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Public Access to the Beaches of Connecticut

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PUBLIC ACCESS TO THE BEACHES OF CONNECTICUT

A RESEARCH PROSPECTUS
SUBMITTED IN CANDIDACY FOR THE DEGREE OF
MASTER OF MARINE AFFAIRS

DEPARTMENT OF MARINE AFFAIRS

BY
DON W. OSWALT

KINGSTON, RHODE ISLAND
DECEMBER 1974

MASTER OF MARINE AFFAIRS
UNIV. OF RHODE ISLAND
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Introduction

Elements of the public of Connecticut are engaged in direct conflict against private and municipal property rights over the issue of increased public access to beaches of the state. In Connecticut, as well as the nation, definite solutions to the problem are slow to materialize. The public's right to the whole beach is being clarified by only a few states, while public access under common law remains a clouded issue nationwide.¹

The research study I am proposing would examine in detail the legal issues involved, the state and federal legislative actions, geographical considerations, etc. I feel that the resulting collation of the issues and alternative solutions will assist the state planners and decision makers of Connecticut in resolving the problem of public access to the beaches of Connecticut.

Nature of the Problem

Nationwide there is an increasing demand for outdoor recreational facilities, particularly those along the shoreline.² By the year 2000, that demand will be ten times what it was in 1950; however only 4.2% of the nation's shoreline available for recreational purposes is publicly owned, and less than half of that is beach.³

The same situation prevails in the State of Connecticut. Of its 253 miles of coastline, only 9 miles (3.6%) is publicly owned beach, which includes six shoreline parks.⁴ The 1960 population of 2.5 million is expected to double by the year 2000.⁵ The problem has been further complicated by the actions of some of the municipalities which have jurisdiction over selected public beaches. As a defense against the increasing demand for shoreline facilities,
they have restricted the use of their beach facilities by totally excluding non-residents, or by the use of differentially priced user-fees between residents and non-residents.

Thus the statewide public of Connecticut faces a two pronged problem with regard to beach access in the state; private ownership of some of the beach area and/or access, and municipality restrictions on some of the publically owned beaches. Remedies for solving one do not necessarily solve the other.

**Brief Review of Current Solutions**

Thusfar, nationwide public claims of access to private and municipally restricted public beach have been expressed mainly in court litigations. The principle of "implied dedication" has been successfully applied against private beaches in Texas and California cases; *Seaway Co. v. Attorney General*, 375 S.W. 2d 923 (Tex. Civ. App. 1964); *Gion v. City Of Santa Cruz*, 2 Cal. 3d 29, 465 P. 2d (1970). Also used against private beaches in Oregon and New Hampshire was the principle of "customary rights"; *State ex rel. Thorton v. Hay*, 254 Ore. 584, 462 P. 2d 671 (1969); *Knowles v. Dow*, 22 N.H. 387 (1851); *Nudds v. Hobbs*, 17 N.H. 524 (1845).

Public access to municipally restricted beaches has been gained in court actions via several legal vehicles. The principle of "expressed dedication" was used in New York in *Gewirtz v. City of Long Beach*, 69 Misc. 2d 763, 330 N.Y.S. 2d 495 (Sup. Ct. 1972). An English common law doctrine of "jus publicum" was used in New York and New Jersey cases; *Arnold's Inn, Inc. v. Morgan*, 63 Misc. 2d 279, 310 N.Y.S. 2d 541 (Sup. Ct. 1970); *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 294 A2d 47 (1972). Similar to "jus publicum" in purpose and applicability, but a
distinct and separate doctrine, the principle of "public trust" has been used in Wisconsin cases; City of Madison v. Tolzmann, 7 Wis. 2d 570, 97 N.W. 2d 513 (1959); Muench v. Public Service Commission, 261 Wis. 492, 53 N.W. 2d 51 (1952). The use of the "public trust" has also gained significant precedents in Connecticut. Regarding park lands, many Connecticut cases have stated that municipalities hold such land in trust for the people and not for any restricted use by the local residents; Hartford v. Maslen, 76 Conn. 599, 57 A. 744 (1904); Winchester v. Cox, 129 Conn. 106 (1942); Connors v. New Haven, 101 Conn. 191 (1924). This has also been expressed in cases in other states. In addition, every court in the nation that has considered the problem has stated that beaches should be considered the equivalent of park lands for public trust considerations.

The differentially priced user-fees of municipally controlled beaches are presently being attacked in Connecticut Superior Court, Court of Fairfield, by the Connecticut Civil Liberties Union against the Town of Fairfield. The CCLU's claims rely on the "public trust" doctrine and the constitutional issue of "equal protection" (14th Amendment).

The issue of public beach access is also being debated in the federal legislature. Congressman Eckhardt has introduced a bill, H.R. 10394, which would allow Congress to exercise its full constitutional powers to guarantee to the public a free and unrestricted right to use beaches as a common, consistent with property rights of littoral landowners. The bill is currently being reviewed by the House Subcommittee of Fisheries and Wildlife Conservation and the Environment.

Connecticut's Office of State Planning has expressed a jurisdictional interest in the beach access problem. In a 1970 discussion on coastal zone planning in Connecticut,
Horace Brown, Director of the Office, stated that the acquisition of additional land for beach use was to have a high priority in the immediate future. Since then, and with funding assistance from the Federal Coastal Zone Management Act (1972), Connecticut has taken action to establish a state level coastal zone management agency. Hopefully Mr. Brown's assessment of 1970 coastal planning priorities has been carried over to the coastal zone management efforts as well.

In summary, solutions to the problem of the access to and the use of Connecticut's beaches by the state's citizenry (as the public) are currently relying on the following: state court litigations based on alleged common law and constitutional violations; proposed federal legislation; and potential involvement of the state's coastal planning or management office.

Objectives of the Study

The proposed research study will attempt to fulfill the following objectives:

1. Review the status of the sovereign ownership of Connecticut's beaches; who owns what and where.
2. Review the various legal doctrines applicable to Connecticut's beach access problem; review the progress of the state court litigations.
3. Review existing and proposed state and federal legislation, and agency regulations dealing with public access to the beaches.
4. Present and discuss possible solutions.

Data Gathering

The following are information sources that will be investigated, interviewed, or in some way researched for data pertinent to the study. The list is not necessarily all-inclusive.

1. William Olds, Executive Director, Connecticut Civil Liberties Union
2. Mr. Burrack, Long Island Sound Regional Study, New England River Basin Commission
(3) Allen Carroll, State Dept. of Environmental Protection; involved in coastal zone management
(4) George Geer, University of Connecticut Marine Advisory Service
(5) Congressman Eckhardt, author of H.R. 10394, the Open Beaches Bill.

Conclusions
Court litigations relying on common law doctrines and constitutional issues are currently the only vehicles available to the public which desires increased access to the beaches of Connecticut. Therefore, I feel it would be desirable to investigate alternative solutions, or vehicles; i.e. specific state and/or federal legislation; involvement of state regulatory agencies such as coastal zone management; etc.

you've got a big job in front of you, but it should be "fun"!
outline of what you're going to do is good, but I'd like to get a few things clarified - pubic trust/
REFERENCES CITED


5. Ibid., p. 144.


8. Ibid., p. 375, 376.


10. Ibid., p. 381.

11. Ibid., p. 387, 389.

12. Long Island Sound, p. 4.

13. Ibid.


15. Ibid.


18. Eckhardt, p. 983.

THE UNIVERSITY OF RHODE ISLAND

PROBLEMS OF PUBLIC ACCESS TO THE SALTWATER BEACHES OF CONNECTICUT

RESEARCH PROJECT
SUBMITTED IN CANDIDACY FOR THE DEGREE OF
MASTER OF MARINE AFFAIRS

DEPARTMENT OF MARINE AFFAIRS

BY
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KINGSTON, RHODE ISLAND
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ACKNOWLEDGEMENTS

I wish to express sincere appreciation to the following: George Geer, of the University of Connecticut Marine Advisory Service, whose counsel spurred my interest in the subject and guided me through the difficult initial stages of my research; Charles McKinney, Connecticut's Coastal Area Management Program director, who provided his time, enthusiasm, and suggestions.
INTRODUCTION

In 1973, the public had access to approximately 10.4 miles of swimming beach land along Connecticut's Long Island Sound shoreline. This was comprised of six state beach parks, twelve municipal beaches which were open to the general public without discriminatory restrictions, and twenty-five other municipal beaches which were restricted in some manner to use by local residents. Public demand for saltwater swimming beaches may be up to 35 million annual visits in 1990, and 57 million visits in 2020. To meet this estimated demand, an additional 21.6 miles of beach land will be required; this is more than double the 1973 supply.

There are two basic issues that must be faced in dealing with the problem of increasing beach facilities and access in Connecticut. First, there are many existing beach facilities which could be either enlarged or redeveloped for swimming use. New beach land could also be purchased and developed. Although much of the Connecticut shoreline is not suitable for use as a recreational beach, there is a sufficient amount to meet the estimated demand. The questions to ask are where, how much money, and who's to pay?

The second issue involves the restrictions on access of the general public to some municipal beaches. The restrictions in effect create an exclusion of the general public either directly (i.e. non-residents prohibited) or indirectly (i.e. excessively high user-fees for non-residents). Restrictions are usually realized via parking permit systems. The questions to be asked are: are they legal, how can they be combated, who should combat them, and what effect will the removal of restrictions have on the overall beach access problem along the Connecticut shore?
My objective in this paper is to collate the various proposals and suggestions of studies and reports that have in some way addressed the public beach situation in Connecticut. I will also comment on the general effectiveness of these proposals. To assist the reader, a map is provided in Appendix A which depicts Connecticut's state and local beaches along the Sound shoreline.
RESTRICTED PUBLIC ACCESS

The public can experience beach-use restrictions from both the private and municipal property owner. In either case, the public may have legitimate rights of use of the beach which the property owner wishes to prevent. In judicial attempts to resolve the conflicts, several common law legal doctrines have been invoked in various states. These doctrines will be briefly reviewed below with an eye on their potential applicability in Connecticut.

Customary Use

According to this ancient English doctrine, if the public has used a beach for a very long period of time and under other specific circumstances, then the future use of the beach must remain with the public irrespective of the nature of ownership of the land. The essential factual elements are that the use must have been peaceably enjoyed, uninjurious to the public, obligatory, certainty, continuous and immemorial. "Immemorial" originally (in England) meant that the usage had to date back to the Magna Carta, in the thirteenth century. But in the United States, the Oregon Supreme Court, in State ex rel. Thornton v. Hay, 254 Ore. 584 (1969), stated that if the custom had existed for as long as the citizens of the political area in question had claimed property rites in the area, this was sufficient to establish it as immemorial.7

The doctrine of customary use was also used in two old New Hampshire cases: Knowles v. Dow, 22 N.H. 387 (1851), and Nudd v. Hobbs, 17 N.H. 524 (1845). Except for the Oregon case, the doctrine has not been used since.8

In the above cases, the doctrine was used to secure the rights of public use of privately owned beach land. However, its applicability in Connecticut would not appear to be significant. I am not aware of any public use in Connecticut that would satisfy the immemorial test as used in the Thornton case.
Dedication

Like customary rights, the common law doctrine of dedication is fact dependent in its application. It has three basic requirements: (1) the property owner (private or municipal) must make an offer (expressed or implied) to the public of the title to or the privilege of use of his land; (2) the public must accept (express or implied) the offer; (3) the public use must be extensive and continuous (seasonal fluctuations excepted). The intent of the owner is the determinative factor. Once dedicated, the action is irrevocable, except through non-use.

When the dedication is implied (e.g., owner acquiescence in preventing public use), a corollary requirement exists: the public use must be adverse, or under claim of right. The public must presume they had a right to use the land. Thus in Gion v. City of Santa Cruz, 84 Cal. Rptr. 168 (1970), the California court held that implied dedication existed where the public had used a private beach front for over five years, with the full knowledge of the owner, without asking or receiving permission, and without objection being made. The different factual elements (e.g., length of prescriptive period, adverse use, etc.) will differ with different state court interpretations.

In Gewirtz v. City of Long Beach, 69 Misc. 2d 763 (1972), the New York Supreme Court and lower courts found that an expressed dedication of a municipal beach had occurred. Between 1935 and 1937, Long Beach acquired title to a parcel of beach property by grants and conveyances, and opened it for use by the general public. In 1970, a city ordinance was passed which restricted the use to residents only. In voiding the ordinance, the lower court found (state Supreme Court upheld) that an expressed intent to dedicate occurred when the city originally created a public park from beach land for use by the general public. The subsequent maintenance and improvement of the beach park by the city, and the continuous public use for over thirty years constituted the acceptance.
In summary, the doctrine of dedication can be used in both private and municipal beach ownership issues. However, it suffers by being very fact dependent in its application. For example, it probably would not be useful against a municipality which had always reserved its beach for only its residents, where the general public had never established an extensive period of use, and where state or federal funds had never been used. Many Connecticut town beaches can be so characterised. In addition, I am not aware of any test of the dedication doctrine in a beach case in the Connecticut courts.

**Jus Publicum**

This is an ancient English common law doctrine with Roman ancestry. It says that the foreshore (portion of the beach between the low and high water marks; the tidal portion) of all beach land is held by the state in trust for the general public, for unhindered use in navigation and fishing. At the time of the American revolution, there was a prima facie rule under *jus publicum* that in the construction of land grants from the government (Crown), title to the foreshore did not pass with title to the uplands, unless the grant specifically provides that the title runs to the low water mark.

In 1842, the U.S. Supreme Court, in *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, stated that with our independence each state in the union "inherited" the *jus publicum* in its tidelands, subject only to the rights since surrendered by the Constitution to the general government. Thus there are two ways to alienate the *jus publicum* in America: (1) federal land grants of territorial lands to private concerns, which are within the Constitutional power, and which create purely private rights when the clear intent to alienate is shown; and (2) in land grants by Spain and Mexico prior to ceding to the union, the United States is bound by treaty to protect whatever property rights that were included, but not beyond the low water mark. Neither of these exceptions:to
jus publicum apply in Connecticut.

In Martin, the Court further stated that if a state grants the foreshore to a municipality, it is still impressed with the jus publicum. In 1894, the Court in Shively v. Bowlby, 152 U.S. 1, reiterated the doctrine when it stated that title by grants from the state run only to the high water mark unless expressly and clearly to the contrary. Further, all rights to the foreshore are in control of the state rather than the federal government. Each state has been left to deal with the jus publicum in its tideland "according to its own views of justice and policy".

Until recently, jus publicum said nothing about access to the foreshore. In 1972, the New Jersey Supreme Court, in Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, greatly expanded the doctrine to include access. The court ruled that Avon could neither prevent access of non-residents to the foreshore, nor could it charge unreasonable differential use-fees as it was doing. The Court added that there must be equal accessability to the foreshore for all citizens, where the upland dry sands area is owned by a political subdivision of the state (i.e. municipality) and when it is used for purposes consistent with the right of public passage.

Although Neptune City did not mention recreation specifically as a use of the dry sands area, such use can be inferred from the language of "purposes consistent with public passage". By expanding the jus publicum doctrine to include access across the dry sands area, the court recognized that public rights and needs in the tidelands must change in concert with changing public needs of society. As a result, the modern conception of jus publicum is that the public is entitled to full enjoyment of the foreshore and the sea, and that this cannot be realized without the use of the dry sands area.
The modern concept of the doctrine is limited in use to beaches where the public has a pre-existing means of access to the foreshore; e.g. a municipally owned beach. The doctrine cannot be applied to privately owned dry sands areas without getting into a government-taking issue. Whether or not Connecticut courts will accept this expanded view of *jus publicum* remains to be seen. The doctrine can be significant however when used in combination with the doctrines of public trust and equal protection (discussed below).

**Public Trust**

This doctrine probably developed from *jus publicum.* Although similar, the public trust doctrine is separate and distinct from *jus publicum.* Public trust is a broader doctrine; it applies to the foreshore as well as other types of land. The doctrine says that some property rights in certain lands can never be alienated from the general public.

There are three lines of rational to support the public trust concept. (1) Certain resources are so important, their protection is essential in a free society. Property rights in these resources must be in the general public. The navigable waters of the United States is an example. (2) Resources which are gifts of nature should be reserved for all the people. For example, early New England laws reserved "great ponds" for general use, with equal access to all. (3) Certain lands are public in their nature, and should therefore be kept available to the general public.

The modern applicability of the public trust doctrine has not been clearly defined. Historical precedence is not as clear cut as with *jus publicum*; certain interpretations of the public trust have been ununiform. As a consequence, courts have a broader discretion in applying the doctrine.

One type of land that public trust clearly applies to is that which has been dedicated to public use, such as parkland. Several Connecticut cases have held that
municipalities always own and administer parklands subject to the public trust,\(^\text{41}\) and that it applies for all the people of the state rather than the citizens of the municipality;
Hartford v. Maslen, 76 Conn. 599 (1904); Winchester v. Cox, 129 Conn. 106 (1942); Connors v. New Haven, 101 Conn. 191 (1924).\(^\text{42}\)

In addition, the courts in Neptune City and Gewirtz, which addressed the issue directly, stated that for public trust purposes, municipally owned beaches should be considered the equivalent of parks.\(^\text{43}\) Consequently, it would appear that the municipally owned beaches in Connecticut should be impressed with the public trust, in a "parkland" sense.\(^\text{44}\) Applying the public trust, in the parkland sense, to beaches would avoid the problem encountered with \textit{jus publicum}; i.e. restriction in application to the foreshore only.

Several state courts, including Connecticut, have stated that a municipal beach, being impressed with the public trust, cannot be restricted in use to only the local residents;
Hartford v. Maslen, 76 Conn. 599 (1904); Higgins v. Slattery, 212 Mass. 583 (1912); Bavor v. City of Cheyenne, 63 Wyo. 72 (1947); Price v. City of Plainfield, 40 N.J.L. 608 (1878);\(^\text{45}\) and City of Madison v. Tolzman, 7 Wis. 2d 570 (1959).\(^\text{46}\)

Consequently, the public trust doctrine would appear to be a strong tool to use in removing residency restrictions to municipally owned beaches in Connecticut.

\textbf{Equal Protection}

The fourteenth amendment to the U.S. Constitution says in part that no state shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the law.\(^\text{47}\) This so called equal protection clause means that a governmental classification which is arbitrary and which bears no rational relationship to the permissible governmental purpose, may be held to deny equal protection to
those who suffer deprivation as a result of the classification. 48

Because municipalities are legal agents of a state, their ordinances (e.g. residency classifications in regard to their beaches) are restricted by the U.S. Constitution. Therefore, the equal protection clause may prove to be a potent doctrine for removing residency classifications from municipal beaches.

In adjudicating equal protection issues, the U.S. Supreme Court has been applying a two-tiered inquiry of the classification in question. 50 First they apply a "strict scrutiny" test; if the classification impairs a fundamental right, or if it is inherently suspect, then it automatically fails. 51 The Court considers "fundamental rights" to include the right to vote, the right to travel, certain rights of criminal procedure, certain rights of illegitimate children, and rights of marital and personal privacy; suspect classifications involve race, nationality, and political allegiance. With the possible exception of interstate travel, residency requirements per se do not impair "fundamental rights", and are not of a "suspect nature". Therefore, the strict scrutiny test would apparently not apply. 54

When strict scrutiny fails, the court can then apply a "rational basis" test, which inquires into the rational basis of the classification: is it arbitrary or unreasonable? 55 By this test, the municipality would have to demonstrate that their residency classification bears a reasonable relationship to the purpose. 56

In Gewirtz, three justifications were offered in defense of residency classifications for municipal beaches. All can be rejected as arbitrary or unreasonable. The first is a financial justification; because non-residents pay no taxes to the municipality, their added presence is a financial burden on the local community whose taxes support the maintenance of the beach area. This can be rejected in the many cases where state and federal funding have been provided to the
municipality for beach acquisition or maintenance; funds which non-resident taxes help support. Also, non-residents are consumers of local goods and services, and therefore help the local economy.

A less objectionable solution (than a residency classification) would be reasonable differential user-fees based on a proportion of the true cost of the local imposition. An alternative solution would be to remove beach maintenance from local expenditures, and rely on user fees and state and federal funding.

A second justification for residency classification involves the problem of overcrowding; since somebody has to be excluded, it obviously should be a non-resident. This can be rejected because the *jus publicum* and the public trust are imparted in at least the foreshore for all the people of the state. Also, if people must be excluded, the only non-arbitrary means would be a first come first serve basis.

A third justification involves the behavior of non-residents, which is alleged to be obnoxious, criminal, and lacking in respect. Such problems may in fact exist, but they must be a very small percent of the whole non-resident group. To in effect "punish" the whole group is therefore unreasonable. Such action also assumes a higher degree of civility of the residents; such a generalization is without a factual basis.

Consequently it would seem that the equal protection clause can be a durable doctrine to apply against municipal residency classifications at local beaches.

**Summary of Doctrine Applicability**

Regarding increased public access to privately owned beach land in Connecticut, the dedication doctrine can be useful if all of the several factual elements are satisfied. *Jus publicum* and the public trust doctrines would be of only limited use, i.e. preventing obstructions in the foreshore of the beach.

Concerning municipally owned beaches, the dedication
doctrine would again apply, if the factual elements were satisfied. A stronger approach would be to apply in combination the less fact-dependent doctrines of *jus publicum*, public trust (park land sense), and equal protection.

**Fairfield Case**

The Connecticut Civil Liberties Union is taking legal action to increase public beach access in Connecticut in instances of municipalities that restrict non-resident use of their "public" beaches via total exclusion or unreasonable differential user fees. After surveying, by questionnaire in 1973, twenty-five towns along Connecticut's shore, they arrived at ten potential test-case towns: Branford, Clinton, East Lyme, Fairfield, Guilford, Milford, Old Lyme, Old Saybrook, Stratford, and Westport, over 2.5 miles of beachfront represented. Each town controlled a beach of suitable size and quality, demonstrated a history of state or federal funding, and possessed an extraordinarily flagrant admissions policy.

In February, 1974, the CCLU filed suit against Fairfield as a test case. Thus far no briefs have been filed, but the CCLU intends to base their arguments on the *jus publicum*/public trust and equal protection doctrines.

The complaint by the CCLU sets forth the following facts: Fairfield residents pay a $1.50 seasonal parking permit and are allowed to park at and use all of the municipal beaches; neighboring Easton and Trumball residents pay $7.00 for a seasonal parking permit and the same related privileges; Easton and Trumball residents pay no tax money to Fairfield; non-residents (of these towns) can not purchase a seasonal parking permit; Connecticut non-residents (relative the three towns) pay $0.50 for a week-day parking permit; out-of-state people pay $1.00 for a week-day permit; no non-resident permits are issued for Saturday, Sunday, or holidays; during the last twenty years, Fairfield received over $35,000 from the state General Fund for beach improvement; the plaintiffs, non-residents,
pay taxes into the General Fund. 67

The complaint argues that Fairfield is a creature of the state, derives its powers from the state, and in fact lacks the power to exclude non-residents from its beaches, or to give preferential treatment to one town and not to another. 68 Further, the state owns all the saltwater foreshore, and preserves this land and access to it for the benefit of all the people of the state, and appropriates grants to maintain it for all the people. 69 The beaches operated by Fairfield comprise land the state holds in trust for all its citizens as a unique natural resource, dedicated to the recreational use of all state residents and improved by state funds, the enjoyment of which may not be arbitrarily restricted by the town. 70
BEACH LAND ACQUISITION AND DEVELOPMENT

The efforts of Connecticut's state government to increase public swimming beach facilities have been in the direction of redeveloping existing facilities for increased use and purchasing new areas. This has been demonstrated in two state planning reports,\textsuperscript{71} which have recommended specific beach areas where state attention and energy should be directed (see Appendix A). In addition, a 1973 Long Island Sound Regional Study (LISRS) interim report\textsuperscript{72} stated that of the 413 miles of shoreline, in Connecticut and New York, along the Sound, only 28 miles are undeveloped, and most of that is unsuitable for recreational purposes. Further, the land is too remote from population centers and therefore too difficult to reach.\textsuperscript{73} Consequently Connecticut will have to develop existing publicly owned beach facilities and/or purchase privately owned developed beach property.

Table 1 summarizes the recommendations of Plan of Conservation and Development for Connecticut (PCDC) and of the LISRS draft report regarding increased public beach facilities and access in Connecticut. One apparent conflict should be noted. The LISRS suggests that Long Beach in Stratford should be purchased by the state and included with Pleasure Beach in Bridgeport as a single state park.\textsuperscript{74} However the CCLU municipal beach survey\textsuperscript{75} indicates that Long Beach is restricted to resident-use. If this is true, Stratford may not be overly excited about "selling" their beach to the state. State funds are involved with Long Beach\textsuperscript{76}, which could be used as leverage by the state. At any rate, all other municipally owned beaches, which are recommended in Table 1 for expanded existing use or new swimming beach use under state control, are unrestricted to general public use. Table 1 also lists the additional miles of beach land to be realized from the recommendations.

As a means of paying for the recommended acquisition and development, the citizens' summary of the Statewide Comprehensive Outdoor Recreation Plan (SCORP) calls for a $61 million
**TABLE 1**

Selected Beaches and Parks in Connecticut Recommended for Future or Expanded Use as Swimming Beaches

<table>
<thead>
<tr>
<th>Beach, Park</th>
<th>Owner-Location</th>
<th>New or Expanded Use</th>
<th>Additional Beach Area (miles)</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ram Island</td>
<td>?-Mystic Isl.</td>
<td>New</td>
<td>0.5</td>
<td>L</td>
</tr>
<tr>
<td>Bluff Point</td>
<td>St.-Waterford</td>
<td>Expanded</td>
<td>0.5</td>
<td>P,L</td>
</tr>
<tr>
<td>Rocky Neck</td>
<td>St.-E. Lyme</td>
<td>&quot;</td>
<td>0.6</td>
<td>P,L</td>
</tr>
<tr>
<td>Sound View</td>
<td>Old Lyme</td>
<td>&quot;</td>
<td>1.0</td>
<td>L</td>
</tr>
<tr>
<td>Lighthouse Point</td>
<td>New Haven</td>
<td>&quot;</td>
<td>1.5</td>
<td>L</td>
</tr>
<tr>
<td>Silver Sands</td>
<td>St.-Milford</td>
<td>&quot;</td>
<td>2.0</td>
<td>P,L</td>
</tr>
<tr>
<td>Pleasure Beach</td>
<td>Bridgeport</td>
<td>&quot;</td>
<td>?</td>
<td>P,L</td>
</tr>
<tr>
<td>and Long Beach</td>
<td>Stratford</td>
<td>&quot;</td>
<td>?</td>
<td>P,L</td>
</tr>
<tr>
<td>Sherwood Island</td>
<td>St.-Westport</td>
<td>&quot;</td>
<td>0.8</td>
<td>P,L</td>
</tr>
<tr>
<td>Sheffield Island</td>
<td>?-Norwalk</td>
<td>New</td>
<td>?</td>
<td>L</td>
</tr>
</tbody>
</table>

Total additional beach area: 6.9

*P-Plan of Conservation and Development for Connecticut  
L-Long Island Sound Regional Study
expenditure for total outdoor recreation needs of Connecticut up to 1978 ($23.6 million from federal funds, $27 million from state and $11 million local). Almost $20 million of that is earmarked for municipal and state park areas, which would amount to 11,000 acres throughout the state; the amount of that money to be used along the Sound shoreline is not identified by the SCORP summary. Of the money funded to municipalities for local beach land acquisition and development, LISRS recommends that none by given where residency-use classifications exist.

A preliminary study by LISRS in 1973 suggested that state and local expenditures could be remunerated by bond issues, tax incentives, land trust mechanisms, and user fees. In addition, both SCORP and LISRS suggest that the state could acquire beach land through condemnation or direct purchase of beach property that would become available following natural disasters; e.g. floods, hurricanes. For example, LISRS calculates that 6.2 miles of beach land could be obtained by such "disaster purchases":

- Plum Bank and Great Hammock Beach (Old Saybrook), 0.9 miles;
- Cedar Island (Clinton), 0.1 miles;
- Duck Island Roads (Clinton and Westbrook), 1.5 miles;
- Circle and East River Beaches (Madison), 0.6 miles;
- Milford Point (Milford), 0.7 miles;
- Pine Creek Point (Fairfield), 2.0 miles;
- Oweneke Beach (Westport), 0.4 miles.

The basic assumption with "disaster purchases" is that such property will cost less than other beach land not subject to frequent calamities. Thus the state could reduce its cost of recreational land acquisition. The assumption is correct as far as the structures on the land are concerned; the state will not have to buy any buildings on the land if they have
been removed by a storm. But the land itself may not be less expensive. A soon-to-be-released (June?) study by the New England River Basins Commission of the Federal Flood Plain Disaster Program is finding information to the contrary. Their preliminary findings, which are not yet fully documented, have demonstrated a significant positive correlation between the amounts of federal flood insurance and flood beach development. It may be then that the federal insurance program is subsidizing flood plain development by removing the financial risk. Therefore, "disaster purchase" values may be found to be as expensive as any other beach property.

A suggestion for land acquisition which does not appear in any of the above mentioned planning studies involves donations of open space or access easements in return for subdivision approval, density changes, or other land use concessions by a public authority. The consulting firm of Somoff, Cooper and Whitney prepared a legal memorandum on this subject for the LISRS. They concluded that it is not a desirable means of meeting the objective. Because the donation process is ad hoc and opportunistic, no long term and detailed planning can be done. This will result in several scattered little parcels of land rather than one unified area which would enhance the utility of a recreational area. Further, the process inherently involves development, which may not necessarily be the best way for recreational use of the shoreline to be accomplished; donations are not designed to preserve land and water in an original and unblemished state.

The memorandum goes on to suggest that shoreline conservation efforts that have already been attempted in other areas should be reviewed for application along the Sound shoreline. At the Cape Cod National Seashore, for example, when a current property owner wishes to dispose of his property, he must sell to the seashore authority for a fair market value.
Such limited transferability of shoreline is admittedly drastic. But it can be tempered with an immediate purchase by the authority with a lease-back to the current owners for life.87
LEGISLATIVE RESPONSIBILITIES

What role, if any, should the Connecticut state legislature play in the issue of public beach access in Connecticut? The LISRS draft suggests that the legislature "should affirm unequivocally that everyone has a right to enjoy the Sound, and declare it to be policy that adequate public access will be achieved."88 One means of doing that would be to model state legislation after the federal Open Beaches Bill (HR 1676, now before Congress as an amendment to the Coastal Zone Management Act). The Bill would create a public right to use the foreshore and drysands area as a common.89 This would be a statutory presumptive right of use by the public, and the private property owner would have no right to interfere.90

In hearings before the House Sub-Committee on Fisheries and Wildlife Conservation and the Environment in 1973, the Open Beaches Bill was heavily criticized by many agencies of the federal government. Nathaniel Reed, Secretary of the Interior, pointed out that there are other competing and equally valid uses of the beach in addition to public recreation: e.g. fish and wildlife preservation, scenic, historic.91 Patrick McSweeney, Deputy Assistant Attorney General, thought that legislating away private littoral property rights above the high water mark is on legally shaky ground.92 He added that the presumptive right created by the Bill may be illegal; statutory presumptions are valid only when justified by common experience. While the legal and factual justification has been established for a presumptive public easement on the foreshore, Mr. McSweeney is not aware of a similar justification for presuming that all private titles to littoral land above the high water mark have been subjected to presumptive public easements.93

An additional criticism of the Bill is that it creates additional and unnecessary bureaucracy. Some people feel that the objectives of the Bill (increased public access to beaches) can be accomplished by existing federal and state agencies
and legislation; e.g., the departments of Interior and Commerce, the National Oceanic and Atmospheric Administration, the Coastal Zone Management structure, and federal funding to states from the Land and Water Conservation Fund for general shoreline development. Further, there is before Congress proposed federal land use policy legislation which would advance the existing trend of state-wide land and water use planning by offering the carrot of federal funding in the manner of the Coastal Zone Management Act.

As an alternative to state open beach legislation, the objectives could be incorporated into state coastal zone management legislation, under guidance of the federal CZM act. Being land and water use planning in nature, such CZM legislation would put recreational beach use in the proper perspective as a competing use of the shoreline, not the absolute use.

However, Connecticut's current CZM legislation is experiencing difficulty in being realized. Since applying for section 305 funding (management plan development) under the federal CZM act in June, 1974, the state legislature does not appear ready to send forth CZM legislation from this session. Of three bills introduced, only one went through committee hearings, and it is not expected to pass the full assembly.

Rather than wait for state CZM legislation, the state government has gone ahead with state-wide land and water use planning and outdoor recreation planning. Both the State-wide Comprehensive Outdoor Recreation Plan (SCORP), and the Plan of Conservation and Development for Connecticut (PCDC), address the issue of public beach access and offer recommendations (discussed above). Consequently, state CZM legislation may not be so vital to the public beach access problem per se (I do not wish to imply that CZM legislation is not vital to coastal land and water use planning overall, for indeed it is important).

What the state legislature must do now, in my opinion, is
to act on and be supportive of the recommendations of SCORP and PGDC relating to public beach recreation.
CONCLUSIONS

The problems of public access to and use of saltwater swimming beaches along Connecticut's shoreline are reflected in two statistics. First, of thirty seven municipally owned "public" beaches, twenty-five in some manner restrict the access of the general public. Secondly, the available supply of swimming beach land must be doubled by the year 2020 to meet the estimated demand. The state government seems well on its way to resolve the second issue, but it is doing very little to resolve the first.

An absolute right of public use of all the beach, foreshore plus dry sands area, does not exist. The long history of property law and legal philosophy has seen to that. However, municipal beach residency requirements which restrict the access of the general public to beaches which were acquired and are maintained in part by state and federal funding are grossly inequitable and should be removed. The Connecticut Civil Liberties Union is justified in attacking these requirements in court. Indeed, the CCLU is doing the job of the state's attorney general office. The lack of legal action from the state justice department may reflect the strength of opposition from coastal town politicians; home rule is still strong in Connecticut. At the very least, all state and federal funding for beach land acquisition and development should be discontinued to those municipalities which persist in this discriminatory behavior.

The significance however, to increased public beach facilities, of removing municipal residency requirements is questionable. Although these restricted beaches (with state funding) represent almost 25 percent of the current swimming shoreline, most may already be used at near capacity. Thus, removing the restrictions to general public access may not necessarily increase the amount of swimming beach facilities. Unfortunately, I was unable to obtain any quantitative data
to affirm or disprove this contention.

At any rate, the state's attorney general office must not use such a contention as an excuse for not taking legal action. The issue of legality should be recognized as and remain a separate issue from that of public demand for swimming beachland.

The only significant increase in general public beach access and facilities will probably come through state acquisition of new beach land, and through expansion of existing facilities, both state and local (non-restricted). The recommendations of SCORP, PCDC, and LISRS provide almost thirteen additional miles of swimming beach land along the Sound shore of Connecticut; this is more than double the present supply.

Any additional state legislative action need only be supportive of existing activities. A state open beaches policy would be wrong for the same reasons as the proposed federal policy. State coastal zone management legislation will probably not add anything new to the current state-wide planning processes (SCORP and PCDC) involving recreational saltwater beach facilities. What is required of the state legislature is that they support the recommendations of SCORP and PCDC.

The issue of public beach access boils down to one predominant point - if the people of Connecticut desire more swimming beaches, as the demand estimates suggest they do, then they are going to have to pay for it. To acquire new beach property and to expand existing facilities, the public will pay directly via user-fees, and indirectly via state and federal funding (i.e. taxes). Even if the state condemns beach property (e.g. flood prone), by eminent domain, for future recreational use, the private owner will be paid just compensation: again, tax money.
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86. Ibid., p. 10.
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90. Ibid., sec. 315 (e) (1)and (2).
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APPENDIX A

A Map of Public Beach Access in Connecticut