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Concerned Citizens of Brunswick County Taxpayers Ass'n v. Holden Beach Enterprises: Preserving Beach Access through Public Prescription

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NOTES

Concerned Citizens of Brunswick County Taxpayers Ass'n v. Holden Beach Enterprises: Preserving Beach Access Through Public Prescription

Coastal states have seen a fundamental conflict emerge over title to their oceanfront beaches. Increasing demand for residential and commercial beachfront development has compelled the transfer of title to oceanfront property from the hands of the state or individuals with extensive undeveloped land holdings into the hands of individual lot owners. The resulting conflict is simple and universal. The public harbors the expectation, instilled through generations of unrestricted use, that oceanfront beaches lie within the public domain and that access to these beaches is guaranteed by some public right.[1] On the other side of the conflict, oceanfront property owners, most of whom paid premium prices for their land, assert that the rights of ownership vested in them are no narrower than those vested in an inland owner. These landowners object to public passage across or recreational use of their property out of concern that it may restrict their ability to develop the land or may reduce the value inherent in an "exclusive" residential subdivision or resort location.[2] On North Carolina's barrier islands, this conflict between public expectation and the demands of oceanfront property owners has grown incrementally as construction of public infrastructure has stimulated development. In most cases, public recreational and commercial use of barrier islands begins long before intensive residential development because permanent households are dependent on improved roads, bridges, or ferries, while recreational and commercial use occurs when an island can be reached only by boats, wooden bridges, and sand roads. This scenario breeds conflict between prior users and private landowners. In North Carolina, demand for oceanfront residential development has exploded over the last two decades,[3] fueling a rapid transition from open

1. *See* State *ex rel.* Thornton v. Hay, 254 Or. 584, 588, 462 P.2d 671, 673 (1969); Richard S. Goldman, Note, *Access to Public Municipal Beaches: The Formulation of a Comprehensive Legal Approach*, 7 SUFFOLK U. L. REV. 936, 961, 966-69 (1973); Elizabeth Leland, *Development Puts Beach Out of Reach*, CHARLOTTE OBSERVER, July 1, 1989, at A1.

2. *See* MARK E. SULLIVAN, LEGAL ISSUES IN BEACH ACCESS, REPORT TO THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL 1-2 (1977); Steve A. McKeon, Note, *Public Access to Beaches*, 22 STAN. L. REV. 564, 564-66 (1970).

3. Janet Olson, *Development Thrives on Coast*, WILMINGTON MORNING STAR, Apr. 3, 1989, at 1A; Mason Peters, *Population Waves Boom Along N.C. Coasts's Dunes*, GREENSBORO NEWS & REC., Dec. 31, 1985, at B1.

beaches and dunes to private subdivisions on many barrier islands. For these reasons, the North Carolina courts are now being forced to determine the extent of public and private rights in oceanfront beaches.

The clash between private and public expectations concerning public use of oceanfront beaches generates two distinct issues. One issue is "perpendicular access," which encompasses access from the public road across private upland property to the beach. Easements allowing perpendicular access have traditionally been created through eminent domain,[4] prescription,[5] or implied dedication.[6] "Lateral access" involves access across and recreational use of privately owned areas of the beach.

In North Carolina, as in most states,[7] title to the "foreshore," the land lying between the mean high tide line[8] and the mean low tide line, is inalienably vested in the state.[9] Title to property landward of the mean high tide line can be privately held.[10] Public use of oceanfront beaches almost invariably extends beyond the foreshore to the "dry-sand," the area lying between the mean high tide line and the first line of stable vegetation. Public use of the dry-sand beach is the subject of the lateral beach access issue. Coastal states around the country have confronted the question whether the public possesses some vested right to use the dry-sand beach.[11] Several courts have relied on the common-law doctrines of public prescription,[12] implied dedication,[13] custom,[14] or the

4. Eminent domain is the power of government to take private land for public use. *See* RALPH E. BOYER ET AL., THE LAW OF PROPERTY § 12.3, at 435 (4th ed. 1991). Because such takings invoke the Fifth Amendment right to payment of just compensation, a principal goal of state beach access programs is to preserve public rights created through other common-law doctrines in order to avoid having to rely on eminent domain.

5. *See infra* text accompanying note 20.

6. Implied dedication occurs when the elements of common-law dedication—intent on the part of the owners to dedicate land to public use and acceptance by the public—can be unequivocally proven by the conduct of the parties alone. 2 GEORGE W. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 369, at 432-33 (5th ed. 1980).

7. 1 RICHARD R. POWELL & PATRICK J. ROHAN, POWELL ON REAL PROPERTY ¶ 163, at 698 (1991); B.H. Glenn, Annotation, *Rights to Land Created at Water's Edge by Filling or Dredging*, 91 A.L.R.2D 857, 859 (1963).

8. The North Carolina Supreme Court has defined this term as "a *mean* or average high-tide, and not as the extreme height of the water." Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 303, 177 S.E.2d 513, 516 (1970) (emphasis added).

9. *Id.* at 302, 177 S.E.2d at 516; *see* N.C. GEN. STAT. § 77-20(a) (1990).

10. *Carolina Beach*, 277 N.C. at 302, 177 S.E.2d at 516.

11. *See* Alice G. Carmichael, Comment, *Sunbathers Versus Property Owners: Public Access to North Carolina Beaches*, 64 N.C. L. REV. 159, 162-75, 180-84 (1985).

12. *See* City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 75 (Fla. 1974); Moody v. White, 593 S.W.2d 372, 377-78 (Tex. Civ. App. 1979); *cf.* State *ex rel.* Thornton v. Hay, 254 Or. 584, 594, 462 P.2d 671, 676 (1969) (recognizing doctrine but not relying on it).

13. *See* Gion v. City of Santa Cruz, 2 Cal. 3d 29, 43, 465 P.2d 50, 59, 84 Cal. Rptr. 162, 171 (1970); Seaway Co. v. Attorney Gen., 375 S.W.2d 923, 930 (Tex. Civ. App. 1964).

public trust[15] to find that public rights do or can exist in the dry-sand beach.[16] A few states, however, have refused to do so, allowing purchasers of beaches long used by the public to close these beaches for exclusive use.[17]

In *Concerned Citizens of Brunswick County Taxpayers Ass'n v. Holden Beach Enterprises*[18] the North Carolina Supreme Court applied the public prescription doctrine to facts involving both perpendicular and lateral beach access issues.[19] Prescription is a common-law doctrine similar to adverse possession; it enables an individual who continually crosses another's land for a long period of time to perfect a permanent private easement in the path used.[20] Public prescription, by which a public easement is created, operates in a manner similar to private prescription, but requires that the nature and extent of the use throughout the prescriptive period be sufficiently public to give the landowner notice that a public easement has been claimed.[21] A few states have not recognized public prescription.[22] In *Concerned Citizens* the North Carolina Supreme Court significantly expanded the doctrine of public prescription to make both perpendicular and lateral beach access easier to acquire.

This Note discusses relevant aspects of the prescription doctrine: the "adverse use" element,[23] the "uninterrupted" element,[24] the "substantial identity" element,[25] and the significance of public maintenance in proving public prescription,[26] and considers other common-law theories

14. *See* United States v. St. Thomas Beach Resorts, Inc., 386 F. Supp. 769, 773 (D.V.I. 1974), *aff'd*, 529 F.2d 513 (3d Cir. 1975); *In re* Ashford, 50 Haw. 314, 316-17, 440 P.2d 76, 77-78 (1968); *Thornton*, 254 Or. at 595, 462 P.2d at 676.

15. *See* Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 332, 471 A.2d 355, 368, *cert. denied*, 469 U.S. 821 (1984).

16. *See generally* Gilbert L. Finnell, Jr., *Public Access to Coastal Public Property: Judicial Theories and the Taking Issue*, 67 N.C. L. REV. 627, 631-43 (1989) (discussing cases applying common-law doctrine).

17. *See* Bell v. Town of Wells, 557 A.2d 168, 179 (Me. 1989); Opinion of the Justices, 383 Mass. 895, 897-98, 916, 424 N.E.2d 1092, 1096-97, 1106 (1981).

18. 329 N.C. 37, 404 S.E.2d 677 (1991).

19. *Id.* at 44-45, 404 S.E.2d at 682-88.

20. 2 THOMPSON, *supra* note 6, § 335, at 140-41.

21. Daniel A. Degnan, *Public Rights in Ocean Beaches: A Theory of Prescription*, 24 SYRACUSE L. REV. 935, 953 (1973).

22. Both Connecticut and New York hold that "the unorganized public" cannot acquire rights by prescription. *See* Miller v. Grossman Shoes, Inc., 186 Conn. 229, 233-34, 404 A.2d 302, 304 (1982); Forest Hills Gardens Corp. v. Baroth, 147 Misc. 2d 404, 408, 555 N.Y.S.2d 1000, 1002 (N.Y. Sup. Ct. 1990); *see* 2 THOMPSON, *supra* note 6, § 342, at 208.

23. *See infra* notes 73-82 and accompanying text.

24. *See infra* notes 83-98 and accompanying text.

25. *See infra* notes 99-122 and accompanying text.

26. *See infra* notes 137-53 and accompanying text.

used to preserve lateral access to public beaches.[27] The Note concludes that the tests adopted by the *Concerned Citizens* court for determining the existence of the essential elements of public prescription created a reasonable expansion of the prescription doctrine that mirrors positions adopted in the majority of states. The Note suggests that the precedent established in *Concerned Citizens* will make it possible for the public to acquire rights of recreational use in the dry-sand beach through the doctrine of public prescription, and asserts that public rights to use the dry-sand beach should also be recognized through the public trust doctrine.[28]

Holden Beach West is a residential subdivision on the western end of Holden Beach,[29] a barrier island located near the southern extreme of North Carolina's coastline. In 1986, a group of citizens initiated a declaratory judgment action seeking to prevent Holden Beach Enterprises, the developer of Holden Beach West, from obstructing access to a road that the developer had constructed through the subdivision from the western end of an existing public road westward to Shallotte Inlet.[30] The North Carolina Department of Natural Resources and Community Development intervened as a plaintiff on behalf of the people of the state.[31] The claimants alleged that the subdivision road had become a public right-of-way either by prescriptive public use or by implied dedication.[32] The trial judge, sitting as the factfinder, held that the claimants' evidence was insufficient to perfect an interest in the road by prescription or implied dedication.[33] The North Carolina Court of Appeals affirmed the trial court in all respects, adding, in response to the claimants' argument that rights of recreational use of the dry-sand beach were vested in the public by virtue of the public trust doctrine, that the public trust doctrine should not be extended to "deprive individual property owners of some portion of their property rights without compensation."[34] A closely di-

27. *See infra* notes 154-200 and accompanying text.

28. *See infra* notes 201-75 and accompanying text.

29. Holden Beach, which is west of Lockwood Folly Inlet and Long Beach and east of Shallotte Inlet and Ocean Isle Beach, lies along the southernmost stretch of North Carolina's coast. This stretch of coastline lies on an east-west axis. *Concerned Citizens*, 329 N.C. at 40, 404 S.E.2d at 679.

30. *Id.* at 39-40, 404 S.E.2d at 679.

31. The Department of Natural Resources and Community Development intervened on the grounds that it was authorized to enforce North Carolina's Beach Access program under § 113A-134.1 of the North Carolina General Statutes. *Id.* at 39, 404 S.E.2d at 679. Pursuant to state government reorganization, this authority is now vested in the Department of Environment, Health, and Natural Resources under the same statute.

32. *Id.*

33. *Id.*

34. Concerned Citizens of Brunswick County Taxpayers Ass'n v. Holden Beach Enters., 95 N.C. App. 38, 46, 381 S.E.2d 810, 815 (1989), *rev'd*, 329 N.C. 37, 404 S.E.2d 677 (1991).

vided North Carolina Supreme Court reversed and remanded, holding that the lower courts had misapplied the common-law tests for public prescription.[35] The supreme court expressly disavowed the court of appeals' statements concerning the public trust doctrine,[36] but did not otherwise address the public trust or dedication issues.[37]

Seasonally, for approximately forty years, members of the public crossed the property now known as Holden Beach West to fish, hunt, camp, and drive on the sands near Shallotte Inlet.[38] Prior to 1962, when Holden Beach Enterprises purchased the property, this use had occurred with the implied, if not express, permission of the landowner.[39] To aid in analysis of the *Concerned Citizens* holding, the path over which the public easement was claimed may be divided into three distinct sections. The first section of the path extended one-quarter mile from the eastern boundary of the subdivision to the western edge of the overwash area.[40] This section of the path could be characterized as a typical sand road; it consisted of a two-rut path that ran along the landward side of the frontal dunes.[41] Smaller trails were located along this road where drivers turned off to get to the sound or the beach, and the location of the path over this area shifted at times when drivers compensated for dune movement, avoided flooded areas, or left the path to avoid oncoming vehicles, but it generally remained in an identifiable line.[42] The second section of the path crossed an area approximately one-third of a mile wide known as the "overwash area."[43] The overwash area was created in 1954 when Hurricane Hazel cut a new inlet through Holden Beach Island.[44] Although this inlet quickly filled in, it left behind a low-lying area where the dunes had been destroyed and the dry-sand beach was very wide; this

35. *Concerned Citizens*, 329 N.C. at 54-55, 404 S.E.2d at 688.

36. *Id.* at 55, 404 S.E.2d at 688.

37. The court's decision to disavow the court of appeals' refusal to expand the public trust doctrine is important because *Concerned Citizens* may serve as a stepping stone to a future judicial expansion of the public trust doctrine creating public rights of access to areas of the dry-sand beach. *See infra* notes 268-75 and accompanying text.

38. *Concerned Citizens*, 329 N.C. at 42, 404 S.E.2d at 680.

39. *Id.* at 56, 404 S.E.2d at 689 (Mitchell, J., dissenting). The fact that the use before 1962 was permissive in nature is not expressly acknowledged by the majority. It can be implied, however, from the reasoning of the majority opinion, which is primarily concerned with the period from 1962 to 1986. This fact is critical because prescriptive use must be adverse. *See infra* notes 73-82 and accompanying text. Thus, the prescriptive use in the *Concerned Citizens* case did not begin until 1962.

40. *Concerned Citizens*, 329 N.C. at 42, 404 S.E.2d at 680. For a description of the overwash area, see *infra* text accompanying notes 43-45.

41. *Concerned Citizens*, 329 N.C. at 42-45, 404 S.E.2d at 680-82.

42. *Id.* at 43-44, 404 S.E.2d at 681-82.

43. *Id.* at 42-45, 404 S.E.2d at 680-82.

44. *Id.*

wide beach remained subject to frequent overwash during storms.[45] Use of the overwash area took three forms. First, the overwash area was the primary destination for many sun-seekers. Second, persons driving toward the inlet at low tide would proceed oceanward across the overwash area to get to the foreshore, where the sand was packed and easy to drive on. Third, at high tide, persons travelling toward the inlet would drive laterally across the overwash area to reach the sand road running behind the dunes on the west side of the overwash area. The precise locations of these routes were impossible to pinpoint over the years because trails across the wide beach were erased during large storms.[46] The third section of the path ran from the west side of the overwash area to the general vicinity of the inlet.[47] While the part of this section nearest the overwash generally followed an identifiable path, the western end was described as "random loops and trails."[48]

Between 1977 and 1978, Holden Beach Enterprises constructed a marl road[49] through the subdivision in the same general location as the sand road.[50] The sand road, however, had curved where the subdivision road was straight, and, while the road did cross the old path at some points, the two ran up to 200 feet apart in some places.[51] The developer aligned the subdivision road with the state primary public road to the east, and paved the subdivision road in 1985, after the state completed paving the public road.[52] It was over this subdivision road that the claimants sought a public easement. Although the Town of Holden Beach used the road to provide municipal services to subdivision residences, all costs for construction and paving of the subdivision road were borne by the developer.[53] Between 1962 and 1985, in an escalating effort to prevent trespass across his land, the developer posted many "No Tres-

45. *Id.* at 41, 404 S.E.2d at 680.

46. The use of the overwash area was not described fully in the majority opinion. For a summary of testimony describing the use of the overwash area, see Joint Brief for the Plaintiff-Appellants and Intervenor-Plaintiff-Appellant at 30, Concerned Citizens of Brunswick County Taxpayers Ass'n v. Holden Beach Enters., 95 N.C. App. 38, 381 S.E.2d 810 (1989) (No. 8813SC1075), *rev'd*, 329 N.C. 37, 404 S.E.2d 677 (1991).

47. The length of the third section did not remain constant because Shallotte Inlet gradually shifted eastward between 1960 and 1985. See map appearing on next page for a diagram of the beach.

48. *Concerned Citizens*, 329 N.C. at 43, 404 S.E.2d at 681.

49. The term "marl" describes a roadbed consisting of crushed shells and clay. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1383 (1976).

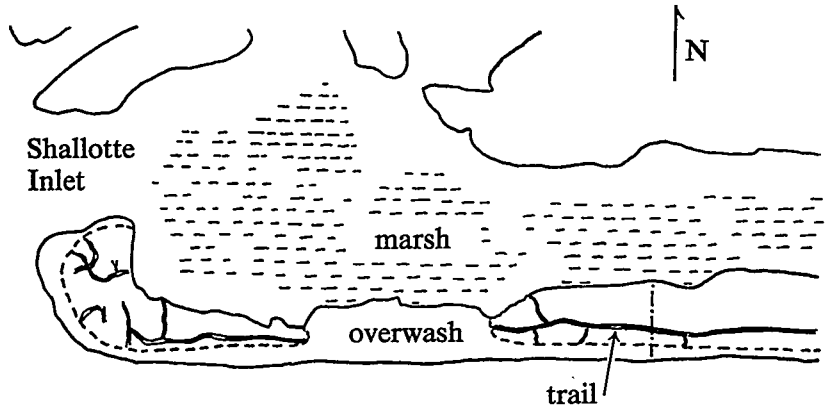
50. *Concerned Citizens*, 329 N.C. at 41, 404 S.E.2d at 680.

51. *Id.* at 43-44, 404 S.E.2d at 681-82.

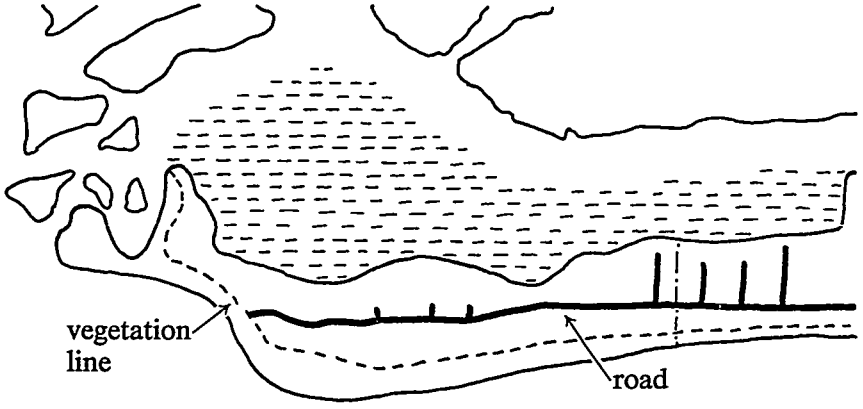
52. *Id.* at 41-42, 404 S.E.2d at 680-81.

53. The Town of Holden Beach used the subdivision road to supply fire and police protection, garbage service, and a water line; the Town also posted street signs on the road. *Id.* at 42, 404 S.E.2d at 681.

Holden Beach West: 1962



Holden Beach West: 1984



The above diagrams were drawn from aerial photography. The 1962 photography was Exhibit 19 at trial. The 1984 photography is on file at the North Carolina Division of Coastal Management.

passing" signs, placed telephone poles across the road, stretched a padlocked cable across the road to a length of 200 feet, constructed numerous gates, posted guards, and warned users that he would have them arrested for trespass.[54] While these efforts succeeded in turning away some beachgoers, they were ignored or destroyed by many, and the number of people using the road increased over the years as public use of Holden Beach Island increased.[55]

Writing for the majority, Justice Meyer identified two chief grounds for reversal. The court first turned to the question of substantial identity, and held that the requirement that " '[t]here must be substantial identity of the easement claimed' " in order to perfect an easement by prescription did not require that the use be "confined to a definite and specific line of travel for twenty years."[56] Rather, the test requires only " 'substantial identity' of a definite and specific line" sufficient to give the owner of the servient land "notice of not only the adverse claim, but the extent of it as well."[57] In addition, the trial court must "take into account the character of the land over which one claims an easement when determining whether the easement has substantially retained its identity."[58] Finally, changes in a path made to avoid natural obstructions or to suit the convenience of the landowner do not destroy the substantial identity of an easement.[59] Turning next to the interruption question, the court held that the trial court's finding that the State could not prove continuous and uninterrupted use under these facts was erroneous.[60] Rather, "[t]he fact that the barricades placed by the [owner of the servient land] may . . . discourage[ ] the use of the pathway . . . or even suspend[ ] its use very briefly . . . does not destroy . . . continuity of use."[61] Moreover, unsuccessful attempts to interrupt use, including those that make the use of a way less convenient, "will not prevent the use from ripening into an easement."[62] Both of the court's reasons for reversal represent substantial changes in the law of prescription in North Carolina. A significant omission from the *Concerned Citizens* opinion should also be noted: The court did not address whether the standards for public prescription in North Carolina differ in any way from those

54. *Id.* at 49-51, 404 S.E.2d at 685-86.

55. *Id.*

56. *Id.* at 45-46, 404 S.E.2d at 682-83 (quoting West v. Slick, 313 N.C. 33, 49-50, 326 S.E.2d 601, 610-11 (1985)) (emphasis omitted).

57. *Id.* at 47, 404 S.E.2d at 683.

58. *Id.* at 48, 404 S.E.2d at 684.

59. *Id.* at 49, 404 S.E.2d at 684-85.

60. *Id.* at 49, 404 S.E.2d at 685.

61. *Id.* at 52, 404 S.E.2d at 686.

62. *Id.* at 54, 404 S.E.2d at 687.

established for private prescription. This omission is important because prior decisions have suggested that maintenance of a roadway by public officials is an essential element of public prescription in North Carolina.[63]

Justice Mitchell dissented, arguing that the actions taken by the developer were sufficient to constitute an interruption of prescriptive use as a matter of law.[64] Stating that any barrier erected by a landowner that prevents the "full and free enjoyment of the easement" for any period of time, "however brief[ ]," should constitute an interruption of prescriptive use,[65] Justice Mitchell suggested that any "act[ ] which would block . . . public use sufficiently to be criminal if done in a public highway" should be considered an effective interruption of public use of a prescriptive easement.[66] Finally, the dissent pointed out the majority's failure to address the argument that, as a matter of law, the easement did not exist because "control of it has [not been] accepted by properly constituted public authorities," but the dissent did not offer an opinion on this issue.[67]

To acquire an easement by prescription in North Carolina, a claimant must prove that her use has been (1) "adverse, hostile, or under claim of right," (2) "open and notorious," and (3) "continuous and uninterrupted for a period of twenty years," and that (4) there has been "substantial identity of the easement claimed."[68] These four essential elements have remained virtually unchanged for over fifty years.[69] The burden the claimant must meet to prove each element, however, has been the subject of a slow and at times inconsistent evolution. The development of the law has been inconsistent for two reasons. More importantly, since 1850, the doctrine of prescription in North Carolina has undergone a slow transformation from a theory based on the common-law doctrine of the lost grant to a theory based on an analogy to adverse

63. *See infra* notes 139-53 and accompanying text.

64. *Concerned Citizens*, 329 N.C. at 55, 404 S.E.2d at 688 (Mitchell, J., dissenting). Justices Webb and Whichard joined the dissent. *Id.* at 61, 404 S.E.2d at 691 (Mitchell, J., dissenting).

65. *Id.* at 59, 404 S.E.2d at 690 (Mitchell, J., dissenting).

66. *Id.* (Mitchell, J., dissenting). The majority and dissent disagreed sharply on the factual question of how successful the developer had actually been in interrupting traffic across his land for substantial lengths of time. *Id.* at 60, 404 S.E.2d at 691 (Mitchell, J., dissenting). This disparity is significant because it indicates that the majority's concern for the public policy goal of providing public beach access may have colored its interpretation of the facts. *See infra* text accompanying note 216.

67. *Concerned Citizens*, 329 N.C. at 56, 404 S.E.2d at 688 (Mitchell, J., dissenting).

68. *E.g.*, Dickinson v. Pake, 284 N.C. 576, 580-81, 201 S.E.2d 897, 900-01 (1974).

69. *See, e.g.*, West v. Slick, 313 N.C. 33, 49-50, 326 S.E.2d 601, 610-11 (1985); *Dickinson*, 284 N.C. at 580-81, 201 S.E.2d at 900-01; Hemphill v. Board of Aldermen, 212 N.C. 185, 188, 193 S.E. 153, 154-55 (1937).

possession.[70] In addition, the essential elements of prescription are interrelated. For example, use may be deemed permissive, negating the essential element of adverse use, if no substantial attempt has been made by the landowner to interrupt it, while any substantial attempt by the landowner to interrupt use may be construed as negating the essential element of continuous and uninterrupted use.[71] Similarly, if a claimant forsakes one path over a landowner's property for another, this change may be construed as an abandonment of the earlier path representing a lapse in continuous use, as a deviation from the earlier path that may defeat the "substantial identity" essential element, or simply as evidence of permissive use.[72]

The requirement that use be "adverse, hostile, or by claim of right"[73] has been the subject of considerable litigation in North Carolina. Before 1850, North Carolina followed the view, derived from the theory

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70. The prescription doctrine derived from the common-law theory of the lost grant, under which the courts created the fiction that an easement was granted in years past in a deed that was subsequently lost. *See* Jerome J. Curtis, *Reviving the Lost Grant*, 23 REAL PROP. PROB. & TR. J. 535, 537-38 (1988). The doctrine operated to preclude a landowner from presenting evidence that a grant had not been made if the claimant could show continuous, peaceable use for a long period of time and that the use had occurred under claim of right. *See* 1 SIR EDWARD COKE, COMMENTARY UPON LITTLETON 113b (Francis Hargrave & Charles Butler eds., Philadelphia, Robert H. Small 1853) (1659); 2 THOMPSON, *supra* note 6, § 337, at 162. American courts have altered the theoretical basis for the prescription doctrine by shifting from the lost grant theory to a theory based on adverse possession. *Id.*; *see also* Curtis, *supra*, at 536-41 (describing the development of the law from the lost grant theory to the analogy to the statute of limitations for adverse possession). Thus, American courts generally require that the claimant prove use that is open and notorious, continuous and uninterrupted, adverse, and under claim of right to perfect an easement by prescription. *See* 2 THOMPSON, *supra* note 6, § 340, at 190-91. Prescription, however, differs from adverse possession in two significant ways. First, adverse possession occurs when the statute of limitations runs on a landowner's right to bring an action to recover possession; in contrast, there is no statute of limitations on the right of a landowner in possession to sue in trespass when persons are crossing his property. Thus, prescription is a judicial doctrine while adverse possession is, fundamentally, a creature of statute. *See* ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 8.7, at 455-56 (1984). Second, to acquire property by adverse possession, a claimant must prove exclusive possession. *See id.* § 11.7, at 762. While most jurisdictions allow nonexclusive prescriptive use, some create a presumption of permissive use when use is nonexclusive. *See* 2 THOMPSON, *supra* note 6, § 343, at 214-16.

71. John G. Aldridge, Note, *Prescriptive Acquisition in North Carolina*, 45 N.C. L. REV. 284, 292-94 (1966).

72. *See, e.g.*, Long Island Beach Buggy Ass'n v. Town of Islip, 58 Misc. 2d 295, 296, 295 N.Y.S.2d 268, 272 (N.Y. Sup. Ct. 1968), *aff'd*, 35 A.D.2d 739, 316 N.Y.S.2d 430 (N.Y. App. Div. 1970).

73. These terms are used interchangeably by the courts. *E.g.*, *Dickinson*, 284 N.C. at 581, 201 S.E.2d at 900. It is most useful to conceive of the collective elements in the phrase "adverse, hostile or by claim of right" as a term of art connoting the claimant's burden of proof that the use was not permissive in nature and that the landowner was given notice that a property interest adverse to his own was being claimed. Dulin v. Faires, 266 N.C. 257, 261, 145 S.E.2d 873, 875 (1966).

of the lost grant, that continued use over a long period of time created the presumption that the use was adverse.[74] This presumption of adverse use continues to control in the majority of states.[75] After 1850, however, North Carolina gradually shifted to a presumption of permissive use, requiring the claimant to prove by contrary fact that a landowner did not impliedly give the claimant a license to cross his land.[76] This burden has been difficult to overcome.[77] For example, when a claimant had crossed

74. *See* State v. Hunter, 27 N.C. (5 Ired.) 369, 370 (1845); Gerenger v. Summers, 24 N.C. (2 Ired.) 229, 232 (1842); Pugh v. Wheeler, 19 N.C. (2 Dev. & Bat.) 50, 59 (1836); Wilson v. Wilson, 15 N.C. (4 Dev.) 154, 155-56 (1833); Brent C. Shaffer, Note, *Acquiring Public Use of Roadway by Statute and Prescriptive Easement in North Carolina*—West v. Slick, 21 WAKE FOREST L. REV. 807, 810 (1986).

75. *See, e.g.*, 2 THOMPSON, *supra* note 6, § 335, at 144; J.E. Macy, Annotation, *Easement by Prescription: Presumption and Burden of Proof as to Adverse Character of Use*, 170 A.L.R. 776, 778-92 (1947). Professor Cunningham argues that the adverse presumption is the better view for the simple reason that an intrusion on another's property without express permission or license is a trespass and therefore adverse to the fee owner's property interest. CUNNINGHAM et al., *supra* note 70, § 8.7, at 452-53. Professor Cunningham views the presumption of permissive use as the unfortunate result of the theory of the lost grant, a theory that he states was not the theoretical foundation of the prescription doctrine in America and should be relegated to the status of a historical curiosity. *Id.* at 451-53.

This argument may be challenged on two counts. First, the theory of the lost grant is less conducive to a permissive presumption than is a prescription theory based on an analogy to adverse possession because, while both theories require adverse use, only the lost grant theory requires "peaceable" use and landowner "acquiescence." Thus, under the lost grant theory, the claimant must prove both that the use occurred without permission and that the landowner acquiesced to it (by failing to object); in contrast, under the analogy to adverse possession, the claimant must prove only that the use was without permission. *See* Curtis, *supra* note 70, at 543. Because evidence of lack of permission and evidence of peaceable use and landowner acquiescence will generally be conflicting, a presumption of permissive use is inconsistent with the lost grant theory. *See id.* at 543-44. Second, at least in North Carolina, the fiction of the lost grant was without question the theoretical basis for the development of the prescription doctrine. *See* Aldridge, *supra* note 71, at 287-92. Like other jurisdictions, North Carolina has slowly extricated its prescription doctrine from the lost grant theory. *Id.* It may be argued that, as a result, North Carolina should also unburden itself of its permissive presumption.

76. *See* Potts v. Burnette, 301 N.C. 663, 666-67, 273 S.E.2d 285, 288 (1981) (expressly refusing to reject North Carolina's "present position that a user is presumed to be permissive and adopt the rule, obtaining in the majority of jurisdictions, that the user is presumed to be adverse"). The transition from the adverse presumption to the permissive presumption can be traced through the following cases: Snowden v. Bell, 159 N.C. 497, 499, 75 S.E. 721, 721 (1912), *aff'd*, 166 N.C. 208, 80 S.E. 888 (1914); Boyden v. Achenbach, 86 N.C. 397, 399 (1882); Ray v. Lipscomb, 48 N.C. (3 Jones) 185, 186 (1855); Smith v. Bennett, 46 N.C. (1 Jones) 372, 373 (1854); Ingraham v. Hough, 46 N.C. (1 Jones) 39, 43 (1853); Mebane v. Patrick, 46 N.C. (1 Jones) 23, 25 (1853); Felton v. Simpson, 33 N.C. (11 Ired.) 84, 85-86 (1850). *See* Aldridge, *supra* note 71, at 287-92 (providing a summary of the development of the law of prescription in North Carolina); Macy, *supra* note 75, at 800-01.

77. *See* Aldridge, *supra* note 71, at 290-92; Macy, *supra* note 75, at 800-01. *But see* Shaffer, *supra* note 74, at 811 (concluding that "the North Carolina presumption of permission is so easy to refute that a change to the majority view would lead to virtually no difference in result"). Shaffer relies on *Dulin*, 266 N.C. 257, 145 S.E.2d 873, for the proposition that the permissive presumption is refuted easily, because the *Dulin* court held the presumption rebut-

another's land without express permission for fifty years, removed obstructions when they were placed across the road, and threatened to sue the landowner if an obstruction was not removed immediately, the supreme court held that the claimant had failed to overcome the presumption of permissive use.[78] This led one commentator to conclude that prescription could not be proved in North Carolina unless the landowner expressly or actively objected to the use or expressly acquiesced to the user's adverse right.[79] In other words, an easement could not be perfected by a showing of "quiet acquiescence" alone, even if the use had continued for generations.[80] More recent cases indicate that a claimant

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ted when a claimant never requested permission to use a road and a landowner never objected to the use. *See id.* at 261-63, 145 S.E.2d at 876-77. This reliance on *Dulin* is misplaced. The *Dulin* court found as a fact that the landowner had expressly stated during the prescriptive period that the claimant owned the road in question and was responsible for its upkeep. *Id.* at 260-61, 145 S.E.2d at 877. While this Note agrees that claimants' success in rebutting the presumption of permissive use has increased substantially since *Dickinson*, the permissive presumption continues to defeat prescription in some cases in which easements could be perfected under the majority rule. *See infra* note 81 and accompanying text.

78. Weaver v. Pitts, 191 N.C. 747, 748-49, 133 S.E. 2, 2-3 (1926). The *Weaver* court may have been influenced by the fact that a public road providing access to the same points as the alleged prescriptive road had recently been created. *Id.*

79. Aldridge, *supra* note 71, at 289-92; *see also* Henry v. Farlow, 238 N.C. 542, 544, 78 S.E.2d 244, 246 (1953) ("Neither law nor logic can confer upon a silent use a greater probative value than that inherent in a mere use."). Both the owner and the claimant remained silent in *Henry*. *Id.* at 543, 78 S.E.2d at 244-45.

80. *See Henry*, 238 N.C. at 544, 78 S.E.2d at 246; Aldridge, *supra* note 71, at 289-92. It has generally been held in American jurisdictions that prescriptive acquisition requires "open, exclusive, continuous, uninterrupted, adverse use[] under [a] claim of right with the knowledge and acquiescence of the owner for the prescriptive period." 25 AM. JUR. 2D *Easements* §§ 49, 63 (1966); *see* 3 RICHARD R. POWELL, POWELL ON REAL PROPERTY ¶ 413, at 34-104 to 34-136.3 (1990). This formulation of the prescription doctrine is a hybrid of the elements of the lost grant and adverse possession theories, and is indicative of the confusion engendered by the evolution from one theory to the other. "Acquiescence" has been defined within the lexicon of prescriptive acquisition as "consent by silence, passive assent or submission." 2 THOMPSON, *supra* note 6, § 337, at 164. Under the lost grant theory, this term described the nature of the use that lay between use with landowner permission and use in the face of express landowner objection. *See* Curtis, *supra* note 70, at 544. The doctrine of acquiescence should not be applied to a theory of prescription based solely on an analogy to the statute of limitations for adverse possession because adverse possession does not require silence, assent, or submission. *See* CUNNINGHAM et al., *supra* note 70, § 8.7 at 453. In North Carolina "acquiescence" is not an element of prescriptive acquisition; the term disappeared from the case law in the early 1900s. In addition, "quiet acquiescence," or the failure to object to use by another, is construed as evidence of permissive use. *See* Aldridge, *supra* note 71, at 291-92; *see also* State v. Norris, 174 N.C. 808, 809, 93 S.E. 950, 951 (1919) (holding that the "mere fact that [claimant] was using a pathway across the defendant's land for his own convenience will not be given the effect of an adverse user without evidence to support it" because "[t]he quiet acquiescence of the defendant in such use, as an act of neighborhood courtesy, will not be allowed to prejudice him"); *Snowden*, 159 N.C. at 499, 75 S.E. at 721 (declining to " 'deduce from the owner's . . . simple act of neighborhood courtesy, in [granting] the use of a way convenient to others and not injurious to himself, over land unimproved or in woods, consequences so seriously

may be able to rebut the presumption of permissive use when the landowner has quietly acquiesced in the claimant's use for a very long period of time and when the claimant has undertaken to maintain the road in some way, albeit slight.[81] The courts, however, continue to recite the fundamental rule that "[a] mere permissive use of a way over another's land, however long it may be continued, can never ripen into an easement by prescription."[82]

The "continuous" and "uninterrupted" requirements may be viewed as distinct elements of prescription. A lapse in continuity connotes inaction by a claimant who fails to assert his claim to a path with the frequency necessary to give the landowner notice of his claim; the requisite frequency varies greatly depending on the nature of the use by which the

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detracting from the value of the land thus used, and compel him needlessly to interpose and prevent the enjoyment of the privilege in order to the preservation of the right of property unimpaired' ") (quoting *Boyden*, 86 N.C. at 398-99).

81. *See* Potts v. Burnette, 301 N.C. 663, 668, 273 S.E.2d 285, 289 (1981) (holding that a claimant had successfully rebutted the presumption of permissive use by showing 50 years' use without express permission and that claimant had graded and graveled the road); *Dickinson*, 284 N.C. at 583-84, 201 S.E.2d at 901 (holding that a claimant had successfully rebutted the presumption of permissive use by showing 30 years' use without express permission, that claimants had performed the slight maintenance—raking leaves and scattering oyster shells—necessary to maintain road, and that the road was the only access to claimant's home). A series of North Carolina Court of Appeals cases have suggested that maintenance of the roadway and the fact that the roadway was the sole means of access to the claimant's property are extremely important, if not essential, factors in rebutting the presumption of permissive use when the permission has never been requested, but the landowner has not objected. *See* Presley v. Griggs, 88 N.C. App. 226, 233-35, 362 S.E.2d 830, 834-35 (1987); Perry v. Williams, 84 N.C. App. 527, 529, 353 S.E.2d 226, 228 (1987); Williams v. Sapp, 83 N.C. App. 116, 121, 349 S.E.2d 304, 306-07 (1986); Dotson v. Payne, 71 N.C. App. 691, 697-98, 323 S.E.2d 362, 366-67 (1984); Newsome v. Smith, 56 N.C. App. 419, 422, 289 S.E.2d 149, 150-51 (1982).

"A 'hostile' use is simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under a claim of right." *Dickinson*, 284 N.C. at 581, 201 S.E.2d at 900 (citing *Dulin*, 266 N.C. at 261, 145 S.E.2d at 875). The list of "circumstances" that can evidence adverse or hostile use in North Carolina includes the following: (1) Use under color of title, *see* Johnson v. Stanley, 96 N.C. App. 72, 75, 384 S.E.2d 577, 579 (1989); Higdon v. Davis, 71 N.C. App. 640, 650-51, 324 S.E.2d 5, 13 (1984) (holding use under color of title sufficient to give notice that use was under claim of right), *rev'd in part*, 315 N.C. 208, 219, 337 S.E.2d 543, 548 (1985) (finding that use did not occur under color of title); (2) continuing use despite physical acts or speech on the part of the landowner objecting to the use, *see Concerned Citizens*, 329 N.C. at 54-55, 404 S.E.2d at 686 (1991); (3) maintenance by the claimant, *see Potts*, 301 N.C. at 668, 273 S.E.2d at 289; (4) use over a way that provides the sole means of access to claimant's property, *see Dickinson*, 284 N.C. at 583-84, 201 S.E.2d at 902; (5) continuous use for an extremely long period of time, *see Potts*, 301 N.C. at 688, 273 S.E.2d at 289; (6) prior admission by landowner that claimant had right to use path, *see Dulin*, 266 N.C. at 262, 145 S.E.2d at 876-77; and, of course, (7) express statements by the claimant throughout the prescriptive period claiming a property interest in the right-of-way, *see Perry*, 84 N.C. App. at 529, 353 S.E.2d at 228.

82. West v. Slick, 313 N.C. 33, 49, 326 S.E.2d 601, 611 (1985) (citing *Dickinson*, 284 N.C. at 581, 201 S.E.2d at 900).

easement is claimed.[83] For example, in *Concerned Citizens* a lapse in use during the winter months did not defeat continuity because the nature of the use was seasonal.[84] An interruption of prescriptive use connotes activity by the landowner that prevents the claimant's use of the path for a period of time or defeats the adverse use element.[85] There exist among the states significant differences in the level of landowner objection necessary to constitute an interruption of prescriptive use. A majority of states require intent to interrupt, an overt act toward that end, and actual success in interrupting use for some substantial period of time.[86] A significant minority, however, require only an overt action representing an assertion of ownership and manifesting intent to interrupt use, regardless of whether use ever actually ceases.[87] The legal effects of an interruption of prescriptive use and of a lapse in continuous use are identical—the prescriptive clock is reset to zero.

The only North Carolina case that directly addresses what a landowner must do to interrupt prescriptive use is *Ingraham v. Hough*.[88] The *Ingraham* court held that "an act done by the owner of the servient tenement which would prevent the full and free enjoyment of the easement" or "any act which, if done in a public highway, would be an indictable offense" should be considered an interruption of prescriptive use.[89] *Ingraham* has been cited in other jurisdictions and by commentators for the proposition that a mere verbal protest, unaccompanied by physical obstructions, is sufficient to constitute an interruption of prescriptive use.[90]

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83. *See, e.g.*, Downing v. Grover, 237 Mont. 172, 176, 772 P.2d 850, 852 (1989).

84. *Concerned Citizens*, 329 N.C. at 53, 404 S.E.2d at 687-88.

85. *Downing*, 237 Mont. at 176, 772 P.2d at 852.

86. *See* Bull v. Salsman, 435 So. 2d 27, 30 (Ala. 1983); Guerra v. Packard, 236 Cal. App. 2d 272, 294, 46 Cal. Rptr. 25, 37 (1965); South Norwalk Lodge v. Palco Hats, 140 Conn. 370, 374, 100 A.2d 735, 737 (1953); Lofland v. Truitt, 260 A.2d 909, 912 (Del. Ch. 1969); Shuggars v. Brake, 248 Md. 38, 46, 234 A.2d 752, 757-58 (1967); Brown v. Redfern, 541 S.W.2d 725, 728 (Miss. 1976); Trustees of Forestgreen Estates v. Minton, 510 S.W.2d 800, 802-03 (Mo. 1974); Keefer v. Jones, 467 Pa. 544, 550-51, 359 A.2d 735, 738 (1976); Huff v. Northern Pac. Ry., 38 Wash. 2d 103, 113, 228 P.2d 121, 127 (1951); 2 THOMPSON, *supra* note 6, § 347, at 250-51.

87. Chicago Steel v. Malan Constr. Co., 200 Ill. App. 3d 701, 708, 558 N.E.2d 341, 345 (1990); Gadreault v. Hillman, 317 Mass. 656, 662-63, 59 N.E.2d 477, 481 (1945); Rice v. Miller, 306 Minn. 523, 526, 238 N.W.2d 609, 610-11 (1976); Thompson v. Schuh, 286 Or. 201, 209 n.5, 593 P.2d 1138, 1143 n.5 (1979); 2 THOMPSON, *supra* note 6, § 347, at 253.

88. 46 N.C. (1 Jones) 39 (1853). *Ingraham* was ignored by the majority in *Concerned Citizens* and only briefly noted by the dissent. *Concerned Citizens*, 329 N.C. at 59, 404 S.E.2d at 690 (Mitchell, J., dissenting).

89. *Ingraham*, 46 N.C. (1 Jones) at 44.

90. *See, e.g.*, Conness v. Pacific Coast Joint Stock Land Bank, 46 Ariz. 338, 340-41, 50 P.2d 888, 889-90 (1935); 2 THOMPSON, *supra* note 6, § 347, at 253-54 n.35; Annotation, *What Will Disprove Acquiescence by Owner Essential to Easement by Prescription in Case of Known Use*, 5 A.L.R. 1325, 1325-26 (1920).

One commentator concluded that prescription could be proved in North Carolina only if the landowner expressly acquiesced in the claimant's right to use the way, because silence on the part of the landowner was deemed evidence of permissive use, while any protest by the landowner constituted an interruption of prescriptive use.[91]

This reliance on *Ingraham* may have been misplaced. *Ingraham* was decided during a transitional period in the law of prescription when the North Carolina courts indulged in the fiction of the lost grant by presuming a prior grant if the use of a path had been long, continuous, and peaceable.[92] Because the common law was moving toward an analogy to adverse possession, however, the courts illogically held that this presumption could be rebutted by evidence that no such grant had occurred.[93] Most importantly, the *Ingraham* test for prescription, founded on the lost grant theory, required uninterrupted "peaceable" use and landowner "acquiescence," while the modern prescription test, based on an analogy to the statute of limitations in adverse possession, does not require "peaceable" use or landowner "acquiescence" and places much greater weight on the requirement that the use be "adverse, hostile, or by claim of right."[94] Because the lost grant theory focused on "passive assent"[95] by the landowner, while the adverse possession theory does not require "passive assent" and demands evidence that the use was openly adverse to the landowner's property interest, the level of landowner protest necessary to constitute an interruption of use should differ substantively under these tests.[96] Under the lost grant theory, a verbal protest

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91. *See* Aldridge, *supra* note 71, at 292-94.

92. *Ingraham*, 46 N.C. (1 Jones) at 42-43. A 20-year duration has been required consistently in North Carolina under both the lost grant and adverse possession theories. *See* Wilson v. Wilson, 15 N.C. (4 Dev.) 154, 155 (1833).

93. *Ingraham*, 46 N.C. (1 Jones) at 42-43. To allow evidence proving that a lost grant, which was merely a fictional construct created by the courts, had never actually existed was clearly illogical.

94. *See supra* notes 73-82 and accompanying text.

95. *See supra* note 80.

96. JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 374 (3d ed. 1989); *see* Note, *Interruption of the Adverse Enjoyment of Easements*, 20 HARV. L. REV. 317, 318 (1907):

> [W]hen applied to the adverse enjoyment of incorporeal hereditaments, especially easements, the idea that non-acquiescence, affirmatively proved, rebuts the entirely fictitious legal presumption of a lost grant necessary for title by prescription, seems to have given "uninterrupted" an entirely distinct meaning. Adverse enjoyment is "continuous" if, in fact, exercised throughout a period of time; it is "uninterrupted" if the person whose rights are infringed has in no sufficient manner asserted the wrongness of the use. The one requirement prescribes the character of the use itself; the other concerns the attitude, position, or actions, of the injured person.

Id. The author of the Harvard note establishes that under the lost grant theory, the inquiry

logically defeats the element of passive assent. Under the analogy to adverse possession, however, a verbal protest merely strengthens the proof that the use was undertaken without the express or implied permission of the landowner.

Since *Ingraham*, the North Carolina courts have not attempted to redefine what constitutes an interruption of prescriptive use, although cases have established that the erection of a fence with an unlocked gate does not constitute an interruption.[97] The courts have simply repeated the statement that any act by the landowner which "would prevent the full and free enjoyment of the easement" constitutes an interruption of prescriptive use.[98]

The requirement that the claimant must prove "substantial identity of the easement claimed" has its origins in *Speight v. Anderson*,[99] in which the supreme court affirmed prior cases requiring that use be confined to a "definite and specific line" for a twenty-year period, and established that "[w]hile there may be slight deviations in the line of travel there must be a substantial identity of the thing enjoyed."[100] In particular, the *Speight* decision affirmed *Cahoon v. Roughton*,[101] a 1939 case in which a prescriptive easement over a road leading to a wharf was denied because the pathway had shifted "as erosion caused by the rains and the tides made it necessary."[102] Recent cases have construed the "substan-

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determining whether an interruption occurred considered chiefly the action of the landowner; an interruption occurred if the landowner "asserted the wrongness" of the trespass to a sufficient level to constitute "non-acquiescence." *Id.* In contrast, the modern doctrine of adverse possession looks to whether an actual temporal interruption of use occurred, rather than to the level of landowner objection, to determine whether an interruption occurred. *See* CUNNINGHAM et al., *supra* note 70, § 11.7, at 763. Modern prescription theory draws from both: it requires some overt action by the landowner manifesting intent to interrupt use, but focuses on the extent to which the landowner succeeds in preventing use rather than on the level of landowner objection. *E.g.*, Keefer v. Jones, 467 Pa. 544, 550-51, 359 A.2d 735, 738 (1976); *see supra* notes 86-87 and accompanying text.

97. *See* Crump v. Mims, 64 N.C. 767, 769-71 (1870); Warmack v. Cooke, 71 N.C. App. 548, 554, 322 S.E.2d 804, 809, *disc. rev. denied*, 313 N.C. 515, 329 S.E.2d 401 (1984).

98. *See, e.g.*, West v. Slick, 313 N.C. 33, 50, 326 S.E.2d 601, 611 (1985); Dickinson v. Pake, 284 N.C. 576, 581, 201 S.E.2d 897, 901 (1974).

99. 226 N.C. 492, 39 S.E.2d 371 (1946).

100. *Id.* at 496, 39 S.E.2d at 374; *see also* Hemphill v. Board of Aldermen, 212 N.C. 185, 188, 193 S.E. 153, 155 (1937) ("[T]he travel must be confined to a definite and specific line, although slight deviations in the line of travel, leaving the road substantially the same, may not destroy the rights of the public.").

101. 215 N.C. 116, 1 S.E.2d 362 (1939).

102. *Id.* at 119, 1 S.E.2d at 364. The *Cahoon* decision is important because it could be cited for the propositions that substantial deviations to avoid natural obstructions destroy substantial identity and that the character of the land over which the easement is claimed should not be considered in determining substantial identity. *Id.* Both propositions were rejected in the *Concerned Citizens* opinion. *Concerned Citizens*, 329 N.C. at 48-49, 404 S.E.2d at 683-85.

tial identity" requirement less strictly. In *Oshita v. Hill*[103] the court of appeals required only a "reasonably definite and specific line [of travel]," and noted that, "since prescriptive ways are established by custom and usage rather than by road builders and engineers, a metes and bounds description is not required; that the way can be located and identified from the testimony given is sufficient."[104]

In *West v. Slick*[105] the supreme court applied the "substantial identity" test to an easement claimed over the "shifting sands" of North Carolina's barrier islands for the first time.[106] The claimants in *West* alleged that a public prescriptive easement had been perfected over two unimproved roads across a four-mile stretch of Currituck Banks, seven miles south of the village of Corolla.[107] All of the land within this four-mile stretch, from the oceanfront to Currituck Sound, was privately owned.[108] The course of one of the roads had varied somewhat over the years because sand blown across the road had at times blurred its location, and because travellers had turned off the road to avoid oncoming cars and areas of the road that had eroded or flooded due to storms.[109] Although it affirmed the *Speight* and *Cahoon* decisions, the court held the claimants' evidence sufficient to prove the location of a definite and specific way over this road because the deviations that had occurred were "slight" and not "substantial."[110] The *West* court did not state that the test for "substantial identity" should vary depending on the environment in which the prescriptive easement is claimed, although this inference may reasonably be drawn from its application of the substantial identity element.[111]

The requirement that the claimant prove the continuous use of a reasonably definite route to perfect a prescriptive easement controls in the majority of states.[112] Courts have upheld the creation of easements by prescription in situations in which deviation from a single path oc-

103. 65 N.C. App. 326, 308 S.E.2d 923 (1983).

104. *Id.* at 329, 308 S.E.2d at 926.

105. 313 N.C. 33, 326 S.E.2d 601 (1985).

106. *Id.* at 40-45, 326 S.E.2d at 605-08. *See generally* Shaffer, *supra* note 74, at 813-14 (analyzing the *West* decision).

107. *West*, 313 N.C. at 36-37, 326 S.E.2d at 603-04.

108. *Id.*

109. *Id.* at 41-42, 326 S.E.2d at 607-08.

110. *Id.* at 45, 326 S.E.2d at 608.

111. *Id.*; *see* Shaffer, *supra* note 74, at 823-24.

112. *E.g.*, Krencicki v. Petersen, 22 Ariz. App. 1, 3, 522 P.2d 762, 764 (1974); 2 THOMPSON, *supra* note 6, § 344, at 226; W.J. Dunn, Annotation, *Acquisition of Right of Way by Prescription as Affected by Change of Location or Deviation During Prescriptive Period*, 80 A.L.R.2D 1095, 1096 (1961).

curred to avoid natural obstructions,[113] to avoid man-made obstructions,[114] at the request of the landowner,[115] or when the deviation was slight or immaterial in degree.[116] It is clear that slight deviations do not defeat prescription in North Carolina.[117] It is less clear to what extent substantial (or not "slight") deviations may defeat prescription. *Cahoon* provides authority for the proposition that substantial deviations to avoid natural obstructions will defeat prescription.[118] Although *West* purports to follow *Cahoon*, it could be cited for the proposition that deviations to avoid natural obstructions are not substantial deviations.[119] Before *Concerned Citizens*, the North Carolina courts had not directly addressed whether substantial deviations to avoid man-made obstructions destroy the substantial identity of the easement. The majority of states that have addressed this issue have held that changes in the course of the path made to suit the convenience of the landowner do not destroy the identity of the path claimed.[120] The cases addressing the requirement of a definite and specific path generally do not focus on the landowner's intent in creating an obstruction.[121] Viewed in this light, there is no difference between a deviation to avoid a fence intended to serve as a barricade to trespassers and a deviation to avoid a fence intended for agricultural

113. *E.g.*, State *ex rel.* Game, Forestation & Parks Comm'n v. Hull, 168 Neb. 805, 825, 97 N.W.2d 535, 547 (1959); Nonken v. Bexar County, 221 S.W.2d 370, 374 (Tex. Civ. App. 1949); *see* M.L. Cross, Annotation, *Acquisition of a Right of Way by Prescription as Affected by Change of Location or Deviation During Prescriptive Period*, 143 A.L.R. 1402, 1410-14 (1943); Dunn, *supra* note 112, at 1098.

114. *E.g.*, Telford v. Stettmund, 205 Okla. 86, 89, 235 P.2d 692, 694-96 (1951) (holding that construction of building in path did not defeat prescription where use continued around building); *see* Cross, *supra* note 113, at 1411-14.

115. *E.g.*, Zunino v. Gabriel, 182 Cal. App. 2d 613, 618, 6 Cal. Rptr. 514, 518 (1960); *see* Cross, *supra* note 113, at 1414-17. Some jurisdictions treat changes in the course of a path at the request of the owner as an abandonment of the path, resetting the prescriptive clock on the use of another. *See* Peters v. Little, 95 Ga. 151, 152, 22 S.E. 44, 45 (1894). In any case, submission to the will of the landowner may be viewed as evidence of permissive use.

116. *See, e.g.*, 2 THOMPSON, *supra* note 6, § 344, at 226; Cross, *supra* note 113, at 1410; Dunn, *supra* note 112, at 1097-98.

117. *See supra* notes 99-111 and accompanying text.

118. *See* Cahoon v. Roughton, 215 N.C. 116, 119, 1 S.E.2d 362, 364 (1939).

119. *See* West v. Slick, 313 N.C. 33, 44, 326 S.E.2d, 601, 608 (1985). *West* does not describe the nature of the natural obstructions that travellers were forced to avoid. The opinion merely restates testimony of the claimant's witness that there were "bad places" in the track that drivers were at times forced to avoid. *Id.*

120. *E.g.*, Cook v. Wimpey, 57 Ga. App. 338, 338, 195 S.E. 325, 325 (1938); Flener v. Lawrence, 187 Ky. 384, 390, 220 S.W. 1041, 1044 (1920); Faulkner v. Hook, 300 Mo. 135, 139, 254 S.W. 48, 50 (1923); State *ex rel.* Game, Forestation & Parks Comm'n v. Hull, 168 Neb. 805, 826, 97 N.W.2d 535, 547-48 (1959) (landowner moved gate and road 85 feet); Fowler v. Matthews, 204 S.W.2d 80, 86 (Tex. Civ. App. 1947); *see* Cross, *supra* note 113, at 1414-17; Dunn, *supra* note 112, at 1098-99.

121. *See* Dunn, *supra* note 112, at 1098.

purposes. The question of the landowner's intent, one may fairly conclude, should be limited to the "adverse" and "uninterrupted" elements. North Carolina courts have not addressed whether changes made in the course of a path at the request of the landowner defeat the substantial identity requirement; evidence of such changes, however, would be overwhelming evidence of permissive use.[122]

Like a growing majority of states,[123] North Carolina recognizes that a public easement may be created by prescriptive use when the nature of the use throughout the prescriptive period has been sufficiently public to give the landowner notice that a public easement, and not a mere private easement, has been claimed.[124] Public prescription differs significantly from private prescription. A private prescriptive easement vests only in the person or persons who actually used the path for the entire prescriptive period (although tacking among successive users is recognized when privity of estate, blood, or contract exists).[125] While a private prescriptive easement may be alienated, the scope of the easement may not exceed the scope of the use by which it was created.[126] In contrast, a public prescriptive easement vests in the general public and thus may be used by persons who never used the path during the prescriptive period.[127] A public prescriptive easement is much less limited in scope because the use by which the easement was created is deemed to be general public use.[128] In theory, the scope of the public prescriptive easement should be limited to the extent of the use during the prescriptive period; in practice, however, the extent of use of a public prescriptive easement may greatly exceed the extent of use by which the easement was acquired.[129] Public easements also may create a more permanent burden on a landowner than private easements. While the landowner may negotiate with holders of a private prescriptive easement to repurchase or reroute a private easement, alteration of a public prescriptive easement requires negotiation with the state and may be either too expensive or impossible to accomplish.

Because a public easement is less limited in scope and creates a more permanent encumbrance than a private easement, courts have placed a

122. *See supra* notes 73-82 and accompanying text.

123. *E.g.*, Dillingham Comm. Co. v. City of Dillingham, 705 P.2d 410, 416 (Alaska 1985); *see* 2 THOMPSON, *supra* note 6, § 342, at 209.

124. *E.g.*, West v. Slick, 313 N.C. 33, 41, 326 S.E.2d 601, 606 (1985).

125. 2 THOMPSON, *supra* note 6, § 346, at 247.

126. *Id.* § 349, at 262.

127. Degnan, *supra* note 21, at 953.

128. 2 THOMPSON, *supra* note 6, § 342, at 214.

129. *Id.*

greater burden on the claimant attempting to prove public prescription.[130] The essential difference is that the claimant of public prescription must prove that the nature and extent of the use has put the landowner on notice that a right has been claimed by the general public, and not merely by a group of individuals.[131] In practice, this burden has been met in most states only when the use is deemed to be identical to that of a public street or road.[132] A few courts require that the route over which the easement is claimed have been maintained by public authorities as if it were a public road;[133] others require public maintenance in implied dedication cases, but not in public prescription cases.[134] In addition, public prescription can occur only when both ends of the acquired path lie in publicly owned places.[135] The North Carolina courts have not expressly addressed how the claimant's burden of proof differs between public and private prescription; as stated, the essential elements in public and private prescription cases are generally identical.[136] The cases have followed the pattern that public prescription occurs only when the use resembled the use of a public road and both ends of the road lay in publicly owned places.[137] Discord exists in the North Carolina case law concerning the significance of maintenance by public authorities.[138]

In *Hemphill v. Board of Aldermen*[139] the North Carolina Supreme Court held that a public easement could be perfected through prescriptive use only if the claimant could show that municipal or state authorities had undertaken to maintain the roadway.[140] This holding has not

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130. *See* Degnan, *supra* note 21, at 953.

131. *Id.*

132. 2 THOMPSON, *supra* note 6, § 342, at 211.

133. *E.g.*, Bain v. Fry, 352 Mich. 299, 305, 89 N.W.2d 485, 489 (1958). Connecticut and New York do not recognize the doctrine of public prescription. *See* Miller v. Grossman Shoes, Inc., 186 Conn. 229, 233-34, 404 A.2d 302, 304 (1982); Forest Hills Gardens Corp. v. Baroth, 147 Misc. 2d 404, 408, 555 N.Y.S.2d 1000, 1002 (N.Y. Sup. Ct. 1990).

134. *E.g.*, Felder v. Crook, 208 Ill. App. 3d 1012, 1026, 567 N.E.2d 1115, 1125 (1991).

135. See Layman v. Gnegy, 26 Md. App. 114, 117, 337 A.2d 126, 128 (1975); 2 THOMPSON, *supra* note 6, § 343, at 214.

136. Town of Sparta v. Hamm, 97 N.C. App. 82, 86, 387 S.E.2d 173, 176, *disc. rev. denied*, 326 N.C. 366, 389 S.E.2d 819 (1990).

137. *E.g.*, *id.* at 87, 387 S.E.2d at 176.

138. *See* West v. Slick, 313 N.C. 33, 53-57, 326 S.E.2d 601, 612-15 (1985).

139. 212 N.C. 185, 193 S.E. 153 (1937).

140. *Id.* at 188, 193 S.E. at 155. The *Hemphill* court held:

> To establish the existence of a road or alley as a public way in the absence of the laying out by public authority or actual dedication, it is essential not only that there must be twenty years user under claim of right adverse to the owner, but the road must have been worked and kept in order by public authority.

Id. Although it is not clear in the language of the *Hemphill* opinion, it may be argued that public maintenance is required for the entire prescriptive period. *See* Scott v. Shackelford, 241

been expressly overruled;[141] it is suspect, however, for the following reasons. Public easements can be created in North Carolina by prescriptive use and through the doctrine of implied dedication.[142] Under the doctrine of implied dedication, courts find a dedication of a right-of-way to the public, absent a deed evidencing formal acts of dedication by the landowner and acceptance by the public authorities, if a dedication and acceptance can be implied from the conduct of the parties.[143] The claimant by implied dedication must show both clear and unmistakable intent to dedicate on the part of the landowner and acts evidencing acceptance on the part of the public authorities.[144] In North Carolina, as in most states, it has been established that maintenance of the road by the state or municipal authorities is required to meet the burden of proof of acceptance by the public if express, formal acceptance cannot be proved.[145]

N.C. 738, 743, 86 S.E.2d 453, 457 (1955) ("[I]t is not enough for the public to use the streets, highways or alleys for twenty years. The public authorities must assert control over them."); Chesson v. Jordan, 224 N.C. 289, 291, 29 S.E.2d 906, 908 (1944) (every public road or highway must be "established either by the public authorities in a proceeding[,] . . . or . . . generally used by the public and [under the control of] the proper authorities . . . for the period of twenty years or more[,] or . . . dedicated to the public by the owner").

The term "user," rather than "use," was commonly employed in older cases and has been repeated inconsistently in recent cases. "User" has been defined as "[t]he actual exercise or enjoyment of any right." BLACK'S LAW DICTIONARY 1543 (6th ed. 1990). The term is more specific than "use," particularly in the context of the "adverse" requirement, but is probably no more accurate; usage of the term appears to be fading. *See, e.g.*, Potts v. Burnette, 301 N.C. 663, 666, 273 S.E.2d 285, 287 (1981).

141. The question whether public maintenance is an essential element of prescription was discussed at length in the *West* opinion. *West*, 313 N.C. at 59, 326 S.E.2d at 613. The *West* court did not resolve the issue, finding instead that the slight public maintenance that did occur was sufficient to meet any requirement. *Id.*; *see* Shaffer, *supra* note 74, at 815-18 (describing the inconsistency among decisions on this issue).

142. *See, e.g.*, Nicholas v. Salisbury Hardware & Furniture Co., 248 N.C. 462, 469-72, 103 S.E.2d 837, 842-45 (1958); Town of Sparta v. Hamm, 97 N.C. App. 82, 85, 387 S.E.2d 173, 175-76, *disc. rev. denied*, 326 N.C. 366, 389 S.E.2d 819 (1990). Older cases often refer to public prescription as "dedication by adverse user." *See, e.g.*, Tise v. Whitaker-Harvey Co., 146 N.C. 272, 273-74, 59 S.E. 1012, 1013 (1907). Apparently, the terms are synonymous. *See* Draper v. Conner & Walters Co., 187 N.C. 18, 20-21, 121 S.E. 29, 30-31 (1924).

143. *Nicholas*, 248 N.C. at 468, 103 S.E.2d at 842; *Draper*, 187 N.C. at 21, 121 S.E. at 30-31; *Town of Sparta*, 97 N.C. App. at 85, 387 S.E.2d at 175.

144. *Nicholas*, 248 N.C. at 468-69, 103 S.E.2d at 842; Milliken v. Denny, 141 N.C. 193, 197, 53 S.E. 867, 869 (1906). The *Milliken* court explained that

> [t]he acts and declarations of the landowner indicating the intent to dedicate his land to public use, must be unmistakable in their purpose and decisive in their character to have that effect. . . . [T]hey must be such acts as are inconsistent and irreconcilable with any construction except the assent of the owner of such dedication.

Id.

145. *See* Steadman v. Town of Pinetops, 251 N.C. 509, 515-16, 112 S.E.2d 102, 107 (1960); Blowing Rock v. Gregorie, 243 N.C. 364, 368, 90 S.E.2d 898, 901 (1956) (stating that public maintenance and control are one way of proving acceptance, but implying that other ways also exist); Scott v. Shackelford, 241 N.C. 738, 743, 86 S.E.2d 453, 457 (1955) (holding that public

The doctrines of implied dedication and public prescription are clearly distinguishable. Implied dedication focuses on the landowner's intent to donate an interest in land to public use and the intent of public authorities to accept that donation. In public prescription, the focus is on the activity of the actual users and the degree to which a manifest intent to claim a property right contrary to the landowner's interest existed. The landowner's intent is considered only to determine whether the use was permissive or adverse; the landowner's intent to dedicate is irrelevant. Similarly, because offer and acceptance are not required for prescription, the intent of the public authorities is also irrelevant. The actions (but not the intent) of public authorities in maintaining a road may, however, be crucial to the determination of whether the use was adverse or whether the landowner was given adequate notice that the interest claimed throughout the prescriptive period was claimed by the general public and not by a group of individuals.

Although the common-law rules relating to implied dedication and public prescription in North Carolina were clearly distinguished as early as 1844,[146] the courts have at times confused the two doctrines, stating that conduct meeting the requirements of implied dedication creates a presumption of a lost grant to the public,[147] or requiring twenty years of continuous use to prove implied dedication.[148] A result of this confusion is that maintenance and control by public authorities, which are essential elements of implied dedication, have also been required in some public prescription cases.[149] Several decisions, however, have recognized that maintenance by public authorities is not an essential element of public prescription, but may be necessary in some cases to prove other essential

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road acquired by implied dedication must be one "dedicated to the public by the owner of the soil with the sanction of the [public] authorities and *for the maintenance and operation of which they are responsible*") (citing Chesson v. Jordan, 224 N.C. 289, 291, 29 S.E.2d 906, 909 (1944)); Jeffress v. Town of Greenville, 154 N.C. 490, 493, 70 S.E. 919, 920 (1911); Boyden v. Achenbach, 79 N.C. 539, 541 (1878).

146. State v. Marble, 26 N.C. (4 Ired. Eq.) 318, 320 (1844). The *Marble* court recognized that the requirement of 20 years of continuous use was applicable only to public prescription, and not to implied dedication, because "it is rather the intention of the owner than the length of time of the user which must determine the fact of the dedication." *Id.*

147. State v. Norris, 174 N.C. 808, 808, 93 S.E. 950, 951 (1917) (public highways include those that have "been used and kept up by the public for such a period of time that the law will presume a dedication to the public use").

148. State v. Johnson, 33 N.C. (11 Ired. Eq.) 647, 650-51 (1850) (presumption of dedication where "the public had used [the claimed path] as a road, and the County Court had so recognized it, by the appointment of overseers and hands to keep it in repair *for twenty years*, which is the shortest time").

149. Chesson v. Jordan, 224 N.C. 289, 291, 29 S.E.2d 906, 909 (1944); Hemphill v. Board of Aldermen, 212 N.C. 185, 188, 193 S.E. 153, 155 (1937).

elements of public prescription.[150] As a result of this inconsistent treatment in the case law, the *West* court held that "public maintenance is either to be considered as evidence of adverse use of a road by the public, or as an essential element, the showing of which must be established in order to establish a public road by prescription."[151] While the North Carolina courts have clearly articulated the reasoning behind the requirement of public maintenance to prove implied dedication,[152] the cases provide no express justification for the requirement of public maintenance in prescription.[153]

Although the public prescription doctrine has traditionally been applied only to roads or streets, four coastal states have applied the doctrine to the dry-sand area of ocean beaches.[154] In *Seaway Co. v. Attorney General*,[155] the Texas Court of Civil Appeals held that a public prescrip-

150. Wright v. Town of Lake Waccamaw, 200 N.C. 616, 617-18, 158 S.E. 99, 100 (1931). *Wright* addresses the following passage in Boyden v. Achenbach, 79 N.C. 539 (1878), which has proved problematic over the years:

> It is not however intended to be denied that where the public has used a way as a public road or cartway just as if it had been laid off by order of Court—as if it has had an overseer and hands and been worked and kept in order—for more than twenty years, it will be presumed that it was so laid off; or that the owner of the land had dedicated it to the public; but the mere user of footpaths and neighborhood roads without such accompanying circumstances will raise no such presumption however long the time.

Id. at 541. Whereas the *Hemphill* and *Chesson* courts interpreted this sentence as requiring the circumstance of public maintenance ("an overseer and hands") for both implied dedication and prescription, the *Wright* court suggested that public maintenance was required for implied dedication but was merely evidence of adverse use in public prescription cases. *Wright*, 200 N.C. at 617, 158 S.E. at 100; *see* Haggard v. Mitchell, 180 N.C. 255, 261, 104 S.E. 561, 564 (1920) (holding that public prescription may occur when "the occupation is so general and of such a kind as to permit the inference and appri[s]e the owner that the public has assumed control of his property and is exercising it as a matter of right," and stating that public maintenance is not essential); State v. Fisher, 117 N.C. 733, 738, 23 S.E. 158, 158 (1895) ("the *best evidence* of [adverse use in the case of public prescription] is the fact that the proper authorities have appointed overseers and designated hands to work, and assumed for the public the responsibility of keeping the way in repair") (emphasis added).

151. West v. Slick, 313 N.C. 33, 56, 326 S.E.2d 601, 614 (1985).

152. *E.g.*, Oliver v. Ernul, 277 N.C. 591, 598, 178 S.E.2d 393, 396 (1971) ("A dedication without acceptance is merely a revocable offer and . . . 'neither burdens nor benefits with attendant duties may be imposed on the public unless in some proper way it has consented to assume them.' ") (quoting Owens v. Elliot, 258 N.C. 314, 317, 128 S.E.2d 583, 586 (1962)).

153. *See Chesson*, 224 N.C. at 291, 29 S.E.2d at 909; *Hemphill*, 212 N.C. at 188, 193 S.E. at 155.

154. Gion v. City of Santa Cruz, 2 Cal. 3d 29, 43, 465 P.2d 50, 59, 84 Cal. Rptr. 162, 171 (1970) (using implied dedication doctrine, but in a manner similar to the public prescription doctrine); City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 75 (Fla. 1974); State *ex rel.* Thornton v. Hay, 254 Or. 584, 594, 462 P.2d 671, 676 (1969); Moody v. White, 593 S.W.2d 372, 377-78 (Tex. Civ. App. 1979).

155. 375 S.W.2d 923 (Tex. Civ. App. 1964).

tive easement could be created over the area extending from the mean high tide line to the first line of stable vegetation when the entire beach had been used by the public for vehicular and pedestrian travel, fishing, camping, swimming, and sunbathing.[156] *Seaway* established that the natural boundaries of the beach, the water and the first line of stable vegetation, were sufficient to delineate a definite route similar in nature to a public road and therefore sufficient to prove public prescription.[157] Although the court relied heavily on the use of the beach as a route of vehicular travel, the easement created in the public the right to use the beach for general recreational purposes and not solely as a travel route.[158] The *Seaway* court also expressly recognized that a strong public policy supports preserving the public right to use ocean beaches.[159] A 1986 case, *Feinman v. State*,[160] expanded the *Seaway* analysis, holding that a public prescriptive easement over the dry-sand beach was not absolutely tied to a specific location, but moved landward and seaward as the beach eroded and accreted.[161] Were this "rolling easement" concept not recognized, a public prescriptive easement over the dry-sand beach would disappear as the beach eroded.

Public interests in the dry-sand beach also have been created through three other common-law doctrines: implied dedication,[162] custom,[163] and the public trust.[164] The California and Texas courts have allowed the creation of a public easement in the dry-sand beach by implied dedication.[165] In Texas, the implied dedication doctrine is similar to implied dedication in North Carolina, requiring evidence of the landowner's intent to dedicate to public use and of acceptance by public authorities manifested by public maintenance and control of the acquired land.[166] In California, implied dedication takes two forms. The first is the traditional form similar to North Carolina's common law of implied

156. *Id.* at 939.

157. *Id.*

158. *Id.*

159. *Id.*

160. 717 S.W.2d 106 (Tex. Ct. App. 1986).

161. *Id.* at 108-11.

162. Gion v. City of Santa Cruz, 2 Cal. 3d 29, 43, 465 P.2d 50, 59, 84 Cal. Rptr. 162, 171 (1970); *Seaway*, 375 S.W.2d at 930.

163. United States v. St. Thomas Beach Resorts, Inc., 386 F. Supp. 769, 772-73 (D.V.I. 1974), *aff'd*, 529 F.2d 513 (3d Cir. 1975); *In re* Ashford, 50 Haw. 314, 316-17, 440 P.2d 76, 77-78 (1968); State *ex rel.* Thornton v. Hay, 254 Or. 584, 595, 462 P.2d 671, 676 (1969).

164. Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 332, 471 A.2d 355, 365, *cert. denied*, 469 U.S. 821 (1984). *See generally* Finnell, *supra* note 16, at 640-43 (discussing the public trust doctrine and application of the doctrine by the New Jersey Supreme Court).

165. *Gion*, 2 Cal. 3d at 43, 465 P.2d at 59, 84 Cal. Rptr. at 171; *Seaway*, 375 S.W.2d at 930.

166. *Seaway*, 375 S.W.2d at 935-36.

dedication; the second, which has been labeled "dedication by adverse use,"[167] more closely resembles public prescription.[168] The California cases allowing acquisition of an easement in the dry-sand beach relied on the latter form.[169]

The Oregon Supreme Court, which has acknowledged that a public easement in the dry-sand beach can be perfected through public prescription,[170] has relied on the common-law doctrine of custom to establish that the public holds an easement for general recreational and commercial use over the dry-sand beach on all beaches of the state.[171] Recognizing an urgent public policy need to preserve public access to oceanfront beaches,[172] the Oregon court noted a critical drawback to the public prescription doctrine: prescription requires substantial litigation because a case-by-case analysis of each stretch of beach is demanded.[173] As California's experience showed, the prescription doctrine may also encourage landowners to go to great lengths to keep the public off their land in order to interrupt prescriptive use; such a result may close more beaches to public use than it opens.[174] The custom doctrine holds that a customary use may achieve the status of law if "continued from time immemorial, without interruption, and as of right; it must be certain as to the place, and as to the persons; and it must be certain and reasonable as to the subject matter or rights created."[175] Commentators have unearthed no application of the custom doctrine in the common law of North Carolina.[176]

The final method of creating a public interest in dry-sand beach was adopted by the New Jersey Supreme Court in *Matthews v. Bay Head Improvement Ass'n*.[177] The New Jersey court rejected the doctrines of public prescription, implied dedication, and custom as "[a]rchaic judicial responses" to the modern conflict between the expectations of oceanfront landowners and those of the general public.[178] The *Matthews* court re-

167. *Gion*, 2 Cal. 3d at 38, 465 P.2d at 56, 84 Cal. Rptr. at 167-68.

168. *See* County of Orange v. Chandler-Sherman Corp., 54 Cal. App. 3d 561, 567, 126 Cal. Rptr. 765, 769 (1976).

169. *Gion*, 2 Cal. 3d at 37-44, 465 P.2d at 56-58, 84 Cal. Rptr. at 167-70.

170. State *ex rel.* Thornton v. Hay, 254 Or. 584, 594, 462 P.2d 671, 676 (1969).

171. *Id.* at 595, 462 P.2d at 676.

172. *Id.* at 588-91, 462 P.2d at 673-75.

173. *Id.* at 595, 462 P.2d at 676.

174. *See* Carmichael, *supra* note 11, at 170 (describing the "ironic aftermath of *Gion*").

175. *Id.* at 173.

176. *Id.* at 174-75.

177. 95 N.J. 306, 332, 471 A.2d 355, 365, *cert. denied*, 469 U.S. 821 (1984).

178. *Id.* at 326, 471 A.2d at 365.

lied on the public trust doctrine,[179] a common-law doctrine which, although applied differently in each state,[180] generally provides that title to lands under tidal waters and some navigable rivers is vested inalienably in the state, in trust for the benefit of its citizens.[181] The public trust doctrine is a broad area of property law that has expanded rapidly during recent decades; a flexible judicial tool, the courts have found the doctrine applicable to many natural resources, including inland streams and parks.[182]

The public trust doctrine concerns two unique property interests: ownership and public trust rights. In North Carolina, title to lands beneath ocean waters between the mean high tide line and the seaward limit of state jurisdiction is vested inalienably in the state by virtue of the public trust doctrine.[183] The ownership aspect of the doctrine ends at the mean high tide line; although the state may hold title to the entire beach in fee, title to real property landward of the mean high tide line is not derived from the public trust.[184] The second property interest created by the public trust doctrine concerns the rights that accrue to the general public by virtue of the public trust. These rights differ in each state, but generally include the right to navigate for commercial or recreational purposes, fish, swim, hunt, and enjoy other recreation.[185] These rights generally attach only to submerged lands in which the state holds title by virtue of the public trust. In some circumstances, however, privately held lands may be subject to public trust rights. The *Matthews* court held that the privately held dry-sand beach is subject to some public trust rights for the simple reason that without some right to use the dry-sand beach, the public's public trust rights in the foreshore are virtually mean-

179. *Id.*

180. For a description of the states' varying applications of this doctrine, see DAVID C. SLADE ET AL., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK: THE APPLICATION OF THE PUBLIC TRUST DOCTRINE TO THE MANAGEMENT OF LANDS, WATERS AND LIVING RESOURCES OF THE COASTAL STATES at xv-xxxiii (1990).

181. *See* Valerie B. Spalding, *The Pearl in the Oyster: The Public Trust Doctrine in North Carolina*, 12 CAMPBELL L. REV. 23, 30-33 (1989) (discussing Magna Carta grant of sovereign rights in tidal lands and resources up to the high water mark).

182. *E.g.*, Sierra Club v. Department of Interior, 398 F. Supp. 284, 293-94 (N.D. Cal. 1975) (extending public trust to national park land); *see* SLADE et al., *supra* note 180, at xv-xxxiii; Harrison C. Dunning, *The Public Trust: A Fundamental Doctrine of American Property Law*, 19 ENVTL. L. 515, 516-19 (1989). A complete analysis of the public trust doctrine is beyond the scope of this Note; accordingly, this discussion considers only the application of the doctrine to the ocean and oceanfront beaches.

183. *See* N.C. GEN. STAT. § 77-20(a) (1990); Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 302, 177 S.E.2d 513, 516 (1970).

184. *See* Spalding, *supra* note 181, at 63.

185. Mark Cheung, *Dockominiums: An Expansion of the Riparian Rights That Violates the Public Trust Doctrine*, 16 B.C. ENVTL. AFF. L. REV. 821, 835 (1989).

ingless.[186] *Matthews* found two interests created by the public trust doctrine: the right to cross the dry-sand beach in order to reach the foreshore and the right to use the dry-sand for general recreational purposes, including sunbathing.[187] The court significantly limited these interests in two ways. First, the rights exist only on those beaches where circumstances make public use of the dry-sand reasonably necessary.[188] Second, the rights remain "subject to the accommodation of the interests of the owner" of the dry-sand.[189]

The complex development of the public trust doctrine in North Carolina has been ably traced in previous articles.[190] This discussion, therefore, concerns only the application of the doctrine to beach access issues. North Carolina has recognized the public trust doctrine and its application to tidal waters for as long as it has been a state.[191] Similarly, it is settled law that title to the foreshore is vested in the state and that the general public possesses the right to use the foreshore for recreational purposes by virtue of the public trust doctrine.[192] Commentators suggest that public trust rights can exist in submerged lands held in private ownership under some circumstances in North Carolina.[193] Although recent cases have recognized the continuing validity of the public trust doctrine and demonstrate that the rights guaranteed to the public by the doctrine are expanding,[194] the North Carolina courts have not yet considered the application of the public trust doctrine to the dry-sand beach. A 1987

186. Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 323, 471 A.2d 355, 364, *cert. denied*, 469 U.S. 821 (1984); *see also* Hall v. Nascimento, 594 A.2d 874, 877-78 (R.I. 1991) (holding that an area of dry-sand beach created by beach nourishment is subject to public trust rights).

187. *Matthews*, 95 N.J. at 322-23, 471 A.2d at 363-64; *see* Carmichael, *supra* note 11, at 182.

188. *Matthews*, 95 N.J. at 325, 471 A.2d at 365.

189. *Id.*; *see* Anne Conley-Pitchell, *The Public May Have a Right to Use Privately Owned Beaches for Recreation But the Extent of Any Such Right Will Be Determined by a Location by Location Test*, 15 RUTGERS L.J. 813, 823-32 (1984); Carmichael, *supra* note 11, at 180-83.

190. *See* Monica K. Kalo & Joseph J. Kalo, *The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust*, 64 N.C. L. REV. 565, 572-86 (1986); David A. Rice, *Estuarine Land of North Carolina: Legal Aspect of Ownership, Use and Control*, 46 N.C. L. REV. 779, 795-802 (1968); Thomas J. Schoenbaum, *Public Rights and Coastal Zone Management*, 51 N.C. L. REV. 1, 11-15 (1972); Spalding, *supra* note 181, at 46-62; Carmichael, *supra* note 11, at 175-79.

191. *See* Spalding, *supra* note 181, at 46.

192. Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 302, 177 S.E.2d 513, 516 (1970).

193. *See* Kalo & Kalo, *supra* note 190, at 571.

194. *See, e.g.*, State *ex rel.* Rohrer v. Credle, 322 N.C. 522, 532, 369 S.E.2d 825, 831 (1988) (acknowledging public trust doctrine for lands under public waters); State v. Forehand, 67 N.C. App. 148, 150-51, 312 S.E.2d 247, 249, *disc. rev. denied*, 311 N.C. 307, 317 S.E.2d 904 (1984).

opinion of the North Carolina Supreme Court, however, hinted that some public trust rights do exist in the dry-sand beach.[195] A 1991 federal case, decided after *Concerned Citizens*, held that the value of public trust rights may not be used by the Internal Revenue Service to diminish the charitable deduction allowable to a North Carolina taxpayer when the taxpayer donates a strip of dry-sand beach to a municipality, but conceded that "the extent to which the public trust doctrine applies to dry sand property in North Carolina is an unsettled question."[196] Several North Carolina statutes suggest that the public possesses rights of access

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195. In Town of Emerald Isle v. State, 320 N.C. 640, 360 S.E.2d 756 (1987), the supreme court addressed the issue whether a statute prohibiting vehicular travel on one part of an oceanfront beach, but not on another, constituted an "exclusive emolument" prohibited by the North Carolina Constitution because the statute benefitted only the landowners on the restricted beach, and not those on the unrestricted beach. *Id.* at 651-52, 360 S.E.2d at 763-64. In restating the plaintiffs' argument, Justice Frye wrote:

> [T]he act grants the oceanfront property owners within Blocks 51 thru 54 a special privilege or exclusive emolument in that they do not have the use and enjoyment of their oceanfront property infringed upon or restricted by the public's right to use motor vehicles *on the public trust portions of such property.*

Id. at 652, 360 S.E.2d at 764 (emphasis added). This statement, while probably not essential to the opinion, clearly implies that the general public possesses some rights of access in the beach by virtue of the public trust doctrine and that these rights exist in the dry-sand beach because this is the only part of the beach that oceanfront property owners can own. *See* Brief for Appellant-Intervenor at 16, *Concerned Citizens* (No. 8813-SC-1075).

196. Cooper v. United States, 779 F. Supp. 833, 835 (E.D.N.C. 1991). In *Cooper* a taxpayer conveyed shares of stock in a corporation, the only asset of which was a stretch of beach property bounded by a seawall and the mean high tide line, to the town of Atlantic Beach. *Id.* The IRS challenged the amount of the charitable deduction taken by the taxpayer on the theory that the taxpayer had not possessed a sufficient bundle of property rights to justify the value reported either because the property was subject to public trust rights or because the property had previously been dedicated to the town. *Id.* Finding no prior dedication, the court reasoned that, because issues involving the application of the public trust doctrine to the dry-sand have remained unsettled by the judiciary, North Carolina General Statutes § 77-20, which establishes the mean high tide line as the oceanward boundary of private property in North Carolina, should control. *Id.*; *see* N.C. GEN. STAT. § 77-20 (1990).

Although the court was probably right to find for the taxpayer, this reasoning is suspect. Section 77-20 merely precludes the extension of private property rights oceanward of the mean high tide line; it does not limit public rights landward of the mean high tide line in any way. *See id.* In addition, the existence of public trust rights was arguably irrelevant in *Cooper*. Even if public trust rights did exist, the taxpayer possessed a transferable property interest. The value of this interest for tax purposes is its fair market value. *See* Treas. Reg. § 1.170A-1(c) (as amended in 1990). Fair market value considers the highest price a willing buyer would pay for the property rights held, regardless of the quantum of ownership, and is generally determined by comparison to sales of similar properties. *Id.* § 1.170A-1(c)(2). Because the public trust doctrine must apply to all North Carolina ocean beaches identically, if at all, the existence of public trust rights is irrelevant to the determination of value of one stretch of beach. The court implicitly acknowledged this point by limiting its holding to the conclusion that the taxpayer owned the dry-sand beach prior to the gift, granting a partial summary judgment for the taxpayer and reserving valuation questions for later proceedings. *Cooper*, 779 F. Supp. at 836.

to the entirety of the oceanfront beach.[197] Finally, some have argued that the North Carolina Constitution, which establishes that it is a proper function of the state to preserve the ocean beaches "as a part of the common heritage of the state,"[198] implicates public trust rights.[199] Despite the references to public trust rights in oceanfront beaches adopted by the North Carolina Legislature, one commentator has stated that the public trust doctrine is a purely aquatic doctrine in North Carolina and has suggested that an expansion to the dry-sand beach is not foreseeable.[200]

The history of the common-law doctrines that govern public beach access in North Carolina reveals great uncertainty. This uncertainty has exacerbated the current conflict between the expectations of oceanfront property owners and those of the beach-going public. The unusual facts of *Concerned Citizens* gave the supreme court the opportunity to untangle legal issues relating to both the perpendicular and lateral access issues. Before discussing the extent to which the court succeeded in this

197. Section 1-45.1 of the North Carolina General Statutes, which prohibits adverse possession of public trust lands, defines public trust rights as follows:

> "[P]ublic trust rights" means those rights held in trust by the State for the use and benefit of the people of the State in common. They are established by common law as established by the courts of this State. They include, but are not limited to, the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State *and the right to freely use and enjoy the State's ocean and estuarine beaches.*

N.C. GEN. STAT. § 1-45.1 (Supp. 1991) (emphasis added). Section 160A-308 restricts the power of municipalities to prohibit the use of vehicles for commercial fishing activities on the "foreshore, beach strand and barrier dune system." *Id.* § 160A-308 (1987). Section 113A-134.1 establishes the public policy goals underlying North Carolina's beach access program (which focuses on perpendicular beach access), and notes that "[t]he ocean and estuarine beaches are resources of statewide significance and have been customarily freely used and enjoyed by people throughout the State." *Id.* § 113A-134.1 (1989). While none of these statutes actually creates a public interest in the dry-sand beach, each implies that some such interest exists. Brief for Appellant-Intervenor at 19-20, *Concerned Citizens* (No. 8813-SC-1075).

198. N.C. CONST. art. XIV, § 5.

199. The plaintiffs in *Concerned Citizens* argued that the North Carolina Supreme Court implicitly equated "public trust rights" with the "common heritage" language used in article XIV, § 5 when it stated in State *ex rel.* Rohrer v. Credle, 322 N.C. 522, 369 S.E.2d 825 (1988), that this constitutional provision "mandates the conservation and protection of public lands and waters for the benefit of the public." Brief for Appellant-Intervenor at 18, *Concerned Citizens* (No. 8813-SC-1075) (citing *Credle*, 322 N.C. at 532, 369 S.E.2d at 831). To support this argument, the plaintiffs relied on § 146-6(f) of the North Carolina General Statutes, which provides that when widened beaches are created by beach nourishment projects, the entire area of the nourished beach "shall remain open to the free use and enjoyment of the people of the State, consistent with public trust rights in ocean beaches, which rights are part of the common heritage of the people of this State." *Id.* (citing N.C. GEN. STAT. § 146-6(f) (1991)).

200. Spalding, *supra* note 181, at 64.

untangling, it is necessary to analyze the court's treatment of the public prescription doctrine.

In determining the level of landowner objection that constitutes an interruption of prescriptive use, the *Concerned Citizens* court faced a question of first impression. The *Ingraham* decision, which has been cited as the dispositive case on the issue of landowner interruption in North Carolina for more than a century,[201] is simply not relevant to a prescription theory based on an analogy to the statute of limitations in adverse possession. The elements of "peaceable" use and "passive assent" to the use by the landowner—essential to the lost grant theory—are inconsistent with the adverse possession theory, which requires neither "peaceable" use nor "passive assent" and places greater emphasis on the requirement that the use be notoriously adverse to the landowner's interest.[202] The test adopted in *Concerned Citizens*, which requires intent to interrupt use, overt acts towards that end, and actual success in preventing use for some substantial period of time in order to constitute an interruption of prescriptive use, places North Carolina in line with the majority of states.[203] The fact that the North Carolina Supreme Court adopted a majority position on prescriptive acquisition may itself be significant, indicating a shift from the court's traditional distrust of the prescription doctrine. The application of this test to the facts in *Concerned Citizens* makes the test particularly noteworthy.

The critical question under the interruption test adopted in *Concerned Citizens*, as in the majority of states, is how long use must be interrupted to constitute a "substantial interruption." The *Concerned Citizens* opinion and the majority of cases in other states make it clear that, under the majority rule, a brief interruption, for a few minutes or hours, is not sufficient to interrupt prescriptive use.[204] The author has

201. *E.g.*, Annotation, *supra* note 90, at 1325-26.

202. *See supra* text accompanying note 96.

203. *See* cases cited *supra* note 86. The opinion does not make clear whether the "actual and substantial interruption" test adopted in *Concerned Citizens* requires that the landowner intend to interrupt use. *See Concerned Citizens*, 329 N.C. at 51-54, 404 S.E.2d at 686-88. Intent to interrupt was clearly evident from the facts, and, consistent with the adverse possession theory, the court was concerned less with the landowner's state of mind than with the physical cessation of use. *Id.* The theoretical basis for the requirement of intent to interrupt use is that intent, manifested in actions taken towards that end, distinguishes an interruption of use caused by the landowner from a mere lapse of continuous use caused by the whim of the user. This distinction is important only if the length of time required to constitute a "substantial interruption" and that required to prove a lapse of continuous use differ significantly.

204. *Concerned Citizens*, 329 N.C. at 53, 404 S.E.2d at 687; *see* South Norwalk Lodge v. Palco Hats, 140 Conn. 370, 374, 100 A.2d 735, 737 (1953); Lofland v. Truitt, 260 A.2d 909, 912 (Del. Ch. 1969); Trustees of Forestgreen Estates v. Minton, 510 S.W.2d 800, 802 (Mo. 1974).

uncovered no case, however, in which an actual interruption lasting more than a few days was not held to be a substantial interruption.[205] In addition, several cases indicate that a ritual interruption of use occurring for one day every year or every few years does constitute a substantial interruption.[206] Thus, it appears that under the majority rule an actual interruption for more than a few days, during a time in which the road would have been used were it not for the landowner's efforts to obstruct use, constitutes a substantial interruption.

It is difficult to determine from the *Concerned Citizens* opinion to what degree the developer actually succeeded in interrupting use, because the court merely summarized the conflicting evidence presented by the parties and rejected the findings of fact by the trial court as unsupported by the evidence.[207] However, the tone of the opinion, which recognizes that the developer met with "varying degrees of success"[208] in interrupting use over the twenty-year period, suggests that a period of interruption much longer than a few days is necessary to constitute an actual interruption. The opinion quotes testimony by an employee of the developer stating that a gate would remain standing for a varying period of time until someone driving a four-wheel drive vehicle would get angry enough to demolish it.[209] Rather than focusing on whether the period of time prior to the destruction of the gate was sufficient to constitute a substantial interruption, the court relied heavily on the level of defiance exhibited when the gates were demolished as grounds for reversing the trial court's findings of fact.[210]

The *Concerned Citizens* court also failed to distinguish adequately between a lapse in continuous use caused by the whim of the users and an interruption forced by the actions of the landowner.[211] It is well established that a long lapse in use during bad weather months does not destroy the continuous element of prescription when the nature of the use is recreational and seasonal.[212] This fact has no bearing, however, on the

205. *See* O'Connor v. Beale, 143 Me. 387, 391-92, 62 A.2d 870, 872-73 (1948) (finding an interruption when landowner placed sawhorses with an attached "No Trespassing" sign across road and the sawhorses remained in place for at least one week); George v. Crosno, 254 S.W.2d 30, 35 (Miss. App. 1952) (finding use interrupted when landowner continually maintained locked gate despite fact that claimant frequently broke lock and used path).

206. *See* Talbot's, Inc. v. Cessnun Enters., 566 P.2d 1320, 1322-23 (Alaska 1977); Stiegelman v. Pennsylvania Yacht Club, 432 Pa. 111, 117, 246 A.2d 116, 119-20 (1968).

207. *Concerned Citizens*, 329 N.C. at 39, 404 S.E.2d at 679.

208. *Id.* at 43, 404 S.E.2d at 681.

209. *Id.* at 50, 404 S.E.2d at 685.

210. *Id.* at 51, 404 S.E.2d at 686.

211. *Id.* at 53, 404 S.E.2d at 687.

212. *See* 2 THOMPSON, *supra* note 6, § 347, at 249-50.

length of time necessary to constitute an interruption if the landowner undertakes to interrupt use at a time when use would occur but for the landowner's actions.[213]

The court's treatment of the substantial interruption question also raises questions pertaining to a claimant's burden of proof. The North Carolina Supreme Court has consistently held that the claimant bears the burden of proving each essential element of the prescription doctrine, including the uninterrupted use element.[214] This view suggests that a claimant must provide affirmative evidence that users were never actually prevented from using a path for any substantial period of time; the claimant's burden should be particularly great when a landowner has presented undisputed evidence that many barriers were constructed and maintained with the intent of interrupting use. While the court did not address the claimant's burden of proof, the opinion implies that the burden is slight, and that the landowner must prove that use has been interrupted.[215] In addition, findings of fact by a trial court, even when a jury trial has been waived, are conclusive on appeal unless there is no evidence to support them, even though the evidence presented might sustain findings to the contrary.[216] Given only the evidence presented in the majority opinion, it is difficult to conceive how the trial court's findings of fact could not survive this deferential review. The *Concerned Citizens* court's decision to reject the trial court's findings of fact on the interruption issue evinced the court's interest in preserving public beach access.

The *Concerned Citizens* substantial interruption test also raises the question of how many people must be prevented from using the path to constitute an interruption of public prescriptive use. The opinion indicates that use by all members of the general public, and not just a large portion of the public, must be interrupted to constitute a significant interruption.[217] An alternative view would be to look only to the use by persons who were never actually prevented from using the road and determine whether their use was sufficient to give the landowner notice that a public easement was being claimed; if it was not, then a private easement could be created for the benefit of those persons whose use was not interrupted.

For these reasons, the *Concerned Citizens* opinion makes it much

213. *See supra* notes 83-98 and accompanying text.

214. Potts v. Burnette, 301 N.C. 663, 666, 273 S.E.2d 285, 287 (1981).

215. One of the claimant's own witnesses in *Concerned Citizens* testified he turned around whenever he went to the eastern end of the subdivision road and found the developer's gates locked and standing. Record at 95, *Concerned Citizens* (No. 85-CVS-634).

216. Blackwell v. Butts, 278 N.C. 615, 619, 180 S.E.2d 835, 837 (1971).

217. *See Concerned Citizens*, 329 N.C. at 51-55, 404 S.E.2d at 686-88.

more difficult for a landowner to interrupt prescriptive use in North Carolina than in other states. From a public policy perspective, this result can be viewed as encouraging property owners to invest in more effective barricades and fences; it may even lead some property owners to resort to threats or acts of violence to protect their property. Similarly, the holding may encourage members of the public to disregard signs and barriers and trespass on private lands, although it is doubtful that an average trespasser has in mind a twenty-year process of prescriptive acquisition when ignoring a "No Trespassing" sign. The *Concerned Citizens* decision also could be viewed as discouraging landowners from relying on physical barriers as a means of interrupting prescription, encouraging them instead to pursue lawsuits in order to interrupt prescriptive use. Such a result may be more peaceable, but may be expensive for the landowner. Moreover, a judgment of trespass against a few individuals may not be deemed sufficient to interrupt prescriptive use against the entire public, and may actually serve as evidence of adverse use.[218] Some states have adopted procedures by which a landowner may record a notice stating that public use is by permission.[219] Such a remedy may not be helpful to landowners trying to prevent all use, rather than just prescriptive use, because it may create a license in the public that is revocable only by voiding the recorded document; to prevent prescriptive acquisition, a landowner would have to open his land to the public. Thus, one foreseeable result of the *Concerned Citizens* decision may be the adoption of a statutory means of interrupting public prescriptive use, perhaps by establishing that an action to quiet title in a landowner can interrupt public prescription when frequent users of the path, the municipality, and the state are given notice of the action and the opportunity to contest. Not only would such a statute forestall landowners' incentive to barricade private ways by providing a more certain, albeit more expensive, method of interrupting use, but it would also hasten the resolution of prescriptive claims.

The relaxation of the "substantial identity of the easement claimed" element, from requiring "a definite and specific line of travel," to demanding only "substantial identity of a definite and specific line" sufficient to give the landowner notice of the extent of the adverse claim, is a

218. In State *ex rel.* Haman v. Fox, 100 Idaho 140, 594 P.2d 1093 (1979), the court held public prescriptive use to have been interrupted when the landowner had several people removed from his property by the police. *Id.* at 148, 594 P.2d 1101. It is unclear whether the same conclusion would be reached in North Carolina.

219. *See* CAL. CIV. CODE § 813 (West 1982); Larry L. Teply & Richard L. Williams, Comment, *Interruption of Prescriptive Use: A Prescription for Prescription*, 25 U. FLA. L. REV. 204, 208-11 (1972); *see also* CONN. GEN. STAT. ANN. § 47-38 (West 1986) (providing that interruption may be achieved by serving notice on users in accordance with statute).

significant change in North Carolina common law.[220] Unlike the change in the standard for interruption of use, however, this change was readily foreseeable. *West* and *Oshahita* indicated that the requirement of a definite and specific line of travel was being relaxed, in that both cases found "slight" deviations that would have been held "substantial" under earlier case law.[221] Thus, in *Concerned Citizens* the court merely achieved in form what it had accomplished in substance in *West*. The majority opinion in *Concerned Citizens* identified two justifications for the substantial identity requirement: (1) to enable the court to determine with reasonable specificity the location of the easement claimed, and (2) to assure that the landowner was given notice "not only of the adverse claim, but of the extent of it as well."[222] Following *Concerned Citizens*, the North Carolina courts probably will not apply the substantial identity element mechanically, as they have at times in the past, but will look to whether these underlying concerns have been satisfied.

The requirement that the character of the land be considered in determining whether an easement has substantially retained its identity is reasonable. Courts have long placed differing burdens of proof on the claimant attempting to prove adverse use, depending on whether the easement claimed crossed developed or undeveloped land.[223] One purpose of the substantial identity requirement, in addition to those articulated by the court, is to give effect to the reasonable expectations of the parties.[224] Such expectations should differ markedly from the norm in an oceanfront environment, where finding the exact location of a pedestrian beach access may be a virtual impossibility following a hurricane or storm surge. Deviations in a path to avoid natural obstructions already may have been considered "slight" under *West*.[225] By holding that such changes do not, as a matter of law, defeat prescriptive acquisition, the court joined the view held in the majority of states.[226]

The *Concerned Citizens* court also joined the majority view in hold-

220. *See supra* notes 99-122 and accompanying text.

221. West v. Slick, 313 N.C. 33, 44-45, 326 S.E.2d 601, 608 (1985); Oshahita v. Hill, 65 N.C. App. 326, 329, 308 S.E.2d 923, 926 (1983); *see* Shaffer, *supra* note 74, at 813-14.

222. *Concerned Citizens*, 329 N.C. at 47, 404 S.E.2d at 683; *see also* Shaffer, *supra* note 74, at 824 ("The function of the identity requirement is essentially to insure proper notice to the landowner.").

223. *See* CUNNINGHAM et al., *supra* note 70, § 8.7, at 454 (noting that public use of "unenclosed, unoccupied" land may be deemed permissive, or public prescription may be disallowed on such lands).

224. *See* Margit Livingston, *Public Access to Virginia's Tidelands: A Framework for Analysis of Implied Dedications and Prescriptive Rights*, 24 WM. & MARY L. REV. 669, 675-76 (1983).

225. *West*, 313 N.C. at 44, 326 S.E.2d at 608.

226. *See* authorities cited in *supra* note 113.

ing that deviations to suit the convenience of the owner do not destroy the substantial identity of the easement claimed.[227] The application of this rule in *Concerned Citizens*, however, is somewhat unusual. When the developer constructed the subdivision road, the course of travel over the entire property shifted by a distance ranging from zero to 200 feet; thus, an entirely new path was created.[228] It is not clear from the facts of the case whether the public abandoned the winding sand road and began using the new road simply because the new road was more convenient or because the construction of the new development made use of the old road difficult or impossible. If the former is true, the court's logic was flawed because it was the convenience of the users, and not of the landowner, that prompted the shift; thus, the argument could be made that a new prescriptive period began when the public shifted to the new road. If the latter is true, then the court's analysis was correct.

To understand the significance of the *Concerned Citizens* substantial identity test, it is necessary to consider the application of the test to each of the three unique areas the path crossed. The use of the land between the entrance to the subdivision and the eastern edge of the overwash, which has been characterized as a typical sand road, was virtually identical in nature to the use described in *West*. The court's treatment of this area did not bring about any significant change in the law outside the context of changes in location made for the convenience of the landowner. The same conclusion cannot be reached for the other two areas.

The next section of the road, which crosses the "1954 overwash," presents a unique set of issues. For at least half of the prescriptive period, the use crossed a low, wide, sandy beach created when the overwash event destroyed the dunes. Thus, for much of the prescriptive period the use crossed land substantially similar to the dry-sand beach.[229] The nature of the use of the overwash was not limited to direct passage across the sands; this area also was used for general recreation and vehicular access to the foreshore at low tide. By the time the subdivision road was constructed, the shoreline had accreted to the extent that the entire subdivision road lay landward of the first line of stable vegetation. Thus, in this section, although prescriptive use first began over the overwash/dry-sand beach, the easement claimed ran over the upland. To further complicate matters, the plaintiff's claim in *Concerned Citizens* expressly included a public easement over only the subdivision road,[230] but implicitly included a right of access from the road to the beach at the overwash

227. *See supra* note 115.

228. *Concerned Citizens*, 329 N.C. at 44, 404 S.E.2d at 682.

229. *See supra* note 46 and accompanying text.

230. *Concerned Citizens*, 329 N.C. at 42, 404 S.E.2d at 680-81.

area and at the inlet. The court expressly addressed only the claim to the subdivision road, but acknowledged that the sole reason for the action was to assure access to the inlet and the beach.[231] Because the *Concerned Citizens* court merely reversed the trial court on the substantial identity question and rejected the trial court's findings of fact, the court did not state whether substantial identity could be proved over the entire overwash area, over a path leading from the subdivision road to the current dry-sand beach, or merely over the subdivision road.[232]

In explaining how the substantial identity test should be applied, however, the court relied on two Texas prescription cases, *Feinman v. State*[233] and *Seaway Co. v. Attorney General*,[234] and noted that the concept of the public "rolling easement" in the dry-sand beach developed in these cases was consistent with the concept of substantial identity in North Carolina.[235] *Feinman* and *Seaway* are lateral beach access cases considering solely the dry-sand beach.[236] The *Concerned Citizens* court's reliance on these cases suggests that substantial identity could be proved by evidence that substantial identity existed over the dry-sand beach prior to the construction of the subdivision road. It suggests that the fact that use then shifted to the road did not destroy substantial identity because the change was made for the convenience of the landowner. Under this theory, a path from the subdivision road to the dry-sand at the overwash also could be prescribed because it too constituted a change in location of use made for the convenience of the landowner. The chief significance of this analysis is that, like *Seaway*, it establishes that the substantial identity requirement can be satisfied by evidence that the boundaries of prescriptive use were the first line of stable vegetation and the mean high tide line.

The third segment of the claimed easement extended from the western edge of the overwash area to the inlet. The court described the public's use over this area prior to the construction of the subdivision road as following a sand road extending from the overwash area toward the inlet, then ending in a "random series of loops and trails."[237] Prescriptive acquisition over this land raises two questions. The first is whether substantial identity can be proved when use follows "random loops and trails." The opinion does not answer this question. It suggests, however,

231. *Id.* at 53, 404 S.E.2d at 687.
232. *Id.* at 46, 404 S.E.2d at 683.
233. 717 S.W.2d 106 (Tex. Ct. App. 1986).
234. 375 S.W.2d 923 (Tex. Ct. App. 1964).
235. *Concerned Citizens*, 329 N.C. at 48, 404 S.E.2d at 684.
236. *Feinman*, 717 S.W.2d at 107; *Seaway*, 375 S.W.2d at 925.
237. *Concerned Citizens*, 329 N.C. at 43, 404 S.E.2d 681.

that it could, because the claimant must prove only that there existed a means to determine with reasonable specificity the location of the easement claimed and that the line of travel was sufficiently definite to give the landowner notice of the extent of the adverse claim. Because the plaintiff's burden is greatly diminished "where the easement claimed is across windswept, shifting sands which are subject to ocean storms," evidence of "looping trails" may be sufficient to prove substantial identity, particularly when use later shifted to a defined road.[238] The second issue arises from the rule that a public prescriptive easement may be perfected only when both ends of the claimed path lie in public places.[239] If this position were adopted in North Carolina, a finding on remand that substantial identity ended where the sand road disappeared into loops and trails could defeat public prescription of the entire subdivision road, or at least the portion of the road lying between the overwash and the inlet.

Neither the court of appeals nor the supreme court discussed whether public prescriptive acquisition can occur when public authorities have not undertaken maintenance of the road. As Justice Mitchell pointed out in dissent, however, several early cases suggested that maintenance by public authorities is an essential element of public prescription in North Carolina.[240] The courts' silence on the issue lends support to the argument that public maintenance is not an essential element of public prescription, but may be critical evidence of other essential elements.[241]

Evidence of maintenance by public authorities can serve two important functions in public prescription cases. First, it may show that the landowner was on notice throughout the prescriptive period that the interest asserted was claimed by the public at large and not merely by a group of individuals.[242] Second, it may prove that the use was notoriously adverse to the interest of the landowner.[243] While it is settled that the claimant bears the burden of proving both of these facts in public prescription cases, it is not clear that evidence of public maintenance should be the only means by which these facts can be proved. Adverse use unquestionably can be shown without public maintenance, particularly when use occurred despite landowner objections. While public maintenance could serve as a bright-line rule for determining whether the

238. *Id.* at 47, 404 S.E.2d at 683.

239. *See* Layman v. Gnegy, 26 Md. App. 114, 117, 337 A.2d 126, 128 (1975); 2 THOMPSON, *supra* note 6, § 343, at 214.

240. *Concerned Citizens*, 329 N.C. at 56, 44 S.E.2d at 688 (Mitchell, J., dissenting).

241. *See supra* notes 83-98 and accompanying text.

242. *See* Degnan, *supra* note 21, at 953.

243. *Id.*

landowner has been given notice that a public easement has been claimed, it would be an underinclusive rule. Circumstances exist in which public maintenance has not occurred where the landowner has been given unmistakable notice by the character and extent of the use in which a public easement has been claimed. Such situations are particularly likely to occur in coastal environments where sand roads are often not strictly maintained and where use by vacationers from many different areas of the state is common. For these reasons, maintenance by public authorities should not be an essential element of public prescription.

Several aspects of the *Concerned Citizens* decision have important ramifications for perpendicular beach access in North Carolina. The North Carolina courts traditionally have taken the approach that "prescription is disfavored in the law," and have developed a presumption of permissive use that is extremely difficult for claimants to overcome in many cases.[244] The tests employed to determine whether landowner objection constitutes an interruption of prescriptive use and whether prescriptive use has followed a sufficiently definite path have similarly created barriers to prescriptive acquisition in North Carolina.[245] This result has been justified by the overarching public policy in North Carolina to reward or encourage "neighborly act[s]."[246] The courts have been loathe to punish a landowner who generously gave to the public or her neighbors a license to cross her property.[247] This suspicion of prescription has been particularly great in cases in which public easements are claimed; maintenance and control by public authorities have been required in every case, either as an essential element of public prescription or as evidence of adverse use.[248] In *Concerned Citizens* the traditional distrust of prescriptive acquisition ran headlong into another overarching public policy, the state's duty to preserve public access to oceanfront

244. *See, e.g.*, Potts v. Burnette, 301 N.C. 663, 666-67, 273 S.E.2d 285, 288 (1981) ("[U]ser is presumed to be permissive.").

245. *See supra* notes 88-122 and accompanying text.

246. *Potts*, 301 N.C. at 666-67, 273 S.E.2d at 288; *see, e.g.*, Chesson v. Jordan, 224 N.C. 289, 292, 29 S.E.2d 906, 908-09 (1944) ("Neighborliness is a virtue the law neither condemns nor penalizes. Hence, the use by defendants must be hostile in character, repelling the inference that it was permissive and with the owner's consent."); Atlantic Coastline R.R. v. Ahoskie, 202 N.C. 585, 592, 163 S.E. 565, 568 (1932) ("Neighborly conduct either on the part of a person or corporation ought not to be so construed as to take their property."); Johnson v. Stanley, 96 N.C. App. 72, 74, 384 S.E.2d 577, 579 (1989) (because "landowner's mere neighborly act of allowing someone to pass over his property" should not "operate to deprive the owner of his land[,] . . . mere use alone is presumed to be permissive") (citations omitted).

247. *Ahoskie*, 202 N.C. at 592, 163 S.E. at 568.

248. *E.g.*, Hemphill v. Board of Aldermen, 212 N.C. 185, 188, 193 S.E. 153, 155 (1937) (evidence of adverse use); Town of Sparta v. Hamm, 97 N.C. App. 82, 87, 387 S.E.2d 173, 176, *disc. rev. denied*, 326 N.C. 366, 389 S.E.2d 819 (1990) (essential element of public prescription).

beaches. The court responded by making it much more difficult for landowners to interrupt prescriptive use, modifying the substantial identity test to allow prescription in a coastal environment where routes of travel move with the shifting sands, and by choosing not to adopt the underinclusive bright-line rule that maintenance by public authorities is an essential element of public prescription.

Although each of these changes in North Carolina's prescription doctrine will enhance its usefulness in preserving perpendicular public beach access, the presumption of permissive use will continue to create a substantial barrier to prescriptive acquisition in cases in which the landowner has not objected to the use and the users have not expressly claimed a right to use a path. One may argue the expansion of the prescriptive doctrine in *Concerned Citizens* signals an end to North Carolina's distrust of the prescription doctrine and will eventually lead to abandonment of its minority position on the presumption of permissive use. However, such a change appears unlikely given the supreme court's clear reaffirmation of the permissive presumption only a decade ago in *Potts v. Burnette*.[249] An alternative argument is that a presumption of adverse use should be adopted only in cases involving access to ocean beaches. The primary justification for the permissive presumption is that a landowner should not be punished for acts of "neighborliness."[250] Thus, the presumption seeks to protect the landowner who neither objects nor permits use expressly, but, because the users have not expressly asserted a right to use the path, assumes that the users believe that they are using the land with his permission. This set of circumstances simply does not exist on the oceanfront. The public expectation that some public right of access to ocean beaches exists or should exist is pervasive; oceanfront property owners, possibly more than anyone else, are clearly cognizant of this public expectation. Thus, it is illogical to protect an

249. 301 N.C. 663, 273 S.E.2d 285 (1981). The *Potts* court stated:

> Plaintiffs have vigorously urged us to reject our present position that a user is presumed to be permissive and adopt the rule, obtaining in the majority of jurisdictions, that the user is presumed to be adverse. This we decline to do. An easement by prescription, like adverse possession, is not favored in the law, and we deem it the better-reasoned view to place the burden of proving every essential element, including hostility, on the party who is claiming against the interests of the true owner. Additionally we note that "[t]he modern tendency is to restrict the right of one to acquire a prescriptive right-of-way whereby another, through a mere neighborly act, may be deprived of his property by its becoming vested in one whom he favored." Thus, in order for plaintiffs to succeed in their claim, they must have shown sufficient evidence of the hostile character of their use to create an issue of fact for the jury.

Id. at 666-67, 273 S.E.2d at 288 (citations omitted) (quoting 2 THOMPSON, *supra* note 6, § 335, at 145).

250. *See supra* note 246.

oceanfront landowner for the reason that he has not been given notice that beachgoers have claimed an interest adverse to his own.

North Carolina's presumption of permissive use represents a public policy decision to protect the landowner who does not "sleep on his rights" because he has not been given notice of the adverse interest. Other courts have relied on other public policy considerations, particularly the public interest in maintaining possession of real property in the hands of persons making the most efficient use of it,[251] in adopting the presumption of adverse use. Most important, because the permissive presumption originates in public policy, the presumption should be changed if a more compelling competing public policy exists.[252] The North Carolina legislature has established clearly that the preservation of public beach access is an important public policy goal.[253] The court's treatment of the uninterrupted use requirement in *Concerned Citizens* evidences judicial recognition of this same public policy goal.[254] Given this recognition, the courts should adopt a presumption of adverse use in cases involving beach access to reflect the public policy goal of preserving public beach access.

The most significant aspect of the *Concerned Citizens* opinion is its potential impact on lateral access issues. In resolving conflicts arising out of differing public and private expectations of public property rights in the dry-sand beach, several coastal states, following the Texas model

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251. *See* Macy, *supra* note 75, at 779.

252. *See* Livingston, *supra* note 224, at 675-76 (stating that courts should be, and often are, more willing to allow intrusions on private property rights through their application of common-law doctrines when a significant public benefit, like access to public waters, is at stake).

253. *See* N.C. GEN. STAT. § 113A-134.1 (1989):

> The public has traditionally fully enjoyed the State's ocean and estuarine beaches and public access to and use of the beaches. The beaches provide a recreational resource of great importance to North Carolina and its citizens and this makes a significant contribution to the economic well-being of the State. The ocean and estuarine beaches are resources of statewide significance and have been customarily freely used and enjoyed by people throughout the State. Public access to North Carolinas beaches is, however, becoming severely limited in some areas. . . . Public purposes would be served by providing increased access to ocean and estuarine beaches . . . . There is therefore, a pressing need in North Carolina . . . for the identification, acquisition, improvement and maintenance of public access ways to the ocean and estuarine beaches.

This legislative policy has been adopted at the administrative level by the North Carolina Coastal Resources Commission and is implemented by the Division of Coastal Management. *See* N.C. ADMIN. CODE tit. 15A, r. 7H.0306(a)(5) (Nov. 1991) ("Established common-law and statutory public rights of access to the public trust lands and waters shall not be eliminated or restricted. Development shall not encroach upon public accessways nor shall it limit the intended use of the accessways.").

254. *See supra* notes 201-17 and accompanying text.

in *Seaway*, have recognized public prescription of the dry-sand beach.[255] Prior to *Concerned Citizens*, the North Carolina courts had not addressed whether the public could acquire rights to the dry-sand by prescription. Several aspects of North Carolina's public prescription doctrine, however, undermined its applicability to the dry-sand. Public prescription has occurred in North Carolina only when the prescriptive use has been similar to the use of a public road or street.[256] A public road or street typically has precise, permanent boundaries. In *Concerned Citizens* the court favorably noted the *Seaway* decision, which held that the boundaries of the dry-sand beach (the first line of stable vegetation and the mean high tide line) were sufficient to define the boundaries of a public prescriptive easement because they are "natural monuments and as calls in a description of land are of the highest dignity."[257] The *Concerned Citizens* court's reliance on *Seaway* and *Feinman*, which established that a public easement over the dry-sand beach moves as the beach erodes and accretes,[258] clearly indicates that public prescriptive easement can be acquired over the dry-sand beach despite the dissimilarities between such an easement and a typical public road. A public road also is typically used solely as a line of travel. In *Concerned Citizens*, as in *Seaway*, the dry-sand was used both as a line of travel and for general recreational use.[259] Use of oceanfront beaches virtually always involves some travel, if only in the form of pedestrians strolling along the sand. The issue presented is whether recreational uses such as sunbathing and fishing, which cannot be defined as travel, may also be considered prescriptive use. The *Concerned Citizens* opinion, by recognizing that the nature of public use of coastal lands differs inherently from that of inland roads, suggests that recreational uses may also be considered prescriptive use.[260]

The permissive presumption continues to present a barrier to public

255. Gion v. City of Santa Cruz, 2 Cal. 3d 29, 43, 465 P.2d 50, 59, 84 Cal. Rptr. 162, 171 (1970); City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 75 (Fla. 1974); State *ex rel.* Thornton v. Hay, 254 Or. 584, 594, 462 P.2d 671, 676 (1969); Moody v. White, 593 S.W.2d 372, 377-78 (Tex. Civ. App. 1979).

256. *See, e.g.*, Town of Sparta v. Hamm, 97 N.C. App. 82, 87, 387 S.E.2d 173, 176, *disc. rev. denied*, 326 N.C. 366, 389 S.E.2d 819 (1990) (holding that street continually used by public was easement).

257. Seaway Co. v. Attorney Gen., 375 S.W.2d 923, 939 (Tex. Civ. App. 1964). The *Seaway* court noted that "[t]his requirement of a definite route is required so the owner may have notice of not only the fact of adverse claim but the extent of it," and established that the "physical nature of the beach" defined a route sufficient to give the landowner the required notice. *Id.* This argument is identical to that made by the *Concerned Citizens* court in its treatment of the substantial identity issue. *Concerned Citizens*, 329 N.C. at 47, 404 S.E.2d at 682.

258. Feinman v. State, 717 S.W.2d 106, 108-11 (Tex. Ct. App. 1986).

259. *See Seaway*, 375 S.W.2d at 933; *supra* note 46 and accompanying text.

260. *Concerned Citizens*, 329 N.C. at 47, 404 S.E.2d at 682.

prescription of the dry-sand beach.[261] The arguments supporting a presumption of adverse use in perpendicular beach access cases apply equally to the dry-sand beach.[262] The need to protect the "neighborly" landowner is nonexistent because it is common knowledge that many members of the general public believe a public right to use the dry-sand exists. The public policy behind preserving public use of the dry-sand is well established. A third justification for reversing the permissive presumption applies solely to the dry-sand beach. Because the dry-sand beach is unsuitable for development due to overwash in severe storms,[263] a public easement over the dry-sand neither deprives the landowner of the right to develop his land nor deprives the public of any gains in efficiency attributable to private ownership of land.

Even given the expansion of the public prescription doctrine in *Concerned Citizens*, there remain significant drawbacks to the use of the prescription theory for preserving public access to the dry-sand beach.[264] Reliance on the prescription doctrine demands much litigation because it requires a separate showing of proof for each stretch of beach. In addition, it will succeed only on those beaches on which public use has been common for many years. Extensive public use follows the construction of the public infrastructure allowing access to a barrier island. In several coastal areas of North Carolina, such access has been recently constructed or does not yet exist. Finally, the prescription doctrine encourages oceanfront landowners to attempt to interrupt prescriptive use by preventing use of their property. For this reason, an expansion of the doctrine may serve to close more beaches than it opens.

Three other common-law doctrines provide alternatives to prescription for creating public access to the dry-sand. The implied dedication doctrine presents each of the above drawbacks as well as a fourth, the need to prove acceptance by public authorities through evidence of public maintenance and control.[265] The custom doctrine was applied in Ore-

261. *See* City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 76 (Fla. 1974) (finding that a presumption of permissive use could not be overcome when public use of a privately owned area of dry-sand beach had occurred for over 65 years, but when public use was consistent with the interests of the landowner, who operated a commercial pier and recreation center).

262. *See supra* text accompanying notes 249-50.

263. All oceanfront beaches in North Carolina fall within the "Ocean Hazard Area" Area of Environmental Concern (AEC). N.C. ADMIN. CODE tit. 15A, r. 7H.0306(a) (Nov. 1991). Within this AEC, virtually all development is prohibited oceanward of a "setback line" established at least 60 feet landward of the first line of stable vegetation. *Id.* r. 7H.0306(a)(1). For the broad definition of "development" to which this rule applies, see N.C. GEN. STAT. § 113A-103(5) (1989).

264. *See* Carmichael, *supra* note 11, at 164-65.

265. *See supra* notes 145-46 and accompanying text.

gon for the specific purpose of avoiding the limitations of the prescription doctrine by creating an interest in all beaches at once; however, no precedent for use of the custom doctrine exists in North Carolina.[266] Only the public trust doctrine addresses the drawbacks of the prescription doctrine and is well grounded in the common law of North Carolina. Several commentators have suggested that an expansion of the scope of the public trust doctrine to include beach property landward of the mean high tide line could best address these problems and preserve traditional expectations of the public's right to use the beach.[267]

The only reference to the public trust doctrine in *Concerned Citizens* occurs in the supreme court's express disavowal of a statement made by the court of appeals that the public trust doctrine should not be extended " 'to deprive individual property owners of some portion of their property rights without compensation.' "[268] It is not clear from the court of appeals' statement whether it was referring to the perpendicular or lateral beach access issue.[269] Only one conclusion can be drawn from the supreme court's brief reference to the public trust doctrine: the court did not want to foreclose the possibility that public rights to use the dry-sand beach could exist by virtue of the public trust doctrine.[270] Obviously, this conclusion is far from judicial recognition of such public rights. The *Concerned Citizens* court's willingness to reshape the public prescription doctrine to allow prescriptive acquisition of the dry-sand and to make prescriptive use much more difficult to interrupt does evince judicial rec-

266. *See* Carmichael, *supra* note 11, at 174-75.

267. *See* Finnell, *supra* note 16, at 677. One commentator argues that,

> [t]he public trust doctrine should become the theoretical foundation for assuring reasonable public access to coastal public property. It should become a principal theory supporting public rights of access to public property, for protecting public rights already perfected under other common-law theories, and a key factor for courts to weigh when applying the multifactored takings analysis.

Id.; *see* Ted J. Hanning, *The Public Trust Doctrine Expansion and Integration: A Proposed Balancing Test*, 23 SANTA CLARA L. REV. 211, 235 (1983); Karen Oehme, *Judicial Expansion of the Public Trust Doctrine: Creating a Right of Public Access to Florida's Beaches*, 3 J. LAND USE & ENVTL. L. 75, 92-94 (1987); Carmichael, *supra* note 11, at 200-01. *But see* Spalding, *supra* note 181, at 64 (suggesting that the public trust doctrine is, and is likely to remain, a strictly aquatic doctrine).

268. *Concerned Citizens*, 329 N.C. at 55, 404 S.E.2d at 688 (quoting Concerned Citizens of Brunswick County Taxpayers Ass'n v. Holden Beach Enters., 95 N.C. App. 38, 46, 381 S.E.2d 810, 815 (1989), *rev'd*, 329 N.C. 37, 404 S.E.2d 677 (1991)).

269. The claimants' public trust arguments, however, addressed only the public's right to use the dry-sand beach. Brief for Appellant-Intervenor at 11-21, *Concerned Citizens* (No. 8813-SC-1075).

270. In Cooper v. United States, 779 F. Supp. 833 (E.D.N.C. 1991), a federal tax case described *supra* note 196, the court considered the treatment of the public trust doctrine in *Concerned Citizens* and concluded only that "[t]he extent to which the public trust doctrine applies to dry sand property is an unsettled question." *Cooper*, 779 F. Supp. at 835.

ognition of the public policy goal of maintaining public beach access. Taken together, the recognition of this policy, the decision to disavow the court of appeals' statement limiting the public trust doctrine, and the existence of legislation indicating that public trust rights exist in the dry-sand[271] suggest that an expansion of the public trust doctrine similar to that adopted by the New Jersey Supreme Court in *Matthews* is foreseeable in North Carolina.

Several advantages commend the public trust doctrine over other common-law doctrines for establishing public rights in the dry-sand beach. Unlike the prescription doctrine, the public trust doctrine would apply uniformly to every ocean beach in the state.[272] It would thus eliminate the need for burdensome beach-by-beach litigation and would allow public access to beaches that are now unaccessible to the public. While the public prescription doctrine allows only the creation of a permanent easement in the public, the public trust doctrine can be flexibly employed to protect the interest of the landowner while creating public rights sufficient to allow free enjoyment of ocean beaches.[273] Finally, the public trust doctrine most closely mirrors the expectations of the citizens of North Carolina.[274] Public expectation is that the right to enjoy ocean beaches exists, not by virtue of an acquired property interest, but because the right to use oceanfront beaches has always existed as a necessary part of public use of the ocean.[275]

Concerned Citizens changes the doctrine of prescription in North Carolina by establishing that: (1) To interrupt prescriptive use the landowner must undertake some overt act protesting the use, with the intent to interrupt use, and must succeed in actually interrupting use for some substantial period of time; (2) to establish "substantial identity" the claimant need only prove that the use followed a path sufficiently definite both to allow reasonable determination of the location of the claimed easement and to give the landowner notice of its extent; and (3) maintenance by public authorities is not an essential element of public prescription. These are reasonable changes that move North Carolina closer to the common law of prescription applied in the majority of states. The court's application of the "uninterrupted" test evinced recognition of the public policy in favor of preserving public beach access. The decision was unusual, however, because the court suggested that a period of time

271. *See supra* note 197.

272. *See* Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 321-24, 471 A.2d 355, 363-65, *cert. denied*, 469 U.S. 821 (1984); Carmichael, *supra* note 11, at 183.

273. *Matthews*, 95 N.J. at 324, 471 A.2d at 365; *see* Carmichael, *supra* note 11, at 183.

274. *See* Carmichael, *supra* note 11, at 183.

275. *Matthews*, 95 N.J. at 322-23, 471 A.2d at 364.

longer than that required in other states will be necessary to constitute an interruption of prescriptive use in North Carolina, and because the burden of proof placed on the claimant asserting uninterrupted use was slight. Joining several other coastal states, the North Carolina Supreme Court has recognized that a public prescriptive easement can be perfected in the dry-sand beach and that the interest created will move as the shoreline erodes and accretes.

To enable prescriptive acquisition of an easement over the dry-sand, the court should go further and reverse its presumption of permissive use in cases involving public beach access. The justifications for a presumption of adverse use are convincing. The need to protect the "neighborly" landowner is minimal because widely held public expectations give the landowner notice that public use of beaches occurs by claim of right. Further, the public policy to preserve beach access must be weighed against the public policy protecting the landowner. Finally, because the dry-sand beach is unsuitable for development, the interest protected under the permissive presumption is less significant.

The public prescription doctrine is a limited tool for preserving public access to the dry-sand beach because it demands burdensome litigation, applies only where long public use has occurred, and encourages oceanfront landowners to prevent use of their property. The public trust doctrine should be expanded to recognize public rights of access to the dry-sand beach on all beaches of the state. The citizens of North Carolina have for generations recognized ocean beaches as one of their most prized resources and have harbored the expectation that these beaches, like the ocean itself, should remain open for public enjoyment. By recognizing the existence of public trust rights in the dry-sand beach, North Carolina could permanently root this expectation in the common law of the state.

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