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Public Lands - The Public Trust Doctrine Includes a Right to Equality of Access to Municipal Beach Area

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PUBLIC LANDS—The Public Trust Doctrine Includes a Right to Equality of Access to Municipal Beach Area.

In 1970, the New Jersey municipality of Avon-by-the-Sea adopted an ordinance which required non-residents using the municipal beach area to pay a substantially higher fee than residents or taxpayers of Avon.[1] The neighboring inland municipality, Neptune City, challenged the ordinance, asserting that it violated the Equal Protection Clause of the fourteenth amendment and denied plaintiffs their common law right of access to navigable waters and tidelands.[2] The New Jersey Superior Court held that there was a reasonable basis for discriminatory beach fees since the taxpayers of Avon bore the financial burden of maintaining and policing the beach area. The court, in *Neptune City v. Avon-by-the-Sea,* also refuted the contention that plaintiffs' common law public water rights were abridged since in New Jersey the legislature has an absolute power to alienate public trust lands or vacate the right in such lands.[3] The court, therefore, construed the statute[4] which authorized the municipality to set beach fees as a delegation of an absolute state power over trust lands.

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1. Only residents or taxpayers could purchase a season pass for $10. Non-residents could purchase monthly passes for $10 each month or buy daily badges.

2. "Tidelands", "foreshore" or "greatwater", as hereafter used, refers to the land between the mean high water mark and the mean low water mark held by the states as a public trust. LORD HALE, DE JURIS MARIS, *republished in* S. MOORE, A HISTORY OF THE FORESHORE 378 (1888).

3. Neptune City v. Avon-by-the-Sea, 114 N.J. Super. 115, 274 A.2d 860 (1971).

4. N.J.S.A. 40:61-22.20 provides:

> The governing body of any municipality bordering on the Atlantic ocean [*sic*], tidal water bays or rivers which owns or shall acquire, by any deed of dedication or otherwise, lands bordering on the ocean, tidal water bays or rivers, or easement rights therein, for a place of resort for public health and recreation and for other public purposes shall have the exclusive control, government and care thereof and of any boardwalk, bathing and recreational facilities, safeguards and equipment, now or hereafter constructed or provided thereon, and may, by ordinance, make and enforce rules and regulations for the government and policing of such lands, boardwalk, bathing facilities, safeguards and equipment; provided that such power of control, government, care and policing shall not be construed in any manner to exclude or interfere with the operation of any State law or authority with respect to such lands, property and facilities. Any such municipality may, in order to provide funds to improve, maintain and police the same and to protect the same from erosion, encroachment and damage by sea or otherwise, and to provide facilities and safeguards for public bathing and recreation, including the employment of lifeguards, by ordinance, make and enforce rules and regulations for the government, use, maintenance and policing thereof and provide for the charging and collecting of reasonable fees for the registration of persons using said lands and bathing facilities, for access to the beach and bathing and recreational facilities, but no such fees shall be charged or collected from children under the age of 12 years.

On appeal, the supreme court, per Justice Hall, reversed the decision of the lower court.[5] The court saw no legislative authorization in the language of the statute for charging higher beach fees. The court rested its decision upon the common law right of the citizenry to equal access to public lands: the public trust doctrine.[6] In *Avon,* the New Jersey Supreme Court articulated a modern and flexible view of the public trust doctrine which marks a significant departure from prior cases and an extension of the trust doctrine generally.

The *Avon* decision could have a decisive impact in Illinois, as well as in other jurisdictions with lake or oceanfront recreation areas which attract large crowds. Several Illinois municipalities which administer Lake Michigan beaches charge higher fees to non-resident beach users.[7] The *Avon* rationale would afford a persuasive argument in a challenge to those fee regulations.

THE PUBLIC TRUST: A FLEXIBLE DOCTRINE

The development of the public trust doctrine shows the responsiveness of the doctrine to public pressures. A review of the history of the public trust is important to a consideration of the *Avon* decision and possible future applications.

> English treatises and American courts have espoused a doctrine that states hold title to greatwater resources merely as trustees and for common benefit. This "public trust" doctrine embodies the prevailing perceptions of the citizen/state relation respecting public water interests. Yet the trustees' powers and the beneficiaries' interests have been protean and amorphous.[8]

The public trust doctrine was originally derived from the Roman law. The shores of the Mediterranean, actually an imperial inland sea, were common to all citizens.[9] After the disintegration of the Roman Empire, commercial and fishing activities became strictly local, and the broad concept of a common right was lost in the struggle of feudal lords to expand private interests.[10] In medieval England, the king had

5. Neptune City v. Avon-by-the-Sea, 61 N.J. 296, 294 A.2d 47 (1972).
6. *Id.* at 303, 294 A.2d at 51.
7. Lakefront municipalities charge higher fees in two ways: higher beach use fees for non-residents, or a non-resident parking fee. Evanston and Wilmette charge non-residents twice as much as residents. In 1972, non-residents paid $16.00 to use Evanston or Wilmette beaches for the season, residents paid $8.00. Lake Forest and North Chicago charge parking fees to non-residents to achieve the same goal, while residents are permitted to park in beach lots using municipal stickers as identification.
8. Note, *State Citizen Rights Respecting Greatwater Resource Allocation: From Rome to New Jersey,* 25 RUTGERS L. REV. 571, 574 (1971). [hereinafter cited as *Greatwater Resource*].
9. 1 WATERS AND WATER RIGHTS, § 36.1 at 184 (Clark ed. 1967) [hereinafter cited as Clark].
10. *Greatwater Resource, supra* note 8, at 575.

a private interest in all tidal and riverbed soil as well as in the other lands of his realm.[11] As one writer would suggest, this view reflected the political and economic structure of feudal society. By the thirteenth century, with the gradual, though limited, revival of trade and commerce, the public had acquired easements in riverbanks and the foreshore for commercial purposes.[12] The king's right to grant and control tidal and riparian lands was circumscribed to a degree by the Magna Carta.[13]

The tremendous expansion of international trade and commerce during the Renaissance necessitated unrestricted access to the foreshore and riverbanks for shipping and fishing. The gradually developing theory that the Crown held the tidal lands in trust for the people[14] was ratified during the Elizabethan era, again by political and economic pressure. Lawyers argued, successfully after a time, that in disputed foreshore claims there was to be a presumption that the title was in the Crown for the benefit of the people.[15] Thus, private interests were subordinated to public use to facilitate the expansion of trade and British naval hegemony. By the Glorious Revolution, the trusteeship was transferred to Parliament.[16]

After the American Revolution, the separate colonies succeeded to the sovereignty of Parliament. Under the Constitution, the states retained control of their tidelands, subject to the federal government's paramount control of navigation.[17] The general view is that states hold the tidelands subject to a public trust, and, that grantees of the state take title subject to the trust.[18]

THE PUBLIC TRUST DOCTRINE IN NEW JERSEY

Against the contemporary background of a growing awareness of an imminent ecological and human use crisis of water resources, the

11. Note, *The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine*, 79 YALE L.J. 762, 764 (1970). [hereinafter cited as 79 YALE L.J. 762]
12. *Greatwater Resource, supra* note 8, at 585.
13. 1 Clark, *supra* note 9, § 35.2 at 181. The charter prohibited the king from placing weirs in tidal rivers, but not along the seashores.
14. 79 YALE L.J., 762, *supra* note 11, at 768.
15. *Greatwater Resource, supra* note 8, at 591. The trust doctrine, as it develops over the centuries, is clearly related to pressing economic needs, and can be formulated to accomplish many purposes. "Maximum benefits are not obtained from a resource unless (1) conflicting claims are given priorities that accurately reflect their relative importance and (2) provision is made for multiple use to the extent that less pressing claims can be allowed without seriously damaging the higher priority uses." 79 YALE L.J. *supra* note 11, at 762.
16. *Greatwater Resource, supra* note 8, at 597.
17. U.S. CONSTITUTION art. I, § 8; Shively v. Bowlby, 152 U.S. 1 (1894); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).
18. Clark, *supra* note 9, § 36.4(A) at 197.

New Jersey Supreme Court considered the *Avon* case. The opinion indicates a consciousness of the possibilities of the public trust doctrine as a tool for judicial activism to counter legislative or administrative inaction or misappropriation regarding public resources.[19]

Arnold v. Mundy[20] was the first important case to deal with the public trust doctrine in New Jersey. The court reviewed the establishment of the colony under Charles II's grant to the Duke of York and the later grant to the Proprietors. The court concluded that New Jersey, like the other colonies, was established to set up a government, not a private venture. Thus, tidal lands were subject to the same public right and governmental control as such lands in England.[21] The legislature could improve tidal lands, or license their use, but it "cannot make a direct and absolute grant, divesting all the citizens of their common right. . . ."[22] Thus, though the lands could be alienated, they would continue to be subject to the public trust rights of access, even after a conveyance.

Twenty-five years later, the New Jersey high court drastically changed its position on the legislature's power to alienate trust lands. In *Gough v. Bell*[23] at issue was the right to filled tidal lands in the Hudson River. The court considered whether a state could convey title to the soil of navigable[24] rivers and seashores. Overruling *Arnold*, the court concluded that while the king was limited in his power regarding trust lands, Parliament was not:

> The objection to an alienation of the public domain by the king is, that he is but a trustee for the community. But the legislature are not mere trustees of common rights for the people. . . . The act of the legislature is the act of the people. . . .[25]

The New Jersey legislature then, like Parliament, was free to grant public trust lands, including the seashore, to private parties, and thus to deprive the public of access to such lands permanently, subject only to the federal control of navigation.

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19. "New Jersey's experience—at once unique and typical—has involved probably the full range of legal, political, economic and social problems which can raise, or develop around these [public trust] issues. Her tidal and navigable resources and her citizenry's water interests have suffered perhaps more injury than those of any other jurisdiction in the common law world." *Greatwater Resource, supra* note 8, at 649.
20. 6 N.J.L. 1 (Sup. Ct., 1821).
21. *Id.* at 15.
22. *Id.* at 16.
23. 21 N.J.L. 156 (Sup. Ct., 1847), *after new trial*, 22 N.J.L. 441 (Sup. Ct., 1850).
24. "Navigable" is construed in New Jersey in the common law sense of tidal waters rather than the more generally held American view that navigability in fact constitutes the test. Cobb v. Davenport, 32 N.J.L. 369 (Sup. Ct., 1867), *motion to strike additional plea granted*, 33 N.J.L. 223 (Sup. Ct., 1867).
25. Gough v. Bell, 22 N.J.L. 441, 457-58 (Sup. Ct. 1850).

In *Avon*, the court quoted extensively from *Illinois Central Railroad v. Illinois*[26] seemingly in an attempt to refound New Jersey law on this watershed decision. *Illinois Central*, perhaps the most decisive case in the public trust area, involved a grant by the Illinois legislature to the Illinois Central Railroad of the submerged lands under the entire Chicago harbor. The fundamental question considered in *Illinois Central* was the power of the legislature to alienate public lands,[27] and the measure of control retained by the state which would limit a grantee in his use of the lands and preserve public rights of access to the resource. The view of the public trust taken in *Illinois Central*, that the state may act in its trustee role only to *improve* the public right, is the position endorsed by the *Avon* court.[28]

It is not, however, the position taken by the New Jersey courts prior to *Avon*. Even in post-*Illinois Central* cases,[29] the courts operated on

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26. Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892).

27. *Id.* at 451. The case makes it very clear that the Court will look skeptically on any conduct which reallocates a resource or subjects public trust land to use by a private interest. It has also been noted that the Court could have treated the grant as a license to use the submerged lands under the harbor, which then could have been revocable at the will of the legislature. Instead, as indicated, the Court stated the issue in terms of the legislature's *competency* to grant such lands. *Greatwater Resource*, *supra* note 8, at 623-24.

28. It is a title held in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

146 U.S. at 452-53.

29. Ross v. Mayor of Edgewater, 115 N.J.L. 477, 180 A. 866 (Sup. Ct., 1935), *aff'd per curiam*, 116 N.J.L. 447, 184 A. 810 (Ct. Err. & App., 1936), *cert. denied*, 299 U.S. 543 (1936); Bailey v. Driscoll, 19 N.J. 363, 117 A.2d 265 (1955); Schultz v. Wilson, 44 N.J. Super. 591, 131 A.2d 415 (App. Div., 1957), *certif. denied*, 24 N.J. 546, 133 A.2d 395 (1957).

the assumption, articulated most recently in *State v. Maas and Waldstein Co.*[30] that:

> Ownership of the land below the high water mark is vested in the State and is held under the guardianship of the Legislature, which is possessed of the same absolute power as Parliament enjoyed under the common law, to regulate, abridge or vacate public rights in navigable rivers, except in the field reserved to Congress by the Federal Constitution.[31]

However, the legislature's power to convey was not directly at issue in *Avon*. The municipality is a creature of the state in administering its beach park area, and the state's title to the foreshores is not disputed. The court's view of the state's powers and the rights of the citizens is important to the court's holding that the municipality must not deny equal access to the beach area to any citizen. While the lower court considered the common law rights of the citizens as vacated by the legislature's enactment of N.J.S.A. 40:61-20.22, the supreme court decided that the state could not vacate the right of access to trust lands in delegating its own authority to the municipality, which was in fact acting in the state's own trustee role.[32]

TOWARD A MODERN PUBLIC TRUST DOCTRINE

Originally, the public trust doctrine, which developed as a response to political and economic changes, was restricted to fishing and navigation uses.[33] However, as leisure time has increased for the majority of the population, the trust doctrine has expanded to include non-economic public uses.[34]

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30. 83 N.J. Super. 211, 199 A.2d 248 (1964).
31. *Id.* at 220, 199 A.2d at 252.
32. Neptune City v. Avon-by-the-Sea, 61 N.J. 296, 309-10, 294 A.2d 47, 53-54 (1972).
33. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970) [hereinafter cited as Sax].
34. The flexibility of the doctrine is explained as follows:

> The principle that the public has an interest in tidelands and banks of navigable waters and a right to use them for purposes for which there is a substantial public demand may be derived from the fact that the public won a right to passage over the shore for access to the sea for fishing when this was the area of substantial public demand. As time goes by, opportunities for much more extensive uses of these lands become available to the public. The assertion by the public of a right to enjoy additional uses is met by the assertion that the public right is defined and limited by precedent based upon past uses and past demand. But such a limitation confuses the application of the principle under given circumstances with principle itself.

The law regarding the public use of property held in part for the benefit of the public must change as the public need changes. The words of Justice Cardozo, expressed in a different context nearly a half-century ago, are relevant today in our application of this law: "We may not suffer it to petrify at the cost of its animating principle." 1 Clark *supra* note 9, § 36.4(B) at 202.

> The public trust has no life of its own and no intrinsic content. It is no more—and no less—than a name Courts give to their concerns about the insufficiencies of the democratic process.[35]

Thus, in recent years, many jurisdictions have recognized a public right to access to water resources for other than commercial use. Scenic enjoyment has been included,[36] as has recreation, as a protected public use.[37] In *Avon*, the New Jersey Supreme Court acknowledged a recreation easement in public lands, and interpreted the concept of public access to mean equality of access to all members of the public.

To date, Illinois courts have not considered the question of a recreation easement in or equality of access to public water resources. However, recent cases indicate that the courts might adopt a modern and progressive view if the issue were presented. The Illinois Supreme Court recognized the individual citizen's right to sue to preserve the public trust in *Paepcke v. Public Building Commission*.[38] Plaintiffs challenged the authority of the Chicago Board of Education and other agencies to construct schools and recreation facilities in two city parks. The court specifically overruled, in part, an earlier decision, *Droste v. Kerner*[39] which held that individuals did not have standing to sue to enjoin a legislative grant of submerged lands to United States Steel.

In *Paepcke*, the plaintiffs asserted that the agencies had exceeded their authority in appropriating park lands, and that the legislature would have to specifically authorize the reallocation of park lands. The court found the authorization sufficient to support the agencies' action, and alluded to the approaches taken by two states, Massachusetts and Wisconsin, in solving reallocation of resource problems,[40] as valid tools for judicial action.

The Massachusetts courts have demanded that the decisions regarding public trust resources be made with maximum public visability and participation.[41] In *Gould v. Greylock Reservation Commission*,[42] where a writ of mandamus and declaratory relief were sought to pre-

35. Sax, *supra* note 33, at 521.
36. Scenic Hudson Preservation Council v. Federal Power Commission, 354 F.2d 608 (2nd Cir., 1965); Muench v. Public Service Commission, 261 Wis. 492, 53 N.W.2d 514, *aff'd on rehearing*, 261 Wis. 492, 55 N.W.2d 40 (1952); City of Madison v. State, 1 Wis. 2d 252, 83 N.W.2d 674 (1957).
37. Gion v. City of Santa Cruz, 2 Cal.3d 29, 84 Cal. Rptr. 162, 465 P.2d 50 (1970); Gewirtz v. City of Long Beach, 69 Misc.2d 763, 330 N.Y.S.2d 495 (Sup. Ct. Nassau Cty. 1972); State *ex rel.* Thornton v. Hay, 254 Ore. 584, 462 P.2d 671 (1969).
38. 46 Ill.2d 330, 263 N.E.2d 11 (1970).
39. 34 Ill.2d 495, 217 N.E.2d 73 (1966).
40. 46 Ill.2d 330, 341, 343, 263 N.E.2d 11, 19 (1970).
41. Sax, *supra* note 33, at 502.
42. 350 Mass. 410, 215 N.E.2d 114 (1966).

vent the lease of public lands for construction of ski resort facilities, a presumption which guides public trust decisions was established.[43] The court held that in the absence of a definite and specific statement from the legislature permitting such use, the Authority was exceeding its power in executing the lease for a ski area.[44] The courts have thus provided a mode of reviewing the actions of the administrative agencies which make most of the public resource decisions without directly invalidating a legislative act.[45] Other Massachusetts decisions indicate the same concern for express authorization for change in use of public lands. In *Sacco v. Department of Public Works*,[46] the court notes that there is a presumption in favor of environmental protection, which will operate in public trust cases.

In Wisconsin, more than in any other state, the courts have attempted to work out a rational and flexible meaning for the public trust doctrine.[47] The Wisconsin approach considers the state's trusteeship role as susceptible to more direct judicial intervention, and explicitly outlaws all state grants of water resources to private interests which do not further public interests of the state and national citizenry.[48]

In *State v. Public Service Commission*[49] the court articulated the cri-

43. *Id.* at 419, 215 N.E.2d at 123.

44. This recreational scheme, in the profits of which Resort is to share, is to compete with private recreational ventures of similar character. The profit sharing feature and some aspects of the project itself strongly suggest a commercial enterprise. In addition to the absence of any clear or express statutory authorization of as broad a delegation of responsibility by the Authority as is given by the management agreement, we find no express grant to the Authority of power to permit use of public lands and of the Authority's borrowed funds for what seems, in part at least, a commercial venture for private profit. If the enabling acts have not authorized such an arrangement, the contention that an equity participation by the underwriter and construction company is necessary in order to obtain revenue bond financing cannot provide a justification for the agreement. The Authority, of course, can seek further legislative authorization within proper constitutional limits.

Id. at 426, 215 N.E.2d at 126.

45. Sax, *supra* note 33, at 498.

46. 352 Mass. 670, 227 N.E.2d 478 (1967).

47. Sax, *supra* note 33, at 509.

48. While the court early noted that the "trust reposed in the state is not a passive trust; it is governmental, active and administrative . . . [and] requires the lawmaking body to act in all cases where action is necessary, not only to preserve the trust, but to promote it." City of Milwaukee v. State, 193 Wis. 423, 449, 214 N.W. 820, 830 (1927). More recent decisions indicate that the court will closely consider the actual promotion of public interests in plans or leases of the public trust. Hixon v. Public Service Commission, 32 Wis.2d 608, 146 N.W.2d 577 (1966); Town of Ashwaubenon v. Public Service Commission, 22 Wis.2d 38, 125 N.W.2d 647, 126 N.W.2d 567 (1963); City of Madison v. Tolzmann, 7 Wis.2d 570, 97 N.W.2d 513 (1959); City of Madison v. State, 1 Wis.2d 252, 83 N.W.2d 674 (1957); Muench v. Public Service Commission, 261 Wis. 492, 53 N.W.2d 514, *aff'd on rehearing*, 261 Wis. 492, 55 N.W.2d 40 (1952).

49. 275 Wis. 112, 81 N.W.2d 71 (1957).

teria it employed in implementing the public trust doctrine in a case concerning a land fill project in an inland lake:

1) Public bodies will control use of area.
2) The area will be devoted to public purposes and open to the public.
3) The diminution of lake area will be very small when compared with the whole of Lake Wingra.
4) No one of the public uses of the lake as a lake will be destroyed or greatly impaired.
5) The disappointment of those members of the public who may desire to boat, fish or swim in the area to be filled is negligible when compared to the greater convenience to be afforded those members of the public who use the city park.[50]

The flexibility of the public trust doctrine, is then being recognized as an effective instrument in protecting and promoting public uses of natural resources. The prospect for a progressive approach on trust issues in Illinois seems particularly bright since the *Paepcke* case, where the court indicated a willingness to construe the public right in broad terms. Other jurisdictions such as Massachusetts and Wisconsin have proposed guidelines for resolving the conflict of interests inherent in public trust disputes. The *Avon* case, however, introduces a new element into the doctrine: equality of access to public lands.

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50. *Id.* at 118, 81 N.W.2d at 73.