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Harbor Lines and the Public Trust Doctrine in Washington Navigable Waters

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HARBOR LINES AND THE PUBLIC TRUST DOCTRINE IN WASHINGTON NAVIGABLE WATERS

Ralph W. Johnson * and Eileen M. Cooney **

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I. INTRODUCTION

Since 1971 the Shoreline Management Act (SMA)¹ has been the dominant legal tool for managing the Washington coastal zone. However, use of state-owned beds of navigable fresh and salt waters² below low tide or the low-water line is still controlled largely by the harbor line system established in the 1889 state constitution.³ Almost no attention has been paid to the harbor line system in the legal literature,⁴ or to its relationship to the other laws concerned with coastal zone management. This article briefly analyzes the relationship of the harbor line system to the SMA, to the various federal laws concerned with the coastal zone, and to the public trust doctrine, and then describes the origin, development, and operation of the system in Washington.

1. WASH. REV. CODE ch. 90.58 (1976).

2. The term "navigable waters" has many definitions. We are here concerned with the test of navigability used in connection with the equal footing doctrine under which each state automatically acquired the title to the beds of "navigable" waters within their borders at statehood, unless these lands had previously been expressly conveyed away by the federal government. Two authors have summarized the test of navigability for title as follows:

There are four criteria for navigability for title:

(1) Navigability for title is determined as of the date each state came into the Union.

(2) Such navigability is determined by the natural and ordinary condition of the water at that time, not whether it could be made navigable by artificial improvements. However, the fact that rapids, rocks, or other obstructions make navigation difficult will not destroy title navigability so long as the waters were usable for a significant portion of the time.

(3) Navigability in intrastate commerce is all that is required, not usability in interstate commerce.

(4) The waters must be usable by the "customary modes of trade or travel on water." This may include waters usable for commercial log floating. This includes waters as little as three or four feet deep that are geographically located so they have been, or can be used by canoes and rowboats for commercial trade and travel (fur traders' canoes). This does not include waters which are difficult to access because of surrounding mud flats or the like, and which are geographically isolated from habitation and transportation routes, and which have never been and are not likely to be used for commercial trade or travel. This probably does not include waters that are geographically isolated from habitation and transportation routes and which have never been and are not likely to be used for commercial trade or travel, even though these waters are deep enough and large enough to float commercial type vessels, and are not physically inaccessible because of mud flats or the like.

Johnson & Austin, *Recreational Rights and Titles to Beds in Western Lakes and Streams*, 7 NAT. RESOURCES J. 1, 24-25 (1967).

3. WASH. CONST. art. 15 (1889, amended 1932).

4. No articles analyzing the state harbor line system have been found in any of the three law reviews published in the state, *Washington Law Review*, *Gonzaga Law Re-*

II. LAWS GOVERNING SHORELINE AND TIDELAND MANAGEMENT OTHER THAN THE HARBOR LINE SYSTEM

In the past fifteen years Congress, the state legislature, and the courts have aggressively attacked the problem of controlling uses of navigable waters and beds in Washington. Generally, these laws and court decisions have (1) preserved water surfaces and beds for water-related uses by curbing the filling and construction that formerly were prevalent on privately owned beds, (2) protected and enhanced the environmental and aesthetic qualities of these areas, (3) developed priorities for future uses, and (4) established governmental regulatory systems for controlling development and activities. A brief review of these recent laws and court decisions is essential in order to understand the role that the harbor line system plays in the overall framework of coastal zone management.

A. Coastal Zoning Under Washington's Shoreline Management Act

In 1968 the Washington Supreme Court in *Bach v. Sarich*,⁵ barred nonwater-related uses of nonnavigable lakes. The next year, in *Wilbour v. Gallagher*,⁶ the court extended its protection of water-related values to navigable waters. The *Wilbour* court explicitly affirmed a broad public right of navigation in the navigable waters of the state and essentially prohibited any further fills or construction in those waters unless either the local or state government explicitly and affir-

view, or *University of Puget Sound Law Review*. Because of this paucity of literature on the subject, the legislature directed the Attorney General, the Department of Ecology, and the Harbor Line Commission to undertake a joint study of the locations, uses, and activities relating to the shorelines of cities and towns of the state and to cover the following:

- (1) Events leading to the establishment of the various harbor lines pertaining to cities of the state,
- (2) The location of all such harbor lines,
- (3) The authority for establishment and criteria used in location of the same,
- (4) Present activities and uses made within harbors and their relationship to harbor lines,
- (5) Legal aspects pertaining to any uncertainty and inconsistency, and
- (6) The relationship of federal, state, and local governments to regulation of uses and activities pertaining to the area of study.

WASH. REV. CODE § 90.58.330 (1976). Pursuant to this mandate the 1972 Harbor Area Study was completed. HARBOR LINE COMM'N, ATT'Y GENERAL, & DEP'T OF ECOLOGY, 1972 HARBOR AREA STUDY, A REPORT TO THE 43D LEGISLATURE OF THE STATE OF WASHINGTON (1972) [hereinafter cited as 1972 HARBOR AREA STUDY].

5. 74 Wn. 2d 575, 445 P.2d 648 (1968).

6. 77 Wn. 2d 306, 462 P.2d 232 (1969), *cert. denied*, 400 U.S. 878 (1970).

matively authorized such action.⁷ Filling and construction came to a sudden halt after *Wilbour* until 1971 when the state legislature enacted the Shoreline Management Act,⁸ initiating the first and most comprehensive statewide shoreline management program in the nation.

To a large extent, the SMA supersedes the harbor line system. The harbor line system is constitutional in origin and dates from 1889 with an important amendment in 1932.⁹ Various statutes have been enacted over the years implementing this constitutional system.¹⁰ In

7. For a thorough analysis of *Wilbour v. Gallagher* see Corker, *Thou Shalt Not Fill Public Waters Without Public Permission—Washington's Lake Chelan Decision*, 45 WASH. L. REV. 65 (1970) and Rauscher, *The Lake Chelan Case—Another View*, 45 WASH. L. REV. 523 (1970).

8. Shoreline Management Act of 1971, ch. 286, 1971 Wash. Laws 1st Ex. Sess. 1496 (1971) (codified at WASH. REV. CODE ch. 90.58 (1976)). For an indepth analysis of the Act see Crooks, *The Washington Shoreline Management Act of 1971*, 49 WASH. L. REV. 423 (1974).

9. WASH. CONST. art. 15 (1889, amended 1932, amend. 15). Article 15 now provides:

§ 1 HARBOR LINE COMMISSION AND RESTRAINT ON DISPOSITION. The legislature shall provide for the appointment of a commission whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays and inlets of this state, wherever such navigable waters lie within or in front of the corporate limits of any city, or within one mile thereof on either side. Any harbor line so located or established may thereafter be changed, relocated or reestablished by the commission pursuant to such provision as may be made therefor by the legislature. The state shall never give, sell, or lease to any private person, corporation, or association any rights whatever in the waters beyond such harbor lines, nor shall any of the area lying between any harbor line and the line of ordinary high water, and within not less than fifty feet nor more than two thousand feet of such harbor line (as the commission shall determine) be sold or granted by the state, nor its rights to control the same relinquished, but such area shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce.

§ 2 LEASING AND MAINTENANCE OF WHARVES, DOCKS, ETC. The legislature shall provide general laws for the leasing of the right to build and maintain wharves, docks and other structures, upon the areas mentioned in section one of this article, but no lease shall be made for any term longer than thirty years, or the legislature may provide by general laws for the building and maintaining upon such area wharves, docks, and other structures.

§ 3 EXTENSION OF STREETS OVER TIDE LANDS. Municipal corporations shall have the right to extend their streets over intervening tide lands to and across the area reserved as herein provided.

WASH. CONST. art. 15.

10. Only a few statutes have ever been enacted dealing explicitly with implementation of the constitutional harbor line system. Current statutes include sections 79.01.008 ("Outer harbor line"), 79.01.012 ("Harbor area"), 79.01.016 ("Inner harbor line"), 79.01.044 ("Harbor line commission"), 79.01.420 ("Harbor lines and areas to be established"), 79.01.424 ("Relocation of inner harbor line"), and 79.16.440 ("Excavation of waterways through state lands—Requisites of excavation contract"). WASH. REV. CODE §§ 79.01.008-.016, .044, .420, .424, .16.440 (1976).

the late 1960's the citizens of the state became concerned that the harbor line system and complementary statutes were inadequate to protect the shoreline against piecemeal encroachment by industries, housing developers, businesses, and other competitors.¹¹ In response to these concerns, the legislature enacted the SMA in 1971.¹²

Under the SMA, local governments are directed to create local master programs zoning shorelands, tidelands, wetlands, and property 200 feet inland from these areas along the coast and most freshwater lakes and streams.¹³ The local programs must be consistent with Department of Ecology (DOE) guidelines.¹⁴ After approval from the DOE, the programs constitute use regulations for the various state shorelines.¹⁵ Most substantial development¹⁶ on the shorelines, except single family residences which are expressly exempted, is not allowed

11. Developers also wanted an administrative system for the issuance of permits for shoreline development. Under *Wilbour v. Gallagher*, 77 Wn. 2d 306, 462 P.2d 232 (1969), *cert. denied*, 400 U.S. 878 (1970), such permits were necessary before any development could commence. Thus, environmentalists and developers both wanted some kind of permit system. Needless to say, these groups sought substantially different criteria for the issuance of development permits. The resultant political struggle eventually produced the Shoreline Management Act.

12. Shoreline Management Act of 1971, ch. 286, 1971 Wash. Laws 1st Ex. Sess. 1496 (1971) (codified at WASH. REV. CODE ch. 90.58 (1976)). For a discussion of the background of the SMA, and the policies expressed in it see Crooks, *supra* note 8.

13. WASH. REV. CODE §§ 90.58.030(1)(c)-(f), .080 (1976). Shorelines of the state include all major water areas, their associated wetlands, and the lands underlying them. They are divided into "shorelines" and "shorelines of statewide significance."

14. *Id.* § 90.58.080(2). These guidelines are found at WASH. ADMIN. CODE ch. 173-16 (1977).

15. WASH. REV. CODE §§ 90.58.090-.100 (1976).

16. "Development" is defined as

a use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level.

WASH. REV. CODE § 90.58.030(3)(d) (1976). "Substantial development" is defined as any development of which the total cost or fair market value exceeds one thousand dollars, or any development which materially interferes with the normal public use of the water or shorelines of the state; except that the following shall not be considered substantial developments for the purpose of this chapter:

(i) Normal maintenance or repair of existing structures or developments including damage by accident, fire or elements;

(ii) Construction of the normal protective bulkhead common to single family residences;

(iii) Emergency construction . . . ;

. . . .

(v) Construction on wetlands by an owner, lessee or contract purchaser of a single family residence for his own use or for the use of his family.

Id. § 90.58.030(3)(e).

until a permit has been issued by the appropriate local government consistent with the local program and state law.¹⁷ Although the SMA gives local governments authority to regulate the water column and bed use beyond low tide or low water, only a few local governments have seriously tried to do so to date.¹⁸ The management of this important area is presently left essentially to the harbor line system.

The version of the SMA initially passed by the Legislature contained a clause which would have excluded local governments from any role in managing state-owned land.¹⁹ This clause was vetoed by the Governor, however, and the Act consequently does not distinguish between state-owned land and other land.²⁰

No Washington appellate case has expressly decided which law controls when the SMA conflicts with a statute implementing the harbor line system. Nevertheless, it is reasonably clear that the SMA should control in such a situation because it is more recently enacted and more comprehensive. Given a direct conflict with the constitutional provisions concerning the harbor line system,²¹ the SMA would not control. To some extent, however, the courts could avoid a direct conflict by interpreting constitutional terms, such as "navigation" and

17. *Id.* § 90.58.140 (Supp. 1977).

18. The fifteen coastal counties in Washington have all submitted local master programs for approval by the DOE. Only four or five of these programs have dealt at all with the water column or bed below low tide line, and their treatment can best be characterized as meager and unsophisticated. Of the city master programs, only Seattle's deals seriously with this area. Telephone conversation with D. Rodney Mack, Ass't Director, Dep't of Ecology, Jan. 18, 1979. Such inadequate treatment of the water column and coastal beds has been typical of state coastal zone management programs throughout the nation. Delogu, *Land Use Control Principles Applied to Offshore Coastal Waters*, 59 Ky. L.J. 606 (1971). In an attempt to rectify this deficiency in Washington, the Department of Ecology recently contracted for and received a study to assist local governments. Shapiro & Assoc., *Manual for Management of the Coastal Aquatic Area* (June 1977) (prepared for the Dep't of Ecology).

19. For state-owned land, the Department of Natural Resources (DNR) would have been given the same authority that local governments exercise with respect to land not owned by the state. Thus, both the DOE and the DNR would have had powers under the SMA to manage state-owned land. *Shoreline Management Act of 1971*, ch. 286, § 3, 1971 Wash. Laws 1st Ex. Sess. 1496 (1971).

20. Parts of the Governor's explanation of the partial veto are reproduced in 1971 Wash. Laws 1st Ex. Sess. 1515 (1971).

21. We are not aware of any direct conflict between the harbor line system and the SMA. In *State v. Sturtevant*, 76 Wash. 158, 135 P. 1035 (1913), the court said that the area lying inside the "inner harbor line, being, whether submerged or not, theoretically nonnavigable, is treated as land, not water." *Id.* at 165, 135 P. at 1037. Until enactment of the SMA this language was thought to confirm a right in the upland owner to fill out to the inner harbor line. However, to the extent such a right may have existed in the past it would now seem clearly subject to the zoning and permitting requirements of the SMA.

“commerce,” in harmony with policies expressed in the SMA. Because the SMA reflects contemporary priorities rather than those of 1889 or 1932, such an approach is justified. The basic constitutional system, which survived the enactment of the SMA, is compatible with this approach. In effect, the two systems establish a double veto over uses of coastal waters. An activity in conflict with either system will not be allowed.

B. Federal Controls and Influences on Coastal Management

The state is not the only actor in the management of the coastal zone. The federal government has long exercised management powers in this area and in 1972 substantially expanded its authority by enacting the Federal Coastal Zone Management Act²² and amending the Federal Water Pollution Control Act.²³

1. Rivers and Harbors Appropriation Act of 1899

An Army Corps of Engineers permit is required for any obstruction or alteration of navigable waters under section 10 of the Rivers and Harbors Appropriation Act of 1899.²⁴ Navigable waters are defined for this purpose to include any area to the ebb and flow of the tide up to the mean high water mark.²⁵ Jurisdiction also extends to manmade canals on private property that connect to navigable waters.²⁶ The Corps must balance the expected benefit from the project against its reasonably foreseeable detriments and may decline to issue the permit if it finds the obstruction or alteration is not in the public interest.²⁷

2. Federal harbor line systems

The Army Corps of Engineers also establishes harbor lines on behalf of the federal government, marking pierhead or bulkhead limits

22. Coastal Zone Management Act of 1972, Pub. L. No. 92-583, 86 Stat. 1280 (codified at 16 U.S.C. §§ 1451-1464 (1976)).

23. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 884 (codified at 33 U.S.C. § 1344 (1976)) (now called the Clean Water Act).

24. 33 U.S.C. § 403 (1976).

25. 33 C.F.R. § 209.120(d)(1) (1977).

26. *United States v. Sexton Cove Estates, Inc.*, 389 F. Supp. 602 (S.D. Fla. 1975), modified, 526 F.2d 1293 (5th Cir. 1976).

27. 33 C.F.R. § 209.120(f)(1) (1977).

in navigable waters.²⁸ Although these lines are no longer as important as they once were, they still have some legal significance. In the past there has been some confusion about the relation of these lines to state harbor lines. To further the confusion, federal and state harbor lines are often located in the same place, although they have different functions. Although the federal law calling for the establishment of federal harbor lines uses the term "harbor lines," they are usually referred to as either pierhead lines or bulkhead lines. To avoid confusion, this article refers to state harbor lines as harbor lines and federal harbor lines as either pierhead or bulkhead lines.

Originally, bulkhead lines marked the seaward limit where a person could fill without a permit; pierhead lines were the seaward limit where open-pile structures could be placed without a permit.²⁹ The first pierhead and bulkhead lines in Washington were often established at the same time as the state harbor lines. The state and the Corps worked together, generally placing the outer harbor line and the pierhead line in the same place, and the inner harbor line and the bulkhead line in the same place.³⁰ However, the pierhead line and the outer harbor line had different functions. The outer harbor line was the absolute limit beyond which no construction could occur;³¹ the pierhead line was merely the limit beyond which no construction could occur without federal permission.³² Often one line would be changed while the other remained in place.³³

An additional significance of federal harbor lines is that no federal money can be spent for dredging shoreward of them.³⁴ Therefore, if the federal government wants to dredge shoreward of pierhead or bulkhead lines, it abrogates the lines. This occurred, for example, when the federal government wanted to develop the Shilshole Bay Marina in Seattle.³⁵

The gradual change in the use of federal harbor lines eventually culminated in a 1970 regulation changing them to mere guidelines, for use with respect to navigation alone.³⁶ A permit is now required

28. 33 U.S.C. § 404 (1976); 33 C.F.R. § 209.150 (1977).

29. 33 U.S.C. § 404 (1976); 33 C.F.R. § 209.150 (1977); Interview with Robert Spearman, Army Corps of Engineers, Seattle (July 11, 1978) (notes on file with *Washington Law Review*).

30. Interview with Robert Spearman, *supra* note 29.

31. WASH. REV. CODE § 79.01.008 (1976).

32. 33 U.S.C. § 404 (1976); 33 C.F.R. § 209.150 (1977).

33. Interview with Robert Spearman, *supra* note 29.

34. 33 U.S.C. § 628 (1976).

35. Interview with Robert Spearman, *supra* note 29.

36. 33 C.F.R. § 209.150 (1977).

for any works in navigable waters whether shoreward or seaward of federal harbor lines.³⁷ Therefore, the only remaining real significance of federal harbor lines is that federal money cannot be expended for dredging shoreward of the lines.³⁸

3. *Federal Coastal Zone Management Act*

The Federal Coastal Zone Management Act³⁹ sets standards for state coastal zone management programs and provides two major incentives for states to comply with these standards. First, states meeting the federal standards receive federal funding for development and implementation of the state programs.⁴⁰ Second, once the state coastal zone management program has been federally approved, the activities of all federal agencies in that state's coastal zone must be consistent with the state coastal zone management program to the maximum extent practicable.⁴¹ The Washington coastal zone management program was the first state program in the nation to receive federal approval.⁴²

4. *Federal Water Pollution Control Act Amendments of 1972*

Section 404 of the Federal Water Pollution Control Act Amendments of 1972⁴³ gave the Corps of Engineers extremely broad powers of control over filling and construction in navigable waters of the United States. "Navigable waters" are defined broadly to include not only tidal waters, but also adjacent wetlands, mudflats, and

37. 33 U.S.C. § 403 (1976).

38. Applications for establishing or modifying federal harbor lines are now being treated in the same manner as permit applications. 33 C.F.R. § 209.150(c) (1977). In practice, however, the federal government will spend no more money on federal harbor lines, except in cases where they must abrogate the lines in order to proceed with navigational improvements shoreward of existing lines.

39. 16 U.S.C. §§ 1451-1464 (1976).

40. *Id.* §§ 1453(g), 1454, 1455.

41. *Id.* § 1456(c)(1).

42. The Washington Coastal Zone Management Program should be distinguished from the Shoreline Management Act. The SMA is a specific statute establishing a coastal management system for the state. WASH. REV. CODE ch. 90.58 (1976). The Coastal Zone Management Program is the combination of state and local laws that authorizes overall governmental management of the coastal zone. The Program includes, among others, the following: the State Environmental Policy Act, *id.* ch. 43.21C; the Energy Facility Site Evaluation Act, *id.* ch. 80.50; the Environmental Coordination Procedures Act, *id.* ch. 90.62; the Shoreline Management Act, *id.* ch. 90.58; the Water Pollution Control Act, *id.* ch. 90.48; and the Washington Clean Air Act, *id.* ch. 70.94.

43. 33 U.S.C. § 1344 (1976).

swamps.⁴⁴ Corps' regulations require an ecological evaluation of the proposed fill or construction before a permit may be granted.⁴⁵ The permit may either be issued with conditions designed to minimize the adverse effects on the aquatic environment or denied altogether if, despite conditions, the dredge or fill will have an unacceptable adverse effect.⁴⁶ Although the Corps initially dragged its feet in implementing its section 404 authority,⁴⁷ current Corps policy is to conduct its section 404 permit program consistent with the state program, if any. The Corps will not, for example, issue a permit if the state declines to do so and only occasionally will refuse a permit if the state issues one.⁴⁸

C. *The Public Trust Doctrine in Washington*

One of the most ancient and venerable doctrines relating to the harbor line system is the public trust doctrine. This doctrine and the harbor line system constitute parallel and partially coincident approaches to the protection of the public interest in the beds of navigable waters.

The most significant expression of the public trust doctrine is found in *Illinois Central Railway v. Illinois*.⁴⁹ In *Illinois Central*, the Supreme Court upheld the repeal by a state legislature of an earlier legislative grant to the Illinois Central Railroad of part of the bed of Chicago harbor in Lake Michigan. In upholding the repeal the court declared:

The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace.⁵⁰

44. 33 C.F.R. § 209.120(d)(2) (1977).

45. *Id.* § 209.120(f).

46. 40 C.F.R. § 230.3(d) (1977).

47. *See* Natural Resources Defense Council, Inc. v. Callaway, 392 F. Supp. 685 (D.D.C. 1975).

48. *See* 42 Fed. Reg. 37138 (1977) (to be codified at 33 C.F.R. § 320.4(h)).

49. 146 U.S. 387 (1892).

50. *Id.* at 453. The public trust doctrine has subsequently been applied by various state courts. In California, for example, the cases have held that the beds of navigable waters up to the line of ordinary high tide, whether publicly or privately owned, are held in trust for the public purposes of navigation and fishery. A public ease-

Illinois Central was decided in 1892. The Washington constitutional harbor line system was adopted in 1889. In *Illinois Central*, the court said that even a legislative grant of the beds of navigable waters could be invalid if it violated the public trust. No attempt was made to define the precise nature or extent of that trust, or to say just which leases and conveyances by state agencies could be set aside. Courts and writers have taken widely divergent views of these matters in the intervening years.⁵¹ The drafters of the Washington Constitution sought to protect this same public interest by creating a Harbor Line Commission charged with identifying specific harbor lines and harbor areas in state-owned navigable waters and beds and by imposing a specific set of constraints on conveyances and leases of these lands by state agencies.⁵²

Nothing in the Washington harbor line system, however, should be taken to negate the public trust doctrine in this state. The doctrine has been acknowledged by the Washington court, although it has not been relied upon as extensively here as in some other states, for example, California⁵³ and Wisconsin,⁵⁴ which, like Washington, give high priority to water-related values. The reason may be that the harbor line system has reduced the need for reliance on the public trust doctrine and has, at least until recently, given adequate protection to many of

ment and servitude exists over these lands for those purposes. . . . "The right of the state is subservient to the public rights of navigation and fishery, and theoretically, at least, the state can make no disposition of them prejudicial to the right of the public to use them for the purposes of navigation and fishery, and whatever disposition she does make of them, her grantee takes them upon the same terms upon which she holds them, and of course subject to the public rights above mentioned."

People v. California Fish Co., 166 Cal. 576, 138 P. 79, 82 (1913) (quoting *Ward v. Hulford*, 32 Cal. 365, 372 (1867)). A 1971 California case has held that the public trust doctrine protects not only the historically recognized public rights of navigation and fishery but is "flexible" enough to "encompass changing public needs" such as ecological and environmental values. *Marks v. Whitney*, 6 Cal. 3d 251, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971). Massachusetts has applied its public trust doctrine to various land and lake surface areas, ruling, for example, a state highway department cannot build a highway through parklands, great ponds, state reservations, or kindred areas under general statutory authority to use state lands for highway purposes; instead, as to these lands, it can use them for highways only when the legislature explicitly says so. *See Robbins v. Department of Public Works*, 355 Mass. 308, 244 N.E.2d 577 (1964); *See also Gould v. Greylock Reservation Comm'n*, 350 Mass. 410, 215 N.E.2d 114 (1956). These cases are discussed in Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 492-501 (1970).

51. *See generally* Sax, *supra* note 50.

52. WASH. CONST. art. XV.

53. *E.g.*, *People v. California Fish Co.*, 166 Cal. 526, 138 P. 79 (1913).

54. *State v. Public Service Comm'n*, 275 Wis. 112, 81 N.W.2d 71 (1957); *Muench v. Public Serv. Comm'n*, 261 Wis. 492, 53 N.W.2d 514, *aff'd on rehearing*, 261 Wis. 492,

the same public interests which otherwise would have received public trust doctrine protection. Early Washington cases, although not relying explicitly on the public trust doctrine, recognized legally protectable public interests in navigable waters and beds of the state.⁵⁵ In *Hill v. Newell*,⁵⁶ the court explicitly approved the reasoning of the leading California public trust case,⁵⁷ saying that the public trust language of the California case expresses the views of the Washington court.⁵⁸ In *State v. Sturtevant*,⁵⁹ the court acknowledged that the state held the right of navigation “in trust for the whole people” of this state.⁶⁰ The court did not expressly use the term public trust in *Wilbour v. Gallagher*,⁶¹ but it gave strong protection to the public right of navigation, one of the interests traditionally protected under the public trust doctrine.

Thus, the public trust doctrine clearly seems to exist in Washington, although often not called by that name or explicitly articulated or relied upon by the appellate courts as such. The existence of the doctrine in Washington is important because, as indicated below, harbor lines have been established in only a small percentage of the state’s waters, and even where harbor lines do exist, they do not perfectly reflect contemporary public values in navigation and in the beds of navigable waters. The public trust doctrine may be available to protect these values in a proper case.⁶²

III. WASHINGTON’S HARBOR LINE SYSTEM

The harbor line system established by the Washington Constitution is a unique way of protecting the public interest in the state’s harbor

55 N.W.2d 40 (1952); *Merwin v. Houghton*, 146 Wis. 398, 131 N.W. 838 (1911); *Priewe v. Wisconsin State Land & Improvement Co.*, 93 Wis. 534, 67 N.W. 918 (1896).

55. *Madson v. Spokane Valley Land & Water Co.*, 40 Wash. 414, 82 P. 718 (1905); *Dawson v. McMillan*, 34 Wash. 269, 75 P. 807 (1904).

56. 86 Wash. 227, 149 P. 951 (1915).

57. *People v. California Fish Co.*, 166 Cal. 576, 138 P. 79 (1913).

58. *Hill v. Newell*, 86 Wash. 227, 231, 149 P. 951, 952 (1915). The actual holding was that the state title to the beds of navigable waters was absolute, and if, pursuant to a plan to improve navigation, a portion is cut off and no longer useful for navigation, that portion can be alienated free from public control. *Id.* at 232, 149 P. at 953.

59. 76 Wash. 158, 135 P. 1035 (1913).

60. *Id.* at 165, 135 P. at 1037.

61. 77 Wn. 2d 306, 462 P.2d 232, *cert. denied*, 400 U.S. 878 (1969).

62. The public trust doctrine might, for example, establish the outer limits of the Harbor Line Commission’s powers to relocate harbor lines, as in the Pier 50–51 controversy, *see* note 178 *infra*, or the doctrine might constrain the amount of nonnavigational activity to be permitted in the harbor area or beyond the outer harbor line.

areas.⁶³ The system has generally succeeded in reserving these com-

63. State law also provides specific protection of the public interest in tidelands. State-owned tidelands are divided into "first class" and "second class" tidelands. First-class tidelands are

the beds and shores of navigable tidal waters belonging to the state, lying within or in front of the corporate limits of any city, or within one mile thereof upon either side and between the line of ordinary high tide and the inner harbor line, and within two miles of the corporate limits on either side and between the line of ordinary high tide and the line of extreme low tide.

WASH. REV. CODE § 79.01.020 (1976). "Second class tidelands" are state-owned tidelands that are not "first class tidelands." *Id.* § 79.01.024. See Figure 1 *infra*.

Shorelands are lands bordering on "the shores of a navigable lake or river not subject to tidal flow, between the line of ordinary high water and the line of navigability." *Id.* §§ 79.01.028; 79.01.032. "First class shorelands" are those in front of or within two miles of a city, *id.* § 79.01.028, and "second class shorelands" are those more than two miles from the corporate limits of a city, *id.* § 79.01.032.

The Department of Natural Resources (DNR) has the power to lease state-owned tidelands and shorelands and prescribe the terms of the lease consistent with the laws and the constitution. *Id.* §§ 43.30.130, 79.01.504, 79.01.536, 79.01.544. Originally the Commissioner of Public Lands had the power to lease state-owned tidelands and shorelands, but in 1957 his powers and duties were transferred to the DNR. State Dep't of Natural Resources Act, ch. 38, § 13, 1957 Wash. Laws 123 (1957) (codified at WASH. REV. CODE § 43.30.130 (1976)).

The guiding principles for the DNR aquatic land-leasing program are as follows:

- (1) Priority is given to water-dependent and water-oriented uses.
- (2) The statewide public need is considered.
- (3) Fair market rental payment [is] required when public use is withdrawn for private consumption.
- (4) Compliance with Shoreline Master Program, Corps of Engineers Permit and the State Environmental Policy Act [is required].
- (5) Consideration [is] given to adjacent upland owner prior to leasing.

W. Johnson, *Tideland and Harbor Area Leasing Policies*, in *SHORELINES MANAGEMENT '77, PERFORMANCE AND PROSPECTS* 39, 39 (R. Goodwin ed. 1977) (proceedings of a conference, Sept. 22-23, 1977 at the University of Washington.).

Tidelands and shorelands can be leased for up to 55 years. WASH. REV. CODE § 79.01.470(3) (1976). Most leases, however, are issued for terms of ten years with a preference right to renew if the Commissioner of Public Lands finds it in the public interest to do so. W. Johnson, *supra*, at 40. There are special provisions for tideland and shoreland leases for log-booming purposes. The lease can be for only a term of ten years, and failure to use the land for log-booming purposes for a year causes a forfeiture of the lease and a reversion of the land to the state. See WASH. REV. CODE §§ 79.01.536, .540 (1976).

If a lessee of tidelands or shorelands fails to renew the lease, the DNR appraises the improvements on the lands, and the subsequent lessee (if the lands are leased within three years of the expiration of the former lease) pays the prior lessee the appraised value of the improvements. *Id.* § 79.01.548.

The statute also allows the leasing of beds of navigable waters for log-booming purposes, for the removal of sand and gravel, and for prospecting for, developing, and producing oil and gas. *Id.* §§ 79.14.020, 79.16.536, 79.16.570. Section 43.30.130 allows the DNR to lease public lands for the purpose of prospecting for, developing, and producing oil, gas, or other hydrocarbon substances, and for planting and cultivating oysters, clams, or other edible shellfish. *Id.* §§ 43.30.130, 79.01.568-.592.

mercially important areas for public ownership and control.⁶⁴

Article XV of the Washington Constitution requires the legislature to appoint a Harbor Line Commission to establish harbor areas.⁶⁵ The first Harbor Line Commission was established in 1890, and when it went out of existence three years later its duties were transferred to the Board of State Land Commissioners.⁶⁶ In 1957, those duties were in turn given to the Board of Natural Resources.⁶⁷ The Board is the

The statute that authorizes a bed lease without tying the lease to a specific purpose provides:

The Commissioner of Public Lands [now the DNR under R.C.W. § 43.30.130] may lease to the abutting tide or shoreland owner or lessee, the beds of navigable waters lying below the line of extreme low tide in waters where the tide ebbs and flows, and below the line of navigability in lakes and rivers claimed by the state and defined in section 1, Article XVII of the Constitution of the state, or in case the abutting tide or shorelands or the abutting uplands are not improved or occupied for residential or commercial purposes, may lease such beds to any person, firm or corporation for a period not exceeding ten years for booming purposes. Nothing in RCW 79.16.530 through 79.16.560 shall change or modify any of the provisions of the state Constitution or laws of the state which provide for the leasing of harbor areas and the reservation of lands lying in front thereof.

Id. § 79.16.530. This does not appear to authorize leases of beds to anyone but the abutting land owners or lessees. The only leases to nonabutting owners or lessees that can be issued under this statute are booming leases under certain conditions. The provisions for leasing beds of navigable waters are not clear or well organized. They should be clarified by the legislature. Leases other than booming leases can extend for periods up to thirty years. *Id.* § 79.16.540.

64. When Washington entered the Union in 1889 it took title to the beds and shores of navigable waters within its boundaries, with the exception of the few areas that had already been granted away by the United States. *See* *United States v. Utah*, 403 U.S. 9 (1971). Between 1889 and 1971, approximately 60% of Washington's tidelands were sold to private parties. DEP'T OF ECOLOGY, WASHINGTON STATE COASTAL ZONE MANAGEMENT PROGRAM 73 (1976). At first, tidelands were sold by metes and bounds fixed by surveys. Act for Appraisalment and Disposal of Tide- and Shore-lands, 1889-90 Wash. Laws 431 (1889). However, in 1895 a law was passed defining the seaward boundary of tidelands as "the line of mean low tide" or "the inner harbor line" where one had been established. Act Relating to Public Lands, ch. CLXXVIII, § 1, 1895 Wash. Laws 527 (1895). The definition was amended 16 years later by extending the boundary of tidelands out to "extreme low tide" or "the inner harbor line." Act Relating to State Lands and Their Management, ch. 36, § 1, 1911 Wash. Laws 129 (1911). Therefore, between 1895 and 1911, tidelands were sold out to mean low tide or the inner harbor line; after 1911, they were sold out to extreme low tide or the inner harbor line. The further sale of state-owned tidelands and shorelands ceased in 1971. WASH. REV. CODE § 79.01.470 (1976).

65. WASH. CONST. art. XV, § 1. Article XV is quoted in its entirety in note 9 *supra*.

66. Harbor Line Commissioners Act, 1889-90 Wash. Laws 239 (1890). Act Creating the Board of State Land Commissioners, ch. CXXV, § 6, 1893 Wash. Laws 386 (1893).

67. State Dep't of Natural Resources Act, ch. 38, § 15, 1957 Wash. Laws 123 (1957) (codified at WASH. REV. CODE § 43.30.150 (4) (1976)).

policymaking body within the Department of Natural Resources and is composed of the Governor, the Superintendent of Public Instruction, the Commissioner of Public Lands, the Dean of the College of Forestry of the University of Washington, and the Director of the Institute of Agricultural Sciences of Washington State University.⁶⁸

The Washington Constitution calls for the establishment of harbor lines "within or in front" of incorporated cities and "within one mile . . . on either side."⁶⁹ In 1927, the legislature directed the Commission to establish outer harbor lines, marking the outer boundary of the harbor beyond which the state can never grant any rights, and inner harbor lines, marking the landward extent of the harbor area.⁷⁰ The bed of the harbor area is owned by the state and "forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce."⁷¹ Within these limitations the state can build structures in the harbor area or lease it to private persons for a period not to exceed thirty years, and cities can extend streets over the harbor area.⁷²

The width of the harbor area was originally between 50 and 600 feet, but when article XV was amended in 1932, the permissible maximum harbor width was extended to 2,000 feet.⁷³ The outer harbor line is generally located in water deep enough to accommodate vessels with the maximum expected draft. The inner harbor line is generally at or near the line of low tide, but because harbor areas must include only state-owned land, it is never nearer shore than state ownership extends.⁷⁴ Figure 1 illustrates how harbor lines might be drawn in front of a hypothetical city.

Since the amendment to article XV in 1932, it has been clear that the harbor line system applies to navigable fresh as well as salt waters. The phrase "ordinary high tide" in the original article was replaced by "ordinary high water."⁷⁵ The change in language made explicit the in-

68. WASH. REV. CODE § 43.30.040 (1976).

69. WASH. CONST. art. XV, § 1.

70. Public Lands Act, ch. 255, § 11, 1927 Wash. Laws 468 (1927) (codified at WASH. REV. CODE § 79.01.044 (1976)).

71. WASH. CONST. art. XV, § 1.

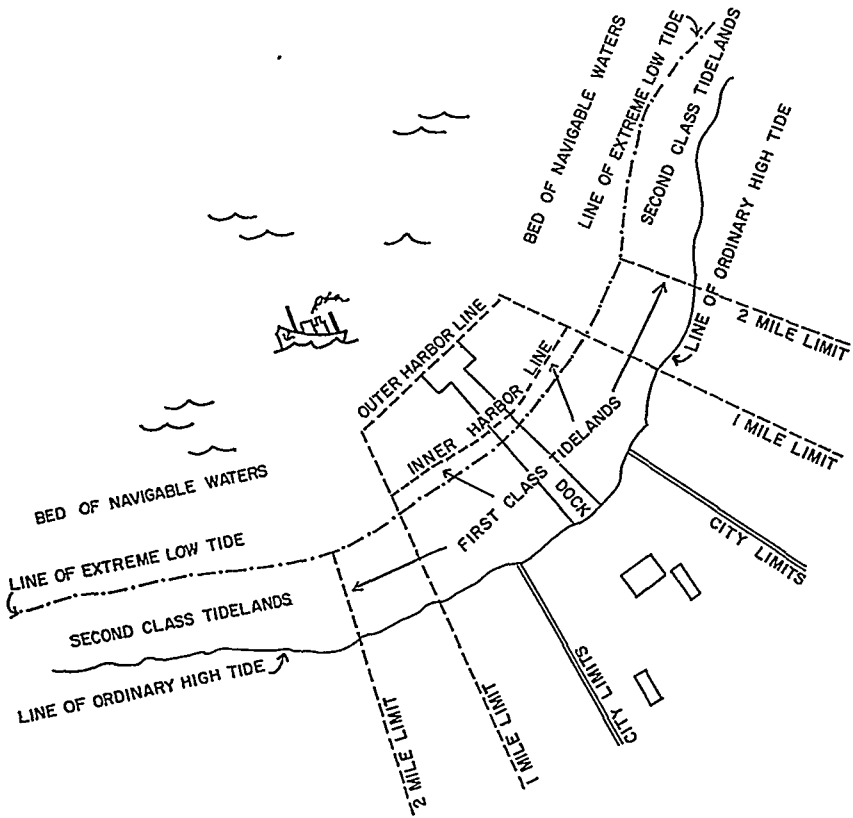
72. *Id.* §§ 2-3.

73. *Id.* § 1 (1889, amended 1932, amend. 15).

74. 1972 HARBOR AREA STUDY, *supra* note 4, at 17.

75. WASH. CONST. art. XV, § 1 (1889, amended 1932, amend. 15). Prior to the change, it was argued that the reference to "the line of ordinary high tide" in section 1 and to "intervening tidelands" in section 3 of article XV required that article XV be restricted to tidelands. The argument that article XV applied to all navigable waters was based on the language in section 1 providing for harbor lines "in the navigable waters of

FIGURE 1
SCHEMATIC DIAGRAM OF
HARBOR LINES AND TIDELANDS



terpretation given to the original article XV by the Washington Supreme Court.⁷⁶

A. *Management of the Harbor Area by State Agencies*

The Department of Natural Resources (DNR) has the power to lease and manage saltwater harbor areas.⁷⁷ If the harbor area lies within a port district, the port commission has the power to make nonbinding recommendations "as to the character of the improvements, time of commencement and completion thereof, the percentage for fixing rental, and the terms and conditions of the lease."⁷⁸ Ordinarily, upon receipt of a lease application, the DNR forwards a copy to the concerned port commission and generally accepts its recommendations.⁷⁹ The DNR can prescribe the terms of the lease.⁸⁰ Plans for proposed structures in the harbor area must accompany the lease application, and approved structures must be completed within the time specified by the DNR.⁸¹

State-owned freshwater harbor areas are leased by the port commission in that port district.⁸² The port commission has powers similar to those of the DNR in saltwater harbor areas to the extent that it can approve plans for construction in the leased area and can set the time period within which such construction must be commenced.⁸³

B. *Uses Allowed in Harbor Areas*

Article XV of the Washington Constitution mandates that the state's harbor areas "shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce"⁸⁴ and that the legislature shall provide laws for "the leasing of the right to build and maintain wharves, docks and other structures, upon the

all harbors, estuaries, bays and inlets of this state." 1903-04 OP. WASH. ATT'Y GEN. 306 (1904); *cf.* 1891-92 OP. WASH. ATT'Y GEN. 104 (1891).

76. *State ex rel. Seattle v. Savidge*, 95 Wash. 240, 246, 163 P. 738, 740-41 (1917); *Puget Mill Co. v. State*, 93 Wash. 128, 134, 160 P. 310, 312-13 (1916); *State v. Sturtevant*, 76 Wash. 158, 164-65, 135 P. 1035, 1037-38 (1913).

77. WASH. REV. CODE §§ 43.30.130, 79.01.504 (1976).

78. *Id.* § 79.01.504.

79. Interview with Dep't of Natural Resources staff (May 9, 1978).

80. WASH. REV. CODE §§ 43.30.130, 79.01.504 (1976).

81. *Id.*

82. *Id.* § 53.32.010.

83. *Id.*

84. WASH. CONST. art. XV, § 1.

areas mentioned in section one of this article.”⁸⁵ There are few Washington cases interpreting the phrase “conveniences of navigation and commerce” and none more recent than 1927. Nevertheless, it is possible to discern an expansion in the concept of “commerce” as it relates to harbor areas similar to the expansion of that concept in the interpretation of the commerce clause of the United States Constitution.⁸⁶

1. *Court interpretations of “conveniences of navigation and commerce”*

The Washington Supreme Court first addressed these questions in 1898 in *State ex rel. Denny v. Bridges*.⁸⁷ The court upheld the denial of a harbor area lease for the purpose of curing and canning fish, maintaining a retail and wholesale fish market, and making, storing, and selling ice for fish packing because the proposed use was not allowable under the constitution. It said that the word “navigation” was used as a qualification of the word “commerce,” and “other structures” meant conveniences of navigation and commerce.⁸⁸ This restrictive early interpretation of article XV allowed only navigation uses in harbor areas.

In 1909, the Supreme Court rejected the *Denny* interpretation in *State ex rel. Hulme v. Grays Harbor & Puget Sound Railway*.⁸⁹ A railroad company wanted to build its track across a harbor area. The court declared that commerce by land and commerce by sea were too intimately related for the framers of the constitution to have intended the phrase “navigation and commerce” in as restrictive a sense as the *Denny* case implied. The *Grays Harbor* court reasoned that if the framers had wanted to restrict use of harbor areas solely to commerce by sea, they would have said so explicitly.⁹⁰ The court avoided overruling *Denny* by deeming the interpretation of “navigation and commerce” in *Denny* to be mere dictum: “The real point at issue in that case was whether the state had power to lease the harbor area to accommodate a private interest only remotely connected with

85. *Id.* § 2.

86. Compare, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918), with *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), and *Wickard v. Filburn*, 317 U.S. 111 (1942).

87. 19 Wash. 44, 52 P. 326 (1898).

88. *Id.* at 47, 52 P. at 327.

89. 54 Wash. 530, 103 P. 809 (1909).

90. *Id.* at 535-36, 103 P. at 811. The court concluded that it was constitutional for the railroad to cross the harbor area as long as it did not obstruct the navigation of the stream. *Id.* at 537, 103 P. at 812.

commerce."⁹¹ Thus, although the court rejected the language in *Denny*, it apparently still thought that curing and selling fish and storing and selling ice were improper activities in a harbor area.⁹² The permitted uses in the harbor areas under article XV were still rather narrowly restricted.

The court expressly overruled *Denny* in 1927 in *State ex rel. Bloedel-Donovan Lumber Mills v. Savidge*.⁹³ In that case, the owner of a dock in Bellingham was building a paper mill on his tidelands and wanted to modify his harbor lease so that part of his dock in the harbor area could be used for the paper mill. The court declared that manufacture and commerce are closely linked; manufacturing has to do with the production of commodities and without manufacturing there would be no commerce. The court noted that only twenty percent of the dock would be used for manufacturing. The remainder would still be devoted to shipping purposes. The court further noted that only five percent of the harbor areas in waterfront cities in Washington were being used for wharves and docks; the state obviously could control harbor areas so that there would be sufficient wharves and docks to meet the public need without prohibiting other trade or business use. The court ruled that the lease should be modified to allow manufacturing improvements so long as there was sufficient space available to meet the needs of commerce.⁹⁴ Thus, it appears that if there is sufficient harbor area to satisfy the needs of navigation and commerce, the court will not prohibit the use of a harbor area for another purpose, at least if it is closely related to commerce.⁹⁵

91. *Id.* at 535, 103 P. at 811.

92. Interestingly, it seems that curing and selling fish is more closely related to navigation and commerce than some current harbor area uses, such as motels and retail stores.

93. 144 Wash. 302, 310, 258 P. 1, 3 (1927). In *Bloedel* the court also rejected its earlier statement in *Denny* that the term "navigation" limited the term "commerce." The *Bloedel* court went on to say that manufacturing was related to commerce and was therefore permitted. It did not attempt to define "conveniences of navigation and commerce."

94. *Id.* at 306-11, 258 P. at 4.

95. The court has not addressed this question since 1927. However, in 1970 it heard an appeal relating to the standards of valuation and assessment, for tax purposes, of a lease of a harbor area in Seattle upon which the Edgewater Inn Motor Hotel is built. In the first footnote it stated that "in . . . the first appeal in the instant case the court inaccurately identified the property as tidelands. It appears in the findings of fact that Pier 67 is within the boundaries of a harbor area and is governed by the constitutional provisions and statutes applicable thereto." *Pier 67, Inc. v. King County*, 78 Wn. 2d 48, 49 n.1, 469 P.2d 902, 904 n.1 (1970). The court did not discuss these constitutional provisions or indicate whether it believed the Edgewater Inn complied with the constitutional provisions.

Clearly, times have changed since 1927 when this doctrine was established. The court in *Bloedel-Donovan* established the general rule that the harbor area is properly reserved for “conveniences of navigation and commerce” so long as the state controls the leasing of the area and insures that nonconstitutional uses give way to constitutional uses⁹⁶ when necessary. The question must still be asked, in the modern setting, what are constitutional uses, and whether there currently is sufficient room for them. With the increasing pressures on Washington’s harbor areas, these questions should be readdressed and current harbor area uses should be reevaluated.

2. *State control of harbor areas: DNR policies for land use management*

In addition to restricting the harbor area to certain uses, a primary purpose of the harborline system is to retain state control of the harbor area.⁹⁷ The state owns the beds of harbor areas, and leases portions to private persons and corporations. However, the state retains control over the leased area through the lease provisions.⁹⁸ Structures in tidal harbor areas must be approved by the DNR and must be built within the time specified by the state.⁹⁹ Structures in state-owned freshwater harbor areas are controlled by the local port district.¹⁰⁰

In 1899, the legislature amended the state leasing statutes to provide that “[t]he lessee of any part of such harbor area may at his or its option, improve the same in such manner, subject to the approval of the board and to such extent as such lessee shall elect.”¹⁰¹ This was held unconstitutional in *State ex rel. Trimble v. Bridges*¹⁰² because allowing a lessee to decide whether to improve the harbor area would relinquish state control over the area. The lessee could hold the area for thirty years without improving it, and the state could not improve the area or require its improvement. *State ex rel. Trimble v. Bridges*

96. As used in this article, “nonconstitutional” uses are those less directly related to navigation and commerce, for example, apartments, restaurants, and business establishments; “constitutional” uses are those closely related to navigation and commerce, for example, wharves, landings, and docks.

97. “The manifest purpose of this section [WASH. CONST. art. XV, § 1] is to prevent the control of the waterfront of cities from ever falling into private hands.” *Chlopeck Fish Co. v. City of Seattle*, 64 Wash. 315, 323, 117 P. 232, 235 (1911).

98. WASH. REV. CODE §§ 53.30.010, .020, 79.01.504, .508 (1976).

99. *Id.* §§ 79.01.504, .508.

100. *Id.* §§ 53.30.010, .020.

101. Act Relating to Public Lands, ch. CXXII, 1899 Wash. Laws 225 (1899).

102. 22 Wash. 98, 60 P. 66 (1900).

firmly establishes the power of the state, through the DNR and the port districts, to exercise control over Washington's harbor areas through its control over harbor leases.

In 1972, the DNR adopted a harbor area land use management classification system which classifies uses based on the degree to which they conform to the constitutional directive that harbor areas be reserved for "conveniences of navigation and commerce."¹⁰³ Uses are divided into five groups.

Group I encompasses "water dependent commerce," which is the preferred use. It includes industries that require water transport and provide a service to others. Leases may be granted for up to thirty years with no restrictions on renewals.¹⁰⁴

Group II includes "water oriented commerce," which covers commercial uses that require water, but do not serve others. These are considered to comply with the constitutional use reservation, but are assigned a lower priority and may be asked to yield to water-dependent uses. Leases may be issued for periods up to thirty years, but contain restrictions on renewal.¹⁰⁵

103. Dep't of Natural Resources, Harbor Area Land Use Management Classifications (Dec. 19, 1972) (on file with *Washington Law Review*).

104. Typical uses in this group, according to the DNR policy, are "(1) Public or private terminal and transfer facilities which handle general commerce; (2) ferry and passenger terminals; (3) naval construction and repair facilities; (4) marinas and mooring areas; (5) tug and barge companies." *Id.* at 1.

105. Typical uses in this group include "(1) pulp and paper mills; (2) lumber and plywood mills; (3) fish processing plants; (4) sand and gravel companies; (5) petroleum handling and processing plants." *Id.* at 1-2.

On August 23, 1977 the DNR staff requested that the Harbor Line Commission approve a policy change in the harbor area use classification system so that a use of the harbor area could be considered to comply with the water-dependent (Group I) or water-oriented (Group II) commerce designation if 80% of the harbor area is used for water-dependent or water-oriented uses. Dep't of Natural Resources, Harbor Area Land Use Management Classifications, Request for Policy Change (August 23, 1977) (on file with *Washington Law Review*). This request was denied because the Commission preferred to deal with these situations individually. Interview with William A. Johnson, Supervisor, Division of Marine Land Management, Dep't of Natural Resources (July 31, 1978) (notes on file with *Washington Law Review*). At the same time there was also a request for a policy variation for a harbor lease in Bremerton. The lessee wished to renew a lease for 30 years, with 80% of the harbor area to be used for a boat marina and 20% to be used for an apartment complex. Although the apartment complex was a nonconstitutional use, the staff determined that the needs of navigation and commerce would be adequately met over the next 30 years and recommended that the lease be issued. Dep't of Natural Resources, Bremerton Harbor Area Lease No. 2339, Request for Policy Variance (August 23, 1977) (on file with *Washington Law Review*). The lease was approved by the Commission; however, it has not yet been issued because the proper shorelines permits have not yet been obtained. Interview with William A. Johnson, *supra*.

Group III covers “other water dependent and water oriented uses.” These are low priority uses which do not make an important contribution to navigation or commerce. Leases are granted in areas that are not needed or suitable for constitutional uses for periods up to twenty years, with provisions that they cannot be renewed.¹⁰⁶

Group IV covers “all other uses,” that is, those that do not require a waterfront location and are not closely linked with a water-dependent use. These include apartments, hotels, taverns, retail stores, and private residences. No new leases will be issued for these uses. Renewal leases will be issued for a maximum of ten years and will contain restrictive provisions.¹⁰⁷

The fifth classification covers areas withdrawn from use by the DNR. These are areas where constitutional uses cannot be located, for example, in severely exposed areas or where such use would be contrary to the public interest, for example, near a public beach. No leases are issued for these areas.¹⁰⁸

These classifications seem in accord with the *Bloedel-Donovan* holding that areas not needed for constitutional uses can be devoted to other uses if the harbor area has wharves and docks sufficient to meet all public requirements and the state retains control in case the area should later be required for constitutional uses.¹⁰⁹ The harbor area being used for nonconstitutional uses is still reserved for “conveniences of navigation and commerce” because the uses can be changed if necessary.

3. Streets in harbor areas

Section 3 of article XV simply states: “Municipal corporations shall have the right to extend their streets over intervening tidelands to and across the area reserved as herein provided.”¹¹⁰ In the late 1800’s the city of Seattle laid out Railroad Avenue, on the tidelands along the edge of Elliott Bay. It touched the uplands only where it began and it was not an extension of any street. Although it was de-

106. Dep’t of Natural Resources, Harbor Area Land Use Management Classifications 2 (Dec. 19, 1972) (on file with *Washington Law Review*). Typical uses include “(1) public ecological and scientific reserves; (2) public waterfront parks; (3) public use beaches; (4) aquariums available to the public; (5) restaurants available to the public; (6) resorts and convention centers available to the public.” *Id.* at 2.

107. “Warehouses not directly associated with water born [sic] commerce” also fall within this category. *Id.* at 2–3.

108. *Id.* at 3.

109. See text accompanying notes 93–95 *supra*.

110. WASH. CONST. art. XV, § 3.

clared to be a public street, its actual purpose was to provide a right-of-way for railroads. A lower court ruled that Railroad Avenue was a street authorized by the constitution and statutes of the state. The supreme court reversed, holding that cities could extend their streets only across tidelands in the same direction as, and with the same width of, existing streets.¹¹¹ The purpose of article XV, section 3, declared the court, was only to allow the public "to freely reach the harbor area."¹¹²

The ruling was quoted with approval four years later in *Ilwaco v. Ilwaco Railway & Navigation Co.*¹¹³ The town of Ilwaco had attempted to extend a street across tidelands at an angle not a direct projection of the street on the upland and to include improvements within the street area. The court quoted article XV, section 3 of the constitution and reiterated that, in exercising its constitutional rights to extend streets over tidelands, the city must extend streets in a direct line, that is, in the same direction and with the same width as the upland street.¹¹⁴ The right of cities to extend their streets over tidelands to and across the harbor area is thus clearly limited by the condition that these streets must be straight-line extensions of upland streets.¹¹⁵

A city's right to extend a street over tidelands is also limited by prior improvements located in the tidelands where the street is to be extended. In the two cases dealing with this issue, the Washington Supreme Court has held that if cities do not exercise their power to extend streets in a timely fashion,¹¹⁶ the state may exercise its leasing power to the detriment of the city's right.¹¹⁷ Once land is leased by the

111. *Seattle & M. Ry. v. State*, 7 Wash. 150, 34 P. 551 (1893). The case also involved construction of a state statute that was slightly broader than the constitutional provision, however, even with the more liberal statute, the court found that Railroad Avenue was not authorized. *Id.* at 156-57, 34 P. at 553.

112. *Id.* at 157, 34 P. at 553.

113. 17 Wash. 652, 50 P. 572 (1897).

114. *Id.* at 658, 50 P. at 574.

115. In *State ex rel. Bartlett v. Forrest*, 12 Wash. 483, 41 P. 194 (1895), and *Columbia & P.S. R.R. v. City of Seattle*, 6 Wash. 332, 33 P. 824 (1893), the court upheld straight-line extensions of upland streets.

116. It is probably sufficient for a city to plat the extension or otherwise reserve a specific portion of the tideland. See note 117 *infra*.

117. In the earlier case, *State ex rel. Gatzert-Schwabacher Land Co. v. Bridges*, 19 Wash. 428, 53 P. 547 (1898), an upland owner in Seattle purchased tidelands and applied for a lease of the harbor area contiguous to the tidelands. The lease was denied. The state thought it lacked authority because both the tidelands purchased by appellant and the harbor area sought to be leased would be part of Union Street if it were to be extended. The validity of the tideland conveyance was questioned for the same reason. On appeal, the Washington Supreme Court noted that there was nothing in article XV, section 3, of the constitution that limited the exercise of a city's right to extend streets to

state, a city can extend its streets only by condemning the improvements it would destroy.¹¹⁸ Any other holding would have severely impaired the power granted the state by article XV to lease the harbor area because any lease would be subject to a city's right to plat and extend a new street.

The state, as well as the city, has power to lay out streets in harbor areas. Its power derives from section 1 of article XV and is less restricted than the cities' power. Section 1 provides that the harbor area is under control of the state and reserved for "landings, wharves, streets, and other conveniences of navigation and commerce."¹¹⁹ This has been interpreted as granting the state the power to lay out streets in any manner.¹²⁰

C. *The Duty to Draw Harbor Lines*

The Washington Constitution says that a commission shall be appointed "whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays and inlets of this state, wherever such navigable waters lie within or in front of the corporate limits of any city or within one mile thereof on either side."¹²¹ Soon after the first Harbor Line Commission was established, the

and across harbor areas to streets in existence at the time of platting the harbor. However, if the right to extend streets continues into the indefinite future, the value of tidelands to be sold and harbor areas to be leased would be impaired. A city could take the area at any time without compensation whenever it wanted to extend a street. When the Seattle waterfront was platted, only every other street was extended across the tidelands. Union Street was not one of those so extended. The court held that since the city could have extended the street over the tidelands without cost when it platted the area and did not do so, the state had the power to dispose of the tidelands. The city could no longer extend its streets over the leased area unless it compensated the lessor for any loss.

In the second case, *In re Percival Application No. 92*, 91 Wash. 470, 157 P. 1082 (1916), the Board of State Land Commissioners leased to J.C. Percival a portion of the harbor area in front of the city of Olympia, upon which he had maintained a wharf since before 1889. The city challenged the lease, because the lease interfered with the city's right to extend certain streets. In 1891 the Commissioners had platted the area without designating the extension of any streets. The city did not object. Moreover, the city never attempted to physically occupy the area, and did not notify the Board of State Land Commissioners of its intent to extend the streets in question until 1913. The court held that the city had lost its right to extend its streets over the harbor area. Percival's long use and improvement, acquiesced in by the city, entitled him to receive the lease.

118. See *State ex rel. Gatzert-Schwabacher Land Co. v. Bridges*, 19 Wash. 428, 429, 53 P. 547, 547 (1898).

119. WASH. CONST. art. XV, § 1 (emphasis added).

120. *Chlopeck Fish Co. v. City of Seattle*, 64 Wash. 315, 324, 117 P. 232, 235 (1911).

121. WASH. CONST. art. XV, § 1.

Washington Attorney General opined that harbor areas need not be established in "all navigable waters in front of incorporated cities, but only in such navigable waters as are within a harbor, estuary, bay or inlet."¹²² The Attorney General concluded that the Commission was required to determine whether the waters in front of a city were in fact a harbor,¹²³ bay, estuary, or inlet and to establish harbor lines only in those places.¹²⁴

In practice, harbor areas have not been established in all potential harbors. They have been established only where there has been "a demonstrated need, demand, and available funds to cover the cost."¹²⁵ In 1972, the DNR adopted a provisional policy governing the establishment of new harbor areas until a comprehensive study is completed of the national dependence on Washington state harbors and a statewide harbor development plan is adopted.¹²⁶ The provisional policy provides that no new harbor areas for deep-draft commerce shall be established until all suitable space in existing harbors is occupied with water-dependent commerce or important existing industries. The policy further provides that additional harbor areas for normal-draft commerce will be established when (1) the area in question is abutting or within one mile of an incorporated city or town on navigable water, (2) the area is developed for water-dependent commerce,¹²⁷ (3) the chief official representing the community requests the designation, and (4) the Harbor Line Commission determines that establishment of a harbor area pursuant to article XV of the constitution is in the state or national interest.¹²⁸

The Washington courts have never decided whether harbor lines must be drawn in front of all cities. Because the question may have an important impact on property owners, a consideration of the effect of having harbor lines established in front of privately owned tidelands and shorelands follows.

122. 1891-92 OP. WASH. ATT'Y GEN. 104, 106 (1891) (emphasis in original).

123. A harbor is a portion of a body of water sufficiently enclosed by land "to afford a shelter or place of refuge for vessels." *Id.*

124. *Id.*

125. 1972 HARBOR AREA STUDY, *supra* note 4, at 17.

126. Dep't of Natural Resources, Provisional Policy Statement (Dec. 21, 1972) (on file with *Washington Law Review*).

127. *See* note 104 and accompanying text *supra*.

128. Dep't of Natural Resources, Provisional Policy Statement (Dec. 21, 1972) (on file with *Washington Law Review*).

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D. *Effect of Harbor Lines*

1. *Leases*

Washington statutes provide for leasing of harbor areas¹²⁹ and the beds of navigable waters¹³⁰ to private persons. Harbor areas can be leased for periods of up to thirty years.¹³¹ Any improvements in the leased area must be approved by the DNR¹³² or the local port district.¹³³ Where there are no harbor areas, beds of navigable waters can also be leased for up to thirty years.¹³⁴ Again, plans for proposed improvements must be filed with the DNR.¹³⁵

The creation of a harbor area thus does not affect the terms of leases of the area. The creation of a harbor area may, however, affect eligibility for a lease in saltwater areas. One difference between harbor area leases and bed leases is that upland and tideland owners abutting saltwater harbor areas have no preference right to lease the harbor,¹³⁶ whereas the abutting tideland or shoreland owner or lessee has a preference right to lease the bed where there are no harbor lines.¹³⁷ The owner of shoreland bordering a freshwater harbor area has a preference right to lease the harbor area.¹³⁸

2. *Right to fill*

In 1913, the Washington Supreme Court stated in *State v. Sturtevant*¹³⁹ that tidelands and shorelands were sold into private ownership on the theory that "all land lying back of the inner harbor line or the line of ordinary navigability would be reclaimed and put to useful purposes."¹⁴⁰ The court also stated, "The area lying between high water and the line of navigability, as fixed or to be fixed by the inner harbor line, being, whether submerged or not, theoretically nonnavig-

129. WASH. REV. CODE § 79.01.504 (1976).

130. *Id.* § 79.16.530.

131. WASH. CONST. art. XV, § 2.

132. WASH. REV. CODE §§ 43.30.130, 79.01.508 (1976).

133. *Id.* § 53.32.010.

134. *Id.* § 79.16.540. If the bed is leased for log booming, the lease can be issued for only 10 years. *Id.*

135. *Id.* § 79.16.550.

136. *Id.* § 79.01.504.

137. *Id.* § 79.16.530.

138. *Id.* § 53.32.020.

139. 76 Wash. 158, 135 P. 1035 (1913).

140. *Id.* at 171, 135 P. at 1040.

able, is treated as land and not water"¹⁴¹ Prior to the Washington Supreme Court decision in *Wilbour v. Gallagher*¹⁴² and the subsequent enactment of the Shoreline Management Act, this language was generally thought to confirm a right in the shoreowner to fill shoreward of the inner harbor line. If any vestige of such a right still remains, the same right should be recognized for tidelands and shorelands where harbor lines have not been established. This can be inferred from the fact that the court did not merely refer to the inner harbor line in its discussion; it also referred to the line of ordinary navigability, which is the boundary of shorelands when no harbor lines are established.¹⁴³ Also, although the court did not discuss tidelands where there were no harbor lines because this case related specifically to shorelands, the general theoretical discussion should apply to both.¹⁴⁴ It thus seems that any potential right to fill should not depend on the existence of a harbor line. If such a right exists but is not recognized for tidelands and shorelands where harbor lines have not been established, a landowner could argue that he has a constitutional right to have harbor lines located in front of his first-class tidelands or shorelands if they are within a mile of the city.

The existence of a harbor area is unlikely to have a significant effect on the uses an abutting landowner can make of his own land under other regulatory schemes. Both federal¹⁴⁵ and state¹⁴⁶ legislation require permits for any filling or construction on shorelands or tidelands. These statutes and the regulations promulgated under them¹⁴⁷ make no distinction between lands abutting harbor areas and those abutting navigable beds.¹⁴⁸

3. Tidelands

Although harbor lines may create larger tideland areas,¹⁴⁹ estab-

141. *Id.* at 165, 135 P. at 1037.

142. 77 Wn. 2d 306, 462 P.2d 232 (1969), *cert. denied*, 400 U.S. 878 (1970). See text accompanying notes 6-8 *supra*.

143. *State v. Sturtevant*, 76 Wash. 158, 165, 135 P. 1035, 1037 (1913).

144. In its general discussion about the early decision to sell shorelands and tidelands, the court discussed both tidelands and shorelands. *Id.* at 171, 135 P. at 1040.

145. 33 U.S.C. § 1344 (1976).

146. WASH. REV. CODE § 90.58.140 (Supp. 1977).

147. 40 C.F.R. pt. 230 (1977); WASH. ADMIN. CODE ch. 173-16 (1977).

148. With the passage of the Shorelines Management Act in 1971, there are now restrictions on placement of fills on shorelands and tidelands, so the argument of a right to fill out to the inner harbor line may well be moot. See Part II-A *supra*.

149. First-class tidelands include "the beds and shores of navigable tidal waters be-

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lishing an inner harbor line seaward of privately owned tidelands would not give the tideland owner additional tideland; it would merely create a new area of state-owned tidelands between privately owned tidelands and the bed of the navigable water. This could not be sold to the private owner, but could be leased to him, thus creating additional usable tidelands. The newly created state-owned tidelands would then be subject to less restrictive lease provisions than the state-owned bed.¹⁵⁰ This appears to be the only reason for a land owner to desire establishment of a harbor area but it does not suggest any basis for argument that a land owner has a constitutional right to have harbor lines set in front of his or her land.

E. Uses Beyond the Outer Harbor Line

Article XV of the Washington Constitution states that “[t]he state shall never give, sell, or lease to any private person, corporation, or association any rights whatever in the waters beyond such harbor lines”¹⁵¹ The phrase “the waters beyond such harbor lines” has not been interpreted by either the Washington courts or the Attorney General. Any waters that are not within harbor lines could be said to be included. Such an interpretation would mean that the beds of navigable waters abutting first- and second-class tidelands where no harbor lines have been established are covered by the prohibition against granting rights to private persons. The same would also be true of the beds lying directly seaward of the harbor lines.¹⁵²

A more reasonable interpretation, however, is that the prohibition in article XV applies only to waters seaward of where harbor lines have been established because these areas are the subject matter of article XV. There is reason to keep these free from obstructions because they are the areas where ships must go in order to reach the harbors. Article XV could conceivably prevent location of bridges, piers, ca-

longing to the state, lying within or in front of the corporate limits of any city, or within one mile thereof upon either side and between the line of ordinary high tide and the inner harbor line.” WASH. REV. CODE § 79.01.020 (1976).

150. For example, tidelands can be leased for up to 55 years, WASH. REV. CODE § 79.01.470(3) (1976), whereas beds can be leased for only 30 years, WASH. CONST. art. XV, § 2.

151. WASH. CONST. art. XV, § 1.

152. This could be supported by arguing that, while most of article XV just applies to geographical harbor areas because that is the area needed for wharves and docks and where ships take refuge, the prohibition on granting any rights in the waters applies to all the rest of the navigable waters because all the rest of the area is used for water-borne commerce and must be free from obstruction.

bles or pipelines on the bed in any navigable waters in Washington outside of harbor waters.¹⁵³

Although the Washington Supreme Court has never directly addressed what use can be made of property beyond harbor lines, in *State ex rel. Hulme v. Grays Harbor & Puget Sound Railway*¹⁵⁴ it discussed whether a railroad corporation could build a railroad across a navigable river at a point where the tide ebbs and flows. This railroad bridge extended across the tidelands, through the harbor area, and across the bed of the river beyond the harbor lines, but the court dealt only with the tidelands and the harbor areas.¹⁵⁵ The court concluded that the Washington Constitution did not preclude the railroad corporation from acquiring the right from the state to cross the harbor area.

A Washington Attorney General's opinion on the legality of leasing the beds of navigable waters for oil exploration concludes that it is legal because (1) the intent of the framers of the Washington Constitution was to protect marine commerce, not to stifle other activities and (2) the constitution prohibits granting rights to private persons in the waters beyond the outer harbor line, not in the bed.¹⁵⁶ If this reasoning is correct, pipelines and cables, which merely occupy the bed of the waterway, would be allowed by the constitution. Uses that encumber the water column, such as bridge piers or some aquaculture projects, would not be allowable because they require rights in the waters, not just the beds, and because they could interfere with marine commerce. The court said in *Chlopeck Fish Co. v. City of Seattle*,¹⁵⁷ however, that the prohibition against granting rights in wa-

153. R.C.W. § 79.16.530 allows the abutting upland owner or the lessee of the abutting tidelands to lease the beds of navigable waters below the line of extreme low tide. WASH. REV. CODE § 79.16.530 (1976). Section 79.01.384 allows a right of way across beds of navigable waters to be granted to "any municipal or private corporation, company, association, [or] individual" for construction of "any telephone line, ditch, flume or pipeline for the domestic water supply of any municipal corporation or transmission line for the purpose of generating or transmitting electricity for light, heat or power." *Id.* § 79.01.384. Section 79.01.568 authorizes leasing of the "beds of all navigable tidal waters in this state lying below extreme low tide not in front of any incorporated city or town, nor within two miles on either side thereof" for cultivation of oysters, clams, or other edible shellfish. *Id.* § 79.01.568.

154. 54 Wash. 530, 103 P. 809 (1909).

155. *Id.* This provision was mentioned by the court again in 1911 in *Chlopeck Fish Co. v. City of Seattle*, where the court said, "It will be noted in this connection that the prohibition found in the first clause of this sentence against the sale, gift or lease of any rights whatever in the waters beyond the harbor lines is applied to *private* persons, corporations or associations only." *Chlopeck Fish Co. v. City of Seattle*, 64 Wash. 315, 323-24, 117 P. 232, 235 (1911) (emphasis in original).

156. 1963 OP. WASH. ATT'Y GEN. No. 46 at 3-4 (1963).

157. 64 Wash. 315, 117 P. 232 (1911).

ters beyond the harbor lines applies only to private persons.¹⁵⁸ A lease for a bridge pier or other use encumbering the water column granted to a public corporation would not violate the constitution.¹⁵⁹ Thus, granting any rights to a private person or corporation in the waters beyond the outer harbor line appears to be at least a technical violation of the Washington Constitution. A grant which concerns merely the bed of navigable waters, or a grant to a public entity would not violate the constitution.

F. *Moving Harbor Lines*

As originally adopted, article XV spoke only of establishing harbor lines; it made no provision for moving or disestablishing harbor lines.¹⁶⁰ The Washington Supreme Court in 1895, in *Wilson v. State Land Commissioners*,¹⁶¹ held that the only way to disestablish harbor lines was through a constitutional amendment. In 1932, article XV was amended to provide that “[a]ny harbor line so located or established may thereafter be changed, relocated or reestablished by the commission pursuant to such provision as may be made therefor by the legislature.”¹⁶²

The legislature has authorized relocation in various ways. It has directed the Harbor Line Commission to make a specific change in a specific harbor line.¹⁶³ It has authorized the approval of a tideland replot that would change harbor lines,¹⁶⁴ and generally authorized changing inner harbor lines whenever they fall “inside of the government meander line, or for any other good cause.”¹⁶⁵ The legislature has also passed a law authorizing the Commission to relocate harbor lines in front of specified cities.¹⁶⁶ Additional sites are frequently specified by the legislature.¹⁶⁷ The DNR construes this to be continuing authorization to change inner and outer harbor lines in front of

158. *Id.* at 323–24, 117 P. at 235.

159. R.C.W. § 79.01.372 provides that counties, cities, towns, and other municipalities have the right to construct bridges and trestles across waterways. WASH. REV. CODE § 79.01.372 (1976).

160. WASH. CONST. art. XV, § 1 (1889, amended 1932).

161. 13 Wash. 65, 42 P. 524 (1895).

162. WASH. CONST. art. XV, § 1 (1889, amended 1932, amend. 15).

163. Harbor Lines Act, ch. 24, § 2, vol. 2, 1967 Wash. Laws Ex. Sess. 1513 (1967).

164. WASH. REV. CODE § 79.16.325 (1976).

165. *Id.* § 79.01.424.

166. Harbor Lines Act, ch. 24, § 1, vol. 2, 1967 Wash. Laws Ex. Sess. 1513 (1967).

167. The most recent version is Harbor Lines Comm’n Act, ch. 124, 1977 Wash. Laws 1st Ex. Sess. 450 (1977).

the named cities and not a one-time authorization.¹⁶⁸

1. *Constraints on the movement of harbor lines*

From the present language of article XV, it appears that when authorized by the legislature, the Harbor Line Commission clearly has the power to change harbor lines. The question remains, however, for what reasons can these lines be changed and what guiding principles must the Commission follow? The Washington Attorney General addressed those questions in a 1976 opinion discussing how the law allowing the Commission to change harbor lines in front of specified cities¹⁶⁹ applies to the harbor lines in Elliott Bay in front of the City of Seattle.¹⁷⁰ The Attorney General noted that the legislature had not set out any guidelines for relocating harbor lines. However, because the constitution entrusted this function directly to the Harbor Line Commission, it is an administrative, not a legislative function, and no legislative guidelines are required.¹⁷¹ The Attorney General concluded that the Commission must, when changing harbor lines, act within the same constitutional constraints which apply to the establishment of new harbor areas. Therefore, the harbor area resulting after a movement of harbor lines must still have a width of between 50 to 2000 feet and be located over state-owned land.¹⁷²

The Attorney General also set two additional guidelines for the Commission. First, because article XV was intended to maintain viable harbor areas in front of cities and to preserve state ownership of harbor areas, changes in harbor lines may not destroy the "viability"

168. 1976 OP. WASH. ATT'Y GEN. No. 62 (1976) (letter opinion) (complete opinion on file with *Washington Law Review*) [hereinafter cited as 1976 OPINION].

169. Act Authorizing Harbor Line Comm'n to Change Certain Harbor Lines, ch. 139, 1963 Wash. Laws 664 (1963). More cities were added to the list in 1977. Harbor Lines Comm'n Act, ch. 124, 1977 Wash. Laws 1st Ex. Sess. 450 (1977).

170. 1976 OPINION, *supra* note 168.

171. *Id.* at 6-7. It has been suggested by Doug Anderson that the Attorney General's interpretation that changing harbor lines, like establishing them, is an administrative function, ignores the difference in the language providing for these two actions. Briefly, Anderson's position is that the relocation function is a hybrid of legislative and administrative functions, and should be subject to the standards doctrine, the purpose of which is to provide a judicial means to prevent the administrative abuse of discretion. Anderson argues that relocating harbor lines is similar to rezoning and therefore the procedural safeguards required in rezoning actions should also be required in harbor line relocations. D. Anderson, *The Pier 50-51 Harbor Line Relocation: A Case Study of Legal Principles Limiting the Power of the Harbor Line Commission to Relocate Harbor Lines* 19-20 (1977) (unpublished seminar paper in University of Washington Law Library).

172. WASH. CONST. art. XV, § 1. See 1976 OPINION, *supra* note 168, at 7.

of the harbor area.¹⁷³ Second, the Harbor Line Commission, like all public agencies, must exercise its power in the public interest and not for the gain of private parties.¹⁷⁴ It also seems clear that harbor lines may not be moved to facilitate private acquisition of the harbor area.¹⁷⁵

The Board of Natural Resources, acting as the Harbor Line Commission, also has procedural guidelines to follow mandated by the Washington Administrative Procedures Act¹⁷⁶ and the rules of practice and procedure for the Natural Resources Board.¹⁷⁷

2. *Effects of movement of harbor lines*

If an inner harbor line in tidal water is moved outward,¹⁷⁸ classifi-

173. 1976 OPINION, *supra* note 168, at 7.

174. *Id.* at 8.

175. "The manifest purpose of this section [WASH. CONST. art. XV, § 1] is to prevent the control of the water front of cities from ever falling into private hands." *Chlopeck Fish Co. v. City of Seattle*, 64 Wash. 315, 323, 117 P. 232, 235 (1911).

176. WASH. REV. CODE ch. 34.04 (1976).

177. WASH. AD. CODE ch. 332-08 (1977).

178. An example of moving the inner harbor line seaward in order to avoid the constitutional restraints placed on harbor areas is the Pier 50-51 harbor line relocation in Seattle. In 1976 the Howard S. Wright Development Company requested the Board of Natural Resources, acting as the Harbor Line Commission, to relocate the inner harbor line seaward of Piers 50-51, so that their proposed development (a hotel-office-tower complex) would be located on state-owned tidelands rather than in the harbor area. Board of Natural Resources, Dep't of Natural Resources Resolution No. 218 (November 7, 1976) (on file with *Washington Law Review*). This relocation would allow the company to obtain a 55 year tideland lease; a harbor area lease for such a development could run no more than 20 years. See note 106 and accompanying text *supra*.

The Board passed Resolution No. 218, relocating the inner harbor line beyond Piers 50 and 51. On its face, the resolution stated that the reason for moving the lines was to assist the development by avoiding constitutional restrictions. It further noted that "[p]roject financing is less difficult to obtain for improvements to be placed on a tideland area covered by a long term state lease." Board of Natural Resources, Dep't of Natural Resources Resolution No. 218, at 1 (November 7, 1976) (on file with *Washington Law Review*). The resolution also stated that it was in the public interest to change the line. *Id.* at 2.

On February 14, 1977 the Seattle Shorelines Coalition petitioned for a writ of certiorari, challenging the Commission's action. *Seattle Shorelines Coalition v. Department of Natural Resources*, No. 824247 (King County Superior Court, filed Feb. 14, 1977). Among the grounds for challenging the relocations was the claim that it violated the mandate of article XV that the harbor area be forever reserved for conveniences of navigation and commerce, that the relocation was "arbitrary, capricious and unrelated to the constitutional purposes for which the harbor lines are established," and that "it relinquished the state's right to control the harbor area." Affidavit of Plaintiff Benella Caminetti in Support of Petition for Writ of Certiorari at 7-8, *Seattle Shorelines Coalition v. Department of Natural Resources*, No. 824247 (King County Superior Court, filed Feb. 14, 1977) (on file with *Washington Law Review*).

cation of the area between the old and the new inner harbor line changes from harbor area to first-class tidelands.¹⁷⁹ Because the harbor area would have been owned by the state, the newly created tidelands would also be owned by the state. The abutting tideland owner would have no claim of ownership of the new tidelands because the abutting tidelands would have been sold with the outer boundary defined by metes and bounds.¹⁸⁰

The newly created tidelands would be subject to fewer restrictions as tidelands than as harbor area. Fifty-five year leases would be available,¹⁸¹ rather than the thirty year constitutional limit on harbor areas, and the constitutional reservation for "conveniences of navigation and commerce"¹⁸² would not apply. The land would still be reserved from sale to private parties, although the prohibition on the sale of tidelands is merely a statutory restriction,¹⁸³ whereas the restriction on the sale of harbor areas is constitutional.¹⁸⁴ It would be more likely, therefore, that tidelands rather than harbor area would eventually be sold because the sale could be authorized by statute.¹⁸⁵ The tidelands would, however, still be subject to the Shorelines Management Act.¹⁸⁶

Resolution of this case on the merits could provide some guidelines for harbor area relocations. However, it is likely that the case may not be decided on the merits, because the Washington State Ferry System is interested in obtaining the site for terminal expansion, which would render the question moot.

The question raised in this case is whether moving a harbor line for the stated purpose of avoiding constitutional restrictions is improper. Technically, once the harbor area is moved outward, there are no restrictions on the former harbor. However, the purpose of article XV is to preserve the harbor as a state-owned harbor area for conveniences of navigation and commerce, and moving a line specifically to avoid this constitutional purpose would be improper. Thus, it can be argued that the Pier 50-51 relocation was a case in which the harbor line system was manipulated to benefit a private party, rather than to protect the public interest.

179. The area between "the line of ordinary high tide and the inner harbor line" is first-class tideland. WASH. REV. CODE § 79.01.020 (1976). See *State ex rel. McKenzie v. Forrest*, 11 Wash. 227, 39 P. 684 (1895).

180. Act Relating to State Lands and Their Management, ch. 36, 1911 Wash. Laws 129 (1911); Act Relating to the Public Lands of the State, ch. 178, § 15, 1895 Wash. Laws 527 (1895).

181. WASH. REV. CODE § 79.01.470 (3) (1976).

182. WASH. CONST. art. XV, § 1.

183. WASH. REV. CODE 79.01.470(2) (1976). Before 1971, state-owned tidelands could be, and often were, sold to the public. See note 64 *supra*.

184. WASH. CONST. art. XV, § 1.

185. A bill was introduced in the Washington State Legislature in January 1976 that would have authorized the sale of certain second-class tidelands to private parties. H.B. 1427, 44th Legis., 2d Ex. Sess. (1976).

186. WASH. REV. CODE ch. 90.58 (1976).

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If the outer harbor line is moved outward, the area in which docks and wharves can be built is increased. If a structure has been illegally built beyond the outer harbor line, moving the line beyond the structure would bring the structure into compliance with article XV of the constitution.¹⁸⁷

Movement of an inner harbor line inward over state-owned tidelands increases the harbor area and the area between the old and new inner harbor lines becomes subject to the restrictions placed on harbor areas. The inner harbor line could not be moved inward over privately owned tidelands without condemning the tidelands because harbor areas must be state-owned.¹⁸⁸

Harbor lines have added significance in fresh water because the inner harbor line is also the outer boundary of shorelands.¹⁸⁹ When many shorelands were conveyed, the deed conveyed the state-owned shoreland abutting the area.¹⁹⁰ The outer boundary was not set. The

187. In Aberdeen, certain piers were built beyond the outer harbor line in the Chehalis River. This is a violation of the constitutional mandate that no rights be granted in the waters beyond the outer harbor line. Nothing was done about the situation until October 1977 when the Harbor Line Commission relocated the outer harbor line outside the offending piers. Board of Natural Resources, Dep't of Natural Resources Resolution No. 227 (Oct. 18, 1977) (on file with *Washington Law Review*). Although the purpose of this was simply to remedy a technical violation of the constitution, it also seems to further the constitutional purpose of preserving a viable state-owned harbor area.

188. 1976 OPINION, *supra* note 168, at 7. In the early 1970's the City of Seattle began proceedings to condemn some West Seattle tidelands. *In re* Petition of Seattle to Acquire by Condemnation Land and Other Property, No. 719531 (King County Superior Court, judgment entered Jan. 27, 1972). The tidelands between the high and low tide lines were conveyed to a private party in 1900. In 1927, the Harbor Line Commission established an inner harbor line seaward of the line of low tide, and platted and sold the newly created tidelands between the line of low tide and the inner harbor line. In 1967, the legislature passed a law directing the Harbor Line Commission to relocate the inner harbor line in the area in question to a location coincident with the existing line of ordinary high tide. Act Relating to Harbor Lines, ch. 24, § 2, 1967 Wash. Laws Ex. Sess. 1513 (1967). The Commission never passed a resolution so relocating the line.

The state was joined as a party in the condemnation proceedings. It asserted its rights to the area up to high tide line, on the theory that the original conveyance was subject to the state's power to later change the lines, and the state had changed them by passing the statute noted above. Findings of Fact and Conclusions of Law at 9, *In re* Petition of Seattle to Acquire by Condemnation Land and Other Property, No. 719531 (King County Superior Court, judgment entered Jan. 27, 1972) (on file with *Washington Law Review*).

189. Shorelands are defined as the land between the line of ordinary high tide and the line of navigability. WASH. REV. CODE § 79.01.028, .032 (1976). When a harbor line is established, this is the line of navigability, and therefore the outer boundary of the shorelands. *State v. Sturtevant*, 76 Wash. 158, 166, 135 P. 1035, 1038 (1913).

190. See, e.g., *Puget Mill Co. v. State*, 93 Wash. 128, 130, 160 P. 310, 311 (1916); *State v. Sturtevant*, 76 Wash. 158, 161, 135 P. 1035, 1036 (1913).

Washington Supreme Court has held that what was conveyed was the land out to navigable water.¹⁹¹ Theoretically, the line of navigability is fixed, even though it is not legally described; the state is said to find that line and define it when it establishes the inner harbor line. Therefore, in practice, the grantee takes shorelands, subject to the right of the state to establish the inner harbor line which is the boundary of the shorelands.¹⁹²

The court has said that when this line of navigability is defined, "the water boundary theretofore open would be forever settled."¹⁹³ However, this holding was enunciated before the 1932 amendment to article XV permitted the Harbor Line Commission to move harbor lines if authorized to do so by the legislature. Thus, if the legislature now authorizes the outward movement of the inner harbor line, and the Harbor Line Commission so moves it, the privately owned shoreland should expand because the harbor line is the outer boundary of shoreland.¹⁹⁴

If the inner harbor line in fresh water is moved outward, the newly created shorelands would be owned by the owner of the preexisting shorelands, whereas in tidal waters, the newly created tidelands are not owned by the owner of the preexisting tidelands because that owner had a set boundary to his tidelands. Moving the inner harbor line outward would probably result in an increase of privately owned shorelands. However, moving the harbor line inward would probably raise a question of "taking" private property based on the owner's reliance on a set boundary.¹⁹⁵

3. *Eliminating harbor areas*

Although the constitution as amended expressly allows harbor lines

191. *State v. Sturtevant*, 76 Wash. 158, 135 P. 1035 (1913).

192. *Id.* at 166, 135 P. at 1038.

193. *Id.* at 168, 135 P. at 1038.

194. In *State v. Sturtevant*, 76 Wash. 158, 135 P. 1035 (1913), the court discussed the ownership of the shorelands created by the lowering of Lake Washington. It said that in a case of a deed whose outer boundary was not set, but rather depended on physical conditions, the deed carried title "to the line of navigability as it may be thereafter fixed." *Id.* at 168, 135 P. at 1039. The value of ownership of shorelands is due to the fact that it gives access to deep or navigable waters. *Id.* at 165, 135 P. at 1037. Therefore, ownership must be extended to the line of navigability.

195. A discussion of the taking issue is beyond the scope of this article. For a discussion of the taking issue, see Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Comment, *Balancing Private Loss Against Public Gain to Test for a Violation of Due Process or a Taking Without Just Compensation*, 54 WASH. L. REV. 315 (1979).

to be “changed, relocated or re-established,”¹⁹⁶ there appears to be no authorization for totally eliminating a harbor area. If the Commission wished to eliminate a harbor area, it could effectively accomplish this goal by moving the area into deep water, beyond the area actually used as the harbor. This would release the actual geographical harbor area from the constitutional restrictions of article XV. It seems doubtful, however, that, if challenged, the courts would permit such a transparent excess of constitutional power. Such action would be contrary to the two primary purposes of article XV, namely preserving harbor areas and maintaining state ownership of them.¹⁹⁷

IV. SEATTLE CENTRAL WATERFRONT: A CASE IN CONTROVERSY

The Seattle central waterfront controversy is the prime example of the problems which can arise over harbor area uses.¹⁹⁸ The problems

196. WASH. CONST. art. XV, § 1.

197. See text accompanying notes 173–74 *supra*.

198. In 1977, the Harbor Line Commission directed the DNR to establish a committee to review existing policies for the Seattle central waterfront and make recommendations to the Commission. The committee membership consisted of representatives from the DNR, the Port of Seattle, the City of Seattle, the League of Women Voters, the Seattle Shoreline Coalition, and the Chamber of Commerce. Memorandum from William A. Johnson, Chairman of Review Comm., Division of Marine Land Management, Dep't of Natural Resources to Harbor Line Comm'n (Mar. 23, 1978) (on file with *Washington Law Review*).

Based on its meetings with former, existing, and potential users of the central waterfront, the DNR submitted findings and recommendations to the Commission in March 1978. The primary findings established that ships and shipping facilities have changed with containerization, resulting in the need for 20 acres of backup space per ship, which is not available on the central waterfront. Railroad service is inadequate and truck service would “overtax roads and subject the public to unsafe conditions.” The deep water makes pier construction expensive. Nonconstitutional uses are not presently financially feasible due to the short (10 and 20 year) lease terms allowed under the present policy. However, the waterfront attracts people and there is a growing dominance of people-oriented activity. *Id.* at 1–2.

The DNR offered four alternatives: (1) change the lease from 30 to 40 years or longer through a constitutional amendment, (2) move the harbor lines out creating a less restrictive land use category, first-class tideland, (3) change the DNR policy to allow 30 year lease terms for nonconstitutional uses, (4) make no changes. *Id.* at 2.

The Port of Seattle supports the longer lease term for nonconstitutional uses because it has no interest in developing facilities for shipping and navigation on the central Seattle waterfront. Port of Seattle, Position Paper for Seattle Central Waterfront Harbor Area Review Comm. (undated) (on file with *Washington Law Review*).

The Seattle Shorelines Coalition and the League of Women Voters both support use of the waterfront for navigation and commerce, and suggested some “futuristic uses” for the area. Seattle Shorelines Coalition, Report to the Central Waterfront Use Comm. (Oct. 27, 1977) (on file with *Washington Law Review*); Irene Christy, League of Women

are exacerbated by public disagreement over what uses are beneficial to the community, and by the incompleteness of the supreme court's explication of what uses are allowable under article XV.

As discussed above, the Washington court has not clearly defined what are "conveniences of navigation and commerce." The DNR says that uses in Groups III, low priority water dependent uses, and IV, uses which do not require waterfront location, are not constitutional uses.¹⁹⁹ It is clear that under the DNR standards many uses in the Seattle harbor area along the central waterfront, such as restaurants, shops, parking garages, and the Seattle Aquarium,²⁰⁰ are not constitutional. The Seattle Shoreline Master Program²⁰¹ is also not fully in accord with other aspects of the constitutional reservation of harbor areas for conveniences of navigation and commerce. Under Seattle's Shoreline Use Goals and Policies, uses are listed in preferred order.

Voters of Washington, Statement to Seattle Central Waterfront Comm. (Oct. 27, 1977) (on file with *Washington Law Review*).

In January 1979, the committee proposed to the Harbor Line Commission that the Harbor Area Land Use Management Classifications be changed to allow the granting of 30 year leases for uses in Groups III and IV. This was not adopted at the January meeting because of concern that this proposal was too broad. A hearing was held to obtain public input on the possible changes. Telephone conversation with William A. Johnson, Supervisor, Division of Marine Land Management, Dep't of Natural Resources (Feb. 21, 1979) (notes on file with *Washington Law Review*).

In February 1979, two resolutions presented by the DNR were passed by the Board of Natural Resources acting as the Harbor Line Commission. Resolution No. 249 added a new class of harbor area to existing harbor area classifications. This allows creation of a "Commercial Waterfront" area in which the DNR could grant 30 year leases for uses not related to navigation and commerce. A "Commercial Waterfront" area can be established on an urban waterfront if (1) adequate harbor areas are available to meet the state needs of navigation and commerce for the succeeding 40 years and (2) the designation will foster accomplishment of the needs of the local community. Board of Natural Resources, Dep't of Natural Resources, Resolution No. 249 (Feb. 6, 1979) (on file with *Washington Law Review*).

The Harbor Line Commission also passed Resolution No. 250 which placed the Seattle central waterfront (from Piers 48 to 70 inclusive) in the new "Commercial Waterfront" category thus allowing the granting of 30 year leases for uses not related to navigation and commerce. Board of Natural Resources, Dep't of Natural Resources, Resolution No. 250 (Feb. 6, 1979) (on file with *Washington Law Review*).

199. The DNR use classification system is discussed in the text accompanying notes 104-08 *supra*. The DNR policy states that Group III uses are allowed if the area is not needed or suitable for constitutional uses thus implying that Group III uses are nonconstitutional. The policy directly states the Group IV uses are those that "clearly do not conform to the purpose for which harbor areas are created." Dep't of Natural Resources Harbor Area Land Use Management Classifications (Dec. 19, 1972) (on file with *Washington Law Review*).

200. See PORT OF SEATTLE, PORT OF SEATTLE HANDBOOK 1978, at 41 (1978).

201. SEATTLE CITY COUNCIL, SEATTLE SHORELINE MASTER PROGRAM (1976) (approved by the Washington Dep't of Ecology, Oct. 8, 1976).

Top priority is given to “[p]rotection and enhancement of natural areas or systems—those identified as containing or having unique geological, ecological or biological significance.”²⁰² This is obviously not compatible with reservation of the area for conveniences of navigation and commerce. However, because there are few, if any, unique natural areas along the Seattle central waterfront or in other Seattle harbor areas, this may be only a technical conflict with the constitutional system. Water-dependent uses are the second preferred use.²⁰³ However, these are defined to include recreational uses such as parks and bike trails.²⁰⁴ Recreational uses are not normally considered conveniences of navigation and commerce. In the DNR use classification, recreational uses fall into Group III,²⁰⁵ which are considered to be nonconstitutional uses.

There are also special goals for the central waterfront, some of which are compatible with the constitutional reservation and some of which are not. The first goal is to “[r]einforce the historic-marine orientation of Seattle as a major downtown theme.”²⁰⁶ In most instances, activities under this goal would be related to commerce and navigation and thus would be constitutional. The second goal is to “[s]trengthen water-oriented recreation tourist activity, related retail business, and public areas open to the water.”²⁰⁷ Many uses in this group would be nonconstitutional, such as parks, restaurants, retail stores and convention centers. The third goal, to “[m]aintain a full complement of water dependent uses,”²⁰⁸ suggests activities more closely related to navigation and commerce and probably within the constitutional uses. The fourth goal, to “[p]reserve and enhance views of Elliott Bay and the Olympic Mountains,”²⁰⁹ suggests activities only remotely related if at all, to navigation and commerce. The permissibility of the nonconstitutional uses is contingent on the maintenance of sufficient area in the Seattle harbor dedicated to the needs of navigation and commerce. If the plan does not provide this, a more fundamental issue must be addressed: taking into consideration the needs of the city, the needs of modern shipping, and the desires of the

202. *Id.* at ix.

203. *Id.*

204. *Id.* at ix, 60, 61.

205. *See* note 106 *supra*.

206. SEATTLE CITY COUNCIL, SEATTLE SHORELINE MASTER PROGRAM 6 (1976) (approved by the Washington Dep’t of Ecology, Oct. 8, 1976).

207. *Id.*

208. *Id.*

209. *Id.*

people,²¹⁰ should conveniences of navigation and commerce continue to have preference over other uses on the Seattle central waterfront?

210. The Seattle Shoreline Master Program, *id.*, and the report of the Seattle 2000 Commission, GOALS STATEMENTS FROM TASK FORCES OF THE SEATTLE 2000 COMMISSION (May 19, 1973), contain many expressions of the people's desires.