Coastal Land Preservation: Obstacles to Effective State Action

I. INTRODUCTION

In recent years the preservation of coastal lands and the natural resources in and around them has become a national concern. Population pressures, changing patterns of recreation, and industrial growth have intensified demand for the use of shorefront areas.[1] At the same time, the need to protect coastal plants and wildlife and the terrain which supports them has become increasingly apparent.[2]

Despite widespread federal activity affecting coastal areas,[3] the states continue to retain primary responsibility for shorelands.[4] And since the early 1960's, many have acted to meet the growing threat to coastal ecology, primarily through legislation. In some cases, this has involved heavy reliance on local zoning or a virtually categorical prohibition against development in specified coastal areas.[5] In other states, legislatures have adopted sophisticated and com-

1. *See* W. ROSENBAUM, THE POLITICS OF ENVIRONMENTAL CONCERN 215-17 (2d ed. 1977); D. RICHARDSON, THE COST OF ENVIRONMENTAL PROTECTION: REGULATING HOUSING DEVELOPMENT IN THE COASTAL ZONE 5-12 (1976).

2. *See* Binder, *Taking Versus Reasonable Regulation: A Reappraisal in Light of Regional Planning and Wetlands*, 25 U. FLA. L. REV. 1 (1972) [hereinafter cited as Binder].

3. *See, e.g.*, United States v. Maine, 420 U.S. 515 (1973); Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970); United States v. Lewis, 355 F. Supp. 1132 (S.D. Ga. 1973); *see also* National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (1970 & Supp. V 1975); Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376 (Supp. V 1975), *as amended by* Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566; Coastal Zone Management Act of 1972, 16 U.S.C.A. §§ 1451-1464 (West Supp. 1977).

4. In tidal areas, the upland includes all property landward of the high tide mark. Here the property owner exercises the traditional prerogatives of fee simple ownership, together with such riparian rights of access to the waters and the right to wharf out from that land as the common law may grant. The foreshore is the area between high and low tide and must generally be subject to access by the public as well as by the upland owner. 5 R. POWELL, THE LAW OF REAL PROPERTY § 723.2[1] (1977).

For a recent Supreme Court restatement of state interests in coastal areas, *see* Askew v. Am. Waterways Operations, Inc., 411 U.S. 325, 338-40 (1973).

5. *See, e.g.*, ME. REV. STAT. tit. 38, §§ 471-478 (Supp. 1977) (repealing ME. REV. STAT. tit. 12, §§ 4701-4709 (1964)).

prehensive programs of coastal development aimed at balancing the preservation of some areas with controlled development in others.[6]

Substantial legal challenges have been mounted against legislation of both types. First, recreational shore users have persuaded state courts to open beach areas to more extensive public use. This is likely to encourage increased usage of already strained coastal land and ecosystems with potentially disastrous consequences for the coastal environment.[7] Second, the states face potential financial obstacles in undertaking effective coastal regulation because of judicial findings that such regulation is often a taking for which private landowners must be compensated.[8] Any serious program of conservation must prohibit land development that leads to destructive uses of ecologically valuable resources; thus most state tidelands acts typically require permission from state environmental authorities before substantial alteration may be made in the use of protected land. However, where private property is involved, the application of such a statute in a particular case may so drastically affect the economic interests of a private landowner as to constitute a taking.[9]

This note will suggest a legal framework for the exercise of state coastal authority that will render present statutes less vulnerable to attacks of this nature. After a more detailed review of current attacks on state regulation, it will be argued that they may be blunted through a combination of zoning law and the public trust doctrine.

II. The State Cases

Current judicial interpretations of state regulatory authority in coastal areas and the limits on that authority are implicitly and

6. *See, e.g.*, California Coastal Act of 1976, Cal. Pub. Res. Code §§ 30000-30900 (West 1977); California Coastal Conservancy Act, Cal. Pub. Res. Code §§ 31000-31406 (West 1977); Delaware Coastal Zone Act, Del. Code tit. 7, §§ 7001-7013 (1975).

7. *See* note 30 and accompanying text *infra*.

8. *E.g.*, State v. Johnson, 265 A.2d 711 (Me. 1970); Bartlett v. Zoning Comm'n of Old Lyme, 161 Conn. 24, 282 A.2d 907 (1971). *See also* notes 25-29 and accompanying text *infra*.

9. *See* Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 Colum. L. Rev. 799 (1976); Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 Colum. L. Rev. 1021 (1975); Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149 (1971); Sax, *Takings and the Police Power*, 74 Yale L.J. 36 (1964); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967).

explicitly delineated in a number of state decisions that have been handed down in the last fifteen years. The decisions may be divided for analytical purposes into two groups: those dealing with access to beach areas and those dealing with wetlands preservation.

A. *The Beach Access Cases*

The beach access cases have a dual importance. They open beach areas to extensive public use that threatens conservation, and they also imply that there are strict limits on state power to regulate such areas for conservation purposes.

One set of access cases concerns the power of a municipality to exclude nonresidents from its beaches.[10] The courts have not been inclined to grant such a broad power, allowing cities and towns only to impose reasonable and nondiscriminatory user fees on outsiders who wish to make use of such facilities. Despite their interest to students of equal protection, these cases are of little significance in connection with state coastal preservation legislation because they do not involve the thorny question of compensation which litigation concerning private landowners raises. Nor are they of much use in delimiting state power over coastal areas, since municipalities are creatures of the state with little ability to contest state regulation of their property.[11]

The cases dealing with private attempts to exclude the public are of much greater import. The typical case has centered on the efforts of a new beach-front property owner to prevent the public, or some portion of it, from crossing his property to reach a beach it has used for many years.[12] In resolving these disputes, the state courts have generally supported the right of public access to beach areas on one or more of four bases: adverse possession; prescriptive easement; implied dedication; or custom.[13]

10. *E.g.*, Borough of Neptune City v. Borough of Avon-By-The-Sea, 61 N.J. 296, 294 A.2d 47 (1972); Hyland v. Borough of Allenhurst, 148 N.J. Super. 437, 372 A.2d 1133 (1977); Van Ness v. Borough of Deal, 145 N.J. Super. 368, 367 A.2d 1191 (1976); Gewirtz v. City of Long Beach, 69 Misc. 2d 763, 330 N.Y.S.2d 495 (1972).

11. As enunciated in the influential "Dillon's rule," municipalities in the United States are deemed to possess only such powers as are expressly granted by the state legislature or those necessarily or reasonably inferred from such grants. 1 J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237, at 448 (5th ed. 1911). *See also* S. Iowa Elec. Co. v. Chariton, 255 U.S. 539, 546 (1921).

12. *See, e.g.*, State *ex rel.* Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969); Hay v. Bruno, 344 F. Supp. 286 (D. Or. 1970) (three-judge court); United States v. St. Thomas Beach Resorts, Inc., 386 F. Supp. 769 (D.V.I. 1974).

13. Since these are common law doctrines they often vary from state to state in

Adverse possession has found little favor with the courts as a means of establishing public access, because it requires the public to make an exclusive use of private land "adverse to that of the owner."[14] In most instances, this cannot be shown since the owner has also made use of the land in controversy.

Prescriptive easement has met with more favor. The court in *Seaway Co. v. Attorney General* held that establishing the right of public access to a beach area by easement requires a finding of "*user* [which] must be adverse to the owner, must be continuous, and must be for at least 10 years."[15] Here, simultaneous use by the owner does not extinguish the public right of access.

The state courts have generally found that an implied dedication exists when many of the same conditions necessary for a finding of prescriptive easement are met. In *Gion v. City of Santa Cruz,* the court required "use by the public for [five years] without asking or receiving permission from the fee owner."[16] Intent may also be a requirement.[17] However, unlike easement and possession, dedication has usually been held to extend to the entire public rather than only to an identifiable group of historic users.

Finally, there is custom, the most expansive of the doctrines. In *State ex rel Thornton v. Hay,*[18] the Oregon Supreme Court permitted public access to a beach abutting private land. But the court explicitly refrained from basing its decision on the theory of prescriptive easement.[19] Instead, it relied on the doctrine of custom, arguing that easements and adverse possession could only apply to small portions of the shore actually in use by a specific group, while custom could support the opening of an entire state coast to public access.[20] Citing Blackstone, the court stated that a custom

this formulation. For example, in Oregon implied dedication requires intent by the owner to dedicate a piece of property, whereas in California no such intent is necessary. *Compare* State *ex rel.* Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969) *with* Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970).

14. *Gion v. City of Santa Cruz,* 2 Cal. 3d 29, at 39, 465 P.2d 50, at 56, 84 Cal. Rptr. 162, at 168 (1970), discusses this theory.

15. 375 S.W.2d 923 (Tex. 1964) (italics added).

16. 2 Cal. 3d 29, at 44, 465 P.2d 50, at 60, 84 Cal. Rptr. 162, at 172 (1970).

17. *See* note 13 *supra.*

18. 254 Or. 584, 462 P.2d 671 (1969).

19. 254 Or. at 595, 462 P.2d at 676. However, the court did state that "the law in Oregon . . . does not preclude the creation of prescriptive easements in beach land for public recreational use," and it found many elements of prescription in the case. *Id.* at 594-95, 462 P.2d at 676.

20. "An established custom, on the other hand, can be proven with reference to a

must be "ancient," "exercised without interruption," "peaceable and free from dispute," "reasonable" or appropriate in the use made of the land, "certain," "obligatory" upon the private landowner, and not "repugnant or inconsistent with other customs or law."[21] *Thornton* has since been cited with enthusiasm in the Virgin Islands and Hawaii, which, like Oregon, have large portions of relatively undeveloped coastline.[22]

B. *The Wetlands Cases*

In the tidal wetlands area, litigation has generally raised a different issue—the right of private landowners to develop or otherwise alter the natural character of their land. There have been a number of decisions upholding the right of the state to regulate such land without compensation even when it has resulted in drastic reductions in the value of the land.[23] However, both the intrinsic difficulty of coastal taking cases and the mounting pressures on states for development make it uncertain whether a benevolent judicial attitude toward state regulation can continue.[24] For this reason, the cases which have held state regulation to be a taking deserve close scrutiny; they may form an obstacle to the effective implementation of preservationist legislation.

A leading case is *State v. Johnson.*[25] The plaintiff owned a portion of salt marsh within an area that required state permits for development under the 1969 Maine Wetlands Act. The plaintiff sought and was denied permission to fill in the marsh. He began to fill the land anyway, whereupon the state enjoined his action. The plaintiff then appealed the grant of the injunction, complaining that his property was being taken without compensation in violation of the fifth and fourteenth amendments. The Supreme Judicial Court of Maine sustained the plaintiff.

larger region. Ocean-front lands from the northern to the southern border of the state ought to be treated uniformly." *Id.* at 595, 462 P.2d at 676.

21. *Id.* at 595, 462 P.2d at 677. *See also* Hay v. Bruno, 344 F. Supp. 286 (D. Or. 1970) (three-judge court).

22. United States v. St. Thomas Beach Resorts, Inc., 386 F. Supp. 769 (D.V.I. 1974); County of Hawaii v. Sotomura, 55 Haw. 176, 517 P.2d 57 (1973), *cert. denied,* 419 U.S. 872 (1974).

23. Sibson v. State, 115 N.H. 124 336 A.2d 239 (1975); Potomac Sand & Gravel Co. v. Governor of Md., 266 Md. 358, 293 A.2d 241 (1972); Just v. Marinette County, 56 Wisc. 2d 7, 201 N.W. 2d 761 (1972).

24. *See* 86 HARV. L. REV. 1582 (1973).

25. 265 A.2d 711 (Me. 1970).

In so doing, the Maine court held that the regulation of Johnson's particular piece of property was a taking under the definition set forth by Justice Holmes in his influential opinion in *Pennsylvania Coal Co. v. Mahon.*[26] By refusing a permit to Johnson, the state had reduced the commercial value of his land to nothing. Under *Pennsylvania Coal,* his land had in effect been "taken" by the government; thus the permit denial and the injunction had to be set aside.[27]

The court also cited a number of zoning cases where extensive regulation had been viewed similarly as an unconstitutional taking to support its decision.[28] It observed that the benefit derived by the landowner from state regulation in such instances was too small in relation to the public benefit and the injury he suffered to justify the taking without compensation.[29]

C. *Implications of the Cases*

The access cases suggest that a state has the power—indeed, at times, the obligation—to open such areas to public access, although this access may expressly encourage usage which endangers vital coastal areas. Use of shore areas by greater numbers of people will encourage despoliation of coastal ecology through sheer volume of usage. It may also create pressure to develop adjacent land in order to provide supporting facilities for such areas. Such pressure may undercut support for further efforts at preservation by making land in adjacent areas more commercially desirable.[30]

26. 260 U.S. 393 (1922).

27. 265 A.2d at 716.

28. Comm'r of Natural Resources v. S. Volpe & Co., 349 Mass. 104, 206 N.E.2d 666 (1965); MacGibbon v. Bd. of Appeals of Duxbury, 347 Mass. 690, 200 N.E.2d 254 (1964); 255 N.E.2d 347 (Mass. 1970); Dooley v. Town Plan & Zoning Comm'n of Fairfield, 151 Conn. 304, 197 A.2d 770 (1964); Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963).

29. The benefits from its [the wetlands involved] preservation extend beyond town limits and are state-wide. The cost of its preservation should be publicly borne. To leave appellants with commercially valueless land in upholding the restriction presently imposed, is to charge them with more than their just share of the cost. . . . [T]heir compensation by sharing in the benefits which this restriction is intended to secure is so disproportionate to their deprivation of reasonable use that such exercise of the State's police power is unreasonable.

265 A.2d at 716.

30. The way in which increased access to beaches can promote development of surrounding areas is particularly clear in the municipal access cases. The decisions explore the difficulties of facilitating access to municipal beaches by nonresidents without simultaneously having to expand parking areas, bathhouses, and similar facilities. *See generally* cases cited at note 10 *supra.*

Yet it would be wrong to view the access cases as insuperable obstacles to coastal preservation. Most of the common law doctrines cited in the cases support a public right of access only if a private owner has not clearly and persistently manifested his desire to retain exclusive access rights to the land in question.[31] Custom, the only doctrine not subject to this limitation, is open to criticism on other grounds. Even the *Thornton* court noted that it is difficult to base any right in a relatively young nation like the United States on an English doctrine requiring "ancient" use. It also noted that American courts have made little reference to custom over the years.[32]

In the wetlands area, the *Johnson* case suggests that state power must be exercised with great care lest it constitute a taking. The *Johnson* court questions the application of such statutes in specific situations—whether as applied, the laws may so drastically diminish the value of a private landowner's property as to require compensation.

Johnson is a significant case even though it has few counterparts in other jurisdictions.[33] Courts apparently find the validity of the diminution of value test itself difficult to dispute, though they may disagree as to the results of such an application in specific instances.[34] Also, some state agencies impose high procedural barriers to judicial review of their permit denials.[35] This may indicate

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

32. 254 Or. at 597-98, 462 P.2d at 677-78.

33. *See* note 8 *supra; cf.* Potomac Sand & Gravel Co. v. Governor of Md., 266 Md. 358, 293 A.2d 241 (1972); Sibson v. State, 115 N.H. 124, 336 A.2d 239 (1975).

34. *See, e.g.*, Potomac Sand & Gravel Co. v. Governor of Md., 266 Md. 358, 293 A.2d 241 (1972); Just v. Marinette, 56 Wisc. 2d 7, 201 N.W.2d 761 (1972).

35. In a 1975 study of appeals to the Massachusetts Department of Environmental Quality Engineering for permits to alter the character of wetlands, it was found that the Department "sought strict adherence to appeal procedures, often denying an appeal or declaring it null and void because of failure to conform adequately with the rules. Eleven of the 125 appeal cases were denied because the request came beyond the time period for appeal." STATE OF MASSACHUSETTS COASTAL MANAGEMENT DRAFT ENVIRONMENTAL IMPACT STATEMENT 111-10 (1977) (U.S. Dep't of Commerce, Nat'l Oceanic and Atmospheric Adm., Office of Coastal Zone Management).

For similar comments on the cumbersome nature of the appeals process in California, also reflecting tensions over state versus local authority in coastal management, *see* WRITTEN STATEMENTS FROM PARTIES WHO COMMENTED ON THE CALIFORNIA COASTAL MANAGEMENT PROGRAM AND THE REVISED DRAFT PROGRAM ENVIRONMENTAL IMPACT STATEMENT (1977) (U.S. Dep't of Commerce, Nat'l Oceanic and Atmospheric Adm., Office of Coastal Zone Management) (*see especially*, comments of the City of Los Angeles).

a concern that reviewing courts would follow *Johnson* and require compensation.

Yet, like the access cases, the *Johnson* decision is not without problems. Much of the decision rests upon Justice Holmes' *Pennsylvania Coal* test, which is subject to criticism on a variety of grounds.[36] Beyond that, the *Johnson* court seeks to demonstrate the unfairness of the Maine administrator's action by an explicit analogy to zoning.[37] But in making the analogy the court ignores Supreme Court decisions that do not view burdensome zoning as a taking. *Village of Euclid v. Ambler Realty Co.*,[38] *Hadacheck v. Los Angeles*,[39] and *Goldblatt v. Town of Hempstead*[40] all uphold the type of land-use regulation at issue here. And, if only on the facts of the case, the situation in the *Euclid* decision seems closer than that of *Pennsylvania Coal* to *Johnson*. In both *Johnson* and *Euclid* a comprehensive land-use regulation was enacted, forbidding certain land uses in designated areas, after a legislative finding that changing social and political circumstances compelled the sovereignty to protect its citizens.[41]

Furthermore, in *Goldblatt*,[42] its most recent decision on the taking issue, the Supreme Court expressed doubt about the utility of applying the *Pennsylvania Coal* test to land-use ordinances. The Town of Hempstead, finding that its growth around the site of a dredging operation endangered town inhabitants, passed an ordi-

36. Indeed, under the same *Pennsylvania Coal* test, the Wisconsin Supreme Court held that the application of an analogous Wisconsin statute in a virtually identical situation to that in *Johnson* was not a taking. Just v. Marinette County, 56 Wisc. 2d 7, 201 N.W.2d 761 (1972). The Wisconsin court explicitly refuted the *Johnson* holding by pointing out, first, that Justice Holmes was speaking of regulation that aimed at the "improvement" of the public condition and that such characterization could not be applied fairly to a wetlands regulation statute, which was aimed at preventing harm to the public. 56 Wisc. 2d at 23, 201 N.W.2d at 771. In addition, it argued that the diminution of "value" Holmes was concerned with was only in presently held property rights, whereas the diminution claimed in these cases was based upon what the land would be worth if it were filled. The court concluded that loss in value "based upon changing the character of the land at the expense of harm to public rights" could not be a controlling factor under the test. *Id.*

37. *See* note 28 and accompanying text *supra*.

38. 272 U.S. 365 (1926).

39. 239 U.S. 394 (1915).

40. 369 U.S. 590 (1962).

41. The recognition by the Court of the town's right to respond to changing metropolitan pressures was a central element of the *Euclid* decision. 272 U.S. at 386-87, 394-95.

42. 369 U.S. 590 (1962).

nance forbidding any further dredging. The plaintiff argued that such an ordinance was confiscatory and hence a taking. In response, the Court mentioned Justice Holmes' diminution of value test,[43] only to ignore it in favor of Justice Harlan's test forbidding compensation for any regulation authorized under the police power.[44] The Court then sustained the ordinance.

The zoning cases cited in *Johnson*,[45] like *Johnson* itself, mechanically recite the Holmes test of *Pennsylvania Coal*, largely ignoring the *Euclid* line of decisions or the significance of *Goldblatt*. They even contradict *Johnson* because most of them deal with local rather than state government land-use regulation.[46] The *Johnson* court explicitly argues that the justification for imposing the financial burden of regulation on any one individual diminishes as the number of citizens who benefit from that regulation grows.[47] Yet, if this reasoning is accepted, it is inconsistent with the zoning cases upon which *Johnson* so heavily relies: generally, *fewer* people stand to benefit overall from a municipal regulation than they do from a state act of a similar kind.

Despite these weaknesses, the case law in the area of coastal land regulation still presents difficulties for a legislature seeking to regulate coastal development. The access cases definitely expand the scope and nature of the public use of shoreline areas without providing a substantial basis for protective state regulation. The *Johnson* case, while conceding the validity of state wetlands regulations, makes their application financially impractical in a number of situations.

43. 369 U.S. at 594.

44. The Court cited from *Mugler v. Kansas*, 123 U.S. 623, 669 (1887):

> "The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community."

369 U.S. at 593.

45. *See* cases cited at note 28 *supra*.

46. The exception to this is *Comm'r of Natural Resources v. S. Volpe & Co.*, 349 Mass. 104, 206 N.E.2d 666 (1965), which considers the constitutionality of a local ordinance prohibiting wetlands filling.

47. *See* note 29 and accompanying text *supra*.

III. Zoning and the Public Trust: Better Bases for Protection

Fortunately, there exists a legal basis for state coastal regulation which avoids the difficulties presented by court decisions in this area. Sound legal authority for more effective coastal regulation can be found in traditional zoning law, especially when the state exercises its zoning authority to protect land within the public trust. Zoning law justifies both the overall regulation of development and the allocation of such development to those areas where it will do the least harm. The public trust doctrine permits further inhibitions on coastal development specifically in circumstances where zoning authority alone may be inadequate.

A. *Zoning*

Historically, state land-use planning has been limited by political concerns and financial restraints rather than by legal constraints on the exercise of the police power for such purposes.[48] Indeed, all local municipal authority over land use—including zoning—derives explicitly from this broader state power.[49] Legal controversy has therefore centered largely on prohibitions against the application of that power to specific pieces of land.

Zoning allows mixed uses—for instance, residential, commercial, and industrial—to coexist within the same overall plan. It provides for building or alteration within areas zoned for a particular type of use so long as the alteration conforms with the overall designation of the area.[50]

Some contemporary coastal statutes have been designated as "open space zoning" because they are similar in purpose to the traditional urban zoning described above. In addition, they often reflect the structural characteristics of their urban counterparts.[51] Thus, rather than establishing blanket prohibitions against any

48. For a variety of state land-use programs and the difficulties they encountered, *see* F. Bosselman & D. Callies, The Quiet Revolution in Land Use Control (1972), prepared for the Council on Environmental Quality.

49. *See* U.S. DEP'T OF COMMERCE, Standard State Zoning Enabling Act (2d ed. 1926), *reprinted in* C. Berger, Land Ownership and Use 656 (2d ed. 1975).

50. *See* Kusler, *Open Space Zoning: Valid Regulation or Invalid Taking?* 57 Minn. L. Rev. 1 (1972) [hereinafter cited as Kusler], contrasting traditional urban zoning and open space zoning.

51. *Id.*

commercial use or development, many coastal statutes allow a variety of specified uses to be made of wetlands or beach areas, provided they comport with the overall purposes of the statute and the classification of the particular land involved.[52] They also generally incorporate a permit application process which functions in the same manner as the variance in zoning. As the Supreme Court of Wisconsin noted in *Just v. Marinette County,* this ensures that in cases of hardship or other unusual circumstances permission can be obtained for a nonconforming use of an environmentally valuable piece of property.[53]

These features of the more comprehensive coastal statutes may have reflected in part an effort to mollify opposition from developers and home-owners who resisted an across-the-board prohibition of development and improvement in coastal areas. Certainly, the allowance of industrial uses in specified land areas by some of the statutes, and the almost universal employment of the permit system, can be viewed in this light.[54] But viewed in the context of zoning law, it can be seen that such provisions provide an important legal underpinning to preservation efforts as well.

First, allowing for more uses—especially economically beneficial uses—is likely to discourage the courts from finding a taking, since a frequent basis for this decision in "open space" challenges is the nature and variety of uses allowed to the landowner.[55] The more uses permitted, the less likelihood in a given instance that the courts will find a taking.

In addition, remodeling state statutes along the lines of traditional zoning may discourage the courts from requiring compensation because of long-standing judicial reluctance to find a taking under such circumstances. Zoning has historically enjoyed a favorable reception at the hands of the Supreme Court. Beginning in the early 1900's, and culminating in the *Village of Euclid v. Ambler Realty Co.*[56] and *Nectow v. City of Cambridge*[57] decisions in the late 1920's, the Court indicated a broad tolerance for zoning

52. *See* statutes cited at note 6 *supra.*

53. 56 Wisc. 2d 7, at 22, 201 N.W.2d 761, at 770 (1972).

54. In a somewhat unusual provision, the controversial California statute for coastal regulation has gone further and eliminated the need for a permit for most improvements to single-family coastal dwellings. CAL. PUB. RES. CODE § 30610(a) (West 1977).

55. Kusler, *supra* note 50, at 35-61.

56. 272 U.S. 365 (1926).

57. 277 U.S. 183 (1928).

enactments, provided they were not "arbitrary" or "capricious" in their intent and classificatory scheme.[58] In *Hadacheck v. Los Angeles*,[59] one of the Supreme Court's earliest examinations of the actual application of a zoning ordinance, the Court upheld a zoning classification that reduced the value of the plaintiff's lands from $800,000 to $60,000 without finding it to be a taking. Much later, in *Goldblatt v. Town of Hempstead*, the Court showed a similar unwillingness to regard a drastic diminution in land value as equivalent to a taking.[60] Most recent zoning cases before the Court have been argued on equal protection grounds.[61] Yet, the Court has reaffirmed its adherence to the standard set down in *Euclid*: it has continued to speak of the traditional freedom from judicial scrutiny of "state and local" zoning, and has even pointed out that instead of looking to the judiciary for redress, those "dissatisfied with provisions of such laws need not overlook the availability of the normal democratic process."[62]

This discussion indicates that less comprehensive statutes may face more severe legal obstacles in their implementation than their more sophisticated counterparts to the degree they do not parallel zoning ordinances. In this regard, redrafting them along the lines of the more comprehensive state legislation would obviously be desirable. Moreover, were such a change to be made; additional help for the preservation effort might accrue during the period of changeover.

A major difference between traditional zoning and regulation based on wetlands statutes is that traditional zoning recognizes—although often only in theory—that zoning must be tied to a comprehensive planning effort so as to ensure fairness and rationality in the allocation of various uses.[63] Zoning cannot occur without the collection of data which allow for an informed decision about the allocation of uses within an area. But if this is true of traditional

58. 272 U.S. at 395; 277 U.S. at 187-88.

59. 239 U.S. 394 (1915).

60. 369 U.S. 590 (1962).

61. Moore v. City of E. Cleveland, 97 S. Ct. 1932 (1977); Village of Arlington Heights v. Metrop. Hous. Dev. Corp., 97 S. Ct. 555 (1977); City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976); Warth v. Seldin, 422 U.S. 490 (1975); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

62. Warth v. Seldin, 422 U.S. 490, 508 n.18 (1975).

63. The advantages and disadvantages of an unusually elaborate zoning plan are discussed in *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

zoning, it is doubly true of "open space" regulation, which must weigh not only the traditional concerns of zoners but the likelihood of the subtle and not so subtle damages that can be wreaked on the ecosystems of coastal land areas as well.[64]

In the course of undertaking the comprehensive inventory and evaluation of the state's coastal land resources necessarily incident to such data collection, a state may impose valid moratoria on development by denying permits without cause.[65] By contrast, statutes which forego multiple land uses and impose a blanket prohibition cannot make such an imposition: if a private landowner successfully appeals the restrictions on his property, the state must either buy and condemn it or allow him to develop.[66] Yet, if the state ultimately concludes it does not need to protect certain pieces of coastal land, it should not have to choose in the interim between paying the cost of acquisition or else allowing more or less unrestricted development.

Under a comprehensive zoning scheme with valid moratoria, a state need not do either. It can simply prohibit development until it has accomplished the transition to a more comprehensive type of regulation. And, if the land is ultimately freed for development, the result will be fair to the owner since he can presumably recover his initial investment and more. Indeed, to the extent that restrictions continue to be imposed on other parts of the coast, the fair market value of his property should increase.[67]

All this does not mean that a legislature can hope to disguise a preemptive strike against private landowners by tacking the "zoning" appellation onto the title of an act. Neither can the legislature control the interpretation the courts will make of such an act, for they may choose not to analogize it to zoning. Yet it does suggest that states with comprehensive statutes have powerful means with which to repel attacks on their exercise of power, while states which have not enacted such statutes are foregoing legal aids to their regulatory efforts.

64. Binder, *supra* note 2, at 18-30, suggests some of the factors to be investigated.

65. *See* CEEED v. Cal. Coastal Zone Conserv. Comm'n, 43 Cal. App. 306, 118 Cal. Rptr. 315 (1974).

66. NYC Hous. Auth. v. Comm'r of Envir. Conserv. Dep't, 83 Misc. 2d 89, 372 N.Y.S.2d 146 (1975); CEEED v. Cal. Coastal Zone Conserv. Comm'n, 43 Cal. App. 306, 118 Cal. Rptr. 315 (1974).

67. *See* Ellickson, *Ticket to Thermidor: A Commentary on the Proposed California Coastal Plan*, 49 S. CALIF. L. REV. 715, 733 (1976) [hereinafter cited as Ellickson]; Healy, *Saving California's Coast: The Coastal Zone Initiative and Its Aftermath*, 1 COASTAL ZONE MANAGEMENT JOURNAL 365, 384-85 (1974).

B. *The Public Trust*

Redrafting current statutes in line with traditional zoning ordinances does leave some important problems unresolved. How far and over how much land should such zoning extend? What safeguards can be built into legislation that substantively permits more "developmental" land use, to prevent it from becoming a prelude to wholesale coastal despoliation and the bartering away of all valuable land?

One way to solve these problems is to reaffirm legislatively the public trust of the state in coastal lands. Such lands have always been the subject of a public trust, but in recent years the obligations imposed by such a trust on private landowners and the state have not always been fully realized nor applied to protect these areas.

In a lengthy, contemporary judicial exposition of the subject,[68] the concept of public trust in coastal areas has been traced back to early English law. All shores and tidal areas were originally held in fee simple by the king. However, lest he foreclose his subjects from fishing and navigation in such lands, these areas were declared subject to an inviolable public trust held for the people alongside the property rights inhering in the sovereign. Thus, in tidal areas, the public had the right to fish and navigate over the foreshore at high tide and the right to fish or clam on such beaches at low tide.

In the United States, the doctrine underwent little modification, except that the states replaced the king as sovereign. Until *United States v. Maine* in 1973,[69] they were held to have title to the submerged lands and the waters above them off their coasts. As a common law doctrine, the public trust was modified in a few states to reflect local needs and requirements: thus, in Massachusetts, the legislature in the 1600's decided to sell portions of the foreshore to private landowners;[70] in New York, the granting of royal patents to the towns during the colonial era carried with it the grant of public

68. Town of Smithtown v. Poveromo, 71 Misc. 2d 524, 336 N.Y.S.2d 764 (1972). The most comprehensive academic treatment to date is provided in Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) [hereinafter cited as Sax, *Public Trust*].

69. 420 U.S. 515 (1973).

70. *See In re* Opinion of the Justices, 365 Mass. 681, 313 N.E.2d 561 (1974), where the Supreme Judicial Court of Massachusetts issued an advisory opinion to the state legislature on the merits of a bill permitting passage on foot over privately owned foreshore.

trust sovereignty as well.[71] In addition, a handful of states, notably Massachusetts and Wisconsin, have sought to extend the public trust doctrine to parks; other states have applied it to inland waterways.[72]

Yet in its most common and ancient usage the doctrine centered on the protection of public rights in coastal lands, and it is in this guise that it has made its reappearance today. In Georgia, Mississippi, California, and New Jersey, it has been cited in support of the principle that the legislature may not alienate the foreshore of its saltwater coastline to private parties and that any other changes it makes in the disposition of the foreshore must be subjected to careful scrutiny.[73] California has recognized the right of private citizens to bring suit against others who seek to interfere with the exercise of their trust rights by filling tidelands or interfering with access to trust areas.[74] In other connections, the doctrine has been invoked in Massachusetts, Maine, Maryland, New York, Wisconsin and Connecticut.[75]

In the nineteenth century, states invoked the public trust doctrine under much the same circumstances as they do today. A number of state courts found that political pressures on legislatures from speculators or industrial interests had led the states to consider selling large portions of the state coastline. The courts resisted this alienation and argued that the public trust in such lands was a corpus held on behalf of all state citizens, which could not be substantially diminished for the benefit of private parties. For example, both California and Wisconsin in the latter half of the nineteenth century used the doctrine to invalidate or substantially modify legislative grants of such land to private parties.[76]

71. *See* Town of Smithtown v. Poveromo, 71 Misc. 2d 524, 336 N.Y.S.2d 764 (1972).

72. Sax, *Public Trust*, *supra* note 68, at 491-523.

73. State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334 (1976); Int'l Paper Co. v. Miss. State Highway Dep't, 271 So. 2d 395 (Miss. 1973); City of Long Beach v. Mansell, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970); LeCompte v. State, 65 N.J. 447, 323 A.2d 481 (1974).

74. Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

75. *In re* Opinion of the Justices, 365 Mass. 681, 313 N.E.2d 561 (1974); Burgess v. M/V Tamano, 370 F. Supp. 247 (S.D. Me. 1973); Potomac Sand & Gravel Co. v. Governor of Md., 266 Md. 358, 293 A.2d 241 (1972); State v. Reed, 78 Misc. 2d 1004, 359 N.Y.S.2d 185 (1974); Just v. Marinette County, 56 Wisc. 2d 7, 201 N.W.2d 761 (1972); Brecciaroli v. Conn. Comm'r of Envir. Prot., 168 Conn. 349, 362 A.2d 948 (1975).

76. Sax, *Public Trust*, *supra* note 68, at 509-10, 524-31.

The Supreme Court gave its approval to this interpretation of public trust in the late 1800's. The Court both in *Shively v. Bowlby*[77] and *Weber v. Board of Harbor Commissioners*[78] held that the state had a proprietary interest in tidal lands and waters together with a trusteeship, analogous to that in England, on behalf of the people. It also ruled that the state could not alienate such land, or, if it did, that the lands would be permanently burdened with a servitude in favor of the public with respect to these rights. In *Illinois Central v. Illinois,*[79] the Court expanded on the trust doctrine in the context of a state grant of extensive development rights to the Illinois Central Railroad along the waterfront of Lake Michigan. The Court held that although the state could alienate land to the railroad, it could not alienate so much, or in such a manner, as to impair substantially the use or enjoyment of it by the public in the remaining portions.

From this brief review, it is apparent that the doctrine offers a way for the state to assert substantive interests in coastal land. First, it makes clear that the whole coastal area is subject to explicit state protection. Second, it spells out the state's obligation to protect this area. By analogy to orthodox trust doctrine, it specifies that the state is under a duty not to alienate most of this land, since this will infringe upon the rights of its beneficiaries, the citizens as a whole. Finally, as a number of contemporary cases illustrate, the doctrine suggests that the state may take positive protective action on behalf of this land.[80]

The public trust doctrine deals specifically with the problems of access and wetlands regulation discussed above, in a way that zoning regulation cannot. In one sense, the trust doctrine implicitly reaffirms the public right of access to coastal areas, since the existence of protected rights are of little value without access to them.[81] This would seem to undercut the doctrine's emphasis on preservation. However, the public trust doctrine imposes an important limitation on access: it suggests that public usage which

77. 152 U.S. 1 (1894).

78. 85 U.S. (18 Wall.) 57 (1873).

79. 146 U.S. 387 (1892).

80. This state action might be effectively coupled today with a state suit on behalf of state citizens as parens patriae. Note, *State Protection of its Economy and Environment: Parens Patriae Suits for Damages*, 6 COLUM. J.L. & SOC. PROB. 411 (1970).

81. Borough of Neptune City v. Borough of Avon-By-The-Sea, 61 N.J. 296, at 306, 294 A.2d 47, at 53 (1972).

destroys the infrastructure of an area supporting fishing, navigation, and recreation may be legitimately regulated by the state in order to meet its responsibility as trustee.

With respect to wetlands, the requirement that the state not alienate coastal land wholesale argues for the view that much coastal land did not belong to the private landowner in fee simple to begin with. This presumably would permit the states to apply severe restrictions on any coastal land without compensating private landowners at all, thereby avoiding the taking problem discussed above.

However, it is hard to believe that the courts would disturb long-settled titles in order to let such a view prevail.[82] A more realistic approach would involve balancing in the manner of *Pennsylvania Coal,*[83] with the public trust still another explicit public right to be weighed against the rights and expectations of the private landowner which will be deprived by extensive state regulation.[84]

It is also significant that public trust is limited specifically to waterways and coastal regions. Unlike other doctrines purporting to protect the environment, it is not invoked generally to prohibit land usages except in coastal areas. As a result, a court need not fear that judicial endorsement of the doctrice can support wholesale restriction on all development within the state.[85] At the same time, the doctrine is relatively restrictive about the purposes to which coastal land can be put; it embodies specific prohibitions against the legislature's taking steps that would irrevocably alter the character of the land. Coupled with the recent recognition of the right of private citizens to sue to enforce such rights,[86] trust can thus serve as a means of enforcing legislative adherence to the purposes embodies in current coastal preservation efforts.

The only major difficulty with the public trust doctrine is that it does not explicitly grant states authority over uplands.[87] This can

82. *Hughes v. Washington,* 389 U.S. 290 (1967), demonstrates a judicial concern about disturbing private title to coastal lands through an assertion of historical state rights.

83. 260 U.S. 393 (1922). *See* notes 26 & 36 and accompanying text *supra.*

84. *Just v. Marinette County,* 56 Wisc. 2d 7, 201 N.W.2d 761 (1972), seems to follow this theory.

85. *See* Sibson v. State, 115 N.H. 124, at 130, 336 A.2d 239, at 243 (1975) (dissent).

86. *E.g.,* Marks v. Whitney, 6 Cal. 3d 351, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

87. Except for Massachusetts, which alienated most of its foreshore to private

be a serious problem since usually uplands are the most suitable for development. Yet this limitation may not be an insurmountable obstacle. It has been recognized that certain kinds of upland development by their very nature physically obstruct all access by the public to foreshore areas.[88] For this reason such development may be viewed as impermissible restrictions on the public trust and thereby invalidated.

In addition, the public trust doctrine dates from an era when there was little or no concern about the dangers posed by development to the environment and few means of tracing its impact. Today, there is not only heightened awareness of the environmental damage that development may cause, but a greater appreciation of how development in one area can affect seemingly unrelated aspects of the environment. For example, it is now recognized that development in adjacent uplands can inhibit the ability of wetlands to control floods by increasing water run-off to a level that marsh areas can no longer absorb,[89] and sophisticated methods for evaluating such interrelationships have been legitimated as mandatory provisions of such statutory enactments as the National Environmental Policy Act.[90]

Given these changes, it should be legitimate to prohibit upland development that will endanger public trust rights even when no direct alterations in the foreshore are proposed.

C. *An Outline of New Coastal Statutes*

Ideally, coastal statutes incorporating the safeguards and standards described above should contain, as a minimum, certain features. First, a declaration of purpose should be included, describing the lands covered by the public trust and specifying that such land is protected by the public trust. The legislation should also specify the rights which the trust protects, declare the legislature's power to protect such rights on behalf of the state's citizens,

owners during the colonial period, it appears that in virtually all states the public trust includes the foreshore below high water. *Compare In re* Opinion of the Justices, 365 Mass. 681, 313 N.E.2d 561 (1974) *with* 5 R. POWELL, THE LAW OF REAL PROPERTY § 723.2[1] (1977).

88. City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73 (Fla. 1974).

89. Binder, *supra* note 2, at 18-30, describes the complicated interaction of ecological forces in wetlands and estuaries.

90. 42 U.S.C. §§ 4321-4347 (1970 & Supp. V 1975). Under NEPA, federal agencies must prepare a detailed environmental impact statement before starting any significant federal action affecting the environment.

and then declare that such rights are dependent on the preservation of shoreline lands and waters and the wildlife therein.[91]

The heart of the statute would outline the state plan for balancing preservation and development of coastal lands over the long term. It would subject all such land to severe developmental restrictions during an interim period of land inventorying and evaluation by a body authorized to undertake such a project. Such a body would be directed to consider the maximum number of uses to which such land might be put, the desirability of dividing the land into areas zoned for different levels of development, and the necessity for harmonizing such a plan with the overall requirements of maintaining public access to trust lands and protecting the infrastructure upon which the enjoyment of trust rights depends.[92]

As a safeguard against administrative error or subjection to political pressure to modify public rights, it may be appropriate to empower private citizens to bring mandamus actions against administrators who authorize construction, development or land usage that is incompatible with the preservation of the trust. This would not, of course, supersede any recognized common law actions which a private party may bring against another private individual whose actions endanger the preservation of the public trust.[93]

IV. CONCLUSION

State court decisions have created legal barriers to effective preservation of coastal areas. This note has tried to suggest a way to overcome these obstacles within the existing framework of case law and statutory possibility.

The solution offered here would incorporate features of traditional zoning law and the public trust doctrine. Zoning can provide a helpful framework for sustaining the substantive purposes of coastal areas regulation. The public trust doctrine deals specifically with the interest of the state and the public in coastal areas and

91. The New York Tidal Wetlands Act opens with a detailed statement of the ecological and other functions performed by unimproved wetlands. Tidal Wetlands Act, 1973 N.Y. Laws, ch. 790, § 1 (Act codified at N.Y. ENVIR. CONSERV. LAW §§ 25-0101 to 0602 (McKinney Supp. 1977)).

92. For models on how this may be accomplished, *see* statutes cited at note 6 *supra*. Section 305(b) of the Coastal Zone Management Act of 1972 requires such an inventory and planning process from states that wish to receive federal assistance under the Coastal Zone Management program. 16 U.S.C.A. § 1454(b)(2)-(5) (West Supp. 1977).

93. Marks v. Whitney, 6 Cal. 3d 351, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

offers an historically valid method of protecting them. It prevents state legislatures from bargaining away their authority and responsibility, and it enumerates the activities and public rights to be protected along the shoreline.

In short, a framework is available within which existing legal challenges to coastal protection can be addressed on a reasonably comprehensive basis. It is now time for states to develop legislation that takes advantage of this framework to ensure protection for the nation's coasts.

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