Public Access to Virginia's Tidelands: A Framework for Analysis of Implied Dedications and Public Presecriptive Rights

Margit Livingston

Repository Citation

Copyright © 1983 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository. https://scholarship.law.wm.edu/wmlr
PUBLIC ACCESS TO VIRGINIA'S TIDELANDS: A FRAMEWORK FOR ANALYSIS OF IMPLIED DEDICATIONS AND PUBLIC PRESCRIPTIVE RIGHTS

MARGIT LIVINGSTON*

In the recent decision of Bradford v. The Nature Conservancy, the Virginia Supreme Court determined the rights of landowners and public users to Hog Island, one of the Atlantic barrier islands of Virginia's Eastern Shore. Reaffirming Virginia's common lands

* Associate Professor, DePaul University College of Law. B.A., Augsburg College; M.A., J.D., University of Minnesota; LL.M., University of Illinois.

Research of this Article was supported by a grant from Lawyers Title Insurance Corporation, a subsidiary of Continental Financial Services Company.

The author wishes to thank Erwin Chemerinsky, Ray Grzebielski, Charles Koch, and Lorraine Livingston for their comments on an earlier draft of this Article. The author gratefully acknowledges the aid of the Virginia Institute of Marine Science, College of William and Mary, and Professor N. Bartlett Theberge in making available their publications on coastal law.

Able research assistance was provided by Michael Hassel, Michael Hillinger, Tori Krisch, and Beth Lamb of the Marshall-Wythe School of Law, College of William and Mary, and Celeste O'Connor and Cynthia Sarno of DePaul University College of Law.


2. The Virginia Supreme Court's opinion in Bradford represents the culmination of litigation regarding property disputes on Hog Island begun in the mid-1970's. Originally, The Nature Conservancy, the defendant in the Bradford case, sued a private sportsmen's club in federal court to enjoin it and its members from trespassing on Conservancy property on Hog Island. The disputed areas included the intertidal strip (also called the shore or the foreshore) on the Atlantic Ocean, the marshes and meadowlands on the bay side of the island, and several roads and trails that traversed the island. The club claimed that the Atlantic shore and the marshes and meadowlands were still publicly owned under Virginia's common lands statutes and thus the club's members, as members of the public, had the right to engage in recreational pursuits on these areas without the Conservancy's permission. The club also asserted the right to use the roads and trails on the theories of implied dedication and prescriptive rights.

The federal district court gave the plaintiff only partial relief. The Nature Conservancy v. Machipongo Club, Inc., 419 F. Supp. 390 (E.D. Va. 1976). It upheld the Conservancy's claim to the Atlantic foreshore but sustained the club's assertion that the tidal marshes were owned by the Commonwealth. Id. at 401-04. It also held that the club had acquired a prescriptive easement to use the Conservancy's northern beach access road. Id. at 399-401. The court, however, denied the club any right, either under implied dedication or prescription concepts, to use the north-south road that ran the length of the island. Id. at 395-99.

On appeal, the United States Court of Appeals for the Fourth Circuit stayed further proceedings on the issues relating to the foreshore and marshes pending a definitive ruling on
doctrine, the court held that the Commonwealth still owns the Atlantic foreshore and certain bayside marshes on Hog Island and that the public may use these "common lands" for fishing, fowling, and hunting. At the same time, however, the court decided that the public has no claim to various pathways that traverse and bisect the island. The island's principal private landowner, The Nature Conservancy, may exclude members of the public from using those portions of the roadways that cross the Conservancy's land.

The effect of the Bradford decision on public and private rights in waterfront parcels is both dramatic and somewhat contradictory. It preserves public rights on the shores of the Atlantic Ocean that were used as a common for fishing, fowling, and hunting as early as 1780. Commonwealth grants of common shoreland on the

those issues by the Virginia Supreme Court. The Nature Conservancy v. Machipongo Club, Inc., 579 F.2d 873 (4th Cir. 1978). Previously, the Fourth Circuit had upheld the district court's ruling with respect to the north-south road but had reversed the decision on the northern beach access road, which was held not to be subject to a prescriptive easement in favor of the club. 571 F.2d 1294 (4th Cir. 1978). The United States Supreme Court denied certiorari. 439 U.S. 1047 (1978).

3. 224 Va. at 191-98, 294 S.E.2d at 870-74. The court affirmed the lower court's ruling on these issues. The state case involved most of the same issues presented in the earlier federal suit, but the parties were aligned differently. In Bradford, Hog Island property owners (other than the Conservancy), citizens of Virginia who hunted and fished on the island, and the Commonwealth of Virginia sued The Nature Conservancy for a declaratory judgment articulating the public rights to use the disputed portions of the island. Ch. No. 16 (Va. Cir. Ct., Northampton County, Feb. 27, 1979).

4. 224 Va. at 198-99, 294 S.E.2d at 874-75. With respect to the north-south road, the court affirmed the lower court's holding that the road had not been dedicated to the public. The court, however, reversed the circuit court's decision that the northern beach access road and the shore itself had become public road by implied dedication.

5. Id. at 200, 294 S.E.2d at 875-76.

6. In 1779, shortly after Virginia's independence from England, the Virginia General Assembly passed an act establishing a land office with powers to grant to private patentees the waste and unappropriated lands of the new Commonwealth. 10 W. Hening, The Statutes at Large 50 (1779) [hereinafter cited as Hening's Statutes]. The statute, however, failed to distinguish certain "common lands" from the rest of the state's unappropriated lands. The Assembly clarified its intention to exempt common lands from grant in an act passed in 1780:

[All] unappropriated lands on the bay of Chesapeake, on the sea shore, or on the shores of any river or creek in the eastern parts of this commonwealth, which have remained ungranted by the former government, and which have been used as common to all the good people thereof, shall be, and the same are hereby excepted out of the [1779] act, and no grant issued by the register of the land office for the same . . . shall be valid or effectual in law, to pass any estate or interest therein.
Atlantic Ocean made after 1780 were declared void.

By extension, the opinion impliedly nullifies state grants of other common lands on or beneath Virginia's rivers, creeks, and bays and confirms the public rights of fishing, fowling, and hunting in these areas.

The court in Bradford also held that tidal marshes on Virginia's Eastern Shore which were ungranted in 1888 and which had been used as a common at that time remained in public ownership under the terms of an 1888 statute. The decision guarantees the public the

---

7. Id. at 226-27 (1780).

8. The court stated that “the reservation from grant of common lands made in 1780, and extended to include all of the Altantic shore in 1873, continues to the present day.” 224 Va. at 196, 294 S.E.2d at 874. The 1873 Act reserved from grant common lands not only on the Altantic shore but also those on the Chesapeake Bay and on the shores of rivers and creeks.

right to fish and fowl on these marshes as well.\textsuperscript{10}

By reading the doctrine of implied dedication/prescription narrowly, however, the court diminished the chances that the public will be able to establish rights-of-way to reach the common shores and beds.\textsuperscript{11} Therein lies the contradiction. Although many of Virginia's shores are open to public use, access to these shores may be limited to publicly owned roads and trails. Of course, governmental acquisition of rights-of-way is one solution to the lack of convenient public access to common shoreland. But the necessity of governmental purchases presupposes that the public has not already established access rights through one of the recognized common law methods such as prescription or implied dedication. Given the potentially large number of shorelands still owned by the Commonwealth,\textsuperscript{12} neither state nor local governments may have the re-

\textsuperscript{10} 224 Va. at 191, 294 S.E.2d at 870. The 1888 statute, as do many of the common lands statutes, refers to the public's rights to fish, fowl, and hunt. Va. Code § 41.1-4 (1981). The term "fowling" presumably refers to the catching and killing of wild fowl, whereas "hunting" refers to the pursuit of four-footed game such as deer or squirrels. Although "hunting" is commonly understood to include "fowling," both terms apparently were used for emphasis and clarity. In this Article, "hunting" will be used in its broader meaning as the taking of any wild animals or birds, whereas "fowling" will also be used to refer to the specific sport of catching wildfowl.

\textsuperscript{11} The court rejected all of the legal theories that the plaintiffs asserted as a basis for recognizing either a public or private right-of-way to cross the Conservancy's property. These theories included implied dedication, reciprocal easements, and easements by necessity. 224 Va. at 198-99, 294 S.E.2d at 874-75. By insisting upon some manifest act of acceptance by public officials, the court espoused a narrow view of the doctrine of implied dedication in particular. \textit{Id.} at 199, 294 S.E.2d at 875.

\textsuperscript{12} The exact extent of Virginia's common lands is not known at present. A few studies have been undertaken to establish the location and acreage of the Commonwealth's common lands. N. Theberge, Report to the Senate Subcommittee on False Cape on State Claims to Lands Within the Back Bay National Wildlife Refuge (1981); N. Theberge, Investigation into History and Ownership of Adam's Island (Virginia Institute of Marine Science, 1975); N. Theberge, Investigation into History and Ownership of Starling's Island (Virginia Institute of Marine Science, 1974). Ascertaining their size and location is a difficult task, especially in counties where land records were damaged or destroyed during the Revolutionary War, the Civil War, or fires in the land records office. \textit{1 Calendar of Virginia State Papers}, 1652-1781, at viv (W. Palmer ed. 1875). Even in the Eastern Shore counties of Northampton and Accomack where the land records largely escaped destruction, tracing through deeds of individual parcels for some indication of common lands is an extremely tedious and time-consuming process. Relying on the county tax rolls as some evidence of where public lands are located is also problematic because the tax rolls often are out-of-date and incomplete. In the \textit{Bradford} case, the trial court relied heavily on testimony of aged watermen who recounted the common use of the shore and the marshes by themselves, their fathers, and their grandfathers. Ch. No. 16 at 5, 8-9, 2 Joint Appendix 209-11, 325-27 (Va. Cir. Ct.,
sources to purchase or condemn sufficient rights-of-way to accommodate all prospective public users. Consequently, other legal methods for establishing public access require examination.

The purpose of this Article is to suggest a framework for analyzing cases in which the public asserts use or access rights over private riparian land by prescription or dedication. The Bradford decision, other Virginia cases, and recent out-of-state cases will be examined to determine the current analytical framework for deciding prescription/dedication cases in Virginia and other coastal states. An attempt will be made to search behind the courts’ rhetoric to discern the principles that the courts are applying to these cases. The Article will evaluate these principles in light of the policies of private ownership and public interest that they seek to serve and will suggest how they form a rational basis for allocating use of water-related resources between the public and private sectors.

I. IMPLIED DEDICATION AND VIRGINIA’S COMMON LANDS

A. Implied Dedication as a Method for Creating Public Rights

A threshold issue in tidelands access and use cases is whether courts should ever rely on common law theories such as implied dedication and prescription as a means of recognizing public recreational rights on private land. If one starts with the premise that public rights-of-way and recreational areas should be acquired by governmental bodies on behalf of the public through purchase or condemnation, then the question is posed whether any circum-

Northampton County, Feb. 27, 1979). Such testimony, while perhaps useful as evidence of common lands in a particular case, might be difficult to assemble and evaluate for purposes of a statewide survey of common lands.

13. Virginia has almost 32,000 miles of shoreline, composed of the lands bordering the Chesapeake Bay, several smaller bays, tidal rivers, and the Atlantic Ocean. About 50% of this land is marsh or wetland and 3% is sandy beach. The other 47% borders agricultural, forest, or developed land. Virginia Commission of Outdoor Recreation, The Virginia Outdoors Plan 66 (1979). The wetlands areas provide fertile grounds for fishing and waterfowling. The beach is used for fishing, sunbathing, strolling, camping, and other recreational pursuits. The demand for areas in which these water-related activities may be carried out exceeds the supply by a considerable margin. Id. at 30.

14. One is justified in starting with that premise because of the constitutional prohibition against the appropriation of private property except for a public purpose and upon payment of just compensation. U.S. Const. amend. V; Va. Const. art. I, § 11. Additionally, a land-
stances exist under which courts should recognize implied dedications of private riparian land. Certainly landowners through express offers and municipalities through express acceptances can consummate a dedication of a public beach or access roadway. In some situations, however, considerations of estoppel and detrimental reliance should result in a finding of an implied dedication.

Several arguments favor leaving the question of beach access and use to either the private domain or governmental acquisition, rather than having the courts determine it. First, one avoids the thorny issue of determining whether a "taking" of private property without just compensation has occurred. Second, the courts need not delve into the confusing facts that inevitably surround implied dedication cases. Finally, municipalities and other governmental units are not burdened with unwanted maintenance responsibilities and potential tort liability.

Underlying many of these objections to the doctrine of implied dedication is the notion that any property right worth having is owner may not be deprived of his property without due process of law. U.S. Const. amend. XIV, § 1. Certainly, a direct governmental acquisition of a right-of-way or beach on private property constitutes a "taking" of private property. F. Bosseman, D. Callies & J. Banta, The Taking Issue 238-40 (1973). The governmental body, therefore, seems to be limited constitutionally to acquiring the public easement through purchase from willing landowners or condemnation from unwilling ones.


16. Some commentators have argued that any recognition of common law implied dedications of beach areas is a violation of the "due process" and "taking" provisions of the Federal Constitution. Comment, Assault on the Beaches: "Taking" Public Recreational Rights to Private Property, 60 B.U.L. Rev. 933, 946-49 (1980); Comment, This Land is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches, 44 S. Cal. L. Rev. 1092, 1117-25 (1971) [hereinafter cited as This Land Is My Land].

In two recent cases, the United States Supreme Court underscored the right to exclude others as one of the preeminent components of the right to private property. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 82 (1980); Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979). In Kaiser Aetna, the Court held specifically that owners of a marina who had connected a nonnavigable pond with a navigable bay could not be required to admit the public to the pond on the theory that the pond was made a public, navigable waterbody. Id. at 172-73.

17. Both the offer and the acceptance in a dedication are questions of fact. Meshberg v. Bridgeport City Trust Co., 180 Conn. 274, 279, 429 A.2d 865, 868 (1980).

worth paying for—either by a private individual who purchases beachfront property to have access to the sea or by a public entity that condemns a roadway to the foreshore. The common law, therefore, should not foster the creation of public rights by finding that landowners have somehow dedicated their property involuntarily to the public.

Undoubtedly, some of these arguments are persuasive in cases where expansive public recreational rights are claimed on large sections of beachfront land. In many instances, however, the public claims only a right-of-way over private land to reach the publicly-owned shore or, at most, the right to engage in a specific recreational pursuit, such as fishing, on a limited section of the dry-sand area. Additionally, these arguments ignore the special nature of the shore, marshes, and other common lands in Virginia’s history. In no other place has the legislature over a period of more than 200 years chosen to protect specific public use rights. Common woods, meadows, and squares disappeared from Virginia history long ago, but common shores, marshes, and submerged lands have been preserved in public ownership to this day. In fact, the Virginia Constitution prohibits the state from selling or leasing one type of water-related lands, natural oyster beds.

Because of the unique qualities of waterfront properties and their special place in Virginia’s history, they deserve special consideration and special legal rules regarding public access. In other words, the focus of the normal common law standards for prescription/dedication may shift somewhat where access to public shores and marshes is involved. Merely because the public derives substantial benefit from having access to these areas, perhaps more than in nonriparian cases, private rights should not be lightly dis-

22. Va. Const. art. XI, § 3. This section forbids the state from allowing any private use of the natural beds that “would take away, destroy, or substantially impair the use of [them] by the people for the purpose of taking oysters and shellfish therefrom.” Commonwealth v. City of Newport News, 158 Va. 521, 553, 164 S.E. 689, 699 (1932).
turbed. But a substantial public benefit has always shifted the calculus in the courts' minds in land use cases. Where the public benefit is great, the courts are more willing to allow intrusions on private property rights.\textsuperscript{23}

B. Virginia's Common Lands: Historical Background

To understand the significance of public rights of access to shores and marshes, one should know a little of the history of Virginia's common lands. Common lands existed from the earliest days of the Virginia Colony. The concept of the "commons" was brought from England to the New World and adapted to the particular conditions of the colony's wilderness environs.\textsuperscript{24}

In England, "common lands" originally referred to areas set aside on a lord's manorial estate or in a town in which the lord's tenants or the town's residents enjoyed certain usufructuary rights.\textsuperscript{25} Common rights were one species of a profit-à-prendre. Commoners had the right to take certain products of the soil or water from the land of another. For example, the common of piscary referred to the commoner's right to take fish from the private waters of their lord's estate.\textsuperscript{26}

In Virginia, the terms "common" and "common lands" were applied to three distinct types of property rights. In its earliest use, the word "common" referred to the London Company's land in the Virginia Colony, upon which new residents were expected to work for seven years.\textsuperscript{27} After their seven years' service, they were enti-

\textsuperscript{23} See infra text accompanying notes 177-84.

\textsuperscript{24} For a thorough discussion of the development of common lands in colonial Virginia, see Butler, The Commons Concept: An Historical Concept With Modern Relevance, 23 WM. & MARY L. REV. 835 (1982).


\textsuperscript{26} Other types of common rights included the common of estovers (the right to take wood for use in a house or farm), the common of pasture (the right to pasture one's cattle on another's land), and the common of turbary (the right to cut peat from another's land). Van Rensselaer v. Radcliff, 10 Wend. 639, 647-48 (N.Y. Sup. Ct. 1833); 1 J. Lomax, supra note 25, at 511-14.

\textsuperscript{27} A. Brown, The First Republic in America 321-22 (1898).
tled to receive their own parcels.\textsuperscript{28} When the London Company was dissolved in 1624 because of financial mismanagement, the colonial land grant system passed to the control of the royal governor and his council, to whom the King gave the power to issue patents of the royal desmesne.\textsuperscript{29} In the ensuing years, many of the common lands were broken up and granted to individual private patentees.\textsuperscript{30}

Common lands also may have existed in the traditional English sense. Although the records are unclear, some evidence indicates that groups of individuals in a borough or town may have enjoyed the right to cut wood, for example, in a landowner’s private forest.\textsuperscript{31} Such practices, however, probably were not widespread. The English manor system, which provided the original impetus for the development of common lands, had disappeared by the time that Virginia was colonized, and the dependent peasantry upon which that system was based did not exist in any great degree in the early days of the colony.\textsuperscript{32}

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Under the new system, land patents could be issued on four bases: "(1) as a dividend in return for investment in the founding of the colony; (2) as a reward for special service to the colony; (3) as a stimulus to fortify the frontier by using land to induce settlement; and (4) as a method of encouraging immigration by the headright," which allowed a grant of 50 acres for every person who immigrated to the colony or who financed the immigration of another. W. Robinson, \textit{Mother Earth—Land Grants in Colonial Virginia 1607-1699}, at 30-35 (1957). \textit{See also} P. Bruce, \textit{The Economic History of Virginia in the Seventeenth Century 487-571} (1896); A. Embrey, \textit{Waters of the State} 1-136 (1931).
\item A. Brown, \textit{supra} note 27, at 627.
\item Early Virginia legal scholars believed that traditional English common rights existed only in a limited sense in Virginia. St. George Tucker, one of Virginia’s eminent jurists in the early nineteenth century, wrote in his commentary on Blackstone that the “right of common in the lands of another . . . I believe does not exist in Virginia; if it does, it can only be in a few cases, and must depend upon contract or grant.” 2 S. Tucker, Blackstone’s Commentaries 32 n.3 (1803). Judge Lomax, writing a few years later in his treatise on real property, stated, “[a]s far as the right of common is established upon general principles of policy, independent of the local customs and institutions of England, it retains its place under the laws of Virginia.” 1 J. Lomax, \textit{supra} note 25, at 511. \textit{See also} 3 J. Kent, Commentaries on American Law 321-37 (1829).
\item Grantees in colonial Virginia held their land from the King in free and common socage, rather than in free simple ownership which was beginning to evolve in England. Socage was a tenancy from the King that required the tenant to render certain fixed and determinate services of a non-military nature to the King. 1 F. Pollock & F. Maitland, History of English Law 291-96 (1903). In colonial Virginia, the fixed services were a fee or annual rent, called quit-rents, paid to the King’s agent. Socage did not hinder the alienability or devisability of land in Virginia, and the original patentees could transfer their land as if they
\end{enumerate}
\end{footnotesize}
The third and most important class of "common lands" consisted of the shores and beds of Virginia's tidal waters. Under English common law, which presumptively was in effect in the Virginia Colony, the King prima facie owned the foreshores and beds of the ocean and the "arms of the sea" or tidal waters.33 The King's subjects were permitted to fish and to navigate on these areas.34 Although some of colonial Virginia's tidal shores may have been granted to private individuals, most likely many public or "common" shores were preserved.35 After the Revolution, the new Commonwealth of Virginia assumed ownership of all crown lands and took over the land grant function.36

Beginning in 1780, the Virginia General Assembly enacted a series of statutes that preserved both public common lands and common rights along the shores and beds of the state's rivers, bays, held it in fee simple. F. HARRISON, VIRGINIA LAND GRANTS 12 n.4 (1925); J. Kilty, LAND-HOLDERS' ASSISTANT AND LAND OFFICE GUIDE 23-26 (1808); W. RIPLEY, THE FINANCIAL HISTORY OF VIRGINIA 1609-1776, at 46-56 (1893); M. Voorhis, The Land Grant Policy of Colonial Virginia 1607-1774, at 6-7 (unpublished doctoral dissertation, University of Virginia).


34. Id.

35. In 1679, the Virginia Grand Assembly, in response to the petition of one Robert Liny, passed a resolution declaring that every landowner's patent extended to the low water mark along rivers and creeks. 2 HENING'S STATUTES, supra note 6, at 456 (1679). This resolution, if authoritative, would have caused many possible common shores along tidal rivers to pass into private ownership. It also stated that landowners could exclude trespassers from entering upon their shores for any purpose. Id. Members of the public, therefore, would have been prevented from establishing common fishing and hunting grounds on the affected shores. Virginia cases have interpreted variously the Liney order as an advisory opinion, a legislative enactment, and a judicial determination. Steelman v. Field, 142 Va. 383, 128 S.E. 558 (1925); Taylor v. Commonwealth, 102 Va. 759, 47 S.E. 875 (1904); Waverly Water-Front and Improvement Co. v. White, 97 Va. 176, 33 S.E. 534 (1899). In the most recent case considering it, the Virginia Supreme Court stated that the Liny order did not have the force and effect of law. Miller v. Commonwealth, 159 Va. 924, 937-39, 166 S.E. 557, 561-62 (1932).

Some evidence indicates that land surveyors, in setting out the boundaries of colonial patents, sometimes recognized the existence of certain common shores and excluded them from the survey. Riley, SUBURBAN DEVELOPMENT OF YORKTOWN, VIRGINIA DURING THE COLONIAL PERIOD, 60 VA. HIST. MAG. 522, 527 (1952).

36. The first land grant office under the new Commonwealth was created in 1779. 10 HENING'S STATUTES, supra note 6, at 50-65 (1779). The office was given the power to grant the Commonwealth's "waste and unappropriated lands" at the price of 40 pounds per 100 acres. Id. at 50-52.
and the Atlantic Ocean.\textsuperscript{37} The effect of these statutes has been twofold: they prohibit the Commonwealth from granting certain common shorelands, marsh and meadowlands, and submerged lands, except by special legislative act or compact;\textsuperscript{38} additionally, they preserve to the public the rights of fishing, fowling, and hunting on these common areas.\textsuperscript{39} Although the exact extent of the Commonwealth’s common lands is not known at this time, many hundreds of miles of shores and marshes, particularly on the Eastern Shore, are open to public use.\textsuperscript{40}

II. DEDICATION AND PRESCRIPTION: AN ANALYTICAL FRAMEWORK

A. Other Theories in Tidelands Access and Use Cases

Although this Article will focus on dedication and prescription as legal theories for establishing public rights of access and use on riparian lands, in some cases courts have looked to custom and the public trust doctrines to establish such rights. Because the recent intense demand for public ocean beaches and marshlands exceeds the ability of governmental agencies to purchase and maintain all the required waterfront space,\textsuperscript{41} courts in coastal states have been asked to declare that the public, by means of long and accustomed use of beaches and other tidelands, has acquired the right to continue recreational activities on them in perpetuity.\textsuperscript{42}

\textsuperscript{37} See supra note 20. See also L. Butler & M. Livingston, supra note 8; D. Brion, supra note 8.

\textsuperscript{38} The current versions of these statutes are found in Va. Code §§ 41.1-3, .1-4 (1981), and § 62.1-1 (1982), and are discussed extensively in the various opinions in The Nature Conservancy cases, supra notes 1-3.


\textsuperscript{40} See supra note 12.

\textsuperscript{41} D. Brower, Access to the Nation's Beaches: Legal and Planning Perspectives 1-8 (1973); National Association of Attorneys General, Legal Issues in Beach Access 1-3 (1977).

While unnecessary to describe the development of those two doctrines in beach access and use cases, a few observations about them are relevant. First, Virginia courts are unlikely to embrace either of these theories as a means of upholding public rights of use and access on tidelands. Custom has never been recognized in this context by Virginia case law, and, in fact, very few jurisdictions have relied on it in tidelands access and use cases. The common lands statutes serve much the same function as does common law custom theory and in a more specific, concrete fashion. These statutes establish public rights of fishing and hunting on se-


43. The concept of custom or customary rights, like that of common rights, originated in English common law. It served, in fact, as a supplement to the common law. Unlike the common law, which was written and uniform in England, custom was based on the unwritten but accepted practices of the inhabitants of a particular locality. 1 W. BLACKSTONE, COMMENTARIES *74. Although many localities gave up their peculiar customs and usages when they accepted the uniform common law, the Crown, sometimes with recorded parliamentary approval, permitted some localities to follow their traditional customs in contravention of the common law. Id. Ultimately, the common law developed the fiction that a custom followed since time immemorial must have been approved by Parliament without a written record. Graham v. Walker, 78 Conn. 130, 132-33, 61 A. 98, 99 (1905).

In England, to be immemorial, a custom must have existed since a “time whereof the memory of a man runneth not to the contrary,” a phrase understood to refer to a usage begun before the coronation of Richard I in 1189. 12 HALSBURY’S LAWS OF ENGLAND, CUSTOM & USAGE 5 (1975). Literally, immemorial usage can never be found in the United States (excluding usages by American Indians) because the European settlement of the New World did not occur until several centuries after Richard’s reign. Because the common law presumably supercedes all non-immemorial customs, most American courts, including Virginia, have refused to recognize customary rights. Harris v. Carson, 34 Va. (7 Leigh.) 632 (1836).

44. The leading American case recognizing a public right to use private beaches based on custom is State ex rel. Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969). The court found that the public had used the dry-sand area above high water mark “according to an unbroken custom running back in time as long as the land has been inhabited.” 254 Or. at 491, 462 P.2d at 676-77. Four other jurisdictions have adopted expressly the theory of custom in beach access and use cases. United States v. St. Thomas Beach Resorts, 386 F. Supp. 769 (D.V.I. 1974); City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73 (Fla. 1974); County of Hawaii v. Sotomura, 55 Hawaii 176, 517 P.2d 57 (1973); Application of Ashford, 50 Hawaii 314, 440 P.2d 76 (1968); Moody v. White, 593 S.W.2d 372 (Tex. Civ. App. 1979).

Other states explicitly have rejected the doctrine as applied to public claims of rights to use ocean beaches. Smith v. Bruce, 241 Ga. 133, 244 S.E.2d 559 (1978); Department of Natural Resources v. Mayor of Ocean City, 274 Md. 1, 332 A.2d 630 (1975). Even Oregon has been unwilling to recognize customary rights on land above the dry-sand area. State Highway Comm’n v. Bauman, 517 P.2d 1202 (Or. App. 1974).
lected tidal areas where the people of Virginia historically engaged in those activities. One common lands statute speaks specifically of the people’s "accustomed" privilege of fishing. Because the legislature has chosen to develop a precise statutory scheme for recognizing and preserving common lands, the courts are likely to feel uncomfortable substituting the similar doctrine of custom for the statutory protection given common lands.

Similarly, the public trust theory is likely to remain dormant as well. Virginia precedent has spawned a relatively narrow version of the doctrine. Currently, the state holds tidelands in trust for the people only to protect the public right of navigation on navigable waters. The trust does not include protection of public rights of

45. 10 HENING'S STATUTES, supra note 6, at 227 (1780).

46. The public trust doctrine also can be traced to an early English common law concept, the *jus publicum*. Under English common law, the King owned all waste and unappropriated lands as part of his *jus privatum*, or private domain. H. LEMMON, PUBLIC RIGHTS IN THE SEASHORE 22-81 (1934); S. MOORE, THE HISTORY OF THE FORESHORE AND THE LAW RELATING THEREETOF xviii-liv (3d ed. 1888); G. PHEAR, A TREATISE ON RIGHTS OF WATER 41-52 (1859); Comment, Public and Private Rights in the Foreshore, 22 COLUM. L. REV. 706, 707-11 (1922). The King also held these lands as his subjects' representative for their benefit. In navigable waters, this public interest, or *jus publicum*, was expressed in terms of navigational and fishing rights. Even where the King had granted tidal beds or shores to private individuals, the *jus publicum* was not destroyed. Whether owned by private persons or by the Crown, shore and submerged lands were always subject to the rights of the public to navigate and fish.

The theory of the *jus publicum* was adopted in the United States in the nineteenth century, both by the United States Supreme Court and by various state courts. Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); Church v. Meeker, 34 Conn. 421 (1867); Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909); Moulton v. Libbey, 37 Me. 472 (1854); Arnold v. Mundy, 6 N.J.L. 1 (1821); State v. Pacific Guano Co., 22 S.C. 50 (1884). The theory was renamed the public trust doctrine and embraced the idea that the government, as the embodiment of the sovereign and as the collective will of the people, owned the lands beneath navigable waters in trust for its citizens. When the government conveys such properties to private individuals, it must do so in a manner consistent with the public trust. The conveyance must further directly a specific public purpose and must not result in an interference with pre-existing public uses of the land. Additionally, the lands conveyed are often said to be subject to certain public rights even after title has passed into private hands. As with the English doctrine, the public rights protected by the public trust doctrine consist primarily of navigation and, to a lesser extent, fishing. Some states have expanded the doctrine to protect other recreational uses such as swimming and picnicking. City of Berkeley v. Superior Court of Alameda County, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980); Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 294 A.2d 47 (1972).

fishing, hunting, or bathing in navigable waters or on tidelands.\textsuperscript{48}

The Virginia cases establishing this circumscribed view of the public trust date from the 1930's and earlier. Changes in the Virginia Constitution\textsuperscript{49} and statutes\textsuperscript{50} since that period reflect a concern for a broader range of public rights on navigable waters, including a concern for protecting public waters from environmental degradation and for allowing the maximum desirable public use of such waters. Given these changes, a contemporary Virginia court might well interpret the public trust more broadly. If so, it might find that the public has the right to engage in several recreational pursuits on the tidal foreshore and bed. A court also might decide that a public right of access across private highland exists on the theory that when the state conveyed the highland to private parties, it reserved an implied easement of public access to the foreshore.\textsuperscript{61} This reservation would be found in the trusteeship under which the state owns tidelands and navigable waters.

Although custom and the public trust remain relatively shaky vehicles for establishing public use and access rights on Virginia tidelands, the theories of dedication and prescription offer much more hope. These theories have long been recognized in Virginia as proper methods for establishing the right to use private roadways. Thus, they may be readily adapted to establish rights of access across private riparian land. Access normally will involve the use of some road, path, or trail on the private highland. Recognition of


\textsuperscript{49} An article on conservation of natural resources was added to the new Virginia Constitution in 1971. VA. CONST. art. XI. The first section of the new article states that "it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth." Id. art. XI, § 1.

\textsuperscript{50} Virginia's water pollution control law was enacted to reduce pollution in state waters to such an extent that they "will permit all reasonable public uses and will support the propagation and growth of all aquatic life, including game fish, which might reasonably be expected to inhabit them." VA. CODE § 62.1-44.2 (1982).

\textsuperscript{51} The theory of an implied easement of public access to the foreshore is hinted at in Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 308-09, 294 A.2d 47, 54 (1972). One difficulty with the theory is that in most cases the state gives no notice to private riparian purchasers of its intention to reserve such an easement. See Seaway Co. v. Attorney Gen., 375 S.W.2d 923, 929 (Tex. Civ. App. 1964).
broader public rights to use the highlands for recreational activities does not flow as easily from the traditional context in which prescription and dedication were developed, but these theories have been used in non-roadway cases. Theoretically, either doctrine may be applied to any right associated with the use of real property, from the right to traverse the property, to the right to take minerals from it, to the right to use it for recreational pursuits.

B. *Implied Dedication and Prescriptive Rights*

Virginia law long has recognized the ability of a landowner to part voluntarily with an interest in his land. The law explicitly acknowledges the free alienability of real property rights. Thus a landowner may consciously donate a roadway to a municipality or other governmental entity. He may also grant an express easement of passage across his land to a neighboring landowner or other individuals. In some cases, however, Anglo-American common law creates an involuntary relinquishment of private property rights: the concepts of adverse possession, implied dedication, and prescriptive easements result in a landowner's parting with an interest in his property without evidencing an express intention to do so.

Tidelands access cases focus on the acquisition by the public of particular rights to use private property adjacent to the tidal shoreline for access, fishing, picnicking, and other recreational purposes. In some instances, private beachfront property owners grant express easements to particular individuals to cross their land to reach the shore, or they may even dedicate a strip of dry-sand area to a municipality for use as a public beach. In both types of transactions, landowners relinquish defined property rights voluntarily, and the beneficiaries, either the easement holder or the gov-


55. Poole v. Commissioners of Rehoboth, 9 Del. Ch. 192, 80 A. 683 (1911).
ernmental agency, expressly accept those rights.

Implied dedication and prescriptive easements, however, are predicated on different assumptions. In both instances, the law attempts to preserve the underlying theory of the express forms of these doctrines, but varies the factual requirements for establishing them. Like an express dedication, an implied dedication consists of an offer by the landowner to donate some interest in his land to the public and of an acceptance by the public. Unlike the requisites for an express dedication, however, both the offer and the acceptance may be implied from factual circumstances, for example, the public's long, uninterrupted use of a specific beach.

Both types of dedication are said to be grounded in the landowner's intentional donation of his property, but one may question the accuracy of this assertion as applied to implied dedications. Certainly, in some cases, the landowner's intent has been to prevent the public from using his land at any time for any purpose whatever, rather than to dedicate his land or a right-of-way to the public.

Similarly, prescriptive easements, consistently with express easements, are based on a grant by the landowner of a right-of-way or some other right in his property to either a neighboring landowner or someone unrelated to the adjacent property. The grant, however, is merely presumed because the claimant of an easement by prescription relies on continuous, adverse use of the property for the prescriptive period to establish his right. Under those circum-

57. Id. Intent to dedicate land "may be implied from [the landowner's] actions and the long use of his land by the public." City of Norfolk v. Meredith, 204 Va. 485, 489, 132 S.E.2d 431, 434 (1963). Acceptance of the dedicatory offer may be shown "by implication from public user of requisite character, . . . or by implication from an 'exercise of jurisdiction and dominion' by the governing authority." Ocean Island Inn, Inc. v. City of Virginia Beach, 216 Va. 474, 477, 220 S.E.2d 247, 250 (1975) (citations omitted). For the definition of public user, see infra note 84.
59. E.g., Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970) (landowner posted "no trespassing" signs on beach and placed barriers across access road).
60. Powell v. Magee, 191 Va. 315, 322, 60 S.E.2d 897, 900 (1950); Cornett v. Rhudy, 80 Va. 710, 712 (1885).
61. The claimant of a prescriptive right-of-way over another's lands must show that his use and enjoyment of the way were "adverse, under a claim of right, exclusive, and continu-
stances, the law presumes an earlier grant that has been lost or destroyed. As with the implied dedication, the common law's stated assumptions do not reflect accurately the factual circumstances of the cases; in most, if not all, prescriptive easement cases, a grant was never made.

If "intent" or a "lost grant" are not the determinative factors in these cases, one must look elsewhere to discover the actual reasons for allowing members of the public to establish the right to use private property. Virginia courts have been no exception in their manipulation of the common law theory. While espousing the traditional common law formulas for implied dedications and prescriptive easements, the courts base their ultimate holdings on several unarticulated premises.

The four interests that seem to be most important in these cases are as follow: (1) the burden on the private landowner's estate created by the proposed public right; (2) the extent to which the landowner's expectations are defeated by the public's adverse rights; (3) the magnitude of public reliance on being able to use a particular piece of private property; and (4) the degree of public benefit generated by the easement. The courts balance these factors to determine whether the public should be allowed a right-of-way or other easement across private property. The first two factors, of course, weigh in the landowner's favor, the latter two in the public's.

ous, uninterrupted, and with the knowledge and acquiescence of the owner of the land over which it passes . . . for a period of at least twenty years." Rives v. Gooch, 157 Va. 661, 663, 162 S.E. 184, 184 (1932). When the claimant's use has been open, continuous, and unmolested for 20 years, the use is presumed adverse or under claim of rights. The landowner then has the burden to rebut the presumption by showing that the use was only permissive. Id.


63. The concurring justice in State ex rel. Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969), the leading case recognizing public beach use rights based on custom, agreed with the majority's holding but rejected the theory of customary rights as the proper basis for it. He suggested instead that the following factors be weighed in such cases.

(1) long usage by the public of the dry sands area . . . ; (2) a universal and long held belief by the public in the public's right to such use; (3) long and universal acquiescence by the upland owners in such public use; and (4) the extreme desirability to the public of the right to the use of the dry sands.

Id. at 600, 462 P.2d at 678. These factors reflect some of the same concerns suggested by the factors discussed in this Article. The concurrence is noteworthy because it is one of the few opinions acknowledging the balancing process that occurs in these cases.
Before examining each of these factors, it must be noted that Virginia law distinguishes between easements acquired by implied dedication and those acquired by prescription. The fundamental difference between the two is the landowner's intent to part with some interest in his land. A dedication, even one implied from facts and circumstances, requires the intent of the owner to donate an interest in his property to the public. A prescriptive easement, on the other hand, is said to be based on the landowner's passive acquiescence in long, continuous, and adverse use of his property under color of right by certain individuals. The period for establishing each is also different. A landowner may offer to dedicate his property at any time, and the offer need not be accepted immediately. The public or the public's representative has a reasonable time in which to accept the offer so long as it is not revoked in the interim. Where acceptance is implied from long public use, no particular period of public use need be shown. To prove a prescriptive easement, however, the claimant must show continuous use of the right-of-way for at least twenty years.

Additionally, Virginia law does not recognize clearly the concept of public prescriptive easements, whereas dedications of rights-of-way to the public are well established. Some Virginia cases clearly rely on some theory of a public prescriptive easement. Others suggest that a prescriptive easement cannot exist in the public at large, but that certain members of the public may establish a prescriptive easement, each by proving separately his own right.

67. Harris v. Commonwealth, 61 Va. (20 Gratt.) 833, 839 (1871). Mere use by the public is insufficient to constitute an acceptance of dedication "without regard to the character of the use, and the . . . length of time . . . enjoyed." Id. No particular time period, however, is specified as a minimum.
68. Cornett v. Rhudy, 80 Va. 710, 712 (1885).
69. One older Virginia case stated flatly that public roads may be created by prescription and that use of a path as a public street for the prescriptive period, such as 20 years, is presumptive evidence that it is a public road. Holleman v. Commonwealth, 4 Va. 710, 712 (1818). See City of Staunton v. Augusta Corp., 169 Va. 424, 438, 193 S.E. 695, 700 (1937).
scriptive use by the public may be relevant in implied dedication cases. It may show an acceptance of a landowner's offer to dedicate a particular parcel\textsuperscript{71} and, in some cases, such use may even be used to establish the offer itself.\textsuperscript{72}

At some point, where the public has used a particular waterfront lot continuously and without objection for many years, the concepts of prescription, dedication, and common lands become intertwined. Extensive, adverse public use for the prescriptive period may create a prescriptive right in the public at large. Such use, if coupled with facts demonstrating the inequity of depriving the public of its interest, may also establish an implied dedication of the property or an easement therein. Furthermore, lengthy public use of waterfront land for fishing, fowling, and hunting may originate "common rights," which are preserved expressly to the people in various Virginia statutes.\textsuperscript{73}

More important than the courts' mechanical recitation of the common law formulas for prescription and dedication is the balancing of the factors enumerated above. The common law formulas are merely convenient checklists for the courts to use in deciding whether to recognize the public right asserted. The courts frequently point to the absence of some "required" element of the formula as the basis for denying the public right.\textsuperscript{74} Conversely, in

\textsuperscript{71} City of Richmond v. A. Y. Stokes & Co., 72 Va. (31 Gratt.) 713 (1879).

\textsuperscript{72} City of Norfolk v. Meredith, 204 Va. 485, 489, 132 S.E.2d 431, 434 (1963). In The Nature Conservancy v. Machipongo Club, 419 F. Supp. 390 (E.D. Va. 1976), the federal district court stated that long use of a roadway by the public could be evidence of an implied dedication, which, in effect, constitutes a public prescriptive easement in the road. "No Virginia authority has been cited to distinguish the concept of a public road easement from an implied dedication and acceptance of land for use as a public road." \textit{Id.} at 398.

\textsuperscript{73} The statutes preserving common lands for the public stated specifically that lands that had been "used as a common" were not to be granted. \textit{E.g.}, VA. Code § 41.1-4 (1981); VA. Code ch. 62, § 1 (1849); 10 HENING'S STATUTES, supra note 6, at 226 (1780). The Virginia Supreme Court, in interpreting the 1780 commons reservation act, stated that it "applied only to tracts of land which had theretofore been designated as a common for the use of the people, or which, though they had not been expressly designated as a common, had been used by the people as a common and come to be recognized as such." Miller v. Commonwealth, 159 Va. 924, 948, 166 S.E. 557, 565 (1932).

\textsuperscript{74} Bradford v. The Nature Conservancy, 224 Va. 181, 294 S.E.2d 867 (1982) (public acceptance of road alleged to be dedicated not shown); Wall v. Landman, 152 Va. 889, 148 S.E. 779 (1929) (prescriptive easement not proved because of lack of adverse use); Town of West Point v. Bland, 106 Va. 792, 56 S.E. 802 (1907) (offer of dedication not shown); Reid v. Garnett, 101 Va. 47, 43 S.E. 182 (1903) (prescriptive easement not established because of
concluding that the public right has been established, the courts run through the same checklist of required elements and find that the public’s representative has proved each of them.\textsuperscript{75}

The judicial thinking in these cases is not so mechanistic as the courts’ articulated reasoning would lead one to believe. A careful analysis of the detriment to the private landowner, the extent of his expectations, the degree of public reliance, and the benefit to the public leads to decisions that weigh the private landowner’s interest against those of the state and the public. Unfortunately, the subjectivity of the balance struck in individual cases is the inevitable by-product of the weighing process. The advantage of the “checklist” approach is the apparent certainty that it offers. Even the most rigid adherence to a checklist, however, still requires a subjective judicial determination of whether the elements of the list have been satisfied. In turn, that determination requires the courts to evaluate the individual factual circumstances of each case. The courts historically have used an unarticulated balancing process in prescription and dedication cases. A change in the courts’ rhetoric to correspond to their actual reasoning process might focus attention more clearly on the policy being formulated, and one might gauge better the efficacy of that policy.

1. \textit{Burden on the Private Estate}

Certainly, the magnitude of the invasion of the private property owner’s interests is one factor weighed by the courts in determining whether public rights have been established through prescription or dedication. The greater the intrusion on the private landowner’s ability to use his land in his unfettered discretion, the more likely the courts are to search for some compelling, counter-balancing considerations.\textsuperscript{76}

\textsuperscript{75} Greenco Corp. v. City of Virginia Beach, 214 Va. 201, 198 S.E.2d 496 (1973).

\textsuperscript{76} The focus on the burden on the servient estate created by the asserted public rights parallels the United States Supreme Court’s emphasis in “taking” cases on the landowner’s reasonable investment-backed expectations. In “taking” cases, the Court normally decides to what extent governmental regulation of land uses impermissibly reduces the landowner’s ability to make a profitable use of his land. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). See also Kaiser Aetna v. United States, 444 U.S. 164 (1979); Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).
This factor distinguishes the roadway cases from the recreational use cases. In the roadway cases the public claims only the right to use a particular pathway for travel to and from certain areas. In the recreational use cases the public has asserted the right to use considerable stretches of dry-sand areas for camping, fishing, sunbathing, and other typical recreational activities. These recreational activities represent a greater interference with the private landowner's use and enjoyment of his property in several ways.

Often in the recreational use cases, public claims to a roadway also will be involved. For example, the public will assert both the right to use the beach for recreational activities and the right to have access to the beach via an adjacent road. To the extent that the court recognizes the beach use rights of the public along with the roadway rights, the use of the roadway itself will increase. The road will serve not only as a means of access to the publicly owned foreshore, but will be used as a way to the dry-sand area above the foreshore. Because the dry-sand area may be used for more types of recreational activities than the foreshore alone, more members of the public will be attracted to it and will use the adjoining road. To the extent, however, that the court finds that the public has no rights to use the dry-sand area as a public beach, the need for access to that area will diminish. The public will still desire access for the purpose of fishing and fowling on the common shores and marshes, but the total invasion of the landowner's quiet enjoyment will be less than in cases in which an entire dry-sand area has been established as a public beach.

Those Virginia cases that eschew the concept of a public prescriptive easement may be motivated by some sense that allowing

---

79. See infra text accompanying notes 87-103.
80. E.g., Cion v. City of Santa Cruz, 2 Cal. 3d 29, 36, 465 P.2d 50, 54, 84 Cal. Rptr. 162, 166 (1970).
adverse use by a few members of the public to ripen into a prescriptive easement in the public at large imposes an unfairly heavy burden on the private landowner. 81 While a few individuals or even the members of a well-defined group (such as a sportsmen’s club) may establish the right to use a road running down to the beach, holding that these same few individuals have also established on behalf of the public at large the perpetual privilege to enter upon the landowner’s private property is an entirely different matter. That situation imposes a heavier burden in two respects. First, the number of potential users is much greater, and, second, the duration of the continued use is much longer. If the prescriptive easement is enjoyed by only a few individuals, their privileges will die with them. 82 A prescriptive easement in the public may last indefi-

81. Theoretically, a public prescriptive easement is a legal impossibility because one may not make a grant to an indefinite grantee, such as the public at large. Because even prescriptive easements presuppose an original grant, now lost, by the landowner, an easement in favor of the general public cannot exist. Milhalezo v. Borough of Woodmont, 175 Conn. 585, 541, 400 A.2d 270, 272 (1978); Ivons-Nispel, Inc. v. Lowe, 347 Mass. 760, 761-62, 200 N.E.2d 282, 283 (1964); Elmer v. Rodgers, 106 N.H. 512, 515, 214 A.2d 750, 752 (1965). Some courts, in rejecting the “lost grant” theory of prescription, have found that the true policy behind prescription is the “stabilization of long continued property uses,” similar to the policy underlying adverse possession. Id. See also Hunt Land Holding Co. v. Schramm, 121 So. 2d 697, 700 (Fla. App. 1960). Thus, the public can acquire a prescriptive easement by complying with the common law requirements of open, continuous, exclusive, adverse use for the prescriptive period.

82. The alienability and inheritability of an easement depend partly on whether it is an easement appurtenant or an easement in gross. An easement appurtenant is a privilege to use another’s land that benefits the easement holder in the use and enjoyment of his land—for example, a right-of-way from the easement holder’s land (or land of which he has possession) across the neighboring land to a public road. The land the easement benefits is called the dominant estate, and the land burdened is called the servient estate. 2 AMERICAN LAW OF PROPERTY §§ 8.6-8.8 (A. Casner ed. 1952). Easements appurtenant may be enjoyed by anyone in possession of the dominant estate, and thus they may be assigned or devised with the dominant estate itself. Id. § 8.71.

An easement in gross is the privilege to use another’s land, the benefit of which does not run to the easement holder’s possession of land. It benefits the holder personally apart from his ownership or possession of other land—for example, a 10-year easement given to a summer tourist to cross coastal property to reach the seashore. Id. § 8.9. Easements in gross were said to be personal to the grantee and thus nonassignable. Most courts today allow easements in gross of a commercial nature to be assigned and devised. Banach v. Home Gas Co., 12 A.D.2d 373, 211 N.Y.S.2d 443 (1961); RESTATEMENT OF PROPERTY § 489 (1944). Some courts, however, will find that the grantor of a personal easement in gross intended that the privilege die with the grantee. West v. Smith, 95 Idaho 550, 511 P.2d 1326 (1973); 2 AMERICAN LAW OF PROPERTY §§ 8.78 - .83 (A. Casner ed. 1952).

Easements in gross may be acquired by prescription. Saunders Point Ass’n v. Cannon, 177
nentially, until such time as the public abandons it. Because the prescriptive easement creates a perpetual servitude on that land, it should be allowed cautiously.

Minimizing the burden on the private landowner is a policy reflected in implied dedication cases as well. Particularly where the implied dedication has been established through long public user, the courts require that any new use of the property be of the same character as the original use or at least create no additional burden on the donor's estate. For example, the public may establish an implied dedication of a strip of beach because of extensive public fishing on and near the beach over a period of years. If members of the public then attempt to camp and drive motor vehicles on the beach, the private landowners may object that the new uses do not comport with the original use upon which the implied dedication was found. These additional and different uses would burden the landowner's estate much more heavily than the original use. Virginia cases have held that, because such additional uses are not within the scope of the original dedication, they should be disallowed.

The burden on the landowner's estate can be considered from a number of points of view: the destruction of certain features of the dedicated land; the interference with the landowner's ability to develop and use the dedicated property and his remaining property;
and the externalities and nuisance qualities generated by the public use. All these elements of the burden on the private property created by the public’s activities should be weighed by the courts in evaluating a claim of implied dedication. In cases involving beach use and access these factors may be particularly significant.

Beaches, marshes, and other waterfront areas have unique aesthetic and ecological qualities that make them the object of much environmental legislation. Both wetlands\(^87\) and sand dunes\(^88\) provide barriers to erosion of the shoreline and flooding of riparian lands.\(^89\) The natural habitat for numerous species of flora and fauna,\(^90\) beaches and marshes are valued as relatively unspoiled scenic areas. To admit large numbers of public users to these areas may destroy their essential character. Driving motor vehicles across the sand dunes and discharging polluting wastes into the wetlands—the inevitable byproduct of human activities—causes severe harm to these ecologically sensitive areas.\(^91\) A landowner who has purchased waterfront property with an eye to preserving it in its natural condition will have his purposes defeated if his predecessors in title dedicated portions of the beach or marshes to the public.

In the nineteenth century roadway cases, destruction of ecologically valuable areas was not a prime consideration. Many of these cases involved roads in developing urban areas in which increased traffic was viewed primarily as an asset.\(^92\) Even in the countryside,

\(^87\) Wetlands may be defined as “areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support—and that under normal circumstances do support—a prevalence of vegetation typically adapted for life in saturated soil conditions.” United States Department of Agriculture, Our Nation’s Wetlands: An Interagency Task Force Report 5 (1978). See also Exec. Order 11990, § 7(c), 42 Fed. Reg. 26961 (1977); Virginia Marine Resources Commission, Wetlands Guidelines 10-33 (1974) (types of wetland vegetation defined).

\(^88\) Sand dunes “represent an accumulation of sand, often supporting rooted vegetation, formed by the interaction of wind and wave action on the sandy material along the shore.” Virginia Marine Resources Commission, Coastal Primary Sand Dune Guidelines 6 (1980).

\(^89\) New York State Coastal Management Program IV-59 to IV-61 (March 1979).

\(^90\) Wetlands Guidelines, supra note 87, at 7; Coastal Primary Sand Dune Guidelines, supra note 88, at 8-9.


dedication of roads was not regarded so much as an invasion of private property rights and a scarring of the land, but as a burden on the counties, which had to maintain them. The difficulty that the courts found in implying a dedication of a roadway in rural areas was not the burden that it imposed on the private landowners, but the responsibilities the dedication imposed on local governments for maintenance and tort liability. In other words, the courts' concern in the roadway cases was to protect local governments from having private landowners thrust upon them the burden for maintaining dedicated roads. In the modern tidelands cases, the public usually proposes the dedication rather than the private landowner. Thus, the courts show a greater solicitude towards protecting landowners from unreasonable intrusions on their property rights.

A public access or use easement also may interfere with the landowner's ability to develop his property. For example, the owner of beach property may wish to build a series of high-rise condominiums along the shore. The existence of the public easement may prevent such development because normally the owner of the servient estate is precluded from using his property so as to interfere with the exercise of the easement. Depending on how extensive the public easement is, the landowner may be forced into preserving his property in an undeveloped state so that members of the public may continue their recreational activities undisturbed by new construction.

The simple restriction on the landowner's development of his property, however, may not be a significant burden on his private property rights if governmental regulation already circumscribes

---


95. In some cases the landowner's proposed development may be able to coexist with the public's use of the beach or marshes. In City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73 (Fla. 1974), the defendant landowner constructed an observation tower on the beach. The court found that the tower would not interfere in any way with the public's use of the beach for recreational purposes. Id. at 77. In other cases the construction of hotels, condominiums, and other buildings necessarily will disturb the public's enjoyment of the shore as a recreational and scenic area. State Highway Comm'n v. Bauman, 517 P.2d 1210 (Or. App. 1974); State v. Beach Co., 271 S.C. 425, 248 S.E.2d 115 (1978).
those rights. Municipalities and counties in Virginia have the power to zone to restrict development in the lawful exercise of their statutorily defined zoning and planning powers. In particular, local governments may adopt wetlands or sand dune ordinances that disallow all activities and development on these ecologically sensitive areas except for maintenance and recreation. Existing state legislation also declares a state policy to preserve and protect existing ocean beaches. A recent federal law prohibits the federal government from providing financial assistance for projects developing coastal barrier islands. Withdrawal of federal funding for such projects (including roads and sewer systems) lessens the economic feasibility of residential and commercial development of those areas.

Assuming that these statutes, ordinances, and regulations are legally sound, arguably many owners of waterfront property, even those parcels not encumbered with public use rights, are significantly restricted in the manner in which they may use and develop property. Under those circumstances, a court, faced with the claim of a public use or access easement, may find that the public rights will not interfere materially with the private owner's ability to use and enjoy his property. At the same time, the courts must be wary of allowing down-zoning and other regulations to become simply a prelude to, or a pretext for, the creation of public ocean beaches without the payment of just compensation.

Of course, this argument assumes that the restrictions imposed by government regulation exactly parallel those created by a public use easement. In other words, it assumes that the servient estate carries no additional burden by allowing a public easement apart from those already imposed because of the regulation. Often that

100. This may be an unwarranted assumption, especially with respect to local land use ordinances. The Virginia Supreme Court has shown no hesitation in striking down on due process, "taking," and ultra vires grounds ordinances that did not allow the landowner a fair return on his investment. See Board of Supervisors v. Rowe, 216 Va. 128, 216 S.E.2d 199 (1975); Board of Supervisors v. Horne, 216 Va. 113, 215 S.E.2d 463 (1975).
assumption will be correct. Restrictive zoning laws frequently prevent the building of any substantial structure on wetlands and beaches.\textsuperscript{101} When zoning laws preclude the landowner from building his planned hotel or house, recognition of a public easement on the beach will not further affect the landowner's building plans.

Recognizing the public easement, however, will prevent the landowner from running his own private beach. Zoning laws, let us assume, have already robbed the property of much of its development potential. One of the few permissible productive uses of the land may be as a private recreational area open only to paying customers. If a court declares a public easement to use the beach or marshes for recreational purposes, the landowner will be deprived of perhaps the only feasible profitable use.\textsuperscript{102} Courts, however, may avoid being locked into the all-or-nothing situation of either completely disallowing the public easement or permitting it without any restrictions. A court might recognize the public rights but then allow the landowner to charge a user fee to defray the reasonable costs of maintaining the land. Or the court might permit unlimited public access to the beach at certain hours and limit access to paying customers at other times. An often-cited advantage of equitable remedies is flexibility. Tidelands and beach access cases present ideal examples of situations where flexibility can effectively accommodate the various public and private interests.

Apart from the effect on the strip of land actually burdened with the easement, a public prescriptive easement may interfere with

\textsuperscript{101} For example, under Virginia's model wetlands zoning ordinance the only permitted construction as of right is of "noncommercial catwalks, piers, boathouses, boat shelters, fences, duckblinds, wildlife management shelters, footbridges, observation decks and shelters and other similar structures." VA. Code § 62.1-13.5 (1982). All other construction must be approved by the local wetlands board. Id.

\textsuperscript{102} For a similar situation created by a zoning ordinance, see Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, appeal dismissed, 429 U.S. 990 (1976), in which a city ordinance rezoned two private parks as parks open to the public. In invalidating the ordinance on a due process ground, the New York Court of Appeals noted that the ordinance "render[s] the park property unsuitable for any reasonable income production or other private use for which it is adapted and thus destroys its economic value." 39 N.Y.2d at 597, 350 N.E.2d at 387, 385 N.Y.S.2d at 10. In Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972), a wetlands ordinance allowing only restricted uses was upheld, but the opinion contains no indication that the landowners were required to admit the public to their land. Presumably, they could have operated a private park or wildlife preserve.
the private owner’s ability to use and enjoy the portion of his property where the easement is not exercised. In adjudicating dedication/prescription cases, the courts often consider the nuisance qualities generated by the public’s activities on the encumbered property. If those activities deprive the landowner of the use of the land on which they are carried out and also have spillover effects that interfere with the owner’s quiet enjoyment of the remainder of his property, the burden on the landowner’s total estate can be impermissibly high. For example, a court may be willing to find that the public has established a prescriptive right or a right by implied dedication to travel a footpath across private property to the ocean foreshore. It may be unwilling, however, to extend that right to travel by motor vehicles because of the externalities they produced. Similarly, daytime fishing does not interfere with the landowner’s enjoyment of the undedicated portion of his property to the same extent that overnight camping does.\textsuperscript{103}

In sum, then, the courts do consider the overall burden on the private property owner’s estate created by the asserted public rights in prescription/dedication cases. In dedication cases, this factor is often articulated in terms of the landowner’s “intent” to part with an interest in his property. In determining which public uses are permitted on the dedicated property, the courts examine the purposes for which the landowner intended to dedicate his property.\textsuperscript{104} In some instances, the courts find that the landowner intended to dedicate a parcel for certain general purposes, such as an access route by whatever means; new methods of travel are presumed to be within the scope of the original dedicatory purpose, even if these produce significantly greater externalities than the old methods.\textsuperscript{105} Other cases may hold that the landowner dedicated the property only for some fairly specific purposes, such as a fishing

\textsuperscript{103} The noise, refuse, and general disturbance produced by overnight campers on the dry-sand area may prevent the landowner’s use of his highland property as a waterfront retreat much more effectively than daytime fishermen’s activities.
\textsuperscript{105} “Where the owner of land dedicates it to the public for a road, he impliedly grants the attendant or incident right to make such use of it as shall suitably fit it for travel . . . . The rights of the owner of the underlying fee are always subordinate to the rights of the public and may grow less as the public need increases.” Anderson v. Stuarts Draft Water Co., 197 Va. 36, 41, 87 S.E.2d 756, 760 (1955).
area. Other recreational or commercial uses, such as hunting or camping, would be excluded as not within the purview of the landowner's original intent.

Where the landowner's intent to dedicate property is inferred from long public use, determining the scope of the donor's original intent is more difficult. Intent in that context is a fiction. The scope of the fictional intent presumably must be determined from the factual circumstances of the public's use. The length and continuity of each public activity may vary. For example, members of the public may have fished along a particular stretch of shore for decades. Sunbathing and picnicking may be of more recent origin or have been engaged in less consistently. A court, in deciding whether the shore and dry-sand area have been dedicated by implication to the public, should take into account the burden on the servient state that the panoply of claimed uses will create. In balancing this factor with the others described later, the court may find that the total burden created by all asserted uses cannot be justified in light of the lack of constructive notice to the landowner of the more recent uses or the absence of detrimental reliance by the public in having this particular area of beach available for picnicking and sunbathing.

In dedication/prescription cases, the courts in fact assess the burden on the servient estate created by the asserted public rights although their assessment takes place in the context of the traditional common law rhetoric. Rather than writing about the scope of the fictional "intent" in implied dedication cases, for example, the courts should examine directly the interference with the owner's private property rights generated by the proposed public rights. A thread that runs throughout Anglo-American property law is the prevention of unreasonable and unjustified intrusions on

---

106. In a different context, the Massachusetts Supreme Court found that a proposed bill to create a public right-of-passage by foot over the tidal foreshore would result in an unconstitutional taking of private property rights without just compensation. In re Opinion of the Justices, 365 Mass. 681, 313 N.E.2d 661 (1974). Although the public had been guaranteed the rights of fishing, fowling, and navigation on the foreshore since the mid-seventeenth century, the court refused to extend those rights: "The rights of the public though strictly protected have also been strictly confined to those well defined areas." 365 Mass. at 688, 313 N.E.2d at 567. The court apparently did not hesitate to distinguish among kinds of public uses—those historically protected and pursued versus those of more recent vintage.
the enjoyment of private property rights. Measuring the extent of the interference produced by the recognition of an implied dedication of beach property or the imposition of a public prescription easement thereon is consistent with that tradition as well as sound policy for courts in their application of common law property concepts.

2. The Landowner's Expectations

Protection of a private landowner's justifiable expectations with respect to his property is another abiding concept in Anglo-American property law. The notion of fee simple ownership carries with it the idea that the owner may exclude all others from his property, shall have the quiet enjoyment of it, and shall be free from unrecorded conflicting interests in it. In the American system, constitutional considerations protect private property owners from unfettered public appropriation and regulation of their interests. Thus, landowners have some legitimate expectation that the free use and enjoyment of their property will not be disturbed by unanticipated and unwarranted conflicting public or private claims.

The traditional common law formulation of prescription/dedication principles reflects the concern for protecting private property owners' expectations. To establish a prescriptive easement the claimant must demonstrate that he has used the asserted right-of-way adversely to the private owner's interests, openly, and continuously for the prescriptive period of time. Requiring adverse use

107. See generally Cohen, Property and Sovereignty, 13 CORNELL L.Q. 8 (1928).
110. Under the fifth amendment to the United States Constitution, “private property [may not] be taken for public use, without just compensation.” U.S. CONST. amend. V. The fourteenth amendment has been held to incorporate the fifth amendment, and thus it applies to the states as well. Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226, 241 (1897). The fourteenth amendment also prohibits the states from depriving any person of his property without “due process of law.” U.S. CONST. amend. XIV, § 1. See also VA. CONST. art. I, § 11.
alerts landowners to the possible creation of rights in private users or the public at large. If the landowner permits others to use his property, normally the courts have found that only a revocable license in the claimants has been created. The landowner who expressly allows others to cross his land out of generosity or neighborliness does not expect that the permitted users will acquire any property rights thereby. That expectation would be altered if he had granted a permanent right-of-way to a neighbor for some kind of consideration.

If the easement claimant has used a right-of-way openly, exclusively, and continuously for the prescriptive period, Virginia law creates a rebuttable presumption that the claimant's use was adverse and under color of right. The claimant does not have to show that his use was hostile to that of the landowner. The burden is on the landowner to prove that he permitted the claimant's use. The onus is put on the landowner to enforce his property rights. A landowner observing persons on his land who reappear continually without his permission receives notice in effect that someone opposes his fee simple ownership, and he can take appropriate steps to have them ousted from his property.

The requirement of open and notorious use follows from the same consideration of promoting the landowner's legitimate expectations. Allowing outsiders to establish adverse property rights by using a right-of-way, covertly for example, is deemed unfair to

---

114. "Where a land-owner keeps open and uses a way, its enjoyment and use by another in common with the public must generally be regarded as permissive or under an implied license, and not adverse, unless there be some decisive act on the part of that other indicating a separate and exclusive use under the claim of right . . . . A different doctrine would have a tendency to do away with all neighborhood accommodation in the way of travel . . . ." Reid v. Garnett, 101 Va. 47, 49-50, 43 S.E. 182, 183 (1903). Accord Graham v. Thompson; 143 Va. 29, 34, 129 S.E. 272, 274 (1925).
116. The presumption of adverse use is not raised, however, if the claimant has used the easement in common with the public. Reid v. Garnett, 101 Va. 47, 49, 43 S.E. 182, 183 (1903). In that situation presumably the landowner has opened his land to the general public; he has granted permission to all to use his property. He cannot distinguish the claimant's use from that by the public at large and therefore cannot be expected to enforce his property rights against that person.
landowners. The usage should be evident enough to alert the landowner, who can then take steps to prevent it. By requiring continuous and uninterrupted use for the prescriptive period, the common law assures that intermittent users will not acquire prescriptive rights. Again, a landowner reasonably expects that an occasional trespasser should not be able to establish adverse interests in his land.

Implied dedication theory protects a private landowner's legitimate expectations by requiring both an offer and acceptance of the dedicated property interest. The offer signifies the landowner's voluntary donation to the public of an interest in his property. The landowner expresses his expectations through his willing offer. The public's acceptance of the offer indicates to the donor that his donation is completed and that he may no longer reclaim his property.

The manner in which the offer and acceptance are traditionally executed illustrates the importance of notice to interested parties of the intended dedication. An express offer may be made by means of a notation on a deed, the designation of the proffered area on a subdivision plat, or some other written document.


119. The claimant need not show open and notorious use if he proves that the landowner had knowledge of his claim by some other means. Gibson v. Buice, 394 So. 2d 451 (Fla. App. 1981).


121. The intention to dedicate "must be manifested in a positive and unmistakable manner . . . . Since we know that individual owners of property are not apt to transfer it to the community or subject it to public servitude without compensation, the burden of proof to establish dedication is upon the party claiming it." Anderson v. Town of Hemingway, 269 S.C. 351, 354, 237 S.E.2d 489, 490 (1977). See also Town of West Point v. Bland, 106 Va. 792, 793-94, 56 S.E. 802, 804 (1907); Harris v. Commonwealth, 61 Va. (21 Gratt.) 833, 837 (1871).

122. Once a dedication is complete, it is irrevocable. Buntin v. City of Danville, 93 Va. 200, 205, 24 S.E. 830, 830-31 (1896).

123. Id.


An express acceptance may consist of the recording of a subdivision plat,\textsuperscript{126} the removal of the affected parcel from the tax rolls,\textsuperscript{127} the adoption of a resolution of acceptance by the local government,\textsuperscript{128} or some other explicit action by the appropriate public officials.\textsuperscript{129} Thus, as with any gift transaction, both parties anticipate that the donation is not complete until both offer and acceptance have occurred, and the manner in which these events occur normally puts the parties on notice that certain private property rights have been relinquished to the public.

The policy of furthering landowner's expectations is less visible in cases of implied dedication. Both the offer and acceptance may be implied from factual circumstances, in particular from long public user.\textsuperscript{130} Here the distinction between implied dedications and prescriptive easements becomes blurred.\textsuperscript{131} By passively permitting the public at large to use his property for an extensive period of time, the landowner at some point will be held to have


\textsuperscript{127} Removal of the dedicated parcel from the tax rolls is some evidence of an acceptance. Anderson v. Town of Hemingway, 269 S.C. 351, 356, 237 S.E.2d 489, 491 (1977). It is not always conclusive, however, where other facts show that the municipality or county did not intend to accept the dedicatory offer. Meshberg v. Bridgeport City Trust Co., 160 Conn. 274, 283-84, 429 A.2d 865, 870 (1980).

\textsuperscript{128} Sarty v. Millburn Township, 28 N.J. Super. 199, 100 A.2d 309 (1953).

\textsuperscript{129} Development and maintenance of the donated area by the local governing body are frequently sufficient to constitute an acceptance. Singewald v. Girden, 33 Del. 51, 56, 107 A.2d 231, 234 (1952); County of Darlington v. Perkins, 269 S.C. 572, 575, 239 S.E.2d 69, 70 (1977); Ocean Island Inn, Inc. v. City of Virginia Beach, 216 Va. 474, 477, 220 S.E.2d 247, 250-51 (1976). In some cases, however, occasional maintenance activities by a local government as part of its general public responsibilities will be insufficient as a formal acceptance of the dedicatory offer, particularly where the offer itself has not been clearly manifested. Kelly v. Phillips, 13 Del. Ch. 261, 271, 118 A. 230, 234 (1922); Lines v. State, 245 Ga. 390, 393-94, 264 S.E.2d 891, 895 (1980).


\textsuperscript{131} Some courts have recognized that relying solely on long public use of private property to establish both the offer and acceptance in a dedication renders implied dedications indistinguishable from an easement in the public acquired by prescription: "The distinction between dedication and prescription cannot be lost. Implying a dedication solely through long public use without regard to any intent to dedicate on the part of the landowner is but a form of prescription, and as such, all of the requisites for prescriptive rights must be met." Department of Natural Resources v. Mayor of Ocean City, 274 Md. 1, 8, 332 A.2d 630, 635 (1975).
donated his property rights to the public. The public use need not be open, notorious, hostile, and for a particular period of time, as with the prescriptive easement. The use need only be of such a character and for such length of time that allowing the implied donor to reclaim his property would be inequitable to the public and to other private landowners.

In judging the inequity of allowing the landowner to reclaim his property, however, the courts naturally are drawn to evaluating the landowner’s expectations. A landowner who consistently and adamantly opposed public use by enforcing "no trespassing" signs reasonably expects that no adverse public rights will accrue. Conversely, a landowner who permitted selected members of the public to use his property reasonably believes that such persons are there at his sufferance only. Moreover, he will convey these expectations to a successor-in-interest. The successor will expect that his predecessor's opposition to public use will have prevented public rights from being established. He will anticipate, similarly, that his predecessor's license to certain users may be revoked.

In some cases, landowners have not opposed public use or licensed it. Either they passively acquiesced in extensive public use over a lengthy period of time or they made ineffectual and spo-

---

132. One of the potential problems with recognizing implied dedications only on the basis of long established public use is that the prescriptive period need not be followed. A court could find an implied dedication to the public of a beach that had been used by the public for five years or even less. See Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. (1970). Because the prescriptive period of fifteen or twenty years (or longer in some states) operates in effect as a statute of limitations, the courts, by using a shorter period for implied dedications, may be contravening the statutory policy behind the longer prescriptive period.


135. Lines v. State, 245 Ga. 390, 395, 264 S.E.2d 891, 896 (1980); Volpe v. Marina Parks, Inc., 101 R.I. 80, 86, 220 A.2d 525, 529 (1966); State v. Beach Co., 271 S.C. 425, 433, 248 S.E.2d 115, 119 (1978). In Lines, the Georgia Supreme Court noted the unfairness to the riparian owner in finding that he had dedicated his property to the public by allowing members of the public to use it on occasion: "It would be inequitable to impose a public easement on a beach owner's property because he tolerated liberties from the public which did not interfere with his private enjoyment." 245 Ga. at 395, 264 S.E.2d at 896.

136. Buntin v. City of Danville, 93 Va. 200, 24 S.E. 830 (1898); City of Long Beach v. Daugherty, 75 Cal. App. 3d 972, 142 Cal. Rptr. 593, cert. denied, 439 U.S. 823 (1978);
radic attempts to oppose it. In that category of cases, the landowner’s expectations and intentions are not clear. Apparently, the landowner either is unaware of the public use or he does not object to it. His attitude may be construed as ignorance or indifference. The law penalizes landowners for such careless attitudes by allowing public rights to accrue against them. Landowners who are too lazy to investigate the extent of public use of their property or too indifferent to oppose the public use that they discover must pay the penalty for their lack of vigilance.

One may argue that these indifferent and indolent landowners should reasonably expect that public rights may be established by virtue of their inattentiveness. Conversely, the somnambulant landowner, in a subjective sense, has no expectations with respect to possible public rights at all. Because he fails to take the rea-


138. The furor caused in California following the Gion decision in 1970 was inspired partly by the belief that the decision penalized the amiable coastal property owners who, out of neighborliness, allowed members of the public to cross their land to reach the shore or to use their beach as a recreational area. County of Los Angeles v. Berk, 26 Cal. 3d 201, 228-29, 605 P.2d 381, 398-99, 161 Cal. Rptr. 742, 759-60 (1980) (dissenting opinion).

One may question whether depriving landowners of their property rights because they exhibit a friendly attitude toward strangers who seek to use their beach is good policy. The answer may be that landowners with such friendly attitudes should be required to inform the public that the public is admitted under a license only. Rather than allowing generations of public users to rely upon having free access to the dry-sand area and the shore, the landowners should post a sign indicating the nature of the license or otherwise providing notice to the public of it. Under California statute a landowner may prevent the creation of prescriptive rights by either filing a notice of permissive use in the county recorder’s office, publishing annually a statement of permissive use in a newspaper of general circulation in the county in which the land is located, or posting at the entrance to the property or along the boundary of it a sign reading “Right to pass by permission, and subject to control, of owner: Section 1008 Civil Code.” CAL. CIV. CODE §§ 813, 1008-1009 (West 1982).

139. The landowner’s reasonable expectations with respect to the possible accrual of public rights depend in part on the legal rules governing such rights. California landowners believed that the Gion decision was unfair because it abandoned the usual presumption that public use of open, unenclosed land is permissive only. County of Los Angeles v. Berk, 26 Cal. 3d 201, 214-15, 605 P.2d 381, 389-90, 161 Cal. Rptr. 742, 750-51 (1980). Landowners who passively acquiesced in public use, therefore, could have expected justifiably that no public rights could have been created without some positive evidence of adverse public use. That argument ignores the fact that to prove adversity and thus to overcome the presumption, some courts hold that members of the public need to demonstrate only that they went
sonable precautions that most landowners would take to protect themselves against trespassers and adverse possessors, he cannot then expect to prevent public rights from accruing. Thus, some courts reason that the recognition of public rights under a theory of implied dedication or prescription will not frustrate the landowner’s reasonable expectations in cases of landowner indifference or carelessness. This reasoning is especially persuasive in cases where not only the public has used the highland for many years, but governmental agencies have undertaken to maintain and improve it. The degree of notice of possible public rights rises to a level at which all landowners are expected to be aware of them.

In the specific context of public tidelands access and use, the landowners’ reasonable expectations are often somewhat different from those in non-waterfront cases. In Virginia, the Commonwealth still owns the foreshore of many Atlantic coast tracts as well as marsh and meadowlands on the Eastern Shore. The public, in addition, may enjoy common rights of fishing, fowling, and hunting on certain privately-owned coastal properties. Because of the extensive public rights in these waterfront areas, riparian owners may anticipate persistent and extensive attempts by members of the public to reach waterfront areas by crossing private


141. One court has suggested that a higher level of proof is required in implied dedication cases in which both the offer and acceptance are implied than in cases in which only the acceptance is implied: “[W]here the theory that the owner has impliedly dedicated the property is relied on, the party so contending must show more than simply that the public made uses of the beach which were consistent with the uses made by the owner.” Smith v. State, 248 Ga. 154, 162, 282 S.E.2d 76, 84 (1981). In other words, where the landowner has not offered expressly to dedicate his land to the public, a greater degree of notice that public rights may be developing is needed.

142. See supra notes 6-10.

143. See Va. Code ch. 87, § 1 (1819) (boundaries of waterfront lands extended to low water mark, but right of the public to fish, fowl, and hunt, preserved on foreshores “which are now used as a common”).
property and also to use the adjacent lands above high water mark for recreational purposes. One of the burdens of riparian ownership is the existence of public rights along navigable waterbodies and of possible common lands along the shores. In examining riparian property, the prospective purchaser presumably adjusts the price he is willing to pay according to the probable existence of public rights that may interfere with his exclusive enjoyment of the property.

Buyers of waterfront lands should anticipate that some public rights-of-way may have been established by prescription or implied dedication, even if these interests are not of record. The status of the title to the foreshore in Virginia is so uncertain that many title insurance companies will not insure it as part of the policy covering the remainder of the riparian tract. \(^\text{144}\) If the title insurer, through its investigations, has discovered no adverse public interest above high water mark and has issued a title policy, then the purchaser of a riparian parcel has some assurance that the public has not yet established use or access rights. Thereafter such rights can accrue only because the landowner failed to oppose generalized public use.

Even if the purchaser does not buy a title policy that insures against unrecorded interests such as prescriptive public easements, \(^\text{145}\) he should have inspected the land and had some opportunity to observe the extent of public use. \(^\text{146}\) The reasonable pur-

\(^\text{144}\) See the title policy insuring Hog Island property in Bradford v. The Nature Conservancy, No. 79-1297, 3 Joint Appendix 76 (Va. S. Ct., June 8, 1978).

\(^\text{145}\) Many title policies do not insure against easements not of public record. Id. Normally, the title insurer relies on the public record and a survey of the land to determine possible easements, dedicated roadways, and other adverse interests. The insurer will disclaim any adverse interests revealed in these documents. If the insurer failed to discover a public prescriptive easement, for example, not revealed by these documents, it would be liable under its policy. The title insurer in the Bradford case disclaimed all easements not of record on the property purchased by The Nature Conservancy because no survey was provided. Conversation with Marvin C. Bowling, Jr., Senior Vice President and General Counsel, Lawyers Title Insurance Company, Richmond Virginia. See also C. Brown, W. Robillard & D. Wilson, EVIDENCE AND PROCEDURES FOR BOUNDARY LOCATION 326-28 (2d ed. 1981).

\(^\text{146}\) In County of Los Angeles v. Berk, 26 Cal. 3d 201, 223-24, 605 P.2d 381, 396, 161 Cal. Rptr. 742, 757 (1980), the court rejected the landowner’s claim that the local governments with jurisdiction over the parcel subject to public easements misled her by failing to inform her of the existence of the easements. The court instead placed the onus on the landowner to discover any adverse interests:
chaser will ask the seller about possible public usage. If a purchaser relies on the seller's assurances that the public does not use the parcel, he may be able to sue for fraud or breach of warranty if the assurances turn out to be ill-founded.

A riparian owner's reasonable expectations with respect to public rights may vary according to the kind of rights asserted. Owners of Eastern Shore meadowlands above high water mark should anticipate that the public may attempt to cross their property to reach the tidal marshes for purposes of fishing and fowling. The primary public interest in such areas will be access to the state-owned marshes. Owners of Atlantic coast parcels, on the other hand, should expect that members of the public not only will seek access to the shore but will attempt to use the dry-sand area for recreational pursuits such as sunbathing and picnicking. Landowners can gauge the probable future public uses by the land's natural topographical features, the prior public uses, and the owners' own expected private uses. For example, the owner of land bordering a bay that is known state-wide for the excellence of its blue crabs may well expect the public to seek to use his land as a launching point for their crabbing boats, especially if the public has done so in the past. In the Bradford case, specifically, watermen and sportsmen had used the marshes of Hog Island for more than a hundred years as fishing and hunting grounds. The Atlantic foreshore also has been a popular spot for surf casting for decades. Given the common use of these areas and the blurring of private/public property rights, The Nature Conservancy could have anticipated that certain public easements across their property might have been established.

---

Defendant and her late husband, as prospective purchasers of the subject property, had at their disposal ample means of informing themselves of all of the considerations, legal and otherwise, which might have had an effect on the wisdom of their decision. . . . We do not believe . . . that defendant may so easily divert the responsibility for her own inattention.

Id.


147. Ch. No. 16 at 8 (Va. Cir. Ct., Northampton County, Feb. 27, 1979).
3. **Magnitude of Public Reliance**

A strong judicial theme in implied dedication/prescription cases is public reliance on having use and access privileges on private property. In implied dedication cases, the Virginia courts frequently speak in terms of estoppel, equity, and prejudice to the public.\(^4\) In prescriptive easement cases, the courts tend to focus on facts that indicate the inequity in depriving the claimant of his asserted rights.\(^5\)

The emphasis on detrimental reliance stems from our basic notions of private property rights. A property owner's rights to exclude others from his estate should be inviolate unless he voluntarily relinquishes his rights to others or, by his words or conduct, leads others to believe that they enjoy certain privileges. At some point, his course of dealing with the public or with private claimants operates to estop him from reclaiming his former position.\(^6\)

In relying on the existence of these privileges, the claimants have foregone opportunities to protect their interest by other means.

Where public officials have accepted a proffered dedication of a roadway, for example, the detrimental reliance is clearly defined. The state or local government commits itself to maintain the roadway and ultimately makes expenditures for that purpose. The dedicated property is removed from the tax rolls, and tax revenues are lost.\(^7\) The governmental body, moreover, exposes itself to tort


\(^{149}\) For example, in Rhoton v. Rollins, 186 Va. 352, 42 S.E.2d 323 (1947), the court held that plaintiff had not acquired a prescriptive easement to travel across a neighboring parcel to reach the public highway. At the same time, however, the court found that the plaintiff had an express easement over defendant's land. The availability of the alternative right-of-way undoubtedly influenced the court's decision on the prescription issue.

\(^{150}\) "Where public or private rights have been acquired upon the faith of conduct of the landowner under such circumstances as to make the doctrine of estoppel applicable, the law will imply the intent to dedicate even where there is an entire absence thereto in the mind of the landowner . . . ." Keppler v. City of Richmond, 124 Va. 592, 611, 98 S.E. 747, 753 (1919).

\(^{151}\) Sometimes no tax revenue loss occurs if one assumes that the roadway's presence raises the assessed valuation of the surrounding parcels. In Virginia, the underlying fee of a dedicated parcel remains with the donor; the public has only a right of use. Payne v. Godwin, 147 Va. 1019, 1026-27, 133 S.E. 481, 483 (1926). Thus, the value of the fee subject to
liability in connection with activities on the roadway and will attempt to insure itself against such liability. Most importantly, public officials will plan the public roadway system in reliance on the public ownership of the dedicated roadway. Other roadways will be linked up with it, and the governmental coffers presumably will not contain funds for acquisition of the supposedly donated road. Considerable hardship to the government, the public at large, and other surrounding private landowners who may have purchased their parcels in reliance on the existence of a public road will result if the donor is allowed to revoke his offer after acceptance.

The equities in implied dedication/prescription cases are much less clearly defined. The courts must decide at what point the public has used a particular strip of land for a period of time that would render reappropriation by the private owner unjust. In prescription cases the time period is usually set by statute or common law, often ranging between seven and sixty years. In cases relying on the theory of custom, the time period is immemorial; the customary usage must date back to man’s earliest recollections. Under Virginia’s common lands statutes, the use as a commons must have existed at the time the statute under which the claim is made went into effect. For example, if the public asserts that certain shorelands were exempt from grant under the 1780 commons reservation statute, the public must show that the lands were used as a common in 1780.

the easement could be taxed. If the local government assumes erroneously that a parcel has been dedicated to the public, it will not tax the property at the appropriate level.


153. The reliance of surrounding private property owners on the existence of public rights on the adjacent riparian land should not be overlooked. In some instances, waterfront owners will have purchased their property with the express intention of using what they assume to be a public beach nearby. See, e.g., Capano v. Borough of Stone Harbor, 530 F. Supp. 1254 (D.N.J. 1982).


157. Miller v. Commonwealth, 159 Va. 924, 948, 166 S.E. 557, 565 (1932); Garrison v. Hall,
The courts have treated the longevity issue in implied dedication cases in a variety of ways. Statutes or common law precedent require some courts to apply a specified prescriptive period, such as fifteen or twenty years.\textsuperscript{158} Others normally demand a longer period of time.\textsuperscript{159} Some unprecedented California cases recognized that an implied dedication could result from only five years of sustained public use.\textsuperscript{159} In Virginia cases, the period of time applied is often unclear. Some Virginia courts have used the standard prescriptive period of twenty years.\textsuperscript{161} Others do not state precisely what length of time is sufficient but merely indicate whether the claimants' use has or has not been of adequate duration.\textsuperscript{162} In one case involving the asserted dedication of some Atlantic coast property, the Virginia Supreme Court noted that the area in question had been used as a public boulevard for more than seventy years.\textsuperscript{163} That length of time was sufficient to complete the dedication.\textsuperscript{164} The court did not suggest what minimum period would have been legally adequate.

If the duration of public uses is perceived from an equitable vantage point, then the legally sufficient duration varies, by necessity, according to specific factual circumstances. Public use is considered relevant in implied dedication cases in three situations: where the offer to dedicate is implied from such use; where the accept-

\textsuperscript{75} Va. 150, 156-57 (1881); French v. Bankhead, 52 Va. (11 Gratt.) 136, 166 (1854).


\textsuperscript{159} Poole v. Commissioner of Rehoboth, 9 Del. Ch. 192, 80 A. 683 (1911) (38 years of public use); Gewirtz v. City of Long Beach, 69 Misc. 2d 763, 330 N.Y.S.2d 495 (N.Y. Sup. Ct. 1972) (more than 30 years); Seaway Co. v. Attorney Gen., 375 S.W.2d 923 (Tex. Civ. App. 1964) (public use since nineteenth century).

\textsuperscript{160} Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970).

\textsuperscript{161} The cases that use the prescriptive period, however, seem to be applying the concept of a public easement created by prescription rather than dedication. City of Lynchburg v. Chesapeake & Ohio Ry., 170 Va. 108, 195 S.E. 510 (1938); City of Staunton v. Augusta Corp., 169 Va. 424, 193 S.E. 695 (1937); Cornett v. Rhudy, 80 Va. 710 (1885); Holleman v. Commonwealth, 4 Va. 135 (1818).


\textsuperscript{163} Greenco Corp. v. City of Virginia Beach, 214 Va. 201, 207, 198 S.E.2d 496, 500 (1973).

\textsuperscript{164} Id.
ance is implied from public use; and where both the offer and acceptance are implied. Although the first situation can occur theoretically, it is not encountered frequently in existing case law. The second situation arises often when the donor offers his property to the public by noting a public street or park on a recorded subdivision plat. Public officials neglect to accept the offer formally, but members of the public, through their long and continuous use of the property, accept the offer by implication. In the third situation, the landowner never intentionally offers his property to the public. Instead, the public’s extensive and customary usage at some point estops the landowner from reclaiming his property.

The extent of public reliance on public ownership of a particular right-of-way conceivably may not differ significantly between the second and third situations. The “public” may be defined to include the citizenry at large as well as government officials as representatives of the people. If one speaks of public reliance in terms of the expectations of the public at large, one can argue that the public in the second situation will no more rely on the presence of a specific dedicatory offer than the public in the third situation will be aware of the lack of such an offer. In a few cases, perhaps, the donor may make the public aware of his offer through some publicizing efforts, such as posting a sign. In most instances, the general populace will be only dimly cognizant, if at all, of some license given by the private landowner to use his property.

165. To find a local government formally accepting an “offer” that has been evidenced only by long public user is unusual. In those cases the landowner does not intend to dedicate his property, and therefore the governmental body’s “acceptance” is not really an acknowledgement of an offer but a declaration of public rights that have been established independently.


169. The public may have this common understanding because the landowner expressly permits them to use his property, because a governmental body maintains the area as a
is also the case even where no offer to dedicate is made. Members of the public will often have a common, if vaguely defined, understanding that they are permitted to use a particular pathway or strip of beachfront, even if the private landowner does not intend to dedicate his property.

On the other hand, by examining public reliance in terms of the expectations of public officials, the expectations arguably differ depending on whether the donor has made an express dedicatory offer. Conceivably, public officials charged with public planning functions should be aware of any offers of private property, such as those indicated on subdivision plats. They justifiably anticipate that the offer will be held open for a reasonable length of time. They also expect that immediate public user may accomplish the acceptance of the dedicatory offer. In other words, in some cases they may rely on the public's use to complete the dedication rather than on some formal governmental acceptance.170

Where no express offer has been made, the extent of governmental reliance on the existence of a particular public right-of-way grows more slowly over time. The fact that the public uses a particular pathway on a regular basis does not mean that public officials necessarily rely to their detriment on its existence. Only when the usage is of a consistent and long-lived nature may the governmental planners come to regard a pathway as a public way.

One can conclude therefore that length of public use sufficient to create an implied dedication should be greater where no express offer to dedicate is involved. One way for the courts to remove some of the subjectivity inherent in the balancing of equities is to apply the statutory or common law period for prescriptive ease-


170. A local government that desires to accept a proffered dedication normally will not rely on public user to constitute the acceptance. Especially if the area dedicated is unimproved, the public may not use it in sufficient numbers to create an implied acceptance. In some situations, however, an attempted formal acceptance by the city or county may be defective for some reason. There, the local government must look to public user for the acceptance, particularly where the landowner now attempts to withdraw the offer.

public beach or road, or simply because they and their ancestors always have used the waterfront as a public ground. Where the public reliance is based on some sort of license by the landowner, courts often are quick to deny a claim of implied dedication. The public cannot rely to their detriment on the existence of a public beach, for example, when they understand that the landowner merely allows their presence on a temporary basis. State v. Beach Co., 271 S.C. 425, 248 S.E.2d 115 (1978).
ments to claims of implied dedication through public use. Absent some strong countervailing reasons, the court should require the public claimants of an implied dedication to demonstrate that they have used the claimed waterfront area without the landowner's permission for the prescriptive period of time. The application of the prescriptive period creates an objective standard that quantifies both the landowner's expectations and the public's reliance.

The courts, in their equitable discretion, may wish to apply a shorter period where the balance of hardships tips decidedly in the public's favor. In other words, if the public can show that it relies on access to a particular stretch of shore and that the landowner has induced this reliance, the public's use of the land for less than the prescriptive period may be sufficient to create an implied dedication. Where the landowner has made an express offer to dedicate or, through his actions, may be construed to have made an implied offer, members of the public expect that they are entitled to use a roadway or engage in recreational pursuit on a beach. The landowner induces those expectations by offering to donate his property either through words or actions. If the landowner has placed no expressed limitations on the scope of the offer, members of the public, in taking advantage of the offer, reasonably believe that they will not be excluded from the landowner's property.

The landowner can change the scope of public expectations at any time before the dedication is complete simply by vigorously opposing public use. For example, he could post "no trespassing" signs, place a barricade across a roadway, hire guards to exclude trespassers, and take other steps to block public access to his property. These actions place the public on notice that their use is not permitted or at least is protested. Unless they have reason to doubt the landowner's authority over the property, they are made aware that they should not enter upon the posted property. The courts thus have recognized that consistent opposition to public use will prevent an implied dedication.\footnote{171. Berger v. Town of Guilford, 136 Conn. 71, 79-80, 68 A.2d 371, 376 (1949); Lines v. State, 245 Ga. 390, 394, 264 S.E.2d 891, 896 (1980).}

Conversely, coastal property owners can alter the extent of public reliance on access to their property by indicating clearly that the public has only a limited license to use it. Techniques such as

\begin{quote}

\end{quote}
posting signs stating the scope of the license, charging of tolls to use the road and the beach, or even publicizing the landowner's consent to public use in a local newspaper\footnote{172} may be used to undercut public reliance on having perpetual privileges to use the beach or meadowlands. Members of the public cannot reasonably expect that they are using a public beach if signs indicate to the contrary.

The public's collective expectations with respect to access to waterfront property differ somewhat from those generally found in non-waterfront cases. As discussed earlier, riparian owners may anticipate more readily that the public will seek to establish rights-of-way across their property leading to the publicly owned foreshore, marshes, and beds than would nonriparian owners. Similarly, the public, by attempting to reach the tidal shores, manifests greater expectations that some access point is available than they would in non-waterfront cases. Because members of the public know or assume, for example, that the Commonwealth owns the tidal foreshore, they may also expect that they can reach the foreshore via some inland route. This is not an unreasonable or irrational expectation in light of Virginia's long tradition of common use of tidelands and their adjacent uplands.

The justifiable public reliance on having access to tidelands, one can argue, may be more extensive than public reliance on being able to engage in general recreational pursuits on the dry-sand area above high water mark. In other words, it may be more reasonable for members of the public to rely on having access to Virginia's common lands than to believe that they may camp and picnic on the lands above high water mark, which are clearly in private ownership. In the former situation, members of the public simply cross private land, most probably via a defined pathway, to reach the publicly owned shores. In the latter situation, they appropriate to their own general recreational use potentially large tracts of privately owned beach or meadowlands.

If one measures justifiable reliance by what the reasonable person would rely upon in judging whether to use particular open land, then perhaps one assumes too much to say that the public will not rely justifiably on being able to use the dry-sand area for

recreational pursuits. The assumption is that the public knows that private riparian owners in Virginia take title at least to high water mark and in most cases to low water mark, and that common rights on private property exist only in selected places. Whether the public at large has or should be expected to have such a refined appreciation of the basic tenets of Virginia coastal law is not clear.\textsuperscript{173} In the cases recognizing the doctrine of customary usage, the courts have acknowledged that members of the public often rely on being able to enjoy themselves on an ocean beach simply because they and their ancestors have always done so and no one has ever stopped them.\textsuperscript{174} The neat distinctions recognized in the law among the bed, the foreshore, the upland, the tidal marshes, and the highland meadows often escape the notice of public users intent on fishing, hunting, swimming, camping, and other pursuits.

In the end, many courts seem to analyze the extent of detrimental public reliance by simply examining the quantum and duration of public uses. If a large and diverse section of the public at large has used the claimed property for a “long” time, without objection from the private owner, then an implied dedication results. But this analysis may be too simple. It fails to determine whether such reliance was justifiable in terms of the scope of the rights asserted, the public’s general knowledge about the extent of private ownership rights, and the availability of other public roads and beaches. With reference to this last factor, one may question whether the public is ever justified in relying on the existence of dedicated or prescriptive rights when adequate state or county recreational areas exist nearby. If implied dedication theory is really founded on principles of estoppel, then courts should examine the prejudice to the public if the public’s claim is rejected. In many places along the coast, governmental agencies have purchased rights-of-way to the shore and created public beaches. The public, arguably, should not be able to rely on having access to private property when public roads and beaches are available.

\textsuperscript{173} The tortured history of the Hog Island litigation, \textit{supra} notes 2-3, reveals the divergence of opinion among title insurers, government officials, property owners, the public, and the courts as to the ownership of the intertidal strip and the existence of common rights.

This argument again assumes that the public can distinguish true public beaches from private beaches that the public customarily uses. In many cases this simply is not possible. Municipalities have posted lifeguards and removed trash at what were determined to be private beaches. Members of the public have used these private beaches as if they were public land without objection by anyone. In some instances the disputed areas even were advertised as public beaches. Unless some visible distinction is made between public and private waterfront lands, the public is often justified in assuming that certain areas are open to the public without restriction.

4. Benefit to the Public

In addressing the equitable concerns inherent in implied dedication/prescription cases, many courts are affected by what they perceive the public benefit to be in allowing public use or access rights on private property. The assessment of the public benefit is a common feature of other types of land use cases. In “taking” cases, courts often balance the perceived public interest fostered by a regulation against the diminution in property values suffered by the private landowners.175 In the private nuisance cases, courts frequently weigh the public interest along with the interests of the parties in either terminating or continuing the nuisance-producing activity.176

Perhaps one naturally assumes some public benefit in allowing the public use or access rights on private property.177 Members of the public gain some property rights that they did not previously possess. They acquire use of a roadway without the state’s having to exercise its condemnation powers. They obtain the privilege of

---

177. One court assumed that the acquisition of public rights by implied dedication in coastal property was beneficial and that therefore an express acceptance by government officials of the dedicatory offer was not necessary: “Where, as here, the acceptance imposes no active duties or does not involve assumption of responsibilities involving expense, and the dedication is clearly beneficial to the public, an acceptance will be presumed.” Poole v. Commissioners of Rehoboth, 9 Del. Ch. 192, 199, 80 A. 683, 686 (1911).
fishing from what was formerly a private shore. Examining the issue from the property rights perspective, one concludes that the larger the bundle of rights acquired, the greater the total benefit to the public. In other words, the right to cross private riparian land to reach the shore is a valuable property right, but presumably the right to not only cross the property but also to use it for various recreational pursuits is even more valuable.

The total public benefit may be examined both in terms of the advantages conferred upon individual beach users and in terms of the aggregate societal good that results. Advantages to individual beach users are aesthetic, social, and economic. The unique aesthetic qualities of the ocean and the marshlands account for their persistent appeal as recreational spots. Tidelands users enjoy their favorite recreational pursuits in an attractive and relatively unspoiled setting. Open beaches also allow families and other groups of people to spend relaxing and satisfying times together. The economic advantage, of course, is that the users of dedicated tidelands do not have to pay as high a fee to enjoy these aesthetically and socially gratifying pursuits as they would on a totally private beach.

The societal benefit derived from publicly dedicated tidelands is

178. The Virginia General Assembly has recognized the special qualities of waterfront property: "Public beaches provide important recreational and aesthetic opportunities to the general public . . . [and] are a rare and valuable resource and should be conserved and developed." Va. Code § 10-215 (Supp. 1982).

Henry Wadsworth Longfellow captured the unparalleled sensory experience of the seashore in his sonnet on "Milton":

I pace the sounding sea-beach and behold  
How the voluminous billows roll and run,  
Upheaving and subsiding, while the sun  
Shines through their sheeted emerald far unrolled  
And the ninth wave, slow gathering fold by fold  
All its loose-flowing garments into one,  
Plunges upon the shore and floods the dun  
Pale reach of sands and changes them to gold.


179. This is not to say that the cost to public users of the beach or marshlands is nil. If the local governing body maintains the dedicated shoreland on behalf of the public, tax dollars must be spent for that purpose. The burden on local treasuries has led some localities to charge higher beach user fees to nonresidents than residents or to exclude nonresidents altogether. Van Ness v. Borough of Deal, 78 N.J. 174, 393 A.2d 571 (1978); Borough of Neptune v. Borough of Avon-by-the-Sea, 61 N.J. 296, 294 A.2d 47 (1972).
measured in part by the sum of the individual benefits that accrue. To that sum may be added any benefits accruing to society as a whole, apart from the individual members. Such benefits include the savings of the costs of governmental purchase of public tidelands, the preservation of a unique part of our national heritage, and the reputed societal harmony that results from the availability of recreational resources.

By holding that private riparian owners have dedicated their coastal property to the public, the courts save local and state governments the costs associated with condemning the property or persuading the landowners to sell it or some interest in it. The government, in effect, receives a gift (albeit a forced one) of the donor's property. As discussed previously, beaches, marshes, dunes, and other waterfront areas constitute unique, irreplaceable natural resources. Because of intensive development of these areas in the past, the remaining undeveloped coastal parcels become all the more important. To relinquish these areas totally to the fiat of private owners (even a regulated fiat), merely hastens the destruction of these priceless lands. Whenever public rights can be established on such areas, they presumably limit permissible private development. In fact, any private development that interferes with the public's enjoyment of its access and use rights could be banned. In some cases, such restrictions might mean that the private landowner would have to maintain his property essentially as a public beach.

Although the social harmony produced by making tidelands available to the public is not empirically demonstrable, apparently the people believe that certain resources should be open to unfettered public use. The earliest common lands statute in Virginia was enacted to protect the poor from deprivation of their custom-

180. "[T]he Atlantic Ocean beach is a unique geographic phenomenon, . . . it is such a limited resource [and] . . . the public involvement in it has been of a different character than that associated with other types of land . . . ." Department of Natural Resources v. Mayor of Ocean City, 274 Md. 1, 22, 332 A.2d 630, 642 (1975) (dissenting opinion).

181. "[T]his State is rapidly approaching a crisis as to the availability to the public of its priceless beach areas. The situation will not be helped by restrained judicial pronouncements. Prompt and decisive action by the Court is needed." Van Ness v. Borough of Deal, 78 N.J. 174, 180, 393 A.2d 571, 574 (1978).

ary privilege of fishing by the wealthy landowners' monopolization of fishing grounds. The whole notion of the *jus publicum* as it developed in English common law was built upon the same premise: that the King owned the seashore and the arms of the sea in trust for all its subjects. Social harmony is fostered, therefore, when the people's intuitive sense of how coastal resources should be distributed is fulfilled by allowing public access to the shores and tidal marshes. Furthermore, the pleasurable recreational experiences enjoyed by public users of these areas will promote, one hopes, a sense of community and greater societal cohesiveness.

In assessing the total public benefit produced by allowing public rights through dedication or prescription, courts must subtract detrimental consequences that flow from their decisions. Virginia courts have recognized potential public burdens created by dedicated easements, and many have been loathe to recognize such rights except upon the strictest proof of satisfaction of the common law requirements. In *Bradford v. The Nature Conservancy*, the Virginia Supreme Court's most recent decision on this issue, the court refused to find that private roadways running to and along the beach had been dedicated, even by implication, to the public. The court based its holding in part on the absence of any formal acceptance of the disputed roadways by the governmental officials responsible for Hog Island. The court conceded that ac-

---

183. 10 *Hening's Statutes*, supra note 6, at 226-27 (1780).

184. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 475-76 (1970). Sax notes that the public trust doctrine is founded, in part, on the notion that "certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than of serfs." *Id.* at 484 (footnote omitted). In addition, the doctrine draws support from the idea that "certain interests are so particularly the gifts of nature’s bounty that they ought to be reserved for the whole of the populace." *Id.*

185. 224 Va. at 198-200, 294 S.E.2d at 874-76.

186. *Id.* at 199, 294 S.E.2d at 875. The court also noted that landowners in rural areas often allow the public to use roadways on their property without any intention of dedicating them to the public. *Id.* (citing Commonwealth v. Kelly, 49 Va. (8 Gratt.) 632 (1851)).

In the *Kelly* case, the court observed that under English common law mere public user could create an implied dedication of a roadway. 49 Va. (8 Gratt.) at 635. The English rule was inapplicable in the United States because of the different land use patterns in the two countries:

In England the price of land is high and owners prohibit with great care all trespasses upon it. And in that country it may be that it rarely happens that an owner permits a free passage over his land, without intending to dedicate it
ceptance of an offer of dedication may be accomplished through public user where an urban roadway is involved, but noted that in rural areas a formal acceptance is also required. The government officials may signify formal acceptance of the offer by "making an entry on the public records or by assuming the duty to maintain" the roadways.

The court's decision in Bradford reflects the policy that rural governments, especially counties, should not have the liabilities associated with maintaining public roads thrust upon them involuntarily through the actions of some members of the public who insist upon using a pathway as if it were a public road. Although the court did not specify those liabilities, several are apparent. The county incurs the expense of maintaining the dedicated road, exposes itself to potential tort liability, loses the tax revenues generated by the dedicated strip, and bears the cost of any litigation associated with affirming the public claim. These costs are even greater where the public claims a section of highland as a recreational area.

Counties incur the same costs, however, when they purchase or condemn property to be used as a public road or beach. Instead of bearing the costs of litigation, the county must pay for the expenses of negotiating the purchase or following the condemnation procedure. In addition, the county has to pay the seller or condemnee just compensation for the property interest acquired.

---

as a road to the public. . . . In this country the price of land is not high; nor do owners of it guard against trespasses on it with the same care; and it is known to all who have lived in the country, that until a recent period, owners frequently permitted roads to be opened through their forests and other lands not in cultivation, without the least intention of dedicating these roads to the public.

Id. The undeveloped land conditions and the live-and-let-live attitudes of private landowners described in the Kelly case no longer exist in Virginia, even along the oceans and bays. Whether the same standard of "intent" should be applied in the modern context is questionable.

187. 224 Va. at 198-99, 294 S.E.2d at 874-75. See also Bohlkin v. City of Portsmouth, 146 Va. 340, 131 S.E. 790 (1926); Lynchburg Traction Co. v. Guill, 107 Va. 86, 57 S.E. 644 (1907).

188. 224 Va. at 198-99, 294 S.E.2d at 874-75.

189. Id. See also This Land is My Land, supra note 16, at 1110-13.

the property interest is acquired by means of prescription or dedication, the county saves that expense. The government, however, exercises its reasoned choice in purchasing or condemning property for public purposes whereas the public, through its use pattern, determines the location of prescriptive rights-of-way. Conceivably, the interference with the governmental units' planning function results in haphazard and ill-placed public roads and coastal recreational areas. One could take the cynical view that the public's collective preferences for certain roads and beaches are a better indicator of where those areas should be located than the county planner's grandiose ideas.191

But other potential costs to the public inherent in implied dedications exist beyond those imposed directly upon the state, county, or municipality. If courts routinely find implied dedications, landowners on places like Hog Island will be encouraged to give up their neighborly attitudes and block all attempted public usage of their property. No longer will they tolerate the routine or even occasional presence of sportsmen or watermen along the shore. Arguably, permissive use will disappear as landowners rush to prevent dedication of their property to the public.192

This asserted harm does not have as much weight, however, as its proponents would give it. Riparian proprietors may prevent implied dedications not only by opposing public use, but also by licensing it. In California, landowners may file a notice of consent to public use that will prevent the public from later establishing an implied dedication.193 Virginia common law clearly states that a no compulsion to sell, is willing to take for property, and which another, under no compulsion to buy, is willing to pay." Tremblay v. State Highway Comm'r, 212 Va. 166, 168, 183 S.E.2d 141, 143 (1971). In most cases, just compensation is determined by an appointed commission that arrives at a fair market value for the property by hearing testimony and personally viewing the land. Va. Code §§ 25-46.19 to .21 (1980).

191. One court observed that in some cases the rights of the public will not be adversely affected if the court does not find an implied dedication of the dry-sand area because the public can simply go elsewhere: "To have picnics and to sunbathe would merely require use of lands owned by the State, the public parks nearby or their own properties." Lines v. State, 245 Ga. 390, 397-98, 264 S.E.2d 891, 898 (1980).

192. The Gion decision in California allegedly generated "soaring sales of chain link fences, as owners of shoreline property frantically attempted to bar the public from the use of their property." County of Orange v. Chandler-Sherman Corp., 54 Cal. App. 3d 561, 564, 126 Cal. Rptr. 765, 767 (1976). See also This Land is My Land, supra note 16, at 1095-97.

193. See supra note 138.
landowner's active consent to public use constitutes a mere license to those to whom it is granted and may be revoked at any time. Rather than blocking public access, which in some cases may not prevent an implied dedication, riparian owners may be encouraged to license public use. This is particularly true if they have been inclined in the past to allow recreational users.

Another possible harm to the public resulting from the frequent recognition of implied dedications is the perception of unfairness to private landowners. The landowners whose property is invaded by the public may believe that their property rights have been "taken" without due process of law and without the payment of just compensation. Nonriparian landowners and members of the public at large may share that feeling of unfairness on some level. The social harmony that could be fostered by allowance of public access to common lands may disappear in the face of the perception that common law implied dedications are not the proper means to accomplish that goal.

Again, this harm may be exaggerated. A sensitive and careful judicial interpretation of the implied dedication doctrine should alleviate any sense of unfairness. The kind of balancing process articulated in this Article seeks to weigh the factors that contribute to a rational policy of implied dedications and prescriptive easements. The first two factors discussed, in particular, focus on the burden experienced by the private landowner and his reasonable expectation with respect to his property. In many cases, the burden on the private owner's estate will be so great and his expectation will run so heavily counter to the public rights asserted that the court will find that an implied dedication has not occurred. To insure that implied dedications are not found except in the most compelling of circumstances, the courts often put the burden on the public to show that the balance of equities weighs heavily in its favor.

Finally, the overuse of the implied dedication theory as a means of creating public rights-of-way to tidelands may lead to the destruction of the very areas that proponents seek to protect from

194. Although an intent to dedicate property to the public may be presumed from long and uninterrupted public use, the landowner may rebut the presumption by showing lack of a dedicatory intention, for example, by demonstrating that he specifically licensed the public's use. Harris v. Commonwealth, 61 Va. (20 Gratt.) 833, 838 (1871).
overintensive development by private owners. The *Bradford* case illustrates how, in some cases, allowing free public access to waterfront lands can be more injurious to the lands than leaving them in the hands of private owners. In *Bradford*, the defendant, The Nature Conservancy, sought to exclude sports enthusiasts from hunting, camping, and driving motor vehicles on the Conservancy's Hog Island properties.¹⁹⁶ The Conservancy, a private environmental organization, allowed visitors to the island to fish, stroll, and pursue other activities not harmful to the oceanfront ecology.¹⁹⁶ The Conservancy fought the Commonwealth's claim to the marshes and the foreshore and the public's claim to a prescriptive pathway to and along the beach because it believed that large numbers of public users driving dune buggies, killing wildlife, and leaving refuse would injure seriously the fragile and irrereplaceable coastline habitat.¹⁹⁷ The Conservancy's goal was not to develop condominums along the beach, but to preserve Hog Island in its relatively unspoiled state.

Some justification exists for the Conservancy's concern. In his essay "The Tragedy of the Commons," Hardin noted that the "inherent logic of the commons remorselessly generates tragedy" and that "[f]reedom in a commons brings ruin to all."¹⁹⁸ Each user of a public or common area seeks to maximize his gain and to minimize his costs. He will overuse the commons to the point of exhausting its utility.¹⁹⁸ More specifically, the hunter in the marshes will kill wildfowl until none are left. The beachcomber will drive his dune buggy along the shores until the natural vegetation is destroyed. None of these users will give a thought to replenishing the natural resources they are destroying; ownership by all means responsibility by none.

¹⁹⁶. See supra note 86.
¹⁹⁷. The circuit court in *Bradford* characterized the suit as a conflict between members of the public who were "asserting their right to use the natural resources of Hog Island reserved to them since a few years after the founding of the Commonwealth [and] a small, wealthy, aggressive organization of conservationists committed to the idea that 'man is the natural enemy of nature.'" Ch. No. 16 at 52 (Va. Cir. Ct., Northampton County, Feb. 27, 1979).
¹⁹⁹. Id. at 4-5.
Although this perceived harm exists in fact, it is not by itself sufficient reason for denying the theory of implied dedication or prescription. The destruction of natural coastal areas may occur in any event if private riparian owners choose to develop their property. Where an implied dedication is found, the private landowner generally still owns the underlying fee. The public simply has an easement to enter upon the dedicated portion. Presumably, the private owner will have some incentive to maintain the surrounding undedicated section of his property. Furthermore, if he is allowed to charge public users a fee sufficient to defray the costs of maintaining the dedicated portion, then he will have some incentive to keep up that area as well. Lastly, nothing precludes governmental regulation of public use on private property. The state, in representing the interest of all its citizens in preserving unspoiled coastal areas, may restrict the types of activities, public and private, that may be carried out on waterfront lands.\(^\text{200}\) For example, the state could ban the driving of motor vehicles on all of Virginia's Eastern Shore barrier islands.\(^\text{201}\)

\(^{200}\) Professor Roberts has commented that shifting regulation of public use of beaches from private landowners to governmental bodies may not be an efficient way to control overuse of the "commons." Roberts, supra note 92, at 179. He argues that the public trust doctrine, for example, limits the state's ability to regulate public use of trust properties. Id. at nn.59-60. Whether the public trust doctrine extends to all publicly owned property, in particular to public easements in lands above high water mark, is not clear. The doctrine traditionally protected only public rights of fishing and navigation on the foreshore and on navigable waters. See supra note 46. Only a few states have expressly extended the doctrine to cover general public recreational activities such as strolling, sunbathing, and picnicking, and only New Jersey has explicitly applied it to the dry-sand area. Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 294 A.2d 47 (1972). Even New Jersey courts, however, concede that governmental bodies may regulate public and private use of the dry-sand area to "achieve . . . valid objectives of avoiding unnecessarily disruptive behavior, overcrowding, and littering, or of protecting environmentally fragile oceanfront property, such as irreplaceable sand dunes, for the benefit of future generations." Lusardi v. Curtis Point Property Owners Ass’n, 86 N.J. 217, 231, 430 A.2d 881, 888 (1981).

\(^{201}\) The specific problem presented by banning motor vehicles on Hog Island, for example, is that fishermen needed them to haul the large ocean fish inland from the foreshore. Hog Island is virtually inaccessible from the Atlantic Ocean side because the surf prevents the landing of small craft. Sportsmen must land their boats on the bay side of the island and then trek or drive to the ocean side. Bradford v. The Nature Conservancy, No. 79-1297, 2 Joint Appendix 135-36, 147 (June 8, 1978) (testimony of Archie Bradford). Although a ban of motor vehicles on Hog Island would diminish the public's enjoyment of fishing on the foreshore, it may be necessary to accommodate the public interest in preserving the island's unique ecology.
In assessing the total public benefit derived from an implied dedication of riparian land, the courts necessarily must evaluate both the positive and negative aspects of allowing public use. The negative aspects, in a public policy sense, exist and should not be ignored. But neither should they be exaggerated.

**CONCLUSION**

The doctrines of implied dedication and prescription, as developed in the roadway cases, apparently served their purpose adequately. Because roads were well-defined strips of land and frequently were the subject of express dedications and express easements, the courts easily molded the express forms of the doctrines to situations in which members of the public had used a roadway continuously for a long period of time without objection by the private landowner. More recently, courts have tried to apply these traditional doctrines to public claims of dedicated or prescriptive rights in coastal property.

When analyzing the modern cases, some courts simply have refused to extend the common law theories of prescription and dedication to assertions of public recreational easements. Waterfront areas are less well-defined than roadways, and they are less frequently dedicated to the public intentionally. The intrusion on the fee owner's property rights is much greater than in the roadway cases, and serious constitutional issues are raised. Thus, these courts have refused to extend prescription and dedications to the context of waterfront use and access.

Those courts that have extended the doctrines to these cases generally have tried to fit the new fact patterns into the traditional common law mold. As has been seen, the fit is not often an easy one. Rather than attempting to manipulate the common law formulas for these doctrines in strained and artificial ways, courts should seek to examine the policies and interests underlying those formulas and seek to effectuate them directly. This Article has attempted to identify the most important of these policies and interests and to develop a framework in which they may be analyzed and balanced against one another. Many courts, for a number of years, have been balancing *sub silentio* the factors identified. Hopefully a clearer standard may be articulated by recognizing this process explicitly and using it in the tidelands access cases
that undoubtedly will confront the courts in Virginia and other coastal states in the years to come.