FILED JUL 26 1974

VOLUME 1

IN THE

Court of Appeals of Maryland

SEPTEMBER TERM, 1974

No. 64

DEPARTMENT OF NATURAL RESOURCES, ET AL.,
Appellants,

v.

MAYOR AND COUNCIL OF OCEAN CITY, ET AL.,
Appellees.

TWO APPEALS IN ONE RECORD FROM THE CIRCUIT COURT FOR WORCESTER COUNTY PURSUANT TO CERTIORARI TO COURT OF SPECIAL APPEALS
(DANIEL T. PRETTYMAN, Judge)

JOINT RECORD EXTRACT

FRANCIS B. BURCH,
Attorney General,

HENRY R. LORD,
WARREN K. RICH,
Assistant Attorneys General,

HAMILTON P. FOX,
Attorneys for Appellants.

DALE R. CATHELL,
PATRICK L. ROGAN, JR.,
WILLIAM G. KERBIN, JR.,
HENRY P. WALTERS,
Attorneys for Appellees.

The Daily Record Co., Baltimore, Md. 21202

N

CONTENTS OF JOINT RECORD EXTRACT

(Volume 1)

Plaintiff's Petition For Injunction 1

Intervening Plaintiff's Motion For Leave To Intervene 5

Order To Show Cause 6

Intervening Plaintiff's Petition 7

Plaintiff's Answer To Demand For Particulars Propounded By 71st Street, Inc. 8

Corporate Defendant's Counter Petition 12

Corporate Defendant's Answer To Petition of E. T. Park, Inc. 13

Corporate Defendant's Answer To Petition of The State of Maryland Department of Natural Resources 14

Municipal Defendant's Answer To Petition of E. T. Park, Inc. 15

Municipal Defendant's Answer To Petition of The State of Maryland, Department of Natural Resources 17

Interrogatories To 71st Street Inc. From The State of Maryland, Department of Natural Resources 18

Interrogatories To E. T. Park, Inc. From 71st Street Inc. 20

Interrogatories To The State of Maryland, Department of Natural Resources, From 71st Street Inc. 21

Corporate Defendant's Answers To Interrogatories of State of Maryland, Department of Natural Resources 24

Answers of the State of Maryland, Department of Natural Resources, To Interrogatories of 71st Street, Inc. 26

Cover Letter from 71st Street, Inc. and Stipulation Exhibit 29

Opinion And Order of Court 33

Exhibit A: Chapter 36, Building Limit Line, Ocean front, Code of Ocean City, County of Worcester, 1972 105

Exhibit B: Chapter 46, Erosion and Sediment Control, Code of Ocean City, County of Worcester, 1972 106

Exhibit C: Memorandum For The Media 116

Order For Appeal By State of Maryland, Department of Natural Resources 117

Order For Appeal By E. T. Park, Inc 118

PAGE

Stipulation For Stay of The Circuit Court of Worcester County Entered on The 23rd Day of April, 1974 118

Writ of Certiorari To The Judges Of The Court of Special Appeals of Maryland 119

Order Of Court Of Appeals 119

Proceedings 120

Testimony:

Nicholas John Kohlerman, M.D.—
Direct 125
Cross 129

George Anthony Schoepf—
Direct 131
Cross 132
Redirect 134

Ronald E. Powell—
Direct 134
Cross 146

John S. Whaley—
Direct 149
Cross 154

William Richard Burdette—
Direct 156

James W. Small—
Direct 157
Cross 161
Redirect 162

Carroll L. Brewington, Jr.—
Direct 163

Turbid H. Slaughter—
Direct 166

Carroll L. Brewington, Jr.—
Direct 171
Redirect 172

Turbid H. Slaughter—
Direct 172
Cross 185
Redirect 191

PAGE

(Volume 2)

Robert William Lindner—
Direct 193
Cross 205
Redirect 217

J. Robert Brown—
Direct 217
Cross 219

George Edward Hoerichs—
Direct 225
Cross 227

George Bert Cropper—
Direct 229
Cross 240
Redirect 262

Joseph G. Harrison—
Direct 263
Cross 264
Redirect 273

Eugene R. Parker—
Direct 273
Cross 274

Marshall T. Augustine—
Direct 277
Cross 290
Redirect 294
Recross 296

Plaintiff's Exhibits:

No. 3—Deed of Lots 4 and 5 from Robert and Elizabeth Taylor to Seventy-First St., Inc., November 22, 1971 300

(Volume 3)

Plaintiff's Exhibits (Continued):

No. 4—Deed of Easement between Yauger, et al. to County Commissioners of Worcester County dated June 27, 1962 302

PAGE

No. 5—Tax Assessment Map for 70th Street 305
No. 6—Isle of Wight plat, 1917 306
No. 7—Oceanbay City plat, 1940 307
No. 8—Isle of Wight Land Co. plat 1963 308
No. 9A—Aerial photo w/markings 309
No. 10—Aerial photo 310
Photo of property looking North 311
No. 12—Aerial photo 312
Aerial photo 313

Intervening Plaintiff's Exhibits:

No. 1—State Roads Expenditures for Ocean Beach Protection, 1949-65 314
No. 3—Aerial photo 315
No. 4—Aerial photo 316
No. 6—Construction data for Asphalt Jetty for 70th and 73rd St. w/profiles 317
No. 8—Corps of Engineers Shoreline and Offshore Depth Change plat, dated February 1972 322
No. 9—Beach Profiles, dated February, 1972 323
No. 10—Aerial photo 324
No. 11—Aerial photo 325
No. 12—Sketch "Caldwell" ideal dune cross-section 326
No. 13—Sketch by witness Slaughter used in testimony 327
No. 14—Sketch 328
No. 15—Excepts from Corps of Engineer's Report on March 6-8, 1962 storm and recovery work performed under PL-875 entitled "Operation 5-High 329

Stipulation Exhibits:

No. 1—Plat by G. B. Cropper of Lots 4 and 5 w/building limit line, dated February, 1972 345
No. 2—Aerial photo 346
No. 3—Aerial photo 347

Chart from Augustine testimony 348

PAGE

Corporate Defendant Exhibits:

No. 1—Photo of Apartment house 353

Photo of Apartment house 354

No. 3—Photo of Apartment house 355

No. 4—Construction drawing for proposed Sandbridge Condominium 356

No. 5—Beach profiles drawn by G. B. Cropper dated March, 1972 357

No. 6—Letter w/proposed contract terms from G. B. Cropper Inc. to 71st St. Inc. dated August 23, 1971 358

No. 7—Beach profile with shoreline comparisons drawn by G. B. Cropper dated October, 1963 363

VOLUME 1
IN THE

Court of Appeals of Maryland

SEPTEMBER TERM, 1974

No. 64

DEPARTMENT OF NATURAL RESOURCES, ET AL.,
Appellants,

v.

MAYOR AND COUNCIL OF OCEAN CITY, ET AL.,
Appellees.

TWO APPEALS IN ONE RECORD FROM THE CIRCUIT COURT FOR WORCESTER COUNTY PURSUANT TO CERTIORARI TO COURT OF SPECIAL APPEALS
(DANIEL T. PRETTYMAN, Judge)

JOINT RECORD EXTRACT

PETITION FOR INJUNCTION

MR. CLERK:

Please issue process for the Mayor and Council of Ocean City by service upon Harry Kelly, Mayor of the Town of Ocean City; issue process for George Bert Cropper, Inc. by service on George Bert Cropper, President of George Bert Cropper, Inc., Ocean City, Maryland; issue process for 71st Street, Inc. by service on Eugene R. Parker, Jr., President of 71st Street, Inc., Ocean City, Maryland.

HEARNE, FOX & BAILEY
HAMILTON P. FOX,
ROBERT P. CANNON,
Attorneys for Petitioner.

PETITION FOR INJUNCTION

Your Petitioner, E. T. Park, Inc., a body corporate of the State of Maryland, by its attorneys, Hearne, Fox & Bailey, and Robert P. Cannon, respectfully represents:

First

That it is the owner of a tract of land located on the Southerly side of 71st Street in the Town of Ocean City, Worcester County, Maryland, which said tract of land is adjacent to the ocean beach as it exists between 70th Street and 71st Street and is separated from said ocean beach by a 10-foot alley running in a North and South direction and the artificially created berm or sand dune created there by the Army Corps of Engineers pursuant to agreements with certain property owners in the Town of Ocean City, Maryland, and Worcester County Commissioners for the purpose of protecting property of your Petitioner and other property owners with property similarly located and the improvements thereon, your Petitioner's lot being improved by a residence having a value in excess of Fifteen Thousand Dollars ($15,000.00).

Second

That the area East of the 10-foot alley which adjoins your Petitioner's property and runs in a North-South direction is a public beach in and upon which your Petitioner and the public in general have acquired an easement for use as a public beach and for the purpose of swimming and bathing in the waters of the Atlantic Ocean, which said easement permits them access to and from the waters of the Atlantic Ocean and allows your Petitioner and the public in general to use all of the area between 70th and 71st Streets East of the aforementioned 10-foot alley as a public beach and as a place of resort for bathing; sunbathing; picnicking and other activities usually indulged in and carried on by the public on a public bathing beach; that said public easement exists from the mean low water mark where the title of the State of Maryland begins and extends in a Westerly direction past the mean high water mark to the area of the beach where the upland supports vegetation, which said public beach area between 70th and 71st Streets corresponds with the dry sand area which exists between the State-owned foreshore and the 10-foot alley heretofore mentioned running in a Northerly and Southerly direction between 70th and 71st Streets and immediately East of and adjacent to the lot of your Petitioner.

Third

That the Mayor and Council of ocean City, by Ordinance dated April 19, 1971, recognized the existence of a public beach along the ocean front in the Town of Ocean City by establishing an ocean front building limit line

and prohibiting building Easterly thereof. Said building limit line adequately protects the public beach in some areas of Ocean City, but in the area between 70th and 71st Streets said public building line does not adequately protect the public beach for the reason that said line runs so close to the mean high water mark as to dissect the public beach and, in fact, totally eliminate portions of the public beach by virtue of the fact that the wave wash at normal high tide goes West of said building limit line so that during a normal high tide no dry sand area would exist for the use of the public between the mean high water mark and said building limit line.

Fourth

That the Defendant; George Bert Cropper, Inc., is a corporation of the State of Maryland which has applied to the Defendant, Brady Bounds, Building Inspector for the Town of Ocean City, for a permit to erect the Sandbridge Condominium consisting of eight (8) units for the Defendant. 71st Street, Inc.

Fifth

That the construction of a building or structure in the area East of the 10-foot alley running between 70th and 71st Streets will cause irreparable damage to the Plaintiff and to the public in general by virtue of the fact that it will be a public nuisance located in and upon the dry sand area in which the public has acquired an easement as aforesaid and will totally eliminate the public's use of a large portion of the public beach as it now exists between 70th and 71st Streets.

Sixth

That your Petitioner brings this Petition for the purpose of obtaining an immediate and temporary injunction enjoining the said Brady Bounds from issuing a building permit to George Bert Cropper, Inc. or to any other person, which said permit would permit construction of any type of dwelling or structure between 70th and 71st Streets in the Town of Ocean City Easterly of the aforementioned 10-foot alley, and in the alternative and in the event that said building permit has aleady been issued, then to enjoin George Bert Cropper, Inc. from proceeding with construction pursuant thereto and to enjoin 71st Street, Inc. from proceeding with construction of the Sandbridge Condominium or any other structure between 70th and 71st Streets in Ocean City East of the aforementioned 10-foot alley, and further requiring after determination of this cause the issuance of a permanent injunction prohibiting any type of construction within the limits of the public beach area between 70th and 71st Streets so that said building limit line would run along the Easterly line of the aforementioned 10-foot alley as it exists between 70th and 71st Streets.

Seventh

That the said Building Inspector, Brady Bounds, is presently in the process of issuing said building permit and that unless he is immediately enjoined and restrained from doing so irreparable damage will be done to your Petitioner and to the public in general by virtue of the fact that the issuance of said building permit will partially destroy the public beach in the area complained of.

Eighth

That George Bert Cropper, Inc. has already erected stakes on the public beach, two of which are shown in a photograph which is filed herewith as Petitioner's Exhibit "A", which said photograph shows that the Northeasternmost corner of the proposed Sandbridge Condominium will actually be located in the wave wash of the Atlantic Ocean so that there will, in fact, be no public beach East of the proposed condominium, and that the construction of said condominium or any other structure in the area of the public beach between 70th and 71st Streets will result in irreparable damage to your Petitioner and to the public in general.

WHEREFORE, your Petitioner prays this Honorable Court to issue a temporary injunction restraining the Mayor and Council of Ocean City and specifically the Building Inspector, Brady Bounds, from issuing any permit for construction in the area East of the 10-foot alley which runs in a North and South direction between 70th and 71st Streets adjacent to the berm or sand dune created by the Army Corps of Engineers until a hearing can be held and a determination made as to the rights of the parties hereto and the rights of the public in the public beach that exists between 70th and 71st Streets, and in the alternative, if said building permit has already been issued to permit construction East of the alley between 70th and 71st Streets, that George Bert Cropper, Inc., 71st Street, Inc., or any other person be temporarily restrained from proceeding to commence any type of construction in the area between 70th and 71st Streets East of said 10-foot alley until this Honorable Court has had an opportunity to hear this Petition and make a determination as to the rights of the public, if any, in said area and, upon a determination of the rights of your Petitioner and the public in said area, issue a permanent injunction restraining each of the Defendants, their agents, servants or employees, from interfering with the rights of the public in said area by proceeding with any type of construction whatsoever in the area East of the aforementioned 10-foot alley between 70th and 71st Streets.

Respectfully submitted,

HEARNE, FOX & BAILEY

HAMILTON P. FOX,

ROBERT P. CANNON,

Attorneys for Petitioner.

EXHIBIT NO. 1

Depicting Stake markers on Beach Area omitted

MOTION FOR LEAVE TO INTERVENE

The State of Maryland; through its Department of Natural Resources, represented by Francis B. Burch, Attorney General; Henry R. Lord, Deputy Attorney General; and Warren K. Rich, Special Assistant Attorney General, moves, pursuant to Maryland Rule 208 b (2) of the Maryland Rules of Procedure, for leave to intervene as party plaintiff in this cause upon the following grounds:

1. This action was commenced by the original plaintiff herein in order to obtain injunctive relief, preventing the issuance by Defendants, Mayor and City Council of Ocean City, Maryland, of a permit for construction in the area east of the 10-foot alley running in a North-South direction between 70th and 71st Streets in Ocean City. Alternatively it requested this Honorable Court to temporarily restrain the construction in the aforesaid area in the event a permit has already been issued.

2. The plaintiff has also requested a permanent injunction restraining the contemplated course of action as set out in the Bill of Complaint.

3. The plaintiff bases his request for relief upon the theory that the public has superior rights by way of easement and by reason of the creation of a public nuisance to the subject area.

4. Plaintiff also relies upon the Ocean City Ordinance dated April 19, 1971 which establishes an ocean-front building limit line which prohibits building east of that designated line. The validity of this ordinance will be an issue in this case because of its ramifications.

5. The Department of Natural Resources is responsible for the development of coordinated policies for the conservation, enhancement, wise use, perpetuation of the natural resources of the State. In particular, the Department of Natural Resources pursuant to the "Wetlands Law", Article 66C, Sections 719-731, is authorized to regulate, along with the Board of Public Works, activity affecting both State and private wetlands, and it appears from the Petition for Injunction that parts of the lands, the subject of these proceedings, are wetlands.

6. The Department of Natural Resources also assists the various soil conservation districts in the State of Maryland in preparing unified sediment control programs and erosion control programs. Pursuant to Article 96A, Sections 105-110 of the Maryland Code, the various counties and municipalities of this State, and in particular Ocean City, have adopted grading and sediment control ordinances.

7. Questions of law and facts raised in the original Petition for Injunction are also common to the interest of the intervener herein.

8. The intervention herein moved will not unduly delay or otherwise prejudice the rights of the parties to this action.

9. The issue in question concerning the beach area between 70th and 71st Streets may be common to all the beaches within Ocean City limits. Because of the inherent State interest, the State of Maryland, through its Department of Natural Resources, as represented by the Attorney General, should be allowed intervention to present all legal and factual arguments which may be relevent to a disposition of this case.

WHEREFORE, your Petitioner prays that it be allowed to intervene as party Plaintiff in the above captioned case.

FRANCIS B. BURCH,
Attorney General for the
State of Maryland,

HENRY R. LORD,
Deputy Attorney General for the
State of Maryland,

WARREN K. RICH,
Special Assistant Attorney General
Department of Natural Resources
State Office Building.

POINTS AND AUTHORITIES

Maryland Rules of Procedure, Rule 208, 208 b (2).

ORDER TO SHOW CAUSE

Upon the foregoing Motion for Leave to Intervene, it is, this 10th day of March, 1972, by the Circuit Court for Worcester County,

ORDERED That Defendants show cause why, if any they may have, the relief prayed in the foregoing Motion for Leave to Intervene should not be granted, on or before the 30th day of March, 1972, provided that a copy of said Motion be served upon the Attorneys for each of the said Defendants on or before the 18th day of March, 1972.

DANIEL T. PRETTYMAN,
Judge.

PETITION

The Department of Natural Resources, State of Maryland, by its Attorneys, Francis B. Burch, Attorney General; Henry R. Lord, Deputy Attorney General; and Richard C. Rice and Warren K. Rich, Special Assistant Attorneys General, respectfully represents unto this Honorable Court:

Count I

1. That the within cause of action concerns proposed construction on a parcel of land located oceanward of the dune line in the area between 70th and 71st Streets in Ocean City, Maryland.

2. That it appears from the original Petition filed in this matter, at least a portion of said land is wetland, either State or private, and, therefore, subject to regulation by the Department of Natural Resources and the Board of Public Works of the State of Maryland in accordance with the provisions of Article 66C, Sections 719 through 731 of the Maryland Annotated Code.

3. That the Department of Natural Resources has been charged to safeguard the wise use and enjoyment of the ocean shorefront for the greatest benefit to the State and its citizens.

4. That it appears a public right of free use of the beaches has been established either by the establishment of a fee or some lesser interest during the course of the past several years.

5. For more than 20 years the beaches of Ocean City, including that parcel lying between mean high tide and the present dune line, have been maintained, used and enjoyed by the public for recreation, picnicking, access to the ocean waters, and for other associated beach uses. Said use by the public was without license, continuous, and extended for such length of time that said use has ripened into a public easement.

Count II

The Petitioner repeats and realleges each and every allegation contained within paragraphs 1 through 4 of Count I.

6. During the past 100 years the areas of beach within Ocean City have undergone constant change, including the natural erosion process. That through said processes, the waters of the Atlantic Ocean have risen to the point where private land ownership has become completely submerged.

7. That from time to time public funds were expended on the Ocean City beach in the area of 70th and 71st Streets in order to prevent the erosion of said beach and to assist in the accumulation of more sand area for those beaches. The accumulation of sand above the mean high tide line on said beaches was through artificial means, not through the natural processes of accretion and, therefore, did and does not inure to the beneficial interest of bordering private property owners.

Count III

The Petitioner repeats and realleges each and every allegation contained within paragraphs 1 through 4 of Count I.

8. That the lands lying between the western boundary of foreshore area to the dune line are held by the State of Maryland in trust for the common enjoyment of the people of Maryland, to be used for recreational and other associated purposes.

9. That the proposed building would encroach beyond the dune line and prevent the public use of the beach area between 70th and 71st Streets in derogation of the common trust doctrine.

WHEREFORE, the Department of Natural Resources, State of Maryland requests that this Honorable Court enjoin the issuance of any building permit for construction of the lands, the subject of these proceedings, until the relative rights of the parties to this cause be adjudicated and all required permits have been obtained from the Department of Natural Resources, State of Maryland and the Board of Public Works, State of Maryland.

Francis B. Burch,
Attorney General,

Henry R. Lord,
Deputy Attorney General,

Richard C. Rice,
Special Assistant Attorney General,

Warren K. Rich,
Special Assistant Attorney General.

ANSWER TO DEMAND FOR PARTICULARS PROPOUNDED BY 71ST STREET, INC.

E. T. Park, Inc., by its attorneys, Hearne, Fox & Bailey, answering the Demand for Particulars of its claim, says:

1. State precisely and in detail the fact or facts and give reference to the records upon which Petitioner bases its claims that it has a private easement over the property in question owned by this Respondent.

A. The deed by which E. T. Park, Inc. acquired title and the deed by which 71st Street, Inc. acquired title to the lots which they respectively own in the block which is located between 70th and 71st Streets in the Town of Ocean City were conveyed to the parties with reference to a deed-recorded plat known as "Oceanbay City", which is recorded among the Land Records of Worcester County, Maryland, in Plat Book O.D.C. No. 2, Folio 76. The Plaintiff believes that pursuant to Maryland law persons who purchased lots pursuant to such a plat which shows lots in a waterfront development are entitled to access to the water, which means access to the water at every point along the waterfront and not just at the ends of streets. Persons who buy property in waterfront developments pay the prices that are paid for property in such developments because of the access to the water and to the public beaches. E. T. Park, Inc. is a corporation owned and controlled by Nicholas J. Kohlerman, and Nicholas J. Kohlerman, as President of E. T. Park, Inc., and individually, together with his family and friends, has been using Lots 4 and 5 in Block No. 38, legal title to which is held by the Defendant, 71st Street, Inc., for access to and from the waters of the Atlantic Ocean, and has specifically used said Lots 4 and 5 in conjunction with other members of the public as a public beach for the purposes of recreation, sunbathing and other similar uses to which a public beach is put. The use to which Lots 4 and 5 have been put has been continuous since the acquisition of the property by E. T. Park, Inc. down to the present date, but particularly during the summer months when the area is used as a public beach resort.

2. State precisely and in detail the fact or facts and give reference to the records upon which Petitioner bases its claim that the property in question is a public beach.

A. The public has an easement over the property in question owned by 71st Street, Inc. by virtue of a deed of easement made June 27, 1962 and recorded among the Land Records of Worcester County, Maryland, in Liber F.W.H. No. 164, Folio 167, whereby the predecessors in title to 71st Street, Inc. gave an easement to the County Commissioners of Worcester County "for the protection of our property, other property in this vicinity and the public generally" for the purpose of constructing and maintaining a sand dune barrier, which said easement says that it is intended for the benefit of the property described and other property owners in this vicinity and the public generally. That said deed of easement for the benefit of the public and other property owners in the vicinity was for the purpose of erecting a sand dune barrier in order to protect the public beach located immediately adjacent to the sand dune barrier which was to be constructed, and that by executing the deed of easement for the purpose of protecting the rights of the public generally they impliedly granted to the public, to the extent that they had the power to do so, the right to use the public beach. The acts which give rise to the public easement are the acts of use and user done and performed by the public in general in going upon the sand beach area

located Westerly of the wet sand area and Easterly of the sand dune barrier created by the Corps of Engineers, and engaging therein in sunbathing, picnicking and general recreational activities of the type usually indulged in by the public at a public beach. The public has used the area between the water and where the sand supports vegetation from the time that the public used to drive horses and horsedrawn vehicles from Fenwick to Ocean City prior to the construction of a beach highway. In the 1920's the State Roads Commission constructed timber jetties as a means of inducing the beach to build up so that in the period between 1926 and 1961 approximately 26 timber jetties were built in the Ocean City area by the State Roads Commission, and from the period of 1954 to 1955 approximately 43 asphalt-type jetties were constructed by the State Roads Commission at 900-foot intervals beginning at the end of the boardwalk at 26th Street and continuing almost to the Delaware line. In the 1930's the State Roads Commission constructed a board fence along the top of the natural dunes to act as a sand fence to build up the beach area. Prior to the time that north Ocean City became a part of the Town of Ocean City, the County Sheriff patrolled the beach and for this purpose purchased a 4-wheel drive vehicle, and during this period of time the beach was cleaned periodically by County prisoners and by employees of the Worcester County Roads Department. After the storm in March of 1962, the area in question was annexed by the Town of Ocean City and since being annexed by the Town of Ocean City the City has patrolled the beach by vehicle in order to afford police protection, has expended public funds for the purpose of acquiring a beach cleaning machine which cleans the beach and specifically cleans that portion of the beach owned by the Defendant, 71st Street, Inc., and upon which 71st Street, Inc. contemplates construction of the dwelling sought to be restrained by these proceedings. The Town of Ocean City has enacted various ordinances governing the use of the beach prohibiting the building of fires thereon without permits and imposed other limitations and restrictions upon the activities that can be carried on on the beach which restrictions specifically govern and control the area owned by the Defendant, 71st Street, Inc. The public having used the area in the vicinity of the property of 71st Street, Inc. and having specifically used the property of 71st Street, Inc. since the storm in March of 1962 for the purposes of a public beach, and the Defendant, 71st Street, Inc., having acquiesced in the control and dominion exercise over their property by the governmental subdivisions that have created the sand dune and regulated the use to which the property can be put, have thereby recognized the public's right to use the area as a public beach.

3. State precisely and in detail the fact or facts and give reference to the records upon which Petitioner bases its claim that there is a public easement over the property in question.

A. See answer to Demand for Particulars No. 2.

4. If Petitioner contends that it has a private easement over the land in question by virtue of tacking onto an adverse, continuous, uninterrupted and exclusive use by predecessors in title of Petitioner, please identify the predecessors in title who Petitioner alleges to have used the property in question, describe said use by such persons and state the dates and years of the use by each of said persons.

A. See answer to Demand for Particulars No. 1.

5. Please give the date which Petitioner acquired title to the alleged property owned by it and describe the use and manner of use which Petitioner has allegedly used the land in question, owned by Respondent, and state the dates and years of each said use.

A. The Petitioner acquired title to the property owned by it by deed dated November 14, 1967 and recorded among the Land Records of Worcester County, Maryland, in Liber F.W.H. No. 226, Folio 632. The use made of the property presently owned by E. T. Park, Inc. is as a summer residence for the owner and chief stockholder of E. T. Park, Inc., Dr. and Mrs. Nicholas Kohlerman, and their family. We do not know the use made of the property by our predecessors in title except to say that prior to the erection of a structure on it it was a building lot in a resort location.

6. If Petitioner claims that the property in question is subject to an easement by virtue of a dedication, please state precisely and in detail the fact or facts and give reference to the records upon which Petitioner bases its claim that such a dedication exists.

A. The Petitioner does not contend that the subject property is subject to a public easement by virtue of any formal act of dedication, but believes that the owner has acquiesced in the use of the land by the public and has acquiesced in the expenditure of public funds for the purpose of policing and cleaning the area, and specifically consented to the construction of a sand dune barrier in the area for the protection of the public and other property owners. It is the Petitioner's contention that dedication can be done in a manner other than by formal acts of or declarations of dedication.

7. If Petitioner claims that the land in question is subject to an easement by virtue of a dedication, please state the exact manner in which Petitioner claims that any such alleged dedication was accepted, indicating the precise manner in which it was accepted and giving the names and addresses of each and every person, firm or corporation who participated in any such acceptance and the manner in which any such person, firm or corporation participated in any such acceptance.

A. See answer to Demand for Particulars No. 6.

8. With regard to the persons, firms and corporations referred to in paragraph 7 hereof, please indicate if any such persons, firms or corporations own or owned any property within three blocks of the property in question and give the location of any such property.

A. See answer to Demand for Particulars No. 6.

HEARNE, FOX & BAILEY,

HAMILTON P. FOX,

Attorneys for Plaintiff.

COUNTER PETITION

Seventy First Street, Inc., a body corporate of the State of Maryland, by Richardson, Rogan & Anderson, its Attorneys, respectfully represents:

1. That it was going to construct an eight (8) unit condominium on Lots 4 and 5, Block 38 on Plat of Ocean Bay Colony, which was to be ready for occupancy by the summer season of 1972.

2. That it had obtained all of the necessary financing and had presold five (5) of the condominium units.

3. That it went to considerable expense for plans and preparations to construct said building and contracted with George Bert Cropper, Inc. to construct the said building.

4. That all necessary permits were obtained and land preparation commenced when E. T. Park, Inc. filed the instant action to prohibit construction.

5. That because of the action of E. T. Park, Inc., Counter Petitioner was caused considerable damage in losing large sums of money which it paid in advance for its proposed condominium, in losing the five (5) sales which were presold, in delaying construction of its proposed project as construction costs are increasing, in forcing Counter Petitioner to release George Bert Cropper, Inc. from the said construction contract in order to mitigate damages between Counter Petitioner and George Bert Cropper, Inc., in damaging the reputation of Counter Petitioner to perform its said contracts; in causing Counter Petitioner to lose profits from sales, in causing Counter Petitioner to hire Attorneys and experts to defend this said action and in causing Counter Petitioner to spend considerable time and money to defend this action.

6. That the action filed by E. T. Park, Inc. is in bad faith, without substantial justification and for purposes of delay as is evidenced by its com-

pletely unfounded claim as indicated by its Petition and "Answer to Demand for Particulars" which are hereby incorporated herein by reference.

WHEREFORE, Seventy First Street, Inc. prays that this Honorable Court award it monetary damages as indicated above, including counsel fee.

RICHARDSON, ROGAN & ANDERSON,

Attorneys for Seventy First Street, Inc.

ANSWER TO PETITION OF E. T. PARKS, INC.

Seventy First Street, Inc., by Richardson, Rogan & Anderson, its attorneys, answering the Petition of E. T. Parks, Inc., says:

1. That it is without knowledge of the allegation of Paragraph 1 as to specific location of Petitioner's property although it does admit that Petitioner owns a lot in the block in question.

2. That it denies the allegations of Paragraph 2.

3. That it admits that the Mayor and Council passed an ordinance establishing a building limit line, but denies any and all other allegations of Paragraph 3.

4. That it admits the allegations of Paragraph 4.

5. That it denies the allegations of Paragraph 5.

6. That it denies that any injunction should insue as requested in Paragraph 6.

7. That it denies the allegations of Paragraph 7.

8. That it denies that the proposed condominium or any portion of it would have been East of mean high water or that it would be of legal damage to anyone.

9. Further answering said Petition, this Defendant claims that it has legal title to lots 4 and 5 in Block 39 and the condominium that it proposed to construct complied in every respect with the said Building Limit Line Ordinance; That by virtue of Petitioner "Answer to Demand for Particulars" it claims a private easement over this Defendant's property because E. T. Parks, Inc., and Seventy First Street, Inc. purchased their lots with reference to a plat known as "Oceanbay City" and that the President of E. T. Parks, Inc. and his family and friends have been using the lots owned by Seventy First Street, Inc. for access to and from the water since acquiring title to the property. Considering that E. T. Parks, Inc. acquired title in 1967

this Defendant alleges that under the facts alleged and particularized the Petitioner could in no manner acquire any such private easement.

10. Defendant further answering says that E. T. Parks, Inc. claims a public easement because of the "Dune Line Easement" referred to in Paragraph 2 of its "Answer to Demand for Particulars." A copy of said "Dune Line Easement" is attached hereto and it does not give the public any right to a public easement as Petitioner alleges. It gives only the right to construct, reconstruct and maintain a sand dune barrier and nothing else.

11. Defendant further answering says that Petitioner filing this action is in bad faith, without substantial justification and for purposes of delaying Defendant from constructing a condominium; That because thereof, Defendant has been seriously damaged as indicated on the Counter Petition filed herewith.

Wherefore, Defendant prays that the Petition be dismissed and that Defendant be awarded his costs, damages and counsel fee.

RICHARDSON, ROGAN & ANDERSON,

Attorneys for Defendant.

ANSWER TO PETITION OF DEPARTMENT OF NATURAL RESOURCES

Seventy First Street, Inc. by Richardson, Rogan & Anderson, its attorneys, answering the Petition of Department of Natural Resources, says:

1. That it admits the allegations of Paragraph 1.

2. That it denies the allegations of Paragraph 2.

3. That it is without knowledge of the allegations of Paragraph 3.

4. That it denies allegations of Paragraph 4.

5. Defendant denies the allegations of Paragraph 5 with reference to the lots in question.

6. Defendant denies the allegations of Paragraph 6 with reference to the lots in question.

7. Defendant denies the allegations of Paragraph 7 with reference to the lots in question.

8. Defendant denies the allegations of Paragraph 8.

9. Defendant denies the allegations of Paragraph 9.

10. Further answering the Petition, Defendant says that the State of Maryland for many years has assessed the subject property for purposes of taxation and has collected taxes on same. Further, the plans for construction of the proposed condominium received approval of all necessary governmental agencies including Sediment Control Office.

Wherefore, Defendant prays the Petition be dismissed with costs.

RICHARDSON, ROGAN & ANDERSON,
Attorneys for Defendant.

ANSWER OF MAYOR AND CITY COUNCIL OF OCEAN CITY TO PETITION OF E. T. PARK, INC.

Mayor and City Council of Ocean City by Cathell and Ewell, its attorneys, answering the Petition of E. T. Park, Inc., says:

1. That it is without knowledge of the allegations of the Petitioner's paragraph one as they may apply to this specific location. That it has no knowledge of the value of Petitioner's residence.

2. That it has no knowledge of any easements acquired by the public or the Petitioner, therefore, it neither admits or denies the acquisition of said easements. That it denies that the title in the State of Maryland terminates at mean low water stating that title in the State of Maryland terminates at mean high water.

3. That it denies that the purpose of establishing a building limit line was to recognize a public beach stating that the purpose of said line was to regulate the easterly direction of construction in reference to the Atlantic Ocean so that such construction and the buildings on adjacent properties would be reasonably safe and secure in event of storm. It was felt that to allow construction easterly of said line would be hazardous, especially considering the effect of possible downdrift of storm debris into neighboring properties. In addition, it felt that the areas of private property east of said line should be made subject to public acquisition and said area has been programed for eventual acquisition by fee simple, easement or dedication. It further states that it is without knowledge as to alleged bisecting of any public beach in the subject location by said line stating that the line was, as of the date of its adoption, established generally to be the same approximate distance from the then mean high water mark and to be just immediately easterly of the actual then eastward limit of buildings in respective locations. It further states that said line was established in reference to mean high water mark as of the date of its adoption and that it is physically and economically unfeasible to re-establish and relocate said line every

time there is a change in the location of the shoreline, said shoreline being constantly changing. It further states it has no knowledge of the extent of dry sand areas at the specific location (or any other) due to the rapidly changing location and topography of the shoreline.

4. That it admits the allegations of paragraph fourth of the Petition stating further however that said permit has been issued. (See exhibits attached to Motion To Dismiss previously filed).

5. In answer to paragraph fifth, this Defendant states it has no knowledge of irreparable damage or potential damage to Plaintiff's property. That it does not consider the proposed building to be a public nuisance in respect to public beach areas further stating that portions of platted lots, generally considered to be private property, extend easterly of said building to non platted area. It further states that whether or not the building eliminates the public's use of a large portion of public property depends upon the establishment of what is or is not public beach, therefore, this Defendant cannot admit nor deny the last allegation of paragraph fifth.

6. In answer to paragraph sixth, this Defendant states that a permit has been issued in the area specified, and further states it does not issue and will not issue building permits between 70th and 71st Streets east of said alley unless any proposed project complys fully with ordinances and laws of both the local, county and state governments. This Defendant further states that it is its understanding that it is not now enjoined from issuing lawful permits.

7. In answering paragraph seventh of the Petition, this Defendant states that the specific permit has been issued, therefore making moot the point of whether or not the *issuance* of this permit constituted any irreparable damage; this Defendant therefore denies the allegations of said paragraph.

8. That this Defendant neither admits nor denies the allegations of paragraph eighth of the Petition having no knowledge of stake locations and further having no knowledge of damage that might be caused the Petitioner further stating that the damage to the public depends on the determination of the ownership of the subject property or a determination of acquired public rights in and to said property.

9. Further answering said Petition, This Defendant states that the permit issued and any other permits that might be issued were and will only be issued if the proposed projects comply with all applicable regulations, ordinances, etc.

Respectfully submitted,

CATHELL & EWELL,

DALE R. CATHELL,

Attorneys for Mayor and City Council

of Ocean City.

ANSWER OF MAYOR AND CITY COUNCIL OF OCEAN CITY TO PETITION OF THE DEPARTMENT OF NATURAL RESOURCES

Mayor and City Council of Ocean City, Maryland, a Defendant, by its attorneys, Cathell & Ewell, answering the Petition of The Department of Natural Resources, states as follows:

1. That it admits the allegations of paragraph one of the Petition but states further that said action also concerns unproposed construction on land oceanward of the dune line between 70th and 71st Streets.

2. That in respect to paragraph two, it neither admits nor denies that the original Petition concerned wetlands, not knowing what constitutes wetlands and not knowing anyone else who knows what constitutes wetlands other than wetlands below mean high water.

3. In answering paragraph three this Defendant states that the safeguarding of the beach areas within its limits is, in the least, a responsibility shared by the municipality, being one of the express powers contained in the charter of said Town, Section 181, subsection 8, page 8. Said subsection states as follows: "(8) Beaches — to license, tax and regulate all activities whatsoever on the public beaches, and, at its discretion, to permit buildings of public accommodation to be erected thereon, including the right to build rest rooms thereon." This Defendant is otherwise without knowledge of the allegations of paragraph three.

4. That it is without knowledge of the allegations of paragraph four of the Petition and therefore neither admits nor denies the allegations therein.

5. In answer to paragraph five, this Defendant neither admits nor denies the allegations therein, having no knowledge that all beaches now located in Ocean City were so maintained, used and enjoyed for the period of time stated. Further stating, however, that that portion of said beach located southward of what is now known as 33rd Street has been so used and maintained and engaged for over 20 years. Further stating that *portions* of said beaches north of 33rd Street have been so maintained, used and enjoyed since 1965. However, this Defendant has no knowledge of what took place on the north area prior to 1965 as such area was not an Ocean City Beach prior to 1965, but a Worcester County Beach.

6. In answer to paragraph six of the Petition, this Defendant in part admits the allegations therein containing stating further, however, that the beaches now in Ocean City have not only eroded, but have also increased in some areas (namely the south beaches) from accretion, some said beach areas having extended eastward as much as 75 yards. This Defendant has no knowledge of any platted lots on the Ocean coast in Ocean City being now completely submerged, but, however, does not deny that some private property may be submerged.

7. In answer to paragraph seven, this Defendant admits and affirms that from time to time public funds were expended in the subject area to prevent erosion and protect against storm damage. However, this Defendant has no knowledge as to accretion, or lack of it, between 70th and 71st Streets further stating that accretion and erosion in said area is a continuing process.

8. In answer to paragraph eight, this Defendant neither admits nor denies the trust therein claimed.

9. In answer to paragraph nine, this Defendant admits the proposed building would extend eastward of the dune line and further admits that if there is in fact such a common trust said building would restrict public use of such trust held area, but it does, however, further affirm that it was unaware of the possibility of such a trust prior to the service of the aforesaid Petition.

10. Further answering said Petition, this Defendant states that prior to this law suit it was of the opinion that all lands west of the building limit line (except streets and street ends) and some land eastward of said line was private property. That it is unaware of any Maryland law, (statute or case law) that questions the ownership of such platted lots or created the trust claimed. That this Defendant was and is in the process of acquiring portions of said beach areas through an open space and land acquisition program.

Respectfully submitted,

CATHELL & EWELL,

Dale R. Cathell,

Attorneys for Mayor and city Council

of Ocean City, Maryland.

INTERROGATORIES

To: 71st Street, Inc., Defendant.

PROPOUNDED UNDER THE MARYLAND RULES OF DISCOVERY

You are requested by the Plaintiff to answer the following Interrogatories, and in doing so, you are requested to comply with the following requirements:

a. These Interrogatories are continuing in character so as to require you to file supplementary answers if you obtain further or different information before trial.

b. Where the name or identity of a person is requested, please state full name, home address and also business address, if known.

c. Where knowledge or information or possession of a party is requested, such request includes knowledge of the party's agents, representatives and, unless privileged, his attorneys.

1. Did the Defendant retain or employ any experts, surveyors or technicians to report on the tidal action which has occurred on the beach in Ocean City in the area between 70th and 72d Streets and to report also regarding the physical dimensions of the beach during the course of the past fifty years, the effects of storms on the beach, the improvements made on the beach, the high tide line and its relative position from 1890 to the present, and any other information relative to the physical appearance and cross-section of the subject beach area? For each such expert, surveyor or technician, state:

a. His name, title, home and business address.

b. His profession or occupation, and the field in which he allegedly is an expert.

c. Whether you intend to call him as a witness during the trial of this action.

2. If you intend to call said expert as a witness during the trial of this action, state the following for each such expert, surveyor or technician:

a. Academic background.

b. Present employment.

c. Attach written report or opinion.

3. If surveys were made by any experts or technicians, state with regard to said tests:

a. The dates surveys were made.

b. Results of surveys.

c. Supply a copy of survey.

Warren K. Rich,
Special Asst. Attorney General,
Department of Water Resources,
For Plaintiff.

INTERROGATORIES

To: E. T. Park, Inc.

From: 71st Street, Inc.

PROPOUNDED UNDER THE MARYLAND RULES OF DISCOVERY

You are requested by the Defendant, 71st Street, Inc., to answer the following Interrogatories, and in doing so, you are requested to comply with the following requirements:

a. These Interrogatories are continuing in character so as to require you to file supplementary answers if you obtain further or different information before trial.

b. Where the name or identity or a person is requested, please state full name, home address and also business address, if known.

c. Where knowledge or information or possession of a party is requested, such request includes knowledge of the party's agents, representatives and, unless privileged, his attorneys.

1. Did you retain or employ any experts, surveyors or technicians to report on the tidal action which has occurred on the beach in Ocean City in the area between 70th and 72nd Streets and to report also regarding the physical dimensions of the beach during the course of the past fifty years, the effects of storms on the beach, the improvements made on the beach, the high tide line and its relative position from 1890 to the present, and any other information relative to the physical appearance and cross-section of the subject beach area? For each such expert, surveyor, or technician, state:

a. His name, title, home and business address.

b. His profession or occupation, and the field in which he allegedly is an expert.

c. Whether you intend to call him as a witness during the trial of this action.

2. If you intend to call said expert as a witness during the trial of this action, state the following for each such expert, surveyor or technician:

a. Academic background.

b. Present employment.

c. Attach written report or opinion.

3. If surveys were made by any experts or technicians, state with regard to said tests:

a. The dates surveys were made.

b. Results of surveys.

c. Supply a copy of survey.

RICHARDSON, ROGAN & ANDERSON,
Patrick L. Rogan, Jr.

INTERROGATORIES

To: State of Maryland, through its Department of Natural Resources.

From: Seventy-First Street, Inc.

You are requested by the Defendant to answer the following Interrogatories, and in doing so, you are requested to comply with the following requirements:

a. These Interrogatories are continuing in character so as to require you to file supplementary answers if you obtain further or different information before trial.

b. Where the name or identity of a person is requested, please state full name, home address and also business address, if known.

c. Where knowledge or information or possession of a party is requested, such request includes knowledge of the party's agents, representatives and, unless privileged, his attorneys.

1. Did you retain or employ any experts, surveyors or technicians to report on the tidal action which has occurred on the beach in Ocean City in the area between 70th and 72nd Streets and to report also regarding the physical dimensions of the beach during the course of the past fifty years, the effects of storms on the beach, the improvements made on the beach, the high tide line and its relative position from 1890 to the present, and any other information relative to the physical appearance and cross-section of the subject beach area? For each such expert, surveyor or technician, state:

a. His name, title, home and business address.

b. His profession or occupation, and the field in which he allegedly is an expert.

c. Whether you intend to call him as a witness during the trial of this action.

2. If you intend to call said expert as a witness during the trial of this action, state the following for each such expert, surveyor or technician:

a. Academic background.

b. Present employment.

c. Attach written report or opinion.

3. If surveys were made by any experts or technicians, state with regard to said tests:

a. The dates surveys were made.

b. Results of surveys.

c. Supply a copy of survey.

4. Give the names and addresses of all persons whom you propose to call as witnesses.

5. State precisely and in detail the fact or facts and give reference to all records upon which you base your claim that the two lots in question, or any portion of either of them, is either State or private wetlands as alleged in paragraph 2 of your Petition.

6. Give the names of any person whom you propose to call as a witness (a) to testify to the facts or facts referred to in Interrogatory number 5 hereof, and (b) through whom you propose to introduce into evidence any such record referred to in interrogatory number 5 hereof.

6. State precisely and in detail the fact or facts and give reference to all records upon which you base your claim that the two lots in question, or any part of either of them, are subject to a public right of free use by the establishment of a fee interest or some lesser interest as alleged in paragraph 4 of your Petition.

7. Give the names of any persons whom you propose to call as a witness (a) to testify to the fact of facts referred to in interrogatory number 6, and (b) through whom you propose to introduce into evidence any such record referred to in interrogatory number 6 hereof.

8. State precisely and in detail the fact or facts and give reference to all records upon which you base your claim that for more than 20 years the two lots in question, have been maintained, used and enjoyed by the public for recreation, picnicking, access to the ocean waters, and for other associated beach uses and that said use was without license, continuous and extended for such a period of time so as to ripen into a public easement as alleged in paragraph 5 of your Petition.

9. Give the names of any persons whom you propose to call as a witness (a) to testify to the fact or facts referred to in interrogatory number 8 and (b) through whom you propose to introduce into evidence any such record referred to in interrogatory number 8 hereof.

10. Please list the names and addresses of any members of the public who used the two lots in question for the purposes claimed by you in paragraph 5 of your Petition and the dates on which such persons used the two lots for said purposes.

11. With reference to the two lots in question, do you contend that by the process described in paragraph 6 of your Petition that the waters of the Atlantic Ocean have risen to the point where private ownership of said two lots has become completely submerged, partially submerged or extinguished in any manner.

If your answer is in the affirmative please indicate as follows:

A. The exact dates on which any of the said two lots became submerged or partially submerged indicating on each of said dates how much of said lots were submerged.

B. The fact or facts and give reference to all records upon which you rely to support your claim that any part of said lots were submerged.

C. The names of the persons who will testify to the fact or facts referred to in part B of this interrogatory and the names of the persons through whom you propose to introduce into evidence any such record referred to in part B of this interrogatory.

12. State precisely and in detail when and describe what work was done with public funds in order to prevent erosion of the two lots in question and the accumulation of more sand thereon as alleged in paragraph 7 of your Petition.

13. When the funds were expended and the work done as described in answer number 12 hereof, was any portion of the two lots in question below the mean high water mark of the Atlantic Ocean.

If your answer is in the affirmative, please indicate exactly how much of the lots in question were below the mean high water mark.

14. Do you contend that the lots in question or any portion thereof are held by the State of Maryland in trust for the common enjoyment of the people of Maryland for recreational and associated purposes?

If your answer is in the affirmative, state as follows:

A. The fact or facts and give reference to all records upon which you base any such claim.

B. The names of any persons whom you propose to call as witnesses to testify to any such fact or facts referred to in paragraph A of this interrogatory add the names of any persons through whom you propose to introduce into evidence any such records.

15. Do you contend that any permits from any governmental agencies necessary to construct the proposed building on the lots in question have not been obtained.

If your answer is in the affirmative, please state which of said permits have not been obtained.

16. Does the State of Maryland, through any of its agencies, assess the two lots in question and collect real estate taxes on same.

If your answer is in the affirmative, please indicate as follows:

A. Approximately how long has the said State been assessing the said lots and collecting real estate taxes on same.

B. The exact dimensions of the said lots assessed by you and on which you collect real estate taxes.

RICHARDSON, ROGAN & ANDERSON,

Patrick L. Rogan, Jr.

DEFENDANT'S ANSWERS TO INTERROGATORIES OF STATE OF MARYLAND

Answers of 71st Street, Inc. to Interrogatories propounded by State of Maryland:

1. Did the Defendant retain or employ any experts, surveys or technicians to report on the tidal action which has occurred on the beach in Ocean City in the area between 70th and 72d Streets and to report also regarding the physical dimensions of the beach during the course of the past fifty years, the effects of storms on the beach, the improvements made on the beach, the high tide line and its relative position from 1890 to the present, and any other information relative to the physical appearance and cross-section of the subject beach area? For each such expert, surveyor or technician, state:

a. His name, title, home and business address.

b. His profession or occupation, and the field in which he allegedly is an expert.

c. Whether you intend to call him as a witness during the trial of this action.

A. Yes.

(1) a. George Bert Cropper; home — Jacqueline Ave. and 15th Street, Ocean City, Maryland; business — North First Street, Ocean City, Maryland.

b. Registered professional land surveyor and registered professional engineer. Expert in land surveying and engineering.

c. Yes, we intend to call him as a witness.

(2) a. Patrick J. Hannon; home — 1306 Camden Avenue, Salisbury, Maryland; business — 116 A North Division Street, Salisbury, Maryland.

b. Registered professional land surveyor and civil engineer. Expert in land surveying and engineering.

c. Yes, we intend to call him as a witness.

2. If you intend to call said expert as a witness during the trial of this action, state the following for each such expert, surveyor or technician:

a. Academic background.

b. Present employment.

c. Attach written report or opinion.

A. (1) George Bert Cropper.

a. B. S. Civil Engineering, Duke University.

b. Owner and operator — George Bert Cropper, Inc. and George B. Cropper Surveyors.

c. No written report.

(2) Patrick J. Hannon.

a. B. S. Civil Engineering, New Hampshire University.

b. Owner and operator of P. J. Hannon Associates.

c. No written report.

3. If surveys were made by any experts or technicians, state with regard to said tests:

a. The dates surveys were made.

b. Results of surveys.

c. Supply a copy of survey.

A. (1) George Bert Cropper made survey dated February 1972, the result of which is a plat which shows the Ocean City Building Limit Line; the Mean High Water Line for the years 1962, 1972, 1942, 1850, 1929, and 1922; the block of land between 71st and 70th Streets, Ocean City, Maryland (Block 38); it superimposes on said plat three prior plats of the block being Isle of Wight Plats recorded in Worcester County, Maryland, in Liber O.D.C. 2, Folio 23, Isle of Wight Plat recorded in Worcester County in Liber O.D.C. 2, Folio 32, and Ocean Bay City Plat recorded in Worcester County in Liber O.D.C. 2, Folio 76; the said plat dated February 1972 further shows the sand fence in block 38. There was also prepared a profile of cross-sections of land located 125 feet North of 71st Street for March of 1972, and March of 1962, of land located 50 feet South of 71st Street for March 1972, of land located 125 feet North of 66th Street for March 1972 and March 1962. These profiles also show the location of the Ocean Highway, Easternmost alley and mean high water for said areas at said times. The profile for March 1972 (50 feet South of 71st Street) shows also the Building Limit Line.

Section C of this interrogatory requests a copy of the surveys made. Defendant excepts to furnishing same for the reason that it is a work product prepared specifically for this suit and same is privileged.

(2) Patrick J. Hannon. Mr. Hannon is preparing a survey of the property in question but same has not been completed as yet. This Defendant will supplement answers when said plat is received.

Seventy-First Street, Inc.

ANSWERS OF THE STATE OF MARYLAND, DEPARTMENT OF NATURAL RESOURCES, TO INTERROGATORIES OF 71ST STREET, INC.

The State of Maryland, through the Department of Natural Resources, in answer to the interrogatories propounded on behalf of the Defendant, comes now and says:

1. Yes.

a. Robert Lindner, Civil Engineer, Navigation Branch, Planning Division, Army Corps of Engineers, Baltimore, Maryland; George Hoerich, Hydrographic Engineer, Department of Natural Resources, State Office Building, Annapolis, Maryland; Turbid Slaughter, Geologist, Maryland Geological Survey, Johns Hopkins University, Baltimore, Maryland; Marshall Augustine, Sediment Control Specialist, Department of Natural Resources, State Office Building, Annapolis, Maryland.

b. See job descriptions above. Mr. Lindner is involved in the study of hurricane and erosion effects on beach areas and Mr. Hoerich is a beach surveyor for the Department of Natural Resources.

c. Yes.

2. a. Mr. Lindner is a graduate of the University of Maryland, School of Engineering; Mr. Hoerich attended the University of Maryland, the Community College of Baltimore and Johns Hopkins University, Mr. Slaughter received his AB in 1940 and his Masters Degree in 1949 from Johns Hopkins University; Mr. Augustine graduated from Penn State University and has worked for 25 years with the Federal Government and with the Soil Conservation Service.

b. See above.

c. No written reports or opinions; however, a survey was made by the Department of Natural Resources and is enclosed herein. (Exh. 1).

3. a. See 2c above.

b. Inapplicable.

c. Inapplicable.

4. In addition to those names specified above, the State may call William Livingston of the State Planning Commission; George Schoep, lifeguard for 20 years in the Ocean City, Maryland Beach Patrol.

5. The State basis its claim with regard to wetlands on the records kept by the Geological Survey and the Army Corps of Engineers regarding the inundation of the subject lots within Block 38. In addition, the Department will refer to the original plats 20DC23 dated March 30, 1927, 20DC32 dated September 1929 and 20DC76 dated December 1939/40.

6. The State reserves a right to call any and all the witnesses listed above with regard to the claim mentioned within paragraph 5, above.

6. The lots in question are within that area enjoyed by the public over a substantial period of years for legitimate public purposes. These uses included the launching of boats, fishing, access to water, sunbathing, picnicking, and other like considerations.

7. George Schoep. The State reserves the right to introduce such other witnesses to enlarge upon Mr. Schoep's testimony.

8. The claim of the State is based upon observations by persons in the area, by known general custom that such uses existed and continued for a period in excess of 20 years. In addition to the aforementioned, the maintenance and care of the beach area by governmental authorities, the preservation of the beach, the refurbishing of the beach area, the shore control techniques, the building of the duneline, and other like considerations.

9. George Schoep, Robert Lindner, William Livingston, James Small, Clarence Taylor, and such other witnesses as the State reserves its right to call.

10. The State contends that the public in general used the lots in question. Insofar as specific names are required, such names are irrelevant to this cause.

11. Yes.

A. On March 6-8 of 1962 and other preceding dates. These dates and incidents will vary since it appears that the subject lots have shifted from the original position plotted out. For instance, it appears that in 1927 the easternmost boundary of the subject lots was approximately 234 feet from mean high tide. In 1929 the position of the lots was changed and so was high tide; the easternmost boundary was approximately 220 feet from the high tide line. In 1939 the distance was approximately 160 feet, and in 1972 this distance is approximately 85 feet.

B. Operation Five-High Disaster Recovery under Public Law 875 from 6-8 March 1962 Storm, by U. S. Army Engineer District, Baltimore Corps of Engineers, Baltimore, Maryland, December 1962, and other records kept by the Army Corps of Engineers, the State Roads Commission, including newspaper accounts, and also Coast and Geodetic Survey and the Maryland Geological Survey records.

C. Turbid Slaughter, Robert Lindner, James Small, George Schoep.

12. See answer to number 8.

13. Yes. Almost all the lots in question were inundated by water as indicated in photographs.

14. Yes.

A. Those records recited above.

B. Those witnesses named above.

15. Irrelevant.

16. Answer will be supplied.

Joseph Manning,
Deputy Secretary,
Department of Natural Resources.

TITLE — LETTER AND STIPULATION EXHIBIT

June 8, 1972

Honorable Daniel T. Prettyman
Circuit Court for Worcester County
Snow Hill, Maryland

Re: E. T. Park, Inc.
and
State of Maryland,
Department of Natural Resources
vs.
71st St., Inc.

Dear Judge Prettyman:

Regarding our stipulation in the above referred to trial as to the information to be provided by Joseph G. Harrison, Supervisor of Assessments for Worcester County, enclosed herewith please find the original letter of Mr. Harrison dated June 7, 1972, with attachments.

I am sending all counsel a carbon copy of this letter and photocopies of the information provided by Mr. Harrison.

Very truly yours,

PATRICK L. ROGAN, JR.

PLR:dw

cc:
Warren Rich, Esq.
Hamilton P. Fox, Esq.
Dale Cathell, Esq.
Henry P. Walters, Esq.

Office of the
County Commissioners
For Worcester County, Maryland

June 7, 1972

Richardson, Rogan & Anderson
Richardson Bldg.
Salisbury, Md. 21801

Att: Patrick L. Rogan

Dear Mr. Rogan:

Enclosed on Dune Line sheet list of money spent by Worcester County in maintaining the Dunes Line as listed by years.

The other two sheets list the assessments starting in 1896 of which Lots 4, 5 Blk. 38 was part of the larger tract.

Note 1928 Lots 4, 5 listed separately.

Trusting this is the information asked for by the court.

Yours truly,

JOSEPH C. HARRISON,
Supervisor.

Dune Line

Beach, Preservation Planting Grass Sand Fences Restoring Dune Line as it was constructed by Army Engineers in 1963.

1968	3365.39
1969	14765.73
1970	632.64
1971	14597.02

The above figures supplied by Worcester County Roads Department, Mrs. Townsend, 6/6/72.

1896—Assessment Book—District 3

Atlantic Coast & Improvement Co.

1420.25 acs.—Assessment $2850

1909—District 3—Assessment Book

Atlantic Coast & Improvement Co.

Assessment $3000

1918—District 3—Assessment Book

Isle of wight Land Company

Assessment $3000

1922—District 3—Assessment Book

Isle of Wight Land Co.

Assessment $3000 Changed to 127 Blks. & Increased Assessment to $15000 for 3/1/26. Sold off some lots reduced Assessment to $14775

1928—District 3—Assessment Book

Sold to Lillian P. Trout

Maridel Beach[Lots 7, 9 Blk. 30 Fronting Maryland Ave.

lots 12, 13, 14, 15 Blk. 30 Fronting 29th St.

Lot 27 Blk. 30 Fronting 13th St.

Lot 2 Blk. 33 Fronting Atlantic Ave.

Lot 1 Blk. 36 Fronting Atlantic Ave.

Lots 4, 5 Blk. 38 Fronting Atlantic Ave.

Lot 5 Blk. 113 Fronting Maryland Ave.

assessment $500 from 1928 to 1933. Changed to D-10

1939—District 10—Assessment Book

Lillian P. Trout

12 Lots—Assessment $800, Increased Assessment to $1200 for 1947

1948—District 10—Assessment Book

Lillian P. Trout

1 Lot Assessed at 200 & 11 Lots assessed at 300—Total Assessment $3500

Sold off some lots reduced Assessment to $1200

1950—District 10—Assessment Book
Sold to Mary Y. Veasey
Assessment $1200
Sold Lots 4, 5 Blk. 38 to Hough O. & Laura E. C. Crow

1951—District 10—Assessment Book
Hugh O. & Laura E. C. Crow
Assessment $600—$300 each Lot

1951—District 10—Assessment Book
Sold to Avery W. Hall, et al.
Assessment $600—$300 each Lot

1951—District 10—Assessment Book
Sold to Hugh O. & Laura E. C. Crow
Assessment $600—$300 each Lot

1953—District 10—Assessment Book
Hugh O. & Laura E. C. Crow
Assessment $1000—$500 each Lot
Sold to Roy G. & Ethel V. Klepser

1954—District 10—Assessment Book
Roy G. & Ethel V. Klepser
Assessment $1000—$500 each Lot

1957—District 10—Assessment Book
Roy G. & Ethel V. Klepser
Assessment $2400—$1200 each Lot
Changed Name to Roy G. & Betty J. Klepser

1961—District 10—Assessment Book
Roy G. & Betty J. Klepser
Assessment $4784—$2392 each Lot
Sold to J. Robert & Mildred M. Brown & H. Robert Sr. & Betty M. Yauger

1963—District 10—Assessment Book

J. Robert & Mildred M. Brown & H. Robert, Sr. & Betty M. Yauger

Assessment $4784—$2392 each Lot

reduced Assessment to $3016—$1508 each Lot due to March 6, 7 Storm

1966—District 10—Assessment Book

Sold to J. Robert & Mildred M. Brown

Assessment $3016—$1508 each Lot

1969—District 10—Assessment Book

J. Robert & Mildred M. Brown

Assessment $7500—$3750 each Lot

Sold to Robert J. & Elizabeth Taylor

1970—District 10—Assessment Boo

Robert J. & Elizabeth Taylor

Assessment $7500—$3750 each Lot

Sold to Seventy First St., Inc.

1972—District 10—Assessment Book

Seventy First Street, Inc.

Assessment $14400—$7200 each Lot

OPINION AND ORDER OF COURT

The Court again approaches a case of first impression in Maryland. In the instant proceeding, however, that fact should not be so startling, in view of the circumstance that all of the oceanfront land in the State of Maryland lies within the boundaries of Worcester County. This County is, indeed, "Maryland's Window To The Sea".

The Court desires to make clear certain generalizations, which, in effect, are a repetition of similar statements recently made by this Court in another matter. In deciding this case, this Court does *not* sit as a Legislative body. It does *not* sit as an Executive, to administer the policies determined by the Legislature. This member of the Court might well disagree with the action, or intention, of legislative bodies, and the policies enunciated by them, whether they be City, County, State or National. This

member of the Court might, also, personally disagree with the administration of that policy by the Executive, whether it be City, County, State or National. As a matter of fact, one of the greatest sacrifices made by a person assuming the Bench is the forfeiture of the privilege to speak on public issues other than those directly related to the administration of justice. Perhaps the greatest frustration experienced by a Judge is that restraint, particularly in view of the experience and knowledge which he has obtained from others through the trial of cases resulting from disputes directly connected with the issue before the public.

In this case, the Court is called upon to determine the facts, as revealed by the evidence, and the reasonable inferences which may be deduced therefrom by a reasonable person. Having thus determined the facts, the Court is compelled to apply those facts to the law, as the Court determines the law to be, and, in that manner, render a decision. The law is to be derived from the Constitution of the United States, the Constitution of Maryland, the laws of the State of Maryland, the Ordinances of Worcester County, the Ordinances of the Town of Ocean City, the interpretation thereof previously enunciated by the Court of Appeals of Maryland and the Supreme Court of the United States. Decisions of courts of sister states and of lower federal courts may be persuasive, but they are not controlling.

It is essential that everyone understands one salient fact. It has not been suggested by any party to this proceeding, by any counsel to this proceeding, by any legislative enactment, by any executive order or implementation, by any administrative dictate or determination, or by any person, group of persons, firm, or corporate entity, within ear-shot of this member of the Court, either formally or informally, that the *entire* ocean-front land in Worcester County, nor any linear portion thereof (no matter how small), be continued or maintained in private ownership. *Everyone wants a portion of the ocean-front land to be available for public use.* The Court shares that desire. *The difficulty arises in determining the width of the area assigned to public usage.* That determination may, or may not, vary with each individual piece of property under consideration. For example, this case will *not* automatically be controlling and determinative in the case of Cantrell v. Caine, No. 4658 on the Civil Docket of this Court, because of the difference in the Plat and factual situation there involved, together with certain different issues therein raised. Accordingly, the decision in this case will pertain only to the property involved herein. During the course of this Opinion, however, there may be set forth certain general proportions of law, and certain general findings of fact, which *may* have application to the entire ocean-front.

There are certain facts of record, among the land records of Worcester County, which are of general application within the confines of the areas

covered by those records. It has been a long time since this member of the Court looked, or studied, the plat of the "Old Town", between South Division Street, as delineated on the Map of the Property of the Sinepuxent Beach Company, 1890, recorded in the landrecords of Worcester County, in Plat Book O. D.C. 1, folio 2, and North Division Street as shown on that plat. That area is not in contention in the instant proceeding, and the Court will express no opinion thereon. It is clear, however, that on the said Plat of the Sinepuxent Beach Company, the area south of South Division Street, as thereon delineated (which now is of little significance because of the Ocean City Inlet and the acquisition of the remainder of Assateague Island by the federal and state governments), and the area north of North Division Street, as delineated on that said Plat, offers a dedication of all the land to the east of the easterly lot lines, as shown thereon, by labelling the same as "Atlantic Avenue". There is no question that this offer of dedication has been accepted by the Mayor and City Council of Ocean City, beginning a number of years ago. It is likewise true that, beginning with the Plat entitled "The Isle of Wight Land Company, Inc. Developing Wight City and Seabay, Maryland", dated 1917, and recorded among the land records of Worcester County in Plat Book O. D. C. 2, at Folio 4, continuing with the Plat of "The Isle of Wight Land Company, Inc.", recorded on March 30, 1927, among the land records of Worcester County in Plat Book O. D. C. No. 2, at Folio 23, and continuing with the Plat of "Oceanbay City, Md.", dated December — 1939 & January — 1940, recorded among the land records in Plat Book O. D. C. 2, Folio 76, all offered to dedicate to the public the area east of the easterly lot lines of the property therein delineated, by inscribing thereon, the word "Beach", and/or lines indicating a Boardwalk, with the same being explicitly delineated on the last of the three named Plats. There is no question but that the Mayor and City Council of Ocean City have accepted that offer of dedication ever since the annexation of this area within the corporate limits of the City of Ocean City in the year 1965. The property which is the subject of these proceedings lies within the limits of the three named Plats. The Plat of the Fenwick Island Land Company (joining the Isle of Wight Plat to the north) is subject to different considerations, and is not before the Court in this particular proceeding; accordingly, the Court will not express any opinion with regard to that area, and the generalizations which the Court has heretofore made with regard to the Sinepuxent Beach Company Plat and the Isle of Wight Land Company Plat do not apply in that area.

No question arises with regard to the access of the public to the "beach" areas. The Plat of the Sinepuxent Beach Company of Baltimore City provides for east-west streets every 300 feet from Baltimore Avenue to Atlantic Avenue. The Plat of the Isle Of Wight Land Company provides for 50-foot streets at 250-foot intervals throughout the area from the Beach Highway to the "beach". The Mayor and City Council of Ocean City have

accepted the dedication of all the streets on the Sinepuxent Beach Company Plat and of all the streets on the Isle of Wight Land Company Plat to at least the present 94th Street. The area between the present 94th Street and the area covered by the Plat of the Fenwick Island Land Company are not before the Court, and the Court expresses no opinion with respect thereto.

DEFINITIONS

For the purposes of clarity, and in order that there be no mistake in the minds of the readers of this Opinion, it becomes necessary to state certain definitions which will be used herein. The Court recognizes that the various experts do not always agree on the same terminology, but the Court is selecting the terminology which, if not the consensus as expressed on the witness stand, appears to be the consensus of the meaning of the witnesses in describing the various areas.

"Beach" will be used to refer to that area which has been dedicated to public use according to the plats of the property on record in the Office of the Clerk of this Court. In reading legal authorities, however, *it is important to remember* that "beach" and "shore" are used synonymously with "foreshore" (meaning the area between mean high water and mean low water). Shalowitz, "Shore and Sea Boundaries", Vol. 1, pp. 281 and 318.

"Dune Line" will refer to the dune line constructed by the Corps of Engineers of the United States subsequent to the storm of March 6-8, 1962. It will become apparent, later, that there existed natural dunes throughout a broad area of Ocean City in past years, and in the annexed areas within comparatively recent years. It will also become apparent that the State Roads Commission of Maryland attempted to connect these natural dunes, or to foster the growth of a natural dune, to provide a line of protection after the construction of the "Beach Highway" north of 26th Street to the Delaware Line. Every effort will be made, during the course of the Opinion, to distinguish those dunal areas by reference to them as either "Natural Dunes", or "State Roads Commission Duneline".

"Groin" will be used to identify certain asphalt structures placed along, and perpendicular to, the ocean-front by the State Roads Commission in the year 1954.

"Jetty" will be used to indicate a timber structure perpendicular to the land area along the ocean-front.

"Bulkhead" will indicate a structure, of various materials, generally parallel to the ocean-front land.

"Berm" is the area of relatively flat or level sand between Mean High Water and the easterly toe of the Dune Line. (Mr. Cropper refers to this area as "Flat beach". His reference to "berm" is to an area of the foreshore between the flat beach area and mean high water.)

"Foreshore" is the area from Mean High Water to Mean Low Water. In this area, it is on a, generally, 20 to 1 slope.

"Mean High Water" means the average height of high waters over a 19-year period. "All high waters are included in the average where the type of tide is either semidiurnal or mixed." "Semidiurnal tides" (two highs and two lows each day) obtain along the Atlantic Coast. Shalowitz, "Shore and Sea Boundaries", Vol. 1, pp. 301 and 313.

"Mean Low Water" means the average height of low waters over a 19-year period. "All low waters are included in the average where the type of tide is either semidiurnal or mixed." Shalowitz, supra.

"Spring Tides" means tides of increased range occurring semi-monthly as the result of the moon being new or full. "Tifes during these periods rise higher and fall lower than during the rest of the month." Shalowitz, supra, p. 314.

"Neap Tides" means tides of decreased range occurring semi-monthly as the result of the phase of the moon. "Tides during these periods do not rise as high nor fall as low as during the rest of the month." Shalowitz, supra, p. 304.

"Mean Sea Level" means the average height of the surface of the sea for all stages of the tide over a 19-year period, determined by actual height readings, and adjusted by a "net", to produce a "sea level datum", the last general adjustment being in 1929.

"Foredune" refers to the same area as "Flat Beach", or "Berm".

"Littoral Drift" means the movement of particles of sand by the action of the sea.

"Nodal Point" means a point along the shoreline at which littoral drift changes direction. In this area, Bethany Beach is the "Nodal Point", and Maryland ocean-front land is generally said to be fed by a southerly littoral drift (although conditions may from time to time change the direction of the drift temporarily).

"Bar" means a ridge of sand off-shore, generally parallel to the shoreline, which lowers the velocity of the wave, causing a churning action, which disturbs the sand on the bottom and moves it in the same direction that the wave was traveling. It has been described as the "prime energy dissipater" [T. 732]. (This area is referred to by Mr. Augustine as the "Longshore Bar", as a part of the "Longshore Physiographic Province.") There are three such bars, in varying depths of water, along the Maryland coastline [T. 552].

"Suspension" means windblown fine particles of sand [T. 664].

"Saltation" means the movement of particles of sand along the ground by the force of the wind, and includes those larger particles which have, at one point, been identified as "Surface Creep" [T. 664].

"Grass" means American Beach Grass.

"Fence" means a snow-type fence, preferably with strips one and a quarter inch wide set three quarters of an inch apart [T. 701].

"Laminar Flow" means the natural, unhampered flow of water.

"Turbulent Flow" means the restricted flow of water either through or around an object, causing the disturbance of the ground surface, generally in an elliptical pattern, which may, or may not, return to its normal resting place on the ebb of the water, depending upon the degree of turbulence.

"Blow Out" means the measurable erosion, in substantial proportions, as a result to turbulence, either by water or wind.

"Shoreline" means the line of contact between the land and a body of water. It is synonymous with "Coastline". On Coast and Geodetic Survey nautical charts and surveys, it "approximates the mean high-water line." Shalowitz, supra, Vol. 1, p. 314.

"Caldwell Section" is a suggested ideal dunal area from the westerly toe of a duneline through the foreshore.

"Physiographic Province" is a geographical area subject to the laws of nature and/or natural phenomena. In this case, it applies to the movement of sand by energy created through the forces of wind and water.

"The '62 Storm" refers to the extra-tropical storm (neither a "hurricane" nor an ordinary "northeaster") which occurred on March 6, 7, and 8 of the year 1962. [See pp. 16-17 of "High Winds . . . High Tides", by Dr. Reginald V. Truitt, dated December, 1967, and pp. 10 and 12 of "Operation Five-High", U. S. Army Engineer District, Baltimore, Corps of Engineers, December, 1962, for a meteorological description of this particular phenomenon.]

"Coastal Highway" means the north-south artery for traffic between 33rd Street in Ocean City and the Delaware Line. It is variously referred to as the "Beach Highway", "Maryland Avenue" and "Route 528". It becomes "Philadelphia Avenue" from 33rd Street south to the Inlet.

"Property in Question" means Lot Numbers 4 and 5, in Block Number 38, on the "Revised Plat of Oceanbay City, Maryland", recorded among the land records in Worcester County in Plat Book O. D. C. 2, at folio 76.

THE POSTURE OF THE CASE

On February 7, 1972, E. T. Park, Inc. filed a "Petition for Injunction" against the Mayor and Council of Ocean City, Brady Bounds, Building Inspector for the Town of Ocean City, George Bert Cropper, Inc., and 71st Street, Inc., alleging that the Petitioner was "the owner of a tract of land located on the Southerly side of 71st Street in the Town of Ocean City, which said tract of land is adjacent to the ocean beach as it exists between 70th Street and 71st Street and is separated from said ocean beach by a 10-foot alley running in a North and South direction and the artifically created berm or sand dune created there by the Army Corps of Engineers pursuant to agreements with certain property owners in the Town of Ocean City, Maryland, and Worcester County Commissioners for the purpose of protecting property of your Petitioner and other property owners with proprrty similarly located and the improvements thereon . . .", that, inter alia, "the area East of the 10-foot alley which adjoins your Petitioner's property and runs in a North-South direction is a public beach in and upon which your Petitioner and the public in general have acquired an easement for the use as a public beach" which easement extended "from the mean low water mar where the title of the State of Maryland begins and extends in a Westerly direction past the mean high water mark to the area of the beach where the upland supports vegetation", that the Mayor and Council of Ocean City had established a building limit line in the area but that the "said public building line does not adequately protect the public beach for the reason that said line runs so close to the mean high water mark as to dissect the public beach" in the area between 70th and 71st Street, and that the said line would totally eliminate portions of the public beach by virtue of the fact that the wave wash at normal high tide goes West of said building limit line so that during a normal high tide no dry sand area would exist for the use of the public, that George Bert Cropper, Inc. had applied to Brady Bounds for a permit to erect a structure entitled "Sandbridge Condominium", consisting of eight units, for 71st Street, Inc., that the construction of the building would cause irreparable damage "to the Plaintiff and to the public in general by virtue of the fact that it will be a public nuisance located in and upon the dry sand area in which the public has acquired an easement", that George Bert Cropper, Inc. had already erected stakes "on the public beach" which showed "that the Northeasternmost corner of the proposed" structure would "be located in the wave wash of the Atlantic Ocean", to the end that there would "be no Public Beach east" of the proposed structure, and praying for an immediate and temporary injunction enjoining Mr. Bounds from issuing the said building permit, but, in the event that the said permit had then been issued, to enjoin the two corporations from proceeding with construction of the proposed structures, with the further request that, upon a determination of the case, a permanent injunction be issued prohibiting any type of construction "within the limits of the Public Beach area between 70th and 71st Streets so that said building limit line would run along the Easterly line of the aforementioned 10-foot alley".

The Court refused to issue the temporary, ex parte, injunction, by Order of Court, dated February 9, 1972, but, therein, signed a "Show Cause Order", and assigned the date of February 22, 1972 for a hearing in the matter. Because of a change in counsel for 71st Street, Inc., on February 21, 1972, the Court ordered a postponement of the hearing, but suspended all construction of the property pending an outcome of the proceeding. The building permit had been issued on February 8, 1972. On March 10, 1972, the Department of Natural Resources of the State of Maryland filed a "Motion For Leave To Intervene", upon which the Court signed a "Show Cause Order", and assigned the date of March 30, 1972 for a hearing thereon. On that date, the Court being advised that the contract between George Bert Cropper, Inc. and 71st Street, Inc. had been dissolved, or at least suspended, upon motion, the Bill of Complaint against George Bert Cropper, Inc. was dismissed. The motion to intervene by the Department of Natural Resources was granted. The said Department of Resources having filed its "Petition" as to the merits on March 15, 1972, the Defendants were granted fifteen days in which to answer the same. On February 23, 1972, the Mayor and Council of Ocean City had filed a "Motion To Dismiss", which was withdrawn on March 30, 1972. At the same time, the Petitioner dismissed its Bill of Complaint against Brady Bounds. The Petition of the Department of Natural Resources alleged, inter alia, that it appeared that a portion of the land in question was "wetland, either State or private, and, therefore, subject to regulation by the Department of Natural Resources and the Board of Public Works of the State of Maryland in accordance with the provisions of Article 66C, Sections 719 through 731 of the Maryland Annotated Code", that the Department of Natural Resources had been "charged to safeguard the wise use and enjoyment of the ocean shorefront for the greatest benefit to the State and its citizens", that "a public right of free use of the beaches has been established either by the establishment of a fee or some lessor interest during the course of the past several years", that "[f]or more than 20 years the beaches of Ocean City, including that parcel lying between mean high tide and the present dune line, have been maintained, used and enjoyed by the public", and that such use "was without license, continuous, and extended for such length of time that said use has ripened into a public easement", that "[d]uring the past 100 years the areas of beach within Ocean City have undergone constant change, including the natural erosion process", and that, as a result thereof, "the waters of the Atlantic Ocean have risen to the point where private land ownership has become completely submerged", that "from time to time public funds were expended on the Ocean City beach in the area of 70th and 71st Streets in order to prevent the erosion of said beach and to assist in the accumulation of more sand area for those beaches", that such accumulation of sand above "mean high tide line" was through artificial means, not through the natural processes of, accretion and, therefore, did and does not inure to the beneficial interest of bordering private property owners", that "the lands lying between the

western boundary of foreshore area to the dune line are held by the State of Maryland in trust for the common enjoyment of the people of Maryland, to be used for recreational and other associated purposes", and "[t]hat the proposed building would encroach upon the dune line and prevent the public use of the beach area between 70th and 71st Streets in derogation of the common trust doctrine". The Department of Natural Resources, therefore, in addition, asked the Court to enjoin the issuance of any building permit for construction on the lands "until the relative rights of the parties" could "be adjudicated and all required permits have been obtained from the Department of Natural Resources, State of Maryland, and the Board of Public Works, State of Maryland". On March 21, 1972, the Court had ordered the hearing on the merits to begin on May 30, 1972, and counsel had been notified to complete pre-trial discovery before that date. On April 21, 1972, Seventy First Street, Inc. filed an "Answer to Petition of E. T. Parks, Inc.", "Answer to Petition of Department of Natural Resources," and a "Counter Petition". In its Answer to the Petition of E. T. Park, Inc., Seventy First Street, Inc., alleged that it held legal title to Lot Nos. 4 and 5 in "Block 39" [obviously a typographical error, because the property is located in Block 38], *denied*, of course, any allegation that the said lots constituted a "Public Beach", that the public had acquired any easement thereon "for use as a public beach", that the dry sand area from mean high water to the upland supporting vegetation constituted a public beach or over which the public enjoyed an easement, recognized the establishment, by the Mayor and Council of Ocean City, of the building limit line, but denied that it, in any manner, constituted a usurpation of any public beach area, admitted the obtaining of the building permit, denied that the irreparable damage to the Petitioner by virtue of the issuance of the building permit, denied that any portion of the proposed structure "would have been East of the mean high water or that it would be of legal damage to anyone", alleged that the structure would be in compliance "in every respect" with the Building Limit Line Ordinance, denied any private easement in E. T. Park, Inc. over the subject property (as particularized by the Petitioner in answer to a Demand for Particulars), in view of the fact that the Petitioner had acquired title to the property in 1967, denied any public easement in the property by virtue of the "dune line easement" and attached a copy thereof to its Answer, alleging that the document granted "only the right to construct, reconstruct and maintain a sand dune barrier and nothing else", and further alleged that the Petitioner had filed its action "in bad faith, without substantial justification and for purposes of delaying Defendant from constructing a condominium" and that "because thereof, Defendant has been seriously damaged". Its Answer to the Department of Natural Resources made similar *denials* of any public easement, public use, regulation of the property under the "Wetlands Act", any interest in the property by the public, any adverse use of the property by the public for more than 20 years, any erosion of the property in question which would submerge private land

ownership, denied the accumulation of the sand above the "mean high tide line" had been through artificial means and that the accretion, therefore, inured not to the benefit of private owners of the property, that the area to the east of the dune line is held by the State of Maryland in trust for the common enjoyment of the people, and that the proposed structure would so encroach upon the dune line as to prevent public use of the beach area "in derogation of the common trust doctrine". It further alleged that "The State of Maryland for many years has assessed the subject property for purposes of taxation and has collected taxes on same. Further, it alleged that the plans for construction of the proposed condominium received approval of all necessary governmental agencies including Sediment Control Office". The Counter Petition alleged that Seventy First Street, Inc. intended to construct eight condominium units on Lots No. 4 and 5 of Block 38, as delineated on the "Plat of Ocean Bay Colony [sic]", which would be ready for occupancy during the Summer season of 1972, had obtained all the necessary financing, had pre-sold five of the said units, had expended monies for plans and preparations to construct the said building and had contracted with George Bert Cropper, Inc. therefor, that "because of the action of E. T. Park, Inc.", it was "caused considerable damage in losing large sums of money which it paid in advance for its proposed condominium, in losing the five (5) sales which were presold, in delaying construction of its proposed project as construction costs are increasing, in forcing Counter Petitioner to release George Bert Cropper, Inc. from the said construction contract in order to mitigate damages between Counter Petitioner and George Bert Cropper, Inc., in damaging the reputation of Counter Petitioner to perform its said contract; in causing Counter Petitioner to lose profits from sales, in causing Counter Petitioner to hire Attorneys and experts to defend this said action and in causing Counter Petitioner to spend considerable time and money to defend this action", and further alleged that the action was filed "in bad faith, without substantial justification and for purposes of delay. . ." It then claimed an award of monitary damages, including counsel fee, by the Court.

During the course of the hearing, the Court bifurcated the proceeding, and postponed a hearing upon the Counter Petition until after a determination of the merits upon the original Petitions and Answers [T. 445 and 446]. The Mayor and City Council of Ocean City filed an Answer on April 25, 1972 in which it alleged its express power, contained in its Charter (Section 181, subsection 8) to safeguard the beach areas within its limits, acknowledging that the portion of the beach located southward of 33rd Street had been used, maintained by the public for over twenty years and "that *portions*" of the beaches north of 33rd Street had been maintained, used and enjoyed by the public since 1965, before which time that area was "a Worcester County Beach", alleged that "the beaches now in Ocean City have not only eroded, but have also increased in some areas from accretion", that it had no knowledge of "any platted lots on the Ocean Coast in

Ocean City being now completely submerged, but, however, does not deny that some private property may be submerged", admitted that "from time to time public funds were expended in the subject area to prevent erosion and protect against storm damage", but stated that it had "no knowledge as to accretion, or lack of it, between 70th and 71st Streets further stating that accretion and erosion in said area is a continuing process", neither admitted nor denied the trust claimed in Paragraph 8 of the Department of Natural Resources' Petition, admitted that the proposed building would extend eastward of the dune line, "and further admits that if there is in fact such a common trust said building would restrict public use of such trust held area, but it does, however, further affirm that it was unaware of the possibility of such a trust prior to the service of the aforesaid Petition", and alleged that "prior to this law suit it was of the opinion that all lands West of the building limit line (except streets and street ends) and some land Eastward of said line was private property", and "[t]hat it is unaware of any Maryland law, (statute or case law) that questions the ownership of such platted lots or created the trust claimed.", and [t]hat this Defendant was and is in the process of acquiring portions of said beach areas through an open space and land acquisition program." On the same date, the Mayor and City Council of Ocean City also filed an Answer to the Petition of E. T. Park, Inc., in which it alleged that it had "no knowledge of any easements acquired by the public or the Petitioner, therefore, it neither admits or denies the acquisitions of said easements.", that it denied that title terminated in the State of Maryland "at mean low water", but that the same terminated at "mean high water", that it denied "that the purpose of establishing a building limit line was to recognize a public beach stating that the purpose of said line was to regulate the easterly direction of construction in reference to the Atlantic Ocean so that such construction and buildings on adjacent properties would be reasonably safe and secure in the event of a storm", that it "felt that to allow construction easterly of said line would be hazardous, especially considering the effect of possible down drift of storm debris into neighboring properties", and that "it felt that the areas of private property east of said line should be made subject to public acquisition and said area has been programmed for eventual acquisition by fee simple, easement or dedication", and that it was "without knowledge as to alleged bisecting of any public beach in the subject location by said line stating that the line was, as of the date of its adoption, established generally to be the same approximate distance from the then mean high water mark and to be just immediately easterly of the actual then eastward limit of buildings in respective locations", that the line "was established in reference to mean high water mark as of the date of its adoption and that it is physically and economically unfeasible to reestablish and relocate said line every time there is a change in the location of the shoreline, said shoreline being constantly changing", that it had no knowledge of the extent of "dry sand areas at the epecific location (or any other) due to the

rapidly changing location in topography of the shoreline", admitted the issuance of the building permit, stated that it had "no knowledge of irreparable damage or potential damage to Plaintiff's property", that it did not "consider the proposed building to be a public nuisance in respect to public beach areas further stating that portions of platted lots, generally considered to be private property, extend easterly of said building to non-platted area", stated that "whether or not the building eliminates the publics' use of a large portion of public property depends upon the establishment of what is or is not public beach", alleged that it would not issue building permits between 70th and 71st Streets east of the alley "unless any proposed project complies fully with ordinances and laws of both the local, county and state governments", alleged that it had "no knowledge of damage that might be caused the Petitioner further stating that the damage to the public depends upon the determination of the ownership of the subject property or a determination of acquired public rights in and to said property", and reiterating its position that "the permit issued and any other permit that might be issued were and will only be issued if the proposed projects comply with all applicable regulations, ordinances, etc.".

The hearing on the merits of the original Petitions began on May 30, 1972, and continued on May 31, June 1, and June 6, 1972. The Transcript was filed on November 20, 1972. Counsel had originally been granted leave by the Court to file Memoranda within the thirty days after the filing of the Transcript, with the Defendants having leave to file a Reply Memorandum within thirty days thereafter. On January 10, 1973, the "Department of Water Resources" of the State of Maryland asked for an extension of time in which to file a "Brief". The Court extended the time until January 26, 1973. E. T. Park, Inc. filed its Memorandum on February 5, 1973. The Attorney General filed the Brief on behalf of the State of Maryland on February 5, 1973. The Mayor and City Council of Ocean City filed its Brief on March 13, 1973. Seventy First Street, Inc. filed its Memorandum on March 30, 1973. On April 2, 1973, the Court asked counsel to supplement their Memoranda with photo-copies of out-of-state authorities cited in their respective Memoranda. Seventy First Street, Inc. had already taken such action as an enclosure to a letter dated March 29, 1973. The State complied on April 10, 1973. E. T. Park, Inc. did not fully comply until June 22, 1973, and the Department of Natural Resources on August 8, 1973.

The Transcript consisted of 741 pages; Memoranda consisted of 100 pages; and photo-copied out-of-state authorities and law review articles not available in the Worcester County Court Library consisted of hundreds of pages. There were 39 Exhibits attached to the Record.

The difficulty in working with this case has been the insistence by the Plaintiffs to rely upon principles of law accepted in Maryland but without

recognizing the proven facts, and by seeking to establish principles of law not recognized in Maryland, upon authorities inapplicable to the instant factual situation or legal framework.

THE ISSUES ARGUED

1. Prior to February 8, 1972, had the owners of Lot Nos. 4 and 5, in Block No. 38, on the Plat of Oceanbay City, Md., as recorded among the land records of Worcester County, Maryland, in Plat Book O. D. C. 2 at folio 76, dedicated their property to the public, or for public use? This inquiry suggests the following subsidiary questions:

a. Did the expenditure of funds by Worcester County and the exercise of the police power by the County prior to 1965 constitute an acceptance of a dedication of Lot Nos. 4 and 5 to public use?

b. Did the expenditure of City funds and the exercise of the police power by the City after 1965 constitute an acceptance of an offer of dedication of Lot Nos. 4 and 5 to public use?

2. Prior to February 8, 1972, had the public acquired an easement by prescription over Lot Nos. 4 and 5 for recreation purposes?

3. Prior to February 8, 1972, had E. T. Park, Inc. acquired an easement by prescription over Lot Nos. 4 and 5, either for access or for recreational use?

4. Prior to February 8, 1972, had the public acquired an easement over Lot Nos. 4 and 5, for recreational use, by virtue of the doctrine of "Custom"?

5. Does the State of Maryland hold title to Lot Nos. 4 and 5 by virtue of the doctrine of "public trust in natural resources"?

6. Prior to February 8, 1972, had the State of Maryland acquired title to Lot Nos. 4 and 5 by virtue of the doctrine of "Submergence"?

A subsidiary question suggested by this inquiry would be:

a. Did this title vest by virtue of the expenditure of Federal, State and County funds in the erection of the Dune Line by the Corps of Engineers of the United States Army after the '62 Storm?

b. Were the owners of Lot Nos. 4 and 5 entitled to the land restored after March 8, 1962?

7. Did the granting of an easement to the County Commissioners of Worcester County, Maryland, on June 27, 1962, by the owners of Lot Nos. 4 and 5, for the purpose of the construction of the Dune Line, constitute an easement in favor of the public for recreational use?

8. Would the granting of the requested injunctive relief constitute the taking of property for public use, without just compensation, in contravention of the Constitution of the United States of America and the Constitution of the State of Maryland?

FACTS

The Property in Question

According to Stipulation Exhibit of Joseph G. Harrison, Supervisor of Assessments for Worcester County, filed on June 9, 1972 [T. 736], the property in question has been assessed for purposes of taxation since 1896. From that date until 1928, the area was apparently assessed on an acreage basis. Since the year 1928, Lot Nos. 4 and 5 have been assessed as lots, on a per lot basis. The assessment, per lot, consistently increased from the amount of $500.00 in 1928 to $4784.00 in the year 1961. As of January 1, 1962 [T. 604], as a result of the '62 Storm, the assessment was reduced to $3,016.00, which continued until 1969, when it was raised to $7,500.00 and again raised in 1972 to $14,400.00. State and County Real Estate Taxes have been collected on these lots during that entire period of time [T. 586].

A certain J. Robert Brown purchased an adjoining lot (Lot No. 3) in 1957 or 1958 [T. 372], and purchased Lot Nos. 4 and 5 in 1961. He erected a four-unit, three-bedroom, apartment house on Lot No. 3 [T. 373, see Corporate Defendant's Exhibit No. 1, 2, and 3]. By means of a "land installment sales contract over about a five-year period" [T. 376], Mr. Brown sold Lots Nos. 4 and 5 to a certain Dr. Robert J. Taylor. By deed dated November 22, 1971, Robert J. Taylor and Elizabeth Taylor, his wife, conveyed Lot Nos. 4 and 5 unto Seventy First St., Inc. [Plaintiff's Exhibit No. 3]. The apartment building on Lot No. 3 was destroyed in the '62 Storm [T. 381, Stipulation Exhibit Nos. 2 and 3]. *Prior to the '62 Storm, Lot Nos. 4 and 5 were high ground [T. 391-392], were covered with beach grass* [T. 377], *and were not used by the public* [T. 377-378]. [See Corporate Defendant's Exhibit Nos. 1, 2 and 3]. As a matter of fact, *Mr. Harrison and his son were standing on a dune running across Lot No. 5 at the beginning of the '62 Storm* [T. 596-599]. At that time, Seventy First Street has been hard-surfaced, and was "black topped" [T. 392]. At that time, the easterly property line of Lot Nos. 3, 4 and 5 were "somewhere close to the front edge" of Corporate Defendant's Exhibit No. 3 [T. 392]. During that time, the public used the area between the easterly property line of Lot Nos. 3, 4 and 5 to the water [T. 378, 379 and Stipulation Exhibit No. 3], which area Mr. Brown estimated to be about thirty feet between "usual high tide" and his easterly property line [T. 379]. After the '62 Storm, Mr. and Mrs. Brown, together with a Mr. and Mrs. Harry Robert Yauger and a Mr. and Mrs. Roy E. Klepser executed, on June 27, 1962, a "Deed of Easement" in favor of "the County Commissioners of Worcester County, Maryland", the substance of which will be referred to later in this Opinion [Plaintiff's Exhibit No. 4].

On August 23, 1971, George Bert Cropper, Inc. submitted a proposal to "71st Street, Inc." for the construction of an eight-unit condominium structure to be known as "Sandbridge Condominium", which said proposal was accepted by "Eugene R. Parker, Jr." and others, on November 1, 1971 [Corporate Defendant's Exhibit No. 6]. The construction plans for this structure are in evidence as Corporate Defendant's Exhibit No. 4, and will be referred to later in this Opinion. As previously stated, an "Application for Building Permit" was submitted to the "Bureau of Inspections" "under the Zoning Ordinance of Ocean City, Maryland", for this structure, on October 26, 1971, and approved by the "Building Inspector" as Permit No. 2091, on February 8, 1972 [filed in the Record on February 23, 1972].

Chapter 46 of the Code of Ocean City, Maryland, is entitled "Erosion and Sediment Control", and establishes certain "erosion and sediment control districts". This Ordinance will receive further treatment at a later stage of this Opinion, but, for present purposes, Section 46-6 requires approval of the Worcester Soil Conservation District prior to the disturbance of any soil, the beginning of any construction or the issuance of any "City building permits" within the "Beach District". *The Corporate Defendant (Seventy First Street, Inc.) had obtained such approval prior to the issuance of the said permit* [T. 426-427 and Corporate Defendant's Exhibit No. 4].

Chapter 36 of the Code of Ocean City, Maryland, is entitled "Building Limit Line, Ocean Front", which delineated on "Oceanfront Building Limit Line" on plats . . . available for examination in the office of the Clerk-Treasurer." *The proposed structure lay to the west of the said Building Limit Line* [Stipulation No. 1, and T. 427].

The structure would be constructed in the following manner. First, timber pilings would be driven into the ground under the proposed footings, the exact lengths of those pilings being undetermined until after soundings had been made. These pilings would "generally" be 30 inches apart "and enough of them to develop the load of the building, based on about 20 tons per pile". On top of the pile foundations, there would be poured concrete footings, starting at an elevation of plus five above mean low water mark. Footings run both north and south and east and west, and interlock, with a top elevation of "about plus 7" feet [T. 564-565]. On top of the concrete footings would be concrete columns extending up to the beams supporting the first floor, at an elevation of 22.67 feet. The concrete columns would be spaced at 18-foot intervals, with some columns being 2-feet square, but with others being 2 feet by 30 inches, in an east-west direction. On top of the columns would be a structure 79 feet 10 inches long by 25 feet 4 inches wide, with cantilevered porches at the floor levels, making a total width of 34 feet. The lowest point of clearance under the building is at an elevation of 20 feet above mean low water mark, 2.67 feet being consumed between the top of the porch floor and the bottom of the beams. All beams would be of concrete,

varying in design strength. 4000 pound concrete would be used for the columns and the beams, and 2500 pound concrete for the footings. The cement would be "Type 1A", "which is [an] air intraining type cement". The Contractor did not consider the structure to be "enough in the ocean" to use a "sulfite resistant type of cement." [T. 428-433, 435-436] The concrete columns are set back "about 10 Feet" from the building limit line, and the easterly edge of the cantilevered porches, "just to the building limit line" [T. 511-512]. In this area, the sand fence is located on the crest of the dune line and is twenty feet easterly of the easterly right-of-way line of the north-south 10-foot alley [Stipulation Exhibit No. 1]. The entire structure would be east of the sand fence [T. 427-428]. In this area, the dune is 10-feet wide at the top, with "a very steep slope on the westerly side" down to an area 8-feet in height. On the easterly side, it slopes gradually down to the average level of the beach, or at an elevation of "about plus eleven" at the building limit line, from which point it "gradually sloped" to 8-feet at the beginning of the foreshore (which Mr. Cropper calls the "crest of the berm"). "The bottom of the girders holding up the first floor would be, at least, four feet above the top of the dune line", with the same being "about twelve feet above the average level" of the sand east of the dune and under the structure [T. 465]. One portion of the structure (other than the piling, footings and columns) extends down to the sand, and that is "the entrance portion". That entrance includes an elevator, stairs, elevator equipment room and trash chute [Corporate Defendant's Exhibit No. 4], and is 28-feet in length, in the north-south direction, and 8-feet 4 inches in width, in an east-west direction [T. 466]. This portion of the structure would be 4-feet east of the sand fence [T. 467 and Stipulation Exhibit No. 1]. This entrance portion of the structure abuts the westerly porches of the structure, and is outside of the overall area of 74 feet by 34 feet [T. 512]. In this area the dune slopes westerly to a point "around 18 or 20 feet" west of the westerly right-of-way line of the 10-foot alley, and slopes to the east "about 80 feet east of the easterly right-of-way line of the 10-foot alley" [T. 517-518]. The entrance portion would be heavily reinforced, and tied to the footings in such a manner that in the event it did disintegrate, it would do so without destroying the major structure. It would be designed strong enough to withstand a storm equal in fury to the '62 Storm [T. 569]. Although not mentioned in the testimony, Corporate Defendant's Exhibit No. 4, on Pages 1 and 3 thereof, indicate that the parking area for the occupants of this structure would be in an east-west direction abutting a concrete curbing on the west side of the principal portion of the structure, and on both the north and south side of the entrance portion of the structure, in a paved area to be extended to the westerly right-of-way line of the 10-foot alley, and with the alley to be paved from 71st Street to a point 10-feet south of the southerly property line of Lot No. 4. The finished grade on the easterly side of that parking area would be at plus sixteen feet; the grade on the easterly right-of-way line of the 10-foot alley would vary from plus fourteen feet at 71st Street to plus 14.5 feet at the southerly proper-

ty line of Lot No. 4; the grade along the westerly right-of-way line of the 10-foot alley would vary from plus 3.7 feet at 71st Street to a high point of 18.1 feet to the west of Lot No. 4 and to plus 17.3 feet at the southerly property line of Lot No. 4. The alley would be so paved as to provide a "swale at center of alley to prevent surface water crossing alley to west". At about the mid-way point of the paved parking area east of the alley the elevation would range from plus 15 feet on the north to a high point of plus 16 feet in the center of the entrance and then to an elevation of 15.4 feet on the southerly property line of Lot No. 4. This construction would apparently have the effect of raising the elevation of the dune at the westerly line of the main portion of the structure, and from that point to the crest of the dune, but of lowering the elevation of the dune westerly of the sand fence, in varying degrees, to the westerly right-of-way line of the 10-foot alley. Of course, it is to be assumed that this entire area would consist of solid fill, rather than loose sand. Incidentally, before leaving the nature of the construction, the Contractor explained the nature of the stakes, which appeared in the exhibit to the original Petition, as being stakes to delineate the area of a cofferdam to be constructed in order to protect the area in which the foundation was to be poured [T. 495-496].

In the meantime, E. T. Park, Inc. had purchased two lots along 71st Street, the same being Lot Nos. 22 and 23, each having a frontage of fifty feet along 71st Street, and a depth, in a southerly direction, of one hundred twenty feet to a different 10-foot alley; that is, one that runs in an east-west direction. Lot No. 22 also lies along the westerly property line of the north-south 10 foot alley. By deed dated November 23, 1966, from Kenneth F. Lee and Betty Jean Weller Lee, E. T. Park, Inc. acquired Lot No. 22 in Block No. 38 on "Revised Plat of Oceanbay City, Md.", recorded among the land records of Worcester County, Maryland, in Liber J. E. B. No. 7, at Folio 211, and also in Plat Book O. D. C. No. 2, at Folio 76. By deed dated November 14, 1967, from Robert C. Taylor, Roger D. Taylor and Nellie E. Taylor, E. T. Park, Inc. acquired Lot No. 23 in Block No. 38 as delineated on the aforesaid Plat. A prior property owner purchased the "Reynolds House", formerly situated between 69th and 70th Streets [Stipulation Exhibits No. 2 and 3, and identifiable, with a reading glass, on Intervening Plaintiff's Exhibit Nos. 10 and 11], and placed it on Lot No. 22, fitting it lengthwise on the said lot [Plaintiff's Exhibit Nos. 10, 12 and 13]. *At the time that E. T. Park, Inc. purchased the property, Dr. Kohlerman, as sole stockholder, knew that there were two lots on the ocean-side of his property, and that the same extended in an east-west direction* [the Property in Question], *and that such lots were "privately owned"* [T. 35-36]. It is his opinion that, opposite his house, the dune is about fifty feet, "more or less", at the base, and "roughly twelve feet high". At any rate, he can see over the dune from the porch of his house [T. 23]. Although Dr. Kohlerman testified that the dune had grass upon it, the photographs indicate that the only grass extends from an area west of the

sand fence and along the westerly slope of the dune [Plaintiff's Exhibit Nos. 11, 12, 13, and 10]. Plaintiff's Exhibit Nos. 12 and 13 would indicate that the vegetation line begins considerably westerly of the sand fence.

The Movement of the Water, and the Dune Line.

The place to start is apparently with Stipulation Exhibit No. 1, because that was the first Exhibit to be agreed upon by all parties. As in every case that involves the breaking of new ground, the extent of the testimony is more limited, in certain areas, than would be the case of a later trial with regard to similar subject matter. The Court regrets a serious oversight on its part in one respect that immediately comes to mind. Counsel had started to ask George Bert Cropper his professional qualifications [T. 419-421] when the Court interrupted to make certain of a date to which the witness was testifying. Apparently this disrupted the thoughts of Counsel, and the Court did not realize the mistake until a reading of the Transcript. The Court was well aware of all of the professional qualifications of Mr. Cropper, because of his many appearances in the Circuit Court for Worcester County as an Expert Witness, as supposedly were most (if not all) of Counsel in the instant proceeding. Unfortunately, this does not fill the void in the Record. Some additional qualifications may be found at Page 559 of the Transcript. Of course, by a reading of all of Mr. Cropper's testimony, his familiarity with the entire Ocean City area becomes clear and apparent. The said Exhibit indicates the established mean high water line for the year 1850, with a substantial movement of that line to the east as established in 1929. Mr. Cropper is not certain of the mean high water line shown on the Isle of Wight Plat in 1922, and fails to give credence to its scientific authenticity. By 1942, the line had moved substantially to the west. After the '62 Storm it had moved farther, sutstantially, to the west, but yet was easterly of the easterly property line of Lots Nos. 4 and 5. By 1972, the line had again moved substantially eastward. *At any rate, the mean high water line, at the time of the institution of this suit, was 133 feet easterly of the building limit line, and 198 feet easterly of the easterly right-of-way line of the north-south 10-foot alley* [T. 511]. Corporate Defendant's Exhibit No. 7 indicates the same material, but over a longer segment of the shoreline, and indicates the origin of the material from which the plats, charts and drawings were obtained. In addition, Corporate Defendant's Exhibit No. 7 delineates the easterly line of an 1883 patent by the name of "Summer Retreat". It is interesting to note that, at the site of the property involved, the high water line taken during the month of October, 1963 generally coincides with the patent line, while the mean high water line taken in November 1962 was to the west of that line. *In any event, the mean high water line taken in November, 1962 was generally parallel with, and perhaps slightly to the east of, the easterly property line of Lot Nos. 4 and 5.*

Mr. Slaughter was considerably confused by Stipulation Exhibit No. 1, but, by the use of a scale, he was "roughly" able to testify as to certain distances portrayed thereon [T. 254-261]. He testified that, by that method, the distance from the easterly property line of Lot Nos. 4 and 5 to the 1929 mean low water mark was "about two hundred feet or there abouts, less or more", in 1942, "about one hundred and fifty feet", "about fifteen feet" between the 1962 line and the 1942 line, between the 1962 line and the sand fence, in "the magnitude of about one hundred twenty feet", between the 1972 line and the easterly property line of the lots, "about seventy-five feet, roughly", between the 1972 line and the sand fence, the distance of "[a]bout one hundred and eighty feet", and between the building limit line and the 1972 line, the distance "would be close to one hundred forty and one hundred fifty feet", and the distance from the westerly property line to the sand fence as a distance of "about twenty-five feet", and from the sand fence to the westerly side of the proposed structure as "about ten feet".

The Court turns now to the facts with respect to erosion and restoration in the area in question. The movement of the mean high water line, over a period of years, has already been detailed from Stipulation Exhibit No. 1. Mr. Slaughter, the Geologist with the Maryland Geological Survey, produced on behalf of the State, explained the forces at work along the shoreline. It is "surmised" that five thousand years ago the barrier beach existed out to the twenty-seven or thirty-foot depth contour. Over that five thousand year period, that depth contour has moved landward "in the neighborhood of half a mile, or three-quarters of a mile of shore". The sea level is rising, "although . . . not rising very fast", and "in the neighborhood of close to a half a foot since the early Thirties". Whether this trend will continue, stop, or reverse is not known. Theoretically, therefore, from a geological standpoint, the barrier island would want to migrate westward, according to Mr. Slaughter, but, north of the Ocean City Inlet, man has "fastened it down with piling, with buildings, and, therefore, it cannot migrate". Because of the hydraulic process constantly continuing off shore, the shoreline continues to erode. How long this will continue, and to what extent, is not known [T. 191-192, 195-196 and 266]. The erosion does not continue at a fixed rate all of the time. "It all depends on conditions, climatic conditions, and the amount of material that happens to be moving predominately toward the south. Different parts of the beach are fed different amounts during different periods of time over which we are concerned." [T. 194]. The rate of erosion from 1850 to 1942 ranges from zero at 94th Street to 3.2 feet per year at the Delaware Line, and from 94th Street south, it ranges from 1.6 feet through 4.3 feet to 5.4 feet "and less" at "possibly" 20th Street [T. 195]. The erosion at 70th Street between 1850 to 1942 was 1.6 feet per year [T. 268]. From 1929 to 1947 it was two hundred seventy feet, from 1947 to 1965 it was twenty-five feet, from 1965 to 1971, no measurements were made, but from 1971 to the date of the hearing in May of 1972, there has been "no erosion, no change" [T. 234-235].

The effort to combine the total erosion over the period of 1929 to 1965, and to divide by the number of years, is not a valid method, because of the great variations between the two measured periods, and it is not valid as a projection for the future, because of the unknown [T. 253]. At the most, the recorded periods must be broken into segments, in which it could be mathematically stated that from 1929 to 1947, the erosion occurred at the rate of 15 feet per year, and from the years 1947 to 1965, erosion occurred at the rate of 1.4 feet per year [T. 670] and during the year 1971 to 1972, no change occurred. *It must also be recognized that from the period 1850 to 1929 (and possibly until 1922), the mean high water mark moved far to the east, even if the experts cannot account for the same, or have forgotten such a fact* [T. 670-671]. The one time when serious erosion occurred on the lots in question is, of course, during the '62 Storm. [Stipulation Exhibit Nos. 1, 2 and 3, Intervening Plaintiff's Exhibits Nos. 5, 10, 11]. Virtually the entire island was awash during that storm. It was not completely submerged at the same time, but virtually the entire island got wet at one time or another [T. 328, 581-582, 598-601, 611-612]. As a matter of fact, there was a wash-out (sometimes referred to as "an inlet") in the area somewhere between 71st and 72nd Streets, which was filled by the State Roads Commission through the use of earth-moving equipment [T. 171, 174, 97-98, 532-539]. Lots Nos. 4 and 5 suffered from erosion but the exact extent of the erosion was not measured [T. 607-608, 381-382].

While normal erosion is caused by wind and waves under normal conditions, shorelines loss because of a specific occurrence, such as a storm, is "referred to a 'evulsion' of beach" [T. 320]. Both Mr. Lindner, a Civil Engineer with the Baltimore District Corps of Engineers, produced on behalf of the State, and Mr. Slaughter testified as to the natural restorative characteristics of the shore front after an avulsive action, but were unable to give specific details of the period of time necessary for such natural effects to occur. Each referred to Dr. Truitt's "High Winds . . . High Tides" in citing history for the natural closing of beaches in the shoreline. The restorative process depends upon certain factors such as the littoral system (including the movement of sand north as well as south, and east and west, as well as south) the tides, the currents, and the winds [T. 321-322, 218-219, 269].

After the '62 Storm, the State Roads Commission moved the sand (not needed to fill the wash-out in the specific area under consideration), as close to the water as possible, at the street ends, and *not* on private property [T. 165-170]. The Corps of Engineers of the United States Army built a dune, as described in Intervening Plaintiff's Exhibit No. 15, "Operation Five-High", with the dune crest not less than 12 feet above mean low water, and located "approximately 150 feet west of the mean high water line, Atlantic Ocean", after the '62 Storm. One million, fifty thousand cubic yards of material were pumped into the area [Intervening Plaintiff's Exhibit No. 15, page 26]. The

dune was twenty feet wide on the base, with one on five side slopes, the east slope going down to an elevation of ten feet, to the west of a fifty foot berm, which went down to a one on twenty slope. *This was the design of the dune, but because there was "no after-placement survey made", the exact constructed dune is unknown* [T. 351-352]. The dune was constructed by means of dredged material from the coastal bays, which consisted of eighty percent water, which, after running-off, left the material between "training dikes", which was then pushed by bull dozers to form the dunes, and the dune was stabilized with American Beach Grass and fence [T. 349-350].

The unfortunate fact is that no one knows the exact elevation of the beach at the locus in quo at the time that the construction of this dune took place thereon, nor the exact size of the dune, nor the nature of its construction immediately thereafter. Accordingly, there is no evidence as to the distance, if any, that the berm was extended eastward as a result of the construction of the dune [T. 348, 350, 351, 357 and 359]. There is no evidence of the exact volume of the dune as constructed [T. 352-357]. *The construction of the Dune Line, itself, and its maintenance, does not create a condition which will add one "bit" to the width or the height of the berm* [T. 311, 357-358, 453]. *Whether the construction of the Dune Line had any effect upon the rate of erosion of the shore-line is not known, and is purely a matter of speculation* [T. 360]. No study or survey had been made between 1965 and 1972 that would furnish any data for comparison, or any erosion or accretion rates or distances [T. 361]. *From the time of the construction of the Dune Line in the Fall of 1962, until May of 1972, there had been nothing done, artifically, by man to contribute to the accretion of the shoreline in an easterly direction* [T. 452]. *From the year 1850 to the year 1922, there was "no man-made reason" for the movement of the high water line to the east* [T. 448-449]. The accretion at 71st Street during this period was at the rate of 1.6 feet per year, and was the result of "how Mother Nature's law works" [T. 664-665]. The purpose of a Dune Line is to protect life and property to the west of the dune [T. 159-160, 704-705, 721-722, Intervening Plaintiff's Exhibit No. 15]. The Dune Line would not contain the ocean in a storm of the intensity of the '62 Storm [T. 726-727, 270, 311, 554-557, Intervening Plaintiff's Exhibit No. 15].

Public Use

The use made by the public of the area in question is the subject of the next inquiry. The Court suggests that the testimony of the witness Joseph G. Harrison might well be the beginning point for recitation of these facts. The familiarity of Mr. Harrison with the ocean-front area of Ocean City goes back to the time when he was "a kid", a storm in the year 1916 being the first that he can recall [T. 619]. In earlier years, when the city limits of Ocean City were much farther to the South (the last line being at 42nd

Street before annexation to the Delaware Line), the entire area from the ocean to the Ocean Highway was considered a "beach area", and "[p]eople used it promiscuously for one thing or another" [T. 614]. Sand dunes were "scattered over the whole area", and "[y]ou might have a sand dune starting back half-way between the ocean and the Beach Highway". When Mr. Harrison "was a kid", there were sand dunes ten or twelve feet high just north of the Presbyterian Church on Baltimore Avenue, and under "the old Harry Cropper house", now known as the Tide's Inn. There was a sand dune which stayed until "[j]ust a few years ago" when it was dug out in order to construct a restaurant. Sand dunes, therefore, didn't necessarily have to be right on the ocean front, but could be scattered "anywhere along" the said beach area [T. 617-618]. In that part of the beach area that was not built upon (even above 9th Street in the "early Twenties"), the public used the beach area "at any point that they wanted to use it, not only on the beach front, but anywhere else up the beach that there wasn't any building, and the public would picnic on it, or bathe on it, or do a little smooching at night on it. There hasn't been any real restrictions on any of it that wasn't in use, . . .", but once a building was constructed, the public would generally respect the building [T. 620]. This use by the general public has continued "up to the present time" [T. 623]. This situation has existed even so far back as the time when the Boardwalk ended at the Hamilton Hotel. At the end of the Boardwalk, it "[d]idn't matter who owned the lot there [,] [y]ou used it as you saw fit to use it on a party". The "thing is — has multiplied as years have gone along, and they were built on, people did respectyour property." [T. 624-625, 626]. To the same effect was the testimony of Mr. Powell, the President of the City Council [T. 84]. The witness Cropper explained the same historical facts [T. 497, 498, 499, 500, 502]. Since the '62 Storm and the construction of the Dune Line, on undeveloped ocean-front lots, the public has in general, utilized the area from the dunal areas, or the line of growth of vegetation, to the water's edge for ocean-front activities [T. 55, 90, 91, 502]. On developed lots, the public has, generally, made similar uses of the land between the structures and the water's edge [T. 130, 131-132, 377]. In earlier days, before the construction of the Ocean Highway, when one wanted to go to the Delaware Line, it was necessary to use a beach-buggy type of vehicle, to either drive the hard wet sand near the edge of the surf, or, on high tide, to ride the soft sand portions of the beach area, because of either the lack of a road, or the poor condition of an older road that had been constructed in the area [T. 74, 75 and 76]. At any rate, the beach is not now recognized by the City of Ocean City as a public thoroughfare for the movement of vehicles by the general public [T. 77]. The practice of using the beach as a highway ended upon the construction of the Ocean Highway around the year 1940 [T. 114]. Commerical fishing by the use of "pound boats", launched from the beach, occurred where the Ocean City Inlet is now located, or just South of that Inlet [T. 73]. There is no evidence of any such activity in the area now under consideration.

The important fact is that no witness, with the exception of the sole stockholder of the Complainant Corporation, could testify as to any use of Lot Nos. 4 and 5 by the general public. The personal knowledge of the witness Schoepf is limited to a period since 1965, and, while he saw people in the general area, he could not specifically identify people and activities on the two lots [T. 54, 56, 61 and 62]. The witness Whaley confines his familiarity with the area to the period since 1965, but, again, he cannot specifically identify the use by the public on the two lots in question [T. 130, 131 and 132]. The witness Harrison specifically testified that he has never seen the public so utilizing the two lots in question [T. 636]. The person most familiar with the property for the longest period of time, *the former owner,* Mr. Brown, *Specifically testified to the non-use of these two lots by the public prior to 1962* [T. 377]. The sole stockholder of the Complaining Corporation, *Dr. Kohlerman, dates* his specific familiarity with the area *since 1964,* the date of purchase of the Complainant's property [T. 21]. He testified that he, his family, his friends, and the general public, use the lots in question, for swimming, for bathing, sun-bathing, ball playing, picnicking, and as a volley-ball court [T. 24, 25 and 26].

Governmental Regulation and Control

Closely associated with the contention with regard to the use of the beach area by the general public, is the question of governmental regulation and control of the beach area, which is the subject of the next factual inquiry.

The witnesses Roland E. Powell and Joseph G. Harrison furnished the most substantive evidence in this regard. Mr. Powell, who, at the time of the Trial, had been a member of the City Council for Ocean City for four years, and the Chief of the Volunteer Fire Company of that City for fifteen years [T. 71], testified that at sometime between the years 1954 to 1956, he had been a Special Deputy Sheriff who had for his use a four-wheel vehicle to patrol the area from 41st Street to the Delaware Line. It was not a scheduled patrol, but consisted of answering complaints or "just riding out of the evening", with the purpose of keeping people away from private homes, trying to keep large beach parties from tearing up the sand fence, and answering complaints from people who lived in the area with regard to noise or fires near buildings [T. 78, 79, 80 and 115]. Prior to annexation, the County used prison labor to clean the sand area to the east of the then existing sand fences [T. 82]. This procedure was used at the beginning of the Season, and two or three times during the Summer. It continued for a period of three or four years. It covered any undeveloped area "that needed cleaning up", even to the west of the then existing sand fences, according to Mr. Harrison [T. 82, 83, 616, 617]. Trash containers were placed at the ends of Streets "for a year or two" [T. 615-616]. Since annexation of the area north of 42nd Street, the City has provided funds of at least One Hundred Thousand Dollars a

year to clean the beach from the Ocean City Inlet to the Delaware Line, and between the Dune Line and the water [T. 149-150]. It also provides police protection, life guard service and first aid service in this same area. This distance, of course, is approximately ten miles, and the annexation occurred in the year 1965 [T. 91, 92, 115]. Since annexation, the Town of Ocean City has enacted certain ordinances with regard to the regulation of conduct of the public on the public portion of the ocean-front area. These ordinances pertain to the drinking of alcoholic beverages, ball-playing, the running of dogs, and hours for surfing. There are "probably ten or twelve different ordinances" [T. 92 and 93]. Incidentally, Mr. Powell testified that if persons were playing volley-ball on the public area of the ocean-front, it would be the duty of a life guard to stop them. Of course, the life guards only work from about 10:00 o'clock, A.M. until about 5:00 or 5:30 o'clock P.M. [T. 116].

In addition to the regulation of conduct, in the context just previously enumerated, after the '62 Storm and, apparently, up until the year 1971, the County Commissioners for Worcester County regulated construction in the area, particularly as it affected the Dune Line. Although the regulations are not before the Court, the Witness John S. Whaley characterized them as being "quite stringent about denying a right to build east of the crest of the dune" [T. 134]. Although this stringency seemed to be somewhat relaxed in certain areas, or for certain types of structures, Mr. Whaley's experience indicated a requirement on the builder to push the sand back and rehabilitate the dune after construction [T. 134-143, 145, 148]. At any rate, until the year 1971, the Mayor and City Council of Ocean City would not issue a building permit that would interfere with the crest of the dune, or the easement thereof, until the builder had presented the City with a letter from the Board of County Commissioners approving the project insofar as the piling supporting the structure would disturb the dune. During the Spring of 1971, the Board of County Commissioners apparently notified the Mayor and City Council of Ocean City that the County would no longer be responsible for the dunes [T. 136-137]. According to Mr. Cropper, after the '62 Storm an application was made to the Board of County Commissioners for Worcester County for both the pilings and for the disturbance of the Dune Line under construction, showing the method of construction, and the method for replacing the dune. Since 1971, similar applications have been submitted to the "Soil Conservation Department" [T. 454-455].

The County became involved by virtue of certain easements obtained in 1962. The easement involved in this case is entitled "DEED OF EASEMENT", was dated June 27, 1962, and was made between Harry Robert Yauger, Betty M. Yauger, J. Robert Brown and Mildred M. Brown, as the Parties of the First Part, and the "County Commissioners of Worcester County, Maryland", as Parties [sic] of the Second Part. The Parties of the

First Part, as owners of Lot Numbers 4 and 5, in Block 38, located on Plat Isle of Wight — Ocean City", did:

> ". . .grant and convey unto the County Commissioners of Worcester County, Maryland, their successors and assigns, a perpetual easement across the aforesaid property for the purpose of constructing, reconstructing and maintaining a sand dune barrier (to be constructed or reconstructed originally by the Corps of Engineers of the U. S. Army) for the protection of our property, the other property in this vicinity and the public generally, but in connection therewith do grant the further right to construct and maintain across our property sand fences or other protective devices as may be necessary, it being understood and agreed that the County Commissioners of Worcester County, their agents, employees, successors and assigns are hereby vested with all rights, powers and authority necessary for the construction, reconstruction, repair and maintenance of said dune barrier, sand fences or other protective devices, including the right to enlarge said dune barrier if it is subsequently determined that such action is necessary for the protection of property.
>
> "IT IS FURTHER UNDERSTOOD AND AGREED that said County Commissioners, their agents, employees, successors and assigns will perform the work contemplated hereunder with reasonable care and in a good and workmanlike manner and in connection therewith shall have no further obligation or liability resulting from such construction, reconstruction, repair or maintenance of said dune barrier, sand fences or other protective devices.
>
> "IT IS FURTHER UNDERSTOOD AND AGREED that any improvements or other facilities to be constructed or erected on the aforesaid premises will be done in accordance with permits to be issued by said County Commissioners and will be constructed or erected in such manner as will permit the free and unhampered flow of littoral currents and sand, thus avoiding as much as possible any disturbance or destruction of said dune barrier, sand fences or other protective devices, it being UNDERSTOOD AND AGREED that at such times as said County Commissioners, their successors and assigns may determine that the rights and easements herein granted are no longer necessary for the pruposes [sic] intended, then and in that event the same shall cease to exist.
>
> "IT IS FURTHER COVENANTED AND AGREED that the rights, conditions and obligations hereby imposed or intended for the benefit of the property herein described, the other property owners in this vicinity and public generally are to be construed as covenants running with the land and binding upon the parties hereto and any subsequent owners of said property."

This Deed of Easement is recorded among the land records of Worcester County, Maryland, in Liber F. W. H. No. 164 at Folios 167 and 168. It was

not recorded until January 9, 1963 [Plaintiff's Exhibit No. 4]. It is interesting to note that the Deed of Easement anticipated the construction of private buildings on the subject property, subject to the requirements as therein set forth, and that it granted to the Board of County Commissioners the right to unilaterally determine the termination date of the "rights and easements" granted.

In view of Mr. Cropper's statement, it might be well now to review the "Erosion and Sediment Control" Ordinance as adopted by the Mayor and City Council of Ocean City, which is published as Chapter 46 of the Code of Ocean City, 1972 Edition, as amended, a photo-copy of the "Beach District Regulations" thereof being attached hereto, as an exhibit, for the benefit of the reader hereof.

One further building regulation should be noted, and that is the "Building Limit Line Oceanfront" Ordinance as adopted by the Mayor and City Council of Ocean City, which is published as Chapter 36 of the said Code, and which is likewise appended hereto.

Mr. Powell testified as to the manner in which this line was drawn:

> "The Council, Planning and Zoning, a surveyor, oh, probably, four or five other people who knew the beach, went on a trip, took a trip in four-wheel drive vehicles. They started at the end of the Boardwalk and went to the Delaware Line, and I would say through common sense of looking where the ocean was at the present time, how far it appeared that the high tide washed toward the dune line, and taking buildings that were built in different areas, and trying to strike a line that a surveyor could set down on a City map, and the Council taking the position that this is as far as we want a building out, I think that is the way it was struck." [T. 98-99].

Any land located to the west of the Building Limit Line may be built upon so far as the Mayor and City Council of Ocean City are concerned, and the City has issued building permits on top of the Dune Line, if they are of a certain elevation, are built "in accordance with the Maryland State Soil Erosion Law", with the piling a certain distance apart in order that a bulldozer may "go out on the beach and push this dune line up under it", and something like a sea wall [T. 119-121]. The Building Limit Line was apparently promulgated during the Spring of 1971 [T. 118]. Incidentally, the property owner herein does not attack the validity of the Building Limit Line.

Expenditure of Public Funds

Closely associated with governmental regulations of the ocean-front property, is the strong contention made by the Plaintiff and the Intervenor with respect to the expenditure of public funds for the protection and/or rehabilitation of the ocean-front land.

The witness who, perhaps, had the most extensive knowledge of the earliest efforts in this regard was Mr. James W. Small, who was the Resident Maintenance Engineer for Worcester County, for the old State Roads Commission (now the State Highway Administration), and who was in charge of the sand fence between the years 1953 and 1962 [T. 155]. The sand fence was built just after the construction of the Coastal Highway in 1938, and ran from 26th Street (then the northern limit of the Town of Ocean City) to the Delaware Line. It was built and maintained by posts and boards, originally intended to be set so as to create a twenty-to-one slope "back from the crest of the beach at high water", but with no specifically planned elevation, the effort being to increase the height of the sand fence, as the sand built up, in order to collect as much dune as could be collected by action of the wind. The slope was the essential quality for the effectiveness of the dune. If the fence was placed sufficiently to the west of the ocean, it apparently performed its function, but if, because of buildings, it was necessary to place the fence closer to the ocean than originally designed, the fence "would not take a wave". The State had no easements for the erection and maintenance of this sand fence [T. 156-157]. It was the opinion of the witness that the sand fence was erected to protect the road, while he thought that it was the opinion of the property owners that the fence was to protect the buildings. He was under the impression that the monies for this project came from "some general fund and not road taxes" [T. 160]. He had no specific recollection of the area between 70th and 71st Streets [T. 160]. There is no way to determine from the evidence the amount of money that was spent for the erection and maintenance of this sand fence.

Next, in chronological order, was the construction of asphalt groins. There were forty-three such groins constructed between 28th Street and the Delaware Line between August, 1954 and June, 1955, varying in length and design according to their location. The "apron" (or base) varied from eighteen feet in width to thirty feet in width. The width of the "groin" (or peaked portion) was uniformally eight feet in width, with the crest of the "groin" (or peak) varying from three feet to three and one-half feet in height above the top of the "apron". The asphalt groin at 70th Street was started on August 24, 1954, completed on November 16, 1954, and was one hundred seventy-six feet in length, with an "apron" twenty feet wide, and a "groin" eight feet in width at its base, and three feet high at its crest. The "apron" was six inches in depth [Intervening Plaintiff's Exhibit No. 6]. The asphalt groins were constructed by first bulldozing a trench below the surface of the sand, laying the "apron", and then pouring the "groin" through a "slip form" on top of the "apron". The exact depth of the "apron" below the original surface of the sand is impossible to determine [1954 Construction Methods, Intervening Plaintiff's Exhibit No. 7]. The cost of the completed groins was between Five Thousand Dollars and Three Thousand Dollars each [T. 210].

At any rate, the total amount spent by the then State Roads Commission for "Oceanbeach Protection" was $15,245.00 in 1954, $153,822.00 in 1955, and $62,964.00 in 1956 [Intervening Plaintiff's Exhibit No. 1]. It is impossible to determine how much of these funds were spent north of the City Limits, in view of the testimony of Mr. Powell that no funds have ever been spent by the City for the protection of ocean-front land, all of it having been spent by either the Federal, State or County governments [T. 93-95]. It is important to note that the closest asphalt groin to the north of the subject property was at 73rd Street, which was started on September 2, 1954, completed on November 16, 1954, but repaired on June 20, 1955 [Intervening Plaintiff's Exhibit No. 6]. In view of the testimony of Mr. Brewington, Assistant District Engineer of Construction for the Lower Shore for twenty-two years, an employee of the State Roads Commission for forty-three years [T. 176], the purpose of placing the asphalt groins was "To build up the beach. To retain the sand that goes south" [T. 178], it would appear only the 73rd Street groin would have that effect, if any, upon the property which is the subject of this litigation. That groin was constructed in the same manner as the 70th Street groin, and was one hundred seventy-eight feet in length [Intervening Plaintiff's No. 6]. The effectiveness of the asphalt groins is a matter of some disagreement. At any rate, Mr. Brewington, who, probably, knows more about those structures than any other witness, is of the opinion that they were effective for "a couple of years" [T. 180]. He is also of the opinion that "Probably some of them down there now are still effective." [T. 181], but he is more familiar with the timber jetties because they are directly under his construction [T. 184]. The Court has no evidence of subsequent inspections of the 73rd Street asphalt groin, but as to the 70th Street groin, the "first ten feet of the end was broken up" upon an inspection done in August of 1955, and one-third of the end was gone upon another inspection in 1956 while, upon the last inspection, on June 5, 1956, eighty feet of the "groin" was gone, but the "apron" was "Okay" [T. 204-205]. Mr. Slaughter, a Geologist with the Maryland Geological Survey, who lived in Salisbury from 1949 through 1955, and was very interested in the construction of the asphalt groins [T. 237] is of the opinion that "[d]uring the period of their existence, they did. . . . serve to increase the height of the beach". He does not consider them a "groin", but "[s]imply a sand fence perpendicular to the beach, because they only entended into the water a very short distance of, perhaps, fifteen or twenty feet, and in most cases, the ends were soon broken off due to wave activity" [T. 237]. In his opinion, also, they only serve to increase the height of the beach, and not its width [T. 238], but he emphasized that the asphalt groins were constructed at a most unfortunate time because of the advent of the Hurricane Hazel in October of 1954 and Hurricanes Connie and Diane in August of 1965. It was too difficult for him to state an opinion as to whether or not the asphalt groins would have created more accretion to the beach had not the storms occurred, but they did serve a purpose [T. 239-241]. *He had no personal knowledge of the effect*

of the asphalt groins installed at 70th Street [T. 265]. Mr. Cropper, who had personal knowledge of the condition of the oceanfront land, and the construction of the asphalt groins, was of the opinion that they had no effect upon the improvement of that land [T. 451, 452, 557, 559, 560, 561]. *The evidence is clear, however, that the only expenditures of funds in the 70th-71st Street area for the protection of the ocean-front land, prior to 1962, were for the sand fence and the asphalt groins, and these were the only two devices attempted to be used for that purpose* [T. 209]. It is also clear that, in the thirteen years from 1949 through 1961, the State of Maryland spent $460,353.00 for all of the "Oceanbeach Protection" from the Ocean City Inlet to the Delaware Line [Intervening Plaintiff's Exhibit No. 1].

Of course, the largest single government expenditure on the ocean-front property was as a result of the '62 Storm. Intervening Plaintiff's Exhibit No. 15, "Operation-Five-High", at page 26, describes the work authorized as: "Construction of an emergency protective area, with a sand-fence thereon, from the Maryland-Delaware Line south to the Ocean City Inlet, South 2nd Street." At page 29, the "total cost of the work done 'including government costs' ", was in the amount of $1,517,560.00. As has been indicated, the State of Maryland assumed the responsibility of clearing the streets and highways of debris and sand, and for filling the breach in the Coastal Highway in the vicinity of 71st Street. The evidence does not contain the amount of money expended in this manner. The State Roads Commission also undertook the design and supervision of construction of the Boardwalk. While it was reconstructed in a slightly different, and better, manner than that existing prior to the Storm, the total cost was $392,000.00, of which the Federal Government paid $296,600.00, the difference being in the "betterments" in the new structure [Intervening Plaintiff's Exhibit No. 15, at page 35]. Intervening Plaintiff's Exhibit No. 1 does indicate an expenditure of $48,225.00 by the State Roads Commission in 1962 for "Oceanbeach Protection", with an expenditure of $28,513.00 in 1963, for the same purpose, but neither of these figures are explained as to the purpose for which they were used. There is also an expenditure of $2,290.00 in 1965, for the same purpose, but, also, without allocation to the use put. Unfortunately, Intervening Plaintiff's Exhibit No. 15 does not furnish an allocation of the expenditure of these funds to geographical areas. In other words, it is impossible to determine exactly how much money was expended within the Town limits of Ocean City, how much was spent in the area north of the Town limits of Ocean City to the beginning of the Fenwick Island plat, or how much was spent on the ocean-front in the area delineated by the Fenwick Island plat. The Corps of Engineers pumped sand on the ocean-front land between August 14, 1962 and December 20, 1962 [Intervening Plaintiff's Exhibit No. 15, page 29].

Position of Corps of Engineers

The mission of the Corps of Engineers was to restore shore protection to a degree which could be considered "temporary but which would be effective against a storm of an intensity which can be expected to occur once in 10 years". It was not intended to provide for "permanent protection against a storm with a frequency of once in fifty years". It was considered impractical to attempt to restore the shoreline to its alignment prior to the Storm, and to "accept the shoreline where it is and build protection behind it and keep the homes and streets behind the protection". *It was also recognized that* "LEGISLATIVE MEASURES" *would be necessary to insure that shore protection once re-established was not destroyed* by leveling dunes at street ends or for construction of homes and businesses "on the beach as has been done in the past". [Pages 8-11, Appendix B, Intervening Plaintiff's Exhibit No. 15] [Emphasis Supplied]. The initial design was for a dune twenty feet wide at twelve feet above mean low water and a beach berm thirty feet wide at elevation ten feet above low water [Intervening Plaintiff's Exhibit No. 15, pages 8 and 9 of Appendix B]. This specification was later changed to provide a width of berm to fifty feet, where practicable [Intervening Plaintiff's Exhibit No. 15, Appendix B, at pages 13 and 17]. The desired distance from mean high water was one hundred ninety feet [Intervening Plaintiff's Exhibit No. 15, Appendix B, at page 10], with a change in alignment, where necessary, of no more than five degrees over a distance of one-half mile, unless a faster change was dictated by the pre-storm alignment [Intervening Plaintiff's Exhibit No. 15, Appendix B, at page 24]. The Corps of Engineers sought to make it clear that the temporary protection was not designed for a ten-year period, but only designed as a protection against the kind of storm that had previously occurred in cycles of ten years, urging that no persons could predict when a storm greater than "a 10-year storm might occur" [Intervening Plaintiff's Exhibit No. 5, Appendix B, at page 28]. *The Corps of Engineers recognized the private ownership of land upon which the beach protection devices were to be erected north of 41st Street to the Maryland-Delaware Line* [Intervening Plaintiff's Exhibit No. 15, page 30]. In undertaking this assignment, the following position of the Corps of Engineers is important:

> "The first question raised is as to whether the beaches and dunes constitute 'public facilities of local government damaged or destroyed in such a major disaster'? The law as to ownership of the beaches will vary in various states, but even where beaches and dunes are on private land they often serve a public purpose by protection of the barrier beach from breaching and they also serve a public purpose in protection of the public roads behind the property. Whether or not they can be considered as public facilities is open to some discussion. Even if these are considered as private lands, to the extent that the work of restoration is 'essential for the preservation of life and property,' it would still be within the meaning of the Act. In using

> this justification, we would have to consider the risk of life and property which would result from the possibility of another storm which would, in the absence of the beaches and dunes, do serious damage which would not have occurred if restoration had been accomplished."

Further, in considering the extent of work which could be done, within the wording of the law, as to "making emergency repairs to and temporary replacement of public facilities of local governments damaged or destroyed in such a major disaster", the position of the Corps of Engineers is also worthy of note:

> ". . . With reference to beaches and dunes, these primarily serve the purpose of storm protection for private and public property behind the beach. The height and width required are related to the severity of storm which they are planned to protect against, and it appears as though a design for protection against a storm with a frequency of perhaps ten years might be suitable for a temporary repair; whereas a frequency to fifty or one hundred years or more might be necessary for a permanent repair or replacement. In some cases at resorts whose economy is dependent on recreation, the width of beaches can also be dictated by recreational requirements. Temporary repair for this purpose, or replacement, might well be based on the assumption that during the period before the permanent work is done, the allocation of beach space per person might be substantially reduced. In replacing beaches, it must be recognized that a storm tears away a beach and extended periods of calm weather restore it, so that in estimating quantity of material which must be placed under P. L. 875 a reasonable allowance must be made for the contribution of the sea toward the restoration work within the period of a few months' time during which temporary repairs or replacements can be completed."

To resolve the issue, therefore, the Corps of Engineers proceeded as follows:

> ". . . Beaches, dunes and bulkheads on private property are included where they serve to provide essential protection for public property such as nearby roads . . ."

The above quotations were from a Memorandum prepared by Brigadier General T. H. Lipscomb, Division Engineer, as contained in Intervening Plaintiff's Exhibit No. 15, Appendix B, at pages 3-5.

Although it had been the desire of the Corps of Engineers to complete this project before the hurricane season [supra, page 5], such was not the case. Coastal storms occurred on September 23rd, November 3rd, and November 26th-28th, 1962, causing a delay and a considerable amount of

damage to the project [Intervening Plaintiff's EXHIBIT No. 15, page 32]. The reason is stated as follows:

> "In Ocean City proper (41st Street south to the inlet) the City owns the beach from Atlantic Avenue, which is the boardwalk south of 27th Street, to mean high water in the Atlantic Ocean. In Worcester County, north of 41st Street to the Maryland-Delaware Line, the beach is privately owned. This private ownership of the beach caused the County considerable difficulty in securing right-of-way for the work. The original assignment from O.E.P. authorized construction of an emergency protective barrier from the Maryland-Delaware Line to 41st Street, the City limits of Ocean City. This assignment was contingent upon Worcester County furnishing necessary lands and rights-of-way and executing the necessary hold and save assurances . . ." [Intervening Plaintiff's Exhibit No. 15, page 30]
>
> * * * * * *
>
> ". . . The reluctance of State, County or City governments to assume the responsibility for furnishing the required assurances of local cooperation resulted in a delay of about 4 months in the starting of this work." [supra, page 32]

It is important to remember that, after completion of the Dune Line, no inspection and report was made thereof to determine and record the height, width, distance from Mean High Water, or alignment of the finisher structure, at the Property in Question, or elsewhere.

With this evidence before the Court, in an effort by the Plaintiffs to support their respective allegations, the extensive remaining portion of the Record may be characterized as the testimony of various witnesses with regard to various plans for the construction of ideal permanent protection of ocean-front lands, but with, parenthetically, little realistic approach as to how the same might be accomplished. As the Corps of Engineers recognized on March 14, 1962, in addition to the legislation heretofore referred to, "for permanent protection, it would be desirable to provide substantial increase in the beaches and dunes over that which existed prior to the storm, but this would require not only funds but construction effort which would take many years" [Intervening Plaintiff's Exhibit No. 15, Appendix B, page 8].

Generalizations

The remainder of the Record may be further characterized by the obvious observation that it is directed toward *legislative action.* The sins of omission or commission of the Federal, State, County or City governments are not before the Court for either decision or comment. What should have been done, what could have been done, or what needs to be done, is a matter which must be left to the respective legislative bodies. Under our form of government, with the sacred doctrine of separation of powers, it is not for the Court to legislate. The Court must decide the case upon established legal

principles, as applied to the facts as they are found to exist, and not as one might wish that they existed.

One salient fact to remember is that Mr. Slaughter had no personal knowledge of the physical condition or history of the property here involved; Mr. Lindner had no knowledge prior to 1962 of any of the area; Mr. Hoerichs had no specific knowledge of the property here involved, and had no knowledge of the general area prior to 1961, and perhaps 1965; and Mr. Augustine had no knowledge prior to 1962. Another fact is that there was general agreement that the dune line, as now constructed and maintained, would not furnish protection from another storm of the type and intensity of the '62 Storm. It is also generally agreed that a building properly designed and constructed does not need a dune to protect it in the event of a storm of the intensity of the '62 Storm. Mr. Slaughter is of the opinion that building properly designed and constructed over the Dune Line will not necessarily affect the integrity of the Dune Line, while Mr. Augustine is of a different opinion.

One could summarize that, so far as the scientific community is concerned, there are natural forces at work which man does not yet understand, that the Caldwell Section topped with sand fence at its crest and covered with American Beach Grass is the best Protective device yet found for ocean-front property protection. but that its effect upon creation of a "beach" to the east is unknown, and that no comparative analysis has been undertaken with regard to the merits of protecting, restoring and/or enlarging the parallel off-shore bar, either as a factor in protection or buildup of a "beach area", with those devices already in use, including perpendicular jetties, parallel bulkheads and a dune line. In contrast, however, is the testimony of Mr. Harrison, from years of intimate observation, both in a personal and an official capacity, to the effect that the principal cause of erosion is a breach in the bar, and the principal reason for the build-up of the sand area is a patching of the bar [T. 628], and the testimony of Mr. Crooper, based upon personal and professional observations, that the condition of the off-shore bars control the amount of sand deposited on the ocean-front to form a "beach area" [T. 551-554].

THE LAW

Against this factual background, the Court now turns to a discussion of the applicable law. The Court wishes that it could adopt the simplicity of the Memorandum submitted by 71st Street, Inc. because it appears to succinctly delineate the facts, define the law, and reach a proper conclusion. To do so, however, would not do justice to the laborious research and preparation of Memoranda by the Plaintiff and the Intervening Plaintiff, nor would it conform to the mandate that a Court, in rendering a decision, take cognizance of all of the issues raised by the contentions of the respective parties.

Certain generalizations, however, are in order. *The Corporate Plaintiff has, throughout these proceedings, adopted its own arbitrary definition of the "beach"*. It has defined that area as the dry sand area lying between the mean high tide and the vegetation line. Such a definition does not appear warranted under either the facts or the law. Accordingly, while certain of the authorities cited by the Corporate Plaintiff, and the Intervening Plaintiff, might be appropriate to a properly defined "beach", they could have no application under the definition utilized by the Corporate Plaintiff, at least not to the extent of the application sought herein by the Plaintiffs. Secondly, the Intervening Plaintiff seeks the application of law to such an extent as to place in doubt the title to an inconceivable amount of private property within the State of Maryland. Although the Memorandum does not contain the ultimate application of this doctrine so vividly and astonishingly pictured by counsel during the trial, when applied to its ultimate conclusion, such a result would inevitability arise. The pertinent portion of the Transcript is contained on pages 181, 182 and 183. In that colloquy, Counsel for the Department of Natural Resources took the position that the maintenance of the natural dunal area by the State Roads Commission, through the erection of board fences connecting natural dunes, wherever they happened to be, gave title to the State of Maryland to all that property over which the fences happened to run.

In addition, the Intervening Plaintiff makes no distinction between erosion, by gradual and imperceptible changes, and avulsion, which is sudden and perceptible. Indeed, the Intervening Plaintiff utilizes only a general doctrine of "Submergence". Counsel for the Mayor and City Council of Ocean City, in its Memorandum, has dramatically directed its attention to the results of the application of such a broad theory after the 62' Storm, insofar as it would effect title to property lying in what is now the Town of Ocean City, when practically the entire area was awash. One further generalization is in order. Both Plaintiffs have indulged in the erroneous practice, during the trial, and in Memoranda, of applying facts common to the entire area from the Inlet, on the south, to the Delaware Line, on the north, to Lot Nos. 4 and 5 in Block 38 on the Plat of Oceanbay City, Maryland, the property here in litigation. They both choose to ignore the dirth of evidence with respect to this particular piece of property. Furthermore, they continue to attempt to apply certain facts to this property, which were of a general nature, without any limit in time, and in the face of clear, and irrefutable evidence, by the former owner, Mr. Brown, as to the nature of this property and the use made thereof, prior to 1962, while, at the same time, also ignoring the pictorial evidence contained in Corporate Defendant's Exhibit Nos. 1, 2 and 3, (particularly No. 1).

DEDICATION

The Court is of the opinion that there has been no dedication of the Property in Question. For the purposes of this portion of the Opinion, the

Court, in order to escape the avalanche of cases cited by the Parties, begs the indulgence of Counsel to cite general propositions of controlling Maryland law from the Maryland Law Encyclopedia, based as they are, upon the cases therein cited.

It would appear obvious, and conceded, that there has been no express dedication of the Property in Question by way of designation on a recorded plat of this area for a public purpose. An effort to construe the easement granted on June 27, 1962 as expressing such a dedication is unavailing. The easement thus granted must be construed according to its terms. The stated purpose of the easement was for the construction, reconstruction and maintenance of the sand dune barrier. It was for the purpose of protection, not for the purpose of developing a public park. As stated, it was intended for the benefit of the property therein described and for other property owners in the vicinity. Obviously, it ran to the benefit of the public generally because it was for the protection of public property to the west of the protective barrier and to all members of the public who were thus protected by its construction. In any event, when read in the light of history, the position of the Corps of Engineers, and the subsequent policy of public officials with regard to construction on lots similarly situated, the Deed of Easement would be restrictive of the rights granted, and would defeat the claim of the Plaintiffs that there existed an expressed dedication of this property to any use other than that stated therein.

The Plaintiffs make much of the theory of implied dedication. The Court is, likewise, of the opinion that, under the facts existing herein, there has been no implied dedication of the Property in Question.

> "A dedication is a devotion of land to a public use, by an *unequivocal act* of the owner of the fee, manifesting the *intention* that it shall be accepted and used presently or in the future for such public purpose. An intention to dedicate to the public use is an essential element of dedication, irrespective of how the dedication is claimed to be made. The intention of the dedicator must be ascertained from his declaration and acts, and it must be *clearly manifested.*" 8 M.L.E, "Dedication", Section 1. [Emphasis supplied]
>
> * * * * * *
>
> ". . . however, an owner should not be deprived of his property on the ground of dedication unless there has been *some clear* and *decisive act* indicating an intention to dedicate to the public use." M.L.E., supra, Section 3. [Emphasis Supplied]
>
> * * * * * *
>
> "Generally a survey and plat alone may establish an offer to dedicate if it is evident from the face of the plat that it was the intention of the owner to set apart certain ground for public use. However, there is no dedication if such intention is not shown, and such intention cannot

be inferred from a plat by placing on it names which import a private use as readily as a public use. The unquestioned exercise of the right of absolute ownership of a tract included in a recorded plat may constitute a conclusive refutation of an alleged ous intention of the owner to dedicate such tract to the public use." M.L.E., Supra, Section 5.

* * * * * *

"The burden of proof to establish a dedication is generally on the party asserting it . . .". M.L.E., supra, Section 13.

* * * * * *

"Dedication of land to public use, and the essential elements of dedication, such as the intention of the land owner to dedicate, must be established by *clear evidence*. In determining whether there has been a dedication of land to a public use, each particular case must be decided by considering the declaration of the land owners, his intentions as manifested by his acts, and all other circumstances of the case. The acceptance of an offer to dedicate may be inferred from the evidence." M.L.E., supra, Section 14. [Emphasis Supplied]

* * * * * *

"The extent and effect of a dedication must be measured and limited by the scope and nature of the right of user, which the public or the grantees of appurtenant lots have acquired as an easement, and the amount of land, and the width and length of streets and highways, dedicated to the public, depend on the intention of the dedicator as manifested in the act of dedication and the surrounding circumstances.

"Compliance with the conditions, restrictions, and limitations imposed upon a dedication, is essential unless waived. Where the dedicator of land to be used as a highway or street retains absolute title to land adjoining the land dedicated, *neither the municipality nor the users of the dedicated land have the right to enter on, use, or occupy the property beyond the dedicated limits, and any attempt by a municipality*, accepting an offer to dedicate a street, to widen, to construct, or repair the way outside the limits of the street or *to enter upon, use, or occupy the land of the dedicator outside the limits of the right-of-way, constitutes a wrong* for which the municipality would be liable." supra, Section 21. [Emphasis Supplied]

* * * * * *

"A dedication does not affect the ownership of land, but merely gives to the public a right of user for the purpose intended by the dedicator. *For all purposes consistent with the dedicated use the rights incident to the grantor's pre-existing title may still be exercised by the grantor.*" M.L.E, supra, Section 22. [Emphasis Supplied]

* * * * * *

> "Dedicated property cannot be diverted from the uses to which it was dedicated. Likewise, *a dedication cannot be so enlarged as to accumulate burdens not reasonably contemplated in the dedication.*" M.L.E., supra, Section 23. [Emphasis Supplied]

The key to the resolution of the apparent contradiction in the cited cases by the parties is the very fact that each case must be determined upon its own facts and circumstances. As a result, in various cases the evidence has been held sufficient to show the dedication, and in others it has been insufficient to show the dedication. The case of *Toney Schloss v. Berenholtz*, 243 Md. 195, makes this point abundantly clear.

Implied dedication, resting as it does, principally upon estoppel in pais, it is well to note, at this point, the "well settled" principle of law "that mere silence as to rights of record does not create an estoppel". *Klein v. Dove*, 205 Md. 285, at pages 295 and 296, *Sachs & Sons v. Ward*, 182 Md. 385, at page 395, and cases therein cited. It can hardly be disputed that the recording of the plat, the deeds, and the Deed of Easement, gave constructive notice to the entire world of the boundaries of the property in question, the private ownership thereof, and the easements to which it was subjected. See *Bourke v. Krick,* 304 F. 2nd 501, Section 3-102 (formerly Section 26) of Article 21 of The Annotated Code of Maryland.

The argument of the Plaintiffs for invoking the doctrine of Implied Dedication appears to be two-pronged. On the one hand, they submit that the mere use of land by the public works a dedication thereof to the public. Such an argument clearly ignores the necessity for the clearly manifested intention of the dedicator, which is essential to an effective dedication. The need for the requirement, as enunciated in the law, and the fallacy of the arguments of the Plaintiff, may be illustrated in the following manner. Suppose a person purchases a lot but has no desire to improve the same at that time. Nevertheless, the children in the neighborhood proceed to use it upon which to play softball, touch football, volleyball, practice shooting basketball or riding their motor bikes. Would such activity, alone, effect a dedication of a neighborhood park? If so, about an acre of land behind the house in which the Court resides has been dedicated to the youth of Berlin.

If mere user was to work a transfer in title, in this day of nomadic existence of so many young people, "Street People", "Runaways", and the like, no vacant land would be safe from public ownership. If this were true, most of the now developed property in Ocean City would be in the public domain and would ignore the clear evidence in the Record that the public has consistently respected private rights when the land is improved or built upon.

The second prong of the attack would couple with the first, the expenditure of public funds on the said piece of property. Again, the argument ig-

nores the requirement for a clearly manifested intent on the part of the dedicator. Furthermore, it ignores the extent to which a dedication may have been made to the public. The public authorities can exercise control over no more of the property than that which was intended to be dedicated, and for the purposes for which dedicated, by the dedicator. In addition, and of most significant importance, is the official position and intention of the public authority in expending such funds.

The difficulty in this case arises from the fact that the property in question lies in a rapidly developing area, from one of open, unimproved land, to one of high density urban development. Any reasonable approach to an appraisal of the facts requires an appreciation of that historical fact, and the consequences flowing therefrom, as revealed by the evidence.

Tiffany on "Real Property", Third Edition, Vol. 4, Section 1101 and 1102 reaffirm the necessity for a clear intention to be manifest on the part of the property owner. While both sections should be read in their entirety, several statements are here pertinent:

> ". . . A mere nonassertion of his rights by the owner does not establish a dedication. . .
>
> * * * * * *
>
> "There are numerous decisions to the effect that the mere fact that land is used by the public for a greater or less time does not in itself show a dedication thereof by the owner. . .
>
> * * * * * *
>
> ". . . And the owner's mere acquiescence in the use of land by the public for purposes of travel or recreation can furnish but slight evidence of dedication when such land is unenclosed land not in use for purposes of cultivation or otherwise. . ."

On page 270 of the 1973 Cumulative Supplement, one finds this statement:

> "Dedication will not be inferred from mere permissive use of unenclosed land."

The evidence is absolutely devoid of any indication of any intention on the part of the property owners to dedicate the entire Property in Question to the public use. In addition, the Court specifically finds, that, other than the occasional use for the playing of volleyball, in the Summertime, for about six years prior to the date of the hearing, the Plaintiffs have failed to produce any evidence of the actual use of the Property in Question by any members of the general public. The easement granted was for a specific purpose, and the funds expended therefor were in furtherance of that limited purpose. In the event that any portion of the beach cleaning funds were used on any portion of the property in question, the clear intention ex-

pressed by the Mayor and City Council of Ocean City, by the enactment of the Building Limit Line, and the granting of the permit to the property owners here involved, clearly recognizes the private property rights of the owner, and negates, affirmatively, any intention on the part of the Mayor and City Council to accept any dedication of the entirety of the Property in Question for the public use. There is not one iota of evidence of the expenditure of any County funds on the Property in Question. The only evidence of any active dominion and control over any part of the Property in Question by the County would be as a result of the Deed of Easement for the construction and maintenance of the Dune Line.

In short, the Plaintiffs have failed to carry their burden of proof, to show by preponderance of the affirmative and probative evidence, that there has been, under the law in effect in the State of Maryland, either an expressed or implied dedication of the Property in Question to the public use.

PRESCRIPTION

Closely associated in the argument of the Plaintiffs with regard to dedication, is the doctrine of prescription.

There seems to be no contention with regard to the fact that an easement by prescription must involve use for the prescriptive period of twenty years.

> "In order to acquire an easement by prescription, the use must have been adverse, exclusive, continuous and uninterrupted, under a claim of right, for the prescriptive period. A claim of an easement depends upon the character and extent of the use during the prescriptive period, and a surreptitious or concealed use or a use merely incidental to the main use cannot give rise to a prescriptive easement." 8 M.L.E., "Easement", Section 12.
>
> * * * * * *
>
> "*In order to establish an easement by prescription, the use must be for at least twenty years.* It must appear that the use was continuous and uninterrupted for the full prescriptive period.
>
> "However, the requirement that the use be continuous and uninterrupted for the full prescriptive period does not mean that a person shall use the way every day for twenty years, but simply that he exercises the right more or less frequently, according to the nature of the use to which its enjoyment may be applied, and without objection on the part of the owner of the land, and under such circumstances as exclude the presumption of a voluntary abandonment on the part of the person claiming it." M.L.E., supra, Section 13. [Emphasis Supplied]
>
> * * * * * *

> ". . . The use must be under a claim of right, and the right must be claimed under and through someone who had a right to grant or create the easement claimed.
>
> "An adverse use means use without license or permission. The use of a way whenever one sees fit over the land of another, without asking leave, is an adverse use which gives a right of way by prescription, but the mere failure on the part of the owner of realty to protest against the use of a road across his realty is not permission which will prevent an easement by prescription from arising, but is acquiescence.
>
> "Generally a permissive use can never ripen into an easement by prescription, at least during the period within which permission is granted, . . ." M.L.E., supra, Section 14.

The instant case is analogous to the situation existing in the case of *Mt. Sinai Nursing Home, Inc. v. Pleasant Manor Corporation*, 254 Md. 1, where the Court said, at page 6:

> "The difficulty the appellants now face is that although the law they now cite would support their right to prevail, they lack the facts to do so."

In that case, the continuous use had lasted sixteen or seventeen years, but the Court of Appeals affirmed the denial of the prescriptive right because the Appellants had failed to meet their burden of showing use by the public for the necessary twenty years.

The position of the Plaintiffs ignores the testimony of Mr. Brown as to the private nature and use of the Property in Question prior to the '62 Storm. It also ignores the obvious fact that Dr. Kohlerman can testify to activities only since the year 1964. Even assuming the use of the Property in Question by the public to have been extensive enough to create an easement by prescription (which the Court declines to do), the maximum period during which such use could have continued uninterruptedly would have been a term of ten years. This is insufficient to meet the statutory and otherwise legal requirements for the creation of an easement by prescription. The Court now turns to those contentions raised by the Plaintiffs for which no specific Maryland authority can be cited.

CUSTOM

The Court declines to rule upon the validity of the application of a "custom" as it is sought to be applied in this case. Such a consideration can be reserved until a more appropriate factual situation presents itself for consideration. Assuming, therefore, without deciding, and only for the purpose of argument, that a doctrine of "custom" is appropriate, and that it could be shown that a "custom" did, in fact, exist granting unto the public a right of

use of the fore-shore to the open sea, it is simply not applicable to the factual situation presented in the instant proceeding. As previously stated in this Opinion, no one, including the property owner, contends that private ownership of the Property in Question extends to the mean high water mark, or the mean low water mark, of the Atlantic Ocean. *Everyone recognizes the existence of a strip of land between the easterly property line of the Property in Question and the waters of the Atlantic Ocean at mean high water to be reserved for the use of the public as a "Beach", as delineated on the pertinent plats. What the Plaintiffs seek to do is to extend the "custom" across the lines of private property as delineated on a recorded plat thereof,* and whereon there appear public ways of access to that "Beach" area at intervals of two hundred fifty feet. The facts do not support the principle of law sought to be invoked.

One is tempted to engage in a dissertation upon the theory of "custom" as urged by the Plaintiffs. In view of the position taken by this Court, the same appears to be unnecessary. The Court would commend, however, a reading of the entire Section III of the "Introduction" of Blackstone in order for one to savor the full context in which Sir William Blackstone discussed this branch of the law. It cannot be taken out of context of that which preceded, or followed, the pages cited by the Corporate Plaintiff. In any event, the Corporate Plaintiff has not referred the Court to the specific custom which is sought to be established herein, and it is doubted that such a reference could be found among the writings of Blackstone, or his successor commentators. If such did exist, however, it is fundamental that the common law may be changed by legislative enactment. This proposition was laid to rest, once and for all, so far as Maryland is concerned, in the case of *Board of Public Works of Maryland v. Larmar Corporation*, 262 Md. 24, and the history, as therein set forth, of legislative enactments enlarging and restricting common law riparian rights. As a matter of fact, this is exactly what the case of *Shively v. Bowlby*, 14 Supreme Court 548, 152 U.S. 1, stands for. The Corporate Defendant has quoted only a portion of Article 5 of the Declaration of Rights of the Constitution of Maryland, of 1867. Perhaps it would be well to quote the remainder of that Article, with the emphasis (by underlining) being supplied by the Court:

> "ART. 5. That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity; and also of all Acts of Assembly in force on the first day of June, eighteen hundred and sixty-seven except such as may have since expired, or may be inconsistent with the provisions of this Constitution; *subject, nevertheless,*

> *to the revision of, and amendment or repeal by, the Legislature of this State.* And, the Inhabitants of Maryland are also entitled to all property derived to them from, or under the Charter granted by His Majesty Charles the First to Caecilius Calvert, Baron of Baltimore."

There is no substantial difference between that portion of the 1867 Constitution of Maryland and paragraph III of the Declaration of Rights of the First Constitution of Maryland, as reported by Kilty, Volume 1, The Laws of Maryland, 1799 Edition. It reads as follows:

> "III. That the Inhabitants of Maryland are entitled to The Common Law of England, and the trial by Jury according to the course of that law, and to the benefit of such of the English Statutes as existed at the time of their emigration and which by experience have been found applicable to their local and other circumstances, and of such others as have been since made in England or Great-Britain, and have been introduced, used and practiced by the Courts of Law or Equity; and also to all Acts of Assembly in force on the first of June, 1774, except such as may have since expired, of have been, or may be altered by acts of convention, of this Declarartion of Rights; *subject, nevertheless to the revision of, and amendment or repeal by, the Legislature of this State;* and also the Inhabitants of Maryland are also entitled to all property derived to them from or under the charter granted by His Majesty Charles I to Caecilius Calvert, Baron of Baltimore." [Emphasis Supplied].

It should also be noted that Blackstone, himself, in detailing the necessary requisites for the recognition of a "custom", in the very first requisite thereof, said this:

> ". . . For which reason, no custom can prevail against an express act of parliament, since the statute itself is a proof of a time when such a custom did not exist." Blackstone, Vol. 1, pages 76-77.

Restrained as it is, by its own declaration, from a point-by-point analysis of this "doctrine", the Court can only observe that it is hard to conceive of a more contradictory set of "customs" than that which arrays the unrestricted public use of a piece of land against the right of private ownership, under valid deeds of conveyance, duly recorded, and delineated by the boundaries established upon subdivision plats of record. As Blackstone said:

> "7. Lastly, *customs must be consistent* with each other: one custom cannot be set up in opposition to another. For if both are really customs, then both are of equal antiquity, and both established by mutual consent; which to say of contradictory customs is absurd . . .". Blackstone, Volume 1, page 78. [Emphasis Original].

Counsel is entitled to one further comment. The cited case of *Mayor and City Council of Baltimore vs. The Baltimore and Philadelphia Steamboat*

Company, 104 Md. 485, does not stand for the proposition of establishing a "custom" as herein sought to be established. That case was a condemnation case for the purpose of widening Pratt Street at its intersection with Light Street, and concerned itself with those riparian rights for which the property owner was entitled to be compensated.

PUBLIC TRUST DOCTRINE

What has been heretofore stated with regard to the alleged doctrine of "custom" applies with equal force to the alleged doctrine of "Public Trust in Tidal Areas". Again, assuming, without deciding, and solely for the purpose of argument, that there does exist such a doctrine in the State of Maryland, it is not applicable to the facts of this case. Assuming that an area of the fore-shore is impressed by a public "trust", there exist no facts in this proceeding which would extend the area of that trust across a property line delineated by lot and block numbers on recorded plats. The spectre of the unilateral definition of the area by the Plaintiffs to be that from mean high water to the line of vegetation, raises its head, and seeks, by its own irrepressible growth, to envelop all that it encounters. The Court specifically finds that there are herein present no facts upon which such an expansion of the doctrine, if such does exist, to give it any force and effect in the determination hereof. *Assuming a right in the public of fishing and navigation in navigable waters, the Plaintiffs cite no Maryland authority for extending that right to private property separated from the waters of the Atlantic Ocean by a strip of land dedicated to public use.*

If Counsel will carefully read *Kerpelmen vs. Board of Public Works of Maryland,* 261 Md. 436 (cited by the Corporate Plaintiffs in support of its theory), at page 442, one will find that the Court of Appeals recognized the theory upon which this Court had determined the issues therein raised, and that the theory of a public trust was one of those issues. The Court then said:

> ". . . for this reason [standing to sue] rather than for the reasons considered in the Chancellor's opinion *about which we express no opinion.*" [Emphasis Supplied].

Again, the Court would commend the reading of *Board of Public Works of Maryland vs. Larmar Corporation,* 262 Md. 24, for a more explicit history, and a determinative opinion, with regard to the rights then under consideration, which were, in the nature of riparian rights, and to which, perforce, the public rights of fishing and navigation were subjected. In citing *Delmarva Power and Light Company of Maryland vs. Eberhart,* 147 Md. 273, Counsel have again applied the words "beaches and the shores" to their own geographical definition. A delineation of the extent of the public easements listed by the Court in that case was not necessary nor intended therein. It

was not the point of the case. The Court was therein concerned with deciding the narrow issue of whether an easement granted to a public utility was a public easement or a private easement. The listing cited by Counsel was contained within one paragraph of that opinion, and was used for the purpose of distinguishing easements which are generally considered public, and those which are generally considered private. It cannot be cited as authority for the proposition sought to be established by the Plaintiffs herein. In the event, however, that one would consider that case to cause confusion in the area of the law, again, the Court would refer to the later and more extensive consideration of the rights as contained in the later opinion of the *Board of Public Works of Maryland vs. Larmar Corporation, supra.*

During the course of this Opinion, the Court has seen fit to restrict itself to Maryland authorities, saving the consideration of out-of-State citations and law review articles until a subsequent portion of the Opinion. However, Opinions of the Supreme Court of the United States of America being also controlling in a decision by the Court, such decisions should likewise be considered under the respective arguments of counsel for which they are cited. Such is the "lead-off" authority cited by the Intervening Plaintiff with regard to the contended application of the "Public Trust Doctrine". *Shively vs. Bowlby*, 152 U.S. 1, is cited. It may also be found reported in 14 Supreme Court 548. For convenience, and in the interest of time, the Court is going to quote a portion of its Opinion in No. 8934 Chancery, from which the case of *Kerpelman vs. Board of Public Works of Maryland supra*, emerged.

> ". . . Unfortunately, Counsel for the Complainant has misread the case, and has appropriated wording from that case, out of context, to attempt to support the position of the Complainant herein.
>
> "That case establishes the proposition that, consistent with the Common Law of England, the individual States inherited the sovereignty over lands under navigable waters within the State, and granted unto them control and regulation of riparian rights, which the States were free to alienate according to the constitution and statutes of the respective States. In a most helpful and extensive treatment of the entire subject matter of riparian rights as they existed within the original thirteen states, and as, by virtue of that Opinion extended to the new States admitted into the Union thereafter, the Supreme Court, in Shively vs. Bowlby, has furnished a source of history of the treatment of riparian rights of enormous magnitude, and through its study, one is oriented to the broad spectrum, and the range of treatment, of the subject by the individual States. This concept is fundamental if one is to now attempt to define and understand riparian rights within the United States. Available treatises, encyclopedic compendiums, and conclusions based upon summaries of annotations must all be read and considered in the light of the cardinal principle that the decisions of the individual states are based

upon the law as it had been established within the individual states, and unless the law in force in the State in which the appellate decision has been rendered is identical with that in Maryland, the decision of the foreign jurisdiction, or the interpretation of a federal tribunal based upon the law of that foreign jurisdiction, is neither persuasive nor controlling.

* * * * * *

"The language which Counsel for the Complainant has selected from Shively vs. Bowlby with regard to the imposition of a trust does not apply to the type of trust which the Complainant espouses. The factual situation in Shively vs. Bowlby presented the issue as to whether or not a purported grant from the United States of America, while the area was a territory under the jurisdiction of the Federal Government, took precedence over a grant by the State of Oregon for the same land. The Court determined that the United States had no power to make such a grant because the Federal Government held the land in trust pending the formation of the new State. If one will read the last ten paragraphs of that Opinion, the thrust of the entire opinion will become most evident. The type of trust referred to therein bears no resemblance to the type of trust here urged upon the Court."

The Court just recently discovered a similar analysis of this case in Volume Two of "Shore and Sea Boundaries" (1964), at pages 532 and 533, written by Aaron L. Shalowitz, an employee of the U. S. Coast and Geodetic Survey for 48 years, and one with extensive legal and engineering experience and education.

CONSTRUCTIVE TRUST

The Intervening Plaintiff has introduced the concept of a "constructive trust" in urging upon the Court a public trust in the Property in Question. Its theory is apparently based upon two factual considerations; namely, one, the expenditure by the Federal Government in creating the Dune Line, the expenditure for maintaining and improving the dunes by Worcester County, and the expenditure by the State of Maryland for the construction of the asphalt groins, and, secondly, upon the fact that the Dune Line was constructed by the use of 1,050,000 cubic yards of sand taken "from State wetlands" in Assawoman Bay, Isle of Wight Bay and Sinepuxent Bay. Acknowledging that the Dune Line was primarily designed for storm protection, the Intervening Plaintiff alleges that it "also had the effect of providing an enlarged area for public recreational purposes", and that "[b]ecause of these efforts, lots which were never buildable or were unbuildable as a result of the 1962 storm can now be built upon."

The astounding conclusion is then stated as follows:

> "Construction on or over the dune lines . . . would of necessity be a confiscation by the private property owner for his own economic benefit of property which is held in trust for the public, ... Such a result would unjustly enrich the littoral owners at the public's expense and may not be tolerated."

There follows this summary of the contention:

> ". . . A court of equity may impose a trust over this property, for the benefit of those who may have an interest in it, not protected by legal title."

The elements of a constructive trust are stated to be, as follows:

> "A constructive trust is not based on agreement, but is raised by construction of law, regardless of the intention of the parties, when property is acquired by fraud, misrepresentation, imposition, or concealment, or under other circumstances rendering it inequitable for the holder of the legal title to retain it." 21 M.L.E., "Trust", Section 61.

To these elements must be added the possibility of "duress", by virtue of the Opinion in the case of *Wooddy vs. Wooddy*, 258 Md. 224, at page 233. The violation of a confidential or fiduciary relationship most often gives rise to litigation alleging the creation of such a trust.

The Court specifically finds that the Property in Question was not acquired, even after 1962, by fraud, by misrepresentation, by imposition, by concealment, by duress, or by a violation of a confidenttial or fiduciary relationship. Accordingly, the Intervening Plaintiff is apparently pressing upon the Court to find it inequitable for the property owner to retain the property "under other circumstances". Such an approach is addressed to the conscience of the Court.

> "A constructive trust is the formula through which the conscience of equity finds expression; it is a mere remedy to which equity courts resort in granting relief, and when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest a court of equity converts him into a trustee. Thus constructive trusts, which are independent of any intention, are forced on the conscience of the party by operation of law . . ." 21 M.L.E., supra.

From the many cases annotated in the Maryland Law Encyclopedia, and the list appearing in *Peninsula Methodist Homes vs. Cropper*, 156 Md. 728, at page 737, the Court has been referred to no single case in which a constructive trust has been impressed upon private property created, improved, or enhanced in value, as the result of the expenditure of public funds. As a

matter of fact, it could well be inferred that the legislative policy of the State of Maryland is to the contrary. Section 12-106 of Article 21 of the Annotated Code of Maryland reads as follows:

> "(a) The fair market value of property in a proceeding for condemnation shall be the price as of the valuation date for the highest and best use of such property which a seller, willing but not obligated to sell, would accept for the property, and which a buyer, willing but not obligated to buy, would pay therefor *excluding any increment in value proximately caused by the public project for which the property condemned is needed, plus the amount,* if any, by which such price reflects a diminution in value occurring between the effective date of legislative authority for the acquisition of such property and the date of actual taking if the trier of facts shall find that *such diminution in value was proximately caused by the public project for which the property condemned is needed,* or by announcements or acts of the plaintiff or its officials concerning such public project, and was beyond the reasonable control of the property owner." [Emphasis Supplied].

The Intervening Plaintiff's position, in this regard, while giving lip-service to the construction of the Dune Line for storm protection, seeks to abort and pervert the basic purpose and mission of "Operation Five-High", as set forth in Intervening Plaintiff's Exhibit No. 15. The entire effort was predicated upon property damage as a result of the '62 Storm, and the designation of the area as a "Disaster Area" by the President of the United States was predicted upon that fact. Property damage is the unifying thread throughout the entire project, and the use of the words "restoration" and "protection" recur regularly throughout the Report and the accompanying Exhibits. Reference is specifically directed to a TWX message from OEP National Headquarters in Washington, Dated March 20, 1962, appearing as page 1 of Appendix B, portions of which read as follows:

> "1. Protective and other work shall be limited to the minimum amount necessary to remove the immediate threat to health and safety and to prevent immediate damage to property. Assistance may be available for replacing sand dunes and other barriers, but only to the extent necessary to provide emergency protection.
>
> * * * * * *
>
> ". . . Please note that protective work can be performed for the protection of public or private property. The purpose of the protective work is to prevent further damage to public and private property."

As early as March 12, 1962, the Corps of Engineers in Baltimore was advised of the responsibility of the various Federal agencies "for preparation of estimates of damage and estimates to alleviate such damage". The message went on to say:

"Estimates of damage for category assigned to Corps of Engineers is to be broken down into following four groupings

A. Type and extent of disaster and list of affected counties.

B. Current estimate of public property damage.

C. Current estimate of private property damage.

D. Current estimate of total funds personnel equipment and material or other resources required to alleviate such damage health safety public safety. Only major equipment and material need be reported.

It is to be noted that items B. and C. above are estimates of damage that have occurred whereas items D. is an estimate of funds required to alleviate damages in accordance with criteria set forth in P. L. 875." [Intervening Plaintiff's Exhibit No. 15, Appendix A. pages 3 and 4].

In an official communication of the United States Corps of Engineers, dated March 29, 1962, the following was reported:

"1. During his trip on 26 and 27 March, General Wilson, the Chief of Engineers, appeared to be very satisfied with the initiative that all districts displayed in getting work underway under Public Law 875. In all the States visited the particular point was made that the Corps of Engineers working under OEP is providing a standard shore protection for all States equally. In fact, in one particular State, a local official made the statement to the effect that as long as the Corps of Engineers, acting as a Federal agent of OEP, was consistent along the entire coast line he felt that he could better cope with the problem *of individual properties* affected by the restoration work, if he could state that his community is being treated no better or worse than any other community from Montauk Point to the North Carolina border." [Intervening Plaintiff's Exhibit No. 15, Appendix B, page 16.] [Emphasis Supplied].

The position of the Intervening Plaintiff also assumes, as true, fact which is not supported by the evidence. That fact is that the erection of the Dune Line also had the effect of providing an enlarged area for public recreational purposes. As heretofore set forth, the evidence on that fact is not clear, not in agreement, and, probably, in contradiction to the assumption made by the Intervening Plaintiff.

To summarize, if this Court is faced with placing in the balance of its conscience the creation of a constructive trust in favor of the public because of the money spent and the material used in the restorative and protective measures taken after the '62 Storm, on the one hand, and the appropriation of private property, as a result of an act of God resulting in a disaster,

without affording just compensation to the property owner by the government, on the other hand, then this Court would have no difficulty in finding that the latter equity is of much greater weight than the former. The Court would, therefore, specifically find that these circumstances are not such as to render it inequitable for the holder of the legal title to retain that title.

The Court is not quite clear as to the theory raised by the Corporate Plaintiff in urging the creation of an "implied trust". The case of *State vs. Wingert,* 132 Md. 605, cited by the Plaintiff, concerns a "resulting trust". As stated on page 610 thereof, "In all species of resulting trust, intention is an essential element." The requisites for the creation of a resulting trust are as follows:

> "A resulting trust is an implied trust created by operation of law, and arises by implication from the facts and circumstances to effect the presumed intention of the parties. Courts of equity declare resulting trusts in favor of donors for the purpose of carrying out what appears from the circumstances would probably have been the donor's intention if he had thought of the situation which arose.
>
> "A resulting trust arises where the legal estate is disposed of or acquired but the intention appears or is inferred from the terms of the disposition, or accompanying facts, that the beneficial interest is not to go with the legal title. A resulting trust cannot arise unless the legal title is in one person and the beneficial interest is wholly or partially in another."
>
> * * * * * *
>
> "A resulting trust arises, if at all, the instant the legal title is taken and vests. The intention or presumption of intention to create a trust must be present at the time of the transaction out of which it is sought to be established and its existence must be determined from the facts then existing, and not from those occurring subsequently." 21 M.L.E., "Trust", Section 41.

Certainly, it can be stated without reservation or anticipation of refutation, that no facts exist herein to support the creation of a resulting trust. If for no other reason, the essential element of "intention" is absent from both sides of the transaction in 1962.

In the case of *Fasman vs. Pottashnick,* 188 Md. 105, the term "implied trusts" was used to include the two classes composed of, one, resulting trusts, and, two, constructive trusts. In that case, relief was sought by the creation of either of these two trusts, and denied under the basis of the facts therein. In speaking, therefore, of "implied trusts", one must consider the terms only in the context of the two classes, as hereinbefore considered. *Fasman vs. Pottashnick, supra,* page 109. The case of *Sines vs. Shipes,* 192 Md. 139, is also cited by the Corporate Plaintiff in support of its theory. Again, the use of the term "implied Trust" must be considered in the light of

the two named classes thereof. See page 153 of that Opinion. Not finding any distinction, therefore, in the use of the theory of "implied trusts" in aid of the contention of the Corporate Plaintiff, what the Court has previously said with regard to the creation of a constructive trust and a resulting trust, under the facts of this case, is affirmed.

SUBMERGENCE

There remains for consideration the theory propounded by the Intervening Plaintiff which it has labeled as the "doctrine of submergence". Briefly stated, the theory rests upon the fact that the Property in Question was "submerged" by the '62 Storm, and once having been "submerged", it became the property of the State of Maryland, and, because of the creation of the Dune Line, it was reclaimed through artificial means, and therefore could not inure to the benefit of the property owner.

To attempt to unravel this argument, one must remember certain salient facts. One, the Intervening Plaintiff refers to a storm, where the water suddenly and perceptibly overran its usual boundaries, removing large quantities of sand and earth, and then receded to its normal boundaries, bearing in mind, of course, the constantly changing contours of a shoreline. Secondly, when the waters receded, a portion of the Property in Question remained as fixed land. By November, 1962, the mean high water line was at or just to the east of the easterly property line of the Property in Question and by October, 1963, it was considerably to the east of the easterly property line of the Property in Question [Corporate Defendant's Exhibit No. 7].

This contention, as applied to the factual situation existing in this case, being a matter of first impression in Maryland, requires the Court to revert to traditional definitions and concepts with regard to riparian rights, and to the text-writers and encyclopedias for an application to similar circumstances.

The term "avulsion" is the correct traditional terminology to be applied in the event of "the removal of a considerable quantity of earth from the land of one proprietor and its deposit on the land of another suddenly and by the perceptible action of the water". "[W]hen avulsion happens, the ownership of the land remains according to the former boundaries." 93 C.J.S., "Waters", Section 79, 56 Am Jur, "Waters", Section 476 and 477, Shalowitz, "Shore and Sea Boundaries", Vol. 1, Appendix A, page 281.

> "74. Submergence of shore. — The rule which operates in favor of the riparian owner also operates against him and the condition and extent of the operation are the same whether it is applied in his favor or otherwise. If a portion of the land of the riparian owner is suddenly engulfed, and the former boundary can be determined or the land

> reclaimed within a reasonable time, he does not loose his title to it. As held in St. Louis vs. Rutz, where the bank of a river is suddenly washed away, its owner does not loose his title to the locus in quo, but if, subsequently, land is formed in the stream over the place where the land formerly was, he will have the title to it, and such title cannot be claimed by the owner of an island on the opposite side of the river in another State, by the mere fact that the land is attached by accretion to such island in the process of formation. The former owner may reclaim the destroyed land, and if the land of the frontager is entirely destroyed, so that water touches non-riparian land, the former owner will not loose his land if, when after the subsidence of the influences producing the avulsion, the loss is made up by steady and constant accretions. The person who claims the land under the water has the burden of showing that it caved off suddenly, and also the extent to which the former boundary went . . .". Farnham, Law of Waters and Water Rights, Vol. 1 Section 74, with particular reference to the case reported in Footnote 3, at the bottom of page 331. See also Vol III, pp. 2485-2500, especially p. 2494.

To like effect, Professor Farnham says, in Section 144:

> "At common law the right of way of the public does not vary or fluctuate with the fluctuation of the bed of the river, so as to entitle the public, when the highway is completely washed away, to substitute for it a sufficient quantity of the adjacent land of the owner of the fee without making compensation for the additional land taken."
>
> "Accretion" is the process of gradual and imperceptible addition to riparian lands caused by the action of the water in washing up sand, earth, gravel or other materials. The land formed as a result thereof is correctly termed "alluvion". Land formed by accretion belongs to the riparian owner on or against whose bank or shore the alluvial matter is deposited, ... The fact that accretions are due wholly or in part to obstructions placed in the stream by third persons does not prevent the riparian owner from acquiring title thereto; . . . . Where a riparian owner has no part in the making of artificial deposits, which allegedly increased the deposit by accretion, the riparian owner has title to such accretion." 93 C.J.S., supra, Section 76.

The definition is standard, and appears in 56 Am. Jur., "Waters", supra, Farnham, supra, Section 69, Shalowitz, supra, page 279.

> "Most of the cases heretofor mentioned relate to alluvion formed by rivers, but the same rules are generally applied in cases of alluvion formed by the sea". 56 Am. Jur., supra, Section 491, citing Stevens vs. Arnold, 262 U.S. 266, 67 L. Ed. 974, 43 S. Ct. 560.

As opposed to "avulsion", the term "erosion" means the "gradual eating away of the soil by the operation of current or tides; it is a gradual

process and, during its occurrence, imperceptible." 93 C.J.S., supra, Section 80. To the same effect is the definition in 56 Am. Jur., supra, Section 476, and Shalowitz, supra, page 288.

> "A riparian owner may lose title to his land or portion thereof by a diminution of its area through gradual changes in the course of the adjoining stream or river. . . ."
>
> * * * * * *
>
> " 'Submergence' is the disappearance of the soil under the water and the formation of a more or less navigable body over it. The ownership of land may be lost by submergence, but a submergence of the land by floodwaters, of itself, does not constitute an erosion such as to destroy the land." 93 C.J.S., supra, Section 80.

As to the reappearance of land after submergence, the following is noted:

> "The general rule is that, where land becomes submerged by reason of erosion, or for some other cause, title thereto is not lost, and, when it reappears, either by accretion or reliction, the original owner is entitled to the property reclaimed." 93 C.J.S., supra, Section 81.
>
> "It is a general rule that where the location of the margin or bed of a stream or other body of water which constitutes the boundary of a tract of land is generally and imperceptibly changed or shifted by accretion, reliction, or erosion, the margin or bed of the stream or body, as so changed, remains the boundary line of the tract, which is extended or restricted accordingly . . . . But where the change takes place suddenly and perceptibly either by reliction or avulsion, as where a stream from any cause suddenly abandons its old and seeks a new bed, such a change works no change of boundary or ownership." 56 Am. Jur., supra, Section 477.
>
> "§493. — Restoration or Reappearance of Land after Erosion or Submergence. — The courts are not agreed as to the right of riparian owners to accretions that occur on navigable waters within the boundaries off land gradually lost by erosion or submergence. . . . But there seems to be no doubt . . . that if a navigable river suddenly encroaches upon adjoining private land, the title to the submerged portion remains in the former owner. When thereafter such land arises to the surface, whether by the deposit of alluvion or by a change in the channel of the stream, dominion reattaches thereto as if never suspended, and whatever accretions may have been added to the tract belong to its proprietor, as in ordinary cases . . ." 56 Am. Jur., supra, Section 493.
>
> "It has been stated as a general rule that it is immaterial, as respects the effect of accretion, reliction, or erosion, whether it results from natural or from artificial causes, in whole or in part. This rule has frequently been applied in cases where the accretion, reliction, or erosion is indirectly induced by artificial conditions created by third persons." 56 Am. Jur., supra, Section 486.

In speaking of "accretion", Professor Farnham, Vol. 1, in Section 69, at page 323, says:

> "But the mere fact that the formation is assisted by artificial structures placed on the shore in the regular improvement of the estate will not prevent his acquiring such title. Nor will the fact that the accretion is formed by a change in the current of the stream as the result of the improvements made on its bed."

See also Vol. III, p. 2486.

> "A variant of the accretion doctrine is where changes in shoreline are brought about by natural causes but induced by artificial structures, as, for example, where jetties or breakwaters have been built, and, thereafter, by gradual and imperceptible processes, accretions to the shoreline occur as a result of the artificial structures. The rule applied in the Federal courts is to treat such changes as natural accretions for the benefit of the adjacent riparian owner." Shalowitz, supra, Vol. 2, page 538.

> "The rule which operates in favor of a riparian owner, increasing his land holding as a result of accretion or reliction, also operates against him when the water by slow process encroaches on his land. Such process is known as erosion or submergence. It is sometimes given as a justification for the doctrine of accretion, since a riparian owner must run the risk of losing some of his land by erosion . . . . Erosion has been defined judicially as the gradual eating away of a riparian or littoral owner's soil by the operation of currents or tides. Where a riparian tract completely disappears by erosion so that an adjoining non-riparian tract becomes adjacent to the water, the latter tract becomes riparian and the new tract carries with it all the riparian rights that the original tract had."

> "Avulsion has been defined as the loss of lands, such as those bordering on the seashore, by sudden or violent action of the elements, perceptible while in progress. The property of the part thus separated continues in the original proprietor, and in this respect avulsion differs from accretion in that in the latter case the addition becomes the property of the owner of the land to which the addition is made . . ." Shalowitz, supra, Vol. 2, page 539.

Of course, when, by virtue of reappearance of land either by the recession of the waters or by accretion, the property owner can only claim title to the limit of his boundaries prior to the avulsion or submergence. 56 Am. Jur., supra, Section 493, page 904, 93 C.J.S., supra, Section 76, page 752.

As General Lipscomb said, supra, ". . . In replacing beaches, it must be recognized that a storm tears away a beach and extended periods of calm weather restore it, so that in estimating quantity of material which must be placed under P. L. 875 a reasonable allowance must be made for the con-

tribution of the sea toward the restoration within a period of a few months' time during which temporary repairs or replacements can be completed." Based upon his experience, his predictions proved valid in the present case.

The Court is of the opinion, therefore, that the Intervening Plaintiff made reference to the wrong doctrine of water rights as applicable to the facts of this case. So much of the land area of the Property in Question as was swept away by the sea during the '62 Storm was as a result of an avulsion, and when the land was restored, by the recession of the waters, and by accretion, whether naturally or artificially induced, or by a combination of both, the original boundary of the Property in Question was restored, and remained vested in the property owner, even during the period of suspension.

The Court believes such a result to be supported by reason. To vest title in the State of Maryland of all lands restored after a storm, whether by natural or artificial means, would cast clouds on titles of such magnitude that it is impossible for a person to comprehend the ramifications thereof. History is full of such restorations. Stipulation Exhibit No. 4 is a chronicle of just some of the events which have occurred within Worcester County alone; and ten inlets, subsequently filled, are listed therein. The States of New York, Pennsylvania and Maryland would be amazed to learn of their property ownership as a result of the recent storm "Agnes", to say nothing of the consternation of the citizenry, upon learning of the appropriation of their property rights. What the State cannot do according to its own Constitution and its Statutes, it cannot do under the pretense of Divine direction or the anger and fury of "Mother Nature".

It remains only to consider whether or not the "Wetlands" legislation, contained in Section 718, and following, of Article 66C, of The Annotated Code of Maryland, as suggested by the Corporate Plaintiff, affect this determination. The Court is of the opinion that such was not the intent of the General Assembly in its passage, and its provisions have no adverse bearing upon the decision herein made. In the first place, no claim is made by the Corporate Defendant of any right below mean high tide of the Atlantic Ocean; accordingly, "State Wetlands" are not affected. "Private Wetlands" are not affected because the Property in Question is not subject "to regular or periodic tidal action", as defined in the Statute. At any rate, even on State Wetlands, an owner of land is permitted to preserve his access to navigable water, or to protect his shore against erosion. Likewise, the Court finds nothing in Sections 1 through 29 of Article 96A of The Annotated Code of Maryland contrary to the opinions expressed herein.

OUT-OF-STATE AUTHORITIES

In view of the great weight attached to out-of-State authorities by the Plaintiffs, and in the light of the voluminous photo-copies thereof submitted to the Court, the Court feels compelled, in fairness to Counsel and to the Litigants, to confirm that it has carefully read and studied each of these authorities. Because of the factual situation existing in the instant proceeding, as hereinbefore set forth, a brief reference to each case with the reason why the Court felt the same not to be persuasive, seems sufficient.

In *Gion v. City of Santa Cruz*, and *Dietz v. King*, California cases, both reported in 465 P.2d 50, the facts reveal that the prescriptive period in California is *five (5) years;* in the Gion case, Counsel stipulated that the public had fished on the property since 1900, and in the King case a recorded instrument by the owners of the property acknowledged that there had existed a public easement and right-of-way in road in question for over a hundred years. The Court recognized, however, as the controlling principle of law, that the creation of a prescriptive right is to be treated "the same as any other, that is, the issue is ordinarily one of fact, giving consideration to all the circumstances and the inferences that may be drawn therefrom." [p. 57], and cited the provision appearing in the Constitution of California with regard to frontage on navigable waters. The Court did say this, however:

> "Although article XV, section 2 may be limited to some extent by the United States Constitution it clearly indicates that we should encourage public use of shoreline areas *whenever that can be done consistently with the federal constitution.* [p. 59] [Emphasis Supplied].

Seaway Company, Inc. v. Attorney General, a Texas case, 375 S.W.2d 923, involved the application of a 1959 statute enacted by the Legislature of Texas entitled the "Open Beaches Bill", in which it was declared to be the public policy of the State for the people to "have the free and unrestricted right of ingress and egress to and from the State-owned beaches bordering on the seaward shore of the Gulf of Mexico or such larger area extending *from the line of mean low tide to the line of vegetation in the event the public has acquired a right of use or easement to or over such area by prescription, dedication, or has retained a right by virtue of continued right in the public.*" [p. 925]. The Court noted that the beach and the line of vegetation had been stable for two hundred or more years and that the use of this portion of the land, as defined in the Statute, was "beyond the memory of living man" as disclosed by documentary evidence, attesting to the facts, in addition to reputation evidence coming through witnesses who received it from persons now deceased. At one point, the Court said this:

> "There is testimony that while there is, particularly from storms, some erosion on the beach and at points on the vegetation line, such is temporary and the beach and the line of vegetation through the

> work of nature rebuild in relatively short time. The waters and winds rebuild the beach with sand and the vegetation grows from roots that are shown by the testimony not to be destroyed by the storms. The vegetation line effectively marks the sandy beach from the upland which is covered by continuous spread of vegetation inland. It marks the ending of the sandy beach almost as effectively as a bluff or fences. It makes of the sandy area seaward of it an area in the nature of a defile. Certainly it is a well identified area made by nature." [p. 931].

At a later point, the Court said this:

> ". . . As above noticed, this has not been a desultory use as is the case in those cases relied on by appellant. It has not been a use across an open prairie where one travels helter-skelter. Nor has it been travel where for some time one travels on a given route and later travels another route distantly removed from the first route. The physical nature of the beach and the use made definitely define the route. The line of vegetation and the line of low tide mark the route . . . Evidence shows daily systematic use of the whole area. This requirement of a definite route is required so the owner may have notice of not only the fact of adverse claim but the extent of it. The nature of the terrain and the use made gave sufficient notice to the owner of the extent and location of the route claim . . ." [p. 939].

Interestingly enough, the Court made the following observation:

> "We do not know that we clearly comprehend the appellees' position that the judgment can be upheld on the theory that the use of the beach by the public has become a part of our tradition and common law and the easement exists by reason of continuous right in the public. We suppose they seek to have us hold that the seashore is held in trust by the sovereign at common law for the people and to enjoy it there must be a means of egress and ingress to enable them to enjoy such use and therefore the sovereign has no power to cut off convenient access. *We know of no such rule of law.* In our extensive research we have found no cases so holding nor have any been cited. In some cases the expression is used that the sovereign holds the seashore for the use of the members of the public. *We think this is true but this is far from holding that grants by the sovereign of land above the seashore are impressed by implication with a reserved easement in favor of the public to furnish access by land to the shore. Nor is there in such cases such holding of the want of power in the sovereign to pass a fee simple title to the upland above the line of mean high tide."* [p. 929] [Emphasis Supplied].

In *State ex. rel. Thornton v. Hay*, an Oregon case, 462 P.2d 671, the first salient fact to be conceived is that *the mean high water mark is treated as*

being identical with the vegetation line [p. 673 and the last phrase of Footnote 3 on p. 674]. An Oregon Statute defines that to be at the sixteen-foot-elevation contour line. Secondly, the statutory prescriptive period in Oregon is ten (10) years [p. 676]. Thirdly, the public use of the disputed land area was *admitted* to be continuous for more than sixty years [p. 676]. Fourthly, from 1894 on, the Court found that the high water line was assumed by Oregonians to be the vegetation line [p. 674], was supported and affirmed by "several early Oregon decisions, and that, in Oregon 'land owners likely did not think they had anything to dedicate, until 1967, when legislative debates created sufficient notoriety to send a "number of ocean-front land owners to the offices of their legal advisors" [p. 675]. Fifthly, *the case arose out of a legislative enactment* declaring it to be the public policy of the State "to forever preserve and maintain the sovereignity of the State heretofor existing over the seashore and ocean beaches of the State", and declaring "that all public rights and easements in those lands . . . are confirmed and declared vested exclusively in the State of Oregon . . ." [pages 674-675].

The Court stated, at page 676:

> "While such a statute cannot create public right at the expense of a private land owner the statute can, and does, express legislative approval of the common-law doctrine of prescription *where the facts justify its application.* Consequently, we conclude that *the law in Oregon,* regardless of the generalizations that may apply to elsewhere, does not preclude the creation of prescriptive easements in beachland for public recreational use." [Emphasis Supplied].

In applying the doctrine of "Custom" in that case, it is important to note several findings of the Court:

> ". . . In the case at bar, there was evidence that the public use and enjoyment of the dry-sand area had never been interrupted by private land owners.
>
> * * * * * *
>
> ". . . The record shows that the dry-sand area in question has been used, as of right, with similarly situated lands elsewhere, and that the public's use has never been questioned by an upland owner so long as the public remained on the dry-sand and refrained from trespassing upon the lands above the vegetation line.
>
> * * * * * *
>
> "Finally, in support of custom, the record shows that the custom of the inhabitants of Oregon and of visitors in the State to use the dry sand as a public recreation area is so notorious that notice of the custom on the part of persons buying land along the shore must be presumed. In the case at bar, *the land owners conceded their actual knowledge* of the public's long-standing use of the dry sand area, . . .
>
> * * * * * *

> ". . . The rule in this case, based upon custom, is salutary in confirming a public right, and at the same time it takes from no man anything which he has had a *legitimate reason to regard as exclusively his*". [Page 678] [Emphasis Supplied].

Borough of Neptune City v. Borough of Avon-By-The-Sea, a New Jersey case, 294 A.2d 47, stands for no proposition in contest in the instant proceeding. It involved the validity of a municipal ordinance in the light of a New Jersey statute. Avon's beach was a public park under New Jersey statutes. The municipal ordinance sought to establish a different fee, for the use thereof, between residents and non-residents. The Court found the ordinance to be invalid, in view of the legislative enactment. There could be no valid contention that municipal authorities did not hold a public park, or a dedicated public beach, in trust for the use of all of the people. While the majority of the Court was apparently trying to tell the New Jersey legislature something, it is important to note their specific holding:

> "Here we are not directly concerned with the extent of legislative power to alienate tidal lands because the land seaward of the mean high water line remain in State ownership, *the municipality owns the bordering land, which is dedicated to park and beach purposes, and no problem of physical access by the public to the ocean exists.* . . .[Page 53].
>
> * * * * * *
>
> ". . . However, our cases rather early began to broadly say that the State's power to vacate or abridge public rights in tidal lands is absolute and unlimited, and our statutes dealing with State conveyances of such lands contain few, if any, limitations thereon." [Page 54].

After theorizing about certain prior grants by the State, the Court said:

> ". . . This case does not require resolution of such issues and we express no opinion on them. We mention this alienation aspect to indicate that, at least *where the upland sand area is owned by a municipality* — a political subdivision and creature of the State — *and dedicated to public beach purposes,* a modern court must take the view that the public trust doctrine dictates that the beach and the ocean waters must be *open to all on equal terms and without preference* and that any contrary state or municipal action is inpermissible." [Page 54] [Emphasis Supplied].

The same factual situation was presented in *Gewirtz vs. The City of Long Beach,* a New York case, 330 N.Y.S. 2d 495. By an amendment to its Charter, the City of Long Beach sought to restrict water front property to the "residents of the City of Long Beach and their invited guests" [Page 499], in the face of a local law enacted by the City in 1936, with an im-

plementing ordinance, dedicateing the ocean beach-front property to public use as a public park, and it had been maintained as such until the institution of the case in 1971. It is interesting to note that the Court specifically rejected basing its decision upon the Seaway, Thornton or Gion cases [Page 508].

Poole vs. Commissioners of Rehoboth, a Delaware case, 80 Atl. 683, can be of no help. It involved an express dedication by the developing corporation, based upon a plat and verbal declarations of the dedicator, made contemporaneously with the dedication, and an acceptance thereof by the continued maintenance of the land as an open ocean-front, with user of it, as such, since 1873.

Virtually the same factual situation existed in *Barclay vs. Howell's Lessee*, 31 U. S. 498. A close reading of the facts will indicate a plat with a street reaching to the water, with express declarations of the dedicator at the time of the making of the plat.

Of like effect is the case of *Application of Ashford*, an Hawaiian case, 440 P. 2d 76. It deals solely, and entirely, with the boundaries of parcels of land, as described in Royal Patents, as running "ma ke kai" (along the sea). The sole issue was whether or not the information complied by the United States Coast and Geodetic Survey should be the determination of the term "ma ke kai" or the line along the edge of vegetation, or the line of debris left by the wash of waves during ordinary high tide. The impact of this decision can best be found in the words of the Court:

> "When the royal patents were issued in 1866 by King Kamehameha V, the sovereign, not having any knowledge of the date contained in the publications of the U. S. Coast and Geodetic Survey, did not intend to and did not grant title to the land along the ocean boundary as claimed by the appellees. *Hawaii's land laws are unique* in that they are based on ancient tradition, custom, practice and usage. Keelikolani vs. Robinson, 2 Haw. 514. The method of locating the seaward boundaries was by reputation evidence from kamaainas and by the custom and practice of the government's survey office. It is not solely a question for a modern-day surveyor to determine boundaries in a manner completely oblivious to the knowledge and intention of the King and old-time kamaainas who knew the history and the names of various land and monuments thereof.
>
> * * * * * *
>
> ". . . It was the custom of the ancient Hawaiians to name each division of land and the boundaries of each division were known to the people living thereon or in the neighborhood. 'Some persons were specially taught and made repositories of this knowledge, and it was carefully delivered from father to son'.
>
> * * * * * *

> "Two kamaaina witnesses, living in the area of appellees' land, testified, over appellees' objections, that according to ancient tradition, custom and usage, the location of a public and private boundary dividing private land and public beaches was along the upper reaches of the waves as represented by the edge of vegetation or the line of debris. . .
>
> "*Cases cited from other jurisdictions cannot be used in determining the intention of the King.* We do not find that data or information published and contained in the publications of the U. S. Coast and Geodetic Survey were relied upon by the kamaainas for the purpose of locating seaward boundaries in Hawaii . . . Property rights are determined by the law in existence at the time such rights are vested . . ." [Pages 77 and 78] [Emphasis Supplied].

A. K. Roy, Inc. vs. Board of Commissioners, 237 La. 541, is of no application. In the first place, this is a Louisiana case, which applies the civil law rather than the common law. See the footnotes to page 550. Secondly, it is a condemnation case for the purpose of the construction of a levee. Thirdly, the case decides nothing, because it was found that the Record contained evidence that a large portion of the land was below mean high water, and that *under the provisions of Louisiana law*, as it defines seashore, the case was remanded for further proceedings to determine the exact amount of land which might be in private ownership. It can easily be seen, by any person carefully reading the case, that the definition of "sea shore" in Louisiana does not apply in Maryland, and perhaps does not apply anywhere else in the United States. See Shalowitz, supra, Vol. 2, p. 416.

Several cases were cited with regard to the application of the doctrine of "Custom". *Knowles vs. Dow*, 22 N.H. 387, decided in 1851, involved the depositing of seaweed by the residents of Hampton on the sand hills until it could be removed at their pleasure. The evidence was to the effect that this had been a custom since time immemorial, and there was specific evidence of the use of the property as far back as fifty years prior to the trial of the case. The Court said, at page 409:

> "A regular usage for twenty years, unexplained and uncontradicted, is sufficient to warrant a jury in finding the existence of an immemorial custom."

The Court was quick to point out, however, that a custom originates in permission.

> "It is a right which the owner of the soil permits to be exercised upon his land; and he must have acquiesced in it in order to give it validity; because the custom must not have been the subject of contention and dispute." [pp 409-410].

On the other hand, the case of *Nudd vs. Hobbs*, 17 N. H. 524, decided in 1845, denied the existence of a custom to enter upon private property for the purpose of taking the sea-weed and rock-weed thrown upon the shore, holding that the same belonged to the property owner. "A custom for the inhabitants of a town to take a profit in alieno solo, is bad; . . . and the citizens of the State generally cannot make out a better right to take such profits by mere custom." [Page 527]. Apparently, the Defendant, in that action for trespass, could not produce his evidence to even establish a prescriptive right-of-way, which he had alleged.

To the same effect is the case of *Hill vs. Lord*, 48 Me. 83, decided in 1861. The Court said, at pages 100-101:

> "Upon a careful consideration, we are satisfied that a right to take sea-weed is not an easement, but is a right to take a profit in the soil; that neither the inhabitants of a town nor the public, can acquire any right to it by custom; and that the evidence in this case does not establish any prescriptive right to it in the defendant himself, nor in the Town of Kennebunkport in its corporate capacity. . ."

Littlefield vs. Maxwell, 31 Me. 134, decided in 1850, is to like effect. In that case, there seems to be no question that the Court equates a right by "custom" to a prescriptive right acquired by twenty years of user [Page 141]. It makes clear the proposition that a claim by inhabitants for the right of piling wood along the waterfront is an interest or profit in the soil, "and brings it within the rule that such a claim cannot be sustained by custom. . ." [Page 143].

Hume vs. Rogue River Packing Company, 92 P. 1065, involved a case in which the plaintiff sought to establish a private and exclusive right to take salmon fish for a distance of eighteen miles in the Rogue River of Oregon. As one basis for his contention, he sought to establish that such an enterprise was the custom for fishing in the navigable rivers of the State. The discussion of such a custom was indeed brief [at page 1070], and the case is of really no benefit with respect to the subject matter of the instant proceeding.

Post vs. Pearsall, 22 Wend. 425, a New York case decided in 1839, is a complicated opinion to read, because it contains an opinion of the Chancellor and four Senators. One must be careful in quoting its language because four concurred for different reasons, and one dissented. At any rate, the decision was to the effect that the doctrine of dedication of highways did *not* extend to the dedication of public landings, even if the use had continued for "upwards of twenty years" with the knowledge of the owner, but against his now asserted will. The doctrine of "custom" was specifically re-

jected. Referring, in particular, to the pages cited by the Corporate Plaintiff, one will find that Senator Furman said:

> "A *custom* can only exist in favor of the community of a town, village or hamlet, etc. and must be pleaded; . . . But the inhabitants or tenants within any such village or place cannot allege or plead a custom to have an interest or profit a prendre out of another's soil — that must be alleged by prescription and not by custom . . . Custom cannot be pleaded in favor of the whole nation, for then it becomes the common law. . ."

The Chancellor had said, at page 432:

> ". . . But as the law is well settled that a customary accomodation in the lands of another, to be good, must be confined to the inhabitants of a *Local district, and cannot extend to the whole community or people of the State* . . ." [Emphasis Original].

A number of cases were cited in support of the alleged "Public Trust Doctrine".

Illinois Central Railroad Co. vs. Illinois, 13 S. Ct. 110, is a riparian rights case. In addition, it involves an enabling statute and a statute repealing the same. It is not authority for the kind of "Public Trust Doctrine" here sought to be enforced, and, as a matter of fact, at page 118, recognizes the right of alienation by the State for the improvement of the public interest, or a grant, which when occupied, does not impair the public interest in the remaining land and waters.

Gould vs. Greylock Reservation Commission, a Massachusetts case, 215 N. E. 2d 114, involved the lease which the Greylock Reservation Commission had entered into with the Mt. Greylock Tramway Authority. The case involved the use of public land in a public park. *Sacco vs. Department of Public Works,* a Massachusetts case, 227 N. E. 2d 478, concerns the use of a "great pond" owned by the Commonwealth of Massachusetts. *Robbins vs. The Department of Public Works,* a Massachusetts case, 244 N.E. 2d 577, involved the transfer of public land from one public agency to another for the construction of a highway. *Shepard's Point Land Company vs. The Atlantic Hotel,* 44 S.E. 39, involved the application of North Carolina riparian rights legislation to a factual situation involving the erection of wharves by certain riparian owners in a harbor in front of their land between high water mark and deep water. It was held that the grantees took an easement as riparian owners to erect such wharves. The case of *Prieuve vs. Wisconsin State Land and Improvement Company,* a Wisconsin case, 67 N.W. 918, involves an attempt to completely drain a lake four and one-half miles long and one and one-half miles wide, together with the streams that fed the said lake, in order to convert it into solid land, thereby depriving the riparian owners of their rights to the waters of the lake. *Trempealeau Drainage Dis-*

trict vs. Houghten, a Wisconsin case, 131 N.W. 838, involved the improvement of the channel of the Trempealeau River, in order to improve navigation thereon, for the public's welfare. It is interesting to note, however, that the Court said, at page 840:

> "It is well established in the law of this State that the rights of riparian owners on navigable waters rest upon the title to the bank, and that such rights may be condemned for public purposes as other property *upon payment of a just compensation therefor.* The claim that remonstrants' riparian rights are to be injuriously affected by the change of the channel of the Trempealeau River and by the removal of the water of the drained area cannot operate to stay the hands of the State in carrying out a public purpose *so long as due provision is made for compensating such riparian owners* for any damage done to their riparian interests. This class of property is subject to the paramount rights of the State in the exercise of its governmental functions, and is subject to condemnation for public uses. Since this drainage interprise is in its object and purposes a public one, and *since provision for compensation to persons for the damage caused thereby to their property has been made,* there can be no legal objection thereto upon the ground that riparian rights are injuriously affected. Whatever damages a riparian owner may suffer as a result of carrying out the enterprise must, under the provisions of the statutes, be included in the assessment of damages, *for which compensation is to be made* in the same manner as other damages are ascertained and compensated." [Page 480] [Emphasis Supplied].

In Re Crawford County Levee and Drainage District no. 1, a Wisconsin case, 196 N.W. 874, involved the establishment of a drainage district which would have reduced three thousand acres of water to one thousand seven hundred and seventy-five acres. The entire thrust of the case was the destruction of the navigable waters, and was summarized by the Court in the following paragraph, on page 877: "It will thus be seen that, in view of federal ordinances and Acts of Congress, of constitutional and statutory state provisions, and federal and state decisions, no substantial navigable waters can be destroyed for purposes of drainage."

City of Milwaukee vs. State, 214 N.W. 820, involved the filling of land under navigable waters, under a legislative mandate. Finding in favor of the legislative enactment, and the grant to the Illinois Steel Company, the Court, at page 830, significantly said this:

> "The trust reposed in the state is not a passive trust; it is governmental, active, and administrative. Representing the state in its legislative capacity, the Legislature is fully vested with the power of control and regulation. The equitable title to these submerged lands vest in the public at large while the legal title vests in the state, restricted only by the trust, and the trust, being both active and ad-

> ministrative, requires the lawmaking body to act in all cases where action is necessary, not only to preserve the trust, but to promote it. As has heretofore been shown, the condition confronting the Legislature was not a theory but a fact. This condition required positive action, and the Legislature wisely and well discharged its duties when it enacted the statutes involved. It is possible that the Legislature, confronted with the impending danger of the destruction of a large part of the commerce of Lake Michigan, which is tributary to Milwaukee and other Wisconsin ports on the Great Lakes, could be said to perform its duty in the administration of the trust, without taking appropriate action to relieve the situation as it did in the instant case? The occasion presented one of dire necessity, and, like this court in the adoption of the legal principles referred to in the Wisconsin cases, the Legislature afforded the needed relief by enacting the statutes involved. A failure so to act, in our opinion, would have amounted to gross negligence and a misconception of its proper duties and obligations in the premises.
>
> * * * * * *
>
> "*It is not the law,* as we view it, *that the state,* represented by its Legislature, *must forever be quiescent in the administration of the trust doctrine, to the extent of leaving the shores of Lake Michigan in all instances in the same condition and contour as they existed prior to the advent of the white civilization in the territorial area of Wisconsin . . .*" [Emphasis Supplied].

State vs. Public Service Commission, a Wisconsin case, 81 N.W.2d 71, involved the filling and dredging of a portion of a lake adjacent to a public park, under control of public agencies, and used for public purposes, with a minimal destruction or impairment of the navigable waters. It was sustained, quoting *City of Milwaukee vs. State.* The Court also quoted the trial court in that case, as follows, on page 74:

> "It does not appeal to the reasoning of this Court that in exercising its duty, as trustee for the people of the State to the lands underlying its navigable waters, that the State is required to leave the beds of all navigable waters intact and in the condition in which they were created by nature.
>
> * * * * * *
>
> " 'There must be a realistic and sane legal approach to this problem, namely a balancing of public need and convenience against the interference with the navigation involved.' "

The Court found a similar quotation in Farnham, supra, Volume 1, page 84.

City of Madison vs. State, a Wisconsin case, 83 N.W. 674, likewise involved the fill of a portion of navigable waters adjacent to a park for the purpose of constructing certain public buildings thereon. The action was by

the State of Wisconsin, but the Court found that a valid legislative grant had been given to the City of Madison.

State Highway Commission vs. Fultz, 491 P.2d 1171, involved an appeal from a refusal of the State Highway Engineer, as required by Oregon Law, to issue a permit for the construction of a beach access road and revetment, and in a companion case, the State Highway Commission sought to enjoin the corporation from continuing with construction of the said road and revetment without the necessary permit. The case was a mere application of the same statute that was considered in *State ex. rel. Thornton vs. Hay,* supra.

Home for Aged Women vs. Commonwealth, a Massachusetts case, 89 N.E. 124, decided in 1909, concerned the taking by the Charles River Basin Commission of a fee in a strip of lands under tidal water, and involves petitions for an assessment of damage caused by the taking. The entire project involved the construction of a dam, and the building of an additional sea wall along the shore. One of the grounds of contention was the fact that the taking of this property was not necessary for the improvement of navigation, and was not, therefore, authorized under the laws of Massachusetts. In speaking of the broad application of the doctrine of trust for the control of navigable waters, the Opinion must be read in the light of these further remarks of the Court, at page 129:

> "The change in the Charles river under these statutes was for the improvement of navigation as well as for other useful purposes. If that was one of the purposes of the Legislature, it was enough to warrant the legislation and the action under it, even if such a change in the river could not be authorized, for other useful purposes alone, without compensation to these petitioners . . . The building of a new wall or embankment and the taking of the intervening land for a public park are required by the same statute that directs the construction of the dam, and are natural, if not necessary incidents of the change in the level of the water. There was a sufficient reason, in the conditions and in the objects to be accomplished, for the exercise of the paramount power of the Legislature over the commonwealth's lands under tide water."

Hixon vs. Public Service Commission of Wisconsin, 146 N.W. 2d 577, was nothing more than an appellate review of a proceeding before the Public Service Commission of Wisconsin, which by Wisconsin statute, is charged with regulation of the navigable waters of that State. The property owner had dug a channel through a sand bar in the front of his home along the lake front, and used the spoil to build a projection out into the lake some eighty feet wide at its base, seventy-five feet long, which was planted with sod and other vegetation. He failed to secure a permit for this construction prior thereto. In applying Wisconsin statutes, and the facts as the Public

Service Commission found them to be, the Court affirmed the action of the Public Service Commission in denying him his permit. Of interest, is the statement of the Court to the effect, on page 582, that:

> "While the state of Wisconsin holds the beds of navigable waters in trust for all its citizens, the legislature may authorize limited encroachments upon beds of such waters where the public interest will be served."

To support the alleged doctrine of "Submergence" has been cited *Dewey Land Company vs. Stevens*, a New Jersey case, 90 Atl. 1040, and the case of *Garrison vs. Engle*, a New Jersey case, 193 Atl. 820. Neither of these cases spoke to the difference between avulsion and erosion, because it was apparent in both cases that the land had been lost through an erosive process, rather than an avulsive force. Each referred to a prior New Jersey authority, *Ocean City Association vs. Shriver*, 46 Atl. 690. That case apparently stood for the proposition "that the title to the land is not lost if when the ocean recedes the land can again be known and reclaimed by admeasurement". The case of *Camden and Electric Land Company vs. Lippincott*, 45 N. J. Law 405, was also quoted to a similar effect. In the Dewey case, the property owner sought to establish his claim not by virtue of accretion, but by other means, and in the Garrison case a pier over navigable waters was involved.

It is made clear in the case of *People vs. Hecker*, 4 Cal. 334, that the decision is based upon California law with regard to artificial accretions [Page 336, 343, 344 and 345], which is an admitted departure from the common law [Page 344]; and that the general rule is to the effect that local law is to be applied to questions of title between the State and riparian owners [Page 343, citing *Archer vs. Greenville Sand and Gravel Co.*, 233 U. S. 60, 34 S. Ct. 567].

The case of *Carolina Beach Fishing Pier, Inc. vs. The Town of Carolina Beach*, a North Carolina case, 177 S. E. 2d 513, from its facts, quite obviously involved erosion, and not avulsion [Page 514 and 517]. The case is likewise bottomed upon a special act of the North Carolina Legislature with regard to this particular project, and the vesting of title to the lands recovered through the project [Pages 514, 516 and 517], and another general statute in North Carolina with regard to the title of land raised from navigable waters [Page 517].

The case of *City of Daytona Beach vs. Tona-Rama, Inc.*, a Florida case, 271 So. 2d 765, has been relied upon heavily by the Plaintiffs. It is important to note that upon its initial hearing, the court merely found that:

> "*For more than twenty years prior to the institution of this action* the general public visiting the ocean beach area had actually, continuously, and uninterruptedly used and enjoyed the soft sand area of

the beach *involved in this proceeding* as a thoroughfare, for sunbathing, picnicing, frolicking, running of dune buggies, parking, and generally as a recreation area and playground. The public's use of the area in question for the purposes hereinabove stated was open, notorious, visible, and adverse under an apparent claim of right and without material challenge or interference by anyone purporting to be the owner of the land." [Pages 766-767]. [Emphasis Supplied].

Upon rehearing, the Court emphasized that its initial decision was based entirely upon the traditional concepts of prescriptive use. A portion of the Opinion published upon rehearing, however, is pecularily appropriate to the instant proceeding:

> "While the factual circumstances of this case require adherence to our initial decision, we deem it necessary to clarify our opinion lest it be construed as lending the approval of this court to all of the theories argued by appellees in their brief in support of the trial court's judgment.
>
> "In its brief, the appellee Board of Trustees of Internal Trust Fund advanced the following argument in support of the judgment reviewed herein:
>
>> 'There has been a growing concern recently in coastline areas to secure public access to beaches and other coastal areas. The publics' rights for the use and enjoyment of land are expanding, partly due to growing judicial recognition of the need to preserve beaches for public recreation. This is evidenced by recent decisions by the California and Oregon Supreme Courts. See *Gion vs. Santa Cruz,* 2 Cal. 2d [3d] 29, 465 P. 2d 50, 84 Cal. Rptr. 162 (1970); *State ex. rel. Thornton vs. Hay*, [254 Or. 584,] 462 P. 2d 671 (1969).
>>
>> 'The public possesses property rights in nearly all the coastal tidelands through either state ownership or public rights to use privately owned coastal property. There exists three methods by which the public has been permitted to acquire and/or maintain legal right of access to beaches and other recreational areas, none of which require any 'adverse' use by members of the public in the strict sense of the term.'
>
> *"We now expressly reject the contention embodied in the foregoing excerpts from the appellee's brief. Were we to accept such notions, it would amount to expropriation of private property without compensation by sheer judicial fiat. Our initial decision herein was and is in no way influenced by the appellees' notions that the need to preserve beaches for public recreation in any way authorizes the taking of such beaches from their lawful owners."* [Emphasis Supplied].

Thereafter, the Court analyzed *State ex. rel. Thornton vs. Hay*, and emphasized that the Oregon Attorney General had conceded, with the

Court's approval, that such legislation could not divest a person of his rights in land, based upon *Hughes vs. Washington*, 389 U. S. 290, 88 S. Ct. 438, and concluded with the following statement:

> *"We share appellees' concern with the problem posed by the development of our privately owned shorelines. Nonetheless they are privately owned. Confiscation is not permitted under the state or federal constitutions. Hughes v. Washington, supra."* [Emphasis Supplied].

One additional brief comment is appropriate. Law Review Articles, Student Notes, and treatises are intended to be provocative. Through them, the author wishes to stimulate thought, discussion, or action, or perhaps, hopefully, all three. While they often furnish a useful compendium of cases, and a starting-point for a broad over-view of a particular subject matter, they should not be construed as precedents. Courts should make their own analysis of the cases reported upon the subject, and quote the Law Review material only in the event that a conclusion reached therein is accurately expressive of the conclusion reached independently by the Court. The danger of obscuring an objective appraisal of judicial decisions by the espousal of subjective opinions, the promotion of theories and desired courses for the development of the law are thus minimized. Having read and analyzed all of the Law Review articles offered by Counsel, the Court will not further prolong this Opinion by the dissection of each of them, but will rest upon the authorities heretofor embraced herein, with the assurance to the parties that the Court has found nothing therein to persuade it to the contrary of the views expressed within this Opinion, and much to support those views.

State versus Municipality

The contentions and position of the Municipal Corporate Defendant are deserving of some treatment. In its Answer to the Petition of E. T. Park, Inc., the City stated, in part:

> "5. . . . That it does not consider the proposed building to be a public nuisance in respect to public beach areas further stating that portions of platted lots, generally considered to be private property, extend easterly of said building to non platted area. It further states that whether or not the building eliminates the public's use of a large portion of public property depends upon the establishment of what is or is not public beach, therefore, this Defendant cannot admit nor deny the last allegation of paragraph fifth.
>
> 6. In answer to paragraph sixth, this Defendant states that a permit has been issued in the area specified, and further states it does not issue and will not issue building permits between 70th and 71st Streets east of said alley unless any proposed project complys fully

with ordinances and laws of both the local, county and state governments. This Defendant further states that it is its understanding that it is not now enjoined from issuing lawful permits.

* * * * * *

"9. Further answering said Petition, this Defendant states that the permit issued and any other permits that might be issued were and will only be issued if the proposed projects comply with all applicable regulations, ordinances, etc."

In its Answer to the Petition of the Department of Natural Resources, the City stated, in part:

"10. Further answering said Petition, this Defendant states that prior to this law suit it was of the opinion that all lands west of the building limit line (except streets and street ends) and some land eastward of said line was private property. That it is unaware of any Maryland law, (statute or case law) that questions the ownership of such platted lots or created the trust claimed. That this Defendant was and is in the process of acquiring portions of said beach areas through an open space and land acquisition program."

The most peculiar and anomalous situation, confrontation and contradiction existing in this case can be found in the Transcript between pages 686 and 704, in the testimony of Mr. Augustine, produced by the Intervening Plaintiff, an employee of the Department of Water Resources as Natural Resource Planner, Sedimentation Specialist. The essence of that evidence is that Mr. Augustine, as the one representative of The Department of Natural Resources worked with the Mayor and City Council of Ocean City, and their Counsel, Mr. Cathell, in developing the Erosion and Sediment Control plan for Ocean City, and that his associate approved the adopted Ordinance in full, which meets with 99% scientific approval of Mr. Augustine himself.

His position is amplified at pages 711 through 716, at which point Counsel for the State conceded that the State was not contending that the proposed building on the Property in Question would be in violation of the "Sediment Control law".

Accordingly, the State is attacking, in this proceeding, a policy and a legislative enactment which it previously assisted in preparing, and approved in adoption. By doing so, it attacks itself, and seeks to have this Court declare by judicial fiat a legislative policy which the Mayor and City Council of Ocean City declined to promulgate, or one which was not considered by them, or one requiring fiscal implementation beyond available resources. Such a course of action is beyond the authority of this Court.

Moreover, in its expression of policy, contained in Section 36-3 of its Code, the Mayor and City Council have affirmatively declared an intention

to acquire, for the use of the public, a certain width of ocean-front land through an Open Space Implementation Program. The Court is not at liberty to arbitrarily change the width of that acquisition.

The tragedy is that this very proceeding may have suspended the implementation of that program. If, of course, this proceeding has resulted in a re-consideration and enlargement of the extent of the intended acquisition by municipal authorities, as well as funding governmental units, a different result will have obtained.

CONCLUSIONS

In answer to the questions originally posed herein, the Court expresses the following opinions:

1. Prior to February 8, 1972, the owners of Lot Nos. 4 and 5, in Block No. 38, on the Plat of Oceanbay City, Maryland, as recorded among the land records of Worcester County, Maryland, in Plat Book O.D.C. 2, at Folio 76, had not dedicated that property to the public, or for a public use, irrespective of the expenditure of funds by Worcester County, and the exercise of the police power of Worcester County prior to 1965, and the expenditure of funds by the Mayor and City Council of Ocean City, and the exercise of the police power by the Town of Ocean City, after the year 1965, for certain purposes and in certain areas along the ocean front;

2. Prior to February 8, 1972, the public had not acquired an easement by prescription over Lot Nos. 4 and 5, in Block No. 38, on the aforesaid Plat of Oceanbay City, Maryland;

3. Prior to February 8, 1972, E. T. Park, Inc. had not acquired an easement by prescription over Lot Nos. 4 and 5, in Block No. 38, on the aforesaid Plat of Oceanbay City, Maryland, either for access to the water, or for recreational use;

4. Prior to February 8, 1972, the public had not acquired an easement over Lot Nos. 4 and 5, in Block No. 38, on the aforesaid Plat of Oceanbay City, Maryland, for recreational use, by virtue of an alleged doctrine of "Custom";

5. The State of Maryland does not hold title to Lot Nos. 4 and 5, in Block No. 38, on the aforesaid Plat of Oceanbay City, Maryland, by virtue of the alleged doctrine of "Public Trust in Natural Resources";

6. Prior to February 8, 1972, the State of Maryland did not acquire title to Lot Nos. 4 and 5, in Block No. 38, on the aforesaid Plat of Oceanbay City, Maryland, by virtue of an alleged doctrine of "Submergence", and that such a title did not vest by virture of the expenditure of Federal, State and/or

County funds in the construction of the Dune Line by the Corps of Engineers of the United States Army after the 1962 Storm, but that the owners of Lot Nos. 4 and 5, in Block No. 38, on the aforesaid Plat of Oceanbay City, Maryland, were, and are, entitled to the land restored thereon, and contiguous thereto to the east, to the limit of the easterly boundary of the said lost, after March 8, 1962, irrespective of the reason for such accretion, whether natural or artificial, in view of its loss by avulsion during a storm of such intensity as to be projected for recurrence only in cycles of every fifty years;

7. The granting of the easement to the County Commissioners for Worcester County, Maryland, on June 27, 1962, by the owners of Lot Nos. 4 and 5, in Block No. 38, on the aforesaid Plat of Oceanbay City, Maryland, for the purpose of construction and maintenance of the Dune Line, did not constitute an easement in favor of the public for recreational use; and

8. The granting of the requested injunctive relief would constitute the taking of private property for public use, without just compensation, in contravention of the Constitution of the United States of America and the Constitution of The State of Maryland, would abridge the fundamental sacred right of all Americans to own property and enjoy the profits thereof, and would subvert the fundamental premise of the American economic system.

POSTSCRIPT

With some temerity, the Court ventures a comment not necessary for the decision in this case. As an impartial observer and analyst of the Record, and in the absence of agreement upon any realistic permanent solution to be found in the scientific evidence, the comment, however, appears justified. It would seem that a country that can put men on the moon, maintain a space station for an extended period of time, generate atomic energy, send a submarine under the ice cap to the North Pole, or anchor an oil drilling platform many miles into the open sea that will withstand hurricane winds, if its talents and resources would be so directed, could find an answer to a device that would sufficiently harness and channel the sea to minimize its erosive force. If the slope is the key to the dissipation of the energy of the wave, then the longer the reach of the slope, the greater the dissipation, and the greater the opportunity for the release of the sand suspended in the water thereof. While structures perpendicular to the shore are intended to break the force of the wave, they feed the side favorable to the then drift of the sand, but starve the side then unfavorable to the drift of the sand, frequently encouraging erosion rather than preventing it. The encroachment of man and his structures, as well as the processes of nature itself, have made Mr. Augustine's ideal Physiographic Province, in its entirety, a matter merely of historical interest. It seems that there could be designed

and produced a device, triangular in shape, constructed of rust resistant and corrosive resistant material, securely anchored to the ocean floor, astraddle the first off-shore bar, parallel to the ocean-front land, with verticle baffles so alternated in angulation as to filter the wave from either direction, breaking its force, and thus effectively filtering from it the sand particles which would be then distributed more quickly, in larger quantity, and along a longer reach, thus, making the slope more gradual, while, at the same time, increasing the width of the public area of the ocean-front land, being the prime objective, but also furnishing increased protection to the life and property landward of the public area, not only through the distance afforded for dissipation of the energy of the wave, but also to, hopefully, stabilize the integrity of the off-shore bar, thus preventing a breach which repeats itself by an indentation or inundation of the fixed land.

Accordingly, it is, this 23rd day of April, 1974, by the Circuit Court for Worcester County, Maryland, ORDERED AND DECREED:

1. That the permanent injunction restraining 71st Street, Inc., as prayed by E. T. Park, Inc., be, and the same is hereby, DENIED;

2. That, because the building permit had already been issued, and the permit from the Sediment Control Officer (acting under the Ordinance approved by the Department of Natural Resources) had already been issued, and because the State of Maryland abandoned the claim of any interest in the Property in Question by the Board of Public Works of the State of Maryland, and that, therefore, the resolution of these issues has become *moot*, the relief prayed by the Department of Natural Resources to enjoin such action be, and the same is hereby, DENIED;

3. That, under the provisions of Maryland Rule 605 a, this Order and Decree shall be considered a final judgment, and, therefore, subject to appeal;

4. That, accordingly, a Hearing upon the "Counter Petition" of Seventy First Street, Inc. against E. T. Park, Inc. be, and the same is hereby, suspended and postponed until the time for appeal of this Opinion and Decree shall have expired in the event that no such appeal is noted, or until after a final appellate determination has been filed in this Court; and

5. That the costs hereof be paid by E. T. Park, Inc.

DANIEL T. PRETTYMAN,
Judge.

EXHIBIT A

Chapter 36

BUILDING LIMIT LINE, OCEANFRONT

§ 36.1 Legislative authority; limit line established.

§ 36.2. Open Space Implementation Program.

§ 36.3. Easements and acquisitions.

§ 36.4. Building prohibitions.

§ 36.5. Financing.

[HISTORY: Adopted by the Mayor and City Council of the Town of Ocean City 4-19-71. Amendments noted where applicable.]

GENERAL REFERENCES

Planning and Zoning Commission — See Ch. 14.

Boardwalk — See Ch. 32.

Building construction — See Ch. 34.

Erosion and sediment control — See Ch. 46.

Subdivision of land — See Ch. 92.

Zoning — See Ch. 105.

§ 36-1. Legislative authority; limit line established.

Pursuant to the Charter of the Town of Ocean City, Maryland, and pursuant to Articles 23A, 33A and 66C (Sections 410A through 410-I) of the Annotated Code of Maryland, as amended, and pursuant to the Constitution of the State of Maryland and pursuant to the Comprehensive Plan of the Town of Ocean City,[1] there is hereby established an oceanfront building limit line; a copy of the plats containing said oceanfront building limit line is attached hereto and made a part hereof.[2]

---

[1] Editor's Note: A copy of the Comprehensive Plan is on file in the office of the Clerk-Treasurer.

[2] Editor's Note: A copy of the plats is available for examination in the office of the Clerk-Treasurer.

§ 36-2. Open Space Implementation Program.

The Open Space Implementation Program, a copy of which is attached hereto, is hereby adopted as the policy of the Mayor and City Council of the Town of Ocean City, Maryland, with the said Mayor and City Council reserving, however, the right to amend or change said program as deemed necessary from time to time.[3]

§ 36.3. Easements and acquisitions.

The Mayor and City Council hereby declares it to be the policy of the Town of Ocean City to acquire by easement, gift, grant, purchase, condemnation or otherwise those areas so designated for acquisition or easement in the aforesaid Open Space Implementation Program, reserving, however, the right to make any and all amendments or changes as may from time to time be deemed necessary and/or proper.

§ 36-4. Building prohibitions.

All future building east of the aforesaid oceanfront building limit line is hereby prohibited.

§ 36-5. Financing.

The Mayor and City Council and the Planning and Zoning Commission shall immediately and forthwith, in coordination with any state, federal or county agencies, departments, commissions or committees, proceed to develop a financing plan for the purposes of fulfilling the aforesaid Open Space Implementation Program and any subsequent open space programs adopted in furtherance of the aforesaid Comprehensive Plan of the Town of Ocean City.

EXHIBIT B

Chapter 46

EROSION AND SEDIMENT CONTROL

ARTICLE I

Control Districts Established

§ 46-1. Purpose.

§ 46-2. Beach District.

§ 46-3. Bay District.

[3] Editor's Note: A copy of the Open Space Implementation Program is available for examination in the office of the Clerk-Treasurer.

ARTICLE II
Beach District Regulations

§ 46-4. Definitions.

§ 46.5. Requirements and regulations.

§ 46-6. Approval of plans.

§ 46-7. Required permanent structures.

§ 46-8. Vegetation.

§ 46-9. Requirements during construction.

§ 46-10. Permanent berms.

§ 46-11. Grading and sediment control.

§ 46-12. Seasonal prohibition.

§ 46-13. Maintenance.

§ 46-14. Structures east of dune line.

§ 46-15. Stairways and steps.

§ 46-16. Plans.

ARTICLE III
Bay District Regulations

§ 46-17. Requirements and regulations.

§ 46-18. Approval of Plans.

§ 46-19. Plan required.

§ 46-20. Standards and specifications.

ARTICLE IV
General Provisions

§ 46-21. Provisions applying to all districts.

§ 46-22. Applicability.

§ 46-23. Approvals.

§ 46-24. Administration.

§ 46-25. Inspection and enforcement.

§ 46-26. Approval procedure.

§ 46-27. Fees.

§ 46-28. Bonds.

§ 46-29. Time limitations.

§ 46-30. Violations and penalties.

[HISTORY: Adopted by the Mayor and City Council of the Town of Ocean City 4-19-71. Amendments noted where applicable.]

GENERAL REFERENCES

Planning and Zoning Commissions — See Ch. 14.

Building construction — See Ch. 34.

Oceanfront building limit line — See Ch. 36.

Soil removal — See Ch. 87.

Subdivision of land — See Ch. 92.

Zoning — See Ch. 105.

ARTICLE I
Control Districts Established

§ 46-1. Purpose.

For the purpose of soil erosion and sediment control, there is hereby established two (2) erosion and sediment control districts.

§ 46-2. Beach District.

The Beach Erosion Control District is hereby established and shall consist of all that land within the corporate limits of the Town of Ocean City bordered on the north by the boundary line between the State of Maryland and the State of Delaware, bordered on the east by the waters of the Atlantic Ocean, bordered on the south by the waters of the Ocean City, Maryland, Inlet and bordered on the west by the dune line as established by the Army Corp of Engineers in 1962 as extending approximately one hundred fifty (150) feet westward of the mean low-water mark of the Atlantic Ocean, but in any event said dune line shall be considered as being one hundred fifty (150) feet westward of the mean low-water mark of the Atlantic Ocean or at the highest point of the dune line in any respective location, whichever is further westward, or in the event that there is no dune line in a respective

location, the west boundary shall be the boardwalk[1] maintained by the Town of Ocean City. In the event that there is no dune line or town-maintained boardwalk in any respective location, the western boundary of the Beach Erosion District at that location shall be that point at which surface drainage is eastward, or one hundred fifty (150) feet westward from mean low water, whichever is greater.

§ 46-3. Bay District.

All the property lying within the Town of Ocean City not situate in the Beach Erosion Control District is established as being in the Bay Erosion Control District.

ARTICLE II
Beach District Regulations

§ 46-4. Definitions.

The following terms, wherever used herein, shall have the respective meanings assigned to them unless a different meaning clearly appears from the context:

DUNE — Extends from mean low water one hundred fifty (150) feet westward, and consists of a berm starting at zero (0) elevation at mean low water, gradually rising to plus seven (+ 7) feet above mean low water at a location one hundred (100) feet westward of mean low water, at which point said dune shall be angled upward to at least plus sixteen (+ 16) feet above mean low water at a point one hundred fifty (150) feet westward of mean low water.

DUNE LINE — Located at the highest point of the dune at any respective location, or one hundred fifty (150) feet westward of mean low water, whichever is further westward.

§ 46-5. Requirements and regulations.

The soil erosion and sediment control requirements and regulations in the Beach Erosion Control District shall be as set out in this Article.

§ 46-6. Approval of plans.

Prior to the initiation of clearing, grading, transporting, moving, exchanging or otherwise disturbing any soil (including sand),[2] or issuance of any city building permits,[3] or the construction of any structure in the Beach

[1] Editor's Note: See Ch. 32, Boardwalk.

[2] Editor's Note: See Ch. 87, Soil Removal.

[3] Editor's Note: See Ch. 34, Building Construction.

Erosion Control District, including, but not limited to the construction of buildings, roads and streets, by any private person, partnership, joint venture, corporation, municipal corporation or any county or state agency, the plans for erosion and sediment control shall be first submitted to and approved by the Worcester Soil Conservation District. In reviewing the submissions, the Worcester Soil Conservation District shall consider whether the respective submission complies with the erosion and sediment control provisions of this chapter as heretofore and hereinafter stated. If the submitted plans do not comply with said provisions, the plans shall not be approved. If the Soil Conservation District finds that the submitted plans are in compliance with these provisions, it shall approve said plans. In approving said plans, the Soil Conservation District may impose written recommendations in reference to the proposed construction, and any such approval shall be subject to compliance with said recommendations.

§ 46-7. Required permanent structures.

Prior to construction of any structure on any lot, parcel or tract in the Beach Erosion Control District, the owner, builder of developer shall construct a sand dune as hereinafter specified. If said sand dune already exists, the owner, builder or developer must take the steps hereinafter specified to protect and maintain said dune.

§ 46-8. Vegetation.

All areas east of said dune line between plus five (+ 5) feet above mean low water and plus sixteen (+ 16) feet above mean low water not covered by a building or structure and not paved shall be planted in vegetation suitable to the environment of the location. Said vegetation shall be acceptable to the Worcester Soil Conservative District.

§ 46-9. Requirements during construction.

During construction of any structures east to the dune line, the owner, builder or developer shall, at all times until said structures are completed, create and maintain a berm acceptable to the Worcester Soild Conservation District.

§ 46-10, Permanent berms.

The owner, builder or developer shall construct a berm eastward from the dune line acceptable to the Worcester Soil Conservation District.

§ 46-11. Grading and sediment control.

All grading proposed shall be in accordance with the Soil Conservation Service Handbook, "Standards and Specifications for Soil Erosion and Sedi-

ment Control in Urbanizing Areas."[4] and such other authorities as may from time to time be utilized by the Worcester Soil Conservation District. The grading plan shall be designed by a registered professional engineer of land surveyor, landscape architect or architect who shall certify that it meets the standards and specifications as set forth in this Article. The grading plans shall be submitted along with other required plans to the Worcester Soil Conservation for approval.

§ 46-12. Seasonal prohibition.

No alteration, modification or excavation of the dune line shall be permitted during the peak of the hurricane season, which is hereby established as being that period between September 7 and October 31 in each year.

§ 46-13. Maintenance.

The owner, builder or developer shall be responsible for maintaining the dune line, including its berm, subsequent to construction according to the hereinbefore-stated specifications. The owner, builder or developer shall present to the City Engineer, after the approval of the Soil Conservation District, but prior to the approval by the City Engineer of the Town of Ocean City and the issuance of a building permit,[5] an executed declaration or other binding, recordable document creating a binding covenant to maintain said dune line and berm, which shall run with the land and be binding on all successors, heirs and assigns of the owner and be perpetual. Said covenant shall require the owner, his successors, heirs and assigns to conduct maintenance according to the requirements of the Worcester Soil Conservation District, as they may be established from time to time. The Mayor and City Council of Ocean City may, at its sole discretion, waive the requirement for the declaration aforesaid if it, the Mayor and City Council of Ocean City, receives from said owner a public easement to all that area east of the dune line and the building or structure erected on said lot, so that the said Mayor and City Council of Ocean City may, if it chooses, maintain the berm and dune line as above specified. In no event, however, is such a public easement to be construed as requiring the Mayor and City Council to maintain said berm or dune line or to waive the duty of the owner, his successors, heirs or assigns to maintain the dune line or berm, and said easement shall so state. Any such easements shall contain a provision that the owner, his successors, heirs or assigns shall, upon one (1) week's notice from the Mayor and City Council, cause all stairways, steps and other fixtures or facilities (excluding pilings or foundations) located east of said dune

---

[4] Editor's Note: A copy of this handbook is on file in the office of the Erosion Control Administrator.

[5] Editor's Note: See Ch. 34, Building Construction.

line to be temporarily elevated or retracted (as hereinafter specified) or temporarily removed from that area east of said dune line for the purpose of facilitating berm maintenance.

§ 46-14. Structures east of dune line.

All structures or building situate eastward of said dune line shall be constructed on steel reinforced concrete piling properly engineered and designed to bear the load of the structure and so certified by a registered professional engineer or architect. In no event thall any structure or building be erected east of said dune line in such a manner that the vertical clearance beneath said structure of building is less than plus nine (+ 9) feet above the minimum required elevation of the berm of said dune line, said required berm elevation being plus seven (+ 7) feet above mean low water at its westernmost point. In no event shall any part of any reinforced concrete pilings located eastward of said dune line be closer than eighteen (18) feet to any other part of any other piling or any retaining seawall or the dune line. Retaining seawalls are permitted at the discretion of the Soil Conservation District so long as the dune line ia maintained and maintainable at, at least, plus sixteen (+ 16) feet above mean low water.

§ 46-15. Stairways and steps.

All stairways and steps located eastward of said dune line shall be retractable either horizontally westward of the dune line or vertically to at least an elevation of plus nine (+ 9) feet above the minimum required elevation of the berm of the dune at any respective location.

§ 46-16. Plans.

Prior to the issuance of a city building permit, the following plan, certified as herein specified, shall be submitted to the Worcester Soil Conservation District when application is made for approval, and shall show:

A. Structural and vegetative measures, including locations of plantings.

B. Temporary berm, including extent and location of berm during construction.

C. Permanent berm, including the proposed berm subsequent to construction.

D. Structure specifications, including the locations of foundations and pilings.

E. Clearance elevation, certified as required.

F. Stairway or step locations and specifications, indicating stairways and steps east of the dune line.

G. Grading provisions.

ARTICLE III
Bay District Regulations

§ 46-17. Requirements and regulations.

The soil erosion and sediment control requirements and regulations in the Bay Erosion Control District shall be as set out in this Article.

§ 46-18. Approval of plans.

Prior to the initiation of clearing, grading, transporting, moving, exchanging, hydraulic filling, bulkheading or otherwise disturbing any soil (including sand), or the issuance of a city building permit, or the construction of any structure in the Bay Erosion Control District, including, but not limited to, the construction of buildings, roads and streets, by any private person, partnership, joint venture, corporation, municipal corporation or any county or state agency, the soil erosion and sediment control plans for the proposed clearing, grading, transporting, moving, exchanging, hydraulic filling, bulkheading, disturbing or construction shall be first submitted to and approved by the Worcester Soil Conservation District. In reviewing the submissions, the Worcester Soil Conservation District shall consider whether the respective submission complies with the erosion and sediment control provisions as heretofore and hereinafter stated. If the submitted plan does not comply with said provisions, the plan shall not be approved. If the Soil Conservation District finds that the submitted plan is in compliance with said provisions, it shall approve said plan. In approving said plan, the Worcester Soil Conservation District may impose written recommendations in reference to the proposed construction, and any such approval shall be subject to compliance with said recommendations.

§ 46-19. Plan required.

In all activities involving the disturbance of earth, the Worcester Soil Conservation District may, at its option, require the owner, builder or developer to furnish the Soil Conservation District a grading, sediment and erosion control plan prepared by a professional engineer, land surveyor, landscape architect or architect. In the case of subdivisions[6] involving the construction of streets and/or the installation of underground utilities, a grading, sediment and erosion control plan prepared by a professional engineer or architect shall be required.

§ 46-20. Standards and specifications.

In considering plans for earth changes in the Bay Erosion Control District, the Soil Conservation District shall be guided by the Soil Conservation

[6] Editor's Note: See Ch. 92, Subdivision of Land.

Service Handbook, "Standards and Specifications for Soil Erosion and Sediment Control in Urbanizing Areas,"[7] and such other authorities as may become available.

ARTICLE IV
General Provisions

§ 46-21. Provisions applying to all districts.

The following general provisions, as set out in the sections below, shall apply in both the Beach Erosion Control District and the Bay Erosion Control District, unless otherwise stated herein.

§ 46-22. Applicability.

The provisions of this chapter shall not apply to agricultural land management practices, the construction of agricultural structures or the construction of single-family residences and/or their accessory buildings on lots of two (2) acres or more. All other activities which involve disturbances of earth or sand[8] are covered by the provisions of this chapter.

§ 46-23. Approvals.

Approval by the Worcester Soil Conservation District shall be required prior to the issuance of a building permit. Regardless of planning, zoning or subdivision controls, no municipal official or employee shall issue a permit for grading or for the construction of any building, other than for those matters exempted within this chapter, unless such grading or construction is in accord with the provisions of this chapter and with the policies of the Worcester Soil Conservation District. Approvals granted by the Worcester Soil Conservation District shall be valid and remain in effect for a period of one (1) year from the date of issue or approval.

§ 46-24. Administration.

A. The responsibility for providing technical assistance and erosion and sediment control plan approval lies with the Worcester Soil Conservation District.

B. The office of Erosion Control Administrator is hereby created, and said Administrator shall be designated by the Mayor and City Council. The Administrator shall execute the provisions of this chapter. The Planning and Zoning Commission[9] of Ocean City,

---

[7] Editor's Note: A copy of this handbook is on file in the office of the Erosion Control Administrator.

[8] Editor's Note: See Ch. 87, Soil Removal.

[9] Editor's Note: See Ch. 14, Planning and Zoning Commission.

Maryland, shall provide such administrative support as may be required.

C. The Administrator shall make periodic inspections of the site, and if deviations from approved plans are noticed or if practices are discovered which are contrary to the intent of this chapter, he shall order compliance. If compliance is not achieved, the Administrator shall order all work to cease and desist until compliance is achieved. A final inspection shall be made and a report filed with the Worcester Soil Conservation District.

§ 46-25. Inspection and enforcement.

A. The Administrator shall provide a site inspection prior to the start of grading or construction, periodically during construction and upon its completion.

B. In those cases of large or complex projects deemed to be beyond the capabilities of the Erosion Control Administrator's office, the municipality reserves the right to employ, at the expense of the owner or developer, such consultants as are deemed necessary.

C. Notice of violations shall be filed with the State Department of Water Resources and with the Worcester Soil Conservation District.

§ 46-26. Approval procedure.

A. A minimum of three (3) copies of the proposed plans shall be submitted to the Erosion Control Administrator. The Administrator shall then direct the applicant to submit said Plans to the Worcester Soil Conservation District for review and approval.

B. Upon approval, the owner shall then present a copy of the plans, stamped "Approved" by the Worcester Soil Conservation District, to the Administrator prior to the issuance of a building permit.[10]

§ 46-27. Fees.

The Mayor and City Council of the Town of Ocean City, Maryland, may establish a schedule of fees based upon the extent of construction as indicated on submitted plans.

§ 46-28. Bonds.

The Mayor and City Council of Ocean City may, at its option, require that the owner-applicant post with the Mayor and City Council a bond executed by the owner and a corporate surety with authority to do business in the State of Maryland, sufficient to ensure completion of the project or restoration of the site to meet the minimum requirements of this chapter.

---

[10] Editor's Note: See Ch. 34, Building Construction.

§ 46-29. Time limitations.

Any work done pursuant to approvals granted under this chapter shall be commenced within one (1) year from the date of said approval and shall be completed within two (2) years of the granting of said approval, except that the Worcester Soil Conservation District may, for good cause shown, specify that said approval may remain in effect for a lesser or greater length of time, or said Soil Conservation District may, for good cause shown, extend an approval beyond the length of time originally specified.

§ 46-30. Violations and penalties.

A. Any private person, partnership, corporation or officer of the municipal government who disturbs earth or commences any activity regulated by this chapter, in violation of this chapter, shall be subject to a fine not exceeding five thousand dollars ($5,000.) or one (1) year's imprisonment for each and every violation.

B. Any agency whose approval is required under this chapter, or the Mayor and City Council of Ocean City, Maryland, or any person in interest may seek an injunction against any person, partnership or corporation, whether public or private, violating or threatening violation of this chapter.

EXHIBIT C
MEMORANDUM FOR THE MEDIA

For those who must initially hurriedly read the Opinion in No. 9335 on the Chancery Docket in the Circuit Court for Worcester County, it is recommended:

1. That the first four pages and the continued paragraph on the top of page 5 be first read and understood.

2. That it be constantly remembered that:

(a) This case involves two lots delineated on a recorded Plat of a much larger area including blocks, streets, and alleys;

(b) That there is an area of ocean-front land lying between the lot lines and the Mean High Water of the Atlantic Ocean which is dedicated to the public on the recorded Plat, and labeled thereon as "Beach", which has been accepted and maintained by the Mayor and City Council of Ocean City;

(c) That such delineation of a public area, although changing as it does with the shoreline, continues north until the street adjoining the Carousel on the north;

(d) That the State of Maryland owns to the Mean High Water line, and that in a legal concept, the wash of the waves caused by climatic and meteorological conditions are not of *legal* significance, Mean High Water, as defined on page 6 of the Opinion, being the legally significant factor.

3. That the factual situation in this case may well differ materially from the factual situation in any other ocean-front case, and that other issues will present themselves as a result of the other Plat to the north of the Carousel, such as the case involving the "Caine House".

4. That the Mayor and City Council of Ocean City have adopted a Building Limit Line which is located to the west of the easterly property line of the Property in Question, which Building Limit Line has not been attacked by the property owner, and under which a permit had been issued by the Mayor and City Council of Ocean City;

5. That the Mayor and City Council of Ocean City have adopted an Erosion and Sediment Control Ordinance with the advice of The Department of Natural Resources, and fully approved by that Department, under which a permit was issued to the property owner.

ORDER FOR APPEAL BY STATE OF MARYLAND, DEPARTMENT OF NATURAL RESOURCES

Mr. Clerk:

Please enter an Appeal to the Court of Special Appeals from the Order and Decree entered in this action on the 23rd day of April, 1974.

Francis B. Burch,
Attorney General,
State of Maryland.

Henry R. Lord,
Deputy Attorney General.

Warren K. Rich,
Special Assistant Attorney General,
Department of Natural Resources.

ORDER FOR APPEAL BY
E. T. PARK, INC.

Mr. Clerk:

Please enter an Appeal to the Court of Special Appeals from an Order and Decree entered in this action on the 23rd day of April, 1974.

HEARNE, FOX & BAILEY,

HAMILTON P. FOX,

Attorney for Plaintiff.

STIPULATION FOR STAY OF THE DECISION OF THE CIRCUIT COURT OF WORCESTER COUNTY ENTERED ON THE 23rd DAY OF APRIL, 1974

It is stipulated and agreed by the parties hereto that the Order and Decree of the Circuit Court for Worcester County, entered on the 23rd day of April, 1974, is stayed pending a determination by the Appellate Court in this matter.

E. T. PARK, INC.,

HAMILTON FOX,

WARREN K. RICH,

State of Maryland,

Department of Natural Resources.

Mayor and City Council,

Ocean City, Maryland,

Dale Cathell.

71st St., Inc.,

Patrick Rogan.

Approved: Circuit Court of
Worcester County.

Daniel J. Prettyman,

Judge.

WRIT OF CERTIORARI

TO THE JUDGES OF THE COURT OF SPECIAL APPEALS OF MARYLAND:

WHEREAS, *The Department of Natural Resources, State of Maryland, et al. v. Mayor and Council of Ocean City, Maryland, et al.*, No. 228, September Term, 1974 is pending before your Court, and the Court of Appeals of Maryland is willing that the record and proceedings therein be certified to it.

YOU ARE HEREBY COMMANDED to cause them to be sent without delay to the Court of Appeals of Maryland, together with this writ, for the said Court to proceed thereon as justice may require.

WITNESS, the Chief Judge of the Court of Appeals of Maryland, this 3rd day of June, 1974.

James H. Norris, Jr.,

Chief Judge.

ORDER

It is this 3rd day of June, 1974

ORDERED by the Court of Appeals of Maryland, on its own motion, that the writ of certiorari to the Court of Special Appeals shall issue in the above entitled case and said case shall be docketed on the regular docket as No. 64, September Term, 1974; and it is further

ORDERED that counsel shall file briefs and record extract in accordance with Rule 830, the appellants' brief and record extract to be filed on or before July 15, 1974.

Robert C. Murphy,

Chief Judge.

(T. 4) PROCEEDINGS

(The Court) Now, we are here this morning for a hearing on the merits in No. 9335 Chancery. I want to say this, that while the issue is a critical one, and while the principles of law, which may be found to be applicable, may have some general application, this case only concerns one piece of property at one location on the beach, and insofar as is practical, the evidence should be confined to this particular location.

Now, without any reference to evidence, without any reference to authorities, and without any argument, I should like for counsel to merely outline their respective theories in order that my thoughts might be more or less channelized.

Mr. Fox, can you give me, now, your basic theories?

(Mr. Fox) Yes, Your Honor.

First of all, it will be our contention, and I'm — in view of what Your Honor just said about a particular piece of property, it would be our contention that the public has acquired, over a period of a great many years, a right to use the dry sand area on the Shore of Maryland, from Virginia to the Delaware Line, above the area where the waves wash at an ordinary high tide, and to a westward (T. 5) line that would be difficult to define, in those areas where the natural grasses still predominate, we would say that the area is from the dry sand area, that goes back to where the upland supports vegetation, or natural grasses.

In more recent years, since the storm of '62, the Army Corps of Engineers constructed the man-made dune that extends in a north and south direction, at least, in the area that we are concerned with in this piece of litigation, I would say for practical purposes that that area, westward limit of that area would probably be the crest of the dune.

The reason I use the area where the upland supports vegetation is that the delineation of the western boundary of the public easement, and the reason that I use the crest of the dune as a line of delineation for the public easement, is as a practical matter, that is what people do use in the days when the westward area would have been defined by the vegetation of the upland, when people go to the beach and play ball, or spread their blankets down, or whatever. They don't spread it down on top of the grass. So, they don't play ball on top of the grass because you get pricklies in your feet, and it makes a bulge in your blanket, and so they have habitually used the dry sand area (T. 6) that is eastward of the general high grassy areas.

Now, since the Army Engineers constructed the dune, as a practical matter, if you go to Ocean City, as we all do, you see people stretched out on the eastern slope of the dune, and from there on, to the very water's edge as

the place where they play ball, and do all of the various things that people do on the beach.

Now, that would define the area, according to my theory that I am talking about.

Now, the evidence with regard to it will, of course, be, firstly, that—

(The Court) Well, we can get into that later. I just wanted to get your theories.

(Mr. Fox) Yes, sir.

(The Court) Now, that is your theory, then, that this is a public right; and we are not talking about any easement that has inured to the benefit of E. T. Park, Inc. as differentiated from anyone else?

(Mr. Fox) Well, Your Honor, I would say that the deed of easement that was executed by the landowners in this area, one of which I would offer in evidence at the very outset of the case, was executed by the predecessor in title of Seventy-First Street, Inc., the Defendent, the (T. 7) said deed of easement which gave the Army Corps of Engineers permission to erect the sand dune that we have been talking about, says that it is intended for the benefit of the property herein described, the other property owners in this vicinity and the public generally are to be construed as covenants running with the land and binding upon the parties, and so forth.

So that deed of easement confers some rights on E. T. Park, Inc., as a property owner in that vicinity, with the right to have that sand dune maintained and kept in a condition so it can be maintained.

(The Court) All right.

Mr. Rich.

(Mr. Rich) Thank you, Your Honor.

The State, of course, supports the theory that Mr. Fox has asserted with regard to the public right to use the beaches; and would go on to say that the fact that there have been many public expenditures, over the course of the past twenty, thirty or forty years, would allow, or connote the fact that the individual property owner who owns subject Lots 4 and 5, holds that as a constructive trustee for the use of the public in general. That the right of the public to use the beaches as a recreational (T. 8) resource is a right that cannot be abridged, even should there be conveyances of the private property from either the State or private individuals.

The State would go on to assert that over the course of the past fifty years, the area in question has been inundated by storm, has undergone a

natural erosion process, but for the artificial means used to protect these beaches in the form of the sand dune, the groins, the pumping in of sand, the general maintenance, the area under question would now be awash by high tide.

The State would further assert that when this property was originally conveyed, although the lots were numbered the same, they were not in fact the same lots, but over the course of the past fifty years, lots have slowly migrated in a westerly direction to where they now stand today. That at the time of the original transfer, there was a large amount of beach used by the public.

For instance, it was approximately three hundred feet. Today, the beach is much less.

Even assuming that the lots had migrated westerly—

(The Court) Wait a minute.

You are maintaining that the location of the lots, as oriented with the plat, are not accurate. That (T. 9) they are to the west of where they should be, is that—

(Mr. Rich) The lots under question today, although numbered the same as the original lots in 1917, plots are not in the same position. They are west of it, where they were in 1917.

(The Court) You mean the whole block is west now?

(Mr. Rich) No, I mean the lots in question are west. There were a number of lots taken away, but the waterfront lots took their place.

(The Court) Well, I have to get this clear. I don't—

You mean the numbering is different because the Plats have been revised, or do you mean that everything is out of kilter up there?

(Mr. Rich) Your Honor, I have tried to unmingle this in my mind, and it appears that we are missing six lots, lots 1, 2, 3, 4, and 5 have remained numbered the same, and they are longitudinal lots. Each oceanfront lot. For instance, Lots 20 through 24 are no longer in being.

(The Court) Well, but — are the lots where they are supposed to be according to the last plat made thereof

(T. 10) (Mr. Rich) According to the last plat, we believe the lots are where they are supposed to be. According — but these lots do no coincide with the first plat.

And, in fact—

(The Court) That answers my question.

(Mr. Rich) In fact, the first plot would either be at the present time near mean high tide or inundated by mean high tide.

(The Court) We are not talking about the original lots, Mr. Rich. We are talking about the lots as they have now been conveyed to the present title.

(Mr. Rich) All right.

(The Court) Okay. Is that right, now?

(Mr. Rich) Yes.

I would say there is a chain of title, that we will attempt to show how the first lots were granted, and how the chain of title arrived at what it is at the present time with regard to the lots in question today.

(The Court) Oh, all right.

Now, wait a minute.

All you saying to me that the chain of title to these lots goes back to the original platted lots?

(Mr. Rich) Your Honor, I believe so.

(T. 11) (The Court) Okay. Excuse me.

(Mr. Rich) Essentially, in summary for the Court, we would assert the following theories of law: the Public Trust Doctrine, the theory of constructive trust, the theory of submergence, and, also, support the theory propounded by Mr. Fox with regard to the public right to use the beach.

Thank you, Your Honor.

(The Court) Yes, sir.

All right, Mr. Cathell.

(Mr. Cathell) Your Honor, the City of Ocean City expects to propound no theory. We expect to take a rather passive art at these proceedings, and with that in mind, I would like to refer you on to Mr. Rogan for his statement.

(The Court) All right.

Will you want to question witnesses?

(Mr. Cathell) It is anticipated, at this time, from reading the Pleadings, that we will not. It will have to be something that I felt would be extremely adverse to the City.

* * * * * *

(T. 11) (Mr. Rogan) I'll talk for the Defense.

(T. 12) Of course, our theories will be a general denial of the theories of the State and of E. T. Park, Inc. We will contend that there has been no dedication and acceptance of this land for public use. We will contend that there is no easement by virtue of public usery. We will contend there is no private easement by virtue of usery for the statutory period of twenty years. We will contend that the land in question is not subject to any public trust nor constructive trust. We will contend that any expenditures by the State of Maryland in the area, and in the entire Ocean City area, are the expenditures of a volunteer. We will contend that this case is an attempt, by the State, by E. T. Park, Inc., to confiscate private property to public use without compensation.

Basically, they are our contentions.

(The Court) All right, sir. Thank you.

All right, now, you may call a witness, Mr. Fox.

* * * * * *

(T. 13) (Mr. Fox) That I think will come in by agreement.

First of all, I think the deed of E. T. Park, Inc. should be offered as Plaintiff's Exhibit No. 1.

It so happens that E. T. Park, Inc. owns two adjoining lots on 71st Street, and while the second lot really isn't concerned, I think I would offer both deeds.

* * * * * *

(T. 13) Plaintiff's Exhibit No. 1 and 2 are deeds to E. T. Park, Inc. for Lots 22 and 23.

(The Court) Is this according to the Ocean City Plat? What plat is it?

(Mr. Fox) The revised plat of Oceanbay City, which is recorded O.D.C. No. 2, Folio 76.

* * * * * *

(T. 14) (Mr. Fox) Then Exhibit No. 3 would be the deed to Seventy-First Street, Inc., the Defendant, of Lots 4 and 5 as shown on the same plat.

* * * * * *

(T. 14) (Mr. Fox) Next, would be Plaintiff's Exhibit No. 4, which would be the Deed of Easement, dated June 27, 1962 between Harry Robert Yauger and J. Robert Brown, et al, and the County Commissioners of Worcester County. Brown and Yauger being predecessor in title of Defendant Seventy-First Street, Inc.

* * * * * *

(T. 15) (Mr. Fox) Then for the purpose of clarity, Plaintiff's Exhibit No. 5 would be a photocopy of the Worcester County Tax Map of the Block 38, where all these lots are located, and they show the lot of E. T. Park and the — what are herein referred to as the Robert Brown Plat, merely for the purpose of locating them together.

* * * * * *

(T. 16) (Mr. Fox) The next exhibit would be the plat of the Isle of Wight Land Company, Inc., made in 1917 by Robert C. Walker, and recorded in O.D.C. No. 31, Folio 62.

* * * * * *

(T. 16) (Mr. Fox) The next would be the plat of Oceanbay City, Maryland. It bears the date George Bert Cropper, December, '39, and January, 1940, which recorded O.D.C. No. 2, Folio 76.

(The Court) Well, that is the revised plat.

(Mr. Fox) Well, that is called Oceanbay City.

(The Court) Okay. The other one was called Isle of Wight Land Company.

* * * * * *

(T. 17) (Mr. Fox) Now, Plaintiff's Exhibit No. 8 would be a plat that is called "The Isle of Wight Land Company, Inc." but bears on it the word "Revised Map", and the notation George Bert Cropper, November 1963.

(The Court) Where is that recorded?

(Mr. Fox) O.D.C. 2, Folio 32.

* * * * * *

(T. 20) NICHOLAS JOHN KOHLERMAN, M.D.

DIRECT EXAMINATION

By Mr. Fox:

Q. Dr. Kohlerman, tell us your name and address, please. A. Nicholas John Kohlerman, M.D., 101 Wendover Road, Baltimore, Maryland.

Q. What is your occupation or profession? A. I am a gynecologist.

Q. What is your connection with the E. T. Park, Inc.? A. I am President of E. T. Park Company.

* * * * * *

(T. 20) Q. Now, does E. T. Park Corporation, the Plaintiff (T. 21) in this case, own real estate in the Town of Ocean City? A. Yes, sir.

Q. And where is that real estate located? A. On the — at Five 71st Street and the Ocean.

Q. I invite your attention to Plaintiff's Exhibit No. 10 that has been offered in evidence, and ask if that photograph shows a picture of the property that is owned by E. T. Park, Inc.? A. Yes, sir.

Q. In addition to the area shown in the photograph, does E. T. Park, Inc. also own a lot in the rear of the house that is shown in that photograph? A. Yes, sir, immediately adjacent.

Q. How long have you owned that property? A. It was purchased in 1964.

Q. Have you owned it continuously since then? A. Yes, sir.

Q. What use do you make of the property? A. We have two uses. It's used mostly for family living during the summer, and during the time I'm there, I provide various medical services for people in the surrounding vicinity without charge. And I also use it for inviting of friends and guests there.

(T. 22) Q. Now, what is there directly east of your property? A. Directly east is a sand dune.

Q. How long, if you know, has that sand dune been there? A. To my knowledge, since the construction after the storm of 1962. I don't know exactly. I think it was a year or two later that they put it up. I'm not real sure.

Q. For how long have you been coming to Ocean City in the summertime? A. Well, my first visit was in 1926; but, regularly, after that, since 1953.

Q. Now, you say regularly since 1953, what do you mean "regularly" since 1953? A. Every summer and during the winter, on weekends.

* * * * * *

(T. 22) Q. Now, approximately how high is this sand dune (T. 23) that is east of your house? A. To my recollection, from the base itself, roughly twelve feet high, and about fifty feet, more or less, at the base.

Q. Can you see over it from the porch of your house? A. Yes, sir.

Q. Now, is there anything on this sand dune? A. There is a sand fence and grass, ocean grass, whatever you call it — seaweed.

Q. How long has the sand fence been there? A. It has been there ever since I purchased the place, varying, because they deteriorate and have to be replaced.

Q. What sort of sand fence is it? Is it a snow fence type of thing? A. Yes. Slats bound together with two rows of wire.

Q. The snow fence that is there, is there another one underneath it, do you know? A. Yes, sir. I think over the years it has gone down, and the dune has built up so that at times — I realize that every once in awhile somebody stubs a toe on (T. 24) the hidden fence.

* * * * * *

(T. 24) Q. Now, east of the crest of the dune, what is there? A. Well, there is a sloping eastward side of the dune. Then there's open beach.

Q. Now, what use has been made of that open beach since you have been the property owner there? A. The beach has been used by my family, myself, friends, and also by the general public and, especially when the tide comes high, the public comes up on the eastward face of the dune. It is, also, used partly as a refuge when the shade from the north building starts covering the beach at about 2:30 or 3:00 o'clock and, then, they move on to the open beach so that the beach is usually (T. 25) fairly well occupied by a number of people.

Q. For how long have you been familiar with this particular stretch of beach that is east of the block in which your house is located? A. About — in overall, as such, I have been, I'd say for ten or fifteen years.

* * * * * *

(T. 25) Q. During the period that you have owned that property, since 1964, has there ever been any attempt, as far as you know, to restrict the use of the public, or to restrict your use of the beach, that is, east of your property? A. No, sir.

Q. What sort of use has the public and you and your family made of that beach area? A. They have used it for swimming, for bathing, sunbathing, ball playing. As a matter of fact, it's sort of headquarters, as they

call themselves, the 71st Street Club. They have a volley ball court set up right at the (T. 26) base of the dune, and they are there all summer. They also picnic. People picnic. They have, up until a year or two ago, used it for campfires. It's not allowed any longer, and the people are chased away, and other various and sundry things that people usually do on the beach.

Q. Did there come a time when you learned that a building was contemplated in the area of this beach? A. Yes, this was in February of this past year, this year.

* * * * * *

(T. 26) Q. Now, the area where the building was to be constructed, is that the same area that you have testified to with regard to the public use? A. Yes, sir.

Q. Where has this volley ball court been set up in relation to where the building was proposed? A. It would be — well, I'm not sure of the (T. 27) dimensions of the building, but from what I have seen of the stakes put out, it would completely obliterate the volley ball court.

Q. Is the volley ball court in the area where the building was contemplated? A. Yes, sir.

Q. How long have they been playing volley ball there? A. I'd say over at least the last six years, or longer.

Q. How close to the crest of this dune does wave wash come? A. In 1967, the wave wash came right to the top and spilled over the crest of the dune.

Q. What do you mean by "spilled over"? A. Spilled over under my house.

In other words, it went to the west side of the dune. This was in 1967.

(The Court) Do you mean on one occasion, or on more than one occasion?

(The Witness) This was on two occasions during that year. And, then, two years ago, the wave crest came to the very foot of it for a sheer drop of about fourteen (T. 28) feet.

By Mr. Fox:

Q. I'm not sure I know what you mean.

"The wave crest came to the foot of it", I don't know exactly what you mean by that. A. Apparently, there had been fairly heavy seas, and it had eaten away the beach, so that when you came to the top of the dune, there was a sharp drop of fourteen to fifteen feet into the water. It was in October of 1960 — no, 1970, I believe it was.

(The Court) You said to the base of the dune, but do you mean the fourteen foot drop was from the crest of the dune? Which do you mean?

(The Witness) Well, it was like this: my boy went to the top of the dune and almost fell in, and he started to go over, and he looked down, and there was a fourteen foot drop.

(The Court) From the crest, not from the base.

(The Witness) From the crest, yes, sir.

By Mr. Fox:

Q. Then you think it was in October, 1970? A. Yes, sir; and this required the people next door to put up boards across their porches so they wouldn't drop (T. 29) off into the water.

* * * * * *

(T. 29) Q. Well, I was referring to your testimony with regard to the action of the water on the beach in front of that condominium. A. Well, the water came up to a line about under the steps, and right along the base of the dune, so it was (T. 30) a sheer drop.

Q. Is this the October, 1970 incident that you're speaking of? A. Yes, sir.

Q. Now, you have told about the water coming over the dune on two occasions in 19__ A. '67, I believe.

Q. __'67, and you have told about this occasion where the waves washed the sand out so that there was a sheer drop off the dune in October of 1970. Had there been any other occasions that you know of that the wave wash has come close to, or on the dune? A. Yes, sir, because it's not unusual for the tractors, hired by the townhouses, to have to push the sand back up to replace the slope that has been washed away.

In other words, we have rather high tides starting in the fall and going through the early part of the winter.

Q. Are you referring now to the — you're talking about this Beach Loft property? A. This includes the property in front of me as well.

Q. And the tractors do what? A. Push the sand back to replace that which has (T. 31) been washed away.

Q. Do you have any idea, on how many occasions the water rises to the foot of that dune during the summer? A. I would be making an off-hand guess, but I'd say—

(Mr. Rogan) We are going to object to any guesses.

(The Court) We'd better not have any guesses.

(The Witness) I'll estimate, then.

(The Court) We'd better wait.

(Mr. Fox) Let me rephrase my question. Let me rephrase my question.

By Mr. Fox:

Q. On the normal high tide, how close does the wave wash come to the base of the dune

(The Court) Now, you are talking about a normal high tide? The mean high water, is that what you're talking about?

(Mr. Fox) I don't think that is — yeah, that is right. What a normal high tide would be.

(The Court) All right.

Where does it come, with respect to the dune, is the question.

(The Witness) It varies, but I have seen it go (T. 32) as high as within fifty feet of the base. This is during the day. In the evening, it goes closer to the base, as it is evidenced by the fact that if people go out early in the morning, you are unable to sit on the beach very close to the water because the water — the sand is still damp and wet, and one can see the debris line that has been washed up. Sometimes comes as close to ten feet to the base. This is without any unusual activity of the water.

By Mr. Fox:

Q. The debris line comes as close as ten or fifteen feet of the base? A. Yes, sir.

Q. You are referring to the base of the dune only in front of your property? A. Well, all along the area between the townhouses and the one at 68th Street. That is as far as I can see.

* * * * * *

(T. 34) CROSS EXAMINATION

By Mr. Rogan:

* * * * * *

(T. 35) Q. It was. When you purchased the property, you did know that there were lots out in front of your property, did you not? A. Yes, sir.

Q. And there are two lots out in front of your property, right? A. Two, and part of another.

Q. And they extend in an east — west direction, is that correct? A. Yes, sir.

Q. And your lots extend in a north — south direction? A. Yes, sir.

Q. You knew when you purchased the property there (T. 36) was property privately owned in front of you? A. Yes, sir.

* * * * * *

(T. 37) Q. Doctor, with regard to your testimony about 1967, when the waves came to the top of the dune, when the water came to the top of the dune, did you actually see the water on top of the dune? A. Yes, sir.

Q. Was this as a result of a storm? A. It was the result of what they call a Northeaster.

Q. A Northeaster? A. Yes, sir.

Q. Isn't it a fact, Doctor, that when the water does come high, we have a Northeaster? When the water (T. 38) approaches the dune— A. When it comes to that?

Q. Yes. A. When it comes to that height, yes, sir.

* * * * * *

(T. 39) Q. Do you come down and spend fifty-two weekends down here? A. More or less, and I spend about six weeks during the summer, too.

Q. You take a six-week vacation during the summer? A. You bet.

Q. So, it's your testimony that when the water gets high, it is a result of a Northeaster, is that not true? A. Not always, no, sir.

* * * * * *

(T. 40) Q. Now, Doctor, you were asked the question on the normal high tide, which the Court and your attorney agreed was the mean high tide, how close does the water come to the dune, and your answer was fifty feet, is that correct? (T. 41) A. Well, it varies from day to day, but, yes, I am giving you the closest it has come.

Q. You are giving us the extremes, are you not? A. Yes, sir.

Q. Now, the normal would not be the extreme, would it? A. No, sir.

* * * * * *

(T. 44) (The Witness) I would say the highest it comes up, as I said before, is to within fifty feet of the base of the dune; and at the lowest high tides, let's say it comes one hundred, one hundred thirty feet from the base of the dune.

(The Court) We'll just leave it at that.

* * * * * *

(T. 45) GEORGE ANTHONY SCHOEPF

DIRECT EXAMINATION

By Mr. Rich:

* * * * * *

(T. 50) Q. And your employment with the Mayor and City Council is in what capacity? A. As Assistant Captain of the Beach Patrol in Ocean City.

* * * * * *

(T. 51) Mr. Schoepf, you have heard the testimony of the first witness in this case, and it refers to the beach area between 70th and 71st Streets in Ocean City; are you familiar with this area? A. Yes, sir.

Q. What is the basis of your familiarity with this area? A. Patroling the beach with bathers and assigning personnel to the area for the safety purposes and protection of lives.

* * * * * *

(T. 52) Q] Now, during the course of your visiting this area, have you noticed people using the beach? A. Yes, sir.

Q. And could you just, in detail, disclose the approximate number during the week and during the weekends during the summer? A. If you are talking about now until June, each time during the height of the season, according to how many tourists come in, it will change.

But, approximately from Memorial Day until the (T. 53) second week in June, I would say it would average approximately two hundred fifty or three hundred people in the area.

From the middle of June until July, approximately July 4th, you would range anywhere between four hundred fifty people from Monday through Friday and, then, from Friday to Saturday, Sunday, I would approximate it as one thousand people in the area.

Q. When you talk about the area, are you talking about — what do you mean the area? A. Well, I am talking about the area from 70th — in fact, I

can get down from the condominium between 69th and 70th, 70th and 71st, 71st and 72nd Street, in that area.

* * * * * *

(T. 54) Q. What I'm saying to you, you said approximately four hundred people are in this total area. What would be the number in the area between 70th and 71st Street? A. Between 70th and 71st Street?

Q. Yes. A. I would approximate it about the same, between three hundred fifty or four hundred.

Q. Oh, in that area. A. Yes.

Q. For what period of time have you been familiar with this beach? A. Ever since the City took it in the City.

Q. When was that? I don't know. A. I'm — again, I'm not sure. I'd have to check back. I think it's 1965.

* * * * * *

(T. 55) Q. What uses did the people put to that beach? What did they do there? A. Swimming, picnicking, and in some cases, launching sailboats off the area; of course, something I can't mention, but—

* * * * * *

(T. 55) Q. Do they use the area from the water back to the dune line? A. Yes, sir.

Q. And has this use of the beach increased in recent years?

Have you noticed, for instance, that there has been increased population over the course of the past two or three years? A. Yes, I have.

(T. 56) Q. Has the season changed? A. Now, how do you mean changed?

Q. Has it grown longer or shorter? A. The season has increased due to the increase of the condominiums and townhouses that have been put in the area. More people are staying longer and coming earlier.

Q. Have you seen people playing volley ball? A. To my knowledge, right now, to say yes, I could not give you a true statement.

* * * * * *

(T. 56) CROSS EXAMINATION

By Mr. Rogan:

Q. Mr. Schoepf— A. Yes, sir.

Q. —the figures which you gave to us are approximations of people that you see in the area, right? A. Yes, sir, they are all approximate figures. Yes.

* * * * * *

(T. 61) Q. Mr. Schoepf, I am going to direct questions to you on this area (indicating), one hundred feet south from 71st Street and, then, one hundred twenty feet east from the sand fence.

(The Court) All right.

By Mr. Rogan:

Q. Now, in that area, can you give me an estimation of the number of people that uses that specific area, the same as you testified to on direct examination? A. Yes, sir.

Now, this, again, would be an approximate number, Mr. Rogan.

Q. Yes, sir. A. And in that area, you have the spillover from the public, coming from the back part, and the areas in question there; and I would say, on a normal week day, in mid-season I'm talking about, from June 15th until the end of July, you'd have approximately, again, between two hundred fifty or three hundred people during the week, Monday through Friday and, then, as transients come in, you would increase (T. 62) in this area, I'd say approximately another two or three hundred.

Q. I don't think you understood my question.

I'm only referring to that one hundred by one hundred twenty foot area. A. That one little lot?

Q. Yes, sir. A. I couldn't do that. I wouldn't know. You'd have to come out with a counter every day and count this.

Q. So, you don't know this? A. I don't. But I do know there are people there, but as to the number, I couldn't give you an exact number.

Q. Now, the people who use this area, do you have any idea where they come from? A. No, sir, I don't.

Q. Do you have any idea or not whether they are residents or guests of the townhouses immediately surrounding the area? A. No, I don't.

Q. You have no way of knowing from whence they come? A. Only if they get in trouble, then I have to find out where they live, or something of that sort.

(Mr. Rogan) Thank you. That is all I have.

(T. 63) (The Court) Any redirect?

(Mr. Rich) Yes.

REDIRECT EXAMINATION

By Mr. Rich:

Q. Sir, do you enforce the local ordinances of Ocean City on the beach? A. Yes, sir.

Q. Are you a licensed policeman? A. I'm deputized.

Q. And is there a law against open fires? A. There is a law which states that anybody, that is, any open fires must have a permit, and the permit must be gotten from the Fire Marshall.

Q. Let me ask you this: suppose someone wanted to build a fire on the dune in the evening and roast some corn in there, do they have to get a permit from the City? A. Yes, sir.

* * * * * *

(T. 70) ROLAND E. POWELL

DIRECT EXAMINATION

By Mr. Fox:

* * * * * *

(T. 70) Q. How long have you lived in Ocean City? A. My entire life.

Q. And how long is that? A. Forty-three years.

Q. Are you presently, or have you in the past, been a member of the City Council of Ocean City? A. Yes, and I presently am.

Q. How long have you been a member of the City Council? (T. 71) A. It will be four years this fall.

* * * * * *

(T. 71) Q. Are you the Fire Chief now? A. Yes, sir.

Q. How long have you been Fire Chief?

A. I have been Fire Chief for approximately fifteen years.

* * * * * *

(T. 73) Q. Do you recall times when the pound boats used to be launched on the beach, and stored on the beach? A. Yes, sir.

Q. Where were the pound boats stored, and from what part of the beach were they launched? A. Most of them were down where the Inlet is now, and just south of them, had fish camps.

Q. What do you mean by "fish camps"? A. Well, it was a group of shacks, I guess you'd call them, where they had cooking facilities and sleeping facilities for fish pound fishermen.

Q. Over what period of the year did the fish pound fishermen live on these camps? A. I'd say in the spring until the fall.

* * * * * *

(T. 74) Q. Well, prior to the time that the Beach Highway was constructed to the Delaware Line, how did people get from Ocean City to Fenwick Island? A. If they traveled, they had to travel it in a beach buggy, or some type of beach rig.

Q. Do you remember when there was a Coast Guard station at — where was the Coast Guard station they later on called the Twenty-First Club? A. Isle of Wight Station, which would be about 84th or 85th Street.

Q. How did people get from the Isle of Wight Coast Guard Station to the Town of Ocean City? A. They either drove the beach in pickup trucks with large tires, or they actually — Isle of Wight Station had a boat that many times they'd come down the Bay.

Q. Was there any road from Isle of Wight Coast Guard Station to the Town of Ocean City, except along the ocean beach? A. Well, like I said, there was a partial road, (T. 75) which was built before my time. I traveled on it with my father, but it was broken up. You couldn't — it was cement, as I remember. But you may go a half a block on cement, and, then, you'd be in sand. Just about like the old road on Assateague Island is now. It wasn't fit to ride on it. We either went on the back road, or on the beach.

Q. Has the ocean beach, from Ocean City North to Fenwick Island, has been used as a road as a means of transportation back and forth? A. I would say so, yes.

Q. During what periods of time, from about what years to what years, was the traffic normally moved up and down the beach? A. Are you speaking that they actually drove the beach

Q. Yes. A. What would be prior, of course, before the Beach Highway was built, and as I remember, of course, it would be a matter of record, but I was probably about twelve years old when they built the Beach Highway, because we rode on it once with our bikes to Selbyville.

If I were twelve years old, it must have been about 1939 or '40, I suppose, the Beach Highway was built.

(T. 76) Certainly, any traffic, riding north or south, had to go out on the beach. I'm sure on low tide they drove the surf.

Q. Now, when vehicles — you talked about days using four-wheel vehicles. When you drove the beach, what area of the beach did you drive on? A. Well, low water, you go along near the water where the beach is hard and it's much easier pulling.

Q. You say on low water? A. Yes.

Q. On high water, what part of the beach did you drive on? A. High water, sometimes you can still follow the water lines.

But many times, you have to go up on the beach. As a rule, as you get nearer to the dunes, you may find a harder surface. It will vary. It takes a good man to drive the beach, unless he really knows what he's doing.

Q. Do you recall—

(The Court) You know this is very interesting, Mr. Fox, from a historical standpoint, but I can't possibly conceive that it has any legal significance now. Just as an analogy let me say this: even though the motor (T. 77) transportation up and down Assateague Island, then and now, might be by beach buggy along the surf, the Federal government and State government still felt obliged to condemn the property and acquire it through eminent domain.

(Mr. Fox) Of course, Your Honor, that is not exactly correct.

The area they acquired by eminent domain wasn't the foreshore of the beach. It was areas that had been sold in deeds, and deeds had been recorded to areas back from the beach.

(The Court) Well, that is not true, either, Mr. Fox.

But, is the beach now recognized by the City of Ocean City as being a public thoroughfare for the movement of vehicles by the general public?

(The Witness) No, sir.

By Mr. Fox :

Q. Do you recall the — prior to when the Town of Ocean City annexed the area from about 40th Street north to the Delaware Line? A. Yes, sir.

Q. Now, prior to that annexation, where was the northern limits of Ocean City? (T. 78) A. About 41st Street.

Q. Now, when, if you know, did the Town of Ocean City annex this area from 41st Street north? A. I believe it was 1965.

Q. Now, prior to 1965, how was the — or was the beach patrolled by anybody prior to '65? A. Not by any form of government.

Are you talking about beach patrol or lifeguards?

Q. No, I am talking about vehicular patrol by any branch. A. By the Sheriff's office.

Q. By the Sheriff's office. How did the Sheriff's office patrol the beach from 41st Street to the Delaware Line on the day when they patrolled it? A. Four-wheel drive vehicles.

Q. Do you know whether or not they purchased these four-wheel drive vehicles specifically for the purpose of patrolling the beach? A. I know that one they did.

Q. Why do you know about one they did? A. Because I was Deputy Sheriff, and I had it at my disposal.

(T. 79) Q. As a Deputy Sheriff, you then did use a four-wheel drive vehicle to patrol this beach area from 41st Street to the Delaware Line? A. Yes, sir.

Q. And during what period of years was that? A. I would say it would be '54 or '55, '56, in that area.

Q. For how many years were you a Deputy Sheriff? A. I believe three.

Q. And for how many of that three years were you assigned to, at least, part of the time, to patrol the beach in a vehicle? A. That was our only area. You are a Special Deputy.

Q. Were there other vehicles that the Sheriff's Department used to patrol it, used more than one vehicle? A. I think they had another vehicle; but there was only one in that area that stayed there full-time.

Q. And from what period of time did you patrol the beach? What hours of the day or night? A. It wasn't a scheduled patrol. Most of it, it was answering complaints, just riding out of the evening, or something like that.

(T. 80) Q. And for what purpose was your patrol? I mean, what did you seek to bring about or prevent? A. Well, keep people away from private homes, which most of them were private homes and cottages as in those days. Large beach parties, trying to keep them from tearing up the sand fences. Most of it was complaints from people that lived in the area, noise, fires near buildings, and things of this nature.

Q. Now, at the time when you were patrolling the beach, you mentioned a sand fence. Was there a — I started to say oak. I don't know whether oak or not, but was there a board sand fence that ran north along the beach of Ocean City? A. Yes, sir.

Q. Do you know the approximate location of that sand fence? Is there anything there now that would indicate where that sand fence was then located? A. Well, in many areas, part of the old fences are still there.

Q. And by whom, if you know, was that sand fence constructed? A. State Roads Commission.

Q. And how long was the fence? Over what area did (T. 81) it extend? A. Well, at one time or the other, they ran the entire length of the beach. A block, maybe, washed out or flat, but they did keep them up.

Q. At the time the sand fence was constructed there, were there any buildings east of the sand fence that you know of? A. Yes. There were buildings east of the sand fence.

Q. Where, if you know? A. There were two between 75th Street and 76th Street that I could — they are still there, and I'm sure prior to 1962, there were probably others. Just where they were, what blocks, I couldn't honestly say.

* * * * * *

(T. 82) Q. Was there a time when, prior to annexation of this beach area, that the County, in addition to having police patrol the beach, cleaned the beach? A. Yes.

Q. What sort of labor did it use to clean the beaches, if you know? A. Prison labor.

Q. And in what area of it did the prison labor clean? A. What I would call the sand area, or the beach area, where the people — east of the dune line, so to speak.

Q. Well, back in those days, there wasn't an artificial sand dune, was there? A. Well, they built sand fences, but certainly one would make dunes, or help make them.

Q. Well, the area that the County used prison labor to clean, you say it would be east of the sand fence? A. As a rule, they would be east of the dunes, or (T. 83) east of the fence, where the people would go out and use the beach and have beach parties, of course.

* * * * * *

(T. 84) (The Court) Mr. Powell, prior to the granting of the permits for what is now called "High Rise Row", did members of the general public use all of that area to get to and from the beach, principally the surfers with surfing rigs, and so forth?

(The Witness) I'm not sure I understand your questioning.

(The Court) From the Beach Highway, all the way to the Ocean, was that area in there used by members of the general public?

(The Witness) Yes.

(The Court) And not necessarily by streets or not necessarily on the other side of the sand fence, is that right?

(The Witness) No, they used most anything that was open land. They would use it.

(The Court) You see, Mr. Fox, you have to pinpoint in time because, obviously, as an area is developed along the beach, the development pushes the people closer to the ocean. It doesn't prove anything to say that people use the beach in 1920 or 1960 or '65. If you are going to try to come within the prescriptive period, then you're going to have to limit it to the prescriptive period, to (T. 85) this one particular block of land. You just can't generalize over the whole history of Ocean City, or over the whole beach area. There is no way to reach a decision on that basis.

(Mr. Fox) If I may, Your Honor, I don't think there is a prescriptive period so far as the public easement is concerned. I think there is so far as the private easement is concerned, but that is something to be developed later as far as the case law is concerned.

* * * * * *

(T. 88) If I may interject this. I know Your Honor said at the outset, and it's your ball and bat that we are playing with, but I don't necessarily concede that this case doesn't have application from the Virginia Line to the Delaware Line.

(The Court) As I say, it's interesting from a historical standpoint, and it may be interesting. It may be necessary to show erosion and secretions, and all that sort of things, to show a larger area, because this little block in and of itself might not prove anything on a map of that size, an area of that size

But we have got to pick our westerly line, and (T. 89) we have to pick out point in time that you want Mr. Powell to begin, because his familiarity with this area expands a lifetime, and we could sit here for several days while he develops the various progressions of the use of the various parts of the island.

But that is — it seems to me, we would just be turning our wheels — we need to get down to the specifics, and that is all I am trying to do. I am not trying to cut you off from any evidence which you think would develop your theory. But I would want to limit it to something that was meaningful, that is all.

(Mr. Fox) Your Honor, understand my point when I say the situation up in the sand dunes and surface beach, that vacant land, I don't think is analogous to my situation when I am talking about the land either between the Army Engineers' dune, since it has been constructed, or the natural dunes before the Army Corps of Engineers' dunes were constructed.

(The Court) Well, let's limit it now . . . . yes, let's limit it to this particular area east of that line and, then, give Mr. Powell the time limits that you want him to cover.

* * * * * *

(T. 90) By Mr. Fox:

Q. Getting down to the '62 situation, since the storm of '62, which I'm sure you recall very well, do you not, Mr. Powell? A. Yes, sir.

Q. And directing our inquiry to around 70/71st Street, in that area, what area in there has the public used as a beach? A. I'd say they use the beach where vegetation didn't grow. Hard sand — certainly, there were people on that in 1962, such as bathers and campers and people of that type.

* * * * * *

(T. 91) Q. In the area of 70th and 71st Street, since the construction of the Army Engineers' dune, what area of the beach is used by the general public? A. East of the dune line, of the Army Engineers' line.

Q. Now, the Town of Ocean City presently cleans the beach, do they? A. Yes, sir.

Q. Do you have any idea how much it costs them to clean the beach? A. Well, it would run over $100,000.00 a year.

(T. 92) Q. And this money is spent to clear — when we talk about cleaning the beach, what area are we talking about? A. The Inlet to the Delaware Line.

Q. As far as westerly direction, what area are we talking about? A. Dune line to the water.

Q. This area referring to the Army Engineers' dune line? A. Yes, sir.

Q. Is it presently cleaned by the Town of Ocean City at a cost of approximately $100,000.00? A. It would be in an excess of that, but at least that much.

Q. The funds are tax derived funds, are they? A. Yes, sir.

Q. What other services does the Town of Ocean City render, as far as the beach is concerned? A. Well, police, lifeguards, first aid.

Q. Has the Town of Ocean City enacted certain ordinances with regard to the regulation of conduct on the public beach? A. Yes, sir.

Q. Can you think of some of those ordinances that (T. 93) the Town of Ocean City has enacted? A. Well, there is no drinking, ball playing, dogs allowed on the beach, certain hours to surf. There is probably ten or twelve different ordinances on it.

Q. Now, when the — to what area do these ordinances — do you members on the City Council consider these ordinances to apply? A. They would apply to the entire beach.

Q. When you say the entire beach, what area are you talking about, from east to west? A. I would say anywhere where people are doing those things, east of the dune line.

Q. Have people been arrested and prosecuted for these violations of City ordinances in those areas? A. Yes, sir.

I couldn't name you a particular case, but the police have instructions to arrest, and I'm sure they have. I think it's a matter of record.

Q. Does the Town of Ocean City spend any funds for the protection of the beach, that is, the protection from wave wash? A. No. Only through State aid. Not any monies out of the Town itself, I'll put it that way.

(T. 94) Q. Does it spend any funds for the purpose of maintenance of the dune, the Corps of Army Engineers? A. No, sir.

Q. Does it obtain funds from either the State or Federal government for the purpose of maintaining the Army Engineers' dune line? A. The dune line itself, I would say, no.

Q. Does it obtain funds from either the State or the Federal government for the purpose of maintenance of the beach? A. No, sir.

Q. For the protection of erosion? A. They recently acquired money to build new jetties, groins, if you want to call them.

Q. Has the Town of Ocean City, in years gone by, built groins, or has that always been done by the State Roads Commission? A. I couldn't say.

Q. Didn't you say they had recently obtained money to build jetties or groins? A. It's appropriated, but I'm sure it will be spent by the State. But it's appropriated for Ocean City.

Q. By whom? (T. 95) A. In the past Legislature.

Q. By what, the Federal government or the State? A. By the State.

Q. By the State of Maryland? A. Yes.

Q. Appropriations for the construction of joint groins and jetties? A. Yes.

Q. Has the location of any of them been determined? A. Not eaxctly. I think you will see some of them in the 30th Street area. Probably one at the bend of the beach at 15th Street.

There are presently three jetties, wooden jetties, at 76th, 74th, that the State built, before it was annexed. Other than that, I don't know of any money.

* * * * * *

(T. 97) Q. Do you recall the storm of '62? A. Yes, sir.

Q. Was there a place in Ocean City, or several places in Ocean City, where the water washed through from the sea to Assawoman Bay? A. Many places.

Q. What happened, if you know, in the 71st Street area? A. Well, the road was completely washed away. It would have the appearance of a new inlet being cut through, the tide, where the seas washed across for a couple of days, I guess. It wasn't really an inlet, but it was a water (T. 98) washover from the ocean.

But the biggest hole, or the biggest gut, was cut near the present State highway. It was completely cut out. It was impassable.

* * * * * *

(T. 98) Q. How close is that to 71st Street? A. Within a block. I believe it's 72nd Street. I get my streets mixed up. I believe it was 72nd or 71st; but I believe it was 72nd Street that it was cut out.

* * * * * *

(T. 98) Q. Were you a member of the City Council at the time that they established the present ocean building limit line? A. Yes, sir.

Q. Were you a member — how was that line established? A. The Council, Planning and Zoning, a surveyor, (T. 99) oh, probably, four or five other people who knew the beach, went on a trip, took a trip in four-wheel drive vehicles. They started at the end of the boardwalk and went to the Delaware Line, and I would say through common sense of looking where the ocean was at the present time, how far it appeared that the high tide washed toward the dune line, and taking buildings that were built in

different areas, and trying to strike a line that a surveyor could set down on a city map, and the Council taking the position that this is as far as we want a building out, I think that is the way it was struck.

* * * * * *

(T. 99) Q. Do you know where the building limit line is between 70th and 71st Street? (T. 100) A. Approximately, yes.

* * * * * *

(T. 101) (Mr. Fox) Referring to Plaintiff's Exhibit No. 12, that you have in your hand.

(The Witness) Well, here again, it's only through memory, but I believe the limit line was struck through the building at the top of the photograph, which is a three-story building, and it went right through this portion.

They did not, at the time we went on the beach, go in front of this building.

And, from that point, there is another group of townhouses, I believe, at 75th Street, that is not shown on here. It would go on up. It's the Ocean Villa Apartments — not apartments, but townhouses, and I think the line was struck from here to there (indicating).

But here, again, we have looked at ten miles of beach.

By Mr. Fox:

Q. When you say the line was struck from here to there, the "here" refers to what? (T. 102) A. The center of this building, at the upper part of the picture.

(The Court) This is on Plaintiff's Exhibit No. 12; and this would be to the south, right?

(The Witness) This would be the southern end.

(The Court) Then you say there are some structures at 75th Street?

(The Witness) I think they went to 75th Street, a group of townhouses, and hit the base of the building.

Do you remember this, Dale? Didn't we take it there? It went through that building (indicating).

(Mr. Fox) Let me show you Plaintiff's Exhibit No. 9 and see if that—

(The Court) It doesn't go to 75th Street, apparently, but maybe you can tell us how far north of that photograph these buildings are.

There is a — what appears to be a swimming pool, some structure near the top of that photograph.

(The Witness) This is Beachmark Motel. That is the Beachmark.

(The Court) Swimming pool?

(The Witness) Yes, and just to the north of that, which is not shown on this picture, there's a group of (T. 103) condominiums called the Ocean-Villa, and if my memory is right, it took the base of — base of the building, not the porches, but the base of the building of the Ocean Villa condominium units.

(The Court) Let me ask you a question right now. I have been looking at it since this morning.

You see that row of timber piling?

(The Witness) Yes.

(The Court) What is that, at 72nd Street?

(The Witness) It would be on the north side of 72nd Street.

(The Court) What is that supposed to be?

(The Witness) That was breakwater or two buildings that were to the west of them. The buildings were not on pilings and they were demolished in the '62 storm. The breakwater stayed there, but they were piling. They had a cement foundation. I watched them fall over.

I think two or three piling in back, and that was the porch piling.

(The Court) Yes.

By Mr. Fox:

(T. 103) Q. Then, Mr. Powell, I take it the committee that established this limit line was influenced by a structured (T. 104) by some extent, by structures which had been built prior to the establishment of any building limit line? A. Yes, sir.

* * * * * *

(T. 106) Q. I show you Plaintiff's Exhibit No. 13.

(The Court) Now, you see the old piling?

(T. 107) (The Witness) Yes, sir.

(The Court) Do you think the building limit line is to the east or west of that, or about in line with it?

(The Witness) I'd say it would be the — to the west of it.

(The Court) Now, the fences that comes down in front of the beachwall, has the City ever made any objections to those fences there? Did they take any official position when property owners put those fences out there?

(The Witness) No, sir. No objection.

(The Court) Then the City doesn't try to make any determination as to whether it's on property that is deeded to these people or whether it's on other property, or on the—

(The Witness) Not to my knowledge, Your Honor. No.

* * * * * *

(T. 108) Q. Now, to your knowledge, what attempts have been made to restrict the use of the Ocean City beaches to any particular number of people?

Or to phrase it another way, have there been any attempts, to your knowledge, in Ocean City, to prevent the general use of the beach by the general public? A. Do you mean has the City attempted to restrict it, or have private individuals attempted to restrict it?

Q. Well, I'll first ask you, has the City ever attempted to? A. Not to my knowledge, no.

Q. What knowledge do you have of any attempt on the part of private individuals to restrict the use of the beach? A. Well, you refer to it as beach. Of course, it was platted and recorded land, but I believe between 90th and 91st Street, or in that area, there were a group of (T. 109) cottages built on the oceanfront. They claimed the right to the beach in front of them, which they had a deed to, and they did wire — put wire, the property line, and signs "Keep Off" "Private Property". I believe there is one other.

Q. What is the situation as far as that is concerned now? A. It lasted for about — not over a week, I believe, because they couldn't keep the people off, or at least, that is my opinion. Not legally, but the people came on, and it would take two guards to tell the people to get off the beach.

Q. How long ago was this done, if you know? A. It was called Turnerville, one of the cottages, and I'd say it has been built about seven years ago.

Q. How long ago was this attempt? I take it, it was unsuccessful to make it a private beach. A. I'd say about seven years ago.

Q. What has been the situation in the past seven years? A. People use the beach out in front of them.

Q. Now, you were about to tell about another incident. A. There is a group of condominiums, I believe, at (T. 110) 33rd Street. That also has a sign "Private Beach — Help us keep it clean". "You may use it", or something like that, but they do have — or did have corner posts with an arrangement that they could put a wire or wire in front, or chain up in front of it, but I don't think they actually kept anyone off of it.

Q. Other than these two incidences that you have referred to, do you know of any attempt by private individuals to prevent the public from the use of the beach anywhere from the Delaware to the Virginia Line? A. I don't recall of any.

* * * * * *

(T. 110) CROSS EXAMINATION

By Mr. Rogan:

* * * * * *

(T. 112) Q. Your recollection, Mr. Powell, is that the building limit line, in the area between 70th and 71st (T. 113) Street is to the east of the existing dune line? A. Yes, sir.

* * * * * *

(T. 113) Q. And the Ocean Villa at 75th Street is— A. It runs the entire block, from 75th to 74th.

Q. That is also to the east of the existing dune line? A. There really isn't a dune line there. The (T. 114) building goes over the dune line. They have a breakaway wall underneath.

Q. Okay. Now, Mr. Powell, let me see if I have your testimony correct.

I believe you testified that many years ago, people used the area of the beaches as a means of getting north and south? A. Yes, sir.

Q. And you indicated that the people would drive down close to the water where the sand was hard? A. On certain tides, yes.

Q. If it permitted it? A. Right.

Q. And you also indicated that this condition lasted until they built the Beach Highway up to Delaware? A. Yes.

Q. Which would have been approximately the year 1940? A. Around 1940, I'd say.

Q. You say you were approximately twelve years old? A. Right.

Q. Now, with regard to the patrolling of the beach (T. 115) by the Sheriff's office for Worcester County, I believe you indicated the familiarity with the patrolling of the beach was for the years 1954, 1955, and 1956? A. It could vary a year or two, one way or the other. I got out of the service in '52, and shortly thereafter.

Q. Your best recollection is '54, '55, and '56? A. Right.

Q. And now you also indicated that the Town of Ocean City annexed the area in 1965, correct? A. Yes, sir.

Q. And that it costs the Town of Ocean City more than $100,000.00 per year to clean the beach? A. Yes, sir.

Q. And the beach extends from the Inlet to the Delaware Line. Can you give me that distance, sir? A. Approximately ten miles.

* * * * * *

(T. 116) Q. You also indicated that Ocean City has many ordinances which control the beach, and one is that you can't play ball? A. That is during swimming hours when your lifeguards are on.

Q. Would that include volley ball? A. It would include any kind of ball.

Q. Therefore, if anybody was playing volley ball on the beach, it would be the duty of the lifeguard to stop them? A. Yes, sir.

(The Court) What are the hours for lifeguards, Mr. Powell?

(The Witness) I believe in that area it's from about ten to five or 5:30. I don't believe they come on quite as early as they do downtown.

By Mr. Rogan:

Q. Now, Mr. Powell, there have been many buildings built in Ocean City on dry sand areas, have there not? A. Yes, sir.

Q. There have been many buildings built in Ocean City that are east of the existing dune lines, is that not (T. 117) true? A. There are buildings built east of the dune lines. I wouldn't say there are a lot of them, but there are some, yes, sir.

* * * * * *

(T. 118) Q. When was your building limit line established, sir? A. This would be the second spring, I believe, that has been established. This would be a second building season, so it's better than a year old, I'll put it that way.

Q. And your building limit ordinance, it provides the building may be constructed to the west of it, but not to the east of it? (T. 119) A. Yes, sir.

Q. So, then, any land located to the west of the building limit line, so far as the town officials of Ocean City are concerned, it may be built upon? A. Yes, sir.

(Mr. Rogan) Thank you. I have no further questions.

(The Court) Well, just to clarify this on the record:

To your knowledge, did Worcester County authorities grant building permits on top of, or to the east of the new dune line prior to it's annexation?

(The Witness) I don't think they issued any. I don't know whether they had any request for them, and why I say that, that is the only building that I know that has been built east of it, until—

(The Court) No, I say on — okay.

(The Witness) —would be the Jim Caine building, and the City had annexed it by that time.

(The Court) How about on top of the dune line, over the dune line?

(The Witness) Yes; I don't know whether it was the County, but the City has issued them on top of the (T. 120) dune line.

(The Court) That was going to be my next question.

(The Witness) If they hold them at a certain elevation, yes, sir.

(The Court) As I understand it, then, the building limit line determines the easterly boundaries of the building land.

(The Witness) Yes, sir.

(The Court) The dune line, in and of itself, doesn't establish any kind of boundary.

(The Witness) Only in a building sense. The dune line comes into play, I believe this is right — and I'm not an attorney. Mr. Cathell, the City Solicitor, could explain it better to you — but I believe the dune line comes into play with soil erosion when you touch the dune line, or build across it, then you have to build in accordance with the Maryland State Soil Erosion Law.

(The Court) But so long as you comply with any of those requirements, and you said something about one being built above it, a certain height—

(The Witness) You have to be a certain height, and piling has to be a certain distance apart, with the (T. 121) idea that you can take a bulldozer, go out on the beach and push this dune line up under it. Some of the compliances. It also calls for a sea wall, or something like that.

But to my knowledge, the City's building line, if you went down for a permit, you could get a permit from the City without any problem to build out so far as that building line.

* * * * * *

(T. 122) JOHN S. WHALEY

DIRECT EXAMINATION

By Mr. Fox:

* * * * * *

(T. 122) Q. And what is your occupation, Mr. Whaley? A. I am a real estate developer.

* * * * * *

(T. 123) Q. Have you been connected with the building of the development of other sizeable structures in the Ocean City area? A. We were the builders of the Beachmark, which is a six-story building, and Beach Loft, which, I believe, is a five-story, and been the builders of townhouses projects, which involved twenty-five to thirty units, I think, on various sites.

Q. Do you serve the Town of Ocean City in any official capacity? A. Yes, I am an alternate member of the Board of Zoning Appeals.

(T. 124) Q. How long have you been such? A. I believe about a year and a half.

Q. How long have you lived in Ocean City? A. Since 1965.

* * * * * *

(T. 124) Q. How long have you been familiar with the Ocean City beach? A. Really, since 1965, it has been under my attention more.

* * * * * *

(T. 126) Q. Are you familiar with the area specifically between 70th and 71st Street? A. Generally speaking, yes.

Q. Did you have occasion, some time ago, to have some connection with some construction in that area? A. Yes, we built, I believe, the Beach Place North at 71st Street, and Beach Place at 69th Street.

(T. 127) Q. I want to show you one of these exhibits, if I may—referring to Plaintiff's Exhibit No. 11 — and ask you to identify the structure that is in the background of that photograph. A. It's Beach Place North.

Q. What connection did you have with the construction of that building? A. I was one of the co-developers of it.

Q. Now, do you presently — how long ago was it built? A. I think we completed that in 1966.

* * * * * *

(T. 127) (The Court) Okay.

Plaintiff's Exhibit No. 11 would indicate that that structure is over the dune line. Was the dune line in place when that structure was built?

(T. 128) (The Witness) Yes, it was; and the front porch of the building was located at the crest of the dune, and in accordance with what we believed were County regulations at that time, Worcester County regulations.

* * * * * *

(T. 129) (Mr. Rogan) Does he mean the beach area between 70th and 71st? What beach area does he mean?

(The Court) I understood the question to be limited to the two lots in question in this proceeding, east of the dune line.

Now, that is the area we are talking about in all of our questions, Mr. Fox, to all of the witnesses.

(Mr. Rogan) His question was the beach in general.

(Mr. Fox) I directed his attention to the structure that he was connected with, the building in front (T. 130) of it, and in front of the area between 70th and 71st Street and the beach in that general area is what I'm talking about, which includes the area which we are considering.

(The Court) Okay. All right.

Do you understand? He wants to know who uses it, and how it's used.

(The Witness) I think so.

It's used in the summer by bathers and surfers and et cetera.

By Mr. Fox:

Q. To your knowledge, is the use of it restricted to persons who own lots in the immediate area? A. To the best of my knowledge, it is not.

Q. Have you ever seen any evidence, either there or anywhere else on the beach, in Ocean City, of an attempt to restrict the use of the beach to any limited number of people? A. No, I have not.

* * * * * *

(T. 131) Q. With regard to your development in Ocean City, Mr. Whaley, has the public always used the beach area in front of your developments for the purposes of beach and bathing, and whatever they use them for, since you have been connected with them?

(Mr. Rogan) Objection, unless he restricts his answer from 1965 to date.

(The Court) Well, he said since he has been connected with them. That only includes from 1965 forward.

(The Witness) Yes, to the best of my knowledge, (T. 132) the public has been allowed to use the beaches in front of our projects.

By Mr. Fox:

Q. Have you ever made any attempt to prevent the public from using them? A. No, we have not.

* * * * * *

(T. 133) (The Court) Let's just say, so we don't have to keep going over and over plowed ground, that Ocean City furnishes the lifeguard service, known as the Beach Patrol, during certain months of the year, from the Inlet to the Delaware Line, and that it attempts to clean the beaches in that area, and they have ordinances that have been enacted to cover conduct on the beach, police department answers the complaints with respect thereto, and so forth.

There isn't any need of just repeating that in the record. I think that is established. I think anyone could have stipulated to that.

(Mr. Cathell) The City of Ocean City does stipulate to that.

* * * * * *

(T. 133) By Mr. Fox:

Q. Prior to the annexation, you are familiar with this area which we are talking about — was annexed by the Town of Ocean City; do you remember about when it was? (T. 134) A. I believe about '65 or '66.

Q. Now, prior to that, in order to build your various structures, from whom did you have to obtain your building permit? A. I believe it was from the County.

Q. Are you familiar with the County's policies so far as building — permitting buildings on or east of the dune? A. Yes.

They were — at that time, they seemed to be quite stringent about denying a right to build east of the crest of the dune.

* * * * * *

(T. 134) (Mr. Fox) I want to show that the policy of (T. 135) the County, prior to annexation, was not to allow structures east of the Army Engineers' dune and offered in evidence is a deed of easement that deals with this particular thing, and is an agreement where the County Commissioners are parties.

(The Court) Yes. You don't have to reread it. I am familiar with that.

(Mr. Fox) And my point is when the County Commissioners have the jurisdiction in this area they wouldn't allow the type of structures that the City now allows, because I'll later on argue to the Court that it is a breach of the agreement between the County Commissioners and the various lot owners, and that the City has, for some reason — I don't know — breached the previous policy of the County Commissioners, though I think they are bound by it.

(The Court) I don't know whether this witness can help you with it, but I'm going to overrule the objection at the present time, because he said he began building in 1965, and that, however, the porch of Beach Place North started at the crest of the dune, because he felt that that was in keeping with County regulations at the time.

* * * * * *

(T. 136) (The Court) Do you recall over what period of time that took place?

(The Witness) I really don't. I'm quite hazy about it. I do seem to recall that we seemed to be dealing with the County on all of those townhouse projects, which would have been Beach Place which was built — built in 19—

(Mr. Cathell) Perhaps I could clarify it.

(The Court) It might help, yes.

(Mr. Cathell) Until approximately one year ago, even since annexation, until approximately one year ago, (T. 137) before the City issued any building permit that would interfere with the crest of the dune, or the easement thereof, the person had to present the City with a letter from the County Commissioners approving that project as far as the piling disturbing the dune.

Up until approximately a year ago, the builders and developers had to get a letter before they could come to the City to get the building permit.

(The Court) Prior to the spring of 1971?

(Mr. Cathell) Yes, sir.

And approximately the spring of '71, the County Attorney for the County Commissioners, sent a letter saying that they no longer were responsible for the dune and we replied back to them, "No, you are." And there it is.

But, since that time, we haven't received a letter. They no longer issue them.

* * * * * *

(T. 139) (The Court) Before we leave that, just to give him a chance, now, to remove something from my mind:

Did you build Beach Mark?

(The Witness) Yes, uh-huh.

(The Court) Now, at the top of that photograph, is that Beach Mark?

(The Witness) Yes.

(The Court) And is that structure out in front of it a swimming pool?

(The Witness) It is the swimming pool.

(The Court) Well, now, that structure for the swimming pool seems to start at the dune line and go east, is that right?

(The Witness) That is the way it would appear.

(The Court) Well, — what would be the difference between that structure and other structures which you say you have kept west of the dune line?

(The Witness) There really is very little (T. 140) difference.

I'm not sure that the dune line really existed at the time we built that pool on that particular block. As I recall, it was very — rather flat site, and we've actually, on almost all of these projects, reinforced the dune, in accordance with County approval, by pushing sand into place where we took the dune line to be. And why it appears in this case to straddle the dune, I really don't know.

* * * * * *

(T. 141) Q. And in these areas, what use is made of the land immediately adjacent to the water? A. It's used as a public beach area, or, at least, as a beach area. There are no restrictions of a private nature, as far as I know.

Q. And, as far as you know, is this the situation through the length and breadth of Ocean City? A. It seems to be.

* * * * * *

(T. 141) CROSS EXAMINATION

By Mr. Rogan:

Q. How big is the swimming pool in front of the Beach Mark? A. The swimming pool, it's — I imagine was twenty by forty, although I really don't recall that.

Q. There is a walkway, or landing area, around the pool, also? (T. 142) A. Yes, which would probably have been ten feet on either side of the pool.

Q. And from the photograph, it looks like just about all of the pool is to the east of the dune line and, certainly, the walkway on the easterly side.

(The Court) He'd have to look at the photograph.

(The Witness) That would be the case of the present dune line.

By Mr. Rogan:

Q. Wasn't the dune line constructed in 1962? A. Yes.

Q. So when did you build the Beach Mark condominium? A. In 1968.

Q. So the dune line would have been in existence in 1968? A. Not necessarily.

In other words, it might have been a very flat site. There might have been no site there.

Q. But you do concede it goes an appreciable distance east of the dune line? A. It appears to in this photograph; however, due to the nature of obtaining permits and so forth, there apparently is some reason — I mean, I don't believe that (T. 143) we could have been building east of the dune line since — we were inspected by the — I think it was Mr. Cueman of the County Commissioners, and these properties were all surveyed in, and then they were inspected by this — by the County Inspector.

* * * * * *

(T. 144) Q. How about Sun Village at 91st Street?

(Mr. Rich) I have to object to this line of questioning. It's really — we've gone pretty far afield.

(The Court) Yes, Mr. Rogan.

You, first objected, and I went along with you and, fortunately, Mr. Rich is bailing you out, and now I sustain his objection.

There isn't any need of going up and down the entire beach.

(T. 145) But there should be one piece of property that Mr. Whaley should be familiar with, and when you finish, I'll ask him about that.

But, have you got anymore of his properties?

(Mr. Rogan) You allowed them to go into all of this. You can't go east of the dune line.

* * * * * *

(T. 145) Q. It is your testimony that it is your practice not to build east of the dune line? A. That is correct. My practice, due to the fact that I took it to be a regulation.

Q. That was you understanding? A. Yes.

Q. Whether or not that regulation — that, in fact, was a regulation, you don't know, do you? A. Well, I assumed that it was a regulation or I (T. 146) wouldn't have been doing it.

* * * * * *

(T. 148) (The Court) Do you remember what year you built Beach Loft?

(The Witness) Yes, 1967.

* * * * * *

(T. 148) (The Court) Anyway, to get back to the same line of questioning, now, did you build the swimming pool in front of the Beach Loft?

(The Witness) Yes, uh-huh.

(The Court) Does that swimming pool straddle the dune line, also?

(The Witness) Yes.

(The Court) A portion of it?

(The Witness) Yes, it appears to.

* * * * * *

(T. 149) (Mr. Rich) Your Honor, in light of sticking to your rules, we have a witness available in the courtroom named Jake Schaffer, who was in charge of the maintenance crew that goes up and down the beach. I would proffer, rather than call him at this time, I would proffer to the Court that this man would testify, generally, in excess of $100,000.00 is used to clean and maintain the beaches in Ocean City, and that the area which he cleans is from a mean high water mark to the foot of the dune line.

(The Court) Now, gentlemen, is there any objection to that?

(Mr. Rogan) No, sir.

(The Court) All right.

(T. 151) WILLIAM RICHARD BURDETTE

DIRECT EXAMINATION

By Mr. Rich:

* * * * * *

(T. 151) (The Court) What is your full name, sir?

(The Witness) William Richard Burdette.

* * * * * *

(T. 151) Q. You are employed by? A. The State Highway Administration.

Q. What capacity? A. As an accountant and data collector, and I also accumulate special projects data.

* * * * * *

(T. 152) Q. Now, I asked you to accumulate certain things for me, and one of the things I asked you to accumulate was the expenditures for ocean beach protection by State Roads, dating back to 1949. A. Yes, sir.

Q. Did you do that? A. Yes, sir.

Q. How did you go about doing that? A. I went through the public records of the State Highway Administration, formerly the State Roads Commission, produced a report bi-annually, and this contained ocean beach protection—

* * * * * *

(T. 152) (The Court) Are these appropriations, or completed projects?

(The Witness) These are completed.

(T. 153) (The Court) Completed projects?

(The Witness) Yes. This is the actual expenditure.

(The Court) For completed projects since 1949?

(The Witness) Yes, uh-huh.

* * * * * *

(T. 153) (Mr. Rich) I would introduce this as Plaintiff's Exhibit No. — State's Exhibit—

(The Court) Let's make it Intervening Plaintiff's No. 1.

* * * * * *

(T. 154) (The Court) I was wondering why you picked the year 1949.

(The Witness) Well, our bi-annual reports, I had a break there. I was missing one of the reports.

(The Court) So you stopped?

(The Witness) Right.

* * * * * *

(T. 155)

JAMES W. SMALL

DIRECT EXAMINATION

By Mr. Rich:

Q. Sir, would you state your full name and address, please? A. James W. Small, Pocomoke City.

Q. By whom are you employed, Mr. Small? A. State Highway Administration.

Q. What capacity, sir? A. Resident Maintenance Engineer, Worcester County.

Q. What duties do you have with regard to the beach in Ocean City, which is the subject of this suit? A. Well, at the present time, I have no duties between — between 1953 and 1962, I was in charge of sand fence. During the '62 storm, I was in charge of the field forces on cleanup of debris and sand.

Q. Now, in your duties as in charge of sand fence, are you able to tell this Court what type of protective (T. 156) measures the State Roads Commission took with regards to sand fence in the ocean beach area? A. Yes, I think the sand fence was built just after the construction of the Beach Highway in 1938. My job was to maintain it, which we did by posts and boards.

Originally, set out, I think, a twenty to one slope back from the crest of the beach at high water.

Q. And from what areas to what areas did this sand fence extend? A. Well, in 1953 it went from 26th Street to the Delaware Line.

The 26th Street, at that time, was the City Limit. We worked outside the City Limits.

Q. What elevation was this fence placed at? A. There was no planned elevation. Our job was to increase the height of the sand fence, as sand built up, to collect as much dune line as we could due to wind action and so forth.

Q. Did this sand fence do the job? A. Under certain conditions.

If the sand fence was placed back from the ocean far enough, to accumulate sand, which was blown by the wind, it did an excellent job, but gradual slope was necessary (T. 157) for its function.

Q. All right. By gradual slope, do you mean the slope from the water to the position of the sand fence? A. Yes, the water has to — force of a wave will have to dissipate itself in this upgrade coming from the ocean. We were forced — we had no easements for sand fence, and we were forced, through construction of buildings, sometimes to try the sand fence closer to the ocean than what was originally designed, and we found out that the sand fence would not take a wave.

* * * * * *

(T. 158) Q. Now, taking into consideration that the dune line is presently where the sand fences are located in these exhibits, could you correlate, or indicate with relation to this sand fence, where the old sand fence that the State Roads put in was? A. No. The old sand fence that the State Roads put in was subject to change due to building, as I mentioned before, and sometimes it changed short distances year to year because the builders would knock down the fences, and we'd have to build one in front of the — front of the new building. It was changeable.

Q. You would build it in front of the new building? A. Yes, many times.

Q. Well, was it generally your custom to build (T. 159) these fences in front of the buildings? A. Well, we had no easement, and we had to put sand fence on other people's property wherever we could.

As a matter of fact, many of these people who built very near the ocean, demanded protection from the ocean because they were taxpayers.

* * * * * *

(T. 159) Of course, this would be a test, maybe.

Q. Would it be fair to say, Mr. Small, in most instances, wherever you placed these fences into position, it was your purpose to protect the homes or the structures from erosion? A. My opinion has always been that our sand

fence was placed to protect the road. The property owners' opinion (T. 160) seemed to be that the sand fence was to protect the homes. And I'd rather think that a little of both would be correct, because I think the monies for this came from some general fund and not road taxes.

Q. Now, in the area of 70th and 71st Street, did anyone ask you to put a sand fence up there? A. I have no recollection of this specific area. It has been too long.

* * * * * *

(T. 162) (The Court) All right.

The Doctor, this morning, talked about a storm in October, 1970, I think it was, where he had a fourteen foot drop from the crest of the dune. Did you envision your sand fence to be such as to be effective in storms such as that, or this twenty to one slope, and all of that, or is it just for the normal tides?

(The Witness) That would be for the normal tide, or the normal small storm.

High winds, or what we refer to as Northeasters, or heavy storms tend to slacken the slope on the beach, and I suppose the sand goes out into the ocean.

In normal weather, normal tides, the sand is cast up on the beach, and the slope is very steep. There seems to be more sand on the beach during normal weather than the very rough weather.

But the thing he referred to, I have seen things like that in heavy seas. It does take the sand away from the fence and carries it out to sea a bit.

* * * * * *

(T. 163) (The Court) My question is this: the dune you construct in open ground, in open area, to protect, in your case, the road, and it turned out to protect the houses that were behind the sand dune.

Now, if you have a structure on piling, over the top of that dune, or in the place of the dune, will it stop the wash of the ocean as much as a bare dune and fence?

(The Witness) Well, I think the answer lies in (T. 164) what kind of slope, sand slope, do you have between the building and the ocean. The slope is the thing that slows the water down and dissipates this energy, not the building.

(The Court) So the slope, at any particular location, is impornt.

(The Witness) Yes.

* * * * * *

(T. 164) Q. Are you able to tell us what reparative measures were taken in the area around 70th and 71st Street after that storm? Can you tell us what you all did there to correct the damage that occurred as a result of that storm? A. Are you asking me for the entire thing, or just this one location?

(T. 165) Q. I am talking about this location. A. Well, at 72nd Street, there was a rather large washout, which, apparently, started at the Bay and wored towards the ocean, past our road, and washed the road out for maybe ten feet deep and seventy-five to one hundred feet across.

The first thing we did on each side of this washout, there were enormous quantities of sand on the road. We had Pans to pick up this thing and start filling this washout in. That was what was done in the immediate area.

Q. Did you pump any sand into that area? A. No, we did not pump any sand. We hauled sands after the '62 storm with road machinery, rented road machinery.

Q. Did you haul any sand into that area? A. Into the area?

Do we haul sand into the area?

Q. Yes. A. We hauled it into the washout area that I described from the adjacent road. Much of the road was covered with up to a foot of sand.

Q. Any other things that you do there? A. Well, the sand we didn't need to fill in washout, (T. 166) we hauled it to the beach.

Q. What did you do with it on the beach? A. What did we do with it?

Q. Uh-huh. A. We dumped it into the ocean as near as we could.

Q. Did you grade it while you dumped it, or did you— A. No.

Of course, we had many requests to — we had enormous quantities of sand to remove, and we had many requests to put it in front of my house, or in front of my motel, or whatever, and — the decision was made to — I told the people to start pushing it towards Spain, at the street ends, knowing that the tides and the winds would carry it north and south, and distribute it over a relatively short period of time.

(The Court) You didn't haul any sand on private property, right?

(The Witness) Not that I know of. A lot of things were going on that I didn't know of, probably.

By Mr. Rich:

Q. How many men did you supervise, Mr. Small? A. Well, I suppose we had, maybe, fifty or seventy- (T. 167) five State employees, workmen, and we had twelve or fifteen construction inspectors, and I think we had, probably, one hundred prisoners from Poplar Hill Camp, picking up debris, and we had superintendents, and equipment operators from contractors. I think we had one hundred twenty-five pieces of heavy equipment and about, maybe, twenty-five pieces of State equipment, smaller equipment.

Q. Did you confine your general cleanup maneuvers to purely public roads, or did you also— A. The first phase, yes.

Q. How about the second phase? A. The second phase was where — I was not in charge of the second phase. The first phase, we cleaned the State, the City, and County streets. The second phase was where our special operations went in with a smaller crew and picked the sand up off the street that the property owners had thrown on the street in clearing their property.

Q. Do you know whether this was considered a national emergency? A. Yes, I believed it was declared a disaster, national disaster. I believe we had many meetings with the Federal government relative to Federal aid.

Q. Did you receive Federal funds for maintaining (T. 168) this cleanup operation? A. We received certain Federal funds, yes.

Q. Would that be under PLE 75? A. I don't know about that, at this time.

(Mr. Rich) Your witness.

CROSS EXAMINATION

By Mr. Rogan:

Q. Sir, the washout area that you described as filling in, that was on 72nd Street, I believe? A. Yes.

Q. And the extra sand, it's my understanding that you took that right up the street ends, righ down to the ocean, right A. No, this was filled in, the State Road there has a one hundred twenty foot righ-of-way.

Q. You're talking about the Beach Highway? A. Yes, the Beach Highway.

That had up to a foot in depth. I guess, at least, half of the Beach Highway had up to a foot of sand in depth on it, so it took some of the sand

on the State Highway and filled in this washout, and the excess, we hauled up to the City streets to the ocean and dumped it and bulldozed it into the ocean.

(T. 169) Q. And you didn't dump any of this sand on private property? A. The orders were that none would be dumped on private property.

Of course, it was a big operation. I wouldn't know whether somebody did or not. I did not see it.

(Mr. Rogan) That is all.

REDIRECT EXAMINATION

By Mr. Rich:

Q. Were you personally in charge of 71st Street area? A. Yes.

Q. How many employees did you maintain there? A. At this location?

Q. Yeah. A. Well, at this particular location, I only had one contractor working there, and I think he had about three Pans and three or four dozers, and I remember hauling into this washout.

Q. Let me ask you this: when you say that you didn't dump this sand on private property, are you saying that you took all of this sand and you dumped it back into the ocean, or are you saying that you took the sand and dumped onto (T. 170) vacant lots or areas where there were no houses?

(Mr. Rogan) Objection, as leading.

(The Court) He has already answered that he did not put it on private property. He ordered it taken and bulldozed toward the sea.

By Mr. Rich:

Q. I would like to know whether or not this sand was placed within the confines of the water. A. Yes, it was — you might say it was dumped off the crest where normal high tide would have been, I suppose. We shoved it towards the water, keeping the bulldozer, you know, maybe, six or eight feet above the water. We didn't get any bulldozer wet, but we dumped it on the slope going down to low water at the street ends.

* * * * * *

(T. 171) Q. How would you describe the amount of destruction which occurred in the 71st Street area as distinguished from the destruction in the other areas on the barrier on the island? A. Probably wasn't a great deal of difference from the rest of it.

I do remember — I visited Ocean City every low tide during the storm, and I remember one of these low tides that a building was sitting in the center of the road in this area, a one-story building, and I do that — I think we covered up a couple of cars that had been inundated in the sand. We couldn't pull them out with the equipment, and that is about as close as I can come.

The only difference this area was, from the rest of it, was just this one washout.

* * * * * *

(T. 174) Q. But, it is your testimony that this washout occurred in 72nd Street, is that correct? A. Very close to it. Closer to 72nd than any other street.

Q. It couldn't have been between 70th and 71st? A. It could have been, but still would have been closer to 72nd Street.

Q. If it was between 70th and 71st Street, wouldn't it be— A. It didn't cover a whole block. A block is two hundred and fifty feet long, and this was less than one hundred feet wide.

* * * * * *

(T. 175) CARROLL L. BREWINGTON, JR.

DIRECT EXAMINATION

By Mr. Rich:

Q. Mr. Brewington, will you recite your full name and your address and place of business? A. Carroll L. Brewington, Jr., 207 North Park Drive, Salisbury, Maryland. Business address, District Office, (T. 176) State Highway Administration, West Road, Salisbury, Maryland.

Q. By whom are you employed? A. The State Highway Administration.

Q. In what capacity are you presently employed? A. Assistant District Engineer of Construction for the Lower Shore.

Q. For the four lower shores (sic)? A. Lower shore, four counties, Dorchester, Wicomico, Somerset and Worcester County.

Q. How long have you been employed in that capacity? A. Going on forty-three years — no, I have been with the State Roads Commission, or Highway Administration, forty-three years, but I have been in maintenance, I have been in construction the last twenty-two years, I guess.

* * * * * *

(T. 178) Q. What year were those groins placed there, sir? A. I believe around 1954, in that area, in that period. In the fifties, early fifties. Between '50 and '55.

Q. Do you know exactly where those groins were placed?

By groin, I am referring to asphalt. A. The asphalt groins?

They were placed, I'd say, anywhere about 30th Street on up on the beach. About every — I think they put them in every nine hundred feet, something like that.

Q. What was the purpose of placing these groins? A. To build up the beach. To retain the sand that goes south.

* * * * * *

(T. 179) Q. Are you familiar with the groin placed in the 70th and 73rd Street areas? A. I remember when they were being done, yes.

Q. You can refresh your recollection, if you want to, within the records at your left hand. There's a date of initiation and date of completion. If you would look at those, Mr. Brewington, and I would like to ask you what date the groin at 70th Street was initiated and what date it was completed.

* * * * * *

(T. 180) (The Witness) It began on the 24th of August, 1954 and was completed the 16th of November, 1954.

(The Court) Can you tell me whether or not these asphalt groins effectively performed the function that they were designed to perform?

(The Witness) Yes, I think they did until they had a storm, one of these big storms, but some of them came out, but I still believe that they helped the beach by building up the sand before you had storms.

(The Court) For what period of time would you say they were effective?

(The Witness) I would say a couple of years.

* * * * * *

(T. 181) (The Witness) Probably some of them down there now are still effective.

* * * * * *

(T. 181) By Mr. Rich:

Q. Are you saying that without the groins there the beach would have been in a worse position than it is, say without the groins there, it would have been a lot worse off? A. Yes.

Q. And this groin that was on 70th Street, what beach, in fact, would that tend to build up?

(The Court) Well, now, let's get this straight, now.

The groin had come and gone long before the '62 storm, according to Mr. Brewington. A couple of years was about as long as they were effective.

Now, I think what you want to get on to, you want to find out were there any other structures in this area prior to the '62 storm that would have protected this roadway, or this property.

What is the point, in other words, Mr. Rich, of going through the history of various neasures that have (T. 182) been taken to build up the beach?

(Mr. Rich) Your Honor, the point, without these facilities, in fact, there would not be lots 1 through 5, and, in fact, there wouldn't be a case here today; but for the fact that these public expenditures were made, this beach might not exist in the condition that it exists today.

What I am saying, what I would like to say succinctly to you, Your Honor, is that a property owner, either by his own means, or by governmental means, who takes certain measures to keep out the waters of the State, cannot assert title and usage as against the State.

What I am saying is his interest might not be—

(The Court) Do you mean to tell me all of the board fences that were put up, under Mr. Small's direction, and maintained by him for nine years, with this expenditure of money that has been listed, gave the State title to the property over which those board fences ran?

(Mr. Rich) I am saying this: there are cases, there are cases that I know of, which say title could be — if I could reconstruct what would have been, and is not now, title would be in the State; and there are other cases which says if it does not give title, it does impose a trust for the use of the public.

(T. 183) (The Court) Well, I am asking you now. Answer my question.

(Mr. Rich) I am saying both things, Your Honor. I am not limiting myself to one of those points.

(The Court) What I am saying—

(Mr. Rich) The answer is yes.

(The Court) No matter where that board fence was, the State now holds title?

(Mr. Rich) That is not necessarily true. I have a higher burden than that. My burden is to show the Court what would, in all probability, would have had to develop, but not for these protective measures.

(The Court) You are going to be prepared to prove what would have happened to this beach had not any protective measures been taken?

(Mr. Rich) Your Honor, I hope to prove that.

I also would say this, Mr. Brewington has already testified that but for these protective measures the beach would have been in worse condition at the time of the storm.

(The Court) All right.

(Mr. Rich) Thank you, Your Honor.

* * * * * *

(T. 184) (Mr. Rich) Is it your testimony that the groin on 70th Street washed out prior to the '62 storm? A. Some of it. Some of them came out. I can't say all of them. I still think they did some good, because as soon as the groins were put in, you start building sand up over them. A lot of them are buried under the sand. The same way with the jetties, the wooden jetties.

I am more familiar with them than with the groins, because they were under our construction.

* * * * * *

(T. 184) Q. Let me call your attention to the groin on 70th Street, the groin, the asphalt groin on 70th Street, and ask you if there is a record indicating an inspection of that groin subsequent to its placement there at 70th Street? A. Yes, sir, there is a record. There was a record it was placed there.

(T. 189) THURBID H. SLAUGHTER

DIRECT EXAMINATION

By Mr. Rich:

Q. Mr. Slaughter, please give your name and address. A. My name is Thurbid H. Slaughter, 252 Stanmoor Road, Baltimore, Maryland.

Q. And what is your position? A. I am a geologist with the Maryland Geological Survey.

* * * * * *

(T. 190) Q. Could you be a little more explicit with regard to barrier islands? A. Barrier islands are formed in a particular fashion, geologically, that is. It is the action of water and land.

* * * * * *

(T. 191) (The Witness) To begin with, the present barrier island we know, that we see, that we stand on, that we enjoy, it is said by one of the most recent studies by the Department of Natural Resources, for Assateague Island, that due to the age determination of some salt peat marsh material, which was found at a depth of around minus twenty-seven feet below mean sea level, that this peat is roughly five thousand years old. And we figure that a depth of minus twenty-seven feet, that this was the — perhaps one of the youngest ages of a back bay, or the Chincoteague Bay or Assawoman Bay, that we know of today.

At one of its more recent levels, and it's only about five thousand years ago, that the sea level has risen since five thousand years ago to its — roughly, to its present level.

Now, as the sea level rose, the barrier beach which existed, apparently, we can only surmise, out beyond (T. 192) the bay that existed of minus twenty-seven feet, as the sea level has come up the barrier beach which was formed, presumably, back about five thousand years ago, was migrated towards the mainland, as we know it today.

And if you'll look at the hydrographic charts of now, the present depth, the twenty-seven or thirty foot depth contour would be in the neighborhood of half a mile, or three-quarters of a mile off shore, meaning, perhaps, it migrated over that period of time into its position today.

The point I want to make, and get across — and I think this is important so far as the barrier beach is concerned — that the barrier beach, geologically, and since we are still in a period of rising sea level, although it's not rising very fast, it has risen, perhaps — and I can only extract data from Atlanta City, in the neighborhood of close to a half a foot since the early thirties. And this trend may continue. It may go down, we don't know, but it's already into eustatic changes that are brought about by the melting of the icecaps, the glaciers, and so on; but this water is still coming up.

So, geologically, the barrier island, that we know today, has to migrate westward. And the island we are most interested in exists, from our standpoint, from the (T. 193) standpoint of sedimentation, from trying to explain its origin and where it's going to go, is from Indian River Inlet to the Ocean City Inlet.

In other words, all phases of sedimentary pattern of definition of erosion, everything that happens, happens in between these two barriers, and it is a self-contained — what we call a physiographic province.

(The Court) What was that, now, again?

(The Witness) What we all call a physiographic province.

And so that the material that we know, that feeds our beaches, and keeps the beach healthy, so to speak, and keeps it from eroding any faster, we get our source of supply of sand from Delaware, in the vicinity of Bethany Beach.

Now, from Bethany Beach, which is probably about seven miles north of the Maryland/Delaware Line, the littoral drift moves northward. But, Bethany Beach is what we call a nodal point.

At Bethany Beach, the material in that drift goes northward and southward, and so that we are benefiting by the erosion of Delaware beaches to the north of us. The material moves to the south, and it is caught by the northern (T. 194) jetty at the Ocean City Inlet.

There has been a tremendous build up, as we all know who enjoy Ocean City, up to probably, maybe, somewhere in the neighborhood of around 10th Street, but the accumulative effects of this northern jetty has not gone beyond 10th Street in this case.

There is erosion that has taken — well, it's going on, and has been going on. The island is not eroding at a fixed rate all of the time.

In other words, it's not chugging along at one foot a year, two foot a year. It all depends on conditions, climatic conditions, and the amount of material that happens to be moving predominantly toward the south. Different parts of the beach are fed different amounts during different periods of time over which we are concerned.

Now, we have made a study of the erosion of the barrier beach of the Maryland portion, of the beach from the Delaware Line to the Virginia Line over the period of 1850 to 1942, using United States Coast and Geodetic Survey map data; and we have, through our comparison of maps, we have obtained different rates of erosion from different parts of the island, and it ranges from, say, from zero, which is up around, for that period of time, almost zero, up around (T. 195) 94th Street, and it goes from there to the Delaware Line three and a half to 3.2 feet per year recession, and going south from 94th, it ranges from 1.6 to 4.3 to down around, oh, I should say, possibly, 20th Street, 5.4 feet and less, of course, as you get down toward the Inlet, because of the accumulative effect of the jetty.

The thing that we have to remember is there is a dynamic relationship between land and sea. There is, off shore, a process, hydraulic process going on every moment. It never stops. And we have to take this into account, what changes are taking place off shore. And from the Army Corps of

Engineers' data, which we have obtained, given to us by them, we know from their work, begun back in 1929, that the off shore is deepening in close to shore, and this having its effects in certain areas, pretty obviously; but certainly another indication that the barrier beach island is migrating westward.

And, now, the thing we have got to remember, that man has staked out, or he has done something to Fenwick Island. He has fastened it down with piling, with buildings, and, therefore, it cannot migrate. It's stuck. But Old Mother Nature is still eroding the shores, is still eroding.

Assateague Island, in the meantime, which is not (T. 196) pegged down by timber, by structures, it is migrating westward in toto. I mean, it is not receding, it's simply migrating.

Fenwick Island would do the same if it were not pegged down by man structures. But since it is, the part that is pegged down by man does not move, but the shoreline is receding. This is a fact, and it is going to continue. Another reason that I say it is going to continue, again, is the fact that we have this continued sea level rise which is going on, and how long it's going to continue, I don't know. But this is simply another indication.

If the trend were to reverse, if the sea level were to fall, go in the other direction, then we would be making land. We would, then, be building land. But, as it is, the trend is towards diminution and recession of the beach.

* * * * * *

(T. 197) Q. —if you could just, with that red pencil of yours, show the Court — I think there are five or six recognized stages as to how a barrier island is created, and how a barrier island disappears.

* * * * * *

(T. 197) (The Witness) As sea level rises in this direction (indicating), you have this barrier island which migrates almost uphill. It's not very much of a hill. But this barrier island is migrating towards the mainland.

Now, just to reduce this a little bit, I have quite a slope. But here we have the back bay, and we have the present. This would be Fenwick — or would be Assateague, and this would be the mainland, and we have the back bay here.

Now, this island, if it is not restricted by man, by any of man's construction, it's going to migrate towards the mainland in toto.

In other words, it's simply going to go over (T. 198) like this, and it's going to emerge.

The northern tip end of Assateague almost merged with the mainland as a result of the March '62 storm. There used to be a tremendous width of the backside of Assateague, thousands of feet. I won't say thousands of feet, I would say, at least, fifteen hundred feet.

Now, it's much less, and this map does show a little more width mainly because the Army Engineers have come in and dredged the Inland Waterway Channel. This is a good example of the merging of a barrier island.

Now, the one that we are on today here, that is, the Fenwick Island, is tacked down by buildings; but the ocean side is — and wants to erode, but we have to do something to prevent it. And this is our biggest problem in the State of Maryland, as to how to prevent and hold onto what we have got.

By Mr. Rich:

Q. Could you just label that top island that you drew with a "F" to represent Fenwick, and the other island with an "A".

Is that an "A"? A. Assateague, uh-huh.

(Mr. Rich) Could you mark that Intervener (T. 199) Exhibit No. 2? What is your—

* * * * * *

(T. 202) (Mr. Rich) No. 5 is a blow-up aerial photograph for the photogrammetic development of Assateague Island. The scale is one inch equals two hundred feet, taken May 6, 1962, subsequent to the storm.

(The Court) Assateague Island?

(Mr. Rich) Yes.

(The Court) What relevance does that have?

(Mr. Rich) This photograph shows the 70th Street area.

* * * * * *

(T. 203) (Mr. Rich) Lastly, Your Honor, there is a joint exhibit, all parties concur to the admission of a diagram prepared by the Defendant's expert, Mr. Cropper.

Now, I don't know — want to title it?

(The Court) Stipulation Exhibit No. 1.

What is it now?

(Mr. Rich) It's a plat of the—

(The Court) 71st Street area?

(Mr. Rich) Plat of Block 38.

(The Court) As shown on what plat?

(Mr. Rich) As shown on three plats. Plat O.D.C. 2-23, O.D.C. 2-32, and O.D.C. 2-76.

* * * * * *

(T. 204) CARROLL L. BREWINGTON, JR.

DIRECT EXAMINATION

By Mr. Rich:

Q. Mr. Brewington, I refer you back to your testimony, and my questions of yesterday afternoon, and I was referring to the inspections of the asphalt groins which had been placed on 70th Street in year 1954 or '55, as the record will reflect, and I ask you now to refer to the record, to which you hold in your hand, and advise as to what the followup inspections indicated as to the condition of that groin on 70th Street. A. Shows the groin was completed in November, '54. This inspection shows it was done in August of '55. It's 70th Street, and the condition was good. First ten feet of the end was broken up. First ten feet of the end of it. That was the first inspection.

(T. 205) They had another inspection of it back in '56, 70th Street. It showed one-third of the ending. One-third.

Q. Any other inspection, sir? A. No.

Yes, you have. June 5th of '56, 70th Street, about first eighty feet of the groin top gone. Apron was okay. That was in June of '56. That was the last.

* * * * * *

(T. 209) (The Court) Well, my question is this: what funds, if any, do you know of, or what construction, if any, do you know of, other than the asphalt groins that would have affected the beach in front of 70th Street?

(The Witness) The sand fence?

(The Court) Yes.

(The Witness) That is all that I know of.

(The Court) Were there any timber jetties placed up in this area?

(The Witness) No, no.

(The Court) Yesterday there was a list of expenditures introduced into evidence. Most of them small, relatively so, beginning with $5,000.00 in 1949, and going on up to $2,300.00 in 1965. Some of the years, 1955, appreciable amount was spent, $153,000.00.

Now, of this total list, then, the only thing that you know about that would have affected beach protection in the 70th, 71st Streets area, was the fence and the asphalt groin?

* * * * * *

(T. 210) REDIRECT EXAMINATION

By Mr. Rich:

Q. Do you know the approximate cost of construction of one of those groins? A. Well, I think they start off around $5,000.00, and got them down to about $3,000.00 a piece.

* * * * * *

(T. 216) TURBID H. SLAUGHTER

DIRECT EXAMINATION

By Mr. Rich:

Q. Mr. Slaughter, at the time we closed yesterday, you were discussing migration of the barrier island and the anchoring of the island into the bottom.

Now, if you would just clarify to me what you mean by anchoring. A. Man has, through his efforts, put piling deep into the ground in order to make sure his cottages, or homes, or motels do not wash away under extreme tide. Man has built buildings, he has built roads, and, in essence, man has to protect what he has erected. Therefore, man is making every effort to preserve and prevent loss of this property.

Therefore, the term anchoring is applied to this respect. You take Assateague, to the south. Man has not, with the exception of a few instances in the State Park, (T. 217) and in the Federal Park, few buildings have been built, but the major part of Assateague is free to act as nature wishes it, and it is free, uninhibited from—

Q. From a geological standpoint, Mr. Slaughter, is it better to anchor a barrier island, or is it better to allow it to be natural? A. That is a good question.

(The Court) That is a loaded question.

(The Witness) It depends.

(The Court) There aren't any conservationists in the crowd. Talk freely.

(The Witness) Well, I would say it depends on how you wish to use the island. If you wish to keep it as a natural body, to be enjoyed by nature lovers, and by the general populace for fishing, swimming, and so on, without the erection of buildings, I would say that that — say that the island, in that case, would be in a state that is useable, and it will continue to recede or to migrate; but yet, man will still be able to use it.

If you want to build buildings on any portion of a migratory barrier beach, you must be prepared to make sure, or at least, take steps to prevent nature from encrouching upon your structures that you have erected.

(T. 218) A dictum is nature, to command it, must be obeyed, this is Francis Bacon, a very good—

By Mr. Rich:

Q. Whether that may be hearsay or not, I think that would be admissible.

Mr. Slaughter—

(The Court) Of course, now, actually, to use your comparison with Assateague Island, isn't it true that it may not necessarily just creep or walk or move, but it may be subject to being broken up, too, if it's left free to nature? Isn't that true, too, south of the Inlet, and parts of Assateague Island?

(The Witness) That is true, Your Honor.

There have been many breakthroughs that have occurred since man's knowledge and experience has been recorded. One of the best publications recording this sort of thing is Dr. Reginald V. Truitt, "High wind and high seas".

(The Court) Yes, sir, I have a copy of that.

(The Witness) I think that this document, this happenstance, generally, it has shown through observation that given enough time, any inlet that does break open, has been held naturally, through the eventual movements of material in a southerly direction and, eventually, plugging it up.

(T. 219) The present Ocean City Inlet, of course, has been maintained and kept open by the Army Engineers since the 1933 storm.

(The Court) Now, which is something I was going to ask you as a result of your very interesting explanation yesterday.

But, immediately to the south of the Inlet, where you have shown, and where the present aerial photograph will show, that the island has moved backward into the bay, isn't it true that that dramatic movement was precipitated by the attempted stablization of the Ocean City Inlet?

(The Witness) Yes, sir, that is true.

(The Court) The jetties are designed, apparently, so that there doesn't seem to be anyway to stop the inundation and the movement of the beach back further.

In other words, that would not necessarily have been that dramatic without the stabilization of the Inlet, is that right?

(The Witness) That's right, sir. Yes, sir.

* * * * * *

(T. 223) (The Court) Now, suppose that the entire barrier reef is eventually built upon, and all you have are the street ends, or open spaces, will that help in any way to stabilize the remainder of the island?

(The Witness) By additional structures, sir?

(The Court) The constant construction of the beach.

(The Witness) No. 1 would say, no, sir, that would not help the condition of preservation or maintaining the beach, no.

* * * * * *

(T. 224) (The Court) What do you mean by anchoring?

(The Witness) It's simply a term to denote that man has inserted into the — in through the soil and down into the substrata of the island, his structures, such as his piling, and by man's intent, he hopes to anchor or keep his structures in place by this.

In essence, you do not anchor the islands, but you simply are trying to do this, but this is simply a result of a man's effort, sir.

(The Court) Ever since yesterday, this concept has been turning over in my mind.

As I understood you yesterday, you said that (T. 225) when — because the area in question here had been anchored that the erosion was not as great as where the island has freedom of movement, such as Assateague.

(The Witness) Yes.

(The Court) All I'm trying to do, through this questioning, is to find out just what you mean, Mr. Slaughter. I am still a little confused.

Do the structures, and does the construction of buildings help to stabilize the drift of the island?

(The Witness) No, it does not, sir.

(The Court) Well, then, can you tell me what you meant yesterday?

(The Witness) Well, it means that man is intending, through his efforts of construction, sir, to say that I'm going to stay in this spot. I am putting down my anchor, and I am going — or my building, my piling, and I am going to stay here. But man has a price to pay in order to keep this concept going. He is intending to anchor it, but he cannot do it simply by putting piling down into the ground, sir. There is something else besides that.

* * * * * *

(T. 231) By Mr. Rich:

Q. There was testimony by Mr. Small, the State Roads Commission, who testified that he was instructed that the sand from the storm of '62 was not to be placed on the so-called private property, but was to be transported into the area near the water.

Once that sand transported after the storm, Mr. — are you still with me? A. Yes, uh-huh.

Q. Once that sand was transported after the storm, back to the beach, in the area near the water, what would happen to that sand? A. It would be redistributed up and down the beach to the north, and to the south, depending on wind direction.

Q. So it would adhere to the benefit of the beach? A. That's right. Yes.

* * * * * *

(T. 232) Q. Mr. Slaughter, in your duties, you have reviewed (T. 233) the rate of erosion of the barrier island, is that correct? A. That's right.

Q. Now, since, let's say, 1929, or 1930, prior to the hurricane of '33, until the present time, what is the rate, can you give us an answer as to the relative rate of erosion of the beach area?

* * * * * *

(T. 233) A. The data that I described yesterday was from United States Coast and Geodetic Survey maps, and it encompassed the period of 1850 to 1942, and since then, the Army Corps of Engineers, and a little bit prior to that time, the Army of Engineers, in their own work, have made measurements along the coast of Maryland, and they have, due to their

measurements, data as to how much the erosion has been for the period of 1850 to 1929, and 1929 and 1947, and 1947 to 1965. This is their data, and we have — they have very kindly given it to us. But they are the ones who originally obtained it. So what I would be quoting—

* * * * * *

(T. 234) (The Witness) 1929 to 1947, sir.

(The Court) All right.

(The Witness) This is at 70th Street.

(The Court) Yes.

(The Witness) The measurement eroded was two hundred and seventy feet. 1947 to 1965, at 70th Street, erosion was twenty-five feet; and this is measured to mean high tide.

(T. 235) (The Court) Mean high tide?

(The Witness) Yes, sir.

(The Court) Okay.

(The Witness) And, since 1965, I do not have any data except some that my Department has, and myself have obtained at 76th Street, begun during January, 1971.

We have made three measurements at 76th Street, and that is all that I have in the way of erosion data.

By Mr. Rich:

Q. Would the measurement, with regard to 76th Street, relate to what is occurring on 70th Street? A. I would say possibly so. Yes, it's not too far away. Not too far away.

Q. May I hear those figures? A. Essentially, there has been no erosion, no change.

Q. 1965 to 1972? A. No, excuse me. I mean since we began our erosion measurements at 76th, which was January. 1971.

* * * * * *

(T. 236) Q. How about from 1965 to 1971?

(The Court) He doesn't know.

(The Witness) This, I don't know.

* * * * * *

(T. 237) (The Witness) I must say that I lived in Salisbury 1949 through 1955, and I was very interested in the construction of these groins as they were being constructed, and I took some pictures and I observed them being constructed, and their ultimate life, as far as I could observe.

During the period of their existence, they did, in my opinion, sir, serve to increase the height of the beach.

Now, these structures, in our terminology, we did not consider them groins.

(The Court) What do you consider them?

(The Witness) Simply a sand fence perpendicular to the beach, because they only extended into the water a very short distance of, perhaps, fifteen or twenty feet, and in most cases, the ends were soon broken off due to wave activity.

(The Court) All right.

(T. 238) By Mr. Rich:

Q. You are saying during their life, they did perform the purpose of either slowing down the erosion process or actually reversing that process resulting in some accretion to the beaches? A. They did actually increase the height of the beach. Only the height. I emphasize the height, not width.

* * * * * *

(T. 238) (The Court) Does the height of the beach affect the erosion of the land by the action of the water?

(T. 239) (The Witness) The height of the beach determines the rate of erosion that will eventually take place landward, sir.

So, that what I mean is that, as you pointed out, erosion is going on all of the time, but the higher your beach, the slower that rate is going to be, the slower it's going, or the longer it's going to take erosion to get back towards the land, or towards the dune area.

Now, if the level of the beach lowers, that gives the waves an opportunity to get up closer to the dune area, which is something we hope to protect.

(The Court) All right, sir.

By Mr. Rich:

Q. Well, in 1954 — why were these groins put in there in the first place? Was it a bad situation in 1954 and '55? A. No. I would say that the situation was normal. It wasn't bad. It was normal.

Now, I know Mr. Walter Hopkins, and I have talked to him many times about this. He was very interested in this project, and I think he was quite proud of the project; but, unfortunately, Old Mother Nature didn't give him a chance to really prove his point in that we had Hazel, (T. 240) Hurricane Hazel in October of "54, which did damage to some of the groins that were being put in. We had Connie and Diane in August of '55, and they did damage to many of the groins that were being put in.

So, it was a bad start for their initial being, and I don't know whether many of them were repaired or not, but nevertheless, it sort of got off to a bad start.

(The Court) Were any of them actually repaired, do you recall?

(The Witness) No, sir, this I couldn't recall.

By Mr. Rich:

Q. Even with this bad start, there was a result, an accretion in that the beaches did build up? A. They did.

* * * * * *

(T. 242) Q. What other public improvements, that you know of, were placed on the beach in the area of 70th and 73rd Street, sir, to help the — or prevent erosion? A. None that I know of, sir.

Q. There was certain, after the storm of '62, however, there was the replacement of certain sand on the beach, is that correct? A. Yes, that is correct.

Q. And did that have an effect on preventing erosion? A. The sand was pumped by the Army Engineers onto the beach just a trifle over one million cubic yards, as I believe their records show.

The idea was to restore the beach. This was the primary purpose, and to give enough sand to create an emergency dune line.

Q. Let me go to the point of maintaining the dune line.

What is involved, actually, in maintaining the integrity of the dune line? A. Well, may I ask, are you referring specifically to the Fenwick Island portion, or to any dune?

(T. 243) Q. Let's talk specifically about Fenwick Island.

(The Court) Let's talk about the island at 70th Street, 70th to 72nd. I'll let you go that far, two blocks.

(The Witness) I would say that it would be difficult to maintain a dune under the circumstances as today, as the rules and regulations apply.

One of the things you cannot prevent people from walking over the dunes. Grasses that have attempted to be planted, and to help maintain the dunes, they have, in many instances, have not done very well.

So, I would say, without — or with the situation where you have got so much change of direction, and you have at Ocean City or Fenwick — not a nice, straight line, like you have at Assateague — it would be very difficult, or it would be asking too much of nature to maintain a dune. It's just too hard-pressed. Just to much in the way of man-man structures to let nature do it.

By Mr. Rich:

Q. What effect does the building, actually putting a structure on top of the dune have on its maintenance?

(The Court) Okay, we'll ask that question first, if he knows the answer. But there is a more important (T. 244) question, I think. But go ahead.

(The Witness) I don't see how you can maintain a dune with a building on top of it.

* * * * * *

(T. 244) By Mr. Rich:

Q. The question that I think the Judge would ask, in fact, if you put a structure on top of a dune, wouldn't this structure impede the progress of erosion or water for the building behind the dune, or behind that structure? Wouldn't it serve the same purpose and help, in fact, the purpose of the dune? A. I would say, and I could document this with pictures as a result of the March 1962 storm, some buildings that were on the dunes, themselves, even though they were on piling, and had a bulkhead in front of the building, the sand was washed from underneath of the building, and the opening of the water got beyond and made its effect landward of the building, even though the building was right on the dune.

* * * * * *

(T. 245) I think it's Plaintiff's Exhibit No. 11, Mr. Reporter — or Mr. Pruitt, hand that to the witness, if you will please.

Now, you see that — you see that group of townhouses that you are looking straight at?

(The Witness) Yes, sir.

(The Court) And you see the building straight over the dune.

Now, if the first place — let's put it this way — does that structure in any way damage the integrity of the dune?

(The Witness) As it appears in this photograph, it has not, sir.

(The Court) All right.

Now, does that structure — you see the piling under it rather clearly. So we have to assume the piling is all of the way under the whole building. Now, does that structure serve to enlarge, shall we say, the dune by the very fact that these various timbers and pieces of the structure are there?

(The Witness) It could, sir. It could serve to (T. 246) collect sand.

(The Court) All right.

Now, looking at that structure as it is — this is the thing that I want to know — does it, in any way, damage the use of the sand fence for the purpose for which it was designed?

(The Witness) Not to any great extent, no.

(The Court) Okay, thank you.

* * * * * *

(T. 250) (The Court) He has said now — he has said this — and you correct me, Mr. Slaughter, if I repeat it incorrectly — first, the structure, as pictured in Plaintiff's No. 9, does not affect the integrity of the dune.

(Mr. Rogan) No. 11.

(The Court) No. 11, I mean.

(Mr. Rogan) Yes.

(The Court) No. 11 does not affect the integrity of the dune, that it doesn't prevent the dune from accomplishing its purpose, and that it could enlarge the function of the dune by collecting the sand on the ocean side of the structure.

By Mr. Rich:

Q. You are testifying to the condition that you are seeing in that photograph, is that correct? A. That is all. That is all.

Q. Are there some conditions upon which, in your opinion, this structure could be — have a detrimental (T. 251) affects on the dune? A. Well, this is difficult to answer. I mean, affect on the dune. Well, I mean — I—

* * * * * *

(T. 252) Q. Considering the intensity of the storm of '62, what would be the effect of that dwelling on the property behind it, and with respect to

the integrity of the dune under it? A. Well, number one, if we were to duplicate the March 1962 storm, the dune would disappear completely. It would be lowered to a level much lower than is observed in this photograph. The building in front, if it were constructed properly on piling deep enough, would still be standing. The building to the rear, if it were built on piling, it would still be standing and, perhaps, the building in the front may have cut down some of the wind velocity to prevent some wind damage to the building behind it. That is about all I can say.

Q. You don't know if that building was there in 1962, do you?

* * * * * *

(T. 253) Q. Before we put on the next witness, Mr. Slaughter, could you give me — you have testified as to the amount of the erosion from 1929 to 1947, two hundred and seventy feet, from 1947 to'65, twenty-five feet; if you added those two together, could you give us a rate of erosion since 1929 to 1965? A. It's a little over eight feet per year, if my mathematics are correct, sir.

* * * * * *

(T. 254) Q. Mr. Slaughter, I refer you to the joint exhibit, and I ask you if there is a line marked there mean high water 1929?

Would you locate that, please? A. Right here (indicating).

(Mr. Rogan) Judge, do you want a copy of that plat?

(The Court) I think I can see it all right; but if you have got one, that will be all right.

(Mr. Rogan) It's pretty long.

(The Court) Go ahead.

By Mr. Rich:

Q. And let's use that as our starting point, Mr. Slaughter.

Is there a property line, based upon a plat, 1927 plat to — the mark there with small slashes.

(Mr. Rich) Now, if you could, I recall to the Court's attention, there's a property line indicating easternmost extremities of the lots 1 through 5, as shown on the Isle of Wight Plat, reported O.D.C. 2-32, of September 29th.

(T. 255) By Mr. Rich:

Q. What is the distance between the mean high water line in 1929 and the eastern most extremity in that plat? A. 1929, sir, to—

Q. To the 1929 line (indicating). A. Here is 1929 to 1927.

Q. '29 line. A. This is 1927.

Q. I am mistaken. It says 1929. A. Roughly, using the scale here, it looks to be about two hundred feet or thereabouts, less or more, sir.

(The Court) All right, sir.

By Mr. Rich:

Q. Now, let's go to the next mean high water line, which is 1942. When I say next, I mean the next in point of time.

What is the distance from the mean high water mark of 1942 to the eastern most extremity of Lots 1 through 5 as shown on the Ocean City Plat dated 1940, recorded O.D.C. 2-76, that will be shown by large slashes?

(Mr. Rogan) Oceanbay City.

(T. 256) (The Witness) This line or this line? I want to make sure that I have got this correct.

The large slashes you say? This line?

By Mr. Rich:

Q. (Indicating) That is the 1942. That is the extremity of the eastern most extremity of the lot, right?

Now, we want to measure the distance from there to the 1942 line where the — or the 1929 line? 1942. A. 1942. It looks to be about one hundred and fifty feet.

Q. All right. Now, let's take the next step which is 1962.

Now, for the record, I would say that the 1962 line is not noted as before or after the storm of March of '62.

Mr. Slaughter, what is the distance between the 1962 line and the 1942 plot?

(The Court) 1942?

(The Witness) This way (indicating), and this line, right?

By Mr. Rich:

Q. (Indicating). A. Here is the '62. All right, 1942 plot is — (T. 257) where is that again, now? Right here?

Q. Mr. Slaughter, it's your testimony.

(The Court) Well, point out.

Again, it's difficult to read this plat.

(The Witness) Here is your 1962 line, right?

Now — all right, now, your 1942 line is where, right here?

(Mr. Rogan) No, this '62. That point (indicating).

(The Witness) I know, but we are measuring shoreline or plat line.

By Mr. Rich:

Q. Right here (indicating).

(The Court) Nowhere the thing says 1942, is there?

(Mr. Rogan) It's 1940, actually, Your Honor.

(Mr. Rich) 1940 plat line.

(The Witness) That was the mean high water line. I refer to that here.

(The Court) All right, it's 1940 plat.

(The Witness) This is 1962 shoreline, right?

By Mr. Rich:

Q. Yeah. A. Now, 1942 plat line is where? Please show me.

(T. 258) Q. It's the large slashes right there. A. The large slashes?

I say in order of about fifteen feet, sir, according to the map, the distance between the 1962 mean high water line and the 1942 plat line.

(The Court) All right, that looks like a seven. It's some kind — it's an arrow on this plat.

About fifteen feet?

(The Witness) Yes, sir. That is maybe a little less but it's fifteen feet, sir.

(The Court) Yes, we don't — can we stipulate when this was done, Mr. Rogan? Can we find out from Mr. Cropper what month in '62?

(Mr. Rogan) When he gets here.

I think it was after the storm, but I'm not real certain.

(The Court) Uh-huh.

By Mr. Rich:

Q. Let me ask you a couple other things, Mr. Slaughter:

What is the distance between that same mean high water line in '62, that same high water line in '62, and the dune line as denoted in that diagram Mr. Cropper prepared?

(T. 259) (The Court) Wait a minute.

Sand fence, is that what you mean? The one labeled sand fence?

(Mr. Rich) Yes, Your Honor, sir.

(The Witness) I don't — oh, here we are.

Here is the sand fence, and here is the 1962 line. I'd say being the magnitude of about one hundred twenty feet.

(The Court) Well, again, we don't know what — on what date he made the '62 measurement, so we'll have to—

(The Witness) Right.

(The Court) —so we'll have to receive all of this evidence subject to that qualification.

(Mr. Rich) I think we should get it in now in order to shorten it.

And just two more questions, and I'll go to the '72 line, which seems to have shown some accretion on this chart.

By Mr. Rich:

Q. Mr. Slaughter, what is the distance between the 1972 line and the eastern most point of Lots 1 through 5 as denoted in 1940 plat O.D.C. 2-76?

(The Court) Be certain that Mr. Slaughter can (T. 260) find that now on the plat, because it's no easy thing to look at.

You may all understand it, but it's difficult for me, and I am sure it's difficult for him.

(The Witness) About seventy-five feet, roughly, sir.

By Mr. Rich:

Q. And just one last dimension from you, Mr. Slaughter, and that would be the same high water mark, 1972, and the sand fence. A. About one hundred and eighty feet.

(The Court) Now, before — as long as we are getting in all of these statistics, is the hashed area supposed to be the Plaintiff's house?

(Mr. Rogan) Yes, sir.

(Mr. Fox) No.

(The Court) What is that area?

(Mr. Fox) Where the Defendant's house was to be located.

(The Court) Where the Defendant's structure was to go?

(Mr. Fox) Yes.

(The Court) I see. I see.

(T. 261) Give me another figure, Mr. Slaughter.

How far is it from the building limit line — you see that — to the 1972 high water, mean high water?

(The Witness) I'd say it would be close to one hundred forty to one hundred and fifty feet, sir.

(The Court) Now, how far is it from the westerly side of these two lots, as shown on the 1940 plat, that is looking — that is the first line of heavy dashes to the sand fence?

(The Witness) I'd say about twenty-five feet.

(The Court) Wait a minute.

Twenty-five feet. And how far is it from the sand fence to the westerly edge of the hashed area, the hashed area where the structure was supposed to be?

(The Witness) It's about ten feet, sir.

(The Court) I don't suppose you know this, but I don't know how much preliminary work you have done.

Do you know how wide the sand dune is at this location?

(The Witness) No. It would be a pure guess, sir.

* * * * * *

(T. 264) CROSS EXAMINATION

By Mr. Rogan:

* * * * * *

(T. 264) Q. First of all, the groin, about which you testified earlier, were you familiar with the groin on 70th Street at any time? A. Only by observation. I took a picture of it once.

* * * * * *

(T. 265) Q. You have no personal knowledge of the effect of the groin installed at 70th Street upon the beach or beachfront in that area? A. No. No.

* * * * * *

(T. 266) Q. And, I believe, you indicated that the sea has risen due to melting of the polar ice cap? A. And glaciers, right.

Q. And glaciers. And I believe you also indicated that this condition may continue, or it may go down? A. Right, sir.

Q. And whether or not it will continue, or whether or not it will go down, it is purely a matter of speculation, is it not? A. That's correct.

Q. Something over which man has no control, and no way of knowing what is going to happen? A. We do not know, correct.

Q. You also gave some erosion figures from 1850 to (T. 267) 1942, and if my notes are correct, you stated that 94th Street, there was zero erosion? A. Uh-huh.

Q. Now, by that, you mean the beach had eroded none? A. The net effect, over that period, as comparing the shorelines superimposed upon each from maps, showed no change at all.

Q. All right, sir. And, then, you also indicated that from 94th Street south, from the period 1850 to 1942, the erosion was from 1.6 to 4.3 feet?

* * * * * *

(T. 268) (The Witness) So, I'd say from 94th Street down to — and it's not marked on this map as to what the exact street would be, but it's — I'd say just a few streets south of Reedy Island, now that is on the bayside. In other words, come south of Reedy Island, on the ocean side about four streets, and to that point, the maximum erosion was 4.3, and it had a minimum of 1.6 in the vicinity of 70th and 71st Street.

I don't know whether I said it yesterday or not.

(The Court) How much at 70th and 71st ?

(The Witness) It was 1.6; but the overall — in other words, you have different amounts, so it will vary for different parts of the beach.

By Mr. Rogan:

Q. This was the period from 1850 to 1942? A. Yes, sir.

* * * * * *

(T. 269) Now, I believe you also indicated if there is a cut through the island caused by a storm, that nature, itself, will heal that wound without intervening, intervention from man. A. This has been the past case.

Q. That has been the experience in your— A. In the past, as recorded by Dr. Truitt.

Q. For example, the Inlet which was cut through in 1933, in your opinion, would have healed itself had man not intervened and put jetties out there? A. In my opinion, it would have eventually closed over, but before closing, it would have caused a considerable indention and recession at that point because of the jetties that had been constructed to the north of the Inlet, prior to the Inlet being cut through.

Q. Well, did the jetty immediately — the big jetty immediately north of the Inlet — isn't that what caused that Inlet to remain open? A. The Army Engineers and, of course, the people of the vicinity, realized, in order to keep the Inlet open, had to erect jetties in order to keep the Inlet open. This was the purpose of the jetties.

(T. 270) The jetties intentionally, or originally, were not — especially the northern one — was not to be thought of as something to accumulate sand on the northern side for the benefit of Ocean City. It was simply to maintain the Inlet, sir.

Q. And it did maintain the Inlet. A. To a fair degree. They were having problems, of course.

Q. And it also did accumlate sand on the northern side. A. More than had been imagined. Beyond the wildest dreams.

Q. I believe it was also your testimony, that God forbid, but if we did have another storm of the intensity of 1962, that in your opinion, the sand dunes that had been built up through the use of the sand fences, that they would be washed away? A. Yes.

Q. And it was also your opinion that a structure, properly built, or properly constructed on the beach, would probably remain?

* * * * * *

(T. 272) (The Court) What do you concede the purpose of this parallel dune line to be, to protect the landward property, or to build up the beach, or both?

(The Witness) May I use the blackboard, sir?

(The Court) Yes.

(The Witness) The dunes, as in the present (T. 273) concept of its use, is a secondary line of defense for landward structures, or whatever may be landward of the dune. The dune is part of an overall concept of berm, or beach width in front of the dune, plus a sloping width from the dune to the water's edge.

In other words, you must have three things properly designed and contained in order to get proper use of all three and, of course, the dune.

The first line of defense is the distance and the slope of the beach in front of the berm.

If we have no berm, but simply have a dune with a very minimal beach width and height in front of it, it's pretty obvious that at times water level will lap up to the dune, and this is the case in instances along our Maryland coast at the present time.

(The Court) For the benefit of the record, maybe you'd better define what a berm is, what you mean by berm.

(The Witness) The berm is a terrace of sand in front of the dune, which is set a predetermined height in order to prevent water from normally washing up and reaching the base of the dune.

The wider you make your dune, or the longer you can make your slope, the safer becomes the existence of (T. 274) your dune.

The dune, by itself, offers protection for buildings, landward of it, or any structures. However, if there is nothing to protect the dune, then the dune goes and, eventually, it loses what ability it has to protect whatever is landward.

So, the dune, when we talk about a dune, we like to think of it in a total picture rather than simply as a dune, per se, because a dune, just by itself, under certain circumstances, will not be the answer.

(The Court) All right.

Now, my second question is, does the dune, as constructed with the sand fence and so forth, does this help to create the berm?

How is the berm stabilized, in other words, and does the dune line help it?

(The Witness) The dune line, or dune, can help build the berm out towards the sea providing there is sufficient sand moving either backwards or forwards in quantity, net quantity, to exceed rather than to erode; and,

also, the thing will aid in the construction or growth of the dune, and this is something that is lacking in the Ocean City, or Fenwick Island area, are grasses.

(T. 275) (The Court) But I am interested now in that dune line in the Fenwick Island area. That is the one that I am interested in, and its condition now.

(The Witness) The dune will only build up to a height, depending upon the physical factors that affect its being and its growth; and, at the present time, the dune line that exists, or the fence that exists, with the lack of grass, the lack of maintenance and so on, probably will not grow any higher than what it is today, sir. It is probably at its maximum right now.

This is some of the things that we are hoping to rectify by future action of the entire beach. Now, I'll leave this facet or field to be discussed by others to follow me, who are more qualified than I, sir.

(The Court) Well, I guess I was going to get into the facet that you don't want to talk about, except this: let me ask you this: this is part of my third question.

We have already established — you have testified that should we have another storm of the type of '62, and the dune line were completely obliterated, as the dunes there then were obliterated, but there are structures where the old dune line was established, such as the structure (T. 276) in Plaintiff's No. 11, would it then be feasible or effective to establish a dune line to the east of those existing structures?

(The Witness) This is possible, sir, yes.

(The Court) And if you did that, would that add to the width of the beach in any appreciable manner over a period of time?

(The Witness) But if I may — may I elaborate on my first initial answer?

(The Court) Yes, sir.

(The Witness) I said, yes, you could establish a dune line to the east of the present one, but this is premise on the fact, hopefully, that the State of Maryland, Worcester County, Ocean City, will hopefully indulge in something that is most necessary, and that is the refurbishment of the beach as it is today.

In other words, as it is today, in a weakened condition, we cannot go forward with any future plans for protection of Ocean City until this beach is widened, sir.

If the beach were widened, then it could be possible,

(The Court) Then the answer to my question, as I take it, then, is this: in the present status of the (T. 277) beach today, it would not alone be sufficent to establish a dune line to the east of the present dune line, or any structures over the dune line.

(The Witness) I would agree with this, in the area that we are concerned about; the beach is too narrow.

(The Court) What would happen to the sand that you put there around this dune line under this—

(The Witness) If we refurbish—

(The Court) Wait a minute.

(The Witness) Right now?

(The Court) Right now.

(The Witness) It would — excuse me, if I may ask.

This dune line that we are speaking of is not to be man-made, sir?

(The Court) Yes, just like the one after '62 was man-made and, then, the normal accumulation by the winds.

(The Witness) What would most likely happen is over a period of time, the dune would disappear, but simply to refurbish the beach, is make it a little wider, sir.

(The Court) The dune would wash out and level off?

(The Witness) Right. Yes, because I think that (T. 278) the present beach is not wide enough to maintain another dune structure in front of the one that exists, sir, naturally, unless you were to refurbish it.

(The Court) When you refurbish, are you talking about putting a berm, then, up and down?

(The Witness) This is including a berm, yes.

* * * * * *

(T. 279) (The Court) If you create the berm, which you say is necessary under any conditions, how will you stabilize that and be sure that that doesn't wash?

(The Witness) Well, this is the $64,000.00 question; that by implacement of this sand on the beach, artificially, the sand is not going to stay there,

unfortunately, forever. It will disappear, too, over a period of time. This is going to mean — and I am — I don't want to go into the (T. 280) facets or facts that the Army of Engineers have, and they are the experts on this matter. I am simply echoing what I have read and learned, and that is, they will have to be, if we are to maintain a beach in Ocean City, which is very important to the State of Maryland and to Worcester County and to Ocean City, there will have to be periodic maintenance, sir, or re-emplacement of the sand. How many years apart, no one knows, sir.

(The Court) But you don't conceive of any kind of structure that could be built that would protect that berm?

(The Witness) No, sir. No, except constant replenishment.

* * * * * *

(T. 280) REDIRECT EXAMINATION

By Mr. Rich:

Q. At the risk of re-opening this subject again, (T. 281) let me just ask this question: looking at the beach, as depicted in the joint exhibit there with the 1967 mean high water line, the joint exhibit, is it your testimony that to maintain a berm in front of 70th Street and 71st Street that there will have to be, from time to time, some re-emplacement of sand? A. You want to enlarge the width of the berm at this location?

Q. Either enlarge it or maintain it at that same level.

(The Court) Wait a minute.

My questions were directed at an eastward movement of the dune line which would enlarge the beach.

Now, I didn't ask him about maintaining it at its present level.

Now, all right, go ahead and answer it.

(The Witness) To answer it, I must say that we cannot consider only this piece of property. We have to consider all of Maryland's beach, from the Inlet to Bethany. We do.

By Mr. Rich:

Q. Consider that, Mr. Slaughter. What is your answer? (T. 282) A. The answer is that there will have to be refurbishment, artificially, by Maryland and Delaware. This is a possibility. This is a possibility.

(The Court) Under present conditions, without any change at all, just right now, we need refurbishing?

(The Witness) To refurbish just a small piece, that will not—

(The Court) I am saying it's your concept, at this point in time, supposing nothing changed, that the beach now requires complete replenishment in order to widen it?

(The Witness) Yes, I'd assume possibly.

15th Street or — I'm not sure — this will be answered — but from some point northward from the accumulative part, or the accumulative part where the north jetty ends, to the Maryland/Delaware Line and, hopefully, that Delaware would do the same, sir. Yes, the whole thing.

* * * * * *

END OF VOLUME 1

FILED JUL 26 1974

VOLUME 2

IN THE

Court of Appeals of Maryland

SEPTEMBER TERM, 1974

No. 64

DEPARTMENT OF NATURAL RESOURCES, ET AL.,
Appellants,

v.

MAYOR AND COUNCIL OF OCEAN CITY, ET AL.,
Appellees.

TWO APPEALS IN ONE RECORD FROM THE CIRCUIT COURT FOR WORCESTER COUNTY PURSUANT TO CERTIORARI TO COURT OF SPECIAL APPEALS
(DANIEL T. PRETTYMAN, Judge)

JOINT RECORD EXTRACT

FRANCIS B. BURCH,
Attorney General,

HENRY R. LORD,
WARREN K. RICH,
Assistant Attorneys General,

HAMILTON P. FOX,
Attorneys for Appellants.

DALE R. CATHELL,
PATRICK L. ROGAN, JR.,
WILLIAM G. KERBIN, JR.,
HENRY P. WALTERS,
Attorneys for Appellees.

The Daily Record Co., Baltimore, Md. 21202

CONTENTS OF JOINT RECORD EXTRACT

(Volume 1)

Plaintiff's Petition For Injunction 1

Intervening Plaintiff's Motion For Leave To Intervene 5

Order To Show Cause 6

Intervening Plaintiff's Petition 7

Plaintiff's Answer To Demand For Particulars Propounded By 71st Street, Inc. 8

Corporate Defendant's Counter Petition 12

Corporate Defendant's Answer To Petition of E. T. Park, Inc. 13

Corporate Defendant's Answer To Petition of The State of Maryland Department of Natural Resources 14

Municipal Defendant's Answer To Petition of E. T. Park, Inc. 15

Municipal Defendant's Answer To Petition of The State of Maryland, Department of Natural Resources 17

Interrogatories To 71st Street Inc. From The State of Maryland, Department of Natural Resources 18

Interrogatories To E. T. Park, Inc. From 71st Street Inc. 20

Interrogatories To The State of Maryland, Department of Natural Resources, From 71st Street Inc. 21

Corporate Defendant's Answers To Interrogatories of State of Maryland, Department of Natural Resources 24

Answers of the State of Maryland, Department of Natural Resources, To Interrogatories of 71st Street, Inc. 26

Cover Letter from 71st Street, Inc. and Stipulation Exhibit 29

Opinion And Order of Court 33

Exhibit A: Chapter 36, Building Limit Line, Ocean front, Code of Ocean City, County of Worcester, 1972 105

Exhibit B: Chapter 46, Erosion and Sediment Control, Code of Ocean City, County of Worcester, 1972 106

Exhibit C: Memorandum For The Media 116

Order For Appeal By State of Maryland, Department of Natural Resources 117

Order For Appeal By E. T. Park, Inc. 118

PAGE

Stipulation For Stay of The Circuit Court of Worcester County Entered on The 23rd Day of April, 1974 118

Writ of Certiorari To The Judges Of The Court of Special Appeals of Maryland 119

Order Of Court Of Appeals 119

Proceedings 120

Testimony:

Nicholas John Kohlerman, M.D.—
Direct 125
Cross 129

George Anthony Schoepf—
Direct 131
Cross 132
Redirect 134

Ronald E. Powell—
Direct 134
Cross 146

John S. Whaley—
Direct 149
Cross 154

William Richard Burdette—
Direct 156

James W. Small—
Direct 157
Cross 161
Redirect 162

Carroll L. Brewington, Jr.—
Direct 163

Turbid H. Slaughter—
Direct 166

Carroll L. Brewington, Jr.—
Direct 171
Redirect 172

Turbid H. Slaughter—
Direct 172
Cross 185
Redirect 191

PAGE

(Volume 2)

Robert William Lindner—
Direct 193
Cross 205
Redirect 217

J. Robert Brown—
Direct 217
Cross 219

George Edward Hoerichs—
Direct 225
Cross 227

George Bert Cropper—
Direct 229
Cross 240
Redirect 262

Joseph G. Harrison—
Direct 263
Cross 264
Redirect 273

Eugene R. Parker—
Direct 273
Cross 274

Marshall T. Augustine—
Direct 277
Cross 290
Redirect 294
Recross 296

Plaintiff's Exhibits:

No. 3—Deed of Lots 4 and 5 from Robert and Elizabeth Taylor to Seventy-First St., Inc., November 22, 1971 300

(Volume 3)

Plaintiff's Exhibits (Continued):

No. 4—Deed of Easement between Yauger, et al. to County Commissioners of Worcester County dated June 27, 1962 302

PAGE

No. 5—Tax Assessment Map for 70th Street 305
No. 6—Isle of Wight plat, 1917 306
No. 7—Oceanbay City plat, 1940 307
No. 8—Isle of Wight Land Co. plat 1963 308
No. 9A—Aerial photo w/markings 309
No. 10—Aerial photo 310
Photo of property looking North 311
No. 12—Aerial photo 312
Aerial photo 313

Intervening Plaintiff's Exhibits:

No. 1—State Roads Expenditures for Ocean Beach Protection, 1949-65 314
No. 3—Aerial photo 315
No. 4—Aerial photo 316
No. 6—Construction data for Asphalt Jetty for 70th and 73rd St. w/profiles 317
No. 8—Corps of Engineers Shoreline and Offshore Depth Change plat, dated February 1972 322
No. 9—Beach Profiles, dated February, 1972 323
No. 10—Aerial photo 324
No. 11—Aerial photo 325
No. 12—Sketch "Caldwell" ideal dune cross-section 326
No. 13—Sketch by witness Slaughter used in testimony 327
No. 14—Sketch 328
No. 15—Excepts from Corps of Engineer's Report on March 6-8, 1962 storm and recovery work performed under PL-875 entitled "Operation 5-High 329

Stipulation Exhibits:

No. 1—Plat by G. B. Cropper of Lots 4 and 5 w/building limit line, dated February, 1972 345
No. 2—Aerial photo 346
No. 3—Aerial photo 347

Chart from Augustine testimony 348

PAGE

Corporate Defendant Exhibits:

No. 1—Photo of Apartment house 353

Photo of Apartment house 354

No. 3—Photo of Apartment house 355

No. 4—Construction drawing for proposed Sandbridge Condominium 356

No. 5—Beach profiles drawn by G. B. Cropper dated March, 1972 357

No. 6—Letter w/proposed contract terms from G. B. Cropper Inc. to 71st St. Inc. dated August 23, 1971 358

No. 7—Beach profile with shoreline comparisons drawn by G. B. Cropper dated October, 1963 363

VOLUME 2

IN THE

Court of Appeals of Maryland

SEPTEMBER TERM, 1974

No. 64

DEPARTMENT OF NATURAL RESOURCES, ET AL.,
Appellants,

v.

MAYOR AND COUNCIL OF OCEAN CITY, ET AL.,
Appellees.

TWO APPEALS IN ONE RECORD FROM THE CIRCUIT COURT FOR WORCESTER COUNTY PURSUANT TO CERTIORARI TO COURT OF SPECIAL APPEALS
(DANIEL T. PRETTYMAN, Judge)

JOINT RECORD EXTRACT

(T. 289) ROBERT WILLIAM LINDNER

DIRECT EXAMINATION

By Mr. Rich:

* * * * * *

(T. 289) Q. Mr. Lindner, by whom are you employed? A. I am Civil Engineer with the Baltimore District Corps of Engineers.

* * * * * *

(T. 290) Q. And what is your job with the Corps of Engineers, sir? A. I work in the Navigation Branch of the Planning Division, and this particular Branch has the responsibility for performing feasibility studies, economic feasibilities on such things as navigation projects, beach erosion

control, and hurricane protection and, specifically, I have been involved with the Ocean City, Maryland and Assateague Island, Maryland and Virginia beach erosion control and hurricane protection.

Q. In your involvement with this hurricane and beach erosion control, what have you done? A. Well, I began working on this project in May of 1969, and have put approximately two and a half years into it. I have been required to get all of the available data that has to be analyzed to provide — to come out with some solution to abate the erosion and, also, to protect against hurricanes or storms.

It requires me to obtain wind data, tide data, storm data, damage data, rate of erosion, and any evaluation procedure follows.

(T. 291) Q. You reviewed past records of your Department and of the Geological Coast Survey and Geodetic Survey, is that correct? A. Yes, a comparison of high water shoreline is necessary in order to acquire rates of erosion.

Q. And you have listened to all of the testimony heretofore presented? A. Oh, yes.

* * * * * *

(T. 291) Q. I hand you this plate with the caption on the lower right-hand corner "Ocean City Beach Erosion Control and Hurricane Protection Shoreline and Off-Shore Depth (T. 292) Changes, File 53, Map 270 D-1, February '72, Corps of Engineers, Baltimore", and I ask you, looking at that plate, could you identify, for the Court, and describe what it is? A. This plate was prepared under my direction to be included in the report that is the answer to Congressional authorization for the study of Ocean City and Assateague Island.

The plate shows the movement of the historical high water shorelines, and, also, the off-shore depth curves.

* * * * * *

(T. 293) By Mr. Rich:

Q. Now, I hand you, and ask you to identify a plate which is titled Plate D-3, Ocean City, Worcester County, Maryland, Beach Erosion Control and Hurricane Protection Beach Profiles, Department of the Army Corps of Engineers, Baltimore, February, '72, File 53, Map 272, and ask you to identify it, and, also, to indicate what it represents. A. This plate, again, was prepared under my direction, and it shows the same exact thing that was on the prior plate, only in one instance we have a planned view, and on D-3 we have a cross section view.

* * * * * *

(T. 301) Q. Mr. Lindner, would you refer to Intervener's Exhibit No. 8, and I would like to ask you to put it up on that blackboard there.

(The witness withdrew from the stand.)

By Mr. Rich:

Q. All right. To repeat the description of that plate, they indicate certain years what was occurring with respect to the mean high water in the Ocean City area, is that correct? A. That is correct.

Q. Now, could you tell, indicate to the Court what that does show, what the years in question are on that report? A. Well, the specific area that we are interested in, at 70th Street, the closest cross-section that was (T. 302) taken and platted here was at 71st Street (indicating) which is located—

(The Court) Just where we want to be.

(The Witness) Referred to as OC 22 on here, that would be the designation.

By Mr. Rich:

Q. Do you want to mark that? A. OC 22.

(The Court) OC 22, is that what I want to look for? Is that correct?

(The Witness) Yes, sir.

By Mr. Rich:

Q. Now, with reference to that area OC 22, for the years mentioned in that plate, can you state what the mean high water line did for those years?

First, identify the years, please. A. Well, from 1929 — let's see, we have two plates here, one — two parts of the plate. The top part shows a 1965 survey, which was made with regard to the study, and the bottom part of the plate — I don't know whether you are going to be able to see this. The 1929 shoreline is — put an arrowhead there. The 1947 shoreline is further in shore, noting an erosion that took place between '29 and (T. 303) '47, and the last shoreline we have is 1965, which was surveyed. That also shows an erosion trend between '47 and '65.

* * * * * *

(T. 303) (The Witness) In OC 22, between 1929 and 1947, two hundred and seventy feet eroded. That is perpendicular to the beach.

(The Court) All right.

(The Witness) And between 1947 and '65, it was twenty-eight feet.

I think these are the same numbers that came out a little earlier, or should have been very close.

By Mr. Rich:

Q. What about the other lines you have there, the twenty-four foot depth line and the twelve foot depth line? Have they migrated in any direction over the course of the (T. 304) years? A. Yes, they have, and I think you can see it a little better with this plate, Number 9, as you designated it.

* * * * * *

(T. 305) (The Witness) By looking at the section OC 22, here is the ten foot depth curve.

(The Court) Ten instead of twelve?

(The Witness) Right; and I think you can see that in '29, it was here (indicating), and in 1947, it has moved into here (indicating), which is roughly one hundred and — excuse me — three hundred and eighty feet.

The horizontal scale is one inch equals two hundred feet.

* * * * * *

(T. 306) By Mr. Rich:

Q. The slope has moved westward you say? A. Yes, the shoreline, as it's sloped, has moved westward.

Q. Has the shoreline become steeper? A. Not to any great degree. The shoreline, along the Mid-Atlantic Coast, has an historic slope of approximately one on twenty feet, and based on the 1965 survey, the one on twenty feet was, again, found.

So, I would not say that the shoreline has gotten steeper.

Q. What does it indicate to you, that the deeper water areas have moved westward, migrated westward, closer to the land? A. Well, this gets back to what was talked about a little earlier today, regarding hurricane protection.

Hurricane protection involves the dissipation of energy that travels shoreward by means of waves.

The closer you let this wave get to the shoreline, (T. 307) the more energy it is going to dissipate into the area that you want to protect.

The name of the game is to keep this energy, or wave, away from the area that you want to protect, or, for instance, away from the dune line.

So, therefore, moving westward, would mean that your energy is moving westward, and you are that much closer to the structural damage — if I can refer to it as that — than you were, say, in 1933 or anytime beforehand.

* * * * * *

(T. 308) (The Witness) When we talk about erosion control and hurricane protection, we have to keep in mind what we are trying to do.

The hurricane protection that we are trying to provide is for the bulk of Ocean City, for the island. The erosion control we are trying to abate is for the people that have used the beach.

Now, there are many things that can stop erosion. We can bring in very large twelve ton stones, the same ones that are on the north jetty, and you can put them along the beach. Nobody wants to lay their blanket out on the stone. You get back to the thoughts of sand for hurricane protection.

The natural berm elevation along Ocean City, (T. 309) Maryland, and Mid-Atlantic States is seven and a half feet. This is what — the sand that was pumped in in 1962, this is the same elevation that we went to in that particular point in time.

I do not know how wide the beach was after we pumped it in in '65. I have no idea.

But to provide good hurricane protection and erosion control for Ocean City, Maryland, we have found that this Caldwell section we can think of. And this is through conferences with the Coastal Engineering Research Center which is the branch of the Corps of Engineers located in Washington.

And through their expertise, and our discussions, this is what we came up with. It consisted of a dune sixteen feet high, twelve feet is there now, with one on five side slopes, a fifty-five foot wide berm, an elevation of ten and a half, which is three feet above the natural berm now, and with an offshore slope of one on twenty.

Now, this is what we feel will provide the best protection against hurricanes for this area.

If I can talk about frequencies right now, the 1962 had a frequency of occurrence, in our evaluation, of fifty years. That means over a large historical record, (T. 310) it would occur once in a fifty-year period. That doesn't mean it can't occur one week apart or anything like that.

The 1962 protection that was put in has a frequency of about ten years. This cross-section has a frequency of approximately one hundred years, just to give you some idea of how this fits together.

(The Court) You mean the '62 protection was put in after the storm?

(The Witness) After the storm. Has a protection frequency of a ten-year storm.

Now, the '62 storm was quite a weird storm. The operation "Five High" you all heard referred to has been given that name because the storm stayed off the coast for five tide cycles, which is a phenomenal amount of time for a storm to hang around.

(The Court) It sure was.

(The Witness) I thought I would go into it to clarify some of the things that were said with regard to this.

(The Court) I don't have here any width of berm. Do you prescribe a width of your berm?

(The Witness) Fifty feet, yes, sir.

(T. 311) By Mr. Rich:

Q. That berm is an elevation, what? A. Ten and a half feet.

The elevation of ten and a half has a frequency of occurrence of one hundred years. I was talking about dissipation of energy before. We superimposed fifty foot waves over a still-water elevation, over a ten and a half feet, and by means of using the wave run off computation, we found that that wave, on this body of water, would run up to an elevation of 11.3 feet on this section, and there would be 1.7 feet, or freeboard.

All we are really saying, if a hurricane, or one hundred year storm, were to hit the beach, we would offer as a sacrifice all of the beach in front of the dune. The dune is a secondary means of protection. The dune, alone, will not hold off a hurricane. There is no way.

(The Court) But as I understand from both you and Mr. Slaughter, now, the dune line, in and of itself, does not add to - well, let me ask you this: does the dune line, in and of itself, without replenishing the beach, add to any appreciable measure the berm, or the width, or the height of the beach?

(The Witness) No, sir, not a bit.

(T. 312) (The Court) Okay.

(The Witness) I know there was talk about windblown sand. I don't know to what volume windblown sand can amount to from the dune to the berm. I'm sure that wind blowing the sand would go on the berm, but I have no idea how much. I think we are speaking of a very small volume of sand.

* * * * * *

(T. 314) By Mr. Rich:

Q. Mr. Lindner, your job really is one of projecting what will happen in the future with regard to the forces of wind and wave and erosion and hurricanes, and to come up with a plan to safeguard the beach areas from those forces, is that correct? A. Yes.

Q. Well, in your preparation for this case, have you come up with a rate of erosion for the beach area in 70th to 71st Street? A. Well, we could use the same figures that were arrived at by Mr. Slaughter's testimony. We have information at 71st Street, which is the closest area, specifically, that I can give you, and the figures which—

Q. That is fairly close. A. The figures which I read before — 1929 to 1947 — (T. 315) there was erosion of two hundred seventy feet. 1947 to 1965 was an erosion rate of — not erosion rate — excuse me — a total erosion of twenty-eight feet. And I believe Mr. Slaughter added these together and divided and got eight feet per year.

* * * * * *

(T. 316) (The Court) No. I know what he's getting at. It's the same question, really, that we asked Mr. Slaughter.

Supposing that in the area of 71st Street, this two block area, nothing is done — or if you can only answer the question talking about the whole beach, as Mr. Slaughter said — supposing nothing is done, everything is left as is now, you want to know if he can tell us what the rate of erosion will be in the future and for the next ten years?

(Mr. Rich) What the extent of it would be.

(The Court) Yes.

Do you know? Can you do it?

(The Witness) Yes.

The shoreline, along Ocean City, from 10th Street, to about right in here (indicating), to the Maryland/Delaware, as Mr. Slaughter said, it would be necessary to look at it from a unit, even though each of these individual sections have their own characteristics of erosion.

(T. 317) We have computed a rate of erosion of two feet per year that the shoreline has eroded, and this is the total shoreline.

If some shoreline erodes faster than others, that is certainly a possibility and probability, based upon the information that we have come up with.

Specifically, on the 71st Street area, the historical rate of erosion, from '29 to '65, is eight feet per year as we computed it before, and this takes into a fact the beach replenishment which occurred after the '62 storm. If we would eliminate that, and I believe that was the approach, to eliminate all man-made help of keeping the beach out, the erosion rate of eight feet per year would have been even higher.

Now, if we tried to take the 71st Street area, and use a rate of eight feet per year times ten years, you get an erosion rate of a total erosion of eighty feet.

Now, whether this would happen or not for the next ten years, I don't know if anyone would know, but this is one way of interpreting the figures.

* * * * * *

(T. 318) (The Court) What would have happened if we had just walked (T. 319) away from Ocean City, in March '62?

(The Witness) The beach would be in worse shape than it is today, as we know it, and that is based strictly on the historical erosion rate in that vicinity that we have been talking about.

I see no reason for the beach to change and start accreting instead of eroding, although that is a possibility. I see no reason for it. I see nothing that would change the normal erosion process.

And when we compare these high water shorelines, this is the net erosion we are speaking of. The beach does migrate off-shore and on-shore on a yearly basis. The beach comes in in the summer and goes away in the winter. That is a very quick summary. There are different climatic conditions regarding tides and winds which affect this littoral system.

The littoral system is the sand that is immediately off-shore in transport along the coast. It has a north-south direction, and it also has an on-shore/off-shore direction.

The on-shore direction is during the summer months. The off-shore direction is during the winter months. And the figures that I have said, about the linear footage change in the high water shoreline, is the net effect, comparing (T. 320) one shoreline with another.

(The Court) Is it true that the frequency of storms — I'm not talking about a '62 storm — but the frequency of Northeasters or hurricanes affects the erosion of the beach?

(The Witness) Yes. You have normal erosion caused by winds and waves under normal conditions and, then, you have what has been referred to as evulsion of beach, or amount of shoreline loss because of a specific occurrence, storm.

(The Court) Now, after these period of storms, what does your study find to be the restorative factor after one of these evulsive actions?

(The Witness) We don't have any such data such as that. We do not know — in order to answer your question, we'd have to know a beach or a length of shoreline before and after a storm and, then, like, study it about five years, or ten years, and fifteen years after to see if it has built up naturally. To my knowledge, this has never been done along the coast of Ocean City.

(The Court) Did your study, or do you have access to any studies, indicate how long, for example, after a well-known hurricane that it takes the beach to get back to a certain point in any given location? You don't have any (T. 321) data like that at all?

(The Witness) No, sir.

Reading Dr. Truitt's book, which Mr. Slaughter mentioned, "High Winds, High Tides", there have been several breaches on Assateague Island, which have closed naturally, and it has taken anywhere from a few months to several years. That is specifically talking about breaches, that is not speaking of shoreline movement.

(The Court) Right.

Well, the other thing I wanted to ask you, in connection with that, since you say that this process doesn't seem to be reversible, but there is a constant net erosion, what is it that happens to fill these breaches, or build this beach back after a storm?

(The Witness) It's the littoral system, which moves up and down along the coast, depending upon the tide, currents, and winds.

One of the big factors—

(The Court) I thought the sand only moved south. Does it move both?

(The Witness) It moves north, also.

During the warm weather months, the wind is from the southeast at about eight to ten miles per hour, and your (T. 322) Gulf Stream comes closer to shore during the summer months and, therefore, the direction of the littoral system, or the sand movement, is in a northbound direction. This only occurs for, maybe, three to five months a year. And, then, it reverses, and instead of the eight to ten mile per hour winds, we have the twelve to fourteen mile per hour winds from the east. These are the Northeasters all during your winter months, because these forces are stronger than the forces from the south, the net direction of the littoral movement is south.

(The Court) Oh, I see. There's no difference between you and Mr. Slaughter except, I suppose, I didn't probe him far enough.

There is movement from the south end, but we are talking about the net effect—

(The Witness) That's correct.

* * * * * *

(T. 323) By Mr. Rich:

Q. Let's do that in the area of Ocean City; after the storm, what did the Corps of Engineers do?

* * * * * *

(T. 323) (The Witness) The President declared this part of the County a disaster area, which released money. The money was given to the Corps of Engineers to provide a dune and a beach. The dune was twelve feet high. It was located one hundred and fifty feet, approximately, back from (T. 324) the high water shoreline, and I assume it was the existing high water shoreline, which would be the one after the '62 storm.

The amount of material that was pumped was one million five thousand yards. It was taken from the bay area. I don't — the information is contained in this "Operation Five High". I believe it was three or four borrow pits, I'll refer to that, in the bay area, and two contractors handled the job. The material was pumped onto the beach by means of training dike, pumped on the beach and held onto the beach for a period by training dikes made of sand, so that some of the material would settle out.

The total cost of the work, including State and everything else, was a little over 1.3 million dollars. This includes all of the money the State put in. They had a lot of trucks and men down here for that, I understand.

* * * * * *

(T. 324) By Mr. Rich:

Q. If you know, what was done in the area of the breach, in the area of 70th and 72nd Street, 71st and 72nd (T. 325) Street? A. It was the — the State handled that completely. They closed it by means of sand that had been deposited on the road in the town. They trucked it there and dumped it, and sooner or later, with enough sand, it finally closed.

* * * * * *

(T. 326) Q. Now, they put in these dunes subsequent to the storm. Were there inspections after that? A. Yes. The dune was established by the Corps of Engineers, and the responsibility for maintenance was turned over to the County Commissioners.

The chief of the operations division and their office has a responsibility for checking to see that all of (T. 327) the constructive projects are properly maintained.

The last inspection that I am aware of was in January of this past year. The inspection is normally made every January, where they drive up and down the beach in a four-wheel vehicle to look at the dune. The beach does not enter into this at all.

Q. They use the beach as a highway? A. That is correct.

And there is no surveying instruments that I am aware of. It's strictly an eyeball type of thing, to see if the dune has maintained its integrity.

Q. When that is a problem, they report it to the County Commissioners, is that correct? A. That would be the procedure, I imagine. There has never been a problem.

* * * * * *

(T. 327) Q. During the storm of 1962, do your records reflect or any of your information available to you, reflect whether or not the lots that are the subject of this suit, were (T. 328) inundated by water? A. We know from aerial photography, during the storm, that water was over much of the island. Since the dune line was completely torn down throughout the entire beach, from the Maryland/Delaware Line, on down, the only part of the island we know was not touched was the area very near the north jetty because of the width, which is very important to protect against hurricanes and Northeasters, and so on, in this area. We know it was not inundated. I would say the entire area was inundated at 70th or 71st Street. I'd say the entire area was inundated except for this point of land.

When I say inundated, I don't mean to say the whole thing was completely submerged at the same time, because waves ran across the whole island. The whole island got wet at one instance or another.

* * * * * *

(T. 329) (The Court) In your opinion, as an expert, and after this lengthy study, would the construction of buildings, on piling, over — or east of a dune line, affect the integrity or use of the dune, or affect the protection of the beach?

(The Witness) I would like to answer that in two parts.

(The Court) Yes.

(The Witness) One part, under storm conditions and one part, under normal conditions.

Under normal conditions, a structure on the beach, where the normal tide cycle cannot reach the structure, will not have any affect on the dune, the beach erosion, or anything else. This is when the water cannot reach the structure (T. 330) under normal conditions.

Under storm conditions, when you have water circling the piers, running amongst the piers, you are going to create eddy currents, which increase the velocity, which increases the erosive force of the material around the piles, assuming we are on piles. It would erode whether it is hitting, and because of this, you would increase the erosion.

I have no idea of how much you would increase this erosion. It may be minute, it may be large in magnitude. I have no experience, or seen prior studies regarding that. But it would increase the velocity, the velocity would tend to be more erosive, the higher it was.

By Mr. Rich:

Q. Under your normal conditions, suppose the normal conditions were such that normal high tide would reach the pilings, what would then be your answer?

* * * * * *

(T. 331) (The Witness) If water is allowed to reach the piling, the possibility of increased erosion around the piling is always there.

As I said before, under the storm conditions, if you have water flowing across the beach and it reaches (T. 332) piling, you are going to see that there is a bit of erosion around that piling and, of course, there would be more erosion in speaking of storm conditions.

In just a normal wave wash-up, I'd venture to say the event would hardly be anything. But, under storm conditions, the effect could be great.

* * * * * *

(T. 333) Last year, I came down to make a presentation to the Mayor and Town Council. I stayed at the Seascape at 15th Street. That was in October; and the water was hitting the bulkhead at 15th Street. I came down November 11th to the public meeting, stayed at the Seascape again, went up to the Boardwalk, and there was fifty feet of beach.

This is a period of a month. I don't know what causes that. We probably would be able to do a great deal if we knew.

* * * * * *

(T. 334) By Mr. Rich:

Q. Assuming, Mr. Lindner, that the rate of erosion that you spoke of and, also, assuming that there are no artificial protective devices put in the 70th Street area, are you able to testify whether or not mean high water will reach the building limit line in the future? A. Whether it will reach?

Q. Yes.

(The Court) Do you want to divide into two sections, normal and storm?

(The Witness) I don't want to put any money on it. I can expound on the existing condition figures, like, for instance, the eight feet per year at 71st Street, and over "x" number of years, under the conditions we have data (T. 335) on to back them up, this will probably occur.

I won't bet my life that this is going to occur.

By Mr. Rich:

Q. But the probability of it, it will? A. Yes.

* * * * * *

(T. 337) Q. In your opinion, if the level of the sea went down, would not the beach area be increased? A. That is correct.

* * * * * *

(T. 337) Q. And you have stated that you have no way of knowing, nor do I, whether the seas are going to come up or down? A. That is correct.

Q. That is a matter of speculation? A. That is correct.

Q. If it does go down, the beach will increase? A. Yes, it would increase at the — the off-shore slope of one on twenty, if sea level went down one foot, it would expose an additional twenty feet of beach.

* * * * * *

(T. 338) Q. Now, the area that your opinions were based on, on the speculation of sea level would continue to rise or remain constant, is that correct? A. The opinions that I made were without any regard to sea level.

Q. So you were assuming that they would either stay the same or rise? A. I think I would have to say my assumption was that they would stay the same.

Q. And you have admitted to me that assumption is a matter of speculation? A. That is correct, yes.

* * * * * *

(T. 339) (Mr. Rogan) Your Honor, referring him to Exhibit No. 9, Intervening Plaintiff's Exhibit No. 9—

(The Court) Yes.

(Mr. Rogan) And I am referring him to the 71st Street area.

* * * * * *

(T. 341) (The Court) 1929 to 1947, what is the difference?

(Mr. Rogan) On the ten foot level.

* * * * * *

(T. 341) (The Witness) Three hundred and twenty feet.

* * * * * *

(T. 341) (The Court) Let's get it from '47 to '65.

* * * * * *

(T. 341) (The Witness) Twenty feet.

* * * * * *

(T. 343) (The Witness) Okay, from '29 to '47, three hundred and forty feet. We are talking about the eighteen foot curve.

* * * * * *

(T. 344) (Mr. Rogan) I want him to give me the twenty foot level between 1929 and 1965. How much did it change?

* * * * * *

(T. 345) (The Court) The thing about it, in both the erosion and in the depth land, there is a dramatic drop after '47 and, so, to lump from '29 to '65 may not mean too much.

But, what is it?

(The Witness) Eighty feet.

* * * * * *

(T. 346) By Mr. Rogan:

Q. You gave us some figures from your studies, that the erosion in the 71st Street area, from 1929 to 1947, was two hundred and seventy feet, is that correct, sir? A. Yes, sir.

Q. And that is an eighteen year period, I think, isn't it? A. Yes, sir.

(T. 347) Q. And, then, the next eighteen-year period from 1947 to 1965, the erosion was only twenty-eight feet? A. Yes, sir.

Q. Or roughly ten per cent of what it had been the previous eighteen years? A. That is correct.

* * * * * *

(T. 347) Q. Can you account for anything that happened between 1929 to 1947 that would cause ten times the erosion than between '47 and '65? A. I can account for it in reverse.

In 1962, there was one million — one million fifty thousand yards put on the beach.

Q. This one million fifty thousand yards, where did it come from? A. The bay behind the barrier island.

Q. Did it not also come from — do you know how far the line was out in 1962? A. I do not. I do not know how much shoreline eroded during '62, nor do I know, by placing material on the beach, how much the beach was restored.

Q. You don't know that? (T. 348) A. I haven't seen that documented anywhere.

Q. This million load was spread over ten miles? A. I'd say 8.9 miles. That is the distance from the Delaware Line.

Q. And you don't know how much that would increase? A. How much it would increase

Q. Yeah. A. The shoreline going out?

Q. Yes. A. I do not.

Q. You do not.

Do you know if the sand that was deposited on the shoreline increased it to a greater distance east than the shoreline that existed prior to the '62 storm? A. No, sir, I don't know.

Q. You don't know if it was the same? A. That is correct.

Q. Less— A. I don't know.

Q. —or more? A. I have no knowledge.

* * * * * *

(T. 349) Q. How can you say this depositing of this sand had such a dramatic change in the erosion if you don't know? A. The putting of the material on the beach, after the '62 storm, certainly contributes to the discrepancy between twenty-eight feet and two hundred and seventy feet. How much of that discrepancy, I do not know.

Q. Sir, how do you know it did if you can't even tell me whether the sand — when it was deposited on the shoreline — made it exactly the same as it was pre-storm, more than it was pre-storm, or less than it was pre-storm? How can you tell me that?

(The Court) Wait a minute. Wait a minute. Let's get something straight:

Mr. Lindner, was the one million yards placed on the beach, or was it placed in the sand dune area one hundred and fifty feet from the beach?

(The Witness) Because of the procedure used to get the material from the bay area to the beach, it was pumped by dredge, which means eighty per cent of what you pump is water, and it runs off, training dikes were used to obtain the material, and by bulldozers, some of this material was pushed up to form the dune, and stabilized with American (T. 350) Beach grass and fence.

(The Court) What I mean, it wasn't pumped on the beach, as Mr. Rogan is saying — and I hope you don't mean to imply it wasn't pumped on the beach as such to widen the beach — it was pumped there to form the dune, wasn't it?

(The Witness) Yes, and to put some type of material back on the beach, also. This was an—

(The Court) Was any of the spread literally on the beach?

(The Witness) This is going to be hearsay, but based on what I have read in this booklet here, and talking, from the men in the office, I would say that the material was reworked to form what closely approximates this Caldwell section, which I was — which I was explaining before.

But, to answer your question, I don't know what the shoreline was before the storm in '62; therefore, I don't know the results of the Corps activity, what comparison of the two lines.

(The Court) I don't know either. I am only taking your testimony, where you said it was a dune twelve feet high, one hundred and fifty from high water mark.

(The Witness) Right. Right.

(The Court) Now, is it your understanding, from (T. 351) the reports made by the Corps of Engineers, that the berm was developed also from this material?

(The Witness) The beach was restored to some degree. I don't know how much beach was placed there.

(The Court) Okay.

(The Witness) In other words, the shoreline was not immediately adjacent to the dune. There was some beach pumped in front. But, I'm sorry, I don't know—

By Mr. Rogan:

Q. Mr. Lindner, this sand was also used for the construction of the dune? A. Yes, sir.

Q. And the dune was constructed twelve feet high? A. Yes, sir.

Q. Do you what its side dimensions were? A. It was one on five. I can look in here for a cross-section.

(The Court) Yes, sir.

(Mr. Rogan) Yes.

(The Witness) The dune was twelve feet high, twenty feet wide, one on five side slopes, the east slope went down to an elevation of ten feet, and from there, the berm, or the flat part of the beach, went out fifty feet (T. 352) and, thereupon, went down to one on twenty slope.

I might say, this is — these are the designed conditions, and to my knowledge, there was no after-placement survey made, survey made, if you will.

By Mr. Rogan:

Q. Mr. Lindner, if the beach is twelve feet high and twenty feet wide at its base, I mean the dune, the dune is twelve feet high and twenty feet wide at its base— A. At its crown.

Q. At its crown. A. Yes.

Q. And you know the slope and you know — how long was this dune? A. How long was the dune?

Q. How many miles? A. I think it was a little over forty-two thousand feet.

Q. Forty-two thousand feet? A. Right.

Q. With those figures, could you calculate how many loads of sand were placed on the dune? A. It would be impossible. I mean, we could figure out the volume of the dune.

(T. 353) (The Court) If you have got a slide rule, you might be able to figure it out.

Well, if you know the base, and you know the slope, you know how wide the crest was, right?

(The Witness) The only thing I don't know, what was the elevation of the existing ground after the storm.

In other words, the dune was placed on the ground and, this — what I'm looking at is a typical section.

(The Court) Right.

Well, then, you use your other figure you gave me, ten and a half feet elevation. That the was the other figure you gave me.

Do you really need this, Mr. Rogan? Or do you want to save it for your brief?

(Mr. Rogan) He has testified — I want to determine how much sand went to the dune, and how much was left over.

(The Court) I thought maybe you could figure it out better and tell me.

(Mr. Rich) Your Honor, we don't know how much sand was there.

(The Court) You can do it my way. The elevation is ten and a half feet. Forget the other foot and a half. Just five it to me ten and a half feet. It doesn't make (T. 354) any difference how much sand was there, because if you had ten and a half feet above elevation, that is fresh sand. Ten and a half feet, twenty feet on the base, for the one to five slope.

(Mr. Rich) But the point is, the question — I don't mean to argue the case, but the question that Mr. Rogan is driving at is what percentage of the volume of sand was used for the dune line.

(The Court) If you figure that out, you know how much was left for the berm.

(Mr. Rich) We don't know what was at the dune line before we put this volume on there. That is the problem. We don't know what was there.

(Mr. Rogan) But we know we put at least that much there, or more.

(Mr. Rich) You put that—

(The Court) He said he can't sit here and figure it out now.

You have your engineer out and put it in your memorandum.

Let's give him a chance.

(The Witness) This is a — this is the section that was hoped for after '62. This (indicating).

(T. 355) The dune is twelve foot high.

(Mr. Cathell) For my benefit, may I ask, is twelve feet high above grade, or twelve feet high below mean low water, or—

(The Witness) Mean low water.

(The Court) Mean low water.

(The Witness) And the existing ground, as shown on typical section here, is like this (indicating).

What I think you want is this area in here. I think that is what you want.

By Mr. Rogan:

Q. I want to know — that's exactly what I want. A. I can't give it to you. I don't think anyone can give it to you. We just — maybe I should go into how we paid the contractor to put the material on the beach, which is very different.

Q. That won't help me. A. Okay.

Q. Can you give me—

(The Court) You have somebody figure it out. It's going to be too complicated.

I'll tell you what. Figure it for one foot.

(The Witness) I'll figure it for this two feet (T. 356) right in here. This width is twenty feet, two feet—

(The Court) No, you said twenty foot on the base.

(The Witness) At the crown.

(The Court) Twenty feet on the crown.

By Mr. Rogan:

Q. You mean this is only two feet from here to here? A. Yes.

Q. That dune line you built was only two feet high? A. According to this section that I am looking at in here, the berm was at an elevation of ten feet. The dune was at an elevation of twelve feet. I do not know what was put there after the storm of '62. This is what is in this book here.

(The Court) We'd better go back and have you redescribe this thing.

Do you want to take it from your cross-section there and give it to me again as exactly how this dune was designed?

We'll help Mr. Rogan and we will give him the figures, and get him to do the computations.

(The Witness) The recommended section for (T. 357) restoring the beach at Ocean City, after the 1962 storm, was for a dune at elevation of plus twelve mean low water, with a top width of twenty feet, with a side slope of one on five.

(The Court) Wait a minute.

Top, twenty feet, right?

(The Witness) With side slopes of five horizontal, one vertical, the back slope of the dune went down to existing ground, the front side of the dune went down to a berm at elevation plus ten. That berm was fifty feet wide, at its outer tow, it went down to existing ground to one on twenty feet. This is what was recommended. I don't know what was provided after the '62 storm, how this section turned out.

* * * * * *

(T. 357) By Mr. Rogan:

Q. Now, you did make the statement that the dune line does not add to the width or height of the beach, is that correct? A. The sand from the dune, is that correct? Did I understand your question correctly?

Q. I have in my notes here that you said the dune (T. 358) line does not add to the width or the height of the beach. A. The dune line?

Q. Yes, sir. A. I would say that is correct. The dune line is the (indicating).

Q. All of the sand that was poured into the dune line, itself, would then not have added to the width or height of the beach, is that correct? A. Assuming that your definition of the beach is in front of the dune, I would say that is correct.

Q. Therefore, then, all that is, and that was there, had nothing to do with helping this dramatic change between 1929 and 1947, and 1947 and 1965 in the rate of accretion or—

(The Court) Erosion.

By Mr. Rogan:

Q. —or erosion?

(The Court) That is a non-secretor, Mr. Rogan, because he has already said that if the thing was built the way it was designed, there would have been a berm, and the berm, everyone agrees, is the most important thing in the whole structure.

Is that right?

(T. 359) (The Witness) That is correct.

By Mr. Rogan:

Q. Was there not a berm after the '62 storm? A. I don't have any idea. I don't have an idea what it looked like after the '62 storm.

Q. If you have no idea, Mr. Lindner, I fail to see where you give so much importance to the depositing of the sand after the '62 storm with reference to this dramatic change between erosion in these two eighteen-year periods.

(The Court) Well, you asked him how he accounted for it, and that is how he accounted for it. Maybe you'd better go on to another question.

(Mr. Rogan) I would like him to explain it to me, if he can.

If he doesn't know what they did after the '62 storm, I don't see how this man can give that much credence to this thing.

(The Witness) The material was placed on the beach, in the period that I described, of twenty-eight feet of erosion, which was from '47 to '65; and I believe that the erosion — total erosion rate of twenty-eight feet would be higher, if nothing was done, and after the '62 storm something was done so that the net difference between these (T. 360) two shorelines shows twenty-eight feet.

* * * * * *

(T. 360) (The Witness) I'd have to say yes. If nothing was done after the '62 storm, this — I don't know what this twenty-eight figure would be. It may only be thirty.

(The Court) It's just one of the unfortunate things that we don't have any study prior to March, 1962.

Is that right? There's no data anywhere prior to '62 storm, right?

(The Witness) That is correct.

(T. 361) by Mr. Rogan:

Q. Mr. Lindner, do you have any data from '65 to '72? A. No, sir. '65 was our last survey that was done in connection with the study.

Q. You have not made any study on erosion of the Maryland beaches since 1965? A. No surveys. No, sir, nothing that would reap any erosion rates of distances.

* * * * * *

(T. 362) (The Court) Is there a formula which you would recommend as the suggested width of a beach, oceanfront beach in this area?

(The Witness) Yes.

(The Court) All right.

Now, what is that suggested width?

(T. 363) (The Witness) It's — it comes out to be one hundred and ninety feet wide. This is the beach that was recommended as part of the study, which the Baltimore District has recently, or is completing, and it consists of — this is in front of the dune, now.

(The Court) This is what I want. It's one hundred and ninety feet from where? From the back of the dune, or the ocean side?

(The Witness) From the front toe of the dune to the high water shoreline.

(The Court) Wait a minute, now.

From the high water shoreline?

(The Witness) From the front toe of the dune to the high water shoreline; in that area, it consists of a berm, which has elevation of ten and a half feet, or one on twenty slope down to high water.

(The Court) To high water.

The one on twenty slope, that was specified in '62 drawing there?

(The Witness) Yes.

* * * * * *

(T. 364) (The Witness) Let me go up to the board.

(The witness withdrew from the stand.)

(The Witness) This is the cross-section we are talking about, and this is the one on twenty slope. If your existing ground — okay, the typical section after the '62 storm was something like this (indicating). You can see that sooner or later your one on twenty slope is going to hit your existing ground, and if you cut it back to here, and, you see, this is an undetermined width here (indicating), and this is somewhat smaller width.

(The Court) What do you have to do — you have to either make the berm — you have to make the berm more narrow in order to accommodate the slope?

(The Witness) Well, I'm not sure what your question (T. 365) is.

If your berm was lower, if your berm was here (indicating), you can see that you would — your one on twenty slope would not be long as if your berm was higher, because you wouldn't have to go as far to reach existing ground.

I don't think I follow your question, but—

(The Court) It's not really a one on twenty slope. All you are trying to do is tie up with the one on twenty slope under water.

(The Witness) That is correct; and we are putting a one on twenty slope that is there. A new slope, but it's the same ratio.

(The Court) Well, something has got to — all right. All right.

(Mr. Cathell) Maybe I could shed some light on this. I have had a little bit of discussion with the Corps of Engineers, and people. I have been told by the Corps that the berm is all of the area from the toe of the steep part of the dune to the low mean water. That is all berm. That is what I have been informed in the past, and what is commonly referred to as berm; but let Mr.—

(The Court) He is using a different definition, (T. 366) and so was Mr. Slaughter.

Maybe I don't understand correctly, but if you are going to have a berm of a certain width, at a certain elevation, that ratio of one on twenty sometimes has certainly got to change.

(The Witness) Well, once you have established a certain width and height of a berm that you want in order to get down to existing ground, which would be below your berm, you could take it straight down or—

(The Court) Right.

(The Witness) —or you could go at it one on twenty, one on thirty, and so on. But knowing that the natural off-shore slope is one on twenty, regardless of what you put down is going to be reworked on one on twenty slope by waves.

(The Court) Oh, by waves.

(The Witness) By the—

(The Court) That was my first question.

Doesn't some of it have to go out under the water?

(The Witness) Yes.

(The Court) It's at mean high water, then — I mean, it would be at low mean water, then, at least?

(T. 367) (The Witness) It would go all of the way down to existing ground, which would pass high water and low water, right on down.

(The Court) All right.

Because you only had one hundred and fifty feet in '62, you told me that was specified, one hundred and fifty. Now, you tell me one hundred and ninety, and I want to find out the difference and why. Some of it has got to go under water, right?

(The Witness) Yes, sir.

(The Court) Okay.

Now, if the dune line, under an existing structure, where a structure has been built out over the dune, is destroyed through a storm of gigantic proportions, what would be your recommendations as to how to restore that protective device? What would you do?

(The Witness) To restore the dune line?

(The Court) Yeah.

(The Witness) Well, you would have to get material in there that was not wet so it would not slump immediately upon trying to stack it in place for a dune.

(The Court) Would you put it back — what I want to know, would you put it back in the same location (T. 368) under that structure?

(The Witness) Well, you'd — the alternative would be to put it in front of the structure. I don't know what the legalities would be in doing that. You are liable to cut off a view or access or something like this.

(The Court) So, what would you do? If you had those alternatives, what would you recommend doing?

(The Witness) If it was possible to replace the dune where it was, this would certainly be my first choice, because I think you would have — it would be the path of least resistance, you'd say; but if the dune line has been there, then it would probably be easier, from a legal standpoint, to put it back there. It may be very difficult from a construction standpoint to put it back there. That certainly would have to come into play. I think the first effort would be to put it back where it was, though.

(The Court) Okay. Thank you.

All right, any redirect, Mr. Rich?

REDIRECT EXAMINATION

By Mr. Rich:

Q. If you disregard the legal implications, Mr. Lindner, is your answer the same? A. It's always important to retain the continuity (T. 369) for a dune for hurricane protection and the hurricane protection consists not only of the dune, but also the beach in front of the dune.

If at one location, in a stretch of beach, you are going to move the dune one hundred feet oceanward, that means that certain width of beach, that is associated with your hurricane protection section, such as one hundred ninety foot width, would also have to be moved forward, and it would be more costly to put it in there.

To answer your question, I think you would still have to go back to putting it where it was, behind the structure.

* * * * * *

(T. 371) J. ROBERT BROWN

* * * * * *

(T. 372) DIRECT EXAMINATION

By Mr. Rogan:

Q. What is your name and address, Mr. Brown? A. J. Robert Brown. I live at 12800 Brunswick Lane, Bowie, Maryland.

Q. How old are you, sir? A. Forty-six.

* * * * * *

(T. 372) Q. Have you ever owned property in Ocean City on the oceanfront block located between 70th and 71st Street? A. Yes, sir.

Q. When did you first acquire property in that block? A. I purchased Lot 3 in that block with a building on it about 1957 or 1958.

Q. Is Lot 3 an oceanfront lot? A. Yes, sir.

Q. And who presently owns that lot, or who did you sell it to? A. Mr. Germanis.

(T. 373) Q. Did you acquire, subsequently, any other property in that block? A. Yes, sir. In 1961, I acquired Lots 4 and 5.

Q. And what lies — what street lies immediately north of Lot 5? A. 71st. It was a corner lot.

Q. So you own three oceanfront lots, then, in this block? A. Yes, sir.

Q. I would like to show you some pictures, sir, first that one, and ask if you can identify it. A. Yes, sir. It's photo number one. It shows the building we renamed as the Ocean Jay. It's the usual four-apartment, three bedrooms each, building located on Lot 3, on oceanfront.

* * * * * *

(T. 374) (The Court) Defendant's No. 1. All right.

Let's call it Corporate Defendant's Exhibit No. 1 as opposed to Municipal Defendant's.

* * * * * *

(T. 374) (The Witness) The second photograph marked No. 2, shows the same building, looking at it from the ocean, slightly to the ocean side, and from the north side of the building.

It also has on that photo a building owned by Mr. Eaton, which was physically located on Lots 1 and 2.

(Mr. Rogan) All right, sir, we would like to offer this one as Corporate Defendant's Exhibit No. 2.

* * * * * *

(T. 375) By Mr. Rogan:

Q. Can you identify the third photograph? A. Photo 3 is of the same building, looking at it from the ocean side, looking, I guess, westward.

Q. This is the building that you own, which is located on Lot No. 3? A. That's right.

(Mr. Rogan) I would like to have this marked as Defendant's Exhibit No. 3.

* * * * * *

(T. 376) (The Witness) I sold them to Dr. Taylor.

I'm sorry. You said 3 and 4?

Q. I mean 4 and 5. 4 and 5 is what I mean. A. To Dr. Taylor.

Q. Is that Dr. Robert Taylor? A. Yes.

Q. When did you sell them to him, sir? A. Oh, it was on a land installment sales contract over about a five-year period, which just ended a year or two ago.

Q. All right. Now, the apartment houses that the pictures show were on Lots 1 and 3; are they still on Lots 1 and 3? A. No. Both of those buildings were destroyed, or lost, in the storm of '62.

* * * * * *

(T. 377) Q. I mean 4 and 5. Was there any growth on these lots at the time that you owned them? A. Yes, sir, they had the usual whatever kind of grass it was that grows in Ocean City. Beach grass.

Q. And I believe one of these photographs — see if you can point out the beach grass on any of these photographs. A. Yes, this would be Exhibit No. 1. Photo No. 1, looking past the car that is parked behind the building on Lot 3, you will see the beach grass on Lots 4 and 5.

Q. And this beach grass existed on those lots until when, sir? A. I would say until a storm hit it.

Q. When you visited the property, sir, directing to your attention to Lots 4 and 5, were those lots used in any way by the people in the area, or anybody coming to the beach? A. No, sir.

Q. Did you ever see people picnicking on those lots? (T. 378) A. I did not. There was an adequate beach in front of those lots, and it was in front of the building that I owned on Lot 3.

Q. And is the beach, in front of the lots, is that where the people picnicking went? A. Yes. Where they bathed, yes.

CROSS EXAMINATION

By Mr. Rich:

Q. How long did you say you owned those lots, sir? A. I owned the lot where the building was, Lot 3, from about 1957 until a year or two ago. I bought the Lots 4 and 5 in 1961, and I think over into '62, the ink was still wet on it, on the contract, when the storm hit. I had good fortune.

(The Court) Yes.

By Mr. Rich:

Q. How often did you visit the property during the time you had that building on Lot 3? A. Frequently. Every summer, of course, the family would spend some summer there, and you had the usual preparation prior to the summer and closing the building after the summer.

(T. 379) Q. Would it be fair to say that you visited it on a weekly basis during the summer? A. Yes, sir, on a weekly basis.

Q. How about the wintertime? A. Not too often. I'd say once or twice in a six-month period of winter.

Q. Now, let me see if I can refer you to the year 1957, '58, '59, when you just had that lot — for your frame of reference, I'll refer you to the time that you just owned Lot 3. A. Yes, sir.

Q. Do you know where the usual high tide, how close the usual high tide would come to the corner of your lot, or to the end of your lot during these years? A. Just thinking about it coming down here, the building lot was one hundred twenty foot east of a ten foot alley.

As you could see from the pictures, you had a car that would be pulled into the back of the building. You had roughly a fifty foot building going further eastward with an extension on it about thirteen to fifteen feet. The high tide would come then to — it was about a thirty foot beach before, or in front of my one hundred twenty foot (T. 380) lot, if that answers the question.

* * * * * *

(T. 380) Q. So, the water, on a usual basis, was approximately — or mean high tide, was approximately thirty feet from your building line, or from your property line, excuse me. A. From the property line, right. I actually had sand on that part of the property.

* * * * * *

(T. 380) Q. Now, 1961, when you purchased Lots 4 and 5, is that same condition? A. Basically the same, that's right.

Q. So, is it your testimony, just to shorten it, until 1962, the time of the storm, you had, oh, about thirty (T. 381) feet of beach between your lots and the water? A. I would estimate that, yes.

Q. Would this estimate basically be — would this estimate be based upon your observations during the summer months? A. Yes, sir.

Q. Well, when the storm occurred in '62, what change developed with reference to the high tide, or the water on your property? A. Of course, it was substantial and very visible.

First of all, the building was no longer there and, there was a water pipe in the back, a well pipe, that was, at one time, underground, which was visible after the storm by about two or three feet. So, that the tide, or the high water mark came up onto my lot approximately halfway.

* * * * * *

(T. 381) Q. Well, let me ask you this: you say the pipe was exposed for about two feet. What would your estimate be for the amount of earth footage, on a footage basis that (T. 382) you lost as a result of that storm? A. I really couldn't estimate, simply because I am not familiar with that. I would just say that the water came up to where — it was about halfway underneath where the building would have been, and that the whole lot had diminished.

Q. Were you familiar with the reparations, or the procedures that the Corps of Engineers undertook to refurbish this area? A. Yes, sir. Naturally, I was, as a landowner, allowed to visit the site just after the storm and, also, everybody could see the progress made by the Corps of Engineers on the reconstruction.

Q. Could you tell me what progress they made with respect to your properties? A. Well, as I say, there was a ten foot alley there, and I would just estimate about ten or fifteen feet east of the alley, they constructed a dune line.

Q. And did they add any beach from the dune line down towards the water, or sand — excuse me — add any sand? A. I would say some, but it did not, at that time, restore the whole one hundred twenty foot lot.

Q. But there was some sand added from the dune down (T. 383) toward the water? A. Yes.

Q. Let me ask you this: if you wanted to build on that property, before they put that sand in there, or before they established a dune line, from a practical standpoint, could you have built something there? A. I do not believe I had enough in that lot to put a sizeable building there.

Q. How about after the reparations made by the Corps? A. Well, I was told it was still not buildable.

Q. Who told you that, sir? A. I think maybe the taxing authority here. They are very considerate, and they reduced the amount of tax on the property because they said it had been substantially damaged.

Q. I hand you two sheets of paper, which is already in evidence, and ask you if you can identify it, or if you are familiar with it? A. It looks like an easement, 1962, between Mr. Yauger, his wife, my wife, and I.

I think what it was, permission to put the dirt on the dune line, or something like that.

Q. It's not dirt. (T. 384) A. Sand; I'm sorry.

Q. That is your signature (indicating)? This is a copy of, I assume, your signature? A. Yes.

* * * * * *

(T. 384) By Mr. Fox:

Q. This dune line agreement, you executed it and understood that the dune line was going to cross your property where? A. I'm not too certain that I knew exactly what point it would go across my property, but I did understand it would be physically on my property.

Q. And what effect did you understand the construction of the dune would have on your ability to build a house on the lot?

* * * * * *

(T. 385) (The Witness) I, naturally, gave consent to have the dune line put across my property on the theory that whatever additional sand, by wind, wave, or whatever would occur, would tend to restore that part of my property, which at that time, was under water.

By Mr. Fox:

Q. About half of your property was under water at the time? A. It was just an observation of mine.

Q. And you owned it how long after that? How long after that before you sold it? A. That particular lot, Lot 3, I owned it for a number of years, from apparently 1962 to just recently, to a year or two ago, I think I sold it to Mr. Germanis.

* * * * * *

(T. 386) Q. Was there ever a building on 4 and 5? A. No, sir.

Q. And they are the northernmost lots in this block? A. That is right.

Q. Never any buildings on them? A. None to my knowledge.

Q. And what — did I understand you to say, when you disposed of these lots to Dr. Taylor, was it your (T. 387) understanding that they were buildable or not buildable?

(The Court) He didn't say.

(The Witness) No.

(Mr. Fox) I think he was talking about 3, wasn't he?

(The Court) No, he was talking about 3 immediately after the storm, that it was not eligible for construction, but he hasn't said anything about the later years.

By Mr. Fox:

Q. Well, Lots 4 and 5 I'm concerned with.

You signed the contract to sell them when, if you know? A. I really apologize for not being more exact, but I didn't know exactly what the nature of my testimony was to be here today, and to the best of my knowledge—

(The Court) You can get it downstairs easily. He said it was about five years ago, or something.

(The Witness) Yes, it was about a five — year contract, so I'd just guess about 1967.

By Mr. Fox:

Q. What sort of taxes were you paying on the property at that time?

What I'm really trying to find out, if, at the (T. 388) time you sold them, whether you considered them buildable lots or not buildable.

(Mr. Rogan) Objection. It's a question of law.

(Mr. Fox) He is the owner.

(The Court) Yes. Here's the thing: if he made any specific inquiry to the necessary permitting authorities, as to whether they would permit construction or not, he knows that.

I'll overrule your objection.

Did you ever attempt to build on 4 and 5?

(The Witness) I did not.

(The Court) Did you make any inquiry as to whether or not they were eligible for construction?

(The Witness) I did not.

By Mr. Fox:

Q. You had made inquiry about the eligibility as far as construction for the lot immediately adjacent to the south?

(The Court) Lot No. 3.

(Mr. Fox) Lot No. 3, yes.

(The Witness) No, sir, I wasn't planning to build just after that storm. I was interested in the tax rate, and I was advised by Mr. Harrison, I believe, that the (T. 389) tax had been reduced on my lots because of their damaged condition.

I do know the lots became restored, but I did not make any inquiry as to whether they restored to the point that they would be — that a building permit would be given if I were to apply for one.

By Mr. Fox:

Q. Well, then, am I to understand that at sometime subsequent to the storm, it was your understanding from inquiries, or information gotten, or at least, from Mr Harrison, that the lots were not buildable?

* * * * * *

(T. 389) (The Witness) I believe from '62 to 1967 I was paying reduced taxes, because the lots were considered to be damaged. Thereafter, it appeared that the lots became built-up, and I entered into a sales of those lots to Dr. Taylor.

(T. 390) By Mr. Fox:

Q. When you say "damaged", do you mean by that that they were lots that you couldn't build on, or what do you mean? A. Yes, that would be my impression, from about '62 to '67 that they were not buildable.

Q. All right. Now, what happened that made them buildable? A. Well, the shoreline just restored itself.

Q. But you never attempted to build on them? A. No, sir, I did not.

* * * * * *

(T. 391) (The Court) Was it on 4 and 5? Was there any kind of a sand fence type thing, or any type of structure that would accumulate sand in front of Lots 4 and 5?

(The Witness) No, sir, but I do know the sand on Lots 4 and 5 appeared to be higher than the building (T. 392) area where the building existed on Lot 3 as if there had been some degree of excavation to put the building on Lot 3.

(The Court) Was 71st Street blacktopped at that time, or clay, or what?

(The Witness) Blacktopped, Your Honor.

* * * * * *

(T. 392) By Mr. Rich:

Q. Those conditions that you described before and after the hurricane, with regard to Lot 3, they were the (T. 393) same for Lots 4 and 5, is that correct? A. Yes.

* * * * * *

(T. 396) GEORGE EDWARD HOERICHS

DIRECT EXAMINATION

By Mr. Rich:

Q. Give your name and place of employment. A. My name is George Edward Hoerichs. I am employed by the State of Maryland, Department of Natural Resources, in the Engineering Division.

* * * * * *

(T. 396) Q. Mr. Hoerichs, what job do you perform there, sir? A. My specific title Hydrographic Engineering Associate III. Principally, the same type of work as the land surveyor, except our work is on the water, and around the edge of the water on the land.

* * * * * *

(T. 397) I have been working for the State since 1961, August of 1961, between 1964 and 19 — well, between 1965 and 1969, I was a resident of Salisbury in charge of the Regional Engineering office in Salisbury, which covered the Lower Eastern Shore from Virginia to the Choptank River, and included the seaside area from the Virginia Line to the Delaware Line. My work took me up and down the Ocean City area.

* * * * * *

(T. 397) Q. Now, Mr. Hoerichs, I asked you to get some (T. 398) information together for me with regard to the length of the beach before the storm of March '62, the distance from the dune line of high water and, also, to compare that with the situation subsequent to March of 1962, is that correct?

* * * * * *

(T. 398) A. Yes. I compiled my data from aerial photographs that were taken in 1961 and, again, in 1962 by the United States Coast and Geodetic Survey, specifically for our Department. At that time, it was the Department of Tidewater Fisheries.

During 1960 and 1961, the Department had requested the Federal government to make a photogrametric resurvey of the entire tidal waters of the State of Maryland. Under this resurvey, the seaside area was included, and the photographs that were taken by the United States Coast and Geodetic Survey, in April of 1961, and again in 1962, I have copies here.

* * * * * *

(T. 402) Q. Refer to your notes, and indicate what the distance between mean high water, or what the distance between the high water mark in photograph No. 10 was from — what data line did you use?

(Mr. Rogan) I don't know that he can pick out the high water mark in the photograph.

(The Witness) Since—

As has been indicated, the high water mark would be hard to define on a photograph, especially after a storm such as this occurrence in 1962.

I reference my distance measurements, for ease of explanation, to the Beach Highway. That didn't move in the storm, and we can make our measurements from the Beach Highway to any particular object we care to use.

However, we did get from the Coast and Geodetic Survey a value for the high water approximation at the time the photographs were taken.

I might inject this, that the time is prepared in a table, a tide table, and it's prepared in advance.

(T. 403) In other words, in 1963, just prior to 1963, you can get a tide table that will tell you when the high water and when the low water, so that as a result of the storm, the tides were thrown out of alignment with, let's call it the book prediction. It may have varied some, and that is one of the reasons that I have used the Beach Highway as a reference line to measure to the shoreline, and to different other objects.

Measuring from the highway to the water line, on 1961 photograph, we come up with a distance of approximately five hundred and fifty feet.

(The Court) All right.

Now, that's at what point?

(The Witness) That's at 71st street.

What I did was measure along from the center line of the Beach Highway, down along 71st Street until I touched the edge of foam thrown up by the sea on the shore. It stands out.

* * * * * *

(T. 404) (The Court) All right. Go on with your measurement.

(The Witness) That '61 photograph, I measured a distance of approximately five hundred and fifty feet to the edge of the water, what I call the edge of the water, where you can see the surf breaking on the shore.

beach grass and pushing up sand to restore the spots in the dunes' line, that we might get a (T. 630) breach in the storm, somewhere in the neighborhood of $20,000.00 a year.

Q. Does the County still expend the money to maintain the Army Corps of Engineers' dune? A. Yes, sir.

* * * * * *

(T. 630) (The Court) The last question was how much the County spends on maintaining the dune line, Mr. Harrison.

(The Witness) I called out to the County Roads Barn, and Mrs. Townsend is getting those figures together, but she didn't have them available right on the spur.

(The Court) Okay.

(T. 631) (The Witness) And the other question was the assessment.

I went back to — got back before 1950, and the assessment appears to be, at that time, at $300.00 flat per lot.

* * * * * *

(T. 635) (Mr. Rich) If this information could be supplied, I would end my questioning right now. If he would be able to supply the original assessment per block, which is now known as Block 38, with specific relation to the oceanfront lots therein, and bring it up to the present time, I think that would serve us all in good stead, Your Honor.

(T. 635) REDIRECT EXAMINATION

By Mr. Rogan:

Q. Mr. Harrison, have you ever, personally, seen anybody using Lots 4 and 5 in Block 38 of the Oceanbay City Plat for purposes of picnicking or sunbathing or anything like that? (T. 636) A. At these two lots that they are referring to?

Q. Yes. Have you ever, personally, seen people using those two lots for picnicking and sunbathing? A. No, sir.

* * * * * *

(T. 636) EUGENE R. PARKER

DIRECT EXAMINATION

By Mr. Rogan:

Q. What is your name and address, please? A. Eugene R. Parker, Jr., 715 Edgewater Avenue, Ocean City, Maryland.

* * * * * *

(T. 408) Q. Was the '62 photograph not taken in the storm period? A. The '62 photograph was taken on the 24th of March, which was just about two weeks, not quite two weeks, after the storm.

Now, I have no personal knowledge of whether the tides had returned to normal by that time or not. I don't know that.

* * * * * *

(T. 409) Q. And I believe your conclusions were that what had been the dune line prior to the storm was pushed west, or standing vegetation was pushed west, is that your testimony? A. Yes, that is correct — well, the dune line that was established after the storm.

Q. No, I am talking about the dune line that existed before the storm. A. The dune line that existed before the storm was obliterated.

Q. Oh, I thought on your direct testimony, I thought you said the dune line was pushed further west. A. No. What I said was that the dune line, as it appeared on the photograph in 1961, was a certain distance east of the center line of the Beach Highway.

And, I went on to say that the dune line, as shown on the photograph in '62, after the storm, was a different distance east of the line.

Q. Well, now, within two weeks after the storm, had a new dune line been established? (T. 410) A. Yes, it had been seen on the photograph.

Q. Is that the one that was — where they put the fences in? A. That, I could not answer, whether or not they put the fences in. All I can go by is what I see on the photograph, and it's very distinct, this dune line that runs up the beach.

It can be seen going in front of the existing buildings there.

As a matter of fact, just — I believe it's at 69th Street, you can see where it goes out in front and, then, breaks and, then, comes back to the west, around that one building, and goes on up the beach. It's very distinct.

* * * * * *

(T. 413) (The Court) Now, can we have a stipulation that prior to the 1962 storm the Reynolds house stood in the back between (T. 414) 69th Street and 70th Street, and that it was removed to the 71st Street location after the March, 1962 storm?

* * * * * *

(T. 414) In reviewing Intervening Plaintiff's Exhibit Nos. 10 and 11, and in coordinating that with the testimony of Mr. Hoerichs, you will find that

the roof of the Reynolds house, which is a black object, which he identified between 69th and 70th Street, is the same house that now belongs to the Plaintiff, but in a different location.

* * * * * *

(T. 415) The record has to show them, removal to its present location, otherwise, everyone is reading the record (T. 416) incorrectly.

(Mr. Rich) The State would stipulate that it was removed subsequent to the pictures introduced by Mr. Hoerichs.

(The Court) Right.

(Mr. Rogan) The Defense will also stipulate, and prior to that, it was located on the oceanfront between 69th and 70th.

* * * * * *

(T. 419) GEORGE BERT CROPPER

DIRECT EXAMINATION

By Mr. Rogan:

Q. Give us your name and address, please. A. George B. Cropper, Ocean City, Maryland.

Q. And what is your profession, Mr. Cropper? A. Professional engineer and surveyor and contractor.

Q. And how long have you been an engineer, surveyor, and contractor? A. I have been an engineer and surveyor for thirty-nine years, and a contractor for twenty-four years.

Q. What is your academic background, Mr. Cropper? A. I am a graduate Civil Engineer.

Q. What school did you graduate from? (T. 420) A. Duke University.

Q. And what year did you graduate? A. '33.

Q. Subsequent to your graduation from Duke University, what occupational experience have you had? A. Well, I was a student at the University of Cincinnati, which was a co-operative school.

I studied electrical engineering and civil engineering there. And while there, I had experience with the U. S. Survey Service and property line surveys in the City of Cincinnati. I was also connected with a surveying company in Miami Beach, Florida, a construction engineer with the — construction engineer with the Lindoff Bicknell Construction Company on the construction of an office building for the Ohio Oil Company in Findley, Ohio,

thought and time and care-taking to the study of the true characteristics of this natural resource and to its restoration or preservation.

* * * * * *

(T. 668) Now, here Mother Nature always has certain limitations she imposes on us. American Beachgrass is known as a primary grass. It performs miracles, but one thing it cannot stand is the foot of man. It is meant for a job, and must — its limitations are traffic.

* * * * * *

(T. 668) All right, off-shore depths.

The deep water moving westerly. 1929 to 1947, (T. 669) these were presented before, of course.

* * * * * *

(T. 669) The next is Atlantic City, where we know we have one-half foot rise in the ocean since 1930; and since it rose in the Atlantic that much, it's reasonable to assume that the ocean does not grow in its plain. So we have rising water.

The other phenomenon in the State of Maryland is the geological recession of our shoreline taking place in its geological phenomenon. That has been confirmed by geologists, dynamics and nature's — well, the net result of man's actions and the dynamics of nature, gives this (T. 670) picture as 71st Street from 1929 to 1947, an eighteen-year period, two hundred and seventy lineal feet, or fifteen feet per year is the erosion rate.

Now, breaking it down from 1947 to 1965, and this is not accurate, because the State Roads dumped thousands of yards in the dune and the Corps pumped and nourished and spread it there, but taking that as it is, an eighteen-year period, we had twenty-eight lineal feet of erosion, 1.4 feet per year, coupling this into a thirty-six year period gives us 8.2 feet of erosion per year.

(The Court) Can I ask you a question right here, now that I have asked the others?

(The Witness) Yes, certainly.

(The Court) I believe that the diagrams in evidence show that the beach actually built up from 1850 to 1922.

(T. 423) Q. Have you located the Ocean City building limit line on your plat? A. Yes, we have. This is represented right here on a line sixty-five feet east of the easterly side of the existing alley. That is this line right here (indicating).

* * * * * *

(T. 425) Q. Now, I notice on your plat that within the confines of Lots 4 and 5, which you have just marked, there's a shaded, or hashed, area. What does that represent? A. That represents the building area as proposed, that we started to build on Lots 4 and 5 for Mr. Parker.

Q. Had you started to construct the building on these lots? A. Yes, sir.

Q. And who were you constructing the building for? A. Gene Parker.

Q. Did you prepare the plans for this building? A. Yes, sir, the plan.

Q. And I believe it was the filing of this suit that stopped the construction of the building, is that right? A. That is right.

Q. I show you this sheet of plans, Mr. Cropper, and ask you if you can identify them, sir? A. These are the plans of the Sandbridge Condominium (T. 426) that we were constructing for Mr. Gene Parker and Associate.

Q. And were those plans prepared by your office? A. They were.

Q. And who took care of getting the necessary permits for the construction of this proposed building? A. My office.

Q. And from whom did you get permits, sir? A. We got permits from the Conservation Department and the City of Ocean City.

Q. Were those permits granted? A. Yes, sir.

(Mr. Rogan) We offer these as Corporate Defendant's Exhibit No. 4.

* * * * * *

(T. 426) By Mr. Rogan:

Q. I notice on the plans that they were approved by Mr. Dryden. A. That is the Conservation Department, Soil Conservation.

Q. Sediment Control Inspector for the Worcester (T. 427) Soil Conservation District? A. Right.

Q. All right, sir. You indicated that the hashed area is where this proposed condominium was to be constructed? A. That is right.

Q. Is that hashed area westerly of the building limit line? A. Yes, sir.

Q. Would the entire building, if constructed, be constructed westerly of the building limit line? A. Yes, sir.

Q. Now, with reference to the — your plat shows a sand fence in here? A. Yes, sir.

Q. And the proposed building, if constructed, which direction would it be from the sand fence? A. East.

(The Court) Would the entire building be completely away from the sand dune?

(The Witness) Yes, sir.

I would like to, Your Honor, explain one thing.

The dune line, so-called, is supposed to be in (T. 428) the body, or the bed of the alley, but they — as I understood, the right of ways were given for it to be built in the bed of the alley, and the sand fence, as shown, should be therefore in the center of the alley. But it has been moved approximately twenty-five feet to the east of where it should. I don't say legally be, but supposed to have been.

But, the building is entirely east of the sand fence, which is in its twenty-five feet east of where it should be.

By Mr. Rogan:

Q. Now, the proposed building, was it to be constructed right on the sand? A. No, sir.

Q. And how was it proposed to be constructed? A. It was on pile foundations, supported — supporting concrete footings, an elevation starting at five, plus five, and, then, on these footings, concrete columns would extend up to the beams supporting the first floor, an elevation 22.67 feet.

(The Court) Wait a minute. The concrete footings are what? At what elevation?

(The Witness) The bottom of them are plus five.

(T. 429) (The Court) Plus five on the bottom. Wait a minute.

And they are concrete pilings?

(The Witness) Concrete columns, yes, extending up from the top of the footings to the beams supporting the first floor.

(The Court) That is plus twenty-three?

(The Witness) 22.67.

(The Court) Plus 22.67.

(The Witness) Yes, sir. That is the surface of the finished floor.

By Mr. Rogan:

Q. Would the—

(The Court) At what intervals would these supporting columns be?

(The Witness) I think they are — we had to change them to meet the ridiculous code, but I think they are eighteen feet in between.

(Mr. Rogan) Is there a scale in Court?

(Mr. Cathell) We will object to the statement "to the ridiculous code", Your Honor. I wrote it.

(The Witness) I will still say it is a ridiculous code.

(T. 430) (Mr. Cathell) I will still object.

(The Court) Well, anyway, the record should reveal the plan was changed to comply with the building code of Ocean City.

Is that right, Mr. Cropper?

(The Witness) Yes, sir.

(The Court) What do you say they are, eighteen feet on center, or eighteen feet—

(The Witness) In between them.

(The Court) Eighteen feet between them. Between columns.

How big are these columns?

(The Witness) Two feet square, I think.

(The Court) Two feet square?

(The Witness) Yes, sir.

(The Court) And how big is the—

(The Witness) Excuse me, Your Honor. They are varied sizes. Some are two feet square but, then a little wider — they are thirty-two — thirty-six inches wide, some of them are, but that is an in an east and west direction.

Two feet by thirty-six inches.

(The Court) In an east and west direction?

(The Witness) Yes.

(T. 431) (The Court) How big is the overall structure? How big was the thing to be? I don't mean cubic-wise. I mean—

(The Witness) Seventy-nine feet ten inches long by twenty-five feet four inches, I believe.

(The Court) Seventy-nine feet ten inches by twenty-five feet four inches.

All right, sir.

(The Witness) That does not include the porches. The open porches extend out, make it thirty-four feet by seventy-nine feet ten.

(The Court) Open porches would extend—

(The Witness) For a total width, then, of thirty-four feet by seventy-nine feet ten.

(The Court) Are there supporting columns under the porches, or cantilever?

(The Witness) No, they are cantilevered up.

(The Court) Well, the lowest one would be, though, the twenty-two feet?

(The Witness) Would be the top of the cantilever, sir. The lowest point of clearance, under the building, is twenty, I believe. Elevation, twenty. There is 2.67 feet between the top of the porch floor and the bottom of the beams.

(T. 432) Now — that's right.

(The Court) Are the beams in the floor all concrete?

(The Witness) Yes, sir.

(The Court) Do you use a particular kind of concrete for footings and columns and beams for this location of a structure?

(The Witness) We use a different strength design for the footings and the columns and the beams.

The strong four thousand pound concrete for the columns and the beams, and twenty-five hundred pound concrete for — that's strength — for the footings.

But we do, we do use normally, in Ocean City, a type 1A cement, which is air intraining type cement, but we don't consider that the structure is enough in the ocean to use a sulfite resistant type of cement, and so we don't in this particular case.

(Mr. Rogan) I think Mr. Cropper could sit down, Judge.

(Thereupon, the witness resumed the stand.)

By Mr. Rogan:

Q. Mr. Cropper, you have explained the height of the columns underneath of the building. Can you tell me the (T. 433) height of the dune in the area where the building was to be constructed? A. Yes, sir. I have — could I have a copy of my cross-section?

(Mr. Rogan) Let me get these in evidence, first.

(The Witness) I have two sets, two different sets there. Both should be put in.

(The Court) Mr. Cropper, the Reporter is not sure of the spelling of the type of the concrete, the Al type.

(The Witness) Just A-1.

(The Court) Did you use a descriptive word along with that?

(The Witness) Air intraining.

(The Court) Now, spell it for us.

(The Witness A-i-r — I think it's i-n-t-r-a-i-n-i-n-g. I don't know whether it's "i" or "e". A-i-r. I think it's either e-n or i-n-t-r-a-i-n-i-n-g.

(The Court) Now, if I'm correct, the other descriptive word is sulfite.

(The Witness) Sulfite resistant. That would be a type 4.

* * * * * *

(T. 434) By Mr. Rogan:

Q. What is the document at which you are looking now, Mr. Cropper? A. This is a cross-sectional sheet showing the cross-section from the ocean back across the dune line area of 71st Street.

Q. Was this prepared by you, sir? A. Yes, sir.

* * * * * *

(T. 434) (The Court) Corporate Exhibit No. 5.

* * * * * *

(T. 435) By Mr. Rogan:

Q. Mr. Cropper, to clear up a point, the building you were going to construct, you indicated it was going to be on concrete columns? A. Yes, sir.

Q. Was there to be anything underneath the concrete columns? A. Footings and piling.

Q. How long was the piling to be? A. Well, we were estimating that the piling would be twenty feet, but, there again, that would be finally determined by the driving of these piles, which determines the ultimate length. Might be thirty or fifty feet long. But, unable to tell at this time.

(T. 436) (The Court) At what intervals do you place that piling?

(The Witness) Under the footings, they are generally thirty inches apart each way, and enough of them to develop the load of the building, based on about twenty tons per pile.

* * * * * *

(T. 436) The dune, the building would have been built to the — the easterly face of the sand dune, the top of which, at a point where the sand fence was, or is, are twenty feet east of the alley, is about elevation fourteen.

* * * * * *

(T. 437) Q. The dune, sir, describe the size of the dune for me. A. Well, we took the cross-section fifty feet south of 71st Street, and the cross-section shows that the dune was only about ten feet wide at the top. It had a very steep slope on the westerly side. Went down to about an area of eight feet in height, and it sloped gradually down to the — about the average level of the beach . . . . . a little bit above the average level of the beach, or elevation about plus eleven at the building limit line and, then, gradually sloped to eight feet at a point, at the crest of the berm.

* * * * * *

(T. 437) (The Court) Mean high water?

(The Witness) Yes.

(The Court) Was how far?

* * * * * *

(T. 438) Maybe you gave it to me before, how far was it from the building limit line?

(The Witness) One hundred and sixty-eight feet.

* * * * * *

(T. 439) On the Stipulation Exhibit, you show a mean high water in 1962, and what we didn't know when that came into evidence was what month you put down that '62 mean high water, whether before or after the storm.

* * * * * *

(T. 439) (The Witness) * * * It was right after the dune line had been finished in '62.

* * * * * *

(T. 440) (The Court) You don't happen to remember the date, do you? Or do you have any records?

* * * * * *

(T. 440) (The Witness) * * * It was actually October of '62.

(The Court) Of '62.

(The Witness) Yes, sir. And the comparison is March of '72.

(The Court) Right. I don't mean to interrupt, but while it's on my mind, were there any artificial means or devices used, to your knowledge, in this area, between October of 1962 and March of 1972, to restore, enlarge, widen, or heighten the beach?

* * * * * *

(T. 441) Well, one other thing, if you want to count it, the County did build a sand fence where the dune line was, and kept repairing that.

Now, that would be an artificial means of trying to rebuild, with the help of nature, the dune line.

* * * * * *

(T. 442) (The Court) Do you happen to know how high the dune was? Well—

(The Witness) Yes, sir, I can tell you exactly how high it was.

At 71st Street, one hundred and twenty-five feet north of the 71st Street. It was exactly fifteen feet at the alley.

(The Court) Now, this was in October of '62?

(The Witness) Right.

(The Court) To your knowledge, was there a fence put in the dune at the time it was constructed?

(The Witness) Shortly — the dune was constructed in the fall — in the summer of '62, '63 — '62 and, then, the fence was put in about '63. Spring and fall of '63.

* * * * * *

(T. 443) (The Court) The alley, to which you have referred, where you thought the dune line should be, and the alley which was referred to on your cross-section, is the alley according to the Oceanbay City Plat?

(The Witness) Yes, sir.

(The Court) 1940 Plat?

* * * * * *

(T. 443) By Mr. Rogan:

Q. I wish you would compare for us now, the height of the dune, the width of the berm, and mean high water from 19 — between the 1963 chart and the 1972 chart. (T. 444) A. At a point one hundred and twenty-five feet north of 71st Street, the mean high water mark was one hundred and ninety-three feet in 1962 — '63. One hundred and ninety-three east of the alley.

In 1972, the mean high water was two hundred feet in the same location, east of the alley.

* * * * * *

(T. 444) A. That is a copy of our contract with Seventy-First Street, Incorporated, Mr. Gene Parker and Associates, to build this building.

* * * * * *

(T. 445) (Mr. Rogan) I would like to offer this as Corporate Defendant's Exhibit No. 4.

* * * * * *

(T. 445) (The Court) We are not going to go into damages during this hearing.

If it's necessary to — what is that word — bifurcate the trial, that is what I am going to. That word always interested me. But, that is what we'll do.

* * * * * *

(T. 447) By Mr. Rogan:

Q. Mr. Cropper, I show you this chart and ask you, sir, if you can tell us what that represents? A. This represents a compilation of all of the surveys since 1849 or '50 up to right after the storm — in fact, up to 1963, showing the mean high water line and, also, in some instances, the mean low water line at the different particular times in this vicinity.

* * * * * *

(T. 448) (Chart, prepared by George Bert Cropper, Inc. of compilation of all surveys since 1850 to 1963, was marked as Corporate Defendant's Exhibit No. 7 into evidence.)

By Mr. Rogan:

Q. Now, this document also shows some cross-sections of what? A. The cross-sections of the street. I have already referred to one hundred and twenty-five feet north of 66th Street, and, also, one hundred and seventy-five feet of 76th Street, and one hundred and twenty-five feet north of 71st Street.

(The Court) These are the same ones that are the other cross-section?

(The Witness) Yes.

(The Court) All right. You can see from this exhibit an interesting thing, which I hadn't noticed on the original — Stipulation Exhibit — apparently, the mean high water mark went further to the east between 1850 and 1922.

(T. 449) (The Witness) Yes, sir, by two different surveys.

(The Court) Do you know of any reason why this should have been, this counteraction and the beach built back up during those years?

(The Witness) There is no man-made reason. * * *.

* * * * * *

(T. 450) (The Witness) Bethany Beach, the beach has receded fourteen hundred feet.

And, at 15th Street, in Ocean City, the beach has receded about one hundred and fifty feet.

(The Court) But right here, in front of the property in question, without any man-made devices, structures, or activity, to your knowledge, it went — it extended out in the years between 1850 and 1922 before it receded again to 1942, is that right?

(The Witness) Right, and it's also extended out since 1963.

* * * * * *

(T. 451) (The Witness) The Chief engineer of the State claimed he had records to show that the beach had made out, but my own observation was that the groins, as you call them, were just a waste of the taxpayers money.

And the funny thing, the write-up in the Engineering News Record about those, and the State tried to justify the expenditure of a couple quarter million dollars, I guess, on those in an engineering news record, and, yet, when he wrote up the next year, the groins were disintegrated and gone.

* * * * * *

(T. 452) By Mr. Rogan:

Q. Mr. Cropper, from the time of the construction of the dune line, I believe the fall of '62 you said, sir— A. Spring and fall, yes.

Q. —to the present time, has there been anything done to the beach, by man, to cause it to accrete out in an easterly direction other than by natural means? A. Nothing other than the erection of the sand (T. 453) fence along the supposedly top of the dune line.

(The Court) I have asked every other witness this, and I'll ask you:

The fence along the top of the dune line, as I understand it, catches the windblown sand, is that right?

(The Witness) That is right.

(The Court) Now, by the attaching of the windblown sand to the dune, does this have any appreciable effect upon the widening or heightening of the berm or the beach area out to the water?

(The Witness) In my opinion, none whatsoever. If anything, it may have a tendency to detract from it, cause it to flatten. In other words, to starve the berm of sand in order to create the beach — the dune line.

* * * * * *

(T. 454) CROSS EXAMINATION

By Mr. Cathell:

Q. Mr. Cropper, since the construction of the dune line in 1962, has your firm constructed any buildings either on or east of that dune line? A. It has.

Q. When these buildings were constructed, did you or your firm apply for permits to build those buildings? A. Yes, sir.

Q. Did you — were you required to make application to the County Commissioners of Worcester County for piling approval in reference to dis-

turbing the dune? A. Two applications — well, the answer to your question, yes, sir.

(The Court) Well, explain how that works, now.

(Mr. Cathell) That was going to be my next question.

(The Witness) We had to have an application for the piling, number one, and, number two, for the disturbance (T. 455) of the dune line during the construction, showing how we were going to do it, and how we were going to replace it, and get a permit to do that.

(The Court) Well, you could put your piling in, you could disturb the dune line, but, then, you had to replace the dune line?

(The Witness) Yes, sir.

(The Court) After the construction?

(The Witness) That's right.

(The Court) Go ahead.

By Mr. Cathell:

Q. Since annexation, to the best of your memory, were you still required to get these permits from the County? A. Yes, sir, up until last year, I think. Then it changed from the County, then. We had to go into the Soil Conservation Department.

* * * * * *

(T. 458) (The Court) In other words, how would you — would you go under these buildings and rebuild the protective barrier under the building, or would you recommend going to the east of the existing structures?

(The Witness) Well, our recommendation has been that the dune line be pushed further east, and we have done this is almost all cases, except this one, and we were denied the right to do it, or privilege of doing this because of this stupid building code we've got.

* * * * * *

(T. 465) A. So, that would be — and the underside of the beams holding the floor is plus twenty, so that would be about twelve feet above the average level of the beach east of where the dune line is.

Q. It would be about twelve feet above the average level of the beach; and, then, would that make it lower than the top of the dune? A. No, sir.

Q. No? A. The dune line is supposed to be at plus sixteen, so the bottom of the girders holding up the first floor would be, at least, four feet above the top of the dune line.

* * * * * *

(T. 466) Q. Now, what other parts of the structure extend down to the sand? A. The entrance portion.

Q. How about your elevator pit? A. That is the entrance part.

Q. Well, now, how large is that portion of the building that would extend down to the sand? A. May I have a set of plans?

Q. Yes, sir. A. Twenty-eight feet.

(The Court) By what?

(The Witness) Twenty-eight feet on the north/south direction, and about seven feet wide — well, actually, about eight feet, four inches wide in an east/west direction.

By Mr. Fox:

Q. Twenty-eight feet running north and south up and down the beach? A. Yes, sir.

(T. 467) Q. And how far would that twenty-eight feet section of the building be in front of the dune? A. That would be — that would be — it would be—
Now, you are talking about the dune line, or the sand fence?

Q. Well, either one that you would prefer. It doesn't make any difference as long as I know which you are giving me the distance of. A. It would be twenty-four feet east of the east side of the alley, and the sand fence is twenty feet east of the east side of the alley. The dune line should be five feet west of the center line of the alley, or the east side of the alley.

So, where the dune line should be, it would be about thirty feet.

* * * * * *

(T. 475) Q. That shows how many lots? A. Two less lots. They moved the front lot back fifty feet.

Q. There is two less lots in the— A. Block.

Q. —block on the second plat than the first plat? A. Yes, sir.

Q. The most recent plat, how many lots are there in Block 38 on that one? A. Four less lots in the second plat.

Of course, six less lots than in the first plat. Moved the front lots back one hundred fifty feet.

Q. Now, what happened, if you know, to the lots that were platted on the east end of Block No. 38 by these older plats? A. The owners owned those plots and just simply — well, they — I don't know what the word is. They gave them to the public, so to speak, by giving the public more beach.

Q. Well, how did they give them to the public? A. By the fact — as far as I know, just by the mere recording of these plats, which show the deletion of the lots from the previous plat. And I don't know of any other (T. 476) thing now.

As far as I know, there is no legal gift to anyone of that land, other than the fact that they moved the front lots back, which gave them more beach.

Q. And these lots were lost, as far as the owners were concerned, I gather, from what you are saying, because of the changes in the high water mark? A. Well, the owners owned the whole piece of land, so to speak, and owned all of these lots that they deleted, with the exception of one or two, and I think in that particular case, they gave another lot so that those lots — that was the only thing that was done — so those lots could be deleted that they had, and the — and they, of course, lost the land, of course, that they thought they once owned.

Q. And was this due to the action of the— A. Normal tides.

Q. —sea and the changing high water mark? A. Receding of the beach, yes.

* * * * * *

(T. 477) A. The point I'm trying to go, the old Fenwick plat (T. 478) showed a wide beach three or four hundred feet wide in front of these front lots.

Q. Even another street out there, didn't it? A. No, no. They didn't call it a street. It was just the open beach; but when we, in our survey in 1940, showed the beach was non-existent, and in '40, for the Oceanbay City, they thought they had a wide beach, but our survey showed the beach was not there.

But, in one case we have the beach not changing, but in the Isle of Wight tract, the beach has been coming in, So I don't know whether the beach was there — what I'm trying to say, at the time of the making of that plat, I don't think the beach was there as represented. That is why the Isle of Wight Land Company moved the land back.

Q. Do you suspect that the surveyor, or the maker of that plat, just made that plat in his office and didn't worry about it? A. That is what I am trying to convey.

Q. What you are saying in a nice way?

* * * * * *

(T. 483) Q. East of where that boardwalk is shown on these plats, you see the word "beach" written several times, do you not? A. Yes.

Q. What did that indicate to you? A. That is just an open beach.

Q. For the benefit of anybody in particular? A. Benefit of anybody who wanted to use it, as far as I know.

* * * * * *

(T. 484) Q. Now, then, how do you account for the fact that you show, or not you show, but these plats show more lots on the oldest plat and less lots on the next oldest plat, (T. 485) and still less lots on the latest plat? A. That is because the owner of the property, and as you know in Maryland, distance to the water line, always by law, has to be shown by a plus or minus.

In other words, your call is to the waters of the Atlantic Ocean, and I think I show on that plat, the patented line there. 1880 something, and that line calls for a distance to the waters of the Atlantic Ocean, thence by and with the waters of the Atlantic Ocean; and what has happened here, the guy thought he had, in a sense, two thousand feet of land, but as the water encrouched on it, it's called the ocean — instead of being plus or minus two thousand, say, in this case would be plus or minus eighteen hundred feet to the waters of the Atlantic Ocean. His back line did not move at all. Just his front line. He'd lost more land.

Q. Right. The back line didn't move, but the front line, where the lots were platted on the front line, gradually kept moving westward as the water line kept moving westward? A. Not the lots. Just the proximity of the water to these lots.

So the owner of all the lots said, "Well, I'll give up some lots. I have got to give my oceanfront lots, (T. 486) which are the most valuable lots. I have got to have some beach in front of them, so I'll just give up some lesser valuable lots in back of them, and move the front lots back."

And that is, in fact, what he did.

Q. He gave up the beach in front and kept moving the lots back? A. That is right.

* * * * * *

(T. 486) Q. Now, you are familiar with the beaches of Maryland, from the Virginia Line to the Delaware Line, are you not? A. Yes, sir.

Q. And have been up and down them, I suppose, many times in a professional capacity for the purpose of surveying? A. Yes, sir.

Q. Is there any section of the beach, between Maryland and Virginia, that is restricted to private use for which the public is prevented to go? (T. 487) A. There was one piece. That was in front of the Atlantic Hotel. But the Atlantic Hotel gave that to the City at the time the City built the bandstand there.

Q. And how many years ago would you say that was? A. I would say twenty years, twenty-five years, maybe.

Q. All right, sir. Well, for the last twenty years, have or have not the public had free access to the beaches of Maryland from the Virginia Line to the Delaware Line? A. Yes, from a certain line, yes. From the Ocean City area, from Atlantic Avenue line and, of course, up until just the last couple of years, the public has had free access to all of the area from the Oceanbay from — well, actually, from 15th Street in Ocean City.

Q. Now—

(The Court) In other words—

(The Witness) There was no differentiation between the beaches and the upland, if you want to call it that.

(The Court) Everybody used whatever was open?

(The Witness) Right.

* * * * * *

(T. 495) By Mr. Fox:

Q. Of course, this just shows two stakes in the water. I don't suppose — can you identify that? A. No, I really can't. A stake is a stake.

Q. A stake is a stake, and water is water. A. That is correct.

Q. Are you acquainted with Dodd Redden? A. No, sir.

Q. All right. Do you think it would be reasonable for the stakes shown in that photograph to be the stakes that were set by your employees for the purpose that you have just mentioned? A. Well, it looks like there is a storm in progress at the present time. Very, very high water, and the debris has been washed up to this other stake, and I — it could be, because we also,

when we stake out, we put stakes to (T. 496) show where the fill is to be placed, and this could represent — could be way beyond the limits of the building for that reason.

In other words, we have to build a cofferdam, so to speak, in front of our structure, and we put the sand, that comes out of the foundation, east of where the building is going, and that could represent that and, so, therefore, it could very easily be.

* * * * * *

(T. 497) Q. Now, Mr. Cropper, you indicate that the public has free access to the beaches of Maryland, from the Virginia Line to the Delaware Line.

As a practical matter, how far westward does that area extend that they use as a public beach? A. Well, it depends there again on the conditions of the beach, and all.

The public has just used wherever the beach is open, regardless of how far back it was; and it depended on whatever restrictive thing was around that stopped them from using it.

Q. Well, since the Army Corps of Engineers has constructed the dune that we have been talking about, would you say that dune has in any way delineated the area that the public has used? A. In some cases, it has.

* * * * * *

(T. 498) (The Court) Let me ask you this: you say that the public uses whatever area may be open until some restrictive object comes along. Once a structure is built, does the public recognize that structure, a house, or building of some kind, and use the remainder of the beach?

(The Witness) Yes; in fact, they even stay away from that structure tentatively.

In other words, what I am saying is, it exerts an influence on the beach far and beyond the actual physical building.

(T. 499) (The Court) What I want to ask you, is there a pre-determined line, or width of an area which is considered to be, by the public, to be the beach which they adhere to, or do they flow to the open spaces and stay away from the built-up places?

(The Witness) That is what they do.

As I have said before, the beach, until the buildings were built up there, they used the whole beach, from the bay to the ocean, and as the beach — the trouble is, the beach has never been defined, per se.

I mean, these plats attempted to portray, or define the beach, but the people were unacquainted with the plats; but as the builders started to build their structures, and that indicated on the ground some — gave the people some idea of where the beach line would be, the people respected that to a great extent.

By Mr. Fox:

Q. From your observance, you are familiar with this particular section we are talking about between — in the 70th and 71st Street area, are you not? A. Yes, sir.

Q. And have you been there on occasion? A. Yes, sir.

(T. 500) Q. From your observance, does the public pretty well use all of the beach that is east of the sand fence in this area? A. Up until after the '62 storm, very little of the beach in this area was used because there were very few houses there.

In fact, in three or four blocks west of the sand fence that the County had constructed, the general level of the beach was four or five feet below the road, and it was very hard for the people to get from the road up to the beach, Therefore, this area was used very, very little.

But after the '62 storm, the storm filled up this pocket, and people have been going up there. It has been easier for them to get up to the beach, and they have been using it more since the '62 storm.

Q. I am talking about since the '62 storm, because that changed this area considerably.

Since the '62 storm, to your knowledge, have the public been using the beach area that is shown in Plaintiff's Exhibit No. 13, from the water's edge to the sand fence?

(Mr. Rogan) Your Honor, I would like Mr. Fox to (T. 501) define what is the beach area.

(Mr. Fox) I just said from the water's edge to the sand fence.

(The Court) He is using the same area that we decided on early in the case, from the water's edge to the sand fence, for the purpose of his contention.

(Mr. Rogan) Okay.

(Mr. Fox) The sand fence shown in this photograph is what I say.

(The Court) The question is whether or not the witness has personal knowledge is what Mr. Rogan originally objected to, and which I sustained.

The question is, Mr. Cropper, whether or not you have any personal knowledge of the use by the public of this particular area.

(The Witness) Not in the last few years, no.

By Mr. Fox:

Q. I thought you said a moment ago that you were familiar with this area and that you had been there. A. Oh, yes, but I don't know that the people — what I am saying, Mr. Fox, I am up here on this beach most all of the winter.

For instance, on the boardwalk in Ocean City, (T. 502) it has been about five years since I have walked up to the boardwalk; but I am familiar with the beach.

But, I can't swear that I have seen anybody on the beach in the last five or six years here, at this particular spot, because I don't remember being on the beach in the summertime right in this particular spot.

Q. Well, you have been — have you ever been on the beach in Ocean City in the summertime? A. But, generally, over the whole beach, I can testify honestly that the people have used the beach indiscriminately, not only from the sand fence up, but on both sides.

For instance, where I have noticed that the tide is in close, why, they don't — they don't confine themselves to the east side of the sand fence, they go to the west side of the sand fence.

Q. Assuming, as you say, they do use the beach on the west side of the sand fence, my question is, from your knowledge, do you know they use the beach from the area of the sand fence to the water's edge? A. Generally, in most cases.

(The Court) He says they use anything indiscriminately that is open.

* * * * * *

(T. 509) By Mr. Fox:

Q. You mentioned, in your direct examination, that this building wasn't going to be enough in the ocean for you to have planned it out of, the supports out of some particular kind of concrete. A. That's right.

Q. What kind of concrete do you call that? A. Sulfite resistant type.

Q. Do you contemplate that these pilings, at the end of this building, will sometime be in the water? A. Occasionally, sometimes, yes. It is designed for that.

Q. And would you have any idea of how many times a year you could normally expect the front piling of this building to be in the water? A. Oh, there again, I would say once or twice a year, something like that, on an average, it would be touching the water.

Q. Because they would be set back how far from the front? A. It would be sixty feet from the back edge of the lot.

(T. 510) Q. How far from the front edge of the lot? A. That would be — and, then, the overhang porch would be ten feet, so that would be fifty-five — about seventy feet.

* * * * * *

(T. 511) (The Witness) The distance to mean high water mark is one hundred and twenty-five plus A, would be one hundred and thirty-three feet.

(The Court) To where?

(The Witness) East of the building limit line.

(The Court) Okay. Building limit line to mean high water. Okay, sir.

(The Witness) And the building limit line, of course, is sixty-five feet east of the back end of the line.

(The Court) No. Well, how far is the building limit line from the — oh, yeah.

Sixty-five feet?

(The Witness) Yes. East of the west end of the lot.

(The Court) Now, do the overhanging porches come out to the building limit line, or do they extend beyond the building limit line?

(T. 512) (The Witness) Just to the building limit line.

(The Court) How much are your columns set back?

(The Witness) About ten feet.

(The Court) Can I ask one more question before we go on, while I am thinking about it?

The solid portion of the structure that you told Mr. Fox about, is that within the overall area of the structure as you described it, or does it sit outside of the seventy-four by thirty-four?

(The Witness) It's to the west of that thirty-four foot depth.

(The Court) The twenty-eight by—

(The Witness) In other words, the thirty-four foot depth is the back end of the porch.

(The Court) I see.

(The Witness) From the building limit line, and, then, the elevator stairwell is roughly eight feet eight inches, I think, or thereabouts, or nine feet four inches, and closer to the back end of the lot.

In other words, it abuts the back porches. It abuts the westerly porches.

* * * * * *

(T. 514) By Mr. Rich:

Q. One of these is that you stated that the elevator (T. 515) shaft would be west of the building at — at what elevation of the beach would the elevator be implanted in the lot? A. It extends from the bottom of the footing on up.

* * * * * *

(T. 515) Q. What would the distance between a shaft and the crest of the dune line be, as it is now, the dune line as it is now? A. It would be right on it. Just about straddled it.

Q. What are the dimensions of the elevator shaft again? A. A little over eight feet wide, and the building, as I testified before, is roughly four to five feet east of (T. 516) the center line, or where the sand fence is now, so that it would straddle it.

* * * * * *

(T. 517) Q. And if you would delineate the dune, the slope and crest and base of the dune on that cross-section, I'd appreciate it. A. Well, I would say that — according to this, the base of your — the low part is sloping down to a point roughly, oh, let me — hold that a second.

Q. Sure. A. Roughly about eighteen feet, I'd say; around eighteen or twenty feet.

Q. Here's the marker. Mark it. A. West of the west side of the alley.

Q. And on the east side of the alley, if you can, put the same mark. A. I'd say the base of it, what I'd call the beginning of the dune, would be, roughly, one hundred feet — well, that's — wait a minute. That is section one hundred. About right along in here (indicating), and that would be (T. 518) about, oh, eighty feet east of the east side of the alley.

(The Court) All right. Now, you say it begins on the west side, eighteen feet where?

(The Witness) Eighteen or twenty feet west of the west side of the alley.

(The Court) To where, now?

(The Witness) To about eighty feet east of the east side of the alley.

* * * * * *

(T. 520) By Mr. Rich:

Q. Mr. Cropper, I would like to refer you to the other plat — I'll hand it to you. This is Corporate Defendant's Exhibit No. 7, * * *.

* * * * * *

(T. 520) Q. And a line came from the Corps of Engineers' survey, isn't that correct? A. I think one of these came from the Corps of Engineers.

Q. That would be 1962 low water line? A. Yeah.

(T. 521) Q. Now, I would like to call your attention to that 1962 low water line, and ask whether or not that low water line was taken before or after the storm? A. That was taken after the storm.

Q. And what does that low water line show, with respect to Lots 4 and 5, which are the subject of this suit? A. Well, low water line is about the front edge of Lots 4 and 5. Coincide, practically.

Q. And the low water line, as I recall, is at elevation 0.00, and mean high water line is at elevation 3.8. A. 3.4.

Q. Excuse me, 3.4.

* * * * * *

(T. 523) Q. Would it be fair, before I hand this over to you, Mr. Cropper, would it be fair to say that mean high water covered Lots 4 and 5? A. At this particular case, at that time, I would say yes, it did.

In fact, I would say that the mean high water would be, based on my — I am trying to refresh my memory at that time — within a couple hundred feet of the Ocean Highway, and I would say mean water was well to the rear of these lots.

(The Court) You are talking about from — until the dune was constructed?

(The Witness) Right. I am talking about the time immediately after the storm, within a day or two, the time my photograph was taken.

* * * * * *

(T. 526) (The Court) Let me say this, Mr. Reporter: (T. 527) by stipulation, an aerial photograph, taken on March 8, 1962, at 2:03 p.m., previously identified as Defendant's Exhibit No. 11, in No. 3273 Civil Docket of this Court, is introduced in the instant case.

* * * * * *

(T. 527) (Aerial photograph, by Aero Service, dated March 8, 1962 at 2:03 p.m., previously marked Defendant's Exhibit No. 11 in No. 3273 Civil Docket was marked as Stipulation Exhibit No. 2 into evidence.)

* * * * * *

(T. 528) (Aerial photograph, by Maps, Incorporated, dated January 17, 1962, previously marked as Defendant's Exhibit No. 3 in No. 3273 Civil Docket was marked as Stipulation Exhibit No. 3 into evidence.)

* * * * * *

(T. 529) (The Court) Say this: the markings that are on those photographs were made in the old case, and they do not apply in this case. If we mark these photographs, we will do it with a different color.

Is there any green on that one, gentlemen?

(Mr. Rich) No.

(The Court) All right, here is a green pen.

The markings apply in this case will be in green.

* * * * * *

(T. 530) (The Witness) Mean high water is roughly opposite the bulkhead that I have circled.

(The Court) All right. Mean high is at bulkhead. Okay.

(The Witness) And mean low water was about where the front of these Lots 4 and 5 are, as shown on the '40 plat.

* * * * * *

(T. 531) (The Court) Oh, no; but he asked you, originally, how much was the distance in the ebb and the—

(The Witness) That would be — yeah, that would be about two hundred and twenty feet.

(The Court) Tidal action?

(The Witness) Yes, sir.

(The Court) Two hundred and twenty feet tidal action?

(The Witness) Yes, sir. Along flat (indicating) here, out to here.

* * * * * *

(T. 532) By Mr. Rich:

Q. And did you notice a cutout? A. Yes.

Q. And do you know from what street to what street that cutout ran? A. Yes, it was roughly — it covered — comprised all of 71st Street, and started about midway between 70th and 71st Street, and went to the north side of 71st Street. It started halfway between 70th and 71st Street, and extended to the north side of 71st Street.

* * * * * *

(T. 537) (The Court) Mr. Cropper, you see, there has been a continuing contention, during this case, over a matter that I think is purely incidental, but I think it's become a point of honor.

Now, Mr. Small testified that the washout in the road was between 71st Street and 72nd Street, and the Court thought that was accurate from the testimony of General Shuey's case, from which these plats came.

But I pointed out, at the time, that this was a fan-shaped gully, or inlet, as it has been called. Now, perhaps Counsel has found the answer to the thing.

When you were speaking of — you didn't call it gully. What was the term that was just used?

(The Witness) Inlet.

(The Court) No, another term that you used, "washout" or "cut"?

(The Witness) Washout?

(The Court) Cut. Cut.

Were you talking about from the beach side, or (T. 538) bay side?

(The Witness) Well, actually, from the highway, east.

(The Court) From the highway east.

And you are still of the impression that the break in the highway was from between 70th and 71st, rather than 71st and 72nd?

(The Witness) Yes, sir. I have a drawing of it, of the survey.

The north side of the break was at the north side of 71st Street and the south side of the break was middle way between 71st and 72nd, and it's borne out by the photograph.

(The Court) Wait a minute.

What did you just say?

(The Witness) 71st and 70th.

(The Court) Oh.

(The Witness) In other words, the inlet was actually between 70th and 71st Street.

* * * * * *

(T. 539) By Mr. Rich:

Q. And the reason this question was asked, Mr. Cropper, was in your report of '64, you gave, basically, a reason for the fact that severe erosion and cut-through occurred in that area. What is the reason? A. I haven't read the report, but as my recollection, one of the reasons is, what I referred to before, the State, in '38, had built a sand fence — do you remember where I have said it here (indicating)?

* * * * * *

(T. 540) The real reason was this beach, in this particular area, was very flat, from the highway to the ocean, and it goes further in this report.

In 1938, when the State built the highway, they had to pull in sand in order to bring the roadbed up to grade in the vicinity of 70th Street, and they also built sand fences, and these sand fences were connecting — were built by connecting the high points of the dune line, wherever those high points may be, with respect to the highway, and in some places, the sand fences were only a couple hundred feet of the highway, and some places, it was four or five hundred feet east of the highway.

And in this particular place, the sand fence was very close to four hundred feet east of the highway. And the area west of the sand fence was low, three or four feet lower than the highway, and the same thing existed south of the Carousel, where the State had denuded the beach, so to speak, in back of the sand hills in order to build these groins that we were talking about and, then, there (indicating) and here (indicating), after the ocean knocked down the dune line, the dune (indicating), or here at 70th Street, the sand fence, it pushed the sand (T. 541) fence back and filled up this whole low

area and denuded the beach; and that is why, if you'll notice on your aerial photograph, the beach cuts in there at low tide, and the same thing existed south of the Carousel where the State had denuded the beach behind the barrier of hills for the sand when it broke through that barrier of hills, the ocean rushing over, took the beach sand — that is normally what we call the berm — and washed it back and filled in this hole; and in some cases, went across the highway as it did at 70th Street, and which bears out one of the things you were talking about earlier, Your Honor, this morning. To protect the beach, I think one of the most important things is not the dune line, but the height and depth of the beach behind the normal flat ocean beach.

The higher that is, and in depth, too, the safer our beach is, much more safe than a bulkhead, or anything else.

Does that answer your question?

Q. Yes, it answers my question.

What you have said, if I might repeat, is that this was a very flat area? A. Right.

Q. And it was evidenced by the unbroken sand (T. 542) fence put up there in '38? A. Right.

Q. Now, you have also made the point, Mr. Cropper, that the best protection, essentially, is to build up what you call the beach area. This is the best type of— A. The east or west of the dune line, yes.

Q. What is that, west of the dune line? A. Yes, build that area up back of the normal dune line, or the artificial dune line, either one. Build it up in height as well as depth.

Q. In your report, you also discuss the history of this area. Let me ask you is this is correct, to save time:

"The history of this area between 70th and 71st Street is one of constantly receding shorelines since 1922."

Then you went on to make the statement:

"This writer also remembers this area, since 1923, as always being flat and low, et cetera, as evidenced by the sand fence", is that correct? A. That is correct.

* * * * * *

(T. 544) Q. And you went on to state that the shoreline has been receding since 1922, again for a total of four hundred and fifty feet in 1962; is that correct?

* * * * * *

(T. 544) A. The four and — four hundred and fifty feet, in my mind, goes back to 15th Street. I'm trying to sort in my mind, now, to bring it back, how I got it here in this paragraph.

Q. Why don't we read the paragraph, and I think you can comment on the paragraph, and I think we can comment on (T. 545) it. I think that would be the fairest. A. "The area from 75th to 66th Street has, for many years, been a very low section with few hills, and these spaced far apart. The sand fence was a single line, and the sand had not built up on either side in depth. In this area, the shoreline has been receding progressively since 1922 for a total of four hundred and fifty feet.

In 1962, from March, 1962 to October, 1963, the beach was built back — has built back one hundred and fifty feet, amounting to a net loss, in forty-one years, three hundred feet, or an average yearly loss of 7.3 feet.

The south side of 71st Street of the highway was breached during the March, 1962 storm. The January 13, 1964 storm indicates this area not to be stable."

* * * * * *

(T. 546) (The Court) Well, '22 was your farthest point out, and it does look like it might be four hundred and fifty feet from '22.

(The Witness) I'm right. Four hundred and fifty feet, that's correct.

* * * * * *

(T. 547) By Mr. Rich:

Q. In '62 — let's get to '62 — that appears to be a turn around this beach, isn't that correct? A. Since then, the beach has made out consistently, yes. Each survey we have made, it has gone out.

* * * * * *

(T. 550) Q. You made the statement, in your report — let me read it to you and see if you agree with it, or if you don't agree with it, or explain it if you would:

"That it is this writer's opinion that the beach, in general, from the Maryland/Delaware Line to north 15th Street, is in much better shape, both in height, width, and the location and the depth of the first sandbar than it has been for many years, and the improvement is much greater than the fill pumped on the beach." A. That is just exactly what I have said.

And the improvement—

Q. Go ahead.

(The Court) I'll tell you what is wrong. I started to interrupt awhile ago.

Mr. Cropper is the first expert that has started to tell us about the bar.

Now, I think that it is necessary for him to (T. 551) explain what the bar is, if that is the term he is going to use, where it's located, and what its effect is, because we don't have it in this record so far.

Now, you have got to go.

(Mr. Rich) I don't have to go yet, Your Honor.

(The Court) Tell us what you meant awhile ago when you referred to the bar.

(The Witness) Well, our beaches are formed by ocean transported, or water transported sand, and this sand is deposited when the current drops below a water-borne capacity.

In other words, it has to have a certain minimum velocity in order for it to transport sand.

Now, wave approaching the shore doesn't break until the depth of the water is equal to half the height of the wave.

(The Court) Now, wait a minute.

The depth of the wave is one-half—

(The Witness) —the height of the wave.

(The Court) —the height of the wave.

All right, sir.

(The Witness) And at that point, the wave breaks, and causes a churning action, which disturbs the bottom (T. 552) sand, and causes it to increase its velocity at that bottom, and to move it into the same direction that the wave was traveling, at the point just before that trough, we call that the bar.

Now, in going out in successive depths of water, where that same action happens in deeper water, we have the first, second, and third bars, as you probably heard talked about here.

(The Court) No, nobody has really told us too much about it.

There are first, second, and third bars that are are identified along this coastline?

(The Witness) That's right.

For instance, the boat that broke itself up, the tanker hit the third bar.

(The Court) The African Queen?

(The Witness) The African Queen.

Now, at the time of the '62 storm, we had a very high sea, which changed the breaking point of our waves. So the result was it was a great churning up and movement of all of the sand, both shoreward and seaward of our bar. It destroyed our bar. It took the sand from the beach and moved it out in the receding waves.

(T. 553) It also, in this breaking at a higher point along the shore, started cutting out troughs. That is what happened here at 70th Street, and instead of the sand being washed back, and keeping its beach, more or less, uniform, it washed over the barrier beach. That is why the shoreline was indented there.

And after the waves started, the tide went down after the storm subsided, then our original condition that created the bar in the beginning started to manifest itself again, and it was pounding on this bar and pushing it ashore. It happened not only here, but off — greater or lesser extent the whole length of the beach.

So, that nature regenerated the beach itself, and by the time the Corps of Engineers got to building this dune line, the sand that they put on the dune line remained up there, what we normally say, you're saying — or what the people in the conversations here today, they say the westerly edge of the beach, and that sand never really nourished the flat beach or the berm or out in the inlet.

In my statement, I say the beach seems to be better through this redistribution of sand and, then, for many years, that's what I'm referring to, higher and wider, and—

(T. 554) At this particular spot, another thing that transpired that happened to create a problem — I don't know whether created a problem, or not, but for some unknown reason, due to the changes of the bar offshore, there was a tremendously deep hole right opposite this wood bulkhead. It was put in because the ocean was cutting in there and the water was ten or twelve feet deep, just off of that where there's only two or three feet both to the north and south of it. But after this storm, that hole disappeared and the beach regenerated itself, such as it was almost a straight line.

If you look at photographs of the beach, and along the shorelines, they are almost a straight line down there. That is what I am referring to in my report.

Since the '62 storm, the beach has been in much better shape, both as to width, height, and all, then it was prior to the '62 storm. And I didn't mean to infer — and I think a closer reading of it will say that the sand put on with the dune line helped it. It was nature itself that did it.

By Mr. Rich:

Q. Does the dune line offer any protection? A. Very, very little. I would say it's good for (T. 555) one tide. One small tide, unless the dune line is back up behind it by high beach, or the same thing will happen as has happened here, because there was a good dune there, built by the — the County had maintained — Worcester County maintained the sand fence. They'd built three different sand fences in this particular area, across here (indicating), and grassed it, and all of that. Tried to make it build up because, you know, back in the twenties, there was a concrete road built from 15th Street up to what we call the "Lucky Linda". It was where Dr. Frank has his office now. It was a concrete road built by private industry, and the road was broken through as many as three and four times, with the ocean washing over every summer.

In fact, I would say the road was open for automobile traffic for about ten per cent of the time. It was for that reason, when the State in '38 built their highway up the beach, that they built this protective device, by putting in sand fences between the hills to try to protect the road.

So that area of the sand fence, between the area of 70th and 71st Street, was equally as high; and I don't have any measurements, unfortunately, to bear this out, but from observation, it's as equally as high as the dune line (T. 556) was in similar areas.

Q. The location of the present dune line, how does that coincide with what was there previously? A. Pretty close to being the same spot.

Q. Wasn't it the intent of the Corps when they imposed the dune area, for it to be on top of, or coincide with the other former dune? A. No, because the dune line put in by Worcester County, as I said before, was varied anywhere from two to five, or six hundred feet from the highway. When they built it, they connected the high points of the hill, regardless due to — the sand fence could be at an angle of thirty degrees with the beach, depending on the high points.

It just so happened, in this particular case, the sand fence was reasonably parallel with the highway.

(The Court) Well, the question was: was the dune line, as now constituted, in about the same location as the previous one?

(The Witness) Presently.

(The Court) What I don't understand, do you mean a natural dune line, or the County dune line.

(The Witness) The County dune line.

(The Court) This is about the same position as (T. 557) the County dune line?

(The Witness) In this particular area, yes, sir.

* * * * * *

(T. 557) By Mr. Rich:

Q. You stated that the '54 groin placed on 70th Street, or the groin system, if you will, really was a failure? A. Yes. It extended out to mean low water, and, unfortunately, the State Roads Commission didn't take a lesson from World War II, and asphalt has to be kneaded to (T. 558) hold together. We built a lot of airfields all over the East Coast, and put asphalt down, and they broke up before a year's time, and the reason was the planes — not enough traffic on them to keep them going.

And they tried to use the same kind of material building these groins with, and, of course, the same thing happened. They just disintergrated.

* * * * * *

(T. 559) The State, as I said before, claimed that they had some cross-sections, but for that particular time, I was doing a great deal of my own surveying myself, and I was on the beach practically every day, and constantly measuring back and forth to the ocean, and in no place did I witness any effect whatever, either for or against the improvement of the beach.

Q. You didn't take any cross-sections after these groins were placed? A. No, not right at that particular time, because the groins only lasted about a year or a year and a half.

Q. Did you compute the rate of erosion prior to the placement of these groins? A. Have I ever done that?

Q. Yeah. A. Well, from 1933 to '36, I was in charge of all of the surveys for the Corps of Engineers here in the Ocean City area, and we had to make a survey every ten days of the ocean, determining the littoral drift and, occasionally, we would make soundings, take cross-sections at about — well, about roughly, 70th Street was one of our points, and those surveys showed

little or no change from one spot to (T. 560) the other until you got down close to the north jetty.

As that grew, we found more and more effect; but as far as having — stopping littoral drift, we found no effect of anything. There was a groin put in at about, about in the forties, the late forties, or early forties, up in the vicinity of 70th Street. A groin jetty. Completely washed up.

(The Court) Timber?

(The Witness) Yes. It was timber, yes. Just like Ocean City.

The State put it down because one of the State Roads Commissioners owned the cottage there. That is why it got there. The water was so deep it just washed it right away.

But these groins that were put in, people don't understand it. If they only went down — hardly got down below mean high water, and the only effect that it could have had was during a storm. Water didn't come up and wash over them except very, very high tides, or something like that. And they were smooth. The wind would blow sand back from one side to the other. That was about the only effect it had. It made it hard to get up and down the beach with beach buggies. That was the biggest damage. Cut out traffic.

(T. 561) (The Court) There haven't been many witnesses that have espoused the virtues of the asphalt groins, Mr. Cropper.

Go ahead, Mr. Rich.

(Mr. Rich) There were a few, Your Honor.

(The Witness) They sold a bill of goods.

(Mr. Rogan) They all worked for the State Roads.

(The Court) Mr. Brewington.

(The Witness) They came in my office, and we'd have a great big argument about it.

By Mr. Rich:

Q. Then you would admit it's a point of contention between you and the State as to the value of those groins, is that correct? A. Quite a bit. It was a ridiculous thing. They came to us and wanted us to give them the sand for these things, and I told them how ridiculous it was, and told them exactly what was going to happen when we had the '62 storm, when it took out the sand.

* * * * * *

(T. 564) Q. Piling. A. Where the pilings are? I can't do that here.

Q. Let me ask you this: is it true that the piling will intersect the curve between the alley and the building limit line? A. They'll be in the area, yes.

Q. That is fine.

(The Court) Down to wherever plus five is.

Do those foundations that you are talking about, do they extend horizontal, too?

(The Witness) Yes. The footings are—

(The Court) I am talking about the footings. I mean, footings, do they go to the — go the whole width of the building?

(The Witness) Yes.

(The Court) Do they go lengthwise, too?

(The Witness) Yes.

(The Court) Both ways?

(The Witness) Yes. Interlock, like this (indicating). Down below the ground.

(T. 565) The top of the footing is generally about plus seven, and bottom footing normally — I have forgot now. Let me look at the plat and see how thick the footing is.

Starts at five.

* * * * * *

(T. 568) (The Court) By what method do you intend to protect a twenty-eight by eight structure that houses the entrance (T. 569) that is in this building?

(The Witness) Well, reinforce it heavy, and tie it to the footing with the thought that if it did disintegrate, it would disintegrate without destroying the major structure. But it's designed strong enough so that it would take the '62 storm.

* * * * * *

(T. 570) REDIRECT EXAMINATION

By Mr. Rogan:

* * * * * *

(T. 571) Q. Then, would these two lots, that is, the lots on the Oceanbay plat, Lots 4 and 5, Block 38, would either part of these two lots be in the area described as "beach" or "boardwalk" in the first two Isle of Wight plats? A. No, sir.

Q. You indicated in cross-examination that you would anticipate that the front piling of this building would be touched by water approximately twice per year? A. That is about right.

Q. Do you have — can you tell us what seasons of the year you would anticipate their being touched by water? A. Generally, in the spring, March.

* * * * * *

(T. 578) (Lindner sketch was marked as Intervening Plaintiff's Exhibit No. 12 into evidence.)

(Slaughter sketch was marked as Intervening Plaintiff's Exhibit No. 13 into evidence.)

(Lindner sketch was marked as Intervening Plaintiff's Exhibit No. 15 into evidence.)

* * * * * *

(T. 579) JOSEPH G. HARRISON

DIRECT EXAMINATION

By Mr. Rogan:

Q. What is your name and address, sir? A. Joseph G. Harrison, Berlin, Maryland.

Q. And how old are you, Mr. Harrison? A. Sixty-seven.

(T. 580) Q. What is your occupation, sir? A. Supervisor of Assessments of Worcester County.

Q. How long have you been Supervisor of Assessments of Worcester County? A. Since April, 1960.

* * * * * *

(T. 581) Q. Now, directing your attention to the 71st Street area of Ocean City, were you familiar with that area during the March, 1962 storm? A. Yes, sir.

Q. And did you visit the area during the March, '62 storm? A. On March 6th, if I recall correctly. It was on Tuesday we met, and I went to

Ocean City immediately after the meeting, and this was about 4:30, and I went up the Beach Highway to 72nd Street, which was flooded at the time, between 72nd and 73rd Streets.

I rode up 71st — or 72nd Street — let me correct myself — 71st Street. Water was going across the highway between 71st and 72nd Street. I rode up to approximately what is known as the alley, between the front set of lots and the other lots, and went up on the sand dune, and the (T. 582) water — the wind was blowing fairly hard — not real hard — maybe forty or fifty miles an hour; and, actually, I watched the porch on the Brown property disintegrate partly.

* * * * * *

(T. 586) Q. Now, Mr. Harrison, the lots in question, which are Lots 4 and 5, which are in this Block, which is bound on the north by 71st Street, and the south by 70th Street, since you have been the Supervisor of Assessments, have you collected State and County real estate taxes on these lots? A. The County Treasurer has. I haven't. I mean, our office hasn't.

* * * * * *

(T. 586) CROSS EXAMINATION

* * * * * *

(T. 592) By Mr. Rich:

Q. Have there been permits issued for east of the dune? A. Yes, east of the dune line.

(T. 593) The dune lines, in general, up in this area, just about down White Street and across these front set of lots — I have some maps down in the office that were marked at the time, when the dune line was being put in there. And, generally speaking, it ran across these lots (indicating). This small map that I have here has got lines drawn, a red line and a black line that indicates approximately where the dune line was reestablished there. I do know for a fact, in Block 37, where the Reynolds house originally stood, in front of that house in 1960, there was a dune that was about fifteen feet tall, which came up higher than their porch, which was on a second story level, and this dune was partly washed out in the storm in 1960, and it left — chopped right off on the ocean side, just about about fifteen feet straight down.

Of course, during the '62 storm, that dune, and all of the other dunes in that area, was flattened right out and left the Reynolds cottage standing up on piling, which, fortunately, was on some good heavy piling and well-built, standing up about four feet above the sand level. And that represented quite a washout, quite a bit of erosion in that one storm of 1962.

Now, all of those other lots to the north of it (T. 594) was damaged to somewhat similar extent, and we have since, of course, been restored partly by pumping in of sand by the Army Engineers, and as Mr. Cropper testified, part of it was due to natural build-back.

* * * * * *

(T. 596) Q. It's your testimony that there were dunes there in that area where you put the wavy line of about four or five feet, is that correct? A. Somewhere in that neighborhood, yes. I was up on one of them in '62, during the storm.

(The Court) Show the witness Corporate Exhibit No. 1, and maybe that will help him estimate.

(The Witness) You see, what happens up in there, in some sections you can have one build up in six months and it might disappear and it might not be built back for some little time.

(T. 598) Here is about where I was, right along in here, as best I can recall. I watched the waves hit this, and later, Ray Coates gets here (indicating), and he gets somewhere along in here, and his car is hit by a wave.

By Mr. Rich:

Q. Where was Ray Coates when it was inundated by the wave? Behind what lot? A. Somewhere between 1 and 2. I think he went up against Shuey's house. That is where he made the telephone call to get some help out of Ocean City.

Q. How deep was the water there, sir? A. It wasn't any water there when I was there.

Q. Was there water there when My Coates' car was struck by a wave? A. He was hit by a wave. Mu understanding. Now, I didn't see Mr. Coates' car hit, and I am — all I am repeating is hearsay on the part of Mr. Coates' car being wrecked.

The time when I was up here (indicating), opposite Lot 5, within the street right-of-way, on the sand dune, which was four or five feet high, the waves were coming in there pretty strong, and looked like they were getting (T. 599) stronger. I stayed up there, maybe, four or five minutes; and, as I said, I said to my son, "We'd better get back to Ocean City before it gets us."

That is when—

Q. How far up did the water reach when you were standing on that dune outside of Lot 5? A. Probably come to about half the distance on Lot 5.

You see, that's twelve years ago, and you don't remember, in detail, too much like that, because so much going on. But, some big waves, anyway.

Q. You are not really certain about what you observed at that — for that short period of time that you were there, are you? A. I am on the sand dune that I was up on, the sand dune right there at the corner of Lot 5 and 71st Street.

Q. Are you certain to the extent to which the water came in in that area? A. I am certain to the extent that it was some big high waves in there. Enough for me to make a decision to get out of that area.

* * * * * *

(T. 604) A. I think that was immediately after the storm.

In '62, we made adjustments on houses that were washed down immediately, retroactive to January 1, and the breaking point was there, if the houses were moved to any extent on their foundation, they were removed from the tax rolls until such time as they were restored.

* * * * * *

(T. 606) Q. What I am trying to get at is whether the reduction in the assessment on this particular lot was due to the fact that the house was washed away, or whether it was also took into consideration that the lot had actually been diminished in size. A. It wasn't made simply because the house was washed away, because on the lots right next to it, there wasn't anything on them, and they were given the same kind of reduction.

Q. Okay. So the lots we are talking about were right next door to the Brown lot? A. Yes.

Q. And these lots we are talking about, 4 and 5, their assessments diminished because the lots diminished in size in the storm of '62, is that correct? A. They were all reduced to some extent on the (T. 607) oceanfront, whether there were any buildings on them or not.

Q. And why were they reduced on the oceanfront? Why was the reduction made? A. Due to erosion taking place to one extent or another.

In some cases, as I said, there was more erosion than there was at other spots. We made a uniform judgment there on these.

Q. Are you satisfied, in your mind, that in these lots that we are talking about, 4 and 5, oceanfront, on the corner of 71st Street, were actually partly eroded away by that storm?

(Mr. Rogan) Objection.

Ask him — I think he should ask him, Your Honor, was any portion of the Lots 4 and 5 eroded away. Not whether he is satisfied, in his own mind, in comparison of all of Ocean City. Ask him direct.

(Mr. Fox) I think the objection is well-taken.

By Mr. Fox:

Q. To your knowledge, was any part of Lots 4 and 5 eroded away by the storm of '62? A. Specifically, I can't say whether it was five feet, twenty feet, or sixty feet, because I didn't inspect (T. 608) all of these lots personally. We assumed from the kind of letters we got, and from what observations we made at other points, that there was a fairly uniformed amount of damage; but to be specific on these two lots, I can't say whether ten feet, forty feet, or sixty feet.

Q. Can you say that there was any? A. I would assume that there was some. There were other spots up and down the beach that there was some damage. I would assume that there was some on this.

* * * * * *

(T. 611) (The Witness) If there was any, there wasn't any over on the beach, because a lot of cottages built up on the sand dunes on cement pads, and they are the ones that went out, and went out fast. Some fourteen of them located up in the Isle of Wight Plat that just disintegrated, and disappeared. That was all.

Those cottages that were put up there on fairly decent piling withstood this thing fairly good. There was one small cottage, located just about at the Carousel. The Carousel was being built at about the same time this storm happened. There was one of them that went down, and one of them stayed there, and the one on piling is about six inches, and the only thing damaged on that cottage was washed the step away; because you had free flow of water and sand under the cottage.

The one next to it did go out, but I found out later that those piling weren't driven in. They were dug in, and they were just not long enough. Most of those cottages up in Fenwick area — and I'm speaking about from the Delaware Line south to about Block 18 — most of those cottages were on dug-in piling, and they did not withstand (T. 612) the storm. They were — everyone of them just disappeared along that oceanfront and—

* * * * * *

(T. 613) By Mr. Fox

Q. During the time that you were County Commissioner, Mr. Harrison, did the County Commissioners exercise jurisdiction over the beach of Worcester County from the municipal Ocean City line to the Delaware Line?

(Mr. Rogan) Objection.

I don't know what he means by the word "beach".

(Mr. Fox) I'll ask him what he means by the word "beach".

(The Court) Okay. Do you want to withdraw your first question?

(Mr. Fox) I would like to leave the question in (T. 614) and, then, ask him to define the beach area, if I may.

(The Court) Okay. Go ahead.

(The Witness) The beach area?

When you take the area north of Ocean City, which is north of the city limits of Ocean City, the beach area was clear back to the highway.

People used it promiscuously for one thing or another, and I don't think the County had many problems in there right at that time, except if somebody went off and built a cottage to the east of the highway, they'd want you to build a road into it.

And there was an unwritten regulation that if there were three or four or more cottages built on one of these streets, that the County would put a gravel clay road in there. And that stayed for a good many years, and worked out real well for both the property owner and the County; because more streets got to be built, and more houses were being built. Naturally, increased the assessable base of the County and, at the same time, value of all of the other lots were being increased.

* * * * * *

(T. 615) By Mr. Fox:

Q. During this period of time, did the County clean that area of the beach north of Ocean City? A. They provided some containers at the ends of the (T. 616) streets for a year or two in there.

You see, you have got a short period in there that the growth was getting to be quite heavy up there, and at about that same time, the City of Ocean City would annex an additional number of streets. I think the last one was up to 42nd Street, and, then, from 42nd Street, they annexed the whole area to the Delaware Line.

Q. Well, prior to annexation, did the County Commissioners employ prison labor sometimes to clean the beach area? A. They usually did it, if my recollection is correct, they tried to clean the beach at the starting of the season and, then, in between, they would use the County Roads Department to supervise it with the prisoners, and they would try to clean the beach, maybe, two or, possibly, three times during the summer.

Q. All right. A. I think that kept up for about, maybe, for a period of three or four years. Not only the beach, but sometimes that beach included two or three lots to the westward, from the oceanfront set of lots.

Q. Well, that is the next thing I want to ask you.

What area, do you know, did the prison laborers clean? From the water how far west? A. I'd say as far west as they found any debris that needed cleaning up.

Q. Well, during this period of time, was there a line of sand dunes in that area? A. There were sand dunes scattered over the whole area. You might have a sand dune starting back halfway between the ocean and the Beach Highway.

Q. Did the prisoners, if you know, go up and clean the area in back of the sand dunes? A. If it needed it; and it would — it was being used for picnicking, and one thing or another, and there was a lot of debris there that was cleaned up.

For instance, talking about sand dunes, just north of the Presbyterian Church on Baltimore Avenue, on the west side of Baltimore Avenue, when I was a kid, there were sand dunes there ten or twelve feet high.

As a matter of fact, under Tides Inn, in Ocean City, was the old Harry Cropper house, built on top of a sand dune and it was just in — and that is just to the west of the — west of Baltimore Avenue and 1st Street. Just a few years ago, the sand dune was dug out from under the (T. 618) house, and there's a restaurant in there now.

So sand dunes don't necessarily have to be right on the oceanfront, and you can get them scattered anywhere along that beach.

* * * * * *

(T. 619) Q. Now, you have been familiar with the oceanfront area of Ocean City for how many years? A. Reaches back to a kid, 1916 to the first storm that I recall being down there.

Q. During the period of time that you have been familiar with the oceanfront area, has there been any attempts — or what attempts, if any, have there been to prevent the general public from using the dry sand area between the sand dunes and the — where the water — where (T. 620) the wave wash comes up?

Have there been efforts to prevent the general public from using that part? A. No, that part of the beach area that hasn't been built on, and I'm talking about even above 9th Street, back in early twenties, was used by the public at any point that they wanted to use it, not only on the beach front,

but anywhere else up the beach that there wasn't any building, and the public would picnic on it, or bathe on it, or do a little smooching at night on it. There hasn't been any real restrictions on any of it that wasn't in use, and that includes even — go down to Ocean City area, go back to years when they first pumped in there, around west of 8th, 9th, 10th Street, along in there. It was—

(The Court) But once a building is constructed, does the public respect the building?

(The Witness) Yes, sir, I would say in general, when one is built, the public has respected them, in most cases.

* * * * * *

(T. 621) By Mr. Fox:

Q. Looking at this Plaintiff's Exhibit No. 9, you (T. 622) see the two condominiums, and you see the sand fence that runs in a north/south direction on this photograph? A. This is—

Q. You see the sand fence and those condominiums (indicating).

Is there any area east of the line formed by that sand fence that the public does not publicly use, to your knowledge? A. No, I think the public has always used the area out in there, even though it was privately owned, even down as far as 32nd Street. There hasn't been too much pressure by the private owners to keep people from using the beach area.

To the best of my knowledge, there was an incident there at 32nd Street, that Mike Lynch built a fence out on the beach; but I don't know, I believe the fellow up on the baech has got the same kind of title as the fellow back on Baltimore Avenue.

Q. Well— A. You're talking about trespassing—

Q. Well, we'll let the Court worry about kind of title they have got.

What I'm trying to find out about, the area (T. 623) presently used by the public on the Ocean City beach, and would you agree that the area east of the sand fence, that is shown on this Plaintiff's Exhibit No. 9, is an area that is now used by the general public? A. I would say the general public has been exposed to using most any of that beach area up to the present time. And, as I said while ago, the general public has used any part of the beach, not only beach front, but any other property that hasn't been occupied by houses. They have taken it upon themselves that they could use it.

* * * * * *

(T. 623) (The Court) Well, Mr. Fox, I don't want to cut you off, but we have put with a day and a half of this kind of questioning, and I have tried to be very liberal (T. 624) and let everybody question about it.

The whole thing begs before me, though, really. Witness after witness, now, has testified the true situation in Ocean City.

Mr. Harrison has repeated three times for you. Of course, he has taken us even further back, taken us all back down to 8th and 9th and 10th Street, but they have testified that the public has just used the open beach area until a building is built and, then, they respect the building.

Now, this has been the thread of all of the testimony, and I'm sure that you, as a private individual, rather than as an attorney, know that that is within your own recollection, your own knowledge. This is just a fact that we have to realize has now been established.

(Mr. Fox) Nobody has ever contended that the public is using anybody's building. We are talking about an area, is what I'm trying to get at.

(The Court) I understand, but we have been over it so many times now, it just isn't pertinent anymore.

(The Witness) Mr. Fox, I can recall back when the boardwalk ended at the Hamilton Hotel, and north of that there was an open beach, just the same as any other spot (T. 625) that might be open down there now, and the kids would have a lot of hot dog parties, one thing or another, didn't matter. The same thing when the boardwalk stopped at 9th Street, above the Commander Hotel. You always go to the end of the boardwalk. Didn't matter who owned the lot there. You used it as you saw fit to use it on a party.

And, of course, that thing is — has multiplied as years have gone along, and they were built on, people did respect your property. Sometimes you'd get to a point in Ocean City where you don't know whether you own anything or not, the way people try to take advantage of you once in awhile down there; but once in awhile, you think you've got a fairly decent title to it.

* * * * * *

(T. 627) By Mr. Fox:

Q. In this photograph, what area do you have as beach, according to your ideas as to what the beach is? A. Well, I know right in here there's some big sand dune (indicating).

Q. You are indicating along where the sand fence is? A. Yes. Some of those dunes have been built by the energies of man, pushed up sand, and planting grass.

Immediately after that storm, the County had a program of planting beach grass. We planted some two and a half million sprigs one year, tried to restore those sand dune lines, or the dunes' line. We call it dunes' line. Actually, it's a series of dunes, and what we are trying to do was connect them up so there would be a solid line and, therefore, there would be a dune line. But dunes can form anywhere up there on that beach.

I can recall, very easily, right after the storm, there was a couple of feet of sand, foot and a half, or two (T. 628) on the road, on the Beach Highway above 94th Street, and all that was moved out on the beach, and you go out there and find those sand dunes, and find it filled up with small particles of asphalt, where they are building the High Rise Apartments today.

But you can ride along the highway with a foot and a half elevation and gradually slope from there right on out to the beach. This was on March 8th or 9th, right after the storm. The whole thing has changed. You can build sand dunes, and you can get them to hold.

The same way out on the beach front. You can get thirty or forty feet of erosion on one section of the beach, and it might not be over one block in length, and that is due to a breach in the bar, and it can wash the beach out in a four or five month period.

Had the same thing to happen at the Stowaway Motel in 1960. The boardwalk was eight feet from the sand, and everybody thought the jetty was causing it. They'd just put in a new jetty in that vicinity the year before; but the next year the bar patched itself up, nature patched it up, and you had a six-foot fill in there. Come up within two feet of the boardwalk.

(T. 629) By Mr. Fox:

Q. Mr. Harrison, you mentioned in this area, shown on the photograph, Plaintiff's Exhibit No. 9, I was just showing you, that some dunes had been built along that sand fence, and some grass had been planted on them. A. I don't know about those particularly dunes, but I do know the County Roads Department planted two and a half million sprigs one year now. That was about 1965 or '66, somewhere along in there.

Q. Those two and a half million sprigs the County planted, was this on the dune built by the Army Corps of engineers? A. Essentially, most of it was on top of the dune line, the area in there that we have been speaking of as the top area of the dune.

Q. Are you talking about the dune built by the Army Corps of Engineers? A. Yes.

Q. Do you have any idea how much it cost the County to do any of that? A. I don't know, but I have heard a figure used, between planting the

beach grass and pushing up sand to restore the spots in the dunes' line, that we might get a (T. 630) breach in the storm, somewhere in the neighborhood of $20,000.00 a year.

Q. Does the County still expend the money to maintain the Army Corps of Engineers' dune? A. Yes, sir.

* * * * * *

(T. 630) (The Court) The last question was how much the County spends on maintaining the dune line, Mr. Harrison.

(The Witness) I called out to the County Roads Barn, and Mrs. Townsend is getting those figures together, but she didn't have them available right on the spur.

(The Court) Okay.

(T. 631) (The Witness) And the other question was the assessment.

I went back to — got back before 1950, and the assessment appears to be, at that time, at $300.00 flat per lot.

* * * * * *

(T. 635) (Mr. Rich) If this information could be supplied, I would end my questioning right now. If he would be able to supply the original assessment per block, which is now known as Block 38, with specific relation to the oceanfront lots therein, and bring it up to the present time, I think that would serve us all in good stead, Your Honor.

(T. 635) REDIRECT EXAMINATION

By Mr. Rogan:

Q. Mr. Harrison, have you ever, personally, seen anybody using Lots 4 and 5 in Block 38 of the Oceanbay City Plat for purposes of picnicking or sunbathing or anything like that? (T. 636) A. At these two lots that they are referring to?

Q. Yes. Have you ever, personally, seen people using those two lots for picnicking and sunbathing? A. No, sir.

* * * * * *

(T. 636) EUGENE R. PARKER

DIRECT EXAMINATION

By Mr. Rogan:

Q. What is your name and address, please? A. Eugene R. Parker, Jr., 715 Edgewater Avenue, Ocean City, Maryland.

* * * * * *

(T. 637) Q. And what is your occupation, sir? A. I am a real estate broker and developer.

* * * * * *

(T. 637) Q. What position do you hold with Seventy-First Street, Incorporated, the corporate defendant in this case? A. I am President and a stockholder.

* * * * * *

(T. 637) Q. When did Seventy-First Street, Incorporated (T. 638) acquire title to these two lots? A. Oh, we acquired title just — around three months, four months ago, but my two partners in the deal had them for seven or eight years. They bought them from Mr. Brown, and we, more or less, formed a corporation when we decided to build.

I have always been, somewhat, of an owner, but never, like, on title. I was never on title.

Q. But Seventy-First Street is the record owner now? A. At this time, yes.

* * * * * *

(T. 644) CROSS EXAMINATION

By Mr. Fox:

* * * * * *

(T. 645) Q. What use has been made of the lots in the last four or five years? A. Well, it's private property, but we let the (T. 646) public use it. We were being nice guys.

Q. I mean, the public has been using it like any other part of the beach for the last four or five years, have they not? A. With our permission.

Q. All right. Now, so far as you know, does the public have free access to all of the land in this particular block, between 70th and 71st Street, that is east of that sand fence right on down to the water's edge?

Has anything ever been done in your knowledge to prohibit the public from using that area? A. Not at this time.

Q. How long have you been in the real estate business in Ocean City? A. I guess since 1962 or '63.

Q. Do you know where White Street is, that has been testified to, up on the Fenwick Plat, a block from which it is? A. Yes, very familiar with it.

Q. Does it occupy a position somewhat similar to the alley that has been testified to, or referred to in this case that is just behind your lots? (T. 647) A. I can't see how, since that is a thirty-foot street and our lots are two hundred feet.

This is ten-foot alley and lots are one hundred and twenty feet. I can't see where they can be that similar.

Q. Well, when you say the lots are two hundred feet, what lots are you referring to? A. I am talking about the lots that are in front of White Street.

Q. You are familiar with the plat of Fenwick that Mr. Cropper referred to, are you not? A. There's a lot of different plats up there. I don't know which one you are speaking of. I'd almost have to see it.

Q. All right, let me shuffle here a second and see if I can find it.

I show you this photocopy of a plat and ask you if you can identify it, and if you are familiar with it. A. Yes, this is a revised plat of Fenwick Island of the Defendant corporation.

Q. And it shows what areas? A. Shows from the Delaware Line to what — where the Carousel is built on, English Avenue.

Q. Now, this plat does show White Street? (T. 648) A. Yes.

Q. And I was asking you a comparative location of White Street and the twenty-foot alley that runs in back of your lots.

* * * * * *

(T. 648) Q. Now, you said a moment ago that when I was directing your attention toward this plat that the lots were two hundred feet, and I'm asking you what lots were you referring to? A. I think most of the lots are east of White Street.

Here are the most (indicating).

Q. Do you see any dimensions on this plat? A. Yes.

(T. 649) There is a two hundred foot dimension right there (indicating).

Q. Now, these lots, does it indicate the eastern terminus of them in the water, or below mean high water? A. This plat does.

Q. Now, you are familiar with the James B. Caine house, are you? A. Yes, I am.

(The Court) Does anybody want to — does anybody want to object?

(Mr. Rogan) Yes, sir.

(The Court) If you don't, the Court is going to strike it out sui sponte, because that case has been pending on this docket, it hasn't been tried for obvious reasons.

Now, I am not going to get into it.

(Mr. Fox) If it please the Court, I would make a proffer—

(The Court) All right.

(Mr. Fox) —that I'd show, by this witness, that he was aware of the litigation pending in this Court for the last three years, wherein an injunction was sought to remove a house, which had been built in an area claimed to be the public beach, east of White Street as shown on the (T. 650) Fenwick Plat, which certainly is, to some extent, similarly situated to the lot that is in question in these proceedings.

(The Court) Well, I am going to overrule the objection because I don't see any similarity.

So, go ahead and ask another question.

(Mr. Fox) You mean you are sustaining the objection?

(The Court) I overrule the proffer, is what I meant. Deny the proffer, whatever terminology. Can't try two cases in one.

(Mr. Fox) I am not.

(The Court) We will have to have all of the other facts in the other case before it—

(Mr. Fox) I am trying to show that he knew that there was litigation on this same subject matter, that's all.

(The Court) He may have the same impression the Court has, that they are two different cases and weren't similar, from a factual standpoint.

(Mr. Fox) I have not further questions.

* * * * * *

(T. 651) (Mr. Cathell) I guess it would be appropriate for me to say that is my case, too. I didn't have one, but that is it.

(The Court) I am amazed.

* * * * * *

(T. 651) MARSHALL T. AUGUSTINE

DIRECT EXAMINATION

By Mr. Rich:

Q. Mr. Augustine, please state your name and address. A. Marshall Augustine, Crownsville, Maryland.

(T. 652) Q. By whom are you employed? A. Department of Water Resources.

Q. In what capacity are you employed by that Department? A. Natural Resources Planner Sedimentation Specialist.

Q. With regard to sedimentation specialty, do you have any former employment that went in that direction? A. Yes, thirty years with Department of Agriculture, Soil Conservation Service, U. S. Forest Service.

Q. What was your title there? A. The last title was Plant Material Specialist, Critical Area Specialist for New Jersey, Delaware, Maryland, and Virginia.

Q. Did your duties entail working with dunes and beach areas? A. Yes, they did.

Q. Exactly what were your duties with regard to those regions? A. As Critical Area Specialist, it started in the research phase of it in 1956, at the request of the four states, because of problems existing along the shoreline.

(T. 653) Q. What four states were they? A. New Jersey, Delaware, Maryland and Virginia.

* * * * * *

(T. 655) By Mr. Rich:

Q. Now, before we go into your questioning, I would like you, as best as you can, to give me your definition, of what you refer to during your testimony, as the "beach". A. Well, I have my charts to show this.

(T. 656) The beach, in general terminology, if you have to understand, is the area which is accessible to human traffic and, normally, at that one to twenty, or twenty to one grade slope until it reaches what is called the berm.

Q. Augie, you are going to have to slow down a little bit. A. I'm sorry. But is that general slope from the water line (indicating). The mean low water tranverses up under general slope of usually twenty to one, to what is known as the berm, or level line in front of the foredune. That is the first dune. The primary dune.

* * * * * *

(T. 658) (The Witness) Now, I would like to go into, first, the physiographic provinces of the shoreline.

* * * * * *

(T. 659) The physiographic provinces along the Maryland shoreline is from the Indian River Inlet to the Atlantic City Inlet. At Bethany Beach is what is known as the nodal point over which littoral drift, from there (indicating), goes north and south, the southern drift carrying over Maryland.

(T. 660) Now, this is a very important area. It is a narrow band of which the sand travels and, then, in which, with the wave action, is brought onto the beach, and picked up by the wind to nourish the beach and the dunal area. There is also an area beyond this which is known as the near shore, which affects the contours, affects the wave action on this (indicating).

Now, the second physiographic province is that of a cross-section, and just as an intrical part as the — along the longshore province. And it starts with the longshore bar, the configuration out under the water, the deeper waters go up normally to a depth right in front of the — start of the mean low water line, and from there up then what is known as the "beach area", which continues up through to the berm.

Now, the berm area is normally a split of ground level, vary from 25 to 50 feet in width, and, immediately (indicating), and the foredune or the front side of the foredune. Then comes the primary foredune and, then, Mother Nature built up the grass, in this area then (indicating), and the soil became — temperatures become acclimated, shrubs would grow over this (indicating). So in the process, nature went forward, and that result (T. 661) would end up in a primary dune, known as the American Beachgrass Zone, the Scrub Zone, where shrubs and herbacious material grow, and the Tree Zone.

Now, this is Mother Nature's concept of shoreline protection. The longshore and the cross-section, each and every phase is intergrated, and has its parts of play, one without the other.

In order to show this, the most important relationship, naturally, is the primary dune down to the mean low water, and this is the area that man has his greatest impact on, that you can also have the impact in remedial work.

* * * * * *

(T. 662) Now, in dune you might limit that there, your mean high water, (indicating) is your bank-fold water in your stream.

Now, Mother Nature then provided this berm area and a primary dune to protect man, and it is the primary dividing area between the ocean and the hard lands, or if it's bay area, in back of it.

* * * * * *

(T. 663) Now, the phenomenon which the berm and the beach and a dune are built up, everything is related (T. 664) to energy. This is dune-building, or sand movement. The fine particles along the beach, the very fine particles, are picked up, what is known as suspension, the wind currents, and can be carried for long distances.

The two forces to build up your beach and your dune are saltation, which is a medium-sized particle, which carries along — hops along the ground. You have seen just in a single hopping along and, the course of the larger particles then roll, or bounce, along. That depends upon the velocity of wind on the shoreline and the amount of sand available as to how quickly you build up your beach and your berm.

Now, under Mother Nature's conditions, and up to the time of limited construction within this dunal area, from the records that were given by Turbid Slaughter in the early part of the trial, based on the Corps of Engineers' report, prior to that, I called Howard Nelson of the Corps to get these figures.

From 1850 to 1929, a period of seventy-nine years, was accretion, or build-up, of one hundred thirty-five (sic) lineal feet.

These — I asked for 71st Street — was accretion of 1.6 feet per year.

(T. 665) All right. Now, this is all based on the laws of energy. It's not what Ithink. It's not what anyone thinks. It's how Mother Nature's law works. I would like to explain those.

The dynamic forces of wind and wave operate on precise laws, and are either building up or destroying. There's no such thing as static in this zone.

Next, plant life, which is actually, also, a form of energy, is necessary to anchor sand in place and trap moving sand. Can function only when we meets its requirements.

* * * * * *

(T. 666) Now, I will go into the dynamics, and we'll call this encroachments by man. First — the dynamics are the whole thing. First, we'll take up man's action, encroachment by man from the dunal area. This is a very fragile strip of real estate. In my humble opinion, no natural resource in the State of Maryland has been so used and, also, abused with less

thought and time and care-taking to the study of the true characteristics of this natural resource and to its restoration or preservation.

* * * * * *

(T. 668) Now, here Mother Nature always has certain limitations she imposes on us. American Beachgrass is known as a primary grass. It performs miracles, but one thing it cannot stand is the foot of man. It is meant for a job, and must — its limitations are traffic.

* * * * * *

(T. 668) All right, off-shore depths.

The deep water moving westerly. 1929 to 1947, (T. 669) these were presented before, of course.

* * * * * *

(T. 669) The next is Atlantic City, where we know we have one-half foot rise in the ocean since 1930; and since it rose in the Atlantic that much, it's reasonable to assume that the ocean does not grow in its plain. So we have rising water.

The other phenomenon in the State of Maryland is the geological recession of our shoreline taking place in its geological phenomenon. That has been confirmed by geologists, dynamics and nature's — well, the net result of man's actions and the dynamics of nature, gives this (T. 670) picture as 71st Street from 1929 to 1947, an eighteen-year period, two hundred and seventy lineal feet, or fifteen feet per year is the erosion rate.

Now, breaking it down from 1947 to 1965, and this is not accurate, because the State Roads dumped thousands of yards in the dune and the Corps pumped and nourished and spread it there, but taking that as it is, an eighteen-year period, we had twenty-eight lineal feet of erosion, 1.4 feet per year, coupling this into a thirty-six year period gives us 8.2 feet of erosion per year.

(The Court) Can I ask you a question right here, now that I have asked the others?

(The Witness) Yes, certainly.

(The Court) I believe that the diagrams in evidence show that the beach actually built up from 1850 to 1922.

(The Witness) 19—

(The Court) To what do you attribute that build up?

(The Witness) 1850 to 1922, there are natural phenomenons that occured, of course, but in that area, up to 1922, in New Jersey, also, we had accretion along those lines, and it is probably the fact that, at that time, we probably had yet the remnants of, in many of these areas (T. 671) of our Tree Zone, Shrub Zone, and our Primary Zone, and we did not have the heavy usuage of this area.

So it was pumping more in bounds and, also, at that time, at least the deep water movements were not known at that time as encroaching in. That is probably — the deep water, of course, is the high energy.

(The Court) I was looking at the high water mark. The high water marks move way out from 1850 to 1922; do you remember that?

(The Witness) I do not remember that particular reference in here, but—

(The Court) Okay. All right.

(The Witness) But this is the—

Now, I'll start with the work in Maryland. The restoration activities are the plus side of man, at least.

In 1962, the Army Corps of Engineers nourished the beach through dredging and dozing. Number two, they established the dune line and built the dune line with dozing. Now, this was at an elevation and it held true pretty closely to plus twelve, with a twenty-foot crest. The five to one slopes were not always attained, because in the back, some of these, of the westerly slopes, there were severe blowouts. Some of them were steeper.

(T. 672) On the frontal shoreline, or the frontal of the dune, the five to one held fairly uniform throughout the entire reach. The reach varied because some of the areas were fairly shallow, of the beach area, so they were not always fifty feet or twenty feet. They did vary, and the length of the slope varied, and they also — also the twenty to one, although when you put in hydraulic dredging, in a short reach, it changed very quickly to a steeper slope. But this was the general configuration.

I was in New Jersey at the time the famous storm hit, and I came down and went through Delaware and in Maryland. At the time I came in then, Worcester Soil Conservation District requested, through the Worcester County Commissioners, for assistance.

The County Commissioners asked for assistance, and I was sent in as a specialist.

At that time, Mr. Ken Carter — was assigned to work with him — later, Ned Cueman. Then we made an appraisal of the entire dune line, and we started the — I set up a research project, from 94th Street to the Carousel immediately to evaluate the effectiveness of the American Beachgrass and planting techniques to find the most successful techniques of establishing it for the next year.

(T. 673) We started planting wholesale — Soil Conservation Service supplied all plants to begin with, and W. R. Grace supplied all of the fertilizer and the transplant machine, and we had prison labor to do this work.

As a matter of fact, at DuPont's three of them got away from me one day, and that wasn't too good.

But, at any rate, we started planting from '63 to '68. We planted the dune from the foredune toe over the crest of the dune to the westward toe of the dune, from 36th Street to the Delaware Line.

The fencing operation, we did not have enough money with the County Roads or the County Commissioners, so that on the trainer dikes, or the twelve-foot dike, I would liked to have had in Delaware, two fences, twenty feet apart, but we had to stagger them. That was because of the economic picture. Later on, we came in and put a fence here, and ninety per cent of them were used fences, or broken fences, and hard to place there.

By 1964 we had built up, roughly, up to sixteen-foot elevation. Then the center fence, the one you see now, came in, and that was, hopefully, to build it up to elevation of twenty.

In 1968 and the last evaluation that I made of (T. 674) the dunes, themselves, we were up to plus eighteen average. Delaware, well over twenty, and New Jersey were up, I imagine, to close to average of twenty-five.

Now, the reason for this, Your Honor, is the fact that we are dissipating energy.

Now, the width of the cross-section here, and the effectiveness of the tide down, are the two factors that deter and absorb energy.

So, therefore, it's necessary to broaden this cross-section. That is what we did.

Now, in October of 1970, Ned Cueman called up and said, "Oh, you'd better get down here. We have had several Northeasters, and I understand it has damaged the dune, and several of them fairly severely."

I did come, and at 71st Street, among others, inspection revealed that at 71st Street, along with several other locations, that northeast storm tides

had topped the dunes. The American Beachgrass, in front of 71st Street, was nearly non-existent. As far as erosion was concerned, it was non-effective, from our original planting.

Also the frontal slope of the dune had eroded from a five to one to a jagged one to one, not just a uniform. Therefore, the storm waves were hitting it head-on.

(T. 675) Now, Your Honor, I would like to take up some of man's activities to break them down.

* * * * * *

(T. 676) All right, and with this, I would like to point out some of the weak points, or points of deterioration associated with construction.

First, I would like to show westerly crest of dune, the westerly crest being the westernmost part of the top of the dune. Now, this is where piling comes in at this point, and the rest of it is westerly of that area.

Now, this, and this (indicating), and observations across the eastern State, most easterly construction that should be permitted, the danger areas, are that the westerly slope of the dune is exposed to wave action from over-topping and from flood waves receding. Even at this, we have our limitations on this.

(T. 677) Now, at this, it is necessary that we have a dunal area that conforms to that which offers the most resistance to energy, namely, plus sixteen minimum of the crest of the dune, with a twenty-five foot crest top coming down to five to one, with a 10.5 elevation, with a fifty-foot level berm, and twenty to one slope to your mean low water.

This is a minimum to which we can have protection to the foreside of the dune from the wave action.

We are still susceptible, however, to backlash action to this (indicating). What happens, when we build over the dune, or easterly of the dune, east and west, and this is the center line of the dune (indicating).

Now, to begin with, this affords no protection to the dune, as erosion proceeds westerly, tides will eventually flow under the structure of the building.

Your danger areas: first, pilings create turbulence, both from water action and from wind action, causing the dune to be blown out — blowouts in the dune.

Number two, and most inportant of all, is that American Beachgrass can stand all but traffic. There is one other limitation. It was not meant for

shade. It is open in the sun. Therefore, it does not tolerate, and dies out under shade conditions. Shade kills American (T. 678) Beachgrass, thus exposing the loose sand to erosion.

Third, is the maintenance. Uniformity of maintenance of both the beach, the berm, and the dune is vital; and even after the vegetation is established on this, blowouts occur.

You have here, over and over again, how dunes are constantly forged in an irregular — since we have no — and it also mentions that there were secondary, tertiary dunes. Those have long since disappeared. Now, we have no second or third fence. We only have the primary dune to defend us between the ocean and land. We are, also, not using this in a manner in which nature wants.

* * * * * *

(T. 679) Now, I would like to explain, if I may, the forces of why we get this action on pilings. So I have taken this, the simplest hydraulic grass, which is laminar flow, which is a smooth flow in a stream—

By Mr. Rich:

Q. Excuse me. What kind of flow was that? A. Laminar flow. L-a-m-i-n-a-r.

Laminar flow, and I show flow lines in blue.

Now, if we would take a line, and arbitrally put squares across those lines, and did look down on them as cubes, down through here (indicating), these are equal potentials of energy, each one of these squares as the waves come across an area.

Now, as they hit a piling in here (indicating), then they are deflected and, of course, the closest to the piling is where the severest destruction occurs and, then, the third wave, fourth wave, of course, are deflected around it. What happens is that in this wave entering in here, it is squeezed into about one-fourth its normal size. (T. 680) This by one-half, and this by three-fourths.

Now, what that means is just like taking a four-inch hose and you contrict it at the end to a half an inch, and the energy is terrifically increased, that's the reason for fire-fighting, you throw the water over an area. Energy is squeezed in around here (indicating), and is doing it. It has to get rid of that energy, so it picks up the sand, whatever is in its way, and takes it out. Normally, it is an elliptical pattern.

* * * * * *

(T. 680) When the '62 storm hit, I was there at that time. We lost thirty-five feet of our protected dune line. The unprotected dune line was natural sand fence, without any vegetation, lost one hundred and fifty feet. Bulkheading, just put in, and at tremendous cost, withstood longer than (T. 681) our vegetated dunes, the onslaught before it started receding. One plank let go, and in a matter of hours, the next block was gone and the street was gone.

So there is a very, very important area, and the extent of energy of nature is hard to duplicate by man at any time.

Now, I'd also like to point out that in the wave action, we have a turbulent pattern. It's not laminar flow. Therefore, this can be exaggerated also to configurations of the blowout, will vary because of the turbulence of flow.

Now, at this same time, just by way of curiosity, you were asking about why you stepped into the moist sand, that is filled in just like nothing — or you dig a hole, and it fills in just like you never took anything out of it. That intrigued me, too.

* * * * * *

(T. 682) So, I went back to hydrology and that answered the question.

Under that, there has to be a surge, or flow. Under your sand tides, you have your ebb and flow, flow and ebb of your tide, so we put a surge under it. That did it. When you stood on that, in that thing, you went right down in it, and you stepped back and/or you dig a hole in it, and it filled right in. This took me, then, to the back, rather, of it, of quicksand, and I went down to Virginia, into the dismal swamp and brought up samples of that, and it's very fascinating, because quicksand is no more than less of real fine sand particles, which are perfectly round, like ball-bearings.

When you put a surge of water under it, they — the friction is so little that it actually rolls you right in it. So that is the phenomenon of why the sand seemed to fill in because of the surge and flow of water under the sand and around the particles, the quicker they can actually roll you in.

(T. 683) Now, on this, we tested sand fences and every type of a pattern conceivable, both here and the West Coast that is, we had parallel, we had zig-zag, squared, had diagonals, and, uniformally across, all of the research pointed out one thing, the most effective sand-trapping that is depended on is parallel to the shore. Anything other than that, the peculiarities of winds or gusts would blow you out. It would do you more harm than good.

One of the peculiarities of the groins in there, they have to be exactly spaced, exactly out at the right distance, or you get unevenness of a curve. You get accretion on one end, and a blowout at the other.

That is the reason you see the sand fences uniform and why — and we try to keep an elevation as uniform as possible.

Now, what happens is, of course, that when we have the zone here, of loose sand, and as the tide comes up, it saturates the sand against the smooth surface. You have (T. 684) a slippage zone in that.

* * * * * *

(T. 687) "In order to protect the natural resources of the State, the Secretary of Natural Resources is directed to adopt criteria and procedures to be used by the counties and the local soil conservation districts to implement soil and shore erosion control programs—

The Department of Natural Resources shall assist the soil conservation districts in the preparation and implementation of a unified sediment control program."

With that in mind, the philosophy was to keep construction off of the dunal area, east of the dunal areas, in line with the—

(The Court) Wait a minute, now.

(The Witness) Yeah.

(The Court) Pursuant to that Act, what was the administrative organization set-up to enforce the regulations that were promulgated as a result of that Act?

(The Witness) Under this Act, the County was directed to develop a program and administer the program, supply inspection and enforcement on County level. The District approval — a technical agency to do the approval agency of it.

* * * * * *

(T. 688) (The Court) What was the set-up in Worcester?

(The Witness) In Worcester County, for the inspection of the permits, they had to hire a man, from the district, parttime to do this.

(The Court) What is he known as, sediment control officer?

(The Witness) And he is the inspector right for the sediment control program.

(The Court) He is the sediment control officer?

(The Witness) Yes, he works out of the County and District, parttime.

* * * * * *

(T. 689) On the criteria of that, the Corps was making their study at this time, and I was working closely with the Corps, and knowing their program and working with them, I was in favor, naturally, of the entire program, how it was obtained, whether Corps or County, that is something else, but the philosophy of twenty to one slope, the philosophy of the berm and the dune, protection of vegetation, and from damaging traffic.

So this was the grounds, then, that I was waiting then for the City to accept the Corps program or get — or come on their own. Naturally, they did not accept the Corps program, or they did not accept the Corps program so we are in a state of flux right now, torn between (T. 690) whether the County does the maintenance work for the dune, or what part the City will do.

So, right now, you see, we have no coordinated program to assure the vegetation restoration of this dune crest and the whole line. That is where we are.

* * * * * *

(T. 690) (The Court) What is the function, under our present set-up, of the sediment control officer, and what standards does he utilize to grant or deny a permit?

(The Witness) It is so stated in the Act that any county, any agency within the County, can ask the service of the Department of Water Resources to assist them in evaluations, even to carry out inspections and enforcement.

Because of specialized area in here, the first thing that I arranged for was a field trip on the dunes with Mr. Allgood, an outfit, the Corps of Engineers, the Geological Survey, the Chesapeake Bay Affairs, Council members, S.C.S. personnel, all members who had anything to do with this, to take them out and with the Forest and Parks, arranged a caravan tour of the dune, so that I could explain to them some of the phenomenon taking place and explain — and the Corps — explain about the Corps program, and what it would (T. 691) mean to the City, and the vegetative program; so we had that taken. That was part of the educational phase.

Then when they get a — when they get a proposed plan for development — I am not in all of the time. If I'm in, they call me and I'll review it. I don't get a chance to review them all for comments. If I get a chance, I come down to help out.

* * * * * *

(T. 691) (The Court) Well, Mr. George Dryden, it has been testified, is the Sediment Control Officer for Worcester County.

* * * * * *

(T. 692) Now, I ask you what does he do when he gets an application for a permit and what standards does he utilize?

(The Witness) Well, we have a book called "Standards and Specifications" — and I did not bring it along — for our sediment control, which covers the — it's statewide in there, and covers the general vegetative practices in which we are involved.

But the dunes, themselves, being a specialty, are not included, so that until we get this worked up, and hopefully the Corps, until it gets it worked up and gets a neat package in here, we, at the State level, are delegated the responsibility to assist every county in their program.

* * * * * *

(T. 694) And, so, in summarizing, in coming up to your point, Your Honor, I would like to point out deterioration forces that work today along the Maryland shoreline.

They are the geological migration of shoreline westerly; movement of off-shore deep water depths westerly; rising ocean; and man's destructive activities — change without compensation resulting in accelerated motion. (T. 695) Now, at best, man's efforts, because of these, are retarded in nature. Therefore, anything, any plan that comes in should have in its plan, not that for exploitation for a particular use, nor should it be just for holding status quo, but in this particular resource, it should be for the enhancement, working together for the enhancement of the entire resource area.

What we asked for, when they look over a plan for erosion and sediment is this: that it is anything — any structure that deteriorates from vegetation, as successful vegetated cover of a dune, with adequate cross-section of height and berm and depth, and a berm and the twenty foot, twenty to one slope.

* * * * * *

(T. 696) Now, from the — from the dune, westerly, what we look for there is their grading plan to see to it that water — I want no storm water going over these dunes, or any place, because they can't tolerate it, to see to it that they come into the backside of the dune, in here (indicating), that they have a program that maintains the twenty-five foot crest, and the revegetation as such for (T. 697) there, and the tidal areas around are subsequence of their grading operation so we don't create sediment back to the bay areas, or storm drainage problems back to the bay side.

So they review it on two areas, and this is very simple, this way (indicating), this way (indicating), gets more difficult, and so, just like I went

over the physical features with you here today, I go over and try to evaluate each case that comes up, * * *.

* * * And, certainly, before any building is allowed east of this dune line, we should have a uniform program, a minimum program of such standards, exercised by the Corps and, then, you evaluate that and, if on the technical standards of it, you can allow this or that, but anything until this is done. Why? Because we should first provide for the best utilization of available sand and transported sand to dissipate energy.

That is, if you are going to use groins, or if you are going to use hydraulic dredging, or using wind action to build up in here (indicating), every measure, because this is the only defense between the ocean (indicating), every effort should be made to use every grain of sand to (T. 698) the best of its advantage to dissipate energy to protect Ocean City and inland.

Now, next, provides for vegetative tie-down of dunal area with American Beachgrass to dissipate energy and to trap — entrap existing sand.

Third, restrict building to the west side of the dune area.

Fourth, restrict traffic from vegetated dunal area to designated crossings to prevent deterioration. And that is simply like you do in Holland and Assateague State Park, that is, indiscriminate crossing of this cannot be tolerated by the American Beachgrass, is to have controlled crossings. People must realize the value of this.

* * * * * *

(T. 699) Last is provide adequate maintenance to insure survival because we are working with dynamics. We are working with energies that never cease, and this fragile piece of real estate is going to require the best technical knowledge that can be provided, and that worked in with the pressures and the needs of the community, the State, the nation, is the least that should be accepted in any program of this proportion and of this value to this County or State.

By Mr. Rich:

Q. The last point that you mentioned was the maintenance of the dunal area, Mr. Augustine. How does the building over the dune, or east of the dune, if you will, affect the maintenance of the dunal area? A. Well, in three ways:

One, the pilings creating turbulence from wind and wave; two, the shading action of killing American Beachgrass, thus exposing a weak joint

or weak zone; and, the third maintenance, because it is done with bulldozers. Usually, we use heavy-wheeled tractors, because of the sand, to keep the uniformity of the area. So, three phases are (T. 700) at stake in there.

* * * * * *

(T. 700) CROSS EXAMINATION

By Mr. Fox:

Q. What effect does the wind have on the maintenance of the sand dune? A. Good question.

Wind, yes, it's very important, in studying wind actions and patterns because, now, American Beachgrass, itself, sets up a turbulence so that — an energy dissipator. So you use a plant, then, and the reason we can't have a worn-out vegetation, because you have a clump here and a clump here, and that worn down vegetation will, itself, blowout irregular patterns.

Now, the lowest elevation of a dune is the breaking point that can destroy a community or cross-section.

Now, next, in the wind action in there (indicating), is that a sand fence is an obstruction, so, same as piling. The difference between sand fence and piling are, first, the plant is a designed plant by nature, to do a purpose. Sand fence did not come about just by pulling out of the (T. 701) air. We tested all manner and means of size openings to size restrictions, areas against the old plank, and it comes up to about, what we have in the standard sand fence, one and a quarter inch, with an opening of about three-quarters of an inch, is the most effective obstruction to the wind.

Now, anything that is parallel, say, to the shoreline, is the only thing that we go with now. The only thing that we tolerate. Anything at an angle, because of the turbulence of wind, create an irregular pattern.

Q. What effect does the construction of dwellings on the east base of the dune have on the wind's ability to maintain the dune? A. When you have a building there, it is, of course, like a bulkhead to the wind action in there, and you will have a — you'll have, of course, the bending of the waves to the side, and you'll have some — the suspension going over, but very little of that going over, so in the end result of it is that — in this turbulent pattern, when the wind hits up on this area in here (indicating), is splashing it up, throws it off the side and funnels it off, and you usually see it along the side, and keeps a pattern in front of a buildup and drops it there (indicating), in a regular pattern, and the tide comes in and washes it out.

(T. 702) So, what we'll end up with is a phenomenon that is not exactly understood, but in the waves retreating from this, we'll lose more than we'll

gain. Some of these laws we do not know exactly how to explain in these actions in here, but it is true that we have winds in many directions. Yet you study that, which does you the most good in building up and that is what we came up with. We did not have time to study what causes turbulences and why the diagonal fence won't work, but we tried to come out with something that would work.

* * * * * *

(T. 703) (The Court) Mr. Cathell just mentioned something, a sediment control ordinance for Ocean City; are you familiar with that?

(The Witness) That is what — yes, that is, basically, what we are talking about.

(T. 704) (The Court) And is that ordinance — does that ordinance meet with your scientific approval?

(The Witness) Technical approval, in my presentation, was allowing none to go over the dune line, and in the — in all counties, ordinances, from this ordinance, there are points of give and take, and I was away at this time, and my associate came back and approved it as it was, but ninety-nine per cent of it, yes. It's like all others.

* * * * * *

(T. 704) By Mr. Rogan:

Q. —from previous testimony, I believe it has been that the purpose — the primary purpose of the dune is to protect the properties westerly thereof; do you agree with that? A. Primary purpose of the — you mean the Corps' dune?

(T. 705) Q. Of the existing dune in the 71st Street area. A. Undoubtedly, the Corps built that dune, and we came upon it to protect the westerly property, so that it is true, certainly.

Q. And previous testimony, by several witnesses, was that the dune line, as established, really has nothing to do with the building up of the beach in the 71st Street area, do you agree with that? A. I certainly do not. I am a student of nature, and I am wholeheartedly of that school of thought of the phenomenon and the physiographic provinces that I have presented to you here, that in this area, that one, from the dune, from the dune down to the mean low water cannot be separated. And if you can show me, after the '62 storm, which was dead level four miles, where the shore restored itself without a dune, I do not know that because we wouldn't have worked so hard across the Eastern States to do it.

There is no way of doing it. You see, what it does, also, Mother Nature builds up if she has the sand there.

Another phenomenon we have to take care of, years ago, when you asked about this accretion, there was (T. 706) a period in agriculture, at that time, at which, probably, more land was cleared and worked in agriculture than it is now. At that time, we had accelerated erosion.

Now, this sediment came down into the streams, was carried in, and become a plus when it hit into the Atlantic Ocean. It increased the littoral drift. The sand has to come from somewhere. Someone has to lose for someone to gain.

During our period of time, we had this terrific accretion coming in, rich, so it could build up. Now we have less sand coming in. I can't prove it, except everytime we take soundings in our — everytime we take measurements of the bottoms of our back bay areas, we are witnessing increased levels of sediment in those, which means that we are trapping more in the back bay areas and less coming out to furnish this littoral drift. That means we have to make the best use of sand.

Now, sand, dead level, and you have an abundant supply through the saltation action, in the roll will build up in here (indicating), and when it hits a ridge, or anything else, that shell, or something else, will start building up, little by little. Nature does it.

Now, it will, in its own, if the sand is there, (T. 707) build that dune up gradually. As it builds the shore, or beach line, not independently, but together, and it's twenty to one, is that which rolls around, and then in the peak of this, it has its own physiographic, but builds up gradually together. It is one unit, sir.

Q. Then you disagree— A. In my opinion—

Q. Then you disagree with the opinion of the other gentlemen? A. I'll state that that is my observation, and it is in the literature, I believe; and that is it.

Q. Now, I take it, from your testimony, you would also disagree with the opinion of Mr. Slaughter, when he looked at the structure that is shown on Plaintiff's Exhibit No. 11, which is built out over top of the dune, and Mr. Slaughter indicated that, in his opinion, that would have no detrimental effect to the integrity of the dune. I understand, from your testimony, you would disagree with that? A. Oh, yes. This is the center line. It's the last fence we put up of the dune, and as clearly as can be seen that this center of the twenty-five foot — should be a twenty-foot crest — okay — to a twelve and a half (T. 708) feet this way (indicating), a five to one slope, at ten foot berm, most critical zone of your dune; yes, I would say very definitely on those factors that it effects it.

Q. You would disagree with Mr. Slaughter on that? A. I didn't — I say those factors are what I appraise as necessary for a dune.

* * * * * *

(T. 709) Q. You don't mean to imply, by your testimony, that there is statutory or ordinance authority which prohibits all construction east of the dune line?

(Mr. Rich) You can answer the question, Mr. Augustine.

(The Witness) You see, I don't know the legal terminology. May I explain it and see if I answer you?

By Mr. Rogan:

Q. Go ahead. A. It is set up that every plan that has clearing, grading and building must have with it a plan showing erosion and sediment and stabilization measures, or water-handling measures, which have to be of such quality to, at least, hold the value of that resource as it is.

Now, if a practice comes in, and it has none of these, and after asking for them, they still come back with (T. 710) none of these measures, there is only one alternative to take, and that is for the — if it comes to us to ask the Soil Conservation District to refuse a technical approval of this plan until such measures are forthcoming.

In other words, it is, maybe, a back way in that you have to meet certain technical standards to control erosion and sediment, and stabilize whatever you are doing in the State of Maryland, except on agriculture as it exists right now, which under soil conservation program or on individual lots of two acres or more that are back — independent of the shoreline.

Now, I may not understand your question, but that is the way we work.

(The Court) I think that answers it.

By Mr. Rogan:

Q. Sir, you will admit that this is, under existing law, some construction is permissible east of the dune line? A. Well — there is some, undoubtedly, going on, and I — that I don't know about, or did not come into my plan. I'll acknowledge that.

Q. Well, now, you have testified— A. Now, it's not my intention to let anything (T. 711) detrimental to the State of Maryland, or to the City of Ocean City, or the County, take place without recompense for it.

Q. I understand that you, personally, sir, do not want to see anything built east of the dune line. You have made that very clear.

My question is: there has been construction east of the dune line, has there not? A. Yes, sir, this has started after '62, after the storm.

Q. Since 1962, there has been construction east of the dune line, and you are familiar with the Ocean City ordinance on the matter? A. Uh-huh.

* * * * * *

(T. 712) Q. And you are familiar that Mr. Dryden did approve the plans for the construction of the building in this case? A. I was told that he did.

* * * * * *

(T. 712) REDIRECT EXAMINATION

By Mr. Rich:

Q. Is it true, Mr. Augustine, under the Article 96A, Section 105 through 111, that the Department of Natural Resources is charged to make recommendations pertaining to sediment control and erosion retardation of the various districts? A. Yes. Fundamental to it.

Q. And you are the one that the Department has (T. 713) charged to accomplish that purpose? A. I was hired for that purpose, not because I was a lawyer, but because I was a technical man, and the State wanted technical assistance done in this field; and they can hire lawyers to keep me out of trouble, or get me into trouble.

* * * * * *

(T. 713) Q. In your opinion, how would this proposed building effect the inter-relationship of the dunal system, as you (T. 714) have termed it previously in your testimony.

* * * * * *

(T. 716) Mr. Rich: * * *. Specifically, what we are contending, or what Augustine's testimony has shown heretofore, that this specific building, between 70th and 71st Street, will have an effect on the dunal system, as he has described it.

Now, Mr. Slaughter has testified in this regard. Mr. Lindner has testified, Mr. Cropper, as a matter of fact, has testified in this regard, and all I am asking him, and (T. 717) it's the last question that I'll ask him, is what effect this proposed building will have on the dunal system.

(The Court) Well, I am going to let him answer it, I think, Mr. Rogan. It's just a peculiar and unusual situation of — but I'm going to go ahead and let him answer and, at least, his answer will be before the Court for consideration. All right.

By Mr. Rich:

Q. Mr. Augustine, you can answer that question, but before you answer that question, with the Court's admonition, I ought to put on the record, that with all deference to your position, if you don't wish to answer the question, I'll withdraw it. A. It's all right for me to answer it. I don't mind that, though.

To begin with, there's no measure in the design, that I saw in the plan, to enhance the features of the dunal area necessary for the preservation or protection of either the beach or the properties west of the area that are of the property, itself. It is merely a structure situated there to function as a unit. In doing this, it, of course, does the same thing to the other. The pilings are there for (T. 718) the turbulence, winds, or storms, and anything along the side of it will be the sheer plains, that it also then shades out the American Beachgrass in here, and allows loose sand. We have nothing — we have conducted expensive research to try to get down plastic, asphalt, anything to attach sand to, to take the place of grass. We cannot do that yet.

And, so, inevitably, what you are going to have is difficult of maintenance of this zone, the heavy storms come, and I'd like to point out, just as our fifty-year storm frequency — that doesn't mean that we get a storm one hundred years, or fifty years, or one like the '62 storm in here — that we can have this storm and it can go right in, roaring right in, and when it hits in the dune, it is either going to go right through it until it hits an obstruction. This has an elevator shaft. When it hits that, it's like hitting a bulkhead. It's going to go up and down, once it hits that vertical obstruction.

So, that I can see nothing in that plan that will enhance the vegetation cover, which is the only thing we know of. We have gotten it down to a science. It doesn't enhance vegetation. It does not protect the sand buildup or trapping of the sand, nor does it tie into the existing sand on this side to fortify that as continuity or the (T. 719) integrity of the dune, nor does it supply, provide for the maintenance and preservation of the cross-section of the dune area, which is so necessary for this.

Now, other measures, like we have roads, streets, or streams, those practices show — oh, boy, phew. I get you in trouble again. I'll slow down.

They have to provide for the maintenance of these critical areas. That's part of the erosion and sediment program. That is what it is for.

* * * * * *

(T. 719) RECROSS EXAMINATION

By Mr. Rogan:

* * * * * *

(T. 719) Q. —Plaintiff's Exhibit No. 12, which is a view of the 71st Street area, looking south, and you have already testified that the building, closest to the bottom of the picture, has a detrimental effect on the dune. And (T. 720) everything that you have said about the proposed building would also apply to this building, which is close to the bottom of the picture, would it not, sir? A. Any building, that in the past, that came over to this — this comes up (indicating). I see it's right in — this is the east, or the west fence line along this (indicating). I'm not familiar with this building. Certainly, anything that's wrong is wrong, whether it was yesterday or the day before.

Q. This is the same building that I showed you in the other photograph, but it's looking at it from a different angle, sir.

Plaintiff's Exhibit No. 10, this building here (indicating). A. This, you can see very plainly in here (indicating). You can see the cross-sections of the dune area.

Q. All right. On Plaintiff's Exhibit No. 10, the building shown at the top of the photograph, at the end of the dune line, which goes over the top of the dune line, is that building not more detrimental to the dune line than the proposed structure in this case? A. I'd have to evaluate that, not from a photograph. (T. 721) I'm a scientist. I have to — I have to observe, not from this (indicating). I couldn't do it, sir.

Q. This building, in No. 10, the building I'm talking about, would that cause more shading of this grass you're talking about than the proposed building? A. I'll not answer from a photograph, sir. I'll just say, as I said before, that this area here is very definitely (indicating) either the east or west side of the dune.

You can see the cross-section under the bulkheading there, so that you know, and it's fifty-foot beach fence coming down from here, we know that this area is a vital area, and no grass growing on it; therefore, it is not a practice for erosion sediment control.

Plus the fact, Your Honor, when we came through here, we planted from the toe of this dune (indicating), right across and over. And in '68, we had a fairly good vegetated cover of the whole thing, and it is hard to take, when you try to protect people's rights, privileges to live, to look at a picture like this and see all of your work gone for nothing.

Q. You want to protect people's property, don't you? (T. 722) A. That's it. Life and property. You bet your life that is it.

Q. What happened to the grass that was built—

(The Court) Wait a minute. You don't mean to imply that someone destroyed your 19 — that the Defendant has destroyed your 1968—

(The Witness) No, no. What happens, traffic, construction, and so forth, have. As I say, maintenance is necessary for everything, and the maintenance in here (indicating) — maybe not maintenance. I cannot say at that point, but it's gone. And at several points, it's all gone.

So we need people to appreciate it.

Let me put it this way: we need to appreciate the resource and, at least, do the very minimum that is required to keep that resource healthy, right?

* * * * * *

(T. 724) Q. Do you remember Mr. John Whaley, who testified? A. Right.

Q. Do you remember the testimony that he had done some building in this area? A. Right.

Q. As a matter of fact, he built this building here (indicating), and he built what they call the Beach Mark Condominium, do you remember that testimony?

There was questioning about this swimming pool (T. 725) out front. How about Mr. Whaley's swimming pool? Does that have a detrimental effect? A. Yes.

Q. There are many structures that have detrimental effects. A. They are structures in this area.

* * * * * *

(T. 725) So, I am not saying that — certain things are wrong in that, but I also do not say that any of those — just because we made mistakes, we don't correct our mistakes.

Q. Mr. Augustine, I have one more question. A. Uh-huh.

Q. The dune line, as it presently exists in 71st Street, would that, in your opinion, survive another March 1962 storm? A. The dune line, as it is now deteriorated, no.

(T. 726) A dune line — I said on my statement in here, that the dunes have to have a certain — the dunal area has to have a certain conformation in order to exist.

(The Court) Now, just one thing, Mr. Augustine.

Now, I listened with a great deal of interest here, but you do have to approach the answers to these questions from a point of reality.

(The Witness) Yes, sir.

(The Court) Not from the point of theory.

Now, Mr. Rogan asked you whether the dune line, as now constituted, and you have to admit it's the way it's going to be, the present line, it doesn't have to stay here, you can build another one to the east. You can build up your beach. You can do anything that you want to do, but assuming that the present dune line is the one that he is talking about, you have to answer his question on the basis of the structures that are there, the use that is being made, made of the beach and of the area, and give him an answer consistent with reality, not the Caldwell section, as one witness called it, or not according to your plan of nature, back up to the — back up to the woods.

(The Witness) From my last inspection of that — was October of 1970 — when I saw it, there was a one to one (T. 727) side slope, and vegetation on it. It would not survive, no, sir.

* * * * * *

(T. 729) By Mr. Rogan:

Q. Are you saying it's a combination of Mother Nature and the dune line that caused the mean high water mark to move to the east? A. I said — you asked me if the dune line had any effect on moving east, and I said man's effort to reestablish Mother Nature's dune would, undoubtedly, have a positive effect, yes.

Q. Suppose man, in 1972, then, built another dune line, like the '62, like the Corps of Engineers' dune line, say, one hundred feet to the east. Would that have a tendency to cause the mean high water mark to go further to the east? A. You are going into dangerous territory there, because as you encroach below the mean low water and fill areas, there has to be this natural reach, and you get a twenty to one, and you move it on out into your water, near shore in there, there's a limitation where dune can come to the — to the beach line. You can't just put out midway, build another dike, trainer dike and put a dune line on that unless you have accretion and fill beyond that.

(The Court) This is a very interesting point.

Isn't it possible to use an entire system, that (T. 730) you are talking about, with jetties, or any other device, in consort with a newly established dune line in order to widen your beach?

(The Witness) That would depend on the off-shore gradient as to whether you drop off in steeper water, and you would have to be closely coordinated with that, otherwise, it will just take it away.

We have tried that in several instances, in Delaware, and it eats it right away until it hits its own kind of an imbalance in there, or balance in that thing.

* * * * * *

(T. 731) (The Court) —dissipate; what is your opinion with respect to the influence of that bar upon the width or the height of the beach area?

(The Witness) Well, providing we have the adequate — given a quantity of sand, adequate quantity of sand, that bar, which has — which dissipates the energy at the wave, at that point then will build up a better beach and a better dune.

Now, if that bar is destroyed or contorted, or even if it's sometimes fractured, as you know, then it comes through, and goes right through to a bulkhead or dune configuration.

So that is the one — one of the very first factors that should be evaluated whenever you build out like that, (T. 732) to see to it that — that is your prime energy dissipater. The depth of the wave breaks there.

* * * * * *

(T. 733) (Mr. Fox) Your Honor, the only thing that I wanted to do was. I had suggested to the Court that I might take Plaintiff's Exhibit No. 9, and take some actual (T. 734) measurements, and superimpose them on Exhibit No. 9 in order that anyone looking at the photograph, to get some idea of the distances, and what I did, I had a man, in my presence, this morning, measure the building that appears toward the top of photograph No. 9, where the snow fences are shown there in a — running in an easterly and westerly direction, to measure the distance from the front to the back of that building, and to measure the distance from the front to the back of the roof of the E. T. Park house, and to measure the distance from the porch of the E. T. Park house to the snow fence that is shown, and to measure the width of the building that is shown towards the bottom of Plaintiff's Exhibit No. 9, and put those four dimensions on — on another copy of Plaintiff's Exhibit No 9, which I would like to introduce as — could we call it 9A? Would that help any?

(The Court) Any objection, gentlemen?

(Mr. Rogan) No.

(The Court) All right, that is a good idea. We'll mark it Plaintiff's Exhibit No. 9A, Mr. Reporter.

* * * * * *

(T. 736) (Mr. Rich) Your Honor, there is one thing that is going to be provided for the record, as I recall it, is — and that is Mr. Harrison's figures regarding the assessment and the various transitions from the Isle of Wight Plat through to the bay — the 1940 plat, Oceanbay City.

* * * * * *

(T. 738) (The Court) The Five High booklet, is that a copy that can remain, now? It would be a terrible task to photocopy.

(Mr. Rich) Yes, that can remain. I can acquire another copy from Mr. Cook.

("Five High" booklet was marked as Intervening Plaintiff's Exhibit No. 15 into evidence.)

* * * * * *

PLAINTIFFS' EXHIBIT NO. 3

THIS DEED, made this 22nd day of November, A.D. nineteen hundred and seventy-one (1971), by ROBERT J. TAYLOR and ELIZABETH TAYLOR, his wife, of Washington, D. C., hereinafter called Grantors, Witnesseth:

THAT FOR AND IN CONSIDERATION OF the sum of Ten Dollars ($10.00), and other good and valuable considerations, receipt of which is hereby acknowledged, the said Grantors do hereby grant and convey unto SEVENTY FIRST ST., INC., a Maryland corporation, its successors and assigns, all those lots or parcels of land lying and being situate in the Town of Ocean City in the Tenth Election District of Worcester County, Maryland, which are more particularly designated and distinguished as Lots Nos. 4 and 5 in Block No. 38 as shown on the plat entitled "Oceanbay City, Md.", recorded among the Land Records of Worcester County, Maryland, in Plat Book O.D.C. No. 2, folio 76, said Lots Nos. 4 and 5 aforesaid, each having a frontage of 50 feet, or a combined frontage of 100 feet on the westerly side of the Boardwalk as designated on said plat, and extending westerly therefrom with a combined uniform width of 100 feet a distance of 120 feet to a 10-foot alley; said Lot No. 5 aforesaid also having a frontage of 120 feet on the southerly side of 38th Street as shown on said plat, now designated as 71st Street; and being ALL AND THE SAME property that was conveyed unto the Grantors herein by J. Robert Brown and Mildred Brown, his wife, by deed dated May 31, 1969, and recorded among the Land Records of Worcester County, Maryland, in Liber F.W.H. No. 255, folio 370.

TOGETHER with the buildings and improvements thereon, and the rights, roads, ways, waters, privileges, appurtenances and advantages thereto belonging or in any wise appertaining.

TO HAVE AND TO HOLD the above described property unto the said SEVENTY FIRST ST., INC., a Maryland corporation, its successors and assigns, forever in fee simple; SUBJECT, HOWEVER, to a Deed of Easement from Harry Robert Yauger, Jr. and Betty M. Yauger, his wife, unto the County Commissioners of Worcester County dated June 27, 1962, and recorded among the Land Records of Worcester County aforesaid in Liber F.W.H. No. 164, folio 167.

AND the said Grantors do hereby covenant that they will warrant, specially, the property hereby conveyed; and that they will execute such other and further assurances of the same as any be requisite.

AS WITNESS the hands and seals of the said Grantors the day and year first written.

WITNESS:

ROBERT J. TAYLOR (SEAL)

NANCY M. BRITTINGHAM,
As to both.

ELIZABETH TAYLOR (SEAL)

STATE OF MARYLAND, COUNTY OF WORCESTER, TO WIT:

I HEREBY CERTIFY, that on this 22nd day of November, A.D. 1971, before me, the undersigned officer, personally appeared Robert J. Taylor and Elizabeth Taylor, his wife, known to me (or satisfactorily proven) to be the persons whose names are subscribed to the within and foregoing instrument, and each made oath, in due form of law, that they executed the same for the purposes therein contained.

AS WITNESS my hand and Official Seal.

NANCY M. BRITTINGHAM,
Notary Public.
My Commission expires: July 1, 1974.

1971, Nov. 22. The foregoing Deed filed for record and is accordingly recorded among the land records of Worcester County, Md., in liber F.W.H. No. 331 folios 615 and 616.

Frank W. Alexas, Clerk

END OF VOLUME 2

FILED JUL 30 1974

VOLUME 3

IN THE

Court of Appeals of Maryland

SEPTEMBER TERM, 1974

No. 64

DEPARTMENT OF NATURAL RESOURCES, ET AL.,
Appellants,

v.

MAYOR AND COUNCIL OF OCEAN CITY, ET AL.,
Appellees.

TWO APPEALS IN ONE RECORD FROM THE CIRCUIT COURT FOR WORCESTER COUNTY PURSUANT TO CERTIORARI TO COURT OF SPECIAL APPEALS

(DANIEL T. PRETTYMAN, Judge)

JOINT RECORD EXTRACT

FRANCIS B. BURCH,
Attorney General,

HENRY R. LORD,
WARREN K. RICH,
Assistant Attorneys General,

HAMILTON P. FOX,

Attorneys for Appellants.

DALE R. CATHELL,
PATRICK L. ROGAN, JR.,
WILLIAM G. KERBIN, JR.,
HENRY P. WALTERS,

Attorneys for Appellees.

The Daily Record Co., Baltimore, Md. 21202

CONTENTS OF JOINT RECORD EXTRACT

(Volume 1)

Plaintiff's Petition For Injunction 1

Intervening Plaintiff's Motion For Leave To Intervene 5

Order To Show Cause 6

Intervening Plaintiff's Petition 7

Plaintiff's Answer To Demand For Particulars Propounded By 71st Street, Inc. 8

Corporate Defendant's Counter Petition 12

Corporate Defendant's Answer To Petition of E. T. Park, Inc. 13

Corporate Defendant's Answer To Petition of The State of Maryland Department of Natural Resources 14

Municipal Defendant's Answer To Petition of E. T. Park, Inc. 15

Municipal Defendant's Answer To Petition of The State of Maryland, Department of Natural Resources 17

Interrogatories To 71st Street Inc. From The State of Maryland, Department of Natural Resources 18

Interrogatories To E. T. Park, Inc. From 71st Street Inc. 20

Interrogatories To The State of Maryland, Department of Natural Resources, From 71st Street Inc. 21

Corporate Defendant's Answers To Interrogatories of State of Maryland, Department of Natural Resources 24

Answers of the State of Maryland, Department of Natural Resources, To Interrogatories of 71st Street, Inc. 26

Cover Letter from 71st Street, Inc. and Stipulation Exhibit 29

Opinion And Order of Court 33

Exhibit A: Chapter 36, Building Limit Line, Ocean front, Code of Ocean City, County of Worcester, 1972 105

Exhibit B: Chapter 46, Erosion and Sediment Control, Code of Ocean City, County of Worcester, 1972 106

Exhibit C: Memorandum For The Media 116

Order For Appeal By State of Maryland, Department of Natural Resources 117

Order For Appeal By E. T. Park, Inc 118

PAGE

Stipulation For Stay of The Circuit Court of Worcester County Entered on The 23rd Day of April, 1974 118

Writ of Certiorari To The Judges Of The Court of Special Appeals of Maryland 119

Order Of Court Of Appeals 119

Proceedings 120

Testimony:

Nicholas John Kohlerman, M.D.—
Direct 125
Cross 129

George Anthony Schoepf—
Direct 131
Cross 132
Redirect 134

Ronald E. Powell—
Direct 134
Cross 146

John S. Whaley—
Direct 149
Cross 154

William Richard Burdette—
Direct 156

James W. Small—
Direct 157
Cross 161
Redirect 162

Carroll L. Brewington, Jr.—
Direct 163

Turbid H. Slaughter—
Direct 166

Carroll L. Brewington, Jr.—
Direct 171
Redirect 172

Turbid H. Slaughter—
Direct 172
Cross 185
Redirect 191

PAGE

(Volume 2)

Robert William Lindner—
Direct 193
Cross 205
Redirect 217

J. Robert Brown—
Direct 217
Cross 219

George Edward Hoerichs—
Direct 225
Cross 227

George Bert Cropper—
Direct 229
Cross 240
Redirect 262

Joseph G. Harrison—
Direct 263
Cross 264
Redirect 273

Eugene R. Parker—
Direct 273
Cross 274

Marshall T. Augustine—
Direct 277
Cross 290
Redirect 291
Recross 296

Plaintiff's Exhibits:

No. 3—Deed of Lots 4 and 5 from Robert and Elizabeth Taylor to Seventy-First St., Inc., November 22, 1971 300

(Volume 3)

Plaintiff's Exhibits (Continued):

No. 4—Deed of Easement between Yauger, et al. to County Commissioners of Worcester County dated June 27, 1962 302

PAGE

No. 5—Tax Assessment Map for 70th Street 305
No. 6—Isle of Wight plat, 1917 306
No. 7—Oceanbay City plat, 1940 307
No. 8—Isle of Wight Land Co. plat 1963 308
No. 9A—Aerial photo w/markings 309
No. 10—Aerial photo 310
Photo of property looking North 311
No. 12—Aerial photo 312
Aerial photo 313

Intervening Plaintiff's Exhibits:

No. 1—State Roads Expenditures for Ocean Beach Protection, 1949-65 314
No. 3—Aerial photo 315
No. 4—Aerial photo 316
No. 6—Construction data for Asphalt Jetty for 70th and 73rd St. w/profiles 317
No. 8—Corps of Engineers Shoreline and Offshore Depth Change plat, dated February 1972 322
No. 9—Beach Profiles, dated February, 1972 323
No. 10—Aerial photo 324
No. 11—Aerial photo 325
No. 12—Sketch "Caldwell" ideal dune cross-section 326
No. 13—Sketch by witness Slaughter used in testimony 327
No. 14—Sketch 328
No. 15—Excepts from Corps of Engineer's Report on March 6-8, 1962 storm and recovery work performed under PL-875 entitled "Operation 5-High 329

Stipulation Exhibits:

No. 1—Plat by G. B. Cropper of Lots 4 and 5 w/building limit line, dated February, 1972 345
No. 2—Aerial photo 346
No. 3—Aerial photo 347

Chart from Augustine testimony 348

PAGE

Corporate Defendant Exhibits:

No. 1—Photo of Apartment house 353

No. 2—Photo of Apartment house 354

No. 3—Photo of Apartment house 355

No. 4—Construction drawing for proposed Sandbridge Condominium 356

No. 5—Beach profiles drawn by G. B. Cropper dated March, 1972 357

No. 6—Letter w/proposed contract terms from G. B. Cropper Inc. to 71st St. Inc. dated August 23, 1971 359

No. 7—Beach profile with shoreline comparisons drawn by G. B. Cropper dated October, 1963 363

VOLUME 3

IN THE

Court of Appeals of Maryland

SEPTEMBER TERM, 1974

No. 64

DEPARTMENT OF NATURAL RESOURCES, ET AL.,
Appellants,

v.

MAYOR AND COUNCIL OF OCEAN CITY, ET AL.,
Appellees.

TWO APPEALS IN ONE RECORD FROM THE CIRCUIT COURT FOR WORCESTER COUNTY PURSUANT TO CERTIORARI TO COURT OF SPECIAL APPEALS

(DANIEL T. PRETTYMAN, Judge)

JOINT RECORD EXTRACT

PLAINTIFFS' EXHIBIT NO. 4

THIS DEED OF EASEMENT, made this 27th day of June, 1962, by and between Harry Robert Yauger, Sr., Betty M. Yauger, J. Robert Brown, Mildred M. Brown, c/o J. Robert Brown, 1101 Fidelity Bldg., Balto. 1, Md., parties of the first part, and the County Commissioners of Worcester County, Maryland, parties of the second part.

WITNESSETH, that for and in consideration of the sum of $1.00 and other good and valuable considerations, the receipt whereof is hereby acknowledged, we the undersigned parties of the first part, the sole owners of Lot(s) Numbers 4, 5 and _____ in Block 38 located on Plat Isle of Wight-Oceanbay City street, avenue, road, at or near_____ street, avenue, road, Worcester County, Maryland, do hereby grant and convey unto the County Commissioners of Worcester County, Maryland, their successors and assigns, a perpetual easement across the aforesaid property for the purpose of constructing, reconstructing and maintaining a sand dune barrier (to be constructed or reconstructed originally by the Corps of Engineers of the U. S. Army) for the protection of our property, the other property in this vicinity and the public generally, but in connection therewith do grant the further right to construct and maintain across our property sand fences or such other protective devices as may be necessary, it being understood and agreed that the County Commissioners of Worcester County, their agents, employees, successors and assigns are hereby vested with all rights, powers and authority necessary for the construction, reconstruction, repair and maintenance of said dune barrier, sand fences or other protective devices, including the right to enlarge said dune barrier if it is subsequently determined that such action is necessary for the protection of property.

IT IS FURTHER UNDERSTOOD AND AGREED that said County Commissioners, their agents, employees, successors and assigns will perform the work contemplated hereunder with reasonable care and in a good and workmanlike manner and in connection therewith shall have no further obligation or liability resulting from such construction, reconstruction, repair or maintenance of said dune barrier, sand fences or other protective devices.

IT IS FURTHER UNDERSTOOD AND AGREED that any improvements or other facilities to be constructed or erected on the aforesaid premises will be done in accordance with permits to be issued by said County Commissioners and will be constructed or erected in such manner as will permit the free and unhampered flow of littoral currents and sand, thus avoiding as much as possible any disturbance or destruction of said dune barrier, sand fences or other protective devices, it being UNDERSTOOD

AND AGREED that at such times as said County Commissioners, their successors and assigns may determine that the rights and easements herein granted are no longer necessary for the purposes intended, then and in that event the same shall cease to exist,

IT IS FURTHER COVENANTED AND AGREED that the rights, conditions and obligations hereby imposed or intended for the benefit of the property herein described, the other property owners in this vicinity and the public generally are to be construed as covenants running with the land and binding upon the parties hereto and any subsequent owners of said property.

AND FURTHER, the undersigned lien holder(s) join in the execution of this instrument for the purpose of releasing the easement and/or rights herein granted from the operation and effect of any mortgage and/or other lien held by them affecting the above described property, retaining their lien and rights as to the remainder of the property not affected by this grant.

IN WITNESS WHEREOF, the parties hereto have caused these presence to be executed and their seals hereto affixed, the day and year first above written.

(Type or print names under all signatures and lien holders should show type of lien.)

Witness: F. W. Otwell	Harry Robert Yauger, Sr. (Seal) (Owner)
Witness: F. W. Otwell	Betty M. Yauger (Seal) (Owner)
Witness: Linda S. Cohen	J. Robert Brown (Seal) (Owner)
Witness: Linda S. Cohen	Mildred M. Brown (Seal) (Owner)
Witness: Lucille Redmond	Betty J. Klopser (Seal) (Lien Holder)
Witness: Lucille Redmond	Ray G. Klopser (Seal) (Lien Holder)

STATE OF MARYLAND, BALTIMORE CITY, To Wit:

I hereby certify that, before me the subscriber, a Notary Public of the State of Maryland, in and for Baltimore City, personally appeared Harry Robert Yauger, Sr., Betty M. Yauger, J. Robert Brown, Mildred Brown, Betty & Ray Klopser, and each severally acknowledged the foregoing Deed of Easement to be (his) (her) or (their respective act) or (to be the act of the said body corporate).

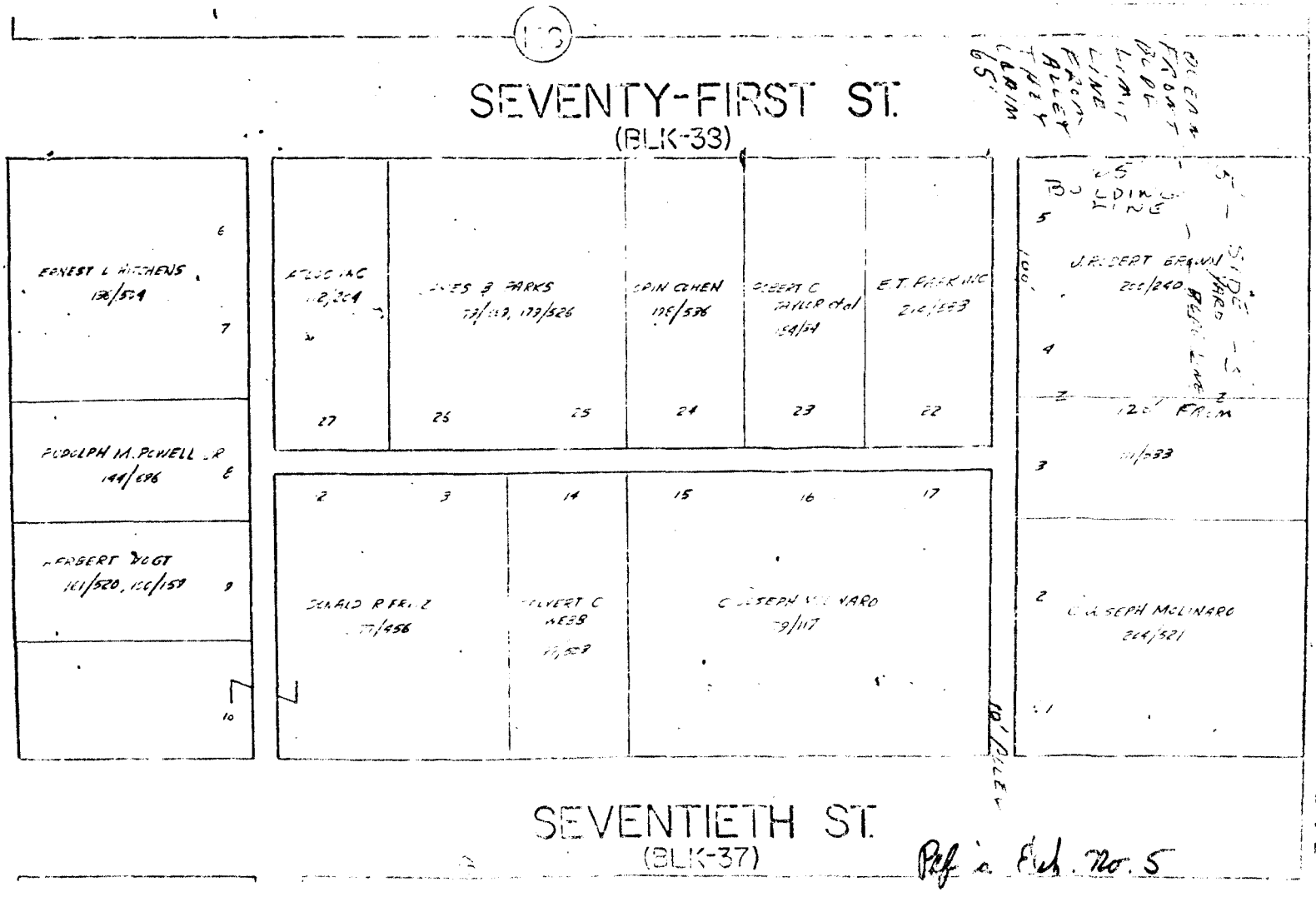
As witness my hand and Notarial Seal, the 27th day of June, in the year 1962.

Raymond A. Egner,
Notary Public.
My commission expires May 6, 1963.

(Seal)

1963, Jan. 9 The foregoing right of way filed for record and is accordingly recorded among the land records of Worcester County, Md., in Liber, F.W.H. No. 164, folios 167 & 168.

Frank N. Hales,
Clerk.



PLAINTIFFS' EXHIBIT NO. 5

E. 305

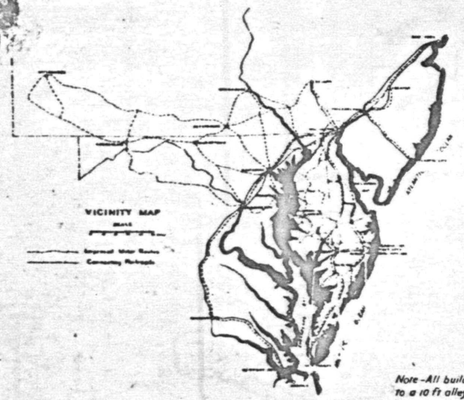
THE ISLE OF WIGHT LAND COMPANY, INC.

DEVELOPING

WIGHT CITY AND SEABAY, MARYLAND

TOPOGRAPHY IN 1917 BY ROBERT C. WALKER

SCALE



Note-All building-lots are 50 by 120 ft to a 10 ft alley. Streets are 50 ft wide.

B A Y

B A Y

A T L A N T I C O C E A N

Wight City & Sea Bay Maryland

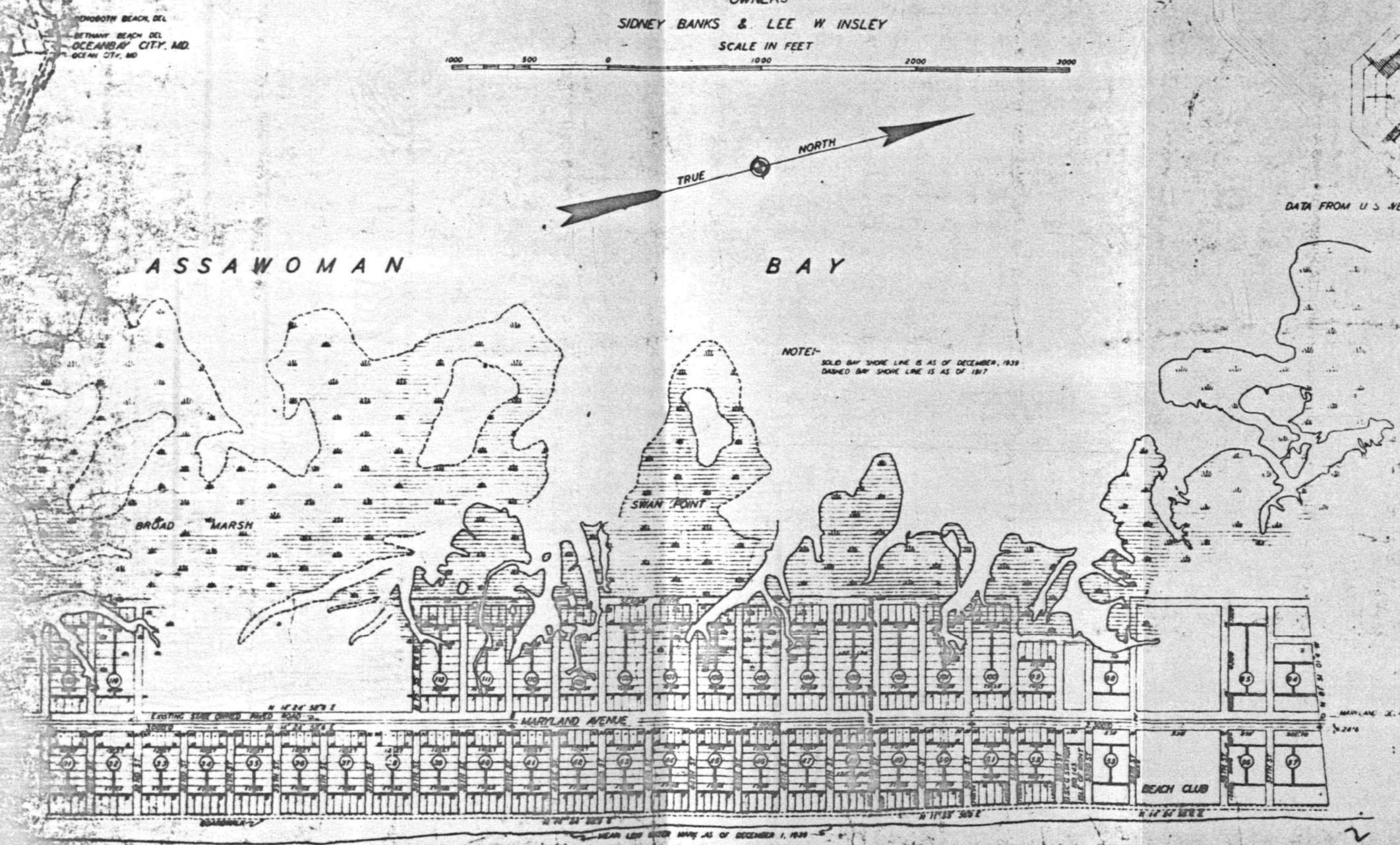
70

FILED
Nov 20 4 48 PM '72
FRANK A. GATES, CLK.
CT. CT. WOR. CO.

OCEANBAY CITY, MD.

OWNERS
SIDNEY BANKS & LEE W. INSLEY

SCALE IN FEET
1000 500 0 1000 2000 3000



BALTIMORE, MD.
WIND DIAGRAM
1923 - 1932

DATA FROM U.S. WEATHER BUREAU, BALTIMORE, MD.

MADE & SURVEYED BY
GEORGE W. CROPPER CO.
OCEAN CITY, MARYLAND

D.D.C. No. 2
Folio 76
Pltf.'s Exh. No. 7

S-40

THE ISLE OF WIGHT LAND COMPANY, INC.

Scale.

Revised Map

BAY

BAY

Devil Island

Salt Meadow

Bread Marsh

Note-All building lots are 50 by 120 ft to a 16 ft. alley. Streets are 50 ft wide

Beach

Beach

Beach

ATLANTIC OCEAN

This is to certify that no alterations, additions or deletions have been made in making this linen tracing, of the original print recorded among the land records of Worcester County, Snow Hill, Maryland, O.D.C. 2-folio 32.

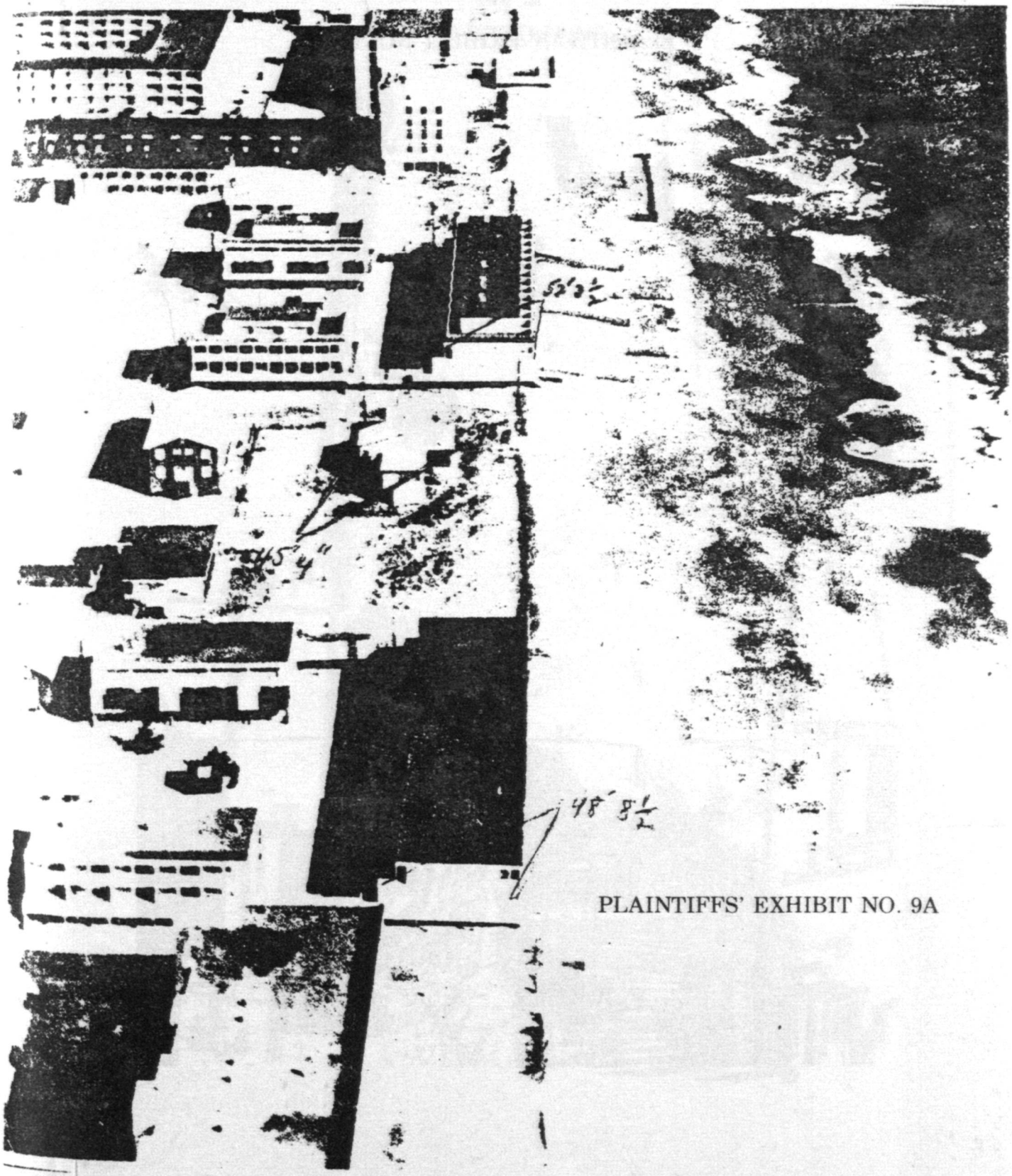
George R. Cropper

George R. Cropper, C.E.
M.P.E. & L.S. No. 248
Ocean City, Maryland
November, 1963
Traced by: R.R. Jones

Plf.'s Exh. No. 8

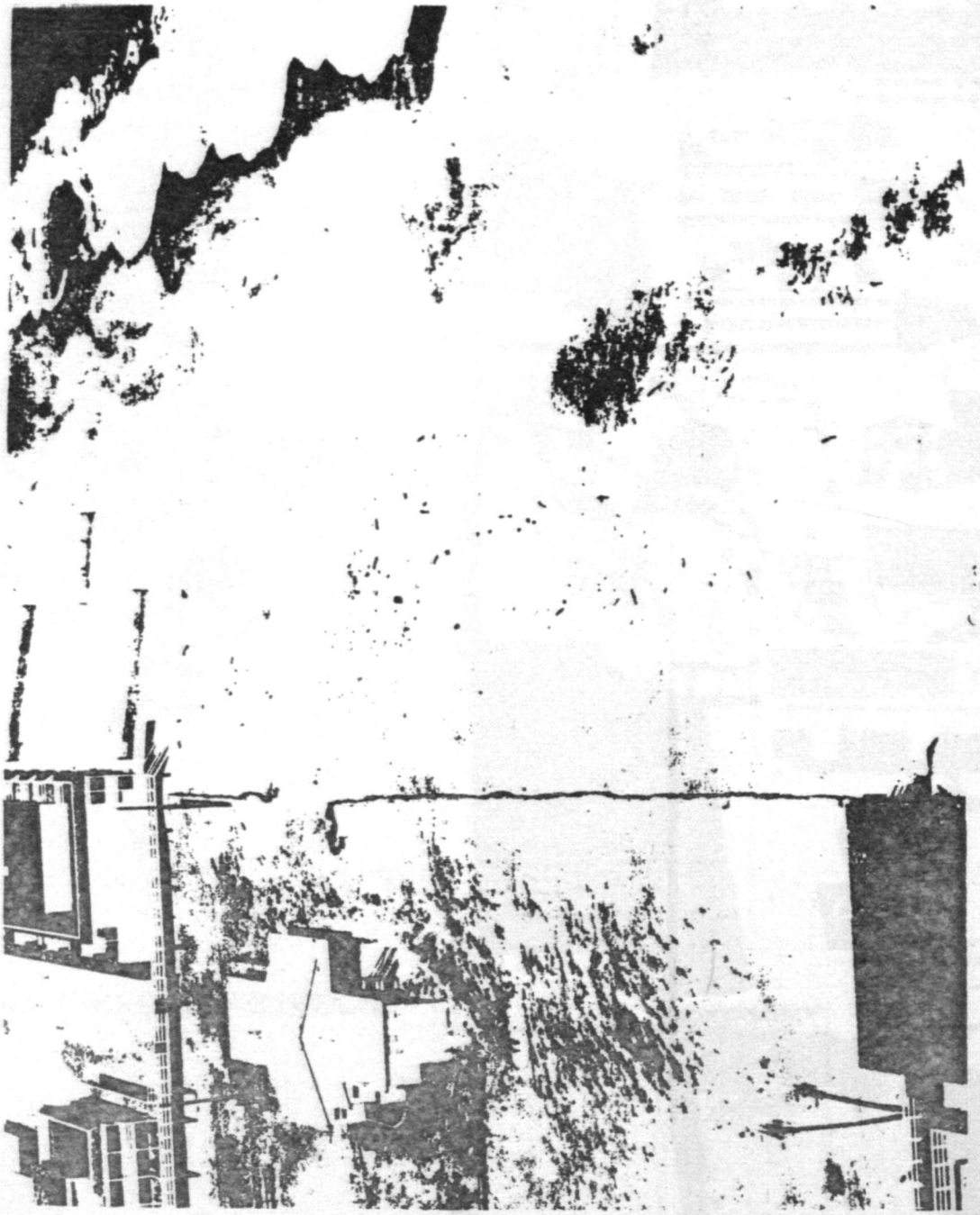
S-63-FT-10

44

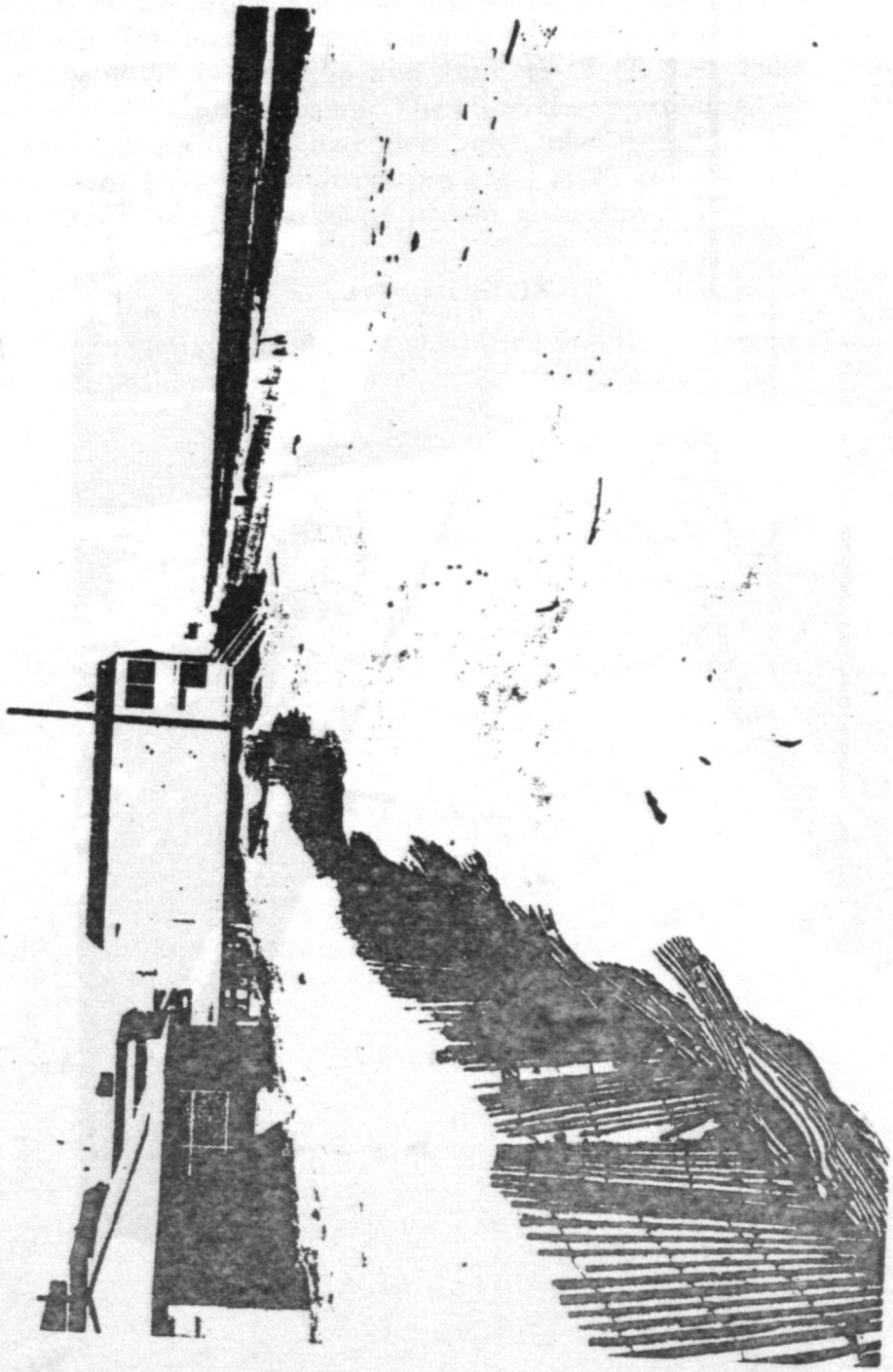


PLAINTIFFS' EXHIBIT NO. 9A

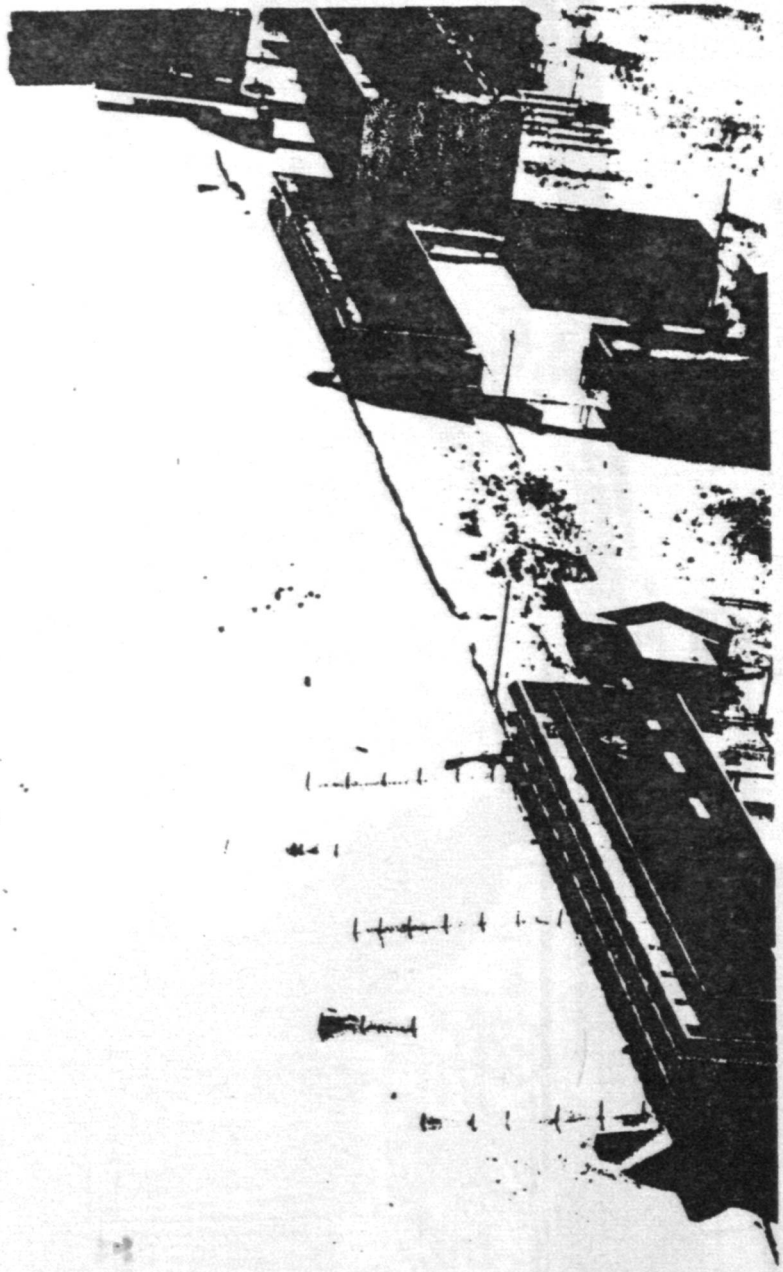
PLAINTIFFS' EXHIBIT NO. 10



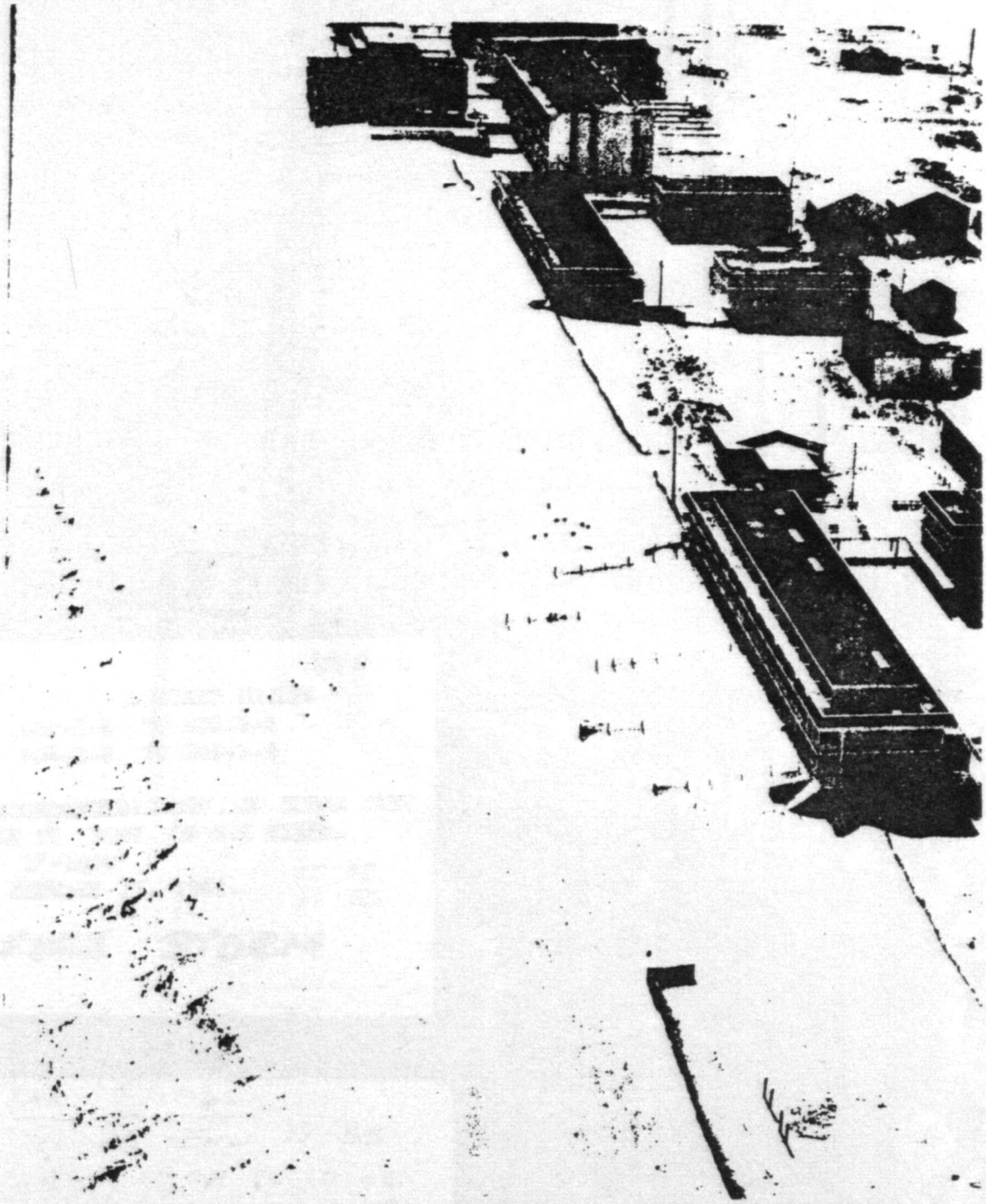
PLAINTIFFS' EXHIBIT NO. 11



PLAINTIFFS' EXHIBIT NO. 12



PLAINTIFFS' EXHIBIT NO. 13

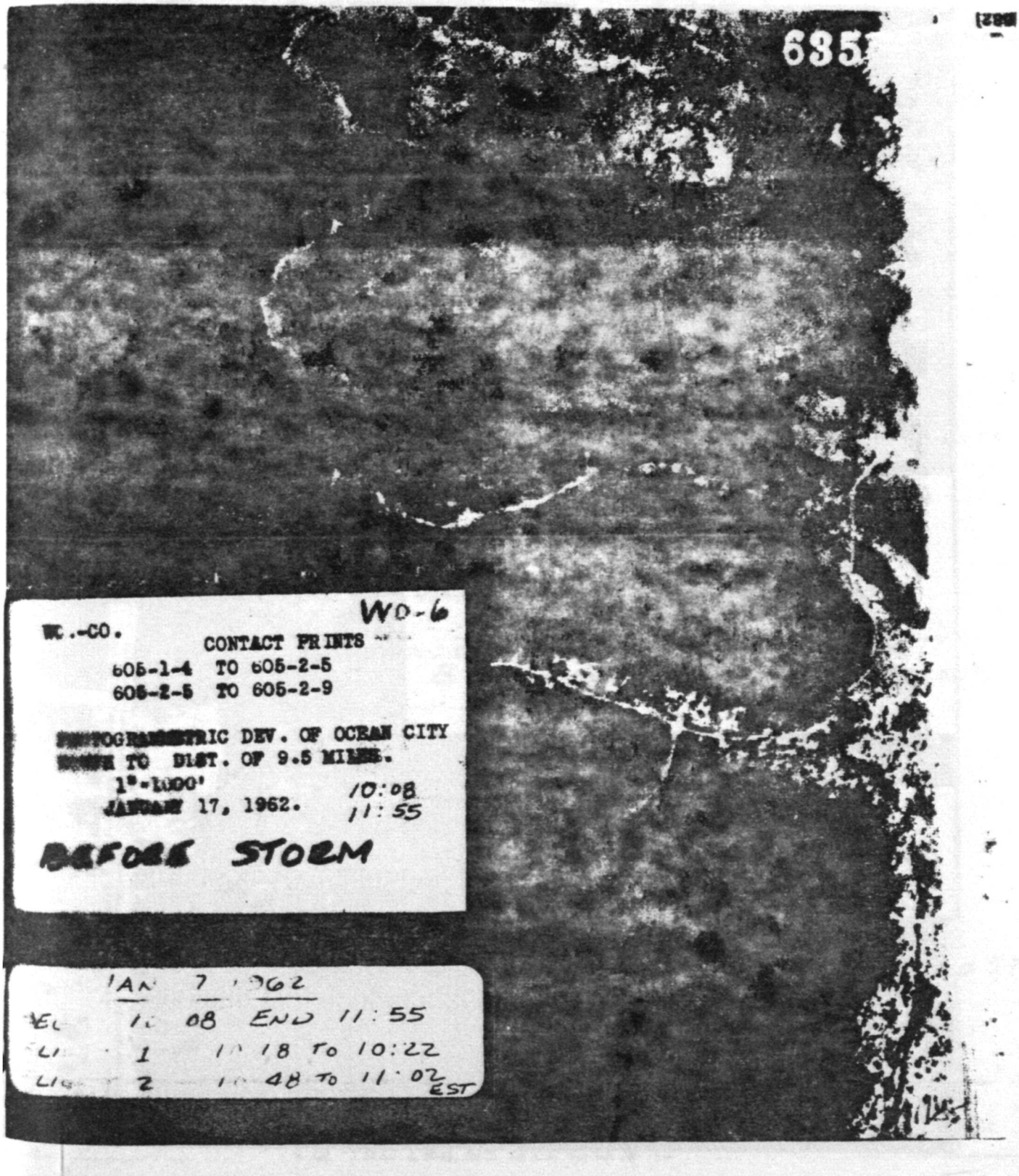


INTERVENING PLAINTIFFS' EXHIBIT NO. 1

Ocean Beach Protection

1965	$ 2,290
1964	—
1963	28,513
1962	48,225
1961	65,645
1960	29,042
1959	18,927
1958	2,289
1957	2,000
1956	62,964
1955	153,822
1954	15,245
1953	28,872
1952	49,742
1951	10,398
1950	16,179
1949	5,228

INTERVENING PLAINTIFFS' EXHIBIT NO. 3



INTERVENING PLAINTIFFS' EXHIBIT NO. 4

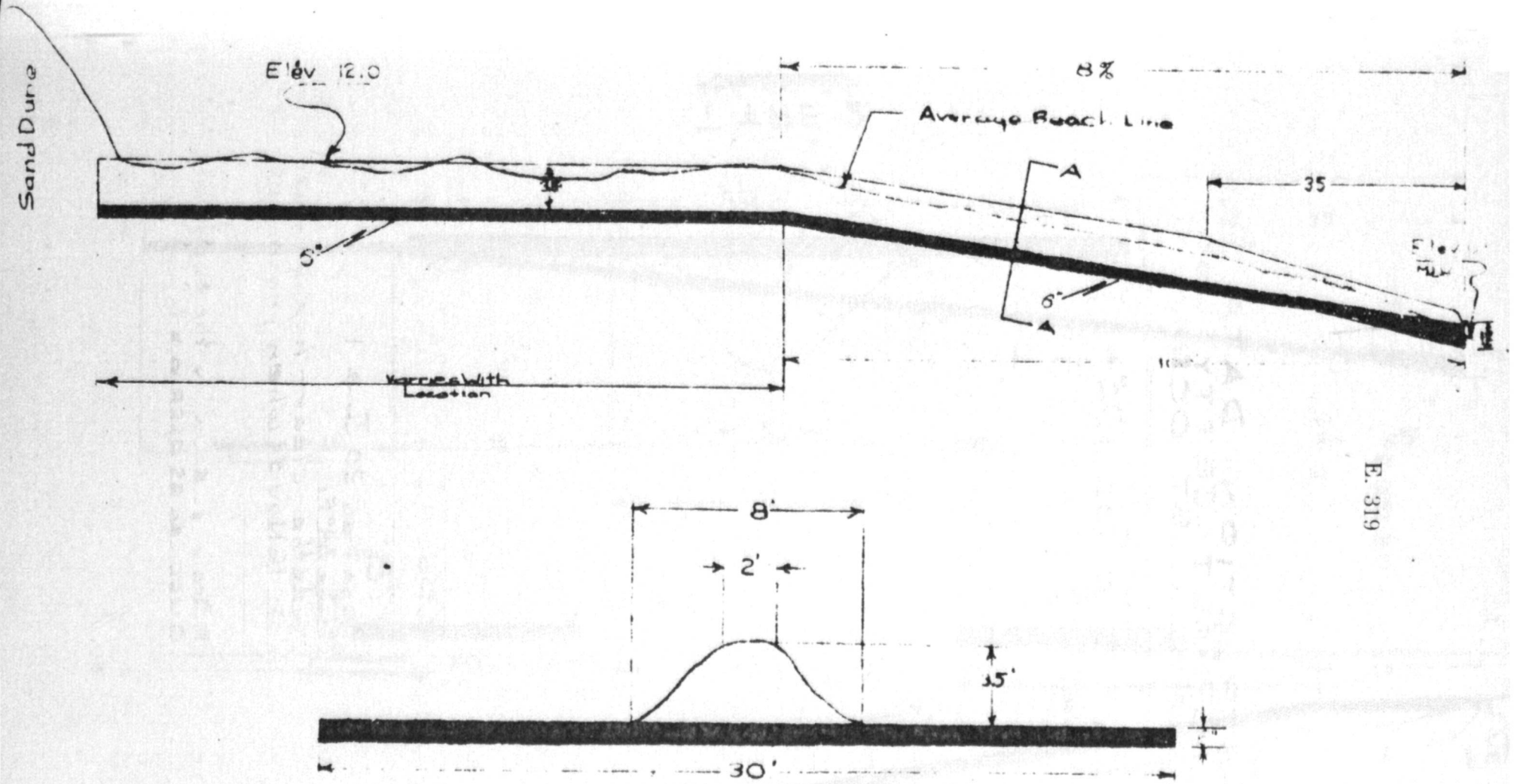
INTERVENING PLAINTIFFS' EXHIBIT NO. 6

CONSTRUCTION DATA PERTAINING TO ASPHALT JETTY LOCATED AT 70th ST. OCEAN CITY MD.

DATE STARTED	24 Aug 1954
DATE COMPLETED	16 NOV. 1954
TYPE	*Type 2 modified to 3. Apron & groin placed seperately.
STAGES of CONST.	Shore Apron 24 Aug; Water Apron 25 Sep. Shore groin 7 Sep; Water groin 16 Nov.
MIX	Apron 12% Asphalt 88% beach Sand Groin 8% Asphalt 10% Clay 82% beach Sand.
TEMP	Apron 300° F in water 225° dry Sand Groin 200° F
TONS	280
LENGTH	176' Weather Clear - heavy seas - temp 57° F. on date groin completed.
NOTE	*D[illegible] the types of j[illegible] are attached as approx[illegible].

CONSTRUCTION DATA PERTAINING TO ASPHALT JETTY LOCATED AT 73rd ST. OCEAN CITY MD.

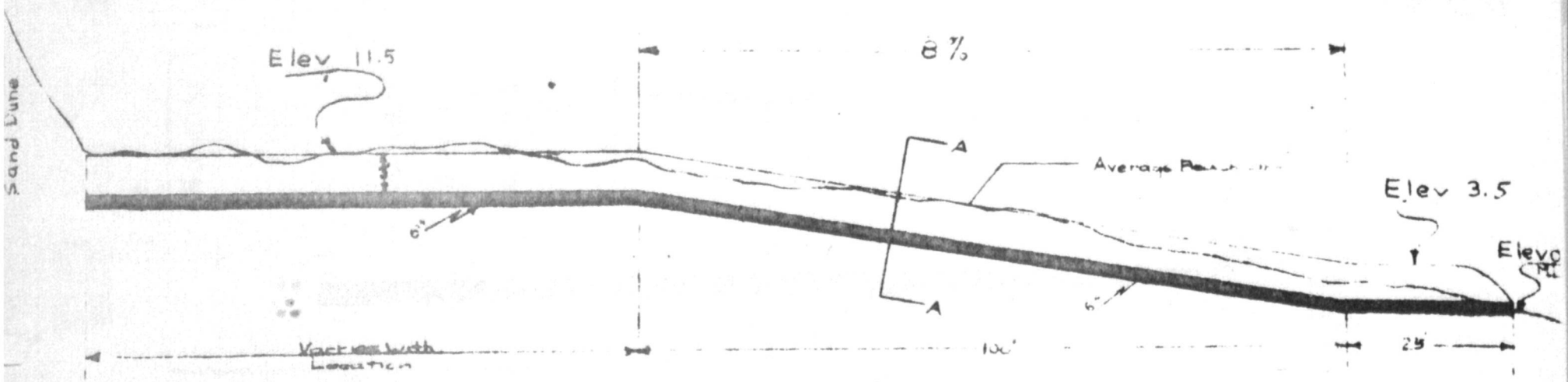
DATE STARTED	2 Sep 1954
DATE COMPLETED	16 NOV 1954
TYPE	*Type 2 modified to 3. Apron and groin placed Seperately.
STAGES OF CONST.	Shore Apron 2 Sep: Water Apron 25 Sep. Shore groin 7 Sep: Wate roin 16 Nov.
MIX	Apron 12% Asphalt 88% beach sand. Groin 8% Asphalt 10% clay 82% beach sand
TEMP	300°F in water 225°F dry Sand, Apron 200°F Groin
TONS	286
LENGTH	178'
	Repaired 20 June 1955, 57 Tons water and temp 84°F. Weather clear - heavy seas - temp 57°F on 16 Nov 54 when groin was first complet
NOTE	*Drawing showing the types of jetties are attached as appendix I.

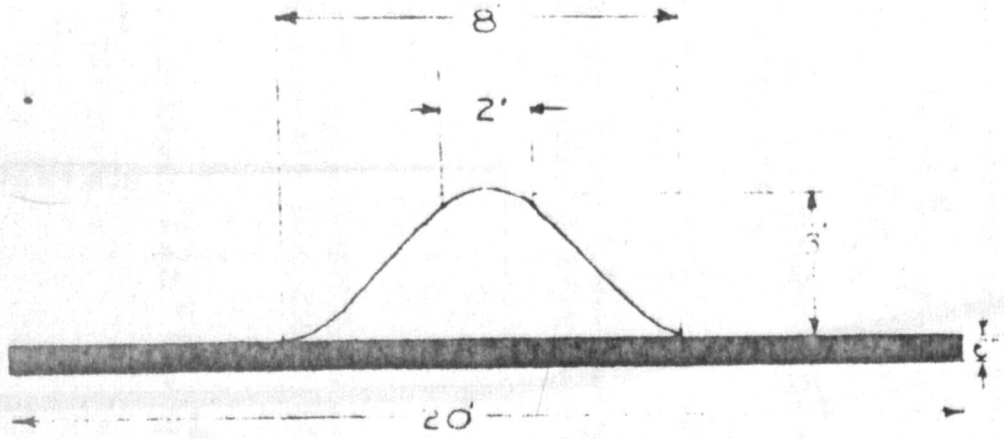


TYPE 1

E. 319

1954

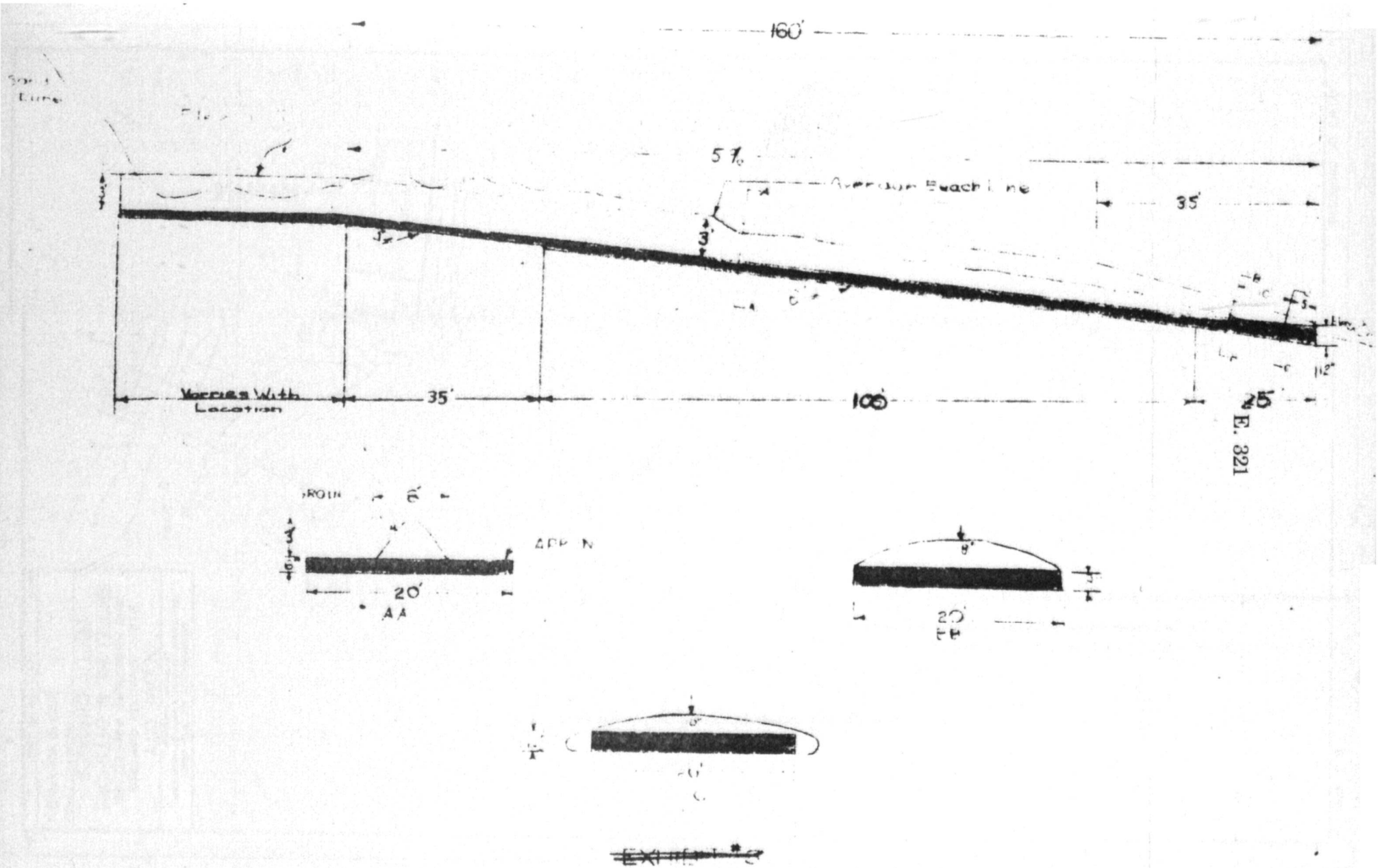




TYPE 2

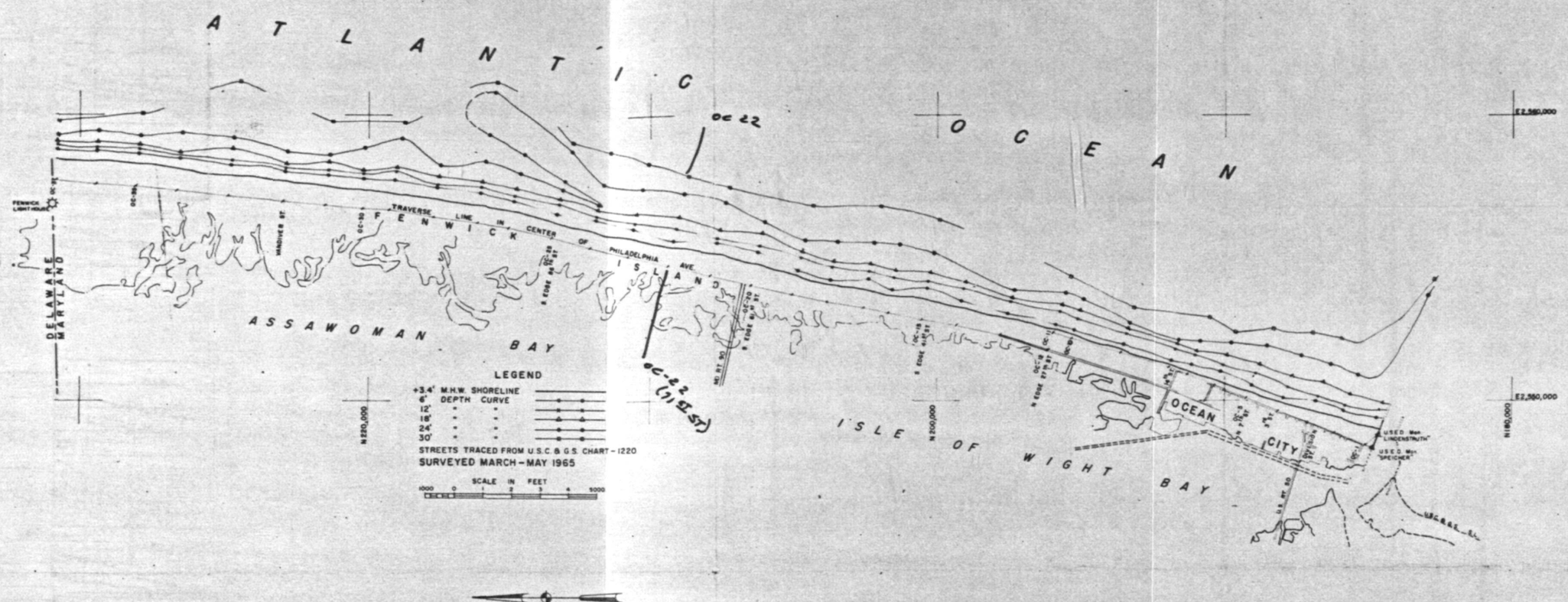
E. 320

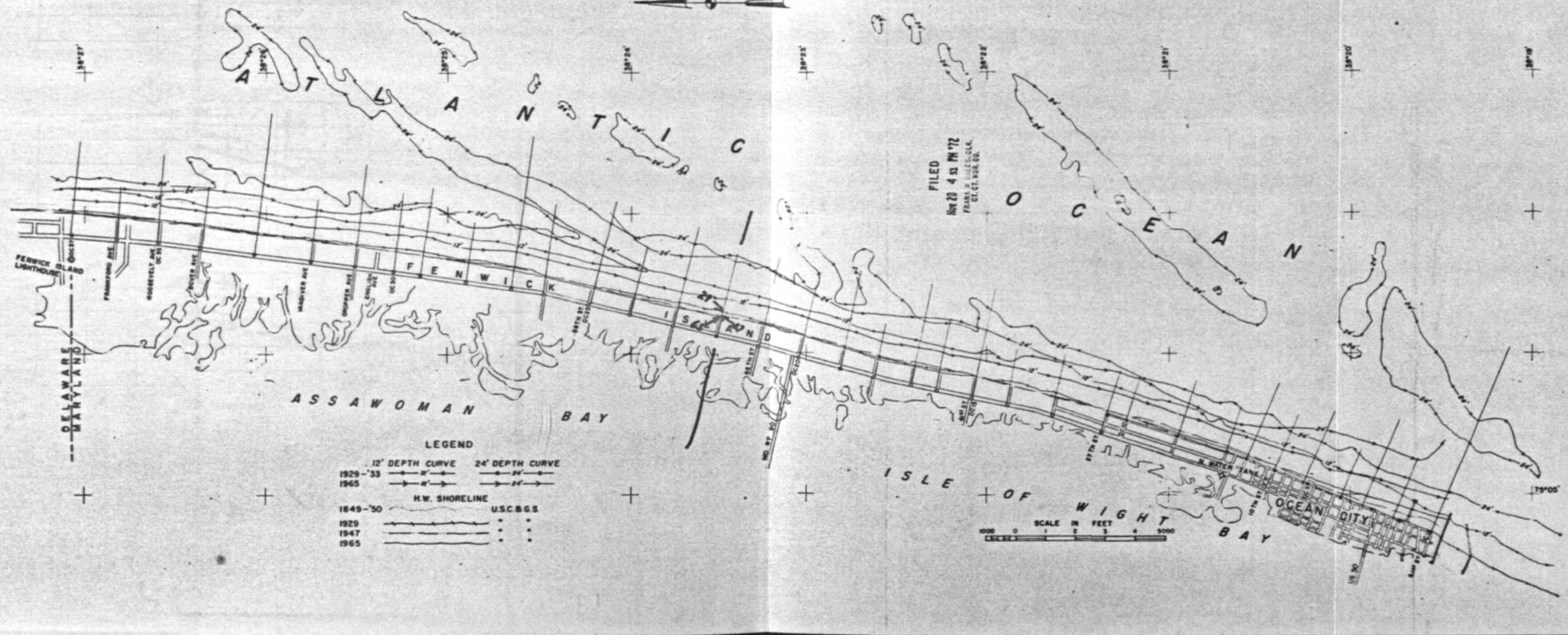
1954



TYPE 3

E. 321





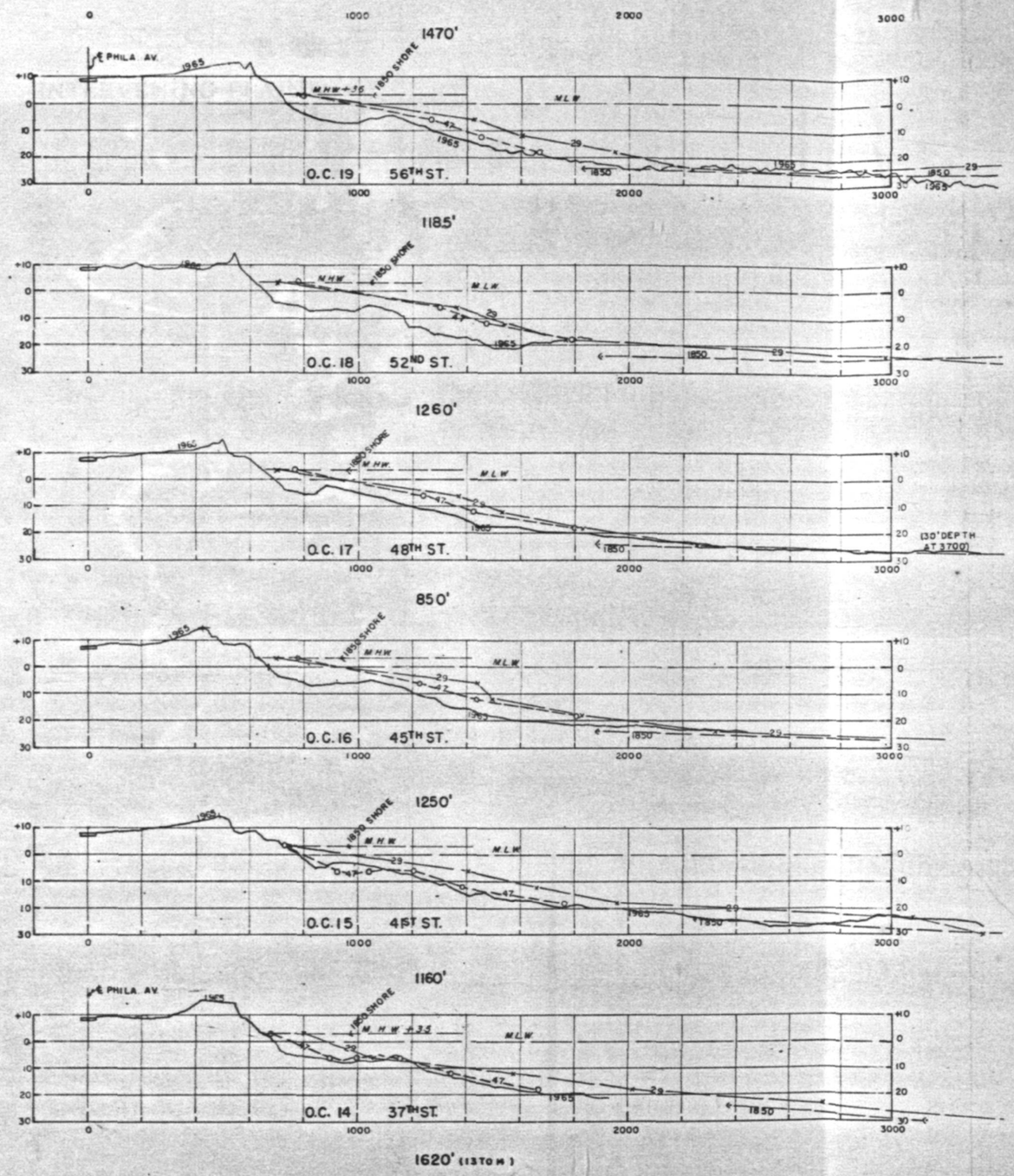
FILED
Nov 20 4 31 PM '72
FRANK W. HUSSEY, CLK.
CT. CT. NOR. CO.

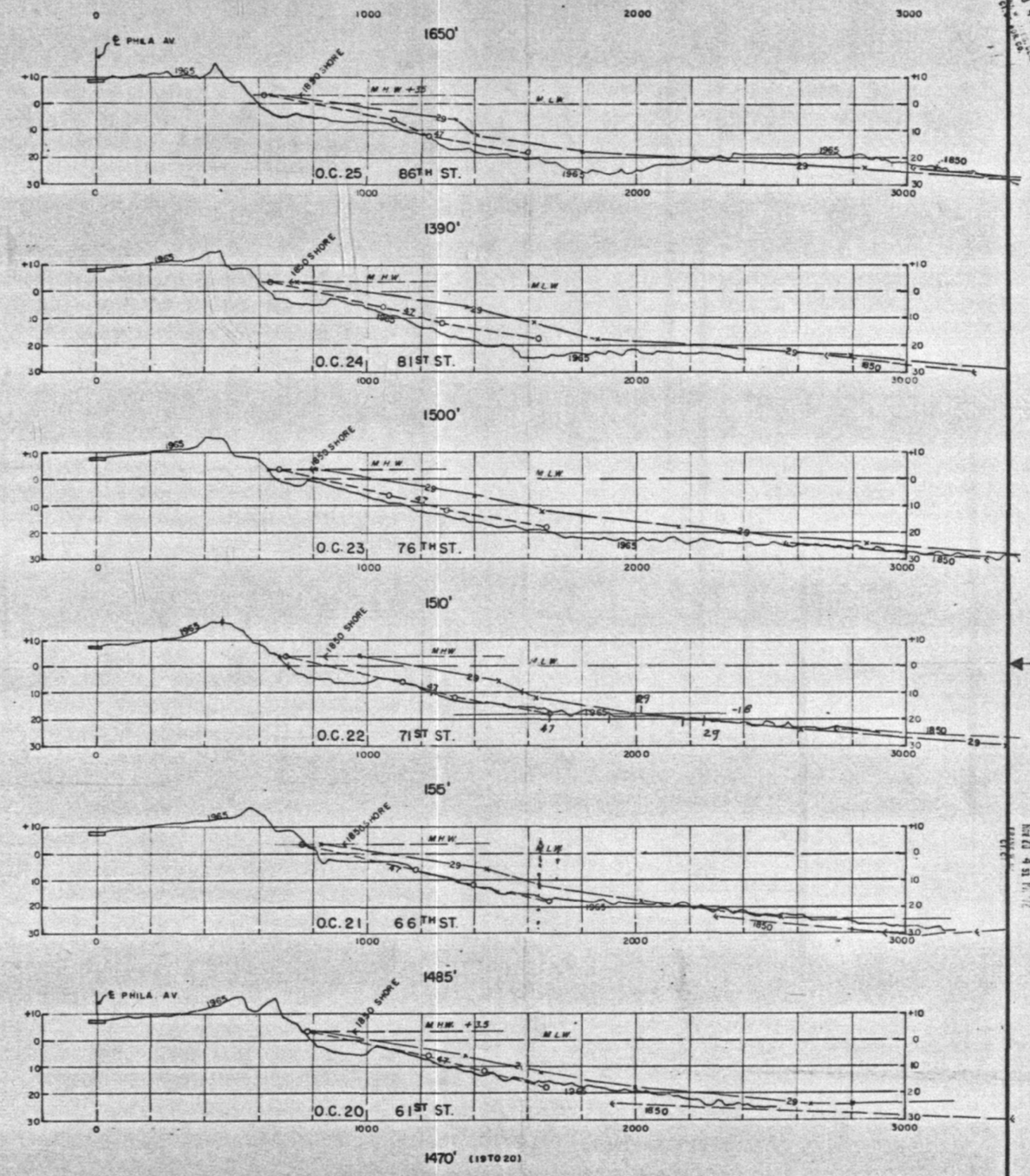
DEPARTMENT OF THE ARMY
BALTIMORE DISTRICT, CORPS OF ENGINEERS
BALTIMORE, MARYLAND

OCEAN CITY
BEACH EROSION CONTROL AND HURRICANE PROTECTION
SHORELINE & OFFSHORE DEPTH CHANGES

DRAWING NUMBER	PLATE
FILE 53 MAP 270	D-1

SCALE | DATE: 1 FEB. '72 | SHEET | OF





LEGEND

DATUM PLANE IS MEAN LOW WATER AT OCEAN CITY, MD.

M.H.W. SHORE LINE IS AT ELEVATION +3.5 FEET

1965 SURVEY SHOWN BY CONTINUOUS LINE (20' HOR. INTERVAL)

1947 POINTS SCALED FROM MAPS 195 & 196 FILE 53 o——47——o

1929 " " " " " " " " x——29——x

1850 " " " " " " " " ‹——1850——‹

DEPARTMENT OF THE ARMY
BALTIMORE DISTRICT, CORPS OF ENGINEERS
BALTIMORE, MARYLAND

OCEAN CITY

WORCESTER COUNTY, MD

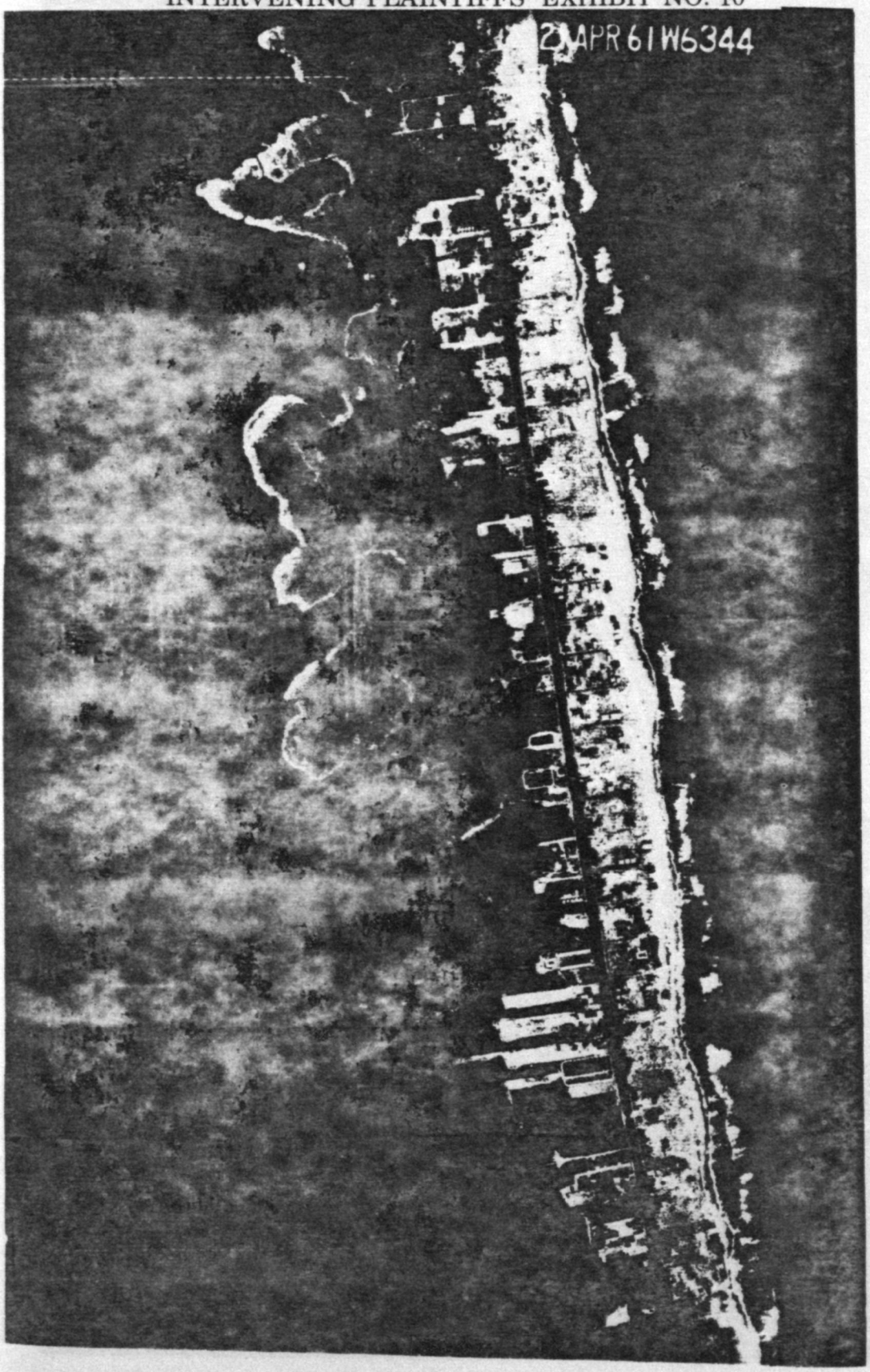
BEACH EROSION CONTROL AND HURRICANE PROTECTION

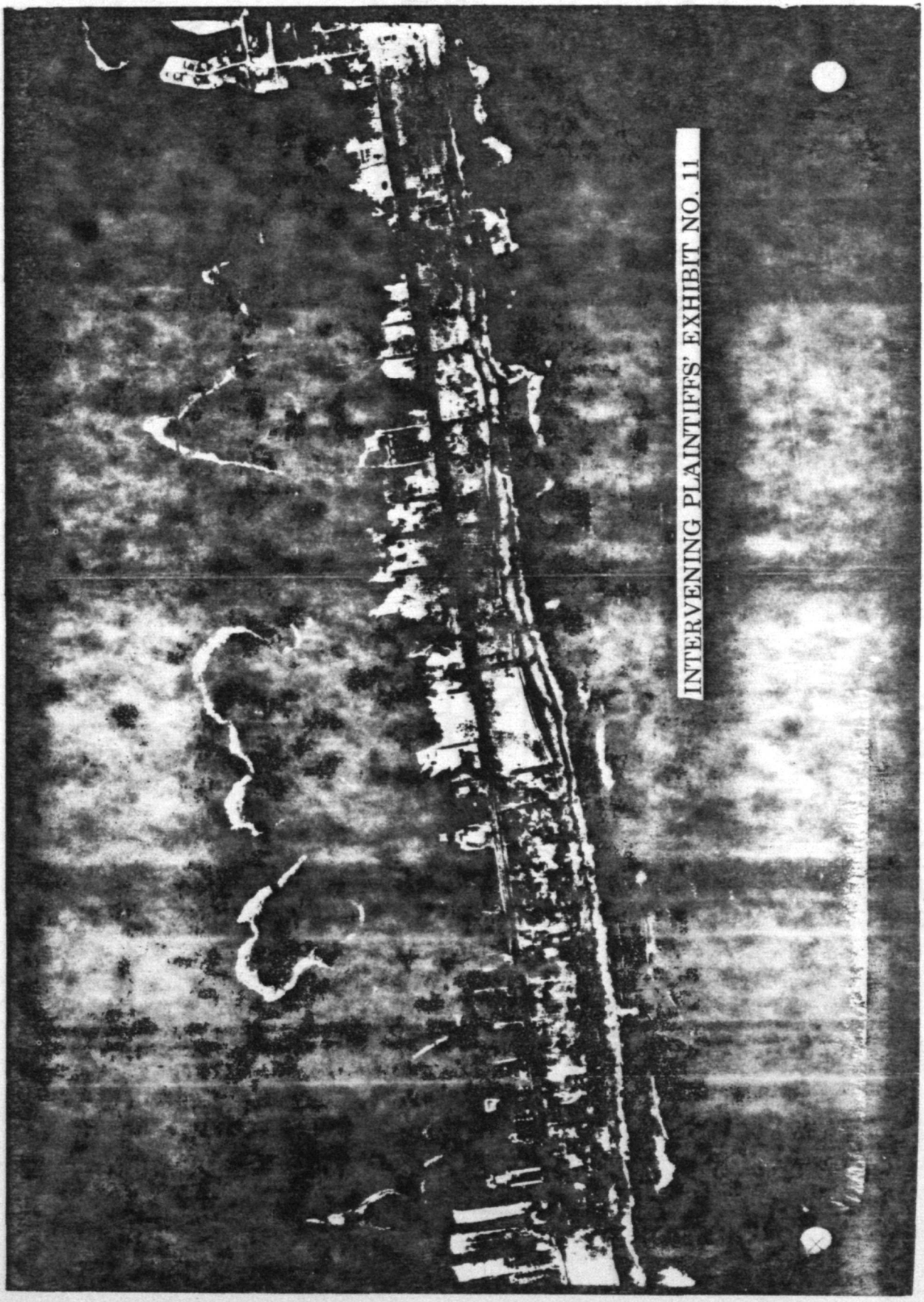
BEACH PROFILES

DRAWING NUMBER	PLATE
FILE 53 MAP 272	D-3

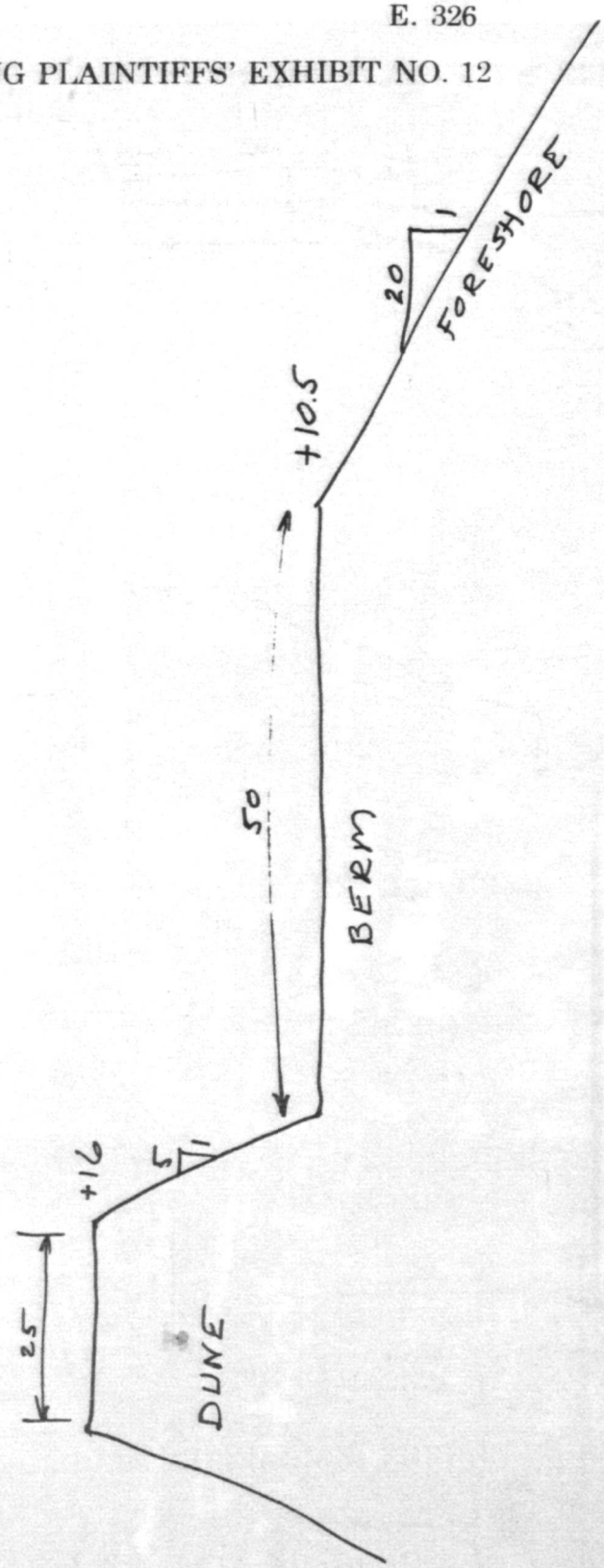
SCALE | DATE 1 FEB '72 | SHEET OF

INTERVENING PLAINTIFFS' EXHIBIT NO. 10




INTERVENING PLAINTIFFS' EXHIBIT NO. 11

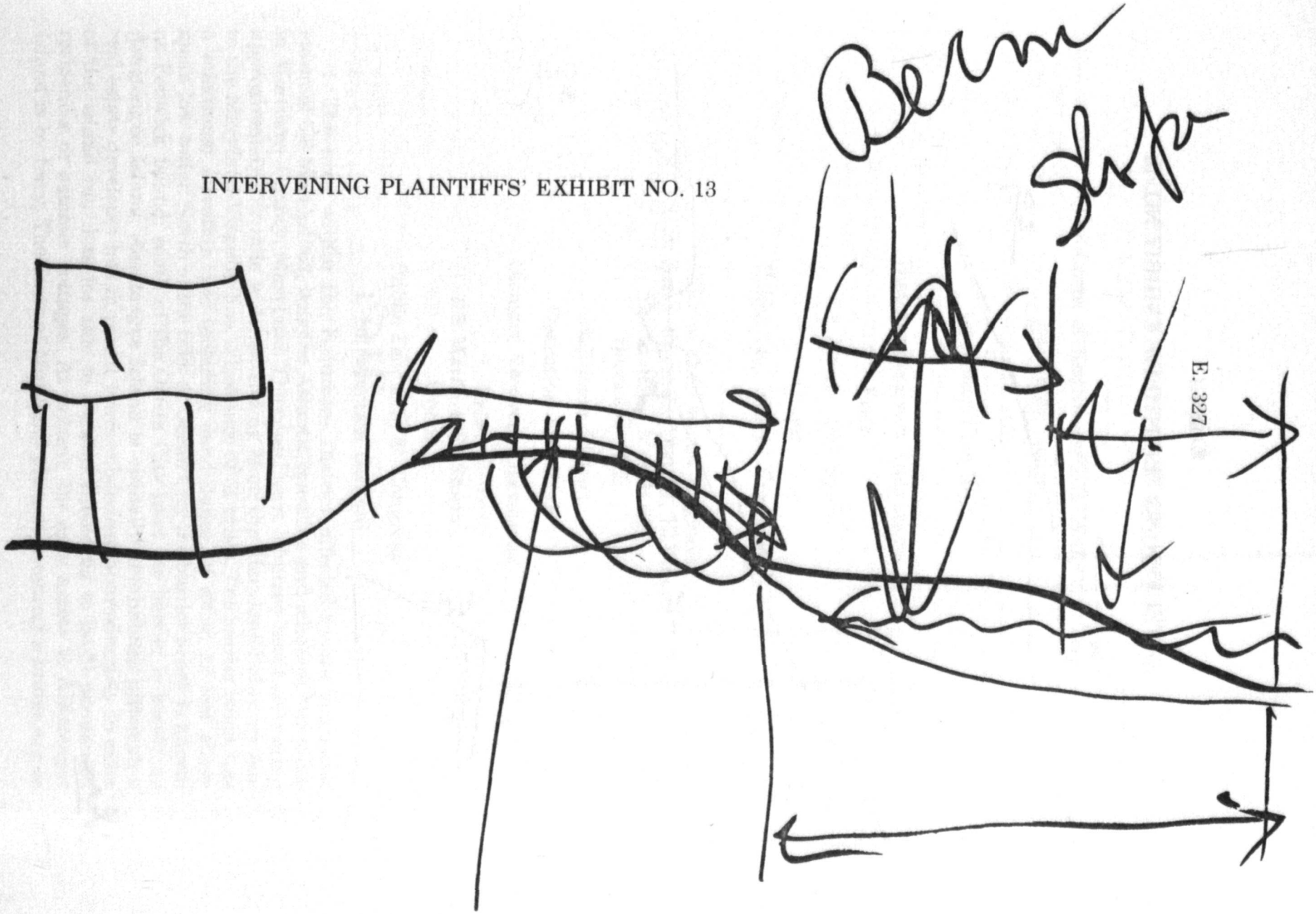
INTERVENING PLAINTIFFS' EXHIBIT NO. 12



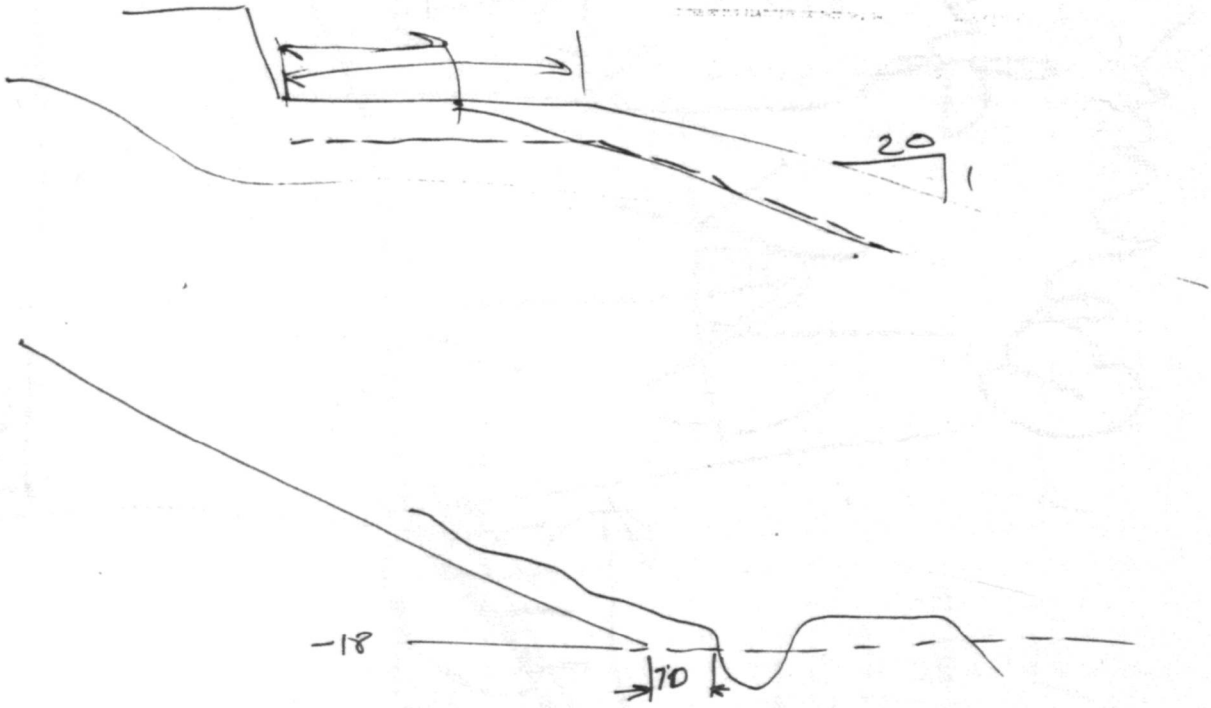
C.O.T.E. REC. FOR O.C.

CALDWELL SECTION

INTERVENING PLAINTIFFS' EXHIBIT NO. 13

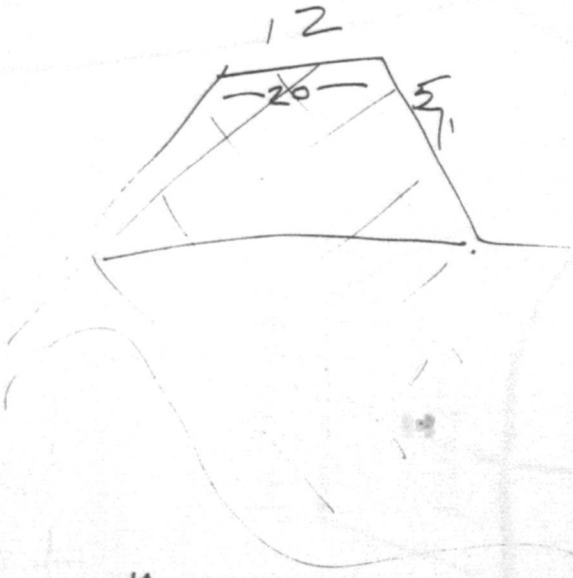


INTERVENING PLAINTIFFS' EXHIBIT NO. 14



$\frac{30}{2}$

60 FT^2



FILED
NOV 28 4 15 PM '72

Intervening Plf's Exh No 14

Chincoteague Bay about 7 miles south of the inlet to provide access to the island. The Secretary of the Army has issued an Instrument of Approval of its construction. The State is also acquiring land on the island to be used in development of an ocean-front public park. The United States Department of Interior has indicated an interest in conducting joint studies with the State to determine the possibility of developing lower Assateague Island for recreation. Fenwick Island, the area north of Ocean City inlet and extending to the Maryland-Delaware line, is known locally as Metropolitan Ocean City although the actual city limit only extends north to 41st Street. The area north of 41st Street is also known as Fenwick, Maryland. The year-round population of Metropolitan Ocean City is 1,200 of which approximately 1,000 live in Ocean City proper. Approximately one-half million vacationists visit the resort each season. A map showing the affected area along the Atlantic coast line is included as Plat 1 at the end of this Section.

2. The March storm was complex in structure and unusual in behavior. The pattern of the storm gave 50 mile per hour on-shore winds a long fetch, generating waves at Ocean City, Maryland, estimated to be 10 to 15 feet high. The storm's behavior, stationary for a while and then moving slowly eastward, made the waves persist for several days. The unusually high wind-driven tides, superimposed on normally high spring tides resulted in a tide one and one-half feet higher than the previous record which occurred during the August 1933 hurricane.

3. The storm was more severe and more damaging than any previously known to have affected the area. Practically the entire barrier beach from the Maryland-Delaware line to the Maryland-Virginia line was under water at some time during the storm from high tides or from wave wash over that barrier. The damage along Fenwick Island varied with the amount of beach existing before the storm. At the inlet, on the south end of the island where the jetty system had impounded a beach about 800 feet wide, damage to structures from wave action was minor. As the beach narrowed gradually north of the inlet, destruction mounted rapidly. At about 41st Street there was a further severe increase in wave damage to structures. From this point northward damages were even more severe. In the vicinity of 71st Street a breach approximately 50 feet wide was cut through to the bay. South of the inlet, Assateague Island was severely pounded, dunes were leveled and seas as high as 6 feet reportedly swept over the island. The small breach that existed in the beach adjacent to the South jetty, and in the barrier beach about one mile south, were widened to the extent that immediate steps were required to close them. Further south on the island a sand fence 15 miles long and the dune it created were reported completely lost.

* * * * * *

INTERVENING PLAINTIFFS' EXHIBIT NO. 15

Corps of Engineers, U.S. Army
Baltimore District

Operation Five-High

Disaster Recovery Operations
From
6-8 March 1962 Storm
Under
Public Law 875, 81 Congress

Office of the District Engineer
U.S. Army Engineer District, Baltimore
Baltimore 3, Maryland
December 1962

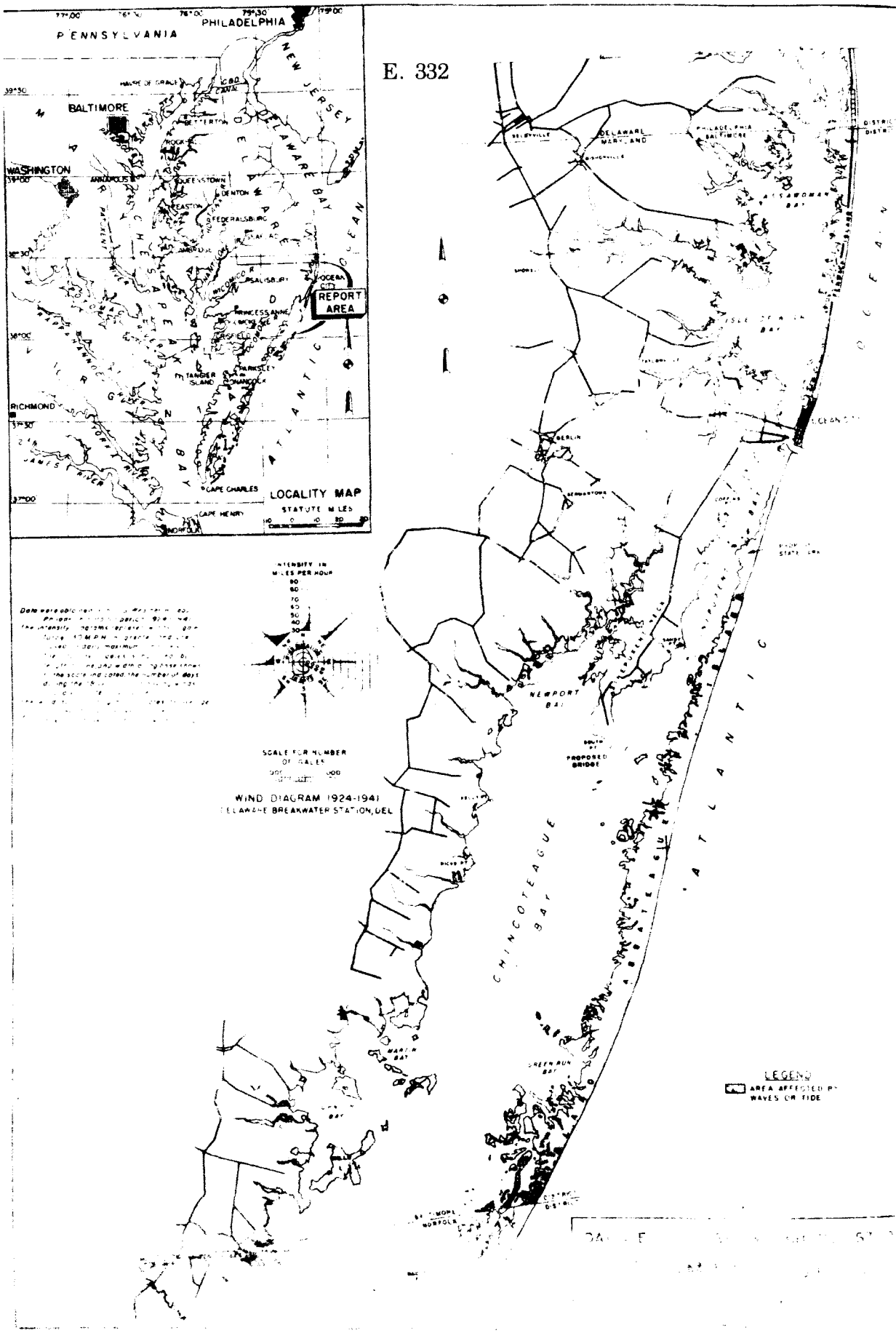
Baltimore District
Operation Five-High
Disaster Recovery Operations
From
6-8 March 1962 Storm
Under
Public Law 875, 81 Congress

I. Introduction General

1. The area within the Baltimore District affected by the northeast storm of 6-8 March 1962, was the Atlantic coastline and adjacent bay areas in Worcester County, Maryland. The coastline is a barrier beach averaging approximately 1/2 mile wide, extending from the Maryland-Delaware line to the Maryland-Virginia line, a distance of 31 miles. The barrier beach has a maximum elevation, not including sand dunes, of about 12 feet above mean low water. North of the inlet at Ocean City the barrier beach is known as Fenwick Island; south of the Ocean City inlet the barrier is known as Assateague Island. Assateague Island is virtually uninhabited although a real estate developer has in recent years subdivided approximately 15 miles of the island into lots for sale to persons intending to build permanent residences or summer cottages. At present, the only access to Assateague Island is by ferry. The State of Maryland plans to construct a bridge across

10. There were two major field operations performed by the District in connection with rehabilitating the disaster area, that of closing the breaches on Assateague Island near the south jetty and one mile south of the inlet, and that of placing the protective dunes along Fenwick Island. The breaches were closed by pumping sand from Ocean City Inlet and Sinepuxent Bay on to the beach adjacent to the South jetty using the 27-inch hydraulic pipe dredge "Peru". The work was performed by negotiated contract with Gahagan Dredging Corporation using Corps of Engineer operation and maintenance funds. Construction of the protective dunes was performed under a work assignment from OEP using PL 875 funds made available for the purpose. Two 16-inch hydraulic pipe dredges, the "Enterprise" and the "Maryland," pumped sand from the bay on to the beach between training dikes to create the dunes. The work was performed by negotiated contract with the Atkinson Dredging Co. and the American Dredging Co. respective owners of the dredges.

* * * * * *


PENNSYLVANIA
PHILADELPHIA
NEW JERSEY
DELAWARE BAY
BALTIMORE
WASHINGTON
ANNAPOLIS
CHESAPEAKE BAY
RICHMOND
JAMES RIVER
CAPE CHARLES
CAPE HENRY
NORFOLK
ATLANTIC OCEAN
REPORT AREA
LOCALITY MAP
STATUTE MILES
INTENSITY IN MILES PER HOUR
SCALE FOR NUMBER OF GALES
WIND DIAGRAM 1924-1941
DELAWARE BREAKWATER STATION, DEL
NEWPORT BAY
PROPOSED BRIDGE
CHINCOTEAGUE BAY
LEGEND
AREA AFFECTED BY WAVES OR TIDE

II. Description of the Storm

12. During the night of 4 March the wind came up from the northeast causing small craft warnings to be posted by the Coast Guard at Ocean City, Maryland. The new moon, which occurred on Tuesday, 6 March, is normally accompanied by somewhat higher tides. However, the combination of the persisting northeast winds and the normal high tides caused the Tuesday morning tide at Ocean City to run an estimated two feet above normal, resulting in minor flooding near the inlet. Throughout Tuesday the wind, surf and tide increased. The Coast Guard posted gale warnings. The unusually high wind-driven tides superimposed on normal high spring tides produced tides 9 feet above mean low water (7.5 feet above mean sea level, 1929 adjusted datum) at Ocean City, Maryland, on Wednesday morning, 7 March, at about 0800 hours; as determined by the Corps crest stage gage in the inlet and high water marks in the City. This tide was one and one half feet higher than the previous high which occurred during the August 1933 hurricane. The damaging effect of the storm started with the high tides of 6 March, reached a peak with the high tides of 7 March, and then diminished on 8 March as the wind subsided. Residents of Ocean City reported that this storm was more severe than that accompanying the 1933 hurricane.

* * * * * *

15. Along Assateague Island, south of Ocean City Inlet, dunes were leveled and two minor breaches, existing before the storm, were widened to the extent that emergency steps were required to close them. North of Ocean City Inlet along Fenwick Island, dunes were leveled and the beach badly eroded. In the vicinity of 71st Street a new inlet was cut through to the bay. Sand was deposited to a depth of 6-feet over areas of the island. The boardwalk, approximately 2-miles long, was torn loose and hugh raft-like sections were hurled into buildings or carried inland. Some ocean-front buildings were undermined and tilted while others were completely washed away.

* * * * * *

III. Damages

17. The March storm along the Maryland coast was more damaging than any previous storm affecting the area. Practically the entire barrier beach was under water from high tide or wave wash. Damage to the Maryland portion of Assateague Island was primarily to the island itself resulting from the loss of beach sand, and dunes. Metropolitan Ocean City, Fenwick Island from Ocean City Inlet north to the Maryland-Delaware line, was the area of major damage. Sections of the island were covered with sand to depths of 6-feet. Debris from destroyed buildings and structures was strewn throughout its entire length. Dunes were leveled and sections of the beach were cut away. One life was lost.

18. Damage resulting from the storm are estimated at $15,290,000 of which $12,100,000 was to private property and $3,190,000 was to public property. A summary of the storm damage is given below in table 1 and a tabulation of the families and structures affected are given in table 2.

* * * * * *

IV. Emergency Operations

* * * * * *

27. The breach in Fenwick Island in the vicinity of 71st Street was closed by the State Roads Commission as one of their first operations in connection with the assignment from the Governor of clearing and rehabilitating the area. Sand removed from highways and streets was used as fill to make the closure.

* * * * * *

V. Operation Pursuant to PL 875

* * * * * *

35. The assignment of constructing an emergency protective barrier, with a sand fence thereon, from the Maryland-Delaware line south to Ocean City Inlet was made by the Office of Emergency Planning on 15 June 1962 in request No. CENAD-22 Md., and Amendment No. 1 dated 27 July 1962, Amendment No. 2 dated 24 August 1962 and Amendment No. 3 dated 13 September 1962. The authorization was for construction of the emergency dunes south to Ocean City Inlet (south 2nd Street). Construction south of the vicinity of 7th Street was not performed as the present protection in place equaled or exceeded the "Caldwell Section," the minimum emergency protection to be provided. This section is a typical dune cross-section developed by Joseph M. Caldwell, Chief of the Research Division of the Beach Erosion Board Staff and is designed to provide emergency protection against storms of a ten year frequency. A continuous dune line of the "Caldwell Section" was constructed from the Maryland-Delaware Line south to the vicinity of 7th Street. Detailed information on the operations and procedures in carrying out this assignment are given on the data sheet that follows. The location of the work, the source of material, a typical section and other pertinent data is shown on Plat 2 at the end of this section.

* * * * * *

7. *Master Plan:* No master plan prepared. OEP advised of approval of County plan from Maryland-Delaware line to 41st Street by our letter of 8 June 1962, and the city plan from 41st Street to the inlet at South 2nd Street, by our letter of 12 September 1962.

8. *OEP request*: No. CENAD-22 MD. dated 15 June 1962, Disaster Contract No. OEP-127-DR, with Amendment No. 1 dated 27 July 1962, Amendment No. 2 dated 24 August 1962, and Amendment No. 3 dated 13 September 1962.

9. *Description of Work Authorized by OEP*: Construction of an emergency protective barrier, with a sand-fence thereon, from the Maryland-Delaware line south to Ocean City Inlet, South 2nd Street.

10. *Length and Type of Protection:* 42,018 lineal feet of continuous berm and dune with the dune crown not less than 12 feet above mean low water, and on a line approximately 150 feet west of the mean high water line, Atlantic Ocean. Erection of a sand-fence extending 42,018 feet along the dune crown.

11. *Sand Placed:* 1,050,000 cubic yards.

12. *Method of Contracting:* Contracts were negotiated, except that contracts for sand-fence and posts were advertised and awarded the low bidder.

* * * * * *

16. *Commencement and Completion of Work:* the dredge "Enterprise" started placing sand for the barrier beach 14 August 1962, after 9 days flotation dredging in the bay to reach the site. Work was completed 20 December 1962.

* * * * * *

20. *Map:* A map, plate 2, is included at the end of this section showing project location, plan, and typical cross section of the berm and dune placed.

21. *Method of Operation and Accomplishment:* Immediately following the storm, District forces assisted by employees of the Maryland State Roads Commission, staked out a tentative alignment for the emergency protective barrier. A District drill crew sampled 54 holes in the Isle of Wight, Sinepuxent and Assawoman Bays to locate suitable material for the protection. Work of the District drill crew was supplemented by personnel of Penniman and Browne of Baltimore, Maryland, who, under contract put down 46 additional drill holes in the Isle of Wight and Assawoman Bay. A field office was established at Philadelphia Avenue and 64th Street, Ocean City, Maryland on 25 July 1962. The office was staffed under the Operations Division by a Captain in the Corps of Engineers serving as resident engineer, and 5 civilian engineer technicians. The sampling and testing of the material dredged and placed for the emergency barrier was performed by a chief engineer, 6 engineering inspectors, and 3 soil technicians, obtained for this purpose by negotiated engineer contract with E. H. Richardson Associates of Newark, Delaware. This contract provided for 24-hour a day, 7

days a week inspection at the discharge for control of the overall operation. Unsuitable material was diverted to designated spoil areas on land by means of a "Y" valve in the 16th-inch discharge line. Construction surveys were performed by a five man party, obtained for the purpose by negotiated engineer contract with Van Reuth and Weidner, Inc. of Baltimore, Maryland. Essential hydrographic surveys were performed by Corps of Engineer personnel. Dredging operations were performed by two 16-inch hydraulic pipe dredges, the Enterprise and the Maryland, operating in Assawoman, Isle of Wight and Sinepuxent Bays. The dredge Enterprise used a booster pump during a portion of its operation. Placement of the barrier was accomplished by constructing two parallel training dikes with bulldozers and then pumping dredged material between the dikes. Considerable difficulty was encountered in finding quantities of suitable material within economical pumping range of the barrier. A drill rig, manned by District field office personnel, was kept in the vicinity of the dredges continually exploring for acceptable material. About two weeks time was lost in completing the work due to the great variation in material within relatively small areas of the bay.

In Ocean city proper (41st Street south to the inlet) the city owns the beach from Atlantic Avenue, which is the boardwalk south of 27th Street, to mean high water in the Atlantic Ocean. In Worcester County, north of 41st Street to the Maryland-Delaware line, the beach is privately owned. This private ownership of the beach caused the county considerable difficulty in securing right-of-way for the work. The original assignment from OEP authorized construction of an emergency protective barrier from the Maryland-Delaware line to 41st Street, the city limits of Ocean City. The assignment was contingent upon Worcester County furnishing necessary lands and rights-of-way and executing the necessary hold and save assurances. OEP issued Amendment No. 1, reducing the scope of the work to be performed and adding the erection of sand-fence along the protective dunes, when Worcester County was unable to secure the necessary releases for construction of the entire length of the assigned protection. When beachfront owners had an opportunity to observe portions of the completed work they requested that their property be included in the protection and furnished the county with the necessary releases. OEP issued Amendment No. 2, restoring all of the originally assigned work with a sand-fence thereon, except for a reach of approximately 600 feet between Wilson Avenue and Jacqueline Avenue. The owner of the reach omitted, refused to grant a release and threatened a court injunction to prevent work on his property.

City officials and property owners in Ocean City proper (south of 41st Street) having observed the protection being provided in the county, and noting the progressive erosion of their beach since the storm, which in some areas had reached the boardwalk, requested OEP to extend the protection

south of 41st Street to the inlet. OEP issued Amendment No. 3 extending the protection from 41st Street south to the inlet and reassigning construction of the 600 foot reach between Wilson Avenue and Jacqueline Avenue, omitted from Amendment No. 2. The property owner granted the county the necessary release. Amendment No. 3 also authorized construction of a sand-fence on these portions of the work. The reluctance of State, county or city governments to assume the responsibility for furnishing the required assurances of local cooperation resulted in a delay of about 4 months in the starting of this work.

Coastal storms off Ocean City on 23 September 1962, 3 November 1962, and 26-28 November 1962, in addition to continuing high tides and strong winds throughout the month of November caused delay of over a month in completing construction of the dunes. Training dikes were lost on five occasions from September through November of which four occurred in November. The discharge pipe was broken on four occasions and areas of partially completed fill were lost in each of the two November storms. Dunes completed at the time of the two November storms were effective in preventing damage, estimated at approximately $1,000,000 for each storm, that would have occurred had there been no protection.

* * * * * *

36. Immediately following the storm the Governor of Maryland assigned to the State Roads Commission the responsibility of clearing streets and highways of debris and sand and of reconstructing the Ocean City boardwalk.

37. Two days after the storm the State Roads Commission had its own and other rented equipment in Ocean City removing sand from the streets and placing it on the beach. At the height of the operation, on 15 March, there were approximately 200 pieces of earth moving and support equipment working in the area. After 15 March the number in use decreased rapidly as the major portion of the work was completed. Sand removed from inside and around buildings and placed in the street by property owners was moved to the beach during the highway clearing. The breach in Fenwick Island in the vicinity of 71st Street was filled with sand removed from highways and streets in the area. It is understood that review of the State's request for assistance under PL 875 for removing sand and debris from streets and highways will be made by the Bureau of Public Roads.

* * * * * *

40. The design, preparation of plans and specifications, and supervision of construction was performed by State Roads Commission forces. The reconstructed boardwalk is identical in length and width with the structure

destroyed by the storm. The State's cost, exclusive of design, inspection, and overhead, was $392,000. The amount determined as eligible for reimbursement under PL 875 was $296,600. The difference, $95,400, is the cost of betterments not allowable for reimbursement under the provisions of PL 875. These betterments consist of:

a. Increased strength of the boardwalk by increasing the size of the stringers used and decreasing their spacing.

b. The use of treated lumber for caps, decking, hand rail, and ramps.

c. The placing of deck boards closer together than they were on the destroyed structure.

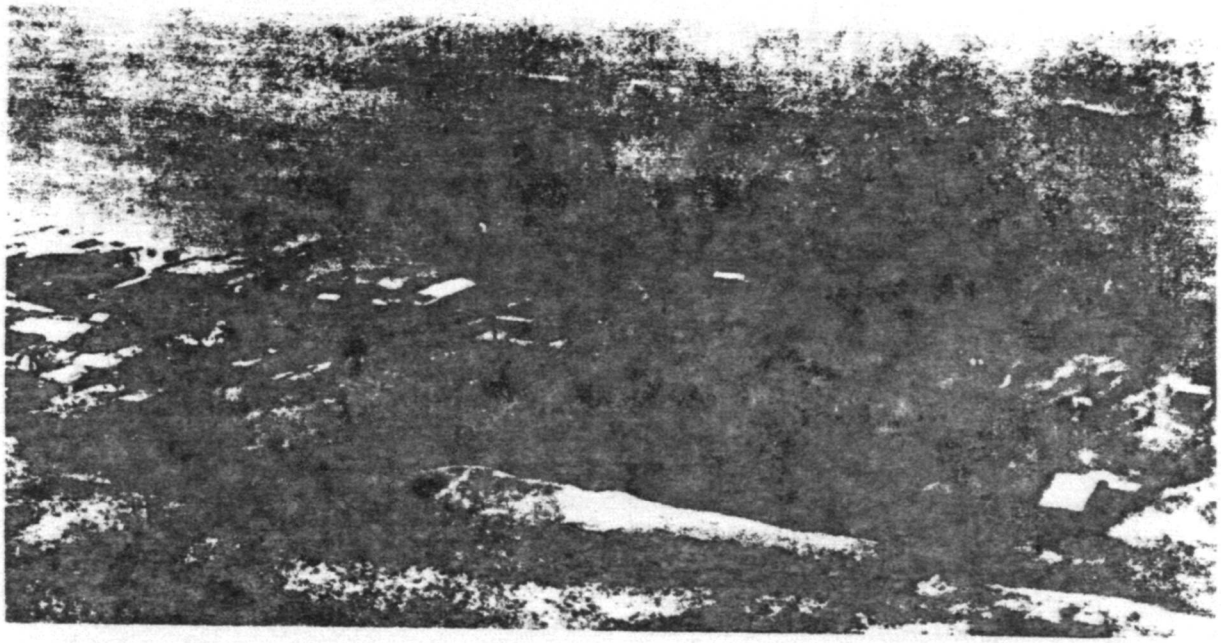
d. The installation of a cable tie-down assembly to prevent the deck from washing away from the piling.

e. The provision of ramps from the boardwalk to the beach.

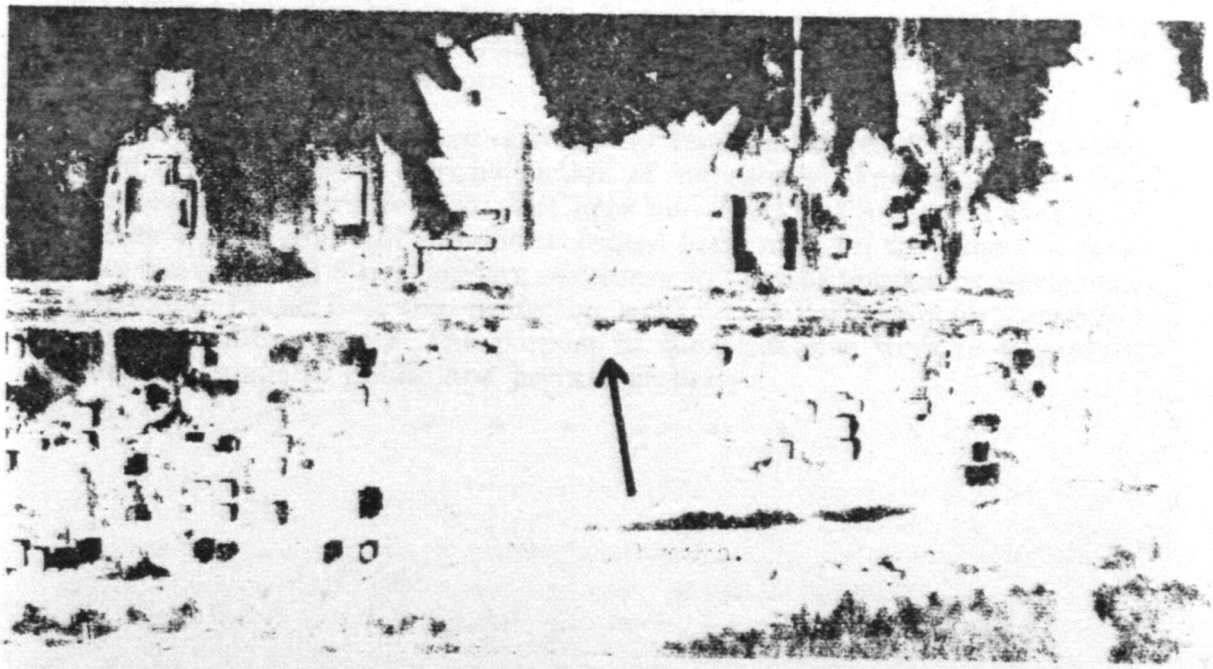
41. A joint field inspection of the completed boardwalk was made by representatives of the Corps of Engineers and State Roads Commission on 27 June 1962. Review of the plans and specifications together with the field inspection showed that good engineering practices were used in the design and that the structure had been constructed as specified. The items of betterment listed above were noted.

42. Prior to the State's submission of their formal request to OEP for "grant-in-lieu" funds, representatives of the State Roads Commission met with Corps of Engineers and OEP personnel to review the proposed request. All phases of the design and construction were reviewed with the Corps' representative giving assistance on engineering questions and OEP's representative advising on the eligibility under PL 875 or questionable items. As a result of this meeting, the State's formal request was properly prepared and in line with allowable costs, saving considerable time and effort in processing the request.

43. The District has no knowledge of other requests by the State of Maryland for assistance as a result of this emergency.



Aerial view of the breach in Fenwick Island in vicinity of 71st Street, taken 7 March 1962 (above); with a view of the same area taken 23 March 1962 (below) showing closure made by Maryland State Roads Commission in connection with clearing roads in the area.



The following TWX was sent by William D. Patton, Area Office Director, Area 2, to Director, OEP, National Headquarters, Washington, D.C., March 15, 1962:

Re Delaware, Maryland, Virginia disasters coastline areas. Urgently need policy decision in as specific detail as possible regarding eligibility under Public Law 875 of such water front facilities as sea walls, sand dunes, beach repairs, board walks, bulkheads, jetties, etc. PATTON

Following is the reply to above TWX, dated March 20, 1962.

In reply refer to 201400Z Mar 62. A1/1. A2/1. -3/1.

Certain questions regarding eligibility of beach front and other community facilities have been arising in connection with financial assistance to be provided in the major disaster areas declared by the President as a result of the storm which began on March 6. States involved are New York, New Jersey, Delaware, Maryland, Virginia, and North Carolina.

The general principles to be applied in answer to questions about eligibility in this disaster or other disasters are to be found in Section 1710.10 of the Federal Disaster Assistance Regulations. The following additional discussion is presented for your guidance.

1. Protective and other work shall be limited to the minimum amount necessary to remove the immediate threat to health and safety and to prevent immediate damage to property. Assistance may be available for replacing sand dunes and other barriers, but only to the extent necessary to provide emergency protection.

We have met with Corps of Engineer representatives and have advised them of our criterion of construction of emergency sand dune and other barriers. Under our direction, the Corps had developed a general sand dune barrier design and will provide technical assistance on the extent of sand dune barriers and other barriers necessary to provide temporary emergency protection. Please note that protective work can be performed for the protection of public property. The purpose of the protective work is to prevent further damage to public and private property.

* * * * * *

U. S. Army Engineer Division, North Atlantic

10 March 1962

MEMORANDUM FOR: Counsel
Chief, Engineering Division
Chief, Real Estate Division

SUBJECT: Applicability of PL 875 to Restoration of Waterfront Facilities

1. The storm of 6 March is causing us to be faced with some very thorny engineering and legal problems on the above subject Federal agencies are, when directed by the President, authorized to provide assistance "(d) by performing on public or private lands protective and other work essential for the preservation of life and property, clearing debris and wreckage, making emergency repairs to and temporary replacements of public facilities of local governments damaged or destroyed in such major disaster, and making contributions to States and local governments for purposes stated in subsection (d)." This authority is "supplementary to, and not in substitution for, nor in limitation of, any other authority conferred or funds provided under any other law."

2. The first question raised is as to whether the beaches and dunes constitute "public facilities of local governments damaged or destroyed in such a major disaster"? The law as to ownership of the beaches will vary in various states, but even where beaches and dunes are on private lands they often serve a public purpose by protection of the barrier beach from breaching and they also serve a public purpose in protection of the public roads behind the property. Whether or not they can be considered as public facilities is open to some discussion. Even if these are considered as private lands, to the extent that the work or restoration is "essential for the preservation of life and property," it would still be within the meaning of the Act. In using this justification, we would have to consider the risk of life and property which would result from the possibility of another storm which would, in the absence of the beaches and dunes, do serious damage which would not have occurred if restoration had been accomplished.

3. The next important question which enters into this picture is the extent of work which can be done within the wording of the law as to "making emergency repairs to and temporary replacement of." It is my belief that "repairs to and replacement of" should not include a betterment over what existed in the first place. The extent of replacement within this limitation, however, is subject to considerable variation depending on the engineering characteristics of the facility. It is my conclusion that the work should, when practicable, be limited to that which will serve a purpose for a period

of time such as that normally required for the design, programming, and construction of repairs or replacements which would be of a permanent nature. In the case of a bulkhead, in general a temporary bulkhead would need to be as strong as the permanent one and so temporary repairs differing from permanent repairs would not normally be feasible. The same thing in general might apply to a boardwalk, although it might be feasible to provide a temporary boardwalk of somewhat smaller dimensions than that of a permanent one. However, since boardwalks are normally constructed of untreated wood, and must be strong enough to hold the traffic, the construction would not be different whether they were temporary or permanent. With reference to beaches and dunes, these primarily serve the purpose of storm protection for private and public property behind the beach. The height and width required are related to the severity of storm which they are planned to protect against, and it appears as though a design for protection against a storm with a frequency of perhaps ten years might be suitable for a temporary repair; whereas a frequency of fifty or one hundred years or more might be necessary for a permanent repair or replacement. In some cases of resorts whose economy is dependent on recreation, the width of beaches can also be dictated by recreational requirements. Temporary repair for this purpose, or replacement, might well be based on the assumption that during the period before the permanent work is done, the allocation of beach space per person might be substantially reduced. In replacing beaches, it must be recognized that a storm tears away a beach and extended periods of calm weather restore it, so that in estimating quantity of material which must be placed under PL 875 a reasonable allowance must be made for the contribution of the sea toward the restoration work within a period of a few months' time during which temporary repairs or replacement can be completed.

4. Pending further discussion of these factors, our estimates of funds required under PL 875 will be based on assumption that the required funds can be furnished within the law for the replacement of beaches, dunes, bulkheads, boardwalks, and other waterfront facilities in accordance with the above discussion. Beaches, dunes and bulkheads on private property are included where they serve to provide essential protection for public property such as nearby roads. Note that public facilities of the federal government are not subject to restoration with PL 875 funds except under Section 6, which requires a special finding by the President after utilization of other available funds.

5. As a minimum objective, waterfront facilities, such as sea walls, dunes, beaches, and bulkheads necessary for the protection of the barrier beaches should be restored by the beginning of the hurricane season. For

major resort areas such as Virginia Beach and Atlantic City beaches and boardwalks necessary for minimum recreational facilities should be restored by 1 June 1962.

T. H. LIPSCOMB,
Brigadier General, USA
Division Engineer

North Atlantic Division, Corps of Engineers

Remarks of Corps of Engineers' Representative at
Meeting of Region 1 on 14 March 1962

The storm of 6-8 March resulted in tides which were of record height in some cases and near record in others. Of equal significance from the point of view of shore protection was the unusually long duration which resulted in unprecedented destruction of beaches and dunes which have in the past provided protection for the shore area. Houses were destroyed on sites where they have been safe from 60 to 80 years. As a result of the breakthrough of the dune line, many areas are now laid open to attack by further storms of substantially less intensity than that of March 6th. If this further damage is to be prevented, it will be necessary to restore the beach and dunes in the threatened areas.

For permanent protection, it would be desirable to provide substantial increase in the beaches and dunes over that which existed prior to the storm, but this would require not only funds but construction effort which would take many years. It is therefore my considered opinion that we should concentrate our efforts at this time on restoration of shore protection with a view to providing by the beginning of the next hurricane season, about 15 August, a degree of protection which can be considered temporary but which would be effective against a storm of an intensity which can be expected to occur once in 10 years.

This chart shows a typical cross section of a beach and dune for such a temporary protection and compares it with that required for permanent protection against a storm with a frequency of once in fifty years. Note that it provides for a dune 20 feet wide at 12 feet above mean low water and a beach berm 30 feet wide at elevation 10 feet above low water. The permanent protection would require a wider dune 4 feet higher and a much wider berm but requires much more material to be placed.

In many of the damaged areas much of the sand from the beach and dunes has been washed back over the streets and land in locations where it can be picked up with dozers, loaders, and trucks and put back as shore protection with land equipment. This can be done as a wide spread coor-

dinated effort. In some areas, however, the dune and beach material has been lost and there is no available material on the adjacent land so it will be necessary to employ hydraulic dredges to build replacement shore protection. The material to be dredged must be carefully selected since if it is not of correct grain size our efforts are wasted and our apparent protection is ineffective.

At this point, I have spoken only of the cross section of our replacement protection but the most serious problem from the point of view of local residents and government is that of alignment. In many cases the sea has removed 50 feet or more of the land leaving homes in or over the water or toppling over the shore line. It has destroyed much of the shore protection afforded by beaches and dunes. It would be desirable to bring in enough material to put the shore back where it used to be, but in my opinion it is not economical or practical at this time. This is not only because of cost but also because the engineering plant does not exist which could do this in the time available.

We should, therefore, accept the shore line where it is and build protection behind it and keep the homes and streets behind the protection. For the emergency protection shown on the typical cross section this will require about 190′ distance from Mean High Water and, if we are to leave room for future development of permanent protection, we should provide about fifty feet additional landward for expansion of the dune. In highly developed areas these distances can be cut by additional fill or by use of bulkheads, but economy and speed will require that this be kept to a minimum until emergency protection can be provided.

The Corps of Engineers has two districts with the responsibilities along the Jersey Coast, the Philadelphia District with the southern area extending up to Manasquan Inlet and the New York District with the area from there north.

Till now they have confined their efforts to closing breaches in the barrier beaches which threaten authorized navigation channels. We have used normal Corps of Engineers' maintenance funds. We will also make a quick design of the temporary protection as I have indicated in the sample chart, but applied to the specific conditions of damaged areas. If our assistance is requested we are prepared to carry out any assigned missions of execution. I believe that for any single engineering unit, such as Long Beach Island, there must be an over-all plan of protection to a single standard of design and a system of coordination established for its execution. Local communities will have to take quick and even heroic action to provide the rights-of-way and utilities relocations so as not to delay the progress of the work. It is also imperative that the natural inclination of people to take sand off the beach for fill purposes be controlled.

I also recommend that consideration be given to providing whatever legislative measures are necessary to ensure that shore protection once re-established is not destroyed by leveling dunes at streets ends or for construction of homes and businesses on the beach as has been done in the past. Those who destroy shore protection in front of their property endanger not only themselves but also those who live behind them and to either side, and those who may need to use the roads behind them as routes of evacuation.

The task before us is of an unprecedented type and requires all of our best efforts for completion so as to give timely protection. The Corps of Engineers is prepared to contribute not only the efforts of the organizations normally assigned this area, but also to mobilize experienced people from elsewhere in our nationwide organization to contribute to the success of this effort.

Revision in Typical Design of Emergency Shore Protection
North Atlantic Division

23 March 1962

District Engineers,
New York
Philadelphia
Baltimore
Norfolk

1. As a result of experience obtained during the secondary storm and high water of 21 March 1962, it has been found desirable to revise the typical design section for the emergency shore protection, previously furnished your office.

2. The revision in the cross section increases the width of berm from 30 to 50 feet. This added width will provide greater stability for the emergency dune and beach protection. This modification should be implemented in all future work.

FOR THE ACTING DIVISION ENGINEER:

EDWARD T. PODUFALY
Colonel, CE
Acting Deputy Division Engineer
for Disaster Operations.

U. S. Army Engineer Division, North Atlantic

NADDD-O 29 March 1962

SUBJECT: Additional Guidance In the Performance of Disaster Recovery Work Under Public Law 875.

TO: District Engineers, U. S. Army Engineer Districts: Baltimore, New York, Norfolk and Philadelphia

1. During his trip on 26 and 27 March, General Wilson, the Chief of Engineers, appeared to be very satisfied with the initiative that all districts displayed in getting work underway under Public Law 875. In all the states visited the particular point was made that the Corps of Engineers working under OEP is providing a standard shore protection for all states equally. In fact, in one particular state, a local official made the statement to the effect that as long as the Corps of Engineers, acting as a Federal agent of OEP, was consistent along the entire coast line he felt that he could better cope with the problem of individual properties affected by the restoration work, if he could state that his community is being treated no better or worse than any other community from Montauk Point to the North Carolina border.

* * * * * *

d. The standard dune section as prepared by Mr. Caldwell, Beach Erosion Board, has been revised by him to change the length of berm from 30′ to 50′. This new berm length should be adhered to unless economy of equipment time is very critical. In that case, the berm length can be reduced to no less than 30′ *provided* it is acceptable from an engineering viewpoint at the particular local location.

* * * * * *

ENGBE-R 14 April 1962
AE

MEMORANDUM FOR RECORD

SUBJECT: Alignment of Emergency Shore Protection

1. The Board staff has been asked by NAD to furnish guidance on the alignment of the emergency beach and dune restoration now under way in NAD. The consensus of the staff is given in the following paragraphs.

2. Insofar as possible, the alignment should parallel the before-storm alignment of the shore. Where a change in alignment is indicated as advisable by post-storm conditions, the change in alignment should be as

small as practicable but in no event more than 5°. If and when a change in alignment is made, the realigned sector should have a length of at least one-half mile before another break in the alignment is made. Using one-half mile tangents will prevent a sharp break which would result from making one 5° change and then shortly making a second 5° change.

3. The use of the one-half mile sector as the minimum length of a realigned tangent, is intended to apply whether the angular break is 5° or any value less than 5°. By the same token, if the pre-storm alignment was changing faster than would be permitted under the *5° one-half mile* rule given above, then the pre-storm alignment would furnish the control and not the *5° one-half mile* rule.

* * * * * *

U. S. Army Engineer Division, North Atlantic

NADDE 11 June 1962

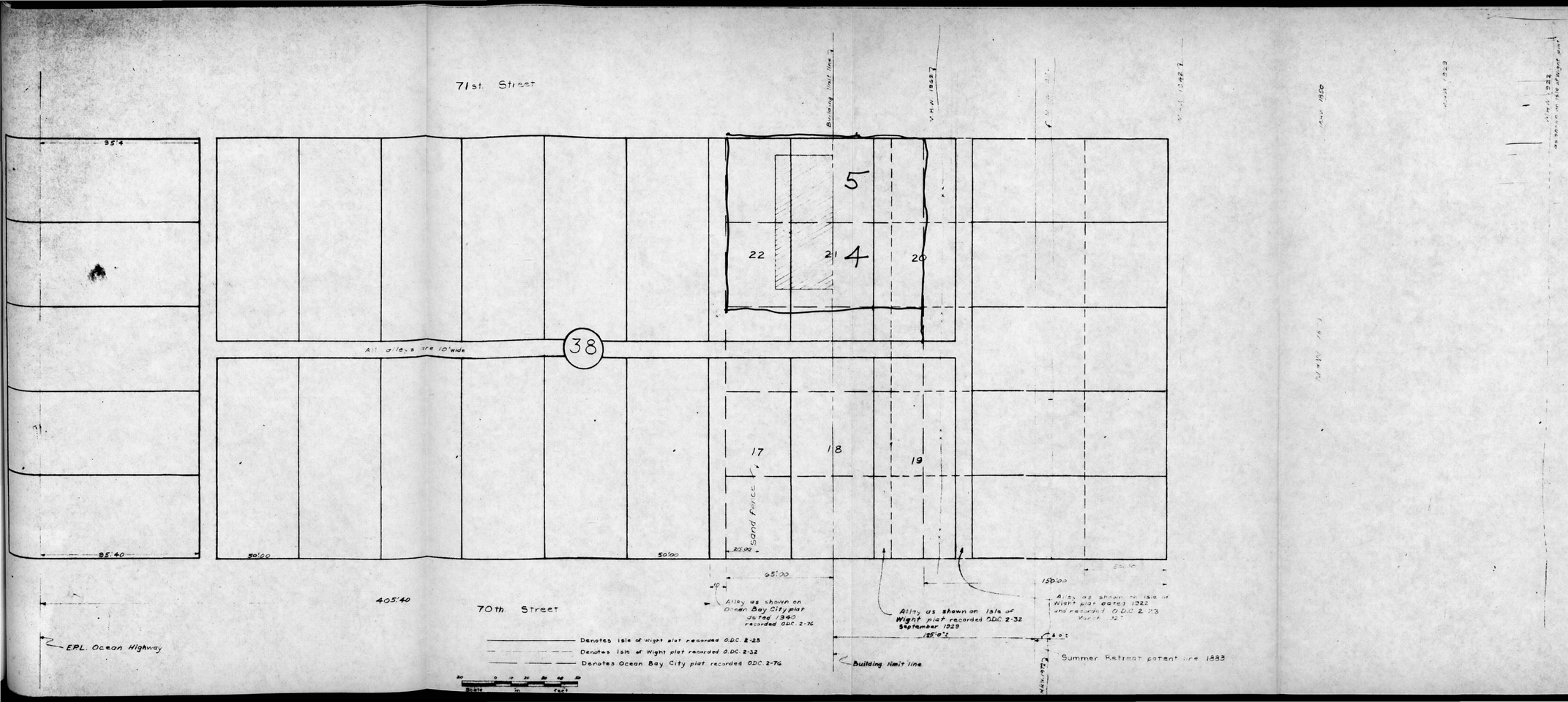
SUBJECT: Publicity on Operation Five-High

TO: 1 District Engineers, U. S. Army Engineer Districts, New York, Philadelphia, Baltimore and Norfolk

1. Dune construction on several sections of the shore damaged by the storm of 6-8 March 1962 is now nearing completion. The guidance below will be followed with respect to publicity to be initiated by the Districts.

2. As individual projects are completed, the fact of completion with whatever statistics are deemed appropriate should be publicized. Appropriate before and after photographs should be included. The most important aspect of the publicity should be a thorough explanation of what has been provided to the communities. It should be understood the work accomplished under PL 875 is temporary protection and that it was designed for a 10-year storm. What is meant by a 10-year storm must be explained. Unfortunately, most laymen interpret 10-year storm to mean that the dune is good for 10 years. Further, as part of the explanation of what has been provided, advice should be given that since no one can predict when a storm greater than a 10-year storm might occur, it would be good policy for each community to develop and practice warning and evacuation plans to prevent loss of life and minimize damage in future storms.

* * * * * *

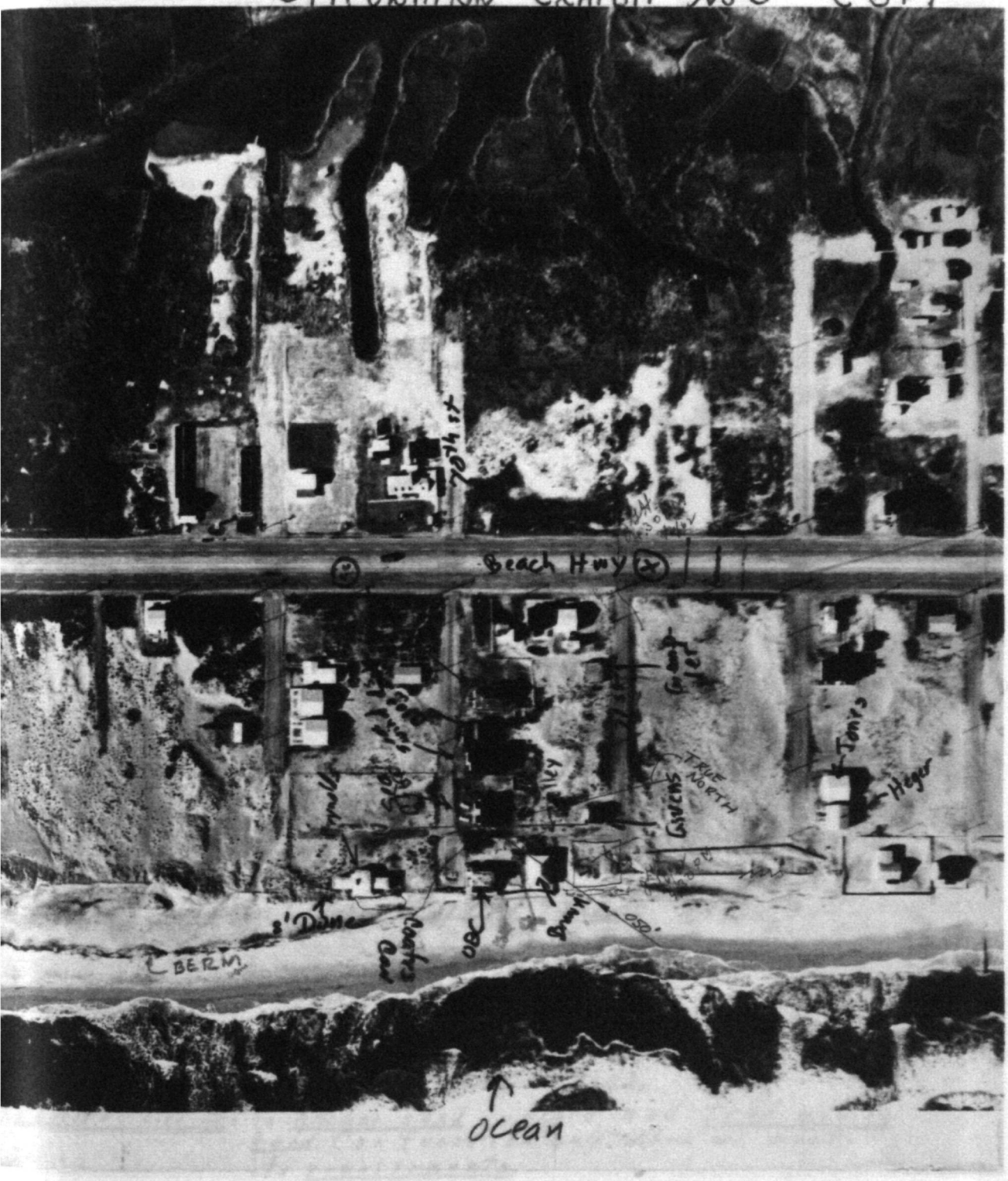


PREPARED IN THE OFFICE OF
G.B.C. SURVEYS, INC.
OCEAN CITY, MARYLAND
APPROVED BY
George E. Griffin Jr.
R.E. & L.S. No. 268
DRAWN BY R.W. Nelson
DATED FEB. 1972.

E-346

SIMULATION REPRINT No. 2
D. 11
D. 11
Givens
Sand
Sand cliffs
Givens
Steam
Piling fence
Rapids

STIPULATION EXHIBIT No 3 E-347

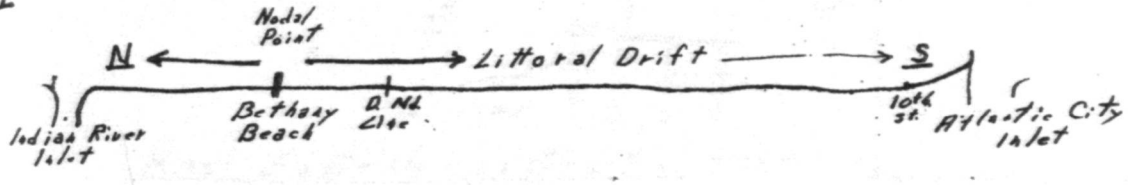


CHARTS FROM AUGUSTINE TESTIMONY

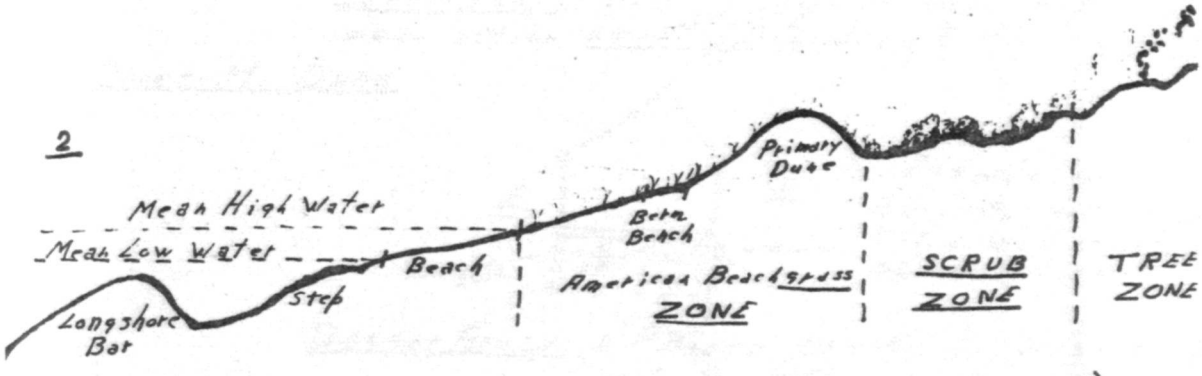
COASTAL DUNES

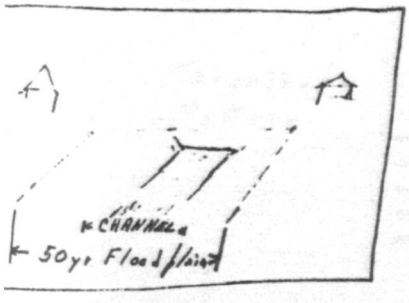
Physiographic Provinces:

1



2





Dune Building (Sand movement)

1 Suspension: Fine particles - may be carried long distances.

2 Saltation: Particles carried close to the ground.

3 Surface Creep: Large particles roll or bounce along ground.

71st St. Shore line

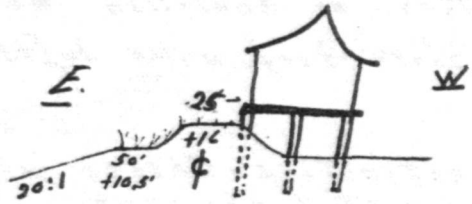
1850 - 1929 (79yrs) Accreted 130 Lin.ft. 1.6'/yr. (Based on M.H.W.) Howard Nelson Army Corps of Eng. (Breaking point) (~~Wave Abrasion~~)

ENERGY: The dynamic forces of wind and wave operate on precise laws and are either building up or destroying.

PLANT LIFE: To anchor sand in place and trap moving sand. Can function only when we meet its requirements.

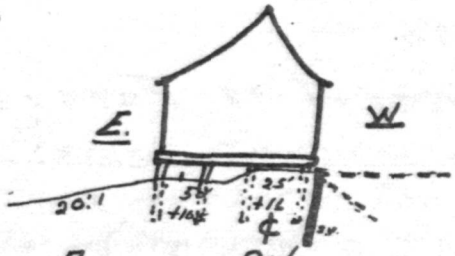
Dune Deterioration Associated with Construction

① Westerly Crest of dune



Most Easterly construction that should be permitted
Danger Areas: Westerly slope of dune exposed to wave action overtopping dune & flood waves receeding.

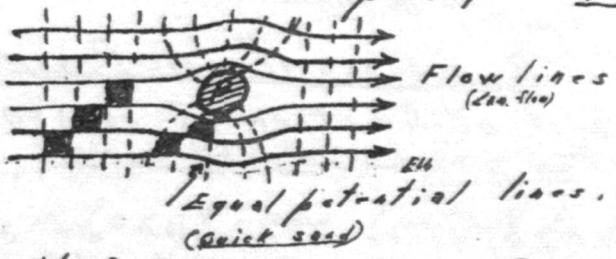
② Over the Dune



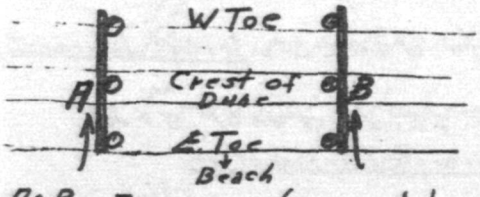
Affords no protection to the dune—As erosion proceeds Westerly tides will eventually flow under the building.

Danger Areas: 1. Pilings create turbulance, water & wind exposing the dune to blow outs.
2 Shading Kills the American Beachgrass thus exposing the loose sand to erosion

Turbulance Pattern



③ Side walls within the Dune



A&B - Zones along sidewalls, decks, porches where sand meets smooth wall are subject to blow outs.

④ Bulkheading

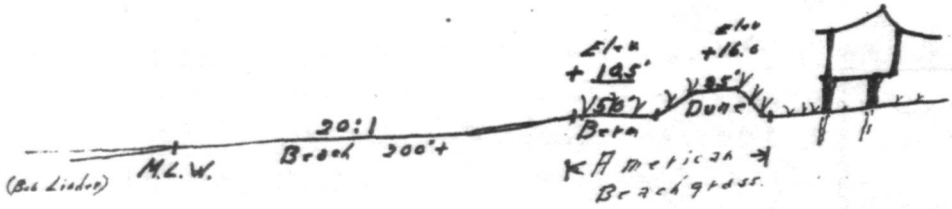
Bulkheading is in defiance of nature, and must be capable of successfully absorbing energy loss at point of impact or overtopping and or undercutting will result.

The net result of segmented construction in the dunal area leads eventually to deterioration or total destruction of the dune, which must rely on the integrity of the total dune and the integrity of the physiographic province.

Deteriorating Forces facing us today

1 Geological migration of shoreline Westerly.
2 Movement of off shore deep water depths Westerly.
3 Rising Ocean.
4 Mass destructive activities - Change without compensation resulting in accelerated erosion.

Protective Measures Needed To Retard Deteriorating Forces



By Physiographic Provinces

1 Provide for best utilization of available sand and transported sand - To dissipate energy.

2. Provide for vegetative tie-down of dunal area with American Beachgrass - To dissipate energy.

3. Restrict building - Westerly of dune - To prevent deterioration.

4. Restrict traffic from vegetated dunal area to designated crossings - To prevent deterioration.

5. Provide adequate maintenance - To insure survival.

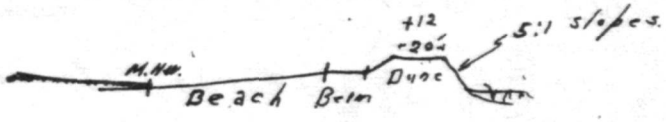
Period of exploitation is over
Just holding the line will not assure a healthy growth.
Enviromental enhancement

Restoration Activities following March-62 Storm.

62 ① Beach Nurishment (Dredging & Dozing)

② Dune line establishment and dune building.

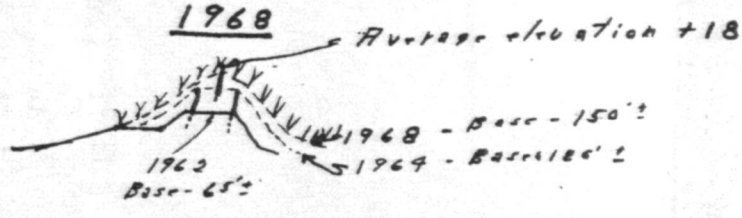
Army, Corps, of Eng.



③ Erection of sand fencing started

Worcester Co. Commissioners.
Worcester S.C.D.
Ken Carter Later Ned Ceuman
M.T Augustine advisor.

④ 1965-1968 Planted American Beachgrass with (Mag Amp) from Easterly toe of dune, over dune to Westerly toe from 36th St to Del. line.



October
1970

Inspection - Dune line

Inspection revealed that at 71st St. St along with several other locations that N.E. storm tides had topped the dune.

1 American Beach grass nearly non existant.

2 Frontal slope of dune eroded from 5:1 to 1:1

(contrast - Mass. State Park)

Ocean City Erosion & Sediment Control Ordinance 1970
Developed by Ocean City Council (Dale Cattle)
Requires that an Erosion & Sediment Control Plan be developed and approved by the Worcester Soil Conservation District before construction can start.

Dynamics

D) Encroachment by Man (Dunal Area) fragile strip of rem (Hollard program)

Clearing
Grading > for buildings, structures, streets, roads

Remaining Vegetation Deteriorated or destroyed by traffic or lack of maintenance.

'st. St. Shoreline

'929-1947 (18yrs.) Eroded 270 Lin ft 15 ft./yr.
947-1965 (18yrs) Eroded 28 Lin ft 1.4 ft/yr > (36 yrs.) 8.2'/yr

② Off Shore Depths (Deep water moving Westerly) (Dynamic of Nature)

929-1947 (18yrs) W. Movement (Energy)

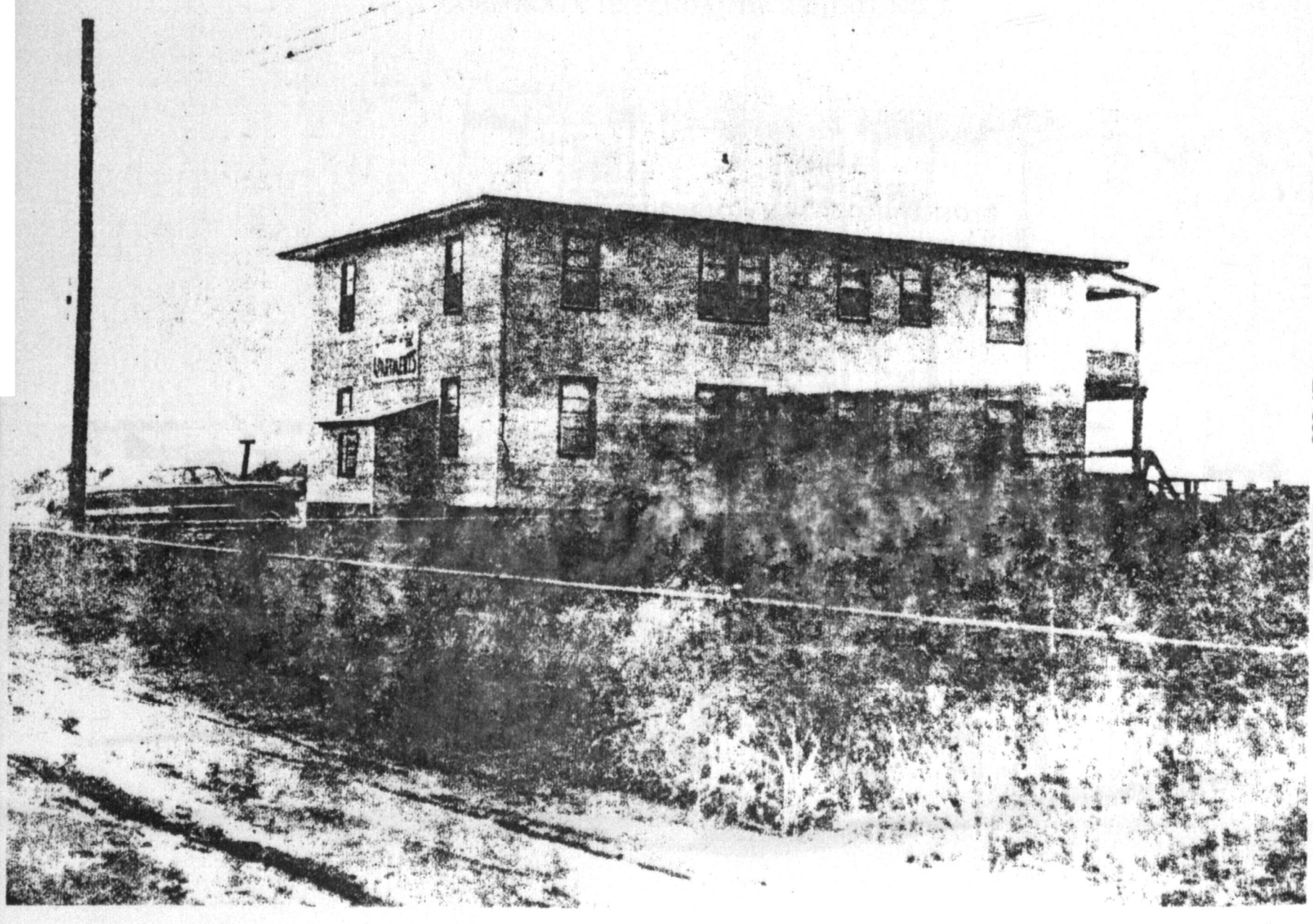
6' Depth	– 350 Lin ft	19.4 ft./yr
12' "	– 300 "	16.6 ft./yr.
18' "	– 340 "	18.8 ft./yr.
24' "	– 130 "	5.4 ft/yr.

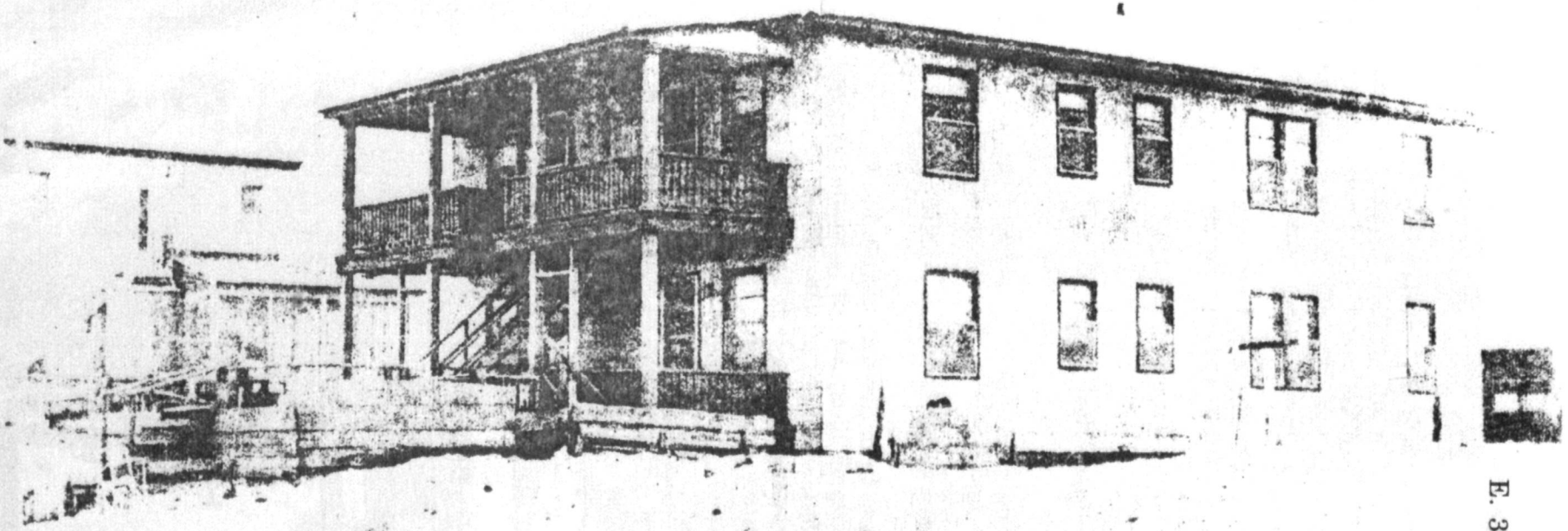
'947-1965 - More or less static except benching at 4 to 5 ft. depths, with steepening of slope to dune line.

③ Atlantic Ocean (Atlantic City) Rise of 1 ft. since 1930 (Dynamics of Nature)

④ Geological recession of shoreline (Dynamics of Nature)

CORPORATE DEFENDANTS' EXHIBIT NO. 1





CORPORATE DEFENDANTS' EXHIBIT NO. 2

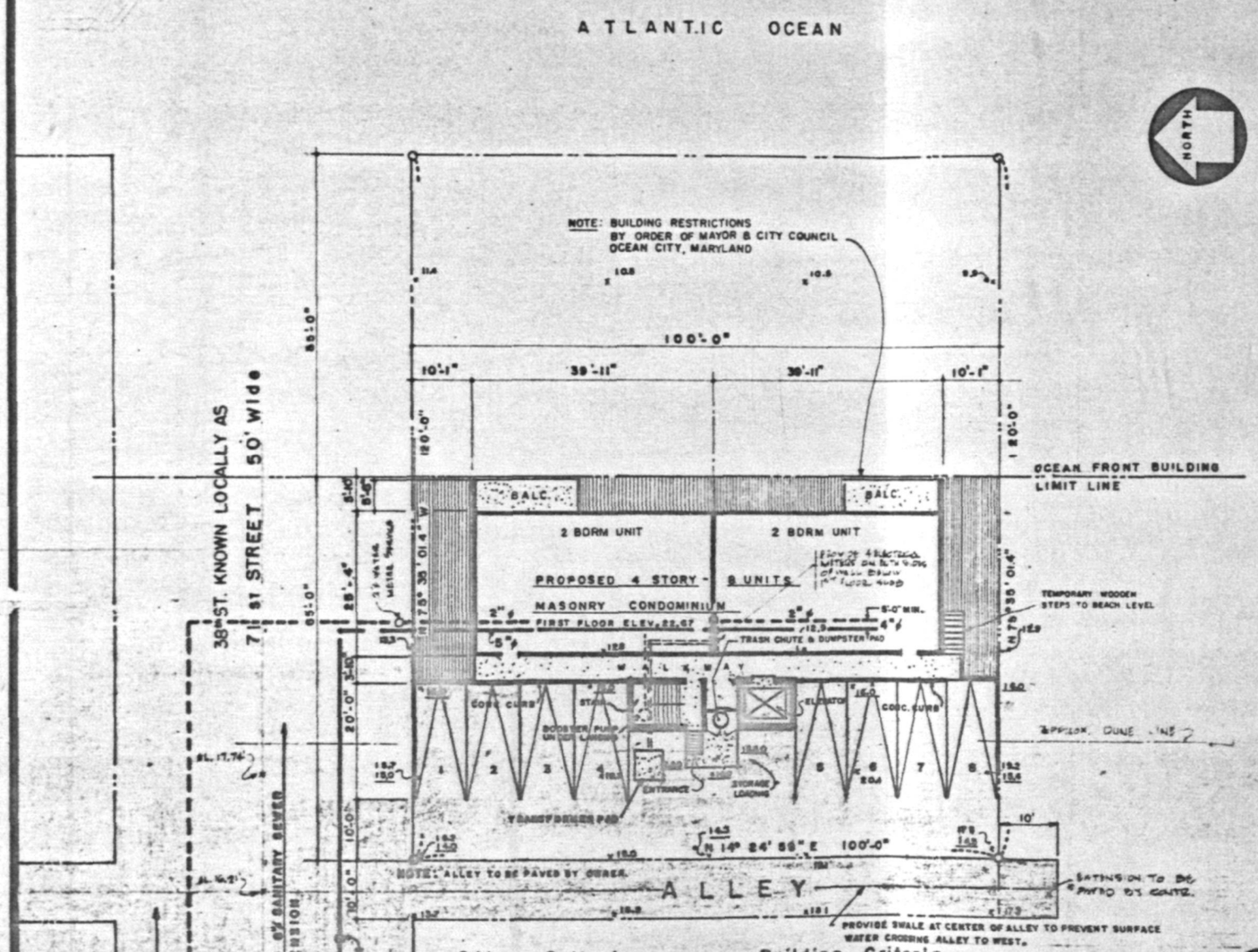
CORPORATE DEFENDANTS' EXHIBIT NO. 3

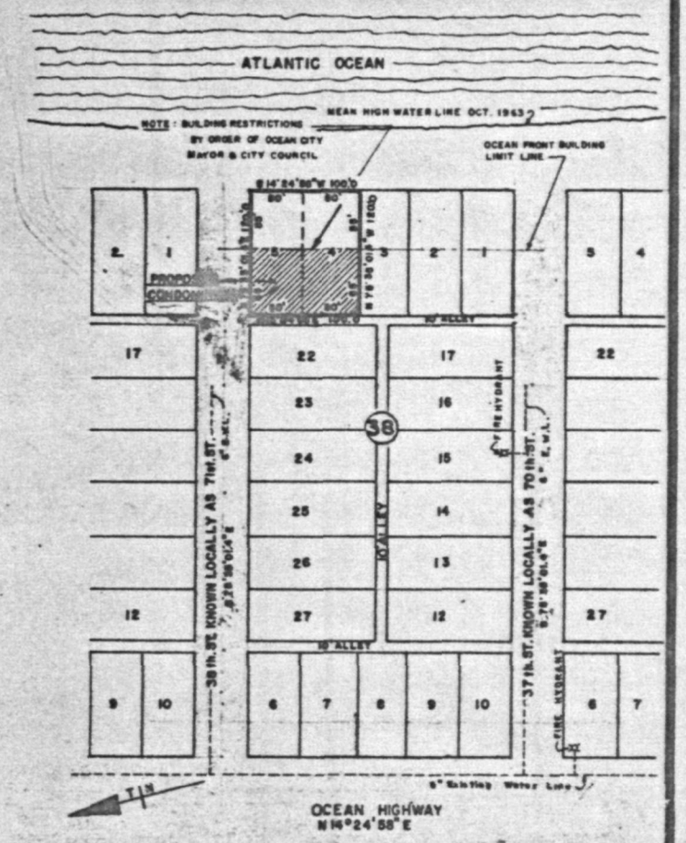
FILED
Nov 20 4 49 PM '72
FRANK W. TIALES, CLK.
CT. CT. WOR. CO.

CORPORATE DEFENDANT EXHIBIT No 4

E. 356

SANDBRIDGE CONDOMINIUM





VICINITY MAP

SCALE: 1" = 100'-0"

GENERAL NOTES:

1. SEE DRAWING NO. 2 & 3 FOR BUILDING DESIGN INFORMATION.
2. TOPOGRAPHY ACCORDING TO INFORMATION FURNISHED BY G & C SURVEYS INC. OCEAN CITY, MARYLAND.
3. INFORMATION AS TO EXISTING & AVAILABLE SEWER & WATER RECEIVED FROM CITY WATER & COUNTY SEWER DEPARTMENT.
4. BOOSTER PUMP TO BE INSTALLED IF REQUIRED TO MAINTAIN 20 PSIG MINIMUM AT 4th FLOOR TAPS.

Site Criteria

LOT SIZE: 66' × 100'

LOT AREA: 6600 Sq. ft.

ALLOWABLE UNITS 10.6 @ 600 sq. ft. EACH UNIT.

Proposed

8 - 2 Bdrm. CONDOMINIUM UNITS

ZONED - R-3
General Residencial District.

Building Criteria

2 BEDROOM UNITS W/2 BATHS
1,012 sq. ft.

4 STORY CONDOMINIUM

Parking

REQUIRED 8-2BDRM. UNITS × 8×1 = 8 CARS

PROVIDED 8 CARS

SITE PLAN

SCALE: 1/16" = 1'-0"

LEGEND

- DUNE LINE
- PROPERTY LINE
- ×16.0 — EXIST. GRADE ELEV.
- ×16.0 — FINISH GRADE ELEV.
- BAND AREAS
- CONCRETE AREAS
- PAVED AREAS

NOTE:
THESE PRESENTATION DRAWING ARE THE SOLE POSSESSION OF GEO. BERT. CROPPER INC. AND ARE NOT TO BE DUPLICATED OR USED WITHOUT WRITTEN PERMISSION.

Corporate Defts' Exh. No. 4

SHEET 1 of 7 No. 71-005.1

Approved by
George H. Dryden
Sediment Control Inspector
Worcester Soil Conservation District
Box 192
Snow Hill, Maryland 21863
Date 1-11-72

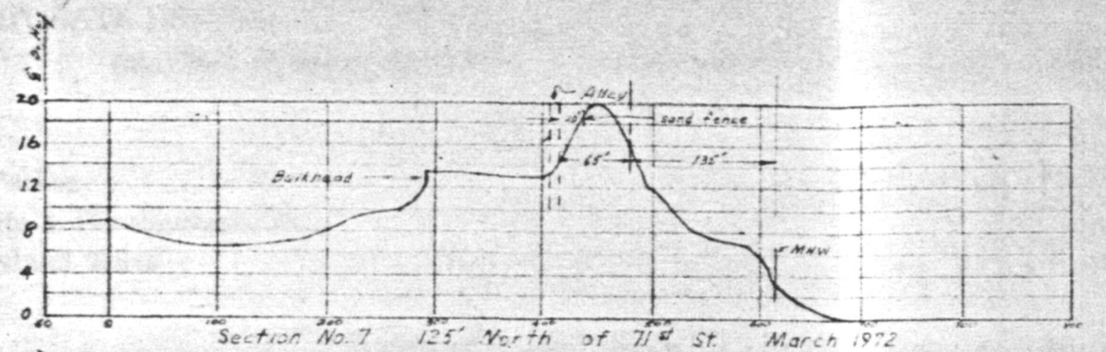
REVISED 2/8/72

REVISED 1/12/72

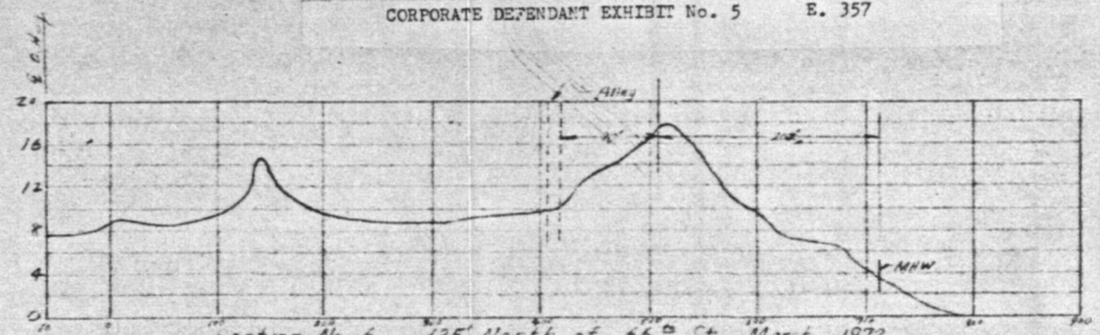
SANDBRIDGE CONDOMINIUM	Gene Parker 8 Units	DRAWN BY HERMAN GECKLE JR.
·DESIGN· ·ENGINEERING· BY GEO. BERT. CROPPER, INC. OCEAN CITY, MARYLAND George B. Cropper APPROVED GEORGE B. CROPPER P.E. & L.S. #246		SCALE: AS NOTED DATE: 1-11-72 DWG. 1

60

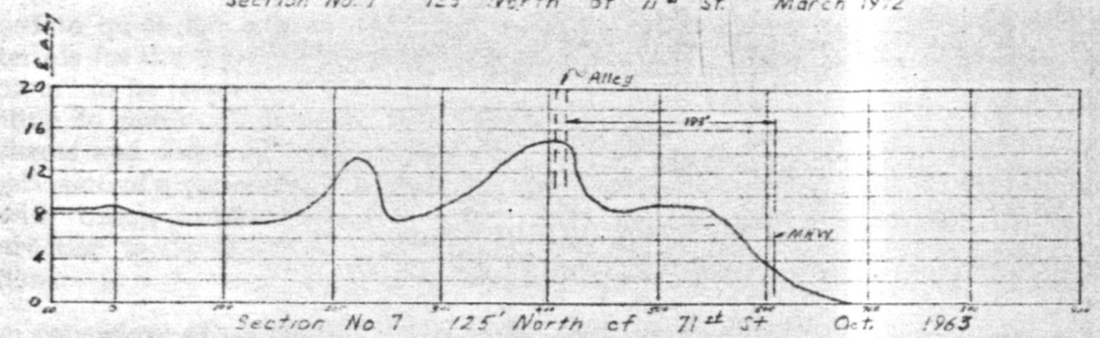
CORPORATE DEFENDANT EXHIBIT No. 5 E. 357



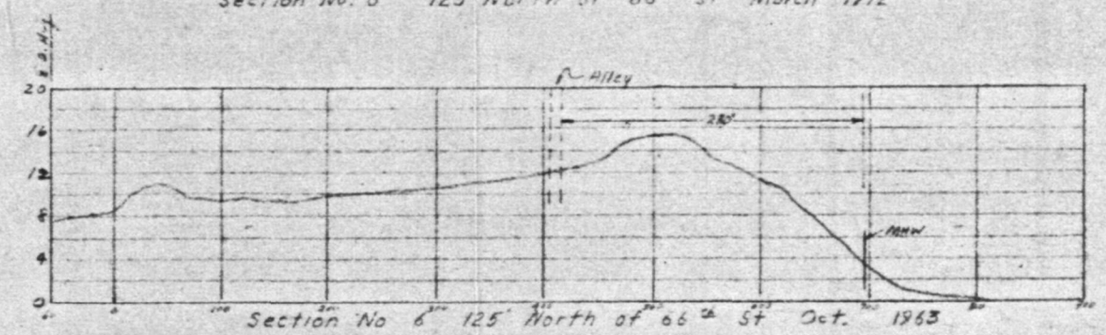
Section No. 7 125' North of 71st St. March 1972



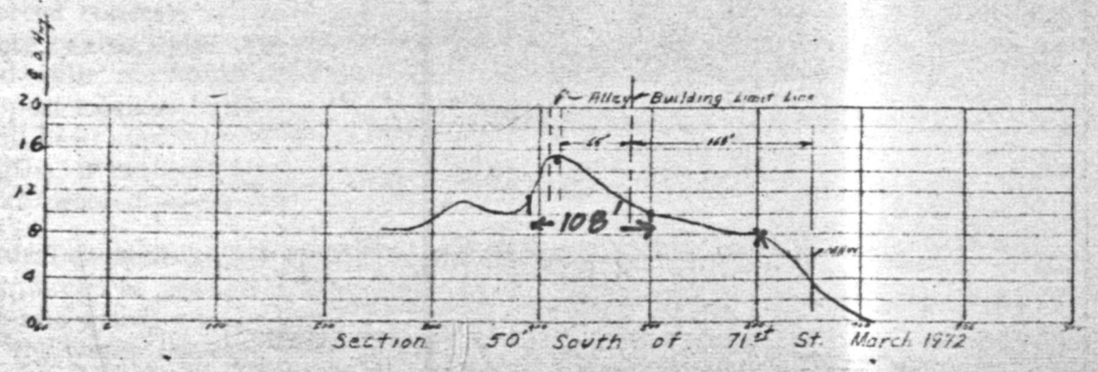
Section No. 6 125' North of 66th St March 1972



Section No 7 125' North of 71st St Oct. 1963



Section No 6 125' North of 66th St Oct. 1963



Section 50' South of 71st St. March 1972

Scale in feet

100 0 100 200

FILED
NOV 20 4 49 PM '72
FRANK W. HALES, CLK.
CT. CT. WOR. CO.

Beach Profiles
Ocean City, Maryland

G.B.C. SURVEYS, INC.
OCEAN CITY, MARYLAND

Surveyed W. H. & Jones
Drawn K.C.
Checked
Date March 1972

Corporate Deft's Exh. No. 5

CORPORATE DEFENDANTS' EXHIBIT NO. 6

Geo. Bert. Cropper, Inc.

August 23, 1971

71st St., Inc.
Attn: Mr. Gene Parker
Parker Real Estate & Development Co.
Ocean City, Maryland 21842

Dear Mr. Parker:

We are pleased to quote the sum of $230,000.00 including Maryland Sales tax on materials for the construction of your proposed 8 unit "Sandbridge Condominium" to be located on lots 4 and 5 block 38, Ocean City, Maryland, according to plans prepared by Geo. Bert. Cropper, Inc. consisting of three sheets and dated 23 August 1971. Plans and construction will be under supervision of a registered professional engineer and land surveyor familiar with beach construction. The above quotation includes design and construction to the extent of a turn-key operation within the following limitations:

1. Foundation consisting of untreated wood pilings (20′ lengths allowed) cut off at the water table and supporting reinforced concrete pile caps at a top elevation of approximately +8.00 mean low water at Ocean City, Maryland, reinforced concrete columns (approximately 12′ high), precast reinforced concrete beams under the main bearing walls as well as the longitudinal wind walls, reinforced concrete knee braces at each ocean side column as a support against both wind and waterborne debris. The first floor elevation will be at approximately elevation 22.67 mean low water. Additional pile lengths, if required by the site will be at an extra price and negotiated prior to proceeding further.

2. The structural elements of the superstructure will consist of masonry bearing walls reinforced as necessary and precast concrete floors and roof developing a fire and sound resistive structure. Solid precast slabs will be used for porches and walks; the walk slabs will be supported on precast cantilever beams. Stairs and landings will be precast concrete or galvanized steel with poured treads. A skim coat of concrete will be applied to the precast plank as a leveling surface for carpet, padding, and vinyl tile application by others. Exterior finish will be golden tan stucco. Include grading and surface treatment.

3. Aluminum gravel stop and facia with a 20 year built-up roof over 1″ rigid insulation as well as aluminum downspouts as required.

4. Peach Tree or equal sliding glass doors with medium bronze baked on Duracron finish and tempered insulating glass. C & E Building Products "#800", or equal, sliding windows with bronze finish and insulating glass.

5. "Delaware or equal 1500 # electro-hydraulic elevator, 4′ x 5′-6″ car, with travel of 150 fpm. $1500 cab allowance utilizing painted panels, S. S. frames, single slide 3° x 7° doors, selective — collective control without attendant, position indicators in car and lobby, director arrows, car and hall, call and register lights. Complete for inspection including wiring as well as sill angles, pit ladder, roller guide shoes, etc.

6. 42″ Aluminum railing eteched and factory applied baked on series 800 BRONZE PAINT (Pittsburgh) as supplied by Aluminall Corp.

7. Lodge pole pine for studs and dropped ceiling. 1 x 2 furring strips on block walls. Exterior walls insulated with ½″ technifoam. ½″ drywall throughout on all walls and dropped ceilings, spackled, and painted one coat for later application of wall paper by others.

8. Interior doors to be flush lauan hollow core, stained. Closet doors to be flush lauan hollow core, bi-fold, stained. All hardware to be "Schlage" or equal. Exterior door to be 1¾″ solid pine with 8 raised panels and aluminum threshold. Interior and exterior jambs for doors and windows to be wood.

9. Kitchen cabinets to be Marsh "Provincil" or equal.

10. Ceramic tile (Atco or equal) to be installed on all floors and over the tub and fiberglass shower with ceramic straight cove base throughout. Each bath to have marble threshold, 2 soap dishes, paper holder, and 2 towel bars, and toothbrush tumbler holder.

11. Air conditioning system to be "Chrysler" or equal split system with a cooling capacity of 23,000 btu at ARI condition, and be installed in the wall of the stair tower. The condensing unit will have aluminum tubes and fins. The air handling unit will be installed with vibration isolators, and suspended above the dropped ceiling in the bathroom area. The system will be furnished and installed by an established contractor regularily engaged in this industry with 24 hour service available. Work will be performed by skilled, experienced, craftsman who will test and balance the system to establish efficient quiet operation prior to acceptance. This installation is the responsibility of this contractor to design and guarantee a 20° drop in temperature at an outside temperature of 95°.

12. The kitchen appliances to be "Frigidaire" or equal PPI-152TAS refrigerator, RDE-38S range, DW-CDUP dishwasher, WCDS washer, DCDS electric dryer, FDF-2 disposers, and ductless range hood to match.

13. Interior exposed concrete and dropped drywall ceilings will receive a sprayed-on textured finish. Exterior balcony and walkway ceilings and edge to be painted with non-staining paint especially adapted to use on new concrete.

14. Plumbing to be designed by the sub-contractor to conform to all local codes including water and sewerage taps, meter, copper piping throughout with the option of cast iron for waste and venting, 30 gallon GLF3PL Jackson 236V hot water heaters, A.S. or equal, 2052.041 water closets, and 2295.020 tubs in Regency Blue, chrome shower rods, piping for lavatories and cabinets furnished by and set by others, 4250.239 stainless steel sink with single lever faucet and strainer as well as hookups to dishwasher, washer, refrigerator, and garbage disposer supplied by others. Further included are drain lines from the elevator pit, washdown and drain lines for the garbage room and chutes, and an exterior hose bib near the entrance. Also provide dry stand pipe and accessories for fire protection including cabinets at each floor.

15. Rubbish chute to be 24″ ℄ #18 gage aluminized or galvanized steel extending 4′ above to roof and covered with glazed metal Skylight with four 15″ x 18″ intake doors and bottom door opening into the municipal garbage containers. Fabrication and accessories will satsify all local codes.

16. Electrical contract will include design and approval by Delmarva Power and Light Company according to all applicable codes, to include underground service, wiring, baseboard heat, temporary service, fire alarms and all other facets necessary to a complete electrical package. Further included are 37 lighting and convenience outlets per unit; $100.00 fixture allowance per unit; wiring of ranges, dishwashers, disposals, water heaters, automatic washers, dryers, and airconditioning units; and one years guarantee after final inspection by the National Board of Fire Underwriters.

In the event of damage resulting from a breakthrough of the dune line during or after construction, the cost of same will be borne by the owner.

Prior to the first payment request, a standard architecture draw statement will be prepared indicating the various categories of construction and the cost allocations for same. These forms will be prepared on the 25th of each month indicating the percentage of work to be completed by the end of that month and submitted to you at that time. Payment will be expected by the 10th of the following month.

Payments will be subjected to a maximum retainage of 10% which will be released within 30 days of essential completion of the project. Any un-

paid balance beyond the due date will be accessed a $1^{1}/^{25}$ per month service charge (18% per annum). This proposal will be effective for acceptance within 30 days with construction to begin in September.

We are pleased to be considered for the work and anticipate your great success with the project.

Sincerely,

George B. Cropper, Inc.
George B. Cropper, Pres.

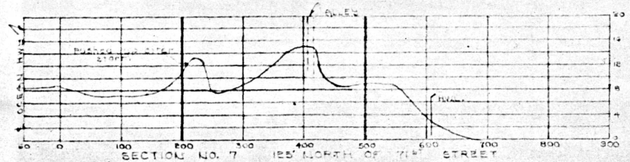
Accepted by: Eugene R. Parker, Jr.

Date: 1 Nov. '71.

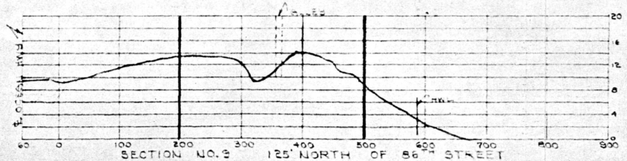
CBC/stl

Everett M. Cobb
Mary A. Cobb
Robert J. Taylor
Elizabeth A. Taylor

FILED
Nov 20 4 49 PM '72
FRANK N. HALES, CLK.
CT. CT. WOR. CO.

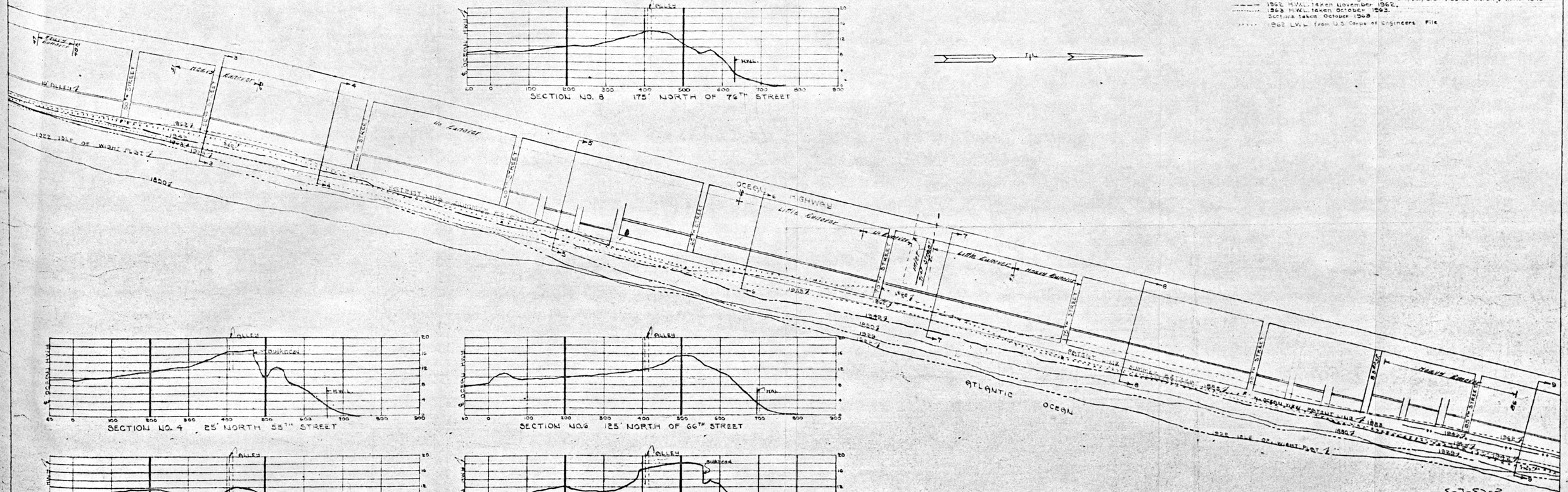


SECTION NO. 7 125' NORTH OF 76TH STREET



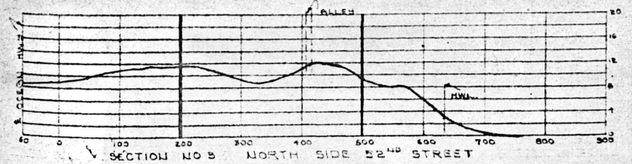
SECTION NO. 9 125' NORTH OF 86TH STREET

SECTION NO. 8 175' NORTH OF 76TH STREET

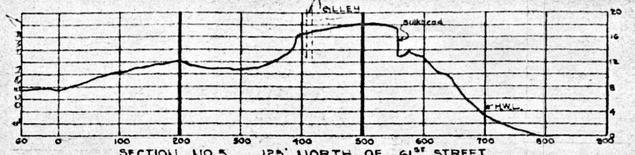


SECTION NO. 4 25' NORTH 55TH STREET

SECTION NO. 6 125' NORTH OF 66TH STREET



SECTION NO. 3 NORTH SIDE 52ND STREET



SECTION NO. 5 125' NORTH OF 61ST STREET

SCALE OF SECTIONS
1" = 100' HORIZONTAL 1" = 10' VERTICAL

NOTES:
1850 H.W.L. from U.S. Coast & Geodetic Survey Map, Register No 299 Date July 1850
1888 H.W.L. from U.S. Coast & Geodetic Survey Map, Register No 4467 Date July 1888
1942 H.W.L. from U.S. Coast & Geodetic Survey Map T8100E T8127 Date 1942
Line shown for Isle of Wight Plat dated 1922 as shown on plat recorded in the land records of Worcester County, Maryland and is probably Low Water line.
1948 H.W.L. is from Plat by Geo Bert Cropper, C.E. & dated March & April 1948
1962 H.W.L. taken November 1962.
1963 H.W.L. taken October 1963.
Sections taken October 1963
1962 L.W.L. from U.S. Corps of Engineers File

GEO. BERT. CROPPER, INC
OCEAN CITY, MARYLAND
APPROVED BY GEORGE B. CROPPER, C.E.
Geo B. Cropper
R.M.E. & L.S. No. 248
SURVEYED BY N.R. Jones 10/63
DRAWN BY N.R. Jones 10/63

SCALE IN FEET
0 100 200 300 400 500

SHEET 2 OF 3

S-7-63-2

FILED
Nov 20 4 49 PM '72
FRANK N. HALES, CLK.
CT. CT. WOR. CO.

FILED JUL 26 1974

IN THE

Court of Appeals of Maryland

SEPTEMBER TERM, 1974

No. 64

DEPARTMENT OF NATURAL RESOURCES, ET AL.,
Appellants,

v.

MAYOR AND COUNCIL OF OCEAN CITY, ET AL.,
Appellees.

APPEALS FROM THE CIRCUIT COURT FOR
WORCESTER COUNTY PURSUANT TO CERTIORARI
TO COURT OF SPECIAL APPEALS
(DANIEL T. PRETTYMAN, Judge)

BRIEF OF APPELLANTS

FRANCIS B. BURCH,
Attorney General,

HENRY R. LORD,
Deputy Attorney General,

WARREN K. RICH,
Assistant Attorneys General,

For Appellants,
Department of Natural Resources,
State of Maryland.

HAMILTON P. FOX,
HEARNE, FOX & BAILEY,

For Appellants,
E. T. Parks, Inc.

The Daily Record Co., Baltimore, Md. 21202

TABLE OF CONTENTS

Page

Statement of the Case ---------- 1

Questions Presented ---------- 3

Statement of Facts ---------- 4

Argument:

I. The Area Between the Dune Line and Mean High Water Has Been Dedicated to Use by the Public ---------- 17

II. The Public Has Attained the Right to Use the Area Between the Dune Line and the Mean High Water Mark Through Prescriptive Use ---------- 28

III. The Public's Interest in Maryland's Coastal Shores Established Through Custom and Grant Require That Activities Violative of the Public Trust Be Proscribed ---------- 32

IV. Land Inundated by Mean High Water Reverts to State Ownership; Areas Reclaimed by Governmental Efforts Remain State Property ------- 43

Conclusion ---------- 46

Appendix ---------- 49

TABLE OF AUTHORITIES

CASES

A. H. Smith Sand and Gravel Co., Inc. v. Department of Water Resources, 270 Md. 652 (1974) ---------- 40

Air Lift, Ltd., v. Board of Commissioners, 262 Md. 368 (1971) ---------- 39

Baltimore City v. Steamboat Co., 104 Md. 485, 494 (1906) ---------- 33

Binney's Case, 2 Bland. 99 (Md. Ch. 1829) ---------- 46

Page

Board of Public Works v. Larmar, 262 Md. 24, 46-47, (1971) ---------- 33, 41

Borough of Neptune City v. The Borough of Avon-by-the-Sea, 61 N.J. 296, 294, 309 A.2d 47, 54 (1972) ---------- 42

Browne v. Kennedy, 5 H&J 195 (1821) ---------- 32, 46

Carolina Beach Fishing Pier v. Town of Carolina Beach, 277 N.C. 297, 177 S.E.2d 513, 517 (1970) ---------- 46

City of Daytona Beach v. Tona-Rama, Inc., 271 S.2d 765 (Fla. 1972) ---------- 30, 31

City of Milwaukee v. State, 193 Wis. 423 449, 214 N.W. 820, 830 (1927) ---------- 38

Conway v. Prince George's County, 248 Md. 416, 419 (1967) ---------- 18

Cushwa v. Williamsport, 117 Md. 306 (1912) ---------- 21

Day v. Day, 22 Md. 530, 537 (1865) ---------- 40, 46

Department of Natural Resources v. United States Steel Corporation, Law No. 7432, Cir. Ct. of Charles Co., March 12, 1974 ---------- 40

Dewey Land Co. v. Stevens, 90 A. 1040, 1042 (N.J. 1914) ---------- 44

Garrett v. Gray, 258 Md. 363, 378 (1970) ---------- 26, 29

Garrison v. Engle, 193 A. 820, 823 (N.J. 1937) ---------- 45

Gewitz v. City of Long Beach, 330 N.Y.S. 2d 495, 508, 509 (1972) ---------- 23

Gion v. City of Santa Cruz, 465 P.2d 50, 56, 58 (Cal. 1970) ---------- 24, 25, 26

Greenco v. City of Virginia Beach, 214 Va. 201, 198 S.E.2d 496 (1973) ---------- 26

Harlan v. Town of Belair, 178 Md. 260 (1940) ---------- 18

Page

Illinois Central Railroad v. Illinois, 146 U.S. 387, 453, 36 L. Ed. 1018, 1043, 13 S.Ct. 110, 118 (1892) ---------- 38

Kerpelman v. Board of Public Works, 261 Md. 436, 445, 276 A.2d 56, 61 (1971) ---------- 32

Mt. Sinai v. Pleasant Manor, 254 Md. 1, 5 (1968) -------- 28

National Life Insurance Co. v. Tower, 251 F. Supp. 215 (D. Md., 1966) ---------- 37

Ocean Hotels Inc. v. Department of Natural Resources, No. 73, 75, 15th Circuit Court (Fla. January 3, 1974) p. 4; Appeal docketed No. 74-255, 4th Dist. Ct. Ap. Feb. 26, 1974 ---------- 43

O'Connor v. Estevez, 182 Md. 541, (1943) ---------- 37

Patterson v. Gelston, 23 Md. 432, 448 (1865) ----------40

People v. Hecker, 4 Cal. Rptr. 334 (1960) ---------- 45

Potomac Sand and Gravel Co. v. Mandel, 266 Md. 358 (1972) ---------- 33, 41

Robbins v. Department of Public Works, 355 Mass. 328, 330, 331, 244 N.E. 2d 577, 579, 580 (1969) ---------- 39

Seaway Co. v. Attorney General, 375 S.W.2d 923 (Tex. 1964) ---------- 27, 29, 30, 31

Smith v. Shiebeck, 180 Md. 412, 418, 419, (1942) ---------- 17, 18, 27, 28

State ex rel. Thornton v. Hay, 462 P.2d 671, 672, 673, 254 Ore. 584, 595 (1969)----- 27, 35, 36

Thomas v. Ford, 63 Md. 346, 351-352, (1885) ---------- 29

Tucci v. Salzhauer, 336 N.Y.S. 2d 721, 40 A. D. 712 (App. Div. 1972); aff'd mem., 352 N.Y.S. 2d (Ct. App. Dec. 27, 1973) ---------- 39

Van Ruymbeke v. Patapsco Industrial Park, 261 Md. 470, 476-477 (1971) ---------- 40

STATUTES

Page

Article 5, Declaration of Rights, Constitution of the State of Maryland ---------- 32

Chapter 241, Laws of Maryland, 1970 [Natural Resources Article, Section 9-101 et seq. (1974 Vol.)] ---------- 41

Chapter 242, Laws of Maryland, 1970 [Natural Resources Article, Section 9-101 et seq. (1974 Vol.)] ---------- 42

Section XVI of the Charter from King Charles I to Lord Baltimore ---------- 33

MISCELLANEOUS

22 Stan. L. Rev. 564 (Feb. 1970) ---------- 27

Melville, Herman, Moby Dick (Schribner's, 1832) ---------- 46

IN THE

COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 1974

NO. 64

DEPARTMENT OF NATURAL RESOURCES,
STATE OF MARYLAND, ET AL.,
Appellants,

v.

MAYOR AND COUNCIL OF OCEAN CITY,
MARYLAND, ET AL.,
Appellees.

APPEAL FROM THE CIRCUIT COURT FOR WORCESTER COUNTY
PURSUANT TO CERTIORARI TO THE COURT OF SPECIAL APPEALS
(DANIEL T. PRETTYMAN, JUDGE)

BRIEF OF APPELLANTS

STATEMENT OF THE CASE

This is an appeal taken by the Intervening Plaintiff, the State of Maryland, Department of Natural Resources, and E.T. Park, Inc., from the opinion and order dated April 23, 1974, of

the Circuit Court of Worcester County. The lower Court denied the permanent injunction sought by the Appellant, E.T. Park, Inc., upon finding and conclusion of law that the public and E.T. Park, Inc. had not acquired an easement upon Lot Nos. 4 and 5 in Block No. 38 of the Revised Plat of Oceanbay City, Maryland.

On March 30, 1972, the State of Maryland, Department of Natural Resources, was granted permission to intervene in this cause. In its petition the State contended that the subject beach area under dispute came within its jurisdiction by means of statutory functions, amongst which was the regulation of State and private wetlands and the general obligation to safeguard the natural resources of the State for the most beneficial utilization by the citizens of Maryland. The State urged as did E.T. Park, Inc., that certain public rights have been established on the beaches in Ocean City which have ripened into a public easement; that the lands between mean high water and the duneline are the subject of a public trust for recreational and associated purposes and, therefore, building eastward of the duneline is in derogation of that trust. Finally, the State contended that over an extended period of time, in a gradual fashion, the Ocean City beach was undergoing an erosion process which had actually submerged various areas of private property and that the expenditure of public funds, both to prevent the ongoing erosion process and to restore what had already been lost, was accomplished by artificial methods at a high cost to the public and, therefore, the benefits of such measures did not inure to the private interests bordering the Atlantic Ocean.

The lower Court determined that the public had not acquired an easement either by any of the alternative methods of prescription, dedication or custom, and also the State of Maryland does not hold title to the subject lot numbers by virtue of the public trust doctrine or by reason of the public expenditures pressed by the State.

The Court also rejected the contention that the granting of the "dune" easement on June 27, 1962 by the then-owners of Lot Nos. 4 and 5 constituted an easement in favor of the public for recreational use and further held that in the event the Court would have granted the request for injunctive relief, such act would be tantamount to the taking of private property for public use without just compensation, in contravention of the Constitutions of the United States and the State of Maryland, and would abridge the "fundamental valid right of all Americans to own property and enjoy the profits thereof", and, further, such act "would subvert the fundamental premise of the American economic system".

It is from that opinion and order that the State of Maryland and E. T. Park, Inc., now appeal.

QUESTIONS PRESENTED

1. Whether the public has acquired an easement by means of dedication of the area between the mean high tide and dune or vegetation line within Appellee's property.

2. Whether the public has acquired an easement by means of prescription of the area between the mean high tide and dune or vegetation line within Appellee's property.

3. Whether the area between the mean high water line and the dune line has become the subject of the public trust through the continued usage and expenditures by and on behalf of the public.

4. Whether all or part of the property of Appellee has accrued to State ownership by means of submergence and the public expenditures incurred which were designed to prevent erosion and restore the beach and dune area.

STATEMENT OF FACTS

The arrival of Memorial Day during the past several decades has signaled the commencement of the annual summer pilgrimage by Marylanders to the bays, lakes, river and ocean shores of the State for sun and recreation. To many summer recreation is synonymous with the public beaches of Ocean City, to which Marylanders flock by the hundreds of thousands each year. As a result of this influx of vacationers, the relative amounts of beach space at Ocean City available for public use is annually decreasing due to increasingly oceanward encroachment of the condominiums and commercial buildings combined with the continuously expanding population of Maryland. Consequently, the density of people using the Ocean City public beaches increases each year.

An apparently inevitable conflict has arisen between those who desire to erect buildings on the beach on the one hand and those who strive to prevent this development on the ground that as members of the public they have a right to use the public beach which would be eliminated or substantially reduced as a result of the construction of condominiums and commercial buildings. Appellant, E.T. Park, Inc., commenced this case on February 7, 1972 when it filed a Bill of Complaint in the Circuit Court of Worcester County seeking to enjoin Appellees, 71st Street, Inc. and George Bert Cropper, a builder, from constructing "Sandbridge Condominium". Appellants' substantive allegations argued that, if constructed, the condominium would be located within two adjacent lots, Lot Nos. 4 and 5, between 70th and 71st Streets,and that when erected the condominium would be situated in the wave wash of the Atlantic Ocean at normal high tide so that no dry sand area would exist for public use in this area.

The Appellant also filed a petition against the Mayor and City Council of Ocean City to enjoin them from issuing a building permit to George Bert Cropper, Inc., for the construction of "Sandbridge Condominium". Appellant alleged that the building limit line established by the Mayor and City Council does not adequately protect the public beach since the line runs so close to the mean high water mark that it would eliminate the public beach in the 70th - 71st Street area at normal high tide. E.T. Park alleged that it had standing on grounds that it owned a tract of land on the southerly side of 71st Street,

which is separated from the ocean beach at 70th and 71st Streets by a 10 foot alley and the artificial sand dune created by the Army Corps of Engineers, and that it had acquired an easement to use this beach.

Dr. Nicholas J. Kohlerman, the sole stockholder of E.T. Park, Inc., purchased this property in 1964. Lot Nos. 4 and 5 were purchased by J. Robert Brown in 1961 which he subsequently granted to Dr. Robert J. Taylor and his wife by means of a land installment sales contract over a five-year period. (E. 219) On November 21, 1971, Robert J. Taylor and Elizabeth Taylor, his wife, conveyed Lot Nos. 4 and 5 to 71st Street, Inc., of which Eugene R. Parker is President.

Since the numerous stages in this proceeding are detailed above, for the present it is sufficient to state that on March 30, 1972, the Bill of Complaint against George Bert Cropper, Inc., was dismissed on the ground that the contract between him and 71st Street, Inc., had been dissolved. At the same time the motion to intervene of the Department of Natural Resources was granted. On April 21, 1972, 71st Street, Inc., filed answers to the petitions of E. T. Park, Inc., and the Department of Natural Resources and a counter petition against E. T. Park. The counter petition alleged inter alia that E. T. Park had lost large sums of money paid in advance for the proposed condominium, construction had been delayed while construction costs increased, and that it had to release George Bert Cropper from his contract. The lower court bifurcated the proceeding thereby postponing a hearing on the counter petition until a determination upon the merits. (E. 238)

The posture of this case must be examinted within the prospective of the history and geography of the beaches at Ocean City. Lots 4 and 5, now owned by 71st Street, Inc., are part of Fenwick Island, a barrier island that is part of a larger chain extending from the southern boundary of New England along the Atlantic Coast in a southerly direction to Florida. The Barrier Islands were formed by the deposition of sand through the dynamic forces of wind and wave. Waves breaking in deep water offshore create troughs in the sandy ocean bottom, displacing the sand and carrying the sand particles westerly to a point of deposit. Gradually, the accumulated deposits form a low subaqueous bar, parallel to the shore, which ultimately emerges from the water. The beach builds up through the process of saltation, which is the hopping or rolling movement of sand particles along the beach until they reach their initial resting areas. (E. 279) The same processes cause the open water areas which separate a barrier island from the mainland to take on the formation of shallow bays and estuaries.

Each component of the beach is related to the other. The term "foreshore" refers to the area from mean high water to mean low water which generally has a slope of twenty to one. (E. 36, 277) The "berm" area is composed of dry sand and extends from the foreshore on a gradual slope to the base of the dune. (E. 36, 277) The berm varies from 25 to 50 feet in width. The dune is the structure which rises at a 5 to 1 slope from the berm to an elevation of 16 feet and has a 20 foot base. (E. 188) When maintained in the state that nature intended, the dunes are frequently covered with American Beach Grass or shrubs which provide natural

protection. American Beach Grass, however, is easily destroyed by the foot of man and lack of sunlight. (E. 280, 283) The phenomena by which the beach, berm, and dunes are built up are related to sand movement. Wind currents pick up the sand and carry it to a resting place. The rate at which the beach and the berm are built up depends on the velocity of wind on the shoreline and the amount of sand available. (E.278)

Three interrelated ingredients must be present if a beach is to have adequate storm protection: first, the beach must have a proper slope and length; second, there must be a berm lying westerly of the beach and rising to approximately a 10.5 elevation with an extremely gradual slope; and, finally, a dune must exist which rises to an elevation of plus 16 feet with a 20 to 25 foot crest. (E. 188) The dune assists in the building and enlargement of the berm to the east so long as it contains sufficient sand. Today the beach in Ocean City is in a weakened condition because of a lack of natural sand source, and, therefore, in order to give adequate maintenance to the dunal area, artificial refurbishment is necessary from time to time. (E. 189, 192)

Due to the dynamic forces of Nature and the encroachment of man, Ocean City is a very fragile piece of real estate. (E. 279) The safety and welfare of the Ocean City area as a whole depends upon the integrity of the total dunal system within the self-contained physiographic province of which it is a part. This province begins at Indian River Inlet, continues southward to the Ocean City Inlet and includes the tract in question owned by 71st Street, Inc. (E. 167) Destructive forces are constantly at work on Fenwick Island.

In its natural state the island would migrate westward, as in the case of Assateague Island. Instead, man has anchored it with piling, buildings, thereby preventing its migration. (E. 169) In addition, other destructive forces include the westerly migration of the shoreline, the rising sea level and consequent recession of the shoreline, and, finally, the destructive forces of man. (E. 288)

Since the early part of the Twentieth Century, the 70th - 71st Street area has been relatively low in elevation and, therefore, particularly susceptible to the threat of storm and wave action. (E. 254) From 1850 to 1929, the beach in the area surrounding 71st Street underwent a process of accretion which averaged approximately 1.6 feet per year. From 1929 to 1947, the process reversed itself and the beach lost approximately 270 feet, or approximately 15 feet per year. Records also reflect that from 1922 to a date after the 1962 storm, the beach in the area of 71st Street receded 450 feet (E. 256, 279). The erosion is directly related to the phenomenon of the deep water zones migrating in a westerly direction. For example, the 10 foot depth line moved westerly 380 feet during the period from 1929 to 1965, a period of substantial erosion.(E. 196)

Since 1938 several measures have been undertaken by various State and local agencies to protect the beach from the ever present menace of erosion. After the beach highway was constructed by the former State Roads Commission in 1938, a sand fence was placed some distance away from it in order to keep it clear from sand. This fence was constructed without obtaining any easements from the landowners concerned. (E. 157) Another sand fence, again built

without obtaining easements, was placed in the beach area by Worcester County in 1953 and ran from 26th Street to the Delaware line. Both of these fences were financed through State General Funds.(E. 159) The fence did its job. Sand accumulated in a general slope of 20 to 1.

Between August 1954 and June 1955, asphalt groins were constructed between 28th Street and the Delaware Line to help retain the sand that flows in a southerly direction (E. 164). These structures were also built with the State funds appropriated for Ocean City (E. 141). An aspalt groin was constructed at 70th Street which was designed to build up the beach between 70th and 71st Streets. Approximately $3,000.00 to $5,000.00 was expended for the installation of the groin. Shortly after the groin was in place, it was covered over by sand, evidencing an immediate increase in the height of the beach. An increase in beach height coupled with an increase in beach width assists in retarding erosion by providing an adequate surface for the dissipation of wave force (E. 174, 178, 299). The bulldozing of beach sand in a westerly direction each Fall is also designed to protect against erosion. Primarily, State moneys have been spent for shore protection and no sums have been expended for dune maintenance by the City (E. 141).

The most extensive erosion control measure in this area was "Operation-Five-High" undertaken by the U.S. Army Corps of Engineers in 1962 as a result of the great March storm that swept the Atlantic Coast. This storm was not categorized as unusual except for its endurance and successive high tides. Peak tides were estimated to be at least 6 feet above normal at

Ocean City although they appeared even higher. The force and pounding of the seas were reported more damaging than the accompanying gale strength winds (Stipulated Exhibit 4, pp. 16-17). The President of the United States declared the Ocean City beach area a National Disaster Area, thereby making federal funds available to finance the construction of the dune line by the Army Corps of Engineers. (E. 202) Immediate reparations then were commenced by the State. Worcester County embarked upon the effort to obtain easements for construction and maintenance of the dune. The former owners of Lot Nos. 4 and 5, Mr. and Mrs. J. Robert Brown, together with a Mr. and Mrs.Harry Robert Yauger and a Mr. and Mrs. Roy E. Klepser, granted a perpetual easement recorded in the County Land Records in favor of the Worcester County Commissioners on June 27, 1962 for the erection of an artificial dune line. The grantors of the easement agreed to the installation of the artificial dune believing that the dune would allow a more rapid build-up of the beach area. (E. 57)

After the easements were obtained, the Army Corps of Engineers began construction of an artificial dune line in approximately the same area as the County dune with respect to the 70th - 71st Street area. (E. 260) Due to its initial elevation of plus 12, the Corps' dune only provided 10 year storm protection, i.e., protection against storms of such velocity that studies show that they will occur only once in 10 years. (E. 197) The designed conditions of the beach were a dune 12 feet high, 20 feet wide, one on five slopes, an east slope with an elevation of 10 feet, a berm 50 feet wide, and a beach area with a one to 20 slope. The restoration measures successfully restored the given beach area as well as rebuilt a primitive dunal system.

Maintenance of the dune then was turned over to the Worcester County Commissioners (E. 203), who adopted a policy of prohibiting development of buildings upon the crest of the dune (E. 152). Although 1,050,000 cubic yards of sand at a cost of $1.5 million was used in this operation, this attempt to provide integrated protection has not been completely successful. However, it has been shown that if no action had been taken to protect the beach after the 1962 storm and the dune line had not been built up, the rate of erosion would have increased. (E. 213)

The most extensive damage caused by the 1962 storm was in the 70th Street area; this was the only place in Ocean City where there was a fatality. The storm created what was virtually an inlet, cutting the state road in the process (E. 202) and inundating the entire land area in the vicinity of 70th Street with water (E. 203). The State assumed responsibility for closing the inlet, transporting sand by truck to the submerged area and filling the area (E. 202). As a result of the 1962 storm, the subject waterfront lots were declared unbuildable and the assessments were reduced (E. 266).

With the nourishment provided by the creation of the dune, the forces of Nature filled in submerged areas and the oceanfront lots became partially restored. By 1964, the dune had reached an elevation of plus 16 and from time to time sand fences were placed along the crest to trap more sand. The dune by itself does not provide adequate protection, for without adequate height and width, it could not withstand storm tide. It is

expected that the wave wash would normally reach the east boundary of Lots 4 and 5 since mean high water is only 60 feet from the front of these lots (E. 199). This specific area, the area adjacent and surrounding 70th and 71st Streets, has been flat and low since 1923 (E.255) and special measures have been necessary to offer storm protection. Without these public efforts, the beach area, including Lots 4 and 5, would be in worse shape today (E. 200). Specifically, there would be a higher erosion rate and as a result less beach area (E. 200).

The public has continually enjoyed the recreational aspects of the Ocean City beach in the 70th Street and 71st Street areas. From Memorial Day to the second week in June, it is estimated that from 250 to 300 people use the beach daily. On week days from mid-June to July, there are approximately 450 daily users and on weekends, the number grows to 1,000. (E. 131) The public swims, sunbathes, picnics, launches sailboats, plays ball, and generally engages in all the other beach oriented activities. Such activities are most intensively enjoyed from the point of mean high water to what is referred to as the dune line (E. 132). In recent years, the beach has been used by more and more people who arrive at this beach area earlier and stay longer than they have in the past (E. 132). Historically, the beach was used as a highway prior to the construction in 1938 of Philadelphia Road, now known as Ocean Highway (E. 135). At this time any person desiring to travel north or south had to travel on the beach. At low water, vehicles would travel near the water where the surface is hard; at high water they had

to go up onto the berm close to the dunes (E. 136).

The County and City have recognized the public usages of this area and have provided vehicles to patrol the beach (E. 137) and laborers to clean that area of the beach (E. 138) from east of the dunes or sand fence to the water's edge. The approximate annual cost to the taxpayers of cleaning and maintaining the beach is $100,000.00 (E. 155) Lifeguards and a phone system have been provided for the public's protection while using the beach and the abutting waters. Certain regulations, common to parks and roadways, were established for the beach area. They prohibit drinking, dogs, surfing or ball playing in the area east of the dune line (E. 141).

The County and the City attempted to preserve this beach area for public use by establishing a line beyond which no buildings could be constructed. Prior to annexation of this area by Ocean City, building permits were obtained from the county. (E. 151) At this time the county had a strong policy against permits for structures that would be constructed east of the dune line established by the Army Corps of Engineers. (E. 152) In fact, Appellant's witness, a real estate developer, stated that it was his practice never to build east of the dune line because it was his impression that the County regulations forbid this. (E. 155)

After annexation the County intended that the City continue this stringent regulation. The City followed this practice and refused to issue a permit for any building that might disturb the dune unless a letter first was presented from the

Worcester County Commissioners approving the project. This procedure ceased in the Spring of 1971, when the Worcester County Attorney forwarded a letter to the City stating that the County was no longer responsible for the dune. (E. 152) At this time the Mayor and City Council adopted an ordinance setting a building limit line east of the dune line constructed by the Army Corps of Engineers and so close to the mean high water mark that the public beach area was reduced. Apparently the building limit line was established one cold December day in 1971 by striking a line between the fronts of the existing buildings. (E. 142) It was believed that development west of the line would be hazardous to the development. (E. 142) However, testimony has revealed that at the time it was set, some buildings suprisingly existed beyond the new building limit line. (E. 143)

Appellee, 71st Street, Inc., the owner of Lots 4 and 5 in Block 38, as shown on the Oceanbay City plat, desire to impose a structure 79 feet 10 inches in length and 33 feet 4 inches in depth within the two adjacent lots. These lots cumulatively have a frontage of 100 feet and are 120 feet deep. The elevator shaft, which is 8 feet 3 inches in width, would be placed directly into the crest of the dune down to an elevation of plus 5. Except for the elevator shaft which straddles the crest, the entire proposed condominium would be built east of the dune line.

The erection of a building over the dune or east of the dune would have a significant affect on the physical maintenance of the dunal area. The placement of pilings would be an

undesirable obstruction causing turbulence from wind and water destructive to the dune. The existence of a structure placed within the dune takes up the sand capacity, reducing the elasticity or ability of the dune to become a source of sand during high tide periods. (E. 295) American Beach grass and sand fence, while deemed obstructions, are desirable. The sand fence is constructed in such a manner that it is the most effective wind obstruction. The fence is placed parallel to the shoreline. Pilings driven into the beach at a slight angle, on the other hand, create undesirable turbulence. (E. 290) The building itself would shade the American Beach Grass, thus killing the natural protection of the dune. (E. 289) Extensive research has shown that no other material can perform the same function as American Beach Grass. Thirdly, the building constructed on the dune would act like a bulkhead to the wind action, causing more of the shoreline to be lost than is gained. (E. 290) The building also would prevent the maintenance of the dune since this can be done only by bulldozers which would be unable to operate where the condominium is located. Finally, destruction of the dune will have a negative effect on the beach itself since a shore cannot restore itself without a dune. (E. 291)

Forces of wind and wave are not static but are dynamic and carry out the dictates of natural law (E. 279). They are constantly either building up or destroying barrier islands and are active in the subject area. The State of Maryland has many natural resources, and only recently has the legislature, judiciary, and the public become aware of the extent to which

these resources have been abused by private interests for their own benefit. "No natural resource in the State of Maryland has been so used and, also, abused with less thought and time and care-taking to the study of the true characteristics of this natural resource and to its restoration or preservation." (E. 279, 280)

ARGUMENT

I.

THE AREA BETWEEN THE DUNE LINE AND MEAN HIGH WATER HAS BEEN DEDICATED TO USE BY THE PUBLIC

Two elements are necessary for dedication to apply. There must be a donative intent, explicit or implied by the landowner, and an acceptance on behalf of the public by either public authority or long public user. A dedication is express when made by declaration, deed or note and is implied when there is acquiescence by the owner in the public use or when some act or conduct of the owner manifests an intention to devote the property to public use.

The proofs are interrelated and supportive of each other. For example, while both long continued use by the public and public expenditures each by themselves may sustain an acceptance, each will also support the presumption of a donative intent on the part of the private landowner. Smith v. Shiebeck, 180 Md. 412 (1942).

No deed or particular ceremony is necessary to show the intent to dedicate nor is any grantee *in esse* a prerequisite

to the transfer of title. Harlan v. Town of Belair, 178 Md. 260 (1940). An implied dedication may prevail where there is no formal dedication or where a formal dedication has been ineffective. Citing Smith v. Shiebeck, supra, the Court of Appeals in Conway v. Prince George's County, 248 Md. 416 (1967), emphasized the ability to imply the intent to dedicate from the surrounding circumstances:

> The intention to dedicate may be implied from the conduct of the landowner. If for example, a person throws open a passage through his land and makes no effort to prohibit persons passing through it and does not show by any visible sign that he wishes to preserve his right over it, his action is a manifestation of an intention to dedicate the highway to public use and he is presumed to have so dedicated it. Thus the question of dedication rests largely upon the ground of estoppel. 248 Md. at 419.

The intent to dedicate the beach to public purpose is supported by all the evidence in this case. From the early 1900's, when the ocean shore was used for the launching of pound boats and the beach provided a necessary way of travel along the coast, to the day when a volleyball game is played daily on Lot Nos. 4 and 5 between 70th and 71st Streets, no one has persisted in an attempt to create a private beach.

Specific use of Lot Nos. 4 and 5 by the public is amply shown by the evidence presented which was directed to the 71st Street beach generally, and specifically to the two lots in question. Dr. Kohlerman, the sole stockholder of E. T. Park, Inc., the owner of the land directly west of Lot Nos. 4 and 5, testified in detail concerning the "swimming, bathing, sunbathing, ball-playing, picnicking" by the public.

(E. 127, 128) The only testimony at variance with this statement was that offered by Joseph G. Harrison. Upon being questioned whether he had "ever personally seen anybody using Lot Nos. 4 and 5,"Mr. Harrison simply replied "No". (E. 273) This testimony, even if considered inconsistent with Kohlerman's, was further tempered by Harrison's general observation that the public was exposed to this area and generally used the area on the east slope of the dune down to the water's edge. (E. 270) Giving Kohlerman's testimony and Harrison's affirmative responses perhaps a passing glance, the Court below adopts only Harrison's negative inference.

Additional testimony as to the use of the entire beach at 71st Street also tears at the conclusion of the Court below. George Schoepf, a lifeguard lieutenant at Ocean City, testified that large numbers of people used the beach in the vicinity of 71st Street -- an estimated 450 people on a mid-summer weekday and up to 1,000 on the weekends. He declared, furthermore, that the public used the lots in question. When asked to estimate the number using the particular area, he stated that he could not give an exact answer to this question. In order to respond accurately he would have to "come out with a counter everyday and count". (E. 133) The implication that he needed a counter because the number of people involved was so substantial could hardly be clearer. The Court, without mentioning this testimony, merely concluded that Schoepf "could not specifically identify people and activities on the two lots". (E. 55) The Court below failed to explain the difference between specific identification and observing generally large numbers of people in the 71st Street area during the summer vacation season.

Witness John S. Whaley's testimony buttressed Schoepf's affirmation that the entire beach, including Lot Nos. 4 and 5, was used by the public. He testified that during the summer the area between 70th and 71st Streets is used "by bathers and surfers". (E. 150)

Nor is it necessary to show a specific intent to dedicate on behalf of the present owner, for if the public's interest is once established, a transfer of the fee interest will not extinguish the public easement. The initial and revised plats of "Oceanbay City" indicate an intent to dedicate a given area to public usage. The Oceanbay City plat dated 1963 (Plaintiff's Ex. 8, E.308) submitted at a time when the subject site had been subject to extensive erosive forces still indicated the same intent to dedicate, although it was obvious that the public would encroach upon so-called "private property" if it was to utilize a beach area.

The advent of the condominium and the large developer only recently have brought a change in philosophy. The pressures for more developmental room is matched, however, by the heightened need for recreational areas. Recreational space cannot now be limited simply because development has become more profitable. The Appellee in this case, as a matter of economic necessity, counts on the expanding leisure time market to operate profitably. The initiation of the commercial endeavor is an acknowledgment of the attraction of the public for beaches which have always been available to the public.

The presence of estoppel, an indicia of intent to dedicate, looms over the history of both private and governmental conduct in this case. Private property owners have

opened their lands to the public and also have permitted the public recreational utilization to be maintained and upgraded by county and city services. These services include cleaning of the area from the dune line to high water, often with prison labor, the bulldozing of sand in a westerly direction each Fall, providing lifeguards and communication facilities at different stations all along the beach and the patrol of the beach by a county-owned, four-wheel drive vehicle. (E. 136, 155, 164)

The acceptance by the public may be by formal action, by the actions of governmental bodies acting on behalf of the public and also by the public use of the property for dedication purposes. Once a dedication is accepted and becomes complete it is irrevocable. Cushwa v. Williamsport, 117 Md. 306 (1912).

Here "acceptance" is manifested from the public action sponsored respectively by the Worcester County Commissioners prior to annexation and the City of Ocean City subsequent to annexation. Prior to annexation, Worcester County patrolled the beach by vehicle, provided maintenance, installed storm protective measures and generally acted in concert with the public right to use the beach. After annexation, the City of Ocean City provided supervision of the public beach facilities and maintained the beach.

The Court below has indicated that the granting of the 1962 easements by the private property owners to the County did not amount to dedication. Clearly an easement was given and, just as clearly, the public was a direct beneficiary. The easement refers specifically to the benefit of private property and of the public generally. It is improper to restrict the public interest to property to the landward side of the dune line as

the Court below does. The public beach and Lot Nos. 4 and 5 benefit in several ways from the protection provided by the dune built by the Corps of Engineers. The height of the dune can help the berm build itself up (E. 291, 188); it also determines the rate of erosion (E. 177). The berm in turn is the first line of defense for the dune. (E. 188)

The Court further maintained that the Army Corps of Engineers' sole function in pumping the 1,050,000 cubic yards of sand on the beach was to provide emergency storm protection for the property owners west of the dune. This finding completely disregards (1) the testimony of Turbid Slaughter (E. 178A), Robert Lindner (E. 209), and Marshall Augustine (E. 281), who all testified that at least part of the sand was used to restore the beach and (2) the Army Corps of Engineers report itself (Intervening Plaintiffs' Exhibit 15, E. 329) which indicates that the policy of the Corps of Engineers was to refurbish recreational areas subsequent to storms. Slaughter testified: "The idea was to restore the beach. This was the primary purpose." (E. 178A) Acknowledging the purpose of the emplacement of sand on the beach, Worcester County maintained a policy of avoiding the erection of buildings upon the dune line. (E. 152) Even after the restoration,lots were unbuildable and the assessment records of the County indicate that from the year of the storm until 1969 assessments for ocean-front property were halved for this reason.

In addition to the large expenditures by the Army Corps of Engineers to preserve and protect the beach, the State, County and City also have spent substantial amounts. The federal government expended $1,517,560 for "Operation-Five-High"

undertaken by the Army Corps of Engineers. Between 1949 and 1961 the State Roads Commission, now the State Highway Administration, dispursed $460,333 for "Ocean Beach Protection." In 1962, 1963, and 1965 the State Roads Commission spent $79,028 for the same purpose, and $392,000 for the reconstruction of the Boardwalk after the 1962 storm. (Intervening Plaintiff's Exhibit. No. 1) Of this latter amount,$296,000 was contributed by the federal government. (Intervening Plaintiff's Exhibit No. 2) An undetermined amount also was spent for sand fences. Finally, the City since annexation has expended at least $100,000. (E. 155)

In Gewitz v. City of Long Beach, 330 N.Y.S.2d 495 (1972), the plaintiffs contended that the City of Long Beach dedicated a city park to the public in general and, therefore, could not exclude non-residents from its boundaries. The Court held in Gewitz v. City of Long Beach, supra:

> The Court further finds that these premises designated by the City itself as a 'public park' were maintained, improved and operated so as to afford untrammeled access to the public at large from 1936 to 1970 subject only to the payment of fees in accordance with a schedule established from time to time by the Council of the City of Long Beach. In addition, the Court finds that from the time the 'public park' was established until 1970 the public at large used the facilities. In the light of this history of a public park open to the public at large, the Court finds that there has been a completed dedication of the ocean beach facilities to the use of the public at large and that such dedication is irrevocable. 330 N.Y.S.2d at 508.

Continuing, the Court further found:

> When the City dedicated the property to use as a public park and thereafter devoted it to the use of the public at large for upwards of thirty years, it put itself in the position of holding that property subject to a public trust for the benefit of the public at large. 330 N.Y.S.2d at 509.

Although the above case concerned municipally owned property its holding is equally applicable here. In fact the present situation is not clouded with the distinction between residential usage and a general public usage. Here the beach is used by everyone, by residents of Maryland and other states, without the payment of an entrance fee. The private property owners' intent has been one of pure public dedication and, therefore once accepted, establishes an interest consistent with a public trust upon the property.

In Gion v. City of Santa Cruz, 465 P.2d 50 (Cal. 1970), the Court upheld the public usage of the beach area for recreational activities through implied dedication. In that case the area under consideration was bounded by a shoreline for 480 feet and extended from the road into the sea a distance varying from 70 to 160 feet. The shore was adjoined by a parking area which was approximately 30 to 40 feet above sea level and which extended as far as 60 feet from the road. The land was subject to continuous severe erosion as evidenced by the relocation of two roads in an easterly direction. Expenditures of public funds parallel the present case, as monies were spent throughout the course of a sixty-year period to protect against shore erosion and to enhance the recreational value of the beach.

The prime ingredient in establishing the dedication is the manner in which the subject property was treated by the public in general. In distinguishing dedication from adverse possession, the Court stated in Gion v. City of Santa Cruz, supra at 56:

> This public use may not be 'adverse' to the interests of the owner in the sense that the word is used in adverse possession cases. If a trial court finds that the public has used land without objection or interference for more than five years, it need not make a separate finding of 'adversity' to support a decision of implied dedication.
>
> Litigants, therefore, seeking to show that land has been dedicated to the public need only produce evidence that persons have used the land as they would have used public land. If, the land involved is a beach or shoreline area, they should show that the land was used as if it were a public recreation area. If a road is involved, the litigants must show that it was used as if it were a public road. Evidence that the users looked to a governmental agency for maintenance of the land is significant in establishing an implied dedication to the public.

Once the public use has been shown all inference drawn from the same may be negated only upon the showing that the private landowner's attempts to discourage the public have been commensurate with the public usage. A sign may be sufficient to dissuade the occasional hiker but is totally inadequate to halt the continuous influx of the public to the seashore in the summertime. In this case the burden upon the private landowner is extremely onerous. When there are hundreds and perhaps thousands of people utilizing the shore area daily between 70th and 71st Streets the means to prohibit this activity should be of equal extent.

The Appellee here failed to produce any evidence indicating an effort to prevent public use. This failure to oppose public use amounts not only to acquiescence but is a positive indication of dedication of the shore. See Garrett v. Gray, 258 Md. 363, 378 (1970).

It is not necessary to show that the public acceptance by means of its use attached to every square foot of sand between the dune line and mean high water at Lots 4 and 5. At the very least, the offer of dedication was alive and well at the time of the filing of the 1963 Oceanbay City revised plat (Plaintiff's Exhibit 8, E. 308) and that plat showed that part of the beach area was used and occupied with no indication on behalf of the public to abandon such use sufficient to form a legal acceptance. See Greenco v. City of Virginia Beach, 214 Va. 201, 198 S.E.2d 496 (1973).

The Court in Gion illustrated that the usual rules of the doctrine of dedication apply to property other than public roads and in particular to a beach area. In Gion v. City of Santa Cruz, supra at 58, the Court states:

> The rules governing implied dedication apply with equal force, however, to land used by the public for purposes other than as a roadway. In this state, for instance, the public has gained rights, through dedication, in park land.

Historically, an open land limitation was invoked to deny application of the theory of dedication. This limitation was applied to unfenced, remote areas, where it was felt the private landowner had inadequate notice of the infrequent public

use. This limitation is inappropriate and recent decisions have not sustained its use but have applied the standard used in public road dedication cases. See "Public Access to Beaches", 22 Stan. L. Rev. 564 (Feb. 1970); Seaway Co. v. Attorney General, 375 S.W.2d 923 (Tex. 1964); State ex rel Thornton v. Hay, 462 P.2d 671 (Ore. 1969). The reason for the limitation is nowhere more inappropriate than in this case for the public usage of the shore has always been common knowledge. The use has existed between easily recognizable and defined boundaries. The dune line has been platted and in fact is defined within the Ocean City Erosion Control Ordinance. The line of mean high water is easily determinable based upon the mean of all high tides over a period of 18.6 years. See Seaway Co. v. Attorney General, supra.

Ocean City landowners have left the beach part of their property open, have not prohibited people from using it as part of the public beach, and have not shown "by any visible sign that they wished to preserve their right over it." Smith v. Shiebeck, supra at 419. Instead of attempting to exclude the public, the owners have shared the beach with the public. There has been no clear exercise of dominion or control of the dry sand area. This inaction is a clear manifestation of their intention to dedicate the beach to public use.

If the Ocean City property owner or their predecessors wished to assert a revocable license or an intermittent permissive use, analogous to the permissive use within the open land

limitation, he must meet that burden of proof. See Smith v. Shiebeck, supra at 418. Appellee has produced no evidence showing that either it or its predecessor in interest has granted a revocable license or conversely that either has hindered in any way the public's use of the beach area. Under these conditions, the intention to dedicate may not only be implied, it is unmistakable.

II.

THE PUBLIC HAS ATTAINED THE RIGHT TO USE THE AREA BETWEEN THE DUNE LINE AND THE MEAN HIGH WATER MARK THROUGH PRESCRIPTIVE USE

Regardless of the ramifications of intent noted in the discussion above, the facts cited to show the acceptance of the subject beach area by the public also are determinative of adverse use which supports the claim of prescription. The overlap in legal effect of the public actions of prescription and dedication was noted by Judge Hammond in Mt. Sinai v. Pleasant Manor, 254 Md. 1, 5 (1968):

> The texts and the cases reveal that a right in the public to travel over a road or a way may arise by acceptance, evidenced by long continued use by the public, of an offer to dedicate a road to the public. There is another rule of law, which sometimes in an opinion seems to blend into, reflect or overlap the rule as to acceptance by user of an offer of dedication. The second rule, the one now relied on by the appellants, is that 'irrespective of the question of intention, uninterrupted use by the public may give the public an irrevocable right. This result follows not because an intention to dedicate is conclusively presumed, but because by the lapse of the statutory period [twenty years] a perfect title by prescription [to an easement in gross] vests in the public.

Uninterrupted use by members of the public for twenty years will give rise to an irrevocable easement. This is so irrespective of the intention of the private owner. Garrett v. Gray, 258 Md. 363 (1970). In Thomas v. Ford, 63 Md. 346 (1885), Chief Judge Alvey declared:

> It is certainly a settled doctrine in this State that public roads or ways of any kind can only be established by public authority, or by dedication, or by long use by the public, which, though not strictly prescription, yet bears so close an analogy to it that it is not inappropriate to apply to the right thus acquired the term prescriptive. Hence the existence of a public way may be established by evidence of an uninterrupted user by the public for twenty years; the presumption being that such long continued use and enjoyment by the public of such way had a legal rather than an illegal origin. (citations omitted) 63 Md. at 351 - 352.

Although, as in most prescription cases the assertion is made that the public use was "permissive", no effort was ever made by the owners or their predecessors in interest to prohibit the public from the free usage of the beach. Failure to object does not confer permission on the use of the property. Failure to object is not permission, but it is acquiescence.

> Acquiescence is the inactive status of quiescence or unqualified submission to the hostile claim of another, and it is not to be confused with permission . . . . Garrett v. Gray, supra at 378.

Seaway Company v. Attorney General, 375 S.W.2d 923 (Tex. 1964), was an action brought by the Texas Attorney General to enjoin the defendant corporation from erecting carriers in a privately owned area extending from the line of vegetation to mean high water. This case was brought pursuant to a Texas statute which declared it the policy of the State that the public

have free ingress and egress from State beaches or those beaches which extend from the vegetation line to mean high water to which the public has acquired an easement by dedication or prescription. The ultimate determination was predicated directly upon the attainment of the public right and the Court ruled that the facts supporte the establishment of the easement under either legal theory.

In Seaway Company v. Attorney General, supra, the Court of Civil Appeals of Texas found that thousands of people used the beach to drive upon, for camping, bathing, fishing and boating. Additionally, public funds were expended for the patrol and maintenance of the beach. These factors were deemed sufficient to show the adverse nature of the use by the public.

Identical findings were set out in support of a determination that a public easement was established by the Court in The City of Daytona Beach v. Tona-Rama, Inc., 271 So.2d 765 (Fla. 1972).[1] In this case the First District Court of Appeals found the following indicia of public use:

> For more than twenty years prior to the institution of this action the general public visiting the ocean beach area had actually, continuously, and uninterruptedly used and enjoyed the soft sand area of the beach involved in this proceeding as a thoroughfare, for sunbathing, picnicking, frolicking, running of dune buggies, parking, and generally as a recreation area and playground. The public's use of the area in question for the purposes hereinabove stated was open, notorious, visible, and adverse under an apparent claim of right and without material challenge or interference by anyone purporting to be the owner of the land. The City of Daytona Beach has constantly policed the area for the purpose of keeping it clear of trash

---

[1] This case was partially qualified and remanded by the Supreme Court of Florida case at 294 So.2d 73 (1973).

> and rubbish and for preserving order among the users of the beach; has controlled automobile traffic using the hard sand area of the beach and enforced a prohibition against parking by vehicles on the area in question; and has otherwise exercised the police power of the City over the area for the convenience, comfort, and general welfare of all persons using and enjoying the beach area. 271 S.2d at 766-767.

Every factor cited by these two courts as establishing a public easement in Seaway and Tona-Rama has been shown to exist with equal or greater force in the instant proceeding. As has been indicated earlier, hundreds of people use the beach area between 70th and 71st Streets for all recreational activities that Maryland beaches have traditionally provided -- swimming, sunbathing, picnicking, launching sailboats, ballplaying, etc. (E. 127, 132) The number of people using the beach, including the area east of the dune line, is so great that it is impossible to give the exact number without employing a counter. (E. 133, 270) In fact, the people who regularly use this beach area have organized what is known as the 71st Street Club. (E. 127, 128) No one has ever attempted to restrict public use of this area or any area where buildings did not exist. (E. 269, 270) In addition, prior to the construction of Ocean Highway, the beach area was used as a public roadway. (E. 135) Barriers do not line the beach and permission was never sought by the public to utilize the subject tract.

If the reasoning of the Court below is followed, would it be necessary for the public at large to seek permission of the bordering property owners in order to place a beach blanket, clothes or a rod holder upon the dry sand area above the high water mark? Would it be necessary to

first obtain the permission of the landowner in order to stand and fish or just to sunbathe? The apparent contradiction which surfaces from the determinations of the Court below is the acknowledgment that there is in fact a certain area that the public has acquired a right to use, but, conversely, whenever that area appears to be in the way of private development, the private interest assumes priority. The lower Court perceives the public interest in the beach to be an ever-changing stretch of sand, awash by both the waves of the Atlantic and also by the force of the private bulldozer.

III.

THE PUBLIC'S INTEREST IN MARYLAND'S COASTAL SHORES ESTABLISHED THROUGH CUSTOM AND GRANT REQUIRE THAT ACTIVITIES VIOLATIVE OF THE PUBLIC TRUST BE PRESCRIBED

It is uncontroverted that the foreshore area along the Atlantic Coast in Maryland, between mean high tide and mean low tide, is owned by the State in trust for the use of the Maryland public for purposes attendant to fishery and navigation. Recalling the origins of the public trust doctrine, Kerpelman v. Board of Public Works, 261 Md. 436, 445 (1971):

> The lands in Maryland covered by water were granted to the Lord Proprietor by Section 4 of the Charter from King Charles I to Caecillius Calvert, Baron of Baltimore, his heirs, successors and assigns, who had the power to dispose of such lands, subject to the public rights of fishing and navigation. Browne v. Kennedy, 5 H&J 195 (1821). By virtue of Art. 5 of the Declaration of Rights in the Maryland Constitution, the inhabitants of Maryland had the same title to, and rights in, such lands under water as the Lord Proprietor had previously held. These lands were

> held by the State for the benefit of the inhabitants of Maryland and this holding is of a general fiduciary character.

While the State may grant title to submerged land, all such grants are subject to the public rights in the navigable waters. See Board of Public Works v. Larmar, 262 Md. 24, 46-47, 277 A.2d 427, 437 (1971); Potomac Sand and Gravel Co. v. Mandel, 266 Md. 358 (1972). This Court has said that the State holds the navigable waters " . . . not absolutely, but as a quasi trustee for the public benefit and to support the rights of navigation and fishery to which the entire public are entitled . . . ." Baltimore City v. Steamboat Co., 104 Md. 485, 494 (1906).

Lands adjacent to the foreshore are now and have been subject from the time of the original grant to public trust treatment. Section XVI of the Charter from King Charles I to Lord Baltimore further provided:

> Saving always to US, our Heirs and Successors, and to all the Subjects of our Kingdoms of England and Ireland, of US, our Heirs and Successors, . . . the Privilege of Salting and Drying Fish on the Shores of the same Province; and, for what Cause, to cut down and take Hedging-Wood and Twigs there growing, and to build Huts and Cabbins [sic], necessary in this Behalf, in the same Manner as heretofore they reasonably might, or have used to do. Which Liberties and Privileges, the said Subjects of US, our Heirs and Successors, shall enjoy, without notable Damage or Injury in any wise to be done to the aforesaid now Baron of BALTIMORE, his Heirs or Assigns, or to the Residents and Inhabitants of the same Province in the Ports, Creeks, and Shores aforesaid, and especially in the Woods and Trees there growing.

The language in the Charter evidences the existence of a practice freely carried out on the shore by the public: the building of shacks; the gathering of wood; the drying of fish;

all of which, of necessity, would be carried out above the high-water mark, and contemplates the imposition of a trust to preserve that interest. From 1632 until the present day, public interest in this area has been acknowledged, to a greater or narrower extent, on the Maryland Atlantic Coast. Originally, that interest may have been identified with the first settlers' traditional means of providing food and barter, but over the years it has been transformed into an interest equally utilitarian which would provide recreational relief to the multitudes of office workers and city dwellers who flock to the Shores of the Atlantic Coast.

Disregarding the artificial parameters set forth this case by the Court below, which directed that evidence be confined to the specific lots in question (E. 120), the record in general discloses a continued public usage of the dry sand areas extending above mean high water to the crest of the dune. In addition to the reference to the fishing and wood gathering activities in the Grant, each subdivision plat for the subject area depicts a stretch of land with a designation for a "beach" or "boardwalk" oceanward of any private property line but above mean high water. (Plaintiff's Exhibits 6, 7, 8,E306-8.). The dry sand area was also used as a highway conveying automotive traffic from the old City limits north to the Delaware settlement; it was a usage uninterrupted by private landowners and it persisted until the ocean highway was completed.(E. 136, 137)

The contention has been made that public recreational usage extended not only to the dune line or line of vegetation but also encompassed in the past, any vacant land which extended in a westerly direction to the ocean highway. It is apparent, however, that the bulk of the modern public usage was directed towards a shoreside recreational use, that of sunbathing, picnicking and swimming, and that these activities were carried out in the area east of the highest point of the dune.

The Supreme Court of Oregon has adopted the concept of customary law in advancing protection of public rights in the seashore. State ex rel. Thornton v. Hay, 254 Or. 584, 595, 462 P.2d 671 (1969). The Court below asserts that the subject matter in the Oregon decision concerned the area below mean high tide, but the plain language of the Oregon decision indicates that the area in dispute was the dry sand area. The Court stated in 462 P.2d 671 at page 672:

> The issue is whether the state has the power to prevent the defendant landowners from enclosing the dry-sand area contained within the legal description of their ocean-front property.
>
> The state asserts two theories: (1) the landowners' record title to the disputed area is encumbered by a superior right in the public to go upon and enjoy the land for recreational purposes; and (2) if the disputed area is not encumbered by the asserted public easement, then the state has power to prevent construction under zoning regulations made pursuant to ORS 390.640.

Continuing on the same page, the Court reiterates its previous statement:

> The land area in dispute will be called the dry-sand area. This will be assumed to be the land lying between the line of mean high tide and the visible line of vegetation. (footnote omitted)
>
> The vegetation line is the seaward edge of vegetation where the upland supports vegetation. It falls generally in the vicinity of the sixteen-foot-elevation contour line, but is not at all points necessarily identical with that line. Differences between the vegetation line and the sixteen-foot line are irrelevant for the purposes of this case.

The Oregon Court clearly distinguished between the high water mark and mean high tide stating at page 673:

> Below, or seaward of, the mean high-tide line, is the state-owned foreshore, or wet-sand area, in which the landowners in this case concede the public's paramount right, and concerning which there is not justiciable controversy.

The record indicates that a custom of public use has characterized the Maryland shore in much the same manner as the Oregon Court outlined in State ex rel. Thornton v. Hay, supra. The record shows that the custom is ancient, dating back to the Grant; that the right of use has been exercised without interruption, by private property owners; that the customary use has been peaceable and free from dispute; that the use always has been reasonable, appropriate for the type of area used and for the general class of persons using it; that the boundaries of the area in use are certain, the crests of the duneline constituting the boundary of public use; that the customary use has been obligatory, imposed upon every adjacent landowner; that the custom has not been repugnant or inconsistent with other customs or with Maryland law.

In addition to all of the enumerated indications of public usage mentioned above, the beach itself was supported and supplemented by 1,050,000 cubic yards of sand gathered from the bottoms of Assawoman and Sinepuxent Bays. (Intervening Plaintiff's Exhibit 15, E. 329) This sand was deposited in such a manner that the dune maintains a 20 feet wide cross section at elevation +12 and a berm was created 50 feet wide at elevation +10, with a sand slope for a grade of about 1 on 20.

Other substantive improvements included the "county dune" and the asphalt groins particularly at 70th and 71st Streets. Because of these efforts, lots which were never buildable or were unbuildable as a result of the 1962 storm can now be built upon. Construction on or over the duneline would infringe upon the area the public has enjoyed over the years and their access to that area, and would of necessity be a confiscation by the private property owner for his own economic benefit of property which is held in trust for the public, and would additionally diminish the storm protection capability of the dunal system.

In light of the public expenditures which show a continuing public presence, allowing developers to utilize restored and refurbished areas would result in an unjust enrichment at the public's expense. A court of equity may impose a trust over this property, for the benefit of those who may have an interest in it, not protected by a legal title. See O'Connor v. Estevez, 182 Md. 541, (1943); see also National Life Insurance Co. v. Tower, 251 F.Supp. 215 (D.Md. 1966).

In light of the demonstrated custom of public use of Maryland's ocean beaches up to and including the crests of the dunes, the public's trust in the open beach must be protected from the encroachment of development.

In addition to the custom which continuous public use has imposed upon the dry sand area of Maryland beaches, the public rights which are subject to the trust doctrine provide a rallying point for judicial protection of the State's seashore.

The extent of the public trust doctrine traditionally has been the subject of judicial determination. Certainly, "[t]he State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of peace". Illinois Central Railroad v. Illinois, 146 U.S. 387, 453, 36 L.Ed. 1018, 1043, 13 S.Ct. 110, 118 (1892). Yet within this outermost restraint on a state's exercise of its public trust, government exercises broad discretion. The Supreme Court of Wisconsin has recognized that " . . . the trust [in navigable waters for public purposes], being both active and administrative, requires the law-making body to act in all cases where action is necessary, not only to preserve the trust but to promote it". City of Milwaukee v. State, 193 Wis. 423, 449 214 N.W. 820, 830 (1927). Consistent with the concept of the public trust, the Supreme Judicial Court of Massachusetts has developed and "stringently applied" the rule that " . . .

public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion . . . ." Robbins v. Department of Public Works, 355 Mass. 328, 330, 244 N.E.2d 577, 579 (1969). To ensure compliance with the rule, the Court notes:

> We think it is essential to the expression of plain and explicit authority to divert parklands, Great Ponds, reservations and kindred areas to a new and inconsistent public use that the Legislature identify the land and that there appear in the legislation not only a statement of the new use but a statement or recital showing in some way legislative awareness of the existing public use. 355 Mass.at 331, 244 N.E.2d at 580.

Moreover, in recent years the public trust doctrine has been expanded beyond the realms of basic navigation and fishery to include protection of public recreational usages, which include bathing, swimming, sunbathing and other shoreside activities. Tucci v. Salzhauer, 336 N.Y.S. 2d 721, 40 A.D. 712 (App. Div. 1972); aff'd mem., 352 N.Y.S. 2d (Ct. App. Dec 27, 1973). Nor is this expansion of the scope of the public trust contrary to basic common law. The common law of nuisance is continually updated when some modern activity of a property owner becomes detrimental to an adjoining parcel or an activity customarily carried out in the neighboring land. See Air Lift, Ltd. v. Board of Commissioners, 262 Md. 368, 278 A.2d 244 (1971), (outdoor rock concert enjoined). Similarly, this Court has recently affirmed the proposition that activities within a floodplain

should be regulated in order to ameliorate the effects on neighboring property. A. H. Smith Sand and Gravel Co., Inc. v. Department of Water Resources, 270 Md. 652, 313 A.2d 820 (1974). In Maryland, the promise of the public trust doctrine for the protection of a delicate environment against the insatiable demands of development in coastal areas has not been fully explored. This Court has noted "...authority in Maryland for the rejection of an underwater patent," Van Ruymebeke v. Patapsco Industrial Park, 261 Md. 470, 476-477 (1971), citing Day v. Day, 22 Md. 530, 537 (1865) and Patterson v. Gelston, 23 Md. 432, 448 (1865). These early decisions rejected patents of submerged land which would cut off riparian owners' access to the navigable waters. Such protection had been enacted by the General Assembly in 1862, but the Court chose to base its decisions in equitable principles. Additionally, courts have insisted upon a strict construction of patents involving underwater land. Judge James C. Mitchell of the Circuit Court of Charles County has recently acknowledged "the presumption that the Sovereign did not alienate title to public lands under navigable waters unless expressly included in the grant," in a case involving a 1641 patent from Caecillius Calvert. Department of Natural Resources v. United States Steel Corporation, Law No. 7432, Cir. Ct. of Charles Co., (Mar. 12, 1974), p. 9. Yet it remains for this Court to delineate the State's role as proprietor of public lands in light of the public trust doctrine.

The enactment of Chapter 241 of the 1970 Laws (The Wetlands Act), Section 9-101 et seq. of the Natural Resources Article (1974 Volume), is an acknowledgment that the trust theory retains its vitality. Prior to 1862 the State patented to individuals fee simple title to lands under navigable waters, subject however to the public rights to navigation and fishing. See Board of Public Works v. Larmar Corp., supra. See also Potomac Sand & Gravel Co. v. Mandel, supra.

In conjunction with the passage of the Wetlands Act, the General Assembly enacted Chapter 242, detailing the procedure by which State lands related to State waters might be conveyed:

> (a) The Board of Public Works shall not convey any title to land owned by the State due to its relationship to the waters of the State to any person other than the riparian owner of proprietor of the land abutting the land being conveyed. The Board may only make such a conveyance after seeking the advice of the Department of Natural Resources, appropriate agricultural agencies, including the Maryland Agricultural Commission and the agricultural stabilization and conservation committee and the soil conservation district committee of the county in which the land is located, and other interested federal and State agencies. Prior to such a conveyance, there must be a public hearing, with proper notice, in the county in which the land is located, after which a written decision must be rendered by the Board justifying its action, taking 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. This document shall be maintained in the permanent records of the Board and be open to public scrutiny.

Such consideration for "the best interests of the State" closely parallels the concern for protection from overdevelop-

ment of natural and recreational areas which has imbued new meaning in a traditional doctrine of public trust in the administration of public lands. In furtherance of Maryland's public trust obligations, the doctrine must include the State's interests in beach properties.

Courts of the coastal United States have demonstrated that the public trust doctrine provides a framework for judicial protection of public rights in the seashore. In Borough of Neptune City v. The Borough of Avon-by-the-Sea, 61 N.J. 296, 294 A.2d 47 (1972), the Court specifically upheld the concept of equal public usage of a dedicated municipal beach based upon the public trust doctrine. Reviewing the trend of decisions regarding the increasing demand and scarcity of water related resources and their importance to the public welfare, the Court states, 61 N.J. at 309, 294 A.2d at 54:

> We have no difficulty in finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities. The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.

And a Florida circuit court, in a decision fixing the shorewardmost point (the vegetation line) of an annually migrating high tide line as the boundary of state property interest,

has recently summarized the special value of Florida's beaches:

> ...pursuant to the trust doctrine, the State safeguards a valuable year-round, natural recreational resource. Without dwelling on the subject, it may be noted that this is a resource which by common knowledge is being subjected to increasing demand and utilization as land development diminishes other available recreational areas. Furthermore, Florida's beaches are intimately related to, and have a profound impact upon, a large segment of the state's economy, so that the protection of this resource is of major importance. Ocean Hotels, Inc. v. Department of Natural Resources, No. 73 75, Opinion p. 4 (15th Cir. Ct. Fla. Jan. 3, 1974), appeal docketed, No. 74-255, 4th Dist. Ct. App., Feb. 26, 1974.

The relatively recent explosion of development along Maryland's ocean shore threatens the public's rights to open beaches. Application of the public trust doctrine will safeguard Marylanders' traditional and modern interests in the shore area.

IV.

LAND INUNDATED BY MEAN HIGH WATER REVERTS TO STATE OWNERSHIP: AREAS RECLAIMED BY GOVERNMENTAL EFFORTS REMAIN STATE PROPERTY

The foregoing theories propounded by Intervening Plaintiff would vest a less than fee interest in the general public. Alternatively the doctrine of submergence would vest a fee interest in the State.

From 1922 to 1965, 450 feet of beach between 70th and 71st Streets was lost to erosion. During the same period

of time, the oceanfront lots in Block 38 were moved approximately 200 feet westward by deleting a number of side lots from the block. (Plaintiff's Exhibits 6-8, E. 306-308) The purpose in the westward shift was to provide sufficient distance between the pounding surf and the proposed oceanfront development.

The westward shift was not enough, for in 1962 the oceanfront lots in Block 38 became submerged. The great March storm was the final wave in a lengthy process of erosion that inundated not only lots 3, 4 and 5, but other landward areas in the same block. (E. 251) The area from 75th Street to 66th Street had for many years been a very low section with few dunes. (E. 254) The sand fence located in the area had not created substantial sand buildup, leaving this area particuarly susceptible to the ravages of storms and high tide.

Once submerged, coastal land becomes State property. In Dewey Land Co. v. Stevens, 90 A. 1040 (N. J. 1914), privately owned beach property, fronting on the Atlantic Ocean, became submerged. While under water, it was granted by the State to defendant's predecessor in title. The ocean subsequently receded and both plaintiffs (former owners) and defendants asserted valid title. Finding for the defendants, the Court stated in 90 A. at 1042:

> . . . if the land was formerly fast land and the title was lost by erosion, it becomes the property of the State, not merely as long as it remained under water, but if the State made a riparian grant absolutely.

Changes brought about by means other than storm may appear more subdued but they are constantly at work adding to or taking away from the shore. This fact was noted in Garrison v. Engle, 193 A. 820, 823 (N. J. 1937).

> . . . in grants of land lying along the seashore, the parties act with a knowledge of the variety of changes to which all parts of the shore are subject. The grantee takes no fixed freehold but one that shifts with the changes that gradually take place. The proprietor of lands having such a boundary is obliged to accept the alteration of his property by the gradual changes to which the shore is subject. It is subject to loss by the same means that may add to his territory; and he is without remedy for his loss, so he is entitled to the gain which may arise from alluvial formations, and he will, in such case, hold by the same boundary, including the accumulated soil.

The land submerged at 70th and 71st Streets was reclaimed at public expense. "Operation Five High" (Intervening Plaintiff's Exhibit 15, E. 329), involving a total expenditure of $1,517,600, restored the beach. Since then the county and subsequently Ocean City have maintained the beach area at public expense. These recent improvements continue a history of public maintenance of the beach, which has involved efforts to bolster the dunes and the implacement of asphalt groins. Yet even today, the wash of storm and winter high tides to the crest of the dunes (E. 128A) demonstrates the constant threat of the ocean which has been held in check by public efforts to reconstruct nature's defenses.

Reclamation of submerged land through artificial means accomplished through a State project will not inure to the benefit of the littoral private owner. People v. Hecker, 4 Cal. Rptr. 334 (1960).

The Supreme Court of North Carolina applied the same rule. In a case factually similar to the instant proceeding, Carolina Beach Fishing Pier v. Town of Carolina Beach, 277 N.C. 297, 177 S.E.2d 513 (1970), the Court held that a berm constructed on submerged land in order to provide storm protection was vested in the State. The Court stated in 177 S.E.2d at 517:

> Thus the lots of the plaintiff were gradually worn away by the churning of the ocean on the shore and thereby lost. Its title was divested by 'the sledgehammering seas . . . the inscrutable tides of God'. Herman Melville, Moby Dick.

CONCLUSION

The ultimate question in this case is whether the dry sand area extending between the mean high tide line and the dune or vegetation line has become subject to an enforceable public interest. Historically, subaqueous lands below tidal influence have been considered subject to the public trust. What is often overlooked, however, is the proposition that non-tidal areas which are navigable in fact are considered public streams, subject to public rights of navigation and fishery. See Binney's Case, 2 Bland 99 (Md. Ch. 1829); see also Day v. Day, 22 Md. 530 (1865).

The basis for these traditional public servitudes springs from essential economic public needs later incorporated into the English common law. The facts in this case emphasize

the activities carried on by the public which at one time were economically motivated but later evolved into basic recreational necessities. All of these activities were carried out in the soft sand area above the mean high tide line, despite the inundation of these areas on occasion by storm, and more frequently by the sea's wave wash. The activities specified in the text of this brief may indicate alternatively the acceptance by the public of an implied dedication, a prescriptive use, or evidence of the pursuit of "customary rights". It is not necessary that Appellants show that all areas which may have been offered or may have been left open have been constantly or consistently subject to adverse activities carried out by the public. It is only necessary to show that there was a public use which expanded and grew in such a manner that by law it manifested an acceptance or a prescriptive use. This acceptance or use then operated to attach the public interest to the dry sand areas between the mean high water line and the dune or vegetation line within Appellees' lots and within similar stretches of sand along the Atlantic Shore in the area depicted by the Oceanbay City revised plats.

An indication of the public interest is the governmental expenditures discussed in this case. One such expenditure was made to place 1,050,000 cubic yards of sand on the beaches in Ocean City. Not only did this sand form an emergency dune but it also added to the beach and berm which is part of the dunal system. The easement taken by Worcester County was a prerequisite to the emplacement of the sand on the beach. This document clearly shows that the public is a direct beneficiary

of the grant of an easement, and just as clearly that building into the dunes is directly inconsistent with the terms of the easement. Worcester County's practice after 1962 in refusing the location of dwellings within the dune supports this thought.

Appellants have shown a long continued usage by the public of the dry sand area and an equally long-held belief by the public that it had a right to use such areas. There has been a continuous and lengthy acquiescence by the private property interests of such use coupled with substantial public expenditures to support this use. Under all these circumstances, the public interest has been amply established.

Respectfully submitted,

Francis B. Burch,
Attorney General

Henry R. Lord,
Deputy Attorney General

Warren K. Rich,
Assistant Attorney General

For Appellant,
Department of Natural Resources,
State of Maryland.

Hamilton P. Fox
Hearne, Fox & Bailey

For Appellant,
E.T. Park, Inc.

APPENDIX

In The Circuit Court of The Fifteenth Judicial Circuit of Florida

Case No. 73 75 CA (L) 01 Knott

Ocean Hotels, Inc.,

Plaintiff,

v.

State of Florida, Department of Natural Resources.

Defendant.

Case No. 73 360 CA (L) 01 Knott

Flordia Board of Trustees of The Internal Improvement Trust Fund et al.,

Plaintiffs,

v.

Ocean Hotels, Inc.,

Defendant

FINAL JUDGMENT

This case presents the issue of fixing the mean high water line on an ocean beach which, through the natural processes of erosion and accretion, undergoes a predictable, seasonal loss and replenishment of approximately 90 feet of beach sand.

The beach area and upland property involved are located on Singer Island in the city of Riviera Beach, Florida. The portion of the beach above the mean high water line and the upland property are privately owned and leased by Ocean Hotels, Inc. (hereinafter referred to as "the company"), and contains the Hilton Inn of the Palm Beaches. The evidence shows that aside from seasonal variations, the beach has maintained a relatively stable configuration with the exception of a time period between 1965 and 1968.

In September 1965 a ship named the Amaryllis was driven ashore somewhat to the south of the company's property, creating accretion involving a substantial temporary buildup and widening of the beach area in front of the Company's property. With the freighter's removal in 1968, the natural forces of wind and wave action began to erode this accreted sand, causing the beach to begin to revert to its prior state. Expert testimony indicated that as of June 6, 1973, the full process had not been completed and that further erosion could be expected before the beach would reach its pre-1965 configuration.

In 1970, while some of the accreted beach still remained in front of the property, the company, with the necessary permits, constructed a three story addition to its hotel, running east to west with the easternmost portion directly fronting on the beach and the waters of the Atlantic Ocean. Situated so that it protrudes approximately 50 feet seaward of the historic vegetation line, it was constructed without the usual pilings, the use of which would evidently have obviated the necessity of the protective seawall which is the subject of controversy in this case. And engineer and witness for the company Duncan E. Britt, commented on these facts in a letter dated February 18, 1972:

> "We both know the real cause for installation of this protection barrier was that the designer of the building did not put the structure on piling. Apparently he was lulled into a false security by the existance (sic) of a beach extending approximately 200 feet east of the building line."

From the outset there was difficulty in protecting the front of the hotel wing. Initially a sandbag sill, or barrier, was installed to stop beach erosion and to prevent the wing from being undermined. But this was only temporarily successful. In 1972, continuing erosion and the resulting high tidal waters threatened to undermine the extension and cause its collapse. To meet the crisis, the company constructed a temporary, emergency cofferdam seawall approximately 26 feet in front (seaward) of the easternmost portion of the hotel wing. This structure was created by driving vertical, interlocking sheets of steel piling into the rockbed beneath the beach. Thus, a U-shaped steel wall, extending several feet above the sandy beach, was built around the seaward end of the hotel extension.

While this metal, sand-filled barrier protects the stability of the front portion of the hotel wing to a large extent, it substantially inhibits the use of a previously unobstructed beach, so that people are unable to walk the beach in front of the hotel during a large part of the year. There is also evidence that the cofferdam seawall is now causing erosion to the southern littoral beaches, as had been anticipated by the company's engineer, Mr. Britt.

Prior to the completion of the seawall, the company was informed that its construction required a coastal construction permit from the Department of Natural Resources, and upon application a permit was granted for a temporary emergency cofferdam seawall. Subsequently, the company filed an application to make the cofferdam seawall permanent. This was considered by the Department of Natural Resources (Cabinet) on December 12, 1972, and again on January 3, 1973. At the latter meeting the company's application was denied and the Department entered an order directing the company to remove the seawall. Thereafter the company instituted the present action to enjoin the enforcement of the Department's order and the State of Florida initiated a separate action to enjoin the company from maintaining its seawall on sovereign land. The cases were consolidated and came on regularly for trial before the court.

I.

At common law the title to all land under tidal waters below the mean high water line belonged to the Crown. These waters and the land which they covered were held by the sovereign in trust for the use of all his subjects. The "trust doctrine" is now codified in Article X, Section 11 of the Florida Constitution which specifies:

> "The title to lands . . . including beaches below the mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people."

In further explanation of this concept, the Florida Supreme Court in *Hayes v. Bowman*, 91 So. 2d 795, 799 (1957), has said:

> ". . . this title is held in trust . . . for purposes of navigation, fishing, bathing, and similar uses. Such title is not held primarily for purposes of sale or conversion into money. Basically it is trust property and should be devoted to the fulfillment of the purposes of that trust, to wit: the service of the people."

Thus, pursuant to the trust doctrine, the State safeguards a valuable year-round, natural recreational resource. Without dwelling on the subject, it may be noted that this is a resource which by common knowledge is being subjected to increasing demand and utilization as land development diminishes other available recreational areas. Furthermore, Florida's beaches are intimately related to, and have a profound impact upon a large segment of the state's economy, so that the protection of this resource is of major importance. Placed in this framework, an accurate determination of the mean high water line, the boundary between the privately owned upland property and the beach area held in trust, obtains added significance.

In arriving at a definition of "mean high water line," the State argues that this court should adopt the definition formulated by Chief Justice Hughes in *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10, 26 (1935):

"In view of the definition of the *mean high tide*, as given by the United States Coast and Geodetic Survey, that 'mean high water at any place is the average height of all the high waters at that place over a considerable period of time,' and the further observation that 'from theoretical considerations of an astronomical character' there should be 'a periodic variation in the rise of water above sea level having a period of 18.6 years,' the Court of Appeals directed that in order to ascertain the mean high tide line with requisite certainty in fixing the boundary of valuable tidelands, such as those here in question appear to be, 'an average of 18.6 years should be determined as near as possible.' We find no error in that instruction.

". . . the mean high tide line . . . is neither the spring tide nor the neap tide, but a mean of all the high tides." (Emphasis supplied.)

In suggesting the federal definition over the Florida definition as stated in *Miller v. Bay-to-Gulf, Inc.*, 193 So. 425, (1940), the State argues persuasively that the *Miller* case which formulated a definition of "ordinary high tide" as requiring an averaging of what the opinion termed "neap tides," as opposed to an averaging of *all* high tides, is based on a misconception of early common law principles. The State contends that the phrase "neap tide" actually means, even under Florida case law, ordinary tides, excluding only the extreme spring tides, and that if this view be taken, the difference between the Florida "neap tide" definition and the federal definition is negligible.* The State earnestly argues that there are inherent advantages in utilizing a definition which is already employed throughout most of the country, formulated by the Coast and Geodetic Survey. This has merit because the Survey's published computations include all the high tides and these figures are in turn utilized and relied upon by surveyors. See "Fluctuating Shorelines and Tidal Boundaries: An Unresolved Problem," 6 San Diego L.R. 447 (1969). These published computations lend themselves to easy reference when attempting to ascertain the vertical component re-

*As stated in the *Miller* case, *supra*: "At times of a new moon and full moon the tidal forces of moon and sun are acting in the same direction. High water then rises higher and low water falls lower than usual. The tides at such time are called 'spring tides.' When the moon is in its first and third quarters, the tidal forces of moon and sun are opposed and the tides do not rise so high nor fall so low. At such times the tides are called 'neap tides.'

"The varying distance of the moon from the earth likewise affects the range of the tide. In its movement around the earth the moon describes an ellipse in a period of approximately 27½ days. When the moon is in perigee or nearest the earth, its tide-producing power is increased, resulting in an increased rise and fall of the tide. These tides are known as 'perigean tides.' When the moon is farthest from the earth, its tide-producing power is diminished, the tides at such time exhibiting a decreased rise and fall. These-tides are called 'apogean tides.' Thus if a new or full moon is in perigee (high-spring or equinoctial tide) the rise and fall of the tide will be greater than during the ordinary 'spring tide.' See Marmer's Tidal Datum Planes. U. S. Coast and Geodetic Survey. Department of Commerce, Pub No. 135."

quisite to boundary determinations. Nonetheless, while an appellate court may yet find the State's arguments compelling (but see *People v. William Kent Estate Co.*, 51 Cal. Rptr. 215), this Court is bound by the holding of the Florida Supreme Court in *Miller*, that:

> "Ordinary high water mark or ordinary high tide . . . [means] the limit reached by the daily ebb and flow of the tide, the usual tide, or the neap tide that happens between the full and change of the moon."

Accordingly, in the case *sub judice*, this court specifically adopts the above definition of "ordinary high water mark" as the "mean high water line."

II.

The above definition, however, is only partially dispositive of the issue at hand. A second series of events must be evaluated before the mean high water line can be fixed with regard to the beach in question. In the late autumn and winter of each year, the beach in front of the company's property undergoes a predictable loss of width amounting to approximately 90 feet. Though this phenomenon occurs with seasonal regularity, its process is gradual and imperceptible, the result of a natural process of erosion. In the spring and summer months, the process reverses itself and natural accretion causes a replenishment of the beach. A twelve-month survey of the beach would thus show that there are two separate and distinct high water lines. The summer line being approximately 90 feet seaward of the winter line. This unique combination of circumstances places the case at hand in the category of one of first impression.

The State responds to the situation by suggesting that the court adopt a fluctuating, migrating boundary line. Essentially the State argues that because the high water line seasonally traverses the complete width of the beach, the boundary line between the private and public lands should be ambulatory, with the tideland subject to seasonal inundation being considered a "movable freehold," at one time being in the domain of the upland property owner and later shifting into the public domain. While this may have merit in that it comports with scientific fact, it is not acceptable as a property law concept. It is impractical in that it is too uncertain to be enforced. *People v. William Kent Estate Co.*, 51 Cal. Rptr. 215 (1st D.C.A. 1966). It is contrary to all notions of specific boundary limitations and would engender more problems than it would resolve. In the present case, it would cause the cofferdam seawall to be on public lands for portions of the year and on private property during other parts of the year.

Having found the State's proposal unacceptable, three alternatives remain. The first is to accept the summer and most seaward mean high water line as the permanent boundary between the respective property owners.

This would clearly be an invasion of the public trust; it would divest the people of the right to use and enjoy a large expanse of the beach for much of the year.

The second alternative is to adopt the mean of the two seasonal high water lines. While this appears at first glance to be an acceptable solution, it fails when subjected to the test of practical implementation. There are no figures which detail the exact extent and amount of beach erosion and accretion. If there were maps available showing the position of the shoreline at regular intervals during the year for a significant number of years, it might be possible to compare them and ascertain the extent of the movement as well as its frequency and duration; but maps presently available are derived from different sources and this inhibits their use for purposes of comparison. What would be needed to establish this fictional but stable boundary line is a series of maps on a monthly or even weekly basis for a long period of time. See "Fluctuating Shorelines and Tidal Boundaries: An Unresolved Problem," supra. The time and expense required for such a project present virtually insurmountable barriers which preclude its practical application. There is the further consideration of how this alternative would affect the public's use of the beach. The evidence shows that the waves break against the seawall during the winter months. Thus if the boundary were situated between the two seasonal high water lines, for much of the year the tides would completely cover the public domain and would in fact extend over and cover a portion of the upland owner's property; i.e., during part of the year the public land would be continuously submerged and unavailable for recreational use; the mean high water line would be landward of the boundary line, and the upland owner's property would be covered by the daily flux and reflux of the sea. In short, for a portion of the year there would be tideland on the Florida coast which contrary to the Florida Constitution would not be held by the State in trust for the people. For these reasons the court cannot adopt the mean of the two seasonal high water lines as the boundary.

Finally, there is the alternative of adopting the winter and most landward mean high water line as a permanent boundary between the public and private land. This solution fully recognizes and retains the *Miller* concept of the mean high water as determining tidal boundaries, fixing the line as it exists when seasonal erosion has had its maximum effect. Such a boundary would be characterized by permanence and stability, and would have the advantage of being readily ascertainable. The established vegetation line (which in the present case has been observed as a boundary by all other upland owners in the vicinity of the company's property) could serve as a convenient reference point. See *Martin v. Busch*, Fla, 112 So. 274 (1927). Both the state and the upland owner would know the exact nature and extent of their ownership and be free to utilize their lands in accordance with

their respective interests; since the state holds its land in trust for the people, its use of the beach is more circumscribed that is the use of the upland property. This limitation redounds to the benefit and protection of the upland owner, for despite the fact that during times when the beach experiences maximum accretion he technically ceases to be a littoral owner, he nonetheless retains his exclusive right to access over his own property to the water, the right to make his water access available to the public in a commercial context and other prerogatives of a riparian owner. See *Board of Trustees, etc v. Medeira Beach Nominee, Inc.*, 272 So. 2d 209 (2d Fla. App. 1973). Important in this solution is the public policy consideration that in the present case, unlike the situation in *Medeira Beach*, to adopt anything but the most landward mean high water line (or the unacceptable ambulatory line proposed by the State) would result in the "loss of public rights in the foreshore or beach which the public always has a right to use." *Id.*, at p. 213.

This court therefore concludes that the winter and most landward mean high water line must be selected as the boundary between the state and the upland owner. In so doing the court has had to balance the public policy favoring private littoral ownership against the public policy of holding the tideland in trust for the people, where the preservation of a vital public right is secured with but minimal effect upon the interests of the upland owner.

Other issues presented for the court's consideration require no extended discussion. The company urges that the substantial expense which may be required for the protection of its hotel extension in the absence of the present protruding cofferdam seawall should influence the court's decision, but where such a problem may be regarded as self-created, as here, there would appear to be little or no merit in that contention.

Wherefore, it is hereby

ORDERED AND ADJUDGED that the company, Ocean Hotels, Inc., forthwith remove its cofferdam seawall and that said company is enjoined from building or maintaining any structure seaward of the mean high water line as hereinabove defined. Costs to be taxed upon further order.

DONE AND ORDERED this 3rd day of January, 1974.

James R. Knott,
Circuit judge.

Copy furnished Counsel:

Kenneth F. Hoffman, Esq.,
Assistant Attorney General,
222 West Pensacola Street.
Miss Ellen Mills,
Attorney for Ocean Hotels, Inc.
707 S. E. Third Avenue.

In The
Circuit Court for Charles County, Maryland

Law No. 7432

State of Maryland,
Department of Natural Resources,
Complainant,

v.

United States Steel Corporation,
Respondent.

OPINION

(Filed Mar. 12, 1974)

This is a Declaratory Judgment suit brought in the name of the State of Maryland, Department of Natural Resources, to have the Court declare certain "Wetlands", within the meaning of the so-called Wetlands Act, Ch. 241 Sec. 1, Laws of Maryland 1970, Article 66C Sections 718-731 of the Code, to be State Wetlands.

The Respondent, United States Steel Corporation, a body corporate of the State of Delaware, Realty Development Division (Respondent) answered, asking dismissal of Complainant's Bill in so far as it pertains to Weir Creek: that all of the Respondent's property described in the proceedings be declared to be derived from a Proprietary grant issued July 25, 1641 from Cascilius Calvert to one James Neal, Plaintiff's Exhibit 5, and thus subject to all rights, immunities and privileges granted by Article 5 of the Bill of Rights of the Maryland Constitution and by the laws of Maryland in effect prior to July 1, 1970 as well as applicable laws in effect thereafter, including Sections 718-731 of Article 66C of the Code: and that Respondent be given such further relief as its case may require.

On that state of the pleadings the parties have filed a stipulation (Stipulation 6), that the Court is asked in these proceedings to determine whether the Wetlands designated on Maps 52 and 53, (filed as Plaintiff's Exhibits 2A and 2B) are State Wetlands or Private Wetlands as a consequence of the Proprietary grant aforesaid. That is the main issue presented. It arises on a stipulation of facts and the testimony of only one witness, called by the Respondent to testify as to the navigability-in-fact, vel non, of Weir Creek. Our task, therefore, is one of interpretation and application of the law, which is discussed at length in the well-prepared memorandums submitted by counsel for the respective parties following their oral arguments.

II.

By stipulation (Stipulation 2), it is agreed that the Respondent's property described and referred to in these proceedings is embraced wholly within the boundaries of the land described in the 1641 Proprietary grant, (Plaintiff's Exhibit 5). We must fit the land description in the Patent to the Wetlands Maps filed as Plaintiff's Exhibits 2A and 2B and determine whether the Respondent now holds the title to any or all of the subaqueous or so-called Wetlands, designated by the letter (W) thereon. If the title is vested in the Respondent, such lands are Private Wetlands within the definition of the Maryland Wetlands Act of 1970, infra, and if title is vested in the State, they are State or Public Wetlands. Section 719 (a) of Article 66c of the Code.

Wetlands are by that definition, "all land under the navigable waters of the State below mean high tide, which is affected by the regular rise and fall of the tide."

III.

At the hearing it was mildly contended on behalf of the Respondent that the waters of Weir Creek, while subject to the ebb and flow of the tide, were not navigable-in-fact and, therefore, would not fit under the navigable waters prong of the definition. While the navigability-in-fact test is applied in the Federal Courts and most of the states, it is settled in Maryland that navigable waters are defined as those which are subject to the ebb and flow of the tide. *Day v. Day*, 22 Md. 530 (1865); *Board of Public Works v. Larmar Corporation*, 262 Md. 24 (1971); 57 Op. Attorney General 435, 458 (1972); Maryland's Wetlands Md. Law Rev. Vol XXX No. 3 (1970), note 9.

The Investigation Report of Weir Creek by geologist Turbit H. Slaughter, Plaintiff's Exhibit 10, contains this paragraph:

"The very name 'Weir' suggests that the creek has always been a flowing tidal system."

We point out that the waters of Weor Creek were not mentioned by name in the 1641 Proprietary grant and that subsequent thereto they have been called Ware Creek, Wear Creek and Weir Creek. However, this is of little moment since the parties have stipulated (Stipulation 3), that the waters of the said creek, by whatever name, "are subject to the ebb and flow of the tide to and from the Potomac River on the south side of the Respondent's property, and were so subject at the issuance of the patent."

It follows, therefore, that the subaqueous lands of Weir Creek below the mean high tide mark, whether navigable-in-fact or not, constitute part of the Wetlands which the Court is asked in this case to label as either State or Private.

IV.

The title or property in the soil beneath navigable waters was under the common law of England vested in the King, who had a right to dispose of it. After magna charta, however, his right of disposition was subject to the right of the public to use the waters above the soil for navigation and fishing. The king's rights to the soil under public or navigable waters, as limited by magna charta, were transferred by the Maryland Charter to Lord Baltimore. The Lord Proprietary thus became owner of the soil, with full power to dispose of it, subject to the public's right of fishing and navigation. *Browne, et al. v. Kennedy,* 5 H & J. 195, 204 (1821); Sections IV and XVI of the Charter of Maryland, as translated from the Latin original and printed in the Maryland Manual. By virtue of the Declaration of Independence and Article 5 of the Maryland Declaration of Rights all property granted to Caecilius Calvert under the Charter, not previously alienated, became vested in the Inhabitants of Maryland — The State. *Board of Public Works v. Larmar Corp.*, 262 Md. 24, 46 et seq.

Whether the Lord Proprietary in issuing patents transferred ownership to the soil beneath a particular body of water becomes a matter of intent, to be gathered from the language of the patent. The crux of the decision in Browne, supra, was that the body of water mentioned in the patent was "included within the lines of the grant; . . . there being no doubt that where the lines of a grant include a stream, the soil covered with water makes a part of the grant, and passes with the rest, without being described as land aqua cooperta," p. 204.

V.

The pertinent language in the 1641 patent which we are called upon to construe, issued to James Neal on the authority of the Lord Proprietary Caecilius Calvert, signed by his brother Leonard Calvert, Lieutenant General, and filed for record among the Land Records of Charles County, is as follows:

"do give grant Enfeoff and Confirm unto ye said James Neale all ye neck of Land lying on Potomack River and bounding on the South and west with ye said River on the East with the mouth of wicocomico river and on the North with a line drawen by Marked Trees from the head of a Creek in the said Wicocomoko River called St. Raphael's Creek west, untill it falls into a Creek Called St. James Creek Containing and now laid forth for two thousand acres be it more or less, together with all waters fishings, woods quarries mines (Royal mines Excepted) Royal fishes, advousons and Patronages of Churges with Liberties of hunting and hawking for any sort of game whatsoever and all other Profits and Emoluments in or upon the same saving to us and our heirs our Royal Jurisdiction and Seignory as absolute Lord and Proprietary's of the Province, To have and to hold the same

unto him the said James Neale his heirs and assigns for ever, to be holden of us and our heirs as of our Manour of St. Mary's in free and common usage by fealtie only for all services yeilding therefore yearly unto us and our Heirs Lords and Proprietary's of the said Province at our usual Receipt forty Shillings in Money Sterling or the Commodities of the country at the feast of our Lords Nativity and we will an appoint that the said Two Thousand Acres of Land Shall from henceforth for ever be one Intire Mannor and be Called by the Name Wollaston Mannor."

Under a Warrant of Resurvey bearing date the 9th day of May, 1667 a slightly different description of Wollaston Mannor was compiled by C. Boteler, deputy surveyor under Baker Brooke, Esq. "surveyor Generall". That description, Plaintiff's Exhibit 11, appears of record among the Land Records of Charles County in Liber No. 15 folio 349. It is set forth over the signature of C. Boteler, the deputy surveyor, and below his signature appears the following: "Loett the above written certificate of Resurvey be recorded, and that Capt. James Neale's old pattent be delivered unto him the said James Neale. Given under my hand this 2nd day of August, 1674: Charles Calvert."

The resurvey description is as follows:

"all that parcel of land called Woolastan Mannour . . ." according to the ancient bounds there of lying in Charles County on the north (348) side of Potomack river and beginning at a certain known place called the Warrant narrows being the intersection of the heads of two creeks viz St. Raphaells Resurvey otherwise called Neales back creek which issueth out of Potomack river M.M. 551. and St. James's creek, which issueth out of wicocomico river and from the said narrows or intersection running with St. Raphaells creek, as the said creek runneth to the mouth thereof at the side of Potomack river bounded by the said river on the south and running as the said river runneth to the westernmost point of Wiccocomico river bounded by the said Wiccocomico river on the east and running to the mouth of the abovesaid St. James's creek, and with said St. James's Creek as the said creek runneth to the first mentioned bounds including also all the marshes belonging to both the creeks aforesaid containing and now laid out and resurveyed, for one thousand six hundred sixty and seven acres more or less to be held of the mannour of west St. Maries:"

VI.

Despite the argument to the contrary advanced in Respondent's Memorandum, we think it is obvious that as employed in the resurvey description the names St. James's Creek and St. Raphaell's Creek are reversed from the way those names were used in the Patent itself. When the resurvey calls for "running with St. Raphaell's Creek, as the said Creek

runneth to the mouth thereof at the side of the Potomack river bounded by the said river on the south and running as the said river runneth to the westernmost point of Wiccomico river," this course can only run from the mouth of Cuckold's Creek, (St. James in the Patent) if it is to be reconciled with the original Patent and the maps an l plats filed as exhibits. However, we don't attach any great significance to this transposing of names in the resurvey description, for, as stated in 63 Am. Jur. 2nd Public Lands, Section 41: "The purpose of a resurvey is to determine where the original survey located boundary lines and to retrace it, rather than to dispute its correctness or correct it."

VII.

The question presented is, what lands, if any, beneath the tidal waters of Cuckold Creek, Weir Creek and the Potomac River were included within the lines of the grant from Lord Baltimore to James Neal as contained in the 1641 Patent and retraced under the warrant of resurvey of 1667? If any such lands were granted, those bordering on the Respondent's property acquired by the Deed filed as Exhibit B with the Bill of Complaint would now belong to the Respondent as successor in title and would fall under the designation of Private Wetlands, within the meaning of the Wetlands Act of 1970, supra.

The Proprietary grant was a neck of land, aptly described, as will be observed by examination of Plaintiff's Exhibits 2A, 2B, 6 and 9. The outlines are: on the north, Neale's Creek, Cuckold Creek and a line of marked trees running between the headwaters of those creeks; on the west and south, bounding on the Potomac River; and on the east, by the mouth of the Wicomoco River. No mention is made of Weir Creek, which clearly lies within the outlines of the Proprietary grant, and we hold, therefore, that the soil beneath its waters, where the tide ebbs and flows, passed under the Patent and Private Wetlands to mean high tide.

We reach a different conclusion with respect to the subaqueous lands of Cuckold Creek and the Potomac River touching the Respondent's property. Those waters (Cuckold Creek by the name of St. James Creek in the one instance and St. Raphaells in the other) are referred to as boundaries or outlines in the Patent and resurvey. The governing principle in such cases, upheld, we think, by the Maryland Authorities, is stated in 63 Am. Jur. 2d — Public Lands, Section 42:

"When the sea or bay is named as a boundary, the line of ordinary high water mark is always intended where the common law prevails, and this is the rule as to a grant from the government of land bounded by a river in which the tide ebbs and flows."

It is pointed out in *Baltimore v. McKim*, 3 Bland 445, 460 (1831) that at one time the opinion seemed to have been entertained that no land covered by navigable water could be granted by patent from the land office but, after the decision in Browne, supra, it was settled that such land "may be granted, and will pass if distinctly comprehended by the terms of the ordinary patent issuing from the land office; subject only to the then existing public uses of navigation, fishery, etc., which cannot be hindered or impaired by the patentee, or those claiming under him."

Respondent relies heavily on the Browne case in urging that since the Neck of land granted to James Neale under the 1641 Patent was described as "lying on the Potomack River and bounding on the south and west with the said river," the intent was to include the adjacent land beneath the river, title to which was held by the Lord Proprietary at the time the patent was issued.

It is true that Browne construed the words in a deed, "bounding upon Jones's Falls," (sic.) as being sufficient to convey land beneath the water to the middle of the stream. But the reason given by the Court for that construction of the deed was that Jones's Falls, a navigable stream at the time it was patented, was entirely within the outlines of the patent and, therefore, the soil beneath its waters became private property and was subject to the same rules of conveyancing that were applied to deeds calling for a boundary on a private stream, and by that rule title passed to the middle of the stream. There is a clear inference, we think, that where the conveyance is by patent from the governing authority and the call is for a line bounding upon public or navigable waters, title of the Sovereign to the adjacent subaqueous lands does not pass unless such lands are expressly described in the grant. This conclusion is supported by the language of the Court of Appeals in the case of *Goodsell v. Lawson*, 42 Md. 349, 362 (1875) where the Court said:

"The grant of a tract of land bounding on the sea or any navigable water conveyed no right to the grantee to the land below high-water mark. From that point it belonged to the Sovereign, and while it might be granted to a citizen by express words,[1] subject to the jus publicum of navigation and fishing, it did not pass as an incident to the ownership of the adjacent land."

---

[1] In the Goodsell case the Court was construing Ch. 129 of the 1862 Public General Laws, which appeared as Sections 45, 46 and 47 of the 1957 Code and was repealed by the 1970 Wetlands Act. Ch. 241 Section 2. The 1862 law took away the right of the Sovereign to grant patents to lands covered by Navigable Waters.

IX.

Finally, it is urged by the Respondent that the language in the 1667 resurvey, Plaintiff's Exhibit 11, "including also all the marshes belonging to both the Creeks aforesaid," is significant and indicates that the Lord Proprietary intended to grant to James Neal the subaqueous lands of Cuckold's Creek, with which we are here concerned.

It is common knowledge, we think, that marshes exist along tidal waters in areas that are above mean high tide as well as in areas below the high tide line.

That fact was recognized in the case of *Van Ruymbeke v. Patapsco, Ind. Park* 261 Md. 470, 483 (1971).

There is no way of knowing what areas the surveyor meant to include by the term "marshes" as employed in the 1667 resurvey. Certainly it would embrace all marshes above high tide but we think it should not be construed so broadly as to overcome the presumption that the Sovereign did not alienate title to public lands under navigable waters unless expressly included in the grant.

X.

It follows from the views expressed herein:

1. That the Wetlands beneath the waters of Weir Creek as designated on Maps 52 and 53 (Plaintiff's Exhibits 2A and 2B) are Private Wetlands that passed under the 1641 Patent to James Neal and that title is now vested in the Respondent as successor in title, subject to the jus publicum of fishing and navigation and subject also to any rights accruing and limitations of use that may be imposed under the Wetlands Act of 1970.

2. That the Wetlands designated on Maps 52 and 53 (Plaintiff's Exhibits 2A and 2B) lying adjacent to the Respondent's property and beneath the Waters of Cuckold Creek and/or the Potomac River were not granted under the 1641 Patent to James Neal and are not Private Wetlands as a consequence of that grant.

A decree, to be approved as to form by counsel for both parties, will be signed when submitted.

James C. Mitchell,
Judge.

FILED SEP 16 1974

IN THE

Court of Appeals of Maryland

SEPTEMBER TERM, 1974

NO. 64

DEPARTMENT OF NATURAL RESOURCES, et. al.,
Appellants,

v.

MAYOR AND COUNCIL OF OCEAN CITY, et al.,
Appellees.

APPEAL FROM THE CIRCUIT COURT FOR WORCESTER COUNTY
PURSUANT TO CERTIORARI TO COURT OF SPECIAL APPEALS
(DANIEL T. PRETTYMAN, Judge)

BRIEF OF APPELLEE

MAYOR AND CITY COUNCIL OF OCEAN CITY

DALE R. CATHELL,
City Attorney,
For Appellee

MAYOR AND CITY COUNCIL OF OCEAN CITY

SALISBURY ADVERTISER—ESTABLISHED 1867

INDEX

TABLE OF CONTENTS

Statement of the Case 1

Questions Presented 2

Statement of Fact 3

Argument:

I. The Subject Property, Lots 4 & 5, Block 38, has not Been Dedicated to Use by the Public 5

II. Has the Public Acquired the Right to Use the Subject Property Through Prescriptive Use and if so, Would the Construction of the Proposed Improvements Illegally and/or Improperly Interfere with such Rights? 9

III. Does the Public Trust Established Through Custom or Grant extend Westerly of the Area between Mean High Water and Mean Low Water, Across an Existing Public Beach 75 Feet in Width and Across a Nonbuildable Area of 60 plus Feet to the Location of the Proposed Project? 10

IV. Does Land Inundated by a Storm of Unusual Severity Revert to the State? Do Governmental Efforts that May Aid in the Reclaiming of Private Property Result in State Ownership or Unlimited Control of the Property so Aided? 15

Conclusion 17

TABLE OF AUTHORITIES

CASES

A. H. Smith Sand and Gravel Co., Inc. v. Department of Water Resources, 270 Md. 652, 658 (1974) 13, 14

Air Lift, Ltd. v. Board of Commissioners, 262 Md. 368 (1971) 13

Board of Public Works v. Larmar, 262 Md. 24 (1971) 10

Borough of Neptune City v. The Borough of Avon-by-the-Sea, 61 N. J. 296, 309 A. 2d 47, 54 (1972) 15

Carolina Beach Fishing Pier v. Town of Carolina Beach, 277 N. C. 297, 177 S.E. 2d 513, 517 (1970) 16

City of Daytona Beach v. Tona-Rama, Inc., 271 S. 2d 765 (Fla. 1972) 9

City of Milwaukee v. State, 193 Wis. 423, 214 N.W. 820 (1927) 13

Dewey Land Co. v. Stevens, 90 A. 1040 (N. J. 1914) 16

Garrett v. Gray, 258 Md. 363, 375 (1970) 8

Garrison v. Engle, 193 A. 820, (N. J. 1937) 16

Gewitz v. City of Long Beach, 330 N. Y. S. 2d 495 (1972) 6

Gion v. City of Santa Cruz, 465 P. 2d 50, 56, 58 (Cal. 1970) 8, 11

Kerpelman v. Board of Public Works, 261 Md. 436, 276 A. 2d 56, 61 (1971) 10

Mt. Sinai v. Pleasant Manor, 254 Md. 1, 6 (1968) 10

Ocean Hotels, Inc. v. Department of Natural Resources, No. 73, 75, 15th Circuit Court (Fla. January 3, 1974) p. 4; Appeal docketed No. 74-255, 4th Dist. Ct. Ap. Feb. 26, 1974 15

Robbins v. Department of Public Works, 355 Mass. 328, 244 N.E. 2d 577, (1969) 13

O'Connor v. Estevex, 182 Md. 541, 556 (1943) 12

Potomac Sand and Gravel Co. v. Governor of Maryland 266 Md. 358 (1972) 10

Seaway Co. v. Attorney General, 375 S.W. 2d 923 (Tex. 1964) 9, 11

Smith v. Shiebeck, 180 Md. 412 (1942) 6

STATUTES

Chapter 242, Laws of Maryland, 1970 (Natural Resources Article, Sections 9-101 et seq. (1974 Vol.) 14

Section XIV of the Charter from King Charles I to Lord Baltimore 11

Soil Erosion and Sediment Control Ordinance 5, 14

MISCELLANEOUS

Tiffany on "Real Property", 3rd Ed. Vol. 4, 1973 Cul. Supp., p. 270..... 6

IN THE

Court of Appeals of Maryland

SEPTEMBER TERM, 1974

NO. 64

DEPARTMENT OF NATURAL RESOURCES, et. al.,
Appellants,

v.

MAYOR AND COUNCIL OF OCEAN CITY, et al.,
Appellees.

APPEAL FROM THE CIRCUIT COURT FOR WORCESTER COUNTY
PURSUANT TO CERTIORARI TO COURT OF SPECIAL APPEALS

(DANIEL T. PRETTYMAN, Judge)

BRIEF OF APPELLEE
MAYOR AND CITY COUNCIL OF OCEAN CITY

STATEMENT OF THE CASE

This is an appeal taken by the Plaintiffs from the opinion and order dated April 23, 1974, of the Circuit Court of Worcester County. The lower court denied the permanent injunction sought by the Appellant, E. T. Park, Inc., upon a finding of fact and conclusions of law that the public and E. T. Park, Inc., had not acquired an easement upon Lots Nos. 4 and 5 in Block No. 38 of the Revised Plat of Ocean City, Maryland, and that said property had not been dedicated to the public and the lower Court further found that the State of Maryland does not hold title to Lots Nos. 4 and 5 in Block 38 by virtue of the alleged doctrine of "Public Trust in Natural Resources" or by virtue of the alleged doctrine of "Submergence" nor did the State acquire said title because of Federal, State and/or County funds in the construction of the Dune Line. The lower Court also found that the granting of the requested injunction would constitute the taking of private property for public use, without just compensation, and that even if the doctrines of "Implied Dedication", "Custom", "Public Trust" and "Submergence" are applicable in Maryland that the facts at the trial below do not support the applicability of said doctrines and/or theories to the instant case.

On March 30, 1972, the State of Maryland, Department of Natural Resources, was granted permission to intervene in this case. In its petition the State contended that the subject beach area under dispute came within its jurisdiction by means of statutory functions, amongst which was the regulation of State and private wetlands and the general obligation to safeguard the natural resources of the State for the most beneficial utilization by the citizens of Maryland. The State urged as did E. T. Park, Inc., that certain public rights have been established in Ocean City which have ripened into a public easement; that the lands between mean high water and the Dune Line are the subject of a public trust for recreational and associated purposes and, therefore, building eastward of the Dune Line is in derogation of that trust. Finally, the State contended that during the storm of 1962 the subject property was submerged and that the expenditure of public funds to restore what had already been lost, was accomplished by artificial methods at a high cost to the public and, therefore, the benefits of such measures did not inure to the private interests bordering the Atlantic Ocean.

The lower Court determined that the public had not acquired an easement over or on the subject property by any of the alternative methods alleged and that the Plaintiffs had failed to show that the facts as to general public beach use elicited at the trial below were synonymous with public use of the subject property.

It was from the opinion and order below that The State of Maryland, Department of Natural Resources, and E. T. Park, Inc., appealled.

QUESTIONS PRESENTED

1. Whether the public has acquired an easement by means of dedication on or over the area below the vegetation line within Appellee's property?
2. Whether the public has acquired an easement by means of prescription on or over the area below the vegetation line within Appellee's property?
3. Whether Appellee's property easterly of the Dune Line has become the subject of a public trust through the continued usage and expenditures by and on behalf of the public?
4. Whether all or part of the property of Appellee has accrued to State ownership by means of submergence and the public expenditures incurred which were designed to prevent erosion, restore the beach and dune area and protect the Ocean Highway and other westerly properties?

STATEMENT OF FACTS

The property in question, Lots Nos. 4 and 5, Block 38, Revised Plat of Oceanbay City, Maryland is situate on and east of the Dune Line constructed in 1962 by the Army Corp of Engineers. The exact relation of the physical location of the subject property to dunes existing prior to 1962 is not clear. The said lots are separated from the mean hight water of the Atlantic Ocean by a public beach. Mr. Slaughter, an expert witness produced by Appellants, using stipulation Exhibit No. 1 (E. 345) testified that the 1972 mean high water mark was about seventy-five (75) feet east of the easterly lot lines of the subject property (E. 184) and that the mean high water mark in 1972 was one hundred and forty (140) to one hundred and fifty (150) feet eastward of the Building Limit Line (E. 185). No construction was proposed east of the Building Limit Line (Corporate Defendant's Exhibit No. 4—E. 356).

While no conflict has arisen as to the public rights to utilize the public beach areas the present dispute resulted from an attempt by the Appellee, 71st Street, Inc., to construct a multi-unit structure on a portion of two lots situate westerly of the expressly dedicated public beach and also westerly of the Building Limit Line.

In order to understand any of the issues it is necessary to properly define the different definitions attributed to the term "beach". Appellants in the Court below adopted the posture that the term "beach" included whatever land they desired to be subject to the public easement, dedication, prescription, custom, or public trust doctrines. However, Appellant's expert, Mr. Augustine, attempts to define beaches as "assessable to human traffic" at a one to twenty slope until it reaches the berm, (E. 277) "continues up through to the berm" (E. 278). There is a level area between such "beach area", varying from 25 to 50 feet in width and the fore dune. The Appellant's expert witness continues to distinguish between beach and berm, (E. 274) beach and the dune (E. 279), (E. 188).

The term "beach" is important in the following two respects in this case. Firstly, from a scientific and technical position as to its scientific description, in other words, what is it? And secondly, it is important from an aspect relating to certain public uses alleged to have occurred thereon.

There is an area in Ocean City that extends from the Delaware Line to the Ocean City, Maryland Inlet and from the Mean Low Water of the Ocean to a westerly point that is, in some location, at a dune or dune line, and at others, at buildings, street ends, etc. The various experts have referred to it as being a berm (E. 188), berm of a Caldwell Section (E. 197 and E. 198), westerly of the berm (E. 236), easterly of the berm (E. 277, E. 278), separated from the foreshore, the dune line, (E. 240). However, for the purpose of this

case, such an area must be described as the general beach, and the subject property as the specific beach area in question.

While the subject physical property has always, in recorded memory, existed, the general beach has, at its present location, extended in the past for large distances to the east; being 450 feet further east in 1922 and from that date gradually moving in a net westward direction to where it is today (E. 256).

While the public has been enjoying the general beach area between 70th and 71st Streets in numbrs as high as 400, there are no accurate figures for the extent of public use, if any, of the specific beach area in question, (E.131, E. 132), nor is the period of time such numbers have been so using the beach been established. While the general beach was used as a highway prior to 1938, its easterly boundary at the time, was situate far to the eastward of the subject property (E. 256). Also, whereas swimming and bathing and the launching of boats is normally accomplished in the water, it appears reasonable to assume that these activities even today are not occurring on the specific beach area as said subject property was in 1972 at least 75 feet from mean High Water (E. 184) and in prior years said specific beach area was even further removed from the situs of such activity; being in 1922, 450 feet further away or a total of 525 feet from the waters.

The people picnicked east of the subject property prior to 1962, (E. 219). In years past they generally went to the end of the boardwalk and open areas until they were built on, (E. 270). Fishing 'pound' boats were launched some five miles south of the subject property in the area where the present Ocean City Inlet is or south of it where the fishing camps were located, (E. 154, E. 135). Beach vehicle traffic prior to 1938 rode the surf which was then considerably eastward of where it now is, (E. 136). On high water you sometimes still followed the water line, (E. 136). Sometimes vehicles went nearer the then existing dunes but it varied. But the beach is not now recognized as a thoroughfare, (E. 136). Prior to annexation of the subject area there was in the 'fifties', a limited sheriff's patrol in the general beach area but it was not a scheduled patrol, but answered complaints and among its duties was to keep people away from private homes and cottages, keeping the public from tearing down sand fences, monitoring fires, noise, etc., (E. 137).

Even prior to annexation there were buildings east of the sand fence, (E. 138). The public, until recently, used all of the area from the beach highway to the ocean, (E. 139, E. 269, & E. 270). They used anything that was open land. The City made no objection when property owners constructed fences on the beach, (E. 145). The $100,000.00 per year, currently expended by the City on beach cleaning applies to the entire beach of over ten miles and not solely to the subject property. Prior to annexation and even after annexation, the County Commissioners permitted structures to be built east of the dune line

so long as they were at certain elevations and the City has continued to allow such construction, (E. 152, E. 147, E. 148, & E. 149). The Sediment Control Ordinance allows construction on or east of the dune line and the Department of Natural Resources' expert, Mr. Augustine, approves of 99% of said ordinance (E. 291) and is aware that the plans for the proposed subject were approved under its terms, (E. 294).

ARGUMENT

I.

THE SUBJECT PROPERTY, LOTS 4 AND 5, BLOCK 38, HAS NOT BEEN DEDICATED TO USE BY THE PUBLIC.

There is no evidence that there has ever been an express dedication of the subject property. The express dedication offered by the recordation of the plats was limited to the area marked on said plats as 'Beach' or 'Boardwalk.' Said dedicated area now lies and has always been to the east of the subject property (E. 36, E. 306 and E. 307).

Even if the acts of the public that occurred on the general beach area were acts that could result in a clear manifestation of the donative intent and an acceptance thereof by the public, there is, other than an occasional volleyball game during a period of six years, no certain evidence that such acts occurred on the subject property. There is, likewise, no certain evidence of any expenditure of county funds on the specific property. Acts of the public occurring on public beach areas north, south and east of the subject property are not evidence of donative intent on the part of the owners of Lots 4 and 5.

Therefore, if implied dedication is applicable in a like situation the facts adduced in this specific case do not meet the essential elements of such a theory.

Appellants are attempting to attribute the actions of the general public for a period of seventy-five or more years on an area over 10 miles long and in varying widths to one, 120 by 100 feet, parcel of the whole. Not only was there very little evidence, other than volleyball, of public acts on the subject property, some of the very examples used by Appellant such as 'pound boat launching,' 'swimming,' and 'bathing' clearly have not occurred on the subject property.

It is not sufficient to meet Appellant's burden of proof as to use of the subject property, for Appellant to wish that the Court below draw an implication from events occurring in the larger area and attribute them to the subject property; nor is it sufficient to ascribe acts of swimming and bathing in the area between 70th and 71st Streets to the subject property as the subject property is a dry sand area not particularily conducive to such physical exercises.

This Appellee has in fact accepted the offers to dedicate the various areas shown on recorded plats as 'Beach' or 'Boardwalk.' However, such area does not now, nor has it ever on any plat included the property in question.

Appellants cite **Gewitz v. City of Long Beach 330** N.Y. S. 2d 495 (1972). This Appellant has no argument with the law as stated in **Gewitz v. City of Long Beach,** supra. However, the Court in **Gewitz** merely held that when a city dedicates its property for use as a public park it cannot thereafter refuse certain members of the general public the right to use said park. This Appellee is not attempting to restrict the use of the area east of the subject property. The question in **Gewitz** was the attempt to revoke a dedication. The issue in this case is an allegation of an implied intent to create one. To attempt to cite **Gewitz v. City of Long Beach,** supra in support of Appellants' position is at best, improper.

Use, if any, by the public of the subject property was, prior to annexation, at the most, sporadic and intermittent. The use, if any, of public funds on the subject property was no more extensive. In any event, the private ownership characterization of the subject property was never questioned by any of the governmental units expending said funds. To allege at this late date that such expenditures by such governmental agencies destroyed the private ownership nature of the subject property, is equivalent to saying that the State, County, and Federal Governments intentionally misled the owners of the property at the time said expenditures were made.

The case of **Smith v. Shiebech,** 180 Md. 412 (1942), cited by Appellants as supporting authority of the propositions that long continued use and public expenditures support the presumption of a donative intent on the part of the owner, is a case involving the dedication of a road. The subject property in the instant case is bordered on the north by an already existing public street and in any event the facts as presented by Appellants in this case do not meet the burden of proof as to sufficiency of use or continuing of use, of the subject property. Even if Appellants were alleging that the subject property was a public road by virtue of implied dedication they still have failed to present sufficient facts to support the theory.

Appellants are attempting to establish that, by dedication, a public beach may be extended shoreward onto privately owned property merely because some beach activities may overflow from the adjacent plotted public beach. Once established as the new law of dedication where would its application terminate? Thereafter, would the overflow of activity onto other private property to the west constitute a dedication of the next property westward? Would such dedication creep shoreward until the public beach or shoreline's western boundary was Chesapeake Bay? We would submit as did the Court below, quoting from Tiffany on "Real Property" Third Edition, Volume 4, 1973 Cumulative

Supplement, page 270 "Dedication will not be inferred from mere permissive use of unenclosed land."

Appellants on page 18 of their brief, stated, "From the early 1900's when the ocean shore was used for the launching of pound boats and the beach provided a necessary way of travel along the coast, to the day when a volleyball game is played daily on Lots 4 and 5 between 70th and 71st Streets, no one has persisted in an attempt to create a private beach." Such statement completely ignores the fact that the testimony clearly shows that the pound boats were never launched from anywhere near the subject property and that in 1900 the beach was hundreds of feet further eastward. But it does more than merely ignore facts. Such a statement attempts to place a burden on the Appellees to prove that the subject property is private thereby ignoring the basic precept that the Appellants have failed to produce sufficient evidence that it was ever a public beach.

The Appellants adopt the position that if they alleged that public activities took place on the general area called the "beach" then Appellees must then prove that such activity did not occur on the subject property. Such is not the case in the law of dedication. Appellants much prove acts on the specific property. Other than the allegations of the President of the private Appellant as to such activities there is no other such affirmative statement or evidence as to the specific subject property.

Witness John S. Whaley's testimony as to use is given as to the entire area between 70th and 71st Streets, (E. 150) and to the specific area in front of his projects, (E. 151).

A lifeguard lieutenant stated that he could not give an exact answer to the question as to use of the subject property and that in order to be accurate he would have to use a counter, (E, 133). The Appellant, on page 19 states "The implication that he needed a counter . . . could hardly be clearer." Therefore, not only is the Appellant alleging that the owner's donative intent is implied by the use of the property but that the use itself is to be implied by the testimony of witnesses that cannot give exact answers with accuracy as to the subject property. In other words, according to Appellants, the lower Court should have assumed by implication that the use of the beach generally was equivalent to use of the subject property. Not only is the owners intent to be implied from certain facts but the facts themselves are to be implied. This Appellee feels that such is not the law of dedication.

Appellants allege on pages 20 and 21 of their brief, that the public has accepted the dedication of the subject property because of the actions of public agencies. This Appellee affirms that it has accepted that beach area that has been offered to it. The key to this case is not the acceptance of an offer to dedicate but whether or not such an offer has ever been made as to the subject

property. The acceptance of the public beach east of the subject property is acknowledged and defended by this appellee. The problem is that the subject property is not situated in the area this governmental agency has accepted.

In discussing **Gion v. City of Santa Cruz** 465, P 2d 50 (Cal. 1970), Appellants state on page 25 of their brief that, "Once the public use has been shown all inference drawn from the same may be negated only upon the showing that a private landowner's attempts to discourage the public have been commensurate with the public use." Assuming that **Gion v. City of Santa Cruz,** supra does stand for such a legal supposition (and this Appellee does not so assume) and assuming that implied dedication (implied offer to dedicate) is applicable in shoreline cases in Maryland (which this Appellee also does not assume), Appellants still choose to ignore that they failed below to prove the public use as to the subject property.

Appellants attempt to impose an onerous burden on the landowner to dissuade public use of the landowner's property. The case of **Garrett v. Gray,** 258 Md. 363, is cited as authority for the proposition that failure to oppose public use amounts not only to acquiescence but is an indication of dedication of the shore. **Garrett v. Gray,** supra, expressly **does not** support such a proposition. The court in **Garrett v. Gray,** supra, expressly states on page 375 that:

> ". . . we do not believe the doctrine of implied grant, or implied dedication is applicable to the case at bar . . . "

Garrett v. Gray, supra, was decided on the ground of **continued** uninterrupted use without permission by the public at large for over 20 years.

It is necessary to show, at the least, some type of offer to dedicate and acceptance thereof of the subject property. Appellants attempt, on page 26 of their brief, to equate the filing of the 1963 Oceanbay City revised plat as a reaffirmance of an offer to dedicate the subject property. Such just simply is not the case. The offer reaffirmed applied to the areas designated on the plat as beach or boardwalk, an area now east and always east of the physical location of the subject property. Appellants also allege that the filing of said revised plat showed "that part of the beach area was 'used and occupied'." Such is not the case. The filing of said plat showed nothing more than an offer, or reaffirmance of an offer, to dedicate an area to the public. And in any event the area so shown on said plat is not the property in question.

Appellants allege on page 27 and 28 of their brief, that Ocean City landowners have not by any visible sign shown that they wished to preserve their rights over their property; that said landowners have not exercised dominion or control over their dry sand area and that such inaction is a clear manifestation of their intention to dedicate the beach to the public. Just as the use of such other's property should not be attributed to the subject property neither should the inactions of other landowners be attributed to the other Appellee.

Appellants further allege that the Appellee's produced no evidence of a revokable license or hinderance of the public's use of the subject property, and that under these conditions, the intention to dedicate may not only be implied, but is unmistakable. Appellants again make the erroneous presumption that they have met the burden of proving sufficient public use of the **subject property.** Appellees have no duty or obligation to hinder public use if public use is not occurring nor do Appellants have the burden of proving such acts of hindrance until such time as the Appellants have proven that there exists sufficient public use to be hindered a burden Appellants have failed to meet.

II.

HAS THE PUBLIC ACQUIRED THE RIGHT TO USE THE SUBJECT PROPERTY THROUGH PRESCRIPTIVE USE AND IF SO WOULD THE CONSTRUCTION OF THE PROPOSED IMPROVEMENTS ILLEGALLY AND/OR IMPROPERLY INTERFER WITH SUCH RIGHTS?

Dedication and prescriptive use are similar in nature as to the burden of proving their creation. The primary distinction is that the use upon which a prescriptive right is based must have occurred continually and uninterruptedly for over 20 years.

Again before Appellees are saddled with the burden of proving that such use did not occur, Appellants must meet the burden as to the existence of such use **on the subject property** for the period of time. Pound boats being launched 5 miles south, swimming and bathing 75 to 450 feet easterly of the property, driving near the water's edge prior to 1938; lifeguard and people between 70th and 71st Streets since annexation in 1965 and the observations of the President of the private Appellant since 1964 (when it purchased its property) do not establish sufficient continual and uninterrupted use of **the subject property** for any substantial period of time and certainly not for 20 years. Appellee should not be penalized for failing to object to something that did not sufficiently occur on it's property for the necessary period of time. In any event, what right did the private Appellee have to object to swimmers or bathers east of the property, pound boats much south of his property, and any activities occurring elsewhere? We would submit none.

Appellants allege on page 31 of their brief that every factor cited in **Seaway Company** v. **Attorney General** 375 S.W. 2d 923 (Tex. 1964) and **City of Daytona Beach** v. **Tona Rama, Inc.** 271 S. 2d 765 (Fla. 1972) has been shown to exist in the instant case. While such a statement may be correct if applied to the entire Ocean City beach, it is incorrect and improper if applied to the subject property. The basic weakness of Appellant's case continues. It is that they have failed to attach sufficient facts and factors **to the subject property.**

In their argument on prescriptive use Appellants quote on page 28 of their brief from the case on **Mt. Sinai** v. **Pleasant Manor** 254 Md. 1 at 5 (1968) as to the perfecting of title by prescription. However, perhaps the most important and appropriate quotation from said case is found on page 6 when the Court states:

> "The difficulty the Appellants now face is that although the law they now cite would support their right to prevail, they lack the facts to do so. The record offers no support for a finding of the necessary continuous and uninterrupted use for twenty years of Hentschel's Lane from the first alley to the second alley."

This Appellee recalls no clear and direct testimony or evidence of any use of the subject property, other than the allegations as to volleyball and picnicking by the President of the private Appellant. Said President's testimony concerned the period of time of his ownership of the property abutting on the subject property. Said Appellant bought the property in 1964 and the evidence therefore fails to meet the 20 year provision by 12 years even if his self-serving testimony is accepted.

III.

DOES THE PUBLIC TRUST ESTABLISHED THROUGH CUSTOM AND GRANT EXTEND WESTERLY OF THE AREA BETWEEN MEAN HIGH WATER AND MEAN LOW WATER ACROSS AN EXISTING PUBLIC BEACH 75 FEET IN WIDTH AND ACROSS A NONBUILDABLE AREA OF 60 ± FEET TO THE LOCATION OF THE PROPOSED PROJECT?

This Appellee agrees with Appellants that there exists an area between mean low and mean high water of the Atlantic Ocean which is owned by the State or subject to a trust for the benefit of the public. **Kerpelman** v. **Board of Public Works,** 261 Md. 436 (1971) and **Board of Public Works** v. **Larmar Corp.** 262 Md. 24 both reaffirm the existence of a public trust for the purposes of fishing and navigation in and to all the lands and waters below mean high water.

However, while **Board of Public Works v.** v. **Larmar Corp.,** supra, held that the sovereign had the right to prohibit, regulate and require compensation for activities of riparian owners occurring seaward of mean high water, it does not establish such a right in the sovereign as to private high land situate shoreward of mean high water. **Potomac Sand and Gravel Co.** v. **Governor of Maryland** 266 Md. 358 (1972)also was concerned only with the State's ownership and rights in land seaward of mean high water. In any event **Kerpelman,** supra, **Lamar Corp.,** supra are cases involving the rights of riparian owners to extend improvements or conduct activities seaward of mean high water.

The owners of the subject property in the instant case, the other Appellee, is not a riparian owner and no improvement or activity was proposed by it seaward of mean high water.

Appellants cite from Section XVI of the Charter from King Charles I to Lord Baltimore and State that the quoted language supports and evidences the existence of practices freely carried out on the shores. They again completely ignore that such rights are to be exercised:

> ". . . without notable Damage or Injury **in any wise** (underlining added) to be done to the . . . Residents and Inhabitants of the same Province. . . ."

We would suggest that an absolute prohibition of any economically sound use of the property of the other Appellee (which is the obvious result if Appellants are successful) is a "notable Damage or Injury in any wise to be done."

Appellants allege public interest from 1632 until the present. Again, where is the testimony, evidence of proof presented at the trial below of any such interest prior to 1900 and where is the evidence of any such use or interest as to the subject property prior to 1964, even if then? Appellants continue and allege continued public usage of dry areas from mean high water to the dune and admit that they disregard that such public use should be directed to the subject property. Even if you disregard the parameters much of the evidence of general beach use cannot be applied to the subject property; such uses being swimming, bathing, launching of pound boats, etc. Not only must Appellants disregard the artificial parameters set by the court below they must, in so doing, also disregard that the thousands of owners of ocean front lots similarly situated, have had no notice of this action nor opportunity to be heard. Not only would the state confiscate their property but their right to be heard or an opportunity to be heard would have been denied them. Appellants again offer as fact that each successive plat of the beach area at 70th to 71st Street shows a section designated as beach, etc. as indicative of the establishment of a public trust. Again Appellants disregard the clear and uncontested fact that the various subdivisions of the area resulted from the westward movement of the shoreline. The physical location of the subject property has never been within the confines of the areas designated as beach **on any of the successive plats** in evidence.

Appellants allege that the bulk of public usage has been east of the Dune Line, an area that not only includes the subject property but includes the public beach between the subject property and the ocean. In both the Texas case of **Seaway Co., Inc. v. Attorney General,** supra and the California case of **Gion v. City of Santa Cruz,** supra, an important distinction exists. In both cases the privately owned property extended to the mean high water mark or seaward.

Therefore, in those cases any evidence of any use of any area shoreward of mean high water, of necessity, occurred on the subject property. In the present case there has, since the recordation of the earliest plat in evidence, always been an area varying in width from the present 75 feet to, in the past, 450 plus feet of area between mean high water and the subject property. Additionally the record clearly indicates sufficient access to said area; there being one 50 foot street (71st Street) immediately north of the subject property and another 50 foot street (70th Street) 150 feet to the south, both of which offered access to the public beach between the subject property and the mean high water mark.

Appellants allege that the custom of the right to use the dry sand area is ancient as it was established at the time of the Grant but fail to mention that the establishment of such custom was conditioned on its use not notably damaging or injuring the private property owner. They have not proved that the use has been exercised without interruption anywhere in Ocean City and specifically have not so proved in reference to the subject property. The peacefulness and reasonableness of such use have not been proven as it relates to the subject property and certainly the boundaries of whatever area the Appellants are discussing are not certain. The case involves 12,000 square feet of land or less. The uses alleged occurred somewhere in an area approximately 10 miles long. And, additionally, this Appellee would state that the prohibitions requested below by the Appellants are repugnant to the very terms of the Grant alleged by Appellants to have established the 'Custom'. To prohibit the use of the 71st St., Inc. property must, of certainty, greatly injure or damage said Appellee. Even if the custom applies to an area so far removed from the traditional trust area, **it is conditioned** and to grant the relief prayed by Appellants below is to violate the conditions attached to the grant of the custom.

Appellants state that the Courts of Equity may impose a trust over the subject property to those who may have an interest in it and cite the case of **O'Conner v. Estevez,** 182 Md. 541 (1943). The Court in **O'Connor v. Estevez,** supra, did not establish such a point though it affirmed the possibility of the existence of constructive trusts in specific properties. On page 556 the Court stated:

> "Nevertheless Courts of Equity recognize such an agreement as a basis for foundation for the establishment of a trust over property for the benefit of those who may have an interest in it, not protected by legal title."

The trust alleged in **O'Conner,** supra, involved a dispute arising out of an agreement between private parties over specific private property. Nevertheless, even if it is applicable to the instant case the evidence does not support the proposition that there was ever an agreement that there was to be a constructive trust created on the subject property which would forbid the proposed construction.

The Deed of Easement for the constructing of the Dune Line provided that construction would be in accordance with permits from the County avoiding as much as possible disturbance or destruction of the Dune Line, etc., (Plaintiff Exhibit No. 4 E. 302). The agency charged with constructing the Dune Line recognized that construction on or east of the Dune Line would occur and that such property was private property (Intervening Plaintiffs Exhibit No. 15 E. 329). Approximately 4/5ths of the storm damage occurred to private property (E. 334). The beach north of 41st Street was privately owned (E. 336). The purpose of the construction was to protect both private and public property (E. 339a, E. 340, E. 341). Worcester County allowed the replacement of homes washed from their foundations (E. 266). Sstructures have been allowed east of the Dune Line (E. 40, E. 241).

It would appear that the agreement in question upon which the constructive public trust would be based was, as between the parties, an agreement that the private property owner would be allowed to construct improvements on the subject property in the future provided he obtained the necessary permits from the County. That those permits were obtained is unquestioned and unchallenged.

The public trust issue in the instant case does not involve the abdication of such a trust over any area but an unwarranted attempt by the Appellants to extend the area of such trust and impose it upon property removed from the traditional areas of navigation and fishing. This is not a case of private interference with the public trust in navigable water but is a case of the State's interference with the private use of private property utilizing as an excuse the Public Trust Doctrine. The original grant to Lord Baltimore, if it creates a custom at all, creates a right to go upon the shore to dry fish, take hedging wood and twigs and to build huts for those purposes. Firstly, the subject property is not the shore as then or now contemplated and secondly, where in all the testimony and evidence in this case is there any fact presented to support that the public has been or is drying fish, taking hedging wood and twigs, on or from the subject property ? There is none.

Appellants continue to cite various foreign cases as supportive of a Trust in navigable waters that cannot be abdicated or diverted. **City of Milwaukee v. State,** 193 Wis. 423 (1927), **Robbins v. Department of Public Works,** 355 Mass. The abidcation or diversion of the public trust in navigable waters is not an issue in the instant case. At issue is an atempt to extend the area encumbered by such a trust.

Appellants state that, the expansion of the law of nuisance is indicative of the propriety of the expansion of the scope of the public trust and cite **Air Lift, Ltd. v. Board of Commissioners,**262 Md. 368 and **A. H. Smith Sand and Gravel Co., Inc. v. Department of Water Resources,** 270 Md. 652, in support of said statement. The nuisance complained of in **Air Lift, Ltd.,** supra, was

proven by evidence showing a singular lack of planning; 30 to 50 thousand projected attendance, no study of traffic flow, inadequate arrangements for food and drink, inadequate or fanciful policing, no zoning approval or applications for permits, and no compliance or cooperation with the Health Department. Because of such evidence the Court agreed with the lower Court as to the clear, present and imminent danger to the health, safety, welfare and property of the residents of the county. Certainly, Appellants are not alleging that the construction of the proposed building constitutes such a danger, when it is being built under building codes so strong and severe that the only expert building engineer heard by the lower Court termed them 'ridiculous' for those reasons (E. 233).

The case of **A. H. Smith Sand & Gravel v. Department of Water Resources,** 270 Md. 652, concerned the application of a pollution abatement statute in which statute the Department of Natural Resources is granted the right to "set water quality and effluent standards to be applicable to the waters of the State . . ." pg. 656. The only evidence produced below as to any statutory jurisdiction over the subject property was the Soil Erosion and Sediment Control Statutes and Ordinances (E. 106). The Department admits that the proposed project was approved under such statutes and in fact approves of 99% of the content of the ordinances. It is unquestioned that the other Appellee met every statutory requirement in obtaining the permits to construct his project.

Even in **A. H. Smith Sand & Gravel Co., Inc. v. Department of Water Resources,** supra, the land owner was not being restricted from the economical use of the entirety of his land. The Court of Appeals agreed with the finding of the hearing officer when on page 658 it quotes:

> ". . . since Mr. Smith's property extends beyond the limits of the flood plain, regulation by the State of the activities of the A. H. Smith Sand & Gravel Co., Inc. in the flood plain of Indian Creek will not in fact prohibit the operations which Mr. Smith has conducted there for many years."

In the present case, if Appellants prevail, the other Appellee will be prohibited from conducting its operations (building and selling condominiums) and prohibited from any other economical use, on the entirety of the subject property. The Appellants are not attempting to regulate; they are attempting to prohibit. The would leave, if they are successful, the Appellee with only one incident of private ownership; that being the right to pay taxes on the subject property.

Appellants quote from **Chapter 242 of the 1970 laws to** further the idea that the legislative considerations for the "best interests of the State" closely parallels the concern for protection from overdevelopment of natural and recreational areas (presumably the subject property) which has imbued new meaning in a traditional doctrine of public trust in the administration of public

lands," and that the doctine must include the State's interests in beach properties.

Firstly: This Appellee does not dispute that the General Assembly of the State of Maryland can pass legislation providing for the prohibitions requested by Appellants provided that if such prohibitions amount to confiscation, compensation be also provided. However, Appellant's problem is this: The General Assembly of the State of Maryland has not passed such legislation and The Department of Natural Resources lacks the power to do so, even though its actions in this case may amount to the same thing.

Secondly: This Appellant does not dispute that the Public Trust doctrine extends to the proprietary interests of the state in its property including beach property. However, the extension of the doctrine to the subject property is an extension to the private property of others.

The State in support of its position that the subject area is encumbered by the public trust cites the case of **Borough of Neptune City v. The Borough of Avon-by-The Sea,** 61 N. J. 296, which involved an attempt to discriminate between public users of an expressly dedicated and accepted public beach. If the ownership of the subject property was identical the law in such a case might be applicable, but the ownership is not. There is no question that if the ownership of this property was so established by this court, then such rules would apply, but it is just that question of ownership and interest that is at issue here.

Ocean Hotels, Inc. v. Department of Natural Resources, No. 7375, (15th Cir. Ct. Fla., Jan. 3, 1974), first of all is a lower Court case (at present) and in any event, merely established as law in Florida that the Public Trust Doctrine encumbers land from mean high water, seaward. Again, this instant case, is an atempt to extend it shoreward.

IV

DOES LAND INUNDATED BY A STORM OF UNUSUAL SEVERITY REVERT TO THE STATE? DO GOVERNMENTAL EFFORTS THAT MAY AID IN THE RECLAIMING OF PRIVATE PROPERTY RESULT IN STATE OWNERSHIP OR UNLIMITED CONTROL OF THE PROPERTY SO AIDED?

From 1922 to 1965, 450 net feet of beach between 70th and 71st Streets were lost to erosion. However, at all times during that period of time the physical location of the subject property remained westward of mean high water.

At various times the area in question was replatted so that as the shoreline moved westward the subject property eventually became two of the easterly platted lots in Block 38. While the numbers of the lots may have changed, the land itself has not been relocated.

The March 1962 storm was not a final wave in a continuing process of erosion. It was a 100 year storm. It was an extra-ordinary natural event. To suggest, as do Appellants, that the March 1962 storm was just a part of the process of erosion is to ask one to take leave of his senses. To allege that the submergence of the Town of Ocean City, in March of 1962 was a gradual inundation resulting from gradual erosion is to completely ignore every fact or parcel of evidence, presented below in regards to said storm.

Every case cited by Appellants in regards to submergence is a case of gradual changes to shorelines, gradual inundation, or erosion. In the case of **Dewey Land Co. v. Stevens** 90 A. 1040 (N. J. 1914) title was lost by erosion. **Garrison v. Engle** 193 A. 820 (N. J. 1937) held that landowners must accept the alteration of property by **gradual** change. The subject lots in **Carolina Beach Fishing Pier v. Town of Carolina Beach,** 277 N. C. 297 (1970) were "gradually worn away by the churning of the ocean" (177 S.E. 2d 517).

This subject property became unsubmerged when the March 1962 storm moved away from the vicinity. It was not submerged when "Operation Five High" was conducted. While there is no doubt that virtually every square foot of the island we call Ocean City was or has been aided, protected, or improved by "Operation Five High", or groins, jettys, dunes, etc., this subject property received no greater benefit than the property of the private Appellee and the properties of others. If a dune westward of Lots 4 and 5 protects them from storms, then certainly the property of E. T. Park, Inc. sheltered from storms behind the dune is even more protected. If when the dune was piped between restraining dikes, gravity caused an overflow of material eastward, same occurred to the west and the private Appellant's property was also improved.

Neither Appellants nor Appellees can deny that through the years the subject property, and virtually every property in Ocean City, has been aided, protected, or improved by public expenditures. If public expenditures divest private ownership and vest ownership in the State, then all of Ocean City is a State Park.

Storms (though not in the scope of the March 1962 storm) are a fact of life in Ocean City. Erosion and accretion of the ocean and bayshore has always and will always occur. The good quality of life at the seashore has always been tempered inevitably by its proximity to one of Mother Nature's greatest and, on occasion, most devastating natural resources.

This Appellee and the State have always taken measures to counteract the effect of storms and erosion and this Appellee and presumably the State will continue to take similar measures. Confiscation of the property subjected to the measures taken was never contemplated by this Appellee and we submit, should not now be contemplated by this Honorable Court. To start such a process here is to raise the inevitable question asked of, but never answered by, the State, as to where such a process should cease.

CONCLUSION

The issue involved in this case is whether a 100 by 120 foot parcel of land comprising the subject property has become subject to a public right that is so extensive that it would prohibit the construction of the proposed project. The ramifications raised in this case will not only have effect on the entire beach of Ocean City, but on any property abutting on the thousands of miles of shoreline in Maryland and on any vacant, open land situate anywhere in the State.

As before stated this Appellee supports Appellants' position in reference to a public trust in navigable waters. However, the Appellants' attempt to utilize dedication, prescriptions, custom, submergence, or public trust, to extend the sovereign's interest to the subject property is, in the opinion of this Appellee, improper and detrimental to the public good. If either of the said theorys or doctrines are to be made applicable to the instant case, then their effect would necessarily extend to many tens of thousands of property owners. If they are to apply to Ocean City properties, they must be applicable to any properties on or near navigable waters submerged in the various floods such as Agnes, as well as land used by hunters, hikers, sandlot ball players, lovers, etc. It is the opinion of this Appellee that such theories or doctrines are inappropriate for application in this case.

Additionally, even if such doctrines are applicable, it is submitted that the facts and evidence upon which the trier of fact, (the Court below), made its decision do not sufficiently meet the requirements of any of the various doctrines. Allegations of proof in Appellant's brief do not overcome the lack of proof in the Court below.

In their conclusion Appellants continue to affirm that there has been public usage of the entire beach area and acquiescense by private property interests and that therefore a public interest has been established. Again, Appellants attribute use of the whole to use of the specific property and attempt to extend the application of this case to hundreds of Ocean City properties whose owners are not parties to the case. Appellants should not be allowed to prevail in this specific case on evidence and proof of activities occurring elsewhere.

Much has been stated as to the Public's interest in the subject and similar property. But is it in the public's interest generally to adopt any of the theories or doctrines propounded by Appellants as applicable in the present type of situation?

Is it in the public's good to prohibit the economical use of such private property? Is it in the public's good to add all temporarily submerged lands to the State's ownership; to so add all vacant lands intermittingly used; to so add all lands that have received benefit from public expenditures? Would there by anything but public land left?

This Appellee submits that it is in the public's interest that the State not be allowed to confiscate, by prohibition, the subject property without just compensation.

Respectfully submitted,

BY:

Dale R. Cathell
Attorney for Mayor and City
Council of Ocean City, Maryland

FILED SEP 20 1974

IN THE

Court of Appeals of Maryland

SEPTEMBER TERM, 1974

NO. 64

DEPARTMENT OF NATURAL RESOURCES, et al.
Appellants,

V.

MAYOR AND COUNCIL OF OCEAN CITY, et al.,
Appellees.

APPEAL FROM THE CIRCUIT COURT FOR WORCESTER COUNTY
PURSUANT TO CERTIORARI TO COURT OF SPECIAL APPEALS
(DANIEL T. PRETTYMAN, Judge)

BRIEF AND APPENDIX OF APPELLEE, SEVENTY-FIRST STREET, INC.

PATRICK L. ROGAN, JR.
RICHARDSON, ROGAN,
ANDERSON & HELAND,
For Appellee,

SEVENTY-FIRST STREET, INC.

SALISBURY ADVERTISER—ESTABLISHED 1867

TABLE OF CONTENTS

Page

Statement of the Case 1

Questions Presented 2

Statement of Facts 3

Arguement:

I. The Public Has Not Acquired An Easement By Means Of Appellee's Property 3

II. The Public Has Not Acquired An Easement By Prescription Over Appellee's Property 9

III. The Public Has No Interest In Lots 4 and 5 That Were Established By Custom Or Grant and The Land In Question Is Not Subject To A Public Trust 13

IV. Title To The Lots In Question Did Not Revert To The State Under The Theory Of The Doctrine Of Submergence 19

Conclusion 20

TABLE OF AUTHORITIES
CASES

Baltimore v. Frick, 82 Md. 537 7

Borough of Neptune v. The Borough of Avon-by-the Sea, 294 A. 2d 47 (N. J. 1972) 16

Canton Company v. Baltimore, 106 Md. 69 7

Carolina Beach Fishing Pier v. Town of Carolina Beach, 177 S.E. 2d 513 (N. C. 1970) 19

The City of Daytona Beach v. Tona-Rama, Inc. 271 So. 2d 765 (D. Ct. of App. Fla. 1973) 10, 11, 15

Conway v. Prince George's County, 248 Md. 416 ..... 7, 11

Cushwa v. Williamsport, 117 Md. 306 11

Dalton v. Real Estate & Improvements Co., 201 Md. 34 9

Day v. Allender, 22 Md. 511 9

Department of Natural Resources v. Cropper, No. 9547 Chancery, Circuit Court for Worcester County, Maryland 6

Feldstein v. Segal, 198 Md. 285 12

Garrett v. Gay, 258 Md. 363 11

Gerwitz v. City of Long Beach, 330 N. Y. S. 2d 495 (1972) 7

Gion v. City of Santa Cruz, 465 P. 2d 50 (Cal. 1970) 7

Harbor Co. v. Smith, 85 Md. 537 6

Harlan v. Town of Bel Air, 178 Md. 260 ..... 7, 11
Hughes v. Washington, 389 U. S. 290, 8 8 S. Ct. 438 (1967) 16
Kerpelman v. Board of Public Works, 261 Md. 436 17
Mt. Sinai Nursing Home, Inc. v. Pleasant Manor Corp., 254 Md. 1 9,10,11
Pearsall v. Post, 20 Wend. 111 12
Seaway v. Attorney General, 375 S.W. 2d 923, (Tex. 1964) 7, 10, 11, 12
Smith v. Shiebeck, 180 Md. 412 ..... 7, 9, 11
State ex rel. Thornton v. Hay, 462 P. 2d 671 ,Ore. 1969) 14, 15, 16
Thomas v. Ford, 63 Md. 346 ..... 7, 11
Toney Schloss v. Berenholtz, 243 Md. 1 95 ..... 6, 7
Wilson v. Waters, 192 Md. 221 12

STATUTES

Annotated Code of Maryland, Article 5 7, Section 10 10
Constitution of Maryland
Article 5, Declaration of Rights 17
Article 6, Declaration of Rights 17
Constitution of United States, Amendment V 20

MISCELLANEOUS

28 Am. Jur. 2d, Estoppel, Section 27, P. 627 8
56 Am Jur., Waters, Section 477, P. 8 92 19
46 A.L.R. 2d 1140 12
170 A.L.R. 820 12
1 Blackstone, Commentaries *75-*78 14
11 C. J. S., Boundaries, Section 34, P. 5 79 20

IN THE

Court of Appeals of Maryland

SEPTEMBER TERM, 1974

NO. 64

DEPARTMENT OF NATURAL RESOURCES, et. al.,
Appellants,

v.

MAYOR AND COUNCIL OF OCEAN CITY, et al.,
Appellees.

APPEAL FROM THE CIRCUIT COURT FOR WORCESTER COUNTY
PURSUANT TO CERTIORARI TO COURT OF SPECIAL APPEALS

(DANIEL T. PRETTYMAN, Judge)

BRIEF OF APPELLEE SEVENTY-FIRST STREET, INC.

STATEMENT OF THE CASE

This Appelle accepts the Questions Presented in Appellant's Brief.

QUESTIONS PRESENTED

This Appellee accepts the Statement of The Case of Appellants.

STATEMENT OF FACTS

Seventy-First Street, Inc. owns the two northernmost ocean front lots located between 70th and 71st Streets in Ocean City, Maryland. (E. 300) The block in question contains five ocean front lots numbered 1 (the southernmost lot) through 5 (the northernmost lot). In March 1962, Ocean City was hit by a severe storm which inundated most of the northern part of Ocean City causing extensive damage to land and property (E. 305, 345). Prior to the 1962 storm the lots in question were covered by beach grass and the vegitation line was at the easternmost side of lots 4 and 5 (E. 219, 347, 353). Lot 3 in the block in question was improved by an apartment house and lots 3, 4, and 5 were owned by the same person, J. Robert Brown (E. 218). Lot 1 was improved by an

apartment house and lot 2 was fenced in and was covered with beach grass. (E. 218, 219, 347, 343, 354).

The 1962 storm destroyed the houses that existed on lots 1 and 3 and also destroyed the beach grass that existed on lots 4 and 5 (E. 219, 346). The storm also caused a large washout or breach of the land in the area of 72nd Street (E. 142, 161, 264, 346). After the storm the State Roads Commission of Maryland conducted clean-up operations under the supervision of James W. Small (E. 157 et seq.). They filled in the breach at 72nd Street (E. 160) and took all of the other sand that had been washed onto the city streets and dumped it into the ocean at the street ends. (E. 160, 162). Small testified that "I told the people to start pushing it toward Spain at the street ends." (E. 162). Small further related that to his knowledge, none of the sand was dumped on private property. (E. 160, 162).

After the 1962 storm the County Commissioners of Worcester County obtained easements from ocean front lot owners for the purpose of the construction of a protective dune on said ocean front lots by the United States Army Corps of Engineers. An easement for such purpose was obtained for the lots in question. (E. 221, 222, 302, 303). The Corps of Engineers dune was constructed on the westerly side of the lots in question. (E. 221.). Most experts agreed that Corps of Engineers dune does not add any appreciable measure of sand to the berm, width or height of the beach. (E. 198, 240).

Marshall T. Augustine, however, did say that the dune helped to build up the beach (E. 291), although he could not say what effect it had or whether the dune line or nature had more effect in building up the beach. The Corps of Engineers" dune will not withstand another storm of the severity of 1962. (E. 187, 259).

The beach after the 1962 storm regenerated itself by natural means (E. 256, 258, 259). The Corps of Engineers' dune offers very little protection. (E. 259).

The only other evidence of beach erosion protection by public expenditures was the construction of an asphalt groin at 70th Street by the State Roads Commission in 1954, (E. 164). These asphalt groins were of nebulous value. (E. 164, 177, 178, 240, 269).

There was also evidence that the State Roads Commission many years ago had built a sand dune fence on the beach. No one could say where the sand dune lots in question. (E. 159). The fence, fence was located with reference to the however, was constructed for the purpose of protecting the road. (E. 159).

Lots 4 and 5 were not used by the public prior to the 1962 storm. Any use by the public in that area for bathing, etc. was on the dry sand area to the east of lots 4 and 5. (E. 219, 247). Since 1962 members of the public have used lots 4 and 5 for purposes of bathing, volley ball, etc. (E. 127, 128).

The Mayor & City Council of Ocean City annexed North Ocean City into the town limits in 1965. (E. 132, 137). The Town established a building limit line ordinance which prohibits construction easterly of an established line. The proposed building was to be westerly of the building limit line and not in violation of that ordinance. (E. 232, 345, 356). The building plans were approved by the Town of Ocean City, The Sediment Control Office for Worcester and everyone else whose approval was necessary. (E. 231). The proposed building does not violate the Soil Sediment Control Law. The distance from the easterly side of the proposed building and the mean high water line in 1972 was 133 feet. (E. 249, 345). The State has assessed the lots in question and has collected taxes thereon for many years. (E. 31, 32, 33).

Defendants started constructing the building in question when suit was filed by Plaintiffs claiming that Defendants should not be permitted to build on lots 4 and 5 claiming the public has acquired a right to use said lots by prescription, dedication, custom, public trust doctrine or the doctrine of submergence.

ARGUMENT

THE PUBLIC HAS NOT ACQUIRED AN EASEMENT BY MEANS OF DEDICATION OF APPELLEE'S PROPERTY.

To support their contention that a dedication of lots 4 and 5 had been affected, Appellants say:

1. That the ocean shore from the early 1900's was used for launching pound boats.
2. That the beach provided a way of travel.
3. That lots 4 and 5 are used by the public for swimming, sunbathing, ball-playing and picnicing.
4. That the initial and revised plats of Oceanbay City indicates an intent to dedicate.
5. That prior to annexation Worcester County patrolled the beach by vehicle and installed storm protective measures.
6. That after annexation the City supervised the public beach facilities and maintained the beach.
7. That the 1962 easements affected a dedication.
8. That Worcester County maintained a policy of avoiding the erection of buildings upon the dune line.
9. That the Federal Government spent $1,517,560. for "Operation Five High".

10. That between 1949 and 1961 the State Roads Commission spent $460,-333. for Ocean Beach Protection. $79,028 in 1962, 1963, and 1965, and $392,000 for constructing a boardwalk after the 1962 storm.

11. That an undetermined amount was spent for sand fences, and,

12. The City since annexation has spent at least $100,000.

Appellee will negate Appellants' contentions in numerical order:

1. It may be true that pound boats were launched from the ocean shore up until the inlet was cut in Ocean City by the 1933 storm, but there was no showing that pound boats were launched from lots 4 and 5. The evidence is to the contrary in that the pound boats were launched down near the area of the present inlet (E. 135), an appreciable distance south of lots 4 and 5. (E. 306, 307, 308). Also lots 4 and 5 were covered by vegitation up until the 1962 storm and Stipulation Exhibit No. 1 (E. 345) shows that lots 4 and 5 were an appreciable distance west of the "ocean shore" up until the 1962 storm.

2. The beach did provide a way of travel up until the highway was built in 1939 or 1940 (E. 136). There is no proof that the travel was over lots 4 and 5 and the inferences from the evidence is that lots 4 and 5 were not used in that they were covered with vegitation until the 1962 storm.

3. There is evidence from Dr. Kohlerman that lots 4 and 5 have been used by the public for sunbathing, ballplaying, etc. Kohlerman had only been familiar with the subject lots for ten years at most. (Apx. 1). He was not even aware that there had been construction on lots 1 and 3 prior to the 1962 storm. (Apx. 1).

   George A. Schoepf, Assistant Captain of the Ocean City Beach Patrol, has been familiar with lots 4 and 5 since 1965 (annexation by the city) and testified that since then the public has used the lots. It is interesting to note that the Town of Ocean City has an Ordinance prohibiting ballpaying on the beach (E. 141) and yet Dr. Kohlerman testified to the playing of ball on lots 4 and 5 for six years. (E. 128).

4. Appellants seek to fortify their argument or dedication by reference to The Ocean Bay City Plat which they indicate is dated 1965 and was Appellants' Ex. 8 to be found at E. 308. In realty The Ocean Bay City Plat is dated 1940, was appellants' Ex. 7 and is found at E. 307. The evidence discloses that the area in question was platted three times: The Isle of Wight Land Company, Inc., plat, dated 1917, found at E. 306; The Ocean Bay City plat, dated and found as aforesaid; and The Isle of Wight Land Company, Inc., plat dated 1963, and found at E. 308. Each of the said plats produced changes in the subject area and none of the said plats show any intention of dedicating lots 4 and 5 to public

use. Stipulation Exhibit No. 1 (E. 345) graphically denotes the relationship of each of these plats to the other. In none of the three plats does the present area of the lots in question show up as "Beach" as appellants seem to infer.

5. The Worcester County Sheriff's office had one vehicle that did patrol the northern part of the present Ocean City to keep people away from private homes, to prevent tearing up of sand fences. Most of it was because of complaints from people who lived in the area about noise, fires, etc. (E. 137). There is no proof that the Sheriff's office patrolled over lots 4 and 5. The inference is to the contrary because vegitation existed on lots 4 and 5 and lots 3 and 1 were improved by construction until the 1962 storm.

6. Since 1965 there is evidence that the city cleaned lots 4 and 5.

7. The 1962 easement (E. 302) is exactly as it says it is - an easement to construct and maintain a dune line. By its very terms it contemplates future construction on the lots in question where it indicates:

   "IT IS FURTHER UNDERSTOOD AND AGREED that any improvements or other facilities to be constructed or erected on the aforesaid premises will be donein accordance with permits to be issued by said County Commissioners and will be constructed or erected in such manner as will permit the free and unhampered flow to littoral currents and sand, thus avoiding as much as possible any disturbance on destruction of said dune barrier, sand fences or other protective devices . . . "

8. Worcester County contemplated building in, over and east of the dune line as is indicated by the above quoted language from the easement. Plaintiff's Exhibits 9A, 10, 11, and 12 and 13 clearly show building in, over and east of the dune. Roland E. Powell indicated that many buildings in Ocean City are built on dry sand areas and there are buildings east of the dune line. (E. 147). The Beachmark Condominium's swimming pool, which was constructed in 1968, extends through and east of the dune. (E. 153. 154). Until the spring of 1971 it was necessary to get a letter from the County Commissioners to build in the dune. (E. 152, 153). Other buildings, with county approval, were constructed in and east of the dune. (E. 240, 241, 264).

9. It is true that the Corps of Engineers constructed a dunal system from the Delaware line south to Seventh Street. Th record reveals that this dunal system was constructed for the protection of the properties which lie to the west of them. The "Operation 5-High" report (E. 341) indicates:

"With reference to beaches and dunes, these primarily serve the purpose of storm protection for private and public property behind the beach . . . a reasonable allowance must be made for the contribution of the sea toward the restoration work within a period of a few months' time during which temporary repairs or replacement can be completed."

The beneficial effect of the dune on lots 4 and 5 is nebulous. The major portion of lots 4 and 5 lie on the berm. Appellants' witness, Robert William Lindner, Civil Engineer, testified that the dune did not add any appreciable measure to the berm. (E. 198). Appellants' witness, Turbid H. Slaughter, a geologist, testified that the dune is a secondary line of defense for landward structures. (E. 188). Appellees witness, George Bert Cropper, Professional Engineer and Surveyor, indicated that the dune would not help the berm. (E. 240).

10. It is true that certain funds were spent by the State Roads Commission for Ocean Beach Protection but there is no proof that these expenditures benefited lots 4 and 5. There is evidence to the contrary for appellants mention an item of $390,000. for a boardwalk and there is no boardwalk anywhere near lots 4 and 5.

11. Sand fences were built in the past but their location and any benefits to lots 4 and 5 were not proven.

12. Appellees admit that the Town of Ocean City spends in excess of $100,000. per year to clean the ten miles of beach on its ocean shore.

Even if the law cited by Appellants is correct as applicable to the case at bar, the above illustrates that they are lacking in their proof to bring said law into operation.

The trial court correctly answered Appellants' argument on dedication as did the Circuit Court for Worcester County, Pollitt, Judge, in the recently decided case of **Department of Natural Resources v. George Bert Cropper,** et **al.,** No. 9547 Chancery. Judge Pollitt's opinion is reprinted herein as a part of Appelle's appendix.

With regard to dedication, Judge McWilliams quoting from other cases said in **Toney Schloss v. Berenholtz,** 243 Md. 195:

"It has always been held in this State and elsewhere that whether a dedication to the public has been made depends in every case upon the intention of the parties, and this, whether dedication is claimed by acts **in pais,** by solemn conveyances of record, or by judicial proceedings. And it is well settled that such intention to dedicate must be established by **clear, satisfactory** and **unequivocal testimony."** **Harbor Co. v. Smith,** 85 Md. 541.

> "The principle of dedication rests largely upon the doctrine of estoppel **in pais,** and, while there are general rules applicable to certain lines of conduct on the part of the owner of land, each individual case must after all be decided upon its own facts and circumstances.' **Baltimore v. Frick,** 82 Md. 83; **Canton Co. v Baltimore,** 106 Md. 83."

Appellants appear to be relying upon the doctrine of implied dedication. In Maryland, dedication cases have normally involved roads or rights of way and this is evident from the cases cited by Plaintiffs: **Smith v. Shiebeck,** 180 Md. 412, involved a road; **Harlan v. Town of Bel Air,** 178 Md. 260, involved a street; **Conway v.** Prince George's County, 248 Md. 416, involved a road.

It is respectfully submitted that the issue of dedication of a roadway or right of way is different from the alleged dedication of land which is in its natural state. With regard to a road or right of way there is something visible and apparent laid out on the ground.

Even in the cases cited by Plaintiffs from other jurisdictions it should be noted that the period of use was for more than the presciptive period. In **Seaway v. Attorney** General, 375 S. W. 2d 923 (Tex. 1964) the Court recognized that an easement could be created by continuous public use for the prescribed period of ten years. In **Gion v. City of Santa** Cruz, 465 P. 2d 50 (Cal. 1970), the Court noted in finding that a public easement existed that all that must be shown was the the public used same under a claim of right for the prescribed period of five years. In **Gerwitz v. City of Long Beach,** 330 N. Y. S. 2d 495 (1972) the period of use was more than thirty years.

Thomas v. Ford, 63 Md. 346, is one of the few Maryland cases dealing with waterfront property and it illustrates the reluctance of the Court to extend the rule of implied dedications to non-road situations. In the **Thomas Case,** the Defendant claimed a public easement over Plaintiff's Patuxent River front property by prescription or by dedication because of public use for many years without objection on the part of the owner. The Maryland Court of Appeals indicated its reluctance to appropriate private property for public use when it said at page 355:

> " . . . if it be once understood that this permissive indulgence of the proprietors of the shores may be construed unto irrevocable privileges, restrictions, and hindrances will inevitably follow, to avoid the possibility of such permissive use maturing into public adverse rights. The production of any such consequences surely ought not to be desired by anyone."

As is indicated in the **Toney Schloss v. Berenholtz** case, supra, the principle of dedication rests largely upon the doctrine of estoppel in pais. Estoppel is pais or equitable estoppel has been defined as follows:

> "... it is the principle by which a party who knows or should know the truth is absolutely precluded, both at law and in equity, from denying, or asserting the contrary of, any material fact which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words or conduct, to believe and act upon them thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion was allowed."

28 Jur. 2d, Estoppel, Section 27, P. 627

The Am. Jur. citation further points out that each case must be judged on its own facts. Basically then such estoppel is based upon fair dealing, good faith and justice and its purpose is to forbid one to speak against his own act or representation to the injury of one to whom they were directed who reasonably relied thereon.

Where in the instant case is there any evidence on which to base the theory of equitable estoppel or estoppel in pais. Did the action of Defendant's predecessors in title induce the construction of the State Roads Commission said dune fence or asphalt groins to the injury of the State Roads Commission. Certainly not for it is not even shown that the fence or groin was constructed on Defendant's lots, that they benefited Defendant's lots and certainly the State Roads Commission would have been aware of the Land Records of Worcester County. Would the Corps of Engineers have been misled in the construction of 1962 dune line. Certainly not for a right of way was obtained for that purpose and that right of way which is in evidence speaks for itself. Would the Town of Ocean City have been misled to its detriment since the incorporation of the area within the city. Certainly not for the town very early after the incorporation established its building limit line ordinance which allows construction on lots 4 and 5. Further, the town and the State of Maryland have collected taxes on the lots in question. Is the public misled to its injury. Certainly not for whatever use they made of Defendant's land was grattis.

Therefore even if the Court sought to extend the implied dedication theory as applicable to roads to the instant case, it must fail factually for the elements of estoppel are not present as against Appellee. Estoppel may and should be present against the State, however, for the State has for many many years assessed and collected taxes on the lots in question and the State through the Soil Sediment Control Officer approved the plans for construction on the lots in question.

Appellee agrees with the comment made by the Appellants on page 20 of its brief as follows: "The presence of estoppel looms over the history of both

private and governmental conduct in this case." But such estoppel works against the Appellants and not the Appellee.

Further, even if a dedication were to be considered in this case, based on the facts hereof, such dedication from merely allowing the public to use the lots would have to have lasted for the prescribed period.

In **Mount Sinai Nursing Home, Inc. v. Pleasant Manor Corp.**, 254 Md. 1, Chief Judge Hammond, said:

> "It is certainly a settled doctrine in this State that public roads or ways of any kind can only be established by public authority, or by dedication, or by long user by the public, which though not strictly prescriptive, yet bears so close an analogy to it that it is not inappropriate to apply to the right thus acquired the terms prescriptive. Hence the existence of a public way may be established by evidence of an uninterrupted user by the public for twenty years; the presumption being that such long continued use and enjoyment by the public of such way had a legal rather than an illegal origin. **Day v. Allender**, 22 Md. 511."

Plaintiffs here argue several theories including dedication and prescription. It is inconsistent to say that there is an implied dedication to the public and that the public is adversely using the lots in questions so as to gain certain prescription rights. The Court said in **Dalton v. Real Estate & Improvement Co.**, 201 Md. 34, 41,

> "There cannot be an easement by prescription in a use to which there has been a grant, express or implied. The two are mutually exclusive. A grant is a formalized, irrevocable permission or license. Prescription has its birth and fruition in use without permission."

No evidence was presented that there had been an implied dedication of the lots in question. No act which clearly manifests an intention to dedicate was shown as is required by **Smith v. Shiebeck**, supra.

II.

THE PUBLIC HAS NOT ACQUIRED AN EASEMENT BY PRESCRIPTION OVER APPELLEE'S PROPERTY.

Even if the argument and authorities of Appellants were correct on this point, Appellees must prevail because the proof falls short of establishing an easement by prescription in that it does not show uninterrupted use for a period of **twenty years.** The proof can only show, at best, a use by the public since

1962. Prior to 1962, the lots in question were covered by grass. The witness who was most familiar with the lots prior to 1962 was the owner of them and he indicated that the general public did not use lots 4 and 5 for picnicking, etc., as they were covered by beach grass and there was adequate dry sand area in front of them. (E. 219).

Prior to the 1962 storm the beach in the area of 70th to 71st Street got very little use. (E. 247).

The Appellants face the same problem that was faced by the Plaintiff in the case of **Mt. Sinai v. Pleasant Manor,** Supra, wherein the Court said at page 6:

> "The difficulty the appellants now face is that although the law they now cite would support their right to prevail, they lack the facts to do so."

In the **Mt. Sinai Case,** the Plaintiff proved public user of an alley at most for only sixteen or seventeen years (P. 7). Appellants in the instant case find themselves in the same dilemma with regard to lots 4 and 5.

The requirement of an uninterrupted use for twenty years arises from Articles 57, Section 10, Annotated Code of Maryland (1957 Edition, 1972 Replacement Volume) which states in part:

> "Whenever land shall be taken up . . . any person, body politic or corporate may give evidence . . . his possession thereof; and if it shall appear in evidence that the person, body politic or corporate . . . have held the lands in possession for twenty years before the action brought, such possession shall be a bar to all right or claim derived from the State under any patent issued upon such warrant . . . "

The out of state authoities cited by Appellants to support their theory of prescription are all factually distinguishable from the case at bar. The Appellants indicate at page 31 of their brief that every factor present in **Seaway Company v. Attorney General,** Supra, and **The City of Daytona Beach v. Tona-Rama, Inc.,** 271 So. 2d 765. (D. Ct. of App. Fla. 1973) is also present in the case at bar. The Appellants are being less than candid in their assertion for in the **Seaway case** it was very carefully pointed out that the beach and vegitation line were stable and the same beach and vegitation line existed for two hundred or more years. Further it was proven that the public used the beach area under consideration for more than one hundred years.

In the **Tona-Rama case** there was proof of public user of the beach in question for more than twenty years.

Even if **Seaway** and **Tona-Rama** were the law of Maryland, the absolute most proof that Plaintiffs offered of the lots in question is ten years. **Tona-Rama** points out at page 770:

> "Not all use of beaches or shorelines gives rise to a prescriptive easement. Neither occasional use by a large number of bathers nor frequent or even constant use by a smaller number of bathers gives rise to a prescriptive right in the public to use privately owned beaches."
>
> "There are many beaches along our entire shoreline that are resorted to by local residents and visitors alike without giving rise to prescriptive easement. It is only when the use during the prescribed period is so multitudinous that the facilities of local governmental agencies must be put into play to regulate traffic, keep the peace and invoke sanitary measures that it can be said that the public has acquired a prescriptive right to use privately owned beaches."

The record in the case at bar does not show use of any such character prior to 1962. Any such use, even viewing the evidence in a light most favorable to Appellants, probably cannot be found until the annexation of the area in question by Ocean City in 1965.

Appellee does not concede, however, that the law cited by Appellants is applicable to the case at bar. The Maryland authorities cited concern roads or ways, i. e. **The Mt. Sinai case** concerned an alley; **Garrett v. Gray,** 258 Md. 363 concerned a roadway; **Smith v. Shiebeck,** Supra, concerned a road; **Harlan v. Town of Belair,** Supra, concerned a street; **Conway v. Prince George's County,** Supra, concerned a road; **Cushwa v. Williamsport,** 117 Md. 306, concerned streets.

Thomas V. Ford, Supra is a Maryland case dealing with waterfront property. There Plaintiff sued the Defendant for dumping timber on Plaintiff's Patuxent riverfront property. Defendant claimed that the public acquired a right to use the land by prescription or dedication by long public use known to the Plaintiff without objection. The Court said at page 354:

> "Professor Washburn, . . . lays it down as settled law that 'a right like that to use a landing place upon the shore of navigable waters for depositing articles, such as wood and the like, cannot be claimed for the public, nor for all the inhabitants of a state, by prescription or custom.' and so in Bennett's edition of Goddard on Easements, 186, it is laid down that a custom for the public to use

land of another on a navigable river as a landing place, and a place for deposit of goods, cannot be supported, and this would seem to be founded in reason and sound public policy."

"As appropriate to this case we may repeat here what was said with great force and reason, by Cowen, J., in **Pearsall v. Post,** supra, that, considering the great extent of shore lines within our State, and the long and uniform indulgence extended by the proprietors of those shores to those who have had occasion to use them for purposes connected with water transportation or fishing, a decision which would admit the possibility of turning such permissive enjoyment into prescriptive and absolute right on the part of the public and would open a field of litigation which no community could endure. And what is still worse in a moral point of view, it would be perverting neighborhood forebearance and kind indulgence to the destruction of important rights. Consequently, if it be once understood that this permissive indulgence of the proprietors of the shores may be construed into irrevocable privileges, restrictions, and hindrances will inevitably follow, to avoid the possibility of such permissive use maturing into public adverse rights. The production of any such consequence surely ought not be desired by anyone."

Appellee respectfully submits that the use of land which is unimproved is presumed to be permissive and not adverse.

Wilson v. Waters, 192 Md. 221, indicates as follows:

"It is true that some courts have ruled that the fact that land, over which a right of way is claimed, was 'unenclosed' raises a presumption that the use was permissive. By that ruling, however, the courts have been misled to establish easements over vacant lots in urban districts, although the lots had been cleared and cared for. Thus, it seems that the appropriate term in such cases is 'unimproved' . . . this case is not exactly like those cases in which the land over which the right of way is claimed is wild land, woodland, or other land in a general state of nature. In such cases it may be presumed that the use of the land is permissive, because it is the custom of neighboring owners to travel over such land for pleasure or convenience, then the owners usually make no objection to their dong so."

See also: 170 A. L. R. 820
46 A. L. R. 2d 1140
Feldstein v. Segal, 198 Md. 285.

Thus where unimproved land is involved, the use of it is presumptively permissive. To change the character of such to adverse, something more must be shown to prove that the use was adverse. The evidence in the case at bar shows no such proof, even discounting the fact that the Appellants failed to prove use by the public for sunbathing, etc., for a twenty year period. The only act of dominion, exclusive of sunbathing, etc., is the Corps of Engineers dune line. This was shown to be permissive by virtue of the fact that an easement was granted for same by Defendant's predecessor in title. The 1954 State Roads Commission asphalt groins were clearly not constructed on lots 4 and 5 and the old State Roads Commission sand fence were not shown to be on lots 4 and 5. In fact, the exact location of such sand fence was never shown. The Mayor and City Council have recognized that lots 4 and 5 are privately owned and not subject to any public easement for many reasons. Firstly, the Building Limit Line Ordinance clearly allows construction as Defendant planned. Secondly, the town officials approved the building plans of Defendant. Thirdly, Ocean City has an ordinance which prohibits ball playing on the public beach, but the evidence is crystal clear that persons played volleyball on lots 4 and 5 without interruption. In short, the record is devoid of any evidence of circumstances to convert any use of lots 5 and 4 from permissive to adverse and there is a total failure to prove a use of twenty years or more.

III.

THE PUBLIC HAS NO INTEREST IN LOTS 4 AND 5 THAT WERE ESTABLISHED BY CUSTOM OR GRANT AND THE LAND IN QUESTION IS NOT SUBJECT TO A PUBLIC TRUST.

The adoption of the theories of Appellants as stated in Argument III of their brief followed to its logical conclusion would result in impressing a public trust over all lands abutting upon the bays, rivers and ocean of Maryland.

Appellee agrees that in the instant case the State owns all land below mean high water and that any grant of submerged lands is subject to certain public rights in navigable waters. These principles have no application to the case at bar for it is crystal clear that the lands in question are an appreciable distance west of mean high water.

Appellant's argue that the ocean foreshore has been subject to a public trust since the grant of King Charles I to Lord Baltimore. Their argument ignores that the land in question was covered with vegetation until 1962. They seem to be indicating that if for some reason, as happened in the 1962 catastrophy, the line of vegetation is pushed to the west that a change in ownership is effected and title is divested from a private party to the State. We must bear in mind that there is no proof of use of lots 4 and 5 by the public until after the 1962 storm. They never fished from lots 4 and 5, cut down

Hedging-Wood and Twigs growing on lots 4 and 5, nor built Huts or Cabins thereon.

Appellee adopts the opinion of the trial court with regard to custom and the Public Trust Doctrine (E. 72 to 82).

Each subdivision plat of the area in question does depict a stretch of land oceanward of any property line designated for a "beach" or "boardwalk," but above mean high water as is suggested by Appellants. It is important to note, however, that lots 4 and 5 are west of any such designated "beach" or "boardwalk" areas on said plats. Lots 4 and 5 were not proven to be used as a highway for traffic to the Delaware line.

To support its theory on custom the Appellants cite **State ex rel. Thornton v. Hay,** 254 Or. 584, 595, 462 P.2d, 671 (1969). Even if the **Thornton Case** were the law of Maryland, which Appellee denies, it would not aid Appellant's cause. Thornton cites 1 Blackstone, Commentaries *75-*78 as setting forth the requisites of a particular custom.

(1) It must be ancient, so much so "that the memory of man runneth not to the contrary."

(2) It must be exercised without interruption.

(3) The use must be peaceable and free from dispute.

(4) The use must be reasonable and in a manner appropriate to the land and to the usages of the community.

(5) The area must be defined with certainty.

(6) The use must be obligatory and not permissive.

(7) It must not be repugnant or inconsistent with other customs or other law.

The evidence produced in this case does not even satisfy the Oregon test. The use of lots 4 and 5 is not ancient i.e. it can only be established to 1962 at best; the use is not reasonable and in a manner appropriate to the land and the usages of the community for it is abundantly clear that other structures in the community have been built on dry sand areas and that whenever property was developed in Ocean City the general public respected the rights of the property owner and stayed away from the area (The State of Maryland must also have followed this policy for in the photographic Exhibits filed herein many structures are shown to be built over dry sand areas.); the area cannot be defind with certainty; the use is not obligatory but presumptively permissive as discussed previously; and the use is repugnant to other law for the use is partly for ballplaying and clearly against an Ocean City Ordinance.

The case of **The City of Daytona Beach v. Tona Rama, Inc.**, 271 So. 2d 765 (D. Ct. of Appl., Fla. 1972) is heavily relied upon by Appellants in their argument on prescription. **The Tona Rama Case** however expressly rejects the arguments of dedication, public trust and custom wherein the Court at page 769 cited the arguments made on behalf of the public as follows:

"There has been a growing concern recently in coastline areas to secure public access to beaches and other coastal areas. The public' rights for the use and enjoyment of land are expanding partly due to growing Judicial recognition of the need to preserve beaches for public recreation. This is evidenced by recent decisions by the California and Oregon Supreme Court.

"The Public possesses property rights in nearly all the coastal tidelands through either state ownership or public rights to use privately owned coastal property. There exist three methods by which the public has been permitted to acquire and/or maintain legal right of access to beaches and other recreational areas, none of which require any 'adverse' use by members of the public in the strict sense of the term."

"We now expressly reject the contention embodied in the aforegoing excerpts from the appellees' brief. Were we to accept such notions, it would amount to expropriation of private property without compensation by sheer judicial fiat. Our initial decision herein was and is in no way influenced by the appellees' notions that the need to preserve beaches for public recreation in any way authorizes the taking of such beaches from their lawful owners."

"One of the cases relied on by appellees, **State et rel. Thornton v. Hay**, 254 Or. 584, 462 P. 2d 671 (1969), indicates that in 1967 the Oregon State Assembly, in response to public debate and political activity, enacted legilation by which it was sought to establish as the public policy of that state the very concepts urged by the appellees in the quoted excerpt from their brief. The Oregon legislation reads as follows:

"ORS 391.610 (1) The Legislative Assembly hereby declares it is the public policy of the State of Oregon to forever preserve and maintain the sovereignty of the state heretofore existing over the seashore and ocean beaches of the state from the Columbia River on the North to the Oregon-California line on the South so that the public may have the free and uninterrupted use thereof.

(2) The Legislative Assembly recognizes that over the years the public has made frequent and uninterrupted use of lands abutting,

adjacent and contiguous to the public highways and state recreation areas and recognizes, further, that where such use has been sufficient to create easements in the public through dedication, prescription, grant or otherwise, that it is in the public interest to protect and preserve such public easements as a permanent part of Oregon's recreational resources.

(3) Accordingly, the Legislative Assembly hereby declares that all public rights and easements in those lands described in subsection (2) of this section are confirmed and declared vested exclusively in the State of Oregon and shall be held and administered in the same manner as those lands described in ORS 390.720.

"Even though the above statute had been enacted by the legislature, the Oregon Attorney General conceded, with the Court's approval, that "such legislation cannot divest a person of his rights in land, **Hughes v. Washington,** 389 U. S. 290, 88 S. Ct. 438, 19 L. Ed. 2d 530 (1967), and that the defendants' record title, which includes the dry-sand area, extends seaward to the ordinary of mean nigh tide. **State ex rel. Thornton v. Hay,** supra, 462 P. 2d at p. 675." (Emphasis added).

The public expenditures as indicated by Appellants in the Ocean City area are not proven to have had any beneficial effect on the lots in question. If there were any incidental benefits, the lots in question would benefit no more and probably less than all other property in Ocean City. To carry Appellant's public expenditure argument to its ridiculous end would be to say that the State or the United States owns all land which have become disaster areas and wherein said State and Federal government have expended large sums for reclamation and relief. Carried to a further ridiculous end, I guess one could say that the United States owns all of the private property within its borders for it expended billions of dollars to bring World War II to a successful conclusion and without said expenditures would now be owned by Germany and Japan by conquest.

The case of **Borough of Neptune v. The Borough of Avon-by-the-Sea,** 294 A. 2d 47 (N.J. 1972) is not authority for the case at bar. It dealt with a beach that was owned by a municipality whereon the municipality sought to charge higher fees to non-residents than residents for use of the beach.

The arguments of Appellants on public trust seems to be that there is now a great need and demand by the public to use for reacreational purposes certain lands which have heretofore been privately owned. That since there is this great public need, the sanctity of private ownership should be destroyed and the lands taken over by the State for the benefit of all. This argument is the

advocacy of the taking of private property for public use without compensation. Such action is prohibited by both the national and state constitutions. If the State can assume control over private lands in such a manner why can they not do the same in the road building program. Certainly there is just as much public need there as there is in confiscating waterfront lands.

As said previiously, Defendant does not argue against the proposition that the State owns the land below mean high water in navigable waters. The land here involved however is fast land and the principles of public trust to which underwater lands are subjected are not applicable to the land in question.

Kerpelman v. Bd. of Public Works, 261 Md. 436, 276 A.2d 56 (1971) indicates that:

> "The lands of Maryland covered by water were granted to the Lord Proprietor by Section 4 of the Charter from King Charles I to Caecillius Calvert, Baron of Baltimore, his heirs, successor, and assigns, who had the power to dispose of such lands, subject to the public rights of fishing and navigation . . . by virtue of Art. 5 of the Declaration of Rights in the Maryland Constitution, the inhabitants of Maryland became entitled to all property derived from and under the Charter and thereafter the State of Maryland had the same title to, and rights in, such lands under water as the Lord Proprietor had previously held. These lands were held by the State for the benefit of the inhabitants of Maryland and this holding is a general ficudiary character. Art. 6 of the Declaration of Rights, however, does not purport to change, modify or enlarge the nature of this holding by the State or to give a citizen of Maryland any different status to challenge a statute or activities . . . than exists in regard to any other matters of State concern."

Appellants cite no Maryland authority and indeed none exists indicating that a privately owned beach front area is held by the State in trust for the public. The Maryland authorities go no further than in saying that the public has a right to use navigable waters for navigation and fishing.

That land above mean high water which is privately owned is not subject to a public trust. That land below mean high water, although it may be privately owned is subject to a public trust for fishing and navigation.

Appellants rely heavily on the case of **Seaway Company v. Attorney General,** 375, S.W. 2d 923 (Tex. 1964). It is interesting to note what the Texas Court said regarding the public trust doctrine at page 929:

"One theory of recovery of the easement by the appellees, and which is one basis of the court's judgment, is that traditionally the sovereign has held the seashore as trustee for the use of the people and any conveyance made by the State would be subject to the right of the people to use the seashore and this includes the right of ingress and egress. Too, it was found by the jury, and such finding is supported by sufficient evidence, that the Republic of Texas, prior to and at the time of the grant, had dedicated the beach to the use of the public. However, even if this be true the Republic of Texas at the time of the grant was, as sovereign, owner of the beach and as such owner had authority to convey fee simple title. . . . There was no law with which we are familiar which restricted the power of the President of the Republic who signed the patent to convey fee simple title to the line of mean high tide. . . . It would no doubt have been good policy for the Republic to have reserved the right of ingress and egress so the people could more effectively enjoy the State-owned seashore and waters, but the plain language of the grant shows the Republic of Texas did not do so. We may imply such a reservation in the face of the language of the grant even though there is evidence that there was a road down the beach at the time of the grant. The grant as made by the sovereign must be upheld just the same as if it were a controversy between two persons. The sovereign must fully honor its valid conveyances and contracts.

"We do not know that we clearly comprehend the (State's) position that the judgment can be upheld on the theory that the use of the beach by the public has become a part of our tradition and common law and the easement exists by reason of continuous right in the public. We suppose they seek to have use hold that the seashore is held in trust by the sovereign law for the people and to enjoy it there must be a means of egress and ingress to enable them to enjoy such use and therefore the sovereign has no power to cut off convenient access. We know of no such rule of law. In our extensive research we have found no cases so holding nor have any been cited us. In some cases the expression is used that the sovereign holds the seashore for use by the members of the public. We think this is true but this is far from holding that grants by the sovereign of land above the seashore are impressed by implication with a reserved easement in favor of the public to furnish access by land to the shore. Nor is there in such cases such holding of the want of power in the sovereign to pass a fee simple title to the upland above the line of mean high tide."

IV.

TITLE TO THE LOTS IN QUESTION DID NOT REVERT TO THE STATE UNDER THE THEORY OF THE DOCTRINE OF SUBMERGENCE.

The State argues that title to land inundated by mean high water reverts to it. The foreign authorities cited for such argument contain accurate excerpt from said authorities but the folly of the argument is that the authorities do not apply to the facts of the case at bar.

There can be no doubt that the entirety of lots 4 and 5 were above mean high water prior to the 1962 storm. There can also be no doubt that any submergence of said lots was caused by the violence of said storm. The authorities cited by the State contain the language that title to riparian property lost by **gradual, imperceptible** changes in the shore reverts to the State.

Carolina Beach Fishing Pier v. Town of Carolina Beach, 177 S.E. 2d 513 (N.C. 1970), was cited by the Appellants at page 46 of their brief, the Court quoted from 56 Am. Jur. Waters, Section 477, at page 892, as authority for the proposition that title to land lost by erosion reverts to the State, says:

> "It is a general rule that where the location or the margin or bed of a stream or other body of water which constitutes the boundary of a tract of land is gradually and impreceptibly changed or shifted by accretion, reliction or erosion, the margin of the bed of the stream or body, as so changed, remains the boundary line of the tract, which is extended or restricted accordingly. The owner of the riparian land this * * * loses title to such portions as are so worn or washed away or encroached upon by the water."

Section 477 of Am. Jur. further indicates at page 893:

> "But where the change takes place suddenly and precepibly either by reliction or avulsion, * * * such a change works no change in boundary or ownership."

The State argues that the **Carolina Beach Fishing Pier Case is** "a case factually similar to the instant proceeding." In this case, the property owner claimed that the town appropriated six of his waterfront lots for public purposes without compensation. From the Court's opinion, it is clear that all six of the lots were submerged under the ocean at the time that the town filled and reclaimed them for erosion control purposes. The opinion does not specifically say how the lots became submerged but the review of the pleadings printed with the opinion indicates that "By reason of such erosion and the westward movement of the Atlantic Ocean . . . the eastern boundary of the lots . . . moved **gradually** westward until . . . completely washed away and submerged . . ." (Emphasis Supplied).

The rule is also correctly stated in 11 C.J.S. Boundaries, Section 34, at page 579, as follows:

> ". . . the geenral rule is that where, by a sudden or violent change, the channel or shore on which riparian or littoral lands are bounded is shifted, the boundaries of such lands remain unaffected, and remain in their original position; but where the change is gradual and imperceptible . . . the boundaries shift with the shifting of the chanel or shore."

It may be true that all or a part of the lots in question became submerged by the violent storm of 1962. This would also be true for all or most of Ocean City as practically the whole island was inundated by water. If Appellants are correct on the assertions they here claim, the State would under the same theory own most if not all of Ocean City.

CONCLUSION

The arguments of Appellants that the public owns or has an easement over the lots in question should be rejected in their entirety. There can be no prescriptive easement because there was no proof of the required use for twenty years, and any use of land in its natural state is presumptively permissive anyway.

Appellants cannot prevail on the theory of dedication and acceptance for the evidence is totally lacking in proof of a dedication or an acceptance.

There can be no interest acquired by custom or public trust for the proof of custom in this case does not even meet the standard of proof required in Oregon, even if such Oregon law were the law of Maryland. It is respectfully submitted that Maryland law is not the same as Oregon law on this point. The doctrine of public trust is totally inapplicable to the lots in question because same would amount to appropriation of private property without compensation and contrary to Amendment V of the Constitution of the United States and Article III, Section 40 of the Constitution of Maryland.

The Doctrine of Submergence is inapplicable for said doctrine applies only to gradual, imperceptible changes in a shoreline.

If the public owns or has an easement over lots 4 and 5 for the reasons advanced by the Appellants, then the public owns or has an easement over most, if not all, of Ocean City including high rise row and all of the expensive construction located thereon.

Appellee respectfully contends that for all of the authorities cited herein and those cited in the opinions of Judge Prettyman in his well reasoned opin-

ion below and those cited by Judge Pollitt in the Cropper case that the decision of the trial court should be affirmed.

Respectfully submitted,

PATRICK L. ROGAN, JR.,
Richardson, Rogan, Anderson & Heland

APPENDIX

NICHOLAS JOHN KOHLERMAN, M. D.

BY MR. ROGAN:

Q. Doctor, you testified that you
ten years? A. Yes, sir.

Q. And prior to that time, you were not familiar with the area?

A. That's right.

Q. Were you familiar with it before the March storm of 1962?

A. What, when you say "familiar," did I know it existed, yes. I had been up there on the beach and walked along there and camped up there and so forth.

Q. You became a property owner up here in 1964? A. Yes, sir.

(T. 36) Q. In the block between 70th Street and 71st Street, are you aware of whether or not there was anyconstruction on the five oceanfront lots which are to the east of your property.

A. Was I aware of it?

Q. Yes, sir. A. When?

Q. At Anytime?

A. Yes, I was aware of it on February 7th, I believe it was, or February 5th.

THE COURT: I think you — Mr. Rogan, you mean at anytime in the past has there ever been any construction between 70th and 71st Streets?

MR. ROGAN: Yes, sir, to the easterly portion.

THE WITNESS: No, I have not been aware of any construction prior to February of this year.

BY MR. ROGAN:

Q. You don't know, then, that there was an existing house on Lot No. 1?

A. No, sir. I know it by story, but I don't—I couldn't describe it, or anything of that nature.

(T. 37) Q. You don't know that there was a house on Lot No. 3 either then?

A. No, sir.

Q. o, then, if then, in fact, these houses did exist on Lots 1 and 3, you were not aware of their presence?

A. That's right.

Q. So that at the time they existiar with that block, would you?

A. No, not specifically.

Q. You have been specifically familiar with it for the past ten years?

A. That's right?

STATE OF MARYLAND
DEPARTMENT OF NATURAL
RESOURCES
vs.
GEORGE BERT CROPPER
and
GEORGE BERT CROPPER, INC.

No. 9547 CHANCERY
IN THE CIRCUIT COURT
FOR WORCESTER COUNTY
STATE OF MARYLAND

OPINION

As recently as May 31 of this year in **Acting Director, Department of Forests and Parks v. Walker,** ..... Md. ....., 319 A. 2d 806, the Court of Appeals restated the elementary conclusion that under **Maryland Constitution,** Article III, Section 40, private property may not be taken for public use without just compensation being first paid or tendered to the owner of such property. Judge Smith, for the Court, there said, at 319 A. 2d 808, "The right of an American citizen to be secure from the exporation of his lands by the sovereign without just compensation is a fundamental right."

That basic statement of constitutional law appears to me controlling in this case. No one in his right mind questions the desirability of having a public beach at Ocean City nor the necessity for the protection of that beach and the entire island from the ravages of storms such as that which struck the entire Atlantic coastline on or about March 5-8, 1962. Such a beach is no more desirable or necessary, however, than are public roads, public parks or any other public use for which the State of Maryland regularly acquires land **by condemnation** under its power of eminent domain. The Court of Appeals has consistently and, to the best of my knowledge, without exception, struck down attempts by the State to take private property for public use under the guise of police power without the payment of just compensation. Sometimes the police power and the power of eminent domain are difficult to distinguish. As stated by Chief Judge Prescott in **Stevens v. City of Salisbury,** 240 Md. 556, 214 A. 2d 775, at 782, quoting the Supreme Court of Washington in **Ackerman v. Port of Seattle,** 55 Wash. 2d 400, 348 P. 2d 664, "When private property rights are actually destroyed through the government action, then police power rules are usually applicable, . . . but when private property rights are taken from the individual and are conferred upon the public for public use, eminent domain principles are applicable." There can be no serious question that the latter is the intent of the State in this case.

The State in this case would deprive the owner of all beneficial use of his property, leaving him with no rights to it other than those it alleges to be in public generally, except perhaps the dubious privilege of paying taxes on it to the State, County and City. As stated by Chief Judge Murphy in **Bureau of Mines of Maryland et al. v. The George's Creek Coal and Land Company et al.,**

..... Md. ....., (**The Daily Record,** July 22, 1974); quoting from **United States v. General Motors Corp.,** 323 U. S. 373, 65 S. Ct. 357, 89 L. Ed. 311, "Governmental action short of acquisition of title or occupancy has been held, **if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.**" He also quotes from **Hudson County Water Co. v. McCarter,** 209 U. S. 349, 283 S. Ct. 529, 52 L. Ed. 828, that where regulation would render the property "wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain."

The **Stevens** case contains another quotation particularly appropriate here, that of Mister Justice Holmes in **Pennsylvania Coal Co. v. Mahon,** 260 U. S. 393, 416; 43 S. Ct. 158, 160; 67 L. Ed. 322: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

With these constitutional precepts in mind, this Court approached the task of reviewing 1100 pages of testimony and nearly 100 exhibits in this case, secure in the knowledge that, whatever its decision, it will almost certainly be reviewed and, if necessary, corrected by higher tribunal.

STATEMENT OF THE CASE
(Omitted)

FINDINGS OF FACT
(Omitted Except Summary)

SUMMARY

In summary, the facts of this case, without discussing the applicable law, make it clear to this Court that if the State of Maryland is entitled to any rights in the lands of these Defendants, it is entitled to the same rights in every parcel of land in Ocean City. There has never been a distinction in kind in the public use of all the vacant land in Ocean City from the Ocean to the Bay —any difference between the use of the beach front and the back being one of degree of frequency. The same people who played ball on the beach camped in the sand dunes all the way to the highway. They fished, crabbed and swam in the bays as well as the Ocean. Lovers parked in the rambling dunes on both sides of the highway and, like the bathers and the picnickers on the beach, vacated an area when it became developed and when asked to do so by a property owner.

Any trust created by the expenditure of public funds applies with equal force to the entire island. The land behind or westerly of the dune constructed

by the Corps of Engineers received benefit therefrom as much as or more than the land in front or easterly of said dune. The primary purpose of the Corps of Engineers in constructing the dune was to protect the Ocean Highway and other land lying **behind** it. If those expenditures create a trust on the Defendants' land, they impress the same trust on the land between the dune and the Bay and there is not a marketable title in Ocean City.

If the State's final contention is correct, it now owns all of Ocean City and a good part of the land surrounding the coastal bays and the State and Federal governments needlessly spent hundreds-of-thousands-of-dollars in condemnation proceedings on Assateague Island. There is evidence in this case and it is a well-known fact that all of that area was under water at one time or another during or after the 1962 storm. The Court has personal knowledge that traffic on Baltimore and Philadelphia Avenues was by outboard motor boat and the highway entering Ocean City from the mainland via Fenwick was covered with water to a depth of two-to-three feet for nearly a mile inland. Where there are now entire subdivisions improved with structures worth millions of dollars, land remained under water for an appreciable time after the storm. There is absolutely no competent evidence in this case that the Defendants' property was submerged as a result of that storm to any greater or lesser extent than all of the area above mentioned.

Every parcel of vacant land in Ocean City has been used by the public in the same manner as has this parcel. Every parcel of land, improved or vacant, benefited from the expenditures of public funds just as much as did this parcel. Every parcel of land in or near Ocean City was submerged under the waters of the Ocean just as much as was this parcel. The consequences of a finding for the State on any of those issues would stagger the mind of even the most ardent advocate of public ownership. If the Constitution of the United States and the State of Maryland could permit such a taking of private property for public use without just compensation being first paid or tendered, then due process of law has completely lost its meaning. If there is any reported case from any jurisdiction which would support such a finding, then it is bad law and I trust the Maryland Court of Appeals would decline to follow it. The law, fortunately, is otherwise.

The public right to the use of the "shores of the sea" is as old as the Justinian Code.[13] But, as is made clear by Mr. Tiffany, the "shore" is properly identified as the land lying between low water and high water. "Land bordering on the sea . . . and lying above ordinary low watermark, but below ordinary high watermark, is known as the **shore,** and this, like the land beyond low watermark, belongs **prima facie** to the state. . . ." **The Law of Real Property, Tiffany, 3rd Edition,** Section 660. Unquestionably, this land below high watermark is

13 "By natural law these things are common to all, **viz:** air, running water, the sea, and as a consequence the shores of the sea." **2Institutes of Justinian,** Title 1, Section 1.

the property of the State of Maryland. **Board of Public Works v. Larmar Corp., 262 Md. 24, 46.** However, "(T)he public ordinarily has, as against an individual proprietor of the shore, in case this has been granted by the state, no right to make use thereof for any purpose other than navigation or fishing. Hence, there is no general right to take sand or gravel therefrom, or even fish shells, as distinct from live fish; **nor can the public go on the shore for the purpose of bathing. . . .**" **Tiffany, supra,** Section 659.

Even assuming that the public has a right of access to the water for swimming, bathing, boating, fishing and other customary aquatic pursuits, those rights cannot unreasonably interfere with the littoral rights of the adjoining landowners. **United States v. Harrison County, Mississippi,** 399 F. 2d 485, 491 (1968) (U.S.C.A., 5th Cicuit). Here, however, the State asserts a public acquisition of additional rights to the use of land lying above the "shore" under one or more of the following theories.

I.

PRESCRIPTIVE USE

As stated in the "Findings of Fact" portion of this Opinion, there is virtually no competent evidence of an adverse use by the general public of the particular property which is the subject of this suit continuously and uninterruptedly fo a period of twenty years, in fact, under its submergence theory, the State contends the subject land did not even exist for a brief period in 1962, so any alleged prescriptive use thereof must have been at least temporarily interrupted at that time. In any event, the Court finds that the public use of the land in question, if any, was permissive and not adverse. In **Wilson v. Waters,** 192 Md. 221, 64 A.2d 135, 138, Judge Delaplaine states that in cases involving wild land, woodland, **or other land in a general state of nature,** "it may be presumed that use of the land is permissive, because it is the custom of neighboring owners to travel over such land for pleasure or convenience, and the owners usually make no objection to their doing so. And in **Thomas v. Ford,** 63 Md. 346, 354, Chief Judge Alvey stated:

> "As appropriate to this case we may repeat here what was said, with great force of reason, by Cowen, Jr., in **Pearsall v. Post, supra,** that, considering the great extent of shore lines within our State, and the long and uniform indulgence extended by the proprietors of those shores to those who have had occasion to use them for the purposes connected with water transportation or fishing, a decision which should admit the possibility of turning such permissive enjoyment into prescriptive and absolute right on the part of the public would open a field of litigation which no community could endure. And what is still worse in a moral point of view, it would be perverting neighborhood forbearance and kind

> indulgence to the destruction of important rights. Consequently, if it be once understood tthat this permissive indulgence of the proprietors of the shores may be construed into irrevocable privileges, restricitions and hindrances will inevitably follow, to avoid the possibility of such permissive use maturing into public adverse rights. The production of any such consequence surely ought to be desired by anyone."

In **Feldstein v. Segall,** 198 Md. 285, 81 A.2d 610, 615, Judge Markell, while finding it unnecessary to make such a holding since the use of the property in question was so "miscellaneous and promiscuous" that it could not be called adverse, again indicated that the use of unenclosed or unimproved land is presumed to have been permissive and not adverse.

In this case, we do not have an open, notorious, continuous adverse use of a physically defined road or right of way as is true in nearly all of the Maryland cases cited by both parties. **Mt. Sinai Nursing Home, Inc. v. Pleasant Manor Corporation,** 254 Md. 1, 253 A.2d 915 (not 354 as cited in the State's Memorandum); **Garret v. Gray,** 258 Md. 363; **Conway v. Prince George's County,** 248 Md. 416; **Smith v. Shiebeck,** 180 Md. 412; **Harlan v. Town of Bel Air,** 178 Md. 260; **Cushwa v. Williamsport,** 117 Md. 306; **Day v. Allender,** 22 Md. 511. We have, instead, a "miscellaneous and promiscuous" use by a few people, rambling all over unimproved property, avoiding properties as they became developed and, according to Mr. Cropper's uncontradicted testimony, leaving his property upon request by him to do so. This Court has been referred to no Maryland authority on which to base a holding of a prescriptive use under the facts of this case.

This same cautious approach to prescriptive easements in waterfront property is reflected in the decisions of other states as well. Thus, in **City of Daytona Beach v. Tona-Rama, Inc.,** 271 So.2d 765 (D. Ct. of App. Fla. 1973), the Florida Court observes, 271 So.2d at 770:

> "Not all use of beaches or shorelines gives rise to a prescriptive easement. Neither occasional use by a large number of bathers nor frequent or even constant use by a smaller number of bathers gives rise to a prescriptive right in the public to use privately owned beaches.
>
> "There are many beaches along our entire shoreline that are resorted to by local residents and visitors alike without giving rise to prescriptive easements. It is only when the use **during the prescriptive period** is so multitudinous that the facilities of local governmental agencies must be put into play to regulate traffic, keep the peace and invoke sanitary measures that it can be said

that the public has acquired a prescriptive right to use privately owned beaches." (Emphasis added)

See, **City of Miami Beach v. Undercliff Realty & Investment Co.**, 21 So.2d 783, 786 (1945).

There is no evidence of any significant governmental action in the area in question prior to annexation in 1965, much less for the required twenty-year period.

In **Seaway Company v. Attorney General**, 375 S.W.2d 923 (Texas, 1964), relied on by the State, the facts were vastly different from this case. There it was shown that the public had continuously used the same stable area for more than one hundred years.

The Court holds, therefore, that Complainant has failed to establish a right in the public to the use of Defendants' land by prescriptive use.

II.

DEDICATION

As stated by Chief Judge Hammond in **Mt. Sinai Nursing Home, Inc. v. Pleasant Manor Corp., supra,** the theories of prescriptive use and a right arising by long continued acceptance of an offer to dedicate a public way sometimes seem to blend into, reflect or overlap each other. There certainly are similarities. The acts of the public indicating an acceptance of the dedication are closely analogous to the acts of the public establishing prescriptive use. The difference is in the question of the owner's intention to dedicate either expressly shown or implied from his conduct. In **Toney Schloss Properties Corp. v. Berenholtz,** 243 Md. 220 A.2d 910, Judge McWilliams said:

> "In **Stover v. Steffey,** 115 Md. 524, 530, 81 Atl. 33 (1911) Judge Pattison, for the Court, quoting from earlier opinions, stated the well-established rule in respect of dedication:
>
> > " 'It has always been held in this State and elsewhere that whether a dedication to the public has been made depends in every case upon the intention of the parties, and this, whether dedication is claimed by acts **in pais,** by solemn conveyances of record, or by judicial proceedings. And it is also as well settled that such intention to dedicate must be established by clear, satisfactory and unequivocal testimony.' **Harbor Co. v. Smith,** 85 Md. 541.
> >
> > " 'The principle of dedication rests largely upon the doctrine of estoppel **in pais,** and, while there are general rules applicable to certain lines of conduct on the part of the owner of the land, each individual case must after

all be decided upon its own facts and circumstances.' **Baltimore v. Frick,** 82 Md. 83; **Canton Co. v. Baltimore,** 106 Md. 83."

"In **Smith v. Shiebeck,** 180 Md. 412, 419, 24 A. 2d 795 (1942), Judge Delaplaine, for the Court, paraphrased the rule quoted by Judge Pattison:

> "'* * * In Maryland no particular form or ceremony is necessary to dedicate land to public use. No deed is necessary to evidence a dedication, nor any grantee in **esse** to take the title. **Harlan v. Town of Bel Air,** 178 Md. 260, 13 A. 2d 370. As dedication is purely a question of intention, any act of a landowner clearly manifesting such an intention is sufficient. **Lanaconing, M. & F. Ry. Co. v. Consolidation Coal Co.,** 95 Md. 630, 634, 53 A. 420.'"

It is also noted that this same opinion quotes Judge Urner in **King v. North Chesapeake Beach Land & Improvement Co.,** 143 Md. 693, 123 A.455, to the effect that even if a dedication is found to exist, the grantor may still exercise all rights of ownership not inconsistent therewith. Under the facts of this case, it can hardly be seriously maintained that Mr. Cropper's house unreasonably interferes with public use of his beach even if such a right exists. Applying the principles hereinbefore stated, however, this Court finds no evidence of a dedication, either express or implied, in this case. Obviously, Mr. Cropper has never expressly made such a dedication and has never intended to do so, and an intent on the part of the owner of land to dedicate it to public use is absolutely essential to constitute a dedication. **Harlan v. Town of Bel Air,** 178 Md. 260, 265.

Intent, of course, may be express implied. However, easements by implication are looked upon with jealousy and are construed with strictness. **Condry v. Laurie,** 184 Md. 317 (1945).

The recording of the original 1902 and 1903 Fenwick plats depicting "Maryland and Delaware Boulevard" and a "Beach" between the east line of the platted lots and the Atlantic Ocean, coupled with the conveyance of lots with reference thereto, would normally be deemed sufficient to effect a dedication of the area east of the platted lots. **Harlan v. Town of Bel Air, supra.** Of course, this presupposes there was something to dedicate. The evidence in the present case strongly suggests that there never was sufficient land between the Atlantic Ocean and the main north-south highway to accommodate "Maryland and Delaware Boulevard" and the "Beach" as platted. In this event, the offer would be nugatory. But even if it is conceded that the recording of the original 1902 and 1903 Fenwick plats effected a dedication of the area east of the platted lots, it did not and could not work a dedication of the lots themselves.

All the authorities make it clear that implied dedication is based primarily on the doctrine of estoppel, that is, the owner has by his own conduct been estopped from denying an intention to dedicate to public use, either by failing to object to such public use or by the acceptance of the benefits of the expenditures of public funds.

The alleged public user of Cropper's property, at least until annexation by the City, was at best miscellaneous and promiscuous. The same can also be said regarding the public expenditures benefiting the property prior to 1962. And, as regards the public expenditures, it is significant that **every public agency which has expended funds alleged to have benefited this property has expressly recognized the private ownership thereof.** The Town of Ocean City, the Worcester County Commissioners, the Corps of Engineers and the State of Maryland through its Planning Department have all by their own action and inaction specifically acknowledged Cropper's private ownership. The Corps of Engineers insisted on an easement for the dune line. The State Road Commission and the County Commissioners cooperated in obtaining these easements. Building limit lines established by the City were complied with and all necessary building permits were issued. The State, County and City have all assessed and collected taxes on the property for years and are still doing so. If anyone has been misled to his detriment by the conduct of anyone else, it is the private property owner who has been so misled by the public authorities.

Mr. Cropper's testimony as to his exercise of dominion and control over his property and the vacating of same by the public upon request is not contradicted.

In short, there is no clear and satisfactory proof of any intent, express or implied, to dedicate this property to public use, nor any evidence of an acceptance of such a dedication.

III.

CUSTOM

The state relies exclusively on **State ex rel. Thornton v. Hay,** 462 P. 2d 671, to support this theory. To discuss freely the legal and factual differences between that case and this one would only unduly prolong an already too lengthy opinion.

Thornton quotes **Blackstone** on the requirements of a "custom."

(1) It must be ancient, so much so "that the memory of man runneth not to the contrary."

(2) It must be exercised without interruption.

(3) The use must be peaceable and free from dispute.

(4) The use must be reasonable and in a manner appropriate to the land.

(5) The area must be defined with certainty with visible boundaries.

(6) It must be obligatory and not permissive.

(7) It must not be repugnant or inconsistent with other customs or other law.

It is perfectly clear from the credible testimony in this case that the "custom" in Ocean City has been for the public to respect private rights to property as it has been developed, indicating it has been permissive and no obligatory. There is no evidence of any "ancient" use of the subject property. The area of such use, as discussed previously, has not been defined with **certainty,** as it was in **Thornton**—the evidence being that public use of vacant land in Ocean City has been from Ocean to Bay and not limited to the foreshore. Even assuming **Thornton** to be the law of Maryland, the evidence in this case just does not support the existence of any such "custom" as alleged by the State.

IV.

PUBLIC TRUST

This Court certainly has no quarel with the proposition of law set for in **Browne v. Kennedy,** 5 H. & J. 196, through **Board of Public Works v. Larmar Corp.,** 262 Md. 24, that the State owns the land under navigable water and that it holds such land in trust for the public. I know of no Maryland case, however, that extends the public trust doctrine to land above mean high water. The authorities so ably and fully discussed by Judge Finan in the **Larmar** case reveal the historical position of this State that private ownership extended to the water's edge. The State by its patents conveyed the land in Ocean City to the waters of the Atlantic Ocean to private ownership, with no reservations except for a public right of fishing and navigation. The State must now fully honor its valid conveyances. See **Seaway Company v. Attorney General,** 375 S.W. 2d 923, 929, for a rejection of this theory of public trust and a good discussion of the reasons therefor.

Hixon v. Public Service Commission, 32 Wis. 2d 608, 146 N.W. 2d 577, cited by the State, merely upheld a decision of the Public Service Commission denying a permit to construct a breakwater in navigable water. It involved construction of a Wisconsin statute regulating filling of navigable waters and bears absolutely no relationship to either the facts or the law of this case.

Just v. Marinette County, 56 Wis. 2d 7, 201 N.W. 2d 761, does contain the statement quoated on page 21 of the State's brief, citing as authority therefor **Wisconsin Power & Light Co. v. Public Service Commission,** 5 Wis. 2d 167, 92

N.W. 2d 241, a careful reading of which reveals absolutely nothing concerning an alleged public trust in "lands adjacent to or near navigable waters." The case cited deals with the regulation of maintaining a dam on navigable waters —clearly of no help in the instant case.

The statement in **People of Smithtown v. Paverano,** 336 N. Y. S. 2d 764, a New York District Court case, that "foreshore" includes all that area washed by the waves is at variance with every definition of that word this Court has ever seen. "Foreshore" is the area between mean high water and mean low water, an area owned by the State in Maryland and, of course, subject to the rights of the geenral public.

In short, this Court has been referred to no controlling or persuasive authority extending the so-called public ttrust doctrine to any area landward of mean high water.

The facts of this case as previously stated demonstrate the fallacy of attempting to extend the public trust doctrine by the expenditures of public funds. Without unduly repeating those facts, it is noted again that the dune as primarily designed to protect the Ocean Highway and the property westerly of the dunes; the sand fences built by the State Roads Commission were to protect the highway; the asphalt groins contributed nothing except broken pieces of asphalt littering the beach; the "County dune" referred to by the State was a natural series of rambling dunes created by God and not by man. The agencies spending the money expressly and consistently recognize the private ownership of the adjacent properties. No public expenditure benefited this property any more thatn it benefited every lot, home, condominium, motel or hotel in Ocean City.

V.

SUBMERGENCE

The contention by the State that because all or a part of the subject property was submerged for a time during or after the March, 1962, storm it became the property of the State is, to me, patently ridiculous. As previously set forth herein, if such were the case, the State would now own most, if not all, of Ocean City and Assateague Island and hundreds of acres of bayside properties westerly of Assawoman, Isle of Wight and Sinepuxtent Bays. The same could also probably be said of much of the 4600 miles of tidewater shoreline of the Chesapeake Bay, much of which has been temporarily flooded at one time or another. Of course, land lost by erosion, such as Sharps Island in the Chesapeake and lands which gradually disappear from all our shorelines from year to year as they slide into the adjacent navigable water, become the property of the State, just as lands created by accretion have hoistorically been considered the property of the riparian owner. A sudden and rapid change in a soreline, however, is in the law termed an avulsion, which works no change

in the boundaries. **Bosley v. Grand Lodge,** 263 Md. 303, 319. Any inundation of the subject property in this case was clearly an **avulsion** and not **erosion.**

Finally, the State in its reply memorandum, cites **Ocean Hotels, Inc. v. State of Florida** (Circuit Court of Florida, Fifteenth Circuit, January 7, 1974) in support of some of its contentions. That case did no more than affirm public ownership of land **seaward of mean high water,** which is something about which all parties are in agreement. It is interesting to note, however, that this case specifically recognizes the private ownership of the land above mean high water and really refutes rather than supports the State's position.

CONCLUSION

In the mind of this member of the Court, this case represents an unprecedented attempt by the State of Maryland to appropriate private property for public use without the payment of just compensation and, as such, would violate both the **Constitution of the United States** and the **Constitution of Maryland.** The Court, therefore, will sign an Order denying the relief prayed.

RICHARD M. POLLITT,
Judge

DATED: AUGUST 27, 1974

ORDER OF COURT

For the reasons stated in the aforegoing Opinion, it is, this 27th day of August, A. D., 1974, by the Circuit Court for Worcester County, Maryland, in Equity, ADJUDGED ORDERED and DECREED, that the Bill of Complaint for Injunction filed herein be and the same is hereby DISMISSED; costs to be paid by the State of Maryland.

RICHARD M. POLLITT,
Judge

FILED OCT 25 1974

IN THE

Court of Appeals of Maryland

SEPTEMBER TERM, 1974

No. 64

DEPARTMENT OF NATURAL RESOURCES, ET AL.,
Appellants,

v.

MAYOR AND COUNCIL OF OCEAN CITY, ET AL.,
Appellees.

APPEAL FROM THE CIRCUIT COURT FOR
WORCESTER COUNTY PURSUANT TO CERTIORARI
TO COURT OF SPECIAL APPEALS
(DANIEL T. PRETTYMAN, Judge)

REPLY BRIEF OF APPELLANTS

FRANCIS B. BURCH,
Attorney General,

HENRY R. LORD,
Deputy Attorney General,

WARREN K. RICH,
Assistant Attorney General,

For Appellant.
Department of Natural Resources,
State of Maryland.

HAMILTON P. FOX,
HEARNE, FOX & BAILEY,
For Appellant,
E. T. Parks, Inc.

The Daily Record Co., Baltimore, Md. 21202

IN THE

COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 1974

NO. 64

DEPARTMENT OF NATURAL RESOURCES,
STATE OF MARYLAND, ET AL.,
Appellants,

v.

MAYOR AND COUNCIL OF OCEAN CITY,
MARYLAND, ET AL.,
Appellees.

APPEAL FROM THE CIRCUIT COURT FOR WORCESTER COUNTY
PURSUANT TO CERTIORARI TO THE COURT OF SPECIAL APPEALS
(DANIEL T. PRETTYMAN, JUDGE)

REPLY BRIEF OF APPELLANTS

I.

THE AREA EAST OF THE DUNELINE WITHIN APPELLEES
TRACT OF LAND HAS BEEN DEDICATED TO PUBLIC USE

The briefs heretofore filed in this matter have exposed the issue of whether the concept of implied dedication may apply to non-road situations. To support their contention that this doctrine is not applicable, Appellees cite the case

TABLE OF CONTENTS

ARGUMENT:

I. THE AREA EAST OF THE DUNELINE WITHIN APPELLEES TRACT OF LAND HAS BEEN DEDICATED TO PUBLIC USE ---------- 1

II. THE EVIDENCE PRESENTED IS SUFFICIENT TO SUSTAIN THE ATTAINMENT OF A PUBLIC EASEMENT THROUGH THE PROCESS OF PRINCIPLE ---------- 5

III. IN ENFORCING THE EXISTING PUBLIC INTEREST PRIVATE PROPERTY IS NOT BEING CONFISCATED ---------- 7

CONCLUSION ---------- 8

TABLE OF AUTHORITIES

Cases

Chapman v. Rogan, 222 Md. 12, 19 (1959) ---------- 2

Garrett v. Gray, 258 Md. 379 (1970) ---------- 5, 6

Hughes v. Washington, 389 U.S. 290, 88 S. Ct. 438 (1967) ---------- 7

Thomas v. Ford, 63 Md. 346 (1885) ---------- 2

of Thomas v. Ford, 63 Md. 346 (1885). That case was an action brought for alleged trespass which arose from defendant's action in piling large quantities of wood on plaintiff's land along the shore of the Patuxent River. In defending the action, it was alleged that this area had become part of an adjacent public landing, either through dedication or through the concept of prescription. This defense was rejected primarily because of the nature of the public use shown. The Court in Thomas stated:

> Indeed, the very nature of the user set up in this case as evidence of the prescriptive right in, or dedication to, the public renders it quite out of the question that such right could, upon principle, exist in the public generally. From the very nature of the user relied on it must be confined to but few individuals, and this negatives the idea of the existence of the right in the general public. Instead of the right being of a mere easement or servitude, without profit in the soil, and open to the enjoyment of all alike, it would be an exclusive appropriation of the actual use of the soil to the first occupier or depositor of wood or other articles, without limit as to the extent or duration of time. 63 Md. at 353.

When cited in the later case of Chapman v. Rogan, 222 Md. 12, 19 (1959), the Court of Appeals reaffirmed that "there is no such thing as dedication for the use of individuals; dedication must be for the public at large". Nothing within Thomas v. Ford, supra, would deny the application of the doctrine of implied dedication to the situation such as the case at hand. Aside from the obvious difference in physical characteristics between a sandy migrating barrier island adjacent to the Atlantic Ocean and shore front property along a river, there is specific evidence in this matter as illustrated in Appellant's

brief showing an intent on behalf of the ownership interests to dedicate to public use.

There is no question but that a given area along the Atlantic Ocean beach front possibly as wide as 450 feet was intended to be conferred to public benefit as evidenced in the various plats referred to in this matter. (E. 306-308) As late as 1962, the former owners of the subject tract of land executed an easement containing the following language:

> [A] perpetual easement across the aforesaid property for the purpose of constructing, reconstructing and maintaining a sand dune barrier (to be constructed or reconstructed originally by the Corps of Engineers of the U.S. Army) for the protection of our property, the other property in this vicinity and the public generally, but in connection therewith do grant the further right to construct and maintain across our property sand fences or such other protective devices as may be necessary, it being understood and agreed that the County Commissioners of Worcester County, their agents, employees, successors and assigns are hereby vested with all rights, powers and authority necessary for the construction, reconstruction, repair and maintenance of said dune barrier if it is subsequently determined that such action is necessary for the protection of property. (E. 302)

The easement further provided:

> IT IS FURTHER UNDERSTOOD AND AGREED that any improvements or other facilities to be constructed or erected on the aforesaid premises will be done in accordance with permits to be issued by said County Commissioners and will be constructed or erected in such manner as will permit the free and unhampered flow of littoral currents and sand, thus avoiding as much as possible any disturbance or destruction of said dune barrier, sand fences or other protective devices, it being UNDERSTOOD AND AGREED that at such times as said County Commissioners, their successors and assigns may determine that the rights and easements herein granted are no longer necessary for the purposes intended, then and in that event the same shall cease to exist.

> IT IS FURTHER CONVENANTED AND AGREED that the rights, conditions and obligations hereby imposed or intended for the benefit of the property herein described, and other property owners in this vicinity and the public generally are to be construed as covenants running with the land and binding upon the parties hereto and any subsequent owners of said property.

The language used speaks for itself, but considering the fact that for a given period of time subsequent to the installation of the dune, the County would not grant authorization to build on the subject tracts, and that the tax assessments were decreased by one-half because the ocean front lots were considered unbuildable, it is apparent that the easement does contain the following restrictions for public benefit: (1) Certain protective devices may be placed on the subject property and the same may be maintained if such action is necessary for protection of property. (2) Should anything be constructed in accordance with permits issued by the County Commissioners, it will be constructed to permit "the free and unhampered flow of littoral currents and sand, thus avoiding as much as possible any disturbance or destruction of said dune barrier" or other protected devices. (3) The rights and obligations imposed were intended for the benefit of the public generally as well as the benefit of the specific property and adjacent or nearby property owners.

The building of the Appellee's condominium will hamper the flow of littoral currents and will hamper the littoral drift of the sand of necessity. An eight foot eight inch elevator shaft is being driven into the dune to an elevation of plus 5, in

addition to wood pilings twenty feet in length which are also driven into the ground as a foundation for concrete pile cups and columns rising to an elevation of +20. (E. 359)

It has also been contended that it may be inconsistent to argue and assert the dedication and prescription theories in support of this matter. Appellants agree that while the theories of course are different, the "public use" which is an ingredient within both theories, may stand for both the acceptance and offer to dedicate and also may be evidence of adverse use to support the prescription theory. See Garrett v. Gray, 258 Md. 379 (1970).

II.

THE EVIDENCE PRESENTED IS SUFFICIENT TO SUSTAIN THE ATTAINMENT OF A PUBLIC EASEMENT THROUGH THE PROCESS OF PRINCIPLE

Both Appellees contend that the Appellants have not supported the theory of prescription with sufficient evidence of adverse public usage. It is conceded that the public use in this area has intensified in recent years and that indeed the evidence presented for the years subsequent to 1962 is directed to the specific lots in question. The record reflects that the public at large has generally utilized this beach area and that this public use was supported by the governmental expenditure of public funds. It has been shown that the beach has been used as a highway prior to the construction of Philadelphia Avenue in 1938. (E. 135) Additionally, that in 1954 an asphalt groin was designed to build

up or increase the width of the beach between 70th and 71st Streets and also that this specific area between 70th and 71st Streets has been patrolled by municipal vehicles.

From an historical standpoint, the beach has always been open to public use, and no barriers or signs except for isolated instances were erected to prevent public access or usage. Appellants need not show that great hordes of bathers and fishermen have utilized the specific tracts in question. The use need not be intensive for a full 20-year period, but it is sufficient to show that the public enjoys the area without seeking the permission from the property owners. In Garrett v. Gray, supra at 378, the Court stated:

> True, the traffic may have been sparse; nonetheless, members of the public freely passed over it without seeking permission of the owners through whose property the road passed, and it was a continued and uninterrupted use by persons other than the property owners whose property is traversed by the road.
>
> In Department of Public Works & Buildings v. Farina, 29 Ill. 2d 474, 194 N.E.2d 209 (1963) the Supreme Court of Illinois stated:
>
>> Public use requires that all persons must have an equal right to the use and that it must be in common, upon the same terms, however few the number who avail themselves of it. [citations omitted] The law is well settled that a public road is public highway regardless of the number of people who use it if everyone who desires may lawfully use it, as it is the right of public travel and not the exercise of the right which constitutes a road a public highway.

III.

IN ENFORCING THE EXISTING PUBLIC INTEREST PRIVATE PROPERTY IS NOT BEING CONFISCATED

The Court below and Appellees have persistently characterized the State's position in enforcing existing public rights as an attempt to take private property without payment of compensation. The simple response to this challenge is that the rights of the public which are the subject of this litigation have been attained and therefore are established public interests. Accordingly, Appellee 71st Street Corporation's land is burdened with an easement or a trust for the benefit of the public, and in no way is compensation an issue in this case.

The case of Hughes v. Washington, 389 U.S. 290, 88 S.Ct. 438 (1967) is referred to by Appellees for the proposition that legislation cannot divest a person of his rights and land. That principle was supported by the concurring opinion of Justice Stewart. The Hughes case was essentially a determination of whether or not federal or state principles of law would govern the application of the doctrine of accretion to plaintiff's property. The concurring opinion suggested that the proper result had been reached by the majority because the enactment of a law reversing established policy and precedent governing vested rights may necessitate payment of compensation to individual property owners. This rationale is not applicable to the instant proceeding. The State's position in the case at bar is not based upon a change in practice or policy, but is an affirmation of an established public interest.

The Appellees concede that an area westward of mean high water of varying width does exist which is devoted and dedicated to the use of the public. That area of public recreational activities, however, has historically extended to the crest of the dune which is equivalent to the line of vegetation. Except in isolated instances, there is no real intent of developers to extend eastward of that line, and, in some areas, the duneline coincides with the so-called private property line. There are not "thousands of owners of oceanfront lots similary situated" as contended by Appelle 71st Street Corporation. Although it was well known that the island is migrating in a westerly direction, and the successive plats indicate a fairly equivalent area devoted to public beach, Appellants now contend that that area has diminished from a broad width of 400 feet to approximately 75 feet in its present form. While the public usage has increased, the availability of the public resource has diminished.

CONCLUSION

It is an uncontested fact that the barrier island which includes the City of Ocean City and its environs has migrated westward since 1859. In moving westerly, approximately 450 feet, what Appellees contend is lost is the area designated by the founding fathers of the City and predecessors as the public beach. At the time that the first plat of Oceanbay City was filed, there was an intent to have a public area from the

waterline of the Atlantic Ocean reaching in a westerly direction to the beginnings of private property areas which would serve to support a public need. The founding fathers of Ocean City had the foresight to acknowledge that to allow Ocean City to grow and be a viable community, it must call on its greatest public asset -- the beach. The recent decisions of the Mayor and City Council to impose a building limit line beyond which the public would have free access, is an acknowledgment of the public beach concept. That line, however, is an arbitrary one and was based primarily on the frontages of existing buildings tc accommodate not really the public but the availability of areas for the development of new condominiums, apartments and motels. The issue at hand is how far and to what point the public beach will extend, whether it be to the building limit line which has been uncontested, or to what could be called the duneline or vegetation line, which has historically been the separation of public, vis-à-vis private interests.

Much has been made in the lower court decision of the fact that the State may not take private property without compensation and, of course, that is an inherent constitutional safeguard that the State strongly supports and encourages. If the public always has held an interest in a public beach, to a greater or lesser extent it has had the ability to have free access to the beach. Consequently, whose interest is being taken without compensation--private developer's or the public's? The State respectfully contends that we do not approach the

question of confiscation in this case. We are not urging a police power act, but we are attempting only to preserve a right that historically has been exercised and maintained.

Respectfully Submitted,

Francis B. Burch
Attorney General

Henry R. Lord
Deputy Attorney General

Warren K. Rich
Assistant Attorney General

For Appellant,
Department of Natural Resources,
State of Maryland

Hamilton P. Fox
Hearne, Fox & Bailey

For Appellant,
E.T. Park, Inc.