University of Baltimore Law Review

Volume 5
Issue 2 *Spring 1976*

Article 8

1976

Recent Developments: Property—Coastal Shores—Private Property Rights Upheld over Claimed Public Right to Recreational Use of Beach—Implied Dedication, Easement by Prescription, Public Trust through Custom and Grant, and Doctrine of Submergence Not Applicable. Department of Natural Resources v. Mayor and Council of Ocean City, 274 Md. 1, 332 A.2d 630 (1975)

James J. Nolan Jr.
University of Baltimore School of Law

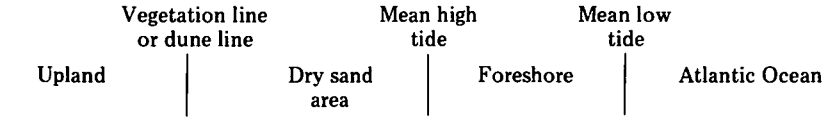
RECENT DEVELOPMENTS

PROPERTY—COASTAL SHORES—PRIVATE PROPERTY RIGHTS UPHELD OVER CLAIMED PUBLIC RIGHT TO RECREATIONAL USE OF BEACH—IMPLIED DEDICATION, EASEMENT BY PRESCRIPTION, PUBLIC TRUST THROUGH CUSTOM AND GRANT, AND DOCTRINE OF SUBMERGENCE NOT APPLICABLE. *DEPARTMENT OF NATURAL RESOURCES V. MAYOR AND COUNCIL OF OCEAN CITY*, 274 Md. 1, 332 A.2d 630 (1975).

Faced for the first time with the question of the rights of private property owners versus the public in the dry sand portion of Ocean City's beaches, the Maryland Court of Appeals resolved recent companion cases[1] in favor of private property rights. Although the trend of modern decisions has been to employ legal doctrines supportive of public recreational rights,[2] a majority of the court of appeals could find no factual or doctrinal basis for protecting the public's recreational use of Maryland's coastal shores.

In *DNR v. Ocean City*, the court upheld the right of a developer to construct a four-story condominium on the dry sand portion of the beach[3] at 71st Street in Ocean City, Maryland. In *DNR v. Cropper*, the

1. Department of Natural Resources v. Mayor & Council of Ocean City, 274 Md. 1, 332 A.2d 630 (1975) [hereinafter cited as *DNR v. Ocean City*]; Department of Natural Resources v. Cropper, 274 Md. 25, 332 A.2d 644 (1975) [hereinafter cited as *DNR v. Cropper*].
2. 5 R. POWELL, THE LAW OF REAL PROPERTY ¶ 723.2[1], at 412.21 (1974) [hereinafter cited as 5 POWELL].
3. The disputed dry sand portion of the beach consists of the area between the mean high tide line and the vegetation line. To aid the understanding of special terminology used in shoreline litigation, a diagram and a list of definitions are set forth below. Legal opinions do not always apply these terms consistently or with scientific accuracy. Here, an attempt has been made to represent the generally accepted meaning of the words as they logically apply to the unique physical characteristics of Maryland's coastal shore.



(a) The *beach* is the area between the ocean and the upland. A beach consists of two main areas, the foreshore and the dry sand area. 5 POWELL, *supra* note 2, ¶ 723.2[1], at 412.22. The beach is sometimes more narrowly defined as the tidelands, the area where the tide flows and reflows. *See* 2 A. SHALOWITZ, SHORE AND SEA BOUNDARIES 612 (1964).

(b) The *foreshore* is the strip of land between the low and high water marks which is alternately covered and uncovered by the flow of the tide. *Id.* at 565. "Shore," "sea-shore" and "beach" are often used to describe the same area as the foreshore.

(c) The *dry sand portion* of the beach consists of the area between the mean high tide line and the vegetation line. 5 POWELL, *supra* note 2, ¶ 723.2[1], at 412.22 n.10.

(d) The *vegetation line* is the extreme seaward boundary of the natural vegetation that spreads continuously inland. It marks the border between the dry sand beach and the adjoining upland. Note, *Public Access to Beaches*, 22 STAN. L. REV. 564, 565 n.9 (1970).

court likewise sustained the right of a landowner to erect a house on the dry sand portion of the beach at 136th Street. In both cases the court rejected arguments that sought judicial enforcement of the public's right to use the dry sand area of the beach.

Combined with the severe beach erosion[4] and the increased commercial development[5] that have taken place in Ocean City, judicial reluctance to acknowledge this public right places the recreational use of Ocean City's beaches in jeopardy. Aware of this threat, the General Assembly has enacted legislation that prohibits construction activity on much of Ocean City's shore.[6] There is, nevertheless, considerable doubt that this legislation will protect all of Ocean City's beaches from further encroachment by developers.[7]

Because the facts of the two cases do not differ significantly, and because the legal issues in both are the same, a complete development of *DNR v. Ocean City* will facilitate a discussion of the problem of public rights in Ocean City's beaches, an analysis of the court of appeals' treatment of the problem, and a brief examination of the legislature's response.

THE FACTUAL SITUATION

On February 7, 1972, E. T. Park, Inc. (Park) filed a Petition for Injunction in the Circuit Court for Worcester County to enjoin the

---

In Ocean City, the vegetation line is practically identical with the dune line. Janney, *Recreational Beaches: The Right to a Scarce Resource*, 3 U. Md. L. J. 121, 133 n.7 (1973).

(e) The *dune line* is the highest point of the primary dune. Since 1962, the dune line in Ocean City is more easily identified as a result of reconstruction efforts by the Army Corps of Engineers, and, as previously noted, generally coincides with the vegetation line. *Id.*

(f) The *upland* is the area adjacent to the beach. It extends landward from the vegetation line, dune line, or other natural boundary of the dry sand beach. Note, *Public Access to Beaches*, 22 Stan. L. Rev. 564, 565 n.5 (1970).

(g) The *mean high tide line* represents the average height of high tidal water on the shore over a considerable period of time. *Id.* at 565 n.8.

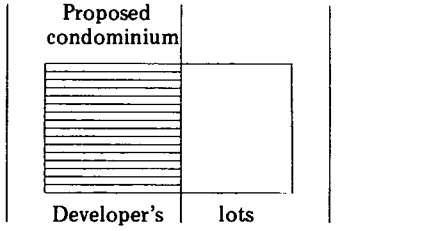
(h) The *mean low tide line* represents the average height of low tidal water on the shore over a considerable period of time. *See* 2 A. Shalowitz, Shore and Sea Boundaries 581 (1964).

(i) *Littoral* means belonging to the shore, as of seas and great lakes. Black's Law Dictionary 1083 (rev. 4th ed. 1968). Although the word "riparian" means of or belonging to the bank of a river, the term is frequently employed in situations involving the shores of a sea or lake. Despite such commonly accepted usage, it is more accurate to use the term "littoral" when discussing land which abuts a sea or lake. *See* 78 Am. Jur. 2d *Waters* § 260 (1975).

4. The beach at 71st Street has been subjected to a process of erosion since 1929. 274 Md. at 4, 332 A.2d at 632. For supporting statistical data, *see* notes 38-41 *infra* and accompanying text.
5. *See* Janney, *Recreational Beaches: The Right to a Scarce Resource*, 3 U. Md. L.J. 121 (1973) [hereinafter cited as Janney].
6. Law of April 1, 1975, ch. 91, [1975] Laws of Md. 757, *amending* Md. Ann. Code, Nat. Res. Art., § 8-1101 (1974) (codified at Md. Ann. Code, Nat. Res. Art., § 8-1101 (Supp. 1975)), and *enacting* Md. Ann. Code, Nat. Res. Art., § 8-1105.1 (Supp. 1975).
7. *See* notes 135-42 *infra* and accompanying text.

construction of a four-story condominium on two oceanfront lots located at 71st Street in Ocean City, Maryland, and owned by 71st Street, Inc. (the developer).[8] Park, corporate owner of land situated behind and inland from the oceanfront lots owned by the developer, contended that it, along with the public, had acquired an easement for use as a public beach of the area between the mean low water mark on the east and the line of vegetation on the west.[9] Park alleged that the proposed condominium, with its eastern front abutting the Ocean City building limit line,[10] would be almost entirely east of the dune line, which in this case is identical to the line of vegetation.[11] Park contended, moreover, that the building limit line virtually eliminated portions of the public beach, because the wave wash at normal high tide extended beyond the building limit line, thereby leaving no dry sand beach for use by the public.[12] The State of Maryland through its Department of Natural Resources was permitted on petition to

8. Park filed its petition against the Mayor and City Council of Ocean City, Brady Bounds (building inspector for Ocean City), 71st Street, Inc. (the developer), and George Bert Cropper (the developer's builder). Park's petition sought to enjoin both the issuance of a building permit and any construction in the disputed area. Joint Record Extract, vol. 1, at 4, Department of Natural Resources v. Mayor & Council of Ocean City, 274 Md. 1, 332 A.2d 630 (1975). Below is a diagram showing the approximate position of the proposed condominium in relation to the dune line, the Ocean City building limit line (*see* note 10 *infra*), and the mean high water mark. Note that the eastern edge of the proposed condominium coincides with the Ocean City building limit line.



Reference to the diagram at note 3 *supra* will illustrate the encroachment of the proposed structure on the dry sand portion of the beach.

9. 274 Md. at 3, 332 A.2d at 632.
10. On April 19, 1971, the Mayor and Council of Ocean City adopted an ordinance establishing an oceanfront building limit line and prohibiting construction east of that line. *See* OCEAN CITY, MD., CODE ch. 36, §§ 36-1 to 36-5 (1975). The line was delineated
> through common sense of looking where the ocean was at the present time, how far it appeared that the high tide washed toward the dune line, and taking buildings that were built in different areas, and trying to strike a line that a surveyor could set down on a city map, and the Council taking the position that this is as far as we want a building out, I think that is the way it was struck.

Joint Record Extract, vol. 1, at 142-43 (testimony of Roland E. Powell, City Councilman). In its Petition for Injunction, Park alleged that the building limit line did not adequately protect the public beach, because the line ran so close to the mean high water mark that it dissected the public beach in the area between 70th and 71st Streets. Joint Record Extract, vol. 1, at 2-3.

11. *See* note 3(d) *supra*.
12. 274 Md. at 3, 332 A.2d at 632; Joint Record Extract, vol. 1, at 2-3.

intervene as a party plaintiff.[13] On April 23, 1974, the Circuit Court for Worcester County issued a decree denying the requested injunctive relief. The State and Park appealed to the Maryland Court of Special Appeals, and, on motion of petitioners, the Maryland Court of Appeals granted certiorari.

In a six-to-one opinion, with Judge Eldridge dissenting, the court of appeals affirmed the lower court decree, rejecting the theories by which petitioners sought to establish a right of public use in the dry sand beach. The court held 1) that there had been neither an express nor an implied dedication of any area within the developer's lot line, 2) that the facts failed to establish that the public had obtained an easement by prescription, 3) that, under the facts, neither custom nor grant could support a public right which would deny to the owner a use permitted by law and local regulation, and 4) that title to the oceanfront lots did not revert to the State as a result of temporary flooding in 1962.[14]

In reaching its conclusion, the court briefly reviewed the history of the lots in question, but, as noted in the dissent, failed "to give sufficient weight to the exceptional nature of the ocean beach, the

13. Permission was granted pursuant to Md. R.P. 208 b 2 by reason of the Department of Natural Resources' authority to regulate activity affecting wetlands (Md. Ann. Code, Nat. Res. Art., § 9-101 *et seq.* (1974)) and its duty to safeguard the natural resources of the State.

14. In *DNR v. Cropper*, the state advanced, and the Court of Appeals rejected, the same arguments that were presented in *DNR v. Ocean City*. *DNR v. Cropper* resulted from an attempt by the Department of Natural Resources to enjoin George Bert Cropper from constructing a house on his oceanfront lot at 136th Street in Ocean City. As in *DNR v. Ocean City*, the proposed structure was within the owner's lot lines and conformed with the Ocean City building limit line, but again the proposed building was almost entirely east of the dune line constructed after the storm of 1962. As a result of erosion, the beach at 136th Street had been narrowed to the point that the mean high water mark was within Mr. Cropper's eastern lot line. The State contended, therefore, that allowing construction of the house beyond the dune line would interfere with public use of the beach.

The Court of Appeals relied on its holdings in *DNR v. Ocean City* to dispose of the State's arguments based on the doctrines of public trust and submergence. With respect to the State's claim that the area within the owner's lot lines had been dedicated to public use, the Court of Appeals sustained the findings of the lower court that there had been no proof of an intention to dedicate any of Mr. Cropper's property. The majority opinion noted that the original plats covering the disputed area had designated the area adjacent to the eastern lot lines as a paper street and as a beach. However, the court found it unnecessary to rule on the legal effect of the original plats, because the area designated as a street or beach had been subsequently covered by water. With respect to the claimed public right of use based on a prescriptive easement, the court pointed out that prior to 1962 the dune line was forty feet east of its present location. The Court of Appeals again relying on the lower court's findings, concluded that there was no competent evidence of a continuous and uninterrupted use by the public of the area between the dune line and mean high water for the requisite twenty year period. Therefore, the public had not acquired a right to use that area through prescription. As in *DNR v. Ocean City*, the majority opinion characterized the State's effort to protect the public's use of the disputed area as an infringement on an owner's right to make an otherwise lawful use of his property. Judge Eldridge dissented for the same reasons as expressed in *DNR v. Ocean City*.

various circumstances surrounding its use, and the historic and compelling public interest in the ocean beach."[15] In order to evaluate the efficacy of the majority's holding within the context of these unique factors, a discussion of relevant scientific and historical considerations precedes further analysis of the majority opinion.

SCIENTIFIC CONSIDERATIONS

Ocean City is located on Fenwick Island, one of a system of barrier islands[16] stretching from New England to Florida.[17] In general terms, barrier islands are formed by the deposition of sand generated by offshore wave action, and are nourished by wind action and sand drift.[18]

Starting at the water and moving inland, the visible configuration of a barrier island consists of the foreshore, the dry sand area, dunes, and upland.[19] In addition to aesthetic and recreational advantages, this arrangement provides storm protection for the area beyond the dunes. The beach, as the primary means of protection, acts to dissipate the energy of waves, while the dunes offer a secondary line of defense for landward structures.[20] Clearly, the preservation of these natural barriers is necessary for man's continued enjoyment of Fenwick Island.

There are, however, a number of factors that threaten the existence of this natural system. The most obvious danger is storm activity in the form of hurricanes and northeasters.[21] Erosion has also occurred at an alarming rate.[22] There is, moreover, evidence that indicates that the island in its natural state would tend to migrate, that is, it would move toward and eventually merge with the mainland.[23] Finally, a continuing rise in sea level signals further infringement by the sea upon present shoreline areas.[24]

---

15. 274 Md. at 15, 332 A.2d at 639 (Eldridge, J., dissenting).
16. A barrier island is an
    > [e]longate island formed as a result of wave processes. Examples typically parallel the coast, are commonly separated from the nearby mainland by a lagoon or bay. Surplus sand may accumulate in dunes to the rear of an outer beach. In places these dunes may be breached by wave overwash, which transplants sand toward the lagoon to accumulate as a barrier flat. R. RUSSELL, GLOSSARY OF TERMS USED IN FLUVIAL, DELTAIC, AND COASTAL MORPHOLOGY AND PROCESSES 7 (Louisiana State Univ. Studies, Coastal Studies Series No. 23, 1969).
17. 274 Md. at 4, 332 A.2d at 632. *See* Janney, *supra* note 5, at 121-22.
18. For a more detailed discussion of the process, *see* Janney, *supra* note 5, at 122.
19. *See* diagram at note 3 *supra*.
20. Joint Record Extract, vol. 1, at 188 (testimony of Turbid H. Slaughter, Geologist, Maryland Geological Survey).
21. *See* Janney, *supra* note 5, at 123 and notes 40-42 *infra* and accompanying text.
22. *See* notes 38-41 *infra* and accompanying text.
23. Joint Record Extract, vol. 1, at 167-70 (testimony of Turbid H. Slaughter). Man-made structures and pilings driven into the sand serve to prevent the migration of Fenwick Island, but at the same time may be causing beach erosion. Janney, *supra* note 5, at 122.
24. *See* Joint Record Extract, vol. 1, at 167; Hicks, *On the Classification and Trends of Long Period Sea Level Series*, 40 SHORE AND BEACH 20 (1972).

Viewed together, these factors pose a serious threat to Fenwick Island. Encroachments by man, such as that proposed by the developer in *DNR v. Ocean City*, increase the danger, not only to public recreational rights, but also to the integrity and stability of the beaches and dunes themselves.[25] The particular history of the 71st Street area demonstrates the nature and extent of the problem.

HISTORICAL CONSIDERATIONS

A system of barrier islands has existed seaward of the Delaware-Maryland mainland for at least the past 4500 to 5000 years.[26] Notwithstanding the appropriation of land from Native Americans,[27] the legal ownership of Fenwick Island, and of all land in Maryland, is recognized as having begun with the Charter of Maryland in 1632.[28] In his proprietary grant to Cecil Calvert, Charles I included all the islands within 34.5 miles of Maryland's easternmost shore.[29] The grant was

25. *See* Janney, *supra* note 5, at 123; Joint Record Extract, vol. 2, at 203-04 (testimony of Robert W. Linder, Civil Engineer, Army Corps of Engineers), 288-91, 295 (testimony of Marshall T. Augustine, Sedimentation Specialist, Maryland Department of Water Resources).
26. NATURAL RESOURCES INSTITUTE, UNIV. OF MD., CONTRIBUTION NO. 446, ASSATEAGUE ECOLOGICAL STUDIES, FINAL REPORT PART I, ENVIRONMENTAL INFORMATION 18 (Oct. 1970).
27. European nations acquired title to lands on the American continent by reason of discovery and conquest, a judicially recognized "rationalization of the way things were and supposedly had to be." Note, *Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial*, 75 COLUM. L. REV. 655, 659 (1975). In an early case, the Supreme Court of the United States recognized that discovery gave title to the European nations by whose subjects, or under whose authority, land was first discovered. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 573 (1823). A review of history led Mr. Chief Justice Marshall to the following conclusion:

> Thus, all the Nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians.

Id at 584.

One authority reports that the Assateague Indians originally inhabited the land bordering the Atlantic Ocean in present-day Worcester County. The Assateagues occupied a larger town on a tract of land near Berlin, Maryland. C. A. Weslager, *Indians of the Eastern Shore of Maryland and Virginia*, in 1 THE EASTERN SHORE OF MARYLAND AND VIRGINIA 47 (C. B. Clark ed. 1950).

28. *See* Kerpelman v. Board of Pub. Works, 261 Md. 436, 445, 276 A.2d 56, 61 (1971). The Charter of Maryland is set forth in 1 THE LAWS OF MARYLAND 1 (rev. by V. Maxcy 1811). Sir George Calvert explored the upper portions of the Chesapeake Bay and on his return to England petitioned the King to grant him lands for the establishment of a colony. Due to Sir George's death, the Charter was issued to his son, Caecilius Calvert, Lord Baltimore. The Charter remained in force until the Revolution of 1776. 3 F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS 1669 n.(a) (1909).
29. The grant was termed to include all islands within ten marine leagues of Maryland's easternmost shore. 1 THE LAWS OF MARYLAND 2 (rev. by V. Maxcy 1811).

subject to a reservation of rights similar to that found in Roman law,[30] under which the shores were common to all men.[31]

Following the American Revolution, the State of Maryland acquired all vacant and unowned land within its borders by virtue of its sovereignty.[32] Subsequent conveyances were by legislative act or by state patent pursuant to legislative authority.[33] Beginning in 1869, the state issued a series of patents covering Fenwick Island; the 71st Street area was included in 1883.[34] These patents granted ownership of the land up to the Atlantic Ocean.[35]

As the development of Ocean City proceeded, landowners subdivided large tracts of land and prepared plats delineating lot lines and streets. According to the recorded plats covering the 71st Street area, landowners offered to dedicate to the public, as a beach or boardwalk, land east of their lot lines.[36] Ocean City accepted these offers, thereby completing a dedication of the area designated as beach or boardwalk.[37] It is likely that this dedication would have satisfied public recreational demands, but a continuing process of erosion has reduced the beach areas dedicated to public use. From 1929 to 1947 erosion narrowed the beach at 71st Street by 270 feet;[38] from 1947 to 1965 the beach lost an additional 25 feet to erosion.[39] In 1962 a severe

30. 274 Md. at 11-12, 332 A.2d at 637. *See* note 62 *infra* and accompanying text.
31. *See* INSTITUTES 2.1.1; T. SANDARS, THE INSTITUTES OF JUSTINIAN 90-92 (1922). One authority briefly summarizes the scope of rights under Roman Law as follows:
> *Res communes* were things whereof no one was owner, and that all men might use. Such were the air, running water, the sea, and the seashore. The seashore extended to the highest point reached by the waves in winter storms. The right of fishing in the sea belonged to all men. Any one could haul up his nets on the shore, or spread them out to dry, or build a hut for himself. So long as the structure existed it was private property; but when it fell into ruins the soil again became common. Every one had the right to prevent construction on the shore that would interfere with his access to the sea or the beach; . . . W. HUNTER, INTRODUCTION TO ROMAN LAW 65 (F. Lawson ed. 1934).

See also Note, *State Citizen Rights Respecting Greatwater Resource Allocation: From Rome to New Jersey*, 25 RUTGERS L. REV. 571, 576 (1971). It is interesting to note that the scope of rights in the shores of the sea under Roman Law were more extensive than those presently enjoyed by the citizens of Maryland.
32. 3 AMERICAN LAW OF PROPERTY § 12.22 (A. J. Casner ed. 1952). *See* Kerpelman v. Board of Pub. Works, 261 Md. 436, 445, 276 A.2d 56, 61 (1971).
33. 3 AMERICAN LAW OF PROPERTY § 12.23 (A. J. Casner ed. 1952).
34. Joint Record Extract, vol. 1, at 15, Department of Natural Resources v. Cropper, 274 Md. 25, 332 A.2d 644 (1975). The patents issued by the State begin
> with "Lady's Resort to the Ocean" in 1869 covering the land from Division Street (near the present inlet) north to approximately 15th Street. "Wild Goose Chase" in 1869 covers from 15th Street to about 33rd Street. Next were "Summer Retreat" and "Ocean View," both issued in 1883, covering from 33rd to 118th Streets; and, finally, "Speedwell" in 1885 from 118th Street to the Delaware Line. *Id.*

35. *Id.*
36. 274 Md. at 7, 332 A.2d at 634.
37. *Id.*
38. 274 Md. at 4, 332 A.2d at 632.
39. Janney, *supra* note 5, at 133 n.3.

storm devastated the Ocean City area, nearly cutting an inlet at 71st Street.[40] The resulting erosion made the beach 450 feet narrower than it was in 1922.[41] Following the storm of 1962, Worcester County obtained perpetual easements from property owners as a preliminary step to a major effort by the Army Corps of Engineers to reconstruct the dune line.[42] Subsequently, the county refused to issue building permits for construction east of the dune line established by the Corps of Engineers.[43] In 1971, however, after the 71st Street area had been annexed by Ocean City, the Mayor and City Council adopted an ordinance designating a building limit line east of the dune line constructed by the Corps of Engineers.[44] Although the building limit line preserved a portion of the beach for public use, it sanctioned construction on the portion of the beach between the dune line and the new building limit line, an area for which the county had previously refused to issue building permits.

It is within this context that Park, later joined by the Department of Natural Resources, sought to enjoin construction of the developer's condominium. The proposed structure was within the legal boundaries of the developer's lots and conformed with the Ocean City building limit line.[45] Nevertheless, construction of the condominium would have the practical effect of further diminishing the recreational area of a beach already severely reduced by erosion.

THE MAJORITY OPINION

Beginning its discussion of legal principles, the court observed that the State holds the foreshore for the benefit of the public.[46] This conclusion is derived from the principle that the states, by virtue of their colonial sovereignty, succeeded to the ownership of tidelands and lands beneath navigable waters.[47] As a general rule, the states hold

40. The "storm of 1962" generated fifty mile per hour winds and ten to fifteen foot waves and inundated most of Fenwick Island. Losses were estimated at seven million dollars. Janney, *supra* note 5, at 123.
41. 274 Md. at 4, 332 A.2d at 632.
42. *Id.*, 332 A.2d at 632-33. As a result of the storm of 1962, President Kennedy designated Ocean City as a national disaster area, thereby making federal funds available for reconstruction efforts by the Army Corps of Engineers. During the course of the project, known as "Operation Five-High," the Corps pumped 1,050,000 cubic yards of sand into the area in order to rebuild the dune line along the entire length of the beach. 274 Md. at 21, 332 A.2d at 642.
43. 274 Md. at 5, 332 A.2d at 633.
44. *Id. See* note 10 *supra*.
45. *See* diagram at note 8 *supra*.
46. 274 Md. at 5, 332 A.2d at 633.
47. A. Stone, *Public Rights in Water Uses and Private Rights in Land Adjacent to Water*, in 1 WATERS AND WATER RIGHTS § 36.3(B), at 192, § 42.1, at 264-67 (R. Clark ed. 1967) [hereinafter cited as Stone]; 1 V. YANNACONE, B. COHEN & S. DAVISON, ENVIRONMENTAL RIGHTS AND REMEDIES § 2:3, at 17 (1972) [hereinafter cited as ENVIRONMENTAL RIGHTS AND REMEDIES]. *See* Board of Pub. Works v. Larmar Corp., 262 Md. 24, 35, 277 A.2d 427, 432 (1971).

these lands in trust for the public,[48] and any conveyance is subject to public rights of navigation and fishing.[49]

Turning to the issue of public rights in the dry sand portion of the beach, the court cited authorities in other jurisdictions which had found in favor of public rights based on one or more of the following theories: dedication,[50] prescriptive easement,[51] custom,[52] or public

48. 5 POWELL, *supra* note 2, ¶ 723.2[1], at 412.22; Stone, *supra* note 47, § 36.4(A), at 197. *See* Kerpelman v. Board of Pub. Works, 261 Md. 436, 445, 276 A.2d 56, 61 (1971). *See generally* ENVIRONMENTAL RIGHTS AND REMEDIES, *supra* note 47, §§ 2:1-2:4; Note, *Public Access to Beaches: Common Law Doctrines and Constitutional Challenges*, 48 N.Y.U. L. REV. 369 (1973); Note, *State Citizen Rights Respecting Greatwater Resource Allocation: From Rome to New Jersey*, 25 RUTGERS L. REV. 571 (1971); Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762 (1970); 31 MICH. L. REV. 1134 (1933). For a short discussion of the public trust doctrine within the context of public recreational rights, see note 53 *infra*.

49. *See, e.g.*, Kerpelman v. Board of Pub. Works, 261 Md. 436, 445, 276 A.2d 56, 61 (1971); Hess v. Muir, 65 Md. 586, 606-07, 6 A. 673, 676-77 (1886); Browne v. Kennedy, 5 Har. & J. 195 (1821). Today, there is some support for expanding the scope of rights protected under the public trust doctrine to include public recreational use. *See* note 53 *infra; but see* City of Long Beach v. Mansell, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970) in which the Supreme Court of California concluded that special circumstances combined with a legislative determination permitted an alienation of tidelands into absolute private ownership.

50. Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970); Borough of Neptune City v. Borough of Avon-By-The-Sea, 61 N.J. 296, 294 A.2d 47 (1972); Gewirtz v. City of Long Beach, 69 Misc. 2d 763, 330 N.Y.S.2d 495 (Sup. Ct. 1972), *aff'd mem.*, 45 App. Div. 2d 841, 358 N.Y.S.2d 957 (1974); Seaway Co. v. Attorney General, 375 S.W.2d 923 (Tex. Civ. App. 1964). *See* notes 72-89 *infra* and accompanying text for a discussion of the law of dedication.

51. Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970); *cf.* State *ex rel.* Thornton v. Hay, 254 Ore. 584, 462 P.2d 671 (1969). *See also* City of Daytona Beach v. Tona-Rama, Inc., 271 So. 2d 765 (Dist. Ct. App. 1972), *vacated*, 294 So. 2d 73 (Fla. 1974). Despite some doubt that the public may acquire an easement by prescription, it is generally recognized by the weight of authority that, where the public has used a way continuously, openly, and adversely to the owner's rights for the statutory period, the public may acquire an easement for the continued use of that way. Stone, *supra* note 47, § 38.2(A), at 225-26. The theory under which the public acquires these rights is also known as long public user. 4 H. TIFFANY, THE LAW OF REAL PROPERTY § 1211 (rev. 3d ed. 1975); *see, e.g.*, Mount Sinai Nursing Home, Inc. v. Pleasant Manor Corp., 254 Md. 1, 5-6, 253 A.2d 915, 917 (1969). As a theory for establishing public rights in beaches, prescriptive easements are probably the weakest because of the difficulty of establishing the requisite elements. 5 POWELL, *supra* note 2, ¶ 723.2[1][c], at 412.28-412.34. *See generally* Degnan, *Public Rights in Ocean Beaches: A Theory of Prescription*, 24 SYRACUSE L. REV. 935 (1973).

52. State *ex rel.* Thornton v. Hay, 254 Ore. 584, 462 P.2d 671 (1969). In *Thorton v. Hay*, the Supreme Court of Oregon resolved the issue of whether the state had the power to prevent private landowners from enclosing the dry sand area contained within the legal description of their oceanfront property. Finding that the public had rights in the dry sand area along the entire Oregon coastline based on the doctrine of custom, the court held that the state had the power to protect the public's enjoyment of recreational rights in that area. *Id.* at 587-88, 462 P.2d at 673. Although there was evidence to support the existence of public rights based on prescription, the court chose to rely on custom, because that doctrine permitted uniform treatment of the entire Oregon shore and allowed for consideration of the unique nature of the land involved. *Id.* at 595, 462 P.2d at 676. The court defined custom as " 'such a usage as by common consent and uniform practice has become the law of the place, or of the subject matter to which it relates.' " *Id.*, 462 P.2d at 677. The court then found that the customary use by the people of Oregon of the dry sand area of the state's beaches met all of Blackstone's requisites of

trust.[53] After briefly reviewing the lower court findings, the court considered and rejected in turn each of the petitioners' four arguments:

1) The area between the dune line and mean high water mark has been dedicated to the public.

2) The public has attained the right to use the area between the dune line and the mean high water mark through prescriptive use.

3) The public's interest in Maryland's coastal shores established through custom and grant requires that activities violative of the public trust be proscribed.

4) Land inundated by mean high water reverts to state ownership: areas reclaimed by governmental efforts remain state property.[54]

The court found that the petitioner's second and fourth arguments were not supported by the facts. With respect to the second argument, the claim that the public had acquired an easement by prescription, the court sustained the finding that there was no evidence of use for the prescriptive period of twenty years.[55] With respect to the fourth argument, the claim that the doctrine of submergence combined with

---

custom. Under the Blackstone analysis, a custom must be ancient, without interruption, peaceable and free from dispute, reasonable, certain, obligatory, and, finally, not repugnant or inconsistent with other custom or other law. *Id. See* 1 W. BLACKSTONE, COMMENTARIES *75-*78.

53. In Borough of Neptune City v. Borough of Avon-By-The-Sea, 61 N.J. 296, 294 A.2d 47 (1972), the issue was whether an oceanfront municipality could charge non-residents higher fees than they charged residents for the use of a beach area. There was no dispute that the dry sand beach had been dedicated to public recreational use and that the foreshore was owned by the state in fee simple. In that context, the Supreme Court of New Jersey held that non-residents could not be charged higher fees, because the public trust doctrine dictates that the beach and ocean waters are open to all on equal terms. *Id.* at 308-09, 294 A.2d at 54.

As notes 46-49 *supra* and accompanying text indicated, tidelands are held by the sovereign in trust for the public, and any conveyance of those lands is subject to public rights of navigation and fishing. But according to the New Jersey court, modern conditions require that the public trust doctrine be extended to afford protection to public recreational rights. Although some commentators have noted the traditionally limited scope of the public trust doctrine (*see, e.g.*, Note, *Access to Public Municipal Beaches: The Formulation of a Comprehensive Legal Approach*, 7 SUFFOLK U. L. REV. 936, 949-50 (1973)), there is some support for the expansion of that doctrine in light of modern conditions. *See* Stone, *supra* note 47, § 36.4(B), at 200-02. *See also* ENVIRONMENTAL RIGHTS AND REMEDIES, *supra* note 47, at §§ 2:4-2:8. For an excellent discussion of the public trust doctrine as a comprehensive tool in resource management settings, *see* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

54. The first part of petitioners' fourth argument states the doctrine of submergence, under which the littoral owner loses title to lands which are gradually covered by water. *See* Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 177 S.E.2d 513, (1970); *but cf.* Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973) (title to land previously submerged but subsequently exposed by rechanneling of river held vested in riparian owner under federal law). The second part of petitioners' argument contends that reclamation efforts reinforce the State's claim to previously submerged land.

55. 274 Md. at 9, 332 A.2d at 635. In order to establish an easement by prescription in Maryland, it is necessary to prove an adverse, exclusive, and uninterrupted use for twenty years. *See, e.g.*, Furman E. Hendrix, Inc. v. Hanna, 250 Md. 443, 445, 243 A.2d 600, 601 (1968).

state reclamation efforts vested fee simple title in the state,[56] the court noted that the contested property had only been temporarily flooded by the storm of 1962.[57] Under the doctrine of submergence, land reverts to state ownership only when it is covered by water as a result of gradual erosion.[58]

The dissenting opinion concurred in the majority's analysis of these two arguments. But, with respect to the petitioners' first and third claims, there was substantial disagreement. The majority and dissenting opinions placed differing interpretations on both Maryland's law of implied dedication[59] and the significance of special factors surrounding the public's rights to use Maryland's beaches. These differences become more apparent in the discussion of the dissent, which follows further analysis of the majority opinion.

Addressing the petitioners' first argument, the majority concluded that implying a dedication, in the absence of proof of a clear and unequivocal manifestation of intent to dedicate, contradicted existing precedent.[60] Noting the distinction between dedication and prescription, the majority further commented that implying a dedication solely from long public use was but a form of prescription and, therefore, required compliance with the essentials necessary to create prescriptive rights.[61]

The majority refused to accept the petitioners' third argument that the public's interest in Maryland's coastal shores, established through

56. This was the only one of petitioners' four arguments which sought to vest the State with a fee simple title. The other three arguments sought merely to establish and to protect the public's right to use the dry sand beach.

57. Because the storm of 1962 was of short duration, the court classified it as an avulsion. 274 Md. at 15, 332 A.2d at 638.

58. When the submergence of land is caused by *erosion*, which is "the gradual and imperceptible wearing away of the land by the natural action of the elements," the state succeeds to the ownership thereof; but when the loss of land is caused by *avulsion*, which is "the sudden or violent action of the elements, the effect and extent of which is perceptible while it is in progress," legal title is not affected. *In re* City of Buffalo, 206 N.Y. 319, 325, 99 N.E. 850, 852 (1912). *See* 3 AMERICAN LAW OF PROPERTY §§ 15.26-15.27 (A. J. Casner ed. 1952).

59. Dedication is the devotion of land by the owner to public use. An implied dedication may arise when a landowner's intention to devote his land to public use appears from his declarations and conduct. For a more detailed discussion of the doctrine, *see* notes 72-89 *infra* and accompanying text.

60. 274 Md. at 8, 332 A.2d at 635.

61. It is not difficult to perceive that an acquisition of public rights by long public use of land without regard to the owner's intent is prescriptive in nature. Thus, for example, the existence of a public way may be established solely on the basis of an uninterrupted user by the public for twenty years. Garrett v. Gray, 258 Md. 363, 376-77, 266 A.2d 21, 27 (1970). But to avoid any possible confusion between prescription and dedication, it is important to remember that no minimum period of public user is required to establish public rights based on dedication. Stone, *supra* note 47, § 38.2(B), at 228; *see* Smith v. Shiebeck, 180 Md. 412, 420, 24 A.2d 795, 800 (1942). All that need be shown to establish a dedication is the landowner's intention to devote his land to public use and the public's acceptance of the intended donation. Stone, *supra* note 47, § 38.2(B), at 227; *see* notes 72-79 *infra* and accompanying text.

grant and custom, required the prohibition of activities violative of the public trust. Under Article XVI of the Charter of Maryland, the King had reserved to himself, his heirs, and to all his subjects, the liberty of fishing and the privilege of salting and drying fish, and to that end, gathering wood and constructing huts and cabins on the shores of the province. These privileges were to be enjoyed as long as their exercise did not result in notable injury to the residents or inhabitants of the province.[62] Petitioners argued that this grant reasonably included an exercise of these privileges above the high water mark, since it would be impractical to engage in the permitted activities in an area subject to continuous tidal action. They asserted that the imposition of a public trust over the dry sand beach was necessary to protect these privileges.[63] Though it posed several interesting questions of interpretation, the majority declined to rule on the extent of the rights encompassed within Article XVI of the Charter, because

> [w]hat the petitioners are attempting to do here, under an assertion of the public's right to picnic and sunbathe on the dune, is to deny the Developer a use of his property to which he has an otherwise lawful right: the right to build to Ocean City's building limit line. This is the "notable damage or injury in any wise to be done . . . to the residents and inhabitants of the same province in the . . . shores aforesaid . . . ." which Article XVI of the Charter specifically proscribed.[64]

Turning to the element of custom, the majority discounted the applicability of *State ex rel. Thornton v. Hay*,[65] in which the Supreme Court of Oregon upheld the public right to use Oregon's beaches on the basis of a custom of public use. The court refused to apply the doctrine of custom, because the facts failed to show ancient use, one of seven prerequisites under Blackstone's treatment of the doctrine.[66] Finally, the majority rejected petitioners' contention that, because of the expenditure of public funds in restoring the dune line and because of recreational and environmental considerations, the area between the high water mark and the dune line was impressed with a public trust.[67] As reasons for its conclusion, the court cited a lack of evidence of acquisition by the public of any interest in the contested lots, as well as a lack of legal authority to support the proposition that such an interest arises from the expenditure of public funds.[68]

62. *See* 1 The Laws of Maryland 8 (rev. by V. Maxcy 1811).
63. 274 Md. at 9-14, 332 A.2d at 636-38.
64. 274 Md. at 13, 332 A.2d at 637.
65. 254 Ore. 584, 462 P.2d 671 (1969). *Thornton v. Hay* is discussed at note 52 *supra*.
66. 274 Md. at 13, 332 A.2d at 638.
67. *Id.* at 14, 332 A.2d at 638.
68. *Id.*

Underlying the majority's unwillingness to accept petitioners' first and third arguments or to recognize the unique factors involved in this case is the understandably strong respect that the court accorded the right of a private owner to make a lawful use of his property. The protection of private property rights, however, does not operate in a vacuum, especially when as delicate and valuable a natural resource as Maryland's beaches is concerned. In such a case, an equal and perhaps greater right belongs to the citizens of Maryland—the right to use and to enjoy that natural resource.[69] The strength of similar public policy considerations has caused other courts to uphold these public rights.[70] It would appear, consequently, that resolving the conflict between private and public rights in this case required a more delicate balancing of competing interests than a majority of the court of appeals was inclined to recognize. One member of the court was willing to consider the public's interest in Maryland's coastal shores, at least as a factor, in his approach to the problem.

DISSENT: APPLICABILITY OF IMPLIED DEDICATION

Judge Eldridge's dissent focused on the law of implied dedication in Maryland. Whereas the majority had concluded that the absence of a clear and unequivocal manifestation of intent to dedicate precluded a finding of implied dedication, Judge Eldridge's reading of the cases revealed that

> there are few hard and fast rules with respect to implied dedication under Maryland law, and each situation must be viewed in light of its own peculiar circumstances.[71]

Dedication is the devotion of land to the public use by an unequivocal act of the owner manifesting an intent that it be accepted and used for a public purpose.[72] Generally the term is "applied to any one of many processes by which the owner of an interest in land can transfer to the public, either ownership, or a privilege of use, of such interest for a public purpose."[73] The doctrine of dedication initially

---

69. The balance must be struck while keeping in mind that all private property and privileges are held subject to limitations that may reasonably be imposed upon them in the public interest. The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. The owner's right to undisturbed possession of his property must sometimes give way to an overriding social interest. ENVIRONMENTAL RIGHTS AND REMEDIES, *supra* note 47, § 2:8, at 38.

70. *See* notes 50-53 *supra*.

71. 274 Md. at 19, 332 A.2d at 641 (Eldridge, J., dissenting).

72. 3 AMERICAN LAW OF PROPERTY § 12.132, at 473 (A. J. Casner ed. 1952).

73. 6 R. POWELL, THE LAW OF REAL PROPERTY ¶ 934, at 361 (1968) [hereinafter cited as 6 POWELL]. For a thorough treatment of the law of dedication, *see* 11 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS ch. 33 (rev. 3d ed. 1964) [hereinafter cited as McQUILLIN].

arose in cases of highway uses and has received analogous application in many other situations.[74] Dedication may be based on either statute or common law.[75] In its common law form, dedication may be express or implied.[76] In either case, two elements must be present: an offer manifesting the intent to dedicate and an acceptance of that offer.[77] In an early leading case, *City of Cincinnati v. Lessee of White*,[78] the Supreme Court of the United States stated the doctrine somewhat more broadly:

> There is no particular form or ceremony necessary in the dedication of land to public use. All that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation.[79]

As frequently repeated by the courts of Maryland, the intent on the part of the owner to dedicate his land is absolutely essential to effectuate a dedication.[80] Such pronouncements, however, do not solve the inherent difficulty of determining a person's mental disposition. The answer lies in discovering whether the owner's intention to dedicate appears from the facts and circumstances in a particular case.[81] To reach this determination the court of appeals has enunciated several principles.[82] The court has stated that the intention to dedicate must be established by clear and unequivocal testimony.[83]

---

74. 4 H. TIFFANY, THE LAW OF REAL PROPERTY § 1098 (rev. 3d ed. 1975). For example, land has been dedicated for use by the public as a park, as a playground and recreational area, as a beach or shoreline area, and for flood control use. *Id.*
75. 11 McQUILLIN, *supra* note 73, § 33.03, at 631-32.
76. *Id.*
    > A dedication is express when the intent is manifested by oral or written words, and is implied when the intent must be gathered from the acts of the dedicator. Otherwise stated, a dedication is express where the appropriation is formally declared, and is implied where it arises by operation of law from the owner's conduct and the facts and circumstances of the case. The substantial difference between the two consists in the mode of proof. *Id.* at 632-33.
77. *Id.* § 33.02, at 628; 6 POWELL, *supra* note 73, ¶ 935, at 365. *See* Town of Glenarden v. Lewis, 261 Md. 1, 3, 273 A.2d 140, 141 (1971), and cases cited therein.
78. 31 U.S. (6 Pet.) 431 (1832).
79. *Id.* at 440.
80. Hackerman v. Mayor & City Council of Baltimore, 212 Md. 618, 624, 130 A.2d 732, 735 (1957); State Roads Comm. v. Teets, 210 Md. 213, 223-24, 123 A.2d 309, 314 (1956); Blank v. Park Lane Center, Inc., 209 Md. 568, 574-75, 121 A.2d 846, 848 (1956). *See* 11 McQUILLIN, *supra* note 73, § 33.29, at 693-94.
81. *See* 11 McQUILLIN, *supra* note 73, § 33.29, at 694-95. *See also* Conway v. Prince George's County, 248 Md. 416, 418-19, 237 A.2d 9, 11-12 (1968); Smith v. Shiebeck, 180 Md. 412, 420, 24 A.2d 795, 800 (1942); Canton Co. v. Mayor & City Council of Baltimore, 106 Md. 69, 83-84, 66 A. 679, 680 (1907); Mayor & City Council of Baltimore v. Frick, 82 Md. 77, 83, 33 A. 435, 436 (1895).
82. The Court of Appeals summarized several of these principles in Toney Schloss Properties Corp. v. Berenholtz, 243 Md. 195, 204-05, 220 A.2d 910, 914 (1966). *See* 11 McQUILLIN, *supra* note 73, at §§ 33.29-33.41, for a more detailed discussion of the same principles.
83. Toney Schloss Properties Corp. v. Berenholtz, 243 Md. 195, 204, 220 A.2d 910, 914 (1966); Stover v. Steffey, 115 Md. 524, 530, 81 A. 33, 35 (1911); South Balto. Harbor & Improvement Co. v. Smith, 85 Md. 537, 541, 37 A. 27, 28 (1897).

Any act of the owner clearly manifesting such intention is sufficient. [84] The intention to dedicate may be implied from the conduct of the owner,[85] so as to estop him from later denying that his intention was to dedicate.[86] Long acquiescence in public use may justify the inference of an intention on the owner's part to dedicate his land.[87] In short, each case must be decided "by considering the declarations of the landowner, his intentions as manifested by his acts, and all the other circumstances of the case."[88]

The majority opinion in *DNR v. Ocean City* properly recognized the necessity of a clear and unequivocal manifestation of intent to dedicate, but failed to look to the above criteria for assistance in reaching the difficult determination of the landowner's intent. Judge Eldridge, on the other hand, emphasized that "each situation must be viewed in light of its own peculiar circumstances."[89] This approach not only incorporates the judicial guidelines listed above; it also appeals to reason, in that it allows the unique circumstances of a particular case to play a part in the decision-making process.

Judge Eldridge listed the circumstances that warranted the conclusion that the public had a right to use the beach at Ocean City:

> 1. The Charter of Maryland reserved privileges which required that the public be able to use the dry sand portion of the beach.[90]

Although unwilling to adopt the petitioners' rationale, the majority acknowledged the force of the argument that the public could not exercise privileges specially reserved in the Charter, unless the right of the public to engage in certain activities above mean high water was

84. Lonaconing, M. & F. Ry. v. Consolidation Coal Co., 95 Md. 630, 634, 53, A. 420, 422 (1902), *cited with approval in* Conway v. Prince George's County, 248 Md. 416, 419, 237 A.2d 9, 11 (1968), Toney Schloss Properties Corp. v. Berenholtz, 243 Md. 195, 205, 220 A.2d 910, 914 (1966), *and* Smith v. Shiebeck, 180 Md. 412, 419, 24 A.2d 795, 800 (1942).

85. Conway v. Prince George's County, 248 Md. 416, 419, 237 A.2d 9, 11 (1968); Smith v. Shiebeck, 180 Md. 412, 419-20, 24 A.2d 795, 800 (1942); Lonaconing, M. & F. Ry. v. Consolidation Coal Co., 95 Md. 630, 634, 53 A. 420, 422 (1902).

86. Blank v. Park Lane Center, Inc., 209 Md. 568, 574, 121 A.2d 846, 848 (1956); Smith v. Shiebeck, 180 Md. 412, 419-20, 24 A.2d 795, 800 (1942); Mayor & City Council of Baltimore v. Frick, 82 Md. 77, 83, 33 A. 435, 436 (1895); McCormick v. Mayor & City Council of Baltimore, 45 Md. 512, 523 (1877).

87. Canton Co. v. Seal, 144 Md. 174, 178-79, 125 A. 63, 65 (1923). *See* Smith v. Shiebeck, 180 Md. 412, 419-20, 24 A.2d 795, 800 (1942); 11 McQuillin, *supra* note 73, at § 33.31. In Garrett v. Gray, 258 Md. 363, 266 A.2d 21 (1970), the Court of Appeals, quoting an earlier case, distinguished acquiescence from permissive use:

> '*Acquiescence* is the inactive status of quiescence or unqualified submission to the hostile claim of another, and is not to be confused with *permission*, which denotes a grant of permission in fact or a license.' *Id.* at 377-78, 266 A.2d at 27-28 (emphasis in original).

88. Smith v. Shiebeck, 180 Md. 412, 420, 24 A.2d 795, 800 (1942).

89. 274 Md. at 19, 332 A.2d at 641 (Eldridge, J., dissenting).

90. *Id.* at 19-20, 332 A.2d at 641.

recognized.[91] Under traditional doctrine, the sovereign holds the foreshore in trust for the public, and any conveyance of those lands is subject to public rights of navigation and fishing.[92] A logical extension of the public trust doctrine, in light of the Maryland Charter, permits the conclusion that any conveyance by the state of the dry sand portion of the beach is likewise subject to recognized public rights.[93] In light of modern conditions, moreover, there seems to be good reason to expand the scope of protected rights to include public recreational uses.[94]

> 2. The owners' acquiescence in the public use for many years of the beach at 71st Street, though not alone constituting an implied dedication, was an indication of the owners' intent to dedicate the land to public use.[95]

An owner's acquiescence in the public use of his land may justify an inference of an intention on his part to dedicate.[96] In the instant case there was testimony that the public used the beach for many years, while there was no evidence that any landowner attempted to prevent this public use.[97] Judge Eldridge concluded: "While I do not suggest that mere acquiescence in the use by the public of a landowner's property, without more, constitutes an implied dedication, nevertheless it is an important circumstance indicating an intent to dedicate land such as this to public use."[98]

> 3. The original and revised plats of the developers consistently recognized that "the area immediately adjacent to the ocean was to be kept as beach."[99]
>
> 4. Prior to 1938, the beach had been used as a public road.[100]

These two circumstances do not provide direct evidence of the landowners' intent to dedicate the area in dispute, because the area originally designated as public beach or boardwalk and used as a public road was part of a much larger expanse of beach. That area has since been narrowed by erosion.[101] These factors, however, do reflect at least a recognition on the part of prior landowners and the public that the area adjacent to the ocean was a public beach.

---

91. *Id.* at 12, 332 A.2d at 637.
92. *See* notes 46-49 *supra* and accompanying text.
93. *See* note 63 *supra* and accompanying text.
94. *See* note 53 *supra*.
95. 274 Md. at 20, 332 A.2d at 641.
96. *See* note 87 *supra* and accompanying text.
97. 274 Md. at 20, 332 A.2d at 641.
98. *Id.*
99. *Id.* at 20-21, 332 A.2d at 641.
100. *Id.* at 21, 332 A.2d at 641.
101. *See* notes 36-41 *supra* and accompanying text.

5. The expenditure of government funds to preserve the beach, to keep it clean, and to provide lifeguard and other services, all indicated that property owners and the public understood the beach was dedicated to public use.[102]

The fact that landowners knew of the expenditure of public funds for the maintenance and preservation of the beach, accepted the benefits of the expenditures, and made no subsequent effort to prevent public use, raises the strong inference of the owner's intent to dedicate. Such conduct should at least operate to estop the owners from denying that their intention was to dedicate.[103] The majority noted the lack of authority for creating a public interest in the disputed land simply as a consequence of the expenditure of public money.[104] Petitioners, however, were not claiming an interest "simply" on the basis of public expenditures. Rather, they considered these expenditures to be a factor, relevant to the ultimate determination of the conflict. Courts in other jurisdictions, moreover, have recognized public expenditures for the maintenance and protection of beaches as evidence of intent to dedicate.[105]

6. The citizens of the State of Maryland understand that Ocean City's beaches are open to public recreational use. The landowner, by allowing public use of the beach and by accepting the benefits of public expenditures, endorsed this widely held belief.[106]

This factor is similar to the previous one, but has the added force of a public policy consideration, which, if not officially articulated, is commonly assumed. The landowner's conduct reinforced the public's assumption that they are free to use the beaches of Ocean City.

102. 274 Md. at 21, 332 A.2d at 641-42.

103. The following statement in 4 H. TIFFANY, THE LAW OF REAL PROPERTY § 1102, at 583 (rev. 3d ed. 1975) seems particularly applicable:

> That the public user has been accompanied by expenditures on the part of the municipal authorities, to adapt the land to such user, and that the landowner knew of such expenditures, and acquiesced therein, would appear to be a consideration indicative of an intention on his part to dedicate, or perhaps operative to preclude him from denying such intention.

See also 3 AMERICAN LAW OF PROPERTY § 12.133, at 474-75 (A. J. Casner ed. 1952). Testimony in *DNR v. Ocean City* showed that government funds were expended to clean beaches, to furnish lifeguard services, and to provide law enforcement protection. In addition to the money used to pay for these services, government funds were also spent to preserve the beach in the 71st Street area. The State and the county erected sand fences along the dunes and constructed a jetty at 70th Street. The reconstruction of the dune line after the storm of 1962 cost over one and a half million dollars. 274 Md. at 21, 332 A.2d at 642.

104. 274 Md. at 14, 332 A.2d at 638.

105. *See* Gion v. City of Santa Cruz, 2 Cal. 3d 29, 39, 465 P.2d 50, 56, 84 Cal. Rptr. 162, 168 (1970); Seaway Co. v. Attorney General, 375 S.W.2d 923, 936-37 (Tex. Civ. App. 1964).

106. 274 Md. at 21-22, 332 A.2d at 642.

Based on all six of the above factors, Judge Eldridge concluded that

> the landowner and his predecessors in title have recognized the public's right to use and the public's use of the dry sand beach to such an extent, that an implied easement to the public for recreational purposes has been created. None of the above factors, taken alone, result in this conclusion, nor do any two of the factors compel this result. But all of the circumstances evaluated together create a total picture of an implied dedication by the landowner and an unmistakable acceptance by the general public.[107]

This totality of circumstances approach finds support in existing law and has the added advantage of allowing for the application of established legal principles to a uniquely modern case.

A similar approach was employed in *Seaway Co. v. Attorney General*,[108] where the Texas Court of Civil Appeals sustained a judgment establishing an easement in the public to use the land adjoining the Gulf of Mexico from the line of mean low tide to the line of vegetation for travel and recreational purposes.[109] The original action had been brought by the Attorney General of Texas and a local District Attorney to enjoin a corporate defendant from erecting barriers on its property on the seaward side of the vegetation line of the Gulf of Mexico. The action was brought pursuant to the state "Open Beaches Bill," which declared it to be the public policy of Texas that the people of the state should have a right of access to and from state-owned beaches or those areas where the public had acquired an easement by presciption, dedication, or continuing use in the public.[110] The court of civil appeals concluded that the evidence supported an implied common law dedication by the landowner's predecessors in title of the area from the vegetation line to the mean high tide line.[111] The court also found that an easement in the public had been created by prescription,[112] but rejected a theory based on public trust.[113]

In discussing the theory of implied dedication, the court said:

> The intent on the part of the owner, however, is not a secret intent, but is that expressed by visible conduct and open acts of the owner. If the open and known acts are of such a nature as to induce the belief that the owner intended to dedicate the way to the public and individuals act on such conduct, proceed

107. *Id.* at 22, 332 A.2d at 642.
108. 375 S.W.2d 923 (Tex. Civ. App. 1964).
109. *Id.* at 940.
110. *Id.* at 925-26.
111. *Id.* at 935.
112. *Id.* at 937.
113. *Id.* at 929.

> as if there had been in fact a dedication and acquire rights that would be lost if the owner were allowed to reclaim the land, then the law will not permit him to assert that there was no intent to dedicate, no matter what may have been his secret intent. The act of throwing open property to the public use, without any other formality, is sufficient to establish the fact of dedication to the public; and if individuals, in consequence of this act, become interested to have it continue so, the owner cannot resume it.[114]

Applying this reasoning to the facts, the Texas court found that the owner had thrown open the beach to public use, and it had remained open for over a hundred years.[115] As further evidence of intent, the court noted that the county had expended funds to maintain the beach so the public could use it. Additionally, police officers had patrolled the beach. Because these activities were carried on openly and for so long that the owners should have known of them, the court concluded that they constituted some evidence of intent.[116]

Also similar to Judge Eldridge's analysis was Judge Denecke's concurring opinion in *State ex rel. Thornton v. Hay*.[117] Unable to accept the majority's application of customary rights,[118] Judge Denecke advocated an approach that took into consideration the relevant factors of the case. Though not resting his conclusion on implied dedication, he found that the following factors, in combination, supported the public's right to use the beach: 1) long public use of the dry sand area, not on all of Oregon's beaches, but wherever the public used the beach; 2) a long and universal belief by the public in the right to such use; 3) acquiescence by landowners in such use; and 4) the compelling desirability of the public right to use the dry sand beach.[119]

A final comparison with the most controversial of the implied dedication decisions, *Gion v. City of Santa Cruz* and *Dietz v. King*,[120] will demonstrate the efficacy of Judge Eldridge's application of that doctrine. In both of these cases, which were consolidated on appeal,[121] the Supreme Court of California concluded that there had

---

114. *Id.* at 936.
115. *Id.*
116. *Id.* at 936-37.
117. 254 Ore. 584, 462 P.2d 671 (1969).
118. *See* note 52 *supra* for a summary of the majority opinion in *Thornton v. Hay*.
119. State *ex rel.* Thornton v. Hay, 254 Ore. 584, 600, 462 P.2d 671, 678-79 (1969).
120. 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970) [hereinafter cited as *Gion-Dietz*]. The decision in *Gion-Dietz* produced extensive commentary in legal periodicals—some favorable and some highly critical. *See* Berger, *Nice Guys Finish Last—At Least They Lose Their Property: Gion v. City of Santa Cruz*, 8 CALIF. WESTERN L. REV. 75, 76 (1971), where the author lists six publications and their evaluations of *Gion-Dietz*.
121. *Gion* involved three oceanfront lots adjacent to a public coastal road. The upper portion of the property was level with the road, while the lower portion dropped sharply to the beach and ocean. Since about 1900, members of the public parked on the level area and

been an implied dedication of property rights. This conclusion was based on the fact that the public had used the land in public ways with the knowledge of the owners for more than five years (the prescriptive period in California) without asking or receiving permission and without objection by anyone.[122] What is unique about *Gion-Dietz* is the legal basis for the court's conclusion—implied dedication by adverse use. The court chose this theory, even though it could have rested its decision on more limited grounds.[123] According to the per curiam opinion, adverse use for more than five years raises a conclusive presumption of dedication.[124] In order for the owner to negate the finding of intent to dedicate based on an uninterrupted public use for more than five years, he must show that he either granted a license or made a bona fide attempt to prevent public use.[125] This approach disregards the essential element of common law dedication—the owner's intent—and replaces it with a conclusive presumption. It would seem that adverse use negates any dedicatory intent. It would also seem that easements created by adverse use should be labeled prescription and not dedication.[126] Moreover, by placing an affirmative burden of proof on the landowner to prevent a conclusive presumption from arising, the court disregarded a previously accepted presumption of permissive

---

proceeded to the beach for swimming, fishing, and picnicking. For some years the city had maintained the land by attempting to prevent erosion and by improving the parking area. The lower court concluded that the City of Santa Cruz, for itself and on behalf of the public, had an easement for recreational purposes in the three lots.

In *Dietz*, plaintiffs, on behalf of the public, sought to enjoin a landowner from closing an unimproved road leading to a beach which had been used by members of the public for more than a hundred years. The landowner's predecessors in title testified that they had intended the beach to be open to the public. The lower court concluded that there had been no dedication of the beach or road.

122. Gion v. City of Santa Cruz, 2 Cal. 3d 29, 43, 465 P.2d 50, 59, 84 Cal. Rptr. 162, 171 (1970).

123. Note, *This Land Is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches*, 44 S. Cal. L. Rev. 1092, 1099 (1971). In both cases there was evidence of the property owners' intention to dedicate. In *Gion*, the owners acquiesced in the maintenance and improvement of their land through public expenditures. In *Dietz*, the owner's predecessors in title had testified that they intended for the public to use the beach. *See* note 121 *supra*. Based on this evidence, the court could have found in each case an implied offer to dedicate land to public use and an acceptance by the public of that offer. Such an approach would have adhered more closely to the recognized principles of an implied dedication.

124. Gion v. City of Santa Cruz, 2 Cal. 3d 29, 39, 465 P.2d 50, 56, 84 Cal. Rptr. 162, 168 (1970).

125. *Id.* at 41, 465 P.2d at 57, 84 Cal. Rptr. at 169.

126. Some courts, including those of California apparently, have doubted that the public can acquire an easement by prescription, because the general public, as such, cannot be the beneficiary of the fictional "lost grant." Stone, *supra* note 47, § 38.2(A), at 225-26. But this obsolete theoretical impediment has not prevented a majority of jurisdictions from allowing the public acquisition of easements by prescription. *Id.* at 226. Maryland counts itself among that majority. *Cf.* 10 Md. L. Rev. 272 (1949). In *DNR v. Ocean City*, the majority opinion, commenting on the claimed prescriptive easement in the public, stated that "the law would support the petitioners, if the necessary facts were available." 274 Md. at 9, 332 A.2d at 635.

use.[127] The practical effect of *Gion-Dietz* was to force landowners to exclude the public from beaches by resorting to extreme measures.[128]

In contrast to the questionable holdings of *Gion-Dietz*, Judge Eldridge employed a more traditional approach to common law dedication, consistent with the criteria previously articulated by the court of appeals.[129] He was careful to remark that merely permitting the recreational use of a shore should not give rise to an easement.[130] He also emphasized that the ocean beach is a unique geographic phenomenon and a limited natural resource of the State.[131] Moreover, the public's involvement with the ocean beach is "of a different character than that associated with other types of land."[132] Finally, his finding of implied dedication would extend only to that portion of the beach shown by evidence to have been used by the public with the owner's acquiescence and maintained by public authorities.[133]

THE LEGISLATIVE EFFORT

As noted previously, the building limit line originally delineated by Ocean City ordinance in 1971 in effect sanctioned construction activity on certain portions of Ocean City's beaches east of the dune line.[134] Permitting such construction threatened both the integrity of the beach system and the public's right to use the dry sand portion of the beach.[135] These threats resulted in the litigation currently under discussion.

Shortly after the court of appeals refused to grant the relief sought by petitioners, the Maryland General Assembly passed the Beach Erosion Control District Act.[136] The act amended Section 8-1101 of the Natural Resources Article and added new Section 8-1105.1. As amended, Section 8-1101 includes certain findings with respect to

127. *See* Note, *This Land Is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches*, 44 S. CAL. L. REV. 1092, 1103 (1971).
128. One writer points out that the practical impact of *Gion-Dietz* was contrary to the result desired by the court. Landowners have erected fences, hired guards, and dynamited paths leading to beaches in an attempt to show adversity to public use. Instead of opening more beaches to the public, the decision resulted in the public's being excluded from many beach areas. *See id.* at 1094-95.
129. *See* notes 80-88 *supra* and accompanying text.
130. 274 Md. at 23, 332 A.2d at 643.
131. *Id.* at 22, 332 A.2d at 642. Judge Eldridge noted that while the shoreline of the Chesapeake Bay measures over three thousand miles, Maryland's Atlantic shoreline is only thirty-five miles long. *Id.* at 24, 332 A.2d at 643.
132. *Id.* at 22, 332 A.2d at 642.
133. *Id.* at 24-25, 332 A.2d at 643-44.
134. *See* note 10 *supra* and accompanying text.
135. *See* note 25 *supra* and accompanying text.
136. Law of April 1, 1975, ch. 91, (1975) Laws of Md. 757, *amending* MD. ANN. CODE, Nat. Res. Art., § 8-1101 (1974) (codified at MD. ANN. CODE, Nat. Res. Art., § 8-1101 (Supp. 1975)), *and enacting* MD. ANN. CODE, Nat. Res. Art., § 8-1105.1 (Supp. 1975).

Maryland's coastal beaches.[137] Section 8-1105.1 creates and defines a beach erosion control district on Assateague and Fenwick Islands.[138] It further prohibits certain activities within the district[139] and provides for the payment of compensation for any taking of property rights.[140]

The legislation, on its face, provides a solution to the problem posed by *DNR v. Ocean City* and *DNR v. Cropper*. However, a closer reading of the Beach Erosion Control District Act reveals that the protection provided by the act against encroachment on Maryland's coastal beaches is less inclusive on Fenwick Island than it is on Assateague Island. On Assateague Island the erosion control district extends from the Atlantic Ocean to the dune line, while on Fenwick Island the district may extend no further than from the Atlantic Ocean to the 1971 building limit line. Section 8-1105.1(a) defines the dune line at Assateague as the western boundary of the beach erosion control district. But the western boundary in Ocean City is defined as:

> [A] *mutually approved line* to be known as the State-Ocean City building limit line *which coincides, more or less, with the existing Ocean City building limit line and on occasion may coincide with the crest of the littoral system*. The Department [of Natural Resources], after surveying, platting and recording the State-Ocean City building limit line, has the authority to describe by regulation the State-Ocean City building limit line. . . .[141]

If in fact protection was sought for all of Maryland's coastal beaches, a logical course of action would have been to move the Ocean City building limit line westward to coincide with the dune line. Yet, while recognizing that construction activity endangered the beach system, Maryland's lawmakers failed to enact a comprehensive remedy, in that 1) the new line coincides "more or less" with the old line, 2) any

137. In addition the General Assembly finds and declares that land movement and disturbance activities on Atlantic Coast beaches east of certain natural and physical contours and elevations of the beach endangers the integrity and continuity of the beach system which includes a dunal system, prevents adequate maintenance, shore erosion and sediment control, and storm protection of these and adjacent areas, and results in the imposition of additional financial burdens on the citizens of the State. . . . Md. Ann. Code, Nat. Res. Art., § 8-1101 (Supp. 1975).

138. *Id.* § 8-1105.1(a).

139. For the purposes of maintaining the Atlantic Coast beaches of the State and the Beach Erosion Control District, the integrity and continuity of the dunal system and assuring adequate maintenance thereof, to provide for shore erosion and sediment control and storm protection, and to minimize structural interference with the littoral drift of sand and any anchoring vegetation, any land clearing, construction activity, or the construction or placement of permanent structures within the Beach Erosion Control District is prohibited. . . . *Id.* § 8-1105.1(b).

140. *Id.* § 8-1105.1(c).

141. *Id.* § 8-1105.1(a) (emphasis added).

expansion of the district beyond the old line will require the approval of Ocean City,[142] and 3) any discretion that the Department of Natural Resources might have had under Section 8-1105.1(a) will be further restricted by the amount of money available to compensate property owners.[143]

This legislation, in light of political realities, is commendable. At least the legislature recognizes the threat to our coastal shores. But because Section 8-1105.1(a) is deliberately underinclusive, there is considerable doubt that the Beach Erosion Control District Act will provide the comprehensive protection which is necessary for the preservation of Ocean City's beaches and the public's right to use them.[144]

---

142. Quite naturally, Ocean City property owners would hesitate to approve a new line which is detrimental to their pecuniary interests. Moving the building limit line so that it conforms with the dune line would undoubtedly result in a decrease in the value of some oceanfront properties. Nevertheless, the residents of Ocean City, more than anyone else, should be aware of the danger of permitting construction beyond the dune line. Most importantly, such construction threatens dunal integrity and, consequently, the ability of the beach system to provide storm protection for structures landward of the dunes, the area where most private property is situated. Secondly, encroaching construction activity will decrease the aesthetic and recreational value of the beaches, Ocean City's prime attraction. As a result, vacationers may be forced to look elsewhere for the satisfaction of their recreational needs.

143. Funds for the compensation of property owners are made available under Program Open Space. *Id.* § 8-1105.1(c).

144. On the federal level, proposed legislation promises to establish a national policy with respect to the beach resources of the nation. H.R. 1676, 94th Cong., 1st Sess. (1975), popularly known as the National Open Beaches Act,

> declares and affirms that the beaches of the United States are impressed with a national interest and that the public shall have free and unrestricted right to use them as a common consistent with State and national conservation policies to the full extent that such public right may be extended without violating such property rights of littoral landowners as may be protected absolutely by the Constitution. . . . *Id.* § 315(b).

The Open Beaches Act prohibits interference with the public's use of the nation's beaches, grants jurisdiction to federal courts in actions related to the protection of public rights, and authorizes federal grants to the states to carry out the purposes of the Act. The proposed Act further establishes a rebuttable presumption that the public has the right to use any area shown to be a beach. For a discussion of the purpose and history of the National Open Beaches Act, see Eckhardt, *A Rational National Policy on Public Use of the Beaches*, 24 SYRACUSE L. REV. 967 (1973). For relevant background information see *Hearings on Public Access to Beaches Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 93d Cong., 1st Sess., ser. 93-25 (1973).

At present, it is unclear what impact the National Open Beaches Act, if passed, would have in Maryland. To promote State-Federal cooperation, the Act accepts the substantive state-law position with respect to public and private rights in beaches. C.L. Black Jr., *Constitutionality of the Eckhardt Open Beaches Bill*, 74 COLUM. L. REV. 439, 440 (1974). The Open Beaches Act, therefore, could be implemented in Maryland only to the extent that public rights have been recognized by our courts and legislature. As previously noted, there are portions of Ocean City's beaches where public rights have received neither judicial nor legislative recognition. Those areas, apparently, would not qualify for protection under the Open Beaches Act. It is likely, nevertheless, that passage of the National Open Beaches Act would provide additional leverage for securing the public's right to use our coastal shores.

CONCLUSION

DNR v. Ocean City and its companion case presented to the court of appeals for the first time the issue of the respective rights of private property owners and the public in the dry sand portion of Ocean City's beaches. If the majority opinion, in upholding landowners' rights, can be commended for disallowing the taking of private property, then the dissenting opinion can be recommended for reasoning through implied dedication to prevent the taking of public recreational rights in a unique natural resource. Irrespective of the conclusions reached by the court, these cases demonstrate that there is a problem in Ocean City. Both the integrity of the beaches and the public's right to their use are threatened by a combination of natural forces and developmental pressures. The ultimate solution of this problem lies in the legislative articulation of an assumed public policy and the enactment of a comprehensive and forceful legislative program. Such action will ensure that future generations of Marylanders will inherit that full measure of enjoyment of Maryland's coastal shores to which they are entitled.

James J. Nolan, Jr.

Also on the federal level, the Army Corps of Engineers is currently conducting a study to determine the feasibility of an erosion-control and hurricane-protection project in Ocean City. A favorable recommendation could result in the implementation of a proposal under which the Corps of Engineers would erect a bulkhead from North Division Street to 27th Street and would construct dunes stabilized with beach grass from 27th Street to the Delaware Line. The net effect of these efforts would be to provide a minimum beach width of 190 feet along the entire shore. Due to the lengthy process of study, approval, design authorization, design, congressional action and presidential approval, however, actual work on such a project would not begin until 1985. Interview with Raleigh Leef, Project Manager for Atlantic Coast, Army Corps of Engineers, in Baltimore, Maryland, Aug. 25, 1975.