Land Commission

Memo

To: Dr. Jeanette Carter; Dr. Mark Marquardt

From: Caleb Stevens, Esq.

CC: Dr. John Bruce

Date: 12/27/2010

Re: Public Access to and Privatization of Beachfront Property

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I. Question

How have the US and other countries addressed the issue of public access to, and privatization of, beachfront property?

II. Short Answer

This memorandum surveys the laws of the United States, New Zealand, South Africa, Mauritius, and Costa Rica regarding public access to, and privatization of, beachfront property. Generally, each of these countries seek to balance the interests of the public and private owners by permitting private ownership of beachfront property while also preserving for public use a strip of land between the high watermark and the low watermark. That said, the United States, New Zealand, and South Africa permit private ownership of beachfront property up to the low watermark. Costa Rica only permits private ownership up to the low watermark under limited circumstances. Mauritius categorically prohibits private ownership up to the low watermark.

III. Analysis

A. United States

There are at least three common law bases for public access to beachfront property: custom, public trust, and implied dedication. This section will address each of them in turn. In addition, several US states have passed laws vesting ownership of beachfront property in the government. Under Oregon law the "shore of the Pacific Ocean between ordinary high tide and extreme low tide . . . is vested in the State of Oregon" and declared an inalienable "state recreation area."[1] Massachusetts has

[1] Oregon Revised Statutes, Section 390.615 (2010).

created "a public on-foot free right of passage" along the coast.[2] Before the right of passage can apply to a privately owned beach, the state must pay the owner just compensation.[3]

> The Texas Open Beaches Act defines a public beach as follows:
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> [A]ny beach area, whether publicly or privately owned, extending inland from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico to which the public has acquired the right of use or easement to or over the area by prescription, dedication, presumption, or has retained a right by virtue of continuous right in the public since time immemorial, as recognized in law and custom.[4]

The Act expressly guarantees the public access to state-owned beaches and private beaches over which the public has acquired an easement from the "mean low tide to the line of vegetation bordering on the Gulf of Mexico."[5] Notably, one means of acquiring public access to a privately owned beach is "by continuous right in the public since time immemorial . . . ."[6] This codifies the English common law doctrine of custom.

a. Custom

One means of ensuring public use of private beaches is the English doctrine of custom. A valid custom "must have continued from time immemorial, without interruption, and as of right; it must be certain as to place, and as to the persons; and it must be certain and reasonable as to the subject matter or rights created."[7] Although the doctrine is generally regarded as inapplicable to the US,[8] a few states have applied it to permit public recreational use of private beaches.[9] The leading case on the application of custom to beaches is *State ex rel. Thornton v. Hay*, in which the Oregon Supreme Court

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[2] James W. Ely, Jr. & Jon W. Bruce, The Law of Easements and Licenses in Land (2010) (citing 1991 Mass. Legis. Serv. ch. 176, § 4 (West)).
[3] *Id.*
[4] Vernon's Statutes and Codes Annotated, Title 2, Section 61.001(8) (Texas 2010).
[5] *Id.* at Section 61.011(a).
[6] *Id.* at Section 61.001(8).
[7] Ely, *supra* note 2 (quoting Stephen Martin Leake, A Digest of the Law of Uses and Profits of Land 552 (1888)).
[8] *Bell v. Town of Wells*, 557 A. 2d 168, 179 (Me. 1989) ("Very few American states recognize the English doctrine of public easements by local custom."); *Smith v. Bruce*, 244 S.E.2d 559, 569 (Ga. 1978) ("The theory of custom has been adopted in very few jurisdictions, has never been recognized in Georgia and will not be adopted as the law of this state in this case."); *Department of Natural Resources v. Ocean City*, 274 Md. 1, 13 (1975) (declining to follow *Thornton* rule that the "right of the public to use a dry sand area contained within the legal description of a water front tract may be grounded solely on a custom of public use."); *Matthews v. Bay Head Imp. Association*, 95 N.J. 306, 326 (1984) (holding that custom is not needed as an alternative to the public trust doctrine for "[a]rchaic judicial responses are not an answer to a modern social problem.").
[9] Vernon's Statutes and Codes Annotated, Title 2; *County of Hawaii v. Sotomura*, 517 P.2d 57, 62 (Hawaii 1973) (finding that the "long-standing public use of Hawaii's beaches . . . has ripened into a customary right. Public policy . . . favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible."); *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 78 (Fla. 1974) ("The general public may continue to use the dry sand area for their usual recreational activities, not because the public has any interest in the land itself, but because of a right gained through custom to use this particular area of the beach as they have without dispute and without interruption for many years.").

adapted the English doctrine of custom to the US context.[10] The Court held that a custom did not have to be limited to a discrete locality but could be applied regionally (i.e. to all of Oregon's beaches).[11] In addition, the phrase 'time immemorial' was interpreted to mean "[s]o long as there has been an institutionalized system of land tenure . . . ."[12] A customary public use right is irrevocable except by state action, but it does not bestow upon the public an interest in the land and may be abandoned by the public.[13]

b. Public Trust

The public trust doctrine means the "body of common law under which the state holds in trust for public use title waters and submerged lands waterward of the mean high tide line."[14] Some US states have extended this doctrine to allow public access to and enjoyment of beaches from the "mean high tide line to the water."[15] In *Borough of Neptune City v. Borough of Avon-by-the-Sea*, the New Jersey Supreme Court addressed the question of "whether an oceanfront municipality may charge non-residents higher fees than residents for the use of its beach area."[16] The court held that because the beach area was a public trust the municipality could not discriminate between residents and non-residents.[17]

In reaching this conclusion the *Neptune* court discussed the public trust doctrine in detail. It originated as an English common law principle that land covered by tidal waters vested in the sovereign and was preserved for public use.[18] After the American Revolution such tidal lands vested in the states.[19] The early purpose of the public trust doctrine was to preserve waterways for navigation and commerce.[20] However, it has been expanded to include recreational use:

> We have no difficulty in finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities.[21]

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[10] Ely, *supra* note 2.
[11] *State ex. Rel. Thornton v. Hay*, 462 P.2d 671, 677 (Or. 1969).
[12] *Id.*
[13] *City of Daytona Beach*, 294 So. 2d at 78.
[14] *Leyden v. Greenwich*, 257 Conn. 318, n.17 (2001).
[15] *Id.*
[16] *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 299 (1972).
[17] *Id.* 309 ("[T]he public trust doctrine dictates that the beach and the ocean waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible.").
[18] *Id.* at 304.
[19] *Id.*
[20] *Id.* (relying on *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892)).
[21] *Id.* at 309; *see Philips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988) (holding that public trust doctrine is not limited to the State's interest in navigation but also includes fishing and urban expansion).

c. Implied Dedication and Prescription

Another means by which the public can gain access to beachfront property is through common law implied dedication. A finding of implied dedication of otherwise private land to the public requires: (1) the owner's acquiescence to the public's use of the land "under circumstances that negate the idea that the use is under a license," or (2) open and continuous public use.[22]

It is important to distinguish between the open and continuous use (i.e. adverse possession) required for a finding of implied dedication and adverse possession by prescription. A prescription is based on an individual claiming to possess a personal legal right in the property.[23] Implied dedication by adverse possession seeks a public right:

> What must be shown is that persons used the property believing the public had a right to such use . . . . Litigants, therefore, seeking to show that land has been dedicated to the public need only produce evidence that persons have used the land as they would have used public land. If the land involved is a beach or shoreline area, they should show that the land was used as if it were a public recreation area.[24]

d. Takings

The question arises whether granting a public easement by custom, public trust, or implied dedication constitutes a taking and requires the government to provide just compensation to the owner of the beachfront property. The most significant case on this issue is *Nollan v. California Coastal Commission*. In this case the US Supreme Court rendered the following holdings: (1) imposing a public access easement on a private beach is a taking requiring just compensation;[25] and (2) requiring the owner to convey a public access easement as a requisite to a building permit in this case "does not meet even the most untailored standards" and thus constitutes a taking.[26]

State courts have applied *Nollan* in divergent ways. In *Bell*, the Maine Supreme Judicial Court declared the Public Trust in Intertidal Land Act unconstitutional for imposing on private beach owners a public trust for recreational use without just compensation.[27] In a similar vein, the New Hampshire Supreme Court ruled that legislation establishing a public prescriptive easement in the dry sands area of private beachfront property constituted a taking.[28] However, in *Arrington v. Mattox*, the Texas Court of

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[22] *Gion v. Santa Cruz*, 2 Cal. 3d 29, 38 (1970).
[23] *Id.* at 39.
[24] *Id.*
[25] *Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987) ("To say that the appropriation of a public easement across a landowner's premises does not constitute a taking of a property interest but rather . . . 'a mere restriction on its use' . . . is to use words in a manner that deprives them of all their ordinary meaning.").
[26] *Id.* at 838.
[27] *Bell v. Town of Wells*, 557 A.2d 168, 176–79 (Me. 1989).
[28] *Opinion of the Justices*, 139 N.H. 82, 94 (1994) ("Although the state has the power to permit a comprehensive beach access and use program by using its eminent domain power and compensating private property owners, it may not take private property without compensation through legislative decree.").

Appeals distinguished *Nollan* from the Texas Open Beaches Act, which enforces a public recreational easement by prescription, dedication, and custom.[29] The court reasoned that in this case the legislation was enforcing a pre-existing right, rather than creating a new right as in *Nollan*.[30]

It is an open question under US law whether in certain circumstances establishing a public use right by custom constitutes a taking of private beachfront property and thus requires just compensation.[31] In *Stevens v. City of Cannon Beach*, US Supreme Court Justices Scalia and O'Connor dissented from the denial of *certiorari* and expressed grave doubts whether an Oregon doctrine of custom existed prior to *Thornton*. If not, then that decision, by depriving "the Cannon Beach property owners of their rights to exclude others from the dry sand," "effected an uncompensated taking."[32]

B. New Zealand

In accordance with New Zealand law the marine area from the average high watermark (or "line of mean high water springs") and the "outer limits of the territorial sea"[33], excluding any land held in fee simple,[34] is owned by the Crown (i.e. is public).[35] This public foreshore and seabed may only be sold by a special Act of Parliament or, if reclaimed land, by a government ministry.[36] Additionally, no interest in the public foreshore and seabed can be acquired through adverse possession or prescription.[37] The law does not disturb any pre-existing "lease, license, permit, consent, or other authorisation."[38]

C. South Africa

In 2008 South Africa replaced the Sea Shore Act of 1935 with the Integrated Coastal Management Act (the "Act"). The Act defines coastal public property as, inter alias, "the seashore, but excluding . . . any portion of the seashore below the high-water mark which was lawfully alienated before the Sea Shore Act, 1935 . . . took effect or which was lawfully alienated in terms of that Act and which has not been subsequently incorporated into the seashore . . . ."[39] The seashore is defined as "the area between the low-water mark and the high-water mark."[40] Coastal public property "vests in the citizens of the Republic" and is held in trust by the government.[41] In addition, it is inalienable, and no rights over it can be acquired by prescription.[42] Regarding public access to coastal public property, the

[29] Arrington v. Mattox, 767 S.W.2d 957, 958 (Tex. App. Austin 1989).
[30] *Id.*
[31] Ely, *supra* note 2.
[32] *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994) (Scalia J., dissenting).
[33] Foreshore and Seabed Act 2004, Section 5 (New Zealand).
[34] *Id.*
[35] *Id.* at Section 14.
[36] *Id.* at Section 13; Resource Management Act 1991, Section 355.
[37] Foreshore and Seabed Act 2004, Section 24 (New Zealand).
[38] *Id.* at Section 17.
[39] Integrated Coastal Management Act, 2008, Act No. 24, Section 7(d).
[40] *Id.* at Section 1.
[41] *Id.* at Section 11(1).
[42] *Id.* at Section 11(2).

Act provides that "any natural person in the Republic . . . has a right of reasonable access . . . and . . . is entitled to use and enjoy coastal public property."[43] However, the public's use cannot adversely affect another's rights to use and enjoy the coastal public property, hinder the government in performing its duties, or "cause an adverse effect."[44] Thus, private ownership of beachfront property is permitted beyond the high watermark and even below it provided that ownership was in accordance with pre-existing law.

D. Mauritius

Under the Beach Authority Law of 2002, a public beach is defined as: (1) "a space along the coast which, by notice published in the Gazette, has been declared to be a public beach by the Minister responsible for the subject of housing and lands," and (2) "the space between the low water mark and the high water mark, and also the surrounding waters up to a distance of 100 metres."[45] Thus, all beaches in Mauritius contain a strip of land between the high and low watermarks that cannot be privately owned, but further inshore beyond the high watermark may be privately owned. In addition, the government acting through one of its Ministries may declare any beach public. As the law's title suggests, public beaches are managed by the Beach Authority.[46]

E. Costa Rica

Costa Rica has adopted a more restrictive approach than Mauritius. The Maritime and Terrestrial Zone Law (the "Law") establishes a Maritime and Terrestrial Zone (the "Zone") that "belongs to the State and is inalienable and imprescriptible." The Zone is a "two-hundred meter wide strip of land along the Atlantic and Pacific littorals, of the Republic, whatever its nature, measured horizontally beginning from the ordinary high tide and lands and rocks that the sea leaves uncovered in low tide."[47] The first 50 meters from the land between the low watermark to the high watermark is a public zone.[48] The remaining 150 meters is a restricted zone.[49] No construction or concessions are permitted in the public zone.[50] Moreover, "[n]obody may claim any right over" the public zone, nor can it be "the object of occupation under any title or case."[51] The public zone must be "dedicated to public use and especially, to the free transit of persons."[52] Only if the local municipality and Tourist Board find that the public zone falls on a stretch of coastline that cannot be exploited for public use may development be authorized.[53]

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[43] *Id.* at Section 13(a)(b).
[44] *Id.* at Section 13(b)(i)-(iii).
[45] Beach Authority Act, Part I, Section 2 (Mauritius 2002).
[46] *Id.* at Part II, Section 4.
[47] Law of the Maritime and Terrestrial Zone, Article 9 (Costa Rica 1977).
[48] *Id.* at Article 10.
[49] *Id.*
[50] *Id.* at Articles 22, 39.
[51] *Id.* at Article 20.
[52] *Id.*
[53] *Id.* at Article 21.

Regarding the restricted zone, concessions are permitted as long as they do not prevent the public from accessing the public zone.[54] The power to grant these concessions is divided between the local municipality, the Tourist Board, and the Lands and Colonization Institute. The local municipality is empowered to grant concessions to restricted zones that fall within its territorial limits.[55] Concessions in tourist areas require the approval of the Tourist Board.[56] In all other areas concessions must be approved by the Lands and Colonization Institute.[57]

Finally, the Law contains a grandfather provision excluding from the Law's application coastal properties registered as owned by individuals at the time of enactment in 1977.[58] The Law also does not apply to coastal property located in the cities.[59]

IV. Conclusion

Placing the countries surveyed on a spectrum from the most protective to the least protective of private beachfront property rights, the United States is the most protective. It permits private ownership up to the low watermark and, in general, requires just compensation for state imposition of public use easements. Recognition of a pre-existing custom, as a means to avoid creating new public use rights and thus payment of compensation to private beachfront property owners, has been viewed with skepticism by at least one sitting justice of the US Supreme Court. The 'middle' countries are South Africa and New Zealand. They each have established a general rule that the beach from the low watermark to the high watermark is public, with a few exceptions. The least protective of private beachfront property rights are Mauritius and Costa Rica, which have created public beaches from the low watermark to the high watermark with no exception and only minor exceptions respectively.

[54] *Id.* at Chapter VI Preamble, Article 39.
[55] *Id.* at Article 40.
[56] *Id.* at Article 42.
[57] *Id.*
[58] *Id.* at Article 6.
[59] *Id.*