RIPARIAN RIGHTS

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Richard

Maryland Law Review

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TABLE OF CONTENTS

ARTICLES

NOTES AND COMMENTS

BOOK REVIEW

Notes and Comments

MARYLAND'S WETLANDS: THE LEGAL QUAGMIRE

"Wetlands" is "a collective term for land-water edge areas and submerged bottoms" which "usually support extensive growths of aquatic plants because of either permanent, temporary or intermittent submersion or inundation. . . ."[1] The most critical type of wetland is the swamp or marsh which is rather easily filled and which is normally not subject to other productive economic use. It is estimated that there are more than 300,000 acres of such swamps and marshes in Maryland.[2] In recent years it has been increasingly recognized that these areas, in their pristine state, have an enormous ecological, economic, aesthetic and recreational value[3] and that the continuation of past landfill trends would, by destroying the wetlands, seriously upset the environmental balance.

Realizing the necessity to protect Maryland's wetland areas and to limit their further despoilation, the Maryland General Assembly recently enacted a wetlands statute.[4] The new act alleviates a great number of ambiguities and uncertainties that existed under the former statutory provisions.[5] Moreover, it establishes clear legislative guidelines for the administration of wetlands and empowers the Department of Natural Resources to promulgate rules and regulations for the management of these areas.

The initial section of this comment concentrates on the historical background of the riparian rights provisions of the Maryland Annotated Code and attempts to explain the status of land reclamation under these provisions. The new Maryland wetlands statute is explored in the second portion. The final part contains an analysis of some legal questions which may affect the validity of the new statute. These include the constitutional problems resulting from uncompensated takings, the repeal of the former statutory riparian rights sections, and the applicability of the public trust doctrine to Maryland wetland areas.

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1. II MARYLAND STATE PLANNING DEP'T, WETLANDS IN MARYLAND — TECHNICAL REPORT V-1 (1970).

2. *Id.* at II-5. There are also 1.6 million acres of submerged bottom under the variable depths of the Chesapeake Bay, its tributaries and the Atlantic coast estuaries.

3. *Id.* at III-1. For discussions of wetland problems in other states, see SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION, SAN FRANCISCO BAY PLAN (Jan. 1969); Longgood, *Saving The Wetlands*, in THE LAMP 6 (Fall 1970, published by Standard Oil Co. of N.J.); D. Brion, A Proposed Wetlands Protection Statute for the Virginia Wetlands, May 26, 1970 (unpublished seminar paper on file with Professor Garrett Power, University of Maryland School of Law).

4. Ch. 241, § 1, [1970] Md. Laws 241 [hereinafter cited as MD. ANN. CODE art. 66C, §§ 718-31 (Supp. 1970)].

5. MD. ANN. CODE art. 54, §§ 45, 46, 47 (1968).

I. HISTORICAL BACKGROUND

A. Title to Lands Under Navigable Waters

Under the early English common law a riparian subject could own the beds of both fresh and tidal waters to the extent that they were of value to him.[6] During the reign of Elizabeth I, however, a significant change occurred in the law governing title to submerged lands. Basing their decisions on the works of several early treatise writers,[7] the English courts began to accept the theory that the Crown owned the beds, including the foreshores,[8] of tidal waters as land not granted out by the sovereign. Not long afterward, the substance of this theory became firmly established in America as well and has played a significant role in the determination of title to land under navigable water.[9]

This notion was interpreted as meaning that the State of Maryland, as a successor in interest to the Crown, had title to the lands under its navigable waters and had the power to alienate it.[10] The power of the State to grant title to lands under navigable waters posed a serious threat to the riparian landowner, however. His common law riparian right to accretions (discussed *infra*) could easily be rendered valueless if submerged land contiguous to his premises

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6. The distinction between tidal and fresh water with respect to ownership of the beds did not exist under the earliest English law. *See* Fraser, *Title to Soil Under Public Waters — A Question of Fact*, 2 MINN. L. REV. 313, 315 (1918). *See generally* 1 FARNHAM, THE LAW OF WATER AND WATER RIGHTS § 36 (1904).

7. Foremost among these writers were Thomas Digges and Lord Hale. Digges first promulgated the theory that the Crown owned prima facie the beds under tidal waters in his treatise entitled *Proofs of the Queen's Interest in Lands Left by the Sea and the Salt Shores*. However, not until Lord Hale redefined the unique doctrine in his great work *De Jure Maris*, which has become the main source of the modern law in this area, was it accorded any significance. *See* F. MALONEY, S. PLAYER & F. BALDWIN, JR., WATER LAW AND ADMINISTRATION — THE FLORIDA EXPERIENCE 351 (1968).

8. "Foreshore" is the "land that lies between the high and low water marks and that is alternately wet and dry according to the flow of the tide." BLACK'S LAW DICTIONARY 777 (4th ed. 1951).

9. Navigable waters in Maryland are defined as those which are subject to the ebb and flow of the tide. Those waters which are not subject to the ebb and flow of the tide are non-navigable even if they can be used for purposes of commerce or travel. Wagner v. Mayor & City Council, 210 Md. 615, 624, 124 A.2d 815, 819–20 (1956); Linthicum v. Shipley, 140 Md. 96, 98, 116 A. 871 (1922). The federal test for navigability, which is also the test used by the great majority of states, differs from the Maryland common law rule. Navigability *in fact* is the sole criterion. Thus, if a waterway is capable of being used in its ordinary condition as a highway of commerce, it is deemed navigable. *See, e.g.*, The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). For a discussion of the Maryland navigability test, see 5 MD. L. REV. 314, 315 (1941).

10. *See* Brown v. Kennedy, 5 Harr. & J. 195 (Md. 1821); *cf.* Mayor & City Council v. Canton Co., 186 Md. 618, 47 A.2d 775 (1946); *see generally* U.S. DEP'T OF INTERIOR, CHESAPEAKE BAY IN LEGAL PERSPECTIVE, ESTUARINE POLLUTION STUDY SERIES 92 (1970).

It is questionable whether the State legislature has the authority to effect such alienation. For the discussion of the public trust doctrine, see notes 132–56 *infra* and accompanying text. The dictum in Browne v. Kennedy, 5 Harr. & J. 195, 202, 203 (Md. 1821) suggests that, although the State could alienate these inundated lands, those who received grants or patents from the State took them subject to the public rights of fishery and navigation. In 1862, the legislature passed a statute which provided that the State could not alienate land covered by navigable waters if such alienation would impair the rights of the riparian proprietor. *See* note 12 *infra*.

were to be granted by the State to a third party.[11] An equally ominous threat to the riparian landowner was that of a subsidence of the water level, which could cause the landowner to be altogether cut off from the water if the formerly submerged land had been conveyed by the State to someone other than himself. The riparian owner gained protection from these possible consequences when the legislature enacted in 1862 what is now section 48 of article 54 of the Maryland Annotated Code,[12] which reads as follows: "No patent hereafter issued out of the Land Office shall impair or affect the rights of riparian proprietors, as explained and declared in §§ 45 and 46; and no patent shall hereafter issue for land covered by navigable waters." By prohibiting the issuance by the Land Office of a patent for lands covered by navigable waters,[13] this section protected riparian rights and, at least to an extent, prevented the State from alienating title to the beds of navigable waters.[14] It has been determined that the prohibition contained in section 48 applies to all land below the high water mark, which includes many marshes and swamps.[15] However, the protection which was afforded riparian owners after 1862 was largely removed in 1943 by the adoption of the present section 15 of article 78A,[16] which gives the Board of Public Works the power to issue patents for land under navigable water for a consideration adequate in the opinion of the Board. Acting pursuant to this section, the Board of Public Works could easily jeopardize the riparian owner's right of access to the water through a conveyance of the submerged contiguous land to a third party. What is perhaps worse than the Board's ability to affect the riparian's rights is that it could convey wetlands indiscriminately, without regard to the effects which such conveyances might ultimately have on the environment. Great damage to the ecological balance, due to land reclamation projects on these conveyed wetlands, could cause irreparable harm to the aquatic plant and animal life in these areas. The 1970 General Assembly attempted to eliminate these dangers by its enactment of section 15A

11. *Cf.* Goodsell v. Lawson, 42 Md. 348, 364 (1875). It was noted in Chapman v. Hoskins, 2 Md. Ch. 485 (1851) that the State's power to convey submerged land was seldom exercised when it would jeopardize riparian rights. Moreover, the court viewed such a threat as a sufficient equitable ground to refuse to uphold the grant of a patent.

12. Ch. 129, § 1(39), [1862] Md. Laws 137.

13. In Hess v. Muir, 65 Md. 586 (1886), the court stated that the only effect of the last clause of this section is to restrict the powers of the Commissioner of the Land Office. *See also* CHESAPEAKE BAY IN LEGAL PERSPECTIVE, *supra* note 10, at 93–94; Dimsey, *Wetlands: The Legal Context*, in II MARYLAND STATE PLANNING DEP'T, WETLANDS IN MARYLAND — TECHNICAL REPORT XIV–1 (1970).

14. Since the enactment of this section, patents have been denied, pursuant to section 48, by the Land Office and by the courts if the desired land was under navigable water. Wagner v. Mayor & City Council, 210 Md. 615, 124 A.2d 815 (1956); Linthicum v. Shipley, 140 Md. 96, 116 A. 871 (1922).

15. Day v. Day, 22 Md. 530 (1865).

16. MD. ANN. CODE art. 78A, § 15 (1969). For an analysis of this section, see 50 OP. ATT'Y GEN. 452, 472–74 (1965). It has been said that taken together, section 15 of article 78A and section 48 of article 54 formulate the general rule in Maryland that the State is owner of all land below the high-water mark of navigable waters except for such lands for which the State has issued a patent. *See* Dimsey, *Wetlands: The Legal Context*, in II MARYLAND STATE PLANNING DEP'T, WETLANDS IN MARYLAND — TECHNICAL REPORT XIV–1 (1970).

of article 78A.[17] The new provision prohibits the Board of Public Works from conveying title to submerged land owned by the State to any person other than an abutting riparian owner or proprietor.[18] In determining whether to make a permitted conveyance, the Board is required to take into account "the best interests of the State with respect to the varying ecological, economic, developmental, agricultural, recreational and aesthetic values of the area under consideration."[19]

B. Riparian Rights

1. Common Law

Notwithstanding the ownership by the State of the beds of navigable waters, the riparian landowner was deemed to possess certain rights by virtue of his proximity to the water. The nature and extent of these rights has been a topic of legal and political controversy for many years. At common law the principle was well established that, where a tract of land was situated adjacent or contiguous to navigable water, any increase in that land as a result of the gradual and natural process of sediment deposit along the shore inured to the riparian landowner.[20] Such a build-up of soil is technically termed an *accretion.*[21] The riparian landowner was similarly entitled to land formed by *reliction,* the exposure of land by a gradual subsidence of the water.[22] The justification for granting the riparian landowner title to such land stemmed from several considerations. Public policy favored the rule because the new land, though small in quantity, could be made immediately productive.[23] In addition, allowing the riparian owner title to the newly formed land seemed merely part of a balancing process since the gain would often be offset by the loss of soil worn away through tidal erosion.[24] But perhaps the paramount rea-

17. Ch. 242, [1970] Md. Laws 551 [hereinafter cited as MD. ANN. CODE art. 78A, § 15A (Supp. 1970)].

18. The prior statute, MD. ANN. CODE art. 78A, § 15 (1969), gave the Board of Public Works broad authority to issue patents to anyone for land under navigable water.

19. MD. ANN. CODE art. 78A, § 15A (Supp. 1970).

20. Linthicum v. Coan, 64 Md. 439, 450–52 (1886); Baltimore & O.R.R. v. Chase, 43 Md. 23, 34–35 (1875); Giraud v. Hughes, 1 Gill & Johns. 115, 125–26 (Md. 1829).

21. The deposit of soil itself is known as alluvion. BLACK'S LAW DICTIONARY 102 (4th ed. 1951).

22. Baltimore & O.R.R. v. Chase, 43 Md. 23 (1875).

23. *See* 1 R. AIGLER, A. SMITH & S. TEFFT, CASES ON PROPERTY 464–65 (1960).

24. In Giraud v. Hughes, 1 Gill & Johns. 249 (Md. 1829), the court, relying on the following quotation from Blackstone, noted this early principle upon which the accretion doctrine was founded:

> . . . as to land gained from the sea, either by alluvion by the washing up of sand and earth, so as in time, to make terra firma, or by dereliction, as when the sea shrinks back below the usual water mark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land *adjoining.*

Id. at 264 (emphasis added). The court then went on to say:

> It is then not upon the principle that the land calls for the water, but because it adjoins the water, that the owner acquires a title to the soil so formed, for, continues he, *de minimis non curat lex;* and besides these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore, a reciprocal consideration for such possible charge or loss; here we have

son for adoption of this principle was that it would preserve the riparian owner's right to the use of the water.[25] If another party were permitted to gain title to accretions or to land exposed by the subsidence of the water, the riparian landowner would be deprived of his valuable water-access rights. The doctrines of accretion and reliction eliminate this possibility.

2. Maryland Statutory Provisions

The first statutory provision in Maryland extending these common law riparian rights was contained in the Act of 1745, which had as it primary legislative purpose the establishment of several new towns. Among these was one on the north side of the Patapsco River to be known as Baltimore-town. Section 10 of the chapter creating Baltimore-town reads as follows: "All improvements, of what kind foever [*sic*], either wharfs, houses, or other buildings, that have or shall be made out of the water, or where it usually flows, shall (as an encouragement to such improvers,) be for ever deemed the right, title and inheritance of such improvers, their heirs and assigns for ever."[26]

The apparent intent of this provision was "to encourage improvements on the water-fronts of the harbor of Baltimore, for the convenience and accommodation of commerce. . . ."[27] In furtherance of this purpose, the State agreed to relinquish all its right as sovereign to the shores covered by such improvements to those who constructed them.[28] The ultimate result was the development of Baltimore into a bustling port city and the transformation of the Baltimore harbor shoreline from a concave figure to a rectangular one.[29]

The right conferred by the Act to make riparian improvements and acquire title to the land thereto was considered valuable and extraordinary. It was construed to be "a franchise, — a vested right peculiar in its nature, but a *quasi* property, of which the lot owner cannot be lawfully deprived without his consent."[30] The only restriction on the riparian's right to build improvements out from the land was that these improvements be confined to the front of his own lot.[31] Once

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in plain and strong language, the reason of the rule, which places the acquisition of the additional soil by the owner of the adjoining land, upon the ground, that he might be a loser by the breaking in of the sea, or at an expense to keep it out. *Id.*

25. *See, e.g.*, Steinem v. Romney, 233 Md. 16, 194 A.2d 774 (1963).

26. Ch. 9, § 10, [1745] Md. Laws. In 1835, this enactment was supplanted by a law giving riparian landowners throughout the State permission to construct wharves. Ch. 168, [1835] Md. Laws. But the adoption of the 1860 code in effect repealed the 1745 provision. *See* Mayor & City Council v. Canton Co., 186 Md. 618, 623 (1945).

27. Baltimore & O.R.R. v. Chase, 43 Md. 23, 36 (1875). *See* note 64 *infra*.

28. *See* Baltimore & O.R.R. v. Chase, 43 Md. 23 (1875); 50 OP. ATT'Y GEN. 452, 464–65 (1965). *See also* notes 30–32 *infra* and accompanying text.

29. Mayor & City Council v. Canton Co., 186 Md. 618, 624, 47 A.2d 775, 778 (1946).

30. Baltimore & O.R.R. v. Chase, 43 Md. 23, 36 (1875). *See* Casey's Lessee v. Inoles, 1 Gill 430, 501 (Md. 1844).

31. *See, e.g.*, Dugan v. Baltimore, 5 Gill & Johns. 357, 367–68 (Md. 1833). For a discussion of the Maryland cases dealing with the problem of what constitutes the front of the riparian owner's lot, see CHESAPEAKE BAY IN LEGAL PERSPECTIVE, *supra* note 10, at 102–06.

such improvements were made, the title to the land under which they rested would vest in the riparian landowner.[32] Such title was to be "original" rather than "derivative" and was, in a sense, similar to the title acquired by adverse possession.[33]

The Act of 1745 was repealed by the codification of the Maryland laws in 1860.[34] The only provision for riparian rights contained in the new codification was a modified version of an 1835 statute[35] which had provided for the construction of wharves on the navigable waters of the State. This limited provision was expanded when the General Assembly enacted chapter 129 of the Acts of 1862, now codified as sections 45 and 46 of article 54 of the Maryland Annotated Code, which read as follows:

§ 45. Accretion to land on navigable river.

> The proprietor of land bounding on any of the navigable waters of this State shall be entitled to all accretions to said land by the recession of said water, whether heretofore or hereafter formed or made by natural causes or otherwise, in like manner and to like extent as such right may or can be claimed by the proprietor of land bounding on water not navigable.

§ 46. Right to make improvements in front of land on navigable river.

> The proprietor of land bounding on any of the navigable waters of this State shall be entitled to the exclusive right of making improvements into the waters in front of his said land; such improvements and other accretions as above provided for shall pass to the successive owners of the land to which they are attached, as incident to their respective estates. But no such improvement shall be so made as to interfere with the navigation of the stream of water into which the said improvement is made.[36]

The major difficulties experienced with these provisions during the past century have been in defining and circumscribing the riparian rights which they accord. Because of the ever-increasing prices brought by waterfront property, especially in the coastal areas of the

32. In Giraud v. Hughes, 1 Gill & Johns. 249, 265 (Md. 1829), the court decided that the right to make improvements in navigable waters granted by the Act of 1745, chapter 9, section 10, was a mere privilege of acquiring property by reclaiming it from the water and that, until the improvement was completed, no title was acquired by the adjacent owner. On the basis of this doctrine, the court in Casey's Lessee v. Inoles, 1 Gill 430 (Md. 1844) held that, where a riparian proprietor had not made any improvement in front of his property, his right to make them was intercepted by a grant from the State of land covered by navigable water contiguous to his property.

33. *Cf.* 1 R. AIGLER, A. SMITH & S. TEFFT, CASES ON PROPERTY 464 (1960).

34. *See* note 26 *supra*. The provisions of the Act of 1745 were simply omitted from the recodification.

35. *Compare* ch. 168, [1835] Md. Laws *with* Md. Code Public General Laws art. XCVII, § 21 (1860).

36. These sections are hereinafter referred to as sections 45 and 46, respectively.

State, and because of the development of more efficient means of filling land, many riparian owners have been engaging in reclamation projects in wetland areas. This activity has raised a controversy over whether a riparian proprietor can, as a matter of right,[37] fill and reclaim wetland areas adjacent to his property.[38] The uncertainty of the law in this area[39] has left the validity of many land titles in a veritable quandry. The following discussion will attempt to resolve this question.

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37. Even if it is assumed that the riparian landowner had, as a matter of right, the authority to fill and reclaim land under sections 45 and 46, he nevertheless had to comply with certain regulations. The Harbors and Rivers Act, 33 U.S.C. § 403 (1964) declares that "the creation of any obstruction . . . to the navigable capacity of any of the waters of the United States is prohibited." This act covers both the building of structures and the excavating and filling of land. Since the right of the United States to control navigation is superior to the right of the riparian to fill or construct an improvement, a permit is required. Unless the Secretary of the Army, upon the recommendation of the Chief of Engineers, issues this permit, no obstruction may be created. Until recently, the decision to grant or deny the permit was based entirely on the resulting effect on navigability. Zabel v. Tabb, 296 F. Supp. 764 (M.D. Fla. 1969). However, the passage of the National Environmental Policy Act of 1969, 42 U.S.C.A. §§ 4331–47 (Supp. Mar. 1970) substantially changed the test. This act requires that every federal agency engaged in activities which may have an impact on man's environment shall take those ecological factors into consideration before proceeding with their activities. Recently, the Fifth Circuit reversed the decision in *Zabel v. Tabb*, holding that the Secretary of the Army was required by the National Environmental Policy Act to consider ecological factors before issuing a permit. Zabel v. Tabb, No. 27555 (5th Cir., July 16, 1970). For a discussion of the factors which the Army Corps of Engineers must now consider, see CONSERVATION AND NATURAL RESOURCES SUBCOMMITTEE, OUR WATERS AND WETLANDS: HOW THE CORPS OF ENGINEERS CAN HELP PREVENT THEIR DESTRUCTION AND POLLUTION, H. REP. No. 91-917, 91st Cong., 2d Sess. (1970).

MD. ANN. CODE art. 96A, § 12(a) (Supp. 1969) prohibits, with some exceptions, the construction of an obstruction on any existing waterway of the State without a permit from the Maryland Department of Natural Resources. In Larmar Corp. v. Cropper, Chancery No. 8935 (Cir. Ct. Worcester County, Md., Aug. 31, 1970), the court held that so much of section 12(a) of article 96A, as amended by chapter 416, [1967] Md. Laws 991, as fails to provide an exception to the permit requirements for changes in the shorelines of tidal waters within the State is unconstitutional because of inconsistencies between the title of the section and the substantive language within it.

MD. ANN. CODE art. 62B, § 5(q) (1968) gives the Maryland Port Authority the power to establish bulkhead lines. A similar power is given to the Worcester County Shoreline Commission by virtue of sections 15A and 15B of the Public Local Laws of Worcester County.

38. MD. ANN. CODE art. 27, § 485 (1967) permitted riparian landowners on navigable rivers, creeks or branches to dig, dredge, take and carry away sand and gravel from the beds of such waters below the high-water mark. This section was repealed by the new Maryland Wetlands Act. MD. ANN. CODE art. 66C, § 731 (Supp. 1970).

39. Two opinions of the Attorney General come to opposite conclusions regarding the right of the riparian landowner to fill and reclaim land. The earlier opinion, relying heavily on the common law doctrine of accretions and ignoring much of the statutory language, stated that sections 45 and 46 were limited to natural accretions and structural improvements and did not encompass dredging and filling. 50 OP. ATT'Y GEN. 452 (1965). In the later opinion the Attorney General ruled that not only could a riparian fill and reclaim land from the sea, but that he acquired good title to the property so reclaimed and could grant and convey the same. 52 OP. ATT'Y GEN. 324 (1967). This opinion was distinguished from the earlier one on the ground that the earlier opinion dealt with the propriety of filling riparian land for a purpose which was not incidental to or connected with the riparian use of the property. This distinction seems rather tenuous.

Confusion as to the existence of reclamation rights of riparian landowners in Maryland exists in federal as well as state courts. *See* United States v. 222.0 Acres of Land, 306 F. Supp. 138 (D. Md. 1969).

(a) Accretions — section 45

The language and legislative intent of section 45 is as confusing as the conflicting interpretations that have been given it. The section entitles riparian landowners "to all accretions to said land by the recession of said waters,"[40] a phrase which is technically inaccurate since it confuses accretion, which is a gradual and imperceptible build-up of soil deposits on the shore, with reliction, which is an exposure of submerged land by the retrocession of the water.[41] Further ambiguities arise from the wording "accretions . . . made by natural causes or otherwise." Since at common law accretions could only be formed by natural causes,[42] it is unclear what accretions "made . . . otherwise" are. Particularly troublesome is the question of whether land reclaimed by filling comes within the purview of accretions "made . . . otherwise."

A possible interpretation is that accretions "made . . . otherwise" refers to land created by accretion or reliction due to some artificial condition effected by the riparian owner[43] or by some third party.[44] Such accretions could form as a result of the erection of dikes,[45] wharves,[46] groins for the purpose of protecting the shore from erosion,[47] or any number of artificial structures which would hasten the natural build-up of soil deposits. These accretions, while not natural, are unintentionally accelerated and, therefore, are distinguishable from the reclamation of land by intentional filling carried out for the express purpose of creating new fast land. When this narrow interpretation of the statutory language is considered together with the rationale for the common law principles governing the title to accretions,[48] it provides little support for permitting the riparian landowner to expand his holdings by filling.

The wording of section 45 is quite broad, however, and at least one commentator has stated that it may be broad enough to allow the riparian owner to reclaim land by artificial means.[49] Moreover, in *Melvin v. Schlessinger*,[50] the Maryland Court of Appeals had oc-

40. *See* note 36 *supra* and accompanying text.
41. *See* 50 OP. ATT'Y GEN. 452, 460 (1965).
42. *See* notes 20–25 *supra* and accompanying text.
43. *Cf.* Brundage v. Knox, 279 Ill. 450, 117 N.E. 123 (1917) (accretion caused by artificial means erected by the riparian owner).
44. *Cf.* St. Clair County v. Lovingston, 90 U.S. (23 Wall.) 46 (1874); The Edmondson Island Case, 42 F. 15 (C.C. Md. 1890). These cases allow the riparian to acquire title to land formed as a result of action taken by a third person when the riparian took no part in the filling.
45. Gillihan v. Cieloha, 74 Ore. 462, 145 P. 1061 (1915).
46. Tatum v. City of St. Louis, 125 Mo. 647, 28 S.W. 1002 (1894).
47. Brighton & Hove General Gas Co. v. Hove Bungalows, Ltd., 1 Ch. 372 (Eng. 1924).
48. The great weight of authority has held that the common law accretion doctrine does not apply to reclaimed land. *See* Burns v. Forbes, 412 F.2d 995 (3d Cir. 1969); Revell v. People, 177 Ill. 468, 52 N.E. 1052 (1898); Michaelson v. Silver Beach Improvement Ass'n, 342 Mass. 251, 173 N.E.2d 273, 275 (1961); Saunders v. New York Cent. & H.R.R., 144 N.Y. 75, 38 N.E. 992, 993–94 (1894). *See also* 50 OP. ATT'Y GEN. 452, 460–64 (1965).
49. *See* CHESAPEAKE BAY IN LEGAL PERSPECTIVE, *supra* note 10, at 98–101. Professor Power (the author of this study), in coming to this conclusion, rebuts the thesis of the Attorney General in 50 OP. ATT'Y GEN. 452 (1965).
50. 138 Md. 337, 113 A. 875 (1921).

casion to construe section 45 in a dispute over the validity of title to an accretion which had formed near the edge of the channel of the Patapsco River and extended toward the shore. Melvin, with a group of others, acquired a patent to the tract in question and sought to enforce a contract of sale to Schlessinger, who declined to buy the property alleging that the patentees were never in possession of it and, therefore, could not convey marketable title. Holding that the property was an accretion and as such could not be patented away since to do so would impair the rights of the riparian landowner,[51] the court went on to give a very thorough analysis of chapter 129 of the Acts of 1862. Speaking of what is now section 45, the court stated that this provision should be interpreted broadly since its purpose was to enlarge riparian rights:

> As already stated, the riparian owners had the right to such accretions before the passage of the Act when they were imperceptibly formed, and now to say that their rights, *enlarged by the statute*, go only to the extent of adding thereto accretions which have more rapidly and suddenly formed, *from natural causes or otherwise*, extending outward from the shore, would be giving the statute a very narrow construction and one that, we think, should not be adopted.[52]

This passage clearly suggests that the court felt that section 45 was extensive in scope and included not only accretions beginning in the water and extending inward towards shore but also accretions formed by other than natural action. Taken one step further, these accretions formed by other than natural action could include land formed by filling.

The last phrase of section 45 bolsters the conclusion that these accretion provisions should be interpreted broadly. It states that the riparian owner is entitled to accretions "in like manner and to like extent as such right may or can be claimed by the proprietor of land bounding on water not navigable."[53] Since the owner of land bounding on "water not navigable" owned title to the bed of the water *ad medium filum aquae*,[54] there is little doubt that he could fill and reclaim the submerged portion of his property providing the riparian rights of others are not adversely affected.[55] It has been said, however, that the Act of 1862 was not intended to give the riparian landowner title to the bed of the adjacent navigable stream *ad medium filum aquae* since accretions alone were intended to be affected and not the bed of the stream prior to the formation of such accretions.[56] It would seem from even this construction that once accretions were

51. *Id.* at 344.
52. *Id.* at 343 (emphasis added).
53. *See* note 36 *supra* and accompanying text. *Cf.* Browne v. Kennedy, 5 Harr. & J. 195, 205-06 (Md. 1821), where Judge Buchanan notes the similarity between the rights of riparian landowners and the owners of land contiguous to water which is non-navigable.
54. *See, e.g.*, Linthicum v. Shipley, 140 Md. 96, 116 A. 871 (1922).
55. *Cf.* Mayor & City Council v. Appold, 42 Md. 442 (1875); Goodsell v. Lawson, 42 Md. 348 (1875); Browne v. Kennedy, 5 Harr. & J. 195 (Md. 1821).
56. Melvin v. Schlessinger, 138 Md. 337, 341, 113 A. 875 (1921).

formed, whether from artificial or natural causes, the riparian owner would gain title to them in the same manner as would his counterpart on non-navigable water.[57]

Finally, the view that the scope of section 45 includes man-made increases as well as natural ones is supported by the language of section 46. This provision places "other accretions" in the same category with "improvements" and provides that both of these additions to the land belong to the abutting riparian landowner.[58]

(b) Improvements — section 46

It has been contended that the Act of 1862, and especially section 46, which confers the right to make improvements, is merely a reenactment of the Act of 1745 on a State-wide scale.[59] The basis for this conclusion lies in the fact that the General Assembly, two years after the repeal of the 1745 Act, used the identical word "improvements" in enacting section 46.[60] Since at common law the riparian owner had no right to make improvements extending into the water,[61] it is reasoned that the 1862 Act carries over the intent of the 1745 Act which provided for such improvements. If this construction is accepted, it appears that the riparian landowner could, as a matter of right, fill and reclaim submerged land contiguous to his property since there is little doubt that the Act of 1745 conferred broad and extensive rights, including the right to fill.[62]

There is support, however, for the position that this section should be construed much more narrowly.[63] Basing its argument upon the historical background of the Act of 1745, a 1965 Attorney General's Opinion reasoned that that Act included liberal riparian rights provisions as an incentive to develop the Baltimore harbor.[64] Since the Act of 1862 applies to all the waters of the State and not merely to the Baltimore harbor area, the Attorney General had difficulty in finding a similar intent in the enactment of the 1862 statute. Consequently, the Opinion concluded that the 1862 provisions should receive a more strict interpretation.

The cases construing section 46 also contain a certain ambivalence, especially as to the meaning of the term "improvements." One interpretation has given the improvement section a conventional and restricted construction.[65] In *Hess v. Muir*,[66] for example, im-

57. *See* Hess v. Muir, 65 Md. 586, 597, 5 A. 540, 6 A. 673 (1886).
58. *See* CHESAPEAKE BAY IN LEGAL PERSPECTIVE, *supra* note 10, at 100.
59. *See* Mayor & City Council v. Canton Co., 186 Md. 618, 625, 47 A.2d 775, 778 (1946); 50 OP. ATT'Y GEN. 452, 465 (1965).
60. *See* CHESAPEAKE BAY IN LEGAL PERSPECTIVE, *supra* note 10, at 100–01.
61. Melvin v. Schlessinger, 138 Md. 337, 340, 113 A. 875, 876 (1921).
62. *See, e.g.*, Baltimore & O.R.R. v. Chase, 43 Md. 23, 33–34 (1875).
63. *See* 50 OP. ATT'Y GEN. 452, 464–69 (1965).
64. *Id.* at 465. The intent of the Act of 1745 was described as follows: "It was designed to convert the lower reaches of the Patapsco River into an international seaport with adequate berthing and warehousing facilities for vessels of the deepest draft. The right to fill and reclaim land thereunder without connection to harbor development was, we must conclude, unthinkable." *Id.*
65. *See* Culley v. Hollis, 180 Md. 372, 25 A.2d 196 (1942); Hodson v. Nelson, 122 Md. 330, 89 A. 934 (1914); Hess v. Muir, 65 Md. 586, 5 A. 540, 6 A. 673 (1886).
66. 65 Md. 586, 5 A. 540, 6 A. 673 (1886).

provements were defined as "such structures as are subservient to the land, and which used in connection with the land, enhance its value or enlarge its commercial or agricultural facilities, or other utility, to an extent the land alone would be incapable of, and in this way 'improve' it . . . . Wharves, piers and landings are examples of such improvements."[67] This suggests that only structural improvements were contemplated by section 46 since other types of improvements, such as the reclamation of land, do not "improve" the existing land, but merely create new land.[68]

The principal adjudication of the right to reclaim land as an exercise of the statutory right to improve was in *Goodsell v. Lawson*.[69] Goodsell, an entreprenuer engaged in oyster packing, leased a parcel of riparian land from Lawson. Under an agreement in the lease, Goodsell was to dump oyster shells into the water in front of the property in order to fill in the submerged land so that it could be reclaimed. Once the land was filled, however, Goodsell, in derogation of the agreement, sued out a warrant of survey in which he claimed title, in himself, to the newly formed land. The court held that the reclaimed land belonged to Lawson since Goodsell, in filling, merely had acted with the consent of Lawson. In arriving at this decision, the court interpreted what is now section 46, stating: "In the exercise of this right of improvement, the riparian proprietor is not restricted except by the provision, 'that the improvement so made shall not interfere with the navigation of the stream of water, into which the said improvement is made.' "[70] Thus implicit in the decision is an acknowledgment of the unfettered right of the riparian to fill so long as his reclamation does not interfere with navigation.[71] Had Lawson himself done the filling, there would have been no doubt of his right to have title to the reclaimed land.[72]

Dicta in other cases interpreting the 1862 statute also recognizes the right of riparian landowners to fill and acquire title to the lands thus created.[73] It would therefore appear that, when a riparian landowner fills in a submerged area bounding his property and reclaims the land from the sea, he gains title to that property by operation of section 46.[74]

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67. *Id.* at 598.

68. *See* 50 OP. ATT'Y GEN. 452, 464–68 (1965). The Attorney General seems to include within the scope of section 46 "improvements" small filling projects connected with wharfing out for the purpose of improving the riparian's own commercial access to deep water.

69. 42 Md. 348 (1875).

70. *Id.* at 371–72.

71. *See* note 37 *supra* for the regulations protecting navigation with which a riparian proprietor must comply.

72. *See* 42 Md. at 360 (1875), where the Maryland Court of Appeals restated the opinion of the lower court.

73. In a separate opinion in Hess v. Muir, 65 Md. 586, 5 A. 540, 6 A. 673 (1886), Judge Alvey said, "The right given to improve out from the shore into the water, was designed, manifestly, to embrace only structural improvements, such as wharfs, piers, warehouses, or the filling out from the shore and reclaiming the land from the inundation of the water." 65 Md. at 603, 6 A. at 674–75. *See also* Mayor & City Council v. Canton Co., 186 Md. 618, 624–27, 47 A.2d 775, 778–79 (1945).

74. Recently, in Larmar Corp. v. Cropper, Chancery No. 8935 (Cir. Ct. Worcester County, Md., Aug. 31, 1970), it was held that title to land reclaimed under sections 45 and 46 vested in the riparian landowner to the same extent as title to the original upland may be vested in him. Furthermore, the court said that this title was not *now*

II. THE NEW MARYLAND WETLANDS STATUTE

Unlike the previous statutory provisions and the cases interpreting them, the new Maryland Wetlands Statute[75] specifically acknowledges the economic, ecological, recreational and aesthetic value of the wetlands and recognizes the possibility and the danger of totally destroying these areas if the despoilation were to continue at the present rate.[76] The wetlands are no longer dealt with as useless swamplands, but rather are recognized as invaluable breeding and feeding grounds for aquatic plant and animal life, as sources of recreational enjoyment, as barriers useful for the reduction of flood damage and as sediment-absorbing parcels for the prevention of channel siltation which would impair navigation.[77] This shift in policy is apparent from the removal of the provisions controlling wetland areas from the Hall of Records article of the Maryland Annotated Code[78] and their placement in the Natural Resources article[79] under the new subtitle "Wetlands." The primary function of these new provisions is to provide a State policy for the preservation of wetlands and to establish rules and regulations for filling and dredging.[80] The administration of the Act is, in general, entrusted to the Secretary of Natural Resources.

One major contribution of the statute is to provide for both a legal and a geographical definition of the term "wetlands." Dividing the wetland areas into State wetlands and private wetlands,[81] the new statute also attempts to clarify the nature and extent of the riparian rights with respect to each area. "State wetlands" and "private wetlands" are defined in section 719:

> (a) *"State wetlands"* means all land under the navigable waters of the State below the mean high tide, which is affected by the regular rise and fall of the tide. Such wetlands, which have been transferred by the State by a valid grant, lease or patent or a

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subject to any right or claim of the State, or of any other person or corporation, except to the extent that the original upland may have been subject to such right or claim.

75. Sections 718–31 were added, under the subtitle "Wetlands," to article 66C of the Maryland Annotated Code. Ch. 241, § 1, [1970] Md. Laws 544. A bill similar to the one enacted was introduced in the 1969 General Assembly, but failed to pass the House of Delegates. *See* H.B. No. 469, 1969 Md. General Assembly. For a compilation of wetland legislation in other states, see Dimsey, *Wetlands: The Legal Context*, in II MARYLAND STATE PLANNING DEP'T, WETLANDS IN MARYLAND — TECHNICAL REPORT XIV-2-11 (1970). *See also* D. Brion, A Proposed Wetlands Protection Statute for the Virginia Wetlands, May 26, 1970 (unpublished seminar paper on file with Professor Garrett Power of the University of Maryland School of Law).

76. MD. ANN. CODE art. 66C, § 718 (Supp. 1970) states the policy and intent of the Wetlands Act.

77. The value of these wetland areas to the State is indicated in II MARYLAND STATE PLANNING DEP'T, WETLANDS IN MARYLAND — TECHNICAL REPORT III-1 (1970), where it was concluded that wetlands "are an exceedingly valuable resource asset to the State of Maryland."

78. MD. ANN. CODE art. 54, §§ 45, 46, 47 (1968).

79. MD. ANN. CODE art. 66C, §§ 718–31 (Supp. 1970).

80. *See* note 98 *infra* and accompanying text.

81. State wetlands are governed by sections 720 and 721 of article 66C while private wetlands are controlled by sections 723 through 730. MD. ANN. CODE art. 66C, §§ 720–21, 723–30 (Supp. 1970).

grant confirmed by Article 5 of the Declaration of Rights of the Constitution of Maryland, shall be considered "private wetland" to the extent of the interest so transferred.

(b) *"Private wetlands"* means all lands not considered "State wetlands" bordering on or lying beneath tidal waters, which are subject to regular or periodic tidal action and which support aquatic growth. These include wetlands, which have been transferred by the State by a valid grant, lease or patent or a grant confirmed by Article 5 of the Declaration of Rights of the Constitution of Maryland, to the extent of the interest so transferred.[82]

Subsection (f) defines "regular or periodic tidal action" as "the rise and fall of the sea that is produced by the attraction of the sun and the moon uninfluenced by winds or other circumstances."[83] To understand the scope of this new Act, it is important to note that "wetlands" includes fully submerged land — it is not limited to marshes and the like. Under these definitions "State" and "private" wetlands differ in several respects. State wetlands must be *under* the navigable waters of the State, *below* mean high tide, and affected by the *regular* rise and fall of the tide. Private wetlands do not have to be *under* the navigable water of the State, nor do they have to be *below* mean high tide; they need only border tidal waters, be subject to some tidal action, and support aquatic growth. Thus within the sphere of "private wetlands" are many marsh areas which are affected by tidal waters only during certain seasons of the year. As a practical matter it will be difficult to distinguish regular tidal action from periodic tidal action, except in extreme cases. This problem is best solved by the taking of a survey after the Secretary has sufficiently refined the statutory definition. A key provision of the new statute calls for the taking of such an inventory of private wetlands.[84] The Secretary of Natural Resources is instructed to make private wetland boundary maps establishing the boundaries of wetland areas for each subdivision of the State and to enforce the rules and regulations governing activities in the private wetland areas so established. Since the designation of a parcel of land as a private wetland area allows the Secretary to promulgate rules and regulations which will necessarily restrict its uses, the Act provides for hearings at which a property-owner may challenge the classification of his land.[85] If, after such hearing, any person having a recorded interest in the lands affected is dissatisfied with the Secretary's classification of his property, or with the rules and regulations affecting it, he is permitted an appeal to the Board of Review of the Department of Natural Resources. If the landowner wishes to appeal the Board's recommendation on the

82. MD. ANN. CODE art. 66C, §§ 719(a)-(b) (Supp. 1970).
83. MD. ANN. CODE art. 66C, § 719(f) (Supp. 1970).
84. MD. ANN. CODE art. 66C, § 724 (Supp. 1970). For an example of rules and regulations regarding the taking of inventories, see MARYLAND STATE DEP'T OF NATURAL RESOURCES, PROPOSED ORDER ESTABLISHING PRIVATE WETLAND BOUNDARIES IN CALVERT COUNTY, MARYLAND, AND PROPOSED RULES AND REGULATIONS (1970).
85. *Id.*

ground that it effects an unconstitutional taking, he may do so in the circuit court of the county in which the land is located. In arriving at its decision, the circuit court is instructed by the statute to weigh the limitations on the reasonable exercise of the police power against the statutorily acknowledged ecological, public health and welfare considerations. The decision of the circuit court may be appealed by either party to the Maryland Court of Appeals.[86]

In addition to providing for the promulgation of rules and regulations governing activities on private wetlands, the new Act contains a procedure for obtaining permission to conduct, on private wetlands, activities *not* permitted by those rules and regulations.[87] The person desiring to conduct such activity must obtain a permit from the Secretary of Natural Resources. Again, the statute calls for full public hearings regarding the proposed activity and allows either the applicant, the county, or municipality in which the land is located to appeal the Secretary's decision to the Board of Review.[88] These sections reinforce the ecological and public health and welfare interests that are the hallmark of the entire Act.[89] In issuing a permit, the Secretary may require a bond to secure compliance with any conditions or limitations enumerated in the permit.[90] The Secretary is authorized to suspend or revoke a permit if an applicant violates the conditions of the permit or exceeds the scope of the work as set forth in the application.[91]

The repeal of sections 45, 46 and 47 of article 54 and section 485 of article 27[92] and the incorporation of their principal parts (minus certain ambiguities) into one new statute has further clarified the law by removing many doubts over the validity of title to land reclaimed from navigable waters. Riparian landowners who have filled and attempted to reclaim land prior to the effective date of the new Act will still have to contend with the uncertainties of the old provisions;[93] but landowners who fill and reclaim wetlands after July 1, 1970, the effective date of the new statute, will have the benefit of a more clearly delineated policy with respect to their riparian rights.

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86. The procedure for appealing the designation of property as a wetland is outlined in MD. ANN. CODE art. 66C, § 725 (Supp. 1970).

87. MD. ANN. CODE art. 66C, § 726 (Supp. 1970).

88. The appeal provision is contained in MD. ANN. CODE art. 66C, § 728 (Supp. 1970).

89. MD. ANN. CODE art. 66C, § 727 (Supp. 1970) delineates the following policy:

> In granting, denying or limiting any permit, the Secretary or his duly designated hearing officer shall consider the effect of the proposed work with reference to the public health and welfare, marine fisheries, shell-fisheries, wildlife, economic benefits, the protection of life and property from flood, hurricane and other natural disasters, and the public policy set forth in this subtitle. In granting a permit the Secretary may limit or impose conditions or limitations designed to carry out the public policy set forth in this subtitle.

90. *Id.*

91. *Id.*

92. Ch. 241, § 2, [1970] Md. Laws 550 repeals these provisions. Sections 45 and 46 are found in the text accompanying note 36 *supra*. Section 47 provided that a riparian owner could make improvements despite resulting injury to oyster bed or bottom. For the discussion of section 485 of article 27, see note 38 *supra*.

93. *See* Larmar Corp. v. Cropper, Chancery No. 8935 (Cir. Ct. Worcester County, Md., Aug. 31, 1970).

The new law conforms more to the common law than to the previous statutory law in that it entitles the riparian owner to natural accretions only.[94] The accretions "made . . . otherwise" wording of the Act of 1862, as well as the language placing the riparian owner on an equal footing with the owner of land adjoining non-navigable water have been eliminated. The improvement section of the 1862 Act has also been narrowed significantly; the new statute only provides *specifically* for improvements for the purpose of preserving the riparian's access to the water or for protecting his shore against erosion.[95] This limitation vitiates any statutory right of the riparian owner to reclaim wetlands by filling under the guise of statutory improvements. But the new law does provide for the development of State wetlands for other uses if such uses receive the approval of the Board of Public Works.[96]

State wetlands are generally more strictly controlled than private wetlands[97] under the new enactment, especially with respect to dredging and filling.[98] The statute implies that it is lawful to fill, dredge or otherwise alter private wetlands, subject to the rules and regulations promulgated by the Secretary of Natural Resources. The prime consideration in the promulgation of these rules is the ecological and and public welfare ramifications of the dredging activities. The provisions dealing with State wetlands are considerably more rigid.

94. MD. ANN. CODE art. 66C, § 720 (Supp. 1970) contains the new accretion and improvement provisions:

> The owner of land bounding on navigable waters shall be entitled to all natural accretions to said land and to make improvements into the waters in front of said land for the purposes of preserving his access to navigable water or for protecting his shore against erosion. After an improvement has been constructed, it shall become the property of the owner of the land to which it is attached. None of the rights covered under this subheading shall exclude the owner from developing other uses as approved by the Board of Public Works.

95. *Id.* Of course, a riparian owner could still contend that a filling project is an improvement made to provide him with access to the water. Acceptance of this interpretation of the term "improvement" seems unlikely. But it may have been better if the drafters of the statute had limited "improvements" to structural improvements or at least defined the scope of the improvements contemplated.

96. *Id.*

97. The lawful uses of private wetlands are delineated by the new enactment in MD. ANN. CODE art. 66C, § 723 (Supp. 1970).

98. The dredging and filling of both private and State wetlands are governed by several sections of the new statute. Dredging and filling are defined in MD. ANN. CODE art. 66C, §§ 719(c)-(d) (Supp. 1970):

> (c) *"Dredging"* means the removal or displacement by any means of soil, sand, gravel, shells or other material, whether of intrinsic value or not, from State or private wetlands affected by the regular ebb and flow of the tide.
>
> (d) *"Filling"* means either the displacement of navigable waters by the deposition into wetlands affected by the regular ebb and flow of the tide of soil, sand, gravel, shells or other material; or the artificial alteration of navigable water levels by physical structures, drainage ditches or otherwise.

MD. ANN. CODE art. 66C, § 721 (Supp. 1970) declares the policy regarding the filling of State wetlands. This section makes it "unlawful for any person to dredge or fill on State wetlands, except to the extent that he has been issued a license to do so by the Board of Public Works." Parts of this section were construed in a recent Opinion of the Attorney General dated August 26, 1970. Daily Record, Aug. 31, 1970, at 4, col. 2.

MD. ANN. CODE art. 66C, § 722 (Supp. 1970) declares the policy regarding the filling of private wetlands. This section authorizes the Secretary of Natural Resources to "promulgate rules and regulations governing dredging, filling, removing or otherwise altering or polluting private wetlands."

With certain exceptions, it is now unlawful to fill or dredge on State wetlands without a license from the Board of Public Works.[99] The procedure for obtaining this license involves consultation with interested federal, State and local authorities, the submission by the Secretary of a report with recommendations to the Board, and the holding of hearings in the local subdivision affected. The terms and conditions of such licenses may vary as to specific tracts of wetlands depending upon various recreational, aesthetic and ecological considerations.

The penalties provided for non-compliance with the statute are significant. In addition to allowing the imposition of a fine or imprisonment, section 730 of article 66C permits a court to hold anyone who "knowingly violates" the Act, or the rules and regulations promulgated under it, liable to the State for the cost of restoring the wetland to its condition prior to the violation.

The statute expressly provides that in no way will it affect the provisions of sections 15A and 15B of the Code of Public Local Laws of Worcester County which establish a Shoreline Commission to designate a "fill and bulkhead line" and a "borrow area limit line" along the easterly side of the Isle of Wight Bay and the Assawoman Bay in Worcester County.[100] The apparent intent of sections 15A and 15B was to give control of filling and dredging activities on both State and private wetlands in Worcester County to local authorities. Since the new Wetlands Act allows these provisions to remain in force, apparently those desiring to fill wetlands in Worcester County must now obtain permits from both the Department of Natural Resources and the Worcester County Shoreline Commission. This dual permit system appears desirable since it would allow local supervision of land reclamation projects as well as control by a panel of expert State authorities who would evaluate the environmental repercussions of any dredging and filling. However, the preservation of sections 15A and 15B by the statute could be interpreted to mean that the Worcester County Shoreline Commission has *exclusive* authority to control filling and dredging within the county, an interpretation which would render the provisions of the new statute which control filling and dredging inapplicable to Worcester County. Such a construction was adopted by the Worcester County Circuit Court in a recent decision, *Larmar Corp. v. Cropper*.[101] In that case the complainant sought a declaratory judgment defining his right to fill, as well as an adjudication of the title to land which he had already filled. The constitutionality of the statute creating the Worcester County Shoreline Commission was attacked on the ground that it infringed upon the riparian owner's right to fill and reclaim land under sections 45, 46 and 48 of article 54 by making a permit mandatory for all landfill projects. The complainant contended that rights established by these sections can be subject only to the right of navigation, and not to any further restriction. The court rejected this argument, holding

99. *See* MD. ANN. CODE art. 66C, § 721 (Supp. 1970), note 98 *supra*.

100. Ch. 241, § 3, [1970] Md. Laws 550.

101. Chancery No. 8935 (Cir. Ct. Worcester County, Md., Aug. 31, 1970).

that the grant of authority of the Commission did not conflict with any of these riparian rights; the court felt that sections 45, 46 and 48 granted, not a vested right to fill, but merely a franchise subject to modification or revocation by the legislature. The legislative intent to restrict these rights was implicit in the General Assembly's enactment of what are codified as sections 15A and 15B of the Public Local Laws of Worcester County so that, if a riparian owner desires to fill, he can do so only upon obtaining a permit from the Worcester County Shoreline Commission. No mention was made of a necessity of obtaining a permit from the Department of Natural Resources. In fact, Judge Prettyman, after reciting the provision of the wetlands statute exempting from its effect sections 15A and 15B, said, "The issue, therefore, narrows to the inquiry as to any riparian rights granted unto Larmar Corporation by virtue of those sections of the Public Local Laws of Worcester County."[102]

III. LEGAL CONSIDERATIONS OF THE WETLANDS ACT

There are a great many legal considerations surrounding any statute which controls the use of privately held lands. In the case of the new Wetlands Act, several questions are immediately apparent. First, do the restrictions which it places upon the use and development of private wetlands amount to an uncompensated taking within the prohibition of the fourteenth amendment? Second, does the Act's repeal of the statutory sections formerly governing riparian rights similarly constitute an uncompensated taking? Finally, is the new statute, as well as the former provisions, violative of the "public trust doctrine" which governs the use of public wetlands in many jurisdictions?

A. Uncompensated Taking

Under the United States Constitution,[103] as well as the Maryland Constitution,[104] the State is prohibited from taking private property for public use without just compensation.[105] A taking in the constitutional sense does not necessarily import a physical confiscation of property; a state may effect a taking through the exercise of its regulatory authority.[106] The state's police power permits it to place reasonable restrictions upon the use of an individual's property where public interests so dictate;[107] such restrictions may include, for example, comprehensive zoning plans, and rules and regulations governing the conduct of certain activities on the property.[108] Under

102. *Id.* at 15.
103. U.S. CONST. amend. XIV, § 1.
104. MD. CONST. art. III, §§ 40, 40A, 40B.
105. For two excellent discussions of the subject of "takings" and just compensation, see Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).
106. *See, e.g.*, City of Baltimore v. Cohen, 204 Md. 523, 105 A.2d 482 (1954).
107. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); City of Baltimore v. Cohen, 204 Md. 523, 105 A.2d 482 (1954).
108. *E.g.*, City of Baltimore v. Cohen, 204 Md. 523, 105 A.2d 482 (1954); American Oil Co. v. Miller, 204 Md. 32, 102 A.2d 727 (1954); Colati v. Jirout, 186 Md. 652, 47 A.2d 613 (1946).

certain circumstances the individual's right to use privately owned property is subordinate to the right of the state to protect its citizens.[109] If, however, the state should place on private property a restriction so unreasonable as to deprive the owner of all practical use of that property,[110] such a restriction may be deemed an uncompensated, and therefore unconstitutional, taking of property, notwithstanding the fact that it promotes the general welfare of the community.[111]

There is general agreement among authorities which have considered the question that zoning or other similar classifications of property cannot be used as a substitute for eminent domain proceedings[112] since to do so is one such unreasonable restriction. Since the state cannot regulate the use of a specific tract through restrictions which deny the property owner all reasonable use of his land, the state has the option of either adopting less restrictive regulations or taking the land under its power of eminent domain.[113]

The question arises whether the provisions of the new Maryland Wetlands Act, especially those sections dealing with private wetlands, violate the constitutional mandate against the taking of property without compensation.[114] If the rules and regulations proscribe the activity proposed by the owner and the owner is refused a permit to conduct the desired activity, such refusal may result in an unconstitutional taking if the landowner has been denied the practical use of his property.

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109. *See, e.g.*, Marino v. Mayor & City Council, 215 Md. 206, 137 A.2d 198 (1957).

110. *See, e.g.*, Congressional School of Aeronautics, Inc. v. State Roads Comm'n, 218 Md. 236, 146 A.2d 558 (1958). An unconstitutional taking will also occur when the property is restricted to uses for which it is not adaptable. *See* Frankel v. Mayor & City Council, 223 Md. 97, 104, 162 A.2d 447 (1960).

111. The same result has been reached as to zoning laws which identify their purposes as ones of conservation. *See* Dooley v. Town Plan & Zoning Comm'n, 151 Conn. 304, 197 A.2d 770, 773 (1964) (flood control); Commissioner of Natural Resources v. S. Volpe & Co., 349 Mass. 104, 206 N.E.2d 666 (1965) (involving a dredge and fill act); Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232, 241 (1963) (swampland preservation).

The following cases have held restrictive conservation legislation to be not equivalent to a taking: Swisher v. Brown, 157 Colo. 378, 402 P.2d 621 (1965) (a marketing control act); Iowa Natural Resources Council v. Van Zee, 158 N.W.2d 111, 117 (Iowa 1968) (a flood control act); Patterson v. Stanolind Oil & Gas Co., 182 Okla. 155, 77 P.2d 83, 89 (1938) (an oil and gas well spacing act). *See also* Greenleaf Johnson Lumber Co. v. Garrison, 237 U.S. 251, 260 (1914) (directing removal of docks in navigable waters, with dissent); Miami Beach Jockey Club, Inc. v. Dern, 86 F.2d 135 (D.C. Cir. 1936) (legislative prohibition of filling submerged land).

112. *See* 1 J. METZENBAUM, ZONING 74–79 (2d ed. 1955); 1 E. YOKLEY, ZONING § 63 (2d ed. 1953). *See also* Congressional School of Aeronautics, Inc. v. State Roads Comm'n, 218 Md. 236, 146 A.2d 558 (1958).

113. *See* Ridden v. Philadelphia, B. & W.R.R., 182 Md. 336, 35 A.2d 99 (1943). MD. ANN. CODE art. 66C, § 357A (1967), which provides for the acquisition of interests in real property for the purpose of preserving open spaces and areas, apparently gives the State adequate authority to purchase wetland areas. For a discussion of whether such a "taking" is in fact for a "public use," see CHESAPEAKE BAY IN LEGAL PERSPECTIVE, *supra* note 10, at 167–70.

114. Water rights are also protected by the constitutional prohibition against taking or injuring private property without compensation. *See* Mayor & City Council v. Carroll, 128 Md. 68, 96 A. 1076 (1916) (damages to a navigable stream); Mayor & City Council v. Baltimore & Phila. Steamboat Co., 104 Md. 485, 65 A. 353 (1906) (wharfage rights and privileges).

A recent case has discussed the issue of uncompensated takings of wetlands areas. *State v. Johnson*[115] involved the denial of a permit required by Maine's Wetlands Act to fill a portion of the appellant's land. Here the land, absent the addition of fill, had no commercial value whatsoever. Deciding that denial of the permit to fill so deprived the appellant of the reasonable use of his property that it was constitutionally both an unreasonable exercise of the police power and an 'uncompensated taking, the court distinguished conventional zoning, which is for town protection, from wetlands preservation, which extends beyond the town and is of statewide concern. The court held that because these wetlands are "a valuable natural resource of the state"[116] the cost of their preservation should be borne by the state and not by the landowner. It reasoned that the benefit to the landowner, as a citizen of the state, which is derived from the restriction is wholly disproportionate to the burden on him resulting from deprivation of all reasonable use of his property.[117]

Because of the similarity of the Maine wetland statute to the new Maryland statute,[118] this case is particularly applicable to the Maryland situation. It suggests that, where a permit is required for filling and dredging, a strong presumption of an unconstitutional taking is created when the denial of such a permit leaves a wetland area virtually devoid of any reasonable uses.

It is interesting to note that nowhere in this decision was the statute creating the permit system found to be violative of the due process requirement of the fourteenth amendment. While the specific permit denial made under the statute was unconstitutional, the statute itself provided for such procedures, hearings and appeals as to satisfy the requirements of due process. The Maryland Act appears to meet these requirements also. But even if its provisions controlling the use of private wetlands are, therefore, not invalid on

115. 265 A.2d 711 (Me. 1970).

116. *Id.* at 716.

117. *Id.* Another recent case, MacGibbon v. Board of Appeals of Duxbury, 255 N.E.2d 347 (Mass. 1970), presented a similar situation. A Massachusetts zoning enabling law permitted towns to pass by-laws to restrict the uses of marshland in order to protect the health, safety and welfare of the citizens. The Duxbury zoning law, as interpreted by the county zoning board, prohibited the excavation or filling of any marsh and authorized special excavation permits for only certain isolated areas far from the coast. The plaintiff was barred by this interpretation from filling his marshland and was, therefore, denied any reasonable use of the property while being left with the burden of paying taxes on it. The court remanded the case to the zoning board without reaching the issue of uncompensated takings, on the ground that preservation of privately owned land in its natural unspoiled state for the enjoyment and benefit of the public, by preventing the owner from using it for any practical purpose, is not within the authority delegated to municipalities under the zoning enabling act. In dictum, the court suggested several lawful ways, such as acquisition by purchase or taking by eminent domain, in which the town could preserve its remaining coastal wetlands in their natural, unspoiled state if it so desired; the inference to be drawn is that such a restriction of the use of property would be invalid on stronger grounds than mere statutory interpretation. *Cf.* Hoffman v. Mayor & City Council, 197 Md. 294, 302, 79 A.2d 367, 370 (1950), where the Maryland Court of Appeals commented on the distinction between restriction and taking: "The only substantial difference, in such case, between restriction and actual taking, is that the restriction leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden."

118. *Compare* ME. REV. STAT. ANN. tit. 12, §§ 4701–09 (Supp. 1970) *with* MD. ANN. CODE art. 66C, §§ 718–31 (Supp. 1970).

their face, their practical effect may be vitiated. For while they give the State the statutory authority to deny permits, this power would be illusory if denial generally resulted in an unconstitutional taking.

The paramount reason for initiating a permit system instead of a mass condemnation of all wetlands is monetary. If the State can preserve the wetlands and their ecological benefits through land use control legislation rather than outright purchase of the areas, a great saving of public funds will result. Assuming *arguendo* that the permit system proves ineffectual at preventing dredging and filling on private wetlands, it at least notifies the State of those wetland areas for which land reclamation is contemplated, thus alerting the State as to when and how a specific wetland area is being endangered and allowing the State either to permit the land reclamation or to condemn the wetland by the exercise of eminent domain, thereby preserving it in its natural state. In this way, the State need spend only a minimum amount of money to protect wetland areas; rather than purchase all wetlands, the State can accomplish its purpose merely by purchasing all *threatened* wetlands.

B. Repeal of the Former Riparian Rights Sections

A problem closely related to that of "takings" and "just compensation" is that of the effect of the new Act's repeal of the former statutory riparian rights provisions.[119] If these provisions created property rights, their repeal would violate the notions of due process since the State would be taking property rights without justly compensating the owner. If the provisions merely created a license, the State may repeal them without payment of compensation since statutory licenses are inherently revocable or subject to modification at the pleasure of the legislature.[120] Thus in determining whether there has been a taking, it is first necessary to identify the nature of the riparian rights involved; that is, whether they are rights of property or merely licenses.

There have been a number of cases which have termed the riparian rights accorded under the Acts of 1745 and 1862 as "franchises" or "quasi" properties[121] and spoken of them as "vested."[122] None of these decisions, however, have actually declared these rights to be property; and they are consistently discussed in terms of something less than property. There seems to be a great deal more weight accorded these rights once they have been exercised and improvements have been completed in reliance on them. In *Western Maryland Tidewater R.R. v. Baltimore*,[123] for example, the court said of the riparian's right to improve under the Act of 1862: ". . . until [the riparian owner] does make the improvements he has no interest in the land under water on which his land borders, excepting such as

119. *See* note 92 *supra*.

120. *See* II AMERICAN LAW OF PROPERTY § 8.110 (1952).

121. *E.g.*, Mayor & City Council v. Canton Co., 186 Md. 618, 47 A.2d 775 (1946); Culley v. Hollis, 180 Md. 372, 25 A.2d 196 (1942).

122. 186 Md. 618, 626, 47 A.2d 775, 779 (1946).

123. 106 Md. 561, 68 A. 6 (1907).

the Act of 1862 or some other statute, if any, may give him."[124] The court in *Hodson v. Nelson*,[125] on the other hand, took a much stronger position with respect to these rights once the improvements were actually completed: "When such improvements are made they become incident to the estate, as not inherently identical in nature with land, but from being joined to it, and contributing to its uses and value legally identified with it, as a fixture or a right of way or other appurtenance that passes with land."[126]

The distinction, then, rests on whether the riparian rights granted under the Act of 1862 have been, in fact, exercised.[127] Once a riparian landowner has constructed an improvement or induced an accretion, he appears to acquire under the statutory provision a property right in that improvement or accretion and cannot be divested of it by the State without payment of just compensation. However, it would seem that until that improvement or accretion is made, he merely has a license to make such improvements; and like any other license it can be revoked before exercised.

To the extent that the former statutory riparian rights are mere licenses, the State legislature may withdraw them without violating due process. In accord with this viewpoint is the dictum in *Mayor & City Council v. Canton Co.*,[128] where the court said, "We shall assume, without deciding, that Section 48 could be repealed, and also Section 47 to the extent that improvements have not actually been made."[129]

Several other cases have come to substantially the same conclusion with respect to sections 47 and 48[130] as well as to the right to dredge accorded by section 485 of article 27.[131] It clearly appears, therefore, that the former statutory riparian provisions were not intended as grants of property, but rather are licenses and as such can be effectively repealed under the new Wetlands Statute.

C. The Public Trust Doctrine

Prior to enactment of the new Wetlands Act, when a riparian landowner in Maryland extended his littoral boundaries by filling submerged land (which had, until then, belonged to the State as owner of the beds of navigable waters),[132] the very act of completing such

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124. *Id.* at 567. *See also* Hodson v. Nelson, 122 Md. 330, 89 A. 934 (1914); Hess v. Muir, 65 Md. 586, 5 A. 540, 6 A. 673 (1886).

125. 122 Md. 330, 89 A. 934 (1914).

126. *Id.* at 339, quoting Hess v. Muir, 65 Md. 586, 598 (1886).

127. *See* CHESAPEAKE BAY IN LEGAL PERSPECTIVE, *supra* note 10, at 148.

128. 186 Md. 618, 47 A.2d 775 (1946).

129. *Id.* at 625.

130. *See, e.g.*, Garitee v. Mayor & City Council, 53 Md. 422 (1880); Baltimore & O.R.R. v. Chase, 43 Md. 23 (1875).

131. Speaking of the right to dredge granted by section 485 of article 27, the court in Smoot Sand & Gravel Co. v. Columbia Granite Dredging Corp., 146 Md. 384, 389, 126 A. 91, 93 (1924) said that the "right conferred by the statute in question is in the nature of a license or privilege to the riparian owner and those with whom he has a contract in writing, which may be revoked at any time by the Legislature."

132. *See* notes 36-74 *supra* and accompanying text.

reclamation gave the landowner, by operation of sections 45 and 46 of article 54,[133] title to the newly formed areas.[134] The question arises when these wetlands are reclaimed whether the State can allow alienation of property to which it holds title on behalf of its citizenry. More narrowly submitted, the problem is whether the State legislature can, as it did by former sections 45 and 46 of article 54, and by present sections 721 and 722 of article 66C[135] and section 15A of article 78A,[136] permit certain landowners to acquire title to land previously owned by the State. In several jurisdictions there have been attempts to halt, through the use of a legal theory known as the public trust doctrine, such controversial conveyancing of state-owned property.[137] This theory is based on the notion that the public has the right to use public land in certain ways and that this right ought to be specially recognized and protected. The validity of the doctrine and the feasibility of its application have been topics of considerable debate; these subjects must be dealt with in any discussion of wetlands legislation in Maryland.

Although the public trust doctrine can be rationalized in a number of ways, it is best explained in terms of a restraint on legislative power.[138] There are two major viewpoints of the doctrine as applied to wetlands. The first is generally founded upon the proprietary notion that submerged public land is owned by all the citizens of the state, who as individuals possess certain interests in these areas, such as the rights of fishing and navigation, which the state secures for them under an implied trust.[139] As trustee, the state — more specifically, the state legislature — is subject to certain limitations on its use and disposal of these lands. Broadly interpreted, the limitations on the legislature fall into three categories: first, the property must be used for a public purpose and must be kept available for use by the general public; second, the property may not be sold for even a fair cash equivalent; and third, the area must be maintained for particular

133. *See* note 36 *supra* and accompanying text.

134. This is true only if it is assumed that sections 45 and 46 encompass land reclamation. *See* notes 36–74 *supra* and accompanying text. *See also* 52 OP. ATT'Y GEN. 324 (1967).

135. *See* note 98 *supra.*

136. *See* note 17 *supra* and accompanying text.

137. For a very comprehensive survey of the scope and application of the public trust doctrine, see Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970). *See also* Stone, *Public Rights in Water Uses and Private Rights in Land Adjacent to Water*, in 1 WATER AND WATER RIGHTS 193–202 (R. Clark ed. 1967); Parsons, *Public and Private Rights in the Foreshore*, 22 COLUM. L. REV. 706 (1922); CHESAPEAKE BAY IN LEGAL PERSPECTIVE, *supra* note 10, at 123–27.

138. *See, e.g.*, Martin v Wadell, 41 U.S. (16 Pet.) 367 (1842), where Chief Justice Taney discusses the early English concept of the trust theory.

139. *See, e.g.*, Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892), a landmark in public trust law. Commenting on this decision, Sax, in 68 MICH. L. REV. 473, reiterated the principle articulated by the Court which has become the central substantive thought in public trust litigation: "When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties." *Id.* at 490.

types of uses such as navigation, fishing or recreation.[140] Few courts, however, have construed the trust doctrine this broadly.[141]

The second concept of the public trust stems from a dichotomy in the nature of legislative powers with regard to property.[142] Beginning with a basic premise of state constitutional law that the state legislature, as representative of the people, has plenary powers except as limited by the state or federal constitution, it then becomes necessary to find a restraint on this legislative power in order to create the trust. The restraint is to be found in the interplay of two categories of rights which the state possesses — *jus privatum* and *jus publicum*. On the one hand the state, as a proprietor of land, is accorded all the rights and privileges accompanying the ownership of private property. These rights are collectively known as the *jus privatum*. Among these rights is the power of disposition, which ostensibly gives the state authority to legislatively alienate land as it sees fit.[143] On the other hand, there are certain public rights, the *jus publicum*,[144] which are inherent in, and inseparable from, the creation and recognition of sovereignty and which place certain limitations on the state legislature. These rights are implicitly dedicated to perpetual public use by the state constitution and cannot be destroyed, impaired or surrendered by the legislature.[145] If the right to use tidal waters and their bottoms is part of this *jus publicum*, then the legislature may not grant a property right in, or authorize the use of, this segment of the public domain unless such use is subject to the *jus publicum*. From this restraint on the legislature's plenary power, the trust relationship is formed.

While the public trust question has been raised in Maryland,[146] the Maryland Court of Appeals has not as yet sanctioned its validity. It is questionable whether wetlands and the "public rights" attached to them are actually embodied within the concept of *jus publicum* and thus sacrosanct from legislative infringement.[147] Assuming such inclusion, whether the doctrine will be incorporated into Maryland common law sometime in the future and, if so, to what extent, should depend on whether the question is raised in the context of sections 45 and 46 of article 54 or of the new Maryland Wetlands Act.

While the necessity for judicial protection of wetland areas may have been more compelling under sections 45 and 46 of article 54 since at the time of their enactment there was no administrative body to protect the public interests, to recognize the public trust doctrine

140. *See* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, 477 (1970).

141. *Id.* at 485–89.

142. *See, e.g.*, Commonwealth v. Newport News, 158 Va. 521, 164 S.E. 689 (1932), where the court, in finding that a right of fishery is not part of the *jus publicum* and, therefore, can only exist subject to the disposal of the legislature, gives a thorough analysis of the powers of the legislature with respect to public rights.

143. *Id.* at 697.

144. For the history and development of the *jus publicum* theory, see Parsons, *Public and Private Rights in the Foreshore*, 22 COLUM. L. REV. 706, 707–20 (1922).

145. 1 FARNHAM, THE LAW OF WATER AND WATER RIGHTS §§ 10, 36a (1904).

146. *See* Phipps v. State, 22 Md. 380 (1864); Browne v. Kennedy, 5 Harr. & J. 195 (Md. 1821).

147. *See* note 142 *supra*.

at this time with respect to areas already reclaimed under those sections might result in more burdens than benefits. Since any land reclamation done under these old provisions would have to have been done before July 1, 1970 (the effective date of the new Act), and since most of the reclamation was probably accomplished well before this date, it may be difficult to apply the public trust doctrine to such reclamations because of the existence of such equitable defenses as estoppel, laches and limitations.[148] Moreover, application of the doctrine so as to void title to the previously reclaimed land would not result in a benefit to the public; it would be virtually impossible, and in many instances hardly desirable, to restore Maryland's shorelines to their colonial position.

There are several possible methods of applying the public trust doctrine to the new statute. Since in its strictest form the public trust doctrine imposes absolute restraints on the legislative power to alienate state wetlands, it is conceivable that the doctrine could be used to void the new statutory provisions which concern public wetlands. The argument that the legislature has exceeded its authority by enacting legislation which permits any activities detrimental to rights of the public, such as dredging, filling and even the conveying of wetlands,[149] is not completely without merit. However, to void the public wetland provisions of the new statute would merely shift the supervision of the public's interests from a competent administrative agency to the courts of the State. The public trust doctrine is merely a judicial technique to limit legislative power; it would require a great deal of judicial skill to circumscribe and refine it so as to keep it properly within the perspective of wetlands management. Judging from the difficulties which other courts have had in defining the doctrine, it may spawn too many judicial entanglements to justify its use.[150] Elevating a theory of uncertain scope and soundness to the status of law to void concrete legislation, carefully drawn to effect the result most beneficial to the public, does not seem in the best interest of the State.

The decisions of administrative agencies are generally considered correct unless it can be shown that they have abused their discretion[151] or that the action of the agency is illegal or *ultra vires*.[152] Thus, the burden of proof when the decision of an administrative

148. In Kerpelman v. Mandel, Chancery No. 8934 (Cir. Ct. Worcester County, Md., Aug. 31, 1970), the court specifically rejected the contention that the public trust doctrine is part of the law of Maryland. The court reasoned that since the legislature has recognized certain riparian rights and has also granted the Board of Public Works the power to convey State-owned land by enacting section 15 of article 78A of the Maryland Annotated Code, it has shown an intent not to make the public trust doctrine a part of the law of Maryland. However, if the premise is accepted that the public trust doctrine is basically a restraint on legislative power, then legislative intent is irrelevant. For a further discussion of the public trust concept in Maryland, see Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, 502–09 (1970).

149. *See* MD. ANN. CODE art. 78A, § 15A (Supp. 1970), which is considered part of the new wetland legislation.

150. *See* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, 486–89 (1970).

151. *E.g.*, Heaps v. Cobb, 185 Md. 372, 45 A.2d 73 (1946).

152. *E.g.*, Pressman v. Barnes, 209 Md. 544, 121 A.2d 816 (1956).

agency is challenged is on the party attacking the decision.[153] In the context of the new Wetlands Act, the public trust doctrine could be recognized and used to shift the burden of proof from the challenging party to the administrative agency where the party is challenging the latter's conveyance of public wetlands or its permitting filling and dredging of them. The theory behind this shift is that any alienation or use such as filling would be prima facie evidence of injury to public rights in such areas and that, therefore, the administrative agency should have the burden of proving that such activities were in the public interest. Aside from the logical inconsistency inherent in recognizing the doctrine, this narrow application of the concept would be subject to the same infirmity that would be present in a broad, substantive use of the doctrine; such application would undermine the effectiveness of the administrative agency. Since the new statute provides guidelines for the agencies involved and since such agencies have (hopefully) expert and competent administrators, the correctness of their decisions should be presumed unless they are shown to be clearly and seriously in error. There is no more compelling need in the case of agencies administering wetlands than in that of other administrative agencies to deviate from the general rule that the party challenging the decision of the agency must bear the burden of proof.

The public trust doctrine could be employed procedurally to give standing to appeal to those not a party either to a conveyancing of public wetlands or to an application for a license to dredge or fill such wetlands. One omission from the new statute is a provision permitting one who is *not* a party to a wetland proceeding to appeal a decision permitting the use or alienation of State wetlands. Likewise, there is no provision for appeal by such a member of the public of the Secretary's designation of (or, more importantly, the Secretary's *failure* to designate) certain areas as private wetlands, nor is there an appeal provided such person of the Secretary's rules and regulations for private wetlands. Each of these decisions of the Secretary may be appealed only by a person "having a recorded interest in land affected by any such rules and regulations."[154] Nor is there any provision for appeal by such a member of the public of the Secretary's grant, pursuant to sections 726 and 728, of a permit allowing a person to conduct an activity on a private wetland which is *not* permitted by the Secretary's rules and regulations; an appeal of such decision can be made to the Board of Review, and then to the local circuit court, only by the applicant for the permit or by the county or municipal government in which the land is located.[155]

The public trust doctrine affords a sound argument for granting any citizen standing to challenge such administrative decisions. As a member of the public and thus a shareholder in the *jus publicum*, a citizen of Maryland would have a small but concrete interest in

153. *E.g.*, Montgomery County v. Public Service Comm'n, 203 Md. 70 98 A.2d 657 (1953).

154. MD. ANN. CODE art. 66C, § 725 (Supp. 1970).

155. MD. ANN. CODE art. 66C, § 727 (Supp. 1970).

Maryland's wetlands. It would seem that an action of an administrative agency taken in derogation of this interest would give such a citizen standing to appeal the agency's decision. Of the proposed applications of the public trust doctrine in Maryland, this limited use would be the most beneficial. But again, it would be illogical to recognize the doctrine but to only allow its limited application.

However, resort to this use of the public trust doctrine may be unwarranted in light of certain provisions of the Administrative Procedure Act[156] and several recent federal decisions regarding the question of standing. Section 237 of article 41 provides: "Any person aggrieved by any decision or action or failure to act on the part of the Secretary or any other department or other agency within the Department of Natural Resources for which an appeal to the board of review of the Department of Natural Resources is provided by § 236 of this article . . . shall be entitled to appeal. . . ." Section 236 provides that "the board shall hear and determine appeals from those decisions of the Secretary or any departments or other agencies within the Department of Natural Resources which are subject to judicial review under § 255 of this article or under any other provisions of law." Thus, for "any person aggrieved" to be able to appeal under section 237, his appeal must lie within the provisions of section 236, which allows only appeals subject to judicial review under section 255. Section 255 states: "Any party aggrieved by a final decision in a contested case . . . is entitled to judicial review . . . ." Thus, it seems that a "person aggrieved" under section 237 must be a "party aggrieved" under section 255 to appeal a decision rendered by the Department of Natural Resources. Whether an individual citizen who was not a party to the original action is a "party aggrieved" under section 255 has not as yet been decided under Maryland law. Several federal decisions have held in construing various federal statutes that such an individual can be an "aggrieved" party within the meaning of those statutes and, therefore, has standing to challenge a decision of an administrative agency.[157] Should the Maryland Court of Appeals adopt the rationale of these decisions, there would be no need to resort to the concept of the public trust. But perhaps the best way to cure the defect in the wetlands statute is to amend it to specify that members of the public have standing to challenge the action of a wetland agency where the public interest is at stake.

IV. CONCLUSION

The status of reclaimed wetlands has to a large extent been settled by the new Wetlands Act. Although the validity of title to land created by filling under sections 45 and 46 is still uncertain, it seems likely that the riparian owner who created fast land prior

156. MD. ANN. CODE art. 41, §§ 244-56 (1965).

157. *E.g.*, Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608 (2d Cir. 1965).

to the effective date of the new statute will be able to successfully uphold his title on the theory that it is either an "accretion" or an "improvement" within the scope of these two sections.

The new statute goes a long way toward preserving the benefits of wetlands for future generations. The recognition of Maryland's wetlands as a valuable natural resource and their protection through an administrative agency is an important initial step in preventing despoilation of these ecologically vital areas. The new statute bars not *every* use of wetlands but only those imprudent, wasteful and uncontrolled uses that would jeopardize plant and animal life and destroy the ecological function of the wetlands. With proper management, some of these areas conceivably could be reclaimed for limited industrial, commercial and residential purposes without upsetting the environmental balance.

While the new statute provides guidelines for wetland administration, much depends on the nature of rules and regulations yet to be established.[158] Hopefully, these rules and regulations will clarify the meaning of the statutory language. For example, it should be explained which "ecological" or "aesthetic" considerations will be evaluated in making determinations on wetland usage and what degree of "tidal action" is necessary to constitute a parcel of land a wetland. The promulgation of distinct and comprehensive regulations at this time should limit uncertainty and minimize litigation in the future.

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