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PUBLIC ACCESS TO SHORELINES AND BEACHES:
ALTERNATIVE APPROACHES AND THE TAKING ISSUE

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ABSTRACT

Important federal and state legislation, state court decisions, and regulatory agency programs support increased public access to shorelines and beaches, both publicly and privately owned. This paper examines alternative theories and approaches for increasing public access, especially the difficult taking issues presented where private property is involved. Techniques for reducing the significance of the taking issue are suggested.

I. INTRODUCTION

A. Terminology and Definitions

1. "Shoreline": Bank or fast land adjacent to freshwater lake or river above ordinary high-water mark defined as the line up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristics. Lawrence v. American W.P. Co., 144 Wis. 556, 562, 128 N.W. 440 (1910).

2. "Beach": Land above the mean-high tide line adjacent to ocean waters.

3. "Public": Recreational users who are neither owners of land immediately adjacent to the freshwater body (riparians), nor the licensees or invitees of such riparians.

B. Thesis: The judicial, legislative, and regulatory theories, policies, and approaches used to expand public access rights to ocean beaches suggest a similar expansion of public access rights to freshwater shorelines. However, greater difficulties with the
taking issue will be confronted in expanding public freshwater shoreline access rights, especially where the shoreline is privately owned as is typically the case. Thus techniques for reducing the taking issue's significance are suggested which both enhance public access and reduce shoreline property owners' concerns.

C. State and Federal Constitutional and Legislative Policy Supports Public Access to Beaches and Shorelines. See, e.g., California Constitution Article X, section 4: "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water . . . shall . . . exclude the right of way to such water . . . so that access to the navigable waters of this State shall be always attainable for the people thereof"; Hawaii Revised Statutes § 205A-21: "The legislature finds that special controls on development within an area along the shoreline are necessary . . . to insure that adequate access, by dedication or other means, to publicly owned or used beaches, recreation areas, and natural reserves is provided"; federal Coastal Zone Management Act section 305(b)(7), 16 U.S.C. § 1454(b)(7), which requires federally approved and funded state coastal zone management programs to have "a planning process for the protection of . . . access to public beaches and other public coastal areas." Cf. the federal Coastal Barriers Resources Act, 16 U.S.C. § 3501
et. seq., which removes most federal subsidies for development on designated undeveloped barrier islands, discussed in Bostic v. United States, 753 F.2d 1292 (4th Cir. 1985). The apparent legislative policy judgment is that public water-oriented recreational interests outweigh private property interests in case of conflict.

D. However, To Date the Courts Have Enlarged Public Rights to Use Fresh Waters (as Discussed in Another Paper) Without Significantly Increasing Public Rights to Use Adjacent Shorelines.

1. Examples of judicial expansion of public water use rights: Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914) (hunting on "navigable waters" (broadly defined) is lawful when they are in a navigable stage between the ordinary high-water marks); Day v. Armstrong, 362 P.2d 137 (1961) (recognizes public right to float "nonnavigable" river whose bed was privately owned, including a right when necessary to disembark and walk or wade upon submerged lands in order to pull, push, or carry floating craft over shallows, ripples, rapids or obstructions but not including unrestricted walking or wading on the river's bed or channel); Montana Coalition for Stream Access, Inc. v. Curran, 682 P.2d 163 and v. Hildreth, 684 P.2d 1088 (Mont. Sup. Ct. 1984) (based on public trust doctrine and 1972 Montana Constitution, court finds a public right to use recreationally navigable streams up to the ordinary high-water mark and
a right to portage across private property to bypass barriers in the water, but no right to cross private property to reach the water; portage rights were subsequently regulated by the Montana legislature in H.B. 265, 49th Legislature 1985); State v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945) (public has right to fish on a reservoir the bed of which is privately owned); Buffalo River Conservation and Recreation Council v. National Park Service, 558 F.2d 1342 (8th Cir. 1977) (public rights to use river obtained by prescription); State v. McIlroy, 268 Ark. 227, 595 S.W. 2d 685, cert. denied, 101 S. Ct. 124 (1980) (river classified as "navigable" based on recreational canoe use thereby creating public rights to use the river); Hitchings v. Del Rio Woods Recreation & Park District, 55 Cal. App. 3d 560, 127 Cal. Rptr. 830 (1976) (stream need not be navigable year round to meet recreational navigability test). See also Muench v. Public Service Commission, 261 Wis. 492, 53 N.W. 2d 514 (1952) (by state statute public recreational rights must be considered in state dam permit proceedings); Cal. Const. Art. I, § 25 (declaring public right to fish upon waters of the state); Minn. Stat. Ann § 105.38(1) (declaring all waters capable of public use to be public); 1987 Ore. S.B. 38 requiring shoreline owners to build and maintain a portage around barriers they erect and authorizing the public to portage around such barriers); Restatement of Torts 2d § 193 (a
person is privileged to navigate in a reasonable manner "navigable waters" situated on land in the possession of another). But see People v. Emmert, 198 Colo. 137, 597 P.2d 1025 (1979) (trespassing conviction of canoeist using nonnavigable stream whose bed was owned by adjacent landowners upheld despite provision in state constitution that unappropriated water of every natural stream is the people's property; according to J. Sax & R. Abrams, Legal Control of Water Resources 66 (1986), Emmert has been narrowly construed by the Colorado Attorney General); Hartman v. Tresise, 36 Colo. 146, 84 P. 685 (1905) (statute providing for public right to fish in any stream in the state subject to actions in trespass for any damage done along the banks held unconstitutional); Bergen Ditch & Reservoir Co. v. Barnes, 683 P.2d 365 (Colo. App. 1984) (bed owner controls water surface use); Bott v. Michigan Department of Natural Resources, 415 Mich. 45, 327 N.W. 2d 838 (1982) (public water use rights based on recreational usability rejected). Compare People ex. rel. Younger v. County of El Dorado, 96 Cal. App. 3d. 403, 157 Cal. Rptr. 815 (1979) (county may not ban all rafting and boating on a section of "navigable" river highly suited to such use) and State v. San Luis Obispo Sportsman's Ass'n, 22 C.A. 3d 440, 584 P.2d 1088, 149 Cal. Rptr. 482 (1978) (constitutionally declared public right to fish extends to all state-owned land not being used for a special purpose incompatible with public

2. In order to exercise public rights to use freshwater bodies, the public must be able to reach the water, but the cases have not been nearly so sympathetic to assertions of public rights to cross private lands to get to water bodies in which public rights exist: Pigorsh v. Fahner, 386 Mich. 508, 194 N.W. 2d 343, 351 (1972) (public has no right to trespass on private uplands to exercise public water use rights); Buffalo River Construction and Recreation Council v. National Park Service, 558 F.2d 1342 (8th Cir. 1977) (fishermen may only carry their boats onto private upland to get around obstacles in the river and may tie their boats to the

3. By way of comparison, in Sweden the public long has had an unwritten customary right, known as
Allemansrätt, or "all man's right," to cross private property in order to use freshwater bodies and coastal waters, so long as gardens are not trampled and the public does not pass too close to any residence on the property. See Hildreth, Coastal Land Use Control in Sweden, 2 Coastal Zone Mgmt. J. 1, 4 (1975).

4. In sum, none of the three state law approaches utilized to expand public rights to use fresh waters beyond those guaranteed by the federal navigation servitude identified by Professors Abrams and Sax--(a) public rights created through state prerogatives as owner of submerged land; (b) expanded state definitions of navigability; (c) public rights created through state ownership of the water itself--so far have had any significant impact on public rights to use private land adjacent to fresh waters in which the public has rights. See Abrams, Governmental Expansion of Recreational Water Use Opportunities, 59 Oregon Law Review 159, 167-68 (1980).

5. Furthermore, a recent attempt to invoke the four powerful theories used by the courts to create public use and access rights in sandy beaches adjacent to ocean waters discussed next--(1) prescription; (2) implied dedication; (3) custom; and (4) public trust--failed in the context of a freshwater lake in State v. Fox, 100 Idaho 140, 594 P.2d 1093 (1979) (injunction ordering removal of seawall blocking public access to portion of
shoreline landward of the seawall previously used by public denied). Consistent with the dichotomy between broadened public rights in fresh waters versus continued respect for private property rights in adjacent lands noted above, this same court appears to be more sympathetic to public rights in fresh waters than in adjacent lands. See Kootapai Environmental Alliance v. Panhandle Yacht Club, 105 Idaho 622, 671 P.2d 1085 (1983) (public trust doctrine held applicable to fresh waters but held not to preclude state lease of exclusive rights in navigable waters to a yacht club); Shokal v. Dunn, 109 Idaho 330, 707 P.2d 441 (1985) (public trust considerations, e.g., impacts on alternative water uses, vegetation, wildlife, and fish must be considered by state water agency before granting a major water right application). Despite the defeat for expanded public shoreline access rights on tough facts in Fox, recent judicial theories and legislative approaches to expanding public ocean beach access rights are summarized next as indicating possible future directions for the law of public freshwater shoreline access.

II. THEORIES AND APPROACHES SUPPORTING INCREASED PUBLIC ACCESS TO OCEAN BEACHES

A. Judicial Beach Access Theories and Their Relevance to Shoreline Access

1. Prescription: In order to establish an access right by prescription, a party must submit reasonably
clear and convincing proof of open, notorious, continuous, uninterrupted use, under a claim of right, with the knowledge of the landowner for the prescription (adverse possession) period. See Rendler v. Lincoln County, 709 P.2d 721 (Ore. Ct. App. 1985), aff'd on other grounds, Ore. Sup. Ct. Nov. 1986 (open and continuous use of privately owned lands abutting a designated but long-neglected county road had created a prescriptive easement by which the public gained access to a neighboring beach for recreational purposes); Pigorsh v. Fahner, 386 Mich. 508, 194 N.W.2d 343, 347 (1972) (no public prescriptive access easement to freshwater lake was established). Doctrine in some jurisdictions, e.g., State v. Fox, 100 Idaho 140, 594 P.2d 1093 (1979), that the general public as distinguished from particular individuals cannot obtain prescriptive rights and other factors usually result in prescriptive beach access claims being linked with implied dedication claims. See Degnan, Public Rights in Ocean Beaches: A Theory of Prescription, 24 Syracuse L. Rev. 935 (1973).

2. **Implied dedication:** A common-law dedication of property to the public can be proved either by showing acquiescence of the owner in use of the land under circumstances that negate the idea that the use is under license or by establishing open and continuous use by the public for the prescriptive period, Gion v. Santa Cruz, 1 Cal. 3d 29, 84 Cal. Rptr. 162, 465 P.2d 50 (1970), where
the court also stated:

This intensification of land use combined with the clear public policy in favor of encouraging and expanding public access to and the use of shoreline areas leads us to the conclusion that the courts of this state must be as receptive to a finding of implied dedication of shoreline areas as they are to a finding of implied dedication of roadways.

Previously the court had not been so receptive to finding public use and access rights in dry sand areas as compared to roadways. City of Manhattan Beach v. Cortelyon, 10 Cal. 2d 653, 76 P.2d 483 (1938); Diamond Match Co. v. Savercool, 218 Cal. 665 24 P.2d 783 (1933); Whiteman v. City of San Diego, 184 Cal. 163, 193 P. 98 (1920); F.A. Hihn Co. v. City of Santa Cruz, 170 Cal. 436, 150 P. 62 (1915); Bolsa Land Co. v. Burdick, 151 Cal. 254, 90 P. 532 (1907). See also State ex rel. Shorette v. Blue Ridge Club, Inc., 22 Wash. 2d 487, 156 P.2d 667 (1945); Note, Public Beaches: A Reevaluation, 15 San Diego L. Rev. 1241, 1254 (1978); Note, Public Access to Beaches, 22 Stan. L. Rev. 564, 574-75 (1970); Note, Which Way to the Beach? Public Access to Beaches for Recreational Use, 29 S. Cal. L. Rev. 627 (1978).

Cases utilizing a prescription/implied dedication approach to find public access easements across private land adjacent to coastal waters in addition to Gion include: County of Los Angeles v. Burke, 26 Cal. 3d 201, 161 Cal. Rptr. 742, 605 P.2d 381 (1980); Villa Nova Resort, Inc. v. State, 711 S.W.2d 120 (Texas Civ. App.
1986); Seaway Co. v. Attorney General, 375 S.W.2d 923 (Tex. Civ. App. 1964); Moody v. White, 593 S.W.2d 372 (Tex. Civ. App. 1979). On the facts, application of both theories as well as the custom doctrine was rejected in a coastal context in Department of Natural Resources v. Mayor and Council of Ocean City, 274 Md. 1, 332 A.2d 630 (1975). See also Department of Natural Resources v. Cropper, 274 Md. 25, 332 A.2d 644 (1975), noted, 5 Balt. L. Rev. 349 (1976); County of Orange v. Chandler-Sherman Corp., 54 Cal. App. 3d 561, 126 Cal. Rptr. 765 (1976) (on the facts, no dedication of privately owned ocean beach found); City of Long Beach v. Daugherty, 75 Cal. App. 3d 972, 142 Cal. Rptr. 593 (1977). Municipal documents may also be interpreted to expressly dedicate a municipally-owned beach to unrestricted public use irrevocably. See Gewirtz v. Long Beach, 69 Misc. 2d 763, 330 N.Y.S.2d 495 (1972) (city unsuccessfully attempted to restrict use of a public beach to city residents after 34 years of operation without any residence requirement). See generally Annot., Implied Acceptance, by Public Use, of Dedication of Beach or Shoreline Adjoining Public Waters, 24 A.L.R. 4th 294 (1983); Comment, Public or Private Ownership of Beaches: An Alternative to Implied Dedication, 18 UCLA L. Rev. 795 (1971). Regarding use of dedication doctrine to create public water use rights, see Bartlett v. Stalker Lake Sportsmen's Club, 283 Minn. 393, 168 N.W.2d 356 (1969); State by Burnquist v.
Fischer, 245 Minn. 1, 71 N.W.2d 161 (1955).

For specific freshwater shoreline locations where previous public use can be documented over a sufficient period of time, the prescription/implied dedication theories can be utilized to gain judicial recognition of irrevocable public access rights. However, those theories' fact and location specific nature may mean that a sufficient number of well-located public access points to satisfy "demand" may not be realizable utilizing them alone. The custom doctrine discussed next operates in much more sweeping fashion to provide public access and use rights in all beaches governed by the custom.

3. Custom: "A usage or practice of the people, which, by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or subject-matter to which it relates." Black's Law Dictionary 461 (Rev. 4th ed. 1968). The Oregon Supreme Court applied the doctrine of custom based on historic use by pioneer Oregonians of dry sandy beaches for transportation to find irrevocable public rights to use sandy coastal beaches inland to the vegetation line even though the zone between the mean high tide line and the vegetation line further inland was in private ownership. Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969); see Delo, The English Doctrine of Custom and Oregon Property Law: State ex rel. Thornton v. Hay, 4
Environmental Law 383 (1974). See also Matcha v. Mattox, 711 S.W.2d 95 (Texas Civ. App. 1986) (public's rights in the contested stretch of Galveston Island beach exist inland to the vegetation line by virtue of public use since time immemorial; erosion due to hurricanes has moved vegetation line inland to the extent that plaintiffs may be enjoined from rebuilding their home to avoid interference with public access rights); City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73 (Fla. 1974) (public customary rights to use dry sand areas without creating any public interest in the land itself recognized, but defendant allowed to build a 176 foot high observation tower next to its pier because the tower would not interfere with the public's customary use of the beach); Note, Open Beaches in Florida: Right on Rhetoric, 6 U. Fla. L. Rev. 983 (1978); United States v. St. Thomas Beach Resorts, Inc., 386 F. Supp. 769 (D. St. Thomas and St. John 1974) (defendant ordered to remove fences that were constructed along the sides of its property, across a beach toward the low-tide line based on the "custom" doctrine as part of federal common law); Washington Attorney General Opinion 1970 AGO No. 70 (concluded that custom doctrine would be applicable in Washington state to give the public a right to the free and unhindered use of the wet and dry sand areas of Pacific Ocean beaches except in the Quinault Indian Reservation whose boundaries extend to the low-water

The custom doctrine would seem to be of limited significance in the freshwater shoreline context given the general absence (outside the Great Lakes) of wide, continuous sandy shorelines which have been utilized as transportation corridors or recreation areas since "time immemorial," e.g., the days of white settlement of the area.

4. Public trust: Of the four theories recently used to expand public ocean beach access rights, the public trust doctrine holds the greatest potential for expanded public access rights to freshwater shorelines. The
basics of the doctrine are reviewed in another paper presented at this conference, so they will not be repeated here.

The New Jersey Supreme Court has used the public trust doctrine aggressively to expand public beach access rights. For example, in Matthews v. Bay Head Improvement Association, 95 N.J. 306, 471 A.2d 355, cert. denied, 469 U.S. 821 (1984), that court traced the development of the public trust doctrine from the time of Justinian through current New Jersey jurisprudence. Building on its 1972 decision in Borough of Neptune City v. Borough of Avon-By-The-Sea, 61 N.J. 296, 294 A.2d 47 (1972), where it extended the public trust doctrine to recreational uses such as swimming and held that the doctrine applied to a municipally-owned dry sand beach immediately landward of the high-water mark, the Matthews court found a public right of access to a dry sand area owned and controlled by a "quasi-public body," the Bay Head Improvement Association whose membership was limited to Bay Head residents. In Neptune the court used the doctrine to invalidate a law under which an ocean front municipality charged higher fees to non-residents for use of municipally-owned beaches.

5. Potential for expansion of public trust to freshwater shorelines: Previous to Matthews, the New Jersey court had stated that its approach was limited to "municipally-owned open beaches. We are not called upon
to deal with beaches on which permanent improvements may have been built, or beaches as to which a claim of private ownership is asserted." Van Ness v. Borough of Deal, 78 N.J. 174, 393 A.2d 571, 573 (1978). But the beach at issue in Matthews, owned by an association of residents, could just as easily have been described as quasi-private as quasi-public, yet the court was willing to extend the public trust doctrine to it. A broad interpretation of the Matthews holding that the public trust doctrine gives the public rights to reasonably use upland areas where such use is essential or reasonably necessary for the public's enjoyment of the ocean would seem to be equally applicable in many freshwater shoreline situations. Freshwater shorelines owned or managed by homeowners' associations would seem to fall squarely within the Matthews ruling. Cf. Hitchings v. Del Rio Woods Park & Recreation District, 55 Cal. App. 3d 560, 127 Cal. Rptr. 830 (1976) (association of homeowners within riverside park district also named as defendant in suit to obtain public access rights).

New Jersey's lower courts have used the above principles to open up municipally-owned beach walkways, toilets, and other facilities located on uplands adjacent to public beaches to non-residents on a basis equal to municipal residents. Hyland v. Borough of Allenhurst, 148 N.J. Super. 437, 373 A.2d 1133 (1977) (non-residents have right to use municipally owned toilet facilities but

These cases suggest approaches to situations where publicly-owned freshwater shoreline facilities are limited to special district, city, county, or state residents or non-residents are charged higher fees for use of the facilities than non-residents. See City of Madison v. Tolzmann, 71 Wis. 2d 570, 97 N.W.2d 513 (1959); Hitchings v. Del Rio Woods Park & Recreation District, 55 Cal. App. 3d 560, 127 Cal. Rptr. 830 (1976) (public may use beach and parking lot owned by park district adjacent to recreationally navigable stream).

However, to date, most applications of the public trust doctrine in the freshwater context have been limited to the beds, e.g., Kootenai Environmental Alliance, Inc. v. Pan Handle Yacht Club, Inc., 105 Idaho 622, 671 P.2d 1085 (1983) (opinion reviews the public trust law of several states), and more recently to diversions of the waters overhead, e.g., National Audubon Society v. Superior Court of Alpine County, 33 Cal. 3d 419, 189 Cal. Rptr. 346, 658 P.2d 709, cert. denied, 104

The freshwater public trust cases most indicative of further evolution inland are the California "shorezone" cases. In State v. Superior Court of Lake County (Lyon), 29 Cal. 3d 210, 172 Cal. Rptr. 696, 625 P.2d 239 (1981), a shoreline owner sued the state to quiet title to a marsh located landward of the low-water mark on a navigable lake. The landowner relied upon an 1870 statute which stated that grants of land bordering on navigable waters where there is no tide extend to the low-water mark. While recognizing the ownership claim, the court also held that the land between the lake's high and low-water marks (the "shorezone") is subject to the public trust doctrine analogous to coastal tidelands which have been conveyed into private ownership without any clear expression of legislative intent to free them from the public trust doctrine. See City of Berkeley v.
According to the court in Lyon, its decision affected no "less than 4,000 miles of shoreline along 34 navigable lakes and 31 navigable rivers." See also State v. Superior Court of Placer County (Fogerty), 29 Cal. 3d 240, 625 P.2d 255, 172 Cal. Rptr. 713 (1981) (public trust doctrine applies to privately-owned lake shoreline below dam-caused artificial high-water mark where inundation has occurred for the prescriptive period); Wilbour v. Gallagher, 77 Wash. 2d 306, 462 P.2d 232 (1969) (owner of shoreline below dam-caused high-water mark must remove fill below such high-water mark and cannot otherwise interfere with public water use while the land is submerged, but when the land is not submerged trespasses may be prevented); West v. Slick, 326 S.E.2d 601 (N.C. 1985) (the public has a right to pass unobstructed along the "foreshore," the strip of land lying between high- and low-water mark, which is state property); Note, Lyon and Fogerty: Unprecedented Extensions of the Public Trust, 70 Cal. L. Rev. 1138 (1982).

Also suggestive of eventual application of the public trust doctrine to freshwater shorelines in compelling circumstances are the cases recognizing superior public rights in navigable waterways and adjacent wetlands vis-a-vis shoreline owners requesting
state permission to exercise their riparian rights to place fill or construct wharfs, docks, or other facilities in those waters and wetlands. See, e.g., Claridge v. New Hampshire Wetlands Board, 485 A.2d 287 (N.H. 1984) (fill permit refused); Graham v. Edwards, 472 So.2d 803 (Fla. App. 1985) (construction of private dock prohibited); In re Application of Cert. Baptist Theo. Sem., 370 N.W. 642 (Minn. App. 1985) (permit to construct radio tower in public wetlands denied); Poneleit v. Dudas, 141 Conn. 413, 106 A.2d 479 (1954) (use of riparian land for marina purposes may be prohibited by city zoning ordinance); Welsh v. City of Orono, 355 N.W.2d 117 (Minn. 1984) (municipality may regulate wharfs and docks in shoreland areas but not dredging of "public waters"); Capune v. Robbins, 273 N.C. 581, 160 S.E.2d 881 (1968) (ocean beach owner who has exercised his littoral rights by constructing a pier into deeper ocean waters cannot interfere with public use of the ocean waters beneath the pier). See also Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 177 S.E.2d 513 (1970); Henry Dalton & Sons Co. v. Oakland, 168 Cal. 463, 143 P. 721 (1914) (riparian's access to navigable waters may be cut off by public seawall on tidelands without compensation); Carpenter v. City of Santa Monica, 147 P.2d 964 (Cal. Ct. App. 1944), Los Angeles Athletic Club v. City of Santa Monica, 147 P.2d 976 (Cal. 1944), Miramar Co. v. City of Santa Barbara, 23 Cal.2d 170, 143
P.2d 1 (1943) and Paty v. Town of Palm Beach, 29 So.2d 363 (Fla. 1947) (cities may build breakwaters and groins blocking the accretion of sand on private beaches without liability); West v. Smith, 95 Idaho 550, 511 P.2d 1326 (1973) (public right to use navigable lake did not include right to "permanently" connect houseboat to shore with a catwalk interfering with shoreline owners littoral rights); Burns v. Forbes, 412 F.2d 995 (3rd Cir. 1969) (filling of mangrove swamp adjacent to tidal lagoon as exercise of littoral rights); Plager, Interference with Public Right of Navigation and the Riparian Owner's Claim of Privilege, 33 Mo. L. Rev. 608 (1968).

6. Limits on the public trust doctrine as a freshwater shoreline access solution: Even if extended in appropriate contexts to freshwater shorelines above the ordinary high-water mark, the public trust doctrine cannot be viewed as an all encompassing solution to freshwater shoreline access problems for the following reasons:

a. Where the bed of the freshwater body is privately owned under the navigable-at-statehood-for-title-purposes test but the water surface is subject to a public use right under the recreational navigability rule, e.g., Bohn v. Albertson, 107 Cal. App. 2d 738, 238 P.2d 128 (1951) (levee failure created recreationally navigable waters over privately owned bed), subjecting the privately owned shoreline adjacent to the privately
owned bed to a public access right pursuant to the public trust doctrine would be difficult to rationalize doctrinely, and would raise particularly difficult taking issues. However, the extension of the public trust doctrine to water diverted from nonnavigable tributaries of navigable freshwater bodies in the Mono Lake case, see Note, The Public Trust Doctrine As a Source of State Reserved Water Rights, 63 Denver L. Rev. 585n.* (1986), illustrates that those difficulties might not be insurmountable.

b. Even the New Jersey Supreme Court in its landmark Matthews decision discussed above, did not extend public use and access rights to all sandy beaches adjacent to ocean beds and waters subject to the public trust doctrine, but instead limited such public rights to locations "where use of the dry sand is essential for reasonably necessary enjoyment of the ocean" such that the public trust doctrine "warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner." Under this approach applications of the public trust doctrine to freshwater shorelines would be limited to locations where public use of the shoreline was essential for access and use of the water body, and even in those locations, as the court also stated "the particular circumstances must be considered and examined before arriving at a solution that will accommodate the public's right and the private
interests involved," suggesting that where a reasonable accommodation of the private interests with public use cannot be made, e.g., by confining public use and access with signs and fences to particular areas, the doctrine will not be applied to create public shoreline use rights.

c. Depending on how far inland the nearest public road is, application of the public trust doctrine to freshwater shorelines may not solve the so called "vertical" access problem of getting the public lawfully from the nearest public road (with available parking space) through intervening private property to the shoreline subjected to expanded public use rights under the Matthews approach.

B. Regulatory Approaches for Creating and Protecting Public Beach and Shoreline Access

1. Many coastal state legislatures have created state beach access regulatory programs implementing the judicial decisions just discussed, and the courts in turn generally have supported agency implementation of the legislation:

a. Pursuant to the "Oregon Beach Bill," ORS 390.605 et. seq., the vegetation line along sandy portions of the Oregon coast was surveyed, public use rights declared to extend inland to the vegetation line, and a permit required for all construction seaward of the vegetation line. The Oregon Supreme Court has supported
both the public use and construction permit aspects of
that legislation. See Hay v. Dept. of Transportation,
301 Or. 129, 719 P.2d 860 (1986) (state agency regulation
authorizing public parking on the sand in front of the
appellant's beach-front motel upheld); State Highway
Commission v. Fultz, 261 Or. 289, 491 P.2d 1171 (1971)
denial of permit to build a road on an ocean beach
upheld on the basis of interference with public use of
the dry sand area). See also McDonald v. Halvorson, No.
A-85-05-05317 (Multnomah County Cir. Ct. 1986) (public
rights established by Thornton v. Hay to use all dry sand
areas between the mean high-tide and vegetation line
encompasses beach areas not expressly designated for
public use by the "Oregon Beach Bill" because the
legislature in enacting the bill did not intend, and
could not even if it wanted to, diminish those judicially
established rights).

tit. 2 §§ 61.001-.024 provides that the public shall have
access to state-owned beaches and other beaches where the
public has acquired access rights by prescription,
dedication, "or has retained a right by virtue of
continued right in the public" and these rights extend
inland to the vegetation line. Texas court decisions
utilizing the legislation to support findings of public
access rights include the Villa Nova Resort, Inc., Seaway
Company, Moody, and Matcha cases cited above.

d. However, the legislative reaction to judicial decisions expanding public beach access rights has not always been supportive of public access. See, e.g., California Civil Code §§ 813, 1009 discussed in
Gallagher, Juke & Agnew, *Implied Dedication: The Imaginary Waves of Gion-Dietz*, 5 Sw. U.L. Rev. 48, 79-80 (1973), providing private upland owners through recording documents and other devices to protect themselves from implied dedication of access rights to the public. Similarly, one reason given for Illinois' withdrawal from the federal coastal zone management program was the opposition to increased public access to the lakeshore near private residential areas.

   e. Furthermore, the courts generally have been supportive of local, state, and federal agency restrictions on public beach use so long as they apply equally to all members of the public. See, e.g., the cases upholding vehicle beach usage regulations: *City of Daytona Beach Shores v. Florida*, 483 So. 2d 405 (Fla. Sup. Ct. 1985) (public trust doctrine not violated by city charging reasonable fees for vehicle access to beach land held in trust for the public by the state where the fees were to be used for maintenance and other beach-related purposes); *Lighthouse Shores, Inc. v. Town of Islip*, 41 N.Y.2d 7, 390 N.Y.S.2d 827, 359 M.E. 2d 337 (1976); *People v. Deacon*, 87 C.A. 2d Supp. 29, 151 Cal. Rptr. 277 (1978); *Sim v. State Parks and Recreation Commission*, 94 Wash. 2d 552, 617 P.2d 1028 (1980); the cases upholding local restrictions on surfing in coastal waters: *MacDonald v. Newsome*, 437 F. Supp. 796 (D.N.C. 1977); *State v. Zetteerberg*, 109 N.H. 126, 244 A.2d 188 ...

f. The best known, most frequently applied, and most often challenged state regulatory program supporting public access to beaches is administered by the California Coastal Commission. The California Coastal Act, Cal. Pub. Res. Code §§ 30000-900, sets forth circumstances in which the Commission must require landowners to dedicate easements for public beach access as a condition of obtaining a coastal development permit. A dedication does not become effective until a public agency or "private" (non-profit) association assumes liability and maintenance responsibilities for the accessway. Id. § 30212(a). This regulatory program is discussed further in connection with the taking issue.

III. THE CALIFORNIA BEACH ACCESS PROGRAM AND THE TAKING ISSUE

A. The California Courts Generally Have Supported Public Beach Access Dedication Permit Conditions Imposed by the California Coastal Commission (CCC) Pursuant to the California Coastal Act: See Frisco Land & Mining Co. v. State of Cal., 74 Cal. App. 3d 736, 753, 754, 141 Cal. Rptr. 820 (1977); Georgia-Pacific Corp. v. Cal. Coastal

B. Three Previous Attempts By Disappointed Developers to Obtain United States Supreme Court Review of CCC Access Requirements Were Unsuccessful: See Oceanic Cal., Inc. v. North Central Coast Regional Comm'n, 63 Cal. App.
In October 1986 the Court Granted Review in Nollan v. California Coastal Comm'n, 177 Cal. App. 3d 719, 223 Cal. Rptr. 28, juris. noted, 55 USLW 3277 (No. 86-133 Oct. 20, 1986), argued March 30, 1987, Where the CCC Required Dedication of the One-Third of a Beachfront Lot Seaward of an Existing Seawall as a Permit Condition for Demolishing a Small Vacation Cottage and Replacing It With a Larger Substantial Year-Around Home. The Nollans' home was one of twenty-nine located between two public beaches, "one more brick in the wall separating the People of California from the state's tidelands," in the language of Grupe, 212 Cal. Rptr. at 589.

1. Nollan's facts involve access to beaches near private seawalls like Whalers' Village, the Fox freshwater shoreline case discussed earlier, and Grupe, but are less harsh than Grupe, except that the proposed single-family home was more modest in Nollan and replaced
a small vacation cottage.

2. Nollan's issues are much like Grupe, Liberty, and Remmenga where the Court recently denied review, except instead of wealthy lot owners in an exclusive subdivision as in Remmenga, Nollan involved a "little guy" single-family homeowner who wanted to replace his vacation cottage with a year-around home.

3. Nollan has been argued as a subdivision exaction case rather than a beach/shoreline access case, i.e., the question is whether mandatory access dedications fall within or without the scope of reasonable exactions from developers; if outside, then requiring access is a taking. See J. Botzum & D. Garner, eds., 18 Coastal Zone Management Newsletter No. 13 at 1-6 (Nautilus Press April 2, 1987).

   a. Based on Associated Homebuilders v. City of Walnut Creek, 4 Cal. 3d 633, appeal dis., 404 U.S. 878 (1971), the California Courts of Appeal in Nollan, Grupe, and Remmenga held that the particular development from which public access is exacted need not have directly caused the access problem being solved or even benefit from the access exacted; there need be only an indirect relationship between the exaction and the need for public access to which the development cumulatively contributes. Grupe, 212 Cal. Rptr. at 590.

   b. Generally, the costs of exactions to the developer may be viewed as offset by value enhancements
due to the development's approval and the provision of public services, and a taking challenge defeated. See Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 73-74 (1964). The court in *Grupe* acknowledged that beachfront lot owners like the Nollans required to dedicate access are not also receiving new public services, but are receiving "a substantial benefit by being allowed to . . . [develop the property] and to thereby greatly increase its value. The benefit involved is that the development is permitted on the coast--an extremely limited resource--in exchange for provisions to ensure maximum public access to, and use of, the tidelands." 212 Cal. Rptr. at 596-97.

c. The California Coastal Act's mandatory access dedication approach implements the state constitutional mandate (Cal. Const. Art. X, § 4 quoted above) for public access to public trust resources, i.e., navigable waters and their beds. Thus it can be argued that no nexus is required between the development's burdens on access and the access exacted because the exaction is imposed in recognition of established public rights not to make the development pay its own way. See Note, *Public Beach Access Exactions: Extending the Public Trust Doctrine to Vindicate Public Rights*, 28 UCLA L. Rev. 1049, 1079 (1981). See also Note, *Public Access to Beaches: Common Law Doctrines and Constitutional Challenges*, 48 N.Y.U. L. Rev. 369, 374 (1973); Comment, *California Beach Access:*

d. More restrictive standards have been applied to development exactions by other state courts, but the U.S. Supreme Court has denied review in the exaction cases presented to it. See D. Hagman & J. Juergensmeyer, Urban Planning and Land Development Control Law 207n.24, 208n.32 (2d ed. 1986); Symposium, Exactions, 50 Law & Contemp. Prob. 1 (1987).

e. Thus Nollan could be the Court's first substantive review of development exactions; perhaps more likely, the Court will treat Nollan more generally as another taking challenge to land use regulations, an area where the Court recently has been avoiding the taking issue based on lack of ripeness but continuing to grant review. See First English Evangelical Lutheran Church v. County of Los Angeles, (No. B003702 Cal. App., 2d Dist., June 25, 1985), U.S. Sup. Ct. juris. noted, (challenge to county ordinance prohibiting structures in floodplains); MacDonald, Somers, & Frates v. Yolo County, 54 USLW 4782 (1986); Williamson County Regional Planning Commission v. Hamilton Bank, 105 S.Ct. 3108 (1985), noted, 13 Ecology L.Q. 625. However, Nollan may be difficult to dodge based on ripeness, as it seems whatever redevelopment proposal the Nollans present to the CCC, the California Coastal Act requires an access dedication. See Cal. Pub. Res. Code § 30212(a) ("public
access . . . along the coast shall be provided in new
development projects").

4. The California Court of Appeal held that although
the public access condition caused a diminution in value,
"it did not deprive the Nollans of reasonable use of the
property," 223 Cal. Rptr. at 30, and therefore was not a
taking.

D. From the Beginning, Some Commentators Have
Criticized the Judicial Theories and Legislative
Approaches Utilized to Expand Public Ocean Beach Access
Rights as Takings, but the Cases So Holding are Few. See
1974) (state statute expanding public fishing and
navigation rights with respect to tidelands to include an
on-foot right-of-passage held a taking; similar Maine
legislation is being challenged as a taking in the Maine
Courts); Sotomura v. County of Hawaii, 460 F. Supp. 473
(D. Ha. 1978) (state court decision holding property
seaward of vegetation line publicly owned is a taking);
Justice Stewart concurring in Hughes v. Washington, 389
U.S. 290 (1967) (sudden judicial changes in the rules
governing ownership of beachfront accretion may
286 (D. Or. 1972) (Oregon statutes confirming public
customary rights along the ocean shore held not a
taking). See generally Berger, Nice Guys Finish Last--At
Least They Lose Their Property: Gion v. City of Santa

Certainly the beach access cases and implementing legislation appear to have redistributed wealth from beachfront landowners to the public. See Roberts, Beaches: The Efficiency of the Common Law and Other Fairy Tales, 28 UCLA L. Rev. 169, 180n.64 (1980). However, that redistribution does not appear to constitute a taking under current Supreme Court taking jurisprudence.

of Engineers' denial of permit to fill privately-owned wetlands may constitute a taking only "if its effect on a landowner's ability to put his property to productive use is sufficiently severe").

F. Nor Does the CCC Appear to Have Run Aftol of the Court's Sometime Sensitivity to "Investment-Backed Expectations," e.g., Kaiser-Aetna v. United States, 100 S. Ct. 383 (1979). Unlike the Corps of Engineers in Kaiser-Aetna, the CCC in Nollan did not first permit development at the location without a public access condition and then later try to impose a public access condition on a subsequent permit requested at the same location. Cf. County of Los Angeles v. Berk, 26 Cal. 3d 201, 161 Cal. Rptr. 742, 605 P.2d 381 (1980) (local government permit denial based on previously unasserted implied beach access dedications upheld).


H. Only If the Court Views the Resulting Public Use as a "Physical Invasion" of the Property by Government Would
Precedent Suggest Treating Access Exactions as a Taking. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (statute providing that landlords may not interfere with the installation of cable TV facilities serving tenants treated as a physical invasion and held a taking).

I. Lost in the Furor Over Public Access to Ocean Beaches Has Been the Question of Public Access to Lands Above the Mean-High Tideline Adjacent to Tidal Bays and Estuaries.

1. The judicial theories supporting public ocean beach access generally do not apply to privately-owned uplands adjacent to bays and estuaries due to the absence of facts supporting the prescription, implied dedication, and custom theories. Thus the shores of bays and estuaries are similar to freshwater shorelines with respect to public access rights. Because the beds of bays and estuaries below mean-high tideline generally are publicly-owned public trust lands like the beds of navigable freshwater lakes and rivers, the public trust doctrine combined with regulatory and other approaches which accommodate public and private interests in freshwater shorelines discussed below will be quite helpful in expanding public access to the shores of tidal bays and estuaries as well.

2. Special attention to bay and estuary access is needed in the Pacific Northwest where the relative lack
of public access to the shores of Puget Sound and bays and estuaries along the coasts of Washington and Oregon compares quite unfavorably with the extensive public access to ocean beaches. However, a 1984 proposal to include an access dedication provision for new development along the shores of Oregon estuaries in amendments to Oregon Statewide Land Use Goal 17, the Shorelands Goal, was rejected. See also former Cal. Bus. & Prof. Code § 11610.5, repealed by 1974 Cal. Stats., ch. 1536, § 4 (subdivision maps for bay shores must include public access to high-water mark); Henderson, The Bay and Estuaries Section of the 1985 Texas Water Bill: Drowning the Public Trust Doctrine, 23 Houston L. Rev. 907 (1986).

3. An outstanding bayshore access program which also serves as a model for freshwater shorelines is operated by the San Francisco Bay Conservation and Development Commission using a combination of new development access dedications, acquisitions of access rights, and negotiations with bayshore landowners such as the Department of Defense to provide public access wherever possible and appropriate to shorelands to which the public previously was denied access unnecessarily.

IV. ACCOMMODATING PUBLIC AND PRIVATE INTERESTS IN FRESHWATER SHORELINES

A. Building on Traditional Accommodations

1. The Massachusetts Bay Colony Ordinance of 1641-47 provided for public access and use of the colony's bays,
coves, and rivers so far as the sea ebbed and flowed, and of freshwater "great ponds" more than ten acres in size. It also authorized passage across intervening private lands to those waters so long as cornfields and meadows were not trespassed upon. Subsequently, this passage right was limited to the crossing of unimproved or unenclosed lands and held inapplicable where some other convenient means of access was available. C. Meyers & D. Tarlock, Water Resource Management, 1074 (2d ed. 1980); see Leighty, Public Rights in Navigable State Waters--Some Statutory Approaches, 6 Land & Water L. Rev. 459, 471-72 (1971).

2. The cases involving claims of public recreational water use rights are built on the assumption that lawful access to the water is available. See, e.g., Montana Coalition v. Hildreth, People v. Emmert, Pigorsh v. Fahner, and State v. McIlroy cited above and Nakoosa-Edwards Paper Co. v. Railroad Comm'n, 201 Wis. 40, 46-47, 228 N.W. 144, 147, 229 N.W. 631 (1930).

3. Where sufficient access is not available to popular waterways, the states traditionally have either purchased or condemned riparian land for public access. See Peck v. Olsen Construction Co., 216 Iowa 519, 245 N.W. 131 (1932) (Iowa Code Ann § 107.24 interpreted to authorize state condemnation of access ways to any waters overlying private beds entirely surrounded by private property); Stony Ridge and Carlos View Terrace Ass'n v.
Alexander, 353 N.W.2d 700 (Minn. App. 1984) (agency use of Minn. Stat. Ann. § 86A.05, subd. 9(b) to acquire access upheld over objection of riparians); Branch v. Oconto County, 13 Wis. 2d 595, 109 N.W.2d 105 (1961) (condemnation to create public access to lake surrounded by property of one landowner upheld under Wis. Stats. § 23.09(14)); Salisbury Land & Imp. Co. v. Commonwealth, 215 Mass. 371, 102 N.E. 619 (1913) (condemnation for public beach and bathing house). See also State v. Bollenbach, 241 Minn. 103, 63 N.W.2d 278 (1954) (statute permitting condemnation of access to "public waters" held inapplicable to private non-navigable waters).

4. If public water use encouraged and made possible by the state as riparian landowner unreasonably interferes with other riparians' enjoyment of the water body, the courts may require the state to impose and enforce suitable regulations on public use. See Botton v. State, 69 Wn.2d 751, 420 P.2d 352 (1966).

5. In recent opinions expanding public rights based on the public trust doctrine, the courts have been sensitive to their decisions' effects on upland owners' investments in improvements. See City of Berkeley, Lyon, and Fogerty supra; Cal. Pub. Res. Code § 6312; O'Neill v. State Highway Department, 50 N.J. 307, 235 A.2d 1, 8-9 (1967).

6. In addition, the cases upholding non-discriminatory governmental charges for public access to public
public beaches and waters could be extended to authorize private upland owners subjected to public access requirements to collect reasonable fees to reflect the cost of access to them including reductions in property value. See City of Daytona Beach Shores and Borough of Neptune City supra. Private collection of access fees would seem particularly appropriate where access dedication is required as a condition of shoreline development permission and the enhanced property values created by the grant of development permission do not outweigh the cost to the shoreline developer of the required access dedication. However, rather than collecting fees, many shoreline developers probably would prefer that the effectiveness of any dedication exacted be conditioned on the assumption by a public agency or non-profit association of liability and maintenance responsibilities as under the California Coastal Act.

7. The need for shoreline development regulatory programs which provide the opportunity to exact access dedications is illustrated by the cases involving overuse of the water body created by the failure of private or public riparians to adequately control the activities of the public permitted to utilize the riparian land to gain access to the water body. See Botton supra; Snively v. Jaber, 48 Wash. 2d 815, 296 P.2d 1015 (1956), annotated 57 A.L.R. 2d 560; Thompson v. Enz, 379 Mich. 667, 154 N.W.2d 473 (1967), on appeal after remand, 385 Mich. 103,
188 N.W.2d 579 (1971); Pierce v. Riley, 35 Mich. App. 122, 192 N.W.2d 366 (1971) (66 percent increase in lake access due to riparian's canal construction enjoined as unreasonable); Bartke & Patton, Water Based Recreational Developments in Michigan--Problems of Developers, 25 Wayne L. Rev. 1005 (1979); Symposium on Access to Waterways, 16 U.C.D.L. Rev. 573 (1983). Obviously, if the water body already is overused, further access to it should not be created by mandatory access dedication or otherwise until the conditions resulting in overuse are corrected.

8. If portions of a particular undeveloped shoreline are more valuable for purposes such as wetlands preservation and riparian vegetation protection inconsistent with intensive public use and access, then any public access conditions imposed on development of the remainder of the parcel should be shaped accordingly. On the other hand, intensive public use may be consistent with the public and private interest in avoiding damage from flooding and erosion which results in a particular shoreline remaining undeveloped.

9. Accommodating public access seems especially appropriate for shoreline owners who also benefit by diverting water from the water body, especially in those western states including Colorado where prior appropriators are allowed to trespass in order to perfect their water rights. See J. Laitos, Natural Resources Law
538-39 (West 1985). See also Boz-Lew Builders v. Smith, 571 P.2d 389 (Mont. 1977). Of course public shoreline access should not be allowed in locations where it would actually interfere with the diversion or the beneficial uses such as crop irrigation and domestic water supply for which the diversion is made, or expose the public to undue hazard from those activities.

The uncertainty arises from the rules in effect in most states and under federal common law that the boundary is ambulatory, i.e., it wanders due to gradual changes in the shoreline from accretion and erosion which alter the location of the mean high tide line or ordinary high-water mark. See, e.g., California v. U.S., 86 L.A.D.J. DAR 4006 (9th Cir. No. 85-1965 Dec. 2, 1986) (federal law governs and federal government owns the land exposed by the receding waters of Mono Lake); Lake Providence Port Commission v. Bunge Corp., 193 So.2d 363 (1966) (freshwater shorelines); Kruse v. Grokap, 349 So.2d 788 ( Fla. App. 1977); Wilt v. Endicott, 68 Or. App. 481, 684 P.2d 595 (1984) (freshwater shorelines). Cf. Beach Colony II v. Cal. Coastal Comm'n, 199 Cal. Rptr. 195 (1984) (boundary not affected by "avulsive" (sudden) changes in shoreline); Louisiana Civil Code, Art. 501 (saltwater boundary changes with erosion but not with accretion). See also State v. Zimring, 566 P.2d 725 (Ha. 1977) (additional shoreline created by volcanic lava flow.
belongs to the state and is subject to the public trust doctrine). However, stabilization of the shoreline by artificial means, e.g., seawall construction, freezes the boundary both in law and in fact, at least so long as the stabilization device works. See In re Pt. Lookout, Town of Hempstead, 144 N.Y.S.2d 440 (1954). This physical and legal boundary stability enhances the development potential of the property but stabilization devices can increase erosion of neighboring private and public lands thereby reducing public recreational opportunities. Thus when development permission is granted for the stabilized parcel, it does not seem unfair for a regulatory agency such as the California coastal Commission to require dedication to public use of the beach seaward of the seawall as in the Nollan case in return for the enhanced development opportunity which was created at some risk to nearby recreational opportunities.

11. Furthermore, the trend in coastal law and policy is to treat landowner construction of seawalls to protect beachfront property from erosion as a non-compensable privilege rather than a property right protected from governmental takings due to their potentially adverse effects on adjacent private and public lands and waters and public use of them. See Rolleston v. State, 266 S.E.2d 189 (Ga. Sup. Ct. 1980) (denial of permit to build seawall based on erosion hazards to adjacent property held not a taking); Chapman & Hildreth, Coastal Erosion

B. Even If the Supreme Court Holds the Beach Access Dedication Imposed On the Nollans A Taking, Shoreline Property Owners Will Find Themselves Still Accommodating the Public Interest Under a Variety of Other Regulatory Programs Which Restrain Their Development Activities Immediately Adjacent to Inland and Coastal Waters.


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at this conference discusses wetlands protection in much further detail.


3. Riparian vegetation protection. See Dept. of Envtl. Reg. v. Goldring, 477 So.2d 532 (Fla. 1985) (state agency's jurisdiction over wetlands extends to aquatic vegetation and exchange of waters (which need not be two way) with state waters); Ore. Admin. Rules § 629-24-116 (regulation of commercial timber harvesting in riparian zone equal to 3 times the river's width; also applies to lake shores); Lane County Code §§ 16.229(7), 16,2331(7), Bellevue, WA City Code § 20.50.044, Beaverton, OR Code § 100.200 (maintenance, removal, and replacement of...