"Waterlocked": Public Access to New Jersey's Coastline

Timothy M. Mulvaney[*] *and Brian Weeks*[**]

"The State can no more abdicate its trust over property in which the whole people are interested…than it can abdicate its police powers...."[1]

"The proprietors were men who understood their rights, and were fearless in the defence of them. If those who twice purchased New Jersey; who braved the dangers of an immense ocean; shared in the toils, sufferings, and privations of the first settlers; who claimed all strays by land, and wrecks by sea, in virtue of their grants, and never for a moment conceived that these grants swallowed up what, by the law of the land they left, had ever been considered the common rights of Englishmen; shall we, after a lapse of almost three centuries, insult the memory of men who were an ornament to the human race, whose virtues have highly exalted their names, and whose labours have been a blessing to the world, by saying, they knew nothing of their privileges, and that their birthrights were lost forever in the forests of New Jersey; that their boasted Magna Charta was a farce from which

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* Deputy Attorney General, State of New Jersey. Mr. Mulvaney is a Deputy Attorney General for the State of New Jersey in the Land Use Division of the Environmental Permitting and Counseling Section. He defends and advises the state and its agencies in environmental and land use litigation, rulemaking and transactions, and the regulatory and physical takings claims they generate.

** Deputy Public Advocate, State of New Jersey. Mr. Weeks is working on waterfront access and eminent domain abuse. He served as a Deputy Attorney General for the State of New Jersey from 2000 through 2006, in environmental, land use and inverse condemnation litigation, rulemaking, and transactions. From 1991 through 1999, he worked in private law firms on environmental regulatory, litigation and transactional matters. Prior to attending law school, he worked as a psychiatric social worker in New York City for ten years.

1. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892).

they could derive no benefit; and that liberty, which they so highly valued, was confined to the grants and concessions? or that our legislatures, from time to time taking upon them to regulate fisheries of oysters as well as of floating fish for the public benefit, were totally ignorant of their powers, overstepped the bounds prescribed by the constitution, to the destruction of the rights and interests of individuals? I think not."[2]

"That generations of trustees have slept on public rights does not foreclose their successors from awakening."[3]

2. Arnold v. Mundy, 6 N.J.L. 1, 92–93 (1821).

3. Ariz. Ctr. for Law in the Pub. Interest v. Hassell, 837 P.2d 158, 172 (Ariz. Ct. App. 1991).

INTRODUCTION

This Article addresses the public trust doctrine as applicable to waterways and their shores, with a particular focus on emerging trends in the state of New Jersey. Several disparate factors have aggravated disputes between competing visions for waterfront areas. The U.S. population has increased much more in coastal than inland areas. The decline in heavy industry along with dramatic increases in real estate values have led to intensive development and redevelopment in waterfront areas, including the re-opening of areas functionally closed to the public for well over one hundred years. As communities have discovered the values of attractive waterfront areas, conflicts have arisen as to who will share in the benefits. Will waterfronts become a public asset, a hybrid of a grand promenade and linear park for access and recreational use, or an asset to be privatized for exclusive profit and utilization?

Since New Jersey is the most densely populated and developed coastal state, its shoreline has been a battleground for competing public and private demands for access and use. Every one of New Jersey's 8.5 million residents lives within sixty miles of the Atlantic Ocean or one of its bays or estuaries. Therefore, New Jersey provides ample fodder for the exploration of the changing contours of the public trust doctrine as applied to waterways and their shores, particularly in light of its very high real estate values and long, flat shoreline vulnerable to storm damage.

Part I of this Article discusses a brief history of the public trust doctrine, while Part II defines the role of this common law doctrine in New Jersey. Part III details the scope of public access to and use of the Atlantic Ocean and the adjacent dry sand beaches in New Jersey. Part III also examines the doctrine in the context of regulatory takings jurisprudence, confronts recent criticisms of New Jersey court decisions that expand public rights to the state's beaches, and comments on the utility of other common law principles to further broaden these rights. Part IV briefly summarizes contemporary public trust issues relating to waterways in other coastal states. Finally, Part V identifies several alternative methods that New Jersey has recently used to uphold the public trust doctrine and anticipates issues that the judicial system could soon face regarding the public trust doctrine as applied to New Jersey's coastline.

I. A HISTORY: ORIGINS OF THE PUBLIC TRUST DOCTRINE

The public trust doctrine is an ancient legal principle emanating from Roman law, which recognized that:

> By the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and the buildings, which are not, like the sea, subject only to the law of nations.[4]

Among the rights of the people recognized by Roman and English law were the rights of navigation and fishery. Some form of the public trust doctrine is recognized by the law in most nations:

> Historically, no developed western civilization has recognized absolute rights of private ownership . . . [of land between high and low water marks] as a means of allocating this scarce and precious resource among the competing public demands. Though private ownership was permitted in the Dark Ages, neither Roman Law nor

4. INSTITUTES OF JUSTINIAN 90 (Thomas Collett Sandars trans., Longmans, Green & Co. 1905).

> the English common law as it developed after the signing of the Magna Charta would permit it.[5]

The doctrine came to the United States by way of English law. It is a common law doctrine that generally recognizes that the public has particular inalienable rights to certain natural resources.[6] As common law, the doctrine remains subject to molding and extension by court decisions.[7] Accordingly, the specific rights recognized under the public trust doctrine continue to evolve over time.

Under English law, the King had limited rights to convey property. Certain rights remained the permanent property of the realm and were held by the Crown in its regal capacity in trust for all subjects. The rights held by the Crown included the rights of navigation and fishery in the sea and other tidal waterways, which English courts construed as including

5. United States v. 1.58 Acres of Land Situated in Boston, 523 F. Supp. 120, 123 (D. Mass. 1981) (internal citation omitted).

6. *See* Capano v. Borough of Stone Harbor, 530 F. Supp. 1254, 1269 (D.N.J. 1982); PUTTING THE PUBLIC TRUST DOCTRINE TO WORK 1 (David Slade ed., 2d ed. 1997) (defining public trust doctrine); Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). Discussion of the public trust doctrine involves the use of several common terms that have specific meanings that might be different from traditional definitions. The classification of waters as "navigable" varies by context under both federal and state law. Factors that can influence the meaning of the term include the scope of federal admiralty jurisdiction, the scope of Federal Commerce Clause authority, the application of the navigational servitude exception to unconstitutional takings or public right of passage under state law, and colonial, state, or federal riparian grants. The U.S. Supreme Court has cautioned that "any reliance upon judicial precedent must be predicated upon careful appraisal of the purpose for which the concept of 'navigability' was invoked in a particular case." Kaiser Aetna v. United States, 444 U.S. 164, 171 (1979) (emphasis removed); *see also* John A. Humbach, Comment, *Public Rights in the Navigable Streams of New York*, 6 PACE ENVTL. L. REV. 461 (1989). Tidal waterways are those bodies where the tide affects the height or flow of the water. The point at which the water simply flows at all times in one direction toward the sea is the head of tide. The legal significance of this distinction is demonstrated in *Fulton Light, Heat & Power Co. v. New York*, 94 N.E. 199, 202 (N.Y. 1911). Tidal waterways are known as navigable in law. *Id.* Tideland is land that is flowed by the normal daily ebb and flow of the tide, from the ordinary low tide up to the ordinary high tide. *See* PUTTING THE PUBLIC TRUST DOCTRINE TO WORK, *supra*, at xv. Casual observers may refer to this area as the "foreshore" or wet sand beach. The dry sand beach is that area of land above, or landward, of the ordinary tide line, and seaward of the vegetation line, *id.* at xiv, the first non-elevated manmade structure generally parallel to the ocean, inlet or bay, or the toe of the first dune. N.J. ADMIN. CODE § 7:7E-3.22(a) (2007). "Littoral" refers to land that now is or formerly was flowed by the tide, while "riparian" also refers to land flowed by a river. Glass v. Goeckel, 703 N.W.2d 58, 61 n.1 (Mich. 2005), *cert. denied*, 126 S. Ct. 1340 (2006); PUTTING THE PUBLIC TRUST DOCTRINE TO WORK, *supra*, at xiv, xv. These terms are often used interchangeably.Borough of Wildwood Crest v. Masciarella, 222 A.2d 138, 142 (N.J. Super.Ct. Ch. Div 1966); PUTTING THE PUBLIC TRUST DOCTRINE TO WORK, *supra*, at xiv. The high water mark is the "line formed by the intersection of the tidal plane of mean high tide with the shore." O'Neill v. State Highway Dep't of N.J., 235 A.2d 1, 9 (N.J. 1967). The mean or ordinary high tide is a mean of all high tides over a period of 18.6 years. *Id.* at 9–10 (detailing formula for determining mean high water line); *see also* Borax Consol., Ltd. v. City of Los Angeles, 296 U.S. 10, 26–27 (1935).

7. *See* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984).

the rights to land one's boat with its catch, to empty and dry the nets, and to bring the fish from the shore to the nearest road to market.[8] The King had no power to convey those rights and any attempt to do so would have been an invalid usurpation of the rights of a free people and their Parliament. Accordingly, when the King conveyed private ownership of the land now known as New Jersey, he did not convey those inalienable rights.[9]

The American Revolution resulted in the conveyance of royal rights to the legislature of each state to be held in trust for its people.[10] At least since 1821, case law in the United States has recognized rights of the public under the public trust doctrine.[11] American law views navigable waters as similar to highways: their shores are open to all and impressed with public rights related to navigation and fishing. The U.S. Supreme Court held: "[i]t is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon [navigable waterways]."[12]

Today, the nature of the protected resources and the scope of the public rights are defined by and subject to the property laws of each state. In general, tidelands are owned by the state and those lands seaward of the mean high water line are impressed with a public trust for the benefit of all.[13] Public ownership in tidal waterways generally extends up to the mean high or low water lines.[14] A few states, including Delaware, Maine, Massachusetts, New Hampshire, and Virginia, are "low water" states, with public ownership of the submerged lands lying seaward of the mean

8. *See* Stevens v. Paterson & Newark R.R. Co., 34 N.J.L. 532, 539 (1870) (explaining traditional understanding of public use of shoreline). An 1830 treatise states:

> So the shore lies between the fishery or navigation and the public, but the public have a right to the fishery and navigation, and a convenient way is presumed over the shore for carrying them on; such as for launching boats, carriage and footway for the conveyance of the fish, goods, &c. to and from the boats, &c. and for exercising whatever other conveniences common sense and usage point out as *essential* to these rights; in short, whatever obstruction would render the fishery or navigation nugatory, must be deemed unlawful and incompatible with those rights.

R. Hall, *An Essay on the Rights of the Crown in the Sea-Shores of the Realm, etc. (a) of the King's Title to the British Seas (b)*, *reprinted in* STUART A. MOORE, HISTORY OF THE FORESHORE AND LAW RELATING THERETO 667, 847–48 (London, Stevens & Haynes, 3d ed. 1888).

9. *See* Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 412 (1842); Bell v. Gough, 23 N.J.L. 624, 684 (1852); Arnold v. Mundy, 6 N.J.L. 1, 11–13 (1821) (summarizing original conveyance of East and West Jersey, later to become known as "New Jersey").

10. *Martin*, 41 U.S. at 410; *see also* Shively v. Bowlby, 152 U.S. 1, 36 (1894).

11. *See* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435 (1892); *Martin*, 41 U.S. at 411–12; *Arnold*, 6 N.J.L. at 3.

12. Packer v. Bird, 137 U.S. 661, 667 (1981); *see also* PUTTING THE PUBLIC TRUST DOCTRINE TO WORK, *supra* note 6, at 5.

13. *Shively*, 152 U.S. at 9.

14. For a discussion of these terms in the context of the public trust doctrine, see *supra* note 6.

low water line.[15] Nevertheless, "even in some of these States . . . public rights to use the tidelands for the purposes of fishing, hunting, bathing, etc., have long been recognized."[16] Most states, including New Jersey, are "high water" states that recognize state ownership in tidal waterways, the underlying submerged lands, and the shore waterward of the mean *high* water line.[17] In some states, notably New Jersey and Oregon, the public also has rights to the shoreline above the high water line.[18] The next Part discusses the public trust doctrine in the context of New Jersey's densely populated and highly developed coastline.

II. NEW JERSEY'S COASTLINE AND THE PUBLIC TRUST

In New Jersey, the public trust doctrine recognizes public rights to a variety of natural resources, including access to and use of the ocean and other tidal waterways and shores. The New Jersey courts recognize that the public trust doctrine is an intrinsic element of property rights and law.[19] While some property rights advocates have suggested that the courts have unfairly imposed the public trust doctrine upon the absolute and unrestricted rights of private property owners, the history of the public trust doctrine and its case law leads to a contrary conclusion: the public trust doctrine is inherent in the chain of title to all properties that border tidal waterways in New Jersey and protects natural resources throughout the state.[20] Thus, no owner of property in New Jersey can reasonably expect to exclude the public absolutely from any tidal waterway or its shore.

15. James M. Kehoe, Note, *The Next Wave in Public Beach Access: Removal of States as Trustees of Public Trust Properties*, 63 FORDHAM L. REV. 1913, 1916 (1995); *see also Shively*, 152 U.S. at 18–25; PUTTING THE PUBLIC TRUST DOCTRINE TO WORK, *supra* note 6; Jose L. Fernandez, *Untwisting the Common Law: Public Trust and the Massachusetts Colonial Ordinance*, 62 ALB. L. REV. 623, 628, 630 (1998) (addressing Massachusetts colonial ordinance extending private property seaward to mean low water line).

16. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 483 n. 12 (1988).

17. *See* Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 53 (N.J. 1972) (categorizing New Jersey as a mean high water state); State *ex rel.* Thornton v. Hay, 462 P.2d 671 (Or. 1969).

18. *See* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984); State *ex rel.* Thornton v. Hay, 462 P.2d 671, 678–79 (Or. 1969) (Denecke, J. concurring).

19. *See, e.g.*, Bell v. Gough, 23 N.J.L. 624, 681 (1852); Slocum v. Borough of Belmar, 569 A.2d 312, 315 (N.J. Super. Ct. Law Div. 1989) ("The public trust doctrine has always been recognized in New Jersey and is deeply engrained in our common law.").

20. *See* PUTTING THE PUBLIC TRUST DOCTRINE TO WORK, *supra* note 6, at 1.

A. Chain of Title to New Jersey's Coastline

A basic tenet of real property law is that one may not convey greater title than one has.[21] Accordingly, understanding the effect of the public trust doctrine on real property rights in New Jersey, as in any other state, requires analyzing the chain of title to real property before addressing the responsibilities of a trustee of that property.

New Jersey was established in 1664 as a proprietary colony, i.e., a real estate investment company, with a grant of property from King Charles II to his brother James, the Duke of York.[22] The Duke of York then conveyed those rights to the proprietors Lord John Berkeley and Sir George Carteret.[23] After the Restoration in 1702, the proprietors surrendered all their rights of government to Queen Anne. Berkeley and Carteret retained their property rights, which they divided in 1676 into East and West Jersey. These grants form the basis of all land titles in New Jersey.[24]

Title to all property in New Jersey is based on, and can be traced back to, these original conveyances from King Charles II.[25] Since the King could not convey the inalienable rights that he held in trust for the public, those rights were not conveyed to Berkeley and Carteret, but rather were retained by the Crown. Accordingly, no property owner in New Jersey other than the reigning monarch of England and the state has ever possessed any of the inalienable rights protected under the public trust doctrine.

B. The State of New Jersey as Trustee

The public trust doctrine involves elements of real property and trust law; the role of the state in safeguarding public rights in natural resources is that of trustee.[26] The state may convey submerged lands or tidal shores to private owners, but the private ownership remains perpetually subject

21. *See* Marvin Safe Co. v. Norton, 7 A. 418, 421 (N.J. 1886) (explaining that holder of property has only that title conveyed to him by the vendor, unless he has gained greater title by operation of law).

22. *See* Graham v. Twp. of Edison, 173 A.2d 403, 405 (N.J. 1961).

23. *Id.*; Grant of Land from James, Duke of York, to John Lord Berkeley, Baron of Straton & Sir George Carteret (June 24, 1664), *available at* http://www.state.nj.us/njfacts/njdoc6.htm (last visited May 23, 2007).

24. Two real estate holding companies, the General Board of Proprietors of the Eastern Division of New Jersey and the General Board of Proprietors of the Western Division of New Jersey, controlled all residual property interests within New Jersey into the late twentieth century.

25. *Graham*, 173 A.2d at 405.

26. *See* Lusardi v. Curtis Point Prop. Owners Ass'n, 430 A.2d 881, 886 (N.J. 1981); Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972); Slocum v. Borough of Belmar, 569 A.2d 312, 316, 317 (N.J. Super. Ct. Law Div. 1989) (describing duties of trustee to include loyalty, care and full disclosure).

to public rights of access and use.[27] The state may not convey, waive, or otherwise extinguish rights protected under the public trust doctrine.[28] Any attempt by the state to do so is void *ab initio*. Under principles of trust law, the state's fiduciary obligation to safeguard the corpus of the trust and its benefits for the public is a strict one. Should the trustee fail to execute faithfully his or her duties, the beneficiaries of the trust may have the right to bring an action for an accounting to recoup the assets of the trust for their benefit.[29]

Since the 1970s, the need for a diligent trustee has grown. Disputes regarding the extent of public access to and use of the Atlantic Ocean, tributary waterways, and their adjacent beaches and shores have grown increasingly discordant as New Jersey's coastal population and development have expanded. In addition, increased participation in active outdoor recreational sports has increased demand for use of both tidal and inland navigational waters.[30] The next Part describes how the scope of these public trust rights continues to evolve via New Jersey case law and statutory and regulatory enactments.

III. THE CURRENT STATE: PUBLIC RIGHTS OF ACCESS TO AND USE OF TIDAL SHORES IN NEW JERSEY

The seminal public trust doctrine case in the United States arose from a dispute in New Jersey over just a few bushels of oysters.[31] Though that case was published in 1821, public trust doctrine case law in New Jersey remained relatively quiet from the second half of the nineteenth century through the first half of the twentieth century. During that time, urban waterfronts were densely developed with largely industrial uses, while several oceanfront cities with sandy beaches and railroad access—such as Asbury Park, Long Branch, Atlantic City, and Cape May City—grew into popular resorts. Outside of these urban areas and resorts, the

27. *See* Nat'l Ass'n of Homebuilders of the U.S. v. N.J. Dep't of Envtl. Prot., 64 F. Supp. 2d 354, 358–59 (D.N.J. 1999); *Lusardi*, 430 A.2d at 886 (holding any conveyance by state of tidally flowed property is subject to permanent public rights of access); Hyland v. Borough of Allenhurst, 393 A.2d 579, 582 (N.J. 1978).

28. *See* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435 (1892); *Neptune City*, 294 A.2d at 54; Karam v. State Dep't of Envtl. Prot., 705 A.2d 1221, 1228 (N.J. Super. Ct. App. Div. 1998) (stating that although states have inherent authority to convey riparian grants to private persons, the "sovereign never waives its right to regulate the use of public trust property"), *aff'd*, 723 A.2d 943 (N.J. 1999).

29. *See Slocum*, 569 A.2d at 316–17 ("A public trustee is endowed with the same duties and obligations as an ordinary trustee."); *Lusardi*, 430 A.2d at 886; *Neptune City*, 294 A.2d at 54.

30. *See* William Arthur Atkins, *Recreation*, WATER ENCYCLOPEDIA, http://www.waterencyclopedia.com/Po-Re/Recreation.html (last visited May 23, 2007) (forecasting future trends of water-based activities).

31. *See* Arnold v. Mundy, 6 N.J.L. 1, 9–12 (1821) (finding oysters planted on submerged land were not property of adjacent upland owner, but could be freely harvested by public); BONNIE J. MCCAY, OYSTER WARS AND THE PUBLIC TRUST: PROPERTY, LAW, AND ECOLOGY IN NEW JERSEY HISTORY (1998).

New Jersey beaches were largely undeveloped and used only for fishing, fowling, and associated activities.[32]

The New Jersey coastline changed rapidly after World War II due to the popularity of the automobile. Prosperity among the working classes and new suburban neighborhoods allowed for improvements to New Jersey's highways. These changes included road tunnels connecting to New York City in the late 1920s and the Garden State Parkway in the early 1950s. Suddenly, the entire 128 miles of white sand beach, affectionately known by the tourist community as the "Jersey Shore," came within reach of the general public.

The decline in heavy industries in the 1970s dramatically changed the urban waterfronts of New Jersey. Areas that were formerly factories, docks, oil tank farms, and railroad yards were abandoned and then redeveloped as desirable waterfront properties, many with magnificent views of New York City. The increased popularity of the attractive new urban waterfronts and the Jersey Shore created new conflicts as nonresidents sought to use the shoreline.

A. Modern New Jersey Public Trust Doctrine Case Law

Starting in the 1970s, the courts slowly addressed disputes between private property owners and the beach-going public, and often decided them under the public trust doctrine. In each of those disputes, the New Jersey courts found in favor of the public right.

The state supreme court recognized that the public trust doctrine extends to access to and use of publicly owned dry sand beach above the mean high water line,[33] where a municipal ordinance prohibiting use of a privately owned oceanfront lot for recreation violated both the state Municipal Land Use Law[34] and state policies based on the public trust doctrine.[35] The courts have also held that a municipality may not restrict use of a portion of its beach to its residents only,[36] nor may it discriminate against nonresidents in its charges or other beach access or use policies. With respect to discriminating as to residency, the courts have held that municipalities may not constructively restrict nonresident use. For example, where a municipality maintained toilet facilities adjacent to a public beach, the municipality abused its power by barring beachgoers

32. For a list of modern New Jersey beach resorts, see New Jersey Tourism, The Jersey Shore, http://www.State.nj.us/travel/jersey_shore_shtwn.html (last visited May 23, 2007).

33. *See* Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 55 (N.J. 1972); *see also* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984) and discussion thereof at *infra* notes 53–59 and accompanying text.

34. N.J. STAT. ANN. § 40:55D-62(a) (2006).

35. *See* Lusardi v. Curtis Point Prop. Owners Ass'n, 430 A.2d 881, 886–88 (N.J. 1981).

36. Van Ness v. Borough of Deal, 393 A.2d 571, 574 (N.J. 1978).

from use of that basic accommodation.[37] In another instance, a trial court found that a municipality breached its fiduciary duties to the public by raising beach admittance fees rather than property taxes to generate revenue solely to benefit its residents and by charging fees that were "disproportionately and inequitably" higher on weekends, when mostly nonresidents use the beaches, as opposed to lower fees on weekdays when mostly residents use the beaches.[38]

New Jersey courts also recognize that, since the public trust doctrine is a common law principle, it is not frozen in time. Rather, like any other common law principle, the public trust doctrine adapts and evolves with the changing needs of society. The New Jersey Supreme Court explained that "we perceive the public trust doctrine not to be 'fixed or static,' but one to 'be molded and extended to meet changing conditions and needs of the public it was created to benefit.'"[39]

The courts recognized that waterways and their shores remain economically and socially significant, although the specific uses change over time. Subsistence and small-scale commercial fishing and navigation were once as important to the economy of New Jersey as tourism and recreational activities are today.[40] Tourism is currently the second-largest contributor to the New Jersey economy;[41] indeed, the modern economic equivalent of the fishing net may be the beach blanket.[42] Current popular

37. Hyland v. Borough of Allenhurst, 393 A.2d 579, 581–82 (N.J. 1978).

38. *See* Slocum v. Borough of Belmar, 569 A.2d 312, 317 (N.J. Super. Ct. Law Div. 1989). A New Jersey court also invalidated a municipal ordinance that prohibited wearing beach apparel on a public street. *See Hyland*, 393 A.2d at 582.

39. *See* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984) (quoting Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 47 (N.J. 1972)).

40. Nevertheless, commercial fishing in New Jersey remains significant. The New Jersey Sea Grant program estimates that the industry contributed $600 million to the state economy in 1998. Gef Flimlin & Stewart Tweed, *Commercial Fisheries*, JERSEY SHORELINE, Mar. 2000, at 17, 17, *available at* http://nsgl.gso.uri.edu/njmsc/njmsco00001.pdf (last visited on June 11, 2007).

41. Kenneth McGill, Presentation, Global Insight, Inc., An Impressive 2005 for NJ Tourism: The Tourism Satellite Account Perspective 11 (2006) (prepared for the N.J. Commerce, Economic Growth & Tourism Commission), *available at* http://www.state.nj.us/travel/pdf/2006-07-tourism-ecom-impact.pdf.

42. Public use has evolved from traditional activities such as fishing and navigation to include a broad range of recreational activities, like swimming and sunbathing. Moreover, recreational activities are now an important component of the economic, commercial, and social life of the Jersey Shore (and along many other states' shores). Fishing and navigation are not exhaustive of traditional public uses. *See Neptune City*, 294 A.2d at 54 (holding that doctrine is evolving and flexible). Almost one hundred years ago, the Massachusetts Supreme Judicial Court held that

> it would be too strict a doctrine to hold that the trust for the public, under which the State holds and controls navigable tide waters and the land under them, beyond the line of private ownership, is for navigation alone. It is wider in its scope, and it includes all necessary and proper uses, in the interest of the public.

Home for Aged Women v. Commonwealth, 89 N.E. 124, 129 (Mass. 1909); *see also* Fernandez, *supra* note 15, at 628–29. For a further discussion of the evolution of the meaning of "public use," see *infra* notes 160–163 and accompanying text.

coastal recreational activities include boating, fishing, swimming, surfing, bird-watching, and tanning. Those who engage in these activities buy gasoline, food, and beach-related equipment, and stay in hotels and rental units, contributing significantly to the state's economy.[43] Tourism is also the third-largest private sector employer in the state.[44] The increase in New Jersey's coastal population and development has outpaced the already rapid rate of population growth and development statewide.[45] The proximity of the ocean and other tidal waterways are the predominant reason for the enormous value of waterfront property.

In July of 2005, the New Jersey Supreme Court recognized the impact of these economic and social developments in New Jersey in the context of applying the public trust doctrine to privately owned beaches in *Raleigh Avenue Beach Ass'n v. Atlantis Beach Club, Inc.*[46] In order to better understand the significance of the *Raleigh Avenue* decision, one must first be familiar with the foundational analysis provided in its predecessor, *Matthews v. Bay Head Improvement Ass'n.*

1. Matthews v. Bay Head Improvement Association

In *Matthews*, the New Jersey Supreme Court addressed three issues that have shaped the subsequent development of New Jersey's public trust doctrine.[47] First, the court recognized that the public has limited rights to cross and use privately owned beaches. Second, the court established that the uses of tidal waterways include recreational uses in addition to the traditional fishing and navigation rights. Finally, the court set forth a multi-factor balancing test for analyzing the scope of public rights to a specific dry sand beach:

43. For example, the National Marine Fisheries Service has estimated that recreational saltwater fishing generates hundreds of millions of dollars in expenditures, total economic output, and earnings, and can produce over 16,000 jobs in a given year. *See* Eleanor Bochenek, *New Jersey's Marine Recreational Fisheries*, JERSEY SHORELINE, Mar. 2000, at 19, 20, *available at* http://nsgl.gso.uri.edu/ njmsc/njmsco00001.pdf In California, coastal tourism is estimated to be the "largest 'ocean industry,'" contributing $9.9 billion to the California economy compared to $6 billion for ports, $860 million for offshore oil and gas, and $550 million for fisheries and mariculture combined." Biliana Cicin-Sain & Robert W. Knecht, *Coastal Tourism and Recreation: The Driver of Coastal Development*, *in* TRENDS AND FUTURE CHALLENGES FOR U.S. NATIONAL OCEAN AND COASTAL POLICY 73, 73 (Biliana Cicin-Sain, R.W. Knecht & N. Foster eds., 1995), *available at* http://www.oceanservice.noaa.gov/ websites/retiredsites/ natdia_pdf/12udel.pdf.

44. MCGILL, *supra* note 41, at 21. Total tourism to the state grew by 9.8 percent in 2005, contributing $25.7 billion, or 5.9 percent of gross state product, including $15.2 billion in wages and salaries, 472,000 jobs, and $7.1 billion, or 7.6 percent, of state tax revenue. *Id.* at 22, 25, 38.

45. New Jersey Smart Growth Gateway, Smart Growth Solutions, http://www.smartgrowthgateway.org/local_envir_intro.shtml (last visited Apr. 2, 2007).

46. 879 A.2d 112 (N.J. 2005).

47. Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J. 1984).

> Precisely what privately-owned upland sand area will be available and required to satisfy the public's rights under the public trust doctrine will depend on the circumstances. Location of the dry sand area in relation to the foreshore, extent and availability of publicly-owned upland sand area, nature and extent of the public demand, and usage of the upland sand land by the owner are all factors to be weighed and considered in fixing the contours of the usage of the upper sand.[48]

The beaches in dispute in *Matthews* were privately owned but managed by a private association that provided services similar in type and scale to those provided by Jersey Shore municipalities. The Bay Head Improvement Association had about five thousand members, with association staff serving as lifeguards, maintaining both the association's and the borough's beaches, patrolling the beach, selling beach badges, and controlling entrance to the beach. In addition, the association maintained a close relationship with the Borough of Bay Head. The purpose of the association was to provide residents of the borough with beach access and use, and the borough supported the association through cooperative municipal resolutions, free office space, tax-exempt real estate, free liability insurance coverage, and public funding of beach protection structures. The court found that the association was quasi-public "[w]hen viewed in its totality—its purposes, relationship with the municipality, communal characteristic, activities, and virtual monopoly over the Bay Head beachfront."[49]

Under *Matthews*, the public enjoys the right to traverse quasi-private beach property if reasonably necessary for access to the foreshore and the right to use some of the quasi-privately owned dry sand beach above the high water mark (i.e., above the landward limit of state property). The right to cross the beach includes the rights to cross from the nearest waterward public road or path down to the water's edge ("perpendicular" or "vertical" access) and the rights to cross along the water's edge ("lateral" or "horizontal" access). Perpendicular access involves the public's ability to reach the beach and ocean, often by traversing privately owned upland property. Lateral access includes the right to actually use the dry sand and to walk along the beach parallel to the edge of the ocean.[50] The court explained the importance of perpendicular access in *Matthews*:

> Without some means of access the public rights to use the foreshore would be meaningless. To say that the public trust doctrine entitles

48. *Id.* at 365.

49. *Id.* at 368.

50. *Id.* at 365. These rights are analogous to the common law right to discharge or take on passengers or cargo from an intertidal shore, to bring fish from the shore to the nearest road, or to land a boat on the shore, unload the catch, and dry the nets. *See* Fernandez, *supra* note 15, at 628–29; *see also supra* note 4 and accompanying text.

> the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the public trust doctrine.[51]

Under the balancing test set forth, the extent of required public access across and use of quasi-private beach property depends upon four factors: the location of the dry sand in relation to the foreshore; the extent and availability of publicly owned upland dry sand area; the nature and extent of the public demand; and the usage of the upland dry sand area by the private owner.[52]

The *Matthews* decision repudiated the practice of affluent oceanfront owners gradually adopting various methods to appropriate sections of beach. Those appropriations included exclusive use of the adjacent area of ocean and shore below the mean high water line. Since those areas are publicly owned natural resources under New Jersey law, such practices effectively employ state assets for exclusive private use, at times even for profit-generating activities. Such practices often are self-perpetuating: as word spreads, it becomes common knowledge which beaches are open to the general public and which are restricted to residents of that municipality, to owners of adjacent properties, or to "members only." The conflict surrounds a difference in expectations: the public assumes past unrestricted use means that the beaches are open for access and use by all, while private persons who invested in oceanfront land at a premium price yearn for coastal exclusivity.

2. Raleigh Avenue Beach Ass'n v. Atlantis Beach Club, Inc.

Twenty-one years after *Matthews*, in a fact-sensitive decision, New Jersey's highest court again addressed public access to and use of the coast. In *Raleigh Avenue*, the court held that the public trust doctrine required that an entire beach owned by a private club, from the high tide line to the dunes, must be open to the public for a reasonable fee to be approved by the New Jersey Department of Environmental Protection (NJDEP).[53] The decision stated that allowable beach fees may cover only the actual costs of basic beach services, including lifeguards, trash removal, showers, toilets, and administrative costs.[54] The court also held

51. *Matthews*, 471 A.2d at 364.

52. *Id.* at 365. While the court recognized public rights to use privately owned beaches, the decision focused on the quasi-public nature of the association that operated the beaches due to its nexus with the municipality. Nevertheless, the beaches at issue in *Matthews* were privately owned.

53. Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112 (N.J. 2005).

54. *Id.* at 118. In essence, the court approved a two-tier fee structure: one for members in private facilities and one for the general public in the public area. The private club, Atlantis, may charge whatever the market will bear for use of its private facilities, such as cabanas, umbrellas,

that the area of privately owned dry sand was open to public access and use based on the four *Matthews* factors. Unlike the quasi-public beach association in *Matthews*, the Atlantis Beach Club was an entirely private organization, independent of the municipal government. The court cited the lack of a public beach in the municipality; a state permit issued to the neighboring condominium project that required public access;[55] high demand from hundreds of residents immediately inland of the beach; and the longstanding prior free public use of the beach.[56]

The dissent in *Raleigh Avenue* stated that the public does not need access to the beach area owned by Atlantis Beach Club because it can use the adjacent beach owned by Seapointe Condominiums. However, the dissenting opinion failed to recognize several important differences between the two owners. While the owner of Seapointe retained title to

gazebos, etc., without regulation under the public trust doctrine. Such fees remain subject to other government police power regulations, such as taxation, consumer protection, health and safety laws, and regulation of the sale of alcoholic beverages. However, Atlantis may not appropriate public assets and use them as if they were the private assets of a for-profit entity.

55. Issued under the Coastal Area Facility Review Act, N.J. STAT. ANN. §§ 13:19-1 to -21 (2007).

56. *Raleigh Avenue*, 879 A.2d at 121–24; *see also* Nat'l Ass'n of Homebuilders of the U.S. v. N.J. Dep't of Envtl. Prot., 64 F. Supp. 2d 354, 358–59 (D.N.J. 1999) (holding that title to riparian property under the public trust doctrine is subject to the public's right to use and enjoy property, even if such property is alienated to the private owners through tidelands grants). The public also has certain rights to inland waterways, as the U.S. Supreme Court has extended the public trust doctrine to non-tidal waters that are navigable in fact. *See* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 479 (1988); Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 437 (1892). Since "navigability in fact" is defined by state law, however, public rights to inland waterways vary widely by state. In general, the public has the right to use a body of water if, in its natural state, the public can navigate through the water body in a floating vessel. Public rights in the bed of inland waterways are largely dependent upon the title owner of the submerged land.

In New Jersey, the state owns all surface and ground water, and holds it in trust for the use of the people of the state. *See* Johns-Manville Sales Corp. v. N.J. Water Supply Auth., 511 A.2d 1194, 1195–96 (N.J. Super. Ct. App. Div.1986) Moreover, public use of these waters is consistent with the public trust doctrine absent some state regulatory reason to prohibit access to or use of a particular water course (e.g., closing access to certain potable water reservoirs). All navigable waters within New Jersey and the land beneath them belong to the state, and all members of the community have rights of navigation in those waters. *See* Stevens v. Peterson & Newark R.R. Co., 34 N.J.L. 532, 549 (1870).

This right of navigation, together with the recognition by the *Matthews* court that the public trust doctrine includes recreational uses, supports the right to use a canoe or kayak on any nontidal waterway in New Jersey that is navigable in fact. Recreational users of nontidal waterways can benefit from a familiarity with the scope of public trust rights under the law of their state, and an awareness of, and sensitivity to, the uses of those waterways and their shores by private property owners. In areas where the rights of passage or portage are unclear, formal or informal permission may be advisable, if not necessary. Some recreational groups have obtained easements to formalize and secure the terms of such long-term use. A successful example of this is the Northern Forest Canoe Trail, which follows mostly navigable rivers along traditional Native American routes for 740 miles from Old Forge, New York to Fort Kent, Maine, passing through the states of New York, Vermont, New Hampshire, and Maine, and the province of Quebec. *See* Northern Forest Canoe Trail, http://www.northernforestcanoetrail.org (last visited May 23, 2007).

both the beach and its property landward of the dune line, the predecessors to Atlantis Beach Club had sold off their property landward of the dune line and retained title only to the beach. The owner of Seapointe included both the property landward of the dune line and the beach in its development proposal, with the beach as an ancillary improvement and service to the high-rise residential condominium buildings on the lot to the west of the dune line. Unlike Seapointe, all of Atlantis' structures, other than an unpermitted, illegal gate, were located in the dune or beach area. Seapointe's owner also complied with state regulations that require public access to the waterfront.[57] When the NJDEP issued a permit approving Seapointe's proposal to develop certain beach and dune areas with amenities for the exclusive use of its owners,[58] it required Seapointe to leave the balance of its beach open for public use, including a continuous area of dry sand beach above the mean high water line along the entire length of the seaward side of its property. The NJDEP also placed a limit on the fees that Seapointe could charge the general public for use of that area.[59] Although Atlantis Beach Club was subject to the same regulations, it had attempted to evade them by conducting regulated activities without the required permits, which would have included public access conditions. The appellate division and supreme court, however, found that Atlantis was subject to and must comply with those regulations.

B. New Jersey Public Trust Doctrine Regulations: Public Access to the Waterfront and the Hudson Waterfront Walkway

Expanding on the common law holdings of *Matthews*, New Jersey codified the scope of public rights to use tidal waterways and their shores in two regulations: Public Access to the Waterfront and the Hudson Waterfront Walkway. The NJDEP promulgated those regulations through its Coastal Permit Program Rules and Coastal Management Program (collectively, its Coastal Zone Management Plan,[60] adopted under applicable federal and state statutes).[61] These regulations require expansive public access to waterfront areas.

57. *See* N.J. ADMIN. CODE § 7:7E-8.11(b) (2006); *see also infra* notes 67–73 and accompanying text.

58. Those amenities included a pool, cabanas, and tiki bars.

59. Recently, NJDEP approved Seapointe's application for a modest fee increase based on increased costs of its beach operations.

60. N.J. ADMIN. CODE §§ 7:7, 7E.

61. Coastal Zone Management Act, 16 U.S.C. §§ 1454–1456 (2006) (state program provisions); Coastal Area Facility Review Act, N.J. STAT. ANN. §§ 13:19-1 to -21 (West 2006); *id.* § 12:5-3 (approval requirements for waterfront development).

The Public Access to the Waterfront rule requires broadly defined physical and visual public access to all waterfront areas "to the maximum extent practicable."[62]

> Coastal development adjacent to all coastal waters, including both natural and developed waterfront areas, shall provide permanent perpendicular and linear access to the waterfront to the maximum extent practicable, including both visual and physical access. Development that limits public access and the diversity of the waterfront experiences is discouraged.[63]

Similarly, the Hudson Waterfront Walkway rule requires specific measures for public access to and use of the west shore of the Hudson River,[64] including a paved path thirty feet wide along the entire shore, with paved perpendicular access paths at regular intervals.[65]

The NJDEP published extensive amendments to the Public Access to the Waterfront rule in the November 6, 2006 issue of the *New Jersey Register*.[66] The amended regulation updates and clarifies the public rights of access to and use of tidal waterways and their shores following the *Raleigh Avenue* decision. The proposed rule amendments expressly state that the public has rights to use any tidal waterway and the shores of all tidelands at any time and that the public is entitled to use any open space land acquired, and any beach built or replenished, with public funds. The rule also formalizes the standards for beach fees set forth in *Raleigh Avenue*.

The Hudson Waterfront Walkway rule met regulatory takings law challenges in the judicial system, and there is a strong possibility that the new Public Access to the Waterfront rule will face similar legal action. The next section addresses the intersection of the public trust doctrine and regulatory takings jurisprudence.

C. The Public Trust Doctrine and Regulatory Takings Case Law

Further litigation of the public trust doctrine will likely involve claims of a regulatory taking. Based on the case law discussed in the next section, this Article posits that requiring public access to and use of the shores of tidal waterways is not an unconstitutional taking of property

62. N.J. ADMIN. CODE § 7:7E-8.11(b).

63. *Id.*

64. The entire length of the Hudson River within New Jersey is tidal.

65. *See* Nat'l Ass'n of Home Builders of the U.S. v. New Jersey Dep't of Envtl. Prot., 64 F. Supp. 2d 354, 356 (D.N.J. 1999); *see also* N.J. ADMIN. CODE § 7:7E-3.48 (2006) (referring to Hudson Waterfront Walkway Planning and Design Guidelines, prepared by Wallace Roberts & Todd, Louis Berger & Associates, Inc. & Ralph Hirsh (1984), at 73 ("public access easement for waterfront walkway must have a minimum right-of-way width of thirty feet") (guidelines on file with authors)).

66. Proposed Repeal and New Rule: N.J.A.C. 7:7E-8.11, 38 N.J. Reg. 4570(a) (Nov. 6, 2006).

since these public rights are a background principle of New Jersey state law.[67]

1. New Jersey Public Trust Doctrine as a Defense to Regulatory Taking Claims

In *National Ass'n of Home Builders of the United States v. New Jersey Department of Environmental Protection*,[68] the federal district court in New Jersey upheld the Hudson Waterfront Walkway rule against a challenge by a national trade association that claimed the regulation constituted an unconstitutional regulatory taking of private property without just compensation.[69] The court noted that most of the property at issue was formerly submerged land that had been reclaimed by artificial filling and held that the Walkway rule is a valid exercise of the state's police power to safeguard rights under the public trust doctrine.[70] The court found that the public trust doctrine is part of real property law in New Jersey and that the doctrine protects the public rights at issue. Because those public rights were never conveyed away by the Crown or the state, the court found that they remain subject to public rights of use and enjoyment that cannot be extinguished even with conveyance of title to these tidal waterfront areas.[71] *National Ass'n of Home Builders* is an important recent application of U.S. Supreme Court case law, clarifying that the public trust doctrine is a background common law principle in New Jersey.

2. Relevant U.S. Supreme Court Case Law on Regulatory Takings

The U.S. Supreme Court has ruled that background principles of state law are essential to determining whether an unconstitutional taking

67. For information on constitutional takings by regulation, see Michael C. Blumm & Lucus Ritchie, Lucas's *Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321 (2005); Sean T. Morris, Note, *Taking Stock in the Public Trust Doctrine: Can States Provide for Beach Access without Running Afoul of the Regulatory Takings Jurisprudence?*, 52 CATH. U. L. REV. 1015 (2003).

68. 64 F. Supp. 2d 354, 358–59 (D.N.J. 1999).

69. *Id.* at 359–60.

70. *Id.* at 358, 359 n.2.

71. Contrary to the assertion of at least one commentator, *National Ass'n of Homebuilders* was not simply a regulatory takings case; the public trust doctrine also was essential to its holding. *See* Stephanie Reckord, *Limiting the Expansion of the Public Trust Doctrine in New Jersey: A Way To Protect and Preserve the Rights of Private Ownership*, 36 SETON HALL L. REV. 249, 252 n.28 (2005). Since these public rights were never conveyed, they never entered the chain of title to these properties and therefore could not be lost by their current owners. As the New York Court of Appeals stated with regard to the navigation servitude: "[h]aving never owned the easement, riparian owners cannot complain that this rule works a taking for public use without compensation." Adirondack League Club, Inc. v. Sierra Club, 706 N.E.2d 1192, 1196 (N.Y. 1998).

claim has any validity. The property owner in *Lucas v. South Carolina Coastal Council* challenged a state regulation that prohibited construction in flood-prone dune areas.[72] South Carolina promulgated the rule after the owner purchased the property, in the midst of developed lots, with the apparent expectation to develop it. The *Lucas* Court found that a total deprivation of economically viable use of a property could be a per se taking of property requiring compensation; however, the claimant first must establish that the property interest of which it was allegedly deprived was not prohibited by nuisance law or any other background principle of state property law. For example, since the *National Ass'n of Homebuilders* court found that the public rights upheld by the challenged state regulation were also protected by the public trust doctrine—a background principle of state law—there was no unconstitutional taking of property.

In an earlier case, *Phillips Petroleum Co. v. Mississippi*,[73] the U.S. Supreme Court held that a state's assertion of a public right is not an unconstitutional taking or exaction if the right asserted is recognized under the public trust doctrine of the law of that state.[74] The Court held that the owners of land in Mississippi that is subject to the ebb and flow of the tide could not reasonably expect to hold title to those lands, because Mississippi law consistently held that the public trust doctrine extends to land under tidewater and that the public interest in these lands includes both navigation and nonnavigation activities such as bathing, swimming, recreation, fishing, and mineral development. Accordingly, the Court affirmed the Mississippi Supreme Court's holding that the state's assertion of these public rights was not an unconstitutional taking.[75]

The U.S. Supreme Court has found an unconstitutional taking in other cases involving public access to tidal waterways; however, neither of those cases involved a discussion of the public trust doctrine. In *Nollan v. California Coastal Commission*,[76] the Court found a taking where the state agency required an access route across private property that would provide public access to a beach, purportedly to protect the public view of the ocean, as a condition for a permit to reconstruct the property owner's home. The Court observed:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning

72. 505 U.S. 1003 (1992).
73. 484 U.S. 469 (1988).
74. *Id.* at 475.
75. *Id.* at 484.
76. 483 U.S. 825 (1987).

> their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.[77]

However, the Court did not address two critical points: whether the access route was required by the public trust doctrine under California law and the extent of public access to this beach, if any, without this access route.[78]

In *Kaiser Aetna v. United States*,[79] the Court found a regulatory taking where the U.S. Army Corps of Engineers required public access to a marina that was created from a pond dredged and excavated to connect to a bay. The pond had been separated from the bay by a barrier beach. The Court found that the pond had not been navigable in fact and did not become available for public access simply by the owners' opening the pond to the bay by their own construction activities. Most importantly, the pond was located on property that was private under Hawaii law,[80] as opposed to the formerly tidally filled lands in *National Ass'n of Homebuilders* that were subject to the public trust doctrine under New Jersey law.

D. Confronting Criticisms of the New Jersey Public Trust Doctrine

Application of the public trust doctrine to establish the principle of public access to New Jersey's coastline, particularly in light of the state supreme court's decision in *Raleigh Avenue*, has not been without criticism.[81] However, those commentators' arguments have overlooked several material points of New Jersey law. First, assets protected by the public trust doctrine, including tidal waterways and their shores, were never conveyed into the chain of title to any private landowner in New Jersey. Second, the state *owns* the ocean and, except for limited rights conveyed to private entities in some areas by tidelands grants, it also owns the submerged land up to the mean high water line. Third, the public has a right to use at least some portion of dry sand above the mean high water line. Finally, the public trust doctrine is a common law concept that, like any other common law concept, is inherently flexible and

77. *Id.* at 831.

78. Had California supported its demand for the easement upon the public trust doctrine and the necessity for physical access to the ocean, the condition might not have been deemed an unconstitutional taking under the fact-specific test of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). *See* Morris, *supra* note 67, at 1038–39.

79. 444 U.S. 164 (1979).

80. *Id.* at 165–66.

81. *See, e.g.*, Reckord, *supra* note 71; Kristin A. Scaduto, Note, *The Erosion of Private Property Rights after* Raleigh Ave. Beach Association v. Atlantis Beach Club, 51 VILL. L. REV. 459 (2006).

changes over time.[82] This section addresses these and other common misgivings about *Raleigh Avenue* and the public trust doctrine.

1. Title and Landowner Expectations

The framers of the U.S. Constitution were well aware of the public trust doctrine. It is not retroactive—it predates the Constitution and is part of the common law. An expansive public trust doctrine always has been part of New Jersey law. As early as 1821, in *Arnold v. Mundy*, the New Jersey Supreme Court clearly understood the profound importance of the freedoms guaranteed by the public trust doctrine.[83] Few cases have set forth the letter and spirit of what the public trust doctrine meant to the early United States in more evocative language than *Arnold v. Mundy*, as quoted verbatim at the beginning of this Article.[84]

Several commentators rely on *Lucas* and *Nollan* to allege that a broad view of the public trust doctrine, such as that found in *Raleigh Avenue*, adversely affects the investment-backed expectations of oceanfront property owners.[85] As the real estate market has risen over the past ten years, some private property owners have become increasingly aggressive about closing beaches adjacent to their upland properties and appropriating the adjacent section of beach and ocean as if it were their private property.

Private property owners have no legal right to appropriate any public asset or right for exclusive private use. The public trust doctrine preserves state-owned assets and public rights and precludes any unreasonable expectations that such rights belong to private landowners. An investment is a commitment of capital with some degree of risk in an effort to gain a profitable return; the return often is proportionate to the degree of risk.[86] Prospective oceanfront property owners should know that, as a matter of law, the courts protect public rights of access to and use of the public resources adjacent to oceanfront private properties and

82. *See, e.g.*, Scaduto, *supra* note 81 (failing to report all material facts of record, such as the property owners' regulatory obligations under New Jersey law or litigation history of riparian grant issue). The facts in *Raleigh Avenue* were more involved than these authors have suggested. When examined together, the history of title, the regulatory history of the parcel, and the history of public use of the beach, as well as the *Matthews* factors, supported unrestricted public access.

83. 6 N.J.L. 1 (1821).

84. *Id.* at 92–93; *see also supra* note 2 and accompanying text.

85. *E.g.*, Reckord, *supra* note 71, at 285–88; Scaduto, *supra* note 81, at 463, 494. For a discussion of the New Jersey Supreme Court's decision in *Raleigh Avenue*, see *supra* Section III.A.2.

86. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring); Creppel v. United States, 41 F.3d 627, 632 (Fed. Cir. 1994) ("One who buys with knowledge of a [regulatory] restraint assumes the risk of economic loss. In such a case, the owner presumably paid a discounted price for the property. Compensating him for a 'taking' would confer a windfall.") (citations omitted).

should incorporate this knowledge into any decision to purchase. The investigation of legal encumbrances upon a property is part of standard due diligence in real estate transactions.[87] Therefore it is not reasonable for private investors to justify the appropriation of public assets with claims that they expected to be able to exclude the public from any beach in New Jersey.[88]

2. Balancing Public and Private Rights

Contrary to what one commentator alleges,[89] the New Jersey public trust doctrine decisions, including *Raleigh Avenue*, have balanced public rights with private rights. Understanding *Raleigh Avenue* requires recognizing that waterfront property owners such as the Atlantis Beach Club receive the reciprocal benefit of unrestricted access to and use of public assets, namely, the ocean and the wet sand beach up to the mean high water line. Those public assets add much to the value and enjoyment of the property and make it unique. The New Jersey courts have never denied any private property owner the right to use assets protected by the public trust doctrine, or required a private property owner to pay damages to the public even for longstanding practices that denied the exercise of public trust rights. In *Raleigh Avenue*, Atlantis disturbed that balance of public and private rights. Atlantis went far beyond its own rights by charging its members for access to and use of a public resource, while excluding all nonmembers.

Another commentator presumes incorrectly that landowners who allow perpendicular access across their properties make themselves vulnerable to added liability.[90] In fact, a state statute limits property owners' liability when they are required to provide public access.[91]

Neither will *Raleigh Avenue* lead to overuse of the beach under a "tragedy of the commons" rationale.[92] This has not been New Jersey's experience. The most significant threat to beaches in New Jersey is not their heavy use but the severe long-term erosion and destruction

87. *See, e.g.*, Colleen E. Healy & Mark S. Hacker, Comment, *The Importance of Identifying and Allocating Environmental Liabilities in the Sale or Purchase of Assets*, 10 VILL. ENVTL. L.J. 91 (1999).

88. In his dissent in *Nollan v. California Coastal Commission*, Justice Brennan, a former New Jersey resident and longtime member of the New Jersey judiciary, noted the assumption by the majority "that private landowners in this case possess a reasonable expectation regarding the use of their land that the public has attempted to disrupt." He disagreed, concluding that "the situation is precisely the reverse: it is private landowners who are the interlopers." 483 U.S. 825, 847 (1987) (Brennan, J., dissenting).

89. Reckord, *supra* note 71.

90. Scaduto, *supra* note 81, at 492.

91. Landowner Liability Act, N.J. STAT. ANN. §§ 2A:42A-8, -8.1 (West 2006).

92. Scaduto, *supra* note 81, at 492–93.

associated with major storm events.[93] Such events have already inflicted damage that far exceeds the standard maintenance required by public use of New Jersey's beaches.[94] Furthermore, the presumption that privatization leads to greater protection of the commons is false in this situation. In *Raleigh Avenue*, the neighborhood plaintiffs alleged that the exclusive private beach club, despite its very high fees, was poorly maintained, and they submitted photographs that appeared to support their claim. By contrast, even the free municipal beaches in New Jersey, such as in the nearby Wildwoods, are clean and well maintained. Most municipalities, like the Wildwoods, recognize that their beaches attract the public to their businesses and rental properties, and increase their property values and tax base. Accordingly, the dire predictions by some commentators of overuse and deterioration simply have not come to pass.

E. Application of Other Common Law Principles in Conjunction with the Public Trust Doctrine

At least one commentator has recommended that states should use the common law principles of dedication, prescription, and custom to protect coastal access, rather than the public trust doctrine.[95] That author, however, fails to acknowledge that the public trust doctrine is itself a longstanding common law principle and that each of the alternative common law principles she suggests has its own shortcomings and is unlikely to adequately protect public rights. These other common law theories may complement a claim under the public trust doctrine given the requisite factual support. However, only the public trust doctrine can provide a broadly applicable and long-term solution to public access problems.[96] The following subsections discuss these common law theories

93. *See* New Jersey Coastal Protection Technical Assistance Service, Stevens Institute of Technology, The Establishment, Growth and Evolution of Coastal Dunes in New Jersey and Its Relation to the Present Storm Protection Level Provided by the Dune Field in Ocean City, NJ, Jan. 8, 2007 (on file with authors).

94. Shore protection projects that repair this damage are publicly funded by the state and federal governments, with extensive requirements for public access to and use of all reconstructed areas. The U.S. Army Corps of Engineers' guidance documents, for example, require perpetual easements, public access and use, parking, restrooms, and handicapped access ramps. For general information on New Jersey shore protection projects, see NJDEP Coastal Engineering, Beach Nourishment, http://www.nj.gov/dep/shoreprotection/nourishment.htm (last visited Apr. 14, 2007).

95. Scaduto, *supra* note 81, at 466–68.

96. *See, e.g.*, Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 360 (N.J. 1984). While the court in *Matthews* did not decide whether common law doctrines such as necessity, prescription, dedication, or custom can establish the public's right-of-way from the public streets to the foreshore, it suggested that these principles were of limited utility: "We perceive no need to attempt to apply notions of prescription, dedication, or custom as an alternative to application of the public trust doctrine. Archaic judicial responses are not an answer to a modern social

that, in an appropriate situation, can establish a public right of perpendicular access to the shore.

1. Easement by Necessity

An implied easement by necessity generally arises by operation of law where "an owner of land conveys to another an inner portion thereof, which is entirely surrounded by lands owned by the conveyor."[97] Without the easement, the landlocked parcel has virtually no utility to its owner, who has no access to his land.[98] Such an easement is predicated upon the strong public policy that no land may be made inaccessible and useless, as the conveyee is found to have a right-of-way across the conveyor's land for ingress to, and egress from, the landlocked parcel.[99]

By refusing perpendicular public access, upland property owners can create a barrier to the ocean, in effect appropriating a public asset to their own exclusive use. In essence, a state-owned asset is not so much landlocked as it is effectively "waterlocked" by the private barriers between public streets and the ocean, held in trust for New Jersey citizens yet inaccessible along many portions of the coast.

An easement of necessity arises only when there has been unity of ownership and a subsequent severance of title resulting in the grantor or grantee owning a landlocked, or in this case, waterlocked parcel.[100] The state, the original conveyor of all private oceanfront lots, now finds itself on the opposite side of that transaction—the private landowners have transformed the state's property, the ocean, into the "inner portion," barricaded against public access or use by private lands. Those private landowners may claim entitlement to retain this alleged benefit of an arms-length conveyance.[101] Such a blockade of the ocean likely violates a number of New Jersey laws, regulations, and public policy, and a court could find an implied right-of-way for public ingress and egress to the ocean.[102] In addition, the Atlantic Ocean is not, technically, a waterlocked

problem." *Id.* at 365 (citations omitted). Though these common law theories are broadly similar across states, each is subject to individual state law.

97. Leach v. Anderl, 526 A.2d 1096, 1099 (N.J. Super. Ct. App. Div. 1987) (quoting 3 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 410, at 34-62 to 34-63 (1985 & Supp. 1987)).

98. *See, e.g.*, Ghen v. Piasecki, 410 A.2d 708, 711 (N.J. Super. Ct. App. Div. 1980).

99. *See Leach*, 526 A.2d at 1099; Old Falls, Inc. v. Johnson, 212 A.2d 674, 680 (N.J. Super. Ct. App. Div. 1965).

100. *See* Cale v. Wanamaker, 296 A.2d 329 (N.J. Super. Ct. Ch. Div. 1972); A.J. & J.O. Pilar, Inc. v. Lister Corp., 119 A.2d 472, 479 (N.J. Super. Ct. App. Div. 1956) (declaring burden of proof on easement claimant as clear and convincing evidence).

101. *See* Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 57 (N.J. 1972) (Francis, J. dissenting) ("In my judgment a private owner could legally fence in his entire beach area upland of the mean high water mark, if he was moved to do so.").

102. *But see id.*

parcel because there are some existing perpendicular access points (although many of those are not preserved in perpetuity) whereby the public could reach the upland, albeit in locations that are distant from specific sections of ocean shore or inconvenient for some members of the public.

Even if one could establish an easement by necessity, it would establish fewer public rights than the public trust doctrine, since each has a different goal: the easement by necessity is to prevent inutility of the property, while the public trust doctrine is to ensure adequate public access to and use of the ocean and its shore. Further, implied easements by necessity would need to be litigated on a case-by-case basis and thus can only account for access to small fragments of New Jersey's 128-mile Atlantic coastline.

2. Easement by Prescription

The common law doctrine of prescription is similar to that of adverse possession: an individual who continually uses private property for an extended, uninterrupted period of time when that private property owner has knowledge of such use can acquire a permanent private easement in that area.[103] A *public* prescription lies when there has been adverse, uninterrupted use of a substantially identifiable pathway by a sufficient portion of the public for a considerable amount of time, such that the landowner has notice of such use and that a public easement has been claimed.[104] To interrupt such public use, a landowner must intentionally

103. *See* Cobb v. Davenport, 32 N.J.L. 369, 387 (1867) (internal citations omitted) ("The user must be adverse, and not by sufferance. It must be contrary to the interests of the owner, and under a claim of right against the true owner, and by his acquiescence, he knowing of such use, and not objecting thereto; and the user must be of such a nature as to afford an indication to the owner that a right is claimed against him.").

104. There are significant differences between a public and a private prescriptive easement. First, public prescription can only occur when both ends of the easement lie on publicly owned property. Second, while a private prescriptive easement is limited to the person or persons who continually used the land during the entire prescriptive period and is restricted to the scope of that use by the claimant(s) during the prescriptive period, a public prescriptive easement can be used by the public at large, including those who never used the pathway during the prescriptive period, and the scope of the use is not nearly as limited because it is for general public use. Third, a private landowner might have the ability to negotiate with the holders of a private prescriptive easement, but such negotiations with the state as holder of a public prescriptive easement are much less likely given the duty the state owes equally to all its citizens, creating a more permanent encumbrance on the property. For this reason, courts often have placed a greater burden on those claimants seeking to establish a public prescriptive easement, as opposed to a private one, namely that the claimant must prove that the nature and extent of the use has put the private landowner on notice that the right has been claimed by the general public, and not merely by an individual or group of individuals. Some states do not recognize public prescription, as one court has held that an "unorganized public" cannot garner rights for the whole. *See* William A. Dossett, Concerned Citizens of Brunswick County Taxpayers Ass'n v.

take some overt act in protest of the use, such as an action in ejectment.[105] In *Stallone v. Schiavone-Bonomo Corp.*,[106] the appellate division set forth the modern New Jersey test for public prescription: those passing and re-passing over a piece of private land must use it at random in their position as members of the general public.[107] In most states, including New Jersey, this burden has only been met when the use is analogous to that of a public road or street.[108]

The utility of the doctrine of prescription to establish perpendicular public access to the ocean is limited, for it applies only in locations where the public has already had access for a substantial period of time. Further, it encourages oceanfront landowners to restrict access in an affirmative effort to interrupt adverse use by the public.[109] Another difficulty with public prescription is the presumption of permissiveness, as courts are reluctant to punish "good neighbors" who let the public cross over their land. Public accessibility is often deemed "permissive" under the assumption that landowners, by neither objecting to nor permitting the

Holden Beach Enterprises*: Preserving Beach Access Through Public Prescription*, 70 N.C. L. REV. 1289, 1291 n.22 (1992).

To establish the "substantially identifiable" prong, claimants must prove that members of the general public follow a pathway sufficiently definite to allow a reasonable determination of the claimed easement and to provide notice of said pathway to the landowner. *See Cobb*, 32 N.J.L. at 387–88; Dossett, *supra*, at 1292, 1309 (suggesting precedent of *Concerned Citizens* makes it possible for public to acquire rights of recreational use by prescription). Dossett contends that an argument for public prescription is aided by a landowner's prior consent to maintenance by public authorities, though it is not essential for said easement to exist, and courts have taken varied positions with respect to this contention. *Id.* at 1309. Such pathways are distinguishable from an easement for general profitable activity such as fishing, hunting, or hawking over a large, rather undefined area, as these activities are generally deemed permissive, not adverse, absent some clear claim of right. *See Cobb*, 32 N.J.L. at 389.

105. *See* Ludwig v. Gosline, 465 A.2d 946, 947 (N.J. Sup. Ct. App. Div. 1983).

106. 246 A.2d 754 (N.J. Sup. Ct. App. Div. 1968).

107. *Id.* at 756. In *Stallone*, the pivotal issue was whether or not the petitioner's decedent was killed while on a public highway or a private road.

108. *See* Olsen v. Erie R.R. Co., 124 A. 367, 368 (N.J. 1924); Acken v. Campbell, 342 A.2d 209 (N.J. Super. Ct. App. Div. 1974). The mere fact that the public is not excluded from a pathway across private land is not enough to create a use by prescription. In *Olsen*, the court affirmed a nonsuit against plaintiff whose decedent was killed while walking at a crossing built by a certain company and used only by those doing business with that company. The *Acken* court held that the particular crossing was private and not a public highway since a necessary component of a prescriptive right is use "by the public of the neighborhood." *Acken*, 342 A.2d at 213. The court held that the use of a crossing, either by one individual, employees of the company, or those having business with the company to which the crossing gives access, does not constitute public use because their use was not indiscriminate nor in their capacity as members of the general public, but because of their relationship to particular property owners or users. *Id.* Four states, California, Florida, Oregon, and Texas, have specifically applied this doctrine to the dry sand area adjacent to the oceanic coastline. *See* Gion v. City of Santa Cruz, 465 P.2d 50, 59 (Cal. 1970); City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 75–76 (Fla. 1974); State *ex rel.* Thornton v. Hay, 462 P.2d 671, 676 (Or. 1969); Moody v. White, 593 S.W.2d 372, 377–78 (Tex. Civ. App. 1979).

109. *See* Dossett, *supra* note 104, at 1331 & n.267.

public to traverse private land, have given the public approval to do so.[110] Since the landowner may terminate a potential prescriptive easement by intentionally obstructing it, the public has little ability to control the preservation of public access with this doctrine.

3. Easement by Dedication

The common law doctrine of implied dedication arises when the conduct of the parties manifests an intent on the part of a private landowner to dedicate land to public use and affirmative acceptance by the public of that dedication. This is distinguishable from a public prescription in that it focuses on the intent of the landowner and the public with respect to public uses of a private property, as opposed to the focus in prescription upon the actions of the public on private property and the degree to which those actions manifested an intent to claim a property right that is adverse to the landowner's existing rights.[111] New Jersey courts have defined the term "dedication" as "the permanent devotion of private property to a use that concerns the public in its municipal character."[112]

Since, in the absence of a deed of grant or written or oral declaration, dedication of private lands to public use is a factual question of intent, the New Jersey Supreme Court has stated that courts must determine the "acts or conduct of the dedicator" rather than any presumed intentions.[113] While the government entity assumes certain responsibilities upon acceptance of the right of public use, a dedication is complete and irrevocable as soon as the landowner voluntarily expresses

110. *Id.* at 326–27. In North Carolina, this strong presumption was somewhat dismissed by *Concerned Citizens of Brunswick County Taxpayers Ass'n v. Holden Beach Enterprises*, 404 S.E.2d 677 (N.C. 1991), which expanded the prescription doctrine. Nonetheless, the presumption is still relatively prevalent. At least one commentator suggests that this presumption should be dismissed in its entirety on the oceanfront, as these private landowners certainly know that the public has great expectations to be able to access and use the beach and the ocean, and a presumption of adverse use would foster the public policy of promoting these rights. *Id.* at 1326–33.

111. *See* Velasco v. Goldman Builders, Inc., 225 A.2d 148 (N.J. Super. Ct. App. Div. 1966).

112. *Id.* at 153 (quoting Black v. Cent. R.R. Co., 85 N.J.L. 197, 202 (1913)) ("An implied dedication arises 'from conduct of the dedicator which falls short of an express statement of intent to dedicate but which nevertheless manifests an intent to dedicate land to public use.'" (quoting Roger A. Cunningham & Saul Tischler, *Dedication of Land in New Jersey*, 15 RUTGERS L. REV. 377, 384–85 (1961))).

113. Brookdale Park Homes, Inc. v. Twp. of Bridgewater, 280 A.2d 227, 232–35 (N.J. Super. Ct. Ch. Div. 1971) (quoting Haven Homes v. Raritan Twp., 116 A.2d 25, 28 (1955)) (concluding that plaintiff's predecessors in title voluntarily and unequivocally manifested their intention to dedicate lot in question to public use as playground area, and that such dedication or offer may be accepted or rejected by public authorities at any time in future); *see also id.* at 233 ("The dedication of private lands to public use is essentially a matter of intent. This has long been the law in this State."); Wood v. Hurd, 34 N.J.L. 87 (1869).

an intent to devote the land to public use.[114] The government's ability to accept the dedication continues indefinitely until such time as it rejects or vacates the dedicated lands by official legislative action.[115]

Easements by dedication are similar to implied easements by necessity and prescriptive easements in that both landowner intent to dedicate and public acceptance must be adjudicated on a case-by-case basis. These requirements limit the utility of the doctrine to substantially shape the scope of perpendicular public access along the New Jersey coastline.[116]

4. Easement by Custom

The doctrine of custom holds that a customary use can have the effect of law if operating since "time immemorial" without interruption and as of right, as long as it is certain as to location and reasonable as to use.[117] In New Jersey, rights acquired by the public as a result of customary use must not be for profitable purposes and must be so widely accepted that they are indistinguishable from the law itself.[118] Both the frequency of use and a finding that a wide array of persons exercised that

114. *See Brookdale Park Homes*, 280 A.2d at 232–35; Highway Holding Co. v. Yara Eng'g Corp., 123 A.2d 511, 515 (N.J. 1956) (finding that selling of lands with reference to map upon which lots and streets are delineated constitutes dedication of streets to public, which dedication cannot be revoked except by consent of public entity); Coleman House, Inc. v. City of Asbury Park, 19 A.2d 889, 891 (N.J. Ch. 1941).

115. *See Brookdale Park Homes*, 280 A.2d at 233 ("[T]here is presently no legal time limit within which an acceptance must take place and that a municipal agency may quite frankly take its time in deciding whether to accept or not."). Examples of acceptance have included an attempt to vacate the dedication by local ordinance and a municipality's awareness that taxes were not assessed on a particular piece of property. *See id.* at 234; Currie v. Mayor of Jersey City, 124 A. 153, 154 (N.J. Ch. 1924).

116. *But see* Gion v. City of Santa Cruz, 465 P.2d 50, 59 (Cal. 1970); Seaway Co. v. Attorney Gen. of Tex., 375 S.W.2d 923, 930 (Tex. Civ. App. 1964); Cunningham & Tischler, *supra* note 112.

117. "Custom is unwritten law established by common consent and uniform practice from time immemorial, and is local, having respect to the inhabitants of a particular place or district." Albright v. Cortright, 45 A. 634, 635 (N.J. 1900) (quoting 2 GREENLEAF'S EVIDENCE § 248 (1842–1853)). *See* United States v. St. Thomas Beach Resorts, Inc., 386 F. Supp. 769, 772–73 (D.V.I. 1974), *aff'd*, 529 F.2d 513 (3d Cir. 1975); *In re* Ashford, 440 P.2d 76, 78 (Haw. 1968); State *ex rel.* Thornton v. Hay, 462 P.2d 671, 676 (Or. 1969). Only a right of easement, as opposed to a *profit a prendre* (e.g., for fishing, hunting, etc.), can be claimed by custom. *See* Cobb v. Davenport, 32 N.J.L. 369, 388–89 (1867) ("[T]he witnesses who fished in the pond testify that they did so under a conviction of their right, yet no one claimed a right personal to himself, or other than such as it was thought belonged to the public in general. This evidence tends merely to establish a customary right, in all the inhabitants and frequenters in that locality, to fish in these waters, if a right to fish could be established by proof of custom. But the right of fishing being a *profit a prendre* in another's soil, as distinguished from an easement, cannot be claimed by custom, but must be prescribed for in a *que* estate.").

118. *See Albright*, 45 A. at 635.

specific use are common factors in a court's determination of a customary use under New Jersey law.[119]

The use of New Jersey's tidal shores since "time immemorial" has been well documented, though the nature of use has changed over time.[120] Native Americans inhabited the land at least as early as 11,000 years ago, and relied on fishing for both food and barter. In the late 1400s, upon the first arrival by European settlers via navigation of the ocean, the coast became an arena for transportation and commerce.[121] Today, in addition to its continued commercial uses, New Jersey's coastline serves as an annual summer tourist destination for residents of all corners of the most densely populated state in the nation, as well as for visitors from Boston, New York City, Philadelphia, Washington, D.C., and beyond.

Customary use has the potential to preserve easements for public access to tidal waterways and their shores. Since it is a common law principle, its application would arise from the facts of specific situations which may vary as to their statewide applicability. To achieve broad applicability, this longstanding customary use of the ocean and its beaches could be memorialized in legislation requiring reasonable perpendicular public access to the entire New Jersey coast. Such legislation could also set standards for the locations of access routes. Common law custom alone, however, is not likely to address the scope of allowable uses along those shores. Other states have codified customary use and the other aforementioned common law doctrines of this section, along with the public trust doctrine.[122] The next Part addresses some of

119. *See* Murray v. Pannaci, 53 A. 595, 596 (N.J. Ch. 1902) (acknowledging doctrine of custom in New Jersey, though holding that no local custom exists that confers right upon citizens at large to take sand off beach that results in substantial injury to other property).

120. *See, e.g.*, N.J. Pinelands Comm'n, History, http://www.state.nj.us/pinelands/reserve/hist/ (last visited Apr. 15, 2007).

121. *See* James R. Lee, Trade and Environment Database Case Studies: Mammoths and Ivory Trade, http://www.american.edu/TED/mammoth.htm (last visited May 4, 2007) (citing HUMAN IMPACT ON THE ENVIRONMENT: ANCIENT ROOTS, CURRENT CHALLENGES 21 (Judith E. Jacobsen & John Firor eds., 1992) and Richard Klein, *The Impact of Early People on the Environment: The Case of Large Mammal Extinctions*, *in* HUMAN IMPACT ON THE ENVIRONMENT, *supra*, at 25–26).

122. Recognizing the drawback of case-by-case litigation under the doctrines of public prescription and implied dedication, the Oregon Supreme Court relied on the doctrine of customary use in ruling that the public holds an easement for general recreational and commercial use over the dry sand on all beaches of the state. *See* State *ex rel.* Thornton v. Hay, 462 P.2d 671 (Or. 1969). Soon after, the legislature memorialized that decision in a statute. OR. REV. STAT. § 390.610 (2006). North Carolina followed Oregon's lead, as the state's Division of Coastal Management has taken the position that although state ownership ends at the mean high water line, the public has always enjoyed the right to use the full width and breadth of the state's ocean beaches seaward of the dune line, under the common law theory of customary use since time immemorial. North Carolina's beach ownership statute states, in part:

> The public having made frequent, uninterrupted, and unobstructed use of the full width and breadth of the ocean beaches of this State from time immemorial, this section shall not be construed to impair the right of the people to the customary free

the recent measures taken in various coastal states across the country in the name of the public trust.

IV. A SAMPLING: CONTEMPORARY PUBLIC ACCESS CASE LAW FROM A VARIETY OF COASTAL STATES

While New Jersey has been at the forefront of the evolution of modern public access rights under the public trust doctrine and additional common law principles, numerous other states are in the midst of addressing these important issues along our nation's shores. This Part summarizes a small sampling of current public access issues on a variety of coastal landscapes, from the Atlantic to the Pacific Ocean and from the Great Lakes to the Gulf of Mexico.

A. North Carolina: Recent Decisions Discuss Public Rights to Dry Sand Beach and Access Road

In an October 2005 order, a state appeals court of North Carolina upheld the dismissal of a lawsuit, on sovereign immunity grounds, by a group of Currituck County property owners who claimed the public has no rights to the area of dry sand beach between the high water mark and the vegetation line.[123] Although the title to this land lies with the private oceanfront homeowners, it has long been the position of the state that the area seaward of the beach vegetation line remains open to access and use by the public under the public trust doctrine.[124] As the ruling was procedural and did not address broader questions of state and private property rights in the contested beach terrain, these issues are certain to reach the North Carolina judicial system again soon.[125]

> use and enjoyment of the ocean beaches, which rights remain reserved to the people of this State under the common law and are a part of the common heritage of the State . . . .

N.C. GEN. STAT. § 77-20(d) (2006).

123. Fabrikant v. Currituck County, 621 S.E.2d 19, 29–38 (N.C. Ct. App. 2005); *see also* Stephanie Showalter, Nat'l Sea Grant Law Ctr., North Carolina Court Affirms Dismissal of Challenge to Public Access Rights, http://www.olemiss.edu/orgs/SGLC/National/SandBar/4.4northcarolina.htm (last visited Apr. 20, 2007).

124. *See* N.C. GEN. STAT. § 77-20; North Carolina *ex rel.* Rohrer v. Credle, 369 S.E.2d 825, 828 (N.C. 1988); Joseph J. Kalo, *The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina*, 78 N.C. L. REV. 1869, 1879 n.46 (2000); Christopher City, Private Title, Public Use: Property Rights in North Carolina's Dry-Sand Beach (2001) (unpublished Master's Project, University of North Carolina, Chapel Hill), *available at* http://dcm2.enr.state.nc.us/Facts/dry-sand.pdf; N.C. Dep't of Env't & Natural Res., Div. of Coastal Mgmt., Who Owns the Beach?, http://dcm2.enr.state.nc.us/Facts/beachown.htm (last visited Apr. 16, 2007) (explaining North Carolina's longstanding policy of maintaining accessible and usable beaches).

125. The appellate court affirmed the trial court's finding that the plaintiffs' claims were barred by the sovereign immunity doctrine, which precludes suits against a state government without its consent, thereby rejecting the plaintiffs' argument that sovereign immunity was waived by N.C. GEN. STAT. § 41-10.1. This provision allows actions against the state to quiet title

Another public access battle in Currituck County may move before the state's supreme court. A community association filed suit contending that two roads leading to the beach should be public, contrary to the county commissioners' decision to close the roads, allegedly upon public safety grounds.[126] A jury verdict reversed the commissioners' decision, and North Carolina's appellate division recently affirmed.[127] Currituck County has joined with the county commissioners' association and a homeowners' association in seeking review by the state's high court.[128]

B. Oregon: Statute Preserves Dry Sand Beaches of the Pacific Ocean for Public Use, but Shores of Inland Waterways are in Jeopardy

Under Oregon statutory and common law, the public has the right to use the entire dry sand beach along the state's 362 miles of oceanic coastline.[129] Although Oregon maintains a public easement on dry sand beaches under the statute, a case-by-case analysis is necessary to establish perpendicular access to these beaches under common law principles. In an effort to accumulate permanent perpendicular public access points, the Oregon Department of Land Conservation and Development has adopted "Statewide Planning Goal 17—Coastal Shorelands," which requires that public lands, rights-of-way, and easements that provide

when the state and an individual "asserts a claim of title to the [same] land." The court found this provision inapplicable because none of the defendants had asserted a "claim of title to land." *See Fabrikant*, 621 S.E.2d at 28 ("a 'claim of title to land' requires more than just an interest in real property" asserted under public trust doctrine). To the contrary, North Carolina has acknowledged that oceanfront property owners may hold title seaward to the mean high water line; its position is that the public must have access regardless of title. *See supra* text accompanying notes 123–124.

126. *See* Ocean Hill Joint Venture v. Currituck County Bd. of Comm'rs, 630 S.E.2d 714 (N.C. Ct. App. 2006) (affirming reversal of the commissioners' decision to close roads to public access and use), *appeal dismissed as improvidently allowed*, 641 S.E.2d 302 (N.C. 2007).

127. *Id.* In deciding to close the roads to the public, the commissioners claimed that the lack of parking forces public beach patrons to park on the side of the road, which could impact fire personnel access. *See* Jeffrey S. Hampton, *Roads Dispute Taken to High Court*, VIRGINIAN-PILOT (Norfolk, Va.), Aug. 8, 2006, at Y1. At trial, the commissioners focused on safety issues accompanying the fact that there is only one entrance to and exit from the beach on the street. Witnesses for the plaintiff testified that the street must be public to allow safe access to and from the beach and ocean. The jury determined that closing the roads to the general public was contrary to the public interest. *Ocean Hill*, 630 S.E.2d at 717.

128. *See* Hampton, *supra* note 127.

129. OR. REV. STAT. § 390.610 (2006) (declaring state policy of preserving and maintaining state sovereignty over ocean shore, and declaring in public interest preservation of said shore for recreational use); State *ex rel.* Thornton v. Hay, 462 P.2d 671, 676 (Or. 1969) (finding public rights to entire ocean shore based on custom). Similarly, under Hawaii's Coastal Zone Management Program, the public owns all beaches in Hawaii. *See* Akau v. Olohana Corp., 652 P.2d 1130, 1135 (Haw. 1982) (detailing purpose of coastal zone management program as one to increase public access to oceanfront).

physical or visual access to coastal waters not be sold unless some public access or potential for access across the property is retained.[130]

While Oregon law has preserved public rights of access to and use of its beaches of the Pacific Ocean, access to the state's inland rivers, creeks, and streams has been under recent attack from private landowners.[131] In August of 2005, the Oregon legislature declined to enact Senate Bill 1028,[132] which proposed the institution of a new user fee system including regulations with respect to time, manner, place, and extent of uses. This system would have severely reduced the public's right to use these waterways for river travel and recreation.[133] In addition, the Oregon State Attorney General's Office issued an opinion explaining that even if a waterway is not a "highway of navigation and commerce" under the federal definition of "navigability,"[134] and is thus privately owned, the waterway is still navigable for public use if boats can proceed unimpeded.[135]

C. Michigan: Public Rights to Walk the Shores of the Great Lakes

In July of 2005, the Michigan Supreme Court ruled that the public may walk along the Great Lakes shoreline in the corridor closest to the water below the mean high water line, against opposition from beachfront owners' claims that they own all of the land to the water and could, if they chose, erect a barrier to public access and use.[136] The U.S. Supreme Court denied certiorari, preserving the rights of all citizens to walk along the beaches of Michigan's 3,200 miles of coastline regardless of who owns the land adjacent to the water.[137]

The Michigan Supreme Court found that "walking the lakeshore below the ordinary high water mark . . . is inherent in the exercise of traditionally protected public rights."[138] Despite generally positive and widespread media attention from citizen and environmental

130. *See* Or. Dep't of Land Conservation & Dev., Statewide Planning Goals, http://www.lcd.state.or.us/LCD/goals.shtml (last visited Apr. 16, 2007).

131. *See* Russell Sadler, *This Is Our Land*, BLUEOREGON, May 22, 2005, http://www.blueoregon.com/2005/05/newcomers_to_or.html.

132. S.B. 1028, 73rd Leg. Assem., Reg. Sess. (Or. 2005), *available at* http://www.leg.state.or.us/05reg/measures/sb1000.dir/sb1028.intro.html.

133. *See* Thomas O'Keefe, Am. Whitewater, Public Right to Navigability Upheld (OR), Aug. 30, 2005, http://www.americanwhitewater.org/content/Article/view/articleid/1400/display/full/.

134. For a discussion of the federal definition of "navigability," see *supra* notes 6 & 56.

135. *See* Or. Op. Att'y Gen. No. 8281 (Apr. 21, 2005), *available at* http://www.doj.state.or.us/ releases/pdf/op_8281.pdf.

136. *See* Glass v. Goeckel, 703 N.W.2d 58, 78 (Mich. 2005), *cert. denied*, 126 S. Ct. 1340 (2006) (concluding that public may walk below mean high water line, as private title to defendant's littoral property is subject to public trust).

137. 126 S. Ct. 1340.

138. *See Glass*, 703 N.W.2d at 74.

organizations,[139] this case arguably only maintained the status quo under the public trust doctrine—that is, riparian lands are impressed with the public trust, so the public can walk on the dry and wet sand shore.[140] The Michigan Supreme Court's decision did not address perpendicular public access or what activities, other than walking, might be permitted along the shoreline. However, it did refer in dicta to a "right of passage," which could be interpreted as a right of access to trust lands over private properties.[141] Further, the justices qualified the holding by stating that beach walking remains "subject to regulation."[142] In addition, the beachfront property owners have expressed their intentions to file a takings lawsuit for an alleged diminution of their property rights without just compensation.[143] Clearly, the battle over public rights of access to and use of the Great Lakes in Michigan will continue in the years to come.

D. Texas: Open Beaches Act Maintains Public Rights to the State's Beaches on the Gulf of Mexico

Like North Carolina, Oregon, and New Jersey, Texas recognizes public rights to both wet and dry sand beaches. Texas' Open Beaches Act, adopted in 1959, preserves the public's rights of free access to, and unrestricted use of, all Gulf Coast beaches in the state seaward of the mean high water line and along those areas of dry sand in which the public has acquired a common law right.[144] Under the Act, beachfront

139. *See, e.g.*, Editorial, *Supreme Court's Inactions Saves Lakeshore Access*, JOURNAL TIMES.COM (Racine, Wis.), Feb. 22, 2006, http://journaltimes.com/articles/2006/02/24/opinion/iq_3919440.txt; Editorial, *Walk a Beach: Thanks to U.S. Supreme Court, Sensible Rule Stands*, FREEP.COM (DETROIT FREE PRESS), Feb. 23, 2006, *available at* 2006 WLNR 3121320; John Flesher, *Justices Avoid Beach Fight: Supreme Court Decides Not to Consider Michigan Access Ruling*, SOUTHBENDTRIBUNE.COM, Feb. 23, 2006, www.southbendtribune.com/apps/pbcs.dll/article?AID=/20060223/News01/602230429/CAT=News01 (praising decision allowing horizontal public access along Great Lakes shoreline).

140. *See* Flesher, *supra* note 139.

141. *Glass*, 703 N.W.2d at 74 ("[O]ther courts have recognized a 'right of passage' as protected with their public trust.); *see also* Town of Orange v. Resnick, 109 A. 864, 865 (Conn. 1920) (listing as public rights "fishing, boating, hunting, bathing, taking shellfish, gathering seaweed, cutting sedge and . . . passing and repassing"); Arnold v. Mundy, 6 N.J.L. 1, 12 (1821) (reserving to public use of waters for "purposes of passing and repassing, navigation, fishing, fowling, [and] sustenance").

142. *See* Glass v. Goeckel, 703 N.W.2d 58, 73 (Mich. 2005), *cert. denied*, 126 S. Ct. 1340 (2006).

143. *See* Flesher, *supra* note 139.

144. The Open Beaches Act, TEX. NAT. RES. CODE ANN. §§ 61.011– .026 (Vernon 2006), declares a "public policy of this state that the public, individually and collectively, shall have the free and unrestricted right of ingress and egress to and from the state-owned beaches bordering on the seaward shore of the Gulf of Mexico, or if the public has acquired a right of use or easement to or over such area by prescription, dedication, or has retained a right by virtue of continued right in the public, the public shall have the free and unrestricted right of ingress and egress to the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico." *Id.* § 61.011(a).

properties can become subject to public access and use by virtue of a landward-migrating vegetation line.[145]

The Act makes it an offense for anyone to obstruct the way of ingress and egress or the use of the beaches. The state and coastal municipalities share the responsibility of protecting and enforcing these public rights. Attorneys general of the state, counties, and districts, as well as criminal district attorneys, all have authority to bring suits on behalf of the people of Texas, and it is their duty to do so and to require removal of any obstructions that may interfere with such public rights.[146] Further, cities and counties along the coast must adopt laws to protect the public accessibility of beaches.[147]

Recently, the Open Beaches Act has been assailed by developers and private beachfront homeowners seeking to protect an alleged private property right of exclusivity to the beaches. In the summer of 2006, a plaintiff backed by the Pacific Legal Foundation filed a federal action against government officials charged with enforcing the Act, claiming that the enforcement of the legislation unconstitutionally deprives beachfront property owners of their private property rights without just compensation.[148] Prior to the suit, government officials determined that, due in part to the effects of flooding associated with Hurricanes Katrina and Rita in 2005, certain private homes that were formerly landward of the coastal vegetation line, but now sit seaward of the line, are potentially subject to removal under the Act.[149] This determination followed the state's recent lifting of a two-year moratorium on enforcement of the Open Beaches Act. The moratorium sought to allow beachfront property owners to make repairs to their homes and give natural weather and tidal conditions the opportunity to move the line of vegetation back from the homes. The plaintiff claimed that beachfront homeowners have a fundamental constitutional right to exclude the public from their property, while the state contended that the property is permanently within the public trust lands identified under state statute.[150] On motion, a

145. *Id.*

146. *See* Seaway Co. v. Attorney Gen. of Tex., 375 S.W.2d 923, 925–26 (Tex. Civ. App. 1964).

147. *See* TEX. NAT. RES. CODE ANN. § 61.015 ("Each local government with ordinance authority over construction adjacent to public beaches and each county that contains any area of public beach within its boundaries shall adopt a plan for preserving and enhancing access to and use of public beaches within the jurisdiction of the local government.").

148. *See* First Amended Complaint for Declaratory and Injunctive Relief for Violation of Federal Constitutional Rights, Severance v. Patterson, 2007 WL 1296218 (S.D. Tex. May 2, 2007) (No. H-06-2467), 2006 WL 2515704.

149. *See id.*; Arrington v. Tex. Gen. Land Office, 38 S.W.3d 764 (Tex. App. 2001) (affirming concept of floating easement where public beach has been established under common law principles).

150. Defendants' Joint Rule 12(b)(1),(6) Motion to Dismiss and Brief in Support, *Severance*, 2007 WL 1296218 (No. H-06-2467), 2006 WL 3099390.

federal district court recently dismissed the complaint, holding that the common law migrating easement is constitutional and finding plaintiff's constitutional challenges to Texas' enforcement of the easement unripe.[151]

V. THE FUTURE OF THE PUBLIC TRUST DOCTRINE: IDENTIFYING PROSPECTIVE ISSUES SURROUNDING PUBLIC ACCESS TO AND USE OF NEW JERSEY'S SHORE

Following the *Raleigh Avenue* decision in the summer of 2005, New Jersey has employed a variety of strategies to protect the public trust doctrine. This Part surveys these efforts and concludes with a brief sampling of some of the major public trust doctrine issues that could soon arise in New Jersey.

A. Ongoing Steps in New Jersey to Further Public Access To and Use of the Atlantic Ocean and the Adjacent Dry Sand Beach

In addition to unrestricted use of the ocean, wet sand, and all of the dry sand, waterfront property owners also receive the benefit of public funds. Most, if not all, coastal states expend significant taxpayer dollars each year to preserve and enhance natural resources protected by the public trust doctrine. In New Jersey, this includes replenishing beaches; building jetties, groins, and seawalls; building, operating, and maintaining sewage treatment plants; building and maintaining roads, potable water, and other expensive infrastructure in coastal areas; controlling nonpoint sources of water pollution; monitoring ocean water quality; enforcing laws prohibiting dumping from ships and barges; regulating and enhancing the habitats of fish, migratory birds, and other wildlife; and numerous other activities that enhance the value and enjoyment of tidal waterways, their shores, and the adjoining public and private properties.

The NJDEP, Attorney General's Office, and Public Advocate are each taking action to uphold the state's obligation to protect these resources and ensure public access to and use of them. These actions include litigation, amended regulations, regulatory oversight, investigation, and proposed legislation, some of which is summarized below. These state agencies must constantly remind waterfront property owners that they must share with nonresident taxpayers the reciprocal benefits and burdens of the public's rights to tidal waterways and their shores. As Justice Brennan opined in his dissent in *Nollan v. California Coastal Commission*, it is not reasonable for beachfront property owners to expect that they will be able to exclude the public from crossing their property for access to public trust areas.[152] It is, after all, the resources

151. *Severance*, 2007 WL 1296218, at *7–9.

152. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 847 (1987) (Brennan, J., dissenting).

protected by the public trust doctrine, i.e., the ocean and its shoreline, that provide so much of the value to the privately owned property. As one commentator explained in the context of regulatory taking analysis under the public trust doctrine, "Each person burdened by a harm-prevention regulation is also reciprocally benefited because similarly situated neighbors are also burdened. The lesson for coastal regulation is obvious: coastal landowners may be burdened by reasonable public access exactions; nevertheless, they are reciprocally benefited, both as individual landowners and as beneficiaries of the *jus publicum*."[153]

The ocean is a public resource that provides benefits to all, including free use. No one may take for their exclusive private use any public asset or right protected by the public trust doctrine. Any barrier that denies members of the public their rights of access to and use of public trust property also creates an enclave in which the private property owner claims to have exclusive use of public assets. These public assets include the ocean and its submerged lands up to the mean high water line and the right of the public to use a reasonable area of dry sand above the mean high water line. Arguably the public trust doctrine has increased the value of real estate and coastal development in New Jersey by allowing everyone to walk along and use the entire beach and ocean, irrespective of ownership, not just the small portion an individual happens to own. An important goal of the state's activities is to prevent the private appropriation of these public assets.

1. Private Beach Clubs in the Borough of Sea Bright, Monmouth County, New Jersey

In 1993, the state of New Jersey, the Borough of Sea Bright, and each of the nine private beach clubs in Sea Bright signed identical three-party agreements ("Original Agreements") for a publicly funded beach nourishment and replenishment project. This beach project runs from Sandy Hook to Barnegat Inlet (about forty miles), is for a fifty-year period, and is estimated to cost hundreds of millions of dollars. The Sea Bright portion of the project is approximately four miles long and will cost well over $40 million in public funds over the life of the project, of which at least $29.4 million has been spent since 1995. The nourishment and replenishment of the Sea Bright portion expanded the beach lying seaward of the beach clubs from a narrow strip of dry sand to a dry sand beach extending 250 feet above the mean high water line.

153. Gilbert L. Finnell Jr., *Public Access to Coastal Public Property: Judicial Issues and the Taking Issue*, 67 N.C. L. REV. 627, 679 (1989); *see also* Paul Sarahan, *Wetlands Protection Post-*Lucas*: Implications of the Public Trust Doctrine on Takings Analysis*, 13 VA. ENVTL. L.J. 537, 564 (1994) (arguing that those who purchase property adjacent to public trust lands do so "with, at least, constructive knowledge of the state's interpretation of the public trust doctrine").

The Original Agreements allow only very limited public access to and use of the new beach, which lies partly on the property of each of the beach clubs and of the Borough of Sea Bright. Additionally, the public may only walk along a fifteen-foot-wide strip of dry sand along the water's edge in front of the beach clubs, or fish during non-swimming hours. Under the Original Agreements, the public has no right to stop, sit, or rest on the beach, or to swim, at any point on any of the properties of the beach clubs.

In a complaint filed on September 22, 2006 by the Attorney General and the NJDEP, New Jersey seeks a declaration and reformation of the parties' and the public's rights pursuant to the Original Agreements. The state relies upon legal decisions subsequent to the signing of the agreements that clarify public rights to tidal waterways and their shores in New Jersey.[154] The state contends that the Original Agreements incorporated the public trust doctrine into their terms and that the courts have clarified the public trust doctrine since the signing of the agreements in 1993.[155]

2. Enforcement Action: Ocean Beach and Bay Club III, Dover Township, Ocean County, New Jersey

In August of 2005, the NJDEP fined Ocean Beach and Bay Club III of Dover Township $12,500 for refusing to allow public access to the beach area adjacent to its property. Under a Coastal Area Facility Review Act Permit issued by the NJDEP, the club is required to allow public access to the beach, subject to a reasonable fee to be used solely for basic beach operating expenses such as lifeguards, trash removal, and bathroom facilities.[156]

More than a quarter of the beaches along the 128-mile New Jersey oceanic coastline are still controlled by private owners, many of whom continue to resist public access. As discussed above in the context of the Sea Bright litigation, some of those resisting owners have benefited from multi-million dollar, publicly funded projects that substantially restored severely eroded beaches. While more enforcement efforts are needed to

154. Complaint, Rabner v. D. Lobi Enters., Inc., No. MON-C-296-06 (N.J. Super. Ct. Ch. Div. filed Sept. 22, 2006). Those decisions include *National Ass'n of Homebuilders of the United States v. New Jersey Department of Environmental Protection*, 64 F. Supp. 2d 354 (D.N.J. 1999), *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 879 A.2d 112 (N.J. 2005), and *City of Long Branch v. Liu*, 833 A.2d 106 (N.J. Super. Ct. Law Div. 2003) (holding that a publicly funded replenished beach, at least in the absence of a state tidelands conveyance, did not belong to beachfront property owners because the "new beach" resulted from avulsion, not accretion).

155. Complaint, *supra* note 154.

156. The NJDEP takes steps to minimize the environmental impacts of public access pathways, for example, by prohibiting access across coastal dunes, strictly regulating beach driving, protecting fertile nesting sites, and installing signage at designated access ways.

re-open these beaches to the public, the resources to enforce these public rights are finite.

3. Acquisition and Green Acres Program

NJDEP's Green Acres program purchases available lands for preservation as part of the state's system of park, forest, wildlife management, and naturally preserved areas. In September of 2005, for example, Green Acres and Ocean Township agreed to purchase nine acres in Waretown, preserving one thousand feet of publicly accessible waterfront area on Barnegat Bay.[157]

B. Anticipated Future Public Trust Doctrine Issues in New Jersey

This Article argues that continued litigation over perpendicular and lateral access to New Jersey's beaches, as well as clarification of the modern definition of "public use," will arise in the near future.

1. Issues for Potential Judicial Determination

It is difficult to predict how many lawsuits will occur as a result of the *Raleigh Avenue* decision, though issues remain in several categories. Some property owners want substantial payments from the state for shore protection projects, which may lead to litigation to obtain easements for project construction and perpetual public access.[158] Applicants receiving permits containing public access conditions may file administrative appeals of these conditions. In addition, when owners should have applied for permits but failed to do so, they are likely to face enforcement actions. Moreover, regulated activities for which the NJDEP issued a permit but neglected to include public access conditions may lead to litigation regarding the state's duty as trustee. Further, courts could also be employed to address properties on which there is no regulated activity but there is inadequate public access or use availability. Finally,

157. The state of Florida has a similar program. *See* Florida Preservation 2000 Act, FLA. STAT. § 259.101 (2006).

158. There are at least two ongoing lawsuits involving these issues in New Jersey. *See* Petrozzi v. Ocean City, No. CPM-L-218-05 (N.J. Super. Ct. Law Div. filed May 2, 2005); New Jersey v. Ginaldi, No. C-264-06 (N.J. Super. Ct. Ch. Div. filed Nov. 14, 2006). Global warming also affects the calculus of publicly funded hazard mitigation and protection projects; rising sea levels and more frequent and violent storms will cause more coastal erosion and damage leading to increased demands for protection and further deterioration of recreational beaches available for human use. Factors related to climate change and shore protective measures have imposed economic and environmental costs while sharpening the competition for public access to and use of finite, threatened coastal resources that are beyond the scope of this Article.

the state may face an appellate division challenge to its recently updated regulations that require public access to the waterfront.[159]

2. What Will "Public Use" Mean in the Future?

During the reign of King John in England, public use in the context of the public trust doctrine meant that people could walk the shores, fish, or gather shellfish as the tide rolled out.[160] However, some of these seemingly obvious and non-intrusive uses are often restricted along New Jersey's shore. In the past, "use" involved landing one's boat, drying one's nets, and traveling to the nearest road to bring the catch to market. Public use of New Jersey's ocean and beaches has evolved—but does it just mean the public can put down a blanket and lie on the sand? Today, people certainly cannot land their boats at will, and are unlikely to be allowed to freely dry their nets. What about eating on the beach? Or running? Or playing ball? Or fishing? What about swimming, bodyboarding, kayaking, or surfing?[161] A sign in the Borough of Deal, New Jersey says: "Unprotected Beach: No Swimming/Bathing, Alcohol or Pets," despite the fact that the Borough considers this beach accessible for public use. In addition, as of the fall of 2006, there is only two-hour parking with limited spaces on the street and dangerous concrete and garbage on the way down the stair-less hill to the dry sand.[162] Another sign, in Ocean City, New Jersey, states: "Beach Tags Required. . . . Persons Not Permitted on Beaches 10 p.m. to 6 a.m. . . . No Bicycles on Boardwalk 12 noon to 5 a.m. . . . Prohibited on Beach or Boardwalk: Dogs, Picnicking, Alcoholic Beverages, Open Fires, Loud Music, Ball Throwing, and Skateboards. Ordinance 87-17." Private oceanfront landowners in oceanfront towns like Deal and Ocean City fear that an expansion of the definition of "public use" will lead to more cars and crowds in their now-exclusive neighborhoods.[163] These current limitations

159. *See* Proposed Repeal and New Law: N.J.A.C. 7:7E-8.11 and Proposed New Rules: N.J.A.C. 7:7E-3.50 and 8A, 38 N.J. Reg. 4570(a) (Nov. 6, 2006) (Public Trust Rights Rule and Lands and Waters Subject to Public Trust Rights).

160. *See supra* notes 2, 49 & 57 and accompanying text.

161. For example, several courts have upheld local ordinances prohibiting or restricting surfing against free speech, freedom of expression, equal protection, and due process challenges. *See* MacDonald v. Newsome, 437 F. Supp. 796 (E.D.N.C. 1977); State v. Zetterberg, 244 A.2d 188 (N.H. 1968); People v. McGuire, 313 N.Y.S.2d 56 (N.Y. Long Beach City Ct. 1970). *But see* Carter v. Town of Palm Beach, 237 So. 2d 130 (Fla. 1970) (holding that complete prohibition on surfing at all Palm Beach beach areas was unreasonable).

162. *See* Alexander Lane, *In Deal, An All-Too-Public Quarrel*, STAR-LEDGER (Newark, N.J.), Sept. 2, 2006, at 1.

163. *Id.* (citing resident complaints of loud music, crowds of cars, and surfers changing into their wetsuits). Indeed, the complaints of the waterfront owners in the *Glass* case in Michigan apparently went far beyond simply public strolling along the lakefront. Private landowners along Michigan's shoreline have indicated they have had to chase people away who were riding on horseback and all-terrain vehicles, and fear that the government will now control all that goes on

in some towns beg a new question: what is the value of perpendicular public access to New Jersey's coastline, for which this Article advocates, if the public cannot enjoy themselves when they get there?

in the lakefront area that is flowed by the tide. *See* Flesher, *supra* note 139. Similar complaints regarding the fear of government control over all waterfront activities have arisen in New Jersey, though none have been substantiated to date. For a discussion of the more substantial fear of damage and erosion associated with coastal storms, and New Jersey's efforts to protect against these effects, see *supra* note 94 and accompanying text.