to revise rents upward as a condition for approving transfers.

540. Clay VII-13.

541. RI Gen Laws § 20-10-6(d) (1982).

grantor's interest to the state.[542]

Two types of involuntary transfers are anticipated and dealt with explicitly in some of these laws. One results from the circumstance of death of the leaseholder. Under Virginia law, if he leaves a will, the lease vests "in the named beneficiary subject to the rights of creditors, if he be a resident of this State," and applies for the transfer within 18 months from the date of death; and if he is a nonresident, he may transfer the lease to a qualified person within the same period.[543] If the leaseholder dies intestate, "the lease shall be vested in the personal representative, if there be one, who shall transfer the lease to a qualified holder within eighteen months."[544] Louisiana simply declares that the shellfish leases "are heritable and transferable."[545] The general leasing laws of Hawaii appear to exempt transfers by "devise, bequest, or intestate succession" from restrictions on voluntary assignments.[546]

The other event calling for special statutory treatment in at least one other state is the assertion of rights of creditors of the lessee holding security interests in the lease. The Louisiana law states that shellfish leases "are subject to mortgage, pledge or hypothecation, and to seizure and sale for debt, as any other property right and credits in this state."[547] The absence of statutory confirmation of creditors' rights and uncertainty as to whether the common law provides such protection may be a deterrent to the financing of aquaculture ventures. Financing institutions may also be apprehensive regarding the value of their security interests in the event the leaseholder-debtor defaults on his lease. The Alaska statute governing the leasing of public lands generally addresses their concern in providing that if a "lessee fails to cure or remedy a breach or default" within a specified time, the holder of a recorded security interest in the lease "may cure or remedy the breach or default if the breach or default can be cured by the payment of money or, if this cannot be done, by performing or undertaking in writing to perform the terms, covenants, restrictions and

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542. Md Natural Resources Code Ann § 4-1112 (1983).

543. Va Code § 28.1-109(12) (Supp 1983).

544. Id. The statute also provides, apparently in reference to intestate situations, that if "there be no qualification on the renter's estate within one year of his death, the [Marine Resources] Commission may within six months thereafter transfer the lease to a qualified holder upon receipt of a transfer duly executed by all of the lawful heirs of the renter both resident and nonresident" (id).

545. La Rev Stat Ann § 56:423E (West Supp 1983).

546. Hawaii Rev Stat § 171-36(5) (Supp 1983).

547. La Rev Stat Ann § 56.423E (West Supp 1983).

conditions of the lease capable of performance by the holder."[548]

G. Lease Rentals

Rents are fixed on a bid basis for shellfish cultivation leases granted by the Department of Environmental Conservation[549] or Suffolk County.[550] The 1874 law on licensing in Islip and Babylon established a yearly rental of $1 per acre;[551] the 1871 and 1897 laws for Jamaica and Hempstead, $5 per acre.[552]

The statutes of states that do not establish rentals on the basis of competitive bidding exhibit considerable variation in approaches to the subject. Some states grant complete discretion to the leasing agency to fix the rent.[553] Others limit the discretion by establishing, or providing for the establishment of, minimum rental charges,[554] or both minimum and maximum amounts.[555] Still others specify criteria to be used by the government officials in fixing the amounts of rentals.[556]

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548. Alaska Stat Ann § 38.05.103 (Supp 1983). The holder must act within 60 days from the date of receipt of the notice or within any additional period allowed by the leasing authority for good cause (id).

549. Environmental Conservation Law § 13-0301(6),(7) (McKinney 1973) (but subject to a minimum annual rental of $1 per acre).

550. 1969 NY Laws ch 990, § 4 (no minimum specified).

551. 1874 NY Laws ch 549, § 6, as amended by 1878 NY Laws ch 142.

552. 1871 NY Laws ch 639, § 4; 1897 NY Laws ch 338, § 5, as amended by 1909 NY Laws 515.

553. Ala Code § 9-12-24 (1980); Alaska Stat Ann § 38.05.085(a)(1) (Supp 1983); NJ Rev Stat Ann § 50:1-27 (West Supp 1983); and RI Gen Laws § 20-10-7 (1982).

554. Miss Code Ann § 49-15-27(7) (Supp 1983) ($1 per acre annually); Va Code § 28.1-109(10) (Supp 1983) (75 cents per acre minimum); Wash Rev Code Ann § 79.96.030 (Supp 1983) (minimum to be fixed by the authorities).

555. La Stat Ann § 56:428C (West Supp 1983) ($1 to $5 per acre); Mass Gen Laws Ann ch 130, § 64 (West 1974) ($5 to $25 annually).

556. Fla Stat Ann § 253.71(2) (West 1975) (basic rental charge plus royalties based on "such factors as the probable rates of productivity and the marketability and value of the product of the enterprise"); Me Rev Stat Ann tit. 12, § 6072(9) (1981) (rent to "represent a fair value based upon the use of the leased area"); Md Natural Resources Code Ann § 4-1110 (1983) (annual rent deemed by the agency to be "proper and commensurate with the value of the leased land"); SC Code Ann § 50-17-730 (Law. Co-op 1977) (rental "based up on an agreed number of acres capable of producing oysters").

Fixed annual rentals are prescribed by some of the statutes.557

At least two of the statutes authorize the reduction or abatement of rents in the event production is curtailed as a result of disasters beyond the control of the leaseholder; in Maryland, if the leasing department finds that the "leased area is affected by environmental factors which destroy or seriously impede the culture and growth of oysters and threaten the potential of the area for continued oyster production";558 and in Virginia, if the area is "declared a disaster area" in which "any natural or man-made condition arises which precludes satisfactory culture of oysters."559

The proposal for ocean leasing in Hawaii requires each lease to fix a basic, annual rental charge per acre, "supplemented, in the case of a commercial activity, by royalty payments . . . based upon either gross productivity or net operating profit."560

H. Various Performance Requirements

1. Marking Leased Areas

Both the Environmental Conservation Law shellfish cultivation section and Suffolk county leasing law require the lessee to mark the areas being cultivated by marker buoys, or call for the adoption of regulations for the purpose.561 Marking requirements are standard in the special laws providing for the granting of shellfish cultivation

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557. Del Code Ann tit. 7, § 1907 (West Supp 1983) (75 cents per acre for shellfish leases to residents of the state, $10 per acre for new leases to nonresidents, $1.50 per acre for nonresidents with existing leases); Fla Stat Ann § 370.16(4),(5) (West Supp 1983) ($5 per acre for the first 10 years, "increased to a minimum of $1 per acre" thereafter); NC Gen Stat § 113-202(j) (Supp 1983) ($1 per acre for leases entered into prior to July 1, 1965; $5 thereafter); Or Rev Stat § 622.290 (Supp 1983) (annual cultivation fee for certain oyster cultivation leases, plus use taxes of "five cents per gallon of oysters if sold by the gallon, or five cents per bushel of oysters if sold in the shell by the bushel"); Va Code § 28.1-109(11) (Supp 1983) (50 cents per acre outside of Chesapeake Bay); Texas Parks and Wildlife Code § 76.017 (Vernon Supp 1983) ($3.00 per acre annually, plus 10 cents per barrel of oysters sold from the location).

558. Md Natural Resources Code Ann § 4-1110(b) (1983).

559. Va Code § 28.1-114 (1979).

560. Clay VII-11, VII-12.

561. Environmental Conservation Law § 13-0301(10) (McKinney 1973) ("No grounds may be worked without the presence of proper corner buoys"); 1969 NY Laws ch 990, § 5 (the county, before leasing, shall adopt regulations governing "the placing and maintenance of marker buoys").

licenses in some of the Long Island towns.[562] Similar requirements are quite common in the statutes of other states.[563]

2. Performance Bonds

The New York laws provide for the posting by lessees of performance bonds as security for default in the payment of rent.[564] Bond requirements in at least two other states serve other purposes: Florida's statute on aquaculture leasing requires the execution of a bond "conditioned upon the active pursuit of the aquaculture activities specified in the lease";[565] and Rhode Island's empowers but does not compel the leasing authority to "require execution of a bond by the permittee to ensure performance by the permittee of all of the conditions of his permit, and, in the event of a failure so to perform, to ensure the removal of aquaculture apparatus from the waters of the state."[566] The Hawaii proposal follows the Florida version in requiring the "execution of a bond conditioned upon the active pursuit of . . . activities specified in the lease," but adds criteria for determining the amount of the bond.[567]

3. Planting and Production Requirements

Neither the Environmental Conservation Law leasing provisions nor the 1969 version of the Suffolk county leasing law mandates active or productive cultivation on the part of the lessee. At one time a predecessor version required the county's deeds to expressly "stipulate

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562. E.g., 1866 NY Laws ch 306, § 2 (Islip and Huntington, Great South Bay).

563. E.g., Del Code Ann tit. 7, § 1909 (West Supp 1983) (including various specified dimensions of corner buoys and their replacements); La Stat Ann § 56:430 (West Supp 1983) (lessees, under state supervision, "shall stake off and mark the leased water bottoms by ranges, monuments, stakes, buoys and the like").

564. Section 13-0301(11) of the Environmental Conservation Law mandates the posting by the lessee of a bond "equal to the total rental of the lease for the ten-year period," and states that the lessee's failure "to pay the annual rental within ninety days of the due date shall result in the forfeiture of the bond to the state and revocation of the lease." The Suffolk county leasing law provides that the county's regulations "may" provide for the inclusion of a similar requirement in the county's leases (1969 NY Laws ch 990, § 5).

565. Fla Stat Ann § 253.71(4) (West 1975).

566. RI Gen Laws § 20-10-8 (1982).

567. Clay VII-13. "The amount of the bond so executed shall be appropriate to the size and scale of the activity for which the lease is being granted, and shall be sufficient to protect the public interest in the removal of all structures and plants or animals cultivated within a leased area should the lease be forfeited for non-performance."

that the grantee shall, within one year from the date of their execution, plant not less than ten bushels of oysters for each acre of said land on said land, or otherwise the grant shall be void and the land so granted shall revert to the county."[568] However, this provision was deleted by a later amendment of the law, which added the provision that if the grantee "does not actually use and occupy [the grounds] for the purposes named [oyster culture] in good faith within three years after the time of receiving such grounds," the county board of supervisors may petition the Supreme Court for an order directing that the grounds revert to the county.[569] If this provision were deemed consistent with the 1969 version of the Suffolk county leasing law,[570] it would have to be incorporated in the county's leases today.

It could be argued that the 1906 good faith occupancy condition is inconsistent with the 1969 law because the 1969 law requires the county to adopt its own regulations governing the terms of the leases;[571] or that the condition must be respected unless and until the county's regulations provide otherwise. Inconsistency might be urged on the additional ground that the 1969 law authorized the granting of leases, while the good faith occupancy provisions of the earlier laws applied to the granting of greater ownership interests through deed instruments.

New York's special town licensing laws generally imposed planting or similar requirements. For example, the 1866 law for Islip and Huntington licensing of areas in Great South Bay stipulated that the licensed area "shall not be so planted or used with less than four hundred bushels [of oysters] to the acre."[572] The quota under the 1874 law for Islip and Babylon dropped to 100 bushels of oysters and shells, to be planted within one year from the time of issuance of the license;[573] and the 1897 law applying to Hempstead, to 50 bushels of

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568. 1896 NY Laws, ch 916, § 1, amending § 3 of the original statute.

569. 1906 NY Laws ch 640, § 4, adding § 8 to the original law.

570. Section 9 of 1969 NY Laws ch 990, says: "Any provisions of chapter three hundred eighty-five of the laws of eighteen hundred eighty-four, as amended, or section three hundred two of the conservation law, or any other general or special law to the contrary notwithstanding, this act shall be controlling, but all provisions of such laws, specific, general or special, not inconsistent herewith shall remain in full force and effect."

571. 1969 NY Laws ch 990, §5.

572. 1866 NY Laws ch 306, § 2, as amended by 1872 NY Laws ch 666.

573. 1874 NY Laws ch 549 § 6, as amended by 1878 NY Laws ch 142.

oysters or 10 bushels of clams per acre.[574] The same 1897 law,[575] an 1865 law applying to inhabitants of Queens county,[576] and the 1871 law for Jamaica and Hempstead[577] stated that the licensee must actually occupy the land within six months or forfeit his rights and privileges. Forfeiture under the 1897 law for Hempstead would result from a failure "to plant" within a year.[578]

Provisions for forfeiture of licenses upon cessation of use or abandonment were commonplace in these statutes.[579]

Some state statutes are more specific in prescribing planting or production requirements, particularly in shellfish cultivation leases. Within one year from the date of the lease, the Florida tenant must begin "the growing of the oysters or clams in a density suitable for commercial harvesting over the amount of bottom prescribed by law"; and by the end of the second year and each year thereafter must "have placed under cultivation at least one-fourth of the water bottom leased until the whole, suitable for bedding of oysters or clams, shall be have been put in cultivation by the planting thereon of not less than 200 barrels of oysters, shell, or its equivalent in cultch to the acre."[580] The cultivation goal for a Louisiana lessee is "at least one-tenth of the leased barren water bottoms," and to achieve it he "shall plant thereon sufficient raw oyster shells to ensure development of the oyster industry in this state."[581] His South Carolina counterpart must plant

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574. 1897 NY Laws ch 338, §§ 2, 9.

575. Id.

576. 1865 NY Laws ch 343, § 2.

577. 1871 NY Laws ch 639, § 2.

578. 1897 NY Laws ch 338, § 7.

579. Forfeiture after two years of cessation or abandonment: 1863 NY Laws ch 493, § 6 (Hempstead and Jamaica); 1865 NY Laws ch 343, § 6 (Queens county); 1866 NY Laws ch 306, § 6 (Islip and Huntington). After one year, 1871 NY Laws ch 639, § 7, six months as amended by 1887 NY Laws ch 183 (Hempstead and Jamaica). After six months, 1897 NY Laws ch 338, § 7 (Hempstead).

580. Fla Stat Ann § 370.16(4)(b) (West Supp 1983).

581. La Rev Stat Ann § 56:430A (West Supp 1983).

65 bushels of shell or seed oysters per acre.[582] Leases of submerged lands in Charles County, Maryland, terminate if the lessee fails to seed oysters within a period of three years.[583]

Yet other statutes contain more broadly worded performance standards, such as the Florida and South Carolina requirement of effective cultivation.[584]

A performance requirement of off-bottom shellfish culture permits granted by the New York Department of Environmental Conservation focuses on the manner of operation, reserving to the Commissioner of Environmental Conservation the right to suspend or revoke a permit "upon the Assignee's failure to continue to carry out involved shellfish cultivation activities in a responsible manner."[585]

I. Protection of Rights of Competing Users of Waters or Submerged Lands

Both section 13-0301 of the Environmental Conservation Law and the Suffolk county leasing law are silent on the subject of competing users of lands in or near the areas to be leased for shellfish cultivation, except to exclude from those areas underwater lands with natural

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582. SC Code Ann § 50-17-790 (Law. Co-op 1977). The statute also contains other details, including specification of the planting period; state authority to "require five per cent of the total quota of shells of the canneries and raw shuck houses to be planted on State oyster bottoms not under lease but within a twenty-mile radius of the cannery or raw shuck house"; and provisions relating to replanting.

583. Md Natural Resources Code Ann § 4-1110(c) (1983).

584. Fla Stat Ann § 370.16(4)(d) (West Supp 1983) (where the evidence "shows a lack of effective cultivation," the state may revoke the leases); SC Code Ann § 50-17-810 (Law. Co-op 1977) ("One year after the date of the lease, and each year thereafter during the life of the lease, if the lessee has not effectively cultivated the area of the lease and oysters are not being marketed from leased area, the [South Carolina Wildlife and Marine Resources Commission] may, after notice, revoke the lease").

585. Off-Bottom Culture of Shellfish Temporary Marine Area Use Assignment Document para 11.

shellfish or bay scallop beds suitable for public fishing.586 The leasing statutes of some of the other states are more sensitive to the demands of other groups for access to affected waters and submerged lands.

1. Public Rights To Use Navigable Waters

A few laws, either in specific or general terms, preserve traditional public rights in navigable waters, such as rights of navigation, fishing, boating and beach access. Generally the laws prescribe performance tests, as, for example, the California law's statement that water bottom leases "may not unreasonably impede public access to state waters for purpose of fishing, navigation, commerce, or recreation," but the lessee "may limit public access to the extent necessary to avoid damage to the leasehold and the aquatic life culture therein."587 The Alaska and Virginia versions are more precise, that of Alaska declaring that leases for fisheries development "shall reserve to the public a right-of-way for access to navigable waters and other tide and submerged lands;"588 while the Virginia law provides that the lessee's right of exclusive occupancy is subject to "the right of fishing in waters above the bottoms, provided that no person exercising such right of fishing shall use any device which is fixed to the bottom, or which, in any way, interferes with such renter's rights or damages such bottoms, or the oysters planted thereon," stipulating that under certain circumstances crab pots and gill nets are not construed as being

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586. Environmental Conservation Law § 13-0301(1) (McKinney 1973) ("where there is an indicated presence of shellfish in sufficient quantity and quality and so located as to support significant hand raking and/or tonging harvesting," or "where bay scallops are produced regularly on a commercial basis"). Compare section 3 of the Suffolk county leasing law; 1969 NY Laws, ch 990 instructing the county to survey and map the ceded lands before leasing them, to determine, among other things, the locations of "areas where the federal government permits fish traps to be located," and "areas where bay scallops are produced regularly and harvested on a commercial basis."

587. Cal Fish and Game Code § 15411 (West Supp 1983); and see Fla Stat Ann § 253.72 (West 1975) ("Except to the extent necessary to permit the effective development of the species of animal or plant life being cultivated by the lessee, the public shall be provided with means of reasonable ingress and egress to and from the leased area for traditional water activities such as boating, swimming, and fishing," and the lessee is required to post restrictions on such public access); Hawaii Rev Stat § 171-35(5) (Supp 1983) (leases to contain adequate protection of access to "other public lands" and "public beaches"); Mass Gen Laws Ann ch 130, § 57 (West 1974) (municipal shellfish planting leases may not "impair the private rights of any person" or "materially obstruct navigable waters"); Me Rev Stat Ann tit.12, § 6072(7) (Supp 1983) (the leasing official must be "satisfied that the proposed project will not unreasonably interfere with the ingress and egress of riparian owners, navigation, fishing or other uses of the area and is not in conflict with applicable coastal zoning statutes or ordinances").

588. Alaska Stat Ann § 38.05.082(a) (1977)

fixed to the bottom.[589] The Off-Bottom Culture of Shellfish Permit issued by the New York Department of Environmental Conservation has a similar thrust in the condition that the "public shall be allowed to use the underwater lands and adjacent water column areas involved with this Assignment, to the extent that such activities do not directly conflict with the Assignments Off-Bottom Culture of Shellfish Permit activities, or any provisions of law."[590]

An Alabama court was confronted with the question whether a riparian owner, given the right under an Alabama statute to plant and gather oysters in waters in front of their premises,[591] could prevent others from navigating such waters.[592] In holding against the riparian owner, the court said that he "had no right under the statute or otherwise to warn defendant off the water, but only—so far as concerned the taking of oysters—to prevent by his warning the taking of oysters from his privately planted reef."[593] The court suggests that even at common law the right to occupy the water bed for oyster planting would not carry with it the right of exclusive occupancy of the water surface.

Maine and Rhode Island counsel the leasing authorities generally to achieve optimum accommodation of aquaculture and other competing uses. In addition to express reference to consideration of particular public rights, the Maine law authorizes the Commissioner of Marine Resources to impose conditions for the use of leased areas which "shall encourage the greatest multiple, compatible uses of the leased area, but shall also preserve the exclusive rights of the lessee to the extent necessary to carry out the lease purpose."[594] In Rhode Island, before granting an application for an aquaculture permit, a prerequisite to granting the permittee a lease, the leasing official "shall review such application to determine whether the aquaculture activities proposed in such application are consistent with competing uses engaged in the exploitation of the marine fisheries."[595]

The proposed law for Hawaii contains a section headed "Rights of

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589. Va Code § 28.1-109(15) (Supp 1983).

590. Off-Bottom Culture of Shellfish Temporary Marine Area Use Assignment Document para 6.

591. See note 525 supra.

592. Havard v State, 220 Ala 359, 124 So 915 (1929); and see Simonson v Cain, 138 Ala 221, 34 So 1019 (1903).

593. Id.

594. Me Rev Stat Ann tit. 12, § 6072(7) (1981).

595. RI Gen Laws § 20-10-5(d) (1982).

the Public," in which an attempt is made to reconcile leasing for aquaculture with the public trust doctrine.[596] It requires the incorporation in the leases of an obligation of the lessee to "provide reasonable means of public ingress and egress to and from the leased area," and to provide the necessary facilities without unduly impairing aquaculture operations.[597]

2. Protection of Riparian Rights

Virginia[598] and Maine[599] add provisions protecting riparian rights.

3. Retention of State or Municipal Rights

The Maine law also accords priority to coastal zoning statutes or ordinances,[600] and requires municipal approval of aquaculture leases of more than two acres of the intertidal zone, if the municipality has an approved fish conservation program.[601] Similarly, leases of internal improvement trust lands in Florida are subject to county veto.[602]

Mississippi expressly makes leases for oyster cultivation "subject to the paramount right of the state and any of its political subdivisions authorized by law, to promote and develop ports, harbors, channels, industrial or recreational projects," provided the lessee is given reasonable notice of termination of the lease and a right to remove any oysters in the affected area.[603] In a similar vein, section

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596. Clay VII-15, VII-16.

597. Id. "The lessee shall, if necessary, construct and maintain gates, openings or lanes at reasonable distance one from another throughout a leased area which includes surface waters and in which any type of enclosure presents an obstacle to free navigation, unless such public transit, in or through the enclosed waters will cause undue interference with the operation being conducted by the lessee within the leased area."

598. Va Code § 28.1-109 (Supp 1983): The renter's occupancy is subject to "riparian rights."

599. See supra text accompanying note 523.

600. Me Rev Stat Ann tit. 12, § 6072(7) (Supp 1983).

601. Id.

602. Fla Stat Ann § 253.68 (West 1975): "[N]o lease shall be granted by the board [of trustees of the internal improvement trust fund] when there is filed with it a resolution of objection adopted by a majority of the county commission of a county within whose boundaries, if the same were extended to the extent of the interest of the state, the proposed leased area would lie."

603. Miss Code Ann § 49-15-27(10) (Supp 1983).

13-0301(14) of the Environmental Conservation Law impliedly acknowledges the authority of the Commissioner of General Services to grant underwater lands for other purposes, though he is prohibited from making grants for shellfish cultivation.[604] The Suffolk county leasing law expressly declares that nothing in the law "shall interfere with the right of the commissioner of general services to grant lands and easements under water to owners of adjacent uplands, pursuant to the provisions of the public lands law, or of the legislature to make such grants without regard to upland ownership and to grant franchises to utilities, municipalities and governmental, educational or scientific bodies for cables, outfalls, ecological studies and experimentation with controlled marine life."[605]

Overriding state interests in waters occupied under an Off-Bottom Culture of Shellfish Permit issued by the New York Department of Environmental Conservation are protected by the applicant's agreement that for "appropriate environmental or public use reasons, or at the request of another involved State agency, the Department, after providing the Assignee with at least 30 days written notice, may require the relocation of the State-owned marine area Assignment hereby granted."[606]

J. Protection of Lessee's Interests

In a series of special laws dating back to the middle of the nineteenth century, if not earlier, the New York legislature has protected the interests of the shellfish cultivator by confirming his "exclusive ownership and property" in the shellfish he plants and the exclusive right to use the beds staked out by him, and by imposing civil or criminal penalties on others tampering with his shellfish or

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604. McKinney 1973. "The Commissioner of General Services shall not grant lands for shellfish cultivation. The public shall not be excluded from the taking of shellfish from underwater lands granted by such commissioner for other purposes, provided however, that should any grant made by such commissioner for such other purposes include lands leased for shellfish cultivation pursuant to this section, the lessee shall have the exclusive right to use and take shellfish from such leased lands for a period of two years from the date of letters patent or the expiration of the lease whichever is the earliest and may prior to the expiration of such period, remove and transplant the shellfish from such lands to other lands leased, owned or controlled by the lessee." The New Jersey statute also contains the restriction on granting shellfish planting leases by other state agencies, but not the express reservation of authority to interfere with such leases to further other public objectives. NJ Rev Stat Ann § 50:1-24 (West Supp 1983).

605. 1969 NY Laws ch 990, § 2.

606. Application for Temporary Marine Area Use Assignment Document p 2.

shellfish bed.[607] Section 13-0309 of the Environmental Conservation Law now provides:

> No person shall take, carry away, interfere with or disturb shellfish of another, lawfully possessed, planted or cultivated; nor remove any stakes, buoys or boundary marks of lawfully possessed, planted or cultivated lands. The possession of dredges, rakes or tongs overboard on any such lands shall be deemed presumptive evidence of a violation of this subdivision.[608]

Hence the omission of similar provisions from the state and Suffolk county shellfish leasing laws is not significant.

When first enacted, section 71-0921(1) of the Environmental Conservation Law declared a violation of any of the provisions of section 13-0309, including the above quoted poaching prohibition, to be a misdemeanor, punishable by fines and imprisonment as prescribed in section 71-0921(2).[609] In the 1977 revision of section 71-0921 the specified punishment terms were omitted for violations of that poaching prohibition,[610] probably falling back on the existing provisions of the Penal Law subjecting trespassers or thieves to criminal sanctions.[611] In any case, at common law oysters are the property of the cultivator and an action in trespass lies against another who interferes with

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607. E.g., 1866 NY Laws ch 306, making it lawful for residents of the towns of Islip and Huntington to plant oysters in the public waters of Great South Bay within the borders of either town; giving them "the exclusive ownership and property in all oysters upon the beds where the same were planted, and the exclusive right to use the said beds for the purpose aforesaid"; and making it unlawful for any other persons "to take away said oysters, or to disturb said beds either by oystering thereon, or in any other way disturbing said beds, under the penalty hereinafter provided (§§ 1, 3)." And see similar statutes relating to the planting of oysters by the inhabitants of other towns in waters under their jurisdiction (1871 NY Laws ch 639, amended by 1887 NY Laws ch 183, towns of Jamaica and Hempstead; 1874 NY Laws 549, amended by 1878 NY Laws ch 142, Town of Islip; 1897 NY Laws ch 338, amended by 1909 NY Laws ch 515, Town of Hempstead).

608. McKinney 1973.

609. McKinney 1973. Punishment by fines of from $25 to $100 for a first conviction; $50 to $150 for a second conviction within five years of the previous conviction; and fines of from $100 to $200, or imprisonment from 30 days to three months for a subsequent conviction within five years of the first of two or more convictions.

610. 1977 NY Laws ch 640.

611. See Penal Law §§ 140.00 et seq, relating to criminal trespass and criminal mischief, and §§ 155.00 et seq, relating to larceny. (McKinney 1975 and Supp 1983).

them.[612]

The aquaculture leasing laws of some of the other states also include provisions protecting the cultivator against theft or destruction of his products or other property;[613] or confirming the cultivator's exclusive property rights in the shellfish he plants.[614] The Alabama legislature has left it to the Department of Conservation and Natural Resources to protect by regulations "the lessees of oyster bottoms in their rights as such lessees."[615]

K. Disposition of Lessee's Improvements on Termination of the Lease

Absent a negotiated agreement by the parties allowing the lessee to remove his improvements deemed to be part of the land leased,[616] at common law they would vest in the lessor upon termination of the lease.[617]

Both the Environmental Conservation Law shellfish cultivation section and the Suffolk county leasing law are silent on the subject of disposition of improvements the lessee may have made on the premises, at the time of termination of the lease, including termination for breach of an obligation of the lessee. However, the applicant for an Off-Bottom Culture of Shellfish Permit agrees to accept "complete financial responsibility for the costs of the removal of any and all structures placed in the waters of the Marine and Coastal District as a result of [the] Assignment, whether such removal be undertaken by the Assignee or, in a proper case (abandonment, failure to comply with Department regulations, permit conditions, etc.), by the Department of

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612. See, e.g., Vroom v Tilly, 184 NY 168 (1906); Post v Kreischer, 103 NY 110 (1886); and Fleet v Hegeman, 14 Wend. 42 (1835).

613. E.g., Cal Fish and Game Code § 15413 (West Supp 1983) (prohibition against removal or destruction of aquatic life or markers in leased land); Del Code Ann tit. 7, § 1911 (Supp 1983); La Rev Stat Ann § 56:423 (West Supp 1983); Me Rev Stat Ann tit. 12, § 6073(2) (1981). Massachusetts allows the recovery of treble damages against the offender. Mass Gen Laws Ann, ch 130, §§ 63, 67, 68A (West 1974).

614. E.g., Fla Stat Ann § 370.16(3) (West Supp 1983); Md Natural Resources Code Ann § 4-1114(a) (1983).

615. Ala Code § 9-12-25 (1980).

616. Mott v Palmer, 1 NY 564 (1848). Buildings, fences or fixtures are generally considered part of the land.

617. See Talbot v Cruger, 151 NY 117, 120, 45 NE 364, 365 (1896), noting that the burden is on the tenant to prove that the landlord agreed to the tenant's removal of the improvements.

Conservation."[618]

Some aquaculture leasing statutes are explicit on the rights of the parties to the improvements upon termination of the lease generally or under particular circumstances, or in requiring that the matter be dealt with in the lease. The Alaska law governing the leasing of public lands generally requires the lessee to remove his improvements within 60 days after the termination date, if the "removal will not cause injury or damage to the land," or he may "sell his improvements to the succeeding lessee."[619] Provisions of the Florida law governing aquaculture leases generally require a lease stipulation regarding "the disposition of improvements and assets upon the leased lands and waters,"[620] while the provisions authorizing state regulations requiring the removal of certain cultch materials from lands leased for shellfish cultivation declare that all "improvements" shall become state property upon the lessor's violation of an order of removal.[621] The California aquaculture leasing law requires the lessee to remove "all structures" upon the termination of the lease for any reason, and empowers the state to remove them at the lessee's expense if the lessee fails to do so.[622] On the other hand, if an aquaculture lease is abandoned under circumstances described in regulations under Puerto Rico law, "all the improvements, construction, fish or plants on Commonwealth land or waters shall be considered as Commonwealth property."[623] The pertinent Alabama provisions grants to the Commissioner of Conservation and Natural Resources "reasonable discretion" to allow additional time to remove the oysters from the leased premises, on such terms as he may prescribe.[624]

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618. Off-Bottom Culture of Shellfish Temporary Marine Area Use Assignment Document para 10.

619. Alaska Stat Ann § 38.05.090 (1977).

620. Fla Stat Ann § 253.72(5) (West 1975).

621. Id § 370.16(4)(f) (West Supp 1983).

622. Cal Fish and Game Code § 15409 (West Supp 1983).

623. PR Laws Ann § 1361(1) (Supp 1983). The preceding paragraph of the section mandates the promulgation of "regulations to establish when a lease shall be considered as abandoned by lessee, for lack of activity, for not paying the amounts or taxes provided in this section, or not using the leased property adequately" (§ 1361[k]).

624. Ala Code § 19-12-25 (1980).

VI. Recommendations

Strategies for law reform for promotion of aquaculture in New York may include a realignment of functions of concerned state agencies or the creation of new agencies for administering different aspects of a state aquaculture program. Alternative institutional arrangements for deploying different functions of aquaculture development (e.g., leasing public lands, providing financial support, regulation of marketing of aquaculture products) are now being reviewed and discussed by others. Pending the outcome, it would be premature to recommend a specific set of statutory amendments. Accordingly, these recommendations are tentative and in most respects general in nature.

1. Among the options for a general approach to law revision are: (a) the exclusive delegation to a single state agency of the functions of granting and monitoring leases of state underwater lands for aquaculture, defined broadly as including shellfish, finfish and plant aquaculture; (b) creation of the state agency and granting it any desired oversight functions to ensure that aquaculture is given fair if not favored treatment in the leasing by municipalities of their underwater lands; (c) creation of the state agency without the oversight functions, but adding legislation to ensure municipal authorization to grant leases on municipal lands for all types of aquaculture, free of any constraints in existing statutes, and reconciling riparian rights and public trust doctrine; or (d) without repackaging the statutes, the enactment of amendments to particular existing laws to eliminate ambiguities, conflicts or other impediments to achievement of a positive program for promoting aquaculture.

2. If the Department of Conservation is to retain the exclusive power to grant shellfish culture leases on state underwater lands--excluding the Office of General Services--and the power is to be extended to other types of aquaculture, both the applicable provisions of the Public Lands Law and Environmental Conservation Law should be modified accordingly.

3. If the Office of General Services now has, and if it is to retain, authority to grant leases or other rights for aquaculture, the applicable provisions of the Public Lands Law should be revised, to the extent necessary, to specify appropriate durations and other terms best calculated to promote that part of the industry. (This is not to be read as an endorsement of a split of aquaculture leasing functions between the two agencies.)

4. If the Department of Environmental Conservation or some other agency responsible for granting aquaculture rights to state underwater lands should have maximum flexibility in the determination of the nature and duration of the rights--including the granting of temporary assignments as under the existing program--the governing statutes should be specific on the point.

5. All aspects of the policies of the state underlying the granting of aquaculture leases of state underwater lands should be

reviewed in the light of the fact that the Department of Environmental Conservation has not yet granted any shellfish cultivation leases under the authority granted to it by section 13-0301 about 11 years ago.

6. The enabling laws providing for the leasing by Suffolk county of lands under Gardiner's and the Peconic bays for shellfish cultivation, and any related laws pertaining to possible reserved or concurrent rights of the state in those bays, should be modified to clearly delineate the precise nature of the rights ceded to the county and those powers, if any, remaining in state agencies.[625] At the same time, consideration should be given to the question whether Suffolk county's rights in the bays should be extended to cover leasing for finfish and marine plant cultivation.[626]

7. The complexities of town ownership and rights of disposition of underwater lands derived from colonial or state legislative grants, compounded by problems of competition with riparian owners and public trust restrictions, create uncertainties impeding the development of those lands for aquaculture. Any future steps the state might take to promote aquaculture development in the Long Island area should impress the town authorities with the need to reduce those complexities and uncertainties. The need for statutory revision relating to municipal control of aquaculture activities through exercise of their police powers is addressed in the companion report on regulatory matters.

8. Combined state, county and local initiatives should be taken to promote the required law reform. Both the fact that ultimately state legislative direction may be required, and the utility of exchanges by state and municipal officials of creative ideas, argue for a joint undertaking of the necessary studies and making of recommendations. Though voluntary, the effort should be organized, and carried out by a newly and informally constituted group of representatives of the participating governments or other interests, or an appropriately placed and qualified existing agency. A state program or programs for local development of aquaculture might include fiscal support for the studies.

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625. In a statement made at a Public Hearing on Marine Fishery Resources and Marine Aquaculture, held by the Assembly Committee on Environmental Conservation at Stony Brook, New York, August 24, 1981, DeWitt Davies, of the Suffolk County Department of Planning, recommended that the applicable laws be amended to require "that no off-bottom and on-bottom culture permits involving the underwater lands and waters of Gardiners and Peconic Bays that are within the purview of Suffolk County as defined in L 1969, ch 990, be issued by DEC unless the applicant has obtained written authorization from Suffolk County." See supra note 164 and the accompanying text.

626. An expansion of Suffolk county jurisdiction recommended by DeWitt Davies at the hearing referred to in note 625 supra.

APPENDIX

THE SUFFOLK COUNTY SHELLFISH CULTURE LEASING ACTS AND RELATED LAWS: SOME PROBLEMS OF INTERPRETATION

The purpose of this exercise is to expose, through close analysis, potential problems of interpretation of the Suffolk county shellfish culture leasing acts and related statutes. Admittedly, some of the suggested, alternative interpretations of various provisions of these acts are strained and their credibility may be questionable. The objective is not to persuade, but rather to alert any draftsman contemplating a statutory revision project on the subject to pitfalls in these laws, some of them revealed only by microscopic examination of their antecedents.

A. Does the County Leasing Power Extend to Hog Neck Bay, Southold Bay and Orient Harbor?

The table here attached as Exhibit 1 shows the locations of three separately designated bodies of water adjoining Little Neck or Gardiner's Bay, namely, Hog Neck Bay, Southold Bay, and Orient Harbor (taken from Report to the Suffolk County Legislature by Peter F. Cohalan, County Executive, Open Space Policy, February 26, 1980). Are they included in the underwater areas ceded to Suffolk county by 1884 and 1969 acts for the purpose of making grants or leases for shellfish culture?

The interests originally ceded to Suffolk county for making these grants were in lands "under water of Gardiner's and Peconic bays" (1884 NY Laws ch 385, § 1). A 1923 amendment expanded this to include waters of "Gardiner's bay and the Peconic bays and the tributaries thereof" (1923 NY Laws ch 191, § 1, emphasis added). The 1969 Act confirming the county's authority but changing its power from selling to leasing embraced the same underwater lands (1969 NY Laws ch 990). (Hereafter, unless otherwise indicated by the context, we will refer to the 1884 Act, as amended, as the "1884 Act," and the 1969 version as the "1969 Act.") Copies of these acts are found in Exhibits 2 and 3, respectively.

In all likelihood, Little Peconic Bay or Gardiner's Bay would be regarded as including the waters and underwater lands designated as Hog Neck Bay, Southold Bay or Orient Harbor, if the matter were in issue before an administrative officer or a court. It would be noted that the addition of the words "and the tributaries thereof" must have included the adjoining bays and harbors, for it would make no sense to include tributary streams and rivers and exclude such bays and harbors. In any case, bodies of water larger than rivers have been described as "tributaries." See Town of Southampton v Heilner, 84 Misc 2d 318, 323, 375 NYS2d 761, 766 (Sup Ct, Suffolk Co, 1975), in which the court referred to Peconic Bay as a "tributary of the Atlantic Ocean."

The Suffolk County Commissioners of Shell Fisheries have construed the 1884 Act as authorizing grants of underwater lands in these adjacent water bodies, as evidenced by their making of such grants. (Information that such grants have been made was supplied by Ronald Verbarg of the Long Island Regional Planning Commission, in a telephone interview with Robert I. Reis, July 27, 1980; and see

Exhibit 1.)

In a litigation over the claim of the Town of Southold that it owned certain land under the waters of Southold Bay which the county Commissioners of Shell Fisheries had granted to private individuals in 1897, both parties considered Southold Bay a part of Little Neck Bay, and the court agreed. Town of Southold v Parks, 41 Misc 456, 84 NY Supp 1078, aff'd 97 App Div 636, 90 NY Supp 1116 (2d Dep't 1904), aff'd 183 NY 513, 76 NE 1110 (1905)—the trial court referring to the land in dispute as "a tract of land under that portion of Peconic bay locally known as 'Town Harbor,' or 'Southold Bay'" (41 Misc at 457, 84 NY Supp at 1078); and see Appellant's Brief in the Court of Appeals, at 2 ("Southold Bay . . . is really a part of Little Peconic Bay"), and Respondents' Brief at 1 ("this particular part of [Little Peconic Bay] known as Southold Bay"). It will be noted that the juxtaposition of Southold Bay to Little Peconic Bay is similar to that of Hog Neck Bay and Orient Harbor to Little Peconic Bay and Gardiner's Bay, respectively.

Of even more significance is the fact that the interpretation by the administrative officers primarily concerned with the question of the extent of the jurisdiction of Suffolk County under the 1884 Act, to be inferred from their grants, supports the position that Hog Neck Bay, Southold Bay and Orient Harbor are part of Little Neck Bay or Gardiner's Bay. The construction given to statutory language by administrative officers in applying a statute will generally be accorded considerable weight by the courts, especially where such construction has been subsequently ratified by the state legislature (impliedly done in the 1923 amendment to the 1884 Act, noted above). McKinney, Book 1, Statutes § 129 (1971).

B. Extent, If Any, of the Jurisdiction of the Commissioner of General Services and Department of Environmental Conservation Over Lands Under Gardiner's and the Peconic Bays

1. Evolution of the Statutes Authorizing Shellfish Culture Leasing by the Department of Environmental Conservation and Suffolk County

Section 13-0301 of the Environmental Conservation Law, authorizing the state Department of Environmental Conservation to lease state underwater lands for shellfish cultivation (see Exhibit 4), and the 1884 and 1969 acts delegating selling or leasing powers to Suffolk county must be read together to determine whether the grant of power to the county forecloses the Department of Environmental Conservation or any other state agency from leasing lands under Gardiner's and the Peconic bays for shellfish cultivation. An historical review of the evolution of the two sets of statutes, with particular reference to features governing their interrelationships, may be instructive.

1868-1879. A three member state Commission of Fisheries was created to examine the various rivers, lakes and streams of the state to ascertain "whether they can be rendered more productive of fish, and what measures are desirable to effect this object, either in restoring the production of fish in them or in protecting or propagating the fish that at present frequent them, or otherwise" (1868 NY Laws ch 285). In 1879 the Governor was authorized to appoint a

resident of either Kings, Queens or Suffolk county as an additional member (1879 NY Laws ch 309).

1884. The 1884 Suffolk county leasing act stated that all the state's "right, title and interest" in the lands under Gardiner's and the Peconic bays were ceded to Suffolk county for oyster culture, "provided that such lands shall revert to the state when they shall cease to be used for oyster culture, and provided that nothing in this act shall be held to interfere with the right of the commissioners of the land office to grant lands under water in said bays to owners of adjacent uplands for purposes of commerce or of beneficial enjoyment within the existing bulkhead line" (1884 Act § 1). The county was instructed to sell parcels of one to four acres, subject to reversion to the county for failure to plant a specified quantity of oysters. Note the state's retention of a reversion for cessation of use, and the reservation of the the right of the Commissioners of the Land Office (predecessors of the Commissioner of General Services) to make grants to upland owners.

The exact locations of the bay areas were not described. Reference was made in one of the sections to inclusion of the "tributaries" of the bays, but not in the section ceding the lands to Suffolk county (see § 2, providing for the appointment of "three commissioners of shell fisheries in the waters of Gardiner's and Peconic bays and the tributaries thereof"). The omission was corrected in a later 1923 amendment to the 1884 Act (1923 NY Laws ch 191).

No provision was made for the payment of annual rentals, though the lands to be conveyed by the county were declared to be real estate "subject to taxation as any other real property" (id § 4).

1887. The state's Commissioner of Fisheries, renamed the Shell-fish Commissioner, was directed to complete its survey, already begun, "of all the lands under the waters of the State suitable for use for the planting and cultivating of shell-fish," and to map the results (1887 NY Laws ch 584, § 1). Note that the statute did not apply solely to lands owned by the state.

The legislature repeated its direction to the Governor to appoint an additional Commissioner of Fisheries from Richmond, Queens, Kings, or Suffolk county, but added that he "shall be a man of experience in oyster culture" (id § 2).

The Commissioners of Fisheries were authorized to grant applications of persons resident in the state for at least a year "for <u>perpetual franchises</u> for the purpose of shell-fish cultivation on the lands under the waters of this State" suitable for the purpose (id §§ 3-4; emphasis added). The franchises were deemed to be personal property, as salable and assignable as any other personal property (id § 6).

The Act did not exact annual charges, nor levy state taxes on the grantees, but did require an initial payment for the franchises.

The authority of the Commissioners of the Land Office to make grants of underwater lands of the state to "owners of uplands adjacent to such fisheries" was preserved, with the proviso that grants made of any lands actually in use under the Act for shellfish cultivation would be subject to the rights of the occupant to remain for two years for cultivation and removal of his shellfish

(id §8).

The legislature expressly excluded from the operation of the Act "lands under water owned, controlled or claimed under colonial patents or legislative grants by any town or towns, person or persons, in the counties of Suffolk, Queens, Kings and Richmond; lands under the waters of Gardiner's and Peconic bays, ceded by the State to the county of Suffolk, pursuant to [the 1884 Act], lands under water in Jamaica bay, lands in the jurisdiction of the towns of Hempstead and Jamaica or in the county of Westchester" (id § 9; emphasis added). The statute did not describe the boundaries of the excluded lands.

1893. The legislature added sections 197 and 198 to the then Game Law empowering the Commissioners of Fisheries to "make leases of lands under water for the purposes of shell fish cultivation" (1893 NY Laws ch 321, Game Law § 197; emphasis added).

Fifteen year leases were to be granted at public auction to the highest bidder who would pay an annual rental of at least 25 cents per acre (id).

The powers of the Commissioners of the Land Office to grant underwater lands, subject to rights of occupants obtained under the 1887 franchise law, were preserved; but it is not clear whether these powers were confined to making grants to upland owners, as under the earlier law (id, Game Law § 198).

The provisions of the 1887 franchise act excluding certain lands, among them those under Gardiner's and the Peconic bays, were copied in the 1893 leasing law (§ 198). Again, no attempt was made to describe by metes and bounds the locations of the excepted lands.

1906. The 1884 Act, having been amended in 1896 (1896 NY Laws ch 916) to revise the performance precondition of the county leases, was again amended in a number of respects.

The 1906 Act required the surveying and mapping of the areas ceded to the county.

It preserved the power of the Commissioners of the Land Office "to grant land under water," without limiting it to upland owner grantees.

It excluded lands within bulkhead or pier lines established by the United States, or in any case lying within 500 feet of ordinary high water mark along the shore.

For the first time, the amended version defined the easterly boundary of the ceded land as "a straight line running from the most easterly point of Plum island to Goff point at the entrance of Napeague harbor." This is open to two interpretations: (1) The legislature was drawing the easterly boundary of Gardiner's Bay, and confirming an intent to cede the entire bay to Suffolk county; or (2) Gardiner's Bay was deemed to have extended beyond the prescribed easterly line, into areas of the bay remaining under state jurisdiction. No justification comes to mind for a division of jurisdiction over Gardiner's Bay between Suffolk county and the state.

The 1906 Act provided for a division of the proceeds of real property

taxation of the granted lands among the towns of Southold, Riverhead, Southampton, East Hampton, and Shelter Island (1906 NY Laws ch 640).

1909. The Forest, Fish and Game Law, the 1909 successor to the Game Law, established a Bureau of Marine Fisheries in the Department of Forest, Fish and Game, and put in charge of the bureau a Superintendent of Marine Fisheries (1909 NY Laws ch 24, Forest, Fish and Game Law § 184).

Provisions of the sections of the former Game Law, added in 1893, authorizing the state leasing of underwater lands for shellfish cultivation, were moved to sections 195 and 196 of the new law, and were amended in a number of respects, including the following:

The office of Superintendent of Marine Fisheries was substituted for the former Commissioners of Fisheries, and charged with leasing any "lands under water for the cultivation of shellfish" (§ 195).

The Superintendent was authorized to summarily oust lessees delinquent in the payment of rents, in which event the lease would become void.

Construed literally, the amendment removed the provisions of the earlier law excluding various lands, among them lands under Gardiner's and the Peconic bays, from the state's leasing authority. The omission may have been the result of a cross-referencing error. Section 196, dealing with limitations on the leasing power, stated that it shall not "apply to any of the excepted lands named in section two hundred of this chapter." Section 200 prohibited the taking of oysters from part of the Hudson river for transplanting outside the state. Perhaps the intent was to refer to section 211, exempting Gardiner's and the Peconic bays and other designated areas from an annual state tax of 25 cents on "each and every acre of shellfish ground located within this state owned, leased or possessed by any person whatsoever." If so, since the excepting provision referred to lands ceded to the county under the 1884 Act as amended, it would not except lands of Gardiner's Bay (if any) east of the Plum Island/Goff Point line established by the 1906 amendment to the 1884 Act.

The 1909 Act provided for the enforcement of payment of delinquent taxes by a sheriff's execution and sale of the taxed property (§ 212).

1911. The Forest, Fish and Game Law became the Conservation Law (1911 NY Laws ch 647). The sections relating to shellfish culture leasing and the state tax were renumbered sections 154 through 159. The Superintendent of Marine Fisheries retained the authority to grant the leases. The leasing and tax provisions were essentially the same.

Through correct cross reference, lands under Gardiner's and the Peconic bays and the other specified lands were excluded from the leasing authority of the Superintendent (§§ 154, 158).

1912. A revised marine fisheries article of the Conservation Law renumbered the leasing and tax sections 304-05, 307-09 (1912 NY Laws ch 318).

The name of the office of Superintendent of Marine Fisheries was changed to Supervisor of Marine Fisheries.

The revised article added to the provisions reserving the power of the Commissioners of the Land Office to grant underwater lands, the qualification that "no grant of land by such commissioners of the land office shall thereafter be used for the cultivation of shellfish, nor shall the public be excluded therefrom for the purpose of taking shellfish" (§ 304[8]).

The same limitations subsection also stated that the leasing power shall not "apply to any of the excepted lands named in section three hundred and seven of this chapter." Again there appears to have been a numbering error. The section excepting lands under the three bays and the other specified lands was numbered 308, not 307.

1923. In addition to amending the Suffolk county leasing law to extend the county's jurisdiction to tributaries of Gardiner's and the Peconic bays, the 1923 amendment added a description of the westerly boundary of the ceded lands, namely, "the westerly shore of Great Peconic bay" (1923 NY Laws ch 191, § 1). That would confirm the cession of the entire area of the Peconic bays to the county, leaving no possibility of a reservation of land to the state in the Peconics.

1928. Minor changes were made in the Conservation Law marine fisheries article, but what might have been an error in the leasing section's reference to excepted lands was not corrected (1928 NY Laws ch 242).

1942. Again the marine fisheries article of the Conservation Law was revamped (1942 NY Laws ch 105). Substantive changes included the revision of the title and text of the leasing section to confine the leasing to "state owned" underwater lands, and the substitution of the Department of Conservation for the former Supervisor of Marine Fisheries as the leasing agency (§ 302[1]).

An additional exclusion excepted "such lands within five hundred feet of high water mark along the shores of Gardiner's and Peconic bays, west of a straight line running from the easterly end of Plum island to Goff point" (id). The ambiguity of the delineation of the easterly boundary of the ceded lands remained. The exclusion of areas west of the east line could be construed as confirming the easterly boundary of Gardiner's Bay or as dividing jurisdiction of some easterly part of that bay between Suffolk county and the state.

The minimum annual rental was increased to 50 cents per acre (§ 302[3]).

The provisions relating to reserved powers of the Board of Commissioners of the Land Office were revised to make more explicit the prohibition against its involvement with shellfish grants: The board "shall not grant lands for shellfish culture" (§ 302[9]).

The annual 25 cents per acre tax was continued but was confined to "all state owned under water lands held by lease or franchise for shellfish culture." In addition, the tax was to be phased out: "Such tax shall not be imposed on such lands hereafter leased or on lands on which outstanding leases may be renewed" (§ 303[1]).

Provisions of earlier laws excepting lands under the three bays, among others, from the leasing and taxing sections were dropped, perhaps indicating that the draftsmen did not deem any of them to be "state owned."

1955–1966. The marine fisheries article was revised four more times before being incorporated in the Environmental Conservation Law in 1972 (1955 NY Laws ch 630; 1962 NY Laws ch 60, § 11, and ch 310, § 83; 1965 NY Laws ch 407; 1966 NY Laws ch 216). The 1955 alterations were not significant.

The first of the 1962 amendments reflected the shifting of general state land management authority from the Board of Commissioners of the Land Office to the Commissioner of General Services.

The 1966 amendment reduced the lease terms from 15 to 10 years.

Amendments made in 1965 are more significant for our purposes. The provisions excluding the 500 foot shoreline strip were extended to "state owned lands," generally, but the depth of the excluded area for Gardiner's and the Peconic bays was increased to 1,000 feet from high water mark (§ 302[1]).

The annual rentals and taxes were increased to one dollar per acre, the taxes applying only to franchises issued prior to March 13, 1942, not to leased lands (§§ 302[7], 303[1]).

The provisions for execution against and sale of property for nonpayment of the taxes on leased lands were deleted. With respect to lands granted by franchise, a new provision stated: "Land under water granted to individuals by franchise for shellfish cultivation by the Department shall revert to state-owned public grounds if the owner defaults in payment of franchise taxes for a period of one year after such tax became due and payable" (§ 303[4]). The policy of barring future perpetual franchises was underscored by an express ban on the reassignment or transfer of franchised underwater lands that reverted to the state, except by leasing under this law (§ 303[5]).

The 1965 amendments were proposed by the Joint Legislative Committee on Revision of the Conservation Law. In its memorandum of March 18, 1965 to the Governor on the proposal, the committee said, in reference to some of the subjects here being reviewed (in Governor's Bill Jacket on 1965 NY Laws ch 407):

> The bill clarifies the distinction between <u>leased</u> lands and <u>franchised</u> lands. No new franchises have been issued by the State since March 13, 1942. Present practice is to lease state-owned under water lands for a term of years rather than grant an indefinite franchise. There are now only a few franchises outstanding. Under this bill, franchises may not be assigned and when franchises are surrendered, thereafter the lands are leased.
>
> . . . .
>
> Present § 302(1) excepts from lands which may be leased, the under-water [sic] lands within 500 feet in Gardiner's and Peconic Bays. The proposed omission, new § 302(1), would except <u>all</u> under water lands within 500 feet of high water mark.
>
> The original deeds giving the Long Island counties ownership of under water lands for the purpose of leasing lands for shellfish cultivation excepted the strip of land 500 feet from

high water mark. This exception has existed since 1884 and is an acceptable precedent. Most of the lands lying within this 500 feet strip may be utilized by persons harvesting clams and scallops by hand operated gear. It is thought desirable to retain this strip along the shore for use by the public.

. . . .

. . . . The 1887 law under which the State began issuance of franchises to shellfish planters was an effort to insure perpetuation of oysters by assisting oyster growers and the placing of under water lands at their disposal for use in carrying out oyster cultivation. It is no longer necessary to grant perpetual franchises for this purpose because sufficient areas are available for leasing and such leases may be extended. Furthermore, when leased lands are no longer useful for shellfish cultivation, they revert to the State for use by the citizens of the State, whereas franchised lands remain in private ownership until legal action is taken by the State to recover such lands. At present, there are many acres of under water lands held under franchise by heirs apparently without their knowledge and as they are not used for shellfish cultivation, they are not producing to the advantage of the state.

1969. The 1969 Suffolk county leasing law began with a reference to the 1884 Act and explanation that the Commissioners of Shell Fisheries provided in that Act "have not functioned for several years and the offices are vacant"; shellfish other than oysters have been harvested and are important to the local economy; the "business of cultivating oysters has declined and one of the results has been the forfeiture of lands, formerly sold by the commissioners of shell fisheries, through tax sales and non-user"; and because of uncertainties as to the locations of titles in the three bays, the lands should be surveyed.

After ratifying sales previously made by the county's Commissioners of Shell Fisheries, the 1969 law described the nature of its cession of interests to the county as follows (§ 2):

All other lands under said waters which, pursuant to said laws, have escheated or reverted to the state, are hereby ceded to Suffolk county for the purpose of the cultivation of shellfish, subject to existing valid grants and easements; provided, however, that nothing in this act shall interfere with the right of the commissioner of general services to grant lands and easements under water to owners of adjacent uplands, pursuant to the provisions of the public lands law, or of the legislature to make such grants without regard to upland ownership and to grant franchises to utilities, municipalities, and governmental, educational or scientific bodies for cables, outfalls, ecological studies and experimentation with controlled marine life. If, hereafter, such of said lands as are now in private ownership escheat or revert to the state, they are hereby as of such time ceded to Suffolk county for the purpose of the cultivation of shellfish.

The county is required to survey and map the lands before leasing or using them (§ 3).

The county may grant 10 year leases on plots of at least 50 acres of "lands under water ceded to it by the state for the purpose of shellfish cultivation, except such lands as are within one thousand feet of the high water mark or where bay scallops are produced regularly and harvested on a commercial basis" (§ 4). No provisions for reversion to the county or state are made for nonuse or for nonpayment of rentals; however, the county is authorized to bring summary proceedings against defaulters, through resort to proceedings under article 7 of the Real Property Actions and Proceedings Law (§ 7).

No attempt was made to repeal or revise specific provisions of the 1884 Act or state leasing law. Section 9 says: "Any provisions of chapter three hundred eighty-five of the laws of eighteen hundred eighty-four, as amended, or section three hundred two of the conservation law, or any other general or special law to the contrary notwithstanding, this act shall be controlling, but all provisions of such laws, specific, general or special, not inconsistent herewith shall remain in full force and effect."

Certain regulatory jurisdiction of the Department of Conservation in the areas of the three bays was expressly reserved (§ 5), but no reference was made to the existence or absence of proprietary jurisdiction of the department over those areas.

In writing to the Governor on the proposed 1969 enactment, the Conservation Commissioner, R. Stewart Kilborne, said, in part (Memorandum of May 19, 1969, in Governor's Bill Jacket on 1969 NY Laws ch 990):

> This bill would cede to Suffolk County for oyster culture the lands under water of Gardiner's and Peconic Bays. Fundamentally, it would return to the county underwater lands previously deeded by the county to oyster farmers but which have reverted to the State through tax sales or nonuse. . . .
>
> . . . .
>
> . . . . Oyster farming has been practiced on the underwater lands in Gardiner's Bay and the Peconic Bays since 1884. But since 1950 the majority of the lands under culture there have been abandoned and have reverted to the State for non-payment of taxes. Other lands have been resold to new owners by the county at tax sales. The provisions of this bill would clear up any question of title with respect to these sales, and it would make reverted lands available to the county to be leased again. . . .
>
> . . . . This bill poses some problems with respect to State participation in oyster culture on its own underwater lands in Gardiner's Bay and the Peconic Bays. The underwater lands involved would have to be resurveyed promptly to reactivate oyster farming. Under the terms of this bill the State would have no valid basis for assisting the county even though the costs of such resurveys are extremely high. Furthermore, while the State desires to have Suffolk County pursue oyster farming, the bill would give the State no authority to press for such a program if

> the county should arbitrarily decide against using the vacant lands for oyster culture. Since these are now State lands, it seems appropriate that the State be authorized to take actions to lease them for oyster culture in accordance with the provisions for shellfish leasing in the Fish and Game Law if the county for some reason should find it impossible to proceed.

In view of the latter observation, the commissioner suggested that amendments be made to define the state's role, to "enable the State to join with the county in financing and carrying out the resurvey, and, in case it should be impractical for the county to undertake its surveying program, the way would be open for the State to proceed."

1972. The state leasing provisions of section 302 of the former Conservation Law were incorporated without significant change in section 13-0301 of the Environmental Conservation Law (1972 NY Laws ch 664). The following year the section was amended to alter the general requirement of a minimum of 50 acres for each lease to allow a minimum of five acre plots "for the purpose of off-bottom culture of shellfish" (1973 NY Laws ch 253).

2. Nature of the Interests Ceded to the County and Reserved to the State

We have noted that Suffolk county's authority to grant interests in Gardiner's and the Peconic bays for shellfish culture rests on two different but related statutes, the 1884 Act and the 1969 Act. The nature of the interests ceded by the state appear to be the same under both acts, with the exception of the difference in the condition restricting the county's use of the land—selling for oyster culture under the earlier law, leasing for shellfish culture under the later one. Initially, the 1884 Act declared that "[a]ll the right, title and interest which the people of the state of New York have in and to the lands under water of Gardiner's and Peconic bays in the county of Suffolk, is hereby ceded to said county, for the purpose of oyster culture" (§ 1). This language was preserved in later amendments, except for the addition of the words "and the tributaries thereof," mentioned above. The 1969 Act did not purport to renew or change the scope of the 1884 cession, but only to add to it lands under the three bays previously ceded that had "escheated or reverted to the state" in the interim, or that might thereafter "escheat or revert to the state."

The meaning of "escheat" is clear. Under the Abandoned Property Law, "[a]ll lands the title of which shall fail from a defect of heirs, shall revert, or escheat, to the people" (§ 200). It was either known or assumed that some private grantees of lands under one or more of the three bays had died without heirs and that the state succeeded to their titles.

a. Reversion Through Nonuse for Shellfish Cultivation

The meaning of the term "reverted" in this context is obscure. The 1884 Act tacked onto the grant to the county the proviso "that such lands shall revert to the state when they shall cease to be used for oyster culture" (§ 1). This has the appearance of a condition subsequent, an immediate grant to the county subject to forfeiture upon the occurrence of a later condition. If so, it gave the state a "right of reacquisition," defined in New York law as a "future estate left in the creator or in his successors in interest upon the

simultaneous creation of an estate on a condition subsequent." Estates, Powers and Trusts Law § 6-4.6. If this characterization is correct, the reversion to the state would not be automatic upon the cessation of use of the lands for oyster culture, but would require some positive action by the state to enforce the reversion. See 20 NY Jur Rev, Estates § 21; and 2A Powell on Real Property, para 272 (1981).

Though we would lean toward that interpretation, it is arguable that the proviso created a determinable estate in the county, reserving to the state a future interest known as a "possibility of reverter," defined as a "future estate left in the creator or in his successors in interest upon the simultaneous creation of an estate that will terminate automatically within a period of time defined by the occurrence of a specified event." Estates, Powers and Trusts Law § 6-4.5. If the latter is a correct interpretation, upon the county's becoming inactive in its selling lands under the bays for oyster culture, the state would have automatically obtained title to the unsold lands.

We have found no record of positive action by the state to effect a return of the bay lands through exercise of a power of reacquisition, or that state authorities have regarded county inaction as creating an automatic reversion to the state. From one point of view, the question is moot because the purpose of the 1969 Act was to cede reverted lands to the county, regardless of what triggered the reversion. Yet the question whether "reverted" in the 1969 Act could be construed as applying to a reversion for cessation of county leasing under the proviso may be significant if the proviso remained operative after 1969 and the state wished to exercise its rights of reacquisition or urge an automatic resumption of title for failure of the county to use any of the lands for oyster culture. The 1969 Act did not contain the forfeiture clause, but the omission cannot be said to necessarily eliminate it. The 1969 Act did not purport to amend the 1884 Act. Instead, the 1969 Act declared that all provisions of the 1884 Act and any other applicable laws "not inconsistent herewith shall remain in full force and effect" (§ 9). If the state wished to take advantage of the proviso and reassert its dominion over the three bays, the question would then arise whether the proviso is inconsistent with the 1969 Act.

Since the 1969 Act did not contain the nonuse reversion provision, or purport to delete it from the earlier law, it can be reasoned that, as read together, the two acts were not inconsistent in any material respect. It may be noted, however, that although the titles of the 1884 Act and its amendments referred to the ceding of lands to the county for the "cultivation of shell fish" the substantive provisions were limited to the cultivation of oysters. The 1969 Act broadened the provisions to authorize leasing for the "cultivation of shellfish," embracing clams and any other species of shellfish in addition to oysters (§ 2). This is a minor inconsistency. We surmise that, in accordance with standard canons of construction, the courts would tend to let the provisions of the two acts stand together and remain operative, without repealing either. McKinney, Book 1, Statutes § 192 (1971). This would lead to a construction expanding the reversion for nonuse provision to include nonuse for either oyster or any other type of shellfish cultivation.

The problem of interpretation is complicated by another use of the term "revert" in these laws. Initially, the 1884 Act required that county grants "stipulate that the grantee shall, within one year from the date of their execution, plant a specified quantity of oysters on said land, or otherwise the

grant shall be void and the land so granted shall revert to the county" (§ 3; emphasis added). In amended versions of the Act the condition was changed to actual use and occupation of the granted land within three years, in default of which the county could seek a court order effecting the reversion (1906 NY Laws ch 640, § 8). We have adverted to the opinion of the Conservation Commissioner that the 1969 proposal "would return to the county underwater lands previously deeded by the county to oyster farmers but which have reverted to the State through tax sales or nonuse."

The Commissioner may have been referring to the legislative finding, cited in the preamble to the 1969 Act, that a result of the declining of the business of oyster cultivation "has been the forfeiture of lands, formerly sold by the [county] commissioners of shell fisheries, through tax sales and non-user" (§ 1). The failure to meet the planting or occupancy requirements of a county grant would result in a reversion of the land to the county, not to the state. Similarly, foreclosures of granted lands for failure to pay county real property taxes would result in the county, not the state, taking title to the lands. As amended in 1906, the 1884 Act declared the lands granted under the Act "to be real property, for the purposes of taxation and for all other purposes" (1906 NY Laws ch 640, § 6).

b. Reversion of Tax Delinquent Lands?

Was the mention of forfeiture "through tax sales" meant to refer to state taxes on shellfish grounds? It is difficult to understand how the provisions for returning tax delinquent lands to the state, either through tax sales or automatic reversion, could have applied to lands under Gardiner's and the Peconic bays. These bay lands were expressly exempted from the state tax prior to 1965, and in that year were impliedly exempted when the imposition of the tax was confined to "state owned" lands (assuming, at least for the moment, that the state did not retain any ownership rights in those lands). In any case, the remedy of reversion was not substituted for collection through execution and sheriff's sales until 1965; and the technical term in the 1969 Act was "revert."

The nature of the "reverted" interests ceded to the county by the 1969 Act remains obscure, and the allusions to forfeitures in the 1965 memorandum of the Conservation Commissioner are puzzling.

If the state were to retain a reversionary interest in the underwater lands of Gardiner's and the Peconic bays, the inquiry would then shift to the question, which state agency or agencies would be qualified to dispose of any such interest to persons or entities other than Suffolk county.

c. Powers of the Commissioner of General Services

The Public Lands Law vests in the Office of General Services, represented by the Commissioner of General Services, the "general care and superintendence of all state lands, the superintendence whereof is not vested in some office or in a state department or a division, bureau or agency thereof" (§ 3[1]). His authority to dispose of state lands under his jurisdiction breaks down as follows:

(1) He may sell specified types of land, not pertinent here (e.g., abandoned canal lands, salt springs reservation land, and parcels detached from

forest preserve lands (Public Lands Law §§ 21, 24, 50-59-a).

(2) Under article 6, he may grant "land under water and . . . the use, occupation and jurisdiction thereof," for certain purposes, to upland owners in certain locations, including lands "[a]djacent to and surrounding Long Island, . . . but not beyond any permanent exterior water line established by law" (id § 75).

(3) He may sell "unappropriated state lands," defined to include, among others, "lands belonging to this state which are not directed by law to be kept for or applied to any specific purpose, except lands under water the disposition of which is governed by article six of this chapter . . . " (id § 30). It is not entirely clear from the wording of this and companion sections whether the exception of "lands under water" applies only to lands the Commissioner of General Services is authorized to sell to upland owners pursuant to article 6; or that all underwater lands are excepted from the definition of "unappropriated state lands," whether or not they are subject to the provisions of article 6. For present purposes, it is assumed that the power of the Commissioner of General Services to alienate underwater lands is limited to grants to upland owners under section 6, and that, accordingly, "unappropriated lands" do not include any underwater lands.

(4) The Commissioner of General Services may lease, for a term not exceeding five years, state lands "not appropriated to any immediate use" (id § 3[2]).

(5) He may lease to the highest responsible bidder, for periods of over five years, interests in land (including subterranean rights) "not needed for present public use" (id § 3[4-a]).

(6) He may "grant rights and easements in perpetuity or otherwise in and to . . . lands under water" (id § 3[2]).

(7) He may transfer to a state agency, at its request, jurisdiction over any lands, including lands under water; or may effect such transfer on his own initiative if the lands are "under utilized or [are] not being utilized in a manner consistent with the best interests of the state" (id § 3[4]).

The most realistic scenario would test the powers of the Commissioner of General Services under section 3(2) of the Public Lands Law to "lease for terms not exceeding five years, and until disposed of as required by law, all such state lands which are not appropriated to any immediate use," or to lease for longer terms, on a competitive bid basis, underwater lands "not needed for present public use." The lands embraced by these provisions are probably those covered by subsection 1 which vests in the Office of General Services responsibility for the care and superintendence of "all state lands, the superintendence whereof is not vested in some office or in a state department or a division, bureau or agency thereof." If so, attention is directed to statutes according other public agencies or officers some types of interests in state lands, which might remove such lands from the "superintendence" of the Commissioner of General Services.

d. Powers of the Department of Environmental Conservation

Section 13-0301 of the Environmental Conservation Law authorizes the Department of Environmental Conservation to "lease state owned lands under water for the cultivation of shellfish," with certain exceptions. Does the mere delegation of this leasing power place state lands under the superintendence of the Department of Environmental Conservation, or would the lands under his superintendence be limited to those he leases out?

It is reasonable to conclude that the assumption of management responsibilities normally devolving upon a lessor would place the leased lands under the superintendence of the Department of Environmental Conservation within the meaning of the statute. By way of comparison, a 1909 opinion of the Attorney General stated that by virtue of statutes declaring that lands within 10 miles of the Clinton prison "shall be retained by the state for the use of said prison" and the nearby hospital for the insane, and authorizing the warden of the prison to lease certain state facilities in the area, these lands were under the "superintendence" of the warden and not of the Commissioners of the Land Office (1909 Att'y Gen 806). Likewise, for comparison, see the provisions of section 9-0105 of the Environmental Conservation Law, assigning to the Department of Environmental Conservation the "care, custody and control of the several preserves, parks and other state lands described" in that law. This was deemed in Towner v Himerson, 67 AD2d 817, 413 NYS2d 56 (4th Dep't 1979) to place these lands under the "superintendence" of the Department of Environmental Conservation under section 3(2) of the Public Lands Law.

3. Absent a Reversion to the State, May Any State Agency Lease Lands Under the Three Bays for Aquaculture?

a. The Department of Environmental Conservation

Putting aside speculation as to the potential authority of the Department of Environmental Conservation to lease lands under Gardiner's and the Peconic bays for shellfish cultivation were the lands to be returned to state ownership through reversion or otherwise, the question may be asked whether the department may share such leasing powers with Suffolk county even while the county remains in the picture. The evidence weighs heavily in favor of an interpretation of the pertinent statutes barring the Department of Environmental Conservation from exercising its shellfish culture leasing powers in those bays. The comments of the former Conservation Commissioner on the proposed 1969 Act, noted above, are consistent with that interpretation. So, too, is evidence of attempts by the legislature to explicitly exclude these areas from the department's leasing jurisdiction, despite some apparent errors in draftsmanship.

Yet one feature of section 13-0301, the state leasing statute, can be cited as arguing that the legislature never intended to bar the department from the waters and lands of Gardiner's and the Peconics bays. The section expressly excludes from the leasing authority areas within 1,000 feet of high water mark "along the shores of Gardiner's and Peconic bays" (§ 13-0301[1]). If the Department of Environmental Conservation lacked the authority to grant leases on any lands under these bays, it would have been unnecessary to exclude the 1,000 foot shoreline strip. The hypothesis that, in drawing the easterly boundary of

Gardiner's Bay in the Suffolk county leasing acts, the legislature acknowledged that there were some lands on the eastern edge of Gardiner's bay over which the state retained jurisdiction would not provide a convincing explanation. It could not account for the inference that the department could lease lands in the Peconics outside the 1,000 foot areas.

In 1972, three years after the 1969 Act, the legislature recodified the Conservation Law. The recodification left intact explicit mention of the 1,000-foot shoreline areas of Gardiners and Peconic bays in transferring section 302 of the Conservation Law to section 13-0301 of the Environmental Conservation Law. It can be argued that had the legislature intended to treat Suffolk County's leasing rights under the 1969 Act as exclusive, the legislature arguably would have removed the inference of shared state power from section 13-0301.

Though not controlling, the "construction of a statute by the Legislature, as indicated by the language of later enactments, is entitled to consideration as an aid in the construction of the statute" (McKinney's, Book 1, Statutes § 75 [1971]). Earlier legislative consideration of a subject may also be a guide to interpretation. Thus "in enacting an amendment of a statute the Legislature, by changing the language, is deemed to have intended to materially change the law" (id § 193). In the episodic history of section 13-0301 of the Environmental Conservation Law the legislature, in 1887, authorized the Commissioners of Fisheries to grant "perpetual franchises for the purposes of shell-fish cultivation . . . under the waters of the State" (1887 NY Laws ch 584, § 5). The 1887 Act expressly excluded "lands under the waters of Gardiner's and Peconic bays, ceded by the State to the county of Suffolk, pursuant to" the 1884 Act (id § 9). The same exception was retained in the successor Game Law and Conservation Law authorizing the leasing of underwater lands for shellfish cultivation (see 1893 NY Laws ch 321; and 1911 NY Laws ch 647, §§ 304, 307, 308).

The 1928 amended version of the marine fisheries article in the Conservation Law deleted the provision excluding lands near the shores of Gardiner's and the Peconic bays from the shellfish culture leasing authority (1928 NY Laws ch 242). The exclusion reappeared in the 1942 replacement of the marine fisheries article, when it was extended to 500 feet from high water mark (1942 NY Laws ch 105). This episode supplies further support for the argument that the Department of Environmental Conservation shares with Suffolk County the right to grant leases for shellfish culture in Gardiner's and the Peconic bays beyond the 1,000 foot shoreline strip.

Related to the question whether the Department of Environmental Conservation Law may grant shellfish cultivation leases on underwater lands of the three bays are the issues, posed earlier, regarding the source of the department's authority to issue Temporary Marine Use Assignments for off-bottom culture in these waters. See the text accompanying notes 155-164 supra.

b. The Commissioner of General Services

Quite apart from the question whether the Department of Environmental Conservation shares shellfish culture leasing authority with Suffolk county in the three bays is the issue whether any state agency is now empowered to grant leases for other types of aquaculture in those bays.

Subsection 14 of section 13-0301 of the Environmental Conservation Law provides:

> The Commissioner of General Services shall not grant lands for shellfish cultivation. The public shall not be excluded from the taking of shellfish from underwater lands granted by such commissioner for other purposes, provided however, that should any grant made by such commissioner for such other purposes include lands leased for shellfish cultivation pursuant to this section, the lessee shall have the exclusive right to use and take shellfish from such leased lands for a period of two years from the date of letters patent or the expiration of the lease whichever is the earliest and may prior to the expiration of such period, remove and transplant the shellfish from such lands to other lands leased, owned or controlled by the lessee.

The section declares what the Commissioner of General Services may not do—he may "not grant lands for shellfish cultivation." The word "grant" is not explained. The term is normally used in the statutes to describe the act of conveying title, but on occasion refers to a transfer of a property interest less than full title (e.g., Public Lands Law § 3[2], authorizing the "grant" of "rights and easements"). In the instant context grant may very well mean "lease."

With certain exceptions not pertinent here, the authority of the Commissioner of General Services to convey title to underwater lands is confined to grants to upland owners to promote commerce, or "for the purpose of beneficial enjoyment" of the grantees, or for "agricultural" or "conservation" purposes (Public Lands Law § 75[7]). These are purposes ordinarily associated with the use of uplands. Shellfish cultivation is an open water activity, one engaged in by persons whose ownership of uplands may be incidentally but not necessarily related to such activity. Moreover, this prohibition must be read in the light of its purpose, which was to take away from the Commissioner of General Services a power given to the Department of Environmental Conservation—the power to lease lands for shellfish cultivation. The legislature must have assumed that absent a restriction equating "grant" with "lease" the Commissioner of General Services could lease underwater lands for shellfish cultivation. To carry this reasoning a step further, it could be concluded that absent the specific prohibition against leasing by the Commissioner of General Services for shellfish cultivation, he could lease lands under Gardiner's and the Peconic bays for that purpose. His authority would be derived from the general leasing power granted to him under the Public Lands Law (§ 3). If it is conceded that the Commissioner of General Services could lease such lands for shellfish cultivation in the absence of a specific statutory bar, it may be concluded that he may lease such lands for finfish or plant aquaculture in the absence of a similar restraint. No such restraint appears in the statutes.

The wording of the second sentence of subsection 14 of section 13-0301 of the Environmental Conservation Law, quoted above, adds another dimension to this analysis. Subsection 14 confirms a continuing right in the Commissioner of General Services to make a "grant" of underwater land for purposes other than for shellfish cultivation, despite the prior leasing of the same land by the DEC for shellfish cultivation. The grant is subject only to the lessee's exercise

of his right, for a period of two years after the overriding grant is made. It could be argued that "grant" must be referring to a grant of title, not the making of a lease, because the period of two years is measured from "the date of letters patent or the expiration of the [Department of Environmental Conservation] lease whichever is earliest". The term "letters patent" normally refers to instruments of conveyance of title by the state. See Black's Law Dictionary 1013 (5th ed 1978), defining "land patent" as a "muniment of title issued by a government or state for the conveyance of some portion of the public domain"; and see Public Lands Law §§ 5, 36. The word "grant" in subsection 14 could be interpreted for the purposes of this part to mean grant of title, because it would not seem reasonable to allow the Department of Environmental Conservation to lease a particular parcel for shellfish cultivation, then permit the Commissioner of General Services to lease the same parcel for another purpose.

The purposes for which the Commissioner of General Services might be asked to convey the state's title to the land might be of overriding interest, say to promote navigation, or to support traditional rights of upland owners to use adjacent waters. This suggests that the lands, though leased to private parties by the Department of Environmental Conservation, are still regarded as "state lands" because of the state's ownership of the underlying title. The Commissioner arguably might lease lands under Gardiner's and the Peconic bays for finfish or plant aquaculture if the lands have not already been leased by the Department of Environmental Conservation for shellfish cultivation.

The potential barrier erected by the 1969 Act's cession of leasing rights to Suffolk County remains, however. The legislature was aware of the need to reconcile the state's right of alienation of lands generally with the delegation of rights to Suffolk County under the predecessor acts. In the 1884 Act, authorizing the sale by the county of lands under Gardiner's and the Peconic bays for oyster culture, the legislature reserved "the right of the commissioners of the land office to grant lands under water in said bays to owners of adjacent uplands" (1884 NY Laws ch 385 § 1). The 1906 amendment of the 1884 Act broadened the reservation by stating that nothing in that Act "shall be construed as limiting the power of commissioners of the land office to grant land under water" (1906 NY Laws ch 640, § 1). The Public Lands Law as of 1906 authorized the commissioners to lease for up to a year all state lands, not under the superintendence of some other officer or board, "as have improvements upon them and which are not appropriated to any immediate use" (Public Lands Law of 1894, 1894 NY Laws ch 317, § 3). This was in addition to the right to make grants of upland owners in and adjacent to Long Island (id § 70[5]). The 1969 Act reverted to the more limited reservation in the original 1884 Act by providing, in section 2,

> that nothing in this act shall interfere with the right of the commissioner of general services to grant lands and easements under water to owners of adjacent uplands, pursuant to the provisions of the public lands law, or of the legislature to make such grants without regard to upland ownership and to grant franchises to utilities, municipalities and governmental, educational or scientific bodies for cables, outfalls, ecological studies and experimentation with controlled marine life. (1969 NY Laws ch 990, § 2).

The reservation says nothing about the right of the Commissioner of General Services to lease lands to other than upland owners. To ascertain whether the 1969 Act would "interfere with" the Commissioner's leases or transfers of other types of property interests to persons other than upland owners, a review of section 9 of the Act is in order. Section 9 provides that the 1969 Act is controlling in the event of a conflict with the 1884 Act, section 302 of the Conservation Law, or any other law, "but all provisions of such laws . . . not inconsistent herewith shall remain in full force and effect." The proposition may be advanced that a lease of land by the Commissioner of General Services of one of the three bays for finfish or plant aquaculture, made under the authority of section 3(2) of the Public Lands Law, would not be inconsistent with the 1969 Act. The proposition could be supported by the following arguments:

(1) The lands under these bays are state lands, since the state has retained title to them. Although the 1969 Act says that the lands are "hereby ceded to" Suffolk County (§ 3), the term "cede" does not in itself define the extent or nature of the transferred interest. Goetze v United State, 103 Fed 72 (CC SDNY 1900). That must be determined from the words and context of the particular instrument of cession, here a state statute that gives no more than a right to the beneficiary to lease the interests transferred.

(2) These state lands are under the superintendence of the Commissioner of General Services, not of Suffolk county, so long as the county fails to fulfill the survey and mapping requirement. The provisions of section 3 of the Public Lands Law authorizing short term leasing by the Commissioner of General Services apply to lands "the superintendence whereof is not vested in some office or in a state department or a division, bureau or agency thereof" (§ 3[1]). Prior to a 1928 amendment this part of the statute referred to "superintendence . . . not vested in some other officer or board" (see 1894 NY Laws ch 317, § 3, as recodified by 1909 NY Laws ch 50). In that juxtaposition "officer or board" probably applied solely to agencies of the state, since the statute dealt with state lands. The 1928 amendment substituted for "board" the words "in a state department or a division, bureau, or agency thereof" (1928 NY Laws ch 578). Unless the term "officer" is deemed to mean "state officer," the amendment would have resulted in the adding of some types of state entities—namely, divisions, bureaus or agencies—and the elimination of another, "officer."

In any case, there is no indication in the wording of the 1928 amendment that the legislature intended to except from the Commissioner's jurisdiction lands under the superintendence of an officer of Suffolk county. This position is supported by application of the familiar maxim "noscitur a sociis" ("it is known by its associates"), holding that "the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it," and that "analogous words and phrases in a statute lend color and expression to each other and are construed to express the same relations" (McKinney, Book 1, Statutes § 239 [1971]). Section 3 and companion sections of the Public Lands Law deal with state, not county, entities.

(3) Even if the term "office" in section 3(1) of the Public Lands Law were construed to mean an office of Suffolk County, the question would remain whether the mere conditional cession of leasing rights to the county placed the bays under the "superintendence" of the county. It might fairly be concluded that it did not and that superintendence of these lands could vest in the county officer only upon the county's fulfillment of the survey and mapping precondition.

Little if any weight should be given to the possible contention that responsibility for making the survey of lands under the bays placed the lands under the control and management (a reasonable definition of "superintendence") of Suffolk County. The requirement in the 1969 Act that the county conduct the survey is in marked contrast to the 1884 cession of these underwater lands to the county "to be managed and controlled by the board of supervisors thereof" (1884 NY Laws ch 385, § 1).

(4) The lands under the bays "are not appropriated to any immediate use." Suffolk County cannot now use them because it has not conducted the required survey.

(5) It might, however, be inconsistent with the 1969 Act for the Commissioner of General Services to commit the state to a lease on such lands—say for seaweed cultivation—that extended beyond the time such survey might be completed and the right to lease vest in the county. This possibility relates to the duration of the lease, rather than to the question whether any lease by the Commissioner of General Services would be valid. If, for example, a year's lease were made--initially or as a renewal--the county would not be in a position to object if it were made clear that the lessee's rights were subject to the ultimate rights the county might have under the 1969 Act.

If this reasoning were accepted by the Commissioner of General Services, and the rights of the county matured through completion of the survey during the term of the state's lease, then the county would be prejudiced only if and when the county were to receive an application for a lease for shellfish cultivation on the same site. The question would then arise whether the county, if it were sympathetic to the state's prior lease, could reject the application and in effect consent to the continuance of the Commissioner's lease. The 1969 Act states that the county "may" lease the underwater lands. This accords the county a measure of discretion, justifying a rejection of the application if the decision is not arbitrary.

The use of the site by the state for a purpose of potential state significance, say to conduct a demonstration project for growing seaweed or for finfish culture, would appear to us to provide a rational, non-arbitrary justification for the rejection. Cf People ex rel Underhill v Saxton, 15 AD 263, 44 NYS 211, 216-217 (3d Dep't 1897), aff'd 154 NY 748, 49 NE 1102 (1897), declaring that the good faith exercise of discretion by the Commissioner of the Land Office (predecessor of the Commissioner of General Services) in rejecting an upland owner's application for a grant of underwater land in Long Island Sound could not be overturned by the court. Cf. Villani v Berle, 91 Misc 2d 603, 398 NYS2d 796 (Sup Ct, Suffolk Co, 1977), holding that the action of the Commissioner of Environmental Conservation declaring certain shellfish lands uncertified and could be reversed by a court only on a showing that he acted arbitrarily.

Exhibit 1

Oyster Lot Rights, Gardiners and Peconic Bays, Long Island, New York +

Number of Parcels	Rights	Acreage
95	State of New York	64,673.00
308	County of Suffolk (including double ownership)	33,695.80*
259	County of Suffolk (without double ownership)	29,383.80
130	Long Island Oyster Farm (including double ownership)	10,214.00*
80	Long Island Oyster Farm (without double ownership)	5,684.00
23	Shelter Island Oyster Co.	1,322.50
3	Town of Shelter Island	86.00
1	Village of Sag Harbor	1.50
22	Individual Owners	1,474.50
16	Unknown Owners	2,299.00
549	TOTAL	109,454.30

* County of Suffolk & L.I.O.F. Double Ownership Amounts to 4,312 Acres

L.I.O.F. and Amms Land Co. Double Ownership Amounts to 191 Acres

Total Double Ownership Acreage is 4,503

\+ Data supplied to Suffolk County by the Suffolk County Real Property Tax Service Agency. The County was informed that double or multiple ownership is indicated when two or more conveyances cover the same parcel of land; and that this condition exists due to historically poor conveyancing practices, particularly where the land use was of marginal value. Letter of DeWitt Davis, Long Island Regional Planning Board, to the author, November 16, 1983.

EXHIBIT 2

Chapter 385, of the Laws of 1884,
as Amended

§ 1. All the right, title and interest which the people of the state of New York have in and to the lands under water of Gardiner's Bay and the Peconic bays and the tributaries thereof, in the county of Suffolk, is hereby ceded to said county for the purposes of oyster culture; and said lands are to be managed and controlled by the board of supervisors of the said county; provided that said lands shall revert to the state when they shall cease to be used for oyster culture, and provided that nothing in this act shall be construed as limiting the power of the commissioners of the land office to grant land under water; and provided that this act shall not be construed to cede, nor shall the said county attempt to convey, any land within the bulkhead or pier lines established or hereafter established by the government of the United States; or in the absence of such bulkhead or pier lines, within five hundred feet of ordinary highwater mark along the shore. The easterly boundary of the land above ceded is a straight line running from the most easterly point of Plum island to Goff Point at the entrance of Napeague harbor and the westerly boundary is the westerly shore of Great Peconic bay.

§ 2. The board of supervisors of Suffolk county shall have power, and it shall be their duty, to appoint commissioners of shell fisheries. The commissioners now in office shall remain in office until their terms shall expire. Said commissioners shall be residents of some one or other of the towns lying contiguous to said bays, and at the first appointment thereof one shall be appointed for the term of one year, one for a term of two years, and one for a term of three years; and annually thereafter one commissioner shall be appointed for a term of three years. Said commissioners when so chosen shall take the usual oath of office and shall give bonds in one thousand dollars each, to the board of supervisors of said county, conditioned for the faithful performance of their official duties; and all moneys received by them for the sale of the lands hereinafter specified shall be paid over by them to the county treasurer of said county, and on the third Monday of April in each and every year, the said commissioners shall render to the said board of supervisors an account duly verified, showing all receipts and disbursements for the preceding year.

§ 3. Upon the passage of this act, the board of supervisors of said county shall appoint a competent civil engineer and surveyor who shall be known as the engineer of shell fisheries. He shall receive such reasonable compensation as the said board of supervisors may agree to pay him, and shall hold office during the pleasure of said board. After two years from the passage of this act, the said board of supervisors may in its discretion abolish said office. Within six months after his appointment, he shall prepare duplicate maps, one set

of which he shall file with the clerk of Suffolk county and the other of which he shall retain in his own possession until his successor is appointed, when he shall immediately deliver said set to such successor. The set of maps in his possession shall at all reasonable hours be open to public inspection. These maps shall accurately show the outlines of all the waters affected by this act, and shall also correctly show the location of all grounds heretofore deeded by the said county for purposes of oyster culture. They shall also correctly show all boundaries of towns and school districts which are or may be established in said waters; and as other grounds are deeded for the purposes of oyster culture or are set off for clam, shell, or scallop grounds, all such grounds shall immediately be shown on the map in the possession of said engineer who once in every six months shall file in said county clerk's office a supplemental map showing such other grounds.

§ 4. Upon the passage of this act, the clerk of Suffolk county shall prepare suitable books for recording and indexing all deeds conveying any interest in said grounds for the purposes of oyster culture or any transfer thereof, whether heretofore recorded or hereafter offered for record. In these books he shall at once record all such deeds as have heretofore been recorded in any book in his office, for which service he shall be paid by the county at the same rate as for recording deeds to other real property. In these books he shall also record all other such deeds as may be presented for record, upon payment by the persons so presenting them of the same fees as he is entitled to receive for recording deeds to other real property. He shall also prepare and keep suitable books for recording and indexing all applications affecting any such grounds.

§ 5. Upon the passage of this act, and within one year thereafter, the commissioners of shell fisheries and the said board of supervisors, or a duly appointed committee thereof, shall determine what portions of the lands hereinbefore ceded to the said county as aforesaid and not heretofore granted for purposes of oyster culture are natural clam, shell, or scallop beds of such a nature that the taking of clams, shells, or scallops thereon can be profitably followed as a business. To this end the said commissioners and board, either as a whole or by a duly appointed committee, may cause the engineer of shell fisheries to prepare surveys and maps, may consider affidavits and examine and subpoena witnesses; but no final determination shall be made in the matter until after a public hearing to be held at the county courthouse in Riverhead in said county after a notice of at least three weeks to be posted in the county courthouse, in the postofficed in the village of Greenport, and published in at least two newspapers published in the county. The said final determination shall immediately be made known by the publication thereof and by being shown on said maps as aforesaid, any person deeming himself aggrieved thereby, may present to a justice of the supreme court or at a special term of the supreme court in the judicial district in which said county may be situated, a petition, duly verified, setting forth the injustice complained of; whereupon the justice or court may allow a writ of certiorari to the said commissioners of shell fisheries and the said board of supervisors to review the action thereof, which writ shall be returnable to a special term of the supreme court in the said district. Upon the return of the

writ, the court may dispose of the matter upon the said return, or may take testimony, or order a reference to hear and determine. Upon the return and all other papers and evidence in the case, the court shall make a final order, either confirming the said action, or modifying or reversing it as justice may require. From this order either party may appeal, and the appeal shall be heard and determined as are appeals in the supreme court from orders. Costs shall be in such sums and against such parties as the court may direct. No portion of the lands so set apart as clam, shell or scallop beds shall be granted for the purposes of oyster culture; provided, however, that twenty-five resident taxpayers of said county may present to the said board of supervisors a duly verified petition, setting forth that some portion of the lands so set apart has for five years last past ceased to be a clam, shell or scallop bed; whereupon the same proceedings shall be had as above provided, which proceedings shall be subject to the same review, and a final determination shall be made deciding either that the lands described in said petition are no longer to be set apart as aforesaid, but may thenceforth be granted for purposes of oyster culture, or that the said lands shall remain set apart as theretofore.

§ 6. All lands hereinbefore ceded to said county and not heretofore granted or hereinbefore reserved may be granted by the county of Suffolk by warranty deed, to be executed by the said commissioners of shell fisheries for the purpose of oyster culture, whenever application in writing is made to the said commissioners by any person or persons who have resided in this state not less than one year next preceding the date of said application, or by any joint stock company or corporation organized under the laws of this state, all the stockholders of which are citizens of this state. The said application and the said grant shall be in manner and form approved by said chairman. All such grants and assignments shall be recorded within three months of the date thereof in the books hereinbefore prescribed to be kept by the clerk of said county; but all such grants and assignments not heretofore recorded shall not be invalidated, but all grants and assignments heretofore made of lands under water of Gradiner's bay, the Peconic bays, and the tributaries thereof, are hereby validated, ratified and confirmed. The lands so granted or assigned and all rights therein are hereby declared to be real property, for the purposes of taxation and for all other purposes.

§ 7. When any such application for a grant is filed with the commissioners of shell fisheries, a duplicate thereof shall immediately be filed with the clerk of said county, who shall note upon it the exact time of its filing, and shall immediately cause a written notice stating the name and residence of the applicant, the date of the filing of the application, the location, area, and description of the grounds applied for, to be posted in the county courthouse at Riverhead in said county, and a copy thereof to be posted in the postoffice in the village of Greenport in said county, and shall send a copy thereof to each owner of oyster ground bounded by said new application Each application shall remain on file in the office of the said clerk and shall immediately be recorded by him in the book hereinbefore prescribed to be kept by him for this purpose. Any person or persons objecting to the granting of the grounds applied for as aforesaid, may, within ten days after the

posting of said notices, file a written notice with the said clerk, stating the grounds of his or their objections, and in case objections are so filed, the said commissioners of shell fisheries and the said board of supervisors or a committee thereof shall upon ten days' notice in writing, mailed or personally delivered to all the parties in interest, hear and pass upon such objections at such place as may be appointed; and if such objections are not sustained to the satisfaction of the commissioners and board or committee, and the area of the ground is not in their opinion of unreasonable extent, the said commissioners and board or committee shall direct the clerk of the said county, if his fees have been paid by the applicant, as hereinafter provided, to sell the land so applied for at public auction to the highest bidder at a sum not less, however, than two dollars and fifty cents per acre or fractional part therof. Notice of the said sale shall be given by the said clerk by posting in the county courthouse aforesaid and in the postoffice at Greenport aforesaid, at least ten days before the said sale, which shall take place at the county courthouse aforesaid. The fees of said county clerk for filing and recording such application and posting and serving the notice thereof shall be three dollars, to be paid by the applicant upon filing such application. The fees of said county clerk for posting the notice of sale and conducting said sale and making a report thereof to the said commissioners and board or committee shall be seven dollars, to be paid by the applicant on notice from the county clerk that objections to his application have been filed as aforesaid. Upon the making of the said sale as aforesaid, and the payment to the said clerk by the purchaser of the amount of his bid, a deed for the land so sold shall be executed as hereinbefore provided, and delivered to the purchaser. From the purchase price received by him the said clerk shall deduct and return to the applicant the sum of seven dollars advanced by him, and shall immediately pay to each of said commissioners the sum of fifty cents per acre, and the balance to the treasurer of the county of Suffolk. At all hearings before the said commissioners and said board of supervisors, or any committee thereof, as herein provided, the said commissioners, board or committee may subpoena witnesses and administer oaths as in courts of law. All lands applied for before January first, nineteen hundred and six, on which a deposit of one dollar per acre was made, and all lands applied for after January first, nineteen hundred and six, in the manner hereinbefore provided, to which no objections are filed, shall be granted by the commissioners of shell fisheries under the provisions of this law as it existed before this amendment, provided, however, that no such lands shall be granted, if in the opinion of the commissioners of shell fisheries, they are clam, shell or scallop grounds.

§ 8. Prior to the delivery of any such deed as aforesaid, the said board or its committee shall cause the engineer of shell fisheries to make a survey of the land described in the said deed, and to locate and delineate the said land upon the official map hereinbefore provided for. Upon receipt of the said deed, the grantee shall at once cause the grounds therein conveyed to be plainly marked out by stakes, buoys, ranges or monuments, which stakes and buoys shall be continued by the said grantee and his legal representatives, and the right to use and occupy said grounds for said purposes shall be and remain in said grantee and his legal representatives; provided that if the grantee or holder of said grounds does not actually use and occupy them for the

purposes named in good faith within three years after the time of receiving such grounds, or does not record any grant or assignment thereof, as hereinbefore provided, the said board of supervisors may present a petition to the supreme court for an order that the said grounds revert to the said county, and that all stakes and buoys marking the same be removed, such petition to be presented upon notice to all persons in interest and the amount and manner of payment of the costs of the proceeding to be fixed by the court.

§ 9. Any owner of grounds granted for the purposes of oyster culture as aforesaid, may surrender the said grounds by delivering to the clerk of the said county a good and sufficient deed or release of the same, duly executed and acknowledged by such owner; provided that such release and recording thereof is made without charge or expense to the county and is approved by the said board of supervisors, and that such premises so released are at the time unincumbered.

§ 10. The board of supervisors of Suffolk county shall have the power, and it shall be their duty to divide the said land among the towns of Southhold, Riverhead, Southampton, East Hampton and Shelter Island for the purposes of jurisdiction and taxation only, and to establish the boundary lines in such bays between said towns, but any such action by said board of supervisors shall in no way affect the title to the lands under water in said bays; and after such boundary lines shall have been established and defined, it shall be the duty of the school commissioner for the district, including the said towns, to set off for the purpose of taxation for school purposes, so much of the land under water within said boundary lines of the several towns adjoining the said bays as shall be contiguous to the school districts now existing in said towns.

§ 11. Any person who shall wilfully deposit or assist in depositing any starfish or periwinkle in any of the waters hereinbefore referred to, or who shall dump mud or other material, except that used in making oyster beds, on any ground granted as hereinbefore provided; and any person who shall wilfully injure, remove or displace any monument, signal, beacon, boundary post, or buoy, legally placed in said waters for the purpose of designating, locating, surveying or mapping any such grounds; and any person other than the owner, the engineer of shell fisheries, or the authorized representative of the said commissioners or board of supervisors, who shall stake out or inclose any grounds in the said waters for the purpose of planting or cultivating oysters thereon, shall be guilty of a misdemeanor.

§ 12. All provisions of the forest, fish and game law, of the penal code or of any other general statute of this state for the purpose of protecting oysters, oyster grounds or the oyster industry, shall be applicable to the lands and waters hereinbefore described as if the said provisions were herein set forth at length.

EXHIBIT 3

Chapter 990 of the Laws of 1969

Chapter 990

An Act to cede lands under water of Gardiner's and Peconic bays to Suffolk county, and in relation to the management of such lands for the cultivation of shellfish.

Approved and effective May 26, 1969.

Passed on home rule request. See Const. art. IX, § 2(b) (2), and McKinney's Legislative Law ↑ 44.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative finding and determination. By chapter three hundred eighty-five of the laws of eighteen hundred eighty-four, entitled "An act to cede lands under water of Gardiner's and Peconic bays to Suffolk county, Long Island, for the cultivation of shell-fish," as last amended by chapter one hundred ninety-one of the laws of nineteen hundred twenty-three, the people of the state ceded to Suffolk county for the purposes of oyster culture lands under the waters of Gardiner's and Peconic bays and the tributaries thereof between the westerly shore of Great Peconic bay and an easterly line running from the most easterly point of Plum island to Goff point at the entrance of Napeague harbor. The commissioners of shell fisheries provided for in said law, as amended, have not functioned for several years and the offices are vacant. Other shellfish than oysters are being harvested and constitute an important asset to the economy of the area generally. The business of cultivating oysters has declined and one of the results has been the forfeiture of lands, formerly sold by the commissioners of shell fisheries, through tax sales and non-user. Markers and buoys formerly marking the corners of parcels of land under the waters have not been maintained. The public generally, the taxing authorities, baymen and, in many cases, even the actual owners of land under water are not certain of location, status or title. It is in the best interest of the people of the state generally and those of the area in question particularly that the lands under said waters should be surveyed and managed to promote the cultivation of shellfish. It is the intent of this act to accomplish that purpose.

§ 2. Ratification of titles. The sale of lands under said waters by the commissioners of shell fisheries, subsequently held and used by the grantees, their heirs, successors and assigns, in accordance with the provisions of chapter three hundred eighty-five of the laws of eighteen hundred eighty-four, as amended, on which all taxes and assessments have been paid, is hereby ceded to Suffolk county for the purpose of the cultivation of shellfish, subject to existing valid grants and easements under water to owners of adjacent uplands, pursuant to the provisions of the public lands law, or of the legislature to make such grants without regard to upland ownership and to grant franchises

to utilities, municipalities and governmental, educational or scientific bodies for cables, outfalls, ecological studies and experimentation with controlled marine life. If, hereafter, such of said lands as are now in private ownership escheat or revert to the state, they are hereby as of such time ceded to Suffolk county for the purpose of the cultivation of shellfish.

§ 3. Survey and mapping. Before leasing or using the lands hereby ceded to it, Suffolk county shall cause an accurate survey to be made of such lands, and a map or maps to be prepared therefrom. Such survey shall determine the location of and such map or maps shall show (a) the boundary lines through said waters of the several towns involved, (b) the ordinary high water mark and a line one thousand feet therefrom, (c) the location of existing grants, easements, franchises and cable lines, (d) areas where the federal government permits fish traps to be located, (e) lands under water presently privately owned for the purpose of the cultivation of oysters, (f) areas where bay scallops are produced regularly and harvested on a commercial basis, (g) structures on the land, publicly or privately owned, and aids to navigation installed and maintained by the federal government which are useful for taking ranges and determining points on the surface of the waters of said bays and (h) proposed plots for leasing and points for the location of buoys from which the boundaries of said plots can be readily determined.

Should any dispute arise as to the boundary between any towns, it shall be resolved by the county executive of Suffolk county with the approval of the legislative body thereof.

§ 4. Leases. Suffolk county may lease lands under water ceded to it by the state for the purpose of shellfish cultivation, except such lands as are within one thousand feet of the high water mark or where bay scallops are produced regularly and harvested on a commercial basis. Leases shall be made only to persons resident in Suffolk county one year or more prior to application, for plots containing not less than fifty acres and for a term of ten years. Before a lease is made, a notice of availability shall be posted conspicuously for at least two months in the marine fisheries office of the department of conservation, in the offices of the county clerk, the department of public works and the clerks of the towns in which all or any part of the lands proposed to be leased are situate. Such notice shall state the time when and the place where bids will be received, and that descriptions of the land available may be seen at and obtained from all offices where notice is posted and at the office of the county executive. Such notice shall also be published in the official newspapers of the county. Letting shall be at public auction. The county may reject any and all bids.

§ 5. Regulations. The county shall, by local law, before leasing any of such lands, adopt regulations governing (a) applications for leases, (b) notices to be given, (c) the form and terms of leases, (d) the transfer or renewal of leases, (e) re-surveying and re-mapping where significant change occurs in the high water mark or where there are changes in range markers or navigation aids, (f) the placing and maintenance of marker buoys, (g) fees to be charged for filing applications and supplying maps and copies of documents, and (h) such other matters as are appropriate, including the use of lands not leased.

The regulations may provide that before delivery of any lease of such lands by the county, the lessee shall post a bond in an amount equal to the total rent for the ten year period which shall provide that upon the failure of the lessee to pay the annual rental within ninety days of the due date the bond shall forfeit to the county and the lease thereupon be terminated.

Notwithstanding any of the provisions of this section the department of conservation shall (a) regulate and control the use of certain types of vessels and equipment for harvesting shellfish, requirements for re-seeding, and the right to enter upon such leased lands for re-seeding or making shellfish population surveys, and (b) enforce all laws relating to such lands under water which have been or shall be designated, surveyed and mapped out pursuant to law as oyster beds or shellfish grounds.

§ 6. Duties of the county clerk. The special libers presently required to be kept by the county clerk for recording deeds of oysterlands shall be supplemented by special libers for recording deeds, leases, franchies, easements and agreements affecting lands under water, and henceforth all documents affecting such lands shall be recorded in such libers and appropriately indexed.

§ 8. Disposition of fees and rents; payments in lieu of taxes. All fees and rents received shall be paid into the general funds of the county. The officer charged by the county with the responsibility for collecting and accounting for such fees and rents shall annually, not later than April first, report the amount received for the twelve month period ending the last day of the preceding February, properly distributed by the several towns involved, apportioning, if necessary, in the case of rent or fees received for any plot partly in more than one town, and file such report with the county treasurer, the county executive, the clerk of the county legislative body and the supervisors of the several towns within which such lands are situate. Not later than fifteen days after receiving such report the county treasurer shall pay to the supervisors of each of said towns, for general town purposes, seventy-five per cent of the amount collected from fees and the rent of such lands under water within the respective towns for the preceding year reported upon.

§ 9. Effect of other laws. Any provisions of chapter three hundred eighty-five of the laws of eighteen hundred eighty-four, as amended, or section three hundred two of the conservation law, or any other general or special law to the contrary notwithstanding, this act shall be controlling, but all provisions of such laws, specific, general or special, not inconsistent herewith shall remain in full force and effect.

§ 10. This act shall take effect immediately.

EXHIBIT 4

Environmental Conservation Law § 13-0301

§ 13-0301. Lease of state-owned underwater lands for shellfish cultivation.

1. Leases. The department may lease state owned lands under water for the cultivation of shellfish, except such lands within five hundred feet of high water mark. Where lands are located along the shores of Gardiner's and Peconic bays, west of a straight line running from the easterly end of Plum island to Goff point there shall be excepted from leasing such lands as are within one thousand feet of high water mark. Lands under water shall not be leased where there is an indicated presence of shellfish in sufficient quantity and quality and so located as to support significant hand ranking and/or tonging harvesting. Under water lands where bay scallops are produced regularly on a commercial basis shall not be leased for shellfish cultivation.

2. No lease shall be granted except upon written application on forms furnished by the department and properly executed, signed by the applicant and approved by the department, and upon payment of the fees prescribed by this section.

3. Leases may be made only to persons resident in the state one year or more immediately prior to application.

4. The lease term shall be ten years.

5. Minimum size of leased areas. No plots of land comprising less than 50 acres shall be leased, provided, however, that where lands are leased for the purpose of off-bottom culture of shellfish no plots of less than five acres shall be leased.

6. Letting. Letting shall be at public auction and to the highest bidder. Before a lease is made, notice of availability shall be conspicuously posted for at least two months in the principal office of the department, the office of the town clerk and the post office nearest to the available land. Such notice shall state the time when and the place where bids will be received. Leases shall be executed and the lease terms shall commence on either the first Monday of June or November. The department may reject any and all bids.

7. Rental. The annual rental for leased lands shall be not less than one dollar per acre on all such lands hereafter leased and on such lands whereon outstanding leases may be renewed.

8. Leases, renewal and transfer. Leases may be renewed within ninety days after expiration, subject to the provisions of this section, upon such terms as may be agreed upon by the department and lessee, provided that the rental shall not be less than the rate of the previous rental, and shall not exceed twice the rate of the previous rental. Leases may be transferred with the consent of the department but no new lease issued under this section may be transferred within the first five years from the date of issuance.

9. Marking grounds and testing. The state shall mark the locations to be leased. A shellfish population survey of the plot or plots shall be carried out by the state. Applicants for lease may be granted the privilege to make tests of the shellfish population under rules and regulations prescribed by the department. All costs for such tests shall be borne by the applicant.

10. Location of corners of leased grounds. No grounds may be worked without the presence of proper corner buoys. On notice, the department will relocate the corners with the costs to be borne by the lessee. It shall be unlawful to fail to notify the department promptly when the buoys or markers are destroyed.

11. Bond. Immediately prior to the execution of a lease by the department, the lessee shall post a bond, equal to the total rental of the lease for the ten-year period. Failure of the lessee to pay the annual rental within ninety days of the due date shall result in the forfeiture of the bond to the state and revocation of the lease. Leases so revoked may then be readvertised and issued under the provisions set forth in this section.

12. Recording fees and other charges. Records of leases of state-owned underwater lands for shellfish cultivation shall be recorded in the principal office of the department. Recording fees shall be as follows: (a) for the filing of each application for a lease, one dollar; (b) for each copy of any record, a charge of twenty cents per folio or a minimum of one dollar and twenty-five cents. Any person requiring an original survey or resurvey shall furnish an adequate vessel and the necessary assistance to do the work at his own expense; and for each survey, in addition to the foregoing, shall pay the department the actual cost for such survey.

13. Summary proceedings. Upon failure to pay the rental on any date due under the terms of the lease or upon revocation as provided in subdivision 11, the department may, after written notice to the lessee, declare the lease cancelled as of the date set forth in such notice, and may immediately thereafter evict the lessee from such lands. The provisions of article 7 of the Real Property Action and Proceedings Law shall apply and govern the procedure in such cases.

14. Limtations. The Commissioner of General Services shall not grant lands for shellfish cultivation. The public shall not be excluded from the taking of shellfish from underwater lands granted by such commissioner for other purposes, provided however, that should any grant made by such commissioner for such other purposes include lands leased for shellfish cultivation pursuant to this section, the lessee shall have the exclusive right to use and take shellfish from such leased

lands for a period of two years from the date of letters patent or the expiration of the lease whichever is the earliest and may prior to the expiration of such period, remove, and transplant the shellfish from such lands to other lands leased, owned or controlled by the lessee.