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SHORELINE ACCESS IN RHODE ISLAND: A CASE STUDY OF BLACK POINT

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I. INTRODUCTION

Access to the shoreline in Rhode Island has been a strong tradition since the colonial era.[1] However, with increasing development pressures on the formerly rural shore areas, especially in the region of the state commonly called "South County," it was only a matter of time before public and private interests collided over the diminishing resource. That inevitable collision occurred at a particular piece of shorefront property known as Black Point, in the Town of Narragansett, when a developer purchased this large tract of oceanfront property and proposed the construction of luxury condominiums. The project would entail the closing of an extensive network of paths to and along the shore that had been used by members of the public for over 100 years.

Negative public reaction to the project was swift and dramatic. This Article will examine the course of the controversy and its ultimate outcome. At the heart of the matter was the ability of the Rhode Island Coastal Resources Management Council (CRMC) to evaluate an enormous volume of evidence pointing to the existence of a dedicated path to and along the shore. The controversy emerged as a statewide political issue pitting Rhode Island's largest developer against the state's largest environmental organization and the Environmental Advocate of the Rhode Island Attorney General's office. Although the CRMC's decision and various aspects of the Black Point case will be under appeal for years, the political heat generated by the case resulted in the condemnation of the entire parcel by the Governor for open-space recreation and incorporation into the state's park system. As a prelude to discussion of this controversy, the history of shoreline access law in Rhode Island will be reviewed. Finally, the Article will review the case's impact on shoreline access throughout the state.

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1. *See generally* Nixon, *Public Access to the Shoreline: The Rhode Island Example*, 4 COASTAL ZONE MGMT. J. 65 (1978).

II. Shoreline Access in Rhode Island

A. *Rights of Use: Types of Activities*

Unlike Maine and Massachusetts, public rights to Rhode Island's shore have not been restricted by narrow interpretations of colonial ordinances.[2] Indeed, Rhode Island's 1663 Colonial Charter provided that the King "shall not, in any manner, hinder any of our loving subjects, whatsoever, from using and exercising the trade of fishing upon the coast . . . and to build . . . such wharfs . . . as shall be necessary."[3] Although the Colonial Charter apparently limited use of the shore to the pursuit of the "trade of fishing," citizens of Rhode Island made use of the shore for a variety of purposes that remained unchallenged by coastal landowners. By 1842, when the Rhode Island Constitution was adopted, that expanded usage was expressly recognized: "The people shall continue to enjoy and freely exercise all the rights of fishery, *and the privileges of the shore*, to which they have been heretofore entitled under the charter and usages of this state."[4]

In 1941, the Rhode Island Supreme Court defined the phrase "privileges of the shore" in *Jackvony v. Powel*.[5] The court found that the term "shore" referred to the land between high and low water marks—the intertidal zone.[6] Discovering which "privileges" became rights under the state constitution was more difficult. Because of a lack of Rhode Island case law on the subject, the court examined those rights "frequently claimed by the public . . . [as] described by authors who have discussed the law pertaining to rights in the shore."[7] The court concluded that there were at least four common law rights that should be recognized: (1) fishing from the shore, (2) taking seaweed from the shore, (3) leaving the shore to bathe in the sea, and (4) passage along the shore.[8] As in most other states, the court found no general right of access *to* the shore; however, once at the shore, the public's range of permitted activities was quite broad.

When Rhode Island convened a Constitutional Convention in 1986, one of the first issues it addressed was a constitutional clarification of the concept of "privileges of the shore."[9] A strong desire

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2. For a thorough discussion of the Massachusetts Colonial Ordinance, see Bell v. Town of Wells, 510 A.2d 509, 511-15 (Me. 1986).

3. Rhode Island Manual, at 126 (1985-1986).

4. R.I. Const. art. I, § 17 (emphasis added).

5. 67 R.I. 218, 21 A.2d 554 (1941).

6. *Id.* at 228, 21 A.2d at 558.

7. *Id.* at 223, 21 A.2d at 556 (referring (without stating) to such sources as Gould on Waters (1900), and J. Angell, Treatise on the Right of Property in Tidewaters and in the Soil and Shores Thereof (1826)).

8. *Id.*

9. *Shoreline-Access Proposal Greeted with Wide Approval*, The Providence Journal, Mar. 13, 1986.

existed among the delegates to expand the geographic scope of the term "shore" to include beach areas up to the vegetation line. However, after substantial debate and upon advice of counsel that such an expansion would likely be considered a "taking," the term was left undefined. The rationale was that existing case law made this definition clear and adoption of the "mean high tide mark" as the absolute landward boundary between the public and private usages would, in many instances, abrogate expanded rights of passage or uses that may have historically developed by prescription or dedication.[10]

The convention delegates did, however, define "privileges" of the shore to include the four activities cited in *Jackvony*, and any other unspecified activities to which the public may have gained historic rights.[11] The practical effect of the amendment was to leave the definition of "shore" flexible, within the boundaries of existing case law, but more fully define "shore privileges" so that the Rhode Island Supreme Court would be precluded from reversing its *Jackvony* holding any time in the future. The amendment was adopted in the November general election by the highest majority of any of the fourteen proposed amendments on the ballot: 67.9%.[12]

Thus, Rhode Island's position on public shore access remains far more liberal than those of Maine and Massachusetts. In those states, private ownership extends to the mean low water mark, subject to the public easements of fishing, fowling, and navigation.[13] By contrast, in Rhode Island, private property ownership may extend only to the "shore." This means the upland private owner owns, at most, down to the mean high water mark. The upland owner's interest may be further limited by prescriptive rights or dedication. Ownership of the shore rests with the state, and as trustee the state has permitted a wide variety of activities to take place.[14] Since *Jackvony* was decided in 1941, the precise location of the shore has been the subject of litigation several times,[15] but the public's right to be on the shore for *any* activity has remained unchallenged.

B.. Right of Access

Access to the shore has been a difficult problem. As early as 1958, the Rhode Island General Assembly established a permanent Com-

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10. COMMITTEE ON THE EXECUTIVE BRANCH AND INDEPENDENT AGENCIES, COMMITTEE REPORT ON CONVENTION RESOLUTION 86-00003 at 4-5 (1986) [hereinafter COMMITTEE REPORT].

11. *Id.* at 3.

12. *R.I. Referendums: The Constitutional Convention*, The Providence Journal, Nov. 5, 1986, at 1.

13. *See* Bell v. Town of Wells, 557 A.2d 168 (Me. 1989); Opinion of the Justices, 365 Mass. 681, 313 N.E.2d 561 (1974).

14. *See supra* text accompanying note 8.

15. *See* State v. Ibbison, 448 A.2d 728 (R.I. 1982) and cases cited therein.

mission on Discovery and Utilization of Public Rights-of-Way ("Commission") to prevent the loss of existing access sites from lack of use.[16] The unpaid Commission functioned intermittently for nearly twenty years before it was abolished.

One of the Commission's final acts was to publish 20,000 copies of a map illustrating 143 rights-of-way to the shore. Criticism of the map surfaced quickly: Commission member Monroe Allen stated that the map was "a fraud on the state."[17] He contended that many of the sites were either nonexistent or inaccessible. *The Providence Journal* concurred: "[T]he unsuspecting outdoorsman could benefit from x-ray vision and the knight's armor if he intends to journey to the water's edge by way of some of the 143 public paths identified on the state map."[18]

The Commission's efforts to mark existing rights-of-way also faced problems. Vandals and adjacent property owners quickly destroyed or removed right-of-way markers as fast as they were installed. Hindered by low funding and opposition from riparian landowners, the Commission struggled on. The public, however, was clearly ready for a stronger effort. On March 14, 1974, *The Providence Journal* editorialized:

> [T]he Rhode Island public is entitled to use the shoreline for recreation. And after 16 years of the commission's work, performance hardly measures up to need, nor does it promise to serve the public adequately in the foreseeable future . . . it seems only reasonable to conclude that there must be a better way.[19]

In 1977, after several years of Commission inactivity, the General Assembly transferred the Commission's functions to the Coastal Resources Management Council ("CRMC"), the state's primary coastal construction permitting agency.[20] In addition to its permitting duties, the CRMC is responsible for "[t]he designation of all public rights-of-way to the tidal water areas of the state, and shall carry on a continuing discovery of appropriate public rights of way to the tidal water areas of the state."[21] The CRMC, however, has faced many of the same problems encountered by the Rights-of-Way Commission. According to Rights-of-Way Subcommittee Chairman Joseph Turco, "[w]ith growing numbers of people wanting to get to

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16. R.I. GEN. LAWS §§ 42-33-1 to -8 (repealed 1977).

17. *Bay Right-of-Way Guide is Risky*, The Providence Journal, Mar. 10, 1974.

18. *Seeking Rights of Way? Bring a Machete*, The Providence Journal, Oct. 6, 1975.

19. *Access to the Shore*, The Providence Journal, Mar. 14, 1974.

20. R.I. GEN. LAWS §§ 46-23-1 to -21 (1988).

21. *Id.* § 46-23-6(E)(1). It is unclear whether this section gives the CRMC *exclusive* jurisdiction over recognition and discovery of rights-of-way; the traditional method of a Superior Court suit to quiet title on behalf of the public is apparently still available. The issue has not been litigated. Since appeals of CRMC decisions are heard in Superior Court, that court will ultimately make the decision in either case.

the seashore, there's been a growing number—a counterforce—trying to keep them away as the shore becomes a scarce commodity."[22] The quasi-judicial authority of CRMC to make right-of-way designations was recently upheld by the Rhode Island Supreme Court in a definitive decision involving dedication of a public right-of-way by a landowner.[23]

Thus, when the facts of the proposed Black Point development surfaced, two separate areas of the CRMC's jurisdiction were invoked: CRMC's general coastal construction permitting authority and its authority to designate rights-of-way. The CRMC was established in 1971 "to preserve, protect, develop, and where possible, restore the coastal resources of the state."[24] The somewhat schizophrenic charge to both preserve and develop the shoreline has perhaps contributed to the CRMC's uneven record in coastal management.[25] Another complexity of the CRMC is the mechanism by which members are appointed. Unlike federal administrative agencies, in which appointments are made by the President, members of Rhode Island boards are often directly appointed by the legislature. In the case of the seventeen-member CRMC, seven appointments are made by the governor, two are made indirectly by the governor, and eight members are appointed by the legislature.[26] The legislative appointments are divided between the Speaker of the Rhode Island House and the majority leader of the Rhode Island Senate.[27] Thus, the appointment process, together with the large size of the panel, renders the CRMC even less accountable to the public than typical administrative agencies, where the responsibility clearly lies with the executive branch alone. This relative lack of public accountability, however, is not balanced by any requirements for specialized expertise on the part of the members.

The primary responsibility of the CRMC is to prepare a comprehensive management plan for all the resources of the state's coastal region and then ensure compliance with the plan through its permit procedure. The plan was first approved in 1978 and was extensively modified and simplified in 1983 to enable the council to function with more limited staff resources after severe budget reductions.[28]

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22. *Beach Bummer*, The Providence Sunday Journal, July 7, 1985, at E5, col. 3.
23. Sartor v. Coastal Resources Management Council, 542 A.2d 1077 (R.I. 1988).
24. R.I. GEN. LAWS § 46-23-1(a) (1988).
25. *See generally*, *Carving up the Coast*, The Providence Sunday Journal, Oct. 28, 1984, at B1, col. 4.
26. R.I. GEN. LAWS § 46-23-2 (1988). The governor indirectly appoints the two *ex officio* members through appointment of the director of environmental management and the director of health.
27. Technically, the two senatorial appointments are made by the lieutenant governor as presiding officer of the Senate. By tradition, however, they are in fact made by the majority leader of that body.
28. *See generally* 1983 COASTAL RESOURCES MANAGEMENT PLAN, Rhode Island

The record of the plan's implementation has been criticized as uneven at best. According to Trudy Coxe, executive director of Save the Bay, the state's largest environmental group, "Though the council has had many committed members over the years, its track record is one of delay, inconsistent decisions, and political favoritism . . . . Lengthy abusive hearings have been mistaken for public participation."[29] Proposals to reform and restructure the CRMC to increase its effectiveness have been introduced in the Rhode Island General Assembly in each of the past five years.[30] Since access to the shoreline is one aspect of the amorphous concept of coastal management that the general public readily understands and appreciates, it will remain one of the most visible and controversial aspects of the coastal program no matter what changes are made.

III. The Black Point Case

A. *Introduction*

The Black Point controversy involves shorefront land known as Black Point and a shorefront path historically known as the Narragansett Pier Cliff Walk. The Conservation Law Foundation, a Boston-based, non-profit environmental public interest group and the Rhode Island Department of the Attorney General sought to establish that the public had a legal right to use this well-worn path of varying width, which runs along most of the shoreline perimeter of the Black Point parcel, following the approximate seaward edge of vegetation.

During the controversy, the Attorney General's office uncovered a wealth of historical evidence regarding the Narragansett Pier Cliff Walk. The most critical item was the record of a long-forgotten 1928 case. Indeed, a pleading filed in that 1928 case about Black Point and the Narragansett Pier Cliff Walk provides an excellent introduction to the matter:

> [T]here had existed from time immemorial a well defined common and public way along the shore in front of the cliffs so called at said Narragansett Pier, running from Tucker's Wharf, so called, to Scarborough Beach, which way has for many years been commonly known as "the cliff walk"; that during all of said time the course of said public way extended directly across the easterly portion of the property [at Black Point]; that during all of said time the members of the public were accustomed to make and did make general use

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Coastal Resources Management Council.

29. *Reaction Mixed to Proposed DEM Reorganization*, The Providence Journal, Dec. 8, 1989, at C13, col. 4.

30. The most recent proposal, released in November, 1989, by the state Environmental Quality Study Commission after two years of work, would transfer CRMC's permitting authority to a strengthened version of the existing Department of Environmental Management, leaving the CRMC as an advisory body only. *Id.*

> of said public way throughout its entire length, including that portion thereof which extended across the premises [at Black Point], and that such general use by the public has been uninterrupted, continuous and adverse and with the knowledge and acquiescence of the various owners of the property across which said way extended, including the various predecessors in title of the [landowner of Black Point].[31]

This is the same factual and legal claim that was presented to the CRMC in 1987. At that time, the Conservation Law Foundation and the Attorney General first demanded that the CRMC designate the shoreline path as a public right-of-way.[32]

B. Procedural History

The Downing Corporation ("Downing"), a major Rhode Island real estate developer, applied to the CRMC for approval to construct an eighty-unit residential condominium cluster development on its parcel, which is approximately forty acres, with 3,200 feet of frontage on the Rhode Island Sound at Black Point. On April 29, 1987, formal hearings began. These hearings were before an *ad hoc* subcommittee of the CRMC that was constituted in accordance with CRMC's general permitting authority. Both the Conservation Law Foundation and the Rhode Island Attorney General appeared in opposition to the Downing application to advocate the claims of public rights of access. The Rhode Island Attorney General's appearance was made in his capacity as Environmental Advocate, pursuant to the State Environmental Rights Act.[33]

In the fall of 1987, while its own hearings were underway, the *ad hoc* subcommittee requested the CRMC's Standing Subcommittee on Rights-of-Way ("Standing Subcommittee") to convene hearings to consider the claims of public rights of access. The *ad hoc* subcommittee made this request because the proponents of the public rights had made a substantial showing of their claims during the subcommittee's hearings.

As a result, the Standing Subcommittee on Rights-of-Way began hearings in this matter on December 15, 1987, and concluded the sessions on October 26, 1988. In the meantime, the decision of the *ad hoc* hearing subcommittee on the Downing application itself was held in abeyance pending the Standing Subcommittee's decision on the claimed public rights.

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31. Answer of Defendants at 3, Moren v. Gibson, Equity No. 319 (R.I. Super. Ct., Wash. Cty., filed July 23, 1928) (copy of court documents related to this case are on file at the Maine Law Review).

32. The CRMC is authorized to designate rights-of-way to the tidal areas of the state pursuant to R.I. GEN. LAWS § 46-23-6(E)(1).

33. R.I. GEN. LAWS §§ 10-20-1 to -11 (1985).

C. Summary and Evaluation of Evidence Presented

The Attorney General presented a wide array of historical and contemporary evidence to the Standing Subcommittee, including the official record of the 1928 Superior Court case; twelve works of published literature from the turn of the century; the testimony of several elderly citizens, including a veteran of the Narragansett Coast Guard Station and a prominent long-time community leader; the correspondence and diaries, from 1928 through 1929, of a prominent South County family; a 1952 deed in the chain of title to Black Point referring to a possible "public right of way along the margin of the ocean"; a survey from 1928; a survey from 1933; the expert testimony of a widely respected Rhode Island title attorney; aerial photographs; a fifty-year-old fragment of pavement from the cliff walk; a videotape of the current Narragansett Pier shorefront; newspaper articles from 1928; the testimony of current users; and an 1871 painting.

This evidence, which is detailed below, pointed to an obvious conclusion: there once existed a Narragansett Pier Cliff Walk, which extended along the edge of the vegetation above the rocky shore for several miles of shoreline from the village center of Narragansett to Scarborough Beach, and which was subject to a traditional custom of public usage dating from before the Civil War. Further, the current shoreline path at Black Point, which is the path presently in question, is a surviving portion of that historic Narragansett Pier Cliff Walk.

The Attorney General's evidence of the Narragansett Pier Cliff Walk began with material from the nineteenth century. The availability of the Cliff Walk for public use was featured in one work of art and in ten published works of promotional literature from the late nineteenth and early twentieth century. Major portions of the Narragansett Pier Cliff Walk were paved during this time and portions of this pavement are still visible today.

As evidence from the next period, the period immediately before and after World War I, the Standing Subcommittee reviewed the videotaped deposition of the late Oliver H. Stedman, then age ninety-five and a prominent local historian, community leader, and life-long resident. He testified that the public recreational use of both the Narragansett Pier Cliff Walk itself and the dry rock area was an established and accepted custom. He further testified as to his personal use, as a matter of "right," of the Walk.

This brings us to the 1928 case. This Superior Court civil action was brought by the then-owner of a sizeable portion of Black Point (a predecessor-in-title to Downing) against certain members of the public for alleged trespass. The court denied the landowner's prayer

for a preliminary injunction.[34] In doing so, the court admitted into evidence, and found in accordance with, a survey entitled *Plan of Ocean Shore from Tucker's Wharf to Scarborough Beach*. This survey clearly showed that the Narragansett Pier Cliff Walk extended the full length of the depicted stretch of shorefront, including what is now the Black Point parcel.

Having lost at the preliminary injunction stage, the landowner never prosecuted the case further. The record of the case simply ceases at this point. But, as shown below, public usage continued unabated. One can surmise, but not directly prove, that the 1928 landowner acquiesced in the decision.

Although the official court records reveal the above information, they do not include a transcript of the hearing. Additional information, however, can be gleaned from contemporary newspaper accounts. According to press accounts of the hearing that appeared in *The Providence Journal*, the Providence *Evening Bulletin*, the now defunct *Providence News*, and the now defunct Providence *Evening Tribune*,[35] the judge, Justice Herbert Carpenter, denied the injunction on the basis of more than seventy years of public use of the Narragansett Pier Cliff Walk at Black Point. The newspaper accounts also show that Judge Carpenter was cognizant of two equities in the landowner's favor when he made his decision: (1) that the landowner had planted a lawn over the path at great expense which would be damaged by the foot traffic, and (2) that the landowner provided an alternative route for the public to use. This route represented a minor detour. Nonetheless, the judge was willing to abide the destruction of the landowner's lawn and resolutely refused to mandate even a minor short term detour in the route. Thus, the newspaper articles reveal that the judge was thoroughly convinced of the long history of well-defined public use of the Narragansett Pier Cliff Walk.

As an adjunct to the records of the 1928 case, the Standing Subcommittee received corporate minute books, correspondence, and a diary documenting the strong support of a prominent long time local family, the Hazards, for the legal defense of the Narragansett Pier

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34. Moren v. Gibson, Equity No. 319 (R.I. Super. Ct., Wash. Cty., Aug. 17, 1928) (order denying preliminary injunction).

35. *Summer Visitor Attempts to Close Pier Ocean Walk*, Evening Bulletin, Aug. 15, 1928; *Pier Society Woman Seeks to Close Walk*, Providence News, Aug. 15, 1928; *Pier Residents to Fight Moren Trespass Order*, Evening Bulletin, Aug. 16, 1928; *Pier at War Again as Woman Acts to Shut Off Ocean Walk*, The Providence Journal, Aug. 16, 1928; *Court Upholds Public's Right to Use of Ocean Walk at Pier*, Evening Bulletin, Aug. 17, 1928; *Cliff Walk at the Pier to Stay Open*, Evening Tribune, Aug. 17, 1928, at 1, col. 6; *Closing of Walk at Pier Opposed*, The Providence Journal, Aug. 17, 1928, at 8, col. 4; *Court Denies Injunction on Pier Walk*, Providence News, Aug. 17, 1928; *Pier Promenaders Win*, N.Y. Times, Aug. 18, 1928; *Court Denies Plea to Bar Pier Walk*, The Providence Journal, Aug. 18, 1928, at 16, col. 1.

Cliff Walk. This evidence was especially significant because the Hazards owned shorefront property that was also crossed by the Narragansett Pier Cliff Walk.

The Standing Subcommittee also viewed the videotaped deposition of Francis B. Collins, a Coast Guard veteran, who testified as to the use of the Narragansett Pier Cliff Walk during the Prohibition Era by himself and other members of the United States Coast Guard in plain view of the private shorefront owners. The well-defined Narragansett Pier Cliff Walk from downtown Narragansett to Scarborough Beach was the required shorefront route for Coast Guard foot patrols that operated nightly and during fogs in order to look out for "rum runners" and ships in distress.

To complete the survey of historic use, the Standing Subcommittee heard the testimony of people who have used the shoreline path at Black Point and the dry rock area over the past forty years. The shoreline path is a surviving remnant of the historic Narragansett Pier Cliff Walk. These individuals testified that they used the shoreline path at Black Point and the dry rock area, often while the owners of the house at Black Point were in residence, without asking for permission and without any effort on the part of the owners to stop them.

The Attorney General also elicited evidence of the title history of the parcel. The current developer acquired the land from the Lownes family. In 1952, the Lownes family acquired the northernmost portion of what is now the Downing parcel by a warranty deed from Therese Noble ("the Noble deed"), which indicates the land is "conveyed subject to any public right-of-way along the margin of the ocean that may exist."[36]

A title attorney, widely recognized as the "dean" of Rhode Island land title attorneys and founding Chairman of the Rhode Island Bar Title Standards Committee, testified as a witness for the Attorney General that the clause in the Noble deed described a possible easement located along and near to the shore, but *above* the high water mark. This language would be a "red flag" to a title examiner and cause him to be "alert," to be "worried," and to take exception. Moreover, he testified, in the circumstances of the instant case, where both a site visit and a survey would reveal an extremely well-delineated, well-trodden pathway meeting the description of the deed, the language of the deed is confirmed by the physical circumstances of the land itself.

Finally, as a culmination of their presentation to the Standing Subcommittee, the Conservation Law Foundation and the Rhode Island Attorney General presented abundant evidence of the wide va-

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36. Warranty Deed, Therese Noble to Cliff Shoals, Inc., July 26, 1952, Book 35, Page 31, Narragansett Land Evidence Records.

riety of current public use of the shoreline path at Black Point, the dry rock area and, in addition, three perpendicular paths.

D. Legal Issues Presented

Two separate and distinct methods of public acquisition of rights in private land exist in Rhode Island: (1) dedication and (2) prescription or adverse possession. The proponent of a public right-of-way need prevail only on one of these two alternative theories in order to succeed.

1. Dedication

In order for the public to acquire rights in private property through the common law principle of dedication: (a) the private owner must have manifestly intended to dedicate the land to public use, and (b) the dedication must have been accepted either by the proper governmental authority or by the general public.[37]

The private owner's intent to dedicate may be demonstrated either by words or conduct.[38] Also, the required intent may be inferred from mere silence and passive acquiescence in public use, if such silence and acquiescence is sufficient, under the circumstances, to show an intent on the owner's part "to abandon his own private control of the property and to allow it to be appropriated to the public."[39]

In *Talbot v. Town of Little Compton*, the public had "openly, notoriously and uninterruptedly used the entire tract under a claim of right for a length of time far in excess of the statutory period for obtaining title by adverse user."[40] The Rhode Island Supreme Court held that a presumption of dedication by prior owners existed.

In *Talbot*, the long continued public use of a beach included hunting, fishing, and bathing, as well as taking sand and gravel on a regular basis for municipal purposes. The prior owners responded only by erecting a fence more than sixty years earlier, which was promptly destroyed, and by one or two verbal objections to the taking of sand and gravel that were not followed by any preventive action. No private owner had ever attempted to exclude the inhabitants of the town from free use of the beach.[41] *Talbot* signifies that if the public exercises open, notorious, uninterrupted use of private property over an extended period of time, the private landowner will be presumed to have intended to yield control to the public and to

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37. Vallone v. City of Cranston Dept. Pub. Works, 97 R.I. 248, 254-55, 197 A.2d 310, 314 (1961) (citing State v. Coy Real Estate Co., 44 R.I. 357, 362, 117 A. 432, 434 (1922).

38. *Id.* at 254, 197 A.2d at 314.

39. Daniels v. Almy, 18 R.I. 244, 249, 27 A. 330, 332 (1893).

40. 52 R.I. 280, 286, 160 A. 466, 468-69 (1932).

41. *Id.* at 285-86, 160 A. at 468.

have dedicated the property to public use.

With reference to the Black Point parcel as shown above, there was overwhelming evidence before the CRMC of both ongoing and historic public use of the shoreline path. This evidence demonstrated that public use of the Black Point portion of the shoreline path has been open, notorious, uninterrupted, and exercised under a claim of right. Indeed, this virtually universal assumption that the public has had a right to use certain portions of the property is best reflected in the response of local residents to the landowner's attempt, sixty years ago, to stop public use of the Black Point portion of the shoreline path.

In short, public use of the shoreline path over such a significant period of time certainly satisfied the requirement of an acceptance by the public. The question then remains as to the element of dedication by the private owners. The evidence shows that the Lownes family, owners of the property in question for forty-five years prior to the Downing purchase, responded to public use by the very "silence" and "acquiescence" from which an intent to dedicate may be inferred. The evidence shows that neither Albert Lownes nor any member of the Lownes family ever blocked the path or put up "No Trespassing" signs or took any other kind of action to stop or control public use. The Lownes even allowed a reference to the customary public use to appear in their deed.

The Lownes's response is neither surprising nor unique, given both the long history of public use of the Narragansett Pier Cliff Walk and the dry rock area between Narragansett Center and Scarborough Beach prior to their ownership and the response of the landowner's neighbors and the court to the landowner's abortive attempt to stop public use of the shoreline path only a decade earlier. Thus, the public use in the Black Point case has been characterized by the very qualities that led the court in *Talbot* to find that a presumption of dedication had arisen.[42] In summary, except for the brief and abortive Moren venture in 1928 and the current Downing effort, the private shorefront owners have either acquiesced in public use of the shoreline path and the dry rock area or encouraged it, a pattern of conduct that clearly demonstrates an intention to dedicate these areas to public use.

2. *Prescription*

To create an easement by prescription in Rhode Island, there must be proof of open, adverse, and continuous use by the public for a period of at least ten years.[43] The element of adverse use is to be

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42. *Id.* at 286-88, 160 A. at 468-69.

43. R.I. GEN. LAWS § 34-7-1 (1984). *See also* Greenwood v. Rahill, 122 R.I. 759, 762-63, 412 A.2d 228, 230 (1980). In Rhode Island, it appears that an easement by prescription may be created in favor of the public. *Id.*

distinguished from use that is permissive. For example, in *Daniels v. Blake*,[44] the court observed that the friendly personal relations that had earlier existed between the landowner and the individuals who were claiming a prescriptive right-of-way across the land demonstrated that the claimants' use was permissive, not adverse. In contrast, the evidence is clear that most public users of the shoreline path, the perpendicular paths, and the dry rock area at Black Point did not know the owners and had no personal contacts or relations with them. Moreover, no member of the public ever asked for, or received, permission to use the property.

In 1872, the Rhode Island Legislature adopted a special statutory restriction, apparently to make the acquisition of an easement by prescription more difficult. Now incorporated in the General Laws, it provides: "No right of footway, except claimed in connection with a right to pass with carriages, shall be acquired by prescription or adverse use for any length of time."[45]

This restriction should not apply here for three independent reasons. First, the public rights at Black Point had already matured in 1872 when the restrictive statute was enacted. A well-established custom existed as early as 1858, seventy years before the 1928 Moren case, and fourteen years before the enactment of the restrictive statute. Moreover, it is clear that the statutory restriction is not retroactive.[46]

Second, the restriction must be read in conjunction with Rhode Island General Laws section 34-7-8, which is contained in the same chapter: "*34-7-8. Shore rights preserved—Prospective applicability.* Nothing herein contained shall affect any rights of the shore to which the people of this state are now entitled under the charter, the constitution or by the law, or be construed to apply to any preceding action."[47]

Of course, the contested public rights at Black Point do not arise by virtue of the traditional privileges of the shore contained in the Rhode Island Constitution.[48] This is because the pathway in question is upland from the intertidal zone. Rather, these rights arise by virtue of dedication and/or prescription. These rights, however, were established in association with the privileges of the shore. The public uses the pathways crossing the upland portions of Black Point to take advantage of the intertidal zone or to bypass impassable sections of the intertidal zone.

There is a direct parallel to the findings of the 1986 Constitutional

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44. 81 R.I. 103, 108, 99 A.2d 7, 11 (1953).

45. R.I. GEN. LAWS § 34-7-4 (1984).

46. *See, e.g.*, State v. Healy, 122 R.I. 602, 410 A.2d 432 (1980) (statutes are presumed to operate prospectively and not retrospectively).

47. R.I. GEN. LAWS § 34-7-8 (1984).

48. R.I. CONST. art. I, § 17.

Convention mentioned above:[49]

> The use of the term "shore" is not intended to be narrowly construed to mean only the area below the mean high tide mark. But in instances where the public has traditionally used areas lying above the mean high tide mark in a manner and to an extent *that such use has ripened into a legal right, either through prescriptive use or implied dedication*, such areas are also intended to be included within the definition of "shore."[50]

In other words, while upland public rights are not created by the traditional privilege of the shore, once created, they are protected by that doctrine. Therefore, the protection of section 34-7-8 should apply to the upland right-of-way at Black Point.

Indeed, this interpretation of the relationship between section 34-7-4 (the carriage restriction) and section 34-7-8 (the protection of the privilege of the shore) is the only interpretation that makes sense as a matter of statutory construction. The only significance this provision could have would be to exempt upland rights-of-way near the shore. The traditional privilege of the shore needs no statutory preservation and would not be affected by a chapter regarding prescriptive rights-of-way in any event. Thus, the exemption of section 34-7-8 must apply to upland prescriptive easements that are separate from, but arise in conjunction with, enjoyment of the traditional privilege.

Third, in connection with the Downing parcel at Black Point, ample evidence in the record exists that the shoreline path, at least as far north as the so-called cobble beach (about halfway along the current path), was used regularly by fishermen and others in motorized vehicles until Downing blocked access in 1986 (with some vehicular use continuing thereafter) and that the portion of the shoreline path north of the cobble beach was used at least occasionally by motor vehicles. For example, there is testimony by witnesses of vehicular use beginning at least as early as 1972, although there are indications that such use expanded after the Lownes house on Black Point was razed in 1974. In any case, such use has certainly continued for more than the minimum ten year period for acquiring rights by prescription. Furthermore, the evidence is clear that those who used vehicles on the shoreline path to gain access to the shore at Black Point did so under a claim of right, without ever asking for, or receiving, permission from any owner of the Downing parcel.

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49. *See supra* text accompanying notes 9-12.

50. COMMITTEE ON THE EXECUTIVE BRANCH AND INDEPENDENT AGENCIES, COMMITTEE FINDINGS REGARDING PROPOSED AMENDMENT TO ARTICLE XXXVII, SECTION 1, OF THE ARTICLES OF AMENDMENT TO THE RHODE ISLAND CONSTITUTION, at 1.

E. The CRMC Decision

1. Summary of Decision

Despite all of the above, the CRMC did *not* uphold the public's right to use the entire length of the path. In two separate decisions, both dated May 22, 1989, the CRMC approved Downing's application to build the condominium project at Black Point and determined the existence of a right-of-way on Black Point.[51] However, the designated right-of-way represented only roughly half of the full length of the existing shoreline Cliff Walk.

The decision on the right-of-way is a three-page text with a photocopy of an aerial photograph attached. Much of the text is taken up with a description of the right-of-way being designated, procedural history, repetitive findings, and standard "boilerplate" decisional language. It is only with the fifth of fifteen findings of fact that the CRMC begins to reveal the basis of their decision. Findings five and six contain the decision's sole discussion of the historical evidence described above. The *Moren* case was dismissed as not being a "final adjudication;"[52] their evaluation of the remainder of the enormous amount of historical evidence was that it "purportedly identified" the contested path.[53]

Then, the decision changes tack and states five brief overlapping findings, all generally favorable to the public.[54] Finding ten summarizes: "The evidence shows public use of a *portion* of the path at all seasons of the year and public use has been open, notorious and plainly visible to past owners."[55] Finding twelve, however, presents the most controversial element. The CRMC found "insufficient evidence" for the right-of-way past a certain point, approximately half of the distance claimed as public.[56] To support the finding of the truncated path, the CRMC made only brief reference to "conflicting testimony"[57] as to the actual area used by the public and cited no part of the record.

In short, only three findings substantively address the evidence for establishing the full path as a public right-of-way and purport to justify the Council's abbreviated result. A closer examination follows.

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51. Petition of Downing Corporation/Ocean Road Partners, No. 85-12-30, Coastal Resources Management Council (May 22, 1989) (decision assenting to construction); Town of Narragansett/Black Point R.O.W., (unnumbered) Coastal Resources Management Council (May 22, 1989) (decision designating, in part, shoreline path as public right-of-way and refusing to designate, in part, shoreline path as public right-of-way) [hereinafter *Right-of-Way Decision*].

52. *Right-of-Way Decision*, *supra* note 51, at 2.

53. *Id.*, finding 6.

54. *Id.*

55. *Id.* (emphasis added).

56. *Id.*

57. *Id.*, finding 14.

2. Analysis of Decision

In refusing to recognize the full length of the Cliff Walk as a right-of-way, the CRMC failed to discuss the 1952 Noble deed, which explicitly refers to a possibility of a right-of-way. The decision merely recited that there are "no recorded public rights-of-way on the parcel."[58] Of course, in light of the 1952 deed, this is misleading. Although the 1952 deed did not declare a right-of-way, it did reference a possible right-of-way. The CRMC never explored this implication, despite the fact that there is a well-worn path that matches the deed.

Although the CRMC decision does acknowledge the existence of a visible well-worn path, the decision barely discusses why it chose to terminate the path at an arbitrary halfway point. No finding is made, nor could it have been made, that the path becomes less visible or pronounced at the arbitrary cut-off point. In fact, the path does begin to gradually taper off towards its end, but this physical feature in no way coincides with the CRMC's placement of the legal terminus. The only justification the CRMC offered for the cut-off is the supposed existence of "conflicting testimony as to the actual area used by the public."[59] However, the authors' reading of the record reveals no such evidence. Indeed, it would be hard to reconcile any such evidence with the very existence of the full well-trodden pathway.

The CRMC's decision also dismisses the significance of the 1928 case merely by indicating that "there was no final adjudication"[60] of the right-of-way. Although this statement is true as far as it goes, it is incomplete. The statement fails to mention that there was a preliminary ruling in the 1928 case that was in favor of the public or that the 1928 landowner and the successor landowners thereafter honored the public's use of the path. Arguably, this acquiescence by conduct was a tacit acceptance of the 1928 preliminary ruling as a binding decision.[61]

Finally, the decision made only cursory reference to the travel brochures and other material from the late nineteenth and early twentieth centuries. The CRMC drew absolutely no conclusions with regard to this material.

F. Subsequent and Collateral Proceedings

The proceedings before the CRMC led to a plethora of litigation and collateral activity, both before and after the CRMC's final ruling. Even before the CRMC decision, the matter found its way into

58. *Id.*, finding 5.
59. *Id.*, finding 14.
60. *Id.*, finding 5.
61. *See supra* text following note 34.

both the courts[62] and the political arena. The political field proved especially significant. During the hotly contested 1988 gubernatorial race, incumbent Governor Edward DiPrete announced plans to acquire Black Point as public property. The Governor planned to pay for Black Point through either purchase or condemnation, notwithstanding the then-pending claims before the CRMC that were aimed at establishing the public's pre-existing rights to the land.[63]

After the CRMC decision, the Attorney General appealed and sought to quiet title.[64] Others appealed the decision as well.[65]

On July 7, 1989, the administration, acting through the Rhode Island Department of Environmental Management and using the power of eminent domain, condemned the entire Black Point parcel as the Governor had planned, for an appraised price of $6,448,000.[66] This, in turn, has generated even more litigation.[67]

Despite the Governor's condemnation, the legal controversy over

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62. *See* Downing Ocean Road Inc. v. Narragansett Zoning Board of Review, No. WC86-403 (R.I. Super. Ct., Wash. Cty., Apr. 7, 1987) (decision overturning, on jurisdictional grounds, decision of the Zoning Board of Narragansett which had declared the existence of the public right-of-way), *cert. denied*, No. 87-206 (R.I. Sup. Ct., Nov. 10, 1987); Ocean Road Partners v. Taylor, No. PC88-2677 (R.I. Super. Ct., Prov. Cty., June 20, 1988) (order denying temporary restraining order to developer against citizens' group which had staged a "picnic" demonstration on the Black Point property).

63. *DiPrete Vows to Get Black Point Property*, The Providence Journal, Sept. 7, 1988, at 1, col. 1.

64. James E. O'Neil, in his capacity as Attorney General and Environmental Advocate for the State of Rhode Island brought O'Neil v. Downing/Ocean Road, No. WC89-0383 (R.I. Super. Ct., Wash. Cty., filed June 23, 1989) (action appealing decision of the CRMC and seeking quiet title).

65. Ocean Road Partners v. DiMuro, No. PC89-3432 (R.I. Super. Ct., Prov. Cty., filed June 23, 1989) (developers appeal of CRMC decision designating a part of the path as a public right-of-way); Conservation Law Found. of New England v. Coastal Resources Management Council, No. PC89-3429 (R.I. Super. Ct., Prov. Cty., filed June 23, 1989) (environmental organization's appeal of CRMC decision assenting to construction and CRMC decision designating only one-half of the path as a right-of-way); Save the Bay v. Coastal Resources Management Council, No. PC89-3428 (R.I. Super. Ct., Prov. Cty., filed June 23, 1989) (environmental organization's appeal of CRMC decision assenting to construction and CRMC decision designating only one-half of the path as a right-of-way).

66. State of Rhode Island and Providence Plantations, Department of Environmental Management, Division of Planning and Development, Statement of Condemnation, dated July 7, 1989, executed by Governor DiPrete and Director of Environmental Management Bendick, recorded at Book 327, Page 31, Town of Narragansett Land Evidence Records (describes purpose as "public recreation and the conservation of natural resources").

67. *In re* Ocean Road Partners, No. PM89-3766 (R.I. Super. Ct., Prov. Cty., July 14, 1989) (interim order withholding $1 million out of the $6.4 million appraised value of the property in order to satisfy the Attorney General's pending claim of a public right-of-way upon action initiated by the condemning authority in order to pay the appraised amount into court); Ocean Road Partners v. Rhode Island, No. PC89-4189 (R.I. Super. Ct., Prov. Cty., filed Aug. 2, 1989) (action by the developer against the state seeking to overturn the withholding of $1 million by the state).

the right-of-way endures.[68] The central civil action, the appeal of the denial of half of the right-of-way, was assigned to a judge in early 1990.[69] If the case follows the course of most civil litigation in Rhode Island courts, a decision is not expected for at least another year.

IV. Conclusion

Despite the fact that the Black Point case will live on through the appeals process for many years, it is quite clear that it has already had a significant impact on public access law in Rhode Island. Even though it was only a partial victory for public access, this was, for example, the first time the CRMC has used its authority to recognize a path *along*, and not just *to*, the shore. It could very well serve as the basis for similar claims as other large waterfront tracts around Narragansett Bay go through the permit and development process. Even though the CRMC did not recognize the full length of the path, their decision must be considered an affirmation of the common law doctrine of dedication in Rhode Island since it formed the basis for their finding that half of the path was indeed in the public domain.

If the CRMC verdict is overturned and dedication of the full path to the public is found, as the state argues, the state will have achieved a remarkable victory. Proponents of the dedication doctrine will have a current, well-documented precedent from which to work. If the verdict is overturned and the dedication argument rejected, as Downing argues, the use of that doctrine to maintain public rights will be drastically curtailed or eliminated. It would be difficult to construct a hypothetical situation that would present facts more compelling than those demonstrated in this case. If the court will not recognize dedication here, the doctrine must be considered all but dead in Rhode Island.

If the CRMC is upheld, however, the future of the dedication doctrine will depend upon the precise language of the court's opinion. A decision recognizing the doctrine based on deference to administrative factfinding in this case would be a valuable precedent for public access advocates. Failure to explicitly recognize the doctrine would conceivably cloud the issue in future cases.

Whatever the courts decide, however, they cannot alter the fact that because of the high level of controversy associated with this case, the people already enjoy Black Point as coastal open space by virtue of the state's taking by eminent domain. In addition, this case has raised access to the shore as a major public policy issue in Rhode Island. Buoyed by their success, access advocates are more

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68. *See supra* note 67. All of these actions are still pending and active.

69. Ocean Road Partners v. DiMuro, No. PC89-3432 (R.I. Super. Ct., Prov. Cty., filed Sept. 27, 1989) (order establishing briefing schedule).

confident than ever before. The years of public hearings, litigation, and appeals in this case have focused attention on the need to maintain existing access sites and to plan for future needs. The Black Point case will have a lasting impact as Rhode Island continues to struggle with the balance of public versus private rights to the shore.