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PRACTICAL LEGAL REMEDIES TO THE PUBLIC BEACH SHORTAGE

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I. INTRODUCTION

Over one half of the population of the United States lives in the 10% of the nation's land area lying closest to the coastline.[1] This concentration, coupled with an increase in individual leisure time and mobility,[2] has made shoreline areas an increasingly important recreational resource.[3]

Although all American jurisdictions recognize the right of the public to use coastal waters for navigation, fishing, and commerce, to swim in public waters, and to walk on the foreshore,[4] wide divergence exists as to whether the public has the right to use the privately owned littoral property[5] between the high and low water marks.[6] In many parts of the country inability of the public to gain access to these areas has led to a shortage of public beaches, and an increase in attempts to gain access to nonpublic beaches.

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[1] S. REP. No. 733, 92d Cong., 1st Sess. 2 (1972). Since 1940, population on all coasts has increased faster than the population in general. The increase has been most dramatic on the Pacific coast, where the population nearly tripled between 1940 and 1970. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES (93d ed. 1972). Of the 33 Standard Metropolitan Statistical Areas of one million persons or more, 23 of them (including all of the eight largest metropolitan areas) lie on the Atlantic Ocean, Pacific Ocean, Gulf of Mexico, or on one of the Great Lakes. 1 U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CHARACTERISTICS OF THE POPULATION 36 (1970).

[2] M. CLAWSON & J. KNETSCH, OUTDOOR RECREATION 32 (1966).

[3] In 1970, 43% of the United States population swam an average of 21 days during the year. BUREAU OF OUTDOOR RECREATION, DEP'T OF THE INTERIOR, 1970 SURVEY OF OUTDOOR RECREATION ACTIVITIES, PRELIMINARY REPORT (1972).

[4] The foreshore is the wet-sand area, or the area seaward of the mean low tide line. *See, e.g.*, Opinion of the Justices, 365 Mass. 681, 313 N.E.2d 561 (1974).

[5] Littoral property is land which borders the ocean.

[6] This area, from mean low tide to the vegetation line, is often referred to as the dry-sand area.

In analyzing these attempts, this article will discuss the nature and causes of the beach shortage and the various legal remedies successfully employed in the recent wave of litigation directed at opening more of the nation's beaches. These remedies include application of the common law doctrines of public trust, dedication, and custom, which may operate at the expense of the private property owner, and eminent domain, which, in contrast, requires compensation to the owner for the interest taken in his land. Noncoercive statutory remedies, involving incentives to private land owners to provide public beach access, will also be discussed. It will be shown that no single legal doctrine provides the answer to the public beach crisis, but that the legal theory most useful in opening new beaches varies with the facts at hand.

II. The Nature of the Public Access Problem—Geographical, Sociological and Legal Aspects

Public right of access to ocean beaches is undisputedly a state law issue.[7] Although in some jurisdictions access to all beaches is an established right,[8] in most coastal states, beach availability depends on whether or not one owns property on the oceanfront or in a municipality which maintains a beach for its residents. Although such ownership is costly in terms of high land prices and property taxes, the demand for both littoral and nonlittoral land in coastal communities is great. The result is that less than 6% of the United States recreational shoreline remains available for use by the general public.[9] Public access to many of the best recreational beaches is limited by the resultant prohibitive costs, and also by the location

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[7] Each state has sovereignty over its tidelands, except where the lands were granted by a prior sovereign before the state was admitted to the union, Hughes v. Washington, 389 U.S. 290 (1967), or are subject to a prior trust, Borax Consol. Ltd. v. Los Angeles, 296 U.S. 10, 15 (1935), or have been condemned by the United States, Coupland v. Morton, 5 E. L. R. 20504 (E.D. Va. Feb. 26, 1975), *aff'd*, 5 E.L.R. 20507 (4th Cir. July 7, 1975).

[8] *See* State *ex rel.* Thornton v. Hay, 254 Ore. 584, 462 P.2d 671 (1969) discussed in text at notes 64-73, *infra*.

[9] In total, the nation has 59,157 miles of detailed shoreline, including the Great Lakes, of which 21,724 miles are usable for recreation but only 1,209 miles are open to the public. 117 Cong. Rec. 1880, Table 4 (1971). Ironically, Florida, with its high ratio of coastline to land area, exemplifies the public beach shortage problem. Of Florida's 2,665 miles of shoreline, 1,078 miles are beaches but only 161 miles are publicly owned recreation areas. In Miami Beach there are solid miles of shoreline to which access is blocked by huge buildings which are so close to the ocean that the entire beach is covered by water at high tide. H.R. Doc. No. 25, 93d Cong., 1st Sess. 25 (1973), *quoting* the Miami Herald, April 22, 1973. Furthermore, the major portion of the public recreational shoreline consists of marshes, bluffs, and rocky beaches. 117 Cong. Rec. 1880-81, Table 5 (1971).

of these beaches, frequently far from urban population centers.[10] The consequent low ratio of usable public beach to population continues to decrease as demand increases and available beach facilities do not. As a result, public beaches during peak-use periods typically are severely overcrowded,[11] impose daily user or parking fees, and are difficult to reach because access roads and highways are congested with traffic.[12] The potential for ecological harm resulting from intensive use of the very limited public beach facilities is obvious.[13]

The public beach shortage is further exacerbated by the practice of municipal beach proprietors, particularly in the Northeast, of discriminating against nonresidents. With the increase in demand for beach facilities in recent years, many shoreline communities have shifted to policies restricting beaches to resident use[14] or charging substantial fees to nonresident users.[15] These high fees put use of the beach beyond the financial means of many nonresident families, in effect preventing them from using the beach at all. Though such a beach may be classified as public, for the purposes of most nonresidents, the beach is private and restricted.[16] Many coastal

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[10] Further, the coastal beaches most accessible to large numbers of people are commonly the most polluted. Boston Globe, April 27, 1975, at B6, col. 1.

[11] Note, *Access to Public Municipal Beaches: the Formulation of a Comprehensive Legal Appraoch*, 7 SUFFOLK L. REV. 936 (1973) [hereinafter cited as *Access to Public Municipal Beaches*].

[12] Lt. Gen. Frederick J. Clarke, U.S. Army Chief of Engineers, told the American Shore and Beach Preservation Ass'n on Sept. 11, 1969: "Seekers of outdoor recreation are . . . creating 50-mile-long weekend traffic jams reaching all the way from Boston to Cape Cod. . . ." 1 EDITORIAL RESEARCH REPORTS 155-56 (1970).

[13] MASS. H.R. DOC. No. 6611, 35 (1975).

[14] For example, Osterville Beach on Cape Cod excludes all nonresidents (no fee is charged to residents and taxpayers). MASS. H.R. DOC. No. 5302, 17 (1975). The town of Scituate, Mass. requires a resident sticker as a prerequisite to use of the town parking lot. There is no parking for nonresidents of Scituate at all, effecting total exclusion indirectly. *Id.* at 11. *See also*, Comment, *Non-Resident Restrictions in Municipally Owned Beaches: Approaches to the Problem*, 10 COLUM. J. OF L. & SOC. PROBS. 177 (1974).

[15] These may also include restrictions and charges on nonresident parking. MASS. H.R. DOC. No. 6611, 27 (1975). For example, the town of Yarmouth, Mass. charges its residents $10.00 a season for the sticker required to use the town beach. The charge for nonresidents, however, is $10.00 per *week*. MASS. H.R. DOC. No. 5302, 17-18 (1972). In 1972, the New York Times reported that Westport, Conn. charged its residents $8.00 per season for parking at Compo Beach, while nonresidents were charged $15.00 per *day*. Darnton, *Suburbs Stiffening Beach Curbs*, New York Times, July 10, 1972, at 25, cols. 5-6, *cited in* Note, *Access to Public Municipal Beaches, supra* note 11, at 938-39, n.7.

[16] The purpose of nonresident fees is not always exclusionary. In some instances they represent a forced subsidy by nonresidents not only of the beaches to which access is gained, but in some instances of the beaches to which access is denied. They may even be used to cover town expenses unrelated to beaches. MASS. H.R. DOC. No. 6611, 113 (1975).

communities continue to exact these fees despite the fact that their economy is dependent on the tourism-related income generated by nonresident beach users.[17]

The validity of such discrimination in access to city beaches has been upheld in some jurisdictions. For instance, the Rhode Island Supreme Court upheld a state statute which allowed cities and towns to charge suitable user fees, and exempt their own residents if they wished.[18] In New Jersey, however, municipalities are forbidden to discriminate on the basis of residence in allowing access to their beaches. In the case of *Brindley v. Lavallette*,[19] the New Jersey Superior Court applied the unique rule that ". . . discrimination against nonresidents in an ordinance invalidates it, excepting possible special circumstances which would justify the discrimination."[20] This rule was extended in *Neptune City v. Avon-By-The-Sea*[21] to prohibit a town from charging higher fees to nonresidents for the use of its shorelines. Thus differential fee charges, as well as outright exclusion of nonresidents, are barred in New Jersey.[22]

The common law nondiscrimination rule seems to exist only in New Jersey. Most other states allow discrimination in beach access. Even in states where discrimination is permissible, however, it will not foreclose access in areas where the general public has previously acquired irrevocable legal rights to use the beach property in question.[23] For this reason, all other reported beach-access discrimina-

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[17] *Id.*

[18] Jackvony v. Powel, 67 R.I. 218, 21 A.2d 554 (1941). Residents may only be exempted from admission fees. Other charges for beach facilities (*e.g.*, bathhouses) must be uniform, reflecting an apparent compromise in policy. Publ. L. 1939, c. 759, *as amended by* Publ. L. 1949, c. 2245, which requires admission to Easton's Beach in Newport to be free to all.

[19] 33 N.J. Super. 344, 110 A.2d 157 (Law Div. 1954), striking down Borough of Lavallette Ordinance No. 166, which prohibited persons from using the borough's beach without a license and provided that nonresidents of Lavallette could not receive a license.

[20] *Id.* at 349, 110 A.2d at 159. Such circumstances would exist where, *e.g.*, a town restricted access to a facility built entirely with property tax revenue.

[21] 61 N.J. 296, 302, 294 A.2d 47, 50-51 (1972).

[22] The court based its holding on the public trust doctrine, *id.* at 309, 294 A.2d at 54, discussed in text *infra*, at notes 25-40. New Jersey municipalities may not discriminate against nonresidents even in membership to municipal beach clubs. Van Ness v. Deal, 139 N.J. Super 83, 352 A.2d 599 (Ch. Div. 1975). *See also* Sea Isle City v. Caterina, 123 N.J. Super. 422, 303 A.2d 351 (Crim. Div. 1973).

[23] These rights may be acquired, *e.g.*, through application of any of the common law doctrines to be discussed at notes 25-92, *infra*. For example, when the city of Long Beach, N.Y. amended its charter to restrict the use of Ocean Beach Park to Long Beach residents and their guests, the court held the amendment, Local Law No. IX/70, invalid. Gewirtz v. Long Beach, 69 Misc. 2d 763, 330 N.Y.S.2d 495 (Sup. Ct. 1972), *aff'd*, 45 App. Div. 2d 841, 358 N.Y.S.2d 957 (1974). The park, because of long public use, was irrevocably dedicated to

tion cases have been decided on the basis of state real property law.[24] Challenges to discriminatory treatment of nonresidents are not as productive (except in New Jersey) as direct assertion of the public right of access under one of the common law doctrines to be discussed. This is true not only because most courts are willing to allow municipal discrimination against nonresidents, but also because far more nonpublic beach is held by private individuals and corporations than by municipalities.

III. Common Law Right of Access to Beaches

A. *Public Trust*

The public trust doctrine[25] derives from the rule of English law that coastal waters and the land they covered were held by the sovereign for the common use of the people.[26] In the United States, sovereignty over land covered by tidal waters lies in the respective states.

The original purpose of the public trust doctrine was to preserve all the natural water resources for navigation and commerce. Water resources were essential to the fishing industry and supported the principal means of transportation of goods. The United States Supreme Court articulated this doctrine in *Illinois Central Railroad Co. v. Illinois*,[27] holding that a state cannot relinquish its public trust in tidal waters by a transfer of the property, except where transfer would promote the interests of the public therein, or where the public interest in the navigable waters remaining would not be impaired.[28] The key public trust issue in litigation over coastal

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the public at large (see text at notes 41-65, *infra*). The possibility, not dealt with by the court, of discrimination at a beach which has always been restricted, still remains, however.

[24] A constitutional argument against municipal discrimination has been suggested, based on the equal protection clause of the Fourteenth Amendment. *See* Note, *Access to Public Municipal Beaches*, *supra* note 11, at 957. Such an argument would probably fail because the defendant municipality need only show a rational relation of the residency classification to a legitimate state purpose, such as prevention of overcrowding at the beaches, or protection of the environment by keeping out-of-town vehicles out of the municipality. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[25] *See also* Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 Yale L.J. 762 (1970).

[26] Neptune City v. Avon-By-The-Sea, 61 N.J. 296, 303, 294 A.2d 47, 51 (1972).

[27] 146 U.S. 387 (1892) [hereinafter cited as *Illinois Central*]. The Court held that an Illinois statute granting the railroad title to the bed of Lake Michigan did not convey the fee to the lands. The legislature's repeal of the act was upheld as constitutional, since it never had the power to grant more than a license to use the submerged lands.

[28] *Id.* at 453.

rights concerns what uses the "public interest" can be extended to cover. Most courts refuse to apply the public trust doctrine in beach access situations. The highest court in Massachusetts, for example, in 1961 limited the scope of the public trust doctrine to its traditional functions of promoting fishing and navigation.[29] It held that to claim title under the public trust doctrine in land created in front of private property as part of a municipal project to improve navigation or fisheries,[30] the state must show a substantial and reasonable connection between the project and the creation of the land: *i.e.*, that the project would be impaired without the creation of the land.[31] Where creation of a beach was found to be unrelated to the purpose of the project, (the improvement of navigation in a harbor) the court held that the adjacent littoral property owners held title to the new beach under the law of accretion.[32] Since the Massachusetts public trust doctrine does not extend to recreational use, the plaintiffs were entitled to an injunction to keep the public from using the beach above the low-water mark.[33]

Most jurisdictions agree with Massachusetts that the public trust in the coastal area applies only to navigation and fishing.[34] However,

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[29] Michaelson v. Silver Beach Improvement Ass'n, 342 Mass. 241, 173 N.E.2d 273 (1961), refusing to follow the dictum in Home for Aged Women v. Commonwealth, 202 Mass. 422, 89 N.E. 124 (1909), which purported to extend the public trust doctrine to include recreational uses.

[30] The commonwealth dredged the floor of Wild Harbor in Falmouth, leaving sufficient sand to create a beach, where none existed before, in front of plaintiff's property.

[31] *But cf.* United States v. Harrison County, 463 F.2d 1328 (5th Cir. 1972).

[32] Generally, the boundary line of littoral property changes with the shoreline as long as the change is not due to a storm or other sudden force. *E.g.*, Allen v. Wood, 256 Mass. 343, 152 N.E.2d 617 (1926).

[33] In most states, private ownership of littoral property extends only to the mean high-water mark. In Massachusetts, under what is known as the Colonial Ordinance of 1641-47, THE BOOK OF THE GENERAL LAWES AND LIBERTYES 50 (1649), private title extends as far as the mean low-water line, or 100 rods from the mean high-water line, whichever is less, Opinion of the Justices, 365 Mass. 681, 313 N.E.2d 561, 565 (1974). The Georgia Supreme Court recently interpreted its statute defining the boundaries of private littoral property, holding that the foreshore is held in trust by the state subject only to adjacent landowners' right to cultivate and harvest oysters and clams. State v. Ashmore, Ga., 236 Ga. 401, 224 S.E.2d 334, *cert. denied*, 97 S. Ct. 90 (1976).

[34] However, several state supreme court decisions contain dicta which suggest that the public trust doctrine protects the right to swim in public waters. The Florida court declared eloquently:

> Skill in the art of swimming is common amongst us. We love the oceans which surround our State. We, and our visitors too, enjoy bathing in their refreshing waters. The constant enjoyment of this privilege of using the fore-shore for ages without dispute should prove sufficient to establish it as an American common law right, similar to that of fishing in the sea, even if this right had not come down to us as a part of the English common law, which it undoubtedly has.

it may be possible to apply the doctrine to public recreational use, if, as suggested in *Michaelson*, such use can be shown to bear a substantial and reasonable connection to a project which furthers navigation or fishing.

The public trust doctrine has successfully been applied to recreational uses of the shorelands only in New Jersey after the 1972 landmark case of *Neptune City v. Avon-By-The-Sea*.[35] Although the *Neptune* court did not pass on the question of what rights the public has to use tidal lands and waters bordering a parcel of land in private ownership, it did interpret the public trust doctrine to require that any beach owned by a municipality be open to all on equal terms. The court reasoned that public rights to lands in the tidal area are no longer limited to those essential to navigation and fishing, but also include recreational uses. It stated that the doctrine ". . . should be molded and extended to meet [the] changing conditions and needs of the public it was created to benefit."[36] Municipalities owning beaches in New Jersey, therefore, hold them in trust for the general public, and may exclude persons from beaches no more than from offshore waters.

The recent New Jersey decisions are clearly the minority rule in application of the public trust doctrine to beach access cases. Yet, in states where the extent of the public trust doctrine has not recently been defined, it may be possible to persuade the court to adopt the broad New Jersey rule. This approach seems reasonable and consistent with the Supreme Court decision in the *Illinois Central* case, that rights in tidal lands cannot be conveyed to private parties except to further the "public interest."[37] Aside from the uncertainty of its application to recreational uses, the public trust doctrine has a further limitation in that it applies only to property currently or recently owned by a governmental entity. While a recent conveyance or newly-established land use inconsistent with the public interest may be challenged, most shoreland now owned by private interests was conveyed by states soon after they were chart-

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White v. Hughes, 139 Fla. 54, 59, 190 So. 446, 449 (1939). *See also* Treuting v. Bridge and Park Comm'n, 199 So. 2d 627, 632 (Miss. 1967), discussed in *The Mississippi Public Trust Doctrine: Public and Private Rights in the Coastal Zone*, 46 MISS. L.J. 84 (1975); Hixon v. Public Service Comm'n, 32 Wis. 2d 608, 619, 146 N.W.2d 577, 582 (1966), the most recent in a series of Wisconsin Supreme Court cases discussing recreational use of inland waterways.

[35] 61 N.J. 296, 294 A.2d 47 (1972).

[36] *Id.* at 309, 294 A.2d at 54.

[37] Illinois Central R. Co. v. Illinois, 146 U.S. 387, 453 (1892).

[38] *See* Opinion of the Justices, 365 Mass. 681, 313 N.E.2d 561, 568 (1974).

ered. Since no court could return private land to a state on the grounds that the ancient conveyance was invalid as a breach of the public trust without violating Fifth and Fourteenth Amendment prohibitions against taking without conpensation,[38] such challenges are not foreseeable.

A state's public trust sovereignty over coastal lands may be abridged not only by legislative alienation but also by the occasional exercise of the federal eminent domain power. While this exercise sometimes diminishes available beach land, as when a coastal military installation is established, it may also serve to preserve coastal land. The latter was the case when a federal court affirmed the Department of the Interior's closure of an area under its jurisdiction to motor vehicles, which had been causing damage to the beach.[39] The court held that the taking of coastal lands as a National Wildlife Refuge extinguished Virginia's public trust therein. However, even if the court had applied the Virginia public trust doctrine, it would probably not have been extended to protect vehicular access. Given the reluctance of most courts[40] to extend the public trust to protect recreational uses, it would not make sense to argue a further extension of the doctrine to protect an activity which is not only unrelated to navigation and fishing, but ecologically harmful as well.

B. Dedication

Public right of access to a beach may be established by proving that an easement or fee simple in the property has been expressly or impliedly dedicated to the public. Express dedication may be found, for example, in a deed donating land to the government for public beach use, in the filing of a development plan setting aside the beach front for public use,[41] or, when the land is government-

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[39] Coupland v. Morton, 5 E.L.R. 20504 (E.D. Va. Feb. 26, 1975), *aff'd*, 5 E.L.R. 20507 (4th Cir. July 7, 1975). The federal government condemned part of the Virginia shoreline in 1938 and the surrounding beaches were bought up by developers in the 1960's. The privately-owned tracts were accessible only from the north over government property, because they were bounded on the upland side by forest. The motor vehicle traffic, which had grown to 150 vehicles per hour at peak periods, left the beach "worse than a plowed field," so the government excluded all vehicles but those of neighboring land owners, and limited those to one trip per week. *See also* White v. Hughes, 139 Fla. 54, 190 So. 446 (1939). For a general discussion of the problems created by off-road vehicles, see Rosenberg, *Regulation of Off-Road Vehicles*, 5 ENV. AFF. 175 (1976).

[40] *See, e.g.*, Michaelson v. Silver Beach Improvement Ass'n, 342 Mass. 251, 173 N.E.2d 273 (1961) and text at notes 29-33, *supra*.

[41] Volpe v. Marina Parks, Inc., 101 R.I. 80, 220 A.2d 525 (1966). *But see* Threedy v. Bren-

owned, in its designation as a public beach.[42]

Implied dedication may be established by showing the owner's acquiescence in public use of the land (indicating an intent to dedicate the land), or by proving prescription, *i.e.*, adverse public use for the statutory period.[43] In either case, specific permission by the owner to use the land for a limited purpose is a defense to a claim of implied dedication. Normally, a dedication must be accepted to be valid.[44] Public use is the usual form of acceptance. This requirement is waived, however, when the dedicator is the government, if its actions reasonably imply an intention to dedicate the land.[45] Once a dedication is proved, the public acquires an irrevocable easement over the land.[46]

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nan, 40 F. Supp. 69 (E.D. Wis. 1941), *aff'd*, 131 F.2d 488 (7th Cir. 1942).

[42] Gewirtz v. Long Beach, 69 Misc. 2d 763, 771, 330 N.Y.S.2d 495, 505 (Sup. Ct. 1972), *aff'd*, 45 App. Div. 2d 841, 358 N.Y.S.2d 957 (1974).

[43] Gion v. Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970). The prescriptive period varies from state to state, as does the statutory period required to claim title to property by adverse possession. In California, the prescriptive period is 5 years, in Oregon it is 10, while in Massachusetts it is 20 years. Before *Gion*, the theory of implied dedication had been applied only to roads. *See also* Hollywood, Inc. v. Hollywood, 321 So.2d 65 (Fla. 1975); Degnan, *Public Rights in Ocean Beaches: A Theory of Prescription*, 24 SYRACUSE L. REV. 935 (1973); Comment, *This Land is My Land: The Doctrine of Implied Dedication and its Application to California Beaches*, 44 S. CAL. L. REV. 1092 (1971). Prescription differs from adverse possession in that prescription operates in favor of the general public while adverse possession operates in favor of an individual or small group.

[44] Acceptance need not be immediate if it is made within a reasonable time and before withdrawal of the offer of dedication. Greenco Corp. v. Virginia Beach, 214 Va. 201, 208, 198 S.E.2d 496, 501 (1973).

[45] When the city of Long Beach, N.Y. attempted to close its beach (declared a public park by a 1936 city ordinance) to nonresidents, the court held that the 1936 ordinance had dedicated the beachfront to public use. The court stated that a dedication made by a governmental entity, like one made by a private owner, is irrevocable. The waiver of the acceptance requirement obviated any evidentiary problems the plaintiffs might have faced in proving that the beach had been used continuously for the prescriptive period by nonresidents. Gewirtz v. Long Beach, 69 Misc. 2d 763, 771, 330 N.Y.S.2d 495, 505 (Sup. Ct. 1972), *aff'd*, 45 App. Div. 2d 841, 358 N.Y.S.2d 957 (1974). *Cf.* Priory v. Borough of Manasquan, 39 N.J. Super. 147, 120 A.2d 625 (1956).

[46] Gion v. Santa Cruz, 2 Cal. 3d 29, 35, 465 P.2d 50, 53-54, 84 Cal. Rptr. 162, 165-66 (1970). The fee remains with the recorded title-holder. The land owner receives no compensation for the rights lost in the land, but

> . . . in reality he has lost relatively little—his possibility of exclusive enjoyment of the property. Since by definition implied dedication requires prolonged, uncontested public use of the land, the lack of exclusivity must not have previously been a problem to the owner. He and his guests still have full access to the beach, for whatever purposes they formerly used it and under the same conditions of mixed public/private use. The owner has also lost his ability to alienate the property unencumbered by public rights, but the courts have found this loss to be relatively insignificant when compared to the policies in favor of general public access to beaches.

In *Seaway Co. v. Attorney General*,[47] the first implied dedication case to deal with public beach access, the Attorney General of Texas filed suit under the Texas Open Beaches Act of 1959[48] to declare a public easement in a beach on Galveston Island in the Gulf of Mexico. Section 1 of the Act declared that the public should have the unrestricted right of access to the state-owned shores wherever it had acquired an easement or a right of use by prescription or dedication. Obstruction of such access was made a civil offense.[49] Section 2 of the Act created a presumption that a prescriptive right was imposed on all areas between mean low tide and the vegetation line.[50] The action was brought to enjoin the defendant's construction of a barrier which interfered with public use of the beach on the seaward side of the vegetation line.

The court could not have applied the public trust doctrine, since the land had been conveyed by the sovereign Republic of Texas, which, unlike the states of the Union, did have power to grant fee title to coastal lands. Rather the plaintiff's verdict was based on the law of dedication. The court stated that an implied dedication could be shown by such acts or course of conduct by the land owner as would induce the reasonable belief that he intended to dedicate the land to the public. Here, the owner's acquiescence in continuous adverse use of the beach by thousands of persons from 1840 to 1947 for pedestrian and vehicular travel, swimming, fishing, and camping, was indicative of such an intent. Moreover, the county had manifested its acceptance of and dominion over the land by providing police patrols and expending public funds on beach maintenance. Simultaneous use by the owner and others raised a presumption that public use had been with the owner's permission. The presumption was rebutted, however, by a showing that the defendant's property constituted an integral part of a road used by the

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Note, *Public Access to Beaches: Common Law Doctrines and Constitutional Challenges*, 48 N.Y.U.L. REV. 369, 374 (1973).

[47] 375 S.W.2d 923 (Tex. Civ. App. 1964). Florida courts had previously recognized that a recreational easement in a beach could be established by prescription, Miami Beach v. Miami Beach Improvement Co., 14 So.2d 172 (Fla. 1943).

[48] VERNON'S ANN. CIV. STAT., art. 5415d, § 1 *et seq.* (1962). The Act is intended to provide a quick and effective means by which public representatives may seek removal of structures blocking beach access while owners may challenge infringement of their ownership rights, Gulf Holding Corp. v. Brazoria County, 497 S.W.2d 614 (Tex. Civ. App. 1973).

[49] In 1969 the Texas legislature enacted a penalty of $10 to $200 per day for making any oral or written communication that a public beach is private property. VERNON'S ANN. CIV. STAT., art. 5415d-2 (Supp. 1975).

[50] VERNON'S ANN. CIV. STAT., art. 5415d, § 2 (1962).

general public without permission. The finding of implied dedication made it unnecessary for the court to use the Section 2 presumption of a prescriptive right, which includes by definition a presumption of adverse public use.[51]

The California Supreme Court, in *Gion v. Santa Cruz*,[52] was the first to actually rely on a presumption of adverse public use to establish the dedication of a private beach. Once any public use was established, the burden shifted to the fee owner to produce evidence that the use of his property was permissive. When this burden was not satisfied, the court held that the dedicated easement gave the public the right to use the land for parking and recreational purposes, and allowed the city to police the land and practice erosion control. The city was forbidden, however, to erect any permanent structures which would interfere with the owner's remaining interest in the land.

Another important aspect of dedication, its irrevocability once completed, was demonstrated in *Dietz v. King*,[53] the companion case to *Gion*. In *Dietz*, the court found that prescriptive use had occurred continuously over a period of more than 100 years prior to the current owners' purchase of the beach and subsequent attempts to restrict public access. Although these owners never approved or acquiesced in public use of the land, the court found that a dedication had already taken place, and that the land was purchased subject to an unrecorded recreational easement in favor of the public.

Gion and *Dietz* demonstrate the difficulty faced by land owners in overcoming the presumption of permissive public use of beach property. However, the decisions ultimately did not result in an increase in the number of accessible public beaches. The shifting burden of *Gion* and irrevocability of *Dietz* caused a backlash among private beach owners, some of whom closed previously open beaches in order to protect their private property interests.[54] The California

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[51] The defendant argued that Section 2 of the Act was an unconstitutional taking without compensation, because it created a presumption of prescriptive right or easement in favor of public access to the sea. The court did not pass on the constitutional question because the plaintiff Attorney General did not rely on the presumption to establish the easement. Seaway Co. v. Attorney General, 375 S.W.2d 923, 930 (Tex. Civ. App. 1964). See also text at notes 115-20, *infra*.

[52] 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970) [hereinafter cited as *Gion*].

[53] *Id.* [hereinafter cited as *Dietz*].

[54] On the Palos Verdes peninsula in Los Angeles County, major land owners have . . . erected a 7-foot high fence topped by three strands of barbed wire in order to keep the

legislature also took prompt action by statutorily abolishing the common law rule of implied dedication, thus preventing any claims of public prescriptive right from ripening after 1972.[55]

It should be noted that mere evidence of public use is not sufficient to prove a dedication where other elements of the doctrine are missing. For instance, the court in *State Highway Commission v. Bauman*,[56] found that the upland owner had made a bona fide effort to bar access to her property, and thus declined to declare an easement in a private sand dune. Witnesses for the defendant-owner rebutted the state's contention of prior public use of the dune, and testified that the owner had acted to keep the public from using or crossing the property by posting signs, erecting barriers, and ejecting trespassers with the aid of the police. Further, there had never been any governmental involvement in public use of her property. The court, in finding for the land owner, held that there must be "clear and positive" proof of adverse use to find public acquisition of prescriptive rights, as there must rest a clear and unequivocal manifestation of intent to devote the property to public use to find an express dedication. The state in *Bauman* failed to prove adverse use or intent to dedicate the court's strict standard. First, in the absence of any overt act of dedication by the state, sale of the property into private ownership precluded any finding of state intent to dedicate to public use. Next, the present owners showed a clear lack of intent to dedicate. Finally, there was no continuous adverse use for the prescriptive period. Continuous adverse use for ten years at any time since the land was first platted in 1890 would have been enough to establish an implied dedication to public use by the owner, since a completed dedication is irrevocable.[57]

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public from reaching the beach by crossing their property. It is believed that other owners in that area have dynamited paths leading to the water. In Orange County, one land owner has erected a large fence with cactus planted at its base to discourage barefoot access to the beach over his property. Land formerly used for parking and beach access in San Mateo County is being vigorously plowed to deter unauthorized users. Parts of Sonoma County are beginning to look like the beaches of Normandy in 1944, complete with tank traps: automobile transmissions have been planted in the ground to stop vehicular access. Berger, *Nice Guys Finish Last—At Least They Lose Their Property: Gion v. City of Santa Cruz*, 8 CAL. WEST. L. REV. 75 (1971), *quoting* Fradkin, *Owners of Waterway Property Rushing to Block Access Paths*, Los Angeles Times, July 23, 1970 pt. III, at 25, col. 1, and *Fences Go Up to Keep Public From Beaches*, Los Angeles Times, March 21, 1971, § C at 1, col. 6.

[55] CAL. CIVIL CODE § 1009 (Supp. 1975). Claims may still be brought in cases where the requirements for an implied dedication were completed before 1972.

[56] 16 Ore. App. 275, 517 P.2d 1202 (1974) [hereinafter cited as *Bauman*].

[57] *E.g.*, Dietz v. King, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970). See text at note 53, *supra*.

The factual situation in *Bauman* was thus beyond the scope of the dedication doctrine. Unlike *Seaway* and *Gion*, in which the landowners' lack of attention to the public use of the beaches resulted in the dedication of an easement, the land owner in *Bauman* made a bona fide effort to keep the public from using her property. Additionally, she was not faced with the presumption of adverse use, as were the landowners in *Gion*.

Even where adverse public use continues for the prescriptive period, a dedication may not take place when the number of persons using a beach is not sufficiently great to put the owner on notice that his property is in jeopardy of being dedicated. In *County of Orange v. Chandler-Sherman Corp.*,[58] a lower California court held that use of an isolated beach by 12 to 15 persons over a 36-year period was insufficient to establish implied dedication. The court distinguished this situation from *Gion* and *Dietz* in that no "substantial numbers" of people ever used the defendant's beach and no government was involved in its maintenance. It suggested that a line must be drawn between use by a single person once a year and daily use by hundreds with attendant provision of municipal services.

The decision in *Chandler-Sherman* is subject to criticism on the grounds that the extent of public use of private property has never been an aspect of the theory of dedication. Dedication has always required only continuous adverse use for some minimum term. Where adverse use by one person for the prescriptive period overcomes the landowner's rights by adverse possession and adverse use by hundreds alienates his rights by prescription, it is certainly anomalous to hold that the landowner retains his rights in cases of use by 12 to 15 persons.

It would be most unfortunate if the *Chandler-Sherman* decision reflected an emerging judicial trend away from beach dedication. For those concerned that developers will eventually buy up most of the available beach land and exclude the general public,[59] two recent Maryland cases are cause for alarm. The state supreme court, in *Department of Natural Resources v. Mayor and Council*[60] and *Department of Natural Resources v. Cropper*,[61] showed its reluct-

[58] 54 Cal. App. 3d 561, 126 Cal. Rptr. 765, 768 (1976).

[59] *See, e.g.*, Comment, *Recreational Land Subdivisions as Investment Contract Securities*, 13 HOUSTON L. REV. 153, 154 (1975).

[60] 274 Md. 1, 332 A.2d 630 (1975).

[61] 274 Md. 25, 332 A.2d 644 (1975), decided the same day as *Mayor and Council*. In each case, plaintiffs, claiming implied dedication of the beachfront through long public use, sought

ance to find an implied dedication of oceanfront property to the public. Although the court's rejection of claims of express dedication and prescription was supported by the facts,[62] a predisposition to favor private over public rights is apparent from the following language dismissing the plaintiff's public trust argument:

> Intriguing as these questions are, we find it unnecessary to consider them in this case for a very simple reason. What the petitioners are attempting to do here, under an assertion of the public's right to picnic and sunbathe on the dune, is to deny the Developer a use of his property to which he has an otherwise lawful right. . . .[63]

The effect of the court's predisposition can be seen in its failure to even consider, as did the dissenting justice, the possibility that there could be an implied dedication without fulfillment of the factual requirements of prescription.[64]

In summary, despite varying judicial applications and differences in the length of the prescriptive period, the dedication doctrine in

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to enjoin construction of a condominium which would have extended past the vegetation line onto the dry-sand beach. The proposed construction would have narrowed the beach to the extent that it might be completely covered at high tide, effectively denying public use of the beach.

[62] The beach had undergone reconstruction following a severe storm in 1962. The prescriptive period in Maryland is 20 years, and it was impossible to prove that a lot first made usable for recreation in 1962 had been used adversely by the public for 20 years. Department of Natural Resources v. Mayor and Council, 274 Md. 1, 15, 332 A.2d 630, 638 (1975).

[63] *Id.* at 13, 332 A.2d at 637. The court rationalized its predisposition favoring private over public rights with a provision in Article XVI of the state charter. This provision subjected the land grant from Charles I to Lord Baltimore to the reservation of certain public privileges which could be exercised "without notable damage or injury" to land owners. *Id.* at 11, 332 A.2d at 636. The court held that denial to the land owner of a use of his property would be "notable damage or injury," and thus justified holding the plaintiff in both cases to proof of clear and unequivocal manifestation of all elements of an express or implied dedication. The court, in a dictum to *Cropper*, further added that had the issue been the public's right to use that part of the dry-sand beach not interfering with the defendant's possessory rights, "other and different considerations might well have come into play." Department of Natural Resources v. Mayor and Council, 274 Md. 1, 28, 332 A.2d 630, 646 (1975). Under the Maryland court's theory the public would have a usufructuary right (the right of using and enjoying the benefits of a thing belonging to another, without impairing its substance) in the beach. None of the beach-access cases reach this result; the Maryland court suggests it without explaining how such a right would arise.

[64] Department of Natural Resources v. Mayor and Council, 274 Md. 1, 15-16, 332 A.2d 630, 639 (1975). Justice Eldridge, dissenting to both cases, cited Maryland precedents to the effect that no particular ceremony was necessary to dedicate land to public use, and that dedication may be inferred from the land owner's conduct. The facts supporting a finding of implied dedication were acquiescence to public use from 1962 to 1974, public expenditures for cleaning, police patrols, lifeguards, construction of fences and jetties to protect the beach, and public understanding that the entire beach at Ocean City was open to everyone.

theory operates uniformly in all jurisdictions. It differs in this respect from public trust, which is subject to varying common law interpretations. Also, the factual requirements of dedication are relatively easily met, especially in jurisdictions like Texas (and California for claims ripening before 1972), where adversity of use may be presumed. But proving implied dedication of a substantial stretch of beach can be expensive. A state which authorizes its attorney general to bring action against landowners to establish public rights may find it necessary to bring many separate lawsuits to open individual parcels of shoreline property. Furthermore, as previously noted,[65] the practical effect of bringing isolated suits to establish public rights by implied dedication may be to close up more beaches than are opened.

C. Custom

The recently disinterred doctrine of custom can be very powerful in protecting rights to use beaches which have traditionally been open to the public. A custom is a usage or practice, which by long and unvarying habit, and by common adoption, has acquired the force of law with respect to a particular locality and subject matter.[66] Unlike dedication, which must be litigated tract by tract, custom allows rights to a large stretch of shoreline to be adjudicated at one time. In this respect it is similar to the public trust doctrine.

Custom, however, has the serious drawback that seven requirements must be met before the doctrine will apply to a land use. These requirements are that it be: (1) ancient—it must have been used so long "that the memory runneth not to the contrary," (2) continuous—never interrupted by private land owners, (3) peaceable and free from dispute, (4) reasonable considering the nature of the land and the usages of the community, (5) certain as to extent and boundaries—the limit here is recreational use and the boundaries those of the dry sand area, (6) obligatory—not left to the option of individual land owners, and (7) consistent with other law.[67] Thus, the nature of custom restricts it to the "defensive" function

[65] *Supra*, note 54.

[66] *E.g.*, Clough v. Wing, 2 Ariz. 371, 17 P. 453 (1888). *See also* Note, Jaffee, *State Citizen Rights Respecting Greatwater Resource Allocation: From Rome to New Jersey*, 25 RUTGERS L. REV. 571 (1971); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

[67] State *ex rel.* Thornton v. Hay, 254 Ore. 584, 595, 462 P.2d 671, 677 (1969), *citing* 1 BLACKSTONE, COMMENTARIES 75-78.

of preserving existing public beaches, since the first three requirements prevent it from opening up any new stretches of shoreline for public use. The defensive function of custom, however, has proven quite valuable in maintaining public access in certain jurisdictions.

The landmark case of *State ex rel. Thornton v. Hay*[68] revived the custom doctrine, applying it to public use of Oregon beaches. Oregon, in 1967, had enacted a statute declaring its entire shoreline between ordinary high tide and extreme low tide a "state recreation area" and vesting in the state all public rights and easements in the adjacent land,[69] subject to the rights of record-title holders.[70] The Hays, owners of a tourist facility, appealed a decree enjoining them from constructing fences or other improvements in the dry-sand area of their oceanfront property. The trial court found, on a theory of implied dedication, that the public had acquired an easement to use the dry-sand area of the beach for recreational purposes. The Oregon Supreme Court affirmed the decree, stating that the requirements for acquisition of an easement by prescription (on a theory of implied dedication) had probably been satisfied by adverse public use for the 10-year period. But since prescription applies only to the specific tract of land before the court, and the court was concerned that prescription cases could "fill the courts for years,"[71] it relied instead on custom to affirm the decree. The court explained its choice of rationale, the first use of the custom doctrine in the United States since the nineteenth century,[72] as one which enabled the court to treat coastal areas uniformly and to hold that a public right to use the *entire* shoreline of Oregon had been established.[73] Although the relative newness of the American legal system has made it difficult to find usages which have existed since antiquity, here all the requirements for recognition of a custom were present. The free and open public use of the beaches since the adoption of the land tenure system in Oregon satisfied the rule that a custom must be ancient. The reasonableness of the public use was also noted by the court, which recognized that the beach could not be used conveniently by its owners for any purpose except recrea-

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[68] 254 Ore. 584, 462 P.2d 671 (1969).

[69] O.R.S. § 390.610 *et seq.* (1975).

[70] State *ex rel.* Thornton v. Hay, 254 Ore. 584, 591-92, 462 P.2d 671, 675 (1969).

[71] *Id.* at 595, 462 P.2d at 676.

[72] *See, e.g.*, Perley v. Langley, 7 N.H. 233 (1834), recognizing the doctrine of custom. Other nineteenth-century courts generally felt that the United States was too new a country to encompass any land which satisfied the requirement of use since "time immemorial."

[73] State *ex rel.* Thornton v. Hay, 254 Ore. 584, 595, 462 P.2d 671, 676-77 (1969).

tion, because the dry sand area is unsafe during winter storms, unstable in its seaward boundary, and unfit for the construction of permanent structures.[74] Further, the public use of the dry sand for recreation was ". . . so notorious that notice of the custom by persons buying land along the shore had to be presumed."[75] A federal district court subsequently held that this use of the custom doctrine was constitutional; the *Thornton* holding was not so unpredictable as to be an impermissible taking of the Hays' private property rights.[76] *Thornton* thus set an important precedent in the use of the custom doctrine. Use of custom to uphold the right to beach access has spread since *Thornton* from Oregon[77] to other jurisdictions, including Florida[78] and the Virgin Islands.[79]

The usefulness of the custom doctrine is limited by the need to prove a detailed set of facts. An Oregon court, for example, distinguished *Thornton* in *State Highway Commission v. Bauman*,[80] in which the state argued custom as one alternative theory. The court refused to extend the *Thornton* shoreline easement by customary use to property upland of the vegetation line, reasoning that with respect to the defendant's property, two requisites of the custom theory were not met: (1) the public use was not continuous, because there had been frequent attempts by private owners to fence off the land, and (2) the public use was not deemed reasonable, because upland sand dunes were not ordinarily used in Oregon for recreation or for passage.[81]

Establishment of a public recreational easement by customary

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[74] *Id.* at 589, 462 P.2d at 673-74.

[75] *Id.* at 598, 462 P.2d at 678.

[76] Hay v. Bruno, 344 F. Supp. 286 (D. Ore. 1972). An unpredictable departure from previous state law which does not recognize valid existing vested rights is subject to the constitutional prohibition against taking property without just compensation. *See, e.g.*, Hughes v. Washington, 389 U.S. 290, 296 (1967) (Stewart, J., concurring). Authorizing physical intrusion into private property is a significant deprivation of private property rights. Opinion of the Justices, 365 Mass. 681, 313 N.E.2d 561 (1974).

[77] *See also* State Highway Comm'n v. Fultz, 261 Ore. 289, 491 P.2d 1171 (1971), involving the right of private persons to build a road and revetment (rock wall) on an ocean beach.

[78] Daytona Beach v. Tona-Rama, Inc., 294 So.2d 73 (Fla. 1974), discussed in Note, 2 FLA. ST. L. REV. 806 (1974); Note, *Customary Use of Florida Beaches*, 29 U. MIAMI L. REV. 149 (1974).

[79] United States v. St. Thomas Beach Resorts, 386 F. Supp. 769 (D.V.I. 1974) upholding the Virgin Islands Open Shorelines Act, 12 V.I.C.A. §§ 402, 403 (Supp. 1974), as a codification of the common law customary public right to use the beach.

[80] 16 Ore. App. 275, 517 P.2d 1202 (1974).

[81] *Id.* at 283, 517 P.2d at 1206, relating to elements (2) and (4) of the custom doctrine. See text at note 67, *supra*.

use does not necessarily exclude other concurrent, *e.g.* commercial, use of the beach by the property owner. In *Daytona Beach v. Tona-Rama, Inc.*[82] the Florida Supreme Court held that while the public had an irrevocable right established by custom[83] to use the beach for recreational purposes, the owner retained all other rights in his land. Construction of a tower resting on a circle of sand only 17 feet in diameter did not significantly interfere with the exercise of the public easement, was consistent with the customary public use for recreation, and was therefore a permissible private use. The special nature of the *Tona-Rama* owner's interest in the land, promotion of amusement and recreation, allowed the court to decide in favor of the property owner without harming the public's right to use the beach. The custom doctrine, while not the decisive issue in *Tona-Rama*, has at least been discussed and approved in theory by the Florida court. *Tona-Rama* shows, however, that even where custom applies, it may not preserve a beach for exclusively recreational use.

Where the custom doctrine can be applied, it is a very useful tool in establishing maximum public access at a minimum expense. Custom, however, is severely limited by the first of its seven elements—that the use sought to be protected be ancient. This requirement restricts the doctrine to the "defensive" functions of keeping open those beaches which have always been used by the public, and enjoining any construction which would seriously hamper the right of access to the shore. The reason for this restriction is that the burden of showing long-standing use cannot be met in any attempt to open new beaches to the public. To accomplish this, other legal approaches must be used.

D. Eminent Domain

Where a right of public access to beaches cannot be acquired without cost to the state through the application of the doctrines of public trust, dedication, prescription, or custom, and no advantageous purchase is possible, the government retains the power to take the land, or an easement in the land, by eminent domain. This is

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[82] 294 So. 2d 73 (Fla. 1974).

[83] The *Tona-Rama* court reversed a lower court finding that a public easement had been acquired by prescription, holding that where the defendant operated a recreation center and tourist attraction on the beach, public use of the beach lacked the adverseness necessary to create an easement by prescription. Rather than being hostile to the defendant's ownership of the ocean front, public use was in furtherance of his interest. *But see* Morse v. E.A. Robey & Co., 214 Cal. App. 2d 464, 29 Cal. Rptr. 734 (Ct. App. 1963).

the least preferred way for a government to establish the right of the public to use property, because of the constitutional requirement that the owner be compensated for the full value of the property or rights taken.[84]

County of Hawaii v. Sotomura[85] illustrates some of the difficulties a local government may encounter when it condemns oceanfront property. In addition to compensating the owner, the governmental entity must survey the property (taking care to observe the special laws which govern the shifting boundary lines of oceanfront property), appraise land whose value may be greatly affected by speculation, and face the possibility of costly and time-consuming litigation.[86]

One issue which must be litigated is the seaward boundary of the title holder's land. The *Sotomura* court affirmed an earlier precedent[87] by holding that the legal boundary between public beach and private upland was the vegetation line.[88] Other jurisdictions may use a different standard to determine this boundary.[89]

A second problem is locating the vegetation line.[90] In *Sotomura*, erosion had shifted the high-water mark after the defendant's property was registered. The court held that the seaward boundary of the tract had also shifted, to the new location of the high-water mark. Once the seaward boundary of the defendant's property was fixed at the vegetation line as of the date of the summons, the problem

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[84] U.S. CONST. AMEND. V, XIV.

[85] 55 Hawaii 176, 517 P.2d 57 (1973), *cert. denied* 419 U.S. 872 (1974) [hereinafter cited as *Sotomura*]. *See* Note, *Hawaiian Beach Access: A Customary Right*, 26 HASTINGS L. REV. 823 (1975). The county condemned a park site at Kalapana Black Sand Beach, a unique tourist attraction.

[86] *Sotomura* was decided on Dec. 11, 1973, rehearing denied Dec. 28, 1973, and certiorari to the United States Supreme Court denied Oct. 15, 1974. The County of Hawaii had initiated eminent domain proceedings on July 7, 1970, more than 4 years earlier. 55 Hawaii 176, 517 P.2d 57, 59 (1973). The decision is now under review by the federal district court, Sotomura v. County of Hawaii, 402 F. Supp. 95 (D. Hawaii 1975).

[87] Application of Ashford, 50 Hawaii 314, 440 P.2d 76 (1968).

[88] Most states agree in substance with this determination. *See, e.g.*, Dolphin Lane Associates v. Southampton, 37 N.Y. 2d 292, 333 N.E.2d 358, 372 N.Y.S.2d 52 (1975). In Hawaii, the vegetation line is presumed as a matter of law to be the line of debris left at the upper reaches of the wash of waves. The land seaward of this line is held by the state under the public trust doctrine, applied in Hawaii since King v. Oahu Ry. & Land Co., 11 Hawaii 717, 723-24 (1899). The defendant, therefore, was entitled only to compensation for land upland of the vegetation line.

[89] In Massachusetts, New Hampshire, and Maine, private land grants extend to the mean low-water mark. *See, e.g.*, Opinion of the Justices, 365 Mass. 681, 313 N.E. 2d 561, 565 (1974).

[90] Like most states, Hawaii considers the terms "high-water mark" and "vegetation line" interchangeable.

of valuation of the condemned property still remained. The defendants claimed a high value for the land based on its possible use as a site for a swimming pool, in conjunction with another lot zoned for use as a resort hotel. The court was willing to consider such conjunctive use in determining the value of the condemned parcel, but refused to speculate on its future value with no evidence of a market for this proposed use of the land. It therefore upheld the trial court's lower valuation but reversed for a recalculation of the area of the property. The supreme court's presumption of the seaward boundary of the tract has been accepted for constitutional review by the federal district court.[91]

Sotomura thus shows that condemnation can be a slow and expensive process, involving substantial legal and administrative costs, in addition to compensation of landowners. Moreover, due to high speculative costs, such compensation is often extremely expensive.[92] Thus, the principal difficulty of acquiring public rights by eminent domain is not a legal but a practical one: the cost of condemning substantial areas of recreational beach property is more than most states and municipalities are able to pay. Thus, any feasible acquisition of new recreational beaches should be coordinated with planning of transportation and related services to areas of greatest demand. Federal funding is provided for two-thirds of the cost of establishing and implementing an approved state coastal land and water resources management program by the Coastal Zone Management Act of 1972.[93] The Act requires affirmative provision for acquisition of fee or easements in order to obtain approval of the state management program.[94] To receive federal funding, the state plan must actually be implemented. Thus, implementation of the

[91] Sotomura v. County of Hawaii, 402 F. Supp. 95 (D. Hawaii 1975).

[92] The prices in southeastern Florida run as high as $10,000 per foot of frontage, and even in the most remote sections of the state's Gulf Coast, land costs $500 per front foot. Florida is urgently trying to acquire beachfront property for its own residents and tourists, but between 1970 and 1973 it could afford to buy only 10 miles of beachfront land from private holders. The cost was approximately one million dollars per mile. H.R. Doc. No. 25, 93d Cong., 1st Sess., 25-26 (1973), *quoting* the Miami Herald, April 22, 1973. In 1971, the California State Dep't of Parks and Recreation bought one mile of beach frontage for $6 million. Los Angeles Times, Jan. 31, 1971, § B at 1, col. 6.

[93] 16 U.S.C. § 1451 *et seq.* (Supp. 1974). The regulations promulgated by the National Oceanic and Atmospheric Administration under the Act require designation of shoreline areas of particular concern, including "areas of substantial recreational value." 15 C.F.R. § 923.13(a)(3) (1975).

[94] 16 U.S.C. § 1455(d) (Supp. 1974).

Act should be central to the effort of any littoral state to deal with the public beach access crisis.[95]

IV. Effect of State Constitutional and Statutory Provisions on Public Right of Access

Public recreational rights in beaches are usually established judicially by resort to common law doctrines because of the constitutional problems inherent in legislation concerning private property rights.[96] Statutes may, however, serve as the source of legislative intent and as a possible basis for standing. The existence or absence of a statute asserting the public's right to use the shore areas may also strongly influence the way a court will use the common law doctrines outlined. For example, a statute protecting the public from municipal discrimination in beach fees influenced the New Jersey court in *Neptune City v. Avon-By-The-Sea*[97] to take a broad view of the scope of the public trust doctrine. That case also highlights the fact that beach access statutes have greater impact on municipal as opposed to private beach owners, because a state legislature has the power to change the public use to which municipal land is devoted.[98]

A. Effect of State Constitutional Provisions

Courts have relied on provisions of state constitutions to justify holdings in some beach access cases. For example, the California constitution forbids individuals owning tidal frontage to obstruct the right of way to any navigable water which is required for a public purpose.[99] The state supreme court in *Gion v. Santa Cruz* interpreted this section to favor public access to shoreline areas, stating:

Even if we were reluctant to apply the rules of common-law dedication

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[95] Mass. H.R. Doc. No. 6611, 120 (1975). Federal assistance is also available in the form of discounted prices on surplus federal land to be used for public recreation, 40 U.S.C. § 484(e), (j), (k) (1970), and in matching funds spent to acquire recreational land, including beaches, through the Land and Water Conservation Fund, managed by the Bureau of Outdoor Recreation of the Department of the Interior, 16 U.S.C. §§ 4601-08 (1970), and the Open Space Land Program, administered by the Dep't of Housing and Urban Development, 42 U.S.C. § 1500 (1970).

[96] *See, e.g.*, Opinion of the Justices, 365 Mass. 681, 313 N.E.2d 561, 567-68 (1974). See also text at notes 106-114, *infra*.

[97] 61 N.J. 296, 294 A.2d 47 (1972).

[98] *See also*, Gewirtz v. Long Beach, 69 Misc. 2d 763, 330 N.Y.S.2d 495 (Sup. Ct. 1972), *aff'd*, 45 App. Div. 2d 841, 358 N.Y.S.2d 957 (1974).

[99] Cal. Const., art. XV, § 2.

> to open recreational areas, we must observe the strong policy expressed in the constitution and statutes of this state of encouraging public use of shoreline recreational areas.[100]

Thus the *Gion* court used the state constitution as an indirect aid in its application of the common law dedication doctrine.

Direct reliance was placed on the Rhode Island constitution[101] in *Jackvony v. Powel*,[102] in which the state supreme court enjoined the city of Newport from constructing a fence between the high and low water marks along the boundary of its shore. Newport had erected the fence to keep nonresidents from using the beach without paying, in itself a lawful objective in Rhode Island. The court, however, held the statute which authorized the construction of fences[103] unconstitutional, reasoning that fences would cut off the public right of shoreline passage guaranteed by the state constitution. The Rhode Island constitution thus does not grant the public an unlimited right to use all Rhode Island beaches, but it does at least ensure access to the ocean and the wet-sand area.

On the other hand, the Maryland Court of Appeals used the state charter to deny any public right to use the beach for recreational purposes. In *Department of Natural Resources v. Mayor and Council*,[104] the court interpreted Article XVI of the charter as limiting the public right of access to the shores to uses which did not significantly injure the owner's right. On that basis it held that no public right to use the shores could overcome the owner's right to use his land for a lawful purpose, *e.g.*, to build a condominium across part of the beach. While this case can be distinguished on its facts from the cases in other jurisdictions in which dedication was successfully established,[105] the cited language in the state charter seems to have predisposed the majority to find for the property owner.[106]

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[100] Gion v. Santa Cruz, 2 Cal. 3d 29, 42, 465 P.2d 50, 58, 84 Cal. Rptr. 162, 170 (1970). Article XV, § 2 of the California constitution was used in Lane v. Redondo Beach, 49 Cal. App. 3d 251, 122 Cal. Rptr. 189 (Ct. App. 1975), to develop the contours of the public trust doctrine. In an action against the city for selling municipal land in the shore area to a developer, who built structures blocking access to and from the beach, the court stated that a municipality entrusted by statute with tidelands is obligated to achieve the object of the trust, and may not use its powers to destroy its trust obligations.

[101] R.I. CONST. art. I, § 17 (now Art. XXXVII of Amendment) (Supp. 1974).

[102] 67 R.I. 218, 21 A.2d 554 (1941).

[103] Publ. L. 1940, c. 848.

[104] 274 Md. 1, 332 A.2d 630 (1975). See also text at notes 57-61 *supra*.

[105] *See, e.g.*, Gion v. Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970).

[106] See text at notes 60-64 *supra*.

B. *Statutes Providing Standing to Protect or Establish Public Rights of Access in the Courts*

In other cases the existence of a statutory or constitutional preference for open beaches did not directly affect the substantive rights of the parties involved, but mandated that the state attorney general or a state agency act on behalf of beach users to establish the public right of access against property owners.[107] This is very important because citizens usually cannot afford litigation to establish beach access rights, and they may not even have standing to bring action when those rights are in jeopardy.[108] Further, these statutes express legislative support of open beaches. This support may even go so far as to take the form of a judicial presumption in the right of the public to use the beach, forcing anyone who would abridge that right to prove his authority to do so.[109]

C. *Constitutionality of Statutes Affecting Public Access*

Legislative attempts to ensure public access to the ocean have sometimes included, for example, prohibiting the erection of any barrier which would obstruct the public's right to enter or use the beaches.[110] Such laws are constitutional in some states.[111] However, a Massachusetts bill declaring unlawful any interference with the pedestrian free right-of-passage along the shore, including specifically the use of force and the maintenance of any fence, was unanimously held to violate the state and federal constitutions by that state's highest court.[112] Since recreational uses are not protected by the Massachusetts public trust doctrine,[113] the court found that the bill would cause a physical intrusion into private property, constituting a Fourteenth Amendment taking of property under even the

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[107] *See, e.g.*, State *ex rel.* Thornton v. Hay, 254 Ore. 584, 462 P.2d 671 (1969); Seaway Co. v. Attorney General, 375 S.W.2d 923 (Tex. Civ. App. 1964).

[108] In United States Steel Corp. v. Save Sand Key, 303 So. 2d 9 (Fla. 1974), a non-profit citizens' group was denied standing in a suit to enjoin construction of condominiums which would have interfered with public use of the beach on Sand Key. The Florida rule is that a plaintiff must allege an injury different from that suffered by the general public to maintain standing.

[109] *See, e.g.*, VERNON'S ANN. CIV. STAT., art. 5415d, § 1 *et seq.* [Texas].

[110] *Id.*

[111] *See, e.g.*, State *ex rel.* Thornton v. Hay, 254 Ore. 584, 462 P.2d 671 (1969).

[112] Opinion of the Justices, 365 Mass. 681, 313 N.E.2d 561 (1974), discussed with respect to taking in Recent Developments, 1975 U. ILL. L. F. 711.

[113] *See* Michaelson v. Silver Beach Improvement Ass'n, 342 Mass. 241, 173 N.E.2d 273 (1961), and text at notes 30-34 *supra*.

narrowest interpretation of "takings."[114] Because it failed to provide compensation to landowners, the Massachusetts bill was judged unconstitutional.

The constitutional infirmity of the Massachusetts bill was in its establishment of an *unconditional* right of public access on private property. Such an infirmity may be remedied by substituting a presumption of right for the unconditional right. In 1973, Representative Eckhardt of Texas introduced a bill in Congress taking such an approach.[115] The Eckhardt bill expressed the national interest in maintaining the "free and unrestricted right" of the American public to use the beaches in any manner consistent with rights of littoral property owners,[116] and provided that a United States Attorney could bring action in federal district court to protect this right without reference to jurisdictional amount.[117] It also created the rule that demonstrating an area to be a beach would be prima facie evidence that the public has a prescriptive right to its use and may not be excluded by the littoral owner.[118] Only a rebuttable presumption was created, however, which could not constitute a "taking."[119]

The Eckhardt bill, although not as all-inclusive as the Massachusetts bill, is constitutional, because it does not authorize a taking without compensation.[120] Enactment of the Eckhardt bill, or similar bills on the state level would be useful at least to preserve the beaches which are presently open for public use.

V. State and Regional Regulation of Beaches

A. *Building Moratoriums*

Where no public right can be established through common law theories, a building moratorium to preserve the shoreline for recreational use without immediate compensation to land owners may be

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[114] The intrusion would also be a taking under Mass. Const. art. I, pt. 10. Opinion of the Justices, 365 Mass. 681, 313 N.E.2d 561, 568 (1974).

[115] The "Open Beaches Bill," H.R. 10394, 93d Cong., 1st Sess. (1973), discussed in Eckhardt, *A Rational National Policy on Public Use of the Beaches*, 24 Syracuse L. Rev. 967 (1973).

[116] H.R. 10394, 93d Cong., 1st Sess., § 202 (1973).

[117] *Id.* § 204.

[118] *Id.* § 205.

[119] It is "extremely unlikely that there are now serious constitutional limits on the effect that may be given to presumptions in civil cases." C. McCormack, Handbook of the Law of Evidence, § 345 (2d ed. 1972).

[120] See Black, *Constitutionality of the Eckhardt Open Beaches Bill*, 74 Colum. L. Rev. 439 (1974), which declares the bill to be "past all doubt constitutional."

desirable. If a state or local government contemplates condemnation of either an easement or fee simple on ocean front property, it should restrict development on the property by zoning laws or other land use regulations. These can be useful to prevent construction on the oceanfront which would obstruct public access or cause permanent physical damage. For instance, a moratorium on building, pending issuance of land use restrictions, may be invoked to preserve the current ecology of the land from the effects of development, and to retard any increase in land value based on continued speculation in the property for development. The courts have held such restrictions to be constitutional, as long as they are reasonable in effect and duration.[121]

Land use regulations must be restrictive enough to be effective but not so restrictive as to amount to an uncompensated taking by inverse condemnation.[122] Whether restrictions are "reasonable" or "undue" is a matter of judicial interpretation. The court must decide whether the restriction relates to a legitimate state objective and whether the loss suffered by the landowner is grossly disproportionate to the amount of public benefit.[123]

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[121] *E.g.*, in Housing Authority v. Comm'r, 83 Misc. 2d 89, 372 N.Y.S.2d 146 (Sup. Ct. 1975), the New York City Housing Authority brought an action against the state for restricting the use of a parcel of real property which the city had condemned for use as a low-income housing project. The court held that a moratorium clause, prohibiting any person from altering the state wetlands prior to the effective date of land use regulations, was not a taking. It noted the danger of permanent damage to the wetlands, and the legislature's duty to regulate their use. Since the moratorium was reasonable both in effect and duration (slightly less than two years), it did not constitute a taking without compensation. Longer moratoriums have been sustained in zoning cases: Golden v. Planning Board of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972), upheld an 18 year restriction on development pending the formulation of a comprehensive zoning plan. *See also* State v. Reed, 78 Misc.2d 1004, 359 N.Y.S.2d 185 (Sup.Ct. 1974).

[122] Inverse condemnation is deprivation of the beneficial use of private property without commencement of eminent domain proceedings. When a court finds that inverse condemnation has taken place, it will award damages as if a formal taking by condemnation had occurred. NICHOLS, EMINENT DOMAIN, § 28.3[1] & nn. 1.10-1.13 (3d ed. 1975). Building moratoriums are interim procedures—they must be followed within a reasonable time by measures to establish permanent public rights in the coastal area, or the land owner may be able to establish that the restriction on the use of his property constitutes an inverse condemnation. *See* Selby Realty Co. v. San Buenaventura, 10 Cal. 3d 110, 514 P.2d 11, 109 Cal. Rptr. 799 (1973).

[123] In Navajo Terminals v. San Francisco Bay Conservation & Dev. Comm'n, 46 Cal. App. 3d 1, 120 Cal. Rptr. 108 (Ct. App. 1975), the defendant commission had adopted a resolution establishing part of the land owner's property as a waterfront park, pursuant to a comprehensive plan authorized by the legislature for the conservation of San Francisco Bay. The plaintiff claimed that this resolution constituted a *de facto* taking, or inverse condemnation of its property, for which it should be compensated. The court held that adoption of long-range

B. Subdivision Exactions

It has been suggested that easements may be acquired by requiring a developer of oceanfront property to dedicate land or an easement thereon for public recreational use in order to obtain a building permit or approval to subdivide.[124] This approach, used in California,[125] deals effectively with oceanfront construction, one of the chief threats to public beach access.

There are two lines of cases dealing with the constitutionality of statutes which permit such "exaction" of property or easements for recreational purposes by municipalities. The more restrictive view, taken by the Illinois Supreme Court in *Pioneer Trust and Savings Bank v. Mount Prospect*, is that the developer may only be required to assume ". . . those costs which are specifically and uniquely attributable to his activity and which would otherwise be cast upon the public."[126] The more liberal California view, stated in *Associated Home Builders v. Walnut Creek*, is that subdivision exaction ". . . can be justified on the basis of a general public need for recreational facilities caused by present and future subdivisions."[127]

Exactions requiring dedication of beach access can be justified under either standard. Assuming that ample public beach access existed prior to the subdivision, the proposed actions of the developer may cut off such access, or (by raising land values) make it more difficult for the government to acquire an easement in the future.[128] Under the more restrictive *Pioneer Trust* standard, the diminution of beach access, if any, could be specifically attributed to construction of a subdivision which obstructed the right of pas-

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plans establishing target areas for environmental regulation, including tentative designation of land for public use, does not constitute a compensable taking of property. *But see* State v. Johnson, 265 A.2d 711 (Maine 1970), discussed in Gannon, *Constitutional Implications of Wetlands Legislation*, 1 ENV. AFF. 654 (1972), and Klopping v. Whittier, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972), which holds that if a city acts unreasonably in issuing precondemnation statements, either by excessively delaying eminent domain proceedings or by other oppressive conduct, the owner is entitled to maintain an action in inverse condemnation.

[124] Note, *Public Access to Beaches*, 22 STAN. L. REV. 564, 567 (1970).

[125] Sec. 11546 of the California Business and Professions Code provides: "The governing body of a city or county may by ordinance require the dedication of land . . . for park or recreational purposes as a condition to the approval of a final subdivision map. . . ." See also N.Y. VILLAGE LAW §§ 179-k, 179-l.

[126] 22 Ill.2d 375, 379, 176 N.E.2d 799, 801 (1961) [hereinafter cited as *Pioneer Trust*].

[127] 4 Cal. 3d 633, 638, 484 P.2d 606, 610, 94 Cal. Rptr. 630, 634, *appeal dismissed*, 404 U.S. 878 (1971) [hereinafter cited as *Walnut Creek*], upholding § 11546 of the California Business and Professions Code.

[128] *See* Note, *Public Access to Beaches*, *supra* note 124, at 571.

sage to the ocean. Thus exaction of an easement would be constitutionally justified as a protection of the public interest in use of the beach. It would be more difficult to attribute an increase in land values specifically to a developer in order to justify an exaction under the *Pioneer Trust* standard, but the increase could be used as evidence of the public demand and need for recreational facilities to satisfy the *Walnut Creek* standard.

Recreational subdivision exactions have generally been upheld[129] by the courts as long as they have a rational relation to the need created by the subdivision. Statutes have been declared unconstitutional when they are not sufficiently specific[130] or allow exactions which are excessive.[131] Such deficiencies can sometimes be avoided by properly drafting the enabling statute and municipal ordinances. The other obvious limitation of subdivision exaction is that it applies only to land held by developers who intend to subdivide. Clearly, other means must be used to secure and protect public rights to use beaches held by other types of owners.

C. *Tax Incentives*

Another method of acquiring public beach access is to provide tax incentives to property owners encouraging them to donate less than fee simple interests to a governmental or charitable organization for recreational purposes. The type of property interest donated may include a conservation restriction, in the form of an agreement not to build on or alter the state of the land, and to allow public access.[132] Incentives may be furnished by allowing property tax abate-

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[129] *See, e.g.*, Associated Home Builders v. Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, *appeal dismissed*, 404 U.S. 878 (1971); Billings Properties, Inc. v. Yellowstone County, 144 Mont. 95, 394 P.2d 182 (1964); Jenad, Inc. v. Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966); Aunt Hack Ridge Estates, Inc. v. Planning Comm'n of Danbury, 160 Conn. 109, 273 A.2d 880 (1970); Jordan v. Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966).

[130] Ordinances requiring dedication of "at least" a certain percentage of the gross area to be subdivided have been stricken as not bearing any relation to the need for recreational land created by the subdivision, and allowing the municipality too much discretion. Frank Ansuini, Inc. v. Cranston, 107 R.I. 63, 264 A.2d 910 (1970); Admiral Dev. Corp. v. Maitland, 267 So.2d 860 (Fla. 1972).

[131] The willingness of the court in East Neck Estates, Ltd. v. Luchsinger, 61 Misc. 2d 619, 305 N.Y.S.2d 922 (Sup.Ct. 1969), to forbid an exaction as confiscatory shows a weakness of this doctrine. The developer proved that allowing public beach access would diminish the value of his land by nearly half; thus, the town was not permitted to require that the beach be dedicated to the public.

[132] *See* Sicard, *Pursuing Open Space Preservation: The Massachusetts Conservation Restriction*, 4 ENV. AFF. 481 (1975) [hereinafter cited as *Open Space Preservation*];

ments, reflecting the diminished value of land from which development rights have been alienated,[133] and by the federal income and estate tax consequences of such a gift.[134]

A property tax exemption law of this type was recently passed in Alaska.[135] Such a law would not constitute a taking, since it relies on completely voluntary action on the part of the landowner. It has two disadvantages, however: first, it depends on the volition of property owners who may not be willing to trade an easement for a tax exemption; and second, it costs money in the form of foregone tax revenues. However, issuing a tax exemption is necessarily less costly than taking land by eminent domain, while it accomplishes substantially the same purpose.

Conversely, a state may repeal existing tax exemptions for semi-private (nonprofit) organizations which restrict access to their beach. In Massachusetts, for example, a tax exemption is available only where the land devoted to public use is open to an indefinite number of people.[136] This classification does not seem to present any constitutional problems.[137]

VI. CONCLUSION

The public beach shortage has reached serious proportions in some areas, notably Florida and the Northeast. With population increases and shifts toward the coasts, this problem is likely to occur in other areas as well. Numerous approaches are available to pursue

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Conservation and Preservation Restriction Seminar, 16 N.H.B.J. 310 (1975). *Also see generally* Comment, *Acquisition of Public Recreational Access to Privately-Owned Property: Devices, Problems, and Incentives*, 29 ARK. L. REV. 514 (1976) [hereinafter cited as *Public Recreational Access*].

[133] *See Open Space Preservation, supra* note 132 at 495, 16 N.H.B.J. at 383.

[134] Federal income tax law allows deductions for charitable contributions including gifts to state and local governments for exclusively public purposes, 26 U.S.C. § 170(c)(1) (1970). The value of such a gift may be deducted from decedent's gross estate, 26 U.S.C. § 2055 (1970). *See Public Recreational Access, supra* note 132, at 514-15.

[135] This law is described at 25 LAND USE LAW AND ZONING DIGEST ¶ 501 (1975).

[136] *See, e.g.*, M.I.T. Student House, Inc. v. Board of Assessors, 350 Mass. 539, 215 N.E.2d 788 (1966).

[137] The traditional standard of equal protection is applied to organizations whose exemption is reviewed because no fundamental right or suspect classification is involved. The state clearly has the requisite rational basis for the classification in the creation of an incentive to provide additional beaches for its residents. *Also see* note 24, *supra*. Where no state conservation program exists, a group of littoral property owners interested in acting voluntarily to preserve the natural shoreline may do so through use of mutual restrictive covenants. These may prohibit, for example, construction of more than one building per lot. Shorefront Park Improvement Ass'n v. King, 157 Conn. 249, 253 A.2d 29 (1968).

the quest for more open beaches; the selection of a legal approach must depend heavily on the law of the jurisdiction and the particular facts at hand. In particular, the common law doctrines differ among the states as to whether they are recognized or not, and if so, what effect they have and what set of facts will make them applicable. Each doctrine has its general advantages and disadvantages.

Custom and public trust are generalized theories under which it is possible to litigate rights to as large an area as the entire shoreline of a state. However, custom entails proof of a very detailed set of facts, and has only been recognized in a few jurisdictions in the twentieth century. The difficulty with public trust is that it is usually interpreted as embracing rights to use coastal waters but not beach areas.

Successful proof of dedication requires establishing one of several alternate sets of facts, depending in part on whether express or implied dedication is alleged. Any of these factual situations presents a lighter evidentiary burden than does custom. Furthermore, dedication is recognized in all jurisdictions (except for claims ripening after 1972 in California).[138] The difficulty with dedication, however, is that it can only be proven for individual parcels of land. Once the process of bringing dedication suits has started, the effect of defensive actions by land owners, who may close off their land so that they can rebut any future claim of dedication, may harm public access more than any successful lawsuits will have helped.

Eminent domain involves the simplest factual requirement as to constitutionality, simply a showing that the taking is to satisfy a public need and is fairly compensated, but poses difficult valuation problems. Also, the price of shoreline property is high, making condemnation of beaches expensive and often impossible for state and local governments to afford. The provisions of the Coastal Zone Management Act make this alternative more attractive, however.

State constitutional provisions and statutes can be useful in creating presumptions, setting forth legislative policy, and providing standing to raise the public interest in court. However, any state law which abridges the property rights of land owners is a potential violation of the Fourteenth Amendment. This is true as well of land use regulations—although valid to preserve the natural state of

[138] These claims are barred by CAL. CIVIL CODE § 1009 (Supp. 1975).

coastal land temporarily, they cannot constitutionally alienate the fee holder's rights.

Subdivision exactions and tax incentives can be effective in particular circumstances, but both methods of acquiring easements depend on the intent and cooperation of the land owner. Neither is generally applicable for use in obtaining public access to a beach owned by anyone interested in privacy or isolation.

In summary, no general course of action to obtain public beach access can be proposed, because of the diversity of local laws and circumstances. The course chosen must be specifically selected to fit the situation. In attempting to open more beaches for public use, consideration must also be given to any nonlegal obstacles to public access, because mere legal right of access to a beach does not have practical value in all instances. Access may be limited, for example, by unavailability of parking or transportation facilities.[139] To maximize the use of available, especially isolated, beaches and thereby ease the strain on those which are overcrowded, measures to improve physical accessibility of beaches should be undertaken. These may include construction of new parking areas where this can be done with minimal environmental impact, or institution of public transportation to and from outlying parking areas during peak-use periods. Such innovative measures as providing space for bicycles on summer weekend trains to shore communities would also be helpful.[140] Most programs involve expenditure of funds, but the ever-increasing public use of available beach facilities indicates that the cost is one that people are willing to pay.[141]

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[139] "Traffic and parking are, perhaps, the critical issues. Road and parking lot capacity, rather than beach capacity, appear to dictate beach access and use policies in many, if not most, situations." MASS. H.R. DOC. No. 6611, 32 (1975).

[140] Boston Globe, April 27, 1975 at B6, col. 2.

[141] For a discussion of the policy issues underlying allocation of the costs of beach maintenance, see Comment, *This Land is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches*, 44 S. CAL. L. REV. 1092, 1125 (1971). *See also* M. CLAWSON & J. KNETSCH, OUTDOOR RECREATION 262-85 (1966).