



University of Baltimore Law Forum

Volume 19
Number 1 *Fall*, 1988

Article 7

1988

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Recommended Citation

Cropper, Mark S. (1988) "Ocean City Beach Replenishment Conflict," *University of Baltimore Law Forum*: Vol. 19 : No. 1 , Article 7.
Available at: <http://scholarworks.law.ubalt.edu/lf/vol19/iss1/7>

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Ocean City Beach Replenishment Conflict

By Mark S. Cropper

Ocean City, Maryland, is a coastal resort community located on a naturally eroding barrier island. During peak weekends, over 300,000 vacationers and tourists visit Ocean City.¹ In one year (mid 1978 - mid 1979) these visitors provided \$170 million in direct expenditures which had an indirect economic impact on the State and local jurisdictions of over \$300 million.² The major attraction of Ocean City is the coastal beach. Because of the unique recreational, aesthetic, and economic opportunities it provides to all Marylanders, the beach is regarded as a public resource. Thus, it is in the State's best interest to ensure its continued existence.

THE NATURE OF THE PROBLEM

Barrier islands, such as Ocean City, are a product of gradually rising sea levels, abundant sand supply, and constructive wave action. The destruction of such islands is due primarily to storms and their resultant erosive force. The storms gradually erode sand from these islands. Normal wave action takes the sand from nearshore areas and washes it back into the beach. This creates a natural balance between erosion and replenishment. However, in Ocean City, these natural processes have been interrupted by extensive development.³ Consequently, there has been a gradual but constant erosion of sand and a subsequent loss of beach surface.

Sand dunes provide the final buffer to the wave action generated by storms. However, development along the island, the passage of bathers to and from the

beach, and storm erosion have all contributed to the loss of dunes along Maryland's coastal beach.⁴ As a result, Ocean City has been left without any natural protection against storms. The reported rates of erosion range from 1.7 - 2.1 feet per year, with a maximum of 3.7 feet per year.⁵ Thus, if a "100-year frequency storm" would occur, the damage to this coastal community would be devastating.

Although erosion of barrier islands is a natural process, there is existing technology to control beach loss and protect against storm damage. Maryland's coastal beach is a unique and valuable public resource. There is a need to protect this resource not only for the public but for the private development that has occurred there. Thus, it is in the State's best interest to consider a program to reduce or control the beach erosion, which the State has, in fact, begun.

THE CONFLICT

There is no question as to the need for beach replenishment in Ocean City. However, in order for such a project to occur, private landowners of beachfront property must allow the necessary agencies to have access on their property. This intrusion upon private property for purposes that will serve the public is the focus of this article.

To better understand why this conflict would arise, it is necessary to describe what beach replenishment is and how it works. The "Beach Replenishment and Hurricane Protection Project" (hereinafter

to be referred to as the "Project") is performed in basically four steps. The first phase, now completed, involved survey work, design, permits, obtaining necessary rights of way, and construction contracting activities. Second, the contractor "borrows" sand from offshore to build a wide, gradually rising beach and level berm. This phase continued throughout the summer season of 1988. More than 2 million cubic yards of sand have been moved to create the new beach. Phase three consists of Congressional action to approve and fund the Corps of Engineers' "Beach Hurricane Protection Plan" design. The fourth step consists of the Corps of Engineers actually building the hurricane protection portion of the project. The entire project should be completed by 1991.

The conflict lies in the first phase of the Project. Various property owners have refused to provide a "right of way" easement onto their properties. This "right of way" is absolutely necessary before the Project may proceed because of a condition of the federal and state funding. In order for the funding to occur, the public must have an appropriate property interest in the land to be improved. Md. Nat. Res. Code Ann. § 8-1105.2(H)(4)(Supp. 1987).

The Project involves the federal, state, and local governments, and therefore, an Ocean Beach Replenishment Fund was created under Chapter 606 of the 1986 Laws of Maryland. Md. Nat. Res. Code Ann. § 8-1103 (Supp. 1987). Subsection (b) of § 8-1103 authorizes the Board of Public Works, upon recommendation of the

Secretary of Natural Resources, to expend monies appropriated from the fund, directly or through loans or grants to local jurisdictions, for the protection of Maryland's ocean beaches. The Department of Natural Resources, an agency of the State, has been directed and authorized by the General Assembly to design and manage the Beach Replenishment Project in partnership with the Mayor and City Council of Ocean City, and the Commissioners of Worcester County, Maryland. Md. Nat. Res. Code Ann. § 8-1103 (Supp. 1987). Pursuant to § 8-1103(g), all lands developed as part of the Project will be natural resources of the State, vested in the Department of Natural Resources. Pursuant to an agreement of January 8, 1987, between the State Board of Public Works, the Mayor and City Council of Ocean City, and the County Commissioners of Worcester County, lands within the project boundaries presently held by the city and county were conveyed at no cost to the state for the use of the Department of Natural Resources. Md. Nat. Res. Code Ann. § 8-1103(b)(4).

Further, a "Transfer Development Program" was established whereby the state would increase the value of the private landowner's property by assigning development rights to that property which can be sold as real estate. These rights would be assigned to that portion of the property west of the Project line. In exchange, the law would require that, since property east of the Project line would no longer have development value, ownership of the property must be transferred to either the Town of Ocean City or the State of Maryland. The property owners disputing the Project, who had paid full value for their oceanfront properties, did not approve of this idea. They strongly desired to maintain full ownership of their entire properties.

Although the state would accept fee simple conveyances at a property owner's request, it has been determined that a perpetual easement program would be more acceptable to the property owners. Various owners have refused this option as well. However, the present program is not the first time that affected landowners have been requested to donate perpetual easements to the state for beach repair purposes. In 1962, many of the oceanfront property owners granted to the County Commissioners of Worcester County perpetual easements across the then existing sand dune barrier for constructing and maintaining sand fences or other protecting devices.⁶ The 1962 easement granted broad authority to Worcester County to utilize all of the grantor's lot if necessary,

and to enlarge the dune barrier to protect property other than the grantor's. At about the same time as the granting of the 1962 easements, certain Dune and Beach Restoration Agreements were entered into.⁷ These agreements allowed the Corps of Engineers and Worcester County to construct and maintain sand barrier dunes, sand fences, and frontal beaches. The agreements restricted the height of the dune to twelve feet above mean low water and required that the dune be sited along a line approximately 150 feet west of mean high water. As discussed later, the state is arguing that the 1962 easements authorize the 1988 Beach Replenishment Program.

The present Project's requirements differ from the 1962 Easements and Dune Agreements as follows: (1) the Project consists of both a beach replenishment phase and a dune restoration phase; (2) the Project requires non-penetrable fencing to be installed at the base of each side of the dune; (3) the Project requires the construction of stairwells for access to the beach; (4) in order to provide 100-year storm protection, the Project calls for the construction of a dune approximately 265 feet from mean high water, at a height of 17.5 feet above mean low water; and (5) easements granted pursuant to the Project will provide access only to that portion of the property east of the building line.

"The right to use private property as one desires is an ancient and sacred right. . ."

The various property owners have refused to transfer fee simple ownership to the state of the portions of their property necessary for the beach replenishment, or to convey perpetual easements to the state. Therefore, the State of Maryland Department of Natural Resources, the County Commissioners of Worcester County, Maryland, and the Mayor and City Council of Ocean City, Maryland, have joined as party plaintiffs against the various property owners for a declaration establishing the plaintiffs' rights under the 1962 Easements and the 1962 Dune and Beach Restoration Agreements. They also have requested declaration establishing the location of mean high water on the defendants' property (which would, as explained later, establish the boundary between private

and state land) and a declaration that the public has acquired a right of use by prescription over the various properties. Only the issue pertaining to the "easement by prescription" will be addressed here.

EASEMENT BY PRESCRIPTION

The property owners who refuse to provide title to or an easement to their property to the designated agencies in control of the Project have stated several reasons for their actions. Their reasons are interference with their use and enjoyment of the property and the desire for monetary compensation for the interference. The right to use private property as one desires is an ancient and sacred right supported by the federal and state constitutions. These same constitutions also provide that property may not be taken for public use without just compensation.⁸ However, a growing controversy exists between owners of beachfront property and the right of the public to that same property for purposes of recreation or beach replenishment.

Several theories which may provide the public with a right to acquire title to or an easement to privately owned property are eminent domain, implied dedication, custom, and easement by prescription. There are other procedures by which such a right may be vested in the public; however, these four theories are frequently used in the more recent cases. For the reasons which follow, the easement by prescription theory seems to be the most appropriate in cases involving beaches.

It is well supported that "the sovereign may not take private property for public use without payment of just compensation to the property owners."⁹ The United States Supreme Court has determined just compensation to be the "full and perfect equivalent in money of the property taken from the landowner."¹⁰ This compensation is merely an "indemnity" for the loss caused by the taking and is intended to place the landowner in as good a position as if no taking had ever occurred.¹¹ This is eminent domain. In the present Ocean City Project, the federal, state and local agencies determined that no monetary compensation would be awarded to any property owner. If these agencies were required to so compensate the property owners and also to finance the Project, the Project would not take place. Therefore, "eminent domain" would not be the appropriate theory on which to address the dilemma.

It should be noted that "taking" may occur in many forms, including the interference with property as a physical inva-

sion by the government.¹² However, there is a difference between a temporary and permanent invasion which may determine whether a taking has actually occurred. Where a physical occupation of property is authorized by the government and it does not have an excessive economic impact upon the landowner's aggregate property rights, no taking occurs.¹³ This type of taking occurs most often in circumstances of temporary invasions. In reference to the Ocean City Project, the government will be required to temporarily allow machinery to invade the properties for the purposes of reconstructing the beach. The machines will be removed; however, there will be permanently constructed fencing on the properties. Though this may satisfy one element necessary for a taking, this fencing has no excessive economic impact upon the landowners. Any controlling agency of a project involving private property must be careful not to act in a manner that would constitute such a taking¹⁴ (e.g., removing soil from the property). If this were to occur, the agency may be required to compensate the particular property owners, whether or not a taking was intended by those agencies.

The use of "implied dedication" is familiar to cases involving the public's right to privately owned beaches. An implied dedication occurs by operation of law, from the acts of the property owner. It may exist without any express grant or it may be evidenced by a writing. An implied dedication is not required to be in any specific form of words, or, oral or written. It is not founded on a grant, nor does it necessarily presuppose one. However, it is founded on the doctrine of equitable estoppel.¹⁵ There need only be conduct showing an intent by the owner to dedicate the land and an acceptance by the public to complete the dedication.¹⁶ Both of these elements may be implied from public use.¹⁷ Likewise, an owner's omission to act may constitute acquiescence to the public use and thus an intent to donate the land may be implied.¹⁸ One reason why this method is also inappropriate for the Ocean City Project is because the key element of implied dedication is expression of dedication to public use by either the words, acts, or acquiescence of the landowner.¹⁹ Landowners may easily overcome this element by taking positive action to exclude the public from the land. Fences could be built and signs could be posted showing an intention to prevent access to the beach. This action would be very easy for the landowners, but neither the public nor the courts want to encourage private owners of beachfront property to take such action.

An impressive argument can be made supporting a claim of implied dedication based on the language employed in the "1962 Easements" and the "1962 Dune and Beach Restoration Agreement." These agreements can be construed by some as an intent on the part of these or previous landowners to convey the property subject to the "Easement" and "Restoration" to the public. The 1962 Easements granted to the county provide that there is "a perpetual easement across the aforesaid property for the purpose of constructing, reconstructing, and maintaining a sand dune barrier (to be constructed or reconstructed originally by the Corps of Engineers of the U.S. Army) for the protection of our property, the other property in this vicinity, and the public generally."²⁰ The easements also granted the

further right to construct and maintain across the property sand fences or such other protective devices as may be necessary, it being understood and agreed that the County Commissioners of Worcester County, their agents, employees, successors and assigns are vested with all rights, powers and authority necessary for the construction, reconstruction, repair and maintenance of said dune barrier, sand fences or other protective devices, including the right to enlarge said dune barrier if it is subsequently determined that such action is necessary for the protection of the property.²¹

*"For a right to be
acquired through
'custom,' it must
have continued from
time
immemorial..."*

The "1962 Dune and Beach Restoration Agreement" permitted the County and the Corps a right to enter upon the landowner's respective properties for these same reasons.²² The public used the aforementioned property and the State accepted the responsibility for rebuilding it.

It can be inferred from these positive actions between the landowners and the state that the public has accepted an implied dedication of this property. This same argument was made in *City of Miami Beach v. Miami Beach Improvement Co.*²³ In *Miami Beach*, an "implied dedication" was not found in reference to the controversial property. There, the deeds and plats stated that the "beach was reserved for the public."²⁴ The particular piece of land in controversy was specifically defined as the "Ocean Front Strip."²⁵ Had the owner intended to specifically dedicate the "Ocean Front Strip" to the public, it should have been so described in the deed. Therefore, in *Miami Beach*, had the language in the deeds and plats been slightly different, a finding of implied dedication could have been made. The courts require a clear and unequivocal manifestation of an intent to dedicate on the part of the owner before a "dedication" will be implied.²⁶

A third judicial remedy is that of custom. The law of custom was developed in England where citizens were given the right to use private land.²⁷ For a right to be acquired through custom, it must "have continued from time immemorial, without interruption, and as a right; it must be certain as to the place and as to the persons; and it must be certain and reasonable as to the subject matter or rights created."²⁸ Only three states appear to have adopted the custom doctrine when affording the public rights in beach property: Oregon, Florida and Hawaii.²⁹ The Court of Appeals of Maryland specifically declined to rely on this rule in *Department of Natural Resources v. Mayor of Ocean City*.³⁰ There, the court determined that the inability of the claimant to prove a right to venture upon the property of the landowner for more than six years, or to prove the certainty of what property that right was vested in, left the claimant without a claim based on custom. Likewise, the rule is still not appropriate because the right must have continued from "time immemorial" as to a certain place. Because the beach is ever changing and the persons owning and using the property are also constantly changing, this theory is just not applicable to the present circumstances.

As a fourth theory, the claimants in Ocean City have alleged that a right is vested in the private properties through an "easement by prescription." There are several reasons why this is the most appropriate theory for the claimants to use. First, the holder of an easement by prescription does not have to pay compensation to the property owner for the easement. Holders of an easement also

require only the right of use, not a fee simple title to the property.³¹ Since the owner retains all rights compatible with the exercise of the easement, the owner is not divested of title to the property. Also, these easements allow for public enjoyment of the beaches, which is more compatible with private ownership in adjoining uplands. This allows for the private development of the upland properties while the beaches can be used by residents, guests, and all of the public.

Essentially, to establish an easement by prescription the user must establish the easement to be open, notorious, exclusive, continuous, and adverse.³² The burden of establishing this use is by a preponderance of the evidence.³³ In order for a showing that the public has a right of easement through prescription in ocean beaches, the following elements must be proven: (1) that the right is a limited one; (2) that there are reasons for recognizing the use as adverse or amounting to a claim of right; and (3) that these reasons offer principles for distinguishing other public uses of lands that are not apt for public prescription.³⁴ The claimants argue that the portions of the landowners' properties which are within the Project area have been used by members of the public and by public agencies without interruption for more than 20 years. Such use has included picnicking, sunbathing, strolling, and fishing. The city has also used government owned machines and employees to clean these properties during this same period of time. They also argue that the city has made repairs to the beach without permission of the landowners for this period. These actions are considered to be open and continuous.

There are some general rules which should be considered when determining whether an easement by prescription exists. The easement becomes a perpetual right to use the land of another.³⁵ The effect of the easement is to block other uses of the land to the extent that they interfere with the use that is the subject of the easement.³⁶ However, when the public uses beachfront property, its rights in the beach should not rise higher than its rights in the foreshore and the sea.³⁷ The public already owns the adjacent foreshore (the continuous strip of land between the dry sand beaches and the ocean which is defined by the width of the lines of mean high tide and mean low tide).³⁸ This "foreshore" is basically held in trust by the sovereign for the benefit of the public.³⁹ The "sea" is considered the area seaward of mean low tide.⁴⁰ Thus, the only beach area not owned by the state in public trust is the "dry sand beach" which is

the area from the mean high tide to the vegetation line.⁴¹

Although the claimants make a positive argument in support of an easement by prescription, it still may not exist. The claimant must satisfy all of the elements as described above. The one element which often creates hardship for the claimant is "adversity." The use is adverse only if not "accompanied by any recognition, in express terms or by implication, of a right in the landowner to stop such use now or at some time in the future."⁴² This element may be proven by evidence that the use was under a "claim of right," or it may be presumed from proof of a prima facie case of open and continuous use for the appropriate statutory period (20 years) in the absence of contrary evidence.⁴³ Thus, the use must be inconsistent with the owner's use and enjoyment of his lands and must be such that the owner has a right to legal action to stop it, such as an action for trespass or ejectment. Therefore, the landowner may rebut this presumption with contrary evidence of permissive use, either express or implied.

"The courts are very protective of the public's right to use beaches."

Beaches are unique because their use by the public is usually the same as that of the landowner. The pleasures which an oceanfront beach may provide are experienced by both the public and the landowner at the same time. Therefore, it can be argued that the use by the public is not adverse to that of the owners. The owners in Ocean City have allowed members of the public to use the beaches while maintaining ownership of the properties. If the use is with the owner's consent, it is not adverse. These same facts would also rebut an argument of "exclusive possession," which is another element of prescription. Not only is the use shared with the owners, but it is shared with the public at large. Consequently, no easement by prescription exists.

This same issue was addressed in *Department of Natural Resources v. Mayor of Ocean City*.⁴⁴ The owner of land which was lying generally to the rear of an oceanfront tract brought an action to enjoin the construction of a condominium on that property. The state intervened as party

plaintiff. The court rejected the contention that the public had acquired an easement by prescription to the dry sand area tract between the mean high-water mark and the vegetation line.⁴⁵ This was because no evidence of interference by the public was proven prior to 1962. Therefore, the statutory requirement of "continuous and uninterrupted adverse use by the public for a period of twenty years" could not be satisfied.⁴⁶ However, the court held that a prescriptive easement would be found where the necessary facts were available. There was also controversy over the changing topography of the beach. The "use" of the public must be on a particular tract of land. If that tract is ever changing due to the natural erosion and building of the beach, the commencement of the statutory period changes as well.

The courts are very protective of the public's right to use beaches. Where a right can be found, the courts will usually uphold it. However, the courts are also concerned with the right of private property owners to use their land as desired, especially where development rights are concerned. Thus, if the public is attempting to acquire an easement by prescription in private property, and such a right will interfere with the owner's development rights, the courts must decide which rights are to take precedence. Though some courts have confronted this issue, this dilemma does not exist with the present Ocean City Beach Replenishment Project. The Project was designed in a manner that would not conflict with the property owner's development rights. The Project line begins at the farthest point of where private landowners may develop their properties.⁴⁷ Therefore, the reservation of any court to grant a prescriptive easement does not include a concern for denying these property owners their development rights. If these rights were to be infringed upon, the courts must acquire the easement through eminent domain.

CONCLUSION

Oceanfront beaches are a vital resource that few people are willing to surrender. The public has a vested right to use these beaches for swimming, sunbathing, fishing, and many other recreational activities. The private owners of these properties also have a vested right for these same reasons. Yet, the landowners have a financial interest in the property that must be appreciated and protected. Though beaches are unique due to their scarcity and the pleasures they provide, they still may be private property with the same federal and state constitutional protection

as any other private property.

When a controversy occurs between private landowners and the public, it is best to compromise and attempt to satisfy all interests, but this is usually easier said than done. Therefore, a legal procedure must be found to resolve the dispute. Because of the various factors which must be considered, such as financing, constitutionally protected property rights, intentions of the parties, and governmental intervention, the most appropriate legal claim to the Ocean City properties appears to be through an easement by prescription. There are valid, reasonable, and fair arguments to be made for support of such an easement; however, as previously discussed, they are refutable. Various courts have addressed this issue and have based claims on prescriptive easements. Because the law requires a case-by-case analysis for determining such easements, no strict rule applies. The State of Maryland is comprised of a substantial amount of beachfront properties. The citizens who enjoy the pleasures provided by these beaches can only hope that this controversy in Ocean City will be resolved for the benefit of all.

NOTES

¹ Harry Hughes, Governor of the State of Maryland; Ocean City Beach Replenishment, H.B. 472/ S.B. 272; Report to the House Ways and Means Comm., House Environmental Matters Comm., Senate Budget and Taxation Comm. of 1986, at 1 (1986).

² *Id.*

³ *Id.* at 2.

⁴ *Id.*

⁵ *Id.* at 3.

⁶ Deed of Easement dated April 5, 1962, by and between Wm. Paul Pepper and Dorothy W. Pepper and the County Commissioners of Worcester County, Md., and recorded among the Land Records of Worcester County, Md., at Liber F.W.H. No. 164, Folios 430 and 431.

⁷ Dune and Beach Restoration Agreement dated July 20, 1962, by and between the County Commissioners of Worcester County and Elmer H. Garrett and Mary R. Garrett, his wife, and recorded among the Land Records of Worcester County, Maryland at Liber F.W.H. No. 164, Folios 447-451.

⁸ *Dodson v. Anne Arundel County*, 294 Md. 490, 451 A.2d 317 (1982).

⁹ *Id.* at 494, 451 A.2d at 320.

¹⁰ *United States v. Miller*, 317 U.S. 369, 373, *reh'g denied*, 318 U.S. 798 (1943).

¹¹ *Dodson*, at 494, 451 A.2d at 320.

¹² *Keystone Bituminous Coal Assoc. v.*

DeBenedictis, _____ U.S. _____, 107 S. Ct. 1232, 1244 n.18 (1987).

¹³ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982).

¹⁴ *Id.*

¹⁵ Comment, *Easements: Judicial and Legislative Protection of the Public's Right in Florida's Beaches*, 25 Univ. of Fla. L. Rev. 586, 589 (1973).

¹⁶ Note, *Public Access to Beaches*, 22 Stan. L. Rev. 546, 573 (1970).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Comment, *supra* note 15, at 590.

²⁰ Deed of Easement, *supra* note 6.

²¹ *Id.* at 1.

²² Dune and Beach Restoration Agreement, *supra* note 7.

²³ *City of Miami Beach v. Miami Beach Improvement Co.*, 153 Fla. 107, 14 So.2d 172 (1943).

²⁴ *Id.* at _____, 14 So.2d at 177.

²⁵ *Id.*

²⁶ *Department of Natural Resources v. Mayor of Ocean City*, 274 Md. 1, 8, 332 A.2d 630, 635 (1975).

²⁷ Comment, *supra* note 15, at 591.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Department*, 274 Md. 1, 332 A.2d 630.

³¹ Note, *Public Access*, *supra* note 16, at 567.

³² *Chaconas v. Meyers*, 465 A.2d 379, 381 (D.C. App. 1983).

³³ *Id.* at 382.

³⁴ Degnan, *Public's Right in Ocean Beaches: A Theory of Prescription*, 24 Syracuse L. Rev. 935, 955 (1973).

³⁵ Degnan, *supra* note 32, at 956.

³⁶ *Id.* at 941.

³⁷ *Id.* at 956.

³⁸ *Id.*

³⁹ *Id.* at 968.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Chaconas*, 465 A.2d at 382.

⁴³ *Id.*

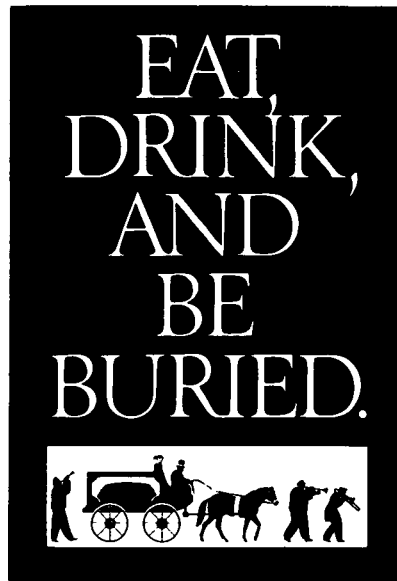
⁴⁴ 274 Md. 1, 332 A.2d 630.

⁴⁵ *Id.* at 8, 332 A.2d at 635. This is the same property at issue in the Ocean City Beach Replenishment Project.

⁴⁶ *Department of Natural Resources v. Cropper*, 274 Md. 25, 332 A.2d 644 (1975).

⁴⁶ Md. Nat. Res. Code Ann. § 8-1101 (Supp. 1975).

⁴⁷ Governor's Report, *supra* note 1.



Go ahead. Live it up while you can.

Eat anything and everything you want, from those processed meats to fatty dairy products to that extra measure of salt. But do it soon. Because poor eating habits can lead to high blood cholesterol, which can result in clogged arteries, a damaged heart, and an early death. The American Heart Association urges you to eat sensibly. Avoid food high in fat, salt and cholesterol. Avoid eating too much. It could keep you from an early grave and let you live it up a little longer.



American Heart Association
WE'RE FIGHTING FOR YOUR LIFE

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