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AN ARGUMENT TO THE STATE OF MAINE, THE TOWN OF WELLS, AND OTHER MAINE TOWNS SIMILARLY SITUATED: BUY THE FORESHORE—NOW

Orlando E. Delogu*

I. INTRODUCTION**

This paper has its roots in the finality of what have come to be called the Moody Beach decisions.¹ In the last of these two cases,

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1. *Bell v. Town of Wells*, 510 A.2d 509 (Me. 1986) [hereinafter *Bell I*] (disposing of a number of procedural aspects of the case); *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989) [hereinafter *Bell II*] (construing private property and public use rights in the intertidal zone).

The original proceeding, a quiet title action begun in 1984, was brought by forty-five shorefront property owners in the town of Wells. As owners of properties that fronted on Moody Beach, they sought a declaration of their property rights and an injunction limiting the use the public could make of the adjoining beach. (During the course of these proceedings seventeen parties were dismissed or withdrew. The remaining twenty-eight were appellees in *Bell II*.)

The original proceeding was dismissed by the Superior Court upon motion by the town and the State asserting that the action was barred by the doctrine of sovereign immunity. The plaintiffs appealed, and in the *Bell I* decision Maine's highest court held that while the state was not an indispensable party to the suit, it could intervene on behalf of the public; that the doctrine of sovereign immunity did not apply; and that a quiet title action was an appropriate vehicle for delineation of private and public rights in the intertidal zone. The case was remanded for trial.

In 1987, after a four-week trial, the Superior Court held that, pursuant to the Colonial Ordinance of 1641-1647, the shorefront property owners held the intertidal zone in fee subject only to the public's right to fish, fowl, and navigate. *Bell v. Town of Wells*, CV-84-125 (Me. Super. Ct., Yor. Cty., Sept. 14, 1987) (Brodrick, J.). The court held that the public had acquired no additional rights by prescription or custom and declared that the Maine Legislature's 1986 enactment aimed at expanding public rights in the foreshore, the Public Trust in Intertidal Land Act, ME. REV. STAT. ANN. tit. 12, §§ 571-573 (West Supp. 1988), was unconstitutional. The Superior Court decision was appealed by the Town of Wells, which was joined by the State of Maine.

In 1989, Maine's highest court handed down *Bell II* and by a 4-3 vote affirmed the Superior Court on all points. In its holding, the Law Court ignored arguments raised by amici predicated on the public trust doctrine and past and recent U.S. Supreme Court cases like *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988).

See also Alison Rieser, *Public Trust, Public Use, and Just Compensation*, 42 ME. L. REV. 5 (1990); Orlando Delogu, *Intellectual Indifference—Intellectual Dishonesty:*

Maine's Supreme Judicial Court, sitting as the Law Court, held that the public's right to use the intertidal zone² was limited to those uses and activities spelled out in the Colonial Ordinance of 1641-1647:

We agree with the Superior Court's declaration of the state of the legal title to Moody Beach. Long and firmly established rules of property law dictate that the plaintiff oceanfront owners at Moody Beach hold title in fee to the intertidal land subject to an easement . . . permitting public use only for *fishing, fowling, and navigation*³

This definition of public use rights in Maine's intertidal zone is unfortunately narrow. The definition is derived from a line of Massachusetts cases that the Maine court felt bound to follow.⁴ Maine, they reasoned, was formed in 1820 out of territory that was formerly a part of Massachusetts.⁵ Thus, the law and legal precedents of the latter arising before 1820, including the Colonial Ordinance, are fully received into Maine law.⁶

Though no Maine court had been called upon to precisely delineate private property and public use rights in the intertidal zone prior to 1989, the Moody Beach decisions made clear that the restrictive definition of public use rights in the intertidal zone is a reality that cannot be altered by wishing it away, by adopting expansive police power regulations, or by fashioning arguments predicated on the public trust doctrine.⁷ These unpleasant facts must be faced. The definition gives a relatively small number of littoral⁸ land

The Colonial Ordinance, the Equal Footing Doctrine, and the Maine Law Court, 42 ME. L. REV. 43 (1990).

2. The intertidal zone is that part of the foreshore extending from the mean high tide line to the mean low tide line. See figure 1.

3. Bell II, 557 A.2d at 169 (emphasis added).

4. See Bell II, 557 A.2d at 174-75 (citing Opinion of the Justices, 313 N.E.2d 561 (Mass. 1974) (informing the Massachusetts Legislature that a proposed act to create a public right of passage along the seashore within the intertidal zone would be an unconstitutional taking of the littoral owners' property)); *Michaelson v. Silver Beach Improvement Ass'n*, 173 N.E.2d 273 (Mass. 1961) (holding that the public's use right did not extend to bathing); *Butler v. Attorney General*, 80 N.E. 688 (Mass. 1907) (same).

5. See Bell II, 557 A.2d at 175.

6. See Bell I, 510 A.2d at 513-14.

7. See *infra* note 70 for a detailed discussion of *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992), which indicates that a significant expansion of public foreshore rights based on the police power is almost certainly not sustainable. As for the public trust doctrine, arguments raised by amici in *Bell II* were completely ignored in the court's opinion. See *Rieser, supra* note 1, at 28-30, 34-36. It is thus unlikely that this doctrine will enable an expansion of public rights in the foreshore in Maine.

8. A littoral landowner is a landowner who owns the adjacent upland and shoreline between the mean high tide line and the mean low tide line. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1323 (1986).

owners along the coast of Maine a property rights windfall. They are unlikely to give it back.⁹

If this situation is to be turned around; if Maine's foreshore areas are to be prevented from becoming permanent enclaves of the few; if public use rights in the foreshore, particularly the use of sand beach areas, are to be enlarged, allowing succeeding generations of Maine citizens to use these areas in ways that cannot even be fully anticipated today; if these succeeding generations are to have a sense (as past generations have had) that Maine's foreshore, its beaches, and tidal pools belong to all of the people; then state government acting alone, or in conjunction with local governments, must develop and adopt new strategies and programs that increase public property rights in these foreshore areas. In short, public entities must purchase shorefront parcels for public use.

It seems clear that the taxing, bonding, spending, and eminent domain powers of state and local government are sufficient to accomplish these ends. These broad powers should be used imaginatively, and in combination with one another, in ways designed to provide the public with a full range of rights in a foreshore broadly defined to include the intertidal zone and the immediately adjacent upland.¹⁰ It will, no doubt, take time and money to put these strategies and programs in place and bring them to fruition, but in the end all Maine citizens will once again have ready access to, and control of,

9. This point was painfully acknowledged in the closing comments of the dissent in *Bell II*:

Despite the shoreowners' testimony that they would continue to permit [strolling on the beach] . . . they are not bound to do so, and the Superior Court order, affirmed by this Court, does not acknowledge any right on the part of the public to stroll on the beach. . . . [A]t Moody Beach and every other private shore in Maine, the public's right even to stroll upon the intertidal lands hangs by the slender thread of the shoreowners' consent. . . . In my judgment, the public rights should not be so quickly and completely extinguished.

Bell II, 557 A.2d at 192 (Wathen, J., dissenting).

10. See *infra* notes 31-44, 58 and accompanying text. The breadth of governmental, primarily legislative, power necessary to accomplish the ends suggested is attested to by cases such as *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984) (In eminent domain cases, the Court "will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'"); *Berman v. Parker*, 348 U.S. 26, 33 (1954) ("It is within the [spending and eminent domain] power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."); *Common Cause v. State*, 455 A.2d 1, 17 (Me. 1983) ("If the project [involving state and city bonding and spending to facilitate industrial development] has a rational basis, we may not strike it down merely because, if we were acting in the role of voters or legislators, we would deem it unwise."); *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 458 (Mich. 1981) ("The Legislature has determined that governmental action of the type contemplated here [the taking of land for industrial development] meets a public need and serves an essential public purpose.").

the foreshore for any and all activities and uses they might wish to undertake.¹¹

The real question is, do we as citizens, and do our governmental leaders, have the will to act? Are we prepared to obtain for all Maine citizens, present and future, the foreshore property interests we seek? That, of course, remains to be seen. This paper outlines an approach that might be taken to accomplish this goal.

II. INCREASED PUBLIC RIGHTS IN THE FORESHORE: TWO EARLY APPROACHES BY THE TOWN OF WELLS

A. Acquisition

Almost before the ink was dry on *Bell II*, the town of Wells, with an eye toward the possible acquisition of a portion of the beachfront, released a report containing the appraised value for ten contiguous parcels comprised of a strip of land that extended from the mean low tide line to an existing seawall that ran parallel to the beach slightly above the mean high tide line. In the aggregate, the intertidal and dry sand portion of these ten parcels represented approximately 15 percent, or 800 linear feet, of beach frontage.¹² The report presented "before" (no public ownership) and "after" (assuming public ownership of the delineated area) valuations for each of the ten properties.¹³ This approach allowed estimation of the fee simple value (the acquisition cost) of the area between the seawall and the mean low tide line for each of the ten parcels the town considered purchasing. The town already owned an adequate access to this beachfront area from an existing public way running off of

11. These very possibilities were recognized by the *Bell II* court in its concluding comments:

As development pressures on Maine's real estate continue, the public will increasingly seek shorefront recreational opportunities of the 20th and 21st century variety, not limited to fishing, fowling, and navigation. No one can be unsympathetic to the goal of providing such opportunities to everyone, not just to those fortunate enough to own shore frontage. The solution under our constitutional system, however, is for the State or municipalities to purchase the needed property rights or obtain them by eminent domain through the payment of just compensation, not to take them without compensation through legislation or judicial decree redefining the scope of private property rights.

Bell II, 557 A.2d at 180.

12. Moody Beach is approximately one mile long and consists of 126 parcels of land. See *Bell v. Town of Wells*, CV-84-125 slip op. at 1 (Me. Super. Ct., Yor. Cty., Sept. 14, 1987) (Brodrick, J.); *Bell II*, 557 A.2d at 170.

13. Gosline & Co., Moody Beach Report-Executive Summary, Nov. 1989. The report was prepared by Gosline of Gosline & Co. an appraisal firm headquartered in Gardiner, Maine. A cover letter summary follows:

As a result of said appraisal, I am of the opinion that the value of the portions of the properties to be acquired as further referenced and identified in the attached report as of September 30, 1989 are:

Ocean Avenue, a public street serving the ten properties.

The total cost of acquiring the 800 feet of beachfront was estimated to be \$516,000. Extrapolation from these data suggests that the cost of acquiring all of Moody Beach between the seawall and the mean low tide line would approximate \$3.4 million.¹⁴ Neither figure seems extraordinarily large, but the absolute dollar amounts, even for the relatively small portion of Moody Beach dealt with in the report, seemed more than the town of Wells could or was willing to afford. A warrant proposing a beachfront acquisition program was defeated at a town meeting in the spring of 1990.¹⁵

B. Licensing

An alternative strategy was explored by the town of Wells during

Tax Map/Lot	Owner	"Before" Value	"After" Value	Compensation
106/30 & 30A	McIntyre	\$ 610,000.	\$ 561,000.	\$49,000.
106/31	Sullivan	\$ 475,000.	\$ 437,000.	\$38,000.
106/32	Ray	\$ 425,000.	\$ 391,000.	\$34,000.
106/33	Desmarais	\$ 400,000.	\$ 368,000.	\$32,000.
106/34	Nevel	\$ 435,000.	\$ 400,000.	\$35,000.
106/35	Thompson	\$1,100,000.	\$1,012,000.	\$88,000.
106/36	Fellows	\$ 750,000.	\$ 690,000.	\$60,000.
106/37	Fisher	\$ 450,000.	\$ 414,000.	\$36,000.
103/14	Moody/Dunn	\$1,200,000.	\$1,104,000.	\$96,000.
103/15	Webb/Scott	\$ 600,000.	\$ 552,000.	<u>\$48,000.</u>
			Total Compensation	\$516,000.

The supporting data, analyses, and conclusions upon which this value is based are contained in the accompanying report and/or the files of the undersigned.

Id.

14. *But see infra* notes 15 & 24-25 and accompanying text.

15. Interview with Mr. Jonathan L. Carter, Wells Town Manager (Apr. 1, 1992). It is fair to note that the town's consideration of beachfront acquisition came at a time when the town had only recently lost, and had borne the considerable costs of, the *Bell* cases. Spending money at that time to buy beach frontage was undoubtedly seen by many of the townspeople as an unaffordable luxury.

In hindsight, one might conjecture that the recent economic downturn, and the accompanying depression in coastal real estate property values, would today allow the acquisition of some or all of Moody Beach to be completed at a lower cost to the public than the 1989-1990 data suggested. Unfortunately, there is presently little sentiment or public money available anywhere in Maine for beachfront acquisition programs since the town of Wells and other Maine towns, as well as the State of Maine, are all feeling the fiscal pressures of the downturn. That's too bad; the State may never see these relatively favorable real estate prices again. When the economy turns around, when public fiscal resources are more readily available, coastal real estate property values will also (in all probability) have turned around and acquisition then (in the mid- to late-1990s) of Moody Beach or any other beachfront property in Maine will undoubtedly cost much more than the projected 1990 dollar amounts.

this same time period. It involved a licensing arrangement whereby the Moody beachfront property owners, as licensors, would allow permanent residents of the town and a small group of seasonal property owners in close proximity to Moody Beach,¹⁶ and the guests of each, to use the intertidal zone for so-called passive recreational purposes as licensees. The proposed license would have run for twenty-five years, and presumably would have been renewable. It would have imposed a number of beach maintenance and upkeep responsibilities on the town. By its own terms, the license would have negated any hint that the town was acquiring an easement interest, or that any rights acquired ran with the land or could become permanent by custom, dedication, prescription, or doctrines akin to adverse possession.

Though the proposed license imposed no direct annual fee on the town, in carrying out the conditions of the license, the town would clearly have to bear some annual costs to provide townspeople with this beachfront recreational area, including long-run beach maintenance costs. These costs did not seem prohibitively high. The licensors saw the proposed arrangement not simply as a vindication of their underlying property rights, but as a conciliatory gesture to neighbors and townspeople after the bruising *Bell* litigations. At the same time, the licensors undoubtedly hoped that the arrangement would encourage the town to value their properties reasonably for property taxation purposes.¹⁷ In short, the license seemed to offer a fair *quid pro quo* for both the town and the beachfront landowners.

The proposed licensing arrangement broke down, however, in discussions over beach use for seasonal guests at campgrounds, hotels, and motels in the town. These people, it was argued, were not townspeople and/or their guests. Moreover, the number of such summer visitors in the town of Wells had historically been large. In the final analysis, the beachfront property owners were unwilling to fashion a licensing arrangement that would transform what they regarded as a tolerable use of the beach by a limited number of permanent and summer town residents into a commercial use of Moody Beach by anyone and everyone who happened to be vacationing in Wells. The licensing idea, like the possibility of public acquisition, died in the

16. These property owners, approximately forty in number, owned land on the upland side of Ocean Avenue in the immediate vicinity of the beach. They were the so-called Tier II defendants in the *Bell* cases. See *Bell v. Town of Wells*, 557 A.2d at 169, n.1.

17. These concerns were voiced during the question and answer session of a conference co-sponsored by the Marine Law Institute and the *Maine Law Review* in August, 1989. In the wake of the Moody Beach decisions, the conference was designed to provide a forum for discussing ideas regarding public access to the foreshore. It led to the publication of a symposium issue of the *Maine Law Review*, *Public Access and the New England Shoreline*, 42 ME. L. REV. (1990).

spring of 1990.¹⁸ Since then, there has been some limited public use of Moody Beach, and the town of Wells has not sought to revive either of the above described strategies to enlarge the public's right to use this beachfront area.

The town's inaction on the licensing and acquisition proposals is both understandable and appropriate. Licensing would have given the public very ephemeral rights. Disputes between the licensors, licensees, and the town would almost certainly have arisen sooner or later. The acquisition originally contemplated by the town, on the other hand, though a much better approach since, as owners, the public's rights would be secure, was too limited in scope.¹⁹ Moreover, the delineated area would certainly have been purchased at what townspeople regarded as a high price. The price had not been fixed by any market determination of value, but by highly subjective appraisal techniques. If acquisition had gone forward, the ultimate price paid would have been determined by some compromise between competing and equally uncertain (seller-buyer) appraised valuations of the delineated beachfront area.

These two shortcomings, acquiring too limited an area, and relying upon appraisal techniques to determine value (rather than market prices), can and should be corrected in any future program of public acquisition of foreshore property rights.

18. Interview with Mr. Jonathan L. Carter, Wells Town Manager (Apr. 1, 1992). A copy of the license as it existed in the early stages of discussion between the town and beachfront property owners is appended to this article.

19. Since only ten parcels out of 126 (approximately 15 percent of the beach frontage) were within the contemplated program, some argued that the acquisition proposed encompassed too small an area. The land to be acquired included only the intertidal zone and a narrow parallel strip of dry sand area up to "the east side of the east face of the Moody Beach seawall . . ." See Gosline report, *supra* note 13, at 18. The proposed acquisition did not include the seawall itself. It would remain the property of the upland owner and thus could not be removed by the town should that step become necessary or desirable to protect the sand characteristics of the beach. The upland owners (as owners of the seawall) would presumably retain the right, subject only to state regulatory limitations, to maintain and repair the wall, and perhaps even to reconstruct it should it be destroyed or damaged by storm, wind, wave, or normal wear and tear.

These are all controversial issues today which would no doubt have provoked dispute in the future had the town acquired precisely the interests delineated in the Gosline report. If the town was not prepared to think in terms of acquiring the whole of the beach or the whole of the ten frontal parcels, it should at least have extended its proposed acquisition to a point several feet to the landward side of (and parallel to) the seawall. Its proposed acquisition should have expressly included the wall itself. Had the scope of the proposed acquisition taken one of these forms, many of the potential seawall problems, at least, could have been avoided. The public would have owned and controlled the wall. See generally, Jeter M. Watson & Richard H. Sedgley, *Land Use Regulation by the Virginia Marine Resources Commission: The Virginia Wetlands Act and Coastal Primary Sand Dune Protection Act*, 7 VA. J. NAT. RESOURCES L. 381 (1988).

III. A NEW AND BROADER ACQUISITION STRATEGY

Two points should be made at the outset. First, it makes little difference whether the approach to be suggested is undertaken at the state level of government—as part of a statewide comprehensive program to acquire beachfront property for Maine citizens to use for recreational or related commercial purposes—or is undertaken by one or more municipal units of government exercising charter, delegated, or home rule powers. An argument can be made that the State is better positioned to carry out a broad land acquisition program. It has easier access to and a wider range of needed financial resources; it has the planning and other technical expertise needed; and it can manage the acquired properties as part of a state park system already in place. Moreover, the State of Maine has considerable experience in similar land acquisition programs, most recently in efforts to secure Land For Maine's Future.²⁰ But if the State will not act, there is nothing in Maine law that would prevent municipal governments from carrying out the program outlined in this article.

Second, the assumption throughout this paper is that the acquisition of property by purchase or by an exercise of eminent domain for public park and recreational purposes is a valid governmental undertaking fully meeting the "public use" and "public purpose"²¹ requirements of the law. There is an abundance of case law and legal

20. See *infra* notes 64-67 and accompanying text. See also, ME. REV. STAT. ANN. tit. 5, §§ 6200-6210 (West 1989 & Supp. 1992-1993). The legislative findings found in § 6200 support the establishment of the acquisition program for Land For Maine's Future, set forth in § 6203(1), contain language that applies with equal force to the foreshore acquisition program advanced here. An earlier more limited example of state land acquisition for recreational purposes occurred in the creation of the Allagash Wilderness Waterway. See ME. REV. STAT. ANN. tit. 12, §§ 661-680 (West 1981 & Supp. 1992-1993).

21. See *supra* note 10. It is a fundamental principal of our jurisprudence that private property may only be taken for a public use and then only upon the payment of just compensation. See ME. CONST., art. I, § 21; *Paine v. Savage*, 126 Me. 121, 136 A. 664 (1927) (holding that private property may be taken only for public use). It is also recognized that the concept of public purpose and public use has greatly expanded over the last fifty years and today includes a wide range of governmental activities and facilities, including public park and recreational facilities. See 2A NICHOLS' THE LAW OF EMINENT DOMAIN, §§ 7.01, 7.01[2]-[3], 7.02, 7.02[2]-[3], 7.37, 7.38 (Julius L. Sackman, ed. [rev. 3rd ed.] 1989) [hereinafter 2A NICHOLS, EMINENT DOMAIN]; *Brown v. Gerald*, 100 Me. 351, 361, 61 A. 785, 789 (1905) (holding that the term public use "necessarily has been of constant growth, as new public uses have developed."). Cf. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 239-44 (1984) (sustaining a broad definition of public use); *Common Cause v. State*, 455 A.2d 1, 15-26 (Me. 1983) (attempting to delineate the often blurred concepts of public use, public purpose and public benefit, but noting that all have been expanded over time); *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 459 (Mich. 1981) (holding condemnation for subsequent transfer to a private corporation to be justified when public benefits are achieved).

treatise support for this proposition.²² The leading treatise on eminent domain notes:

The laying out of public parks and the taking of private land for park purposes is a long established undertaking for American cities. . . .

It is shown elsewhere that parkways, boulevards and pleasure drives may be laid out by the public authorities. . . . Vast tracts of uninhabited woodland, or spots made beautiful by nature, may be taken for state or national parks. . . .

. . . Land may be taken for a municipal bathhouse or for a public bathing beach, as well as for a public elevated boardwalk along a beach or ocean front.²³

With these facts in mind, we can proceed to the crux of the strategy proposed. A Maine governmental entity embarking on a beach-front acquisition program should not attempt to purchase merely the intertidal zone or, as the town of Wells contemplated, the intertidal zone plus a narrow strip of dry sand area above the mean high tide line. Instead, the state or municipality should acquire the entire littoral parcel, upland and intertidal zone,²⁴ and all of the frontal parcels along whatever stretch of improved or unimproved foreshore is being acquired, at their full market value.²⁵ (See figures 1 and 2).

22. A legislature may choose not to exercise eminent domain powers in a public land acquisition program, as was done in the acquisition of Land For Maine's Future, but that is a policy choice. See ME. REV. STAT. ANN. tit. 5, § 6207-A (West Supp. 1992-1993). There is no legal constraint on the Legislature (constitutional or statutory) compelling it to limit itself (or its agents) in this manner. This distinction is clearly understood by Maine's Legislature. It has, for instance, conferred broad eminent domain powers on the Bureau of Parks and Recreation, see ME. REV. STAT. ANN. tit. 12, § 602 (West 1981), subject only to certain procedural safeguards. See ME. REV. STAT. ANN. tit. 35-A, §§ 6501-6512 (West 1988 & Supp. 1992-1993). See also *In re Bangor Hydro-Electric Co.*, 314 A.2d 800, 804 (Me. 1974) (holding that the Legislature may place limits on the discretion it gives its agencies to take land by eminent domain).

23. 2A NICHOLS, EMINENT DOMAIN, *supra* note 21, at §§ 7.37, 7.38. See also *Salisbury Land & Imp. Co. v. Commonwealth*, 102 N.E. 619 (Mass. 1913) (early Massachusetts case holding that exercising the power of eminent domain to acquire beaches for recreational purposes is permissible).

24. A few common sense exceptions to this general approach are appropriate. For example, in circumstances where the frontal parcel is very large, extending back from the shoreline for several hundred yards or more, taking the land up to a depth of 300 feet or 500 feet above the mean high tide line, or up to some natural topographic phenomena, makes sense. Similarly, if the frontal parcel contains an improvement of unique or extraordinary value, dividing the parcel, taking only the unimproved seaward portion, again makes sense. There may also be settings where the depth of the entire frontal parcel is so shallow that it may be necessary to take an additional back lot to secure all, or a significant portion, of the frontal dune in order to adequately protect (or restore) this barrier system.

25. Acquisition at full market value may very well produce arms length sales between the acquiring governmental entity and littoral landowners, thus precluding the need to use eminent domain. In those situations where eminent domain proceedings are necessary, a willingness to pay full market value will surely meet the "just compensation" requirement of the law.

FIGURE 1

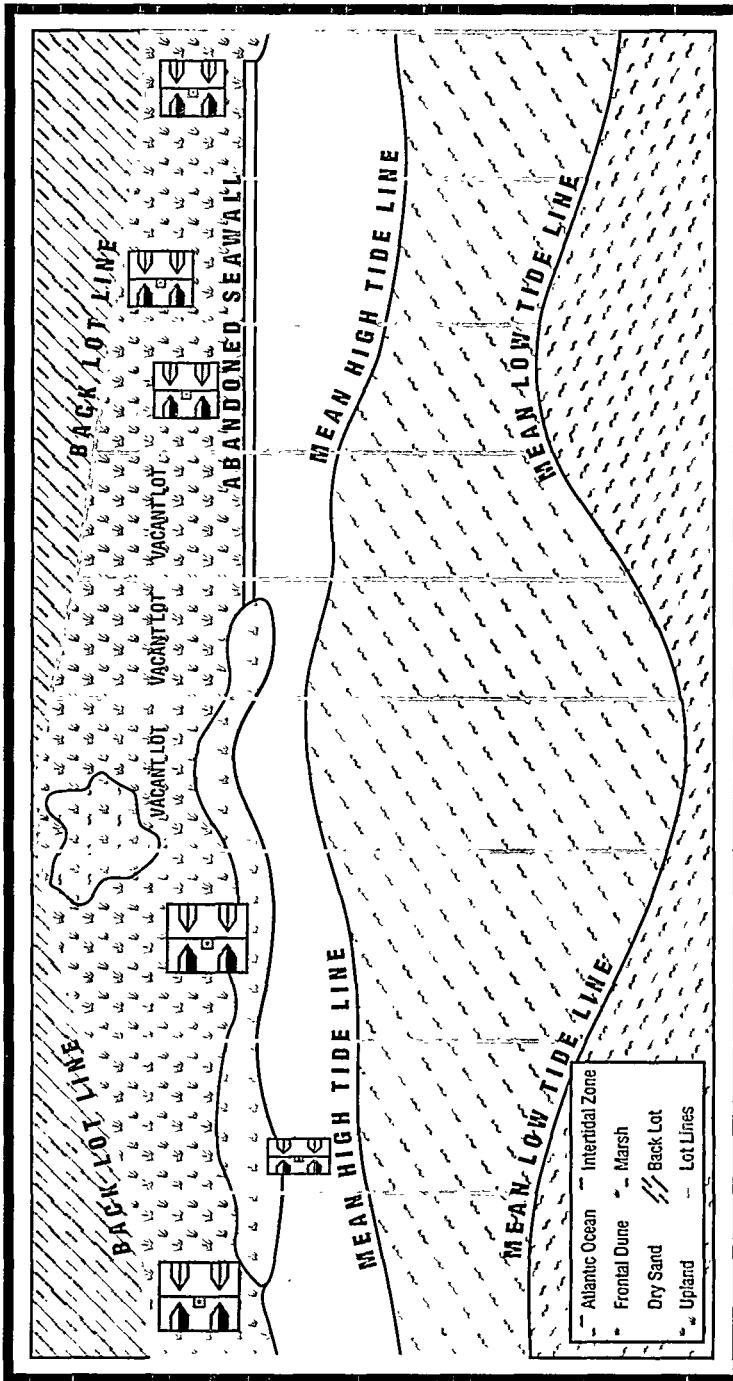
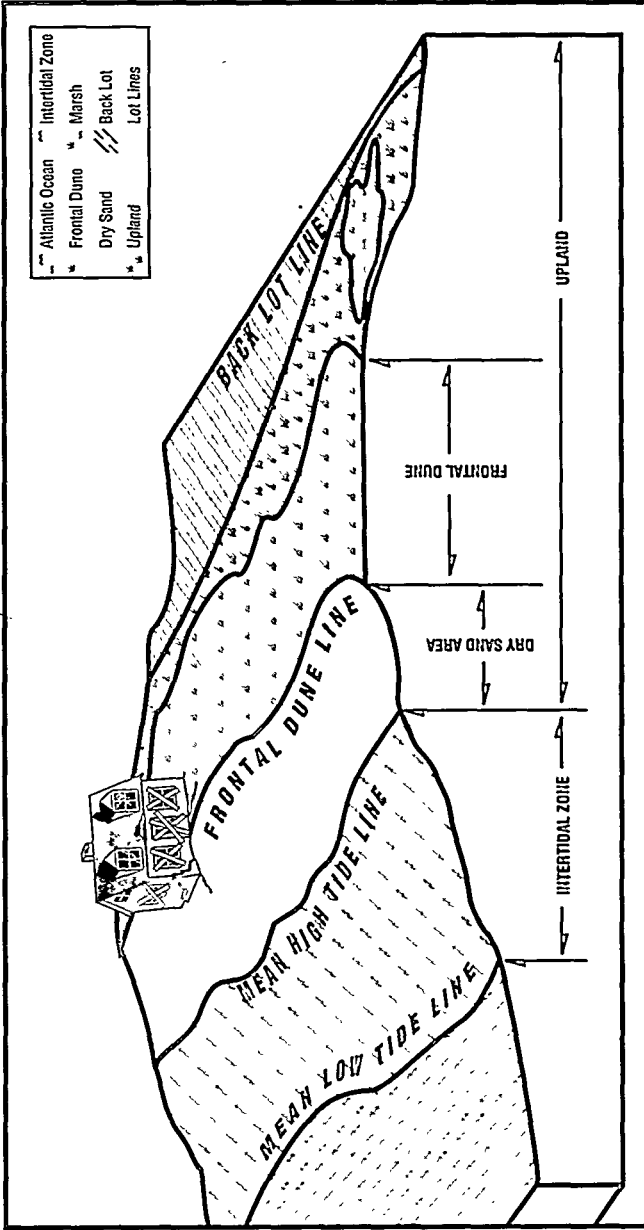


FIGURE 2



The two figures show a top and cross-sectional view of what is being advocated. In figure 1, all of the property between mean low and the back lot lines, whether the individual parcel is vacant or developed should be acquired at full market value for the respective parcel. Depending on the slope of the intertidal zone and the depth of the frontal lots, this may more than double the physical area being acquired, see both figures. In figure 2, a dilapidated representation of house 2 and for house 3 in figure 1 is shown straddling and breaching the frontal dune. After acquisition of these entire parcels both of these houses should probably be removed.

This approach will raise the initial cost of the acquisition program, but it will almost certainly result in a lower net cost for the overall program. Net cost will be lowered by the resale²⁶ of unneeded portions of these littoral properties and by the avoidance of public (and private) costs associated with beach erosion and storm damage repair.²⁷ In addition, acquiring entire frontal parcels will enable a much wider range of recreational and other public benefits to be secured. Finally, the approach suggested can rely on market prices for the land acquired; it will not have to rely on subjective appraisal values, as did the proposed acquisition program of the town of Wells.

This last point is fundamentally important. From Kittery to Eastport, there is always a market for entire shorefront parcels. Fair market value, and thus the "just compensation" to be paid to the owner of a frontal parcel for a purchase or taking of the property, can be ascertained with reasonable and objective certainty by reference to this ongoing real estate market. There is no market anywhere in Maine for intertidal zones alone, or intertidal zones plus a small parallel strip of dry sand beach. Consequently, the value (and the cost of public acquisition) of only a portion of the frontal parcel must always be an appraised, totally subjective, dollar figure, often based on two different subjective evaluations produced by the acquiring public entity and the upland owner. The upland owner will produce a high appraisal of the land, citing its dimensions relative to the total parcel, the loss of isolation and aesthetic value, and the nuisance of public use in close proximity to the landowner's remaining land. The acquiring public entity will counter with a low appraisal of the parcel, citing the land's inherent limited use capabilities, the landowner's full retention of the most significant element of shorefront property value (i.e., its proximity to the water), and the relatively small loss of value occasioned by limited, regulated, and more or less seasonal, public use of the acquired property.

This battle of appraisers is incapable of resolution. There is no market, no willing group of buyers and sellers for fractional portions of littoral property. Compromise or averaging of the two appraisals is no answer; the figure arrived at will still be an unverified guess.²⁸ It will almost certainly err on the high side, meaning the public will

26. See *infra* notes 30-40 and accompanying text.

27. See *infra* note 38.

28. This point was recognized by the trial judge in *Bell II* when, in striking down the Intertidal Land Act, he speculated that the value of the intertidal interests the State had sought to acquire would vary from property to property "from minimal to no more than 25 percent [of the full market value of the property]." *Bell v. Inhabitants of the Town of Wells*, CV-84-125, slip op. at 38 (Me. Super. Ct., York Cty., Sept. 14, 1987) (Brodrick, J.). The Gosline study done for the Town of Wells valued the interests the Town contemplated acquiring at 8 percent of the respective property's full market value. See *supra* note 13.

pay more than it should for the beachfront interests it would acquire. Using an established market to buy the entire beachfront parcel avoids these pricing and valuation problems.

Buying the entire parcel also avoids the other problem noted in the program contemplated by the town of Wells: determining how much land the public should acquire.²⁹ The possibilities include: acquiring just the intertidal zone; acquiring the intertidal zone plus a strip of dry sand area above the mean high tide line; acquiring the intertidal zone plus the area above the mean high tide line encompassing all of the frontal dune (including any artificial constructs such as seawalls, jetties, and storm barriers); or acquiring the intertidal zone, the frontal dune, artificial constructs, plus areas sufficient for parking, picnicking, toilet and changing facilities, beach safety personnel, and beach maintenance equipment.

The answer to the question of how much foreshore land should be acquired is not self-evident. Indeed, it is likely to vary significantly from beachfront to beachfront along the coast, and even within a single beach area being acquired. The size of the beach, its slope, the degree of development immediately behind the beach, the type and degree of public use presently existing and contemplated in the future, the susceptibility of a particular beach to wind, wave, storm surge, erosion, and other natural phenomena, and the degree to which natural dune systems and beach grasses have survived in the face of man-made constructs, are some of the factors that should dictate the scope of public land ownership in the foreshore. Completing the necessary planning and site analysis for each beach area up and down the coast of Maine before any beachfront interests are acquired, and then purchasing only that portion of the frontal parcel the acquiring public entity thinks it will need, puts an extremely difficult, costly and time consuming burden on the acquiring agency.

Moreover, if the governmental unit involved acquires only what it thinks it needs today, and then discovers in a few months or years that to fully protect the public's interests it really needs a bit more of the frontal parcel, it will again be in the same awkward position that the *Bell* cases have placed us in today—the upland owner, not the public, will own and control important use rights in the foreshore. If the public interest is to be protected, further acquisition will again be necessary.

These problems are avoided by acquisition of the entire frontal parcel at the outset. Then, after full development of the widest range of public use rights, any excess land or improvements that are part of, or situated upon, the acquired property can be resold, when and if they are determined to be surplus and unnecessary to any

29. See *supra* note 19.

immediate or foreseeable public need.³⁰ In addition to avoiding pricing guesswork and the uncertainties of determining how much foreshore land to acquire, purchasing the entire frontal parcel will give rise to a range of collateral benefits that further justify this approach.

IV. BENEFITS OF ACQUIRING THE ENTIRE FRONTAL PARCEL IN FEE SIMPLE

The argument that licensing arrangements, recreational easements, or even the acquisition of limited fee interests in the intertidal zone are adequate devices to enable modern recreational uses of beaches (swimming, sunbathing, etc.) represents a failure to learn the lesson of the *Bell* cases. Just as language thought to protect public use rights for "fishing, fouling and navigation" in a Colonial Ordinance³¹ failed to evolve, and thus could not protect modern foreshore uses, so too, the language of licenses, easements, and even limited fee interests, would almost certainly provoke future debate as to the meaning and scope of these acquired property interests. The public's rights *vis à vis* the upland owner's rights would again need to be defined by the courts—the *Bell* cases revisited. We will have repeated the mistakes of the past at great cost, and almost certainly will incur some loss of public use rights and prerogatives sought to be undertaken at that point in time.³²

The alternative advanced here, public acquisition of entire frontal parcels in fee simple, assures us that renewed debate and litigation over the meaning of terms, the conditions of a license, or the scope of easements or limited fee interests—a debate that characterized a good portion of the *Bell II* case³³—could not reoccur. The public would hold in "fee simple absolute" all present and future use rights in the upland and intertidal zone of frontage parcels.³⁴ There would

30. See *infra* notes 45-55 and accompanying text. Property owners with seasonal or year-round houses on acquired parcels could be permitted to continue using these houses at nominal cost until they are removed, relocated, or declared surplus.

31. *Bell II*, 557 A.2d at 173.

32. Part of the problem is the inability of any generation to clearly anticipate the needs of future generations. Our colonial forefathers thought that "fishing, fowling, and navigation" pretty well covered the range of necessary public intertidal uses—they could not imagine or anticipate use of the foreshore for sunbathing, frisbees, etc. The protection we would provide by way of licenses, recreational easements, or limited fees may miss meeting public use needs of future generations by an equally wide margin.

33. See, e.g., *Bell II*, 557 A.2d at 173-76. The dissenting judges in *Bell II* interpreted the public's reserved use rights quite differently. *Id.* at 185-89 (Wathen, J., dissenting).

34. In those situations where some portion of (or improvement upon) the acquired parcel is resold as surplus property, see *infra* notes 45-55 and accompanying text, appropriate language could be inserted in the deeds of resale subordinating for a considerable period of time the grantee's use rights to future, even unforeseen, public use

be nothing to debate. That is one of the primary benefits of gaining "absolute" title to the entire parcel, and to all of the parcels along any one segment of beach or foreshore.

In addition to avoiding future debate over the meaning of terms and conditions, the public as owner of the entire frontal parcel could begin the systematic removal of any and all presently existing physical structures or obstacles (i.e., breakwaters, groins, fill material, seawalls, and piers) to the long-run protection and well being of the foreshore. Oceanographic experts tell us that the removal of all man-made structures in the foreshore area, particularly intertidal and offshore structures that interdict near shore current patterns, is the only sensible long-run course that will result in the stabilization of, and possibly the reestablishment of, natural beachfront conditions.³⁵

More important, the public in undertaking these tasks would, under the approach proposed, be exercising its proprietary (ownership) powers, not simply its police powers, over these united submerged, intertidal, and foreshore property interests.³⁶ The removal of undesirable structures in the water or along the foreshore could be accomplished without a need to balance private littoral landowners' rights against the public's rights in these offshore and upland areas. There would be no need to balance competing interests because there would be no private frontal parcel interests at this point. The entire property would be public, and the public would simply

rights and needs.

35. See J. KELLEY, A. KELLEY, & O. PILKEY, *LIVING WITH THE COAST OF MAINE* 47 (1989):

Construction by man on the shoreline causes shoreline change. The sandy beach is a delicate balance of sand supply, beach shape, wave energy, and sea level rise. Most construction [groins, jetties, seawalls, bulkheads, houses] on or near the shoreline changes this balance and reduces the natural flexibility of the beach. The resulting changes often threaten man-made structures . . . Shoreline engineering [construction] destroys the beach it was intended to save.

See also ORRIN H. PILKEY, JR. & WALLACE KAUFMAN, *THE BEACHES ARE MOVING: THE DROWNING OF AMERICA'S SHORELINE* (1983); Symposium, *The Effects of Seawalls on the Beach*, J. COASTAL RESEARCH, Spec. Issue No. 4 (Pilkey & Kraus ed. 1988) (containing work by a dozen authors examining the present state of scientific research and practical experience with seawalls in many parts of the country).

36. The public is already deemed the owner of all property interests below (seaward of) the mean low tide line. See the Submerged Lands Act §§ 2-8, 43 U.S.C. §§ 1301-1315 (1988) (defining state ownership of the seabed as extending seaward for a distance of three miles from the mean or ordinary low tide line); ME. REV. STAT. ANN. tit. 1, §§ 1-3 (West 1989); ME. REV. STAT. ANN. tit. 12, §§ 558-559 (West Supp. 1991) (Maine's statutory claim to title in the seabed from mean low to the outermost reach of state territorial jurisdiction); *United States v. Maine*, 420 U.S. 515 (1975) (confirming Maine's title to the seabed as delineated in the Submerged Lands Act); Opinion of the Justices, 437 A.2d 597 (Me. 1981) (confirming State's claim to ownership of the seabed below the mean low tide line); See generally, Mitchell M. Tannenbaum, Comment, *The Public Trust Doctrine in Maine's Submerged Lands: Public Rights, State Obligation and the Role of the Courts*, 37 ME. L. REV. 105 (1985).

be exercising the wide discretionary powers of a landowner. Thus, there would be no need for carefully crafted regulations. There would not be costly delays in moving forward to accomplish the removal of unwanted structures. There could be no questions of "taking."³⁷

In the same vein, the public should also order removal of any and all existing houses and other structures that are situated back from the immediate shoreline (but on acquired parcels) that are either dilapidated or improvidently located *vis-à-vis* the foreshore. These houses and structures threaten the safety of individuals and compromise the integrity of the beachfront itself. The repeated damage and destruction of houses and roadways, and threats to life, in the Camp Ellis area in Saco, Maine, in the Popham Beach, Maine, area, and, to a lesser degree, in other areas along the coast of Maine,³⁸

37. Much of the debate in Maine and other states with respect to exercises of the police power to regulate pier, breakwater, or seawall construction, filling or removing material in the foreshore, indeed, almost all aspects of littoral land use, stems from the bifurcated ownership of the foreshore. In such cases, regulators, and ultimately the courts, must balance what are regarded as normal uses of private littoral property—uses that may involve the building of houses or arguably necessary protective structures by the upland landowner—against the sometimes competing needs, desires, and perceptions of public entities looking to protect equally legitimate public property rights and interests in the foreshore. *See* *Esposito v. South Carolina Coastal Council*, 939 F.2d 165 (4th Cir. 1991) (sustaining against a takings claim South Carolina's coastal regulations dealing with setback and rebuilding in the event of storm damage); *Hall v. Board of Env'tl. Protection*, 498 A.2d 260 (Me. 1985) (sustaining application of state sand dune regulations in a context that barred rebuilding of a storm-damaged cottage, and remanding); *Hall v. Board of Env'tl. Protection*, 528 A.2d 453 (Me. 1987) (determining, after remand and subsequent appeal, this was not a taking). *See also* *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991) (sustaining the State's Beachfront Management Act, which barred new house construction seaward of a specified setback line, against a taking challenge, in spite of a lower court finding that this restriction reduced the value of the land to zero). This case was appealed to the United States Supreme Court, which reversed the South Carolina court. *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992). The crux of the Supreme Court's reasoning was that when a police power regulation reduces the economic value of land to zero (or near zero) there is a taking unless the regulation is merely the expression of some preexisting bar to development arising out of that state's nuisance or property law. *Id.* at 2894, 2895 n.7,8. The Supreme Court expressed strong doubt that this was the situation presented in *Lucas*, but remanded for disposition of that issue.

The point being made is that all of these difficult and never-ending questions as to the reasonableness and scope of police power controls are avoided by an approach that makes government the owner of these offshore and littoral property interests. As owner, the government may exercise proprietary controls and powers as extensively as necessary to protect and enhance public interests.

38. Camp Ellis in Saco, Maine has experienced devastating tidal and storm surge damage over a long period of time. The city Planning Department estimates that nearly \$750,000 has been spent in infrastructure repair alone over the last ten years. Saco is not the only area in Maine, however, where structures located in the intertidal zone or on nearby uplands pose serious threats to persons, property, and the integrity

offer abundant evidence of the need for action along the lines suggested here.

In short, whether the objective is the preservation and restoration of fragile beach systems or the avoidance of damage to persons and property in these foreshore areas, the utility of public acquisition of beachfront areas must be recognized. Land use experts and coastal policy planners in Maine have long advocated this approach:

Among the various proposals for reducing coastal storm damage, no measure is likely to be as effective in reducing damages and preserving the beach and dunes as the acquisition of beachfront property and the return of the beach to its natural condition.

Without structures on the beach, there would be no need for federal subsidies, such as Disaster Relief, National Flood Insurance payments, and Small Business Administration loans, to promote the recovery of the area after a coastal storm. Also, municipal expenditure for some services to the acquired beach area could be reduced, since there would be fewer residents in the beach area.³⁹

Another related and more positive series of actions could also be undertaken by the governmental entity that held fee title to frontal parcels once all of the unwanted man-made structures and obstacles in the water and on the land are removed. Frontal dunes could be reestablished, either slowly by accretion (the natural processes of daily and seasonal tide and wave action) or more dramatically by recontouring the land to simulate the frontal dune. Then beach grasses and other indigenous flora could be planted in an effort to hold these fragile land forms in place.⁴⁰ Land areas behind the fron-

of the beach system. In many areas, construction upon, or breaches of, the frontal dune threaten erosion of beach sands and harm to fragile areas on or behind the frontal dune. See J. KELLEY, A. KELLEY, & O. PILKEY, *supra* note 35, at 13, 56-58, 80-81 and 86 (describing damage at Jonesport, Maine, at Popham Beach in Phippsburgh, Maine, at Old Orchard Beach, Maine, and at Higgins Beach in Scarborough, Maine). See also, *Policy Recommendations for Reducing Coastal Storm Damages* (1979), a report to the Governor by the Maine Advisory Committee on Coastal Development and Conservation. It notes:

Recurring coastal storms cause severe damage to Maine's coastal real estate. In 1978 two winter storms caused \$47 million of damage to public and private property. . . . Although sand beaches constitute only 36 miles or 1 percent of Maine's shoreline, most of the damage from the 1978 storms occurred on beaches, the majority south of Boothbay Harbor.

Maine beaches are subject to severe damages because they are low lying relative to storm tides, easily eroded, and extensively developed. Maine's beaches have a total of 1,888 acres of sand dunes, of which 1,168 acres or 62 percent are developed.

Id. at 3.

39. C. TEN BROECK, MAINE LAND AND WATER RESOURCES COUNCIL, *POLICY RECOMMENDATIONS FOR REDUCING COASTAL STORM DAMAGES* 23 (1978) (Draft report to the Governor's Committee on Coastal Development and Conservation).

40. Cf. C. KING, *BEACHES AND COASTS* (2d ed. 1972); B. NELSON & K. FINK, *GEOLOGICAL AND BOTANICAL FEATURES OF SAND BEACH SYSTEMS IN MAINE* (1980). See also

tal dune that are part of the total parcel acquired by the public should be subjected to appropriate limitations that government (the owner of the land) imposes on itself to assure that any future development in these areas will be protective of marshes, wetlands, back dune systems, sensitive soils and plant life that are integral parts of the total foreshore ecology.

The undertaking of all of these measures—removal of breakwaters and seawalls; removal of poorly located houses and other structures; the reestablishment and preservation of frontal dunes; the protection of areas behind the frontal dune—must be regarded as a way to achieve an important and valuable range of collateral benefits. These benefits can only be achieved by the fee simple acquisition of entire frontal parcels along significant portions of the beachfront foreshore.

Another benefit that fee simple acquisition makes possible is the selective provision of a wide range of facilities that will enhance the public's use of the upland portion of the foreshore. For example, Portland, South Portland, and Ogunquit have constructed, and are expanding, shoreline footpaths. These are widely used by joggers, bicyclers, and individuals who simply wish to stroll along the foreshore. Fee simple ownership of entire foreshore parcels along contiguous beachfronts would allow the acquiring governmental entity to put many more such facilities in place at little or no cost⁴¹ beyond that of acquiring the frontal parcel. Such upland pathways, extending for many miles in some instances, could be further improved by adding benches for the elderly, creating picnic areas in adjacent non-fragile portions of the upland (probably behind the frontal dune), and by tying these picnic areas and the pathway itself into existing and future parking and frontage road systems so people could gain easy access to the pathway and its full range of amenities.

Suitable portions of the acquired property should be used to provide additional parking for beach and pathway users. Currently, the limited availability of parking space and other infrastructure facilities, such as restroom and changing facilities, at many public beaches in Maine is a more significant factor inhibiting expanded public use of these beaches than the size of the beach.⁴² Moreover,

J. KELLEY, A. KELLEY, & O. PILKEY, *supra* note 35, at Appendix C (containing over 100 bibliographic references to beach and shoreline-related books and government documents).

41. The Portland Parks Department reports that the out-of-pocket cost of constructing nearly 3.6 miles of footpath along back cove in Portland, Maine was less than \$50,000. A large portion of this amount was donated by local running clubs, builders, and other users of the facility. The State of Maine, as part of a major (Tukey's) bridge widening project, funded largely by the federal government, bore the cost of extending the trail over the back cove inlet.

42. Conversation with Mr. Herb Hartman, Director, Bureau of Parks and Recreation, Maine Department of Conservation, in Portland, Me. (June 8, 1992).

having already borne the cost of acquiring entire frontal parcels in beachfront areas, an expansion of parking facilities using portions of the acquired land could be accomplished for much less than it would cost to purchase separately individual parcels of land to fully meet present and future beachfront parking needs. The same realities and economic logic would allow for the sensible expansion (again at minimal cost) of restroom and changing facilities in proximity to high volume areas of beach and pathway use. Areas for lifeguard or other supervisory or maintenance personnel and their equipment could also be more readily provided within the total land area proposed to be acquired.

All of these improvements and enhancements to the public's recreational use of the foreshore are significant collateral benefits, reaching well beyond the increased water and beach uses which acquisition of just the intertidal zone, or the intertidal zone plus a small dry sand area, would allow. Acquiring whole frontal parcels along entire beachfronts would allow full and unquestioned recreational use of the beach, both now and in the future. In addition, fragile beach systems could be adequately protected and repaired; unwise man-made constructions could readily be removed; a much wider range of passive and active public recreational activities and facilities could be put in place; and new parking and other necessary public infrastructure-type needs could be accommodated in close proximity to the foreshore. This wide range of direct and indirect benefits justifies the larger acquisition program suggested here (see figure 3 on page 263).

V. A LEGAL BASIS FOR THE SUGGESTED ACQUISITION PROGRAM

It has already been shown that the acquisition of property for public recreational use (whether by purchase or by an exercise of eminent domain powers) meets the public purpose requirements of the law.⁴³ Expanding the area to be acquired from the intertidal zone to the entire frontal parcel will not result in a failure to meet these legal requirements with respect to the larger parcel. Specifically, the intertidal zone and adjacent dry sand areas will be primarily acquired for recreational use. More removed dry sand areas and frontal dune areas will be acquired for a combination of recreational, beach stabilization, and beach repair purposes. Areas behind the frontal dune will be acquired for recreational use (footpath and picnic areas in proximity to the beach), protection of the fragile frontal dune ecosystem, and to provide needed parking areas and other supporting infrastructure facilities. All of these are legitimate public purposes justifying the use of the State's spending and eminent do-

43. See *supra* notes 21-23 and accompanying text.

main powers.⁴⁴

The fact that, after careful study and development of the full range of public needs and facilities in the foreshore area, some portions of these acquired properties will almost certainly not be needed by the public, and thus will be resold as surplus property, does not deprive the original taking of its public purpose character.⁴⁵ Under eminent domain law, acquiring the whole of a property when only a portion of it may ultimately be needed, is referred to as "excess condemnation." Though courts have noted that this process has the potential for abuse and is subject to judicial scrutiny, it has, particularly in the relatively modest form advanced here, been sustained in all of the states under a variety of justifying doctrines.⁴⁶

44. See *supra* note 23 (emphasizing that land may be taken for park and recreational purposes, including beaches). See also *Orr v. Allen*, 248 U.S. 35 (1918) (sustaining the taking of land for flood control purposes); *People v. Cunningham*, 35 Cal. Rptr. 814 (1963) (holding that land may be taken by the State for park purposes, and that a portion of the land, or additional land, may be taken to provide supporting parking facilities); *County of Essex v. Hindenlang*, 114 A.2d 461 (N.J. Super. Ct. 1955) (holding that a taking of land to provide a parking facility is a public use when the parking facility is incidental to, and in support of, another conceded public use).

2A NICHOLS, EMINENT DOMAIN *supra* note 21, at § 7.41 notes that: "[t]he taking of land for sea-walls and levees is undoubtedly constitutional." It follows then that a taking of land to remove unnecessary or undesirable seawalls and other man-made obstructions in the intertidal zone and along the foreshore which are in fact damaging to beach areas and frontal dune systems, would also be permissible.

45. It may take months or years for the acquiring agency to complete planning and beach stabilization studies to determine the manner in which various portions of the acquired foreshore properties will be used (beach recreation, dune protection or restoration, pathway or picnic uses, parking or other infrastructure uses). A significant portion of the acquired property will ultimately be used by the public in one capacity or another. The law, however, does not require the acquiring governmental entity to determine at the outset, before any acquisition program begins, what the outermost reach of its needs will be. That is often not possible. Moreover, such an approach would almost certainly be more costly, and it might well block the realization of some legitimate public interests and objectives that are not initially perceived, but emerge only over time. To avoid putting government in the awkward position of needing to know more than it is capable of knowing at the outset of an acquisition program, eminent domain law allows the whole of a property to be taken. Government may then do its planning work carefully to determine exactly what land will be needed and for what purposes. The excess land (if any) may then be resold. The only requirement is that the acquiring government act in good faith. See 2A NICHOLS, EMINENT DOMAIN, *supra* note 21, at § 7.09:

It is not, however, objectionable that a statute which authorizes a taking provide that the municipal authorities may sell lands taken whenever they determine that such property is no longer needed for public use. Such a power is latent in every taking, and is very different from a taking of land with a contemporaneous knowledge and purpose that a definite and separable part is not necessary for the public use.

46. See 2A NICHOLS, EMINENT DOMAIN, *supra* note 21, at § 7.25; Note, *Excess Condemnation—To Take or Not To Take—A Functional Analysis*, 15 N. Y. L. FOR. 119 (1969) [hereinafter Note]; Gary P. Johnson, *The Effect of the Public Use Requirement on Excess Condemnation*, 48 TENN. L. REV. 370 (1981); J. B. Steiner, *Ex-*

FIGURE 3

FIGURE 3

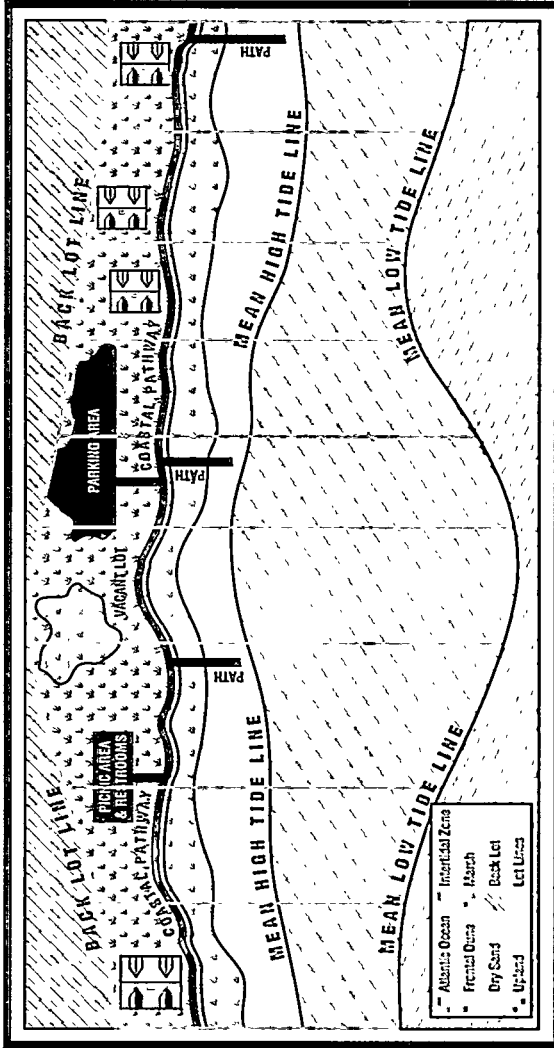


Figure 3, utilizing the same hypothetical beach depicted in figure 1, attempts to show some of the changes possible once acquisition of whole frontal parcels along an entire beachfront is complete. Two dilapidated and/or imprudently located houses have been removed. The remnant of an abandoned seawall has been removed and the frontal dune has been recontoured and extended throughout the full length of the beach. A meandering pathway is in place with connected walkways to the beach and to several new infrastructure-type facilities built on now public land, such as a new parking area and a new picnic area with restroom facilities. After all of the planning, design, and work incident to providing this range of public benefits and improvements have been completed (a process that may take many months), four houses remain. These may ultimately be relocated, or they may be resold as surplus property with small accompanying lot areas and with appropriate conditions to protect adjacent public lands, facilities, and foreshore interests.

Perhaps the earliest, and still the most widely used, justification for excess condemnation is the so-called "remnant theory." This theory itself divides into a "physical remnant" and an "economic remnant" line of reasoning.⁴⁷ Under the first theory, rather than leaving a small, not very useful, portion of a parcel (a "remnant") in private hands, the acquiring governmental entity can condemn the entire parcel in circumstances where its right to take a significant portion of the parcel for an undisputed public purpose is clear. For example, if a 100-foot wide, 1000-foot long right-of-way is needed through a property that is 105 feet wide and 1000 feet long, the remnant theory would allow the governmental unit to take the entire parcel even though only 100 feet of width is actually needed. The theory assumes that it makes no sense to leave a piece of land five feet wide and 1000 feet long in the condemnee's hands.⁴⁸ The physical remnant theory is most used where the remaining snippet of land is landlocked, oddly configured (as in the above example), or cannot be put to any practical or valid private uses.

An "economic remnant" is said to exist when the cost of taking less than all of the parcel would approximate or exceed the cost of taking it all.⁴⁹ This circumstance can arise in several contexts. The

cess Condemnation, 3 Mo. L. REV. 1 (1938); Annotation, *Right to Condemn Property in Excess of Needs for a Particular Public Purpose*, 6 A.L.R. 3d 297 (1966).

47. See 2A NICHOLS, EMINENT DOMAIN, *supra* note 21, at § 7.25[1][a], [b]; Note, *supra* note 46, at 120-33; Gary P. Johnson, *supra* note 46, at 382-89; Opinion of the Justices, 204 Mass. 616, 91 N.E. 578 (1910).

[W]e can conceive of a remnant of an estate, a part of which is necessarily taken, which remnant is so small or of such shape and of so little value that the taking of it in the interest of economy or utility, or in some other public interest, may be fairly incidental and reasonably necessary, in connection with the taking of land for the public work.

Id. at 619-20.

48. See 2A NICHOLS, EMINENT DOMAIN, *supra* note 21, at § 7.25[1][a].

The classic example of a lot remnant occurs when a road is built or widened, leaving in its wake an oddly shaped piece of land. Accordingly, in the statutes relating to the laying out and widening of highways . . . it is not uncommon for the statute to contain a provision authorizing the city to take the whole parcel and use or sell what it does not need for the highway, when part of a parcel is taken and the remainder is left in such condition (or in such shape) as to be of little value to its owner. The courts reason that it will be less expensive in the end for the city to take and pay for the whole of such lots, and devote the remnants to municipal purposes . . . than to engage in protracted litigation over the question of damages to the remaining land with each owner.

Id.

49. See *id.* § 7.25[1][b], [c]; ME. REV. STAT. ANN. tit. 23, § 154, (West 1992) (dealing with condemnation proceedings and laying out the elements of severance damages in Maine). One provision notes:

If the acquisition of only a portion of a property would leave the owner of record with an uneconomic remnant the department may, or at the request of the owner shall, acquire by purchase or condemnation the entire prop-

most obvious is where the delay, administrative, appraisal, survey, legal, and other costs associated with dividing a parcel will cost more than simply going forward and buying the entire parcel. It also arises when an acquiring governmental entity pays for the land it actually needs and takes, and then is faced with paying severance damages to the condemnee, who is left with a remainder that may be significantly diminished in value for any number of reasons. For example, the condemnee's road access may have been destroyed, access to other utilities may have been cut off or made prohibitively expensive, or the remaining parcel may not meet the requirements of zoning or other land use control ordinances.⁵⁰

A second broad theory justifying excess condemnation is called the "restrictive or protective theory." One commentator has explained this theory as follows:

Simply stated, the restrictive or protective theory consists of the taking of adjacent lands in excess of the amount [immediately or minimally] needed for public improvement to *protect* such improvement by creating desirable surroundings. The excess is taken to realize the full potential of the improvement and to extend its duration. This is accomplished through use of the "excess" to enhance the *appearance* of the improvement or create a buffer zone of *safety*, protecting not only the improvement, but often those who use the improvement.

While it cannot be said of all theories of excess condemnation, the constitutionality of the restrictive theory cannot be questioned.⁵¹

To the extent that the entire area of any acquired foreshore parcel is not fully and directly used for public purposes, the unused portion of the parcel (arguably an "excess" condemnation) almost certainly meets the criteria justifying "protective" excess condemnation. Acquiring these areas will allow the taking governmental entity to en-

erty. An uneconomic remnant is a parcel of real property in which the owner would be left with an interest which the department has determined has little or no value or utility to the owner.

Id. § 154-C. See also *Merrill Trust Co. v. State*, 417 A.2d 435, 440 (Me. 1980) (defining the total compensation owed the land owner in a taking case to include the value of the part taken as well as damages accruing to any residual portion of the land not taken).

50. See *State v. Buck*, 226 A.2d 840, 842 (N.J. Super. Ct. App. Div. 1967) ("when the State condemns all of a tract except a portion too small to comply with the zoning ordinance, the State must pay not only for what it takes but also for the damage to the remainder").

51. Note, *supra* note 46, at 133-34. Nichols' treatise also asserts that the constitutionality of the restrictive or protective theory of excess condemnation is "unquestionable." See 2A NICHOLS, EMINENT DOMAIN, *supra* note 21, § 7.25[2]. These scholars hold this view based on the consistent deference courts have extended to legislative judgments aimed at enhancing or protecting public rights and facilities, and increasing margins of safety to property and individuals.

hance and *protect* fragile beach and frontal dune systems. The removal of existing and potentially dangerous or damaging man-made constructs on the upland or in the intertidal zone will be made easier. The overall *appearance* and, more important, the *safety*, of the public and the public's investment in the foreshore, will all be improved if these "excess" lands are acquired as part of the acquisition program advocated here. The law allows it. Indeed, this is the precise intent behind the development of this theory of excess condemnation.⁵²

A third theory justifying excess condemnation is the "recoupment theory." This theory is said to have three strands: remnant-recoupment, protective-recoupment, and pure-recoupment.⁵³ The first two spin out of the two theories of excess condemnation already discussed. Recoupment in these contexts is not really an independent basis for excess condemnation, it merely reinforces the fact that surplus property can be sold.⁵⁴ In short, if an excess portion of a parcel is taken either because it is a valid remnant, or because the taking entity believed it to be essential to "protect" a public use or facility, and the condemnor subsequently determines that a portion of the condemned land is not needed, these recoupment theories hold that such land may be resold and the public investment "recouped" at fair market value. The fact that some portion of the property was acquired by a valid application of the "remnant" or "protective" theories of excess condemnation does not impair the power of government to subsequently dispose of the excess property. Any other approach would constitute an unwarranted limitation on government's proprietary powers and would not make economic or common sense.⁵⁵

52. See *United States v. 91.69 Acres of Land*, 334 F.2d 229, 231 (4th Cir. 1964) ("Ordinarily the Government may take not only the land that will be flooded [by construction of a dam] but such additional land as in the discretion of the condemning authorities may be necessary or desirable to protect the lake or to permit the incidental public use."); *People ex rel. Dept. of Public Works v. Lagiss*, 35 Cal. Rptr. 554, 567 (Cal. Dist. Ct. App. 1963) (allowing excess land taken for a highway to be used to improve lines of sight, highway drainage and slopes, and for roadside beautification); *In re Clinton Ave.*, 60 N.E. 1108 (N.Y. 1901), *aff'g* 57 A.D. 166 (N.Y. App. Div. 1901) (holding that not every part of land taken for a highway had to be used for the passage of vehicles and that excess land could be used for aesthetic purposes and to enhance the comfort, health, and convenience of the public).

53. See Note, *supra* note 46, at 155. See also NICHOLS, *EMINENT DOMAIN*, *supra* note 21, § 7.25[3].

54. See *supra* notes 45-46 and accompanying text.

55. See *In re City of Rochester*, 33 N.E. 320 (N.Y. 1893):

Of course, the city could not take private property for the purpose of selling it or dealing in it; but having once acquired it for a park, and it becoming, in the course of time, unnecessary or useless for that purpose, by the growth of the city or other changes in the situation, a sale in the manner prescribed by the statute would be within the legitimate functions of the city as a municipal corporation, and power to that end, conferred by the

So-called "pure-recoupment," on the other hand, stands on a different, more controversial, and constitutionally questionable footing. One commentator has noted that: "In summary, it appears that although an element of recoupment is found in the remnant and protective theories, it is only an offshoot of the primary purpose for the taking, while for pure-recoupment it constitutes the sole purpose for the taking."⁶⁶ In other words, in "pure recoupment" the State acquires excess land for the express purpose of capturing the economic benefits or appreciated land value accruing to adjacent land as a result of the public project.⁶⁷ For example, if land is condemned for a new highway interchange, and the public entity involved condemns the immediately adjacent land for the sole purpose of capturing the appreciated commercial value that this land will acquire, "pure recoupment" results.⁶⁸ The government, for the sole purpose of mak-

legislature at any time, or in the act authorizing the taking, cannot invalidate the delegated right to exercise the power of eminent domain.

Id. at 321; 2A NICHOLS, EMINENT DOMAIN, *supra* note 21, § 7.09.

56. Note, *supra* note 46, at 156.

57. Though little used in this country, this method of financing public improvements has been, and continues to be, widely used in Europe. See Note, *supra* note 46, at 150-53 for extensive footnote references to European experiences with "pure" recoupment, and early treatise and law review support for this approach.

58. The view that this course of conduct by government is somehow wrong—that governments should not be active participants in the real estate market, even to reduce (or offset) their own public investment costs—is based on several factors: a nineteenth century perception of the appropriate role of government *vis-à-vis* the private sector; a fear of potential governmental abuse (and/or unfair advantage) should it enter these historically private fields of economic activity; and narrow definitions of "public use" and "public purpose." Today the accepted role of government has been greatly expanded. The concepts of "public use" and "public purpose" have been expanded. See *supra* note 10. The potential for governmental abuse has also been curbed by procedural safeguards and judicial review.

If "pure recoupment" has not been embraced by name nationally or in Maine, it has been embraced conceptually in most states by legislation and case law that sanction an increasingly larger entrepreneurial role for government. See *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) (sustaining the taking of land for resale to lessees, in order to achieve land redistribution objectives at minimal cost); *Berman v. Parker*, 348 U.S. 26 (1954) (sustaining government acquisition of blighted structures, and perfectly safe and usable adjacent structures, in order to assemble and resell a commercially viable parcel of land for redevelopment projects); *Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth.*, 190 N.E.2d 402 (1963) (sustaining Port Authority power to take land and sell or lease it to defray the costs of the World Trade Center and other Authority projects). In *Common Cause v. State*, 455 A.2d 1 (Me. 1983), Maine's highest court sustained joint state and municipal actions designed to facilitate private shipyard expansion, which in turn would have a favorable economic and employment impact in the state. The use of taxing, spending, and bonding powers in this context was deemed to meet public purpose requirements. *Id.* at 23-26. Interestingly, the Maine court fashioned a distinction between the "public use" required for an appropriate exercise of eminent domain power and the "public purpose" necessary to exercise tax and spending powers. *Id.* at 23. Few other courts or scholars draw a similar distinction, and most use the terms interchangeably. Finally, in *Poletown*

ing money, has clearly taken more land than it really needs. It has become an active player in the real estate market. The fact that the governmental entity turns around and applies its gains to the cost of the underlying public project does not avoid the constitutional question of whether there is a sufficient "public use" or "public purpose" basis to justify the excess taking.

Early state and federal court decisions consistently held that excess condemnation on a "pure recoupment" theory did not meet constitutional "public use" or "public purpose" tests.⁶⁰ More recent cases suggest that the constitutional question may at least be an open one.⁶⁰ What is clear, however, is that, even if permissible, excess condemnation of land on a "pure recoupment" theory, projecting government as it does into a significant entrepreneurial role in the real estate market, is seldom used today. More important, for our purposes, nothing suggested in this paper relies upon or requires the use of "pure recoupment" excess condemnation. Remnant and protective recoupment may well occur, but these theories of excess condemnation meet the "public use" and "public purpose" require-

Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (1981), the Supreme Court of Michigan sustained the taking of a viable, non-slum neighborhood for resale to General Motors to facilitate construction of an automobile assembly plant with attendant employment and economic benefits. For additional analysis of eminent domain and the public use doctrine, see generally Suzanne LaBerge, *The Public Use Requirement in Eminent Domain: A Constantly Evolving Doctrine*, 14 STERSON L. REV. 649 (1985); Thomas Ross, *Transferring Land to Private Entities by the Power of Eminent Domain*, 51 GEO. WASH. L. REV. 355 (1983); Carl K. Newton & Leslie Sha, *Recent Developments in Condemnation Law*, 16 URB. LAW 645 (1984); William J. Appel, Annotation, *Eminent Domain: Industrial Park or Similar Development as Public Use Justifying Condemnation of Private Property*, 62 A.L.R. 4th 1183 (1988).

59. This position was taken in spite of the fact that the recouped gain, which derived solely from the excess land taken, was made possible only by a public investment, and was subsequently applied to defray the costs of that investment. See *City of Cincinnati v. Vester*, 33 F.2d 242, 244 (6th Cir. 1929), *aff'd on other grounds*, 281 U.S. 439 (1929) ("pure recoupment" theory of excess condemnation struck down as not being for a public use—and as implicitly violative of the due process requirements of the federal constitution); *Opinion of the Justices*, 204 Mass. 607, 610 (1910) (Involved a proposed excess taking of land to put in a major thoroughfare the costs of which would be defrayed by the sale or lease of adjacent commercial lots; the court noted: "It is plain that a use of the property to obtain the possible income or profit that might enure to the city from the ownership and control of it would not be a public use . . . Such proceedings are entirely outside the functions of a State or of any subdivision of a State."); *City of Richmond v. Carneal*, 106 S.E. 403, 405-406 (Va. 1921) (same).

There is, however, a limited context in which something very close, if not identical, to "pure recoupment" has historically been permitted. If a portion of a parcel is taken to install a type of public improvement that has immediate and special benefit to the condemnee's remaining land (sewer or water lines, curb and gutter, or sidewalks) most jurisdictions allow the condemnation award for the land taken to be reduced, in whole or in part, by the value of the benefits conferred. See Note, *supra* note 46 at 168-69.

60. See *supra* note 58.

ments of the law.⁶¹

Finally, it should be noted that a handful of states (not including Maine) have created express constitutional provisions that allow some measure of excess condemnation.⁶² Whether such provisions would be interpreted to allow "pure recoupment," and whether federal constitutional safeguards would be interpreted to override these state provisions, are open questions beyond the scope of this paper. Indeed, the answer to these questions is unimportant for our purposes since no such extension of excess condemnation powers is needed to achieve the foreshore acquisition program outlined here. Spending, taxing, and bonding powers, along with a rather conventional use of eminent domain, are the only tools needed to achieve the objectives outlined.⁶³ These powers may be exercised as readily by the State as by local units of government.

VI. SOME SOFTENING AND SAFEGUARDING PROVISIONS OF THE PROPOSED ACQUISITION STRATEGY

The foregoing arguments are best advanced by going forward in a conciliatory and sensitive manner. This suggestion should not be

61. See *supra* notes 21-23 and accompanying text.

62. See 2A NICHOLS, EMINENT DOMAIN, *supra* note 21, § 7.25[4]. See also Note, *supra* note 46, at 163 (discussing an early Michigan constitutional provision that arguably permitted "pure recoupment" excess condemnation).

63. The exercise of these powers in Maine to achieve objectives along the lines outlined here can hardly be doubted after *Common Cause v. State*, 455 A.2d 1 (Me. 1983). The court noted:

[t]he concept of public purpose is not static. "[W]hat could not be deemed a public use a century ago, may, because of changed economic and industrial conditions, be such today. Laws which were entirely adequate to secure public welfare then may be inadequate to accomplish the same results now." This Court has approved public expenditures—and, under the related "public-use" doctrine, exercises of eminent domain—that might not have passed muster in earlier times.

Id. at 24 (citations omitted). The court's entire discussion of taxation and spending and its relationship to "public purpose" concepts is well worth reviewing. *Id.* at 23-25. It is broad in scope, broad in its deference to legislative judgment, and ends by noting: "Accordingly, we now hold that indirect economic benefits may be taken into consideration in deciding whether public spending by the state is justified." *Id.* at 25. See also 2A NICHOLS, EMINENT DOMAIN, *supra* note 21, at §§ 7.02-7.03, 7.11[1]:

Money cannot be raised by taxation except for public use. It has often been said that the public use which justifies taxation is the same as that for which eminent domain may be employed The cases holding that public money cannot be donated to private manufacturers are the best authority for believing that eminent domain cannot be employed in the same behalf.

Id. (footnotes omitted). It follows then that Maine cases that sustain the use of state taxing and spending powers for purposes of providing parkland, public recreational facilities, supporting parking facilities, frontal dune and other beach protection programs, are precedent for arguing that eminent domain powers may be used for similar ends.

read as expressing equivocation as to what the State's policy should be with respect to the foreshore, or as an admission of weakness or infirmity in any of the underlying legal arguments that justify and sustain the proposed program. Instead, it is a frank admission that broad policy and spending programs of the sort advanced here must gain political acceptance. They must be seen by the public, the Legislature, and ultimately by the courts, as necessary and legally justifiable actions taken in a manner that is reasonable and fair in the balances struck between competing public and private interests.

To begin with, the proposed foreshore acquisition program should be announced at the highest levels of state government, ideally by the governor's office and the legislative leadership. It should be advanced as a bipartisan program of the State that will be unfolded over a considerable period of time; a ten to fifteen year commitment is not too long. This will not only evidence the State's resolve in proceeding with foreshore acquisition, but it will also provide sufficient time to proceed with care, to do the necessary planning, and to unfold the various phases of the program a step at a time. This time frame also would allow the costs of the program to be spread over a long enough period of time to be bearable.

The announced program should then be embodied in appropriate and comprehensive legislation, such as that which established the mandate and funding for the Land for Maine's Future Board.⁶⁴ The legislation proposed here should contain detailed findings of foreshore conditions as they exist today, and should lay out the full range of purposes and objectives which the program seeks to achieve. The 1987 legislative language that established the acquisition program for Land for Maine's Future is strikingly similar to what is suggested here:

The Legislature finds that Maine is blessed with an abundance of natural resources unique to the northeastern United States; that these natural resources provide Maine residents and visitors to the State with an unparalleled [sic] diversity of outdoor recreation opportunities during all seasons of the year and a quality of life unmatched in this nation; that the continued availability of public access to these recreation opportunities and the protection of the scenic and natural environment are essential for preserving the State's high quality of life; that public acquisition programs have not kept pace with the State's expanding population and changing land use patterns so that Maine ranks low among the states in publicly owned land as a percentage of total state area; that rising land values are putting the State's real estate in shoreland and resort areas out of reach to most Mainers and that sensitive lands and resources of statewide significance are currently not well protected and are threatened by the rapid pace of development; and that

64. See *supra* note 20.

public interest in the future quality and availability for all Maine people of lands for recreation and conservation is best served by significant additions of lands to the public domain.⁶⁵

The proposed legislation should make clear that all of the powers of government, those of taxing, spending, bonding, the police power and eminent domain (including excess condemnation), may be exercised by either the state or municipal governments to achieve the foreshore acquisition and improvement objectives of the program. The legislation should also set out an initial financial commitment to the acquisition program—\$25-35 million would seem a minimally appropriate figure.⁶⁶ Furthermore, the legislation should contain a clear mechanism for dividing and sharing these proceeds between participating municipal governments and an identified lead state agency that will acquire foreshore property for the State and take overall responsibility for program coordination.⁶⁷

Beyond this, the legislation should lay out an outline of the planning processes to precede property acquisition and any subsequent improvements to acquired property (including removal of unwanted structures and the building of new facilities). In addition, the legislation should contain an overall timetable for proceeding, including the rendering of periodic reports to the Governor and Legislature by the lead state agency, a mechanism for coordinating between the lead state agency and other agencies with legitimate interests in the foreshore (the State Planning Office, the Department of Environmental Protection, and Land Use Regulatory Commission), and minimal procedural safeguards to be adhered to in carrying out the program. The more carefully this legislation is drafted, the more

65. ME. REV. STAT. ANN. tit. 5, § 6200 (West 1989).

66. The figure suggested here is completely arbitrary. It is large enough to demonstrate real commitment, yet small enough not to deter the program at the outset. The initial bond funding for the acquisition of Land for Maine's Future (see *supra* notes 20, 64, 65) was \$35 million. See P. & S.L. 1987, ch. 73. Whatever figure is initially selected to fund (through bonding) foreshore acquisition, it should be made clear that this is an initial commitment. The total costs of a ten to fifteen year program of state and local government foreshore acquisition cannot be known at the outset. As the program unfolds, however, a clearer sense of how much land should be acquired, where and when it should be acquired, and an approximation of final costs, can be determined. At that time, with the impetus of some demonstrated success, a second bond issue of whatever magnitude seems necessary and justifiable can be advanced. This staged approach is precisely how the State has funded its wastewater treatment plant construction program over the last twenty years. An initial bond issue was followed (after a number of treatment plants were on-line) by several much larger bond issues as the full magnitude, costs, and benefits of the program became apparent.

67. This agency should probably be the Bureau of Parks and Recreation. See ME. REV. STAT. ANN. tit. 12, §§ 601-609 (West 1989 & West Supp. 1992). Alternatively, it may seem appropriate to the Legislature to have the State's role in the foreshore acquisition program carried out through a new and separate entity, as was done in the acquisition of Land for Maine's Future. That 1987 program created the Land for Maine's Future Board. See ME. REV. STAT. ANN. tit. 5, § 6202 (West 1989).

problems will be avoided. More important, detailed and carefully drawn legislation bespeaks a seriousness that will more likely garner both legislative and public support for the whole undertaking, starting with critical bond issue funding support.

The acquisition of entire frontal parcels will often involve the purchase of improvements of the condemnee.⁶⁸ These improvements will usually be seasonal cottages of varying value and in varying states of repair. They will often have an emotional and extrinsic value to the condemnee that must be recognized and taken into account if the condemnees and the public are to accept the overall foreshore acquisition program. The first and most important step was suggested at the outset—the program must pay full market value for these properties.⁶⁹ Additionally, the program should make every effort, consistent with program objectives, to preserve as many of these cottages as possible. Inevitably, some will have to be torn down; others may need to be relocated on or off the lot. In all cases, the condemnees should be given every opportunity, through appropriate (even generous) lease arrangements, to remain in possession of these cottages during the potentially lengthy period between acquisition and the final disposition of these structures. As noted earlier, careful data on all of the acquired properties along any stretch of foreshore should be gathered. A plan for expanding public recreational uses and facilities in an orderly manner will need to be developed. A determination of what frontal dune protections and improvements are necessary (including the removal of dilapidated or detrimental human structures), along with a timeframe for these activities, will need to be developed. In many instances, these activities will take months or years. During all of this time condemnees should be permitted to remain in possession of their cottages, subject only to those limitations necessary to carry out the objectives of

68. All of the ten properties that the Town of Wells examined on Moody Beach in 1989 had houses on them, and certainly the acquisition of entire frontal parcels along such a beach would almost always include a house. See *supra* notes 13-15 and accompanying text. Other beach areas in the state, however, are not nearly as built up. Vast segments of Scarborough Beach, for example, have no structures on the frontal parcel. Each situation would need to be independently examined. Furthermore, houses are not the only man-made improvements that should be part of an "entire frontal parcel" acquisition program; piers, seawalls, bulkheads, out-buildings, should all be included.

69. See *supra* note 25 and accompanying text. Adoption of provisions similar to the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. No. 91-646, 84 Stat. 1894, would also seem prudent. These provisions would require the acquiring entity to attempt to negotiate a sale of the property before commencing condemnation proceedings and completion of market appraisals prior to condemnation. They would also afford condemnees some latitude in remaining in possession. See 6 NICHOLS, EMINENT DOMAIN, *supra* note 21, at § 24.14[2] (characterizing such provisions as "substantially enhanc[ing] the position of the condemnee").

the overall program.

Condemnees should be permitted to remain even longer in cottages that are either relocated, or that are determined to be appropriately located. Only those condemnees whose cottages must ultimately be removed to facilitate public uses, to promote safety, or to provide foreshore protection need be faced with loss of possession, and then not until all of the planning processes outlined above have been completed. This approach to the reasonable interests and expectations of owners of improved frontal property is fair to them and does no harm to the larger public interests the acquisition program is intended to serve.⁷⁰ After all, this is not a highway project

70. The approach outlined is not offered simply to gain public acceptance of a foreshore acquisition program or to soften condemnee opposition to such a program, though ideally it will achieve both of these objectives. More important, this approach is on sound legal ground. It takes into account the larger lessons of the United States Supreme Court's recent holding in *Lucas*. See *supra*, notes 7 and 37.

This Article acknowledged at the outset that significantly enlarged public rights in the foreshore could not in all probability be achieved by new police power enactments. See *supra* note 7 and accompanying text. *Lucas* certainly reinforces this proposition. The Court's preference is clear. Rather than proceeding to attain important and valuable public interests by stringent regulation, the Court approvingly notes: "The many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands altogether suggest the practical equivalents in this setting of negative regulation and appropriation." *Lucas v. South Carolina Coastal Council*, 112 S.Ct. at 2895.

At another point, the *Lucas* court reinforces the general rule that "[physical invasions of property] no matter how minute the intrusion, and no matter how weighty the public purpose behind it, . . . have required compensation." *Lucas v. South Carolina Coastal Council*, 112 S.Ct. at 2893. See also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Expanded public recreational use of beach areas would almost certainly come within the *Loretto* rule. In other words, if we want these public use rights, we must acquire them. We cannot regulate them into existence.

The *Lucas* holding also suggests that efforts to obtain by regulation the broader range of public rights in the foreshore outlined in this Article would almost certainly be held to be a taking. The majority defines a regulatory taking as the loss of all, or almost all, of the economic value inherent in a property. *Id.* at 2894-95 and nn.7-8. That test would certainly be met. Couching the regulations in language of harm avoidance rather than benefit conferral will not change an impermissible taking into a valid regulation. On that point, the *Lucas* court noted: "[T]he distinction between regulation that 'prevents harmful use' and that which 'confers benefits' is difficult, if not impossible, to discern on an objective, value-free basis." *Id.* at 2899. Again we are led to the conclusion that a fair and principled acquisition program is the only way to proceed.

Finally, the overall approach outlined here accepts the spirit of *Lucas*. Public and private interests in land must be fairly balanced. Reasonable investment-backed expectations are entitled to protection. Fundamental alterations in preexisting private property rights—in our case, the staking out of a broad range of public rights in the foreshore—must be compensated. The *Lucas* court cited *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), approvingly. Justice Holmes in *Mahon* noted: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional

where the immediate ouster of condemnees is essential to the undertaking.⁷¹ The foreshore acquisition program can and should move more slowly to remove people from acquired property.⁷² This more sensitive approach to the interests of condemnees may not be legally necessary, but it is a prudence that will gain broadened program acceptance, even among those whose property will be acquired.

Finally, there will be situations in which it is determined that a portion of an acquired property is indeed surplus. These remnant portions, not needed to meet any of the objectives of this program, may be resold by the acquiring entity. The resale should attach whatever conditions are appropriate and necessary to protect the remaining adjacent public lands and facilities. The resale of surplus property should also be structured in a way that gives the condemnee of the particular property an opportunity to reacquire that portion of his original holding that is then on the market.⁷³ Additionally, condemnees as a class should be given priority in any surplus property sales growing out of the program. The condemnees, however, should not receive any economic windfall. After all, they

way of paying for the change." *Id.* at 416. The *Lucas* court would certainly agree. See also *Nollan v. California Coastal Commission* 483 U.S. 835, 841 (1987). This case sustained the view that "a continuous strip of publicly accessible beach along the coast," may be a good idea, but that coastal residents alone cannot be compelled under the police power to contribute to its realization. The state was free to advance its objectives by utilizing its spending and eminent domain powers. The acquisition program outlined in this paper embraces all of these principles.

71. See generally 6 NICHOLS, EMINENT DOMAIN, *supra* note 21, at § 24.11 (describing the evolution and present state of eminent domain procedures that require immediate condemnor possession). Today in most jurisdictions, so-called "quick take" provisions exist, and these have been sustained against due process challenges. See *Sweet v. Rechel*, 159 U.S. 380 (1895); *Joiner v. Dallas*, 380 F. Supp. 754, (N.D. Tex. 1974), *aff'd mem.*, 419 U.S. 1042 (1974) (holding that "quick take" provisions of eminent domain law are not upset by the *Fuentes v. Shevin*, 407 U.S. 67 (1972), line of cases). The important point here is that though the acquiring governmental entity may have the right to immediate possession of acquired foreshore property, it will seldom want or need immediate possession of a condemnee's cottage. When such possession becomes necessary, it can be obtained, but in a manner that is sympathetic to condemnee interests and reasonable expectations.

72. The legal propriety of proceeding in the manner suggested seems unquestioned. See 6 NICHOLS, EMINENT DOMAIN, *supra* note 21, at § 24.11.

73. This approach to the resale of surplus property that was originally acquired as a result of a public acquisition program is not widespread, but it has been discussed in the literature and has been adopted in some jurisdictions. See Note, *supra* note 46, at 139. R.I. CONST. art. VI, 19 provides:

[A]nd in case of any such sale or lease, [of previously condemned but now surplus property] the person or persons from whom such remainder was taken shall have the first right to purchase or lease the same upon such terms as the state or city or town is willing to sell or lease the same.

This provision was sustained in *M.S. Alper & Son, Inc. v. Capaldi*, 206 A.2d 859 (R.I. 1965) (holding that the condemnee had a constitutional right to purchase surplus property found unsuitable for the purpose it was originally taken, and that the right could not be defeated by giving the property to another).

received full market value for the entire parcel at the time it was acquired. While condemnees would be given priority to repurchase, a first refusal if you like, these sales should reflect the fair market value of the remnant parcel at the time of resale.

In order to avoid the same type of valuation problems described earlier,⁷⁴ all resales of surplus property growing out of this program should utilize some type of bid or auction process. This would allow open market forces to determine the price of whatever is being sold. If the original condemnee or someone from the class of condemnees tenders the high bid, the sale to that party should proceed promptly. If a member of the general public tenders the highest bid for a particular property, the original condemnee, and those within the class of condemnees, should be allowed a period of time—thirty to forty-five days—to match that bid and acquire the property. If the original condemnee matches the bid, he should be given priority to purchase the property. If he does not match the bid, but someone from the class of condemnees does, that party should be allowed to purchase the property.⁷⁵ If the bid price is not matched within the allowed time, the highest public bidder should be allowed to conclude the purchase.

The system outlined for the resale of surplus coastal property would give condemnees the preferences outlined above—that is only fair. It would, at the same time allow a free market system to determine value and price—that too, is only fair.⁷⁶ Viewed more generally, this is simply another way in which a softer approach to the legitimate interests of condemnees can be recognized and made a part of the proposed foreshore acquisition program. Arguably, this approach will contribute to public acceptance of the program and blunt some condemnee opposition.⁷⁷

74. See *supra* note 28 and accompanying text.

75. If more than one condemnee within the class of condemnees matches the highest bid price for a particular resale property, a mechanism would have to be developed, for example, first in time, or an auction among the matching condemnees, to determine who will gain the right to purchase the property.

76. To discourage condemnee speculation in resale properties, it might be necessary to put some limit on the number and type of surplus coastal properties a condemnee could acquire. The prevention of condemnee speculation, as well as the mechanics of surplus land disposition within the proposed foreshore acquisition program, is beyond the scope of this Article. These issues need not be decided prior to committing to an acquisition program, but they can and should all be resolved in a manner that maintains the condemnee preference suggested in the text.

77. It would seem appropriate to earmark proceeds from the lease of property, and from the sale of surplus property acquired as part of the foreshore acquisition program, to meet the cost of future program needs, such as further land acquisition, development of facilities, and maintenance. This will have the effect of reducing the long-run net cost of the program, which admittedly will have high front-end costs by virtue of having paid full market value for acquired properties. It will also partially convert the initial \$25-35 million investment in the program into a revolving fund,

VII. CONCLUSIONS AND SOME FINAL THOUGHTS

There is no doubt that the Moody Beach decisions require some action by the State and/or local units of government if the public is to enjoy modern recreational activities in the intertidal zone as a matter of right. There should also be no doubt that the proposals for foreshore acquisition put forward here go well beyond recreational use of Maine beaches. Specifically, a larger number of public use rights and public interests in the foreshore are sought to be fashioned and protected. To do nothing more than redress the consequences of the Moody Beach decisions seems a costly half-measure, especially when, at little additional net cost, a much wider range of public rights and benefits can be obtained. In summary, the proposal advanced here would:

1. Give the public ownership of the intertidal zone, thus allowing a full range of recreational and other uses advantageous to the public.

2. Give the public ownership of the dry sand area above the mean high tide line, thus avoiding pre-Moody Beach problems of trespass, and facilitating the public's use of the intertidal zone.

3. Enable the governmental owner of entire frontal lots to remove any seawalls, jetties, breakwaters, and dilapidated or improvidently located buildings in the intertidal zone or on the acquired upland that threaten the natural characteristics and long-run survivability of fragile beach and frontal dune systems. At the same time, the public owner would be able to take whatever active measures seem appropriate to repair and restore (by recontouring and revegetating) these fragile areas.

4. Enable the governmental owner of entire frontal lots to plan and put in place on suitable portions of the acquired property a system of scenic trails parallel to the beach, and other footpaths and walkways connecting the beach to parking areas and other public facilities as deemed necessary.

5. Enable the governmental foreshore property owner to put in place whatever picnic and camping areas, restroom and parking facilities, and maintenance and public safety facilities that seem necessary to protect and facilitate the widened range of public uses to be permitted as a matter of right in and along the foreshore.

6. Enable the government to more readily provide improved public access to the acquired foreshore and its facilities.

The justifications for promptly moving forward along the lines suggested are numerous. All Maine citizens and their children, not just a privileged few, deserve to be able to recreate on Maine's beaches and foreshore. Our tourist industry is dependent upon access to, and recreational use of, the foreshore. Damage to fragile

thus postponing the need to seek additional bond issue capital investment support for the program.

beach and frontal dune systems must be arrested. Beyond these immediate and observable justifications, we are faced with the prospect of rising sea levels⁷⁸ and increased building along the coast. These factors are placing more structures and people in the path of damaging tides and coastal storms. Broadened public ownership of the foreshore will reduce these trends and risks.⁷⁹ Finally, it is unlikely that there will ever be a more economical time to begin acquiring these property interests since both the price of coastal property and current interest rates are relatively low.

The legal powers necessary to undertake a program as suggested certainly exist. Moreover, Maine has shown both a recent and an historic capacity to acquire and manage unique land areas for the long-run public benefit. The successful work of both the Land for

78. See *supra* notes 38, 39, and accompanying text. Though not discussed earlier as a benefit or reason for public foreshore acquisition, and though scientists may debate the magnitude, primary locations, and cause of sea level rise, there is little doubt that this phenomena is occurring along the Maine coast. The Marine Law Institute of the University of Maine School of Law recently published a citizen's guide to ocean and coastal law. MARINE LAW INSTITUTE, UNIVERSITY OF MAINE SCHOOL OF LAW, PLANNING FOR RELATIVE SEA-LEVEL RISE (1992) (on file with the Marine Law Institute at the University of Maine School of Law). It notes:

Sea level has risen in all of Maine's coastal municipalities during the last fifty years. Geologists project that this rise will continue . . . Maine is experiencing rising sea level at a rate much greater than many other regions of the world. A continuation of the past rate of rise will cause coastal land loss and loss of poorly sited structures. While a continuation of this historic pattern of sea-level rise presents problems enough, some scientists are also projecting an accelerated rate of sea-level rise as a result of global climate change associated with the 'greenhouse effect.' If sea level rises at an accelerated rate, coastal areas face even more extensive threats to natural and built resources.

Id. at 1 (emphasis omitted). These phenomena will inevitably impose significant public and private costs resulting from flooding, flood-proofing measures, and storm driven water damage. The only uncertainty is the magnitude of the loss. There is an extensive and growing literature on this subject. See JOEL B. SMITH & DENNIS A. TIRPAK, THE POTENTIAL EFFECTS OF GLOBAL CLIMATE CHANGE ON THE UNITED STATES, EPA (1990); MICHAEL BARTH & JAMES G. TITUS, eds., GREENHOUSE EFFECT AND SEA LEVEL RISE: A CHALLENGE FOR THIS GENERATION (1984); Giese & Aubrey, *Losing Coastal Upland to Relative Sea-level Rise: Three Scenarios for Massachusetts*, 30 OCEANUS 16 (1987); S. Thompson, *Sea Level Rise Along the Maine Coast During the Last 3,000 Years* (Master's Thesis, Univ. of Maine at Orono, 1973). The Marine Law Institute of the University of Maine School of Law maintains a bibliographic index of materials on sea level rise with nearly 150 entries.

79. See Joseph L. Sax, *The Fate of Wetlands in the Face of Rising Sea Levels: A Strategic Proposal*, 9 UCLA J. ENVTL. L. & POL'Y 143 (1991). Professor Sax, while proposing an insurance approach to the disasters he foresees, recognizes early on that: "Acquisition gives government the surest control over the land in question and removes private economic incentives either to overdevelop or to press for non-enforcement of restrictive laws."

Id. at 146.

Maine's Future Board,⁸⁰ and the longstanding role of the Baxter State Park Authority,⁸¹ suggest that we can fashion appropriate law and institutional arrangements to carry out a program of the type set forth here.

There is no doubt that the front-end costs of the proposed foreshore acquisition program are much greater than the costs of acquiring only the intertidal zone, or of obtaining a recreational easement or license. However; the property interests acquired are also much greater. Moreover, they are permanent and certain. They are more likely to avoid future litigation as to the scope of public rights and permitted uses, and they allow those rights and uses to be exercised over a wider area, and to expand or contract with changing times and needs. The range of direct and indirect benefits that the proposed property acquisition program will give rise to is also much greater than the benefits accruing from either of the approaches the town of Wells examined. In addition, the value of these economic benefits will increase over time and will be received in perpetuity. There will also be some economic return from the lease and resale of surplus portions of the acquired property. All of these factors are offsets to the front-end cost. They suggest that the long-run net costs of the proposed program will be very low. Indeed, it does not strain credulity to suggest that there may well be a net economic return from the proposed foreshore acquisition program, particularly if one factors in cost savings derived from harm avoidance and increased margins of safety for natural systems, persons, and property, especially high-value improvements to property that will be steered away from the water's edge.

Finally, it is worth noting that Maine is not alone in its need to address these foreshore issues nor would we be the first to act. Other states, including Oregon, California, Texas, Florida, and South Carolina, for example, have all sought to protect public rights and uses (often through public ownership) along their respective coasts.⁸² We

80. See *supra* notes 20, 64, and 65 and accompanying texts.

81. See ME. REV. STAT. ANN. tit. 12, §§ 901-908 (West 1981 & Supp. 1992-1993).

82. See generally CAL. PUB. RES. CODE, §§ 30300-30355 (West 1986 & Supp. 1993) (laying out the powers and duties of the California Coastal Commission); SO. CAR. CODE ANN. §§ 48-39-10 *et seq.* (1991 Cum. Supp.) (establishing the Beachfront Management Act and the South Carolina Coastal Council); TEX. NAT. RES. CODE ANN., § 33 (West 1981 & Supp. 1992-1993); Gilbert L. Finnell, Jr., *Coastal Land Management in Florida*, 1980 AM. B. FOUND. RES. J. 303; *Hay v. Bruno*, 344 F. Supp. 286, 290 (Or. 1972) (holding that the confirmation of these public property rights was not a taking of any interest of upland owners); *State ex rel. Thornton v. Hay*, 462 P.2d 671, 677-78 (Or. 1969) (recognizing Oregon's title to most, but not all, of its coastal land in fee to the mean high tide line, and in the form of a prescriptive easement in the dry sand area to the vegetation line). Most recently, these Oregon precedents were challenged by a plaintiff who sought to rely on the Supreme Court's *Lucas* reasoning. See *supra* notes 7, 37 and 70. The challenge failed. See *Stevens v. City of Cannon Beach*, 835 P.2d 940 (Or. 1992).

can do likewise. The Moody Beach decisions, rather than representing a loss of public use rights within the intertidal zone, can become a catalyst for change, for a significant expansion of public ownership and public use rights along Maine's foreshore. The acquisition program outlined in this Article challenges us to find the courage and political will to act in our own best interests. Whether we will remain to be seen.

APPENDIX

Proposed License allowing public recreational use of Moody Beach (not adopted)

LICENSE

I/We, the undersigned (hereinafter "owners" or "licensors") [both] of Wells, County of York, State of Maine, for sufficient consideration, and jointly and in conjunction with other property owners along Ocean Avenue in Wells, Maine, who are presently granting similar licenses to the same licensees (the several of which licenses together shall be hereinafter referred to as the "Joint License") grant to the town of Wells and its owners of permanent residential dwellings property and/or permanent residents, and its permanent and seasonal residents of the "Moody Beach Area" (defined herein as the area between the Ogunquit Town Line on the south, Eldridge Road on the north, the eastern side of the Rachel Carson National Wildlife Refuge on the west, and the Atlantic Ocean on the east, and including certain streets accessing Furbush Road and Bourne Avenue as specifically delineated on the attached map, all of which is more fully set forth on the ~~and as outlined in a map attached hereto~~) (hereinafter "licensees"), a license over specific portions of a certain parcel of land in Wells, York County, Maine, being that parcel of land shown on the tax map and lot number below for the town of Wells, under the terms, conditions, and purposes set forth below.

Tax Map _____, Lot _____

LICENSED AREA

The area subject to this individual license ("license area") is the so-called intertidal zone. It is bounded on the west by the mean high water mark and on the east by the mean low water mark (with the parties to this license agreeing, for the purposes of this license, that the mean high water line lies at least seventy feet from the seawall), and is bounded on the north and the south by the property lines of the abutting owners.

LICENSEES

It is the express intent of the owners/licensors that this license is to be extended ONLY to owners of permanent residential dwellings property and/or permanent residents of the Town of Wells and permanent and seasonal residents of the Moody area as defined herein (all of which are referred to herein as "licensees") and guests of said licensees, with "guests" defined as non-residents of the Town of Wells who are accompanied at all times by a licensee under this license.

PURPOSE

The purpose of the license is for "passive recreational use" by licensees and their accompanying guests. Passive recreation is defined as a lawful use by said licensees and their accompanying guests in the licensed area during daylight hours for their own non-intrusive enjoyment and not for their profit or that of another, and consistent with the peaceful and quiet enjoyment of the shoreland by the licensors and other licensees. Littering is not permitted. No vehicles are permitted and no amplified sound is permitted.

TERM

Licensors intend that this license run for a period of twenty-five (25) years so long as licensees comply with all conditions set forth herein, but in any event an individual Licensor/Owner may revoke the license with respect to their lot by written notice within thirty (30) days of the end of any calendar year. The Joint License may be revoked by a majority vote of all individual licensors within thirty (30) days of the end of any calendar year. The Town of Wells on behalf of all licensees may withdraw from participation in the license, with respect only to all lots as a whole, by written notice within thirty (30) days of the end of any calendar year. This license shall terminate upon the death of the undersigned owner(s) or upon by the transfer or sale of the parcel including the licensed area. The Joint License may, in the event of material and/or continued violations of the terms and conditions set forth in the licenses, be revoked by majority vote of all individual licensors at any time.

CONDITIONS

1. Activities by the Town of Wells and other licensees hereunder in violation of the definition of "passive recreational use" set forth above, including activities which violate any statute or ordinance, are expressly prohibited.
2. In consideration for the owners' offer of this license, the licensee Town of Wells undertakes to perform and/or to assume the following obligations.
 - (a) Take appropriate action against individual violators of the terms and conditions of this license, including but not limited to prosecution of criminal trespass against those individuals who utilize the licensed area in violation of the meaning of "passive recreational use";
 - (b) Post and maintain signs at three accessways along Ocean Avenue known as accessways 17, 18, and 19, and at the southerly portion of Moody Beach abutting Ogunquit Beach, stating as follows:

LICENSED BEACH AREA

(b) (~~Sign Language~~)-Daytime use of the beach area below the high tide line is by consent of the owners. Please respect the privacy of the owners and leave the beach clean for future enjoyment. The area above high tide (within at least 70 feet from the seawall) is private property. **THERE ARE NO LIFE GUARDS ON THIS BEACH;**

(This License is on file with the Town Clerk)

- (c) Station no lifeguards at the accessways or in the license area.
- (d) Assume responsibility for, and agree to indemnify, hold harmless and provide a defense to the licensor/owner for, any claims made or causes of action brought by any person against licensor/owner arising from use of the licensed area or surrounding area by anyone pursuant to this license;
- (e) The current Board of Selectmen agree to publicly oppose any plans or ordinance to establish or expand public or private parking facilities in the

Moody Beach area beyond the public parking facilities as of November 1, 1989, and to fairly enforce all restrictions on parking in the Moody Beach area in effect as of November 1, 1989.

(f) The current Board of Selectmen agree to publicly oppose any attempt to use the Moody Beach area including points along Ocean Avenue and the edge of the marsh at the Rachel Carson National Wildlife Refuge as a route or drop-off point for any public or private commercial transportation or mass-transit vehicle. Expressly excepted from this provision are routes for police, fire, rescue and other emergency vehicles;

(g) The current Board of Selectmen agree to publicly oppose any attempt to reclassify the Moody Beach area as anything other than a residential zone under the Town of Wells Zoning Ordinance;

(h) The current Board of Selectmen agree to take all necessary action and to publicly support revising any and all Town Ordinances which currently make reference to Moody Beach as a "public beach";

(i) In the event that any government entity begins a formal process for taking by eminent domain or for purchasing of any property in the Moody Beach area, this license shall be voidable by any and all parties to the Agreement.

3. Licensors and Licensees agree that any controversy or claim arising out of or relating to this License (excluding specifically any such controversy or claim referred to hereinbefore in CONDITIONS, paragraph 2(d), or the breach thereof, or the enforcement thereof, shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. Arbitration on matters referred to in this paragraph and subject to the provisions hereof shall be conducted by a panel composed of three (3) arbitrators, one appointed by the American Arbitration Association, one appointed by the licensor/owner, and one appointed by the Town of Wells, and the arbitration proceedings shall take place in Cumberland or York County, Maine.

4. Nothing stated herein regarding the terms and conditions of use of the licensed area by licensees shall be construed to prevent owners from exercising full rights of property ownership under the law, and the owners' use of the licensed area is NOT limited by the terms and conditions herein applicable to licensees.

5. Licensors reserve the right to institute an identification system satisfactory to accomplish the terms of this license.

6. This agreement may be amended by a written and executed agreement of the parties. In the case of the licensor, no amendment shall be effective unless approved by a majority of the licensors, and individual licenses shall not be amended so as to vary in any material respect from the terms of the other licenses and the joint license. The Town of Wells agrees not to seek amendment of the terms of any individual license with a licensor without first seeking approval from a majority of the licensors.

7. This is a grant of a license only. It is not to be construed under any circumstances as the granting of an easement of any sort. Nor shall it be considered as the basis for the establishment of prescriptive rights, and each licensee hereunder expressly waives any such claim which is based upon any use of the licensed area.

THIS INSTRUMENT SHALL NOT BE RECORDED IN ANY REGISTRY OF DEEDS AND IS NOT INTENDED TO RUN WITH THE LAND. ANY ATTEMPT BY ANY PERSON TO RECORD THIS INSTRUMENT WILL RESULT IN ITS BECOMING NULL AND VOID.
DATED: _____ (signature block omitted)