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## Burdens on Public Access

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# Burdens on Public Access

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UNIVERSITY  
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In some states, more than ninety-nine percent of residents depend on public beach access points in order to exercise their right to enjoy the beach.<sup>1</sup> Public demand for beach access has continually increased since the 1960s.<sup>2</sup> In the advent of unprecedented shoreline development and with fewer people able to afford living on the coast, beach access has become a necessity in addition to remaining a legal right for the majority.<sup>3</sup> For the public to be able to exercise its right to access shoreline areas held in trust, the public must be granted reasonable access.<sup>4</sup> Although subject to state police powers, there is an equal protection component to the guarantee of public trust resource access.<sup>5</sup> At a certain point, the deprivation of access to such a resource cannot be justified by the state.<sup>6</sup>

Generally, the public right to horizontal use of the beach is enforceable under the legal theory of the public trust doctrine. The public trust doctrine originates from natural law and recognizes the importance of citizens' use of waters for fishing, commerce, and navigation. States, such as New Jersey, have chosen to enforce public access to the beach under this legal doctrine.<sup>7</sup> Access to public trust resources is important for the preservation of beach use for recreational enjoyment, for which there must be perpendicular access. Vertical or perpendicular

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<sup>1</sup> Robert Freudenberg, Public Access in New Jersey: The Public Trust Doctrine and Practical Steps to Enhance Public Access, New Jersey Department of Environmental Protection, 5 (2009), available at [http://www.state.nj.us/dep/cmp/access/public\\_access\\_handbook.pdf](http://www.state.nj.us/dep/cmp/access/public_access_handbook.pdf); Jennifer A. Sullivan, Laying Out An "Unwelcome Mat" to Public Beach Access, 18 J. Land Use & Envtl. L. 331, 332 (2003);

<sup>2</sup> See David Owens, Land Acquisition and Coastal Resource Management: A Pragmatic Perspective, 24 Wm. & Mary L. Rev. 625, 651 (Summer 1983).

<sup>3</sup> See Robert Freudenberg, Public Access in New Jersey: The Public Trust Doctrine and Practical Steps to Enhance Public Access, New Jersey Department of Environmental Protection, 5 (2009), available at [http://www.state.nj.us/dep/cmp/access/public\\_access\\_handbook.pdf](http://www.state.nj.us/dep/cmp/access/public_access_handbook.pdf).

<sup>4</sup> See Erika Kranz, Sand for the People, 83-JUN Fla. B.J. 10, 13 (June 2009).

<sup>5</sup> See Kenneth Manaster and Daniel Selmi, Access to Trust Resources, 1 St. Envtl L. §4:19, at 1 (2012).

<sup>6</sup> See *id.*

<sup>7</sup> See Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, 879 A.2d 112, 124 (N.J. July 26, 2005).

access to the beachfront has been realized by expansion of the public trust doctrine through public prescriptive easement, implied dedication, and customary access legal theories.<sup>8</sup>

However, the public trust doctrine does not indicate how courts are to protect shoreline rights of access.<sup>9</sup> Regulations or ordinances restricting beach access are “not a traditional public forum for First Amendment purposes.”<sup>10</sup> Although the public has a right to use public trust resources, the state has an obligation to manage the public’s right to use these areas.<sup>11</sup> Nonetheless, the right to use public trust resources is “non-fundamental and may be subject to regulation so long as the regulations rationally promote their purposes.”<sup>12</sup> In addition, “the right to access beaches so as to access the shore is not a fundamental state right.”<sup>13</sup>

In order to access the beach, the public must be granted access to the shoreline from public roads.<sup>14</sup> A multitude of access issues can burden reasonable beach access. For example, beach access is hampered by inadequate or nonexistent signage, inadequate parking at public access points, and impaired walkways access.<sup>15</sup> It is not uncommon for a town to adopt regulations that place “financial and logistical obstacles, ranging from fee differentials to outright exclusions” on nonresident access.<sup>16</sup> For this very reason, the lack of public parking or the severe restricting of such locations puts beaches off-limits to non-locals.<sup>17</sup> If there is no

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<sup>8</sup> See Denardo v. Stanton, 906 N.E.2d 1024, 1029 (Mass. App. Ct. June 3, 2009); Gion v. City of Santa Cruz, 2 Cal. 3d 29, 43 (Cal. 1970); State ex rel. Thornton v. Hay, 462 P.2d 671, 677-78 (Or. 1969).

<sup>9</sup> See Surfrider Found.- So. Fl., Inc. v. St. Johns County, No. CA04-89, 2006 WL 4583525, at 10 (Fla. Cir. Ct. Mar. 2, 2006).

<sup>10</sup> Beach Access Restriction Valid, 30 No. 2 McQuillin Mun. Law Rep. 4, at 1 (Feb. 2012).

<sup>11</sup> Kenneth Manaster and Daniel Selmi, Access to Trust Resources, 1 St. Envtl L. §4:19, at1 (2012).

<sup>12</sup> Cavanaugh v. Town of Narragansett, WC 91-0496 1997 R.I. Super. LEXIS 21, at 36.

<sup>13</sup> Id. at 12.

<sup>14</sup> Erika Kranz, Sand for the People, 83-JUN Fla. B.J. 10, 13 (June 2009).

<sup>15</sup> See id. at 14.

<sup>16</sup> See Susan Cordaro, A High Water Mark: The Article IV, Section 2, Privileges and Immunities Clause and Nonresident Beach Access Restrictions, 71 Fordham L. Rev. 2525, 2527 (May 2003).

<sup>17</sup> See NJ Beachgoers Worry New Rules May Limit Beach Access, CBS New York, Jun. 26, 2011, <http://newyork.cbslocal.com/2011/06/26/nj-beachgoers-worry-new-rules-may-limit-beach-access>.

parking available, “then there is a restriction on reasonable public beach access.”<sup>18</sup> Lack of reasonable public parking can also affect safety of beach-goers by forcing “public beach patrons to park on the side of the road” and affects fire personnel access.<sup>19</sup>

On the other hand, public access raises issues for surrounding private landowners that includes noise, trash, parking stresses in a community, and beach-use fees. For issues with private landowners, the distance between a land parcel and the “pedestrian pathway available to [the public] could be found, as a matter of fact, to be so great that [a] parking easement [would be] reasonably necessary for the enjoyment of [the public’s] right to use the beach.”<sup>20</sup> In circumstances where structures are needed for plaintiffs’ enjoyment of a right of way, courts could find certain structures, such as a pathway, to be reasonably necessary.<sup>21</sup> However, the reasonable necessity for such supporting infrastructure is not likely to be found “an absolute physical necessity.”<sup>22</sup> A lack of parking can also create a physical barrier for residents because disabled residents may find the distance to travel too great.<sup>23</sup>

Landowners have resorted to executing psychological barriers by posting illegal ‘no parking’ signs.<sup>24</sup> In Malibu, for example, “wealthy homeowners have gone to lengths to block visitors from the majestic shoreline with security guards and locked gates.”<sup>25</sup> Concerned citizens of Malibu have said, “there is no business necessity to justify the discriminatory burdens and

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<sup>18</sup> Jennifer A. Sullivan, Laying out an “Unwelcome Mat” to Public Beach Access, 18 J. Land Use & Envtl. Law 331, 352.

<sup>19</sup> See Jeffrey S. Hampton, Roads Dispute Taken to High Court, *Virginian-Pilot* (Norfolk, Va.), Aug. 8, 2006, at Y1.  
<sup>20</sup> Harrington v. Lamarque, 677 N.E. 2d 258, 261 (Mass. App. Ct. 1997)

<sup>21</sup> See Scioletti v. Thomas, No. 07 MISC 346579(HMG), 2010 WL 5480706, at 6 (Mass. Land Ct. Dec. 15, 2010).

<sup>22</sup> See Churchill v. Harris, 154 N.E. 87, 88 (Mass. 1926).

<sup>23</sup> See Norkunas v. Seahorse NB, LLC, 444 Fed. Appx. 412, 418 (11th Cir. 2011).

<sup>24</sup> See Tony Barboza, Do-it-yourself Parking Bans in Malibu, *Los Angeles Times*, (November 10, 2011) available at <http://articles.latimes.com/2011/nov/10/local/la-me-adv-fake-beach-parking-20111110>.

<sup>25</sup> See *id.*

benefits of restricting public access to the beach.”<sup>26</sup> A city like Malibu's claims regarding litter, traffic, parking, bathrooms, and security are not a compelling justification for denying public access to the shorefront.<sup>27</sup> Since federal and state laws mandate “equal access for all” and other municipalities provide public access to the beach, municipalities like Malibu should as well.<sup>28</sup>

Despite this, municipalities have the “right to adopt reasonable regulations as to the use and enjoyment of the beach areas.”<sup>29</sup> Although, some beach-goers may dispute that the public has an absolute right to park on public streets, many jurisdictions have held that “parking is not a right, but a privilege, and, as such, is subject to reasonable regulation under the police power” under a state and subsequently a city.<sup>30</sup> Falling within a city’s police power, the city “has the right to regulate parking on public streets.”<sup>31</sup> Even on public streets, “parking on public thoroughfares is not a right, but a privilege to be enjoyed by the public at large.”<sup>32</sup> Likewise, since access to public trust resources is not absolute, access fees may be employed “in a reasonable fashion” to “maintain or improve the trust resources for which the fee was charged.”<sup>33</sup> The question of whether a certain use of funds is permissible is subject to municipal legislation.<sup>34</sup>

The power of a municipality to institute a parking-meter system primarily for maintaining and cleaning the areas adjacent to the parking spots appears permissible. Leading municipalities have successfully used parking meter money to fund cleaning or city beautification projects, as

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<sup>26</sup> See Robert García and Erica Flores Baltodano, Free the beach! Public access, equal justice, and the California Coast, 2 Stan. J. Civ. Rts. & Civ. Liberties 143, 188 (2005).

<sup>27</sup> See *id.*

<sup>28</sup> See *id.*

<sup>29</sup> Van Ness v. Borough of Deal, 78 N.J. 174, 179 (S. Ct. N. J. 1978).

<sup>30</sup> See Yegen v. City of Bismarck, 291 N.W.2d 422, 425 (N.D. 1980); See also Snyder v. State, 92 Idaho 175, 178 (Idaho 1968); See also Billington Builders Supply, Inc. v. City of Yakima, 14 Wash. Appl. 674, 677 (Wash. Ct. App. 1975); See also Dept. of Highways v. Capone, 298 So. 2d 94, 97 (La. Ct. App. 1974).

<sup>31</sup> Thomas & Warner v. City of New Orleans, 230 La. 1024, 1035 (La. 1956).

<sup>32</sup> See Yegen v. City of Bismarck, 291 N.W.2d 422, 425 (N.D. 1980).

<sup>33</sup> See Kenneth Manaster and Daniel Selmi, Access to Trust Resources, 1 St. Env'tl L. §4:19, at 1 (2012); See also City of Daytona Beach Shores v. State, 483 So. 2d 405, 408 (Fla. 1985).

<sup>34</sup> See C. C. Marvel, Permissible Use of Funds From Parking Meters, 83 A.L.R. 2d 625, at 5-6 (1962); See also State v. Douglas, 94 A.2d 403, 407 (Vt. 1953).

well as funding cleanup groups.<sup>35</sup> However, in order to implement such a system, towns need an ordinance authorizing such a system. It is possible that parking meter ordinances will be void upon the ground that it is primarily revenue producing rather than principally a regulatory measure.<sup>36</sup> A parking meter system could ensure continued, uninhibited access to beach access points. Another important benefit to such a system is revenue generation for improvement of the immediate area for enhanced public access point enjoyment.

Although the employment of a parking system is generally used to enforce traffic regulations and “increase turnover for local businesses,” its potential to generate revenue for cities, public funds, and trash pickup is not a novel concept.<sup>37</sup> Revenue generated from parking enforcement systems, can be deposited into a city’s general fund to supplement costs for libraries, police and fire, as well as trash collection.<sup>38</sup> The use of revenue from curb parking to directly improve a metered area can create a strong local interest in charging for parking.<sup>39</sup> Only a portion of the revenue would likely be necessary to cover refuse collection and proper disposal costs.<sup>40</sup>

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<sup>35</sup> Laura Lothian, Businesses Want Parking Meter Money to Clean Up Village for Centennial, (Feb. 19, 2012, 5:12 PM), LaMesa-Mount Helix Patch, [http://lamesa.patch.com/blog\\_posts/village-businesses-want-parking-meter-money-to-clean-up-downtown-for-centennial](http://lamesa.patch.com/blog_posts/village-businesses-want-parking-meter-money-to-clean-up-downtown-for-centennial); Zach Lindsey, Easton Considers Using Proposed Parking Meters to Fund Cleanup Group, Lehigh Valley Live, (June 26, 2012, 8:41 PM), [http://www.lehighvalleylive.com/easton/index.ssf/2012/06/easton\\_considers\\_volunteer\\_cle.html](http://www.lehighvalleylive.com/easton/index.ssf/2012/06/easton_considers_volunteer_cle.html).

<sup>36</sup> *See id.*

<sup>37</sup> *See* Khari Johnson, City Explores Beachfront Parking Permits and Meters, Imperial Beach Patch, Nov. 21, 2012, <http://imperialbeach.patch.com/articles/city-explores-beachfront-parking-permits-and-meters>; *See also* Libby Smith, Denver Sees Significant Increase in Parking Ticket Revenue, CBS Denver, Oct. 25, 2012, <http://denver.cbslocal.com/2012/10/25/denver-sees-significant-increase-in-parking-ticket-revenue>.

<sup>38</sup> Libby Smith, Denver Sees Significant Increase in Parking Ticket Revenue, CBS Denver, Oct. 25, 2012, <http://denver.cbslocal.com/2012/10/25/denver-sees-significant-increase-in-parking-ticket-revenue>.

<sup>39</sup> *See* Matthew Waller, Parking Meters Eyed for Revenue, San Angelo Standard-Times (July 14, 2012, 4:35 PM), available at <http://www.gosanangelo.com/news/2012/jul/14/parking-meters-produce-revenue>; *See also* Douglas Kolozsvari and Donald Shoup, Turning Small Change into Big Changes, Access, at 2, Number 23, Fall 2002, available at <http://shoup.bol.ucla.edu/SmallChange.pdf>.

<sup>40</sup> *See* Douglas Kolozsvari and Donald Shoup, Turning Small Change into Big Changes, Access, Number 23, at 4 (Fall 2002), available at <http://shoup.bol.ucla.edu/SmallChange.pdf>.

The growth of urban and suburban neighborhoods fuels dependency on all public trust resources and especially shoreline access.<sup>41</sup> Preclusion of nonresident beach access will remain a contested issue as long as courts remain divided on whether “beach access restrictions violate the First Amendment of the U.S. Constitution.”<sup>42</sup> Although there are many obstacles incentivizing the status quo, municipalities should eventually realize that tourism is a recognizable factor in any state’s economy. Beach access is an asset; the ensuring of public access to beaches will be a crucial component to continued tourism income.<sup>43</sup>

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<sup>41</sup> See Susan Cordaro, A High Water Mark: The Article IV, Section 2, Privileges and Immunities Clause and Nonresident Beach Access Restrictions, 71 Fordham L. Rev. 2525, 2562 (May 2003).

<sup>42</sup> See *id.* at 2535.

<sup>43</sup> See Erika Kranz, Sand for the People, 83-JUN Fla. B.J. 10, 20 (June 2009).