Colonial Patents and Open Beaches

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlr
Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol2/iss1/10
COLONIAL PATENTS AND OPEN BEACHES

I. INTRODUCTION

To the east of Manhattan, stretching out over one hundred miles into the Atlantic, lies Long Island. On its South Shore, from Brooklyn to Montauk Point, there exist some of the most beautiful, sandy ocean beaches in the world. On the North Shore are the peaceful, secluded and rocky beaches of Long Island Sound. These beaches seemingly constitute an ideal recreational facility for the entire metropolitan area.

For many people, however, a trip to the beach, far from being a pleasant experience, is a horror of traffic jams on the highways and severe overcrowding on the beach itself, assuming one is fortunate enough even to find a place to park. The solution to this problem would clearly seem to be the opening of more public beaches. The opposite has, in fact, occurred. Municipalities and towns which hold title to many Long Island beaches, in reaction to the increased number of beach users, have closed their beaches to non-residents. Additionally, many localities own beaches which have, in fact, never been open to non-residents.

It is ironic that beaches are becoming less accessible at a point in history when Americans are acquiring increased amounts of leisure time. Many American workers have long enjoyed the 35 hour week. Some firms are experimenting with four and even three day weeks. It is not surprising then that, in recent years, the amount and scope of open-beach litigation has increased. Since 1965, decisions favorable to open-beach advocates have been handed down in Texas, Oregon, California, Florida, New Jersey, and New York, with cases in the latter two states being decided against municipalities which restricted their beaches to residents only.

While most of the aforementioned decisions were rather narrow in scope, two were not. Those decisions affirmed substantial rights to free beach access for all citizens of the respective states.

The Oregon case, *State ex rel. Thornton v. Hay*, originated because of a controversy over a fence on a beach and ended with the Supreme Court of Oregon stating that Oregon citizens enjoyed customary rights to use the dry sand portion of all the beaches in Oregon. In the New Jersey decision, *Borough of Neptune City v. Borough of Avon-By-The-Sea*, the Supreme Court of New Jersey, while re-affirming the lower court decision that sea-side communities could not exclude non-residents, further stated that these communities could not discriminate between residents and non-residents in charging a fee for beach use. While these cases will, no doubt, appear in the brief of every plaintiff in an open-beach action, they do not reflect the state of the law in New York. Some 40 years ago the Appellate Division was called upon to decide whether New Yorkers had customary rights to use beaches which were in private hands. The court, in a per curiam opinion, decided in the negative. It should also be noted that nowhere in *Gewirtz v. City of Long Beach*, the most recent New York case on the matter, does the court state that, absent certain circumstances, a municipality must open its beaches to non-residents. Indeed, there are even legislative statements to the effect that a town may restrict its beaches to residents.

As a result of the advancement of numerous theories for opening restricted beaches in various jurisdictions, beach litigation presently enjoys a somewhat confusing posture in the law, no theory having been found to have universal application. Indeed, the future course of beach litigation appears to depend on a case by case development, adjusting itself not only to the legal climate of a given jurisdiction but to a given locality's historic and geographic development as well.

It will be seen that before one may formulate the legal theories requisite to open a particular beach, one must first be aware of and understand its physical properties, particularly when dealing with New York beaches. Is the beach on the North Shore or the South Shore of Long Island? To some this may seem a trivial point. However, the answer to this question will limit or expand

---

the legal arguments available to litigants. A beach on the South Shore, for example, is subject to far more erosion or accretion depending upon circumstances, than a North Shore beach, with concommitant effects on title.

The distinction between North Shore and South Shore beaches is equally important because of the existence of colonial patents, the royal land grants to the freeholders of Long Island townships. These grants, in many cases, extend out into Long Island Sound so that title to the underwater lands is held, not by the State, as is customary, but by the towns.

The existence of the colonial patents are presented by many as a strong argument for keeping the beaches closed since the towns do not administer the beaches for the State but actually hold them in fee by reason of these land grants. Ironic though it may be, modern day residents of New York State enjoy fewer rights to beach enjoyment than did the citizens of ancient Greece and Rome.12 It is contended, and perhaps rightly so, that the colonial patents bind us to another place and another time, that is, to 17th Century England and the despotic rule of the Stuarts. Should we then sweep the patents aside as anathema to American concepts of liberty? In fact, these ancient land grants have been upheld for 300 years by the legislature and courts of New York. As will be seen, their validity is settled and they have shown remarkable resistance to judicial attack. Because of the power of the patents, it must be realized that some North Shore beaches held under title derived from colonial patents may never be opened to the general public.

The "history" of a beach itself must be considered in the formulation of certain other theories directed toward opening restricted beaches. By history, we mean the course of action taken by the owner of the beach with regard to the classes of persons permitted to use the beach. Were non-residents once permitted to use the beach or were they never permitted to do so? The former use may well lay the foundation for an action based on the proposition that acquiescence in use by the general public may imply an intention to dedicate the beach to that public.

Finally, it will become apparent that our options with regard to beaches are limited by financial considerations. Clearly, a state cannot simply take away private property without giving

just compensation in return. Yet beachfront property is enor-
mously valuable and it is doubtful that the State could obtain all
the beaches it needs through the exercise of its condemnation
powers. It should also be realized that any erosion prevention and
beach stabilization projects are also terribly expensive. If the re-
sources of the federal government are brought into play to save
the beaches, what will be the legal ramifications for restricted
beaches which have accepted federal funds?

Barring the development of a universal theory or event which
will open all beaches to non-residents, the success of open-beach
litigation on Long Island will probably evolve on a case by case
basis. It is the purpose of this comment to analyze the various
issues likely to arise in these future cases, and to suggest the
outlines of new theories which may have to be developed and used
in this litigation.

II. THE COLONIAL PATENTS

The colonial patents clearly present a formidable obstacle to
the proponents of open beaches and a comfortable feeling of secu-
ritv for those who would keep the beaches closed. Three hundred
years of history and custom stand behind the words of the pat-
ents, and their effect is not likely to be destroyed by one or even
by many direct attacks through litigation. As a matter of fact,
they are still viable weapons of attack themselves, as witness
their use in an action brought by a Long Island town to regain
title to patented land now being used by private


http://scholarlycommons.law.hofstra.edu/hlr/vol2/iss1/10
dated the 29th day of September, 1677, granted by Sir Edmond Andros, then Governor of New York, conveying to the townsmen of Oyster Bay, among other tracts, the lands under the waters within its jurisdiction in fee, "and all other profits and emoluments to the tract belonging, and all privileges and immunities belonging to a township within the then government." Rogers paid his fine.

Colonial patents to Long Island towns conveying underwater land have been utilized time and again by municipalities to protect the coastal waters within their jurisdictions from various encroachments. Originally intended as inducements to the farmers and craftsmen of England and Holland to settle the harbors and havens of New York, these colonial land grants presently form the basis of considerable municipal regulation of the affected coastline. This is so not only because such lands lie within the jurisdiction of patented townships but also because the fee vests in the municipality and not the State. The sources of title by which the Town of North Hempstead had held underwater lands in Hempstead Harbor and Manhasset Bay as fee owner may illustrate the manner in which Long Island towns have acquired and sustained their titles.

The original grantors of the patents, the Dutch and English sovereigns, derived their title from discovery and conquest. The power of the Europeans to make such grants appears never to have been open to serious question, despite the presence of their predecessor-settlers, the Indians. Chief Justice Marshall, reviewing the power to convey lands so discovered or conquered observed in an early opinion that European discoverers, as a consequence of their acts of discovery and conquest possessed a power to grant the soil, while yet in the possession of the natives. These grants have been understood by all, to convey a title to grantees, subject only to the Indian right of occupancy.


The English possessions in America were not claimed by right of conquest, but by right of discovery. For, according to the principles of international law, as then understood by the civilized powers of Europe, the Indian Tribes in the new world were regarded as mere temporary occupants of the soil . . . .

This being so, it was not surprising to find that titles based purely on grants from the Indians, as opposed to grants from the early Dutch and English governors, were not cognizable in law. See Town of Southampton v. Mecox Bay Oyster Co., 116 N.Y. 1, 5-8, 22 N.E. 387, 388-89, 78 N.Y.S. 1, 4-5 (1889); Nance v. Town of Oyster Bay, 41 Misc.2d
The first settlers of Hempstead were principally Englishmen who had emigrated across Long Island Sound from Connecticut to cultivate the rich Hempstead plains and take shellfish in the harbors of Hempstead's northern shores. The English yeoman arriving in Hempstead did not take by discovery or from the British sovereign but from the Dutch who had antedated the English settlers in New Amsterdam. The United States Supreme Court has observed:

If the discovery be made, and possession of the country be taken, under the authority of an existing government, which is acknowledged by the emigrants, it is supposed to be equally well settled, that the discovery is made for the whole nation... and that the vacant soil is to be disposed of by that organ of the government which has the constitutional power to dispose of the national domains.

The governmental organ so authorized was the Dutch Colonial Governor, William Kieft, who, "by virtue of a commission under the hand and seale of the high and mighty lords, the Estates Generalle," on the 16th of November, 1644, granted a patent to the townsmen of Hempstead,

with their Heirs, Executors, Administrators, Successors or Associates... a certain quantity of Land, with all the Havens, Harbors, Rivers, Creekes, Woodland, Marshes and all other Appurtenances there unto belonging, lying and being upon.

The grant was more than just a conveyance, being a charter of incorporation as well which extended "full Power and Authority, upon the said Land to Build a Towne... and Authority to Erect a Body Politique... ."

Twenty years later, a British expedition under Colonel Richard Nicholls was fitted out and dispatched to the New World. It entered New Amsterdam harbor in the latter part of August, 1664 and, on September 4, Governor Stuyvesant reluctantly surrendered to the English forces. New Amsterdam became New

446, 244 N.Y.S.2d 916, 921 (Sup. Ct. Nassau County 1963).
19. Id. at 42.
20. Id. at 43.
York and Richard Nicholls its first English governor.  
Seeking to secure the townsmen of Hempstead in their title to the lands conveyed by the Kieft Patent, Governor Thomas Dongan issued a patent to them on April 17, 1685, which granted and confirmed to the patentees and their Assigns forever all the before Recited Tract. ... together with all and singular the Woods, underwoods, Plaines, Meadows, Pastures, Quarryes, Marshes, Water Lakes, Causeways, Rivers, Beaches, fishing, Hawking, Hunting and fowling with all Liberties, Privileges, Hereditaments and Appurtenances to the said Tract of Land and Premisses belonging or in any wise Appurtaining.

The Kieft and Dongan Patents, then, were the principal sources of title to the Town of North Hempstead. The effect of Dutch-Roman law on the validity of the Kieft Patent was considered in Grace v. Town of North Hempstead, where the court held the conveyance not violative of Roman Civil Law as it operated in the Netherlands in the seventeenth century. It is submitted, however, that even assuming arguendo that conveyance of underwater lands under seventeenth century Dutch law was void, the English confirmatory patents establish the grants as law under the succeeding sovereign. These patents are part of the common law of England which was controlling until the War of Independence. Their treatment by the Colony and later, by the State of New York, is of paramount importance in determining the legal status of the colonial patents.

During England’s early history, the common law operated under the assumption that the foreshore, or strip of land between the high and low water mark, formed part of the seacoast manorial estates granted by the Crown. Whether the foreshore area

22. F. VAN WYCK, LONG ISLAND COLONIAL PATENTS 159 (1935).
was prima facie in the Crown or presumed to be appurtenant to the adjoining manor became the subject of considerable litigation during the reign of Queen Elizabeth I and the Stuart Kings.\(^{25}\) Definitive case law on the subject remained scarce until the courts of England announced the rule that the foreshore belonged, prima facie, to the Crown.\(^{26}\) However, these judicial developments, taking place after the new state government replaced the British colonial administration on April 20, 1777, did little to clarify New York law regarding ownership of the foreshore.

Because of the paucity of case law in England and the fact that no claim of prima facie ownership by the Crown was ever pressed in the American colonies, decisional law in New York came to rely heavily on works of legal scholarship in assessing the respective rights of individual and sovereign in the foreshore.\(^{27}\) The authority most often cited in this regard is the great seventeenth century Lord Chief Justice of England, Sir Matthew Hale.

---

25. Under the reign of Queen Elizabeth I, a certain Thomas Digges, a grantee of several royal foreshore grants, represented the Crown’s position of prima facie ownership in several suits. Digges was notably unsuccessful in pressing his claims in the wake of Constable’s Case, 77 Eng. Rep. 218 (K.B. 1601), in which King’s Bench held:

that the soil on which the sea flows and ebbs, between the high water mark and the low water mark, may be parcel of the manor of a subject . . . so it was adjudged in Lacy’s Case, Trin. 25 El. in this Court. (emphasis added)

The Stuart Kings were considerably more successful than their Tudor predecessors in establishing the prima facie theory of Crown ownership. Charles I, eager to fill the royal coffers with revenue from the sale of England’s foreshore, initiated an action in 1631 for the removal of a pier which had been erected on the foreshore of the Thames by the upland owner. King Charles was unsuccessful in this action but, after replacing the judges who had ruled against the prima facie doctrine of Crown ownership, emerged victorious in the notorious case of Attorney-General v. Philpot, reported only in S. Moore, A History of the Foreshore, (1888). The Philpot decision was bitterly resented and may well have contributed to Charles’ overthrow.

26. Not until 1795 did the Court of Exchequer mitigate the uncertainty and declare in favor of the prima facie theory of Crown ownership. In Attorney-General v. Richards, 145 Eng. Rep. 980 (Ex. 1795), the court, citing Lord Hale’s treatise and observing that, “It is clear that the right to the soil between the high and low water mark is prima facie in the Crown”, Id. at 983, went on to issue a decree ordering the removal of structures erected on the foreshore by the defendants, imputing to them an invasion of the jus privatum of the Crown.

By 1811 the doctrine of the jus publicum, coexistent with the jus privatum, was set forth in Attorney-General v. Parmeter, 147 Eng. Rep. 345 (Ex. 1811), the court indicating, “The private right of the Crown may be disposed of but the public right of the subject cannot, even if it be within this grant.” Id. at 352.

Sir Matthew's works on this subject formed the theoretical basis of New York law of the foreshore as it developed after the American Revolution.

According to Hale's celebrated treatise, De Jure Maris, the sovereign succeeded to the land under navigable waters in two capacities—that of fee owner and that of trustee.

The theory of fee ownership has been designated the *jus privatum* and forms the basis of any right of alienation by the Crown. Hale's theory of royal title in fee, or *jus privatum* is predicated on the privileges or "regalia" accorded to the king by the common law as powers incident to government and protection of the realm.

This theory was never questioned in the century prior to the American Revolution. Regarding the sovereign's prerogatives of fee ownership, Blackstone indicates that:

in England it hath always been holden that the king is lord of the whole shore and particularly is the guardian of the ports and havens.

In addition, the King succeeded to all open lands as universal occupant and original proprietor. It would appear, under the fictions of feudal law, that all real property having no acknowledged owner is, in theory, vested in the King as the head and sovereign representative of the nation. Bacon's Abridgement states:

The King by our law is universal occupant and all property is presumed to have been originally in the Crown. Hence, it is said, that the King hath direct dominion; and that all the lands are holden mediately or immediately from the Crown.

Since the King succeeds to title as part of his prerogatives as sovereign and as universal occupant, according to Hale, the land under water and in the foreshore
doeth *prima facie* and of common right, belong to the King both in the shore of the sea and the aims of the sea.

---

30. 5 M. Bacon, A New Abridgement of the Law 494 (6th ed. 1807).
31. Blackstone observes, "... whatever hath no owner vests in the King." Blackstone, Commentaries, supra n. 29.
32. Hale, De Jure Maris, Ch. 4, subd. 5, in S. Moore, A History of the Foreshore (1888).
While the King held the lands under water as the prima facie owner in fee, he also held the foreshore area as sovereign for the people of the realm. In this capacity as public trustee, the King could convey such land but it would be subject to the rights of the public for fishing and navigation, referred to as the *jus publicum* or the public trust.  

That the people have a public interest, a *jus publicum* of passage and repassage with their goods by water.  .  .  . For the *jus privatum* of the owner or proprietor is charged with and subject to the *jus publicum* which belongs to the King’s subject; as the soil of an highway is which, though in point of property it may be a private man’s freehold, yet it is charged with a public interest of the people.  .  .  .  

The dichotomy of the Crown’s ownership created by the *jus privatum* and *jus publicum* appears to have been appreciated by other authorities on English law during the seventeenth and eighteenth centuries. Bacon’s Abridgement lends support to Hale’s theory of the Crown’s prima facie ownership stating that:  

“as the King hath a prerogative in the seas, so hath he likewise a right to fishing and the soil.  .  .  .” But while the sovereign “hath a property right in the soil,” the author also recognizes Hale’s notion of the *jus publicum* stating:  

But notwithstanding the King’s prerogative in seas and navigable waters, yet it hath been always held, that a subject may fish in the sea for this being a common right, .  .  . [it] cannot be restrained by grant or prescription.

An examination of English law as it developed before and subsequent to the colonial period, indicates that the notion of the Crown’s alienable, proprietary interest in underwater land and the foreshore was recognized even though case law was sparse. Hale’s enunciation of the law of underwater lands indicates that while the concept of the alienable *jus privatum* might well be of seventeenth century origin, the notion of the *jus publicum* or the public trust, was equally well recognized and formed an integral part of the English common law of foreshore rights.

---

33. This *jus publicum* is apparently a vestige of Roman law of the foreshore. See *The Public Trust in Tidal Areas*, 79 *Yale L.J.* 762, 763-64 (1970).
35. 5 *M. Bacon*, *A New Abridgment of the Law* 498 (6th ed. 1807).
36. Id. at 494.
37. Id. at 498-99.
B. Adoption of Patent Law by New York

The New York adoption of Hale's theories never represented an aberration from common law but was actually a further development and refinement of that law. Indeed, the proprietary interest of the sovereign in the land underneath navigable waters and the alienability of the *jus privatum* was recognized by the New York courts as early as 1828. Interpreting a colonial patent to the Town of Oyster Bay, the court in *Rogers v. Jones* indicated,

It cannot be doubted, that when a patent or grant conveys a tract of land by metes and bounds, the land under water will pass, if the land under water lies within the bounds of the grant.

Forty years later, the Court of Appeals further elaborated on the doctrine to be applied in New York, stating:

The right of property in the soil or bed of a navigable river or arm of the sea, and the right to use the waters for purposes of navigation are entirely separate and distinct. The first of these rights is by the common law vested prima facie in the sovereign power; that is, in England, in the king, here, in the people; but may be alienated by king or people so as to become vested in an individual or corporation.

In *Trustees of Brookhaven v. Strong*, the Court of Appeals, in upholding the municipality's exclusive right to an oyster fishery, passed on the question of title in underwater lands. While mentioning that determination of the rights of fishing in navigable waters and the question of title to the soil of the bed involves "the consideration of confused and antiquated customs, obsolete terms and distinctions and conflicting opinions," the court held squarely in favor of the validity of the colonial grants. The court found "... that by the common law the King had the right to grant the soil under water and with it the exclusive right of shell-fishery. ..." This holding was followed in subsequent deci-

---

40. 60 N.Y. 56 (1875).
41. Id. at 66.
42. The court appears to have put to rest another point decided in *Rogers*; that the Magna Charta did not proscribe the granting of the colonial charters. The *Brookhaven* court upheld the determination in *Rogers* that the Magna Charta prevented the King from placing any waterway "in defense" or off-limits for his own recreation. Apart from this, neither court found any prohibition against the alienation by the sovereign of the *jus privatum*. Cf. 3 Kent's Commentaries 409; People ex rel. Howell v. Jessup, 160 N.Y. 249, 257, 54 N.E. 682, 684 (1899).
The presence of the conveyable *jus privatum* coexistent with the rights of the general public under the *jus publicum* appears to have been well established by the end of the nineteenth century. The Court of Appeals itself indicated its belief in the validity of the colonial patents, stating:

The title to the soil under navigable waters which vested in Long Island towns under the colonial patents was, undoubtedly, subject to the public right of navigation. . . . But whatever limitations may have been imposed upon the title of the town. . . . it is no longer an open question that the colonial patents to the Long Island towns vested in the towns legal title to the soil under the waters of the bays and harbors within the bounds of the patents.

Several New York cases have even dealt with the power of alienation by the very municipalities taking title under the colonial patents. Judge Pound, speaking for the Court of Appeals in a 1932 decision involving a municipality's right to lease certain underwater parcels held under colonial patent, noted that "[t]he town of Oyster Bay holds common lands under water in private, as distinguished from public, ownership which it may convey or lease . . . subject to the public right of navigation."

In fact, the basic right of alienation by the Crown, though subject to the *jus publicum*, has not been questioned by the New York courts since the 1828 holding in *Rogers*. In a 1967 case involving a suit to enjoin the Town of North Hempstead from alienating certain lands under colonial grant, Justice Meyer observed that "the town clearly has the right to convey land under water to the adjacent upland owner," though noting that such a con-

43. Robins v. Ackerly, 91 N.Y. 98 (1883); Hand v. Newton, 92 N.Y. 89 (1883).
45. *Id.* at 358, 14 N.E. at 296. In *People ex rel. Howell v. Jessup*, 160 N.Y. 249, 265, 54 N.E. 682, 687 (1899), the court in construing a colonial grant upheld the notion of the alienable *jus privatum* in the sovereign stating:

*The result of our investigation is that we conclude that the crown had authority to grant not only the land and the lands under the water, but the waters as well at this point, and that the title and the sovereignty over such water and the lands thereunder was by the [colonial] charters vested in and conferred upon . . . the town of Southampton.* [Emphasis added].

48. Riveria Association, Inc. v. Town of North Hempstead, 52 Misc. 2d 575, 580, 276
veyance of the *jus privatum* could not be injurious to the public good.

A review of New York decisional law thus indicates that Hale's bifurcated theory of the interests in underwater lands continues to be the law in this state. However, while the *jus privatum* is recognized, it may yet be inquired whether the proprietary interest once conveyed by the Crown might not also be revoked by the sovereign, now the State of New York. If the *jus privatum* so conveyed by the colonial patents might be revoked, with fee title reverting to the State of New York, the right exercised by patented municipalities to exclude the public pursuant to fee ownership would be extinguished.

The colonial patents have, however, always been considered irrevocable as evidenced by the treatment of the royal grants by the legislatures of the Colony and the State of New York, by state and federal constitutions and by decisional law. Subsequent to the granting of the charters to the Long Island towns, the colonial assembly ratified and confirmed the titles so conveyed. The Court of Appeals has observed that on

May 6th, 1691, the colonial legislature passed an act entitled "An Act for the Setling, Quieting and Confirming unto the Cities, Towns, Mannors and freeholders within this Province, their Several Grants, Pattents and Rights Respectively" . . . which act provided inter alia "That all the Charters, Pattents, Grants, made, given and granted. . . authorized by their late and present Majtys the Kings of England. . . are and shall forever be deemed, esteemed and reputed good and effectual, Charters, Pattents and grants Authentik in the Law against their Majesties their heiers and Successors for ever." Colonial Laws of New York, Vol. 1, PP 224, 225. [Emphasis added]49

The authority of the colonial legislature to confer such a confirmation appears never to have been seriously in doubt,50 the power of that body having been recognized for all local purposes as representing the power of the King in Parliament.51 This confirmation was recognized by the first New York Constitution in 1777, which provided that:52

51. Trustees of Brookhaven v. Strong, 60 N.Y. 56, 70 (1875).
52. N.Y. Const. § XXXV (1777).
[S]uch parts of the common law of England. . . and of the acts of the legislature of the colony of New York as together did form the law of the said colony on the 19th day of April, . . . one thousand seven hundred and seventy-five. . . shall be and continue the law of this state. . . .

By its first Constitution, then, New York adopted not only the common law of England but also the enactments of its own colonial legislature. It would follow then, that even if the doctrine of the alienable jus privatum were repudiated in England, which study shows it was not, the adoption of the 1691 act by the State Constitution would make the validity of the conveyances the law of New York by constitutional command.

Hence, while it is certain that the colonial patents were granted by the antecedent governments of Great Britain and the Netherlands, the State of New York, by frequent ratification by constitutional provision53 has upheld the acts of the original grantor as effectively as though legislative grant had been made. Indeed, since the first State Constitution, the New York legislature itself has frequently conveyed underwater lands by grant. The court in Matter of Long Sault Development v. Kennedy54 stated:

The power of the Legislature to grant land under navigable waters to private persons . . . has been exercised too long and has been affirmed by this court too often to be open to serious question at this late day.

Since the legislature by frequent constitutional confirmation stands in the position of the grantor and the land so conveyed

is proprietary in nature [the land] does not change character because the patent was granted by the State rather than the king or colonial governor.55

The act of the legislature in revoking or abrogating any such grant at will would seem to be in violation of the rule of law expressed by the Court of Appeals in Langdon v. Mayor:56

When valid grants are once made, they are inviolable, and the

54. 212 N.Y. 1, 8, 105 N.E. 849, 851 (1914).
56. 93 N.Y. 129, 156 (1883).
property granted can be resumed by the State, when needed for public use, only upon making compensation.

The long usage and the recognition of the colonial land grants have represented additional factors rendering the patents irrevocable. For example, it has been held that where a township has exercised dominion under a colonial patent for a long period and has filed a map of its boundaries, the State could not maintain an action to have title to such land vested in it.\textsuperscript{57} Similarly, in \textit{Grace v. Town of North Hempstead},\textsuperscript{58} it was observed that the town had voted its northern boundary in 1669 and, since the confirmatory Dongan Patent, it

\begin{quote}
[had] taken control of the waters and the shores of these harbors. It has passed regulations over fishing, as well as touching the building and maintenance of docks, which powers and authority it has continued actively to exercise to the present time. This long usage constitutes the best evidence of the grant.\textsuperscript{59}
\end{quote}

State grantees have fared no better than their grantor in invalidating the colonial patents. In upholding North Hempstead’s claim to underwater land, the \textit{Grace} court invalidated the plaintiff’s claim of title under a State grant stating that:\textsuperscript{60}

\begin{quote}
it must be held, as in \textit{Tiffany v. Oyster Bay}, [209 N.Y. 1, 102 N.E. 585,] that the State had not the title to the property which it assumed to grant to this plaintiff.
\end{quote}

\section*{C. The Potential Limiting Effect of Public Trust}

It is clear then that the alienable \textit{jus privatum} is recognized and irrevocable, and that the towns hold title to the lands under the grant subject only to the \textit{jus publicum}, or public trust. The basic notion behind the public trust doctrine is that “[t]here are things which belong to no one, and the use of which is common to all.”\textsuperscript{61} The doctrine represents the principal weapon in the environmental lawyer’s arsenal. The theory highlights the importance of the sovereign’s role as trustee over natural resources and the duty of the trustee to recognize and uphold constitutionally protected rights of the populace to breathe clean air, drink

\begin{itemize}
\item \textsuperscript{57} People v. Trustees, etc., of the Town of Brookhaven, 146 Misc. 473, 261 N.Y.S. 598 (Sup. Ct. Suffolk County 1932).
\item \textsuperscript{58} 166 App. Div. 844, 152 N.Y.S. 122 (2d Dept. 1915).
\item \textsuperscript{59} \textit{Id.} at 852, 152 N.Y.S. at 127-28.
\item \textsuperscript{60} \textit{Id.}
\item \textsuperscript{61} Geer v. Connecticut, 161 U.S. 519, 526 (1896).
\end{itemize}
Hofstra Law Review


clean water, and preserve the natural resources. It remains to be seen to what extent the *jus publicum* may limit or effectively eliminate the restrictive uses which towns holding under grant have imposed. It would appear that the breadth of application which the courts have attributed to the *jus publicum* would be a determinative factor in establishing the validity of town ordinances restricting to local inhabitants the use of beaches under grant. The courts of New York, however, while recognizing the existence of a *jus publicum* have, to a certain extent, left unsettled the extent to which property constituting the foreshore and underwater lands, once validly conveyed, is subject to the residuary rights of the public.²

The public right of navigation has always been the most significant of these residuary public rights. The Appellate Division, citing Hale, has observed that inherent in every such grant there was an implied reservation of the public right, and so far as it assumed to interfere with, or to make an exclusive appropriation of navigable waters, the grant was void.³ In addition to this *jus publicum* of navigation, it has been suggested that fishing rights, apart from shellfishing which has been held to be in the nature of a *profit a prendre* to lands underwater,⁴ might also constitute part of the residuary rights of the general public.⁵

It is notable, however, that the *jus publicum* rights of navigation and perhaps fishing have been narrowly construed by the New York courts. In *Smith v. Odell*,⁶ plaintiff's claim alleged that the public, in exercising its *jus publicum* of navigation in the Great South Bay was entitled to shoot waterfowl in the area, notwithstanding a colonial patent to the lands under water expressly and exclusively conferring such privilege upon the patentees. The Court of Appeals rejected the plaintiff's contention, holding that the paramount right of navigation applied only to

---

⁵ Where two such rights or interests exist with respect to the same portion of the earth's surface, each must be exercised and enjoyed in a reasonable way. Each right or interest in such case is always subject to the qualification that it cannot be exercised or enjoyed in such a way as to destroy the other.
⁷ 234 N.Y. 287, 137 N.E. 325 (1922).
those activities related to the use of the waters as a public highway. Accordingly, the court observed that the "[jus publicum of]... easement of passage does not involve a surrender of other privileges which are capable of enjoyment without interference with the navigator." Similarly, the public right of navigation has been construed to permit the offshore anchorage of vessels, but not the right to enter upon the foreshore when the jus privatum, or private property element, was held by a town under a colonial grant. In all probability, the courts will continue to hold the jus publicum of navigation to its stated purpose and not permit expansion to other water related activities, at least as far as municipalities under grant are concerned.

The rights of the general public in jus publicum activities other than navigation have similarly been narrowly construed. An early English decision held that the jus publicum of access to navigable waters did not include passage over the foreshore for the purposes of bathing. This holding has been examined and modified by the 1972 decision in Tucci v. Salzhauer. There the New York court found that the right of the public under jus publicum to use the foreshore when the tide is out conferred only the right to pass and repass as a means of access to the water and did not include the right to lie on the beach. The notion that the public might have access at low tide, over the foreshore for fishing or bathing had been implied in dictum in the case of Arnold's Inn Inc. v. Morgan. Access, per se, along the foreshore thus appears to be recognized for certain purposes, but the extent of that access is viewed restrictively by New York courts. Indeed, prior to Tucci it was held that foreshore access did not include the right to drive a stake in the sand for a bather to erect a sun shelter nor did it include gathering of sand worms or even seaweed.

Not only has access been viewed restrictively, but it is worth noting that the courts, in interpreting these aspects of the jus publicum have dealt exclusively with access upon and across the

---

67. Id. at 272, 137 N.E. at 327.
foreshore when the tide is out. The *jus publicum* has never been imposed upon any riparian owner\(^{75}\) of an upland beach area to afford the general public access to the foreshore area. This basic protection of riparian ownership would seem equally applicable to the patented municipality holding upland beaches under a grant. Indeed, access over upland beach area involves different considerations than access over the foreshore, the former being based on riparian rights of ownership. The distinction between *jus publicum* and riparian rights of upland owners is illustrated by a recent decision\(^ {76}\) wherein the right of a riparian owner to access to navigable waters was held not to be subject to interference by the municipal holder of underwater title. The decision is significant because it demonstrates that such access was based in the upland owner’s riparian rights and not in any way connected with an easement,\(^ {77}\) public or private. The court’s distinction between an easement and a riparian right has been recognized in the past\(^ {78}\) and has significance regarding the question of opening town beaches under grant to non-residents. First, expansion of riparian rights should have no effect on the notion of the *jus publicum*, a public easement having no relation to riparian ownership. Secondly, expansion of riparian rights cannot defeat the right of the towns to maintain beach facilities for their own citizens since, in virtually every instance, the townships hold title in fee to the upland beach as riparian owners in their own right.

An overview of New York law indicates that the *jus privatum* is subject not only to the legal rights of riparian owners but also to the *jus publicum* of the general public in the foreshore area which has been narrowly construed by the courts as necessarily related to navigation or limited to restricted access for restricted purposes.\(^ {79}\)

---

75. The term “riparian” has been defined as “[b]elonging or relating to the bank of a river; of or on the bank.” (*Black’s Law Dictionary* 4th ed. rev. 1968). The term is extensively used to describe areas relating to the shore or other tidal waters. While the proper word in this connection is “littoral”, for the purposes of this discussion, the term “riparian” will apply to upland owners in tidal areas. *See* Allen v. Potter, 64 Misc.2d 938, 939-40, 316 N.Y.S.2d 790, 793 (Sup. Ct. Yates County 1970).


77. *Id.* at 6, 311 N.Y.S.2d at 671.


79. The narrow construction of the *jus publicum* in New York was not disturbed by the Gewirtz decision, the court there choosing to omit the concept entirely from its holding, basing its decision on the particular facts in that case and relying on the notion of
D. The Mini Public Trust

Should access and enjoyment of town beaches and underwater lands be subject to a far wider interpretation? Should the *jus publicum* over state beaches be expanded to open all town beaches under grant to non-residents? Should the colonial grants, though valid before the courts and the State Legislature and under the common law since their inception to the present, be condemned to nullification by the notion of the public trust?

The answers to these questions may be neither simple nor obvious. An expansion of the application of the public trust doctrine would not automatically open all beaches but might, on the contrary, add strength to the power of the patented towns to keep the beaches closed. Since patented lands were conveyed to towns-hips in fee, these municipalities holding colonial grants stand very much in the same position as the State vis-à-vis lands affected with a public interest. Indeed, the granting of the colonial patents could be considered as the creation of several “mini” public trusts where the towns receiving the patents became the guardians and trustees of the land for the benefit of the local residents.

First, the colonial charters to Long Island towns must be distinguished from similar grants to private individuals. Unlike individual recipients of private grants, towns have held title to lands under water as corporate bodies for the benefit of all its citizens. It was early held that the grants conveying to certain named individuals as trustees for the people of the township created a corporate body capable of holding title to lands and providing by-laws for its protection.80 The townships took, not as individuals, but as political communities, the municipality holding the common lands and natural resources as “mini” public trust. In this regard the Court of Appeals has noted, “The grant under these patents was in trust for the use of the inhabitants of the town.”81

Later, the court again observed this unique relation of the grant vis-a-vis the citizens of the township stating that the town took and held the thing granted in its corporate political capacity, and as the representative of the crown, or of the colonial

---

80. Town of North Hempstead v. Hempstead, 2 Wend. 100 (N.Y. Ct. Errors 1828).
government, to be administered for the public good. . . Upon the organization of the state government, it continued to hold the soil of the bay in that capacity and, representatively, for the benefit of the members of the community.  

It is apparent, then, that the municipalities under grant took as more than individual owners. They took as political bodies and representatives of the State. Indeed, many of the grants were at once conveyances and town corporate charters.  

The characterization of the patents as the foundations of a "mini" public trust as opposed to a conveyance to an individual for private profit is underscored by the fact that the colonial grants not only conveyed fee title, but simultaneously created the political subdivision designated as "towns." Hence, the idea of restriction of access to lands under which the public may be excluded would appear to be as broad as the original limits of ownership. Thus, what the State of New York came to as political successor to the British Colony of New York could be restricted on a statewide basis. Therefore, patented towns, as the grantees of the sovereign, might restrict their facilities to town residents much the same way as the State, holding beachlands in trust for its own citizens, may restrict the foreshore area to State residents.

The peculiar nature of the colonial grants as instruments of government and not of private profit was further evidenced by the United States Supreme Court which noted that the public domain granted by the patents was "to be a trust for the common use of the new community about to be established." The colonial charters were instruments "upon which were to be founded the institutions of a great political community."  

The distinction between private grantees and municipal grantees holding as trustees for their citizens has been evidenced by the judicial treatment of the two varieties of colonial patents. Grants to private persons have usually been narrowly construed in favor of the sovereign. Indeed, at least one case has gone as far as to void as contrary to public policy a patent by Governor

82. Trustees of Town of Brookhaven v. Smith, 188 N.Y. 74, 78, 80 N.E. 665, 666-67 (1907).  
83. E. B. O’CALLAGHAN, LAWS AND ORDINANCES OF NEW NETHERLAND, 42-46 (1868).  
85. Id. at 411.  
Open Beaches

Dongan attempting to convey eleven miles of foreshore to a private owner. The court indicated that the conveyance, not invalid per se, could not be upheld because it was made in derogation of public rights and served no over-all public service. Citing the United States Supreme Court in *Martin v. Waddell*, the court noted: "Grants to towns or other bodies endowed with local sovereignty form an exception to the rule."

This distinction was drawn again in *People v. Foote* where it was stated:

A patent from a sovereign to a subject is to be construed more strictly in favor of the Crown than a patent by a sovereign to a town, which is to be construed liberally to effect its object, since it concerns the conferring of governmental powers as well as title to land. (emphasis added)

If the patents are viewed as instruments of political sovereignty to be liberally construed in order to facilitate the duties of the town as trustee of the lands so conveyed for its citizens, what is the effect of the *jus publicum* on town beach facilities? Already narrowly construed by the New York courts from earliest case law to the 1972 decision in *Tucci v. Salzhauer*, the *jus publicum* should remain subject to a narrow interpretation, especially with regard to municipal colonial patents which necessarily need liberal interpretation to enable townships to carry out their governmental functions.

If the public trust doctrine is not in itself sufficient to diminish significantly the validity of the patents, what alternative weapons do the open-beach advocates have? A substantial proportion of Long Island beaches is covered by one patent or another. The patents thus create a formidable obstacle not merely in terms of strength, as has been shown, but also in terms of their

---

91. 242 App. Div. at 168, 273 N.Y.S. at 574.
widespread application. If, because of their historical validity, they cannot be attacked frontally, what theories are available to minimize their strength or to avoid them entirely?

III. ALTERNATIVE COMMON LAW THEORIES

While colonial grants are not voidable on their face by the *jus publicum* or public trust doctrine, other legal theories have of late been advanced in an attempt to open patented beaches where applicable. The patents, being viable instruments of local government of proprietary ownership, may be susceptible to attack through various common law theories which could open patented beaches to the general public where the requisite facts present themselves.

Some of the major theories advanced have been those of public easement, by either prescription or necessity, long usage or custom, and implied public dedication. These theories are limited in their approach; nevertheless, they may prove useful as a reasonable, if partial move toward opening municipal beaches which have been kept closed by the continuing strength of the colonial patents. These theories of limited public access to private beaches have been the source of considerable confusion in the courts which have been interpreting their effect; opinions often discuss an “easement by prescription” and “customary rights in the nature of an easement” in the same breath. It is to be observed, however, that these various theories are quite distinct, often requiring the satisfaction of different criteria before an attack to open a beach can be successful.

A. Public Easement By Necessity

In New York, the elements of an easement by necessity or implication have been held to be the following: 1) Estates presently resting in the hands of different owners must have been formerly held in unitary ownership; 2) While so formerly held, a use must have been created by the unitary owner in or across from what would later constitute the servient estate; 3) Such an encumbrance must be physically apparent to the taker of the servient estate and must be necessary to the reasonable enjoyment of the dominant parcel. An open-beach proponent may encounter considerable difficulty in attempting to use this public easement.

---

ment theory. While there may have been initial Dutch or English unitary ownership of the now separate estates, the surrounding circumstances at the time of the conveyance may not evidence any intention of that owner to create an easement.

On the contrary, an historic survey of the patents indicates that a motivating force behind these conveyances was an intention to exclude nonresidents rather than to give them access to the water, and, by so doing, better to protect jealously guarded shellfishing and water rights. Indeed, any necessity for access by the grantor's successor or the general public has arisen some three hundred years after the conveyance, a fact which defeats meeting this criterion for an easement by necessity. Therefore, to permit such an encumbrance at this late date would not only contradict the explicit language of the grants, but ascribe to the parties an intent they clearly never had. Similar problems arise with the second criterion for such an easement which requires that the unitary owner create a use by continual exercise over the servient parcel. The residents of the patented townships constituted the first settlers on Long Island; that the Dutch owner could have created a use prior to the granting of the colonial patents is therefore historically unsound.

The last requirements for an easement by necessity are that the encumbrance be apparent and, of course, necessary. As shown above, it is questionable whether such an encumbrance was ever apparent to the grantees of the patents. It would further appear that nonresidents in those distant times had ample access to waters apart from those found across the patented lands and thus an easement was not even necessary. Even if a court were to measure necessity by current standards, that is, in the light of the clamor for full public access to recreational facilities, several additional obstacles to opening beaches by means of this easement by necessity theory would still present themselves.

For instance, access must be necessary, not merely convenient or even highly desirable; encumbrances have been denied where circumstances show other means of access. In one case,

upland owners were held to have an easement by necessity to reach a nonnavigable pond, that is, one for which there existed no other means of access.\textsuperscript{99} However, where navigable waters have existed, the courts have often held that there is sufficient access and have denied easements across a riparian owner's lands. This result is prevalent in the so-called "deep water" cases.\textsuperscript{100}

The New York element of necessity, then, has usually been construed quite strictly,\textsuperscript{101} and yet in considering what actually constitutes "necessity," variable factors of availability, popularity, expense and convenience should not be discounted in the judicial balancing process. The more relaxed definitions of necessity employed by other jurisdictions might provide useful arguments to be made to a New York court by an open-beach proponent. Several Maine decisions have recognized an easement despite other access to the foreshore, "where the expense to be incurred in creating or using another is excessive."\textsuperscript{102} A number of cases in other jurisdictions have gone as far as recognizing a necessity despite the availability of some form of access to property by water, with a recent Maryland decision noting that "the more modern view" of necessity is met "if the water route is not available or suitable to meet the requirements of the uses to which the property would reasonably be put."\textsuperscript{103} While this view assesses the problem more reasonably and more realistically, one Texas decision held that the element of necessity had not been met when the state, seeking to enforce such an encumbrance, had the alternative means of exercising its powers of condemnation.\textsuperscript{104} In any case, even if the New York courts liberalize the element of necessity, the other common law criteria would still have to be


\textsuperscript{104} State v. Black Bros., 116 Tex. 615, 297 S.W. 213 (1927).
overcome; these hurdles, as shown, may well be insurmountable when seeking to create a public easement of necessity across patented town beaches.

Additional problems become apparent when it is noted that an easement by implication or necessity is one principally affording rights of ingress and egress. The usefulness of the easement would thus apply only where the state already owns the foreshore. On the South Shore, the colonial patents did not carry past the high water mark, and an easement through the upland owner’s land to the state-owned beach would be of some use. On the North Shore, however, the patents carried with them the land under the waters of the bays and harbors. Thus, an easement conferring merely rights of ingress and egress would not lead to any usable beach area. Furthermore, if such an easement were ever permitted it would still be subject to extinguishment when the necessity that gave rise to it abated.

This last restriction is of particular importance when, assuming such an easement were allowed, the state acquires new beach facilities in the near-by area. In such a case, the beach in question should revert to its exclusionary nature, the public having gained alternate access to the state-owned foreshore.

B. Public Easement by Prescription

An alternative theory of public access by easement is that of easement by prescription, more frequently characterized as one of “use” rather than “ingress and egress.” Prescriptive easements, like adverse possession, ripen into full title when held or exercised under a claim of right, adversely, openly and notoriously for an uninterrupted statutory period. In New York the specified period is ten years.

105. The curious history of such a patent, that to the Town of Southampton, is outlined in the recent decision in Dolphin Lane Associates Ltd. v. Town of Southampton, 72 Misc.2d 898, 339 N.Y.S. 2d 966 (Sup. Ct. Suffolk County 1971).


Several difficulties are faced by litigants seeking to establish public easements by prescription over patented beaches, the most notable being the proof of the adverse nature of the use, if any, by the general public. Certainly, it is not every use of another's land which gives rise to a prescriptive easement. The nature of the use must be adverse and hostile, that is, wrongful or actionable. As a result, where municipalities have permitted use of their beaches either by guests of residents or nonresidents subject to special payment, such use by the general public is not hostile or adverse, but permissible pursuant to a license. To allow a prescriptive easement to run under these circumstances approaches a violation of the settled rule that an owner cannot acquire a prescriptive easement against himself.

It follows then, that wherever permission for beach use was given, express or implied, use by nonresidents can never ripen into a prescriptive right.

The opening of a patented beach under a theory of prescriptive easements may well fail even where permission for use by the general public was never granted. It is questionable whether the general public represents a party capable of acquiring a prescriptive right; New York cases have usually held that a use shared with the general public is not the type of activity capable of establishing such an encumbrance. This may be so owing to the fact that use by the general public may not be legally “adverse” since the public at large is not amenable to an action in ejectment or trespass.

Further, it is doubtful whether any easement by prescription would be permitted to run against any parcel “affected with a public interest.” Patented beaches, while often relegated to resident use only, are held and operated by municipalities as a pub-

lic trust, the tracts in question obviously not the sort of privately held lands contemplated by law over which an easement by prescription may be created.

C. Customary Rights in the Nature of a Public Easement

Perhaps because of these technical difficulties encountered with the easement approaches, the Oregon Supreme Court in *State ex rel. Thornton v. Hay*, chose instead to implement the notion of a customary right of enjoyment in beaches and the foreshore in opening to the general public free and unimpaired access to that state's shoreline. The decision, however, is distinguishable on its facts and may do little to introduce into New York law the concept of a right of access by custom against townships holding 300 year old patents.

In the Oregon case, the issue was whether the state had the power to prevent defendant landowners from enclosing the dry-sand area contained within the legal description of their oceanfront property. In holding that the state had the power to do so, the court recognized a public right-of-way to the state owned foreshore over the privately held dry-sand area. This right was held to exist through the English doctrine of custom, defined by Blackstone to be a use 1) so ancient "that the memory of man runneth not to the contrary," 2) exercised without interruption, 3) the customary exercise of which is peaceful and free from dispute, 4) reasonable, 5) obligatory as against those who would oppose it, 6) not contravening or inconsistent with other customs or laws, and 7) certain in its scope. 117

Unlike the situation in the Oregon case, the foreshore under most Long Island waters, where there are patents, belongs to the affected towns and not the state. Even where, as on the South Shore, patents carry only to the high water mark, the patented towns existed at least 100 years before the dawn of the state's political existence. Thus, the state could not have established an

---


Bacon's Abridgment defines custom somewhat differently:
The frequent repetition of an act which at first was a) assented to by the people of a certain place b) for their mutual conveniency and advantage, is called a custom, and every such custom, being certain and reasonable in itself, and commencing time immemorial, and always continuing without interruption, has obtained the force of a law, and in such places shall prevail, though c) contrary to the general laws of the kingdom. (emphasis added) 2 M. BACON, A NEW ABRIDGMENT OF THE LAW 232 (6 ed. 1807).
ancient customary use of access. The importance of this long and
continued use is discussed at considerable length in the New York
case of *Gillies v. Orienta Beach Club.* The plaintiffs sought to
open a private beach by alleging that, for more than 50 years, by
custom and usage, the inhabitants of Orienta Beach had used and
enjoyed the parcel of land in question for access to Long Island
Sound, for the purposes of bathing and boating. In determining
whether a customary right in the nature of an easement existed
in New York, the court observed:

The complaint alleges that the easement has been in use for 50
years. Such an allegation in England would not have justified
invoking the law of custom for in its history 50 years is but a
short period and such a use would not be considered as time
immemorial.

The court adopted the view that “[c]ustom, moreover, is an
outcome of immemorial usage, and will not ordinarily result from
proof of twenty years of adverse enjoyment.”

In seeking to satisfy this requirement the Oregon Court in
*State ex rel. Thornton v. Hay* had noted, “Oregonians could sat-
isfy that requirement by recalling that the European settlers were
not the first people to use the dry-sand area as public land.”

However, where colonial patents have existed and have been up-
held for 300 years, such a basis for a customary right might ap-
pear quite strained. Further, considering the requirement that a
customary right must have been exercised continuously, as well
as for time immemorial, an interruption of some 300 years be-
tween the use by the original inhabitants and that of the general
public now, may prove fatal to the establishment of a customary
right in the nature of an easement.

In addition to confirming the difficulty of establishing an
ancient use, the *Gillies* court further narrowed the scope of cus-
tomary rights in New York. It observed that such rights created
in a use by its continual and consistent exercise might vest in the
residents of a given locality but not in a general, unorganized public:

---

118. 159 Misc. 675, 289 N.Y.S. 733 (Sup. Ct. Westchester County 1935), aff’d 248
119. Id. at 681, 289 N.Y.S. at 740.
120. Id. at 678, 289 N.Y.S. at 736.
122. 159 Misc. 675, 678, 289 N.Y.S. 733, 736 (Sup. Ct., Westchester County 1935).
There have been presented to the courts very few cases in which title to incorporeal hereditaments has been held to rest on custom alone. In the rare instances in which it has given rise to servitudes it has been shown to have continued for time out of mind in favor of a practically definite class of families or persons constituting a town, village or other community.

Thus only a limited number of people could benefit from the finding of an easement by custom and the general public's need for access to the beaches would barely be alleviated.

The establishment of customary rights in the nature of easements has encountered a frosty reception in the New York courts as is perhaps best evidenced by the celebrated decision in Pearshall v. Post where the New York Court stated:

[A] rule of law, which should admit the possibility of turning such enjoyment into a prescriptive and absolute right on the part of the public, would open a field of litigation, which no community could endure. What is still worse in a moral point of view, it would be perverting neighborhood forbearance and good nature, to the destruction of important rights.

A remedy adequate to open the state-owned foreshore to public access in Oregon manifestly is not suitable in the peculiar factual and legal climate of New York, particularly where beaches are held under colonial grant. In fact, it would appear that customary rights in the nature of a public easement are as technically difficult to establish in law as the more traditional easements of necessity and prescription. Owing perhaps to the difficulty of establishing these common law rights of access, several courts have adopted instead the relatively new concept of the implied public dedication.

D. The Implied Public Dedication

A discussion of an implied dedication of beachfront property to a public purpose must properly be separated into two areas: 1) dedication of government-acquired land to the general public through an express or implied dedication, and 2) the taking of a recreational easement over private property through the device of an implied dedication.

The court in Gewirtz v. City of Long Beach laid down basic guidelines to be followed in future litigation against a governmen-

123. 20 Wend. 111, 135 (N.Y. Sup. Ct. 1838).
tal owner of a beach which had once been open to the general public, but which was later restricted to use by residents exclusively. In that case, the city of Long Beach acquired the beachfront property in the years 1935-1937. Federal funds were obtained in 1935 for use in projects to both stabilize the beach against erosion and to enhance it as a recreational facility. Local Law IV/36 was enacted in 1936 to give the City Council authority to supervise and maintain the beach park. It further gave the City Council power to charge a reasonable fee for the use of the beach park. That legislation did not, however, give the City Council the power to delimit the class of persons who could use the facility. Members of the general public at large used the beach park from 1936 until the passage of Local Law IX/70 in 1970. That law restricted the use of the beach to residents of the City of Long Beach and their invited guests. Plaintiffs Albert and Paula Gewirtz were residents of Lido Beach, a community adjoining Long Beach, and plaintiff-intervenor Judith Friedlaender was a resident of New York City.

The court indicated, first of all, that, had Long Beach desired to create a park solely for its own residents, it could have taken steps to insure that the instruments of conveyance, by which it took title to the land, contained restrictions requiring that the property be devoted to a specific public use. No such restrictions were put on the conveyences, however. In discussing Local Law IV/36 the court remarked:

That Local Law ‘created a public park’ out of the municipally-owned ocean beach front property and directed the City Council to make provision by ordinance for the supervision and maintenance of the public park and for the collection of a reasonable charge from users of the public park to be prescribed by the same ordinance.

It is difficult to conceive of any method better calculated to express the intent to dedicate its ocean beach front property to public use as a public park than the local law which the City enacted in 1936 and the implementing ordinance which it thereafter adopted. These actions by the city manifested unequivocally an intention to dedicate the municipally-owned property to public use as a public park.

125. Local Law IV/36, enacted April 26, 1936, became § 98 City Charter of Long Beach (amended 1970).
126. Local Law IX/70, enacted Nov. 4, 1970, became § 98 City Charter of Long Beach.
The court further stated that not only did the City's initial actions constitute an offer to dedicate the land to a public purpose, but its subsequent actions constituted an acceptance on behalf of the general public of its own offer to dedicate the land to the aforementioned use.\textsuperscript{128}

Consideration was given to the fact that acceptance may also be found in continuous, actual public use, the court remarking that:\textsuperscript{129}

\begin{quote}
If the element of acceptance is necessary in this case for a completed dedication to use of the public park and its facilities by the public at large, it is found both in what the City itself has done in operating and maintaining its public park and also in the use which the public at large has made of such facilities over a period of more than thirty years.
\end{quote}

Since it is settled in New York that once a public park has been dedicated it cannot be alienated without express legislative consent,\textsuperscript{130} a municipality would be rather limited in its options should a public dedication be found to have been made. The court did take care to point out that, while, a locality may restrict "self-supporting improvements,"\textsuperscript{131} such as beaches, to use by its residents, express power to do so must be conferred upon the locality by the Legislature.\textsuperscript{132} Long Beach, of course, received no such express grant of power.

Of all the theories discussed, given the requisite facts, an action based on an implied public dedication probably has the best chance for success. Perhaps, because of the inequities of closing a beach to a segment of the population which has long enjoyed and supported that facility, courts seem to look favorably upon such actions. In the case of Long Beach, for 35 years non-residents used the beach and patronized the local business establishments. Non-residents helped defray the cost of beach operations by paying higher fees than residents and also, through their patronage of local business, aided the economy of the City. In

\begin{itemize}
\item \textsuperscript{128} \textit{Id.} at 771, 330 N.Y.S.2d at 506.
\item \textsuperscript{129} \textit{Id.} at 773, 330 N.Y.S.2d at 507.
\item \textsuperscript{130} Brooklyn Park Comm'rs v. Armstrong, 45 N.Y. 234 (1871).
\item \textsuperscript{131} N.Y. \textsc{Town Law} § 140 (McKinney 1965) defines "self-supporting improvements" as "[A]ny dock, pier, wharf, bathing beach . . . . from which revenues are obtained by the imposition and collection of rates, fees, tolls or admissions."
\item \textsuperscript{132} N.Y. \textsc{Town Law} § 143 (McKinney Supp. 1972): "The town board of any town in Suffolk County and of any suburban town may . . . . limit the use of such self supporting improvement to residents of the town. . . . ."
\end{itemize}
fact, when the beaches were first closed it was a group of business-
men who joined in the action for a declaratory judgment to re-
open them.\textsuperscript{133}

The Avon\textsuperscript{134} court pointed out that all the benefits do not run
only from the beach owner to the populace:\textsuperscript{135}

On the other hand, the values of real estate in the com-

munity, both commercial and residential, are undoubtedly
greater than those of similar properties in inland municipalities
by reason of the proximity of the ocean and the accessibility of
the beach. And commercial enterprises located in the town are
more valuable because of the patronage of large numbers of
summer visitors.

Resort communities which restrict their beaches after having
received the benefits of years of public support are not only bad,
neighbors, but they also show a callous disregard of the needs of
the very people who helped build their communities. Certainly,
as far as Long Beach is concerned, it has little reason to complain
of the result of the \textit{Gewirtz} decision. The public funds and sup-
port it received over the years more than justify the opening of
the beaches.

Many recent nationally decided cases\textsuperscript{136} have considered the
second problem, that of acquiring public rights in privately
owned property. Generally, the device used to secure these rights
is adverse use by the general public of the private owner's land,
giving rise to the notion that that owner had impliedly dedicated
a recreational easement over his land to the general public. Given
the state of the law in this area in New York and the generally
unfavorable conditions for such an action on Long Island, the
likelihood of a successful action of this sort seems rather remote.
Since these cases will continue to be relied on by plaintiffs, a
short discussion of them seems in order.

Basically, actions based on implied dedication are somewhat
unfair because, what they in effect do, is penalize the generous
owner who has acquiesced in use of his land by the general public.
In actuality, this sort of action causes far more harm than good.

\textsuperscript{133} Kalin v. City of Long Beach, Sup. Ct., Nassau County, 27 N.Y.2d 799, 264
\textsuperscript{134} Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 294 A.2d
47 (1972).
\textsuperscript{135} \textit{Id.} at 300, 294 A.2d at 49-50.
\textsuperscript{136} Gion v. City of Santa Cruz, 2 Cal.3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970);
A recent law review article\textsuperscript{137} points out that California beach owners, upon learning of the \textit{Gion}\textsuperscript{138} decision, where a public easement by use was found against a private beach owner, immediately took steps to halt effectively the public use of their beaches. This is perfectly understandable behavior since the value of prized shoreline property would be considerably lessened by an easement in favor of the general public.

In an area like Long Island, the mere discovery of a beach where adverse use would be possible would be a major feat. Most beaches in private hands are held either by homeowners or beach clubs and since in neither case are the beaches absentee owned, the degree of control over who uses the beach is very great. It seems a remote possibility that the general public might ever adversely use such beaches for 10 years.

It should be noted that most courts are extremely reluctant to enforce prescriptive easements. In a recent Florida decision\textsuperscript{139} the District Court of Appeals, First District, in upholding a prescriptive easement in favor of the general public, took great care to indicate that this was an extraordinary action with limited application:\textsuperscript{140}

Not all use of beaches or shoreline gives rise to a prescriptive easement. Neither occasional use by a large number of bathers nor frequent or even constant use by a smaller number of bathers gives rise to a prescriptive right in the public to use privately owned beaches.

There are many beaches along our entire shoreline that are resorted to by local residents and visitors alike without giving rise to prescriptive easements. It is only where the use during the prescribed period is so multitudinous that the facilities of local government agencies must be put into play to regulate traffic, keep the peace and invoke sanitary measures that it can be said that the public has acquired a prescriptive right to use privately owned beaches.

The terms prescription and implied dedication are often used interchangeably. Many courts, perhaps unhappy with the harsh sound of the term prescription, prefer to say that the owner has

\textsuperscript{137} O'Flaherty, \textit{This Land Is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches}, 44 S. Cal. L. Rev. 1094, 1095 (1971).
\textsuperscript{138} 2 Cal.3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970).
\textsuperscript{139} City of Daytona Beach v. Tona-Rama, Inc., 271 So.2d 765 (Fla. Ct. App. 1972).
\textsuperscript{140} \textit{Id.} at 770.
impliedly dedicated the easement.\textsuperscript{141} This is, no doubt, related to the high regard American courts have traditionally had for the property rights of individual citizens. In reply to the argument advanced by the plaintiff in \textit{City of Daytona Beach v. Tona-Rama, Inc.}\textsuperscript{142} that the general public had certain rights of access across private beaches which did not even require adverse use, the court said:\textsuperscript{143}

\begin{quote}
Were we to accept such notions, it would amount to expropriation of private property without compensation by sheer judicial fiat. Our initial decision herein was and is in no way influenced by appellee’s notions that the need to preserve beaches for public recreation in any way authorizes the taking of such beaches from their lawful owners.
\end{quote}

It should be apparent that actions seeking the finding of a public dedication are neither favored by most courts nor do they have any widespread application. This type of action is inappropriate against a restrictive municipality because of the requirement that the use be open and notorious. If the use were not the action would fail. If the use were open and notorious, the correct action would be one of an implied dedication, not this hybrid adverse use-implied dedication type action. Because of its effects and limited applicability, this action probably has no viable future.

Clearly, there are many technical and historical problems with these common law theories, no one of which seems to be a universally effective means of getting past the barrier of the colonial patents to open beaches. New approaches of potentially great usefulness may come from the action of the ocean itself. Accretion and erosion of beaches affect the status of title, and the use of federal funds to control or modify these natural events affects the governing power of the local towns. These relatively more recent developments may be the source of new approaches for open beach advocates.

\section*{IV. New Theories}

\subsection*{A. Changes in the Ocean Littoral}

Successful application of a legal theory to open a restricted...
beach to access by the general public often depends on the particular circumstances of the *locus in quo*. Indeed, much of the foregoing has indicated that the colonial patents granted to Long Island townships have rendered many of the better known theories without meaningful force and effect. It is to be remembered, however, that not all colonial patents contained the same areas within their descriptions and the extent of these conveyances was, at times, severely limited. The most important variation among the colonial grants is between the type of conveyance which prevailed on the South Shore of Long Island as opposed to that on the North Shore. South Shore grants, which often included the barrier beaches, carried title only to the highwater mark of the Atlantic Ocean, while North Shore conveyances usually included entire bays and inlets and all the lands thereunder. In other words, patents on the South Shore usually left title to the fore-shore in the state.\textsuperscript{44}

Recently, great concern has been generated regarding natural forces which are working to effect significant changes upon the ocean shoreline along the barrier beaches on the southerly side of Long Island. The action of wind and waves on the barrier beaches, coupled with the acts of riparian owners in the erection of groins and jetties to protect against erosion may, by artificially inducing accretion or reliction,\textsuperscript{45} have the effect of drastically modifying legal claim to title in these ocean beaches. This modification can result regardless of whether the riparian owners are private individuals, or a municipality holding a barrier beach in fee pursuant to a colonial grant.\textsuperscript{46}


\textsuperscript{146} The rights of riparian or littoral owners regarding additional land that has accreted to their shoreline, or the effect of erosion on legal title were recognized early in English law. Blackstone observed that:

And as to the lands gained from the sea, either by *alluvion*, by the washing up of sand and earth, so as in time to make *terra firma*; or by *dereliction*, as when the sea shrinks back below the usual watermark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. \textit{For de minimis non curat lex}: and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration.
The leading case settling the rights of riparian or littoral ownership in this respect is Matter of City of Buffalo\textsuperscript{47} where it was held that gradual encroachment by erosion would result in a loss of title in eroded shoreline property. Therefore, it follows that title to beachfront may be extinguished by acts of erosion or submergence, the former consisting of a gradual eating away of the soil by the operation of current or tide, the latter representing the disappearance of lands under water and the formation of a navigable body over it.\textsuperscript{48} Where the shoreline has diminished along the barrier beaches from ocean currents, riparian title has been lost with the underwater land reverting to the state as owner of the land under the ocean. This rule of common law has been held to operate with equal force against all riparian owners, whether private or municipal, since governmental bodies have been held equally affected "by the rules of avulsion, erosion and accretion."\textsuperscript{49}

The operation of this natural force, therefore, could result in the state gaining title to significant amounts of beach land and thereby greatly increase at least the amount of foreshore available to all state residents.

Of course, riparian owners may not always be subject to the natural effects of erosion and may often enjoy increased beachfront as a result of accretion. However, additional dry-sand area by accretion may have several legal implications depending on how it came to rest on that owner's parcel.

The South Shore towns have been erecting systems of groins and jetties in an attempt to halt the erosion of their beaches and with the resultant increase in the state's beach land. However, since the accretions which may result have been caused by artificial means, title to the area gained will not automatically go to the riparian owner, in this instance the towns. Where the accumulation of land has been too rapid to be classified as an accretion, the riparian owners almost certainly would not get title. The

\textsuperscript{47} 206 N.Y. 319, 99 N.E. 850 (1912).
applicable rule in this situation states that property boundaries do not change where the physical alteration was due to a sudden, perceptible change in the littoral.⁵⁰

Often, however, those accumulations are gradual rather than sudden and the riparian owner's claim may be stronger in that case. It is the general rule that accretion due to some artificial condition created by a third party will not preclude a riparian owner from asserting title over the new land so formed, despite the fact that such an accumulation was brought about by artificial means.⁵¹ Nevertheless, this rule is not so generous when the accumulations so formed resulted from the intentional acts of the riparian owner who benefited. The New York Court of Appeals noted in an early decision:¹⁵²

If by some artificial structure or impediment in the stream, the current should be made to impinge more strongly against one bank, causing it imperceptibly to wear away and causing a corresponding accretion on the opposite bank,. . .I am not prepared to say that the riparian owner (so injured) would not be entitled to the alluvion thus formed, especially against the party who caused it.

Artificial accumulations may thus render an improving riparian owner liable to other owners, one of whom might be the state holding an adjoining beach area. The state may be able to acquire title to the accumulated land under the theory of the Halsey case, if its own adjoining land has been diminished by action of the water around the groins and jetties. The state might also acquire rights in such an artificially formed beach by asserting that riparian accumulations pursuant to jetties and groins constitute an addition of land by wholly artificial means and not such a natural accrual of sand as to carry title. Since a mere fill of underwater land, unless held adversely for the period of prescription, cannot work a change in title, the beach areas so

---


¹⁵² Halsey v. McCormick, 18 N.Y. 147, 150 (1858).
formed may be held to be, not in the former riparian owner, but in the state, the owner of the land which was formerly underwater.\textsuperscript{153} Thus, through both accretion and erosion, the state may gain title or at least access to additional beach areas no longer under the restrictions of the patented towns and available for use by all the residents of the state.

\textbf{B. Effect of State and Federal Funds}

The action of these natural forces which may serve to increase available beach land for the state also looms in the background of a different approach in the attempt to open the beaches: the use of federal funds for erosion and pollution control. When considering the effect of the taking of federal and state funds by a locality to use for the improvement of beaches held in fee and restricted to the sole use of its residents, one must look not only to what funds were accepted in the past, but also to the monies which will be needed in the future to finance costly erosion control projects.

The question of whether the taking of federal funds will, in and of itself, be sufficient to open a restricted beach is unresolved at this time. Certainly, the equities of this situation require that the restricting locality should not be permitted to accept federal monies while excluding those whose taxes are the source of those monies. Yet if equity was the rule, no one would ever be denied the free use of our beaches.

Recently, courts have considered the question of discrimination against non-residents. The Supreme Court has stated that the brevity of the term of one’s residency within a state is not a valid form of discrimination in the administration of state welfare funds.\textsuperscript{154} There are statements from lower federal courts to the effect that, while residents and non-residents may be treated differently if there are valid reasons for doing so,\textsuperscript{155} the basis of discrimination must be rational and not arbitrary.\textsuperscript{156} The municipal beach owner who has accepted federal funds will find it difficult to show the rationality and reasonableness of its actions

where it has used public funds to finance what is in reality a private beach club.

When a municipality which holds beaches endangered by erosion, agrees to accept the assistance of the Army Corps of Engineers, the implications of that act seem to be that the beaches will have to be opened to the general public. Prompted by the passage of the Civil Rights Act of 1964, the Department of Defense issued regulations which affected the power of a locality to restrict the use of a beach which was the recipient of benefits from projects initiated by the Corps of Engineers. These regulations state that no person in the United States shall, on the grounds of race, color, or national origin be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity for which the applicant received the assistance of the Corps of Engineers. Indeed, the applicant must agree to abide by these provisions before any work commences. While the agreement does not specifically include the category of residency, the viewpoint of persons questioned at the New York office of the Corps of Engineers was that a recipient of aid for beach stabilization would be precluded from denying non-residents the use of its beach.

Even in cases where federal funds are obtained without stipulating that the object of the funding will not be restricted, the great weight of opinion would seem to buttress the position that the federally funded facility may not be restricted. Nassau County strictly follows a policy that the use of county parks and recreational facilities are to be restricted to use by county residents. The County Executive has stated, however, that where federal funds are used to obtain or build a facility, it shall be open to all. Indeed, the planned Mitchel Field recreational complex will, because of the expected federal funding, be open to the general public.

The taking of federal funds for beach improvement may also be viewed as raising a presumption that the recipient of those funds intended to dedicate the use of the beach to the general public.

The beaches of the City of Long Beach were opened to the

---

general public because the Gewirtz court found that they had been dedicated to the public use. Included in a summary of what the court considered to be the "essential allegations set forth in the complaint of the plaintiffs" was the acceptance of federal funds by the City. The court noted:

Simultaneously with the acquisition of such beach area the City applied for Federal funding for beach and ocean front improvements including demolition of the old and the erection of a new boardwalk, construction of stone jetties and supplementing the beach front with sand fill. In 1935 the Federal Government, through one of its agencies, issued a commitment for a grant and loan subject to its rules and regulations and that on October 19, 1935 the Common Council of the City adopted a resolution accepting the offer of the Federal Government. Preliminary to such funding the United States Engineers Office granted permission to the city for the proposed beach and ocean front improvements upon condition that the City would not attempt to forbid the full and free use by the public of all navigable waters at or adjacent to the work or structure.

It is interesting to note that, while the City promised that it would not interfere with the "full and free use by the public of all navigable waters at or adjacent to the work or structures," the thrust of the decision was toward an implied dedication rather than toward making the City merely fulfill its commitment. Yet in focusing on the acceptance of the funds rather than on the agreement not to interfere with public use, the court's decision was broader and holds far greater implications for the future. It appears that the court felt that the taking of funds raised the presumption that the City intended to dedicate its beaches:

The evidence shows that even before acquisition of the property was fully complete, the City had taken steps to obtain Federal funds to finance measures designed to lessen the erosion of the beach and to reconstruct the boardwalk. The action thus taken when combined with what was done by the city within a short time after title to the area was acquired, i.e., the creation of a public park out of the land so acquired, strongly suggests

161. Id. at 767, 330 N.Y.S.2d at 502.
162. Id.
163. Id. at 774, 775, 330 N.Y.S.2d at 509.
that in reality the property was acquired with the purpose in mind of devoting it to a special public use.

In this case, the funds were received shortly after title was acquired. However, should the presumption be limited to operation only where such facts exist? The language and the importance placed by the court on the acceptance of federal funds suggests otherwise. A broad application of the presumption would have dramatic impact with regard to future actions. Certainly the public monies provided to fund a Corps of Engineers project or to construct a boardwalk should lend credence to the presumption that a municipality has intended to dedicate its beaches. Such an argument is not difficult to follow where the funds have been directly applied to beach improvement. What, however, would be the implications drawn where a locality has accepted federal funds for a project to clean the polluted waters adjacent to its beaches? Surely the lack of popularity of sand pits as recreational areas suggests that clean water is, at the very least, as important as the dry sand area and boardwalk to the concept of a successful park. Why, then, should the use of federal funds in such a manner not entitle federal taxpayers to the use of the beach so improved? The utility of the federal funds argument drops off where a locality receives federal funds, through Revenue Sharing for example, and mingles those funds with those of its own, thereby “washing” them. The application of federal monies must be directly used for beach improvements for this theory to operate. Since most grants will be for a particular purpose, however, this will not be much of a problem.

If it indeed proves axiomatic that public funds will mandate public beaches, there will be many more public beaches in the future. It should be noted that the majority of Long Island’s South Shore beaches are located on migrating sand islands known as barrier beaches. Because of the prevailing westward longshore drift, sand is continually being carried from the east end of Long Island to the beaches close to New York City and then out into the Hudson Canyon in the Atlantic Ocean. This condition has caused the barrier islands to migrate. It is the natural state of affairs for shorelines to change and inlets to be opened, close and re-open at different points along the island chain. These islands are also susceptible to storm damage as was dramatically demonstrated when a storm in the Spring of 1973 carried away a large part of Gilgo Beach.

If the barrier islands had been permitted to remain in their
natural state, no one would be bothered by a new inlet opening or a beach receding. However, it must be realized that extensive building has taken place on the barrier beaches. Indeed, whole cities exist on them. The Rockaways, Long Beach and Atlantic Beach are all built on the barrier islands. All along the South Shore on both the barrier islands and that part of eastern Long Island which fronts on the Atlantic Ocean extensive building has taken place. Currently, there is a battle raging between the Suffolk County executive and the legislature over whether more jetties and groins are to be built to stabilize the beaches. The National Park Service has stated that it will not spend any more money to save the Atlantic barrier beaches and in the end it will come down to a question of priorities.

If the predictions of some coastal geologists are correct, we can expect to see the thirty-story buildings of the Rockaway Peninsula begin toppling into the sea because of the erosion of the beach there. Since the erection of a jetty cuts down on the amount of sand a down-current owner will receive to maintain his beach it is obvious that a single system is needed. While some people argue that all the jetties must be removed, it is inconceivable that nothing will be done to prevent whole cities from washing out to sea. Because of the effect that the placement of jetties has, a haphazard placement of them may prove more disastrous than their total removal. It seems, therefore, that the only solution is an island-long system of jetties to stabilize the beaches.

It should be remembered that in 1935, Long Beach sought federal funds to assist it in stabilizing its beaches. It is unlikely that the localities could finance the island-long system envisioned by many geologists as the only hope of saving the beaches. Therefore, they will turn to the one governmental body which has the money and the resources to do the job—the federal government.

A project sponsored by the federal government is currently underway to replenish the sand lost at Gilgo Beach. Gilgo is a Babylon Town Beach which, while not restricted to residents only, does assess non-residents a rather stiff user fee while admitting residents free. Will Gilgo be the defendant in a suit to void the discriminatory fees, based on the influx of federal money?

Time will tell and in this area time is on the side of those who believe that federal money will mandate the opening of beaches. The erosion situation is bad and it will continue to worsen unless a unified plan is adopted. Unless they are willing to let billions of dollars of investments float out to sea, the towns will have to
accept the federal government as the prime financial backer of that plan. The forces of nature and economics may turn out to be the most powerful weapons in the open-beach advocate’s legal arsenal.

CONCLUSION

The foregoing discussion has attempted to clarify many of current theories employed by those seeking to open private or restricted beaches to the general public, with particular references to beaches restricted to residents of towns under colonial grant. While the colonial patents represent viable instruments in aid of local government and are valid vis-a-vis the public trust doctrine, they are not indestructible and the areas covered by them may be susceptible to permit an opening for the general public where the requisite facts are available.

The easement approach to the opening of closed patented beaches presents technical common law difficulties and would probably do little to force a change in the often restrictive administration of such beach facilities. A customary right in the nature of a public easement, while avoiding many of the pitfalls of traditional easements, is a legal device which comes very close to being contrived when set up against colonial patents which have been recognized and upheld for three centuries.

Because of the relative inapplicability of these theories, the notion of implied public dedication may be the preferable legal device to open closed beaches where such opening would be desirable. Operating equally against patented and unpatented municipalities, the theory would represent an effective, if limited, approach to undoing restrictive or exclusionary ordinances without much of the contrived reasoning that accompanies the traditional common law theories.

The theory of the implied public dedication, may possibly be effective in many Long Island locations; however, it may not be preferable where, owing to great changes in the ocean littoral as where colonial patents carried only to the high water mark, legal changes in title may have followed the movement of sand. Most importantly, the actions of wind and wave on patented South Shore townships may necessitate the involvement of the federal government. Acceptance by a municipality of such aid foreshadows an end to exclusionary ordinances. This is as it should be. Colonial patents, while representing viable instruments of local sovereignty, cannot be seen as enabling any town to rule by fiat.
or to be oblivious to the ramifications of federal aid by giving nothing in return. Even patented municipalities must be responsive to the pressures and needs not only of local residents but of the state and nation as well.