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One Tier beyond Ramapo: Open Space Zoning and the Urban Reserve

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PUBLIC BEACHES: A REEVALUATION

Lack of public beach recreational space is a continually growing problem in California. After examining recent developments in the public beach area, this Comment discusses the effects of the California Coastal Act of 1976 on public beach access and recreation. It also examines recent judicial decisions concerning public beaches. The Comment concludes that the existing mechanisms for protecting public coastal rights are inadequate and that a solution to the problem will be forthcoming only when the legislature and the courts adopt a new attitude toward protection of this limited resource.

> It is my conviction that the shores of the United States are a part of the common heritage of all the people, that they are impressed with a long-standing public interest, and that new means must be found to protect this great resource and make it available to the public.[1]

The California coastline is a distinct and valuable natural resource.[2] One of the most distinctive features of such a coastline is the use of its beaches for public recreation.[3] In recent years, however, the shortage of public recreational beaches has become critical. Less than forty percent of California's 1,072 miles of coastline[4] is publicly owned.[5] Only 234 miles of the publicly owned coastline is composed of sandy beach suitable for public recreation,[6] and only 110.2 miles of this sandy beach is considered suitable for

1. Jackson, *Foreword* to D. DUCSIK, SHORELINE FOR THE PUBLIC at xv (1974).

2. CAL. PUB. RES. CODE § 30001 (West 1977).

3. "There is probably no custom more universal, more natural or more ancient, on the sea-coasts, not only of the United States, but of the world, than that of bathing in the salt waters of the ocean and the enjoyment of the wholesome recreation incident thereto." White v. Hughes, 139 Fla. 54, 58-59, 190 So. 446, 448-49 (1939).

4. This figure does not include San Francisco Bay and 397 miles of island shoreline. CALIFORNIA COASTAL ZONE CONSERVATION COMMISSIONS, ANNUAL REPORT 1974, at 4 (1974).

5. Only 410 of the 1,072 miles of coastline in California are in public ownership. *Id.* The following table provides a breakdown of California coastline ownership:

Private:	662 miles (approximately 61 per cent)
Public:	410 miles (approximately 39 per cent)
Federal:	145 miles (47 miles open to public)
State:	202 miles
Counties:	34 miles
Local:	29 miles

Id.

6. SAN DIEGO COAST REGIONAL COMMISSION, RECREATION 49 (1974).

swimming.[7]

The demand for this limited resource is great and continually growing. Approximately eighty-four percent of California's twenty million residents live within thirty miles of the shoreline.[8] This population, combined with the ever-increasing number of tourists wishing to enjoy the beaches, puts an increasing strain on the available coastal resources. The number of recreation days[9] spent at California beaches is expected to increase from 127 million in 1970 to 177 million in 1980—an increase of thirty-nine percent in ten years.[10]

The public's right to the use of the water and the foreshore[11] for public purposes[12] is protected by the California Constitution,[13] statutory provision,[14] and common law trust doctrine.[15] However, the public's ability to make use of this right for recreational purposes is dependent not only on a public right to use the water but also on a public right to use the adjacent beaches and shores to gain access to the water.[16] Mere provision for public access to the

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7. *Id.*

8. CALIFORNIA COASTAL ZONE CONSERVATION COMMISSIONS, ANNUAL REPORT 1974, at 4 (1974).

9. A recreation day is a statistical unit of recreation use, consisting of a visit by one person for all or a portion of one 24-hour period. One recreation day may consist of one or several activity days by the same person. A recreation day would merely reflect the attendance at a given area.

SAN DIEGO COAST REGIONAL COMMISSION, RECREATION 1 n.1 (1974).

10. *Id.* at 1.

11. The foreshore is the land which is "covered and uncovered by the daily flux and reflux of the tides." City of Oakland v. Oakland Water Front Co., 118 Cal. 160, 182, 50 P. 277, 285 (1897). This area is often referred to as the "tidelands area."

12. Public purpose has been found to include "the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state for anchoring, standing or other purposes." Marks v. Whitney, 6 Cal. 3d 251, 259, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971).

13. No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.

CAL. CONST. art. X, § 4.

14. "Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tidewater, takes to ordinary high-water mark . . . ." CAL. CIV. CODE § 830 (West 1954).

15. With few exceptions, ownership of the foreshore, as public land, is in the state and is held in trust for the people. 3 AMERICAN LAW OF PROPERTY § 12.27, at 248-51 (A. Casner ed. 1952). For an extensive discussion of the public trust doctrine, *see* Note, *California's Tidelands Trust for Modifiable Public Purposes*, 6 LOY. L.A.L. REV. 485 (1973).

16. This problem was recognized over 40 years ago:

The littoral owner not only may forbid public crossing of his land to the shore, but also . . . , he has a private right to cross the foreshore to the

foreshore, however, is not enough if the public is to extract the full recreational benefit from the coastline. The dry sand area, between the mean high tide[17] and vegetation lines,[18] is a necessary recreational adjunct to the water and to the foreshore. For the public to obtain full recreational value from the coastline, therefore, it must have both the right of access to the water and the right to use the dry sand area.

Public recreational use of the beaches erodes the private property interest of the littoral property owner. As a general proposition, there are no public rights in the privately owned land adjacent to navigable waters.[19] The private littoral landowner is afforded this protection by both the United States[20] and the California Constitutions,[21] which prohibit the taking of private property for public purposes without just compensation.

This Comment examines the conflict between the public's need for recreational access to the coast and the private littoral-owner's right to preserve and to protect his property. In particular, the California Coastal Act of 1976[22] is investigated, and its effectiveness in protecting and in enhancing the public's rights in the coastline is assessed. In addition, alternative methods of protecting the public's right to the coastline are examined. An examination of the judicial remedies of implied dedication and custom

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water himself. In this way subdivision projects form Beach Clubs or the like, with virtual claim of monopoly; an increase of privatism over communism which finds expression in signs "Private Beach, Public Not Allowed."

Wiel, *Natural Communism: Air, Water, Oil, Sea, and Seashore*, 47 HARV. L. REV. 425, 452 (1934).

17. The "mean high tide" is the average of all the high waters at a place over a period of 18.6 years. Borax Consol. v. City of Los Angeles, 296 U.S. 10, 26-27 (1935). For a discussion of the significance of the mean high tide line, see Maloney & Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mappings*, 53 N.C. L. REV. 185 (1974).

18. The vegetation line is the extreme seaward boundary of natural vegetation spreading continuously inland. It is a visible boundary, marking the border between the dry sand and the adjoining upland. Note, *Public Access to Beaches*, 22 STAN. L. REV. 564, 565 n.9 (1970).

19. Stone, *Public Rights in Water Uses*, in 1 WATERS AND WATER RIGHTS 222-23 (R. Clark ed. 1967).

20. U.S. CONST. amend. V. The prohibition against taking private lands without compensation has been held to apply to the states by reason of the fourteenth amendment. Chicago, Burlington & Quincey R.R. v. Chicago, 166 U.S. 226, 235-41 (1897).

21. CAL. CONST. art. I, § 19.

22. CAL. PUB. RES. CODE §§ 30000-30900 (West 1977).

follows. Particular attention is focused on the effectiveness of these remedies in providing public recreational opportunities on the California coast.

THE COASTAL ACT

Since the early 1960's Californians have become increasingly concerned about present and future threats to their state's shoreline. In recognition of the need to protect the shoreline, the California legislature enacted the California Coastal Act of 1976 (Coastal Act).[23] The primary purpose of the Coastal Act is providing for the creation of a comprehensive and an enforceable management plan to "[a]ssure orderly, balanced utilization and conservation of coastal zone resources."[24]

In promoting this management purpose, the Coastal Act generally prohibits development in the coastal zone[25] unless a permit has been obtained from the state or the regional coastal conservation commission. The Coastal Act also establishes basic development goals for the coastal region. These development goals include preservation of agricultural resources,[26] preservation of scenic and visual qualities of coastal areas,[27] concentration of development,[28] preservation and enhancement of public access to the coast,[29] and enhancement of recreational opportunities.[30] These final two goals, public access and recreation, are of primary importance.

Public Access Under the Coastal Act

The controversy over the public's right of access to the coast is one of the most formidable problems in implementing the policies of the Coastal Act. Although the Coastal Act mandates maximum access to the coast and recreational opportunities in the coastal

23. California Coastal Act of 1976, ch. 1330, 1976 Cal. Stats. 5951 (codified at CAL. PUB. RES. CODE §§ 30000-30900 (West 1977)). The 1976 Act was primarily a reenactment of the California Coastal Zone Conservation Act of 1972. The voters of California enacted the latter Act through the initiative process. California Coastal Zone Conservation Act of 1972, Initiative Measure 20 (Nov. 7, 1972) (codified at CAL. PUB. RES. CODE §§ 27000-27650 (West Supp. 1973)) (repealed 1977). For a discussion of the passage of Proposition 20, see S. SCOTT, GOVERNING CALIFORNIA'S COAST (1975).

24. CAL. PUB. RES. CODE § 30001.5(b) (West 1977).

25. The "coastal zone" extends inland generally 1,000 yards from the mean high tide line. *Id.* § 30103.

26. *Id.* § 30242.

27. *Id.* § 30251.

28. *Id.* § 30250.

29. *Id.* §§ 30001.5, 30211.

30. *Id.* §§ 30001.5, 30221.

zone,[31] there has been ardent disagreement over the extent of this mandate. The most formidable challenge is determining how public rights to use the coast can be protected without infringing upon private property rights.

The Coastal Act clearly states that development in the coastal zone cannot interfere with public access to the sea acquired through use or through legislative authorization.[32] Following this declaration the Coastal Act becomes less explicit. It states that: "[P]ublic access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where . . . (2) adequate access exists nearby . . . ."[33] This section of the Coastal Act also places an important condition on the acquisition of public access by stating that "dedicated accessways shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway."[34]

The provisions above leave a number of problems unanswered in the public access controversy. First, the California Coastal Zone Conservation Commission (Coastal Commission) recognizes two types of beach access: lateral access along the beach and transverse access to the beach from upland areas.[35] This recognition reflects the basic goal of keeping all dry sand areas open to the public over the entire length of the coastline. The Coastal Commission has not, however, devised a workable definition of "new development project." It could decide that any new project, such as improvements to a single-family residence, qualifies as a "new development project." If the Coastal Commission were to in-

31. The Legislature further finds and declares that the basic goals of the state for the coastal zone are to:

. . . .

(c) Maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners.

Id. § 30001.5.

32. *Id.* § 30211.

33. *Id.* § 30212. Section 30212 also provides for exceptions where public access would be inconsistent with public safety, military security needs, or the protection of fragile coastal resources, and where providing public access would adversely affect agriculture. *Id.*

34. *Id.*

35. COMPREHENSIVE PLANNING ORGANIZATION FOR THE SAN DIEGO REGION, INITIAL COASTLINE PLAN 19 (1974).

terpret this term broadly, it could require both transverse and lateral access over many projects lying between the nearest public road and the beach, and it could require lateral access over other beachfront projects. Such an interpretation would likely produce criticism because of uncertainty and inequities to the property owners who would have to provide access without being justly compensated merely because they filed for permits. However, a narrower reading could prevent the Coastal Commission from truly maximizing public access.

The Coastal Commission also has not resolved the problem of what constitutes "adequate access nearby" or the problem of finding someone to assume the responsibility for maintenance and for liability of the accessway. Only with answers to these problems will the public access provisions be clearly defined.

Public Recreation Under the Coastal Act

The Coastal Act does not confine itself to the public access mandate but also seeks to preserve and to enhance public recreational opportunities on the coast.[36] Implicit in the public's right to use the coast for recreational purposes is the right to gain access to the beaches.

The Coastal Act expressly provides that: "[O]ceanfront land suitable for recreational use shall be protected for recreational use and development . . . ."[37] The protection of recreational land is limited to the situation where it is found that present and future demand for recreational activities for which the property is suited is already adequately provided for in the area.[38] Coastal Act protection of lands suitable for recreational use does not stop on the beaches but continues into the "[u]pland areas necessary to support coastal recreational uses."[39] How this policy will be interpreted is uncertain.

One possible interpretation is prohibiting the development of coastal areas suitable for recreation in any way that fails to promote and to protect the recreational value of the land. To accomplish this goal the Coastal Commission, or some other appropriate entity, could restrict the development of these lands to commercial recreation development. Legal precedent can be found to support such restrictions. In *McCarthy v. City of Manhattan Beach*,[40] the California Supreme Court upheld a local zoning ordinance re-

36. CAL. PUB. RES. CODE § 30001.5 (West 1977).
37. *Id.* § 30221.
38. *Id.*
39. These areas "shall be reserved for such uses, where feasible." *Id.* § 30223.
40. 41 Cal. 2d 879, 264 P.2d 932 (1953).

stricting the use of the plaintiff's beachfront property to beach recreational activities. The ordinance restricted all building on the property other than the construction of lifeguard towers, open smooth curve fence, and small signs. Because the plaintiff was allowed to charge an admission fee to visitors, the supreme court recognized that he was not deprived of every economic use of the land.[41] Therefore, plaintiff's claimed economic loss was insufficient to invalidate the ordinance.[42] Regardless of precedent, if the Coastal Commission were to adopt a development restriction along the entire coastline similar to the one in *McCarthy*, numerous inverse condemnation suits would surely follow. In *HFH, Ltd. v. Superior Court*,[43] the California Supreme Court explicitly recognized that an action for inverse condemnation is proper where a land use regulation prohibits substantially all use of the land in question.[44]

It appears, therefore, that the Coastal Commission can go so far as to restrict the owner's use of his property to preserve its recreational nature. The only possible limitation on this power is that the regulation cannot prohibit substantially all use of the property. In light of the court's propensity to find that some reasonable use is available,[45] this limitation seems minimal.

This conclusion does not mean that land use regulation could be used to give the public the right to use private property. It has been found that where a zoning ordinance was enacted to allow actual public use of a landowner's property, an action for inverse condemnation was proper.[46] Therefore, although it is possible to

41. *Id.* at 892, 264 P.2d at 939.

42. "The fact that plaintiffs may suffer some financial detriment does not require invalidation of the zoning restriction, for 'every exercise of the police power is apt to affect adversely the property interest of somebody.'" *Id.* at 890, 264 P.2d at 938 (quoting Zahn v. Board of Pub. Works, 195 Cal. 497, 512, 234 P. 388, 394 (1925)).

43. 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975).

44. Regardless of this judicial recognition of the right to recover for inverse condemnation, this author is aware of no reported California appellate case upholding a claim of constitutionally compelled compensation as against a land use regulation. As one study has concluded, "[t]he 'myth' of the taking clause has always lured landowners to expect more from it than prior precedents really justify." F. BOSSELMAN, D. CALLIES, & J. BANTA, THE TAKING ISSUE 232 (1973).

45. McCarthy v. City of Manhattan Beach, 41 Cal. 2d 879, 264 P.2d 932 (1953).

46. Sneed v. County of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963). *See* HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365

preserve recreational areas through land use regulation, such regulation is not sufficient to create a public right to use these areas.

Coastal Act Mechanisms Providing Access

The Coastal Act provides a permit procedure for the protection and the enhancement of public access to and recreation in the coastal area. The permit procedure can be used in two ways to protect the public's interest in the coast. First, through the use of subdivision exactions, public accessways can be secured through new development. Second, the Coastal Commission can use the permit requirement as a holding mechanism to preserve for future acquisitions as open space.

Subdivision Exactions

New coastal development provides an apt occasion to use land use controls for the preservation and the acquisition of public beach access. This proposition is especially true in light of the Coastal Act's directive that new development "shall not interfere with the public's right of access to the sea."[47] Conditional approval of development plans in the preconstruction stage is the primary regulatory method employed by the Coastal Commission.[48] The requirement of commission approval of development plans provides the Coastal Commission with limited control over the developer. The Coastal Commission can use this control to obtain a public easement through any planned development which threatens to block access to the beach.[49] There have been few challenges to the Coastal Commission's authority to require a public access easement through new developments.[50] The question still remains, however, whether a requirement of dedicating property for public access to a beach should be considered a taking without compensation where the requirement is imposed as a condition precedent to obtaining a coastal-zone permit.

(1975), where the California Supreme Court recognized that this circumstance could properly give rise to inverse condemnation.

47. CAL. PUB. RES. CODE § 30211 (West 1977).

48. For a discussion of subdivision control, see Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964).

49. No local agency shall approve either the tentative or the final map of any subdivision fronting upon the coastline or shoreline which subdivision does not provide or have available reasonable public access by fee or easement from public highways to land below the ordinary high water mark on any ocean coastline or bay shoreline within or at a reasonable distance from the subdivision.

CAL. GOV'T CODE § 66478.11(a) (West Supp. 1976).

50. Apparently, most developers feel that the dedication of an accessway is a small price to pay for approval of their permit applications.

Subdivision controls, as exercises of the state's police power, must be reasonably related to the health, safety, and general welfare of the public.[51] Requiring public beach acccess is analogous to the requirement of park dedication. Park dedication has generally been upheld by the courts as noncompensable acquisitions by the local governing body.[52] Furthermore, a requirement that park lands or fees in lieu of land be dedicated to public use has been upheld as a requirement for approval.[53]

One writer has suggested that where subdivisions would block existing or potential shore access, a requirement that developers dedicate public easements would fit within the existing statutory framework.[54] The rationale is as follows:

> Requiring beach access is analogous to requiring streets of the width made necessary by a citywide traffic flow. While it is true that most of the demand for access comes from areas outside the subidivision, the existence of the subdivision aggravates the beach-access problem. First, it may cut off existing access to the beaches; second, even where no access previously existed, the new development will raise land values and create a pattern of land use that will make it more difficult and expensive to purchase beach easements in the future.[55]

Although this rationale seems pervasive where land that is to be used for access purposes is dedicated, it is doubtful whether the argument can be extended to the use of the shorefront itself. Where the public is attempting to obtain the use of the beach, the rational nexus between the exaction and the public need created by the development is difficult to establish. The development, in most cases, will not create a greater public need for beach areas because in areas other than where a pattern of previous public use can be shown, the area in question will have been used as private property. The public may, therefore, face a situation where access to the water is available through the new development, but the right to use the shoreline is restricted to the wet-sand area.

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51. *See* Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964).

52. 2 ASSOCIATION OF BAY AREA GOV'TS, HOW TO IMPLEMENT OPEN SPACE PLANS 23 (1973).

53. Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).

54. Note, *Public Access to Beaches*, 22 STAN. L. REV. 564, 568-69 (1970).

55. *Id.* at 571.

Holding Device

Only through a more radical use of the permit procedure might the Coastal Commission have the opportunity to preserve coastal recreation areas for public use. A possible solution is to use the permit procedure as a holding device to preserve temporarily the status quo of certain coastal property. To accomplish this solution, the Coastal Commission could temporarily deny any permit applications where the development would threaten recreational resources until local authorities develop a comprehensive plan for the region.

Support can be found for this proposition in *State v. Superior Court*.[56] In this case, a developer proposed a development for its property. The Coastal Commission denied the developer's request for a coastal permit. The developer subsequently filed an action asserting that the Coastal Commission had denied the permit so that "its land would 'remain undeveloped and devoted to, and held for, public use as open space.' "[57] The developer contended that the denial of the permit on this ground constituted a taking of its property. The California Supreme Court rejected this contention and noted that because the requirement for a permit was only a temporary measure, to be used until a coastal-zone plan could be adopted, the denial of a permit to the developer did not constitute inverse condemnation.[58] The court stated that "even more severe restrictions on the use of private property than those provided by the [Coastal] Act have been supported as a valid exercise of the police power pending the adoption of a comprehensive zoning ordinance."[59]

This California Supreme Court ruling is one of the strongest affirmations of the Coastal Commission's liberal use of its permit authority during the interim planning period.[60] By using this grant of authority, the Coastal Commission could restrict the development of coastal property suitable for recreational use until local governments are given the opportunity to determine how the land could best be used.[61] To date, however, it does not ap-

56. 12 Cal. 3d 237, 524 P.2d 1281, 115 Cal. Rptr. 497 (1974).

57. *Id.* at 252, 524 P.2d at 1291, 115 Cal. Rptr. at 507.

58. *Id.* at 253, 524 P.2d at 1292, 115 Cal. Rptr. at 508.

59. *Id.* at 255, 524 P.2d at 1292, 115 Cal. Rptr. at 508. *E.g.*, Miller v. Board of Pub. Works, 195 Cal. 477, 234 P. 381 (1925) (prohibiting construction of four-family dwelling in residential district until comprehensive zoning plan enacted); Hunter v. Adams, 180 Cal. App. 2d 511, 4 Cal. Rptr. 776 (1960) (moratorium on the issuance of building permits upheld).

60. *See also* CEEED v. California Coastal Zone Conservation Comm'n, 43 Cal. App. 3d 306, 118 Cal. Rptr. 315 (1974) (temporary restriction on the use of property pending the adoption of a comprehensive plan does not compel compensation).

61. In Schreffler v. State Coastal Comm'n, No. 74849 (Cal. Super. Ct. Apr. 23,

pear that the Coastal Commission has adopted such a broad view of its permit authority.

Preserving access and recreational beach areas through the permit procedure, whether by subdivision exaction or by open space control, has several advantages. It is inexpensive because it forces developers, rather than the general public, to pay the initial costs. Also, it does not require proof of prior public use. The primary disadvantage of the permit procedure is that it applies only to land facing immediate development. Because of this requirement, developers claim the method is too uncertain and too inequitable to property owners. Also, this limitation prevents the Coastal Commission from developing a planned series of accessways and recreational areas. Instead, the Coastal Commission is forced to work on a piecemeal basis until local governments complete local coastal programs including public access and public recreation components. Thus, the permit procedure is only a partial remedy. The inquiry must now turn to the remedies available outside the Coastal Act's boundaries.

THE COASTAL CONSERVANCY

While the Coastal Act was under consideration, need for the establishment of a new state agency with the power and the funding to implement the important policies of the Coastal Act was recognized. The California legislature thus enacted the State Coastal Conservancy Act (Conservancy Act)[62] contemporaneously with the Coastal Act. The Conservancy Act brought into existence the State Coastal Conservancy (Conservancy). The Conservancy is a new state agency, consisting of five members,[63] which is empowered to make various land acquisitions in the coastal area with the assistance of the State Department of Parks and Recreation (Department).

1974), the plaintiff brought a mandate action challenging the granting of a permit subject to the condition that no construction could take place for one year, during which public entities would have the opportunity to acquire the property for recreational use. The court upheld the permit and the condition, and the plaintiff did not appeal.

62. State Coastal Conservancy Act, ch. 1441, 1976 Cal. Stats. 6489 (codified at CAL. PUB. RES. CODE §§ 31000-31406 (West 1977)).

63. CAL. PUB. RES. CODE § 31100 (West 1977).

The primary function of the Conservancy is to augment the planning program established under the Coastal Act by acquiring a land bank that achieves certain specified goals. Among these goals are preservation of agricultural land,[64] implementation of coastal restoration projects,[65] implementation of coastal resource enhancement projects,[66] development of resource protection zones,[67] preservation of significant coastal resource areas,[68] and creation of a system of public accessways to the coast throughout the entire coastal zone.[69]

To begin implementation of these goals, the legislature has funded the Conservancy with an initial 1978 budget of ten million dollars.[70] Although this sum of money is insufficient to purchase fee interests in a significant amount of coastal resources, the Conservancy is empowered to acquire property interests other than in fee. Through the use of limited types of land acquisitions, such as the purchase of options or easements, the power of the Conservancy to effectuate coastal programs is dramatically increased.

One of the primary goals of the Conservancy Act is to provide a statewide system of public accessways to the coast.[71] To implement this policy, the Conservancy is empowered to provide funding "up to the total cost of the acquisition of interests in lands and the initial development of public accessways by the department."[72] With Conservancy funds the Department is entitled to acquire fee title or lesser interests in coastal lands and to develop and to maintain areas required for public access to coastal resources.[73] Once the Department has acquired an interest in an accessway, it must then search for the appropriate local public agency to accept responsibility for maintenance and for liability for the accessway.[74] After this is accomplished, the Department may then lease the accessway to the local agency.[75] The Conservancy Act does not appear, however, to require the local agency to accept responsibility for the accessway. In the event a local agency refuses to accept this responsibility, the power remains with the Department to develop and to maintain the accessway.

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64. *Id.* §§ 31150-31155.
65. *Id.* §§ 31200-31215.
66. *Id.* §§ 31251-31265.
67. *Id.* §§ 31300-31306.
68. *Id.* §§ 31350-31356.
69. *Id.* §§ 31400-31406.
70. STATE COASTAL REPORT, October, 1977, at 6.
71. CAL. PUB. RES. CODE § 31400 (West 1977).
72. *Id.* § 31400.2.
73. *Id.* § 31402.
74. *Id.* § 31404.
75. *Id.*

There are three practical benefits of obtaining public access through the use of the Conservancy Act. First, the Conservancy can use its funds to purchase and develop accessways for present public use.[76] When Conservancy funds are used, there is no need to delay the purchase of accessways until a development is proposed, as would be necessary with the permit procedure. The Conservancy thus has the advantage of being able aggressively to plan coastal access. Second, the Conservancy can use its funds to purchase limited interests in coastal lands as an interim measure to prevent development until additional funds are available to purchase and develop the accessway. Finally, the Conservancy Act protects the private landowner by assuring him just compensation for lands taken.

The Conservancy Act does not solve the access and recreation problem. First, the Conservancy funding is inadequate to create accessways along the entire coastline. This inadequacy is especially true because Conservancy funds are also to be used to implement other coastal policies. Futhermore, the Coastal Act only provides for the acquisition of access over private land: It makes no provision for providing the public with the use of private coastal land for recreational purposes.

With adequate funding and a creative use of its land acquisition powers, the Conservancy has the potential of becoming an important force in coastal land use regulation. However, until this potential is realized, the public must turn to the judiciary for support.

JUDICIAL REMEDIES

As is often the case with politically sensitive issues, the judiciary was the first to respond to the public demand for increased shoreline recreation areas. This response resulted in the application of existing real-property doctrines to the beach situation. The judiciary relied primarily upon the doctrines of implied dedica-

76. *Id.* § 31402.

tion, custom, and prescription.[77]

Implied Dedication

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."[78] For complete dedication, both the intention of the owner to offer land or some interest therein and acceptance by the public must exist. Both the offer and the acceptance may be either express or implied. The concept is probably best summarized as follows:

> Common law implied dedication comprises a system of judicially created doctrines governing the donation of land to public use. No formalities are necessary; conduct showing intent by the owner to dedicate land and an acceptance by the public completes the dedication. Both intent to dedicate and acceptance may be implied from public use. An owner's inaction may be taken as evidence of acquiescence in public use and thus of his intent to donate the land. The public use itself may be taken as evidence of acceptance.[79]

Once there has been a completed dedication, the public's rights cannot be lost through non-use or through adverse possession. As a general rule, the public normally takes only an easement by implied dedication, with the underlying fee remaining with the owner.[80]

Prior to the 1960's, cities made a number of unsuccessful attempts to apply the dedication concept to beach problems.[81] Although courts allowed dedication to acquire public interests in roadways, these early cases found that beaches were subject to an "open land limitation" presuming that public use was under a revocable license from the owner. In the 1960's, however, as the shortage of public beach space became increasingly troublesome,

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77. This discussion excludes the doctrine of public prescriptive rights in property because of the longstanding California rule that the public may not take prescriptive easements in land. People v. Sayig, 101 Cal. App. 2d 890, 226 P.2d 702 (1951). The Florida courts have used prescription in the beach situation. City of Daytona Beach v. Tona-Rama, Inc., 271 So. 2d 765 (Fla. Ct. App. 1972). For a discussion of prescription in the beach context, *see* Comment, *Easements: Judicial and Legislative Protection of the Public's Rights in Florida's Beaches*, 25 U. FLA. L. REV. 586 (1973).

78. 11 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 33.02 (3d ed. rev. 1977).

79. Note, *Public Access to Beaches*, 22 STAN. L. REV. 564, 573 (1970).

80. The holding in Washington Blvd. Beach Co. v. City of Los Angeles, 38 Cal. App. 2d 135, 100 P.2d 828 (1940), is an exception to this general rule: The court found dedication of a fee simple-title. However, this case involved evidence other than mere public use.

81. *E.g.*, City of Manhattan Beach v. Cortelyou, 10 Cal. 2d 653, 76 P.2d 483 (1938); F.A. Hihn Co. v. City of Santa Cruz, 170 Cal. 436, 150 P. 62 (1915).

dedication began to be viewed in a new light.[82]

In 1970, California saw its first successful implementation of the dedication doctrine to beach areas. In *Gion v. City of Santa Cruz*,[83] a consolidation of two cases, the Supreme Court of California applied the concept of dedication to the beach situation. In the first case, the plaintiff owned beach property which was both level and cliff-like at the edge of the sea. The land was unimproved and had been used by the public since 1900 to fish, swim, park, and picnic, as well as for viewing, "without any significant objection by the fee owners"[84] for several years. One prior owner testified that he posted private property signs, but they were quickly torn down or blown away.[85] After 1941, the City of Santa Cruz had taken an active interest in the property, improving it for public use. In the second consolidated case, plaintiffs, as representatives of the public, sought to enjoin the defendant landowner from blocking an unimproved road providing access to the beach. The beach and the road were on property owned by the defendant but had been used by the public "for at least 100 years."[86] Some of the owners of adjacent land had attempted to collect a toll for use of the road, but such efforts were sporadic and ineffectual. Defendant's grantors testified that they had encouraged the public to use the beach.[87] The California Supreme Court granted a recreational easement in both cases on the following ground:

> [C]ommon law dedication of property to the public can be proved either by showing acquiescence of the owner in use of the land under circumstances that negate the idea that the use is under a license or by establishing open and continuous use by the public for the prescriptive period. When dedication by acquiescence for a period of less than five years is claimed, the owner's actual consent to the dedication must be proved. . . . When, on the other hand, a litigant seeks to prove dedication by adverse use, the inquiry shifts from the intent and activities of the owner to those of the public.[88]

Because adverse public use was well established in both of these cases, the court was able to avoid the problem of dealing with the

82. Dedication was first successfully used in a "beach case" in Seaway Co. v. Attorney Gen., 375 S.W.2d 923 (Tex. Ct. App. 1964).
83. 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970).
84. *Id.* at 34, 465 P.2d at 53, 84 Cal. Rptr. at 165.
85. *Id.*
86. *Id.* at 36, 465 P.2d at 54, 84 Cal. Rptr. at 166.
87. *Id.* at 37, 465 P.2d at 55, 84 Cal. Rptr. at 167.
88. *Id.* at 38, 465 P.2d at 55-56, 84 Cal. Rptr. at 167-68.

owners' intent to dedicate. Finally, the *Gion* decision removed the "beach cases" from the restrictions of the "open lands limitation."[89]

Gion sparked a wave of law review commentaries[90] on this new expansion of implied dedication, most of which were critical.[91] One writer viewed the decision as a major alteration of California real property law.[92] The impact was purportedly "felt by the [California] Legislature, the bar, private landowners, the land title industry, and the public at large."[93]

Law review commentators were not the only ones responding to the decision. Private landowners were reported to be taking quick steps to prevent dedication of their property. The following is an example of steps taken:

> On the Palos Verdes peninsula in Los Angeles County, major land owners have recently erected a 7-foot high fence topped by three strands of barbed wire in order to keep the public from reaching the beach by crossing their property. It is believed that other owners in that area have dynamited paths leading to the water. In Orange County, one land owner has erected a large fence with cactus planted at its base to discourage barefoot access to the beach over his property. Land formerly used for parking and beach access in San Mateo County is being vigorously plowed to deter unauthorized users.[94]

The California legislature also took steps to protect private landowners by enacting statutes making it more difficult for the public to show dedication.[95] This legislative action did not, however, affect any dedication which had already taken place.

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89. We will not presume that owners of property today knowingly permit the general public to use their lands and grant a license to the public to do so. For a fee owner to negate a finding of intent to dedicate based on uninterrupted public use for more than five years, therefore, he must either affirmatively prove that he has granted the public a license to use his property or demonstrate that he has made a bona fide attempt to prevent public use.

Id. at 41, 465 P.2d at 57, 84 Cal. Rptr. at 169.

90. Berger, *Nice Guys Finish Last—At Least They Lose Their Property: Gion v. City of Santa Cruz*, 8 CAL. W.L. REV. 75 (1971); Shavelson, *Gion v. City of Santa Cruz: Where Do We Go From Here?*, 47 CAL. ST. B.J. 414 (1972); Note, *Implied Dedication in California: A Need for Legislative Reform*, 7 CAL. W.L. REV. 259 (1970); Note, *Public Access to Beaches*, 22 STAN. L. REV. 564 (1970); Comment, *Public or Private Ownership of Beaches: An Alternative to Implied Dedication*, 18 U.C.L.A. L. REV. 795 (1971).

91. Berger, *Nice Guys Finish Last—At Least They Lose Their Property: Gion v. City of Santa Cruz*, 8 CAL. W.L. REV. 75 (1971); Note, *Implied Dedication in California: A Need for Legislative Reform*, 7 CAL. W.L. REV. 259 (1970); Comment, *Public or Private Ownership of Beaches: An Alternative to Implied Dedication*, 18 U.C.L.A. L. REV. 795 (1971).

92. Shavelson, *Gion v. City of Santa Cruz: Where Do We Go From Here?*, 47 CAL. ST. B.J. 414 (1972).

93. *Id.* at 415.

94. Berger, *Nice Guys Finish Last—At Least They Lose Their Property: Gion v. City of Santa Cruz*, 8 CAL. W.L. REV. 75, 75 (1971).

95. *See* CAL. CIV. CODE § 1009 (West Supp. 1978).

The effect of *Gion* in the judicial arena apparently has been less than was originally anticipated. Only one appellate level beach case has been reported in California in the seven-year period since *Gion*.[96] Even at the trial level, the activity has been less than initially anticipated.

In the lone reported case, *County of Orange v. Chandler-Sherman Corp.*,[97] a California appellate court affirmed a lower court finding that a section of beach had not been dedicated. This case involved a beach in Orange County called Dana Strand. Dana Strand is a long, narrow, sandy beach, near the coastal highway and sheltered by steep cliffs. Defendant and its predecessors in interest owned both the bluffs and the beach. The record showed that prior to an undisclosed date in the 1930's there had been unrestricted use of the beach. From the 1930's until the early 1940's the beach was operated as a "somewhat tacky beach camp . . . , charging fees to some users although [its] operation could charitably be characterized as sloppy."[98] From 1946 to 1956, there was again comparatively unrestricted use of the beach, although the owner did make some ineffectual attempts to restrict the public. After 1956, the owner completely restricted public use.

During the years that use was unrestricted, the beach was used for "surfing, fishing, swimming, picnicking and sunbathing."[99] The use during this time, however, was limited to small numbers of people, rarely exceeding fifteen on the beach at any one time.

The court upheld a finding that no dedication to the public had taken place. The court found that while the use was of a long-term nature it was neither major nor substantial. The court did not find that only a limited and definable group of persons used the beach. Rather, it found that the use in terms of mere numbers was insufficient to constitute "use as a public recreational area."[100]

The court's decision appears to have placed a quantitative limit on the application of implied dedication. However, *Gion* did not deal in numbers. Instead, the *Gion* court required only a showing

96. County of Orange v. Chandler-Sherman Corp., 54 Cal. App. 3d 561, 126 Cal. Rptr. 765 (1976).
97. *Id.*
98. *Id.* at 565, 126 Cal. Rptr. at 768.
99. *Id.* at 566, 126 Cal. Rptr. at 768.
100. *Id.*

that the public had used the beach as a public area and that this use was by various groups of persons as opposed to use by a "limited and definable number of persons."[101] In *Gion* "the thing of significance is that whoever wanted to use the land did so . . . when they wished to do so without asking permission and without protest from the land owners."[102]

Although the *Chandler-Sherman* court did not find that use had been restricted to a "limited and definable number of persons," it did require an additional showing of substantial public use. If a showing of substantial public use is required in future "beach cases," it will have a chilling effect on those who are contemplating suits based on *Gion*. The problem of proving substantial use, especially in relatively isolated areas of the state, could be insurmountable. For the coast landowner, however, this decision may remove fears that "mere" public use for five years would be enough to show a dedication.

Other than the *Chandler-Sherman* case and the few isolated "beach cases" arising immediately after *Gion*,[103] the public has made very little use of implied dedication to obtain public beaches. A survey of county counsel and district attorneys for each of California's coastal counties indicates that no recent "beach cases" have been initiated by any of their offices.[104] In fact, the respondents to the survey revealed that their offices not only had not been involved in any recent implied dedication cases, but that to their knowledge no other public group has initiated any such case.

The only exception to this general lack of activity has been in Orange County. The Orange County Counsel's Office was responsible for the prosecution of the *Chandler-Sherman* case, and it has also recently been involved in two similar actions.[105] However, because the parties were able to settle "at a price favorable to the public," neither of these actions reached the trial stage.[106]

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101. 2 Cal. 3d at 39, 465 P.2d at 56, 84 Cal. Rptr. at 168.

102. *Id.* at 40, 465 P.2d at 56-57, 84 Cal. Rptr. at 168-69.

103. Comment, *Public or Private Ownership of Beaches: An Alternative to Implied Dedication*, 18 U.C.L.A. L. REV. 795, 799 n.28 (1971).

104. At the time of this writing responses had been received from the following offices: Monterey County, County Counsel and District Attorney; San Luis Obispo County, District Attorney; Ventura County, County Counsel; Marin County, County Counsel; Del Norte County, County Counsel; Santa Barbara County, County Counsel; Humboldt County, District Attorney; Sonoma County, County Counsel; Los Angeles County, District Attorney. These responses are on file with the *San Diego Law Review*.

105. Telephone interview with Arthur C. Wahlstedt, Jr., Deputy County Counsel, Orange County (Oct. 20, 1977).

106. *Id.*

Stated bluntly, the use of implied dedication allowed the county to coerce the sale of beach property at a price favorable to the public.

This coercive application of implied dedication could be its most effective application. The threat of litigation could provide the impetus for public representatives and landowners to reach terms on reasonable prices for the purchase of public recreational areas. If used equitably, this approach could allow the public to obtain recreational beaches at an advantageous price while at the same time providing the private landowner with some, although admittedly not complete, compensation for his loss. However, the possibility exists that the public will use implied dedication to extort property from the coastal landowner at an unreasonable price, but this temptation should be tempered by the desire of the public representative to avoid timely and expensive litigation over the property. Therefore, the desire to avoid the litigation process should encourage all parties involved to reach an equitable agreement.

In retrospect, the seven years that have elapsed since the landmark *Gion* decision reveal that implied dedication has only limited success in providing the public with greater coastal recreational opportunities. The cost of litigating numerous tract-by-tract suits along the coastline, coupled with the unwillingness or the inability of existing public agencies to initiate these suits, has limited the practical usefulness of the doctrine.

Custom

The most expansive judicial approach utilized to provide public access to beaches is the ancient doctrine of custom. Custom is defined as "usage or practice of the people which, by common adoption and acquiescence, and by long and invarying habit, has become compulsory, and has acquired the force of a law with respect to the place or subject-matter to which it relates."[107] Only two states, Oregon[108] and Hawaii,[109] have used the custom doctrine to afford the public rights in beach property.

107. BLACK'S LAW DICTIONARY 461 (4th ed. rev. 1968).
108. State *ex rel.* Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969).
109. *In re* Ashford, 50 Hawaii 314, 440 P.2d 76 (1968).

An Oregon case, *State ex rel. Thornton v. Hay*,[110] involved a suit by the state against a motel owner to prevent the defendant from fencing off, for use by motel patrons, part of the beach to which he held title. The Oregon Supreme Court found:

> The dry-sand area . . . has been enjoyed by the general public as a recreational adjunct of the wet-sand or foreshore area since the beginning of the state's political history. . . . Thus, from the time of the earliest settlement to the present day, the general public has assumed that the dry-sand area was a part of the public beach, and the public has used the dry-sand area for picnics, gathering wood, building warming fires, and generally as a headquarters from which to supervise children or to range out over the foreshore as the tides advance and recede.[111]

By adopting the custom approach, the court was able to avoid tract-by-tract litigation by applying a uniform rule to all Oregon's beaches.

Although uniform treatment of beaches is the chief advantage of custom, a problem exists with custom's application to California's beaches. Custom is limited to those lands used by the public from "time immemorial." This creates a difficult problem of proof. It seems safe to assume that prior to achieving statehood California's history of beach use was similar to Oregon's. During this early period, it is likely that both the natives and the early settlers made unrestricted use of the beaches. The difficulty lies in demonstrating a similarity of public usage since California became a state. During this time, the California coastline has experienced more extensive development than has occurred in Oregon. Because of the more extensive development, it could be difficult to demonstrate that the general public has continually assumed that the dry-sand area was a part of the public beach.

It may be possible, however, to demonstrate that the circumstances required to show a custom[112] are present along certain definable sections of California's coastline. For example, it could be possible to prove that the necessary prerequisites to establish a custom are present as to a particular community or section of beach. A court then could adopt custom to preserve public rights in that particular section of the coast.[113] Used in this way, custom

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110. 254 Or. 584, 462 P.2d 671 (1969).

111. *Id.* at 588, 462 P.2d at 673.

112. The circumstances necessary to show custom are as follows:
(1) it must be ancient,
(2) the right must be exercised without interruption,
(3) use must be reasonable and peaceable,
(4) the boundaries of use must be certain, and,
(5) the custom must be obligatory and not inconsistent with other customs or laws.

D. DUCSIK, SHORELINE FOR THE PUBLIC 111 n.14 (1974).

113. This author is aware of no California decision that discusses the use of the custom doctrine in California.

would avoid the necessity of a tract-by-tract adjudication, at least concerning that section of coastline.

The application of custom to a limited geographic area may be more in keeping with the doctrine's ancient heritage. Originally, a customary right arose in favor of a community's public and was limited to a small geographic area.[114] It was only with the Oregon decision that custom was applied on a larger scale.[115] Other courts need not restrict the use of custom to statewide application. Rather, a court faced with proper proof of custom in a limited area should be free to employ the doctrine to protect the public rights in that area.

Both implied dedication and custom, at least superficially, have great potential for preserving existing opportunities for public use of the shoreline. However, the full potential of neither remedy has been realized. Furthermore, a major problem with using these judicial remedies for recreational planning is that they are not really planning at all. The case-by-case adjudication of each stretch of shoreline causes much uncertainty.

CONCLUSION

The Coastal Act provides what may be the last opportunity to preserve the public's rights to enjoy California's coastline. Through diligent planning and control of coastal development, the remaining parcels of open coast can be preserved for public use. At the same time, to meet the ever-increasing demand on California's beaches, the state must take an active role in enforcing rights that have developed through public use. More importantly, a new attitude toward limited resources must be developed. Land, especially limited coastal land, must be considered a resource rather than a mere commodity to be bought and sold. Otherwise, all efforts to preserve limited resources are doomed to failure.

RICHARD H. ZIMMERMAN

114. 6 R. POWELL, THE LAW OF REAL PROPERTY § 934, at 362.5 n.5 (1968).

115. "Most of the customary rights recorded in English cases are local in scope. . . . But it does not follow that a custom, established in fact, cannot have regional application and be enjoyed by a larger public than the inhabitants of a single village." State *ex rel.* Thornton v. Hay, 254 Or. 584, 598 n.6, 462 P.2d 671, 678 n.6 (1969).