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The Public Trust Doctrine: Does it Provide the Public With Access to the Beaches of Lake Michigan in Illinois?

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FEATURE

**THE PUBLIC TRUST
DOCTRINE: DOES IT
PROVIDE THE PUBLIC WITH
ACCESS TO THE BEACHES OF
LAKE MICHIGAN IN ILLINOIS?**

by HENRY ROSE*

Beaches today are where we turn our backs not just on the world at large but also on our inland selves. They are a sanctuary, groomed to remove all distractions, sometimes including the other creatures that once made them their home. Beaches are thought of as a place where time stands still, devoid of a troubling past but also of an ever pressing future.¹



The ancient public trust doctrine, which experienced significant expansion in a celebrated Illinois case involving Lake Michigan,² guarantees the public the right to use navigable or tidal bodies of water for commerce, fishing and navigation.³ In the last 75 years, some states have included recreational uses within the scope of the public trust doctrine.⁴

Lake Michigan borders the State of Illinois. The Lake Michigan shoreline in Illinois includes extensive beaches. Some of these beaches are open to the public, while others are privately owned and not open to the public.

The purpose of this article is to examine whether Illinois courts should recognize that members of the public have a right, under the public trust doctrine, to use all of the beaches of Lake Michigan for recreational purposes, including walking along the shoreline.

HISTORY OF THE PUBLIC TRUST DOCTRINE

The public trust doctrine has its origins in Roman jurisprudence which asserted: *“Now the things which are, by natural law, common to all are these: the air, running water, the sea, and therefore the seashores. Thus, no one is barred access to the seashore . . .”*⁵ The English common law adopted the public trust doctrine and concluded that tidal seas and tidal land, below the high-water mark,

*are owned by the crown as sovereign but may be used by the public for commerce, fishing and navigation.*⁶ *The United States Supreme Court adopted these English common law principles in Shively v. Bowlby.*⁷

In *Illinois Central Railroad Company v. Illinois*,⁸ the public trust doctrine was applied to a portion of Lake Michigan bordering Chicago, Illinois. This decision by the United States Supreme Court has been described as ‘The Lodestar in American Public Trust Law.’⁹ In *Illinois Central*, the court extended the public trust doctrine to the non-tidal Great Lakes, including Lake Michigan, because they are navigable waters that accommodate commerce.¹⁰ The court in *Illinois Central* held that the State of Illinois owned the lakebed under Lake Michigan in trust for the people of the state¹¹ and that the state legislature’s grant of a portion of this lakebed to the Illinois Central Railroad Company was inoperative as a violation of the public trust.¹²

The public trust doctrine applies not only to navigable and tidal bodies of water and the land beneath them but also to the land at the shore.¹³ For navigable lakes, like the Great Lakes, the boundary of public trust lands extends on the shore to the high water mark.¹⁴

Each state entered the Union on equal footing with the original thirteen states with regard to public trust rights in tidal waters and the land beneath them.¹⁵ After entry into the Union, each state has the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as it sees fit.¹⁶ As a result, the public trust doctrine has developed differently in each state.¹⁷

One of the issues that developed differently among the states is whether the public trust doctrine should be expanded from the traditional protected uses of commerce, fishing and navigation to include recreational uses of the applicable bodies of water and shore. For example, courts in California¹⁸ and New Jersey¹⁹ have found that the public trust doctrine protects recreational uses. On the other hand, courts in Maine²⁰ and Massachusetts²¹ have found that the public trust doctrine does not include recreational uses. The Michigan Supreme Court held that the public has the right to walk on the shore of the Great Lakes below the high water mark,²² but Ohio courts have held that the public has no right to walk landward of the water’s edge on the shores of Lake Erie in Ohio.²³

ILLINOIS AND LAKE MICHIGAN

Lake Michigan has 63 miles of shoreline in Illinois,²⁴ of which 34 miles is beach.²⁵ There are nearly six million residents of Illinois who live in the two Illinois counties that adjoin Lake Michigan.²⁶ Lake Michigan is the largest recreational resource available to Illinois residents.²⁷

Some of the Lake Michigan beaches in Illinois are open to the public.²⁸ Other beaches are open to persons who pay a fee for their use during the summer beach season.²⁹ Some beaches are private and not open to the public at all.³⁰

Due to the limited amount of beach on the Lake Michigan shoreline in Illinois and the large population of Illinois residents who live in close proximity of Lake Michigan, public access to Lake Michigan beaches is an important public policy issue. The public trust doctrine bears on this issue.

THE PUBLIC TRUST DOCTRINE AND RECREATIONAL USES

The traditional scope of the public trust doctrine allowed the public to access the sea for commercial, fishing, and navigation purposes.³¹

In the twentieth century, several states expanded the uses protected by the public trust doctrine to include recreational uses, such as bathing, hunting, skating, and swimming.³² The rationale for allowing recreational uses to be protected by the public trust doctrine was articulated well by the New Jersey Supreme Court:

*We have no difficulty in finding that, in the 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. The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.*³³

No court has expressly held that recreational uses are protected by the public trust doctrine in Illinois. However, the Illinois Supreme Court approvingly cited the New Jersey Supreme Court's flexible approach to expanding the protections of the public trust doctrine to include recreational uses in light of changing conditions and public needs when the court expanded the protec-

tions of the public trust doctrine in Illinois to include conservation and protection of natural resources, like Lake Michigan.³⁴

Since the Illinois Supreme Court has endorsed the New Jersey Supreme Court's approach to expanding the protections of the public trust doctrine to include recreational uses, it is likely that Illinois courts would also decide that common recreational uses of Lake Michigan beaches should be protected by the public trust doctrine. Such a decision would go a long way toward fulfilling Lake Michigan's potential as a recreational resource for the millions of Illinois residents who live within close proximity of it.

Illinois courts have yet to address whether members of the public have a right to walk along the shore of Lake Michigan on privately owned beaches. The Supreme Court of Michigan has held that members of the public do have a right, under the public trust doctrine, to walk on privately owned land along the shoreline of the four Great Lakes that border Michigan.³⁵ Conversely, the Supreme Court of Ohio recently affirmed a decision of an Ohio Appellate Court that holds that members of the public do not have a right to walk on the shore of Lake Erie on land that is privately owned.³⁶

The Illinois Supreme Court has recognized that private owners of land abutting Lake Michigan own the land up to the water's edge.³⁷ However, the Illinois Supreme Court has also endorsed the view that the protection of the public trust doctrine extends on the shore up to the high water mark.³⁸ Thus, when the State of Illinois first conveyed lands bordering Lake Michigan to private owners, the lands were subject to the public trust doctrine up to the high water mark even though the private ownership extended to the water's edge. As a result, privately owned land between the water's edge and the high water mark would be subject to public trust uses. This is precisely the set of legal principles that the Supreme Court of Michigan relied on to hold that members of the public have a right, under the public trust doctrine, to walk on privately owned lands on its shores bordering the Great Lakes.³⁹

Since the Illinois Supreme Court has also endorsed an expansive and flexible view of the public trust doctrine that "extend as well to recreational uses, including bathing, swimming and other shore activities,"⁴⁰ it is likely that Illinois courts would include walking by members of the public among the activities that the public trust doctrine would allow on privately-owned beachfront land bordering Lake Michigan.⁴¹

ACCESS EASEMENTS

If under the public trust doctrine, the public is recognized to have the right to access all of the Illinois beaches of Lake Michigan below the high water mark for commercial, environmental, fishing, navigation and recreational purposes, a question arises as to whether the public should be allowed to use adjacent privately-owned land to facilitate the exercise of these public trust rights. Specifically, should the public be allowed to cross privately owned land to reach the portion of the beaches that is below the high water mark if there is no public access to these beaches that is readily available?

The New Jersey Supreme Court held that the public trust doctrine may impose an easement for the benefit of the public over privately owned beaches that are landward of the high water mark.⁴² The court recognized that the public's right to access the beach below the high water mark may, in some situations, be meaningless if members of the public cannot cross privately owned land to reach the beach.⁴³ In order to facilitate the exercise of recreational rights of the public, under the public trust doctrine, the court held that the public must be assured a "feasible access route" to the beach below the high water mark.⁴⁴ Thus, in New Jersey, members of the public have a right to cross privately owned land if it provides the only "feasible access route" to reach the beach below the high water mark.⁴⁵ The court confirmed that the public does not have "an unrestricted right to cross at will over any and all property bordering on the common property. The public interest is satisfied so long as there is reasonable access to the sea."⁴⁶

As in New Jersey, if the public's access to the beaches of Lake Michigan in Illinois can only be reasonably accommodated by allowing members of the public to cross adjacent privately owned lands to reach the beaches, then the Illinois courts should interpret the public trust doctrine to include access easements over these lands. Without such access easements, the public's right to use publicly inaccessible beaches would be rendered meaningless.

BEACH ACCESS FEES

Several municipalities that border Lake Michigan in Illinois charge members of the public fees to access their beaches during the summer season.⁴⁷ Northwest-

ern University, located in Evanston, Illinois, also charges members of the public fees to access its North Beach during the summer season.⁴⁸ This raises the question of whether or not Lake Michigan beach access fees are consistent with the public trust doctrine.

In general, beach access fees do not violate the public trust doctrine as long as they are reasonable.⁴⁹ The Illinois Supreme Court has held that the Chicago Park District can charge boat mooring fees in its harbors without violating the public trust doctrine.⁵⁰ Thus, reasonable fees may be charged to members of the public to access beaches and harbors because their owners incur necessary expenses to maintain them and ensure their safe use by the public.

Municipalities and private owners of Lake Michigan beaches who charge beach access fees should recognize that some members of the public cannot afford to pay the charged fees due to their limited financial circumstances. Despite their indigency, these persons are members of the public who have public trust rights to access Lake Michigan beaches. Municipalities and private owners of beaches like Northwestern University should follow the lead of the City of Evanston, Illinois and develop processes for waiving beach access fees for indigent persons.⁵¹ If municipalities or private owners do not waive beach access fees for indigent persons, they run afoul of the United States Supreme Court's direction in *Illinois Central* that public trust rights must be "freed from the obstruction or interference of private parties."⁵² By allowing beach access fees to be waived for indigent Illinois residents, the benefits of the public trust doctrine will be equally available to all persons in Illinois.

CONCLUSION

The public trust doctrine has deep roots in Illinois. Illinois courts should interpret the public trust doctrine expansively and flexibly to ensure that it fully meets the needs of its beneficiaries, the residents of Illinois. In particular, Lake Michigan's beaches in Illinois should be accessible to all residents of the state so that they can all experience the wonderful recreational benefits that Lake Michigan and its beaches offer to the public.

NOTES

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1 John R. Gillis, Life and Death of the Beach, *New York Times* (June 30, 2012), A21.

2 *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892). (expanded the application of the public trust doctrine from bodies of water affected by the tides to navigable bodies of water, like Lake Michigan).

3 *Shively v. Bowlby*, 152 U.S. 1, 57 (1894).

4 Jack H. Archer, Donald L. Connors, Kenneth Laurence, Sarah Chapin Columbia, Robert Bowen, *The Public Trust Doctrine and the Management of America's Coasts*, (University of Massachusetts, 1994), 23-24.

5 Justinian, *Institutes*, book II, title I, sec. 1, as translated in Thomas, *The Institutes of Justinian, Text, Translation and Commentary* (Amsterdam: North-Holland Publishing Company, 1975), 65.

6 *Shively v. Bowlby*, *supra* note 3.

7 *Id.*

8 *Ill. Cent. R.R. Co.*, *supra* note 2.

9 Sax, the Public Trust Doctrine in Natural Resource law: Effective Judicial Intervention, 68 Mich. L. Rev. 471, 489 (1970).

10 *Ill. Cent. R.R. Co.*, *supra* note 2 at 436-37.

11 *Id.* at 452

12 *Id.* at 460.

13 *Wilton v. Van Hessen*, 249 Ill. 182, 187, 94 N.E. 134, 136 (1911).

14 *Id.* See also *Glass v. Goeckel*, 473 Mich. 667, 681-94, 703 N.W.2d 58, 66-73 (2005). The court in *Glass* adopted the Wisconsin Supreme Court's definition of the high water mark as the point on the bank or shore 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 characteristic. 473 Mich 691-94, 703 N.W 2d 72-73.

15 *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 474-75 (1988).

16 *Id.* at 474-75.

17 See Archer, et al. *supra* note 4, at 19-20.

18 *Marks v. Whitney*, 6 Cal.3d 251, 259, 491 P.2d 374, 380 (1980) cert. den'd 449 U.S. 840 (1980).

19 *Borough of Neptune City v. Borough of Avon-by-the Sea*, 61 N.J. 296, 309, 294 A.2d 47, 54 (1972).

20 *Bell v. Town of Wells*, 557 A.2d 168, 173-76 (Me. 1989).

21 *Opinion of the Justices*, 365 Mass. 681, 687-88, 313 N. E.2d.561, 567 (1974).

22 *Glass v. Goeckel*, 473 Mich. 667, 694, 703 N.W.2d.58, 73 (2005).

23 *State ex rel Merrill v. Ohio Dept. of Natural Res.*, 2009 WL 2591758, *11-16 (Ohio App. 11 Dist., 2009), aff'd 130 Ohio St. 3d 30, 955 N.E. 2d 935 (2011).

24 Illinois Environmental Protection Agency, "Lake Michigan Monitoring Program," www.epa.state.il.us/water/surface-water/lake-michigan-mon.html.

- 25 The Coastal Management Program of the Illinois Department of Natural Resources (IDNR) estimates that there approximately 34 miles of beaches on Lake Michigan in Illinois. Email message of Ania Ruzsak of IDNR to Henry Rose on July 20, 2012.
- 26 The United States Census Bureau estimates that in July, 2011, Cook County, Illinois had 5,217,080 residents and Lake County, Illinois had 706,222 residents. www.quickfacts.census.gov/gfd/states/17/17031.html.
- 27 www.epa.state.il.us/water/surface-water/lake-michigan-mon.html.
- 28 The Chicago Park District operates 24 beaches that are free and open to the public. www.cfmstage.com/beach-report/beach-report-list.cfm.
- 29 For example, Evanston, Illinois operates five beaches and charges fees for admission during the summer season. www.cityofevanston.org/parks-recreation/lakefront-beaches/.
- 30 Blair Kamin, "Let's add lakefront parks," *Chicago Tribune* (June 9, 2009), News Focus, p. 4.
- 31 Archer, et al. *supra* note 4 at 23.
- 32 Minnesota – *Nelson v. DeLong*, 213 Minn. 425, 431, 7 N.W. 2d 342, 346 (1942); Wisconsin – *State v. Public Service Commission*, 275 Wis. 112, 118, 81 N.W. 2d 71, 74 (1957); California – *Marks v. Whitney*, 6 Cal. 3d 251, 259, 491 P.2d 374, 380 (1971); New Jersey – *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 309, 294 A. 2d 47, 54-55 (1972); New Hampshire – *Opinion of the Justices*, 139 N.H. 82, 89, 649 A.2d 604, 609 (1994).
- 33 *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 309, 294 A.2d 47, 54-55 (1972).
- 34 *People ex rel. Scott v. Chi. Park Dist.*, 66 Ill.2d 65, 78-79, 360 N.E. 2d 773, 780 (1976).
- 35 *Glass v. Goeckel*, 473 Mich. 667, 694, 703 N.W. 2d 58, 73 (2005).
- 36 *Merrill v. Ohio Dept. of Natural Res.*, 2009 WL 2591758, 11 (Ohio App. II Dist.) affirmed in 130 Ohio St. 3d 30, 440, 955 N.E.2d 935, 950 (2011).
- 37 *Brundage v. Knox*, 279 Ill. 450, 470-71, 117 N.E. 123, 130-31 (Ill. 1917).
- 38 *Wilton v. Van Hessen*, 249 Ill. 182, 187, 94 N.E. 134, 136 (1911).
- 39 *Glass v. Goeckel*, 473 Mich 667, 694, 703 N.W. 2d 58, 73 (2005).
- 40 *People ex rev. Scott v. Chi. Park District*, 66 Ill 2d 65, 78-79, 360 N.E. 2d 773, 780 (1976)
- 41 Professor Kenneth K. Kilbert wrote an exhaustive article examining the rights of members of the public to walk on the shores of the Great Lakes under the public trust doctrine. *The Public Trust Doctrine and the Great Lake Shores*, 58 Cleve St. L. Rev. 1 (2010). Professor Kilbert opined that, in light of precedent in Illinois involving the public trust doctrine, "there should be no barrier to recognizing the public's right to walk along the shore of Lake Michigan in Illinois below the ordinary high water mark." *Id.* 50-51.
- 42 *Matthews v. Bay Head Improvement Ass'n*, 95 N.J. 306, 471 A. 2d 355 (1984), cert. denied 469 U.S. 821 (1984). The court in *Matthews* also recognized that members of the public who are using the beach below the high water mark for recreational purposes may also have rights to use the privately owned dry sand area above the high water mark for "rest and relaxation" if "use of the dry sand is essential or reasonably necessary for enjoyment of the ocean." 95 N.J. at 325, 471 A.2d at 365.
- 43 *Id.* At 95 N.J. 323, 471 A.2d 364
- 44 *Id.* At 95 N.J. 323-24, 471 A.2d at 364.
- 45 *Id.* At 95 N.J. 322-24, 471 A. 2d 363-64.
- 46 *Id.* At 95 N.J. 324, 471 A.2d 364.
- 47 For example, the City of Evanston and the Village of Wilmette charge beach access fees on either a daily or seasonal basis. www.cityofevanston.org/parks-recreation/lakefront-beaches/; and www.wilmettepark.org/parks-recreation/lakefront-beaches/. The City of Lake Forest charges non-residents a daily fee. www.cityoflakeforest.com/cs/rec/cs_rec2c3.html.

48 www.fitrec.northwestern.edu/facilities/beach/.

49 *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 61 N.J. 296, 310, 294 A.2d 47, 55 (N.J. 1972); *City of Daytona Beach Shores v. State*, 483 So.2d 405, 408 (Fla., 1985).

50 *Broekl v. Chi. Park Dist.*, 131 Ill.2d 79, 89-90, 544 N.E. 2d 792, 797 (1989).

51 www.cityofevanston.org/parks-recreation/lakefront-beaches/season-tokens/. Even Evanston's fee waiver program is flawed because it only allows indigent residents of Evanston to have beach access fees waived. The public trust doctrine provides all residents of Illinois with rights to use Lake Michigan. *See supra* note II and accompanying text. All Illinois residents who are indigent should be able to seek waiver of beach access fees.

52 *See supra* note 8, at 451.