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To: Special Legislative Commission to Study Lateral Access, Rhode Island Shoreline;
Representative Terri Cortvriend, Chair

Re: Relevant Cases on Shoreline Access in Other States

Dear Chairwoman and Members:

I've been asked to provide you with some information on shoreline access in other states, as over the years my students have compiled a compendium of court decisions, statutes, and constitutional provisions implicating the public trust doctrine in most states, which is accessible here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2235329.

I should say at the outset that I don't consider the state Supreme Court's *Ibbison v. State*, 448 A.2d 728 (R.I. 1982), interpreting the constitutional language recognizing public rights in the "shore" to extend only to mean high tide, to be an impediment to the Rhode Island Legislature defining the public's access rights to extend to "high water" or to the "vegetation line." The *Ibbison* court quite clearly grounded its decision on common law principles in the absence of a statutory or constitutional definition of "shore." So if the Legislature were to define the constitutional term to extend landward of mean high water, presumably the court would defer to the Legislature. As the court stated, "This court has held that the common law rights and obligations of the people of the state *unless that has been modified by our General Assembly*." (*Ibbison*, 448 A.2d at 732).

A recent case of interest is *Nies v. Town of Emerald Isle*, 780 S.E.2d 187 (N.C. App. 2015), in which the North Carolina Court of Appeals upheld the public's right to access privately owned dry-sand beaches above the mean high tide line, which is the common law limit of public ownership in North Carolina. The court upheld the Attorney General's and the Legislature's determinations that public rights extended to lands flooded on an irregular basis by storm tides or unusually high tides under the public trust doctrine. The fact that many of the lands above the mean high tide line were privately owned was not determinative, as the court held that ocean beaches in the state, including both wet and dry-sand beaches "generally but not exclusively privately owned" were subject to public trust rights. Because of the applicability of the public trust doctrine, the public had use rights in those beaches, and the landowners had no right to compensation for a taking of private property. The landward extent of the public rights on ocean beaches extended to "the discernable reach of the 'storm' tide;" that is, the high-water mark, not mean high tide.

Similarly, the New Jersey courts have recognized public rights in ocean beaches even if the lands were privately owned, since the public trust doctrine in that state was not limited to publicly owned lands. For example, in *Mathews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984), the New Jersey Supreme Court supplied a four-factor test for determining the scope of the public trust doctrine: 1) the location of the dry sand beaches in relation to the foreshore; 2) the extent and availability of publicly owned upland beaches; 3) the nature and extent of public demand; and 4) the previous use of the beach by the upland owner. None of these factors limited the public's rights to publicly owned beaches, and in *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club,* 879 A.2d 112 (N.J. 2005), the New Jersey Supreme Court upheld public rights to recreate on a privately owned beach.

Although phrased in terms of the public's customary rights (not public trust rights), courts in Oregon have also protected public rights to use ocean beaches regardless of private ownership above the mean high tide line. In *State ex rel. Thorton v. Hay,* 462 P.2d 671 (Or. 1969), the Oregon Supreme Court ruled that the public's right to access ocean beaches in the state for recreational purposes extended landward to the vegetation line. This result was reaffirmed in *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993), cert. denied, 510 U.S. 1007 (1994), which ruled that the U.S. Supreme Court decision's in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), established that the public's customary right to use ocean beaches was a "background principle" of state law insulating the public use of the dry-sand area to the vegetation line from takings claims by adjacent landowners.

In the nearby state of Maine, landowners own to the low water mark, due to the effect of the Massachusetts Colonial Ordinance of 1641. Nevertheless, private ownership of tidal lands did not prevent the state supreme court from recognizing the public's right to use the intertidal area in *McGarvey v. Whittredge*, 28 A.3d 620 (Me. 2011) (upholding the public's right to walk along the shore).

The upshot: These cases suggest that a number of states recognize public rights above mean high water: to high water or to the vegetation line. In these situations, public rights—the so-called *jus publicum*—and private rights—the so-called *jus privatum*—overlap. As the Michigan Supreme Court explained in *Glass v. Goeckle*, 703 N.W.2d (Mich. 2005), a landowner's title does not determine the limits of public rights because "the public trust doctrine preserves public rights separate from a landowner's littoral title." And although that case fixed the landward extent of public rights in the Great Lakes at "the ordinary high-water mark," the court did so on the assumption that would reflect "a distinct mark either by erosion, destruction terrestrial vegetation, or other easily recognized characteristic." *Id.* at 691 (quoting *Diana Shooting Club v. Husting,* 145 N.W. 816 (Wisc. 1914)). Where a distinct mark is lacking, as in the case of most of the Rhode Island shore, the mean high-water mark might not be a practical demarcation of where public rights end.

In none of the states cited above has there been a successful takings claim mounted by landowners resisting public rights. The public trust doctrine is widely recognized as a "background principle" of state property law that insulates the exercise of public trust from takings compensation. See Michael C. Blumm & Rachel G. Wolford, *Revisiting Background Principles in Takings Litigation,* 71 Florida Law Review 1165, 1177, 1183-86 (2019) (surveying relevant case law). By defining the state constitution's recognition of public rights in the Rhode Island "shore" at a recognizable point landward of the unrecognizable mean high tide line, the state legislature would not seem to open the state up to successful takings claims. Thank you for the opportunity make these comments.

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