WHO OWNS THE BEACH? MASSACHUSETTS REFUSES TO JOIN THE TREND OF INCREASING PUBLIC ACCESS

The right of the public to use ocean beaches has recently received widespread attention. Most state courts have found extensive public rights to beach access, but only at the expense of the private beachfront owner.[1] In *In re Opinion of the Justices*,[2] an advisory opinion[3] rendered in response to a question propounded by the Massachusetts House of Representatives,[4] however, the Supreme Judicial Court of Massachusetts ruled that a proposed statute[5] creating an on-foot free right of passage along the beach between the line of mean high tide and extreme low tide would violate the constitutional prohibition against taking private property without compensation.[6] Although the court found

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1. *See* notes 10-40 and accompanying text *infra*. This comment is limited to the law of ocean beaches. For a discussion of problems related to lakeshore access see Note, *Waters and Watercourses — Right of Public Passage Along Great Lakes Beaches*, 31 MICH. L. REV. 1134 (1933); 2 WIS. L. REV. 377 (1924).

2. __ Mass. __, 313 N.E.2d 561 (1974).

3. It has been uniformly and many times held that such opinions, although necessarily the result of judicial examination and deliberation, are advisory in nature, given by the justices as individuals in their capacity of constitutional advisers of the other departments of government and without the aid of arguments, are not adjudications by the court, and do not fall within the doctrine of *stare decisis*.

Commonwealth v. Welosky, 276 Mass. 398, 400, 177 N.E. 656, 658 (1931).

4. The court gave an affirmative response to the following question: "Would the pending Bill if enacted into law violate Article X of the Bill of Rights of the Constitution of the Commonwealth or the Fourteenth Amendment to the Constitution of the United States?" __ Mass. at __, 313 N.E.2d at 565.

5. The bill (House No. 481) was entitled "An Act authorizing public right-of-passage along certain coastline of the Commonwealth." Section 1 provided: "It is hereby declared and affirmed that the reserved interests of the public in the land along the coastline of the commonwealth include and protect a public on-foot free right-of-passage along the shore of the coastline between the mean high water line and the extreme low water line subject to the restrictions and limitations as contained in this section." The bill further provided that this right shall be exercised only during daylight and not in areas of critical ecological significance nor where structures exist pursuant to license or permit or where livestock are enclosed. Fines ranging from $20 to $50 could be imposed on persons unlawfully excluding or limiting the right of passage, and the burden of proof in such cases would rest on the person seeking to exclude the public. The bill also provided a method of compensating property owners having recorded interests in such land for any injuries they may suffer, if they file a claim within two years. Notice of the passage of the Act was to be by recording and publication. The proposed act is set out in full at __ Mass. at __, 313 N.E.2d at 563-64 n.1.

6. The fifth amendment provides in part: "nor shall private property be taken for public

other flaws[7] in the proposed statute, the taking issue is the most important because it is the only one that cannot be overcome by the legislature, without adequately compensating property owners.

Massachusetts is one of many coastal states where attempts have been made to expand the public's right to use ocean beaches. In addition to the common law doctrines of prescription, dedication, custom and public trust, statutes enacted by two states[8] have been helpful in securing public rights in the beach.[9] A discussion of these various legal theories will aid in understanding the situation in Massachusetts.

A prescriptive easement in beach property is acquired when persons continuously use land of another for a prescribed period (usually ten to twenty years). The use must be adverse under claim of right with the actual knowledge of the owner (or so open and notorious that knowledge of the adverse claim can be imputed).[10] Courts in Florida[11]

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use, without just compensation." U.S. CONST. amend. V. The fourteenth amendment provides in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." *Id.* amend. XIV. The due process clause of the fourteenth amendment includes a requirement of just compensation when private property is taken by a state for public use. *See* Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226, 241 (1896). The relevant Massachusetts section provides that, "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefore." MASS. CONST. art. X.

7. In addition to stating that the public has no reserved right to use the beach for recreation and that the creation of such a right would constitute a taking of private property, the court was dissatisfied with the method of discretionary compensation provided in the bill. The scope of the compensation provisions were found to be inadequate, since only those with recorded interests could benefit. In addition, the notice provided by recording and publication was found to be lacking on procedural due process grounds. __ Mass. at __, 313 N.E.2d at 567-71.

8. Ocean Shores; State Recreation Areas, ORE. REV. STAT. § 390.610 (1973); Open Beaches Act, TEX. REV. CIV. STAT. art. 5415d (1962).

9. An understanding of this subject requires the recognition of different areas of the beach. The *sea* is the area continually covered by salt water up to the point of mean low tide. The *foreshore* or *wet sand area* (the area in dispute in Massachusetts) is the strip of land between mean low tide and mean high tide. The *dry sand area* is the portion of beach between mean high tide and the line of vegetation. The area inland from the line of vegetation is the *upland.*

10. City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73 (Fla. 1974), *rev'g* 271 So. 2d 765 (Fla. Dist. Ct. App. 1972); Downing v. Bird, 100 So. 2d 57 (Fla. 1958); City of Miami Beach v. Undercliff Realty & Inv. Co., 155 Fla. 805, 21 So. 2d 783 (1945); City of Miami Beach v. Miami Beach Improvement Co., 153 Fla. 107, 14 So. 2d 172 (1943); Spiegle v. Borough of Beach Haven, 116 N.J. Super. 148, 281 A.2d 377 (App. Div. 1971). *See generally* Degnan, *Public Rights in Ocean Beaches: A Theory of Prescription,* 24 SYRACUSE L. REV. 935 (1973); Comment, *Easements: Judicial and Legislative Protection of the Public's Rights in Florida's Beaches,* 25 U. FLA. L. REV. 586 (1973) [hereinafter cited as Comment, *Easements*].

11. City of Daytona Beach v. Tona-Rama, Inc., 271 So. 2d 765 (Fla. Dist. Ct. App. 1972),

and Texas[12] have applied this doctrine to find easements in favor of the public. The doctrine does, however, have its limitations. In *City of Daytona Beach v. Tona-Rama, Inc.*[13] the trial court ordered the removal of an observation tower, basing its decision on the theory that the public had acquired a prescriptive easement in the dry sand area.[14] The Supreme Court of Florida reversed, however, holding that there was no easement in favor of the public,[15] and declaring that even if one had been acquired, the owner could still build a tower on the beach, since this use was not inconsistent with the recreational use of the land by the public.[16]

While prescription requires adverse possession for a prescribed period of time, the doctrine of implied dedication can be employed as soon as a private owner has indicated an intent to dedicate his beach to the public. Allowing the public to use a beach without any significant effort to keep persons out (even without an express written or oral grant) can be enough to indicate an intent by the owner to dedicate land to the public.[17] Maintenance of the area by a governmental agency[18] or

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rev'd, 294 So. 2d 73 (Fla. 1974). This theory is more commonly used to establish easements in roads. *E.g.*, Grove v. Reeder, 53 So. 2d 530 (Fla. 1951); Zetrover v. Zetrover, 89 Fla. 253, 103 So. 625 (1925); Sumter County v. Brown 123 So. 2d 263 (Fla. Dist. Ct. App. 1960), *cert. denied without opinion*, 127 So. 2d 679 (Fla. 1961).

12. Seaway Co. v. Attorney General, 375 S.W.2d 923 (Tex. Civ. App. 1964). The court also found an implied dedication of the beach to the public. *See* notes 17-22 and accompanying text *infra*.

13. 271 So. 2d 765 (Fla. Dist. Ct. App. 1972).

14. Not all use of beaches or shorelines 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.

> . . . It is only when the use during the prescribed period is so multitudinous that the facilities of local governmental 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.

Id. at 770.

15. City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73 (Fla. 1974); *accord*, Department of Natural Resources v. Cropper, ___ Md. ___, 332 A.2d 644 (1975); Department of Natural Resources v. Mayor & Council of Ocean City, ___ Md. ___, 332 A.2d 630 (1975); Spiegle v. Borough of Beach Haven, 116 N.J. Super. 148, 281 A.2d 377 (App. Div. 1971).

16. 294 So. 2d at 77. Part of the reason for this decision was that the equities were in favor of the private owner. He made a good faith investment of $125,000 to build a structure only 17 feet in diameter at its base. He also paid property taxes for the beach land. *Id.*

17. Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970); Gewirtz v. City of Long Beach, 69 Misc. 2d 763, 330 N.Y.S.2d 495 (Sup. Ct. Nassau County 1972); Seaway Co. v. Attorney General, 375 S.W.2d 923 (Tex. Civ. App. 1964). *See also* Comment, *Easements*, *supra* note 10.

18. Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970); Seaway Co. v. Attorney General, 375 S.W.2d 923 (Tex. Civ. App. 1964).

acceptance of federal funds for beach improvement[19] are sometimes found to be significant factors. In *Dietz v. King*,[20] however, simple use by the public without significant objection from the owner was deemed sufficient to indicate an intent to dedicate the beach to the public.[21] Discussion of the taking issue is curiously missing from this case, and it has been criticized as allowing an unconstitutional taking.[22]

A much broader doctrine which does not depend on the tract by tract approach of prescription or implied dedication is the English doctrine of custom. To acquire rights by custom, use by the public must be continuous from ancient times, peaceable, reasonable, certain as to area, unquestioned by the owner, and not inconsistent with any other law or custom.[23] The Supreme Court of Oregon relied on this doctrine to prevent a private owner from constructing fences or other improvements in the dry sand area of the beach.[24] The decision affects the entire Oregon

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19. Gewirtz v. City of Long Beach, 69 Misc. 2d 763, 330 N.Y.S.2d 495 (Sup. Ct. Nassau County 1972). *See also* Note, *Colonial Patents and Open Beaches*, 2 HOFSTRA L. REV. 301, 338-43 (1974).

20. 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970) (consolidated with Gion v. City of Santa Cruz).

21. These decisions were based in part on public policy as expressed in the California Constitution which provides: "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose. . . ." CAL. CONST. art. XV, § 2. Recreational purposes are among the "public purposes" mentioned by this constitutional provision. Gion v. City of Santa Cruz, 2 Cal. 3d 29, 42, 465 P.2d 50, 58-59, 84 Cal. Rptr. 162, 171 (1970). *See* notes 32-37 and accompanying text *infra*.

22. Berger, *Gion v. City of Santa Cruz: A License to Steal?*, 49 CALIF. S.B.J. 24 (1974); Note, *Implied Dedication in California: A Need for Legislative Reform*, 7 CALIF. WESTERN L. REV. 259 (1970); Note, *The Common Law Doctrine of Implied Dedication and its Effect on the California Coastline Property Owner:* Gion v. City of Santa Cruz, 4 LOYOLA U.L. REV. (L.A.) 438 (1971); Note, *This Land is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches*, 44 SO. CALIF. L. REV. 1092 (1971). Ironically, the *Gion* decision may have closed more beaches than it opened because many owners feared that unless the public were excluded, their property would soon be lost. *Id.* at 1094-98.

23. State *ex rel.* Thornton v. Hay, 254 Ore. 584, 595-97, 462 P.2d 671, 677 (1969) (paraphrasing Blackstone). "A regular usage for twenty years, unexplained and uncontradicted, is sufficient to warrant a jury in finding the existence of an immemorial custom." Knowles v. Dow, 22 N.H. 387, 409 (1851). The word "custom" in this old New Hampshire case actually has a meaning closer to prescriptive easement or license rather than in the custom theory used by the Supreme Court of Oregon. *See* notes 24-26 and accompanying text *infra*.

24. State *ex rel.* Thornton v. Hay, 254 Ore. 584, 462 P.2d 671 (1969). *See also* Degnan, *supra* note 10; Eckhardt, *A Rational National Policy on Public Use of the Beaches*, 24 SYRACUSE L. REV. 967 (1973); Note, *The English Doctrine of Custom in Oregon Property Law: State ex rel. Thornton v. Hay*, 4 ENVIRONMENTAL L. RPTR. 383 (1974); Note, *Public Access to Beaches*, 22 STAN. L. REV. 564 (1970); Comment, *Easement*, *supra* note 10.

coast, however, and this is the very reason the court chose to use this doctrine rather than prescription.[25] The Oregon court did not mention the taking issue except to say that "[w]hile the foreshore is 'owned' by the state, and the upland is 'owned' by the patentee or record-title holder, neither can be said to 'own' the full bundle of rights normally connoted by the term 'estate in fee simple.' "[26] The Supreme Court of Hawaii has also employed the custom doctrine in determining that a private owner's title extended seaward only to the "upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of the waves . . . ."[27]

New Jersey took a slightly different approach to public access to beaches by relying on a public trust doctrine.[28] Although holding only that a municipality may not discriminate between residents and non-residents in the fees it charges for beach use, *Borough of Neptune City v. Borough of Avon-by-the-Sea*[29] provides strong dicta supporting full public access and use of New Jersey beaches. The court declared that lands owned by the state seaward of the line of mean high tide are held in trust for the benefit of the public to use not only for navigation, commerce and fishing, but also for "bathing, swimming and other shore

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25. 254 Ore. at 595, 462 P.2d at 676.

26. *Id.* at 591-92, 462 P.2d at 675, *citing* 1 R. POWELL, THE LAW OF REAL PROPERTY § 163, at 661 (1949).

27. *In re* Ashford, 50 Hawaii 314, 315, 440 P.2d 76, 77 (1968). The decision was based on construction of a grant made by an Hawaiian king in 1866 so that Hawaiian customs and traditions controlled the result rather than a survey taken by the U.S. Coast and Geodetic Survey. In County of Hawaii v. Sotomura, 55 Hawaii 176, 517 P.2d 57 (1973), the court held that a private owner could get compensation in eminent domain proceedings only for land inland from the line of vegetation. The court also stated that "[p]ublic policy,' as interpreted by this court, favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible." *Id.* at 182, 517 P.2d at 61-62. *See* Note, *Hawaiian Beach Access: A Customary Right*, 26 HASTINGS L.J. 823 (1975).

28. Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 294 A.2d 47 (1972). *See also* Jaffee, *The Public Trust Doctrine Is Alive and Kicking in New Jersey Tidalwaters: Neptune City v. Avon-by-the-Sea — A Case of Happy Atavism?* 14 NATURAL RESOURCES J. 309 (1974); Parsons, *Public and Private Rights in the Foreshore*, 22 COLUM. L. REV. 706 (1922); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970); Note, *Colonial Patents and Open Beaches*, 2 HOFSTRA L. REV. 301 (1974); Note, *State Citizen Rights Respecting Greatwater Resource Allocation: From Rome to New Jersey*, 25 RUTGERS L. REV. 571 (1971); Note, *Access to Public Municipal Beaches: The Formulation of a Comprehensive Legal Approach*, 7 SUFFOLK U.L. REV. 936 (1973); Note, *The Public Trust in Public Waterways*, 7 URBAN L. ANN. 219 (1974); Note, *The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine*, 79 YALE L.J. 762 (1970); 26 RUTGERS L. REV. 179 (1972).

29. 61 N.J. 296, 294 A.2d 47 (1972).

activities."[30] The court reasoned that the "public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit."[31]

In addition to the various common law doctrines, statutes enacted in Oregon[32] and Texas[33] provide some additional support for decisions in those states favoring public use of the beach. These statutes, designed to prevent any loss of public rights to private owners,[34] declare a public policy favoring open beaches. These declarations provided part of the justification for the decision to open all of Oregon's beaches to the public.[35] The Texas statute was used to justify the removal of a barrier that had been erected by a private owner on the dry sand portion of the beach.[36] The court indicated that the statute could be used to remove beach barriers by granting injunctions without the traditional showing of irreparable injury or balancing the equities.[37] Several more expansive statutes have been introduced in Congress[38] and proposed by commentators[39] as a solution to the problem of inadequate public beaches. None of these proposals, however, have yet been adopted.

From the foregoing discussion of the law in other states, it can be seen that there is a marked tendency to favor opening beaches to the public at the expense of the private owner. The cases show that at a minimum the

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30. *Id.* at 309, 294 A.2d at 54.

31. *Id. See* Marks v. Whitney, 6 Cal. 3d 251, 257-61, 491 P.2d 347, 378-81, 98 Cal. Rptr. 790, 794-97 (1971) (holding that a portion of wet sand area was subject to the public trust doctrine and stating that public uses in this area are flexible and include bathing and swimming).

32. Ocean Shore; State Recreation Areas, ORE. REV. STAT. § 390.610 (1973); *cf.* note 21 *supra.*

33. Open Beaches Act, TEX. REV. CIV. STAT. art. 5415d (1962); *cf.* note 21 *supra.*

34. Comment, *Easement, supra* note 10, at 595 n.67.

35. State *ex rel.* Thornton v. Hay, 254 Ore. 584, 462 P.2d 671 (1969); *see* notes 23-26 and accompanying text *supra.*

36. Gulf Holding Corp. v. Brazoria County, 497 S.W.2d 614 (Tex. Civ. App. 1973). *See also* Seaway Co. v. Attorney General, 375 S.W.2d 923 (Tex. Civ. App. 1964).

37. 497 S.W.2d at 619.

38. H.R. 4932, H.R. 10,394, H.R. 10,395, 93rd Cong., 1st Sess. (1973); H.R. 11,016, H.R. 15,714, H.R. 16,268, H.R. 16,772, 91st Cong., 2d Sess. (1970); S. 3044, 91st Cong., 1st Sess. (1969); H.R. 6656, 91st Cong., 1st Sess. (1969). *See also* Black, *Constitutionality of the Eckhardt Open Beaches Bill,* 74 COLUM. L. REV. 439 (1974); Eckhardt, *supra* note 24 (discussion of the need for a national open beach act and an argument for its constitutionality by Congressman Eckhardt).

39. Comment, *Easements, supra* note 10, at 596 (appendix).

public has use of the foreshore. Controversies center around use of the dry sand area. In Massachusetts the situation is different, however, and the controversy there is simply over public use of the wet sand area.[40]

The first question addressed by the Supreme Judicial Court of Massachusetts in *In re Opinion of the Justices*[41] was whether the public had any inherent or reserved right to use the foreshore for bathing and recreation. The answer to this question turned on construction of the colonial ordinance of 1641-47.[42] The court, relying on ample authority, concluded that this ordinance granted littoral owners a fee, subject only to the public rights of fishing, fowling and navigation.[43] The court found that recreational use of the beach could not be included within any of these reserved public rights.[44] In addition, the court specifically rejected the contention that the rights reserved by the public could

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40. The normal common law rule allows private ownership seaward to mean high tide so that the public has access to the foreshore. Borax Consol. Ltd. v. City of Los Angeles, 296 U.S. 10, 22 (1935); Shively v. Bowlby, 152 U.S. 1 (1894). Massachusetts recognizes private ownership seaward to mean low tide or 100 rods seaward from mean high tide, whichever is less, because of the colonial ordinance of 1641-47. *See* notes 41-45 and accompanying text *infra*. Maine and New Hampshire are also subject to the same ordinance. *See* cases cited in 33 HARV. L. REV. 458, 459 n.12 (1920). *See also* M. FRANKEL, LAW OF SEASHORE, WATERS, AND WATER COURSES: MAINE AND MASSACHUSETTS (1969); Waite, *Public Rights in Maine Waters*, 17 MAINE L. REV. 161, 171 (1965). Connecticut, Delaware, Pennsylvania and Virginia recognize private title seaward to mean low tide. Note, *The Public Trust in Public Waterways*, *supra* note 28, at 227, nn.47-52.

41. ___ Mass. ___, 313 N.E.2d 561 (1974).

42. Every inhabitant who is a householder shall have free fishing and flowing in any great ponds, bayes, Coves and Rivers, so farr as the Sea ebbs and flowes. . . . It is Declared, that in all *Creeks, Coves* and other places about and upon *Salt-water*, where the Sea ebbs and flowes, the proprietor of the land adjoyning shall have propriety to the low-water mark, where the Sea doth not ebb above a hundred Rods, and not more wheresoever it ebbs further. Provided that such proprietor shall not by this liberty, have power to stop or hinder the passage of boates or other vessels . . . .

BOOK OF THE GENERAL LAWES AND LIBERTYES 50 (1649), *quoted* in *In re* Opinion of Justices, ___ Mass. ___, ___, 313 N.E.2d 561, 565-66 (1974). Originally all the states received title to the foreshore from the Crown of England, which under English law held the lands in trust for the public. To promote the building of wharves, however, Massachusetts gave this area to private littoral owners. ___ Mass. at ___, 313 N.E.2d at 565. *See* note 40 *supra*.

43. ___ Mass. at ___, 313 N.E.2d at 566.

44. *Id.* at ___, 313 N.E.2d at 567. Butler v. Attorney General, 195 Mass. 79, 80 N.E. 688 (1907), provides authority for this proposition.

> We think that there is a right to swim or float in or upon public waters as well as to sail upon them. But we do not think that this includes a right to use for bathing purposes, as these words are commonly understood, that part of the beach or shore above low-water mark, where the distance to high-water mark does not exceed one hundred rods, whether covered with water or not. It is plain we think that under the law of Massachusetts there is no reservation or recognition of bathing on the beach as a separate right of property in individuals or the public under the colonial ordinance.

Id. at 83-84, 80 N.E. at 689.

change with time to allow all significant public uses.[45] Thus the court declined to extend the public trust doctrine, as was done in New Jersey, to include recreational use of the beach.[46]

After deciding that the public had no reserved right to use the foreshore for recreation, the court next considered whether the legislature of Massachusetts could, within the exercise of its police power, authorize passage along its beaches. The court felt that even under the narrowest possible view of the taking clause,[47] authorization of such a physical invasion by the public into private property could not be justified as a valid exercise of the police power. Denial of the owner's right to exclude the public was found to be equivalent to the taking of a public easement for which compensation would be required.[48]

This opinion indicates that there is no easy way to increase public access to beaches in Massachusetts. Private ownership seaward to mean low tide appears unassailable in light of the court's reading of the colonial ordinance of 1641-47. A wholesale authorization of public use of beaches based on the police power seems out of the question because of the taking clause.[49] Moreover, the common law doctrines that were useful in expanding public rights in beaches in other coastal states could have only a very limited impact in Massachusetts. Prescription seems to provide little hope for increasing public access in light of a prior Massachusetts case taking a very narrow view of the doctrine.[50] That decision found an easement in favor of one person, but not the general public.[51] If the requisite facts could be proved, some small beach areas

45. "[T]he grant to private parties effected by the colonial ordinance has never been interpreted to provide the littoral owners only such uncertain and ephemeral rights as would result from such an interpretation." ___ Mass. at ___, 313 N.E.2d at 567. *See also* Michaelson v. Silver Beach Improvement Ass'n, 342 Mass. 251, 173 N.E.2d 273 (1961) (accretion to beach caused by dredging of harbor belonged to private owner and public could not use the new beach).

46. *See* notes 28-31 and accompanying text *supra*.

47. Both the United States and Massachusetts constitutions were relied on. *See* notes 4, 6 *supra*.

48. "If a possessory interest in real property has any meaning at all it must include the general right to exclude others." ___ Mass. at ___, 313 N.E.2d at 568, *citing* 2 P. NICHOLS, EMINENT DOMAIN § 5.1(1) (rev. 3d ed. 1974). *See also* F. BOSSELMAN, D. CALLIES, & J. BANTA, THE TAKING ISSUE 254-55 (1973).

49. *See* notes 4, 6 *supra*.

50. Ivons-Nispel, Inc. v. Lowe, 347 Mass. 760, 200 N.E.2d 282 (1964).

51. *Id.* Apparently the public as a group could not secure a prescriptive easement. *See* MASS. ANN. LAWS. ch. 187, § 2 (1969). The Massachusetts legislature could amend this statute to make it easier for the whole public to acquire easements by prescription.

could be opened to the public by using the doctrine of implied dedication. But it would seem doubtful that Massachusetts would go as far as the Supreme Court of California did, in *Dietz v. King*,[52] especially in view of the criticism invoked by that case.[53] The doctrine of custom probably could not be applied in Massachusetts, because the public has not used the beach from time immemorial, as in Oregon[54] and Hawaii.[55] Furthermore, the Massachusetts court refused to expand the public trust doctrine to find a public right to use the beach for recreation.[56] An additional obstacle that may be encountered in using any of these common law theories is the problem of standing.[57]

The statutory schemes in other states may also be of little avail to the Massachusetts legislature. Statutory presumptions for public use similar to the ones in Oregon[58] and Texas[59] would probably lack sufficient factual support to withstand judicial scrutiny in light of the limited public use of beaches in this long settled and densely populated state.[60] A legislative declaration of public policy, however, might provide some guidance in borderline cases. This could even take the

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52. 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970) (consolidated with Gion v. City of Santa Cruz). *See* notes 17-22 and accompanying text *supra*.

53. *See* note 22 *supra*.

54. State *ex rel.* Thornton v. Hay, 254 Ore. 584, 588-89, 462 P.2d 671, 673 (1969); *see* notes 23-27 and accompanying text *supra*.

55. *In re* Ashford, 50 Hawaii 314, 315, 440 P.2d 76, 77 (1968); *see* notes 23-27 and accompanying text *supra*.

56. Home for Aged Women v. Commonwealth, 202 Mass. 422, 89 N.E. 124 (1909), provided statements in favor of expanding the public trust doctrine but only in the area owned by the state (seaward of mean low tide).

57. *E.g.*, Conservation Council v. Costanzo, 505 F.2d 498 (4th Cir. 1974) (standing denied because of lack of allegation of individualized or special injury, but case remanded to discover if plaintiffs had a right to use the beach below mean high water mark); United States Steel Corp. v. Save Sand Key, Inc., 303 So. 2d 9 (Fla. 1974) (standing denied group specifically organized to secure public access to Sand Key because no special injury alleged beyond what was suffered by the public generally). *But see* Marks v. Whitney, 6 Cal. 3d 251, 261-62, 491 P.2d 374, 381-82, 98 Cal. Rptr. 790, 797-98 (1971) (in suit to quiet title plaintiff had standing to raise the issue of a public trust easement).

58. Ocean Shores; State Recreation Areas, ORE. REV. STAT. § 390.610 (1973); *see* notes 32-39 and accompanying text *supra*.

59. Open Beaches Act, TEX. REV. CIV. STAT. art. 5415d (1962); *see* notes 32-39 and accompanying text *supra*.

60. *See* SPECIAL LEGISLATIVE COMM'N ON AVAILABILITY AND ACCESSIBILITY OF PUBLIC BEACHES, PUBLIC BEACH ACCESS AND USE IN MASSACHUSETTS 113 (1975) (available from Edward Phelan, Director, Documents Room, Fourth Floor, State House, Boston, Mass. 02133).

form of a constitutional amendment similar to the provision in California.[61]

In spite of the many roadblocks present in Massachusetts to the expansion of public use of beaches, a few alternatives are still available. Although expensive, outright purchase of selected beach sites would enable the state to provide public beaches where they are needed most.[62] Gifts or dedications of private beaches to the public could be encouraged by offering various tax incentives.[63] Compulsory dedications of beaches or access to existing public beaches probably could be required of developers and subdividers of beachfront property.[64] Shoreline zoning restrictions could be used to preserve and protect the natural condition of coastal areas.[65] Comprehensive statutes similar to those in Florida[66] and Washington State[67] could be enacted to increase state guidance and control over development near beaches. To coordinate and resolve competing demands in this critical area, long-term planning can and is being used.[68]

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61. *See* note 21 *supra.*

62. Passage of the proposed bill in a form that provides an adequate method of compensation would probably be too expensive in view of the limited right acquired, that of walking along the wet sand area.

63. *See also* Limitation of Liability of Landowners Making Land Available to the Public for Recreational Purposes, MASS. ANN. LAWS ch. 21, § 17C (1973).

64. Massachusetts presently outlaws such requirements. MASS. ANN. LAWS ch. 41, § 81Q (1973). To compel developers to dedicate land to the public, the need for recreational area must be attributable to the new development rather than the community as a whole. *See generally* Note, *Public Access to Beaches, supra* note 24, at 567-72 and sources cited therein.

65. *See, e.g.*, MASS. ANN. LAWS ch. 131, § 40 (Supp. 1974) (protection of flood plains, seacoasts and other wetlands); *id.* ch. 132A, § 2B (1972) (policy that sites be preserved in natural state, etc.). *See also* Creed v. California Coastal Zone Conservation Comm'n, 43 Cal. App. 3d 306, 118 Cal. Rptr. 315 (Dist. Ct. App. 1974) (upholding coastal zone conservation act that restricts development and limits housing). The Supreme Court of California recently upheld a San Diego ordinance limiting the height of buildings in the coastal zone (30-foot restriction). San Diego Contractors Ass'n v. City Council, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974).

66. Florida Environmental Land and Water Management Act of 1972, FLA. STAT. ANN. §§ 380.012-.10 (1974), *as amended*, §§ 380.05-.06, 380.11 (Supp. 1975); *see*, Finnell, *Saving Paradise: The Florida Environmental Land and Water Management Act of 1972*, 1973 URBAN L. ANN. 103.

67. Shoreline Management Act of 1971, WASH. REV. CODE ANN. § 90.58 (Supp. 1974); *see* Crooks, *The Washington Shoreline Management Act of 1971*, 49 HASTINGS L. REV. 423 (1974).

68. *E.g.*, National Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-64 (Supp. IV, 1974). For a discussion of the Act see Mandelker & Sherry, *The National Coastal Zone Management Act of 1972*, 7 URBAN L. ANN. 119 (1974). *See also* Hershman & Folkenroth,

Although the Massachusetts decision was prompted by a bill that attempted to create a new easement for the public, the decision also points out that there is a definite limit to the recent national trend of increasing public access to ocean beaches. Since that limit is set by the taking clause of the fifth amendment made applicable to the states by the fourteenth amendment, it should have universal application to all the states. It is possible to criticize the cases decided in other jurisdictions on this basis,[69] but the more important question for the future is to what extent the taking clause will forestall further attempts to enlarge public access to ocean beaches. This decision would seem to put a damper on any attempts to enact similar legislation at a national or state level.[70] Whether the principle of this case will be enlarged to prevent further public access in other states or will be confined to the circumstances of this state and this proposed law remains to be seen.

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Coastal Zone Management and Intergovernmental Coordination, 54 ORE. L. REV. 13 (1975).

69. *See* note 22 and accompanying text *supra*.

70. *See* notes 38-39 and accompanying text *supra*.