

Strolling the Gold Coast: The Implications of *Leydon vs. Greenwich* for Beach Access in Connecticut

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Greenwich Point Park, the subject of this case, is the green shaded area above.
(Yahoo! Maps 2004)

Introduction

Public access to Connecticut's "gold coast" beaches has become an increasingly contentious issue. Connecticut may seem an unlikely battleground for beach access. After all, the state has only 217 miles of direct coastline and no economically significant coastal tourism industry. Eighty-four of those miles, however, are sandy beach and eighty percent of the shoreline is privately owned. Additionally, ninety-five percent of the state's population lives within fifty miles of the coastline.¹ The legal battle for beach access began in 1995 when Brenden P. Leydon, then a Rutgers University law student, sued the town of Greenwich, one of Connecticut's most affluent communities. Leydon challenged the town's policy of prohibiting nonresidents from using Greenwich Point Park, a public city beach.² After nearly seven years of litigation, the Connecticut Supreme Court declared Greenwich's residents-only ordinance invalid. The case was won on grounds that may be considered unusual: the Connecticut Supreme Court declared Greenwich's residents-only policy a violation of the First Amendment to the United States Constitution and article one, §§ 4, 5, and 14, of the Connecticut Constitution.³

Leydon's win was an impressive and much-lauded step forward in opening Connecticut beaches to public access, especially those of wealthier communities in the southwestern region of

¹ Connecticut Department of Environmental Protection, *Connecticut Coastal Access Guide: Long Island Sound Facts*, January 11, 2006, <http://www.lisrc.uconn.edu/coastalaccess/facts.asp>; NICOLE VICKEY, UNDERSTANDING AND PROVIDING PUBLIC ACCESS TO CONNECTICUT'S COAST, <http://www.seagrant.uconn.edu/access.pdf>.

² See *Leydon v. Town of Greenwich*, 1998 WL 395197 (Conn.Super. 1998) [hereinafter *Leydon I*].

³ U.S. CONST. amend. I provides in relevant part: "Congress shall make no law ... abridging the freedom of speech ... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances;" C.T. CONST art. I, § 4 provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty;" C.T. CONST art. I, § 5 provides in relevant part: "No law shall ever be passed to curtail or restrain the liberty of speech;" C.T. CONST art. I, § 14 provides: "The citizens have a right, in a peaceable manner, to assemble for their common good, and to apply to those invested with the powers of government, for redress of grievances, or other proper purposes, by petition, address or remonstrance."

the state. Yet the Connecticut Supreme Court's unusual application of the First Amendment raises many questions regarding future beach access disputes in Connecticut and elsewhere.

Similar beach access challenges in other jurisdictions have relied upon the common law public trust doctrine. In fact, the Connecticut Appellate Court reviewed the applicability of the public trust doctrine to the facts of this case and identified that the state does hold a public trust obligation. The public trust doctrine, which varies in interpretation in each state, generally requires the state to hold the tidal lands in trust for the public for a variety of commercial and recreational uses such as navigation and fishing.⁴ In recent years, other jurisdictions, such as New Jersey, have expanded the application of this doctrine to include beach recreation, involving both access to the water and a portion of the dry sand beach.⁵

Questions certainly remain following *Leydon*.⁶ The implications of the Connecticut Supreme Court's choice to base its decision on constitutional grounds, rather than common law, are yet to be understood. The case leaves much unresolved about the future of the public trust doctrine in Connecticut. It also raises questions about the application of the First Amendment argument to other beach access cases, as well as cases involving parks and other public forums. Moreover, while the court held that a residents-only policy is invalid, it did not address what provisions are appropriate for ensuring access for nonresidents -- such as fees and parking -- leaving open the possibility for future litigation on this subject.⁷ This paper will provide the reader with an understanding of why *Leydon*'s case was won on constitutional grounds, what might happen next, and what this means for the future of Connecticut's beaches.

⁴ JOSEPH J. KALO ET AL., *COASTAL AND OCEAN LAW: CASES AND MATERIALS* 2-4 (2d ed. West Group 2002).

⁵ See section IV for discussion of New Jersey's caselaw on this matter.

⁶ *Leydon v. Town of Greenwich*, 777 A.2d 552 (2001) [hereinafter *Leydon III*].

⁷ See Martin B. Cassidy, *Board urges slashing Greenwich beach fee*, STAMFORD ADVOCATE, Jan. 10, 2006, at <http://www.stamfordadvocate.com/news/local/scn-sa-nor.beach6jan10,0,5032614.story>; David M. Herszenhorn, *Connecticut Court Overturns Residents-Only Beach Policy*, NEW YORK TIMES, July 27, 2001, at B5; Christine Woodside, *Towels, Sun Block and, Oh Yeah, Checkbook*, NEW YORK TIMES, June 23, 2002, at 14CN1; Christine Woodside, *Is That a Welcome Mat?* NEW YORK TIMES, Nov. 4, 2001, at 14CN1.

I. An Overview of the Public Trust Doctrine and Beach Access

As noted above, the public trust doctrine is a common law theory that has been used in recent years by various jurisdictions as a legal tool for ensuring public access to beaches and other coastal areas. Its history lies in English common law; when title to United States lands was transferred from the British to the newly-established Union, each individual state was given title to its submerged lands and waters. The state is obligated to hold these lands in trust for public uses, customarily the traditional triad of navigation, commerce, and fishing.⁸ Most states, including Connecticut, traditionally define the landward boundary of these trust lands as the mean high water line. Throughout the 20th century, as public use of coastal areas has increased with the rise of recreational activities such as swimming and sunbathing, some jurisdictions, such as New Jersey and Hawaii, have expanded their interpretation of the public trust doctrine to include access to the dry sand portion of the beach landward of the mean high water line.⁹ Such expansive interpretations reflect a pragmatic view that the public trust doctrine is meaningless if the public cannot, in fact, access the public trust lands seaward of the mean high water line.

II. Background: Greenwich Point Park

Greenwich Point Park first entered the legal limelight in 1994 when Brenden Leydon, a Stamford, CT resident attending Rutgers Law School, attempted to jog through the park and was refused access. Greenwich Point Park is a 147-acre municipal beachfront park located on Tod's Point in the town of Greenwich. It is one of four town-operated beaches in this southwestern coastal municipality, which, due to its per capita income (upwards of \$83,000 in 2000) is known

⁸ *Leydon I* at *4.

⁹ *Id.*

as the hub of Connecticut's "gold coast".¹⁰ Greenwich Point Park, as a town beach, is unusual in two ways. The park includes a dry sand beach adjoining Long Island Sound, as well as park-like elements including a picnic area, marina, boathouse, wetland preserve, trails, and a parking lot.¹¹ Also, Greenwich Point (hereafter "the Point") is only accessible via one road owned by a neighborhood group, the Lucas Point Association (LPA). Greenwich has owned an easement on the access road since purchasing the Point from private owners in 1944.¹²

Leydon's first court battle with the town of Greenwich (hereinafter "Leydon I") began in 1998. Leydon brought eight counts against Greenwich. He contended that the town's residents-only access policy was, among other things, a violation of freedom of expression, a violation of equal protection and equality of rights, and a breach of the public trust.¹³ The trial court refuted all eight causes of action. The court noted, regarding freedom of expression, that Leydon did not prove "he intended to enter the Point in order to 'express himself,'" and that Greenwich's ordinance restricting non-resident admission to resident guests did not have a "chilling effect," one of the legal tests for whether or not a violation of free speech has occurred.¹⁴ Perhaps of more interest, given the extensive history and application of the public trust doctrine is the trial court's position. The court did not recognize the existence of a public trust doctrine in Connecticut, noting, "as applied to nonresident beach restrictions, [the public trust doctrine] is a creature of modern New Jersey law."¹⁵ The court further noted that Leydon had "not provided

¹⁰ Town of Greenwich Home Page, <http://www.greenwichct.org/Home/default.asp>; Connecticut Department of Economic and Community Development, *Connecticut Income Information*, Jan. 11, 2006 <http://www.ct.gov/ecd/cwp/view.asp?a=1106&q=250652>.

¹¹ Town of Greenwich Home Page, <http://www.greenwichct.org/Home/default.asp>.

¹² The conditions of this easement were disputed throughout the Leydon suit. *See Leydon III*, 777 A.2d 552.

¹³ *See Leydon I*, 1998 WL 395197.

¹⁴ *Id.* at *2-*3.

¹⁵ *Leydon I* at *4 (referring to *Neptune City v. Avon-by-the-Sea*, 294 A.2d 47 (1992) and *Van Ness v. Deal*, 393 A.2d 571 (1978)).

the court with any authority which even remotely suggests that Connecticut applies the New Jersey public trust doctrine to its common law.”¹⁶

On appeal in 2000 (hereinafter “Leydon II”), Leydon streamlined his case, arguing that the Greenwich ordinance violated the public trust and public policy generally.¹⁷ In this hearing, the Appellate Court made no ruling on the freedom of expression argument before the lower court. It did, however, affirm the existence of the public trust doctrine in Connecticut, citing thirteen state cases on beach and park access that dated back to 1824.¹⁸ The court observed: “these cases clearly reflect that land held by a municipality as a public park or public beach are for the benefit of all residents of this state. We refer to this right as the public trust doctrine, and hold that it does not allow a municipality to discriminate between its residents and nonresidents with regard to access to a public park or public beach.”¹⁹ On this basis, the court reversed, finding in favor of Leydon.

In response to appeals from both the town of Greenwich and the LPA, the Connecticut State Supreme Court heard this case the following year (hereinafter “Leydon III”). The Supreme Court did not analyze the public trust doctrine because, in the court’s opinion, the constitutional right of free expression was a more meritorious basis for upholding the lower court. In its constitutional analysis, the Supreme Court found Leydon’s First Amendment claim “meritorious,” noting that “there simply is no reason to doubt the plaintiff’s essentially unchallenged testimony that, if admitted to Greenwich Point, he would participate

¹⁶ *Id.* at 12-13.

¹⁷ *See Leydon III*, 777 A.2d 552.

¹⁸ *Hayden v. Noyes*, 5 Conn. 391, 397 (1824); *Merwin v. Wheeler*, 41 Conn. 14, 24 (1874); *Hartford v. Maslen*, 57 A. 740 (1904); *Dawson v. Orange*, 61 A. 101 (1905); *Orange v. Resnick*, 109 A. 864 (1920); *Connors v. New Haven*, 125 A. 375 (1924); *Epstein v. New Haven*, 132 A. 467 (1926); *Winchester v. Cox* 26 A.2d 592 (1942); *Fenwick v. Old Saybrook*, 47 A.2d 849 (1946); *Hiland v. Ives*, 228 A.2d 502 (1967); *Torrington v. Coles*, 230 A.2d 550 (1967); *Stradmore Development Corp v. Commissioners*, 324 A.2d 919 (1973); *Luce v. West Haven*, 680 A.2d 259 (1996).

¹⁹ *Leydon III* at *1127.

in...discussions with others.”²⁰ From that fact, the court acknowledged that the Greenwich ordinance in practice burdened nonresidents’ freedom of speech. Further, the Supreme Court held that Greenwich Point Park fit the definition of a “traditional public forum” because it had “the characteristics of a public park,” thus finding the Greenwich residents-only policy unconstitutional.²¹ It is on this basis alone that Leydon ultimately won his fight to open Greenwich’s beaches to nonresidents, invalidating Greenwich’s ordinance, and ending this seven-year court battle.

III. Connecticut and the Public Trust Doctrine

This case raises the question of whether the public trust doctrine in fact exists in Connecticut, and, if so, why it was set aside in this case. As discussed earlier, the public trust doctrine is a common law doctrine that requires the state to hold the tidal lands in trust for the public for a variety of uses, traditionally navigation and fishing. In *Leydon I* and *II*, numerous cases are cited that support the existence of the public trust doctrine in Connecticut. Both the lower and the appellate courts also discuss, in brief, New Jersey’s case law with regard to the public trust doctrine and beach access. An investigation of these cases lends some insight into the history of the public trust doctrine in Connecticut, and why the Connecticut Supreme Court may have set it aside in deciding this case.

The public trust doctrine was discussed in all three *Leydon* cases, yet it is not until the Supreme Court decision that its meaning is clarified. In *Leydon I*, Leydon argued that

²⁰ See *Leydon III* at 571-573.

²¹ *Id.*

Greenwich’s residents-only policy was a breach of the “public trust.” He relied on two Connecticut cases that involve the appropriate use of parklands by a municipality.²² However, these cases are not effective illustrations of the doctrine as they do not involve parklands located on the shoreline.²³ In *Leydon II*, the appellate court cited thirteen additional Connecticut cases, using them as evidence of the history and relevance of the public trust doctrine.²⁴ A review of these cases reveals that only four actually have to do with access to the waterfront and/or a beach. The other cited cases involve public parklands unrelated to shoreline access. Of the four cited cases that do pertain to shoreline access, none reference the public trust doctrine as justification for public access to the shoreline, whether above or below the mean high water line.²⁵ The only relevance of these cases to the public trust doctrine is in dicta. In *Dawson v. Orange*, the court commented that “a public beach is one left by the State, or those claiming under it, open to the common use of the public, and which the unorganized public and each of its members have a right to use while it remains such;” and in *Orange v. Resnick*, the court wrote, “the right, common to all the public, to reach the water front by crossing a public park.”²⁶

Nonetheless, the appellate court used this case law in support of its argument for the existence of the public trust doctrine. The court explained its rationale:

For almost two centuries, our Supreme Court has discussed the concept that land held by a municipality as a public park or public beach is held for the use of the general public and not solely for use by the residents of the municipality.... These [Supreme Court] cases clearly reflect that land held by a municipality as a public

²² *Stradmore Development Corporation v. Commissioners*, 164 Conn. 548, 551 (1973); *Baker v. Norwalk*, 152 Conn. 312, 315 (1965).

²³ *See Leydon I* at 10-11: “lands held by a town as a park are held not for its own benefit or that of its inhabitants but for the benefit of the people of the state at large” (citing *Stradmore Development Corporation v. Commissioners*, 164 Conn. 548, 551 (1973)); “a city may not use parklands in a way that is not incidental and appropriate to the use of property as a public park” (citing *Baker v. Norwalk*, 152 Conn. 312, 315, (1965)).

²⁴ *See Leydon I*, 1998 WL 395197.

²⁵ *See generally* *Hayden v. Noyes*, 5 Conn. 391, 397 (1824); *Merwin v. Wheeler*, 41 Conn. 14, 24 (1874); *Dawson v. Orange*, 61 A. 101 (1905); *Orange v. Resnick*, 109 A. 864 (1920).

²⁶ *Dawson v. Orange*, 61 A. 101, 109 (1905); *Orange v. Resnick*, 109 A. 864, 867 (1920).

park or public beach are for the benefits of all residents of this state. We refer to this right as the public trust doctrine, and hold that it does not allow a municipality to discriminate between its residents and nonresidents with regard to access to a public park or public beach.²⁷

The Court found it appropriate to conflate two separate issues: 1) access to the waterfront and beaches, and 2) access to municipal parks.

According to the defendants, the public park “trust” doctrine applies only to parks and not to beaches, and the public trust doctrine is not applicable to dry sand beaches. In light of the cases cited herein, we conclude, to the contrary, that both doctrines confer upon the plaintiff the right to access the beach, and that the public park trust doctrine confers upon him the right to access the park, including the beach area of the park. To avoid confusion between these two doctrines, however, we refer to the doctrines, collectively, as the “public trust doctrine.”²⁸

Although this note clarifies the intent of the court, the result of this reasoning is a somewhat confused and therefore weakened interpretation of the public trust doctrine.

It is this weakness that the State Supreme Court seized upon in *Leydon III*. Citing in part an amicus brief supplied by the Commissioner of the state Department of Environmental Protection, the court noted that the public trust doctrine “traditionally has been used to refer to the body of common law under which the state holds in trust for public use title in waters and submerged lands waterward of the mean high tide line.”²⁹ Further analysis of the DEP’s brief indicates its concern that “mixing the body of law regarding public parks with the Public Trust Doctrine invites confusion ‘...that potentially undermines [and weakens] this well articulated foundation of the State’s coastal management program.’”³⁰ The court reiterated this concern,

²⁷ *Leydon III* at 564 (citing *Leydon v. Town of Greenwich*, 750 A.2d 1122, 1126-1128 (2000)).

²⁸ *Leydon v. Town of Greenwich*, 750 A.2d 1122, 1127 [hereinafter *Leydon II*].

²⁹ See *Leydon III* at 564.

³⁰ Connecticut Department of Environmental Protection, *DEP Files ‘Friend of the Court’ Brief in Greenwich Access Case*, Jan. 26 2001 <http://www.dep.state.ct.us/whatschap/press/2001/mf0126.htm>; See generally *Connecticut*

commenting that it was “inappropriate” for the appellate court to “conflate the two doctrines by referring to them as one and the same.”³¹

To clarify the public trust doctrine, the state Supreme Court referenced *Phillips Petroleum v. Mississippi* (1988) and five other Connecticut cases.³² The cited Connecticut cases all discuss shorefront property rights and affirm state title to lands below the mean high water line held in trust for public use.³³ While these cases offer a stronger foundation for the public trust doctrine than those cited by the appellate court in *Leydon II*, none discuss the public trust doctrine per se. An 1856 case, *Simon v. French*, offers the strongest doctrinal precedent.³⁴ In this case the court discusses the common law origins of the state’s right to submerged lands below the mean high water line, and the fact that those lands are held in trust for the public for the purposes of navigation and commerce.³⁵

Drawing upon these cases as well as the amicus brief from the DEP, the Court does, therefore, acknowledge the existence of the public trust doctrine in Connecticut; it does not, however, choose to expand its definition to dry sand areas such that it would support *Leydon’s* case:

Under the public trust doctrine, members of the public have the right to access the portion of any beach

Supreme Court Expands Public Access Opportunities (Sound Outlook: A Newsletter of the CT Department of Environmental Protection), Oct. 2001, at <http://www.dep.state.ct.us/olisp/soundout/sooct01.pdf>.

³¹ *Leydon III* at 564.

³² *Phillips Petroleum Co. v. Mississippi*, 108 S.Ct. 791 (1988) (where court found that the state held title to lands subject to the ebb and flow of the tide, even if they are not navigable in fact; these lands were in turn subject to the public trust).

³³ See *Mihalcz v. Woodmont*, 400 A.2d 270 (1978); *Brower v. Wakeman*, 89 A. 913 (1914); *Simons v. French*, 25 Conn. 346, 351 (1856); *Delinks v. McGowan*, 173 A.2d 488 (1961); cf. *Walz v. Bennett*, 111 A. 834 (1920).

³⁴ *Simons v. French*, 25 Conn. 346 (1856).

³⁵ “In England, the king is the proprietor of the land covered by navigable waters, where the tide ebbs and flows, to high-water mark; which, however, he probably owns as a trustee for the public, for purposes of navigation and commerce, and as such, has the right to convey his proprietary interest, subject to such rights of the public.... In Connecticut, it is now settled that the public, representing the former title of the king, is the owner in fee of such flats up to high water-mark, but that the owner of the upland adjoining such flats becomes entitled, by virtue of his ownership of the upland, to the exclusive right of wharfing out over them, in front of said upland, to the channel of an arm of the sea adjoining such flats.” *Simons v. French*, 25 Conn. 346 (1856).

extending from the mean high tide line to the water, although it does not also give a member of the public the right to gain access to that portion of the beach by crossing the beach landward of the mean high tide line.... Thus, the public trust doctrine does not support the plaintiff's claim concerning his right of access to Greenwich Point because the plaintiff would not be permitted to gain unrestricted access to Greenwich Point under that doctrine; he would not be permitted to gain access by way of the driftway, and his access would, in any event, be limited to that part of the beach waterward of the mean high tide line.³⁶

Although the state Supreme Court in *Leydon III* acknowledged and clarified the correct meaning of the public trust doctrine, it entirely set aside the doctrine, as well as the related issue of access to municipal parks, noting that “because we resolve this appeal on constitutional grounds, we need not decide whether the appellate court properly recognized the existence of a common-law doctrine under which town parks purportedly are held by the town for use by the public at large.”³⁷ The Court then further dismissed the significance of the common law aspects of this case by noting that “if there is such a common-law doctrine, it is questionable whether it exists separate and apart from what has evolved into the public forum doctrine” and “any such common-law doctrine likely would be subsumed by free speech and association rights that are protected under the federal and state constitutions.”³⁸ The court’s choice to dismiss the public trust doctrine, as well as its language in justifying its dismissal, suggest that the judiciary wished to sidestep the issue of the doctrine and its potentially expansive role in establishing public access to Connecticut’s beaches.

A further review of Connecticut case law reveals that the state Supreme Court’s decision is not entirely surprising. Aside from the 1981 case of *Leabo v. Leninski*, there

³⁶ *Leydon III* at 564.

³⁷ *Id.*

³⁸ *Leydon III* at 566.

is virtually no case law that lays a firm foundation of the public trust doctrine or discusses its application to contemporary beach access issues.³⁹ In *Leabo* the Connecticut Supreme Court addressed the right of a private landowner to open up his beach to the public at large, the court noted in dicta:

[w]hile it is true that title to the area between the mean low tide and mean high tide lines, covered by the daily flow of tides...remains in the state.... the fact remains that the present case does not involve public access to the wet sand area but to the privately owned dry sand area above the mean high water line.... we are not unmindful of the broader implications of public access to beaches and that [a state general statute] evinces a policy to encourage public access to the waters of Long Island Sound.... Nevertheless, we must point out that while other jurisdictions have recognized public access to the dry sand beaches, they have done so on theories [custom, implied dedication, and prescriptive easement] which do not apply to the present case.⁴⁰

IV. Counterpoint: New Jersey and the Public Trust Doctrine

New Jersey case law, in contrast to that of Connecticut, reveals a well-developed public trust doctrine that has been applied expansively in a variety of beach access cases. Additionally, it provides insight into how Connecticut could have applied the doctrine in *Leydon v. Greenwich*. Most New Jersey decisions occurred in the 1970s and, similar to *Leydon v. Greenwich*, they dealt with issues of nonresident access. In *Neptune City v. Avon-by-the-Sea* (1972), New Jersey's highest court found on the basis of the public trust doctrine that "while a municipality may validly charge reasonable fees for the use of their beaches, they may not discriminate in any respect between their residents and nonresidents."⁴¹ *Van Ness v. Deal* (1978) found that an area

³⁹ Karl B. Leabo et. al. v. Steven Leninski, 438 A.2d 1153 (1981).

⁴⁰ *Id.* at 1156.

⁴¹ Borough of Neptune City et al v. Borough of Avon-by-the-Sea et. al., 294 A.2d 47 (1972).

of a dry sand public beach may not be restricted to the members of the adjoining beach club, and in doing so upheld the Avon decision:

In *Avon*, contrary to defendants' contention herein, we were not limiting our ruling to the beach area between low and high water -- the wet beach area. We said and we meant that, in New Jersey, a proper application of the Public Trust Doctrine requires that the municipally owned upland sand area adjacent to the tidal waters must be open to all on equal terms and without preference.⁴²

In more recent years, New Jersey has extended this broad interpretation of the public trust doctrine to semi-private and private dry sand beaches. In 1984, the courts ruled in *Matthews v. Bayhead Improvement Association* that quasi-public entities may not restrict non-members from entering the dry sand area of the beach; and most recently in *Raleigh Avenue Beach Association v. Atlantis Beach Club* (2004), the courts expanded this holding to include private beach clubs attempting to restrict beach access.⁴³ The New Jersey cases pointedly expanded the doctrine to include public access to dry sand beaches adjoining the mean high water line. As the court indicated in *Neptune*, the expansive nature of the doctrine is necessary to address changing public demands on coastal resources: “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.”⁴⁴ The public trust doctrine, as interpreted in New Jersey, can be expanded. Beach access can be protected by public trust jurisprudence, as evidenced by New Jersey, but a state court must be willing to actively address the issue.

⁴² Stanley C. Van Ness v. Borough of Deal et. al., 393 A.2d 571, 573 (1978).

⁴³ See generally *Matthews v. Bayhead Improvement Association*, 95 N.J. 306 (1984); *Raleigh Avenue Beach Association v. Atlantis Beach Club, Inc.*, 851 A.2d 19 (2004); Jennifer Simon, *Not Just a Walk in the Park: Beach Access and the Public Trust Doctrine in New Jersey*, 3 SANDBAR: LEGAL REPORTER FOR THE NATIONAL SEA GRANT COLLEGE PROGRAM 3 (October 2004).

⁴⁴ *Borough of Neptune City et al v. Borough of Avon-by-the-Sea et al*, 294 A.2d 47, 54 (1972).

Not all of New Jersey's beach access cases have relied on the public trust doctrine. In 1954, *Brindley v. Lavallette* held that an ordinance prohibiting nonresidents from purchasing beach passes was invalid on the basis of discrimination.⁴⁵ In 1978, *Hyland v. Allenhurst* distinguished access to a public beach and the adjoining restroom and changing facilities. Access to restrooms could not be restricted to beach club members, not as a violation of the public trust doctrine but as "an arbitrary and unreasonable exercise of municipal power and authority."⁴⁶ While New Jersey's case law illustrates how the public trust doctrine can be used quite liberally to ensure beach access, these examples are a reminder that other legal arguments have also proven effective in ensuring public access to beaches. The Connecticut Supreme Court's decision to open Greenwich beaches on the basis of First Amendment rights is an example of a viable alternative legal argument for beach access.

V. Greenwich Point as a "Public Forum:" Beaches and Freedom of Expression

The challenge to Greenwich's residents-only beach policy on the basis of freedom of expression began in the trial court as one of Leydon's eight causes of action. The trial court refuted this argument, which was then dropped on appeal; but the state Supreme Court took up this argument in its final review of the case. The court held that Leydon's intention to express himself was clear and that Greenwich Point fit the definition of a "public forum," thus rendering Greenwich's residents-only policy invalid. As this case was decided unanimously and on constitutional grounds, not state law, Greenwich declined to seek certiorari from the United

⁴⁵ See generally Frederick A. Brindley v. Borough of Lavalette, 110 A.2d 157 (1954).

⁴⁶ William F. Hyland v. Borough of Allenhurst et al, 393 A.2d 579, 582 (1978).

States Supreme Court as it was unlikely the case would be accepted; accordingly, this prolonged court battle came to a close.⁴⁷

The outcome of *Leydon III* was based on the definition of a “public forum.” In a public forum one’s First Amendment rights, with few exceptions, may not be inhibited, as these rights are protected by the Constitution. In deciding whether Greenwich Point fit this definition, the Connecticut Supreme Court reviewed cases in New York and Florida to determine when a beach can be construed as a park. The court also focused on “the objective characteristics of the park;” it was noted that Greenwich Point contained “shelters, ponds, a marina, a parking lot, open fields, a nature preserve, walkways, trails, picnic areas with picnic tables, a library book drop and a beach.” Further, “the fact that Greenwich Point has a boundary on the Long Island Sound that serves as a beach for swimming, sunbathing and other activities in no way alters its character as a park.”⁴⁸

Whether the Point was a “beach” or a “park” was hotly contested in all three *Leydon* cases because the legal definition of each term would influence the court’s analysis. In *Leydon I*, a note in the decision reads:

[t]he parties vehemently disagree about whether the Point should be legally labeled a ‘park’ or a ‘beach.’ The court is not convinced that it makes any difference to the legal issues presented, and makes no finding as to whether the Point is legally defined a beach or a park. Therefore, in order to avoid any confusion, the court referred to Greenwich Point Park as ‘the Point’.⁴⁹

⁴⁷ Christine Woodside, *One Man’s Crusade to Open the Beaches*, NEW YORK TIMES, Aug. 5, 2001, at 14CN3 (Jeremy Paul noted that it would be “almost impossible” to reverse this decision “because the decision referred both to the federal and state constitutions”). *Leydon* himself is described in a NEW YORK TIMES article as believing “the United States Supreme Court might be reluctant to hear an appeal” because the “ruling dealt substantially with rights under the State Constitution.” David Herszenhorn, *Connecticut Court Overturns Residents-Only Beach Policy*, NEW YORK TIMES, July 27, 2001, at B5.

⁴⁸ *Leydon III* at 570-571.

⁴⁹ *Leydon I* at *1.

In *Leydon II*, the court used “park to refer to the entire park, including the beach area, and...the term beach to refer only to the beach portion of the park.”⁵⁰ Finally, in *Leydon III*, the court’s decision hinged on defining Greenwich Point a park.

While the Court’s decision to invalidate Greenwich Point’s residents-only policy, based on its status as a park, may seem bold to some (and unjust to many residents of Greenwich and other similarly exclusive towns), this decision does not necessarily have the same weight as if the case were decided through an expansive interpretation of the public trust doctrine. Whereas the public trust doctrine, as interpreted by some states like New Jersey, includes adjoining sandy beaches and is therefore widely applicable, the definition of “park” in this case is rather narrow and may not apply to many other Connecticut beaches. In listing Greenwich Point’s numerous park-like characteristics, the court implies that only a particular set of features (including nature preserves, library book drops, and ponds) determine the point at which a public beach becomes a park. In this regard, the First Amendment approach to opening Connecticut’s beaches may not prove to be as facile as New Jersey’s liberal approach to the public trust doctrine. Conversely, such decisions expanding the public trust doctrine to include dry sand areas can easily be overturned, whereas the constitutional basis of *Leydon v. Greenwich* may prove more resilient over time.

VI. Public Trust Doctrine v. the First Amendment: Why the Latter?

It may be considered unfortunate that the Connecticut Supreme Court chose to set aside the public trust doctrine argument in favor of the First Amendment argument in deciding *Leydon v. Greenwich*. Had the court chosen to interpret the public trust doctrine more expansively, rather than rely on the narrow definition of a park, this case could have proven a much more powerful

⁵⁰ *Leydon II* at 714.

precedent for a wide range of future Connecticut beach access cases. Yet the court had a number of credible reasons for doing so: the trial and appellate court arguments, in which the traditional meaning and application of the public trust doctrine became somewhat distorted, were easily discredited; the public trust doctrine did not have strong judicial precedent in Connecticut, especially as applied to public access; and the case involved a somewhat atypical beach in that it closely resembled a municipal park. Moreover, there are a significant number of factors that make beach access in Connecticut a different type of issue than in New Jersey.

While a civil rights-based legal argument for beach access may seem unusual, Connecticut has a history of pursuing beach access through civil rights. In the 1970s, when New Jersey was opening its beaches through application of the public trust doctrine, Connecticut activists were working for beach access through a series of grassroots, environmental justice-based efforts.⁵¹ In 1973 the American Civil Liberties Union of Connecticut (ACLUCT) brought suit against Fairfield, a town east of Greenwich, for limiting nonresident access. Another social action group, the Revitalization Corps, through the leadership of Edward “Ned” Coll, bused urban children to Connecticut municipal beaches, including Greenwich, and conducted other more flamboyant publicity stunts, akin to the one led by filmmaker Michael Moore and actress Janeane Garofalo onto Greenwich’s beaches at the time of the *Leydon* trial.⁵² Although the tactics were different, the goal of both the ACLUCT and Ned Coll’s Revitalization Corps was equitable beach access.

⁵¹ Marc Poirier defines “Environmental Justice” as the intersection of environmentalism and civil rights. Marc R. Poirier, *Environmental Justice and the Beach Access Movements of the 1970s in Connecticut and New Jersey: Stories of Property and Civil Rights*, 28 CONN. L. REV. 719, 756-757 (1996).

⁵² In one episode of filmmaker Michael Moore’s satirical news program *TV Nation*, actress Janeane Garofalo escorted a group of New York City residents by bus to Greenwich Point Park. When Garofalo and the busload of Harlem residents were turned away, they attempted to access the beach by air and then by sea. Ultimately the group swam ashore, only to be greeted by Greenwich residents who threatened their arrest. *TV Nation* (Columbia/Tristar Studios 1997).

Although the ACLUCT case was later dropped and Coll's activism ultimately shifted to other causes, this period of interest in beach access illustrates a unique set of issues facing Connecticut.⁵³ In close proximity to New York City as well as hosting a number of poor urban centers (Bridgeport, New Haven, and Hartford, among others) juxtaposed with some of the nation's wealthiest communities (Greenwich foremost among them), Connecticut's restrictive beach access policies were viewed as civil rights issues, reflecting race and class tensions. This civil rights aspect of Connecticut's beach access may be no less of an issue today. In 2002, reviews of Connecticut beach access conducted by a *New York Times* reporter and the American Civil Liberties Union of Connecticut revealed an inverse relationship between town economic status and beach access: the wealthier the town, the more restrictive the access, and vice versa. For example, when this writer compared the grades given by ACLUCT to Connecticut beaches with 2000 census data on per capita income, the twelve beaches that earned A's and B's were in towns whose per capita income averaged \$18,725, whereas the four beaches that earned C's and the six beaches that earned D's and F's were in towns whose per capita income averaged \$32,050. At the very least, it is evident that beach access in Connecticut is directly related to socioeconomic status.⁵⁴

Differing state economies could also explain the more conservative approach to beach access taken by Connecticut in *Leydon v. Greenwich*. Whereas New Jersey boasts nearly 1,800 miles of shoreline (including every inlet and island) and relies heavily on coastal tourism to drive

⁵³ See *supra* note 51, at 757-764.

⁵⁴ AMERICAN CIVIL LIBERTIES UNION OF CONNECTICUT, FREE SPACE: A REPORT CARD ON BEACH ACCESS IN CONNECTICUT AFTER LEYDON V. TOWN OF GREENWICH (2002), <http://acluct.org/pages/beach%20report%201.htm>, accessed 11 January 2006; Christine Woodside, *Towels, Sun Block and, Oh Yeah, Checkbook*, NEW YORK TIMES, June 23, 2002, at 14CN1; Connecticut Department of Economic and Community Development, *Connecticut Income Information*, Jan. 11, 2006, available at <http://www.ct.gov/eecd/cwp/view.asp?a=1106&q=250652>.

its state economy, Connecticut has not even one third that much shoreline, much of which is either privately owned or not appropriate for public use due to rocks and other obstructions.

The fundamental importance of beaches to New Jersey is noted in the *Van Ness v. Deal* decision, as the court noted that

[t]he public trust doctrine is deeply engrained in our common law, due, no doubt, to New Jersey's unique location on the Atlantic Ocean, Delaware and New York Bays with numerous rivers and tributaries emptying into these bodies, resulting in extensive shorelines and considerable tidal waters and tidal lands in the State. New Jersey beaches adjacent to its tidal areas are world famous because of their suitability for bathing, surf fishing and other forms of recreation.⁵⁵

On the other hand, it may be that New Jersey has succeeded in ensuring equitable beach access precisely because its courts have chosen a less incendiary rationale, one that in theory is more unifying than civil rights. Marc Poirier points this out in his article, noting that New Jersey's decision to pursue beach access through a "neutral" approach, relying on a property and environment-based rationale, "may very well have been an appropriate decision. In the short run, at least, if access – to schools, beaches, housing, whatever – can be achieved without calling people or society racist, why not do it that way?"⁵⁶ In Connecticut, by contrast, the beach access case the ACLUCT attempted to bring in 1973 was dropped, and it is only after seven years of litigation that the Greenwich case was won.

VII. The Next Front for Connecticut Beaches: Fee Structures

If there is any future litigation about Greenwich's beaches, there is some indication it will focus on differential fee structures. Indeed, following the Connecticut Supreme Court's

⁵⁵ Stanley C. Van Ness v. Borough of Deal et. al., 393 A.2d 571, 573 (1978).

⁵⁶ Poirier, note 51, at 804.

decision, Leydon himself told reporters that he expected a battle over fee structures to be the next step.⁵⁷ While the state Supreme Court noted in *Leydon III* that it was unconstitutional for Greenwich to prohibit nonresidents from entering the beach, it did not offer any opinion on ways in which Greenwich could restrict access through fees, parking, and other mechanisms. In *Leydon II*, the court notes, “we do not address whether a violation of the public trust doctrine would occur if the town were to charge a nominally higher fee to nonresidents than town residents for access to the park and beach because that issue is not before us.”⁵⁸ While that case, of course, was decided on the basis of the public trust doctrine, the state Supreme Court decision does not offer any further insight into the question of what fee structure, if any, would be appropriate.

Immediately following the *Leydon III* ruling in 2001, discussion in the regional media turned to fees and parking, with some expecting this to be the way Greenwich and other municipalities would attempt to continue restricting access to their beaches.⁵⁹ A November *New York Times* article recorded the fees set in the immediate aftermath of the case. Scrutiny continued into the following summer, when a *New York Times* reporter visited a series of beaches along the coast, including Greenwich, and noted not only very high fees for nonresidents but other impediments to entry, including restricted parking, and the off-site sale of nonresident beach passes. At Greenwich, for example, it cost the reporter \$50 for her and her two daughters to use the beach -- \$10 per person plus \$20 to park.⁶⁰ The 2002 ACLUCT report mentioned

⁵⁷ David M. Herszenhorn, *After a Court Ruling, Clouds at the Beaches*, NEW YORK TIMES, July 28, 2001, at B1; Christine Woodside, *One Man’s Crusade to Open the Beaches*, NEW YORK TIMES, Aug. 5, 2001, at 14CN3.

⁵⁸ *Leydon II* at 1127.

⁵⁹ See Martin B. Cassidy, *Board urges slashing Greenwich beach fee*, STAMFORD ADVOCATE (Jan. 10, 2006) available at <http://www.stamfordadvocate.com/news/local/scn-sa-nor.beach6jan10,0,5032614.story>; David M. Herszenhorn, *Connecticut Court Overturns Residents-Only Beach Policy*, NEW YORK TIMES, July 27, 2001, at B5; Christine Woodside, *Towels, Sun Block and, Oh Yeah, Checkbook*, NEW YORK TIMES, June 23, 2002, at 14CN1; Christine Woodside, *Is That a Welcome Mat?* NEW YORK TIMES, Nov. 4, 2001, at 14CN1.

⁶⁰ Christine Woodside, *Towels, Sun Block and, oh yeah, Checkbook*, NEW YORK TIMES, June 23, 2002.

above, which ‘graded’ Connecticut beaches based on fee structure, availability of passes, parking, and other factors, corroborated these observations.⁶¹ At the time of this writing, similar fee structures are noted for the 2005 season; and when compared to resident fees -- \$25 per person for a season pass, and no charge to park an in-state vehicle – it becomes difficult to imagine the method that was used to devise these fees.⁶²

New Jersey’s beach access case law offers a strong precedent for evaluating differential fees for residents and nonresidents, although, that case law largely relies on the public trust doctrine, and the Connecticut courts pointedly disregarded New Jersey case law in the Leydon cases. For example, in *Neptune v. Avon by the Sea* (1972) and *Hyland v. Allenhurst* (1978), New Jersey courts found that it was a violation of the public trust doctrine to charge different fees for residents and nonresidents.⁶³ In *Slocum v. Belmar* (1989), the New Jersey courts found that a fee difference between residents and nonresidents is appropriate, but "must be reasonable in relation to the municipality's expenses incurred as a result of the beachfront."⁶⁴ Although these cases are founded on the basis of the public trust doctrine, it may be feasible for Connecticut to extend the constitutional argument regarding freedom of expression in a public forum to address nonresident fees. Given the severe price difference between resident and nonresident fees, as well as the inverse relationship between towns’ economic status and beach access policies, a civil rights-approach could in fact be entirely appropriate for further pursuing this issue.

VIII. Conclusion

⁶¹ American Civil Liberties Union of Connecticut (2002).

⁶² Town of Greenwich Home Page, <http://www.greenwichct.org/Home/default.asp>.

⁶³ See generally *Borough of Neptune City et al v. Borough of Avon-by-the-Sea et. al.*, 294 A.2d 47 (1972); *Hyland v. Allenhurst et. al.*, 393 A.2d 579 (1978).

⁶⁴ *Slocum v. Belmar et. al.*, 569 A.2d 312 (1989).

At present, the controversy appears to have calmed, but is certainly not gone for good. Media attention to the issue of Greenwich and beach access died down in 2002; and while Leydon is quoted in 2001 and 2002 articles as planning to bring suit, yet again, regarding fee structures, no case has been filed and Leydon does not plan to do so at any time soon due to lack of time and funds.⁶⁵ However, recent articles in the *Stamford Advocate* show renewed discussion of Greenwich beach access and fees for non-residents.⁶⁶ It appears that a 75-year-old Stamford resident who rode his bicycle into Greenwich Point last summer is threatening to sue Greenwich for attempting to charge him for access; he is arguing that their non-resident fee policy is in violation of the 2001 court decision. As of this writing, no decision has been reached on this issue. And yet while Greenwich officials reexamine their beach access policies yet again, the town website's PDF brochure and map of Greenwich Point, which contains directions as well as a list of services available at the park, still proclaims a residents-only admission policy.⁶⁷

Whether Mr. Leydon or another lawyer pursue litigation against Greenwich and other Connecticut beaches for creating obstacles to equitable beach access or not, *Leydon v. Greenwich* was still a landmark case for Connecticut, the first true beach access case in its history. While it represents a disappointment to many who wished to see the public trust doctrine further developed and expanded to address contemporary beach access issues, Connecticut did not have a strong legal precedent on which to base such a decision, and it seems that the judiciary did not want to establish a state precedent akin to that of New Jersey. New

⁶⁵ Christine Woodside, *Is That a Welcome Mat?* NEW YORK TIMES, Nov. 4, 2001, at 14CN1; *Towels, Sun Block and, Oh Yeah, Checkbook*. NEW YORK TIMES, June 23, 2002, at 14CN1; Emails from Brenden P. Leydon to Tiffany Smythe (Dec. 5, 2004; Jan. 10, 2006) (on file with author).

⁶⁶ Martin Cassidy, *Board weights changes to beach policy*, STAMFORD ADVOCATE, Jan. 5, 2006; *No bill yet for Point bicyclist*, Jan. 6, 2006; *Parks board proposes cutting beach fees to non-residents to \$1*, Jan. 10, 2006; *Board urges slashing Greenwich beach fee*, Jan. 10, 2006, <http://www.stamfordadvocate.com/search/dispatcher.front?Query=Paul+Kempner&target=article> (last visited Jan. 11, 2006).

⁶⁷ *Greenwich Point*, Town of Greenwich website, <http://www.greenwichct.org/Home/default.asp> (last visited Jan. 11, 2006).

Jersey's case law, on the other hand, provides an idea of how the future of Connecticut beach access might unfold, whether through a more liberal interpretation of the public trust doctrine or other arguments. Connecticut's use of a First Amendment approach to beach access is notable. While it presents a new method of approaching beach access, it also presents a more restrictive one with regard to the narrow definition of a 'park', and may need to be further broadened before it can be used as a strong precedent for future beach access cases. On the other hand, Connecticut's judiciary did devise a beach access approach that, while unconventional, may lay the groundwork for a renewed civil rights-driven beach access movement in the state.