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W. Wade Beryhill
University of Richmond

Susan S. Williams

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TAKING PRECEDENTS IN THE TIDELANDS:
REFOCUSING ON EMINENT DOMAIN

W. Wade Berryhill*
Susan S. Williams**

I. INTRODUCTION

"Buy land, they're not making any more," Will Rogers supposedly once recommended.1 If he did, then Will had never taken a good look at the shore: Over the years, millions of acres of tidelands have been dredged and filled, many to provide new recreational facilities and vacation homesites.2

That the coastal zone is both an immensely valuable and an alarmingly fragile aggregation of sand and salt water is so widely recognized3 that the statement itself is a truism rapidly approach-

* Professor of Law, T.C. Williams School of Law, University of Richmond; B.S., Arkansas State University, 1967; J.D., University of Arkansas, 1972; L.L.M., Columbia University, 1976.

** B.A., University of North Carolina-Greensboro, 1968; J.D., T.C. Williams School of Law, University of Richmond, 1984; Associate, Hirschler, Fleischer, Weinberg, Cox & Allen, Richmond, Va.

2. "Since 1850 Florida has lost about 60 percent of its wetlands, according to Florida Department of Environmental Regulation Secretary Victoria J. Tschinkel." N.Y. Times, Sept. 25, 1983, § E, at 20, col. 1. The U.S. Fish and Wildlife Service estimates that, of the original 127,000,000 acres of wetlands in the 48 contiguous states, 45,000,000 acres had disappeared by 1956. ENVIRONMENTAL AND NATURAL RESOURCES POLICY DIVISION, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, WETLAND MANAGEMENT, 97th CONG., 2d Sess., A REPORT FOR THE SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS 65 (Comm. Print 1982).
   (b) The coastal zone is rich in a variety of natural, commercial, recreational, ecological, industrial, and esthetic resources of immediate and potential value to the pre-
ing terminal cliche status. However, recognition of the issue has not led to widely accepted solutions. Attempts to address the problem have often been sidetracked by collateral issues, subordinated to economic considerations, or simply lost in the triple labyrinth of federal, state, and local bureaucracy.

Thus, state and local governments argue among themselves as to which entity should have jurisdiction over the development decision but join forces to decry federal interference. The net effect is interminable delay in doing anything at all.

The federal government is often no more consistent. On the one hand, it spends huge sums to encourage state and regional coastal planning and preservation. Simultaneously, the United States Army Corps of Engineers and the Environmental Protection Agency permit dumping of dredged spoils in ocean areas adjacent to fishing sites, unless local officials act to block the disposal.

Meanwhile, although some developments are derailed by the

sent and future well-being of the Nation.

(d) The coastal zone, and the fish, shellfish, other living marine resources, and wildlife therein, are ecologically fragile and consequently extremely vulnerable to destruction by man's alterations . . . .

16 U.S.C. § 1451. See also Adams v. North Carolina Dept't of Natural and Economic Resources, 295 N.C. 683, ___ , 249 S.E.2d 402, 408 (1978) ("the unique, fragile and irreplaceable nature of the coastal zone . . . ."); Brewer, The Concept of State and Local Relations under the CZMA, 16 WM. & MARY L. REV. 717, 719 (1975) ("The area involved, the land-sea interface, has a significance beyond its actual size as a result of the disproportionate population growth in the area, the conflict of uses in the vertical and horizontal planes, and the delicate nature of the prevailing ecosystems.").

4. Illustrative of the conflict between state and local government is the continuing debate over which entity should regulate development in the Florida Keys. See, e.g., North Key Largo, The Last Stand, Miami Herald Reprint passim, Sept., 1982 [hereinafter cited as Reprint]. The Keys were designated an area of critical state concern in 1975. Id. at 2. The designation was removed for Key West in 1981 but reinstated early in 1984. Miami Herald, Mar. 4, 1984, at 1B, col. 5. Other areas of controversy have included delays in implementing a county plan and, more recently, hearings on whether to designate the entire area as a state aquatic preserve, see id., Feb. 5, 1984, at 1B, col. 1; id., Apr. 11, 1984, at 1D, col. 1, and whether the state should remove a moratorium imposed in 1983 on leasing of state-owned bay bottoms for marina construction, see id., Apr. 20, 1984, at 1C, col. 4.

5. See J. Kusler, supra note 1, at 64. Although in fiscal year 1981, the federal government granted $35,534,000 to states for implementation of coastal management programs under the CZMA, 16 U.S.C. §§ 1451-1464 (1982), neither Georgia nor Virginia has yet enacted programs meeting the CZMA's standards for approval. OFFICE OF COASTAL ZONE MANAGEMENT, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., DEP'T OF COMMERCE, BIENNIAL REPORT TO THE CONGRESS ON COASTAL ZONE MANAGEMENT 51 (1982). See also M. Amerman, Coastal Zone Management in Virginia (1979).


7. Dumping of Silt Due to Resume, Miami Herald, Feb. 21, 1984, at 7A, col. 3.
complicated permit procedure, permits are eventually granted for other projects, including some of great magnitude, perhaps because their developers have the financial resources to survive the protracted administrative and judicial processes.

Part of the inconsistency may arise from the effort to graft traditional land-use controls onto an area in which the conflict among the competing interests, economic and environmental, is thrown into high relief. In economic terms, the issue is whether efficiency

8. See infra note 28 and accompanying text; text accompanying notes 58-59.
9. See, e.g., this recent account:

Eleven years ago the [Florida] Legislature enacted a host of environmental measures that were supposed to head off chaos as Florida grows . . . .
 . . . No other state has done as much to save itself, so there are no answers to be found elsewhere. In fact, other states are looking to Florida.

But the insufficiency of Florida's environmental legislation is evident:

The state's 12 million acres of life-supporting wetlands continue to disappear at the rate of about 70,000 acres a year.

Greene, Florida's Environmental Laws Aren't Doing the Job, Miami Herald, Jan. 15, 1984, at 6E, col. 1. "[Florida Department of Environmental Regulation Secretary] Tschinkel said she 'should be ashamed to admit it' but her agency has permitted the permanent destruction of 7,500 acres of wetlands and the temporary disturbance of 3,000 acres during the past two years." Miami Herald, Feb. 21, 1984, at 7A, col. 1.

10. See, e.g., Reprint, supra note 4.

11. This newspaper account reflects the environmentalist viewpoint:

Many of the people who fought to get the present environmental laws passed are now ready to try something else—but with less optimism.

"For some reason, nothing works, and that is kind of depressing," said Richard Pettigrew, former [Florida] state Senate leader from Miami who helped pass those laws.

"What's the reason nothing works?" . . . "Is it the absence of local will? Economic pressure for growth that overrides all else? Strong speculative money going into campaigns?" Pettigrew said he doesn't have the answer.

Neither do many other Florida leaders.

"There is great confusion in the system," [says George Meier, staff director for the House Select Committee on Growth Management.] . . . "No one seems in control."

. . . "[T]he problems have gone beyond traditional government structures."

Greene, supra note 9, at col. 3. On the other hand, this anti-environmentalist (and pro-free enterprise) criticism was leveled against the 1975 California Coastal Plan:

The Coastal Plan authors' contempt for private action is consistent with the myth that "private planning is short-term and selfish while government planning is long-term and public." This is the greatest myth of them all . . . . I submit that . . . public planning is guided by political motives and hence tends to be short-term in nature. . . .

. . . .

Even a casual glance at the affairs of most men indicates that private decisions are not short-term.


[In economic analysis] the term "lexical ordering" [is used] to describe the single-minded, uncompromising pursuit of a particular objective by a decision maker. . . .
or equity should dictate the allocation of coastal resources. After years of separate and piecemeal regulation of land, water, and sky, what has been, perhaps too sanguinely, described as a “quiet revolution” in resource allocation has occurred, and with it has come the “comprehensive plan.” Yet, despite skepticism of the

Consequently, it is fascinating to see the authors of the [California] Coastal Plan exhibit their lexical preferences for environmental enhancement....

... Interpreted literally, the adverse environmental impact of activity in the coastal zone would be minimized if all human activity were excluded from the coastal zone. No doubt the authors of the Plan would plead that was not their intention; yet that is what they propose by their statements and by their advocacy of an uncompromising and single-minded devotion to a single concern—the environment.

Id. at 9-10.

It is commonly alleged that “future generations are best served if the present generation conserves resources.” This popular myth ignores the fact that future generations will receive a legacy from the present whatever happens; the only question is the form in which we pass the resources on to future generations. We can leave our coal and iron ore in the ground so that future generations can use them as they please or we can mine the coal and the ore, turn it into steel, machine it into capital goods, and leave a legacy of capital and embodied technology.

Id. at 17 (emphasis in original).

The fundamental question is: How will the citizens of California be able to register their preferences for marshes versus housing, jobs versus wilderness areas, and gasoline versus marine life, if the [California] Coastal Plan is implemented? The Plan is remarkably silent on the issue of how society's valuation of coastal resources versus other goods and services will be discovered, if at all.

Id. at 10. “In the final analysis, it is hard to avoid the conclusion that the Coastal Resources Allocation Plan has earned its acronym.” Id. at 23.

For a more positive view of the California Plan, see PROTECTING THE GOLDEN SHORE: LESSONS FROM THE CALIFORNIA COASTAL COMMISSION (R. Healy ed. 1978).

12. “Efficiency” refers to “the relationship between the aggregate benefits of a situation and the aggregate costs of the situation,” while the term “equity” refers “to the distribution of [the resources]... among individuals.” A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7 (1983).

In other words, efficiency corresponds to the “size of the pie,” while equity has to do with how it is sliced. Economists traditionally concentrate on how to maximize the size of the pie, leaving to others—such as legislators—the decision how to divide it.

One important question is whether there is a conflict between the pursuit of efficiency and the pursuit of equity. If the pie can be sliced in any way desired, then clearly there is no conflict—with a bigger pie, everyone can get a bigger piece. If, however, in order to create a bigger pie, its division must be quite unequal, there may well be a conflict between efficiency and equity.

Id. at 7-8.


14. See J. KUSLER, supra note 1, at 8.

15. The CZMA declares it to be a Congressional policy to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full
economic determinism which has traditionally informed land-use planning, and despite the general recognition that government at some level must decide the distribution of scarce resources, the ambitious plans and programs of the last decade have not worked as expected: Citizens are angry, local governments are frustrated.

consideration to ecological, cultural, historic, and esthetic values as well as to needs for economic development . . . .


16. Hardin, The Tragedy of the Commons, 162 SCIENCE 1243 (1968). Hardin’s brief article has had great impact on environmental theory. It is perhaps most famous for the parable from which the article takes its name:

The tragedy of the commons develops in this way. Picture a pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons. Such an arrangement may work reasonably satisfactorily for centuries because tribal wars, poaching, and disease keep the numbers of both man and beast well below the carrying capacity of the land. Finally, however, comes the day of reckoning, that is, the day when the long-desired goal of social stability becomes a reality. At this point, the inherent logic of the commons remorselessly generates tragedy.

As a rational being, each herdsman seeks to maximize his gain. Explicitly or implicitly, more or less consciously, he asks, “What is the utility to me of adding one more animal to my herd?”

. . . .

Adding together the component partial utilities, the rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another; and another . . . . But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.

Id. at 1244 (emphasis in original).


19. See Greene, supra note 9.

One of the areas designated critical was the Florida Keys. Environmentalists find it hard to mention this without a bitter smirk. The designation was made way back in the days when Port Bougainville was beginning to germinate in the brains of its developers. Today, with the Keys still under critical designation, the 2,800-unit North Key Largo condo project is displacing fragile mangrove wetlands and tropical hardwood forests and threatening one of the world’s most spectacular living coral reefs. The monster project is a good example of how the goals and laws of 1972 need to be reevaluated in 1984.

Id. at col. 4.

The state’s designation of the Keys as an Area of Critical State Concern (ACSC) has been meaningless in controlling growth and monitoring new developments.

Zoning records show that . . . [from the date of designation in 1975 until 1982] at least 51 major developments have been approved for construction—more than at any other time in Monroe County history.

Reprint, supra note 4, at 2. “[Through July, 1982] the zoning board has never rejected a big condominium project in the Keys.” Id. at 4.
and meanwhile the plowing under of tidelands continues.\textsuperscript{20}

As demands on the shoreline grow and competition for each piece of it intensifies, government will be called upon with increasing frequency to decide resource-use conflicts in ways which must address both short-term economic concerns and long-term policy. Local governing bodies may be incapable of resolving these conflicts satisfactorily, either because of their inability to control (as well as limited interest in) activities beyond their boundaries or because of limitations on their power imposed by the state.\textsuperscript{21} These shortcomings of local control have led to an emphasis on state or regional planning for the coastal zone.\textsuperscript{22} The planning itself can generally be characterized as a choice between control by regulation (the more common approach) and control through some sort

\textsuperscript{20} But vast stretches of the wild coastline had disappeared under assault of bulldozers and dragline to make boatarama cities and mobile home retirement villages . . . . Palls of smoke hid thousands of acres around industrial sites. Perhaps from the air the destruction of what seemed to be left was invisible and the region was already destroyed.

\textsuperscript{21} Many states adhere to Dillon's Rule, which limits the power of municipalities:

- The powers of corporations, stated in general language, are such and such only as the legislature has conferred upon them. Those of municipal corporations . . . are:
  1. Those granted in express words.
  2. Those necessarily or fairly implied in or incident to the powers expressly granted.
  3. Those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.

of ownership interest.

Control by regulation includes such techniques as traditional land-use planning (i.e., the designation of certain areas for certain general uses or activities)\(^\text{23}\) and various permit systems requiring governmental approval before certain property can be developed\(^\text{24}\) or certain activities undertaken.\(^\text{25}\) Although too stringent regulation runs the risk of being labeled an unconstitutional taking of private property without just compensation,\(^\text{26}\) the successful prosecution of such a “taking”\(^\text{27}\) case under a state coastal act appears to be the exception rather than the rule.\(^\text{28}\)

Where feasible, regulation is clearly the more expedient and less expensive method of control. However, in some circumstances, regulation is simply insufficient. The control needed to accomplish the


\(^{26}\) See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (state statute designed to protect property above coal mines from subsidence held to have “taken” mining rights).

\(^{27}\) For the nuances of various “constructive” condemnation actions, see Klopping v. City of Whittier, 8 Cal. 3d 39, 46, 500 P.2d 1345, 1351, 104 Cal. Rptr. 1, 7 (1972) (defining “de facto taking” as a case in which “the landowner claims that because of particularly oppressive acts by the public authority the ‘taking’ actually has occurred earlier than the date [of the condemnation action] . . . .”); D. Hagman, Urban Planning and Land Development Control Law §§ 180, 181 (1975) (distinguishing a regulatory “taking,” such as that in Pennsylvania Coal, from “inverse condemnation,” in which government action negligently damages private property). It appears, however, that many courts are unconcerned with the niceties of these distinctions. For purposes of this article, the term “taking” will encompass all such takings.

\(^{28}\) See Avco Community Developers, Inc. v. South Coast Regional Comm’n, 17 Cal. 3d 785, 800-01, 553 P.2d 546, 556, 132 Cal. Rptr. 386, 396 (1976) (requirement of development permit under California Coastal Act of 1972 held not to amount to a taking); Marina Plaza v. California Coastal Zone Conservation Comm’n, 73 Cal. App. 3d 311, 325, 140 Cal. Rptr. 725, 733 (1977) (permit denial held not to invade or appropriate property right as required for inverse condemnation); In re Loveladies Harbor, Inc., 176 N.J. Super. 69, 422 A.2d 107 (1980) (denial of dredge and fill permits held not to be a taking); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (restrictions on filling wetlands held to be a proper exercise of police power rather than an unconstitutional taking); see also Owens, Land Acquisition and Coastal Resource Management: A Pragmatic Perspective, 24 WM. & MARY L. REV. 625, 632-33 & n. 33 (1983) (stating that successful taking challenges are rare). But see State v. Johnson, 265 A.2d 711, 716 (Me. 1970) (injunction against filling wetland found to be a deprivation of reasonable use of property and therefore a taking); Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 593, 133 A.2d 232 (1963) (denial of request for variance from ordinance strictly limiting wetland uses held to be confiscatory).
state's purpose may be so extensive that it is inconsistent with private ownership. For example, the state may wish to erect windbreaks on the property in order to protect the rest of the community from storm damage, or to prohibit any private use of the land in order to create a wildlife sanctuary. In such cases, regulation may be inappropriate, and the state must consider acquisition of either a fee or some other interest in the property.

Alternatively, the regulatory scheme may have failed. Where the tideland in question is extremely vulnerable or where conflicts among resource users have become too complex or too fragmented to be resolved by regulation, land acquisition can be not only a tremendously valuable tool, but perhaps the only effective resource management device available.

The focus of this article is on the state's power of eminent domain as a means of controlling the use of scarce coastal resources. However, in order to determine whether this rather drastic exercise of governmental power is the most appropriate means of effecting its purposes, the state or its delegate must consider the alternatives. This article therefore will first examine briefly other possible means of control; it will then discuss the substantive and procedural requirements of eminent domain; and finally, it will consider problems of post-acquisition resource management.

II. ALTERNATIVES TO CONDEMNATION

Prior to commencing a condemnation action, the state (or regional planning body) ought to consider whether the forced purchase of a property interest is the only method of achieving its

29. This example is borrowed from Owens, supra note 28, at 631 (citing Lorio v. City of Sea Isle City, 88 N.J. Super. 506, 212 A.2d 802 (1965)).

30. "To leave . . . [the landowners] with commercially valueless land in upholding the restriction [on wetland development] presently imposed, is to charge them with more than their just share of the cost of this state-wide conservation program . . . ." State v. Johnson, 265 A.2d 711, 716 (Me. 1970).

31. As a prerequisite to receiving "administrative grants" under the CZMA, a state must demonstrate that it has authority "to acquire fee simple and less than fee simple interests in lands, waters, and other property through condemnation or other means when necessary to achieve conformance with the management program." 16 U.S.C. § 1455(d)(2) (1982).

32. Although certain problems, such as those presented by dealing with an unwilling seller, are unique to the situation of a forced sale, other considerations addressed infra may also be present in negotiated purchases. For example, considerations of management costs and policy should not vary substantially with the method of acquisition. Therefore, what is said about those problems in the context of eminent domain may be equally applicable to other situations.
objectives. The very nature of a condemnation action presupposes an adversarial proceeding, careful attention to due process considerations, and substantial investments of time and public money in litigating the case. Furthermore, eminent domain is a politically unpopular power, evoking fears of "Big Brother" totalitarianism and generating sympathy for the landowner, one of whose most sacrosanct rights, that of private property, is threatened. Nearly every other form of control, including negotiated purchase, involves less time and trouble, and most involve less expense as well.

A. Land Use Regulations

So long as the desired controls are not so stringent as to give rise to a "taking" claim, administrative regulation is a very desirable means of effectuating coastal land-use policy. It is relatively inexpensive, can usually take effect within a short time, frees the state from the complications of land management, and is accorded considerable judicial deference if challenged.

If the action can be characterized as "legislative" (i.e., a regulation of general application), it will be upheld in court unless it can be shown to be "arbitrary and capricious." Even if the action makes an individual adjudication, such as the denial of a permit, and is therefore judicial or quasi-judicial, it will be sustained so long as it bears a reasonable relation to the public health, safety, or

33. See Owens, supra note 28, at 630, 635.
35. See Note, Updating Eminent Domain for Environmental Control, 4 FLA. ST. U.L. REV. 24, 32 (1976). Administrative and personnel costs are involved, of course, but these costs also occur in land acquisition situations.
37. Zoning classifications, although applied to individual parcels of land, are often considered legislative actions. See R. Wright & M. Gittelman, Cases and Materials on Land Use 738-42 (3d ed. 1982) (discussing cases from various jurisdictions, some of which characterize zoning as legislative and some as quasi-judicial).
38. See Kropf v. City of Sterling Heights, 391 Mich. 139, ---, 215 N.W.2d 179, 188 (1974) (zoning case in which plaintiffs' argument that another use would make the land more valuable did not "meet the burden plaintiffs have in showing that exclusion of other uses from this property was arbitrary and capricious."). See generally Davis v. California Coastal Zone Conservation Comm'n, 57 Cal. App. 3d 700, 705-07, 129 Cal. Rptr. 417, 420-21 (1976).
welfare, and there is "substantial evidence" to support the action.\textsuperscript{39} Only when a fundamental right, such as a vested property interest, is affected by the regulatory action will the court apply stricter scrutiny to the government's action.\textsuperscript{40} (Note, however, that the landowner has no property interest in the existing or proposed zoning of his land.\textsuperscript{41} By analogy, neither should he have any such interest in a designation of his property under a coastal plan absent a denial by the state of a particular use for the property.)

Once a property interest\textsuperscript{42} is found to be affected by the regulatory action, a court may choose to employ any of several tests for determining whether the action constitutes a compensable taking.\textsuperscript{43} One test which has been applied in wetlands litigation is whether the regulation deprives the landowner of the use\textsuperscript{44} of his property. This was one of the criteria used in \textit{Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills}, a case in which the court found a regulation depriving the landowner of income-producing uses of his property to amount to a taking. A similar result under similar reasoning was obtained in \textit{State v. Johnson}.\textsuperscript{46} In both cases, the courts focused on the fact that unfulfilled marshland had no commercial use. Other courts, however, have rejected the taking challenge under substantially similar cir-


\textsuperscript{41} See Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 796, 553 P.2d 546, 553, 132 Cal. Rptr. 386, 383 (1976).

\textsuperscript{42} See W. STOEBUCK, NONTRESPASSORY TAKINGS IN EMINENT DOMAIN 1-3 (1977) (discussing the types of interest that have been considered "property" for condemnation purposes); see also D. HAGMAN, supra note 27, § 180.

\textsuperscript{43} See generally D. HAGMAN, supra note 27, §§ 179-181. It is clearly beyond the scope of this article to examine all the permutations of the "taking" issue.

\textsuperscript{44} Some courts find a taking when the owner is deprived of any "reasonable" use. See State v. Johnson, 265 A.2d 711, 716 (Me. 1970). However, what is a "reasonable" use seems to depend on the predilections of the court. Compare Just v. Marinette County, 56 Wis. 2d 7, 193 A.2d 232, 240 (1963) (wetland regulations limiting landowners to "natural and indigenous uses" held reasonable) with Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232, 240 (1963) (wetland regulations keeping swamp in its natural state held to deprive owner of uses "of the type available . . . as a reasonable means of obtaining a return from his property" and therefore a taking).

\textsuperscript{45} 40 N.J. 539, 193 A.2d 232 (1963).

\textsuperscript{46} 265 A.2d 711 (Me. 1970). For a suggestion that the state's attorney mishandled the case, see Halperin, Conservation, Policy, and the Role of Counsel, 23 Me. L. Rev. 119 (1971).
cumstances.\textsuperscript{47} Still other courts have focused on the burden on the landowner to prove deprivation of use, generally concluding that the owner has failed to show that there is no reasonable use remaining for his property.\textsuperscript{48} It has also been asserted that the owner has a right to continue only a use "actually instituted . . . [but] not to capitalize upon anticipated profit."\textsuperscript{49} It appears that the "deprivation of use" test is not so much an analytical tool as a convenient formulation of the court's opinion and, as such, is not particularly helpful in determining whether a taking has occurred.

A second, somewhat overlapping test employed in \textit{Parsippany} appears to offer a somewhat more objective basis of analysis, although it too is far from free of ambiguity. This test, the public benefit vs. prevention of public harm test,\textsuperscript{50} provides that if the regulation creates a public benefit, it is a compensable taking; whereas if it is intended to prevent a public harm, it is a valid exercise of the police power.\textsuperscript{51} the notion that prevention of public harm does not require compensation for taking or damage probably derives from the right of government to abate a public nuisance.\textsuperscript{52} However, the prevention of harm doctrine may also have

\textsuperscript{47} See, e.g., \textit{Just v. Marinette County}, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

\textsuperscript{48} See \textit{Mugler v. Kansas}, 123 U.S. 623, 669 (1887) (statute prohibiting manufacture and sale of alcoholic beverages "does not disturb the [brewery] owner in the control or use of his property for lawful purposes").


\textsuperscript{50} 40 N.J. at \underline{193}, 193 A.2d at 240 ("[T]he main purpose of enacting regulations with the practical effect of retaining the meadows in their natural state was for a public benefit [flood control and open space].").

\textsuperscript{51} “A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit.” \textit{Mugler v. Kansas}, 123 U.S. at 668-69. \textit{See also} D. Hagman, \textit{supra} note 27, \textsection 28.

\textsuperscript{52} Certainly the Court in \textit{Mugler} seemed to think so:

The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

123 U.S. at 669 (emphasis added).
evolved from the government’s privilege to destroy private property in an emergency, such as to prevent the spread of fire or to keep the property from falling into enemy hands during wartime.\textsuperscript{53}

Whatever its origins, the doctrine is susceptible to varying applications in the wetlands context. For example, in \textit{Parsippany}, the regulations prohibiting commercial uses of marshland were found to create the public benefits of flood control and open space\textsuperscript{54} and were therefore confiscatory. Similarly, in \textit{State v. Johnson},\textsuperscript{55} the court found that wetland regulations were intended to preserve “a valuable natural resource of the state,”\textsuperscript{56} adding, “the benefits from its preservations . . . are state-wide. The cost of its preservation should be publicly borne.”\textsuperscript{57} However, a very similar regulation was held in \textit{Just v. Marinette County}\textsuperscript{58} to amount to prevention of a public harm. In response to the landowners’ argument that their property had suffered severe depreciation in value, the court held:

\begin{quote}
[T]his depreciation of value is not based on the use of the land in its natural state but on what the land would be worth if it could be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.
\end{quote}

\ldots

\ldots The shoreland zoning ordinance preserves nature, the environment, and natural resources as they were created and to which the people have a present right. The ordinance does not create or improve the public condition but only preserves nature from the despoilation and harm resulting from the unrestricted activities of humans.\textsuperscript{59}

\textsuperscript{53} See C. Gregory, H. Kalven, & R. Epstein, \textit{Cases and Materials on Torts} 39-41 (3d ed. 1977) (discussing emergency cases). The authors state that “[a]lthough authority on the question is scant, the general view is that the privilege [to destroy private property] is . . . complete in that no action will lie against either the private or governmental parties whose conduct is justified by a public necessity.” \textit{Id.} at 39.

\textsuperscript{54} 40 N.J. at —, 193 A.2d at 240.

\textsuperscript{55} 265 A.2d 711 (Me. 1970).

\textsuperscript{56} \textit{Id.} at 716 (apparently quoting from an unreported earlier proceeding arising out of the same permit denial).

\textsuperscript{57} \textit{Id.}

\textsuperscript{58} 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

\textsuperscript{59} \textit{Id.} at —, 201 N.W.2d at 771 (footnote omitted).
Are such concerns as flood control, clean water, and preservation of fish and wildlife primarily benefits to the public, or are they instead preventive measures to control floods, water pollution, and the loss of valuable resources? These concerns seem susceptible to either characterization.

Thus, it is apparent that, despite the advantages of control by land-use regulation, this method has definite, if ill-defined limitations even beyond the administrative difficulties. Particularly in an unsympathetic jurisdiction, the application of the regulation may be invalidated. The state then has the choice either of redrafting the regulation in the hope that it will survive the court’s scrutiny on the next challenge or of exercising its power of eminent domain. Certain other methods of control are more severely limited in application but are less susceptible to characterization as a compensable taking because private property interests are held to be either restricted, overridden, or nonexistent.

B. Public Trust

In brief, the public trust doctrine declares that the state holds the navigable waters, submerged lands, and at least a part of the tidelands as trustee for the public. Derived from a mixture of

60. See supra text accompanying notes 3-20.

61. See, e.g., United States v. Willow River Power Co., 324 U.S. 499 (1945) (finding no property interest in the water level of a stream); United States v. 62.61 Acres of Land, 547 F.2d 818 (4th Cir. 1977) (holding that a jetty extending into navigable waters is not a compensable property interest); People v. Hecker, 179 Cal. App. 2d 823, 3 Cal. Rptr. 334, 346 (1960) (holding that an upland owner’s right of access across tidelands was too speculative an interest to be compensable in eminent domain proceedings).

62. Usually, the state holds land in public ownership to the mean high-water (or high tide) mark. See, e.g., Shively v. Bowlby, 152 U.S. 1, 13 (1894). But see VA. CODE ANN. § 62.1-1.2 (Repl. Vol. 1982) (extending private ownership to the mean low-water mark). Public rights to the dry-sand area (between the high-water mark and the vegetation line) have been hotly litigated in some jurisdictions. See State ex rel. Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969) (discussing public trust but basing the public’s right on the separate doctrine of custom). New Jersey has very recently determined, under public trust, “that the public must be given both such access to and use of privately-owned dry sand areas as is reasonably necessary.” Matthews v. Bay Head Improvement Ass’n, 95 N.J. 306, 471 A.2d 365 (1984). See also Alter, The Erosion of Private Ownership of Shorefront Property, REAL EST. REV., Winter, 1983, at 45, 46. The article was written before the New Jersey Supreme Court had heard the Matthews case, but the author pointed out that, if the claim of public rights in the dry-sand area were recognized in this case, New Jersey would become the first east-coast state to find such a right. Id. at 46.

New Jersey has frequently litigated the public trust doctrine in the context of beach use. See, e.g., Lusardi v. Curtis Point Property Owners Ass’n, 86 N.J. 217, 430 A.2d 881 (1981) (overturning zoning ordinance which restricted beachfront property to single-family residen-
Roman law, English common law, and a certain amount of political expediency, the doctrine is invoked primarily in cases of a conveyance of tidelands to private parties or of desired public access to beaches.

Under the public trust doctrine, the public is said to be entitled to certain uses (the *jus publicum*) of the tidelands, traditionally rights of navigation, trade, and fishing. While some courts still adhere to these narrow eighteenth-century limitations on uses, many other courts have adopted a more expansive view of the doctrine, holding that “[t]he public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs.” Probably, the most commonly asserted new public use is that of recreation.

The public trust doctrine has certain distinct advantages for coastal land-use planning. As a common law doctrine, it is probably more flexible than many statutory devices. Unlike other, similar common law doctrines such as custom and prescription, conventional uses and limited recreation to an accessory use); Van Ness v. Borough of Deal, 78 N.J. 174, 393 A.2d 571, 573 (1978) (holding that a publicly owned beach is subject to public trust and “must be open to all on equal terms and without preference”); Borough of Neptune City v. Avon-by-the-Sea, 61 N.J. 296, 294 A.2d 47 (1972) (municipality cannot charge nonresidents higher rates than residents for use of municipally owned beach).

63. See Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 425 (1892) (“It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.”); *Borough of Neptune City*, 61 N.J. at 296, 294 A.2d at 51 (“[L]and covered by tidal waters belonged to the sovereign, but for the common use of all the people.”).


69. Bradford, 224 Va. at 197, 294 S.E.2d at 874 (public has “right to fish, fowl and hunt.”). This case was decided under a statute, Va. Code Ann. § 41.1-4 (Repl. Vol. 1981), but the statute itself amounts to a codification of the early common law.

70. Marks, 6 Cal. 3d at 259, 491 P.2d at 386, 98 Cal. Rptr. at 796.

71. See Van Ness, 78 N.J. at 174; 393 A.2d at 571 (municipality unable to limit public right to beach recreation by restricting use to residents); *Borough of Neptune City*, 61 N.J. at 296, 294 A.2d at 47 (municipality allowed to assess beach user fees but not to discriminate between residents and nonresidents).


73. See Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970) (granting injunction to protect prescriptive easement to beach from self-help by landown-
tinual use over a period of years is not required in order to find a public trust. Unlike implied dedication, the intent of the landowner, the public, and the state is irrelevant. The trust exists regardless of how the parties behave. On the other hand, the doctrine has a number of drawbacks. It is limited geographically to navigable waters and tidelands. Thus, uplands (above the vegetation line) are not subject to the trust. Even more seriously, the uses for which the trust may be employed are generally restricted to those involving some sort of public participation. This limitation has a twofold effect: First, a littoral owner may make any use he likes of his property so long as it does not interfere with these specific public rights. Second, there is serious doubt whether the landowner (state or individual) can put the land to a use which is clearly beneficial to the public but which excludes the public from the property.

For example, a recent Virginia case prohibited a private entity, the Nature Conservancy, from excluding the public from barrier island property which the Conservancy had acquired for the purpose of preserving it in its natural state. Several New Jersey cases have forbidden coastal municipalities to place restrictions on access by nonresidents to their beaches.

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74. See Bradford, 224 Va. at 198, 294 S.E.2d at 875: In order for a road to be dedicated to the public, there must be an offer made by the landowner and an acceptance by the public . . . . While a dedication may be implied from the acts of the owner, these acts must be unmistakable to show the intention of the landowner to permanently give up his property.

The opinion goes on to say that, because of frequent permissive use in rural areas, “formal acceptance by the public” or by the government on its behalf is required in such cases. Id. at 198-99, 294 S.E.2d at 875.

75. See Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892) (holding that an attempted conveyance to a private party by the state legislature could not defeat the trust). Occasionally, where there has been considerable investment over a period of time in reliance on the conveyance, the state has been estopped from asserting the doctrine. See City of Berkeley v. Superior Court, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, cert. denied, 449 U.S. 840 (1980).

76. See supra note 62 and accompanying text.


78. See Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73 (Fla. 1974) (construction of observation tower 17 feet in diameter and resting on sand held not to interfere with public’s recreational rights in beach).


California apparently takes a more liberal view of permissible uses. In the context of a case dealing with the right to fish from public lands\(^{81}\) (a right guaranteed by the state constitution\(^{82}\)), the state supreme court held that the right would not apply "to state-owned lands which are used for a governmental purpose that is incompatible with use by the public for fishing."\(^{83}\) (However, the examples cited of such inconsistent uses are prisons and mental institutions.\(^{84}\)) Another California case\(^{85}\) specifically suggests in dictum that the public trust might be expanded to include "preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area."\(^{86}\)

In a jurisdiction whose philosophy more closely resembles that of New Jersey than that of California, a state coastal agency wishing to restrict public access for preservation purposes might still be able to do so in one situation: If the agency acquires the tideland through eminent domain and if the state is one which views a title so acquired as an original title,\(^{87}\) the agency can argue that it has thus taken the property free of the public trust. The argument would go roughly as follows: The public trust was an incident of the former grant, which derived from the sovereign and, in effect, separated title and beneficial ownership, just as in any other sort of trust. When the state acquired the land by condemnation, the old title and all its incidents were extinguished. Thus, although the nature of eminent domain requires that the land be taken for a public use,\(^{88}\) that use no longer must include public access and recreational rights. (This argument presupposes a distinction between

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82. CAL. CONST. art. I, § 25.
83. 22 Cal. 3d at 447, 584 P.2d at 1091, 149 Cal. Rptr. at 485.
84. Id.
86. Id. at 259-60, 491 P.2d at 380, 98 Cal. Rptr. at 796.
87. See A.W. Duckett & Co. v. United States, 266 U.S. 149, 151 (1925):
Ordinarily an unqualified taking in fee by eminent domain takes all interests and as
it takes the res is not called upon to specify the interests that happen to exist. . . .
[T]he accurate view would seem to be that such an exercise of eminent domain
found a new title and extinguishes all previous rights.
(emphasis added). But see 3 J. SACKMAN, NICHOLs' THE LAW OF EMINENT DOMAIN § 9.1 (rev.
3d ed. 1981) (stating that courts are split on the question of whether eminent domain con-
fers original title).
88. See infra notes 123-43 and accompanying text.
the state and the public, of course. If the two are considered iden-
tical, the state could never condemn the public's interest because it
would already own it. However, such a separation of interests is
implicit in any trust.)

Regardless of the merits of this argument, however, its applica-
bility is clearly limited, as indeed is the usefulness of the public
trust doctrine as a land-use tool.

C. Navigational Servitudes

A doctrine with many of the same philosophical underpinnings
as public trust is that of the navigational servitude. "Stated in its
broadest form, the navigation servitude stands as a bar to compen-
sation when riparian rights are destroyed by governmental activi-
ties done under aegis of a power to regulate or improve
navigation."89

This servitude, anchored in the commerce clause,90 is a well-es-
tablished principle of federal law.91 While its precise parameters
may be disputed,92 it is clear that the doctrine gives the federal
government authority to take or damage certain riparian rights or
interests93 in navigable waters or even in nonnavigable waters flow-
ing into a navigable stream,94 without compensation, so long as the
taking is at least partially in aid of navigation.95 However, compen-
sation is due "when permanent physical encroachment upon or in-
vasion of land riparian to the navigable waterway but above the
ordinary high-water mark results."96

89. W. STOECKEL, supra note 42, at 99.
90. U.S. CONST. art. I, § 8, cl. 3.
91. See, e.g., United States v. 62.61 Acres of Land, 547 F.2d 818, 820 (4th Cir. 1977)
(holding that condemnation of submerged land did not entitle riparian owner to compensa-
tion, either for land or for attached stone jetty).
92. See Kaiser Aetna v. United States, 444 U.S. 164 (1979) (holding that the servitude did
not apply to a body of water which became navigable only after artificial improvements).
93. In some cases the court has denied even the existence of a property interest. See
United States v. 62.61 Acres of Land, 547 F.2d 818 (4th Cir. 1977) (holding that a jetty
extending into the Chesapeake Bay was not only noncompensable but also merely permis-
sive, and therefore not a property interest).
94. See United States v. Grand River Dam Auth., 363 U.S. 229 (1960) (federal hydroelec-
tric project in nonnavigable tributary of navigable river held to constitute part of plan for
flood control and regulation of navigation and therefore to fall within the servitude).
95. See Oklahoma v. Atkinson, 313 U.S. 508 (1941) (upholding application of servitude to
hydroelectric project with incidental benefit of flood control).
Although less well known, a state navigational servitude also exists. It "is subordinate to the federal one, but where the federal government has not acted, it allows the state, in aid of navigation, to take private riparian rights without paying the compensation that would otherwise be required by the fourteenth amendment." Its origins have been variously ascribed to the public trust doctrine and to the state's police power.

Perhaps because of the pervasiveness of federal authority over navigation, the state servitude has seldom been employed. However, the 1967 California case of Colberg, Inc. v. State not only invoked the doctrine but apparently greatly expanded its scope. In denying compensation to a shipyard owner whose access was partially blocked by a freeway bridge over a navigable river, the court declared that "[t]he state, as owner of its navigable waterways subject to a trust for the benefit of the people, may act relative to those waterways in any manner consistent with the improvement of commercial traffic and intercourse." Furthermore, "[t]he servitude . . . precludes compensation for impairment or curtailment of all rights not damaged by permanent physical invasion of or encroachment upon fast lands . . . ." Thus, under this broadened doctrine, a state action which aided land traffic and commerce and, in fact, obstructed navigation was found to be noncompensable.

Despite fears that Colberg might mean that "no owner on navigable waters . . . will ever again receive compensation from the state for the taking of his riparian rights," the case has seldom been cited and has apparently never been determinative in a water-rights controversy. In an Alaska case, Wernberg v.

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97. See W. Stoebuck, supra note 42, at 113.
100. Wernberg, 516 P.2d at 1195.
101. See W. Stoebuck, supra note 42, at 114 & n.129 (indicating that the doctrine appears primarily in dicta); see also Wernberg, 516 P.2d 1191, in which the doctrine was raised in argument but held not to apply.
103. See W. Stoebuck, supra note 42, at 115-16 ("If the doctrine of this decision should catch on, the case would become famous, for the doctrine is as original as it is far reaching." Id. at 115).
104. 67 Cal. 2d at ___, 432 P.2d at 11, 62 Cal. Rptr. at 409 (emphasis added).
105. Id. at ___, 432 P.2d at 14, 62 Cal. Rptr. at 412.
107. See, e.g., City of Berkeley v. Superior Court, 26 Cal. 3d 515, 545, 606 P.2d 362, 380,
State, a Colberg argument was expressly rejected. The well-reasoned opinion, which analyzed the historical and philosophical bases of the state servitude, identified as "the greatest flaw in the Colberg reasoning . . . that it finds a state servitude broader in scope than the federal servitude to which it is admittedly subordinate."  

Although a Colberg-type servitude would undoubtedly be of great benefit to a state wishing to assert control over tidelands, principles of fairness suggest that the doctrine not be invoked. The navigational servitude is, after all, a species of noncompensable condemnation and, as such, should be both narrowly construed and sparingly applied.

D. Voluntary Acquisitions

Having decided that neither land-use regulation nor any sort of noncompensable public easement will serve its purposes, the state should consider acquiring an ownership interest in the wetlands. One commentator has identified three general methods of acquisition: purchase (including eminent domain), donation, and dedication.

A voluntary, negotiated purchase may occasionally give the state a better price than that at which the property would be assessed in a condemnation proceeding. The major advantages of voluntary purchase over eminent domain, however, are expediency, the savings in litigation costs, and goodwill. It is also possible that the state will have more flexibility in identifying the interest to be purchased and the use to which the property will be put. However, the funding process may impose on the state nearly as many strictures as would the requirements of eminent domain.

162 Cal. Rptr. 327, 345, cert. denied, 449 U.S. 840 (1980) (citing Colberg for the proposition that the state servitude is subordinate to federal rights); Bott v. Commission of Natural Resources, 415 Mich. 45, 327 N.W.2d 838, 858 (1982) (citing Colberg as saying that a state may set its own tests for navigability so long as they do not conflict with federal control); Sibson v. State, 110 N.H. 8, 259 A.2d 397, 400 (1969) (citing Colberg as holding that the state servitude involves the "power to control, regulate, and utilize" public waters); St. Lawrence Shores, Inc. v. State, 60 Misc. 2d 74, 302 N.Y.S.2d 606, 614 (N.Y. Ct. Cl. 1969) (referring to Colberg for the proposition that damages do not lie for impaired access under a bridge, but finding, in this case, that access was not impaired).

109. Id. at 1197.
110. Owens, supra note 28, at 640.
111. See infra notes 118-52 and accompanying text.
While relatively uncommon,112 donations are clearly a very desirable means of acquiring property. Aside from the obvious benefit to the state, there are "[s]ubstantial income tax advantages"113 to the donee, and it has been urged that a donation program be incorporated into any coastal management plan.114 Although careful planning may avert some of the difficulties inherent in establishing such a program, the risk remains that the state will not have completely free choice in what it acquires by donation, particularly where the gift is testamentary. Furthermore, the donor may impose unworkable or unacceptable conditions on his gift, and there is no guarantee that a court will sanction the conveyance without the conditions.115

Dedication is a particularly useful and inexpensive means of acquiring land for such purposes as public access and recreation. This method, however, has one major drawback:

The dedication requirement is . . . triggered only by requests for approval of development proposals, and its use generally is limited to instances of active property development. Because the dedication requirement generally must relate back to public service needs or costs being generated by the development, this method has only limited usefulness. It will not address needs in previously developed areas, and is of little use when the purpose of acquiring the land is to prevent development.116

A related problem is that, where the dedicated land is not integrally connected with needs generated by a development, the dedication may be held void as illegal contract zoning.117

113. Id. at 641.
114. Id. The commentator cautions, however, that success "demands extreme flexibility, patience, diplomacy, initiative, and persistence by the acquiring agency." Id.
115. See, e.g., Evans v. Abney, 396 U.S. 435 (1970) (upholding a state court decision that a testamentary trust establishing a racially segregated city park failed for lack of legitimate purpose and that the property reverted to the devisor's heirs, despite the argument that the trust should be amended under the cy pres doctrine to allow an integrated park).
117. "In several . . . jurisdictions votes to rezone on the express condition that the owner impose restrictions (sometimes called 'contract zoning') have been held invalid." Sylvania Elec. Prods., Inc. v. City of Newton, 344 Mass. 428, --, 183 N.E.2d 118, 121 (1962). The rationale is that such private agreements represent an abdication of the legislative power. See id. at --, 183 N.E.2d at 123-26 (Kirk, J., dissenting); D. Hagman, supra note 27, § 94; see also Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 799-800, 553 P.2d 546, 556, 132 Cal. Rptr. 386, 395-96 (1976) (sacrifice sale of beach prop-
Needless to say, the greatest difficulty with any of these acquisition methods is finding a willing grantor. If the landowner is open to persuasion and negotiation, the state can acquire what it needs with relatively little trouble. If the owner is unwilling to part with his property, and if acquisition of the land is important, the state must give serious consideration to condemnation proceedings.

III. SUBSTANTIVE REQUIREMENTS OF EMINENT DOMAIN

Although the language of some inverse condemnation cases suggests that the state is free to take private property at will so long as it compensates the owner,118 this suggestion oversimplifies the requirements for the exercise of eminent domain. The prime limitation on the exercise of this power is found in the fifth amendment, which states: “[N]or shall private property be taken for public use, without just compensation.”119 Either by constitution or by case law, all states have imposed similar limitations on eminent domain.120 Aside from the statutory procedural requirements,121 three substantive limitations have evolved from the state and federal constitutional provisions:

1. The taking must be for a public use.
2. The state can take no greater interest than is reasonably necessary to serve its purpose.

3. The owner must receive fair value for what is taken.

This section will examine the first two requirements.\(^{122}\)

A. Public Use

The "public use" requirement is the subject of varying interpretations. Some jurisdictions have read the term to mean a use which involves "a public purpose, benefit or the public welfare"\(^{123}\) even though a private individual may also derive considerable benefit.\(^{124}\) Other courts have adhered strictly to the requirement of an actual, overriding public use,\(^{125}\) including a "guarantee that the public will

\(^{122}\) This article will touch only briefly on valuation. Just compensation and its ramifications have provided enough material for several volumes. Among the works on the subject are these: L. Orgel, Valuation under the Law of Eminent Domain (2d ed. 1953) (two volumes); 4, 4A, & 5 J. Sackman, supra note 87; Valuation for Eminent Domain (E. Rams ed. 1973).


\(^{124}\) A very recent United States Supreme Court decision, Hawaii Hous. Auth. v. Midkiff, 81 L. Ed.2d 186 (1984), gives vigorous support to this point of view. The case upheld the constitutionality of Hawaii's land reform program which, in effect, requires the conversion of many small leaseholds into freehold estates, in a monumental effort to defeat the concentration of most Hawaiian landownership in the hands of fewer than one hundred landlords. The Court declared:

The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public. . . . In such cases, government does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause [of the fifth amendment].

Id. at 199. See also D. Hagman, supra note 27, § 174 (discussing urban renewal projects which are considered to meet the public use test although involving transfers of property from one private owner to another), § 175 (discussing condemnation by private parties, such as public service corporations). Hagman mentions as one instance of such "private condemnation," the "reclamation of wetlands." Id. § 175. See also Note, Coal Slurry Pipeline, 17 U. Rich. L. Rev. 789, 798-804 (1983) (discussing the availability of eminent domain authority for construction of a coal slurry pipeline in Virginia).

\(^{125}\) See Karesh, 271 S.C. at ---, 247 S.E.2d at 344 (denying use of eminent domain to condemn land for a parking garage and convention center on grounds that "the proposed plan would allow the City to join hands with a developer and undertake a project primarily of benefit to the developer, with no assurance of more than negligible advantage to the general public."). See also the definition of public use found in a Virginia case:

A use to the public must be fixed and definite. It must be one in which the public, as such, has an interest, and the terms and manner of its enjoyment must be within the control of the State, independent of the rights of the private owner of the property appropriated to the use. The use of the property cannot be said to be public if it can
enjoy the use of the facilities”126 or “an enforceable right [of the public] to a definite and fixed use of the property.”127

Where the state retains both ownership and use of the property, as in wildlife preserves, public parks and recreation areas, and flood control projects, the public use requirement should be satisfied in any jurisdiction. Clearly, a more difficult situation arises when the plan contemplates a cooperative venture by both government and the private sector, such as restoration of a blighted waterfront.128 In such a situation, the public use and benefit ought clearly to outweigh any private commercial advantage in order to justify use of eminent domain. In any case, the condemning agency would be well advised to articulate the public use for which the property is to be taken, because such a statement will be given considerable judicial deference if the condemnation is challenged.129

Closely related to the public use requirement is the requirement of public necessity. The questions the public necessity test poses are, first, “Is the use necessary?”; second, “Is eminent domain necessary to achieve the use?”; and finally, “Is the quantum taken [of either the acreage or the property interest] necessary to achieve the use?”130

Where the public use is to be immediate and where the property taken is to be used directly for that purpose, there should be little difficulty in demonstrating necessity. In general, “the need for making a given public improvement, for adopting a particular plan for it, and for taking particular property are considered matters for the discretion of the legislature or its appointed administrative
body.” Such a determination can be overturned only for “fraud, bad faith, or abuse of discretion,” all difficult grounds to establish.

The necessity may be somewhat more difficult to demonstrate where the state takes more property or a greater interest than is strictly needed or where it takes property for some future use. Such situations may arise when, for example, the “severance damages” due for injury to the adjoining uncondemned property approximate or exceed the cost of acquiring the entire parcel and the state opts instead to condemn the damaged property. This type of “excess condemnation” is almost certainly permissible, although it seems unlikely that wholesale condemnation which is not clearly related to an identifiable public use would be sanctioned.

Again, in the wetlands context, the state may practice “future condemnation” by acquiring stretches of coastline with the intention of merely holding them while a long-range coastal plan is formulated. The state may, of course, argue that preservation is itself a public use. However, so long as the amount of property taken and the length of time it is to be held are reasonable, the court should permit such future condemnation as within the state’s discretion to plan ahead.

A somewhat unusual question of the necessity of eminent domain arose in the Oregon case of State v. Hilderbrand. In that case, the owner of property covered by the Scenic Waterways Act repeatedly requested and was repeatedly denied permission to build a cabin on the land. After the owner had made at least four attempts to get approval, the state Department of Transportation, which administers the Scenic Waterways Act, filed a condemnation suit on the grounds that the act “authorizes the condemnation of ‘related adjacent land’ where the owner has proposed using the land in a manner which would impair the natural beauty of this scenic waterway and he has not subsequently aban-

132. Id.
133. Id. § 177.
134. See Carol Co. v. City of Miami, 62 So. 2d 897, 902-03 (Fla. 1953) (failure to start project for seven years held not to show bad faith).
137. 35 Or. App. at ___, 582 P.2d at 14-15. It is not clear from the opinion whether the landowner tried four or seven times to get his cabin approved. Id. at ___, 582 P.2d at 15.
doned his plan notwithstanding the state's disapproval thereof."\textsuperscript{138}

The court found the taking to be both necessary\textsuperscript{139} and constitutional,\textsuperscript{140} given the peculiarities of the Scenic Waterways Act, which would have allowed the landowner to proceed with his construction one year after notifying the Department of Transportation.\textsuperscript{141} The court held:

Thus, in light of the purpose of the Scenic Waterways Act, and giving due deference to the legislature's determination that public ownership of the related adjacent land is warranted under such circumstances, rather than having to maintain constant surveillance of it, the condemnation provisions of . . . [the Act] meet the test of reasonable necessity and, therefore, are constitutional.\textsuperscript{142}

Thus, the mere possibility of a detrimental use by the landowner was sufficient to make a showing of both public necessity and of the necessity of eminent domain. Although the decision in Hilderbrand is closely tied to the precise wording of the statute, by analogy it could provide a valuable rationale for shoreland preservation or for condemnation of otherwise permitted development rights.\textsuperscript{143}

\textbf{B. The Quantum of Interest Taken}

It is hornbook law that the state can acquire only the property interest which is reasonably necessary to accomplish the purpose for which the condemnation action was brought.\textsuperscript{144} The rationale behind this rule has been expressed thus: "If an easement will satisfy the public needs, to take the fee would be unjust to the owner, who is entitled to retain whatever the public needs do not require, and to the public, which should not be obliged to pay for more than it needs."\textsuperscript{145} Furthermore, by taking the entire fee, the condemning agency has removed the property from the tax base; whereas, if only an easement is condemned, the owner can be taxed

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138. Id. at __, 582 P.2d at 15 (citing Or. Rev. Stat. § 390.845(6)(a) (Repl. Part 1981)).
139. 35 Or. App. at __, 582 P.2d at 15-16.
140. Id. at __, 582 P.2d at 16.
142. 35 Or. App. at __, 582 P.2d at 16-17.
143. See infra text accompanying notes 149-51.
145. 3 J. Sackman, supra note 87, § 9.2[2].
\end{flushleft}
on the underlying fee.\footnote{146}{See Owens, \textit{supra} note 28, at 639 \& n.58.}

However, it appears that this rule is often more honored in the breach than in the observance. Judicial deference to the legislative determination of public necessity may uphold the taking of a fee for even a temporary necessity.\footnote{147}{See Wright \textit{v. Dade County}, 216 So. 2d 494, 497 (Fla. Dist. Ct. App. 1968), \textit{cert. denied}, 225 So. 2d 527 (Fla. 1969), \textit{cert. denied}, 396 U.S. 1008 (1970) (condemnor entitled to fee even though use "would not continue for a substantial period . . . ."); see also D. Hagman, \textit{supra} note 27, § 177 (citing instances in which "excess condemnation" has been upheld).} Furthermore, there are often valid reasons for acquiring a fee even when a lesser interest might suffice: "a need to acquire all property rights to adequately protect the property; the lack of any significant cost savings with alternatives; simplicity for both the private landowners and the government; and a lack of familiarity with less than fee acquisition."\footnote{148}{Owens, \textit{supra} note 28, at 637. Owens' analysis applies to all types of land acquisition; his last reason for acquiring a fee (ignorance of other interests) is less applicable to condemnation than to negotiated purchase.}

One clear case in which taking the entire fee would be justified is that of a conservation easement so extensive that the burdened land would be nearly valueless to its owner. (The resemblance to a taking by regulation is obvious.) If the state's purpose is resource preservation, nothing less than fee acquisition may suffice.

On the other hand, in many instances, taking a lesser interest may result in both savings to the state (in acquisition and sometimes in management costs) and retention of substantial benefits by the landowner. Usually, this lesser interest will be some form of easement, although there seems to be no reason why a leasehold or even an intangible interest, such as a franchise,\footnote{149}{For a discussion of the case law and commentary on the condemnation of intangible property, see City of Oakland \textit{v. Oakland Raiders}, 32 Cal. 3d 60, 66-69, 646 P.2d 835, 839-40, 183 Cal. Rptr. 673, 677-79 (1982). The decision held that the plaintiff city had the right to condemn a professional football franchise but remanded the case for evidence of public use.} could not be taken in appropriate circumstances.

A beach access easement through private upland property would give the public a right of passage and allow the owner to use the remaining land in any way which did not interfere with the easement. Conversely, a conservation or scenic easement might be taken to prevent commercial development while leaving the landowner certain agricultural or recreational uses.\footnote{150}{See, \textit{e.g.}, Kamrowski \textit{v. State}, 31 Wis. 2d 256, 142 N.W.2d 793 (1966); Owens, \textit{supra} note 28, at 637-38.} A variation on
the conservation easement is the acquisition of development rights, whereby the landowner relinquishes his right to develop his property.151 Again, in considering any of these interests, the acquiring agency should balance the cost of the entire fee against the cost of the easement (less any tax revenues on the underlying fee from which the agency would otherwise receive a benefit).

While such easements can often be of benefit to the state, there are disadvantages as well. One commentator points to the difficulties of precisely identifying and valuing the interest and to the possibility in some cases of "significant long-term administrative and enforcement costs not incurred with fee acquisitions."152 All of these factors must be weighed in determining the quantum of interest to be taken, but there is no particular reason to believe that the costs would be greater than those of administering many coastal zone management plans.

IV. PROBLEMS DURING THE CONDEMNATION PROCESS

Having determined that only eminent domain will meet its needs, the state still faces the protracted legal process of condemnation. The procedure will probably involve a showing of use and necessity,153 notice to the landowner,154 and some sort of judicial determination of just compensation.155 Some jurisdictions may even require a showing that a good-faith effort to purchase has been made prior to initiating the condemnation procedure.156

151. See D. Hagman, supra note 27, § 182; Owens, supra note 28, at 637-38; see also Schoenbaum & Rosenberg, The Legal Implementation of Coastal Zone Management: The North Carolina Model, 1976 DUKE L.J. 1, 33-34 (discussing transferable development rights (TDR's) in the coastal zone). TDR's allow the owner of property whose development is restricted by environmental or preservationist legislation to transfer those development rights to unprotected property. The validity of TDR's was examined in Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978), in which the Court found that these rights mitigated the burden imposed by New York's Landmark Preservation Law. Id. at 137. But 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 (1976) (holding that TDR's could not prevent the conversion of private property into public parks from being a taking).
152. Owens, supra note 28, at 639 & n.59.
156. See, e.g., MICH. COMP. LAWS ANN. § 213.55 (Cum. Supp. 1983-84); VA. CODE ANN. §
Aside from the purely procedural entanglements that may arise, the potential exists for harassment by either party during pendency of the litigation. Because title generally does not pass to the condemning until after the proceedings, a landowner may be able, in the interim, to cause the very harm which the condemnation was intended to prevent. Although such an action may reduce the amount of compensation which the owner ultimately receives, irreparable damage may have been done. Furthermore, the owner may not be especially concerned about his condemnation award if the value of the property to him is the right to carry on the activity in question. (An example is the removal of fill from a wetland. The owner may want only to remove as much fill as possible before title passes.) Neither is there any particular certainty that a preliminary injunction will lie to prevent the harmful activity.

On the other hand, certain practices by the condemning agency are also susceptible to characterization (and litigation) as harassment. One such practice is "condemnation blight," by which "an announcement that an undesignated parcel or parcels of land may be appropriated at some future time for a generally unappealing project may tend to decrease land values in the vicinity." Similarly, the agency's announced intention to institute eminent domain proceedings against specific property at some future date may result in impaired value (and hence reduced compensation).

25-46.5 (Repl. Vol. 1980) ("No proceedings shall be taken to condemn property until a bona fide but ineffectual effort has been made to acquire from the owner by purchase the property sought to be condemned . . . . "). But cf. CAL. CIV. PROC. CODE § 1230.030 (West 1982) ("Whether property necessary for public use is to be acquired by purchase or other means or by eminent domain is a decision left to the discretion of the person authorized to acquire the property.").


158. See, e.g., Florida E. Coast Ry. v. City of Miami, 299 So. 2d 152 (Fla. Dist. Ct. App. 1974) (holding that condemnee had vested right to continue fill operation begun under federal permit).

159. Klopping v. City of Whittier, 8 Cal. 3d 39, 45, 500 P.2d 1345, 1350, 104 Cal. Rptr. 1, 6 (1972).

160. Id. at 51, 500 P.2d at 1355, 104 Cal. Rptr. at 11:

[A] condemnee must be provided with an opportunity to demonstrate that (1) the public authority acted improperly either by unreasonably delaying eminent domain
Another variety of government oppression, with elements of both condemnation blight and taking by regulation, was examined in *Drakes Bay Land Co. v. United States*.\(^{161}\) In that case a developer acquired land for a subdivision in an area subsequently designated as a National Seashore.\(^{162}\) Local approvals for the development were successfully opposed by the National Park Service.\(^{163}\) The government also acquired nearly all of the surrounding property by one means or another\(^ {164}\) but declined to purchase the plaintiff's land.\(^{165}\) As the court observed:

Thus plaintiff remains without a market for its land. The private sector is not interested, understandably, because of the well publicized threat of eventual condemnation of [Point Reyes National] Seashore realty. The public sector, namely the National Park Service, is not interested because after having successfully thwarted plaintiff's subdivision plans, it realizes that plaintiff is a party who can be deferred interminably, and dealt with at pleasure.\(^ {166}\)

The court found a taking here of the entire fee.\(^ {167}\)

The *Drakes Bay* case is, of course, an extreme example of oppressive conduct by a condemnor. It is possible that less drastic actions might withstand judicial scrutiny, but the time and expense of litigating such collateral issues should make the condemning agency consider the negative implications of the course it intends to pursue in acquiring the property.

**V. MANAGEMENT CONSIDERATIONS**

Public landownership is not a process that stops with acquisition. It is instead a daily succession of maintenance and management policy decisions. Although the primary public use will have been determined before condemnation, effectuating that use will require a number of other determinations.

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\(^{161}\) 424 F.2d 574 (Ct. Cl. 1970).
\(^{162}\) *Id.* at 575.
\(^{163}\) *Id.* at 576-81.
\(^{164}\) *Id.* at 586.
\(^{165}\) *Id.* at 585.
\(^{166}\) *Id.* at 586, 588.
\(^{167}\) *Id.* at 588.
For example, if the purpose is preservation, should the state simply stand by while nature takes its course, even if the natural evolutionary process means destruction of rare biological species or particularly valuable topographical features, such as the dunes forming the barrier islands of the Atlantic Coast? On the other hand, does the state have the resources (in money, manpower, and expertise) to undertake an active wildlife management program? Such a program may involve population controls for certain species, protection for certain others, periodic burning or timbering, and maintenance of the quality and quantity of water in the wetlands. When even the federal budget is severely strained by such undertakings in the national wildlife refuges, it seems unlikely that many coastal states are affluent enough to take on similar programs on anything but a very small scale.

Another related decision is whether, and to what extent, to permit uses besides the primary use. For example, should the state allow any sort of recreational activity in an area set aside for preservation? Similarly, should the harvesting of natural resources, such as oysters or wild rice, be permitted? Are any of these or other uses compatible with the primary purposes for which the land was taken?

Again, economics may be the decisive factor. Among the major demands made on a skeleton staff at the Chincoteague national refuge in Virginia are “recreation-related work—garbage collection, trail building and maintenance, painting, traffic control, beach patrol, and various visitor services.” Similar activities may be required even if the state holds only a beach access easement

168. To some extent, a “hands-off” policy seems to be contemplated by the federal Coastal Barrier Resources Act, 16 U.S.C. §§ 3501-3510 (1982), which limits the availability of federal funds for coastal barrier development. (However, the federal government is not the landowner.)

170. Id. at 77, 78.
171. Id. at 84-85.
172. Id. at 76, 79.
173. Id., passim.
174. See Owens, supra note 28, at 661.
175. Doherty, supra note 169, at 86.
through private uplands.

Another consideration has been described as "[a] philosophical uneasiness with government having anything other than a very limited role in landownership."\(^{176}\) In other words, is the state the best manager? The federal government has recently begun to reevaluate its fitness to cope with its extensive holdings and has, although with little success,\(^{177}\) attempted to divest itself of some of its property. According to a magazine article, one former Secretary of the Interior considers the government "an inept landlord; it neither manages property well nor puts it to its best use."\(^{178}\) Although such pronouncements may reflect a political ideology rather than a land-use philosophy, they are to some extent a valid consideration when a state is deciding whether to exercise its power to acquire land.

VI. CONCLUSION

Historically, coastal development planning has been viewed primarily as a regulatory process in which the only parties are the developer and the governmental body. Litigation has focused mainly on whether a permit denial can withstand fifth amendment scrutiny.\(^{179}\)

Because of its drastic nature (including the threat to private property ownership\(^{180}\)), eminent domain has seldom been used as an alternative. Although the cost of land acquisition prevents eminent domain from being an all-purpose substitute for planning and regulatory programs, it can at times be a valuable device for allocating sensitive and scarce resources. It has been suggested that, in the long run, public ownership may be "the most effective technique of countering . . . unplanned chaos."\(^{181}\)

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176. Owens, supra note 28, at 635-36.
179. See supra text accompanying notes 26-28 and 34-61.
180. See supra text accompanying note 33.
181. Comment, Public Land Ownership, 52 Yale L.J. 634, 636 (1943). See also Owens, supra note 28, at 636 ("Preserving these [wetlands and coastal] areas through acquisition is often more equitable and effective, legally and politically, than attempting to curtail devel-
Government should also consider the middle ground of acquiring development rights or scenic easements.\textsuperscript{182} Acquisition of less-than-fee ownership enables the state to control only the interest it needs and "may provide amicable accommodations where fee acquisition would lead to bitter conflict."\textsuperscript{183}

In advocating increased use of eminent domain to acquire either fee interests or development rights, the authors do not disregard the often-poor record of governmental land management\textsuperscript{184} or the costs of administration and management.\textsuperscript{185} However, these considerations must be balanced against the public interest in preserving critical resources for the future and against the labyrinthine inefficiency of present regulatory programs.\textsuperscript{186} Despite the difficulty of assigning values to such non-monetary factors, the balance will often come down in favor of public ownership.

When regulatory schemes fail, the government should exercise its power to preserve irreplaceable coastal resources by diversion of tax dollars into land acquisition programs.\textsuperscript{187} Failure to do so may, in fact, amount to an abdication of stewardship: "The land belongs to the people . . . a little of it to those dead . . . some to those living . . . but most of it belongs to those yet to be born . . . ."\textsuperscript{188}

\textsuperscript{182} See supra notes 150-51 and accompanying text.
\textsuperscript{183} Owens, supra note 28, at 639.
\textsuperscript{184} See supra notes 176-78 and accompanying text.
\textsuperscript{185} See supra text accompanying notes 168-75.
\textsuperscript{186} See supra notes 4-20 and accompanying text.
\textsuperscript{187} Some coastal states are apparently beginning to use land acquisition as a means of resource preservation. For example, Florida's Save Our Coasts program recently acquired all the remaining privately owned property on an island, Bahia Honda Key, from a developer who had operated a "clothing-optional" beach and had intended to build condominiums on the site. No Nudes, Good News for Park, Miami Herald, Mar. 17, 1984, at 1B, col. 5. For an excellent survey of sources of funding for land acquisition programs, see Owens, supra note 28, at 641-45.
\textsuperscript{188} Just v. Marinette County, 56 Wis.2d 7, —, 201 N.W.2d 761, 771 n.6 (1972) (quoting Jackson County Zoning and Sanitation Dep't letterhead).