P U B L I C H E A R I N G

before

HACKENSACK MEADOWLANDS DEVELOPMENT TASK FORCE

Hackensack Meadowlands Development Commission and its relationship with the Hackensack Meadowlands Municipal Committee and other local, State, and Federal governmental entities

March 30, 1988
Rutherford Borough Hall
Rutherford, New Jersey

MEMBERS OF TASK FORCE PRESENT:

Senator Gabriel M. Ambrosio, Chairman
Senator Thomas F. Cowan
Senator Henry P. McNamara

ALSO PRESENT:

Amy E. Melick
Office of Legislative Services
Aide, Hackensack Meadowlands Development Task Force

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Hearing Recorded and Transcribed by
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Chairman
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March 16, 1988

NOTICE OF A PUBLIC HEARING

Senator Gabriel M. Ambrosio, Chairman of the Hackensack Meadowlands Development Task Force, created by the New Jersey Senate, announced today the second in a series of public hearings to be held by the task force on the Hackensack Meadowlands District and the Hackensack Meadowlands Development Commission. The hearing will be held on Wednesday, March 30, 1988, beginning at 7:00 p.m., at the Rutherford Borough Hall, 176 Park Avenue, Rutherford.

The hearing will focus on the Hackensack Meadowlands Development Commission and its relationship with the Hackensack Meadowlands Municipal Committee and other local, State and federal government entities.

Testimony by local public officials and members of the general public is invited. However, due to time constraints, oral testimony may be limited to a five or ten minute period. Written testimony, which will be incorporated in the transcript of the hearing, is welcome.

Persons wishing to testify or wishing further information on the public hearing or the task force should contact Amy E. Melick at (609) 984-7381.

Persons wishing to contact the Chairman or his office should call Joan Scerbo at (201) 933-0808.

Directions: Take Park Avenue Exit from Route 3 (east or west). The Borough Hall is 176 Park Avenue.

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SENATOR GABRIEL M. AMBROSIO, (Chairman): Ladies and gentlemen, we are going to get started. Several of the Senators will be here, but I am advised that a couple of them are going to be late. So, for the sake of a lot of the witnesses that have signed up, we want to get everybody up to speak tonight. I want to start the proceedings now. Senator Cowan, I see, is just walking in. So, we'll wait for Senator Cowan to get here. I will make a couple of short announcements.

These proceedings are being taken down by electronic reporting. A transcript of the proceeding will be made, so that all testimony you wish to be part of the record is going to have to be made at the desk here, speaking into the microphone. Anybody who has a written statement, can give the written statement, and that will also be a part of the record. If anybody wishes to submit a statement after the Committee hearing is over, feel free to do that, and we will see to it that it gets in as part of the record.

I'd like to welcome my Vice Chairman, Senator Tom Cowan from Hudson County, Tom, it's good to see you.

SENATOR COWAN: Thank you very much.

SENATOR AMBROSIO: Why did they demote you? (laughter) And we have from Senator McNamara's staff, John Strachan. Also, anybody wishing to speak should sign the sign-in form that-- Where did it go Amy?

MS. MELICK: (Committee Aide) I don't know. But I have another one. It will be out there.

SENATOR AMBROSIO: I have a list of speakers who have previously signed in. If there's anybody here who has not signed the sign-in form, please do so and you'll be added to our list of speakers.

I also would like to indicate that I have asked -- and they are here in attendance -- various representatives from the Hackensack Meadowlands Development Commission, including its Executive Director, Anthony Scardino and several members of his

staff that I see in the audience. Several of the people who have signed up to speak have other meetings to go to. And I'm going to take one or two of them at a turn. I'd like first to call on our host mayor, Mayor Elliot to come and have the floor.

Before you do, Mayor, I do want to add a few other things. This Committee was established by a Senate Resolution, and the purpose of the Committee is to review the legislative mandate of the Hackensack Meadowlands Development Commission. It's appropriate to do that in view of the fact that the Commission is now in its 20th year of existence, and after 20 years of working under the legislation, it's appropriate to dust it off, look at it, see how it's been working, and see what relationship the Hackensack Meadowlands Development Commission has with the municipalities. Tonight's meeting is really to focus on that issue. Most of the speakers are mayors and elected officials of the municipalities. And we're here to listen to your thoughts and your recommendations in particular as to what, if any, changes you would like to see in the operation of the HMDC.

There will be subsequent meetings dealing with specific issues. This meeting is really for the mayors, council and other municipal members to add to the record. So Mayor, the floor is yours.

M A Y O R G L E N N E L L I O T: Thank you. My name is Glenn Elliot and I am the Mayor of the Borough of Rutherford. Senator Ambrosio and Task Force members, good evening. On behalf of the citizens of Rutherford, first of all I would like to welcome you to our community. I would also like to compliment the Committee for bringing these hearings to the people. Too often, legislative committees hold their hearings during the daytime hours in Trenton, making it virtually impossible for interested citizens to participate. Thank you, and again, welcome to Rutherford.

Most of the problems with the HMDC tax sharing formula have been addressed in a bill which Senator Ambrosio recently introduced. While I believe other mayors will be speaking about that, I do urge all members of the Legislature to support this important piece of legislation.

I am here this evening to speak about the HMDC Master Plan. This Master Plan which was adopted 18 years ago, has never been reexamined. The HMDC is finally in the process of reexamining and updating this document. But in my opinion, one update every 18 years is not nearly enough. Municipalities are required by State law to reexamine and update their master plans every six years, and I believe the same requirement should be placed on the HMDC.

Rutherford, for example, has over 250 acres of undeveloped land in the HMDC district, south of Route 3. Most of this area, which is known on our tax map as Block 220, is zoned as parkside/residential, which calls for the development of 35 to 40 dwelling units per acre. It's been estimated that if this land were fully developed, Rutherford would gain over 10,000 additional residents. Since the present population of Rutherford is under 19,000 dollars (sic), this would mean a tremendous increase in our population.

This land has been zoned this way for 18 years, and there's never been a proposal, as far as I know, to build any housing in this area in all that time. I believe that the major reason for this is because the area, which is a former landfill site and is surrounded by highways, landfills, and office buildings, is unsuitable for housing. Yet this unrealistic zoning has been in place for 18 years. And Rutherford, which needs ratables tremendously, is unable to develop this land. I believe that if the HMDC had been required to update their Master Plan every six years, this situation and many other similar situations in the district would have been corrected much sooner. At this point, that's really mostly what I have to say.

SENATOR AMBROSIO: Okay. Your recommendation is that we include that in legislation, that they be directed to upgrade their Master Plan within every six-year period?

MAYOR ELLIOT: Yes, similar, just like the municipalities. Okay? Thank you.

SENATOR AMBROSIO: Okay, Mayor. Thank you. Next I'd like to call on Mayor Presto from Carlstadt. Welcome, Dominick.

M A Y O R D O M I N I C K P R E S T O: Thank you very much. Committee members, fellow mayors, and representatives from the HMDC--

SENATOR AMBROSIO: Dominick, excuse me. Is the microphone on for the speaker, because I think some of the people cannot hear?

MS. MELICK: It's not a public address mike. Those are for the Hearing Unit.

SENATOR AMBROSIO: Oh, the mikes are just for the recording. So, you're going to have to use your lungs a little bit, Dominick, so that the audience can hear you.

MAYOR PRESTO: Well, I think the best way to do that is to stand up if people are to hear me.

SENATOR AMBROSIO: Then we lose you for the recording.

MAYOR PRESTO: Are you losing me?

MR. INVERSO: (Legislative Staff) Just turn it around to face you, and that will be fine. (Mayor Presto complies) That's good. Thanks.

MAYOR PRESTO: I am the Mayor of the Borough of Carlstadt. I also wear the hat of the Chairman of the Hackensack Municipal Committee. That is commonly known as the Mayors' Committee. I've seen this organization grow from conception to birth. I watched it in its progress throughout the time it's been there. I feel that insofar as the mandate of the HMDC, I must say that it has been following its mandate. The question is whether that mandate is what the municipalities want for themselves?

As stated by my predecessor, there is a common thread which is going to run through all of the commentaries which are made by the various speakers. Obviously, the first one is going to be the tax sharing. It is something where all of the municipalities joined hand in hand initially and were out fighting it very vigorously. We came down with a court decision and we were saddled with the erroneous problem, "You make the change; you make the suggestion." Therein lies the problem today, because now the various municipalities have divergent interests; that is, we all impact differently by the tax sharing concept. Those who give, don't like it. Those who receive, don't want to see a change. It's going to take a solomonic operation to have something come out which is going to make everyone happy in its outcome.

I think that we have presented in our legislative bid those things which would somewhat make most of the communities happy. There's nothing which is going to make us all happy. I feel that that is something which you as legislators already have in your hands. And you're going to have to carry the ball to try to help us get the change, because there is no other way that we can get that.

I feel that the developers within our respective communities have certain rights. And those rights lie in the fact that if they own land which can be developed, it must be done expeditiously. There are two reasons for expeditious development: One is that it is the lifeblood of every community. Without development, we don't get our taxes; without taxes, our communities are in those binds which we all find ourselves at that time of the year. Where is the money going to come from?

I feel that there is an undue delay on the processing of applications in the Meadowlands and I think that something along the way needs to be done in order to speed up that process where developers are not there for two years, three

years, getting from the drawing board to putting it on a piece of land where we can get our tax dollars. I feel that the developers are entitled to have the same zoning laws in the Meadowlands district as they have in the communities. I am therefore in favor -- and keep in mind that although I am the Chairman of the Mayors' group, I am not necessarily speaking for the Mayors' group in its entirety-- I am expressing my concepts as the Mayor of Carlstadt.

I feel that the special exception must become part of the legislative process in the Meadowlands, because there are too often times that our developers are held up because they cannot qualify under the old antiquated hardship concept. And I would like the Legislature to take a good hard look at that, whether it be in the changes that we are going to have in the plans in the Meadowlands, or by direct legislation to bring that about.

In this vein, I feel that there should be in the law an obligation upon the developer to go both before the local board, as well as the Meadowlands Commission. It's very easy for the developer to come in and say to us that, "We need not come to you." Why not? "The HMDC tells us so." And the HMDC has the perfect legal right to tell them that. I think that that has to be changed so that we sit in the same position as the HMDC, and we can have our input as to what impact that will have on our community over and above the requirements of the HMDC may have.

This delay -- I forgot to refer before -- this delay in approvals-- We have a very classic example of what can happen to our developable inventory of land. When we look at the new maps that are going to be coming out, they are going to say that, "From now on this section of land can under no circumstances be developed. This section of land, maybe; this land, yes." There may some help to the developer there, but it's going to help them in two ways: It's going to take away

any rights he had and it's going to give him insurance in some areas. Had we allowed development earlier, we wouldn't be losing as much land as we are going to lose now. And I blame that on the HMDC and its failure to respond more quickly to the needs of the developers.

I'm going to bring up something which has not been brought up in the past, I don't think, by our committee or anything. I have sat down with the HMDC and discussed forthcoming concepts along these lines. It was always the law that only the municipality, the county, and the State may impose taxes. But that's not truly so, because the HMDC may also impose taxes by its right to bring about local assessments and therefore add onto the tax bills of the property owners within the district, additional taxes.

I don't profess to know that section of the law that well. I had meant to take another look at it before I came here today. But I don't think it carries in it the obligation on the part of the HMDC to have the prior approval of the communities affected, to go ahead and do it. I'm not brushing aside the regional concept of the HMDC; I respect the concept. But I cannot respect their right to come in and impose additional taxes upon our taxpayers. And that's exactly what that does.

I would hope that someplace we could see room to make a change in this area, which will allow us at least to hold hands with the HMDC in this very very sacred area. Taxes are our lifeblood, and it's also the thing that will drive development away. I think that there are other means with which some of these regional things can be done rather than through an imposition of local taxes.

I think that I could go on further, but I know that there are a lot of other mayors here who want to speak. I'm sure that we will have a lot of things in common. So, I'm going to acquiesce. I want to sit around and listen to them.

Thank you all for the opportunity. And if I can sit down privately to have further input, I would be very, very happy to do so.

SENATOR AMBROSIO: Mayor, before you go, there are a couple of questions I'd like to ask you, about some of the proposals that you made. But first I'd like to introduce another member of our Committee, Senator McNamara from District 40.

MAYOR PRESTO: Hi, Senator. How are you?

SENATOR AMBROSIO: You mentioned the delay in the issuance of permits. Now, some of the members of this Committee in our previous meetings have heard some of the war stories about delays that have been caused by some of the Federal agencies -- the EPA and the Army Corps, in particular.

MAYOR PRESTO: Oh, that's bad.

SENATOR AMBROSIO: The delays that you're talking about are over and above that or delays that are part of the HMDC system?

MAYOR PRESTO: I think that in order to appreciate my delays, go before the Army Corps came in and started to put this extra burden on, you'll see what I mean. So, if you have the delays at the end with the Army Corps and the EPA and such like that, we should do something to speed up the other process.

SENATOR AMBROSIO: You also mentioned that you believe that the HMDC should have the power to grant special exceptions.

MAYOR PRESTO: Yes, I do.

SENATOR AMBROSIO: That's the same power that the municipalities currently have. You would want to extend to the HMDC zoning power?

MAYOR PRESTO: Yes. Of course, I speak as an attorney as well as a mayor. I speak as an attorney knowing that the right will be given to the developer by having this special exception. As a mayor, I want to see development come in, and if there's a way it can come in, I want to see it happen.

SENATOR AMBROSIO: Okay. And I'm interested in knowing about your proposal that a developer go before both the HMDC and the local board. Suppose those two jurisdictions differ as to how the application should be handled?

MAYOR PRESTO: Well, I think that we all realize that we are preempted in certain areas. In other words, we could not meet the requirements less than those required by the HMDC. Is that so?

SENATOR AMBROSIO: Right.

MAYOR PRESTO: Because we're preempted from that, because of the State law. But we could, if we wanted to, put additional burdens on them.

SENATOR AMBROSIO: You don't mean in terms of the zoning powers?

MAYOR PRESTO: No, no. The zoning power-- I think we should be consulted at all times and that's happening now with the new Master Plan. We could have all of our input. In fact, I've been called by the HMDC to set up meetings with my municipality. But that's input into the zoning concept. I'm speaking about the everyday problems of zoning and planning, where people come before the boards.

SENATOR AMBROSIO: Thank you, Mayor. Anyone else have any questions? (negative response) Thank you.

MAYOR PRESTO: Thank you.

SENATOR AMBROSIO: Next, I'd like to call on Mayor John Gagliardi, Mayor of Lyndhurst. Welcome, Mayor.

M A Y O R J O H N E. G A G L I A R D I: You're welcome and I thank you for the opportunity to speak here this evening. Of course I'm sitting down. I'm not as young as Mayor Presto. I really want to thank you Senator Ambrosio and your Task Force in at last holding public hearings on what the HMDC is doing and the opinion of the mayors and the people who live in the area.

Thank you for coming to Rutherford to hold public hearings on what the general people in the area feel about the HMDC; what they have done so far, what they should be doing, and what they have failed to do. I don't want to touch on these legal questions, taxes, etc., etc. I'm going to try to present to you the nuts and bolts of the HMDC as discerned by the average and interested taxpayer and citizen of this area.

Some 20 years ago, the HMDC was born in Trenton to provide orderly development of the Meadowlands. After 20 years of existence, I personally find -- speaking solely for Lyndhurst -- that we are in a bigger mess now than we were ever in 20 years ago. And I can relate to that for just a moment by saying that all the development you see out in Lyndhurst/Meadowland was done prior to the HMDC. I would match that industrial complex with any complex in the State. We didn't put up garbage buildings. We had some nice properties going.

Since that time, of course, with the HMDC advent into the area, the yellow section in Lyndhurst, which is called parkside/residential, has been a thorn in the sides of many thousands of people in Lyndhurst, especially for many years. It's been something that just can't seem to be gotten over and rectified. But I'll come back to that in one second.

One of the jewels in the HMDC district, when the Commission was first formed, was to be the DeKorte State Park. It was an noble plan at that time, but with all of the garbage funneled from Lyndhurst, North Arlington, and from many counties, it didn't take anyone with an ounce of brains to realize that the DeKorte State Park project had been replaced with 135 foot high mountains of garbage -- a sad demise to the one principal project in the district. I think it would have been a tremendous project for the South Bergen area. Unfortunately, it never came to pass.

As we turn to the HMDC district map that I just mentioned a moment ago, and run our fingers into Lyndhurst property, we see an abundance of orange color. For the benefit of the Committee, orange represents parkside/residential. Most of the orange area are all landfills, grossly contaminated in many ways and certainly not fit for human habitation.

Lyndhurst's Master Plan, which has been in existence far longer than the HMDC's Master Plan calls for commercial/industrial for this orange area on the HMDC map. But the HMDC remains adamant to change their parkside/residential zone to commercial/industrial. There are property owners who have tried for years to get the HMDC to change the zoning to commercial/industrial. The HMDC would never consider the change, and consequently, we have property owners paying taxes for many years on property that is only fit for commercial/industrial development.

It becomes quite apparent that the HMDC insistence for locating families in the district was for a specific reason. The reason was to have a captive group of families who would work in the district and who would not put an additional burden on our two access roads for ingress and egress. This point was acknowledged by more than one HMDC staff member over the years. Our two ingress and egress roads in Lyndhurst are Polito Avenue and Valley Brook Avenue. Both roads have been in place and were used long before the HMDC opened its facility in Lyndhurst some eight years ago.

To date, both roads have a terrible washboard condition due to heavy garbage truck traffic over the years. Now that the BCUA is using 18-wheel trailers to haul refuse out-of-state. The gross weight of these vehicles have exceeded 80,000 pounds. Neither road was built for that kind of weight and abuse.

The HMDC, who is responsible for solid waste in Bergen County ended their responsibility on February 29, 1988.

However, now that the temporary and permanent transfer station will use the above roads, and when and if a resource recovery plant is built, North Arlington will be host to the residential ash site. Again, it appears that Lyndhurst's roads will be tied up for the next 20 to 30 years with garbage and/or residual gas trucks.

You know, Senator Ambrosio, Lyndhurst has endured garbage dumping for about 40 years to date. And with the HMDC district of 32 square miles, will you reasonably assume that Lyndhurst has paid its dues over the years and the HMDC could find a new site for a transfer station and a residual ash site not necessarily in the district?

As the Mayor of Lyndhurst, I do not believe for one moment that Lyndhurst has friends at the HMDC. We are always penalized much more than the other 13 municipalities in the district. And you know, Senator, in the political arena, the word used when problems arise is "compromise." I am asking this Commission to recommend to the HMDC that their parkside/residential orange area be rezoned back to the Lyndhurst Township designated area commercial/industrial. The HMDC owes Lyndhurst at least that much for the cooperation that they have received from Lyndhurst for the past 20 years.

I would like to go back for just one second, just to show how conscientious and how friendly Lyndhurst was. I can tell you Senator, Lyndhurst was the only host community willing to site a resource recovery plant. And I don't think there's any other municipality in the State of New Jersey who can boast that record. Of course it didn't come to pass, but that's besides the point. We offered that through the HMDC.

I want to thank you for your courtesy and attentiveness. I hope that the meetings do not end here tonight. I think that we have to reach even further, and delve down deeper. There's a lot more to this picture than meets the eye. I'm sure that there will be many more things coming up on

the docket at a future time. And again, I thank you for your time, Senator.

SENATOR AMBROSIO: Thank you, Mayor. I can assure that there's going to be several more meetings on this whole issue.

MAYOR GAGLIARDI: Thank you.

SENATOR AMBROSIO: Next I'd like to call on the Executive Director of the Hackensack Meadowlands Municipal Committee, Margaret Schak. Margaret?

M A R G A R E T S C H A K: Senator Cowan, Senator McNamara, Senator Ambrosio, my name is Margaret Schak. I am the Executive Director of the Hackensack Meadowlands Municipal Committee which is the title given the Committee of Mayors of the 14 towns in the Meadowlands district as created by the Hackensack Meadowlands Reclamation and Development Act.

The Municipal Committee welcomes the review being conducted by this Task Force. I am the spokeswoman for that Committee, although, in addition, some mayors or representatives of individual municipal governing bodies will address you concerning matters unique to their municipalities.

I have been a member of the HMMC since 1974 as an alternate delegate, mayor, and during the last fourteen months, as Executive Director. In the early years of its existence, the HMMC fought in the courts for the municipalities' right to home rule, but as you all know, regional planning won out and fourteen towns have learned to live with the HMDC.

I call your attention to 1977 when I served as a member of a similar legislative body, the Legislative Study Commission of the Hackensack Meadowlands, which made its final report in September 1977. The Municipal Committee was created by the Hackensack Meadowlands Reclamation and Development Act to be a working partner with the Hackensack Meadowlands Development Commission as it carried out its legislative mandate.

In the past, there have been times when the Commission and the Committee cooperated with each other and at other times there have been confrontations, but what I believe is important to say 10 years later, as it was said then, is that regardless of the criticism of the HMDC, the successive commissions and staff have accomplished some tasks that seemed impossible in 1969.

The development process, the added interest with the addition of the Sports Complex, the current plans for transportation networks, further development in the areas of commercial/warehousing and waterfront/residential, environmental protection, refining of the tax sharing formula, and so many other exciting and challenging matters, boggles the mind.

But this is a Task Force to review and evaluate the mandate of the Hackensack Meadowlands Development Commission. And I have to ask the question, with all the development and the successes in the other areas I've just mentioned, could the successes we've experienced been even greater had the relationship between the Hackensack Development Commission and the Hackensack Meadowlands Municipal Committee been what the legislation creating both bodies mandated? Would more of the problems have been solved?

We feel the observation in the 1977 Study Commission was insightful when it observed that a stronger, more visible role for the Municipal Committee would in fact, strengthen the position of the HMDC, and was, "necessary in order to maintain the balance between local and regional objectives which was the purpose of the legislation."

The legislation itself was quite clear in expressing the importance of the Municipal Committee in the development process by stating the purposes of the Act, 13:17-1: "It is the purpose of this Act to meet the aforementioned needs and accomplish the aforementioned objectives by providing for a

commission transcending municipal boundaries and a committee representing municipal interests, which will act in concert to reclaim, plan, develop, and redevelop the Hackensack Meadowlands."

The Legislative Study Commission of 1977 found in its deliberations that there was a, "lack of communication and consultation with the municipalities in the planning and development process." It found that, "such consultation that did take place was largely for form's sake, and that inputs from local government were not taken seriously."

This feeling still exists today, but it is not as divisive as it was in the past. It is interesting to note that in the HMDC's official presentation to your Task Force at your last meetings, the HMMC was not mentioned once. Starting in 1981, our Committee was funded by the Legislature to the extent of having a full-time director and a full-time secretary, enabling much more interplay between the Committee and the Commission.

One cooperative venture of the HMMC and HMDC has been an intensive study of the intermunicipal tax sharing account. Time does not permit us to delve deeply into tax sharing this evening -- in fact, we understand the Task Force has reserved another entire meeting for this -- but, it is one subject that has been a bone of contention to all of us for years. And only intense cooperation and compromise on everyone's part has produced the five tax sharing changes which are now in the form of a bill introduced into the Legislature in early March by Senator Ambrosio.

What could not be done 12 years ago was achieved with the help of a computer, innumerable computer runs, and cooperation of many individuals. Time will tell how soon this bill clears the Legislature and the Governor's desk. My own personal comment would be that the five changes -- especially the elimination of the compounding effect -- should be accomplished as soon as possible to avoid further complications.

Another area in which the HMDC and the HMMC cooperated and used the computer to good advantage was in the HMDC planning department while calculating the economic impact of residential development in the Waterfront Recreation Zone, and estimating its effects on the towns involved and on the tax sharing pool. This analysis can now be used as a model for the various scenarios of the soon to be revised Master Plan.

I regret to say though that sometimes we have not received total cooperation from the HMDC. As far as the Bergen County solid waste problem-- This last December, we literally begged, in at least two HMDC meetings, to allow the two towns most affected by the situation, or even myself as liaison representative of the HMMC to participate in the meetings. But we were refused and were not even allowed to sit in on the discussions. Was this working in concert? We think not. Would any of the momentous problems that arose in December and January been avoided by the towns' participation? No one knows. But shouldn't regional planning at least allow for input from the towns and the Committee, so that they can work in concert with the HMDC?

At least one special meeting of the HMDC, December 1, 1987, was called by the HMDC with 24 hours notice to our Committee. Proper notification of our Committee on other issues has often been a problem in the past, although recently there has been an improvement.

The prior paragraphs prove that progress has been made, but it also means that problems do still exist and await solutions. The following are some areas ripe for correction:

1) Extension of the 45-day period which the HMMC is allowed for approval of various items presented to us by the HMDC by certified mail. The last time this happened, a letter of extension by the HMDC was required.

2) Clarification of the Uniform Construction Code and the Municipal Land Use Law as they interrelate with the HMDC's jurisdiction.

3) Question of whether or not HMDC should be allowed to use special reasons as a justification for approval of a variance.

4) Sufficient notice for special meetings by the HMDC.

5) Consultation should be held with the mayor or his representative on all major items that affect his or her town. The HMDC should "work in concert" with the towns and the Committee. Regionalization did not preclude consultation. Many times the lack of this consultation early enough in a procedure has proved contentious to the mayors involved and in the long run, non-productive. In fact, the Legislative Study Commission of 1977 stated, "Local interests are important in that local consultation and participation is the basic building block not only of democracy generally, but of sound and responsive planning."

6) Capital improvements, road improvements, etc., and how to finance same. In the original law of the 1969, a fund was to be established for capital improvements projects, but this was eliminated in the 1972 amendment. What happens when the developer builds a road or roads, and at some time in the future wants to turn it over to the town, but the town does not want it because of the added costs and services involved?

7) Resolution of how to pay an owner who cannot develop his property because of the way it is zoned.

8) Better cooperation among the Army Corps of Engineers, Department of Environmental Protection, Environmental Protection Agency, and the HMDC, so that the permit process under Chapter 404 of the Clean Water Act, would work more efficiently. At present, years of delay are encountered by property owner applications.

9) Transportation in the area. Massive traffic jams are not unusual. Hopefully, the revised HMDC Master Plan will address this.

10) Housing and its effect on tax sharing. Discussion on this, I am reserving for the Task Force's meeting on tax sharing, which I understand will be a separate meeting. Am I correct on that Senator?

SENATOR AMBROSIO: Yes.

MS. SCHAK: Okay. These 10 items are examples of some of the areas we deal with on a day-to-day basis. It is easy to understand why with a staff of only two, the HMMC is limited in its attempts to help solve some of these problems. It is also limited because of the lack of definitive role in the Act's directive to "work in concert."

We hope that this presentation will assist you in your work on the Task Force. Attached are two items for the record: 1) 13:17-8 of the Act concerning the 45-days approval, and 2) a one-page summary of three computer runs concerning tax sharing. If our committee can assist you with explanations, documents, computer runs, files, etc., we are at our service. Respectfully submitted, Margaret Schak.

I also have a letter from Mr. Porro who is not able to attend. He mentions that he is ill right at the moment and not able to come this evening, but he does present a report that was given to me by his office that I'll turn over to the Committee.

SENATOR AMBROSIO: We'll see that that's part of the record.

MS. SCHAK: Right, and if you have any questions on anything, I'll be glad to try to answer them.

SENATOR AMBROSIO: I do have one or two. Of the ten points that you spelled out, Margaret, have you discussed any of them with the HMDC staff?

MS. SCHAK: I think most of those they know are a problem. You know, certainly HMDC is aware of the 45-day period. It depends on how that is interpreted in the law. If a public hearing is put on a-- If an issue is put into the

"Federal Register" and requires a public hearing, we have asked for the material or the notice of it as soon as possible. So when they notify us early, the public hearing is not in time for our next meeting. In other words, it takes a longer period of time.

SENATOR AMBROSIO: I understand that. Do you have a specific recommendation? In other words, is this something that should be addressed by statute or is it something that can be worked out?

MS. SCHAK: Well, it could be addressed by statute, because to extend a 45-day to more like--

SENATOR AMBROSIO: But is it something that you could work out with the HMDC without legislative change, is what I'm asking?

MS. SCHAK: Well, the way we have worked it out is that everytime it happens, have the HMDC extend it. But, it's not a good way. The better way would be to have the legislation change the 45-days to a longer period of time, because we do meet once a month, but by the time it gets to the public hearing, we shouldn't really act until we hear what the public hearing had to say.

SENATOR AMBROSIO: Wouldn't that tend to be counter to Mayor Presto's comment that he wants to shorten the time period for the HMDC to act on applications and this would compound it by giving them--

MS. SCHAK: If those applications were only delayed by that two-month period, I'm sure even Mayor Presto would approve of that. That's not where the delay is. I think they are talking more about other delays in respect to time element.

SENATOR AMBROSIO: I would like to clarify just a few other points that you raised. You mentioned clarification of the Uniform Construction Code and the Municipal Land Use Law. They relate to the HMDC's jurisdiction. Do you have a specific proposal on that?

MS. SCHAK: I don't have a particular thing. It's a situation where the HMDC's law preexisted -- both of those laws. So the towns have to work with an agreement that was worked out. On the Uniform Construction Code there is a separate agreement completely worked out between the building construction officials and so forth. But it's all cumbersome, because you look in the law and you see one thing and then you have to know that this other document exists that was in such--

SENATOR AMBROSIO: Okay. I would just suggest to your committee and to the HMDC staff that if there some input that you can give to this Committee on how the problem Ms. Schak alerted us to, can be addressed. We'd like to see some input on that. Is it your position or the committee's position that we should extend the special reasons power to the HMDC?

MS. SCHAK: The past experience, which was about a year and a half ago, our committee turned down-- We voted against the HMDC being allowed to have the special reasons. We have it on the agenda for this coming month, and that is going to be rediscussed by our committee and the HMDC. And Mayor Presto, in particular as he mentioned, feels strongly that the HMDC should have that. So, I think we will probably work that out before--

SENATOR AMBROSIO: Would you notify our Committee of your decision on that? We'd like your input on it.

MS. SCHAK: Yes. It may not be decided Monday, but it certainly will be discussed and probably -- maybe even voted on in the next meeting.

SENATOR AMBROSIO: Okay. I don't want to go into each one of your proposals. There's one here that I wish I could help you with -- better cooperation between the Army Corps of Engineers, DEP, EPA, and the HMDC. I'd like to add the DOT, the BPU, the Sports Authority, and the Turnpike Authority. If we could get all of those agencies working in the same direction, we could avoid a lot of problems.

MS. SCHAK: Well, I think even HMDC agrees with us on that because, the Chairman, Len Coleman put a long report together on that.

SENATOR AMBROSIO: Yes, we have that report by the way, and it'll be made part of our Committee's work.

MS. SCHAK: And we have constant complaints from, you know, property owners saying that they waited so long for the permits to be granted and so forth.

SENATOR AMBROSIO: Okay. Thank you, Margaret.

MS. SCHAK: Okay.

SENATOR AMBROSIO: Next, I'd like to call on Mayor Paul Amico of Secaucus. While Mayor Amico is coming up, I was derelict in my duty in introducing one of the Commissioners of the Hackensack Meadowlands Development Commission, Arnold Smith from our host town of Rutherford. Welcome, Arnold. Welcome, Mayor Amico.

M A Y O R P A U L A M I C O: Thank you, Senator Ambrosio, Senator Cowan, Senator McNamara. Thank you for this opportunity. I think the time is long overdue for the history of this legislation to be reviewed and I'm pleased that it is being done. Depending on how many additional hearings there may be or opportunities we will get to submit material that the town of Secaucus will, through its attorneys or its administrator, or through my alternate, through the Mayors' Committee, or through myself, be sending you some comments to add to your record. We will try to do that promptly.

Let me first say that although I have strong criticism about some aspects of the legislation, particularly about the tax sharing aspects that I'm going to speak about mostly tonight, I don't have any criticism of the Commission or its staff or its operations. I find them generally to be a very high level agency. Can you hear me out there?

UNIDENTIFIED MEMBER OF AUDIENCE: No. It's still too soft.

MAYOR AMICO: I think Margaret Schak pointed out that there were five items that the Legislature was considering for possible amendment. Four of them directly affect tax sharing in one way or another. The fifth one, which deals with the certification of school children has little to no effect. But it's the tax sharing deficiency that I am going to speak on mostly. And let me first enumerate -- let me point what those four items are.

One of these is for the municipalities to retain more than the 50% they now retain of the taxes. They go into a pool. The second one is the question about whether or not Teterboro should be involved in tax sharing. The third one is a very important one; it's what's referred to as the compounding effect or the double-whammy effect that tax sharing has on its community. And the fourth one, not overly important, but there's one in which a community who winds up in court over a tax appeal and who loses the tax appeal has no way of getting back the money that was paid into the pool some two or three years earlier. Those are the four points.

The compounding or double-whammy one is, for those who don't understand it, one in which-- Let's take last year, for example. Secaucus paid a million and half dollars into the pool. Well because we paid a million and a half dollars into the pool, that money had to go into our budget and increase the tax rate, and because the tax rate is increased, we're going to pay more into the pool because the tax rate is one of the considerations in the formula.

It seems to me while the State may have had good intentions in trying to compensate the communities who were adversely affected through the zoning, if they had zoning that produced less in taxes than other zonings or if they had parks or dumps or anything like that, it's inconceivable to me that the Legislature had in mind that a community will increase its tax rates through providing more services, through paying for

bonded items for capital improvements, which all increase the tax rate. What it does there is that it takes the progressive community who's willing fix its streets, who's willing to upgrade its building, who's willing to build new schools, who's willing to solve its stormwater problems, things that are not mandated, unlike if you have to upgrade your sanitary sewage plant -- maybe that's a mandated item and maybe you have to do that -- but a community that decides to tax the taxpayers for improvements, where the taxpayers, being willing to pay for them, finds itself in a position that its increased tax rate automatically will increase its next tax share and payment.

On the other hand, a community that fails to do this stuff and keeps its tax rate low, automatically benefits. Now, it seems to me that there's no more important item, or no more two important items in tax sharing. The first is a compounding problem and the second one is this one that I'm enumerating now; because if Secaucus would have spent in 1986 $1,750,000 less, if our tax rate would have been relieved by that amount of money, we would have paid almost a half a million dollars less in tax bills. Now this is something that just should not be allowed to continue.

We are one community that is not waiting for legislation to get relief for it. We're trying to get the Mayors on our committee to agree, because that's difficult when one community that's been in court, and is still court, and will continue to go to court-- Because I think that there are some aspects about this legislation as it pertains to tax sharing -- and I'm not an attorney -- that are really unconstitutional. I think this one that I'm pointing out has to be one.

SENATOR AMBROSIO: Mayor, if I could interrupt you for a moment--

MAYOR AMICO: I was going to suggest you do that any time you want to.

SENATOR AMBROSIO: Yeah, the current bill which is pending, does that address all of the issues that you're dealing with?

MAYOR AMICO: No, it doesn't. It addresses the compounding, but it does not address the (inaudible) tax rate. What has happened is that in the past five years, the payments have gotten so long that it causes us to take an extra hard look at the situation. As most of you all know, Secaucus is a fast growing community and up until seven years ago, we didn't get overly involved in worrying about the economic tax sharing.

However, five years ago, we paid a million dollars for the first time, four years ago we paid a million for the second time, three years ago we paid a million and half, two years ago we paid a million and half, and this year we're paying two million three hundred thousand dollars, adding up to about seven and a half million dollars. And it wouldn't bother me in the least if we were benefiting proportionately through the growth. However, we're in the position where our residents see all of this construction and has town officials that can't keep the tax rate from going up. And the only reason for that is that we are not getting our fair share of return from the ratables, and legislation does not deal equitably with tax sharing. And the budgeting that I just referred to is a tremendously important item. It's not included in the legislation that you referred to.

The last two-family home development in our community quite some years ago -- maybe about ten-- We had some 75 two-family homes built at that time. We had to supply them with sewerage treatment, street repairs, school services, all of that kind of stuff. And of course we get compensated for the extra school children. The general consensus is that we get paid for each dollar that it costs us to educate our children. However, the alternate who represents me on the Municipal Committee is on the agenda to speak, and he's going

to address this problem. He's going to point out to you a defect in tax sharing. It gives everybody the impression that we get paid fully for each school child when we really don't. So, what I'm saying on this home development is that the net taxes we get do not cover all of the services that we have to provide. We have not made a big deal about the legislation outside of the tax sharing. We have a lot of residential development which is an objective of the Commission and the State legislation in the first place. We live with that. But it's impossible to allow the inequities to continue, that exist in the tax sharing.

For instance, the situation in Teterboro where the acreage is included in the size of the district: The town has been included in the tax sharing. The Commission has no zoning authority over the land there. And how this wasn't recognized earlier, and how this was allowed to continue where I understand that the compensation for tax sharing to that community amounts to thousands of dollars per resident for doing nothing -- just for staying here and doing nothing, just for having the State pass this legislation--

I think I pointed out earlier that the figure of almost half a million dollars that we would have saved had we spent the million and three quarter dollars less two years ago-- I had my tax assessor run a calculation. We had earlier asked the HMDC to run some figures for us, which they did, except that they failed to take the county budget out of the tax rate and so, we had to sort of do that over, and that's where we got that information from.

Also, there are payments that communities get, such as in lieu of taxes. And some communities get involved in tax abatements, and some have gross receipts tax, etc., etc. It seems to me that all of this kind of income to a community, in excess to the debt that exists when the legislation had its starting period, has to be treated as taxes. The community

that has generated plants, etc., etc.-- I'm not precisely sure how all of these different forms of compensation are treated, but it seems to me that they should be treated as taxes, because generally they are in lieu of taxes. This ought to be especially true since a lot of that power generated, winds up in communities like Secaucus, who don't generate the power. But a lot of the municipalities that generate the power have that extra income.

So, what happens is that Secaucus is left with the burden of trying to explain to our taxpayers why we can't hold the line on taxes. We're left with the burden of explaining to this Committee what's wrong with the legislation. And since the Commission was established, and since tax sharing was established by the Legislature, I want to impress upon this Committee that I think it's the obligation of the Legislature to take a good long look at this to make sure that they come up with all the deficiencies in the tax sharing, and deal with that.

It's extremely difficult to come up with a formula that's real fair when you're dealing with just zoning considerations. That's difficult enough. If the assessor has to assess a house, he has guidelines that the State provides that the State has to use. He has to use replacement value; he has to look at the sales that took place; he has to look at the condition of the house; he has to measure the house, etc., etc. This is to get a fair assessment mandated by the State, and the revalve company has to do the same thing.

The zoning regulations and the ability of the HMDC or anybody else, to bring out this kind of fairness, is almost impossible to do. Be that as it may -- if it was only affected by the zoning. But when you include the budget in it, you're making a situation that's very difficult in which to bring equity, much worse.

There are some other factors that affect tax sharing that should be looked at. For instance, we mentioned before about the Army Corps of Engineers. They have some jurisdiction in some areas and that's certainly going to affect whether or not areas can be developed. I know Kearny and other towns have the lands that are very difficult to develop if ever developed. That's certainly has to affect tax sharing.

Some years ago, there was a big deal made about the proposal of the Berry's Creek development. I remember our town attorney telling us, "Well, look fellows," speaking to my colleagues and myself, "when Berry's Creek becomes a reality, they'll be putting money into the pool." Berry's Creek did not become a reality. It got held up because of a big family dispute about what to do about the land. It went back and forth. Now here's a situation where a family fight affects whether or not something can happen with that land. And then in the passing of time other things happened; and not a thing has happened up there.

Now, it seems unfair to me that if we're involved in a tax sharing program, that some large area should be kept from development, even though it's zoned for development to produce taxes. Just because of some kind of family dispute held it up in court, it seems that the State should have some role in either making up these losses or playing some role to make sure that the objective of the zoning under the Commission becomes a reality.

SENATOR AMBROSIO: Mayor, you're not suggesting that the State should mandate -- somebody who owns private property -- should mandate that they develop it, are you?

MAYOR AMICO: No. I am not mandating that at all. But I'm mandating that when the State--

SENATOR AMBROSIO: The point I'm getting at is that this is true in any town. You can zone, but you can't force development.

MAYOR AMICO: I agree with you. But in any town you keep your taxes. You don't give them out to some town and then find some other town that can't develop it that's supposed to develop it. So, it's a little different. Do you follow me?

SENATOR AMBROSIO: I understand, but what's the solution? We certainly don't want to get into a--

MAYOR AMICO: Well, I'm not absolutely sure what it is. But it would seem to me that if this formula is put together on the basis that certain areas of zoning could produce taxes, and certain towns are getting compensation because they have dumps and open land that are not developed, it seems to me that something has to happen so that those so-called proposed developable areas become (inaudible); or that there is something to take its place in the form of compensation. That's not easy to do, but--

SENATOR AMBROSIO: Well, I'd be interested in any specific recommendations you can make on them.

MAYOR AMICO: --it happens in every town, except that in each town, you at least get the benefits of what you were doing elsewhere. But we don't get the benefits of what we're doing in our town, because we have to handle (inaudible). And then we have other towns that stymie for some reason or another. Then of course you also have things come along like the proposed baseball stadium, or the extension of the Turnpike, or a toll plaza, and to some extent it is going to affect the use of that land. And of course these are things that you just can't always address. But all of these, one way or another affect tax sharing.

Now, on a little different note, I want to add some comments to what Mayor Presto spoke about and what you did, Senator, as it pertains to the HMDC having the power for special exceptions or for, I guess you refer to them as the, "They can't grant it for a different use in a particular zone." I was one who favored the HMDC having the same

authority the community had. It seemed ironic that the HMDC supersedes the municipality in the zoning. Let the municipality supersede them.

I will add one aspect in that they should have -- and I think that might have been an oversight by the Legislature-- They should have the power to grant the special exception for the use factors like a board of adjustment has.

SENATOR AMBROSIO: Mayor, may I ask you how much longer are you going to be? Because we have about 10 more people who want to speak.

MAYOR AMICO: I'm just about finished.

SENATOR AMBROSIO: Okay.

MAYOR AMICO: And I can't be too strong about that, because if they have the authority to do that, to develop and zone 14 towns, they should not be without that authority. Because the mayors have an opportunity to speak at the hearings to have their voices heard, and so they are not going to lose that opportunity.

The last comment I want to make is -- then I'll answer questions the Committee has -- what was referred to earlier about the various State agencies working together. And if there's one bugaboo about what's happened in the Meadowlands, it has to do with the traffic. And that hurts the reputation of the State, it hurts the Meadowlands Commission, it hurts us in Secaucus, and it's imperative that some way has to be found to have these agencies work together so that each knows what the other is doing. So if there is a way to get some better results by cooperation, we should not miss that opportunity.

It's very important, because it's a sore eye out there for people coming back and forth through the State to see those congested roads, and doesn't speak well for the State or for the nice things that we have in the district. Do you have any questions?

SENATOR AMBROSIO: Do you have a written statement, Mayor?

MAYOR AMICO: I have one here that I plan to dress up and forward to you.

SENATOR AMBROSIO: Fine, especially on the tax sharing part.

MAYOR AMICO: I plan to dress it up and forward it to you. And Mr. Mastronardy is going to speak on the school funding. He has a rather brief statement, but you're going to find it interesting.

SENATOR AMBROSIO: Thank you, Mayor.

MAYOR AMICO: Thank you.

SENATOR AMBROSIO: Next on the list is Mayor Fred Dressel of Moonachie.

M A Y O R F R E D E R I C K J. D R E S S E L: Good evening. I'd like to thank you Senator, for the invitation and the time you are devoting to the concerns of the mayors in the HMDC district.

If I may get completely germane to Moonachie-- The Borough of Moonachie consists of about 1020 acres -- 898 of those entire boroughs (sic) are within the jurisdiction of the HMDC. All but 434 of those 890 some-odd acres are part of the Teterboro Airport development complex. So, you can see that what is left of Moonachie as far as the development in the jurisdiction is less than 200. It's somewhere in the neighborhood of 200 acres. And purely 98% of that is residential, mostly one-family homes and some two-family homes. I take some exception with the existence of the HMDC.

In Moonachie -- for one basic reason to me -- some of the boundary lines are what might seem to be arbitrary. We have the district line going virtually through the back yards of some of our residential area that existed as a residential area before the HMDC was created by the Legislature.

Also, within the borough, the zoning that exists today in the HMDC district is virtually compatible to what was in existence in the borough before. So that one might ask why the properties that lie now in the HMDC were in the process of being developed along the same lines-- The properties were virtually in the hands of developers who had every intention to zone them in a virtually compatible manner as the HMDC district had finally determined.

So, the one question one could ask would be, what is the need of the HMDC in the Borough of Moonachie? That question has never been answered. I've never asked the right people, but obviously, the question would probably be hard-pressed to be answered.

The other problem I have locally in a sense is that we have in the borough about 21 acres devoted to mobile home parks. We as a borough zoned that some 10 or 12 years ago, to that effect. The HMDC, for whatever reasons, could not make a compatible zoning. It's zoned as low density residential, which allows for a mobile home trailer park existence, but doesn't truly affect it. I think two or three times the HMDC was requested to consider retitling that, but they couldn't find it within their zoning concept to rezone it inasmuch as it was allowed for use.

So, there are some contradictions therein just in the existence of the HMDC as a jurisdictional body within the borough. I could say in all fairness, that many times when we approach the HMDC with some particular problem, they do turn an attentive ear to us. And they do try to address what might be some type of an inconvenience or problem. But the concept to me is contrary to what existed. It was unnecessary inasmuch as it did not have to exist in the Borough of Moonachie. And perhaps in all reasonableness, we should never have had to contend with the HMDC.

The borough itself is not above the Hackensack River, although some properties are considered sensitive to the extent where the Corps of Engineers and the DEP and the EPA are attentive to what goes on in the borough. But again as I say, the zoning before the inception of the HMDC was almost what it is today. So, the big question is why? And that remains unanswered and will probably never be.

Another question in my mind is in the tax sharing. It's not particularly a problem to the borough, but we did have an incident as you know, where the suggested changes in the tax sharing could have placed an enormous burden on the Borough of Moonachie, whose population is less than 3000. And we are subjected to the vagaries of the such things. If not for your personal intercession, I believe, and wisdom, we might have been overly burdened. That's very much appreciated.

So, my whole point, I guess where I'm going, is that it has not done anything for Moonachie, and it doesn't seem to be able to do anything for Moonachie as long as it goes on in its current way. Developmental-wise and result-wise, I would say what I would like to see addressed in a very positive way would be a road system somewhere in the Meadowlands to expedite traffic in and out of it.

Through our main street in the borough is a county road, Moonachie Road, which once it gets within a hundred feet into the borough, becomes a two lane road from 4:00 to 5:30 or 6:30. It takes me as long to go three quarters of a mile from Carlstadt into Moonachie, as it does for me to get from East Hanover to the 16W exit on the Turnpike. The traffic just backs up because it cannot get out of that district. With all of the development that did take place, no attention had been given to sufficient infrastructure. And that poses many problems, not only to Moonachie, but also to, I realize, Secaucus and to people on the other end down in the Kearny and North Arlington area.

Those were things, I think, that might have been addressed immediately and some plans to expedite and implement those plans instead of the actual zoning changes and zoning developmental influence-- And I do, with all due respect, take a little exception to the concept of allowing the HMDC to have the special reason zoning. I believe that if that ability lies within the borough, that under this special reasons, let that development revert back to the borough to make the decision; and then make a recommendation to the HMDC as to whether they accept or reject it.

The municipalities have relinquished or had that zoning jurisdiction taken away from them -- basically and emotionally by the legislation -- allow that last remnant to remain, and give the immediate municipality the first consideration and perhaps maybe even the ultimate consideration, and perhaps let another appeals process go after that if it's contradictory to what the HMDC would prefer to have.

But I'm an advocate of "home rule," and I would prefer to see most of the important matters that affect the borough be decided by those people who are put into position by the immediate residents and not some outside agency.

That's about all I have and I appreciate your time. Thank you very much.

SENATOR AMBROSIO: Thank you, Mayor. Thanks for coming. For those who have signed up to speak, I assure you that we will get to everyone this evening. What I'm doing is calling mayors and elected officials first and then the several members of the public who have signed up will be called. It looks like we will be able to get to everybody and out of here by 10:00 at the latest.

Next I'd like Mayor Daniel Sansone of Kearny.

M A Y O R D A N I E L S A N S O N E: Daniel Sansone, Mayor of Kearny. Senator, and the other Senators, and member of the

Task Force, I guess I'm a little unique here tonight as far as my position regarding the tax sharing role of the Hackensack Meadowlands Municipal Committee.

I can't go on record to say that I'm pleased with Senator Ambrosio's bill. Unfortunately, this puts the town of Kearny in a detrimental way and not in an affirmative way. So, I just want to go on record and say that I'm not happy, in all deference to my friend, Mayor Amico. Is the Mayor still here? (positive response) Oh yes. The Mayor and I are very good friends, but unfortunately, we don't think the same when it comes to this.

I realize some giveth and some taketh, but in this situation we look back and see what Kearny had to take over the past years as far as the garbage out in the Meadowlands. Consequently all of our land has been undevelopable. And now the landfills are closing and consequently, we have the mountains out there and also consequently, have the Army Corps of Engineers telling the HMDC that their requirements are a lot stiffer than they were years ago. So, we're between a rock and a hard place.

So, I'd just like to have that put on the record that since the inception of the Hackensack Meadowlands Development Commission, I feel Kearny has been one of the communities that has not benefited very well through the HMDC. Not all of us, but many of the communities are still in the midst of putting together their budget. They haven't introduced their budget. I know we haven't. So, we're still looking at anticipated revenues.

That's why I'd like to ask the HMDC to take a strong look at any sections they may be wanting to open. I understand there is a section called the Junkyard that is being considered being opened for the Hudson County garbage. But I think the time has come to sit down and talk about how those communities feel. I know North Arlington, my neighbor, has part of that

property, and I think the time should come that we seriously have to talk about a substantial amount of compensation to the town of Kearny to make up for some of the problems that we have and we're continuing to have.

My town attorney was with me, but he had to leave. He mentioned to me that he would be sitting down with members of the HMDC, Mr. Scardino and probably Mr. Marturano, to discuss the compensation from the leachate that will be going into our system. I asked Mr. Doyle to put that meeting together very soon, because again we're looking at anticipated revenues to give us relief in our budget for 1988.

I really don't want to belabor the fact. I know the hour is getting late, but I just wanted to give my reasons for my dissatisfaction. I hope we can sit down a little more seriously with the HMDC and start making it little more attractive for the town of Kearny.

SENATOR AMBROSIO: Thank you, Mayor. Next is the Mayor Leonard Kaiser of North Arlington.

M A Y O R L E O N A R D R. K A I S E R: Senator Ambrosio, Senator Cowan, and Senator McNamara, I'd like to thank you for the opportunity you've presented to us this evening. Some of my comments to those sitting on our left might be very repetitious -- I mean that as far as the members of the staff of the HMDC are concerned. I hope that some of my comments are being heard for the first time by members of this Committee, and perhaps we can continue on a good vein for the betterment of this entire area.

I would like to commence by saying I'm fully cognizant and support the need for a regional zoning authority, such as the Hackensack Meadowlands Development Commission to assure comprehensive, orderly, and reasonable development of the Meadowlands, inclusive of a mechanism for the equitable distribution and sharing of tax revenues.

Without such a regional zoning authority, development would have become haphazard and we would not be witnessing all the evils of uncontrolled urban growth -- not necessary uncontrolled from the perspective of individual municipalities, but rather from a regional perspective as it pertains to transportation that works in other infrastructure requirements.

However, implicit for the success of a regional zoning authority is the concept of active participation and involvement in the decision making process by the member municipalities. There is one failure by the HMDC which has remained constant for many years. It has been and is the failure to solicit and incorporate municipal advice into this process. At the very best, the HMDC has been insensitive to member municipalities, and at worst, has purposely ignored them.

Let me cite two examples. A few years ago, the Township of Lyndhurst literally requested the proposed resource recovery facility be sited within its borders. Ponder this for a moment: an openingly willing host community, to what many feel to be the most onerous type of waste facility contemplated. The HMDC chose to ignore this municipality's request and instead returned to the original plan of siting the facility in Ridgefield. The project is grossly behind schedule and certainly will result in extensive cost overruns, and will be completed only if the pending court battles are won.

Let me relate another specific instance to you -- one which very clearly traces the HMDC's pervasive attitude to insensitivity toward member municipalities. Let me further add that this is a classic example, because it commences with the rezoning of a parcel of land known as the LRFC Tract in North Arlington.

In 1982, the HMDC rezoned the 77 acre tract from parkland to multipurpose use, primarily residential. That rezoning was required from a public use to a use permitting development is unquestionable. However, the Borough of North

Arlington at every turn and at every forum argued against primarily residential zoning. In fact we felt so strongly in our opposition, we appealed the zoning change to the New Jersey Supreme Court, where the HMDC zoning authority was ultimately upheld.

Our position was that a residential use was not compatible with adjacent uses, and given the proximity of adjacent landfills, was an impractical use of the property. In spite our objections, the HMDC rezoned the 77 acres to a primarily residential zone. Alas, no development took place. And if this 77 acre tract sounds familiar, it may well be because it was recently designated as the ash residual landfill for use by the Bergen County Utilities Authority, once resource recovery has commenced.

Not only has it been so designated, but this was done without municipal input. On various occasions, municipal officials appeared before the HMDC and asked to be included in discussions affecting the designation of this site as an ash landfill. Every time this request was made, we were denied inclusion; rather we were told we could submit our position in writing. Seventy-seven acres of land in North Arlington was designated as an ash residual landfill without so much as North Arlington being permitted to sit at the table. Our worst fears have been confirmed. Residential development was an unreasonable unrealistic use, and as a result, we will now have yet another landfill sited within our borders.

Perhaps ultimately it is in the public interest to designate this site. It is not my intent to argue the merits -- pro or con -- of designating LRFC sites and ash residual landfills. Perhaps the decision making process was prudent. But certainly, and inconceivably so, it was extremely insensitive to the affected municipalities.

We are more than interested observers. It is our community. Such decisions affect our homes, our lives, our

future, and we must be included from the very onset of discussions. This is an operational aspect and failure of the HMDC, which must be corrected. Perhaps the mechanism to do so would be to strengthen the role of the Hackensack Meadowlands Municipal Committee. Certainly, the Mayors' Committee was meant to be a partnership with the HMDC, as opposed to the adversarial situation that has developed. Strengthening the role of the Mayors' Municipal Committee can only help to correct the existing inequities.

I do know we have limited time this evening, but there are a few other brief comments I would like to mention. First and foremost is the failure of the HMDC to obtain consent agreements from all of the counties affected by dumping in the Meadows. I refer specifically to the County of Hudson. This failure by the HMDC has created the incomprehensible situation whereby the County of Bergen with the large quantity of property in the Meadowlands has been forced to out-of-state disposal sites, while the County of Hudson continues to landfill not only in the Meadows, but in the County of Bergen at tremendous savings.

In addition, I would be remiss if I did not take the HMDC to task for what in my opinion has been their failure to actively seek adequate redress to the inequities caused by Teterboro and the tax sharing formula. I know certain initiatives are presently under way to correct the situation, and as one who for many years has advocated the removal of Teterboro, I am grateful and supportive of those initiatives. However, quite frankly it is a situation the HMDC should have been much more active in correcting, and their reticence in doing so should be noted.

All, I might add, is not ill with the HMDC, however. Their administrative staff is highly professional and efficient in performing their functions. In fact, I truly believe one such staff member received undue criticism for his very

straightforward and truthful comments before this Committee on the issue of recycling.

Being the host of two of the existing disposal facilities, I would concur that we should try to achieve maximum removal of recyclable items from the waste stream. But I also recognize the existing legislation is overly optimistic, ill funded, and unachievable in its stated goals and time frame. Unfortunately, Mr. Chairman, not all of the members of your Committee are here this evening for that particular comment.

I do, however want to thank the Committee for permitting me to appear before you this evening. And with your permission I would like to submit further written testimony and statements from the borough.

SENATOR AMBROSIO: They will be happily accepted, Mayor. Thank you.

MAYOR KAISER: Thank you.

SENATOR AMBROSIO: Our last mayor on the list is Mayor Stewart Veale of Ridgefield.

M A Y O R S T E W A R T V. V E A L E: Senator, I'd like to thank you and the other members of the Committee for the opportunity to appear before you. Quite frankly, it had been my intention, not to make a statement tonight. I do not have a formal statement. I had felt that if the agenda was closely followed, that I would certainly find myself in sympathy with comments made by the Executive Secretary of the HMMC and by my colleagues in that the relationship between the HMMC and the HMDC at times has been very satisfactory and other times has been unsatisfactory.

I think too, that the comment has been made by others that as far as the resource recovery plant is concerned, that there could have been a lot of aggravation saved in the County of Bergen, and there could have been a lot of money saved in the County of Bergen, if the Borough of Lyndhurst had been

granted the necessary adjustment in the zoning, so that they could have accepted the resource recovery plant. And my own Borough of Ridgefield, which is 89% opposed to it, did not have to face the burden of trying to avoid the implementation of that plant.

I would like to take just a few moments, because it had been my understanding that essentially we were to talk about the relationships tonight, but I do have to take friendly exception to the position taken by my friend, Mayor Paul Amico of Secaucus, on the tax sharing. I would like to say that I think one of the genius measures included in the legislation that established the HMDC was the tax sharing formula. But I would like to cite my own borough as a specific instance.

Prior to the time of the establishment of the HMDC, the Borough of Ridgefield which has over 900 acres in the Meadowlands was proceeding on an orderly development plan. We were doing what we think the State of New Jersey should have been doing, in the sense that we were encouraging light industry assembly plants, distribution plants-- We were providing employment, we were avoiding pollution before it became fashionable to avoid pollution, we provided for off street parking, we provided for -- well, in general, a very, very acceptable industrial area.

When the HMDC was established, we were prohibited from developing that any further. As a result, where we were trying to find a way to stabilize a tax rate, we could not, in the sense that we could not develop the industrial area. We think that we were willing to be competitive with any municipality in the region, and go one on one in an attempt to attract what we considered to be a desirable industry. As I said, we were precluded from doing this. And as a result from having been precluded form doing this, we agree with the basic tenant of tax sharing that says those municipalities which are allowed to develop should share the results with those municipalities that are not allowed to develop.

I didn't realize we were going to spend so much time on tax sharing tonight. I would have had a more formal statement for you. And I will ask you--

SENATOR AMBROSIO: Mayor, you'll have an opportunity to do that.

MAYOR VEALE: Yes. I want to reserve that right. And I want to thank you, again for the opportunity to have appeared here and I assure that we will have much further to say on tax sharing on a future date. I thank you and the members of the Committee.

SENATOR AMBROSIO: Thank you, Mayor. Next we have the Commissioner of Finance from North Bergen, Thomas Liggio. Is he here? (negative response) Next is Commissioner John DiLascio, Director of Revenue and Finance, Township of Lyndhurst.

COMMISSIONER JOHN DiLASCIO: Senator, members of the Task Force, I want to thank you for the opportunity and for the time you've taken to come here and listen to the different municipalities.

I have two areas that I'd really like to discuss. One being the zoning out in the Meadowlands. We have an area in the Lyndhurst Meadowlands that is about as suited for the type of zoning that the HMDC has slated for there as putting a battleship on the Sahara desert or putting a sun resort up in Siberia.

We have 200 and some odd usable acres that's zoned for housing. Now you have to remember that this housing is going to be built beneath a 120 foot high mound of garbage infested with methane, surrounded by a railroad, the New Jersey Turnpike, other transfer stations, 600 to 800 trucks passing through the streets in front of where this housing is supposed to be built. Yet, that piece of property stays zoned for housing. It's been zoned for housing since 1969. That's when the HMDC, I believe -- 1970 or 1969 -- became an authority.

By leaving it zoned that way, what we're doing is sentencing that property in Lyndhurst that should really be a legacy for the town in tax monies -- we're sentencing that property to the next 20 to 30 years of desolation because no one has applied for housing. Rightly so, because it would blow the doors off your insurance rates. I think once you put housing up there, and the people start getting sick, you run into Love Canals and everything else that's concerned with and is associated with that type of landfill.

It's been an illegal dump since I was a kid, until the authorities took over control of the dumping. It's, as I say, rat infested, methane infested -- a terrible area. And I think that some consideration should be given to letting Lyndhurst use that land by rezoning it to a use that's similar to what we have there now. The use that's there now is bringing in Lyndhurst many good ratables, helping the taxpayers, and the usable land is being used. I think that's of great importance.

The second thing is that we are the host to the HMDC itself -- Lyndhurst. We supply them with fire coverage, we supply them with emergency coverage, we supply them with many services, and last year it cost us $72,000 in HMDC fees, which of course, I understand some are closures, some are taxes. But we pay $72,000 and give all these services. I think that there should be some provision in the monies, either in the tax pool, or in the dumping fees, aside from host community fees that should pay us for the services that we give to the HMDC. Their function is going to increase and I think they do a lot of educational services which are good, but we are paying the bill for 14 towns.

Another thing that I think should be considered here-- Of course, there are some changes that have been requested by the HMMC in the tax sharing pool. One of course is the double dipping, or being taxed twice on the monies that we pay into the pool. And next year, they're also included

in our tax sharing pool, which has a compounding effect. That should be addressed. It should be addressed quickly.

You know, I've heard that we are going to address them. You've got to remember that as you are addressing them, in just two to three years we're paying in $500,000 that's being taxed twice, and if another year goes by, it's going to be another $150,000 or $200,000; and as the days go by, it's costing us money. There should be a gun put to somebody's head to push this thing along; that this is important.

Another thing is that in the tax sharing pool, I don't know if that's addressed in the five points, but we have a 1970 base year -- which I'm talking for Lyndhurst, of course I know our figures-- We've had $14 million in development in 1970. And the equalized ratio was 98% at that time. That $14 million of improvement is still being applied to 1987. We have something like $197 million worth of assessments, and from that you take the comparison year of 1970; but the 1987 year is being figured at 64.33 ratio, and the 1970 year is being figured still at the 98%. I think that the two-year-- You know, if you're going to figure a comparison year, that property that existed in 1970 certainly isn't worth $14 million today. It's got to be worth-- We have had it revalued since then, so it's got to be worth two or three times as much. That would allow us to contribute less to the tax sharing pool.

Now we presently-- The tax sharing pool is supposed to compensate those areas that have dumps, that have open lands, that have park side -- not park side, but parklands. Well Lyndhurst pays the fourth highest amount into this tax sharing pool. We have dumps, we have parklands, we have wetlands, we have the HMDC; it's just, you know, if you just look at it on the surface like that, it just doesn't add up. Why are we the fourth highest contributor and we have all the things that are supposed to be an asset which should reduce our contribution?

I think those things should be addressed and I think they should be addressed soon; you know not next year or the year after. We've contributed maybe, you know, well over two or three million dollars into this pool. And as time goes by, that number is going to increase. These things ought to be addressed.

A very big problem is tax appeals. We've had something like $350,000 -- in dollars -- that we have returned because of tax appeals in the Meadowlands. Now, that $350,000 was also figured into our assessment to the Meadowlands. We've returned those dollars. We get nothing for it. There's no provision in the tax sharing pool for that type of return.

SENATOR AMBROSIO: Commissioner, if I can interrupt you, there is a bill pending in both houses to correct those problems that you're talking about. We've met with the HMMC, with the HMDC, and with the Governor's office, and it appears that all of the necessary pieces are in place to see that that bill becomes law. I'm confident that the problems that you're addressing now are going to be corrected within the next several months.

COMMISSIONER DiLASCIO: I hope so. See, that's my point. I know this was submitted by the HMMC, I believe maybe better than a year ago, or around that time.

SENATOR AMBROSIO: Not the current bill. The current bill contains the Secaucus problem, the tax appeal problem, the double dipping--

COMMISSIONER DiLASCIO: Right. I think the original -- the whole premise of the thing, the whole idea of the thing started quite a few months and maybe a couple of years back. And my point is to get on the ball. You know, get it passed, because everybody is suffering because of it.

Those are the points I wanted to make. One other thing, I see Ms. Schak's report, and in that report it shows the Ambrosio bill. And I see Lyndhurst is paying $4000

more with your bill. I wish you would read your bill over and look at it again. I haven't read it. Thank you.

SENATOR AMBROSIO: Okay. Let's see, next we have former Mayor, former Assemblyman, private citizen, Peter J. Russo.

P E T E R J. R U S S O: The Honorable Senator Ambrosio, the Honorable Senator Cowan, and the Honorable Senator McNamara, I want to thank you very much for having this hearing in Rutherford here, and in the Lyndhurst area.

I had to read this letter because Mayor Presto made some kind of remark about the mandate of the people. And again, I have to say that before I start I'm former Mayor Russo, former Assemblyman, former Bergen County Park Commissioner, and I've lived in Lyndhurst for 66 years.

I have a letter here from Senator Dickinson: "I am writing to tell you about the plans of developing the Meadowlands under bills passed by the State Senate and pending in the Assembly." It goes to say, "We are at the start of an exciting venture and should realize tremendous advantages through the sharing and the regional development of the entire Meadowlands. If we work together, we can finally turn this wasteland of swamps, cattails, and worse into new parks, new roads, new taxable income, new prosperity for Lyndhurst and South Bergen." This is by Fairleigh Dickinson. Can you pass this letter so the Senators can read that? (positive response)

I don't know why Lyndhurst has to take this kind of a beating from this Meadowland Commission? (displays pictures) This is what Lyndhurst really looks like. And this is what it looks like. It's a dump. And it was created by the Hackensack Meadowland Commission. And I'd like to have the Senators look at these pictures, because they were taken just recently, and one of them is the famous State Highway 17. Can you pass that around so that you can see it? (positive response)

I have fought against this Hackensack Meadowland Authority since 1968 when I was an Assemblyman. I voted against the original 477 because of no guidelines and no protection to help Lyndhurst and South Bergen. In this very borough, in Rutherford, right here, Senator Dickinson, Senator Guarini held a meeting of all the Assemblymen and mayors of South Bergen. It was on Saturday in 1968, from nine a.m. until 12 o'clock. There was a complete agreement of all the mayors and Senators and a number of amendments were agreed upon for the successful passing of this bill. I asked Senator Dickinson and Senator Guarini for amendments in writing. And they stated it was not necessary.

Senator Dickinson and Senator Guarini said that the amendments would be added to the Hackensack Meadowlands on the following Monday. Everyone was in agreement with this Hackensack Meadowlands and the amendments. The following Monday, the Hackensack Meadowlands bill was voted and passed without none of the amendments. And you're one of the witnesses, Mayor, from Ridgefield. The mayors were betrayed and no amendments were added, thereby informing the mayors to go straight to hell.

This is the reason for 20 years for Lyndhurst being a garbage dump instead of what Senator Dickinson said. If we work together, we can finally turn this wasteland of swamps, cattails, and worse into new parks, new roads, new tax income, and new prosperity for Lyndhurst and South Bergen. Now I say this: the Hackensack Meadowlands Commission -- we are not going to get rid of it, so forget about it. But what I say is there should be some changes. The Hackensack Meadowlands Authority law must be changed to have the maze and the fishhook of the 14 towns -- to be part of the decision making of the 14 towns. The Hackensack Meadowland Authority must change to force the Authority to put in the necessary roads, north and south and east and west. These roads were promised. And they didn't put one road in for 20 long years.

The Hackensack Meadowland Authority must be changed to have the Governor appoint a special DeKorte Park Commission to utilize the land for golf courses, an indoor ice skating rink to train our young people for the Olympics in 1992, and recreation for all the people in South Bergen. The Hackensack Meadowland Commission must be changed to stop dumping immediately and cart this garbage away so we can acquire good solid tax ratables. The Hackensack Meadowland Authority must be changed to put in a nursing home -- a combination of a nursing home/hospital facility. This is very important for our senior citizens and all the people in the South Bergen area.

The Hackensack Meadowland Authority must be changed to eliminate the Mayors' Committee which is so much window dressing, and to make this committee work on and with the Hackensack Meadowlands Commission. They have no authority whatsoever. No matter what they say, it doesn't mean a damned thing.

Now, just as recently as last week, I was at a Meadowlands Commission meeting, and Hudson County can dump in the bailer, but Lyndhurst can't. We cannot dump in that bailer. That mean all your towns here pay the high price and Hudson County is getting the low price. Now under what law? Who did this? I don't know whether-- By the way, did the Mayors' group okay this? I don't know whether they did? I don't think so.

Now when we talk about roads-- When I was an Assemblyman, I put the extension of 17 in for a vote -- 1967 right to 1968. You know who campaigned that night against that road going through? The Hackensack Meadowlands Commission. They blocked the extension. They were on the open floor. And one of our people, even Scardino, was talking about the fact -- 10 years, "We have adequate roads there." I don't know what town he's in? There's not adequate roads there. Our roads in Lyndhurst are jammed to capacity.

And let's talk about the authorities. You know, you in the past, make it an authority. Like they did the Garden State Parkway Commission. You're investing that right now. You've got to follow up what they're doing in that Garden State Commission. They put a cultural center in that was losing money for 10 years straight -- 10 years straight. That should be investigated. The Sports Authority -- they do what they want. Mara is the boss of all the State of New Jersey. This has to come to an end.

Now there's a highway out there -- Route 7. The people that live in the Kearny area-- The most disastrous highway in the county. You know where it is, Mayor.

MAYOR SANSONE: I certainly do.

MR. RUSSO: Highway 7 is a disaster. And what has the Hackensack Meadowland Commission done about that? Up to this date, nothing. I think for once and for all, I think this Committee should justify $1,600,000 in salaries of the Meadowland Authority, out there. That's what they get paid. I think it's a little bit more than that. I think you have to justify these salaries. I think they should be justified.

Lyndhurst, you might as well know the truth. It's taxation without representation. That is the way it's been for many years. And here we are, the Mayor of Lyndhurst just talked about-- Did we send something over there on what Belle Mead did? Did I send a picture of it along there? I don't know whether I did.

Well, Belle Mead has developed Lyndhurst. We did it ourselves. The present board of commissioners are doing a good job getting industry out there. We're stymied -- stymied to the point where we don't have a place to do anything, because they're loaded with garbage. And again, the Hackensack Meadowlands hasn't removed it yet.

This has been the biggest land grab in Lyndhurst in the history of America. It's almost as big as the land grab

when Seward bought Alaska. They have five-eights of our land out there. Sixty percent of the land of Lyndhurst belongs to the Hackensack Meadowlands Commission, and they're doing a terrible job with it.

Now let's talk about the DeKorte Park. The DeKorte Park was supposed to be put in there. The Governor of this State was down there. I was there. He talked about the State DeKorte Park. They did nothing about it. As I recommended here, we should have a park out there for the people in this area. What are they doing? They want to put in homes. We have enough homes. If you really want to spend money, go to Union City and build up those death traps. Do the people over there a big favor, instead of trying to put land out there. We got millions of people around that perimeter. Let's satisfy them with recreation, with hospitals, and something that's good.

I just want to let you people know that Lyndhurst is part of this United States; they're are part of the State of New Jersey. We're not being treated that way. The Mayor was right. We're being mistreated. We're treated like a bunch of animals down there. They put a new building up there, and they packed it up with garbage. And I've very thankful that you people are listening to this, because I think you ought to do something about it. Thank you very much.

SENATOR AMBROSIO: Thank you, Pete. Pete, I might just recommend to you that if you have any specific recommendations, in terms of recognizing our role as a legislative Committee-- Do you have any specific recommendations that you'd like to make to us in terms of the change in the law? We'd be happy to receive them.

MR. RUSSO: I just want to--

SENATOR AMBROSIO: Pete, are your through? Are you finished? Next, we have Ben Mastronardy--

MR. RUSSO: Senator, these are all the books on the Meadowlands at the very inception of it. Not one of these books talks about garbage in Lyndhurst. Not one of them.

SENATOR AMBROSIO: Okay.

MR. RUSSO: Can I have my pictures back?

SENATOR AMBROSIO: Yeah, they're back there, Pete.

MR. RUSSO: I'd like to attend those other meetings if you'd put me on the list.

SENATOR AMBROSIO: Sure. You'll be on the mailing list and you'll be notified.

MR. RUSSO: Thank you.

SENATOR AMBROSIO: Thank you, Pete. Mr. Mastronardy is the alternate to the representative of the HMMC from the Borough of Secaucus.

B E N J. M A S T R O N A R D Y: Thank you, Senator. What I'm going to do is just read a statement that relates to the tax sharing formula and the part that deals with the school payment. I find that it is faulty.

The tax sharing formula attempts to reimburse a municipality for the cost of new municipal school services. Now that expression, "new municipal school services," I borrowed from a 1972 report of the Hackensack Meadowlands Development Commission which analyzed the tax sharing provision in the tax sharing law. This new municipal school services is simply the per capita cost times the number of HMD or Hackensack Meadowlands District pupils exceeding the base year HMD enrollment. You can interrupt me anytime you want an explanation.

If, for example, the new school services amount to a million dollars, then the pool pays the municipality one million dollars. However, since payment into the pool is based on all HMD municipal revenues, then part of the payment into the pool is generated by the cost of the new municipal services. This part of the payment increases the costs in question -- the costs of the new municipal school services -- so as to make the payment out of the pool a partial reimbursement. My understanding is that it was supposedly a full reimbursement.

In the case of Secaucus, approximately $288,000 is paid into the pool for every $1 million for new school services. Thus, the new school services are actually $1,288,000 and not the $1 million calculated as reimbursement. This failure of the formula can be corrected by decreasing the total revenue raised in the comparison year by an amount equal to the school payment as currently calculated for that year.

SENATOR AMBROSIO: Mr. Mastronardy, have you discussed this with the HMMC people?

MR. MASTRONARDY: Well, Ms. Schak-- I'm glad you asked that. I should have said this.

SENATOR AMBROSIO: Let me tell you why. You're an alternate member there. Is that right?

MR. MASTRONARDY: Yes. And I don't speak unless the Mayor is not there.

SENATOR AMBROSIO: Okay. My concern is this, the Hackensack Development Commission does not, in any way benefit or lose by a change in the formula--

MR. MASTRONARDY: Right.

SENATOR AMBROSIO: --and my understanding is that they've always taken a neutral position with regard to the formula. All they are is the conduit for which these funds are channeled and redistributed. So, it seems to me that any change in that formula that the HMMC can support, would almost have clear sailing in terms of legislative initiative. I'm just going to make this suggestion that if there's a technical amendment in that formula that makes sense, I think you ought to address it first to the HMMC because that's where I would be looking for input as to whether or not that proposal is equitable as it applies to all of the communities.

MR. MASTRONARDY: Well, first I want to say, and I should have said this at the outset, that this idea did not originate with me -- about the discovery that there was this failing in the way the formula works. It was discovered by Ms.

Schak. She's here. So, she also mentioned it at the meetings, but nobody paid attention, because Secaucus is the only one currently involved in this school payment.

SENATOR AMBROSIO: Okay, go ahead You can go ahead, I just have to handle a phone call. Senator Cowan will take over for just a few minutes.

MR. MASTRONARDY: Okay. Well, I'll finish my statement. This failure of the formula can be corrected-- I don't know if I read this before. Did I read this part? I don't think I did. This failure of the formula can be corrected by decreasing the total revenues raised in the comparison year by an amount equal to the school payment as currently calculated for that year. The rest of the calculations would follow this deduction, and the school payment would then be a full reimbursement.

Anybody have questions? Do you have a question?

SENATOR COWAN: No. That's quite all right. No, I have no questions right now. Do you have some? Any questions at all? (no response) What I would ask though, is do you have a written statement on that?

MR. MASTRONARDY: Yes, I do.

SENATOR COWAN: Okay, would you submit it to the Commission, please? Thank you.

MR. MASTRONARDY: Thank you.

SENATOR COWAN: All right, next on our speaker's list is John Longon, Jr. Is that Longon, L-O-N-G--

J O H N L A N G O N, J R., E S Q.: L-A-N-G. Thanks, Senators. I'm here on behalf of Mayor Louis Tedesco, of the Borough of Little Ferry, and also on behalf of Mayor James (sic) Baeli of the Township of South Hackensack who was here but had to leave to attend a community development meeting; and Mayor Tedesco is involved in budget hearings which he could not take himself away from. But also I'd like to represent-- And I'm not here on behalf of the Borough of Carlstadt where I'm

also retained as the borough attorney-- I would never attempt to speak on behalf of Mayor Presto, since he does such a good job for himself.

But I'm here on behalf of the mayors that I've mentioned. We've had an opportunity to speak with regards to the report given by Margaret Schak, who's always another tough act to follow. And on behalf of the Borough of Little Ferry and Teterboro-- Excuse me. Strike that. Not today. On behalf of Little Ferry and South Hackensack, we'd like to address the questions raised by Margaret -- more particularly adopt the comments made on page six and seven by her.

With regards to that, there was one question asked by Senator Ambrosio in regard to the first comment of the extension of the 45-day period, and whether this would belabor the processing that Mayor Presto had indicated was a problem for developers. I would respectfully state the question that was raised by the extension of the 45-day period is not the problem that the developers have, but rather the inability of the HMDC to process their applications in a timely fashion, or pursuant to the Municipal Land Use Act since it's not applicable to the HMDC.

The HMDC takes their time as they see fit to hear an application, while we in the municipalities are under an obligation to hear it within a certain amount of days, otherwise it is deemed approved. Such is not the position nor is the responsibility of the HMDC. I believe, on the behalf of Mayor Presto, that's what he's addressing; that if in fact there could be some legislation imposed which places a time frame upon the HMDC on which to hear applications pending before them, in a timely fashion. That is, I believe, what Mayor Presto's request would be. The second point raised by Mrs. Schak is the clarification Uniform Construction Code and this Land Use Act as they interrelate between the various jurisdictions.

More particularly, on behalf of the boroughs that I represent, the question was raised as to who has the responsibility in regards to certifications of occupancy and also the fees that are generated by these building permits?

If you ask 13 or 14 building inspectors, you may come up with 13 or 14 different opinions as to who has the final say. Of course, representing the boroughs, it's our opinion that the CO should emanate from us since we're the ones who have the responsibility to service these particular buildings and are very concerned about the safety of them. So, I believe that the responsibility for COs and all the fees that are generated from the building permits should not be shared in any way, shape, or form with the HMDC; and we believe that could only be properly addressed through the administrative code and/or legislation.

I would stay away from question number three and agree with Mayor Presto with regard to special reasons. Once again, we believe the miscellaneous act should be applicable to all lands in the State of New Jersey, not exempting those found in the HMDC. With regards to the sufficient notice of the special meetings, we would also agree with the comments made by Ms. Schak -- which brings us to probably the most important issue that was raised by Mayor Baeli and Mayor Tedesco, which I was asked to address to this Committee, with regard to the representation of the working in concert -- as Margaret has put it. We feel that sometimes, this unfortunately is lacking.

Just by way of example, recently we received a notice from the HMDC with regards to April 20th's hearing concerning amendments to the HMDC district zoning regulations. Of course they were kind enough not to provide us with copies of the amendments which they are going to introduce, but rather refer us that if we see fit, we can travel to Lyndhurst to find copies which I guess we could then, under the Sunshine Law, make copies of.

But we think if one wants to work with the other, that providing us with copies of the notices and/or the amendments, would not be asking too much, and one would think, would be a service which is clearly within the ability of the HMDC to provide. Not to regurgitate the comments made by my high school classmate, Mayor Kaiser, but sometimes the insensitivity which is represented by the zoning which is dictatorial by the HMDC-- By way of example, we in Little Ferry and also in South Hackensack had recently requested that with regard to the waterfront recreation amendments that were adopted and which we approved -- that these would have an adverse impact upon those two municipalities. While not attempting to speak for Secaucus, Carlstadt, or East Rutherford, the other towns which were impacted, what they have effectively done in ignoring our request, either: 1) leave it alone, or 2) zone it to a more appropriate use such as parklands. They, in fact, allowed it now to be developed, or at least permitted it to be developed, for high-rises -- not high-rise, but for townhouses, which now has made it cost prohibitive for us to even contemplate condemning, say for parklands.

We had meetings. Obviously, they fell upon deaf ears. And we feel that if in fact the HMDC was concerned about what would happen, they could have taken appropriate action. In speaking to the 1972 68th legislation with regards to the concept of the proposals that, I believe, ex-Mayor Russo being a Lyndhurst resident all or most of my life, speaks to is the parklands, which dearly impacts on the heart of the people in Little Ferry and in South Hackensack.

The two constituents that I represent tonight is that -- we hear parklands, we continue to hear parklands, we heard the DeKorte Park -- I'd like to find DeKorte Park -- but nevertheless, we in my two towns had been promised parks. And instead of having parks, we have the bare property taken away from parks and made residential. We've been promised that

there will be parks in South Hackensack and Little Ferry since the inception of the HMDC. All we have is vacant property and open space. The way we define parks-- It's just open space, not a park.

Just briefly in closing on behalf of Little Ferry and also South Hackensack mayors, we would like to applaud the efforts made by Senator Ambrosio in the legislation, which he has introduced and is pending, with regards to the compounding effect which the HMDC supports. And also the HMDC, which is very interesting, since I may disagree with the comment made by Senator Ambrosio as to the only way, as a lawyer, that the HMDC can act -- is that, I believe, the appellate division has told the HMDC they should take out the compounding effect. We're litigating that in Newark right now, but nevertheless, with the legislation pending, maybe that litigation will be moved. We strongly endorse the legislation and the long overdue taking out of Teterboro.

And I would just like to, on behalf of Little Ferry and also South Hackensack, thank the Senators for taking the time out this evening and the other elected officials that have come here tonight. And I would also like to note for the record that both the Mayors have requested, if permitted by the Senate Committee, to submit written statements hereafter.

SENATOR AMBROSIO: Certainly, John.

MR. LANGON: Thank you.

SENATOR AMBROSIO: Okay. The last speaker that I have on the list is Nicholas Uliano from Lyndhurst. Is Mr. Uliano still here? (positive response)

N I C H O L A S U L I A N O: My name is Nicholas Uliano. U-L-I-A-N-O, and I'm a citizen of Lyndhurst. I'd just like to state here that I've been thoroughly embroiled in the resource recovery plant and the mounting garbage crisis for Lyndhurst since 1984. And I haven't stopped yet, and I don't think I intend to stop. I'm very happy to see so many people involved

in trying to solve the problem that besets all of the communities in this area.

In February 1985, I organized a meeting which was held in Lyndhurst, and at that meeting I invited Mr. Adam Stern, who's a staff scientist of the Environmental Defense Fund, to speak about the mounting garbage crisis that exists in Lyndhurst Meadowlands, as of February 1985. I might add that he knows nothing about resource recovery plants, although, he made one sentence in reference to resource recovery plants, in that they should exist near an area so that its ash could be sent to the landfill close by. And that was the only thing. His entire presentation was about the mounting garbage crisis that existed in Lyndhurst Meadowlands at that time and continues to exist today, and there doesn't seem to be any solution in sight.

The Environmental Defense Fund issued a report about the mounting garbage crisis, I believe about 125 pages -- both sides. And I gave a copy of that report to the Department of Environmental Protection in the hands of Mr. Albert Montague at his hearing on December 18, 1986. That same report was given to Mr. Daniel Montella and also John Zammit (phonetic spelling) of the Army Corps of Engineers at their hearings in Ridgefield and Palisades Park.

If the HMDC were to dissolve itself as of midnight tonight, you'll see the mayor hastily call his commissioners at a meeting tomorrow morning, and Lyndhurst would solve the garbage crisis of Bergen County; thereby saving it and the county and the State millions of dollars. This is a fact that many of us here tonight agree on, and we're looking for means to do it.

The HMDC is not performing its functions as glorified back in the days of the early '60s, because the men in those days had dreams and they envisioned things that could never exist on the kind of land that is there today. Many people who

have homes built on land-- We are now witnessing many articles in the newspaper, Montclair is one, about the radon, things that exist deep down in the land that people don't know about that surface, to become a threat to human life.

These are the things that the people in the early '60s did not envision, because they wore rose colored glasses. That is the reason we're here tonight, to take those glasses off and look at the real threat that could exist to the people of the future. We do not wish to bestow that legacy onto those people tonight.

The Bergen County Utility Authority conducted a survey because they really thought the 25 acres that exist in Lyndhurst, on which they had their sights on for the resource plant, would be theirs with no trouble at all. A half a million dollars of Bergen County taxpayers' money was spent on that survey. I'd like to see the HMDC refund that money to the BCUA.

They had men out there running around within eyesight, and with the permission of the HMDC, making their land surveys, making their land sampling, making their borings with helicopters flying about taking aerial photographs, and not once was the BCUA ever threatened or stopped by the HMDC. They just went ahead. They got the go-ahead, and they did it.

But when BCUA submitted their application for the right to build that plant, their throat was cut. Their nose was put into the dirt. Those men went out of that hole, that meeting room, I would say, with their tails between their legs. It was such an embarrassing moment for them.

The 13 communities, as far as I'm concerned, I don't think they're interested in the tax sharing pool. They're interested in the elimination of the HMDC because with the elimination of the HMDC, land use control of their land would be returned to the communities for the proper development without any interference from anybody or any State organization

or any national organization of any type, of any kind. And this is what the 13 communities are after. I don't say 14, because I don't consider Teterboro in this matter at all. This control would be returned not only to Lyndhurst, and they are really working hard to do so, but also to Rutherford.

I don't feel that Teterboro will ever be eliminated from the tax sharing pool. Never, because its very existence would have to be redefined. It's there. In order to eliminate something, you have to redefine its meaning -- its very existence. And that you could never do. The reason I say that is because Teterboro is so entrenched in politics on the county level, on the State level, and on the national level. I found that out.

For this Committee, or any committee, to convince the New Jersey Legislature -- and that's where it has to come from -- to redefine and possibly eliminate the HMDC and/or Teterboro, in that order, to me would be the miracle of the century. Thank you.

SENATOR AMBROSIO: Thank you, Mr. Uliano.

L E E P A C I F I C O: Senator Ambrosio, may I say something? I won't take long.

SENATOR AMBROSIO: We have an added speaker. Lee Pacifico has asked to make a statement. Why not?

MS. PACIFICO: Thank you for giving us the opportunity to speak tonight, Senators. My name is Lee Pacifico, and I represent a newly formed organization in Lyndhurst, the Lyndhurst Taxpayers Association.

Under the guise of orderly development for our Meadowlands, a State bureaucracy, the HMDC, was formed some 20 years ago. Since then Lyndhurst has had nothing but grief from this organization. Lyndhurst has one of the best office complexes in the State; no thanks to the HMDC, although they take credit for it. Actually it was begun by the Belle Mead Corporation. They were true pioneers.

The creation of the New Jersey Sports Exposition, the Brendan Byrne Arena, has wreaked havoc in our area. Highways Route 17 and Route 3 feeding into our town, are clogged with the patrons of these establishments, and Lyndhurst residents at times find it difficult to enter or leave their own town.

The HMDC has promised roads to relieve the situation, but that hasn't happened. The HMDC has zoned 200 of our acres -- approximately 200 -- for housing; and approximately 400 for DeKorte State Park. We object to the housing, as it definitely will be an added expense for the town as we will need more policemen, more firemen, and possibly a new school. We feel that the land could best be used for more industry with higher ratables.

As for the park, that land, 40 valuable acres were stolen from Lyndhurst, with the excuse that it could not be built upon. We don't want a park there. I formally worked in New York and I remember what happened to those parks. They are a complete mess today. So, despite what Mr. Russo has to say, I feel we should not have a park there. I'm thinking what would happen in the future to it.

MR. RUSSO: I'd like to rebut that.

MS. PACIFICO: Okay, Pete. The same was said for the Meadowlands. They said we couldn't build upon it. But baby, look at it now; very valuable land there. I believe we could have ratables in the form of industry there also. The garbage crisis has been discussed over and over, but I will repeat: Since the garbage trucks are using our roads for the transfer station in North Arlington, Lyndhurst should be paid for this service.

The latest insult by the HMDC was the granting of permission to Hartz Mountain to build a 14-story hotel in Lyndhurst. This was done, from what I understand, without the permission of our board of commissioners or our township engineer. Now Lyndhurst fire trucks cannot accommodate

buildings over five stories high. So, this is dangerous for our firemen and for the hotel's guests. We don't want high-rises in Lyndhurst. We don't want a city.

More and more we are seeing the death now of home rule. A very sad thing. Pete Russo brought out the fact that the HMMC -- the Mayors' Committee -- doesn't have any clout. This is so true. But neither do our boards of commissioners of each town. They must follow the mandates of the State, no matter how bad or how costly they are for the town.

Our legislators in 1969, Senator Dickinson, etc. created this HMDC monster, and we are living with it now. However, let's try to change this monster by allowing the mayors of each town to be a part of the decision making process. Pass a law to that effect now. I thank you.

SENATOR AMBROSIO: Thank you, Lee. That concludes the speakers that we have for this evening. I would just like to make the following observation. A number of the concerns that were addressed here this evening, literally, this Committee, more the Legislature, has the power to address. I'm reminded of the remark that sticks in my mind the most: It's Pete Russo's, in which he says that we're not going to eliminate the HMDC. And that's clear. So the answer to some of the concerns that were expressed here is, since we're not going to eliminate it, let's see if we can make it the best HMDC we can make it.

And my suggestion is we focus on the concerns that you've addressed here; that there would be greater dialogue, both between the HMDC and the HMMC and the individual municipalities, and that we start looking at the individual problems that were addressed here. I'm going to invite all of the people who addressed this Committee to submit whatever comments they feel they want to. If you want to rebut anything that was said, Pete, you go right ahead and do it. We're going to look at it.

And I also invite the staff of the Hackensack Meadowlands Development Commission to address some of the concerns that were expressed here tonight, and make any recommendations that they see might be appropriate to address those concerns. I want to thank everybody for coming here this evening. We will continue keeping these meetings public and advising you of additional meeting dates. The meeting's adjourned.

(HEARING CONCLUDED)

APPENDIX

Paul Amico
Mayor

Municipal Government Center
Secaucus, N. J. 07094
201 330-2005

May 11, 1988

Senator Gabriel M. Ambrosio,
Chairman
New Jersey State Legislature
Hackensack Meadowlands Development Task Force
State House Annex, CN-068
Trenton, New Jersey 08625

Dear Senator Ambrosio:

Following are my comments regarding the Hackensack Meadowlands Development Commission's legislation that I said I would forward. I am mainly addressing the tax sharing formula because it is the most important part of the legislation that we in Secaucus are concerned about.

I am very pleased that this legislation is being reviewed and that steps are being taken to amend it. You, and the Members of the Committee, are to be complimented for your interest and concern.

Although, I was strongly opposed to the legislation that created the H.M.D.C., I am not a critic of the Commission or its staff. I am, however, very critical about the legislation as it pertains to the tax sharing formula.

At present, through legislative channels, five items are being considered for formula revision that affect tax sharing to one degree or another. They are:

1 - Retention or more than 50% of taxes.

2 - Removing Teterboro from the tax sharing formula.

3 - The compounding or "double whammy" effect.

4 - Money lost by a municipality on court-delayed tax appeals.

5 - The certification of the number of school students.

/x

TO: Senator Gabriel M. Ambrosio, Chairman
Hackensack Meadowlands Development Task Force

In addition to the above, the severe penalizing financial effect that results from a community's tax rate being increased must surely be corrected. Under present tax sharing, if a community improves and upgrades through bonded capital expenditures and by providing good municipal services, the resulting tax rate increase causes higher tax sharing payments. (In the past five years, more than seven and one half million dollars were paid by Secaucus in tax sharing). Were we not making capital improvements and providing good municipal services, Secaucus' tax rate would be lower and our town would pay much less in tax sharing. Our Tax Assessor, James Terhune, made a calculation (see attachment) showing that Secaucus would have paid $462,119.00 less in our last tax-sharing payment if our town and school budget combined has been $1,770,711 lower.

Should a community have a serious flood or fire, or other disaster and was required to spend large sums of money, its tax rate would be increased and its tax sharing payments would go up, while the tax sharing receiving communities would benefit. To include the tax rate in the formula makes an already bad and unfair situation worse.

The present formula does not really share rateables in reality it is sharing tax dollars instead. One way to correct this (so that the rateables are shared by all the municipalities) is to have one tax rate such as an average weighted tax rate for all of the communities in the district. In that way a rateable created in the Meadowlands area would put into the pool the same amount of dollars whether in Jersey City or Carlstadt. This also would have a relationship to the way money is taken out of the pool.

The present formula is intended to reimburse communities for the cost of educating each additional student that is added to the district. However, as pointed out in a statement submitted at one of your meetings by Ben Mastronardy, my alternate to the H.M.D.C., the reimbursement is not full. (See his statement attached).

Our state has excellent guidelines for municipal tax assessors and revaluation companies, all of whom must be certified and and who must consider a number of factors, such as recent sales, age, size and condition of the building, rental income, etc, etc before arriving at an assessment on a building or property in order to bring about equitable assessments.

2x

TO: Senator Gabriel M. Ambrosio, Chairman
Hackensack Meadowlands Development Task Force

If it's the state's goal to compensate communities which have zoning that is less productive tax-wise than others, it should be done equitably and with meritorious guidelines that are at least as good as those required for assessing.

I also believe that legislation should require that money coming into a municipality from in lieu of tax payments, tax abatement agreements, gross receipts, etc, be treated as taxes and be included in tax sharing.

Regarding the "special reasons" situation, I am in favor of giving the H.M.D.C. this authority. I believe their not having it is simply an oversight by the legislature. Municipal officials are advised whenever a "special reasons" application is made and they would have ample opportunity to have input, either in writing or by attending and speaking at the hearing. It does not make sense for the H.M.D.C. to have zoning powers that supercede those of the municipalities and not have the "special reasons" authority.

Sincerely,

PAUL AMICO,
Mayor
Municipal Government Center
Secaucus, New Jersey
07094

PA/lb
Attchs. (2)

CC: Senator Paul Contillo
New Jersey State Legislature
Hackensack Meadowlands Development Task Force
State House Annex, CN-068
Trenton, New Jersey 08625

Senator Thomas F. Cowan
New Jersey State Legislature
Hackensack Meadowlands Development Task Force
State House Annex, CN-068
Trenton, New Jersey 08625

Senator Gerald Cardinale
New Jersey State Legislature
Hackensack Meadowlands Development Task Force
State House Annex, CN-068
Trenton, New Jersey 08625

3x

TO: Senator Gabriel M. Ambrosio, Chairman
Hackensack Meadowlands Development Task Force

CC: Senator Henry P. McNamara
New Jersey State Legislature
Hackensack Meadowlands Development Task Force
State House Annex, CN-068
Trenton, New Jersey 08625

Amy E. Melick,
Deputy Legislative Counsel, Central Staff,
New Jersey State Legislature
Office of the Legislative Services
State House Annex, CN-068
Trenton, New Jersey 08625

Mayor & Council
Town of Secaucus

James C. Terhune C.T.A.
Tax Assessor

Municipal Government Center
Secaucus, N.J. 07094
201 330-2030

March 28, 1988

Memo to the Mayor:

Total taxes collected for 1986

$28,489,415

Total payment to the H.M.D.C. in 1988

$2,361,121

If the total taxes collected were to be reduced by 1,770,711 this reduction is 10% of the local Government and local School portion of the tax rate only for 1986 and not reducing the county portion of the tax rate.

"RESULTS" payment to the H.M.D.C. becomes 1,899,002 a savings of 462,119.

Jim

5X

THE SCHOOL PAYMENT

The tax sharing formula attempts to reimburse a municipality for the cost of "new municipal school services"* (This is simply the per capita cost times the number of HMD pupils exceeding the base year HMD enrollment).

If, for example, the new school services amount to $1,000,000, then the pool pays the municipality one million dollars. However, since payment into the pool is based on all HMD municipal revenues, then part of the payment into the pool is generated by the cost of the new municipal services. This part of the payment increases the cost in question so as to make the payment out of the pool a partial reimbursement.

In the case of Secaucus, approximately $288,000 is paid into the pool for every $1,000,000 for new school services. Thus the new school services actually cost $1,288,000 and not the $1,000,000 calculated as a reimbursement.

This failure of the formula can be corrected by decreasing the total revenue raised in the comparison year by an amount equal to the school payment as currently calculated for that year. The rest of the culculations would follow this deduction and the school payment would then be a full reimbursement.

* Oct. 1972 report of HMDC analyzing the Tax Sharing provisions in Article 9 of the HMDC & Reclamation Act.

B.J. Mastronardy
700 Golden Avenue
Secaucus, N.J. 07094

March 30, 1988

6X

THE SCHOOL PAYMENT

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B.J. Mastronardy
700 Golden Avenue
Secaucus, N.J. 07094

March 30, 1988

** Hack. Mead District

7X

Porro and Porro
Attorneys at Law

ALFRED A. PORRO, Jr.
JOAN ATKINS PORRO
BEVERLY M. WURTH
JANET PORRO COPPA

10 Stuyvesant Avenue
P.O. Box 357
Lyndhurst, New Jersey 07071
(201) 438-1923

March 30, 1988

Senator Gabriel Ambrosio
464 Valley Brook Avenue
Lundhurst, New Jersey 07071

Dear Senator Ambrosio & Committee,

Unfortunately, I have just had some oral surgery and will not be available to make a presentation at your hearing tonight. I am submitting a report which is in rough form which catorgizes various areas of power and interrelationships of the HMDC. This is being undated and refined for a publication at Columbia University. I am hopeful that the research and insights in this presentation will be of aid to you. It also makes comparisions to the Pine Lands Act and its structure and other similiar regional bodies throughout the United States.

Respectfully submitted,
PORRO AND PORRO

ALFRED A. PORRO, JR.

AAP/rb

enc.

8X

DISK #2 INSIGHT 1

INSIGHT TO THE TIDAL TITLE: GENESIS TO REVELATION

> "Let the waters under heaven come together into a single mass, and let dry land appear." And so it was.[1]

I. A SYMPOSIUM OF LAW, SCIENCE AND TECHNOLOGY

A. Prologue

It was on the third day. Darkness, light and the sky preceeded. The Lord blessed mankind with precious sources of food, travel and shelter. And it was good. A gift that has maintained its mystery for law and science. A treasure that has seen war and peace. An experience that has instigated many a thought process from darkness to revelation.

Since Genesis water has represented the "state of affairs before chaos was reduced to order and things achieved fixed form."[2] For about as many years law and science have been competing to reduce, or a lest understand and regulate the chaos of the coastal area where this land and this water meet. Both disciplines have developed their own arsenal of information and rules over the centuries. As one can find a respect of law and science throughout the beautiful Bible passages; these fields in this challenging and complex society today "can nourish reverence for many positive values."[3] Today the challenge of the inter-section of water and land in the coastal and esturine zone

9x

This need is revealed in this Symposium addressing the title to land dilemma created by the tide of the water. The recent emphasis on the value environmentally, economically and commercially of the coastal zone of this country has highlighted the need for mutual understanding between science, technology and the law. This Symposium is a step toward mutual communication. Along with this emergence of water-land areas as a vital parameter of our social structure came an onslaught of interpretation of old laws and the creation of new ones effecting and regulating it. Many of the new laws were the result of the research of the scientific world. And the drafting product of the world of jurisprudence. On the other hand, many of the old laws, primarily the product of an archaic legal system have been applied by way of modernistic proofs coming from a super world of science and technology. Here in this program the coastal zone provides a new revelation of the confluence of law and science. It is an ideal site for the merging of what appears to be a "growing partnership."[4] Here both professions are striving to communicate with each other in their own language, through working and studying together. The tidal title posses the challenge to this "juriscience." The world of philosophy can view this experience as uniquely phenomenological.[5] This experience is indeed an important search. It is a prologue to revelation. Indeed "the poverty of man's understanding is spendthrift of words, because searching speaks more than does finding . . . ".[6]

B. The Symposium

Throughout the coastal areas of the United States there exist countless areas of wetlands, marshes and water inundated lands[7] that have "clouded" titles. Lands within the ambit of this cloud are those adjacent to water where this is inundation by the daily ebb and flow of the tide. These areas are typically in a estuary, tideland flats, marshland, shore or riverbank.[8] In view of the tremendous title dilemma spreading throughout the coastal areas of the United States this program was born. The sperms and the intercourse of law, science and technology will address many of the vital areas necessary for insight. The

simple legal proposition that all the lands lying below the mean high water line of a watercourse belongs to the sovereign will be the focus. During recent decades, the question of

ownership and rights in property adjoining waterways, rivers, bays, oceans and marshes have come an extremely controversial subject. Most coastal states have been asserting their right of ownership. Much of the controversy centers around locating the present and the former mean high water line. This then is the essence of this Symposium.

The historical perspective of this public trust doctrine will be discussed. An overview and specific investigation of its impact on the various states will be presented. The "State of the Art" in locating this line in the various states will be communicated. The experience of various states will surface as horizons of insights to others. The

federal prospective and its desire for some standards of uniformity amongst the states is declared.

The simple legal proposition converts into a complex interdisciplinary challenge in application. The tidal title boundary at this point loses all respect for legal doctrine. The program will provide a forum for the exchange of updated and refined techniques for establishing this boundary. In the forefront will be the surveying profeesional. Related subjects such as tidal datum, photogrametry, hydrology, computer modeling, marine biology and environmental indicators will be explored.

To the end of stimulating the start of a continued dialogue this Symposium does devote itself. To the end of the creation of a vehicle to aid this purpose -- this Symposium proposes the creation of A Tidal Title Institute.

II. DILEMMA: A TIDAL TITLE TRUST PHENOMENA

A. Common Law, Public Trust and Development

Throughout the United States, many properties now or formally touched by the ebb and flow of the tide are automatically owned by the sovereign state in which they are located. Title ownership in such coastal and marsh areas is dictated primarily by ancient common law and not centuries of record ownership. The common law created a sovereign interest in tidelands which has been interpreted to supercede record ownership. The doctrine is clear; its application is a tidy mess. Although only recently at the doorstep of the practicing attorney it is not new. It can be traced to early

Roman origins, through its modifications under the English law to early treatment by the various state and federal courts in the United States. When our forefathers came to the United States, they brought with them the traditional notions of the public trust doctrine. The King and now the various sovereign states have a title interest in tidal areas which it holds as trustee for the public.[9] All lands that are touched by the ebb and flow of the tide, lying below the mean high tide line of the water course of coastal shore have for centuries been deemed to be vested in the sovereign. This legal doctrine emerged from the ancient concept that the king had the right of way, an incorporeal hereditament, to all navigable streams and waterways. The theory underlying this doctrine was the protection of the public interest in fishery and navigation.

The first famous case in the United States on this subject is the Martin v. Waddell's Lessee,[10] it had its origin in New Jersey. Thereafter, the doctrine has been developed by many state court opinions and incorporated in much of our legislation.

Today, every inch of shore, marsh, meadow and estuarine areas are the subject of title challenge. In New Jersey the boundary between the sovereign and private property interest is the mean high water line. The scientists and the techno logical specialists provide boundless data and methods for use in proving the location of this tidal title boundary.

Legally, however, the tidal boundary line often disappears and becomes a "invisible boundary."[11]

On the other hand, record ownership of approximately three centuries can be traced in most of the original colonies, including New Jersey, back to the initial Kings grants.[12] They too disappear in significance in many situations.

Some state's have held that the navigability of the watercourse is immaterial, so long as the watercourse was ebbed and flowed by the tide.[13] In other states where navigability was once a factor, such as in Georgia[14] navigability has been emphasized by the legislature.[15] Some states utilize the mean high water line[16] and some states use the mean low water line as the boundary;[17] others vary slightly.[18] In any event, the area effected by this tideland's doctrine is typically the estuarine zone including its estuary, tidal flats, marshland and upland.

For many decades the court's restricted the application of the doctrine to areas within the boundaries of water courses, such as oyster beds, waterfront areas and the like.[19] However, the last few decades, as the world of science implicitly demanded further means of protecting marshland areas the application of the doctrine has become much broader. It has been applied to the heavily vegetated marsh area under the same public trust doctrine.[20]

SEE INSERT FOR NEW SECTION B.

1. The New Jersey Experience

A. A State-Wide Problem

New Jersey is a state that has had much experience in locating the invisable boundary in coastal, bay, river and marsh areas. Much of this experience comes as a result of unsuccessful and frustrated attempts. Yet, it certainly provided a valuable lesson for other state programs. To the private proprerty owner it provides a backdrop of pitfalls or backdrops of pitfalls to be aware of.

In the decades of the 1960°s, the State of New Jersey did engage in combat with thousands of recorded and previously recognized titles to marshland.[2] The landmark case of O°Neill v. State Highway Dept. of New Jersey[25] set things in process. The court directed the state to cata logue its holdings. For many decades state courts had previously restricted the application of the tideland°s doctrine to areas within the boundaries of recognized watercourses.[23] However, in 1959, the doctrine was utilized to capture untold areas of marshes and meadowlands. In the case of Sisselman v. State Highway Dep°t.,[24] a record property owner of meadowland, seeking to outbluff the state found himself unprepared for the knockout punch. Jerome Sisselman, being dissatisfied with the state°s offer of payment for the property taken for highway purposes in the Meadowland area, did not give heed as the state under its sovereign powers might be the owner of the premises. It

was ultimately so held and the meadowland extension of the tideland doctrine was born.

Initially the meadowland title dilemma was not acknowledged as a statewide problem; it was believed to be limited to the area of its birth - the Hackensack Meadowlands. However, as the years marched by its application spread throughout the State. The State of New Jersey has approximately 244,000 acres of tidal marshland. This acreage presented unique title problems in that they all eventually became subject to the sovereign claim of title by the State of New Jersey. The history behind the evolution which has now forced two statewide constitutional referendums follows, one successful and one unsuccessful:

B. The Hackensack Meadowland Experience

For more than two decades the Hackensack Meadowlands, consisting of approximately 22,000 acres, has been saddled with a unique title problem. Titles to many thousands of acres in the area are clouded by an application of what has become known as the "tideland doctrine."

In New Jersey, King Charles granted to James York on March 20, 1664, all of the area which today we know as the Hackensack Meadowlands.[26] Although this initial grant very clearly conveyed all of the rivers and waterways, it has been theorized that it did not eliminate the sovereign interest of the public to utilize the waterways for navigation and fishery.

With this backdrop, the first few centuries after the initial coveyance remained peaceful with an uncontroversial understanding of the doctrine. However, after the Sisselman decision, absolute chaos resulted. The extension of the doctrine to massive acres of marshland areas, although initially of a soft impact has been a crescendo to its present state of forte.

As the early years unfolded, many property owners experienced the cruelty of the doctrine. Progress brought the necessity for more highways thus more properties were taken without payment to property owners. Property owners desirous of building, selling or mortgaging rushed to the state capitol to obtain what became known as riparian grants or quiet claim deeds to clear their particular meadowland of any such cloud. Title insurance companies, property owners and the State of New Jersey began the long journey of investigating and pursuing methodologies to either contradict or to establish the claim, wherever the interests may have fallen.

As the years progressed, it became evident that the problem was more factual, historical and scientific than legal.

The factual challenge for both sides became the ability to establish the "invisible boundary," i.e., the mean high water line as it related to any particular piece of property.[27] Further complication existed since one must not only establish the location of the present line but

also that of the former line. Since this line was one of scientific phenomena, legal genius and instrumentalities were frustrated.

Scientifically, the mean high water line was keyed to the tide. The tide had many aspects, types and variables. It was affected by nature, i.e., wind, rain, the sun and the moon. It was also affected by historical man-made artificial change, such as the mosquito ditches, dredging throughout the centuries in the Newark Bay and Hackensack River canals, dyking, and by thousands of yards of fill brought in for the highways and private development. The history of the area became of crucial importance. Wrestling matches began between three disciplines, i.e., the law, science and history.

c. Tracing Two Decades

Ultimately the Hackensack Meadowland Reclamation and Development Act specifically addressed itself to this problem and directed the state to catalog its interest in these areas. Under the Act the State prepared a series of maps which ultimatley were published and were designated the State's tideland claim.[28] The provisions for the disposition of conflicting claims between the State and private persons to tide-flowed lands has been held not to constitute an unlawful delegation of a judicial function to the executive.[29]

The criteria and standards for fixing the mean high water line in the Act has proven insufficient indeed. The administrative agency was merely given the direction:

> "To take into account the mean high water line as established by the United States Coast and Geodetic Survey, the nature of the vegetation thereon, artificial changes in land or water elevation, and such other historical or scientific data which, in the opinion of the counsel, are relevant in determining whether a parcel of land is now or was formerly flowed by mean high tide."[30]

This language, was declared at an early state of the Act. It must be read against the backdrop of the legislative history which preceeded the Act and the judicial mandates subsequent thereto. After the initial utilization of the tidelands doctrine in the late 1950's, many attempts at resolution have been made by both property owners and the State of New Jersey. The Sisselman decision became a recorded reality of the infamous day of March 14, 1960. Since then five major occurrences have left their impact along the path of resolving this tidal phenomenon causing the title dilemma. They are: (i) the 1962-64 U.S. Coast and Geodetic Survey mapping program; (ii) the O'Neill decision of 1964; (iii) the "gray and white maps" of 1969; (iv) the 1974 State's quadrangles and overlays; and (v) the present battle of constitutional referendums.

(i) 1962-1963 U. S. Coast and Geodetic Survey

In 1962, the United States Coast and

Geodetic Survey was commissioned by the State to establish the mean high tide line for the Hackensack River and its tributaries (the line of intersection of mean high water with the ground). The project was extended over a period of nearly two years from the beginning of tide observations on the Hackensack River in the Spring of 1962 to completion in early 1964. Upon completion of the project, a report and a series of maps were submitted which clearly defined and designated the present mean high tide line in many areas. However, the survey demonstrated that other areas could not be so designated without extensive and extremely expensive supplemental techniques and reports.

(ii) The O'Neill Decision

On November 6, 1967, the New Jersey Supreme Court, in O'Neill v. State Highway Department,[31] established the basic rules that would be followed in New Jersey regarding the application of the tidelands doctrine. First, the court restricted the sovereign claim to the area within the mean high tide line boundaries of a given watercourse. Secondly, the court clearly denounced the previously attempted "elevation" test and adopted the "tidal boundary" line test. Under the former test, the State did not limit its claim to the boundaries of the watercourse as designated by the mean high water line. Rather, it claimed any upland property which was at the same elevation as, or on an elevation lower than, the mean high tide line. This caused absolute havoc to lands miles away from the watercourse which were of an

elevation lower than that of the mean high water line of the tributary. Third, the court recognized the Coast and Geodetic Survey of the United States (now the National Ocean Survey) as the most authoritative source of the subject of tidal boundaries. Lastly, the court dealt with the most important aspect of the problem; the burden of proof. Recognizing the complex problem created by artificial changes, the burden of proof was placed upon the party attacking the "existing scene" of any given premises.

The Supreme Court in O'Neill was very emphatic that the State should systematically commence the cataloging of its claim in such areas.

(iii) The "Gray and White Maps"

Following the decision in O'Neill, the State legislature attempted, by the passage of the Hackensack Meadowlands Reclamation and Development Act, to provide a solution. The Act required the State to commence studies and ultimately issue a map which would designate State-owned lands and in doing so to consider various scientific, histor icial and U. S. Coast and Geodetic sources. Ultimately, the State issued what was labeled Part I and Part II of Maps entitled "Hackensack Meadowlands" which became known as the "Gray and White" maps.

By the painting of large areas in gray as contrasting to other areas in white, the State attempted to follow the statutory mandate in depicting alleged State-owned lands. However, it ignored the methodology designated by the

legislature as to how the same is to be derived. Finally, in 1971, in the case of State v. the Council in the Division of Resource Development,[32] this first of the contemplated series of maps was suppressed, due to its "not having been prepared in accordance with the legislatve directions." Therefore, these maps not being of evidential value, were worthless relative to the issue of ownership. Ironically, the maps still remain recorded as a cloud to title in the Court Recording Offices in both Bergen and Hudson Counties.

(iv) Recent Quadrangles and Overlays

After the demise of the "gray and white" maps, the State returned once again to the drawing boards; this time with a substantial appropriation. A dedicated staff in the Department of Environmental Protection embarked upon the institution of extremely creative and novel techniques which were never attempted before in the halls of title archives. The technique found as its prime source of innovation a new biological approach. Aerial infra red photography was taken throughout the Hackensack Meadowlands area. Through a process of aerial interpretation, signature tones for various vegetation were established. The prime species found throughout the area was the dominate plant phragmites, more popularly knows as "cat tails." Within this species the State attempted to establish three color tones and relate them to their title claims.

In the area that had already had improvements which prevent the vegetative approach prior to the

aerial photography, the State primarily relied upon a two-fold technique; the first of which is historical. Historical maps and photography were utilzied in these filled areas. Attempts were made to retrace old creeks that no longer existed. Secondly, some areas were claimed by analogy to the nonimproved areas, in the same approximate proportions and percentages found therein.

As to the validity of the maps generally, a monstrous resort to the judicial system was sought by numerous property owners. All of these cases were ultimately consolidated into a lead case which is presently known as The City of Newark, et als, v. The Natural Resource Council, et al.[33] Commencing in March, 1976, extensive expert witnesses were paraded to the witness stand by the State of New Jersey and by the opponents. The trial finally terminated in October, 1976, after many days of testimony, numerous exhibits and many various experts' testimony. One of the consolidated cases, namely the New Jersey Sports and Exposition Authority v. Borough of East Rutherford,[34] was utilized as an experimental case as to the application of the techniques and contrary proofs of a particular piece of property in a quiet title action. The testimony and proofs in that case continued into March 1977. Thus, the City of Newark case involved the issue of the reasonableness of the administrative techniques utilized by the State in issuing the maps generally. The East Rutherford case involved the application of the par-

ticular techniques to a particular piece of property when confronted with contrary proofs by a property owner on that property. In City of Newark the State was successful; in the Borough of East Rutherford case it was unsuccessful.

d. Judicial Interpretaton of the Legislation

Since the passage of the act extensive litigation has occurred which has basically fallen into two categories. One group of cases addresses the mapping aspects of the act, namely its validity and effect. The other gorup of cases addresses the administrative solution provided for in the act. In addition to directing the catalog of the State's interest the act attempts to provide an administrative remedy for persons aggrieved. Such a property owner may file with the Tideland Resource Council "pertinent information, maps, studies or other matters documenting his claim of title."[35] The act provides that the Council shall then either determine to issue a statment or quietclaim deed indicating that the State has no interest or that it is releasing its claim, or reaffirm that all or part of said property is or may be stated owned.

(i) Validity v. Conclusiveness of Maps Published Pursuant to the Act

The Tideland Resource Council, in its latest maps, indicated meadowlands to which the State claimed riparian ownership, and marked off some of those lands with a "hatched" symbol to indicate that the State may have an interest in these areass. Ultimatley the percentage owner-

ship was claimed in such areas on the allegation that they represented mixed ownership between the sovereignty and the private title. In The City of Newark v. Natural Resource Council in Deparmtnet of Environmental Protection,[36] this procedure was struck as it was not in accordance with the statutory direction. The court held that the legislature directed that the map portray results of a study of ownership of riparian lands and "clearly indicating" those lands designated as State owned. The term "clearly" was deemed to mean visibly, unmistakably, and in words of no uncertain meaning. Thus, an unambiguous delineation was deemed to be the legislative intent. The "hatched" designation frustrated that statutory purpose and the State was directed to define its interest in unequivocal terms. After extensive delays and many subsequent court hearings those areas were ultimately redelineated.[37]

The "clearly" designated areas, however, by no means put to rest the problem. Two major cases addressed the two vital issues. In the City of Newark case the issue of the general validity of the State's maps addressed. Was the legislative direction followed by the Council? On the other hand in the case of New Jersey Sprots and Exposition Authority v. Borough of East Rutherford,[38] the issue, assuming the validity of the maps, relates to the effect of the maps on a specific property. This case was a basic quiet title action. Under the Act neither the publication of the map nor the provision for administrative remedy forecloses an

aggrieved property owner from seeking and commencing an action to quiet title.[39]

In the City of Newark case the challengers presented extensive testimony which primarily attacked the methodology utilized by the State in setting forth their claims on the title maps. The scientific invalidity of the State's botanical approach is the prime subject matter of the attack. The State attempted to establish a mean high water line in the Hackensack River marshes by way of a botanical delineation. Recently a New York court of appeals in 289 Dolphin Lane Associates v. Township of South Hampton,[40] refused to accept an alleged vegetation line even though the court stated that this "new technology" may be "intellectually fascinating." The New York court viewed the approach as scientifically untested and thus legally unacceptable. The State of New Jersey in its attempt to claim ownership to marshlands has used this novel biological approach. Aerial infra red photography was taken throughout the Hackensack Meadowlands area followed by a process of aerial interpreta tion of signature tones to establish various vegetative types. The prime species found throughout the area was the dominant plant phragmites. Within this species, the State attempted to establish color tones and relate them to relative title inundation. It then alleged that it could establish for purpsoes of title delineation a botanical line.[41] In the City of Newark case it was the State's basic contention

that this approach is not arbitrary and capricious and in accord with the statutory direction. It should be pointed out that the issue here was merely the validity of the maps and not the impact or weight of that map as it relates to a particular piece of property. That was the issue in the Borough of East Rutherford case. In that case the Municipality established by way of conventional surveying methods a mean high water line which substantially conflicted with the botanical line of the State.[42] Utilizing title data collected in accordance with the National Ocean Survey methods and standards, the Municipality proceeded to establish its line through the most updated surveying techniques. Thereafter the line was verified by collateral tachniques including aerial and ground observations on the premises. The State, on the other hand, contended that the built in tolerances in the conventional surveying methods and in the National Ocean Survey standards and techniques should render the property owner's line invalid as against the botanical line of the State. Thus, the issue very clearly placed the two methodologies at odds with each other.

It should be noted that even though the State's action in mapping may ultimately prove erroneous, no liability will result. In Meer Corporation v. State of New Jersey,[43] it was held that the State is legislatively immune from actions of slander of title. Recently, in the case of Bergen County Associates v. State of New Jersey,[44] this earlier decision was reacknowledged.

(ii) Administrative Discretion and Commitment

The courts have had the opportunity to address the scope of discretion and the impact of the administrative action. In LeCompte v. State,[45] the section of the Act requiring the Council to determine fair market value to the property in its unimproved state at the time of conveyance was held not to apply to the valuation of grants for riparian lands, but solely the valuation of conveyances relating to meadowlands in which the State made claim. A wide scope of discretion was granted to the Council. In the case of BP Oil v. State of New Jersey,[46] it was held to be immune from attack even where contadictory standards were utilized which discriminated against one applicant as compared to another.

Once exercised, the point in time of the bindingness of that discretion has also been a matter of judicial determination. Until the quitclaim deed or riparian instrument is in fact fully executed and delivered, and the consideration paid, the Council is not bound by its commitment to convey or to the price fixed.[47] However, once the instrument is conveyed, absent fraud, the State is estopped form later contending that the consideration was insufficient.[48] Such prior grants may also aid in estopping the State from attempting to conradict physical facts described therein, such as the location of the mean high water line.[49]

E. Amendments and Revisions

After two decades of experience and struggling with the marshland and title dilemma caused by the tidal phenomenon a

new horizon exists for resolution of the problem. The experience, research, judgments and decisions made have constituted a process of refinement and education that will now enable the enactment of legislation which can pragmatically and equitably deal with the problem.

Since the passage of the Act various technical and mechanical amendments have been made. These all deal with the administrative aspects of processing the documents and not the crucial criteria or standards to be applied to the application of the State's claim or dispute thereof. Most of these have been at the urging of the title insurance industry to satisfy certain technical objections rather than an improvement or refinement of the substantive aspects. For example, the title insurance industry feared that the quietclaim covering meadowlands, as distinguished from river beds, might be challenged if notices were not given to riparian proprietors as required in river bed riparian grants.[50] This was amended accordingly.[51] The power to grant a quietclaim deed to such areas was also expressly incorporated in the Act to avoid any atack in that regard.[52] The Council was also granted the power to grant instruments such as leases, licenses or permits in such areas. With respect to the consideration to be fixed, the act initially provided for the council to determine the fair market value of the property "in its unimproved state." This language has now been eliminated by amendment which permits the Council to declare the fair market value of the property

in its improved state.[53] Amendment now permits the council to "take into account the actions of a claimant under color of title who in good faith made improvements or paid taxes, or both, on the lands in question." Thus, it would appear that the consideration of improvements is now optional rather than mandatory as previously set forth. Likewise such is the case in determining the annual rental to be fixed by the council in a lease, license or permit situation.[54] Although not part of the Hackensack Act, a related amendment was made authorizing any country or municipality or other instrumentality of the State the use of riparian lands owned by the State "without consideration or at nominal consideration, and to be maintained and used exclusively for park and recreational purposes."[55] The title insurance companies were not satisfied that the act granted the power to the Council to make a determination that the State had no interest in all or any part of the premises previously designated as State owned.[56] Periodically pending before the legislature is an act permitting the issuance by the Council of a recordable "certificate of non interest."[57]

The experience with the Act in the last decade and the lessons accumulated prior to the existence of the Act disclosed certain judgments that cannot be overlooked. The conclusions derived require extensive amendment to the present legislation. The present state of the Act requires the establishment of uniform standards for determining whether or not the State owns specific meadowland areas and

also a procedure that can effectively provide a remedy for the aggrieved property owner. Presently, the State is not utilizing a uniform or equitable formula in either determining the extent of its claim or in determining the settlement of a questionable or controverted delineation. Presently, the administrative process has proven completely ineffective. It is riddled with the administrative red tape and complete arbitrariness. Statistically very few meadowland quietclaim deeds, leases, licenses or permits have been granted. The prime reason for this is that the Tideland Resource Council, according to legislative direction, is primarily an environ mental arm of the State. With this as its prime purpose it would appear seriously contradictory for the council to take any other approach but a negative one relative to such application. What better instrument to prevent the disturbance of the present environmental status of a given piece of marshland than to deny the property owner's application to clear title thereto. This, of course, should not, and is not generally the case where the property has already been filled and has structures thereon. As a result, the court calendar is saddled with a tremendous backlog of cases which relate to the disputes of title in marshland areas. Each case involves a presentation of extensive and expensive expert testimony. Depending upon the size and nature of the dispute, each case can take any where from a week to many months to try. The reality of this situation is that the

expense and time involved has, and will continue to result in injustice. Property owners of smaller parcels can not afford to challenge the State's claim, even though it may be of the weakest nature on their individual property. Neither the public nor the property owner can afford the expense or the injustice that results from the aging of docket numbers on these pending cases.

A solution has long been in the making. An extensive and elaborate administrative solution has been proposed which would have the two-fold effect of setting uniform standards and also of providing a procedural structure and method for expeditious resolution of these cases.[58] In view of the fact that this proposed solution utilized as its vehicle an administrative body, it met with little popularity. The experience with the present administrative system has not been good and has frustrated many who have in good faith attempted to resolve marshland title problems. Thus, at the present stage of experience, the judiciary appears to be the structure where the solution must lie. Ironically, such was seen as the solution at the time of the passage of the Hackensack Meadowland Reclamation and Development Act. Soon after its passage, the legislature authorized the addition of six judges to specifically handle and specialize in such tideland problems.[59] These judges would be sophisticated in the complications of such litigation and be able to dedicate their time to expediting the settlements and/or

litigating cases in an equitable and expeditious manner. Although the legislation still stands on the books, no such appointments were made. Other states have seen the judicial routes as being an expeditious and efficient way of handling land title disputes. For example the Massachusetts experience with the land court has proven to be a well coordinated, efficient, uniform and expeditious way of handling title disputes.[60] Florida has been a leader in the country for setting uniform standards and methods for establishing tidal boundaries. The Florida act and regulations passed thereunder proivde for very specific procedures to be followed by the professional surveyors in establishing such boundaries.[61] A combination of the Massachusetts judicial vehicle with the Florida type standards would provide for a reasonable resolution of the problem. The Honorable Theodore W. Trautwein, Superior Court of New Jersey, former Assignment Judge, attempted to provide for such a solution within the framework of the existing structure. On June 14, 1977, after much preparation with an ad hoc committee of attorneys specializing in litigation of such cases and the Honorable James J. Petrella, a judge experienced in such cases, the announcement of a new settlement procedure for tidelands matters became a reality. A very detailed "quasi trial procedure was incorporated." This procedure incorporated the necessary uniform standards and the expeditious judicial manner of processing the disputes. However, in order to effectuate the same under

the present structure without supplemental legislation, it is necessary that both parties consent to submit to the procedure. The State of New Jersey has refused to submit to any quasi trial proceedings and thus it has failed.

The ad hoc committee was appointed by Judge Trautwein; its report to the court recommended the "quasi trial" procedure after considering various other alternatives.[62] On June 27, 1977, the procedure was explained and adopted with a "plan for the orderly listing of cases for a quasi trial on some logical preferences basis." In view of the State's refusal to submit to this expeditious procedure has not been utilized. Legislative or court rule amendment is essential in this respect.

The procedure basically would involve the utilization of special judges familiar and experienced with the expert proofs submitted in these complex tidal cases. Hopefully, the appointment of the six judges authorized by the 1971 legislation will be made. The State and the record owner would submit to the court extensive data and proofs two weeks prior to a date fixed for a hearing. This would include all of the basic information relative to the property such as the description of the premises, lot and block references, deed information, and the like, together with very specialized data. A tidal survey of the premises would be an essential submission. This survey would include topographic information, tied into the State coordinate system and would be prepared

in accordance with the tidal standards of the National Ocean Survey. A specific mean high water line would be depicted thereon and a proffer made to the court. Where applicable, the former mean high water line will also be depicted.

The method of depiction of that line would be very specific as in the Florida regulations.[62] Such specific standards will not only aid in uniformity but will provide for the very specific and most accurate approach to the location of the mean high water line.

As part of the proffer as to the location of that line both parties will also set forth a listing of their lay and expert witnesses. The particular proposed testimony would be summarized. In the case of an expert witness the qualificaiton and field of expertise would be set forth with a detailed proffer of proof as to the proposed testimony and specific opinions to be offered.

Further, course materials would be listed for the court. Each source proposed to be utilized relative to the proof of the contention of the party regarding the location of the mean high water line would be identified togetehr with an explanation of the sources authenticity and proposed supportive utilization. A detailed listing of all exhibits proposed to be offered, inluding all data regarding the exhibit would be submitted. All preparation data and what the exhibit will depict together with a proffer of proof relative to the conclusion to be drawn therefrom will supple

ment the offer. A detailed listing of all documents proposed to be submitted, inlcuding the name of the document, publication or the like, author, date, the general content of the same and the specific proffer as to the portion of said document from which conclusions are proposed to be drawn will also be submitted.

This proposed procedure and the standards documented by the court has many benefits. Prime among the same is its catalystic effect in bringing about settlements. Since the ruling in the Federal Pater,[64] cases settlements in tideland cases not only are valid but should be utilized extensively. There is no type of case that better exemplifies all of the policies encouraging settlements in adversary proceedings. In addition, the procedure will minimize the amount of time that will be necessary when the cases are ultimately tried. All proofs will be screened and many stipulations resulting. Thus, the time and expense of the adversary proceeding will be greatly minimized. Lastly, this procedure incorporates much needed reliable standards and uniformity. To make it an effective reality the consent aspect presently exisitng must be eliminated. Thus, either a legislative amendment to the Hackensack Meadowlands Reclamation Act or to the New Jersey Court rules is desperately needed.

F. New Jersey - Proposed Constitutional Amendment

Voters will be asked this November to approve a constitutional amendment that authorizes the legislature to devise a method of settling the State's claim to riparian lands which are held in private ownership.[65]

This amendment will give the legislature the power to "establish the criteria by which consideration shall be fixed for a grant or a lease of any kind subject to riparian claim asserted by the State pursuant to law. In establishing these criteria, the legislature may differentiate between properties being utilized for different purposes. The consideration fixed pursuant to the criteria established by the legislature may be less than the fair market value of the State's interest, or nominal."[66]

Currently, the State law prohibits the conveyance of any state property for less than fair market value. If approved by the voters, the proposed amendment would allow the legislature to set the state's claims at less than fair market value and would allow different standards for residential and commercial or industrial property. The announced intention is to give homeowners an opportunity to clear title at "normal" fees.

Governor Kean supports the amendment and has said that "this amendment will allow the legislature to fairly balance the interests of riparian property owners with the interests of the general public, who, by statute and by

common law, share ownership of all public lands, including legitimate riparian claims."[67]

hold legitimate riparian grants and others are protected by various common law doctrines. The D.E.P. is in the process of preparing grant overlays, to be made available to the public as soon as they are ready which will show exactly which properties may be subject to riparian claim.

II. REPORTS FROM AROUND THE COUNTRY

The following is a series of status reports received from various states regarding the law, the activity and the state of the art there. More detailed reports will be submitted at the program by the various representatives.

A. Alaska

According to the Office of the Attorney General, "the development of Alaska's tidelands claims is still in its infancy;" to date, most questions regarding the location of the lines of the mean high water and mean low water have been resolved through stipulation.

There are several cases currently under way which may be of interest to a riparian practitioner. Of special note is United States v. Alaska No. 84, Original pending before the United States Supreme Court. This case concerns the construction of the Submerged Lands Act, 43 U.S.C. < 1301 et. seq. The issues presented in this case are whether the "coastline" for determination of the grant under the Act to Alaska should be established on the basis of straight baselines; whether submerged lands landward of a string of barrier islands underly inland navigable waters; whether such

lands (even if underlying high seas) were intended by Congress to be conveyed to the state under the Act, and a number of subsidiary questions. One of the most interesting questions is whether a feature known as Dinkum Sands is an island. The state and the federal governments jointly have been monitoring the feature under criteria suggested by the National Ocean Survey to determine both the profile of the feature and a mean high tide datum. According to the Attorney General for the State of Alaska, profiling of the feature involved establishing submerged beachmarks, determination of the tidal datum involved the installation of tide guages. Both efforts were severely hampered by the extreme weather and the ice conditions in Alaska's Beaufot Sea, and it appears that the results of the monitoring project may be inconclusive on the question whether Dinkum Sands is an island.

The case of Deboe v. United States and Honsinger v. Alaska concerns the phenomenon known as isostatic rebound. The geologic phenomenon results from glaciers receding. As they recede, the newly emerged ground rises. The legal issue presented is whether the newly emerged land should be treated like accretion and annure to the upland owner or should not be treated as accretion and, therefore, title remain with the state.

State Department of Natural Resources v. City of Haines,[69] construed A.S. 38.05.320(b) as giving certain municipalities

a statutory entitlement to tide and submerged lands adjacent to municipalities. The ownership of riparian lands in Alaska presents certain unique problems. In addition to often severe weather conditions, the state contains 33,000 miles of coastline. For this reason title disputes are often settled by stipulation. The state uses conventional surveying techniques and aeriel photogrametic work to delineate the coastal line.

B. Georgia

In 1976 the Supreme Court of Georgia construed very narrowly a 1902 statute, which had purported to give away certain tidelands to the adjacent riparian owner and concluded that the state holds fee simple title to the foreshore adjacent to navigable waters. This case dealt with a tract of beachfront property and the foreshore along the beach rather than the marsh.[70]. The prior history in this State is replete with conflict.[71] This decision has generally been construed as applying to the marsh as well. Yet there are some areas of marsh adjacent to "non-navigable" tidewater (under Georgia's very restrictive definition of navigable) which may well not be covered by the court's ruling in Ashmore. There are no decision cases pending on that question.

Another issue still open in Georgia is the question of the upper boundary of the state owned tidelands. There has been no specific adoption by the Georgia courts of the mean

high water datum, and many of the cases speak in terms of "ordinary high water" or simply "high water." Because of Georgia's great tidal range and its gently sloping shoreline, the line of mean high water is quite a distance out in the marsh from the high ground. This State contends that state-owned tidelands extend to the edge of the high ground or to the elevation of the mean monthly spring high tide.

In a recently tried case entitled, Mack v. Wiley, Civil Action No. 17136-G (Superior Court, Chatham County) 1981, before the Special Master, the State intervened when a landowner filed a land registration petition. The landowner asserted title to the low watermark in the adjacent navigable river, a distance of more than 3,000 feet from the edge of his high ground. The state asserted its claim to the marsh up to the marsh-upland boundary, which was almost identical to the elevation of the mean monthly spring high tide. No decision has been rendered by the Special Master, however, an appeal to the Superior Court is anticipated.

C. Louisiana

Title to swamp and overflowed land is vested in the state and the state may convey title in that land.[72] The boundary line is the mean high water line.[73]

The management of these lands appear to be in either the State Land Office or in the various Levee Districts or both.

The origin of the tidelands law of this state stems from the Napoleonic Code. It is, however, similar to the common

law and the Spanish-Mexican law in that the state owns to the high water mark by virtue of its sovereignty. One significant difference between the French civil law and the latter respecting riparian rights is the absence of the public trust doctrine. There is, however, mention made of the public's paramount right of navigation.[74] Note also that in Louisiana the shore is defined as that area of land covered by the sea in the highest water during the winter season.[75]

In 1975 the United States Supreme Court entered a decree defining the respective rights between Louisiana and the United States and establishing a baseline along the entire coast described by mathematical coordinate points. [76] Subsequently, in 1981, the U. S. Supreme Court issued a final decree, further defining the rights of this state and the United States and establishing a three mile projection from the baseline, also by mathematical coordinate points.[77]

Louisiana is the only state in the United States to have a baseline and three mile boundary established by coordinate points as recently as June 2, 1982, the U. S. Supreme Court entered a Final Order terminating the litigation between the parties and the case is now complete.

D. New York

The State of New York is the jurisdiction that recently tested the validity of attempting to establish a mean high water line by vegetation. In 289 Dolphin Lane Associates v. Township of S. Hampton,[78] the court refused to accept

an alleged vegetation line even though the court stated that this "new technology" may be "intellectually facinating!" Basically the court viewed the approach as still scientifically untested and thus legally unacceptable.

This case should be compared to the New Jersey decision in City of Newark v. Natural Resource Council[79] wherein the court viewed the biological approach when combined with other proof as being a "reasonable" basis for a general mapping program. There the State attempted to establish color tones and to relate them to relative tidal inundation; aerial infra red photography was utilized.[80] This decision must be read in conjunction with the use of New Jersey Sports & Exposition v. Borough of East Rutherford,[81] wherein the same method fell when countered by "better" refined surveying and related proofs.

Thus although at first blush the State of New York and New Jersey appear to have conflicting views - in fact, the bottom line result is the same.

E. North Carolina

At present no claims to submerged lands are in litigation in North Carolina. Under a registration statute passed in 1965, more than 3,300 claims were received. Considerable progress has been made on mapping the claims and all claims which provided sufficient information have now been mapped. For purposes of the claims the coast may be divided into two sections with the division line at Cape Lookout. More than

50% of the estuarine/submerged lands south of that line have been privately claimed. The percentage claimed north of the line is much smaller.

All mapping was completed by the state employees who are also surveyors. The maps showing the claimed areas were prepared entirely from information provided by the claimants. To date, all claims litigated have relied on conventional surveying. The state has not published the maps prepared; they are too large and voluminous to be reproduced.

Under G.S. 77-20 (1979, c 618 S.2) the State of North Carolina was declared to be a mean high water state. According to this statute, the seaward boundary of all property within the state not owned by the state, which adjoins the ocean, is the mean high water mark. This section does not apply where title below the mean high water mark is or has been specifically granted by the state. This legislation has not been interpreted by the appellate courts.

At the present time the office of the Attorney General of the State of North Carolina has received approximately 25 requests for verification of title claims to submerged lands. The policy makers are working to formulate a response to such claims. Several of the claims have thus far been recognized as perpetual oyster franchises under statutes enacted in the 1880°s and 1890°s and subsequent cases interpreting these statutes. No other privately asserted title claims have been recognized at the present time.

F. Maryland

Maryland is a basic common law state vesting title to the sovereign in property lying below the mean high water line in navigable waters.[82] There is considerable case law on the subject.[83] There have been recent activity in this regard as a result of the State's wetland efforts.[84] For land to be considered wetland it must be washed by the ebb and flow of the tide and must be navigable. Underwater grants or patents in this State are prohibited by statute.[85] Underwater patents issued prior to the enactment of the prohibition have been upheld.[86]

The WetLand Act:

Purpose:
1. to prevent the further destruction of remaining wetlands
2. to protect the habitat of native finfish, crustaces and shellfish thereby securing the economic future of marine commerce
3. to provide for the recreational and aesthetic enjoyment of these wetlands
4. to reduce the risk of flood damage
5. to facilitate free navigation

Under the Maryland Wetlands Act of 1970, < 9-103 riparian owners are not to be deprived of their rights associated with riparian ownership which they had enjoyed prior to the passage of the Act. Section 9-201 provides that entitles any person owning land bounding on navigable water to any

natural accretion to the land, and allowing said owner to reclaim fast land lost by evasion or avulsion during his ownership of the land lost after Jan. 1, 1972 to the extent of provable existing boundaries. This section also allows the private owner to make improvements into the water in front of his land to preserve access to the navigable water or to protect his shore against erosion.

Note that after the improvemnt is constructed, it becomes the property of the owner of the land to which it is attached. The statute places the burden of proof upon owner to show that the lost fast land occurred after January 1, 1972. Under < 9-301 the Secretary of Natural Resources is instructed to inventory all private wetlands and to prepare maps delineating the boundaries of the same to be filed with the Secretary, and at that office must notify all such land records of the county designated owners of wetlands and provide them with the proposed rules and regulations.

Some recent litigation has sounded a warning regarding the importance of the tidal title issue and the establishing of the tidal boundary. In Hirsch v. Maryland Dept. of Natural Resources,[87] the filing requirement of the statute was the basic focus. Failure to comply with these provisions was held to be fatal to the Department's rules and regulations. A group of wetland owners illegally filled portions of their property after enactment of the Act; the court ruled that the Department could not attempt to force them to restore the

property. A warning regarding the strong fundamental respect for private property rights.

G. South Carolina

There is currently no litigation pending which challenges the general rule of state ownership of tidelands in South Carolina. There are two cases, dealing with relatively small areas, which raise a question of interpretation of the old crown and state grants and plats. According to the South Carolina Attorney General's Office the state supreme court may not hear these cases for several more years. If they are decided favorably to the private claimant, it is likely that the result will affect 30% to 40% of the grants in and near tidelands.

Because of the limited number of claims which have been made, no mapping or publishing program is in effect, except for a requirement that the existence of the claims be published in the State Register, a publication similar to the federal register. The techniques used for proof in these cases has been conventional surveying of the present day condition and the scaling and measurement by planimeter of ancient plats to determine the acreage depicted.

In a recent Supreme Court decision, State v. Fair,[88] the Court reversed the holding of a lower court in granting a directed verdict in favor of the respondent. The action to quiet title was instituted by the State to extinguish a cloud on its claimed title to certain tidelands situated on

the Combahee River in Colleton County. Respondents', by way of answer, asserted title to the real property in dispute and demanded that appellants' claim to title be extinguished by the court.

The area in dispute was formerly under dike and, in the remote past, used for rice cultivation for an indeterminate number of years. The dikes and the trunks in the canals fell into disrepair and the unenclosed property in question reverted to a "natural" state not dissimilar to any open tidewater area.

The trial court finding that the Combahee River is a tidal, navigable stream has not been disputed. The trial court further held that the "bank" of the Combahee River is clearly defined by the remnants of the above. Referenced deteriorated dike protruding above the high water and that this "bank" constitutes the southern boundary of respondents' grant.

The effect of this decision was to grant to respondents the disputed tidelands since all of such lands lie immediately to the north of the line designated by the lower court as the boundary. In revising and remanding, the Supreme Court noted that the land in question is covered by water at each high tides and the fundamental principle of riparian law in this state citing State v. Hardee.[89]

In the case of a tidal navigable stream the

> boundary line is the high water mark, in the absence of more specific language showing that it was intended to go below high water mark, and the portion between high and low water mark remains in the State in trust for the

benefit of the public. The Court also noted that the State comes into court with a presumption of title, and, if an individual is to prevail he must recover upon the strength of his own title, of which he must make proof. The court further quoted the above principle for the proposition that a grant by the government to a subject is construed most strongly against the grantee and in favor of the grantor.[89a]

Giving due adherence to these principles, the court determined that respondents could not prevail on their grants above since the grants were lacking in any language disclosing an intent to convey lands below the high water mark and since the grants were not supported by plats.

The State in proving its case, relied principally on its presumption of title as well as the other fundamental principles of riparian law. It offered photographic evidence of the fact that the land in dispute is covered by normal high tide and by testimony of an expert who gave the water depths on the disputed property at various stages of the tide.

For these reasons the Court reversed and remanded the case directing the trial court to enter the directed verdict requested by the State's cross motion. H. Delaware

The State of Delaware has been concerned throughout the twentieth century with defining the extent of State ownership in public lands in Sussex county. Specifically, there is a strip of land approximately 25 miles long extending from Fenwick Island in the South to Cape Henlopen State Park in the North which has been surveyed many times. It was first surveyed in 1914. The survey was recorded in 1915. However, the most definite survey, the Papper survey (named after the surveyor) was performed in 1929. That survey, which was recorded in the same year, has been recognized by the Delaware courts as the most definitive and the most accurate of the early surveys. This survey was recorded in the Sussex County Recorder of Deeds Office and "mysteriously disappeared" when the State commenced litigation to protect its lands.

These lands were surveyed again in 1955 but the survey was not recorded. The 1914 and 1929 surveys were performed under the authority of the Public Lands Commission which went out of existence in 1929. From 1929 to 1967 the State Highway Department had control over public lands. In 1967 management transferred to the State Department of Natural Resources and Environmental Control (DNREC).

In 1976, the State of Delaware through its Office of Management, Budget and Planning (OMBP) sought and secured a $150,000 coastal Management program grant from the Office of Coastal Zone Management (OCZM) of the federal government. The funds were to be used to support the necessary legal and

civil engineering work required to document claims of title and to conduct and record field surveys and to physically mark the boundaries of all state-owned lands in the 26 mile stretch between the Delaware-Maryland border and the military reservation at Cape Henlopen. This survey was recorded in the Sussex County Recorder of Deeds Office on January 24, 1979.

According to a representative of the State, "the interest of certain people in these lands has increased in direct proportion to their value. During the early part of this century, there was little interest pe se. To farmers, the land held little value. Since the land has increased in value, the state has been faced with many suspect claims.

Of the cases now pending in court, the most important case is State v. Phillips[90], which was filed by the State Highway Department in February of 1967. The disputed acreage is some 13 acres. The case was decided in favor of the State but has since been appealed. There are two other active cases involving tidelands title claims in Delaware. They are State v. Bunting et al[91] and State v. Williams.[92]

According to the Delaware Attorney General's Office the 1977 Public Lands Survey, recorded in 1979, will remain the keystone of Delaware's mapping program in this area. Using this survey as the basis for its claims what remains is for the State to solve any boundary disputes. The state officials are experiencing difficulties stemming from the location of

old land patents. In the 1700's and the early 1800's, the State gave away a lot of land in the 26 mile coastal area. Many of the patents were surveyed using perishable markers which no longer exist. In addition, much of the land was abandoned by the grantees because it was considered to be of little value. One of the largest disputed areas involves over 300 acres. The state contends that the present claimant has never held title to any of the acreage since every survey of this century shows the land as State land. However, the claimant states that because the land was once patented that the State gave up all its rights. The State contends that it adversely possessed the land in question. In conclusion, the State of Delaware uses conven tional surveying techniques in establishing its claims.

Delaware is a "mean low water" state. This was es< tablished in the case of Delaware v. Pennsylvania Railroad.[93] In this case the state brought action for declaratory judgment for a determination as to title and related rights to certain foreshore between the high and the low water marks on the river. The superior court rendered judgment and the state appealed. The Supreme Court held that under Delaware law, a riparian owner of land fronting upon a navigable river holds title to the low watermark, and, therefore, the foreshore is owned by the riparian owner, and not the State. The court further determined that the State had power to govern the foreshore so as to prohibit a filling program

initiated by the riparian owner. This, it should be noted marks a divergence from both the English common law and that found in most states.

State v. Phillips[94] involved an action by the state to establish its title to a tract of beach land located along the ocean between Bethany Beach and Fenwick Island in Sussex County. The Court of Chancery held in favor of the State and the defendant appealed. The Supreme Court held that the basic nature of William Penn's title to the territory now constituting the State of Delaware was to be determined in light of the historical and the political context in which it was acquired. The court determined that the title to the territory granted Penn and his heirs in the purely private capacity but in the capacity of owners and governors. The court determined that their title was inextricably related to their power to govern and therefore all Penn interests in unconveyed lands passed to the state by sovereign succession in 1776 and that for these reasons the legislative resolution and the acts recognizing the sovereignty of the State over vacant lands were not acts attempting to divest Penn heirs of private property without compensation.

I. New Hampshire

Public waters, rivers and streams belong to the state in full unrestricted title until disposed of by way of grant from the legislature or easement or ownership. The state holds these lands in trust for the public but the "public

trust" is a state right which the legislature may control, take away or cede at its will."[95]

Littoral owners on great ponds have title only to the natural high water mark of such ponds and no interest in is bed.[96] What determines this "public right" in a river or a stream is its usefullness to the public. The test of naviga bility is but one of the factors to be considered and is not the sole criterion.[97]

The control and elimination of water pollution is a subject within the scope of the police powers.[98] J.

Florida

The title to land beneath navigable water to the high water mark belongs to the state in trust for the public. This has been the law since 1908 when the supreme court handed down its decision in State ex rel. Ellis v. Gerling.[99] The influence is derived from the English common law and is discussed in Broward v. Mabry.[100] That case also held that the trustees of the internal improvement fund could not convey title to lands under water belonging to the state.

Florida follows the common law and the civil law in that private ownerships of riparian land extends to the high water mark. Brickell v. Tammell.[101]

The case of Apalachicola Land and Develop. Co. v. McRea,[102] defines "tideland" as that land covered and uncovered by the ordinary ebb and flow of normal tides. The case that deals most exhaustively with the whole problem is

Martin v. Busch.[103] In the course of its opinion the court explores the trust concept, the boundary concept and the alienability principle coming to the conclusion that trustees cannot convey land below the hish water mark.

One of the more recent cases on the subject is Bryant v. Lovett[104] where it was held that sovereign land could not be conveyed reaffirming the earlier landmark cases.

The status of the law today is as it was some sixty or seventy years ago. The state owns to the high water mark in trust for its citizens and that land cannot be conveyed by the agency responsible for its maintenance.

The Coastal Mapping Act of 1974,[105] effectively codifies the cannon law of this State by declaring that "the mean high water line along the shores of land immediately bordering on navigable waters is recognized and declared to be the boundary between the foreshore owned by the state and its sovereign capacity and upland subject to private ownership."

K. The West Coast Riparian Experience

The greatest controversy affecting riparian law on the West Coast concerns the application of federal law to tidelands claims eminating from U. S. patents and grants. It is important to review the cases in a historical context in order to fully appreciate the significance of the recent Supreme Court holding in California v. United States.[106]

The first case to actually address the federal law v.

state law controversy was Borox Consolidated Ltd. v. City of L.A.[107] This case involved an action to quiet title filed by the City of Los Angeles. The City claimed the tideland in question by virtue of a grant from the state. The private party defendant claimed ownership to the land by virtue of a patent from the United States after California entered the Union. In an opinion by Chief Justice Hughes, and with a single dissent, the Court held that if the land in question was tideland, the title passed to California at the time of her admission to the Union in 1850; that it remained to be determined whether the land at issue was tideland; and that this issue was "necessarily a federal question" controlled by federal law because "it concerns the validity and the effect of an act done by the United States" and "it involves the ascertainment of the essential basis of a right asserted under federal law."[108]

The Court went on to hold that tidelands extend to the mean high water line, which the Court then defined as a matter of federal law then thirty years after Borox another upland property owner brought an action to quiet title to her accertions that had become attached to her land and that had caused a seaward movement.[109]

Under Washington law, the accretions belonged to the State. Under federal law accretions are the property of the upland owner. The plaintiff was the successor in interest to the owner of ocean-front property patented by the United

States prior to the entry of the State of Washington into the Union. The trial court found that federal law applied. The Supreme Court of Washington reversed holding that Washington law applied and that the state owned any land that accreted after statehood seaward of the 1889 line of the ordinary high tide, the location of which was first surveyed by the Commis< sioner of Public Lands in 1948.[110]

The United States Supreme Court reversed the high court of Washington and reaffirmed the decision in Borox, supra [111] by determining that federal law controlled the boundary between state-owned tidelands and property granted under a federal patent. The Court further determined that the same law applied to determine the boundary between state-owned tidelands and ocean front property where accretions had extended the shoreline seaward. The Court justified its use of federal law by citing the special nature of the coastal boundary question.

> This relationship, at this particular point of the marginal sea is too close to the vital interest of the nation in its own boundaries to allow it to be govrned by any but the "supreme law of the land."[112]

The Court, therefore, went on to decide that under federal law, the federal guarantee of uplands had the right to the accumulated accretions.

The holding in Hughes was taken to task in the subsequent case of State Land Board v. Corvallis Sand and Cravel Co.[113] prior to the recent holding in California v. United States,

supra. The consensus held that the Corvallis decision had seriously erroded the holding in Hughes. The application of Corvallis has since been limited by the United States Supreme Court.

Corvallis involved a dispute between the State of Oregon and an Oregon Corporation over the ownership of land that became part of a river bed because of avulsive changes in the river's course. The Oregon Court of Appeals affirmed the trial court's award of the land to the corporation because that was the result dictated by federal common law, which under Bonelli Cattle Co v. Arizona,[114] was the proper source of law. The Supreme Court reversed, overruling Bonelli and holding that the disputed ownership of the river bed should be decided solely as a matter of Oregon law. Bonelli's error was said to have been reliance on the equal footing doctrine as a source of federal common law. The equal-footing principle holds that all states admitted to the Union possess the same rights and sovereignty as the original Thirteen States. Once the equal-footing doctrine had vested title to the river bed in Arizona, "it did not operate after that date to determine what effect on titles the movement of the river might have."[115] State rather than federal law should have been applied.

The State of California would later point to this holding and contend that in rejectiong Bonelli and holding that disputes about the title to lands granted by the U.S.

are to be settled by state law, the high court also rejected Hughes since that case also involved land that had been patented by the United States to private owners.[116] The Supreme Court did not, however, agree with this interpretation declaring that "Corvallis" itself recognized that federal law would continue to apply if 'there were present some other principle of federal law requiring state law to be displaced.'"[117]

The Corvallis opinion also recognized that Bonelli did not rest upon Hughes and that the Hughes court considered ocean-front property "sufficiently different . . . as to justify a 'federal common law' rule of riparian proprietorship."[118] Thus, the Corvallis, decision did not purport to disturb Hughes. This has been borne out by subsequent applications on Corvallis. Wilson v. Ohama Indian Tribe,[119] made it clear that Corvallis does not apply "where the United States government has never parted with title and its interest in the property continues."[120] The majority opinion in Corvallis, appears to recognize that its rule does not extend to land remaining in federal hands. The dispute in Corvallis was between the state and a private owner of land previously in federal possession. By way of contrast, the riparian owner in Wilson was the U.S., holding reservation land in trust for the Omaha Indian tribe. The issue was the affect of accretion on avulsion changes in the course of a navigable stream, and State boundaries were not invovled. As the Court

in California v. U.S. noted:

> . . . where the United States has held title to, occupied and utilized the land for 100 years: "the general rule recognized by Corvallis does not oust federal law in this case. 472 U.S. at 670.[121]

In 1980 several upland owners of shore properties within the State of Washington brought suit against the state seeking to quiet title in themselves to certain accretions out to the existing high tide line.[122] A key issue was the validity of the Hughes holding. The case was submitted on stipulated facts and argued in December of 1980. In March of 1981, the Court filed a memorandum opinion, in which it concluded, inter alia that Hughes was no longer the law, i.e., that state law would apply to determine ownership of accretions and that the applicable state law as as announced in the Washington Supreme Court in the case Hughes v. State.[123]

The case was appealed to the State Supreme Court, however, the appeal to Bay Haven case was stayed pending the outcome of an original action in the United States Supreme Court.[124] This case concerned an action by the State of California to quite title to ocean beach accretions abutting a Coast Guard site in northern California. One of the key issues of the case was the contrivening validity of the Supreme Court holding in Hughes.

On June 18, 1982, the United States Supreme Court determined that the U. S. and not California has title to

oceanfront land created through accretion resulting from the construction by the U. S. of a jetty, to land owned by the United Staes on the Coast of California. One hundred and eighty-four acrea of upland were created by the seaward movement of the ordinary high-water mark. The land which was originally vacant became the site of controversy when the U. S. Coast Guard applied to the State of California for permis< sion to construct a watch tower on the accreted land. At this time, it became evident that both California and the United States asserted ownership of the land. The United States eventually built the watchtower without obtaining California's permission. California then filed suit to quiet title to the subject land.

California argued that upon its admission to the Union of September 9, 1850 and by confirmation in the Submerged Lans Act.[125] California became vested with absolute title to the tidelands and the submerged lands upon which after construction of the jetty alluvion was deposited, resulting in formation of the subject land. Because the accretion formed on sovereign s..te land, California maintained that its law should govern ownership.

Under California law, a distinciton is drawn between accretive changes to a boundary caused by natural forces and boundary changes caused by the construction of artificial objects. For natural accretive changes, the upland boundary moves seaward as the alluvision is deposited resulting in a

benefit to the upland owner.[126] When accretion is caused by the constitution of artificial works, however, the boundary does not move but becomes fixed at the ordinary high water mark at the time the artificial influence is introduced.[127] Since the jetty was created by the United States Coast Guard, California would have prevailed if the ocurt determined that state law applied.

The United States took the position that the formerly submerged lands were never owned by California before the passage of the Submerged Lands Act in 1953, and that the disputed land was not granted to California by the Act. The U. S. also took the position that the case was governed by federal law rather than state law and that under long-established federal law, accretion, whatever its cause belongs to the upland owner.[128] If federal law were to be applied, title to the depostied land vested in the U. S. as the accretions formed.

After reviewing the previously discussed case by case history of the federal v. state law controversy, the United States Supreme Court rendered a unanimous opinion in favor of defendant concluding that based on Hughes v. Washington and Wilson v. Omaha Indian Tribe, " a dispute over accretions to oceanfront land where title rests with or was derived from the federal government is to be determined by federal law."[129]

The Court also emphasized that the federal Submerged Lands Act[130] vesting title in the states to the lands

underlying the territorial sea, is not dispositive of the aforementioned principle. The Court noted that while the Act confirmed the title of the states to the tidelands up to the line of the mean high tides section 5 of the Act withheld from the grant all "accretions" to coastal lands acquired or reserved by the United States.[131] L. Washington

Under Washington law, the Parks Commission has jurisdiction over state owned or controlled ocean beach tidelands. All other state owned or controlled tidelands in the State of Washington are under the jurisdiction of the Commissioner of Public Lands and administered by the Department of Natural Resources.[132]

When a series of lawsuits to establish the upland/state boundary were started in the late 1940's, the commissioner of Public Lands "surveyed" the 1889 line. The survey techniques used to arrive at the 1889 line for the first four cases brought in 1948 are described in general terms by the Commissioner in his thirteen biannual report. The result was something of a

"questimate," which, it was agreed, would "represent" the line as it existed on the date of statehood. The 1948 survey was extended to take in the entire length of the Long Beach Peninsula, and in later years, was also conducted on South Beach and North Beach, i.e., the ocean beaches to the north of Long Beach. The resulting representation of the "1889 line" is generally referred to as such, or as the

Western Boundary of Upland Ownership. It has ben relied upon by the Washington courts for approximately thirty years. For example, in Hughes,[133] the state supreme court has held that the 1948 survey "represents" the 1889 line as a matter or rule of local property law, therefore, there is no issue of fact to be tried. The sanctity of the 1948 survey was most recently upheld in The Bay Haven cases. The ruling has, however, caused many titles to become clouded and spawned much litigation, most of which has been settled by stipulation.

The Washington State Parks and Recreations Commission has since the late 1960's attempted to keep current a series of maps showing all state tideland and accretion ownerships along the ocean beaches, and the source of such title (i.e., adjudication deeds of dedication, purchases, etc.) Information is gathered from agency files, litigation files, as well as county auditors and assessors. Although not yet published they are open to inspection and copying under the state's public disclosure law.

The public trust doctrine has once again been applied against coastal property owners to guarantee commercial, fishing and recreational uses by the general public in navigable tideland areas. In a decision on May 5th, the California Supreme Court held that when the original owners of land south of the highly developed Marina Del Ray harbor acquired their land

from Mexico, their title remained subject to the public trust doctrine which Mexico also recognized.[134]

M. California

The California State Lands Commission is currently involved in a joint tide-length measuring program. The work was done with a field force staffed with state and federal employees, with N.O.S. processing the data. The four-year field effort costing about 1.6 million dollars resulted in the updating of tidal figures from 151 stations.

One aspect of tideland boundary determination in California that seems of great importance in most instances than precise tidal datums, is early shoreline history. Much of the water frontage has been artifically altered. Early maps and charts are needed to identify legal title and boundaries. Towards this end, continual efforts are being made to add to the already large inventory of early date maps and records.

N. Oregon

In Oregon, the State by virtue of its sovereigny owns the land between the low and high tide. In the conveyance of tidelands, two elements come into play jus privatum and jus publicum. The former can be conveyed absolutely; the latter cannot be. The landmark case is Corvallis & E.R. Co. v. Benson.[135]

The early cases developed this general pattern which has since been adhered to.[136] An excellent historical overview

can be found in the case of Smith Tug & Barge Co. v. Columbia Pacific Towing Corp..[137] The State Land Board is in charge of the maintenance of tidelands. In State v. Rouse,[138] the court held against the BJ in an action to settle whether or not land was tide flowed.

O. Idaho

Historically, the English common law has been applied. The state holds all land to the high water mark subject to the public trust doctrine. Since there are no tidal lands in Idaho, the cases deal exclusively with streams and lakes.

P. Utah

Utah adopted the common law upon admission to the Union and hence title to land below the high water mark belonged to the State. The landmark case is State v. Rolio.[139]

FOOTNOTES

1. Genesis 1:9

2. Sarna, Nahun, Understanding Genesis, 13 (Schocken 3rd Pr. 1974).

3. Lawler, Ronald, Wuerl, Donald W., Lawler, Thomas Comerford, The Teaching of Christ, p. 63 (OSB 1976).

4. Stener, H. Guyford, Science, Technology and Law - A Growing Partnership, 17 Jurimetrics Journal, ABA Section of Science and Technology, p. 189 (Spring 1977) also see Curlin, Fostering, Understanding Between Science and Law, 59 A.B.A..J. 1957 (1973) and Curlin, Law, Science and Public Policy: A Problem in Communication, Scientists in the Legal System (W.P. Thomas, ed. 1974).

5. Spiegelberg, H. The Phenomenological Movement (Nijhos, 2d Ed. 1971).

6. The Confessions of St. Augustine, Translated by John K. Ryan, Bk. , Ch. p. (New York: Doubleday).

7. For a basic introduction to the components of the marsh see W. Niering, The Life of the Marsh (1966). The recent attention that the marshlands throughout the nation have attracted is reflected in the amount of literature published dealing with these areas, see, e.g., J. Clark, Fish & Man (Am. Littoral Soc°y Spec. Pub. No. 5, 1967); P. Johnson, Wetlands Preservation (1969); Panel Reports of the Commission on Marine Science, Engineering and Resources: Marine Resources and Legal-Political Arrangements for Their Development (1969); Panel Reports of the Commission on Marine Science, Engineering and Resources: Science and Environment (1969); Cronin, The Condition of the Chesapeake Bay, in Transactions of the Thrity-Second North American Wildlife and Natural Resources Conference 137 (Mar. 13-15, 1967); Grindley, Estuarine Environment, in The Encyclopedia of Marine Resources 206 (1969); Porro, The Coastal and Estuarine Zone: A National Interest, in 1 Marine Technology 1970, at 561 (1970); Proceedings of the Marsh and Estuary Management Symposium (La. State Univ., July 19-20, 1967); Redfield, Ontogeny of a Salt Marsh Estuary, 147 Science, 50 (Jan. 1, 1965).

8. See generally Emery & Steveson, Estuaries and Lagoons, in 1 Treatise on Marine Ecology and Paleoecology 673-93 (Geological Soc°y of Am. Memoir 67 (1957); van Straaten, Origin of Recent Dutch Tidal Flat Formation, in Proceedings of Salt Marsh Conference-Sapelo Island, Georgia 9 (Mar. 25-28, 1958).

9. For a general discussion of the applicable common law, see J. Angell, A Treatise on the Law of Watercourses 3-12 (4th Ed. 1850); H. Coulson & U. Forbes, The Law of Waters and Land Drainage 93-127 (6th Ed. 1952); 3 J. Kent, Commentaries 427-34 (Halsted ed. 1832. See also J. Angell, A Treatise on the Common Law, in Relation to Watercourses 201-13 (2d Ed. 1833); 2 W. Balckstone, Commentaries.

10. 16 Pet. 367, 41 U.S. 346, 10 L.Ed. 997 (1842); See extensive historical discussion in Arnold v. Mundy, 6 NJL Sup. Ct. (1821) and Gough v. Bell 23 NJL 670 (1852).

11. Porro, Invisibile Boundary Private and Sovereign Marshland Interests, 3 Natural Res. Law. 512 (1970). Also see Porro and Teleky, Marshland Title Delimma: A Tidal Phenomenon, 3 Seton Hall L. Rev, 323 (1972).

12. Abbott, Some Legal Problems Involved in Saving Georgia's Marshes, Georgia State Bar Journal, at p. 28 (Aug. 1970); Leaming and Spicer, Grants and Concessions of New Jersey, 1664-1703 (1881); Vol. I New Jersey Archives, Documents Relating to Colonial History of the State, 1631-1687, (1880); Vol. III Kents Commentaries, supra., p. 607.

13. Shaltz v. Wilson, 44 N.J. Super. 591, 131 A.2d 415 (App. Div.), Cert. denied, 24 N.J. 546, 113 A.2d 395 (1957).

14. See Young v. Harris 6 Ga. 130 (1894).

15. Ga. Cod. Section 2208 (1863), Georgia Code, Sec. 85-1303 Georgia Code Annotated Section 85-1308.

16. They are: Alabama, Alaska, California, Connecticut, Florida, Georgia, Maryland, Mississippi, New Jersey, New York, North Carolina, Oregon, Rhode Island, South Carolina, Texas and Washington.

17. They are: Delaware, Maine, Massachusetts, New Hampshire, Pennsylvania and Virginia.

18. Louisiana which has to antecedents in the Napoleonic civil law utilizes the highest winter tide as the boundary. A detailed discussion of the riparian law of Louisiana appears latter in the body of this text. Hawaii uses the upper reaches of the wash of the waves to define state ownership. See Maloney and Ansness, The Use & Legal Significance of the Mean High Water Line In Coastal Boundary Mapping, 53 N. Carolina L. Rev. 186

(1974). Additionally, where the private owner's title can be traced to original Spanish and Mexican grants (generally in Florida and Texas) the civil law of those countries as interpreted by the affected states is applied. These cases, however represent the exception. Examples of them are discussed in detail during the individual treatment of these respective states.

19. Shively v. Bowlby, 152 U.S. 1 (1894).

20. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Michigan Law Rev. 471 (1970); Comment entitled The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine, 79 Yale L.L. 762 (1970); Note entitle California Tideland Trust: Shoring It Up in 22 Hastings L.J. 759 (1971).

21. Porro & Teleky, Marshland Title Dilemma: A Tidal Phenomena 3 Seton Hall L. Rev. 323 (1972).

22. 50 N.J. 307, 235 A.2d 1 (1967).

23. Bell v. Gough, supra; Shultz v. Wilson, supra; Arnold v. Mundy, supra.

24. Docket No. A-769-59 (N.J. Super. App. Div., March 1, 1961) also see Porro, Reclamation or Damnation, New Jersey Meadowlands 87 N.J.L.J. 657 (1964).

25. Society Conservation briefs, New Jersey Tidal Meadowlands Must Be Preserved, 23 N.J. Nature News 10 (Mar. 1968); see J. Teal & M. Teal, Life and Death of the Salt Marsh 248 (1969) (stating that in 1895 New Jersey had 296,000 acres of salt marsh). For a scientific classification of all New Jersey wetlands, see United States Fish and Wildlife Service, Wetland Inventory of New Jersey (1954).

26. For the prior history of meadowland Indian occupancy and titles see Vol. I, History of Bergen County, Ch. IV. p. 23 et seq. (1923); Vol. XXI, New Jersey Archives Calendar of New Jersey Records, 1664-1703; Minutes of Board of Proprietors of the Eastern Division of New Jersey, 1685 to 1705 and Gorden, History of New Jersey pg. 38-65.

27. See Porro, Invisible Boundary - Private and Sovereign Marshland Interests, supra.

28. N.J.S.A. 13:1B-13.4.

29. Meadowland Regional Development Agency v. State, supra.

30. N.J.S.A. 13:1B-1.

31. 50 N.J. 307, 235 A.2d 1 (1967). For a discussion of O'Neill and its ramifications see the following articles by Porro: The Jersey Meadows: Who Own Them? Who to Control Them? 11 N.J.S.B.J. 143 (1968); Meadowland Owners' Dilemma, 11 N.J.S.B.J. 15 & 99 (Pts. I & II, 1967-68); The Three Faces of O'Neill, 11 N.J.S.B.J. 55 (1968).

32. No. L-12561-68 (N.J. Super Ct., L. Div., Sept. 8, 1971) (court order suppressing evidence), modified, 60 N.J. 199, 287 A.2d 713 (1972).

33. App. Div., Sup. Ct. Docket No. A-3311-72.

34. Sup. Ct. of N.J., Law Div., Docket No. L-16799-72.

35. N.J.S.A. 13:1B-13.5(a).

36. The order voiding all "hatched areas" was entered on March 16, 1975. For two and one half years thereafter the State delayed an ultimate redelineation. On July 2, 1975, the State represented, by Affidavit, a good faith attempt to comply with the order to revise the overlays. The time for compliance was extended. On September 10, 1975, the State arbitrarily determined to claim 100% of all of the "hatched areas." Thereafter Judge Petrella in New Jersey Sports and Exposition Authority v. Marion Greenberg Parker, et als., Docket No. L-26702-72; MBM Truck Leasing Co., Inc., et als., Docket No. L-26780-72 and Logothetis, Docket No. L-26791-72 that the State failed to prove this 100% claim. Further extensions were granted to the State for redelineation. Ultimately, at the end of 1975 and the early part of 1976 certain property owners were granted summary judgments quieting title in hatched areas due to the State's continual failure to redelineate. On October 20, 1977, in New Jersey Sports and Exposition Authority v. Marrone, Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-26794-72 the final ultimatum was given to the State and the redelineation became a reality by January 1978. As a result, many of the areas previously claimed were freed from the stigma of the State's claim.

37. 133 N.J. Suepr 245, 336 A.2d 46 (1974).

38. Sup. Ct., of N.J. Law Div. Bergen County, Docket No. L-16799-72.

39. N.J.S.A. 13:1B-13.5(b).

40. Decided July 2, 1975.

41. See Hackensack Meadows Botanical Delineation Program. Final Report, prepared for State of New Jersey by Earth Satellite Corp. Sept. 1973 also see Porro, Alfred A., Jr. and Weidener, James P., The Mean High Water Line Biological v. Conventional Methods The New Jersey Experience, 1978 ACSM-ASP Annual Proceedings, Feb. 26-March 4, 1978, Washington, D.C.

42. The State line would vest approximately 90% of the premises in the sovereignity whereas the Municipality conventional line would vest approximately 90% of the premises in the record owner.

43. Meer Corporation v. State of New Jersey, et als., Superior Court of N.J. App. Div., A-1417-72.

44. N.J. Sports and Exposition Authority v. Bergen County Associates.

45. 128 N.J. Super 553, 320 A.2d, 876 (Law Div. 1974).

46. BP Oil Corp. v. State of New Jersey, et als., Superior Court of New Jersey, Law Div., Bergen County, Docket No. L-12340-75.

47. Charlotte Taylor v. State of New Jersey, et als., Superior Court of New Jersey, Law Div., Bergen County, Docket No. L-23644-76.

48. New Jersey Sports and Exposition Authority v. Borough of East Rutherford, Sup. Ct. of N.J. App. Div. A-355-75 Decided April 29, 1977.

49. See New Jersey Turnpike Authority v. Desiderio, et als., Superior Court of New Jersey, Law Div. Bergen County, Docket No. L-27823-69.

50. C.f. R.S. 12:3-7 and R.S. 12:3-7.1.

51. R.S. 13:1B-13.7(c).

52. R.S. 13:1B-13.5(a).

53. R.S. 13:1B-13.9.

54. R.S. 13:1B-13.10.

55. R.R. 12:13-37.1.

57.

58. See proposed solution in Porro, Alfred A. and Teleky, Lorraine S., supra.

59. N.J. Stat. Ann. < 2A:2-1 (Supp. 1971-72). See generally N.J. Commission to Study Meadowland Development, Final Report (6/65); Supp°1. Rpt. (12/66).

60. Massachusetts Land Registration Act; also see Flick, Clinton P., Abstract and Title Practice, 2d Ed., West Publishing Co., St. Paul, 1958; Fitch, Logan D. Abstracts and Titles to Real Property, Calahan & Co., Chicago, 1954; Schofield, Lleywllyn T. Massachusetts Land Court, p. 182; Surveying and Mapping Vol. VIII, No. 4, Oct.-Dec. 1948; Humphrey, Clarence B., The Land Court and Its Engineering Procedure; Surveying Practice in Massachusetts, p. 1868, Nov. 1938; Land Registration and Plane Coordinates in Massachusetts, Civil Engineering, Massachusetts, Manual of Instructions, For the Survey of Lands an preparation of Plans, 1971.

61.

62. Ad Hoc Committee Report, Proposals For Procedures Re: Settlement of Tideland Matters, April 20, 1977.

63. See 177.29 F.S. Bureau of Coastal and Land Boundaries, Coastal Boundary Surveying and Mapping, Sept. 15, 1975 and Rules of Department of Natural Resources, Ch. 16-3; Manual of Instructions, Land Court, The Commonwealth of Massachusetts, For the Survey of Lands and Preparation of Plans, 1971; also see < IV, Water Boundaries, Shallowitz Land and Sea Boundaries (U.S. Coast and Geodetic Survey 1975).

64. State of New Jersey, et als. v. The Council in the Division of Resource Development, et als., Sup. Ct. App. Div. A-2622-74.

9/4/87

AN INSIGHT TO INVERSE CONDEMNATION: THE NEW HORIZON THROUGH THE SPIRIT OF LUTHERGLEN AND THE NOLLAN LINK

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AN INSIGHT TO INVERSE CONDEMNATION: THE NEW HORIZON THROUGH THE SPIRIT OF LUTHERGLEN AND THE NOLLAN LINK

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I. THE NEW HORIZON OF INVERSE CONDEMNATION

Inverse condemnation is at the doorstep of every attorney, developer and governmental agency dealing with regulation of land. In the month of June, 1987 the United States Supreme Court decided two extremely important cases, which were the natural evolution of series of cases on the subject for the last couple of years.

On June 9, 1987 the case of First English Evangelical Lutheran Church of Glendale vs. County of Los Angeles, CA. was decided. 55 U.S.L.W. 4781, 107 S.Ct. 2378, 96 L.Ed. 2d 250 (1987) On June 26, 1987 the case of Nollan et ux. v. California Coastal Commission 55 U.S.L.W. 5145, 107 S.Ct. 3141, 97 L.Ed. 22 677 (1987). was decided. Both decisions stabilized and entrenched private property rights when sacrificed for the protection of sensitive environmental resources. Both cases involve water related properties and regulations.

A. Historical Perspective

Since 1985, the Court has been echoing, by way of a growing crescendo, its prologue to the Evangelical Lutheran Church and Nollan cases. These cases were MacDonald, Sommer & Frates v. Yolo County, No.84-2015, 107 S.Ct. 22, 92 L.Ed. 2d 773 (1986); Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 105 S.Ct.

3108, 87 L.Ed. 2d 126, 53 U.S.L.W. 4969 (1985) and U.S. v. Riverside Bayview Homes, Inc. 474 U.S. 121, 106 S.Ct. 455, 474 U.S. 121, 23 ERC 1561, 88 L.Ed. 2d 419, 54 U.S.L.W. 4027 (1985). When the highest Court of this land devotes five major decisions to any subject matter, it is timely for those in anyway impacted to pay attention. Yet, various high ranking attorneys representing governmental bodies and academician have publicly attempted to minimize the decisions as having little or no change in the law. (See for example article, Bird, Kathleen, Property Rulings May Spur Damage Claims, Cautious Attitudes by Local Officials, 119 NJLJ 25 (June 25, 1987). It may very well be that none of these decisions have so called "changed the law". What they have done is applied well respected principals of law respecting private property rights from taking to a contemporary society wherein legislative and judicial bodies have constantly upheld the validity of strict regulation of sensitive land areas for environmental concerns.

This series of cases echos an old tune, but to a new and modern rhythm. The message was, has been and continues to be clear. The public interest in protecting our nation's natural and environmental land, and water resources is high. This is paramount under the police power. It is this great public trust that has been and will continue to be consistently upheld to the subordination of individual property rights. Cavaet: In a nation that colonists and

immigrants gravitated to because of their desire to own a piece of its soil under the protection of law, it is only natural that this Country's highest Court should accomplish what is fundamental to the American way of life. It has upheld respect for the forefather's foundation of protection of these individual property rights, i.e. the Fifth Amendment. The true spirit has returned to the phrase "private property (shall not) be taken for public use, without just compensation". Since 1776 this provision has served as a hallmark of protection to offset the power of the government to take property for public purpose by way of condemnation. Inverse condemnation is nothing more than the forcing of a Governmental Body to respect the Fifth Amendment, exercise its power of eminent domain directly, rather than attempting to take property rights indirectly by strict regulation.

B. The New Horizon

Inverse condemnation sits securely between the valid exercise of the police power and the valid direct exercise of the power of eminent domain. Remedially the Evangelical Lutheran Church and Nollan cases clearly mandate that compensation must be paid to the property owner whether the regulation is temporary or permanent. The stripping of private property rights through important valid regulation of sensitive environmental areas has been balanced - this is the new horizon. A horizon that required insight as the

state of the law and respecting its application in practice.

The wisdom of Justice Holmes expressed in 1922 in Pennsylvania Coal Co. vs. Mahon, 260 U.S. 393 is alive and the essence of the new horizon of land-use cases. Holmes stated:

> "***[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Id at 415, emphasis supplied, cited by the Court at 11.
>
> "A strong public desire to improve public conditions is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change". At 416.

The issue is not one of the validity of the regulation. That is assumed and accepted. If the validity is in question, the remedial perspective is totally different. Inverse condemnation concedes the validity of the regulation in question. A regulatory taking generates a remedy mandated by the Fifth Amendment of the Constitution, i.e. just compensation to the property owner. This point is missed by many of the older cases which tend to confuse and mix the police power and eminent domain. The Fifth Amendment in no way attempted to prohibit the valid exercise of eminent domain in the taking of private property for public purpose. It provided the offsetting protection to the property owner; the fair market value of that which was

taken. This is in essence the goal of inverse condemnation.

The merits of the "taking" were not at all involved in the Evangelical Lutheran Church case. They were assumed and accepted. The regulation in question was one of the Los Angeles County Flood Control District. It prohibited the "construction, reconstruction, place or in large any building or structure, any portion of which is or will be, located within the outer boundaries of the interim flood protection area located in Mill Creek Canyon***". The provision, indeed is not unusual in this contemporary decade. It is similar to much of the flood control legislation that pervades the country. It is similar to much of the wetland, critical and sensitive area regulatory body of law that exists today. Thus, this article seeks to provide insight respecting the law and guidance regarding just compensation in a valid regulatory setting.

II. THE SPIRIT OF LUTHERGLEN

A. The Facts

In 1957 the Church purchased land and constructed a camp ground known as "Lutherglen". It was a retreat and recreation center for handicap children. The land was located alongside the banks of Mill Creek Canyon. This land is a natural drainage channel for the watershed district.

In 1978, a tremendous flood destroyed the structures at Lutherglen. In 1979 the Los Angeles County Flood Control District passed a typical interim flood protection area ordinance. It prohibited the construction or reconstruction of any building or structure in the area designated. This included the property of Lutherglen. Lutherglen immediately challenged the regulation. One of the grounds was an unartful and "criptic" count of inverse condemnation. The trial court granted a motion to strike this allegation. It based its ruling on Agins vs. Tiburon, 24 Cal. 3d. 266, 598 P.2d 25 (Aff'd. on other grounds, 447 U.S. 255 ( ). In Agins the California Supreme Court held that a property owner has no claim for inverse condemnation which is based upon a "regulatory challenge or taking". It stated that compensation is not required until the challenged regulation has been held to have gone "too far" in an action for Declaratory Relief or Writ of Mandamus. In addition the Government thereafter had to continue the regulation in effect. The Trial Court reasoned that since the church alleged a regulatory taking and sought only damages, i.e. no attempt to invalidate the ordinance, the allegation had to be dismissed. The California Court of Appeals affirmed. The essence of this decision framed the key issue in the case, i.e. Is monetary relief under the Fifth and Fourteenth Amendment appropriate for "temporary" regulatory takings?

B. The Issue and Holding

The novel or landmark nature of this case is not the establishing of a meritorious "regulatory taking" case or criteria. That was not involved. That holding has been addressed on numerous occasions by the court. The holding for which the First Lutheran Church case shall always be known is that there is a monetary remedy for "temporary" regulatory takings. Under the Agins case compensation was not required until the regulation in question had been deemed excessive and the regulation continued.

Chief Justice Rehnquist framed the issue and holding as follows:

> "In this case the California Court of Appeal held that a landowner claims that his property has been "taken" by a land-use regulation may not recover damages for the time before it is finally determined that the regulation constitutes a "taking" of its property. We disagree, and conclude that in these circumstances the Fifth and Fourteenth Amendments to the United States Constitution would require compensation for that period."

Thus, temporary just compensation must now be paid by Governmental Bodies for what is typically known as a temporary regulatory taking. This is the essence of the Evangelical Lutheran Church case. Thus a well intended, well founded and perfectly valid declaration prohibiting construction in a wetland area, tidal or fresh water, may

very well require the responsible Government Agency or Body to pay compensatory damages for the period in question. The typical moratorium regulation and old cases are also drawn into question.

III. THE LINKAGE OF NOLLAN

A. The Facts

The Nollan's own ocean front property in Ventura County, north of Los Angeles. In 1982 they decided to demolish their existing home to put up a larger home. The California Coastal Commission, similar to the many State Environmental Protection, Agencies certain regulations which restricted construction in the Coastal area. An eight foot concrete seawall separates the beach portion of the property from the building portion of the lot. The California Coastal Commission permitted the construction on the property in question upon condition that the Nollan's provided increased access for the public along the beach in front of their proposed home. The Commission had found "that the new house would increase blockage of the view of the ocean, thus contributing to the development of 'a wall' of residential structures" that would prevent the public "psychologically*** from realizing a stretch of coastline exists nearby that they would have every right to visit".

The Commission found that "the new house would also increase private use of the shore-front". As a result the Commission could properly and did "require the Nollan's to offset that burden by providing additional lateral access to the public beaches in the form of an easement across their property". It should be noted that the Commission had similarly conditioned 43 other development permits. Access to the beach provisions are common throughout the coastal area.

B. The Issue and Holding

The United States Supreme Court first addressed the issue of the similarity between an outright taking of an easement and the conditioning of a construction permit on the granting of an access easement. It stated:

> "To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather, *** is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interest, so long as it pays for them."

It made no difference to the Court that the public had the right of way along any navigable waterway in California. This public trust is common in many coastal states.

The Court framed it's first issue and concluded:

> "Given, then, that requiring uncompensated conveyance of the easement

> would violate the Fourteenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land use permit alters the outcome. We have long recognized that land use regulation does not effect a taking if it substantially advance(s) legitimate state interests and documents not den(y) an owner economically viable use of his land."

The Court then enters into a police power discussion. Ultimately, it cuts off the nexus and public interest of providing access to the beach and concludes:

> "The Commission may well be right that it is a good idea but that does not establish that the Nollan's (and other coastal residents) alone can be compelled to contribute to it's realization. Rather, California is free to advance its "comprehensive program, if it wishes, by using its power of eminent domain for this "public purpose", see U.S. Const., Amdt. V but if it wants an easement across the Nolan property, it must pay for it."

In both the Lutheran Church and Nollan cases inverse condemnations occurred. In both cases compensation was required. In Lutherglen compensation was required even for "temporary" damages, in that the regulation was subsequently amended. In Nollan compensation was required for the taking of property rights in mandating public access to the ocean.

The issue in the Nollan case was also a narrow one. However, as in the Lutherglen case the Opinion supported the strong protection of private property rights. In Nollan the narrow issue was that of taking private property to provide "increased access for the public along the public beach".

The bottom line of both cases is that government must be prepared to pay to property owners fair market value of property rights that are taken. This is not intended to diminish the laudatory public purposes of it's regulations nor the nexus of the particular restriction or condition.

C. Riparian Lands -- Linkage

The Court in Nollan highlighted the various "sticks in the hurdle of rights" which we know as property rights. (Slip Op. p. 5). The hurdle of property rights of owners of riparian lands are indeed different. However, each hurdle will be valued for what it is.

This holding addresses the important subject matter of "linkage". For decades, planning bodies have been linking to approvals various conditions involving instructing of on-site and off-site improvements, posting of various sums of money for public interest type of facilities and the like. The line of cases that have dealt with this subject matter, prior to Nollan, have addressed the issue of validity of these conditions. Many have been upheld, many have been struck. However, Nollan is different. Nollan tells us that when it is determined that the link or condition is valid there still may be a remedy for the property owner as against the governmental body in question. That remedy is inverse condemnation if the linkage has effectuated a "taking".

IV. THE STATE OF THE LAW

A. Decades Of Development

The state of the law at this point appears to be quite complete. Although many speculate that there are unanswered issues or uncertainties in interpretation, indeed, this appears to be fairylandish. Pragmatically there are numerous decisions of the United States Supreme Court and other courts of this land that have clearly lay out for the practicing lawyer the criteria and guidelines that must be followed.

The subject is broken into four tiers. Firstly, the "taking" issue. Does the regulation in fact constitute a "taking"? Secondly, once a potential taking is found is the issue "ripe"? Has the property owner exhausted all available remedies provided by regulation or law which might permit variance or construction under the prohibitive regulation? It is arguable that this point precedes point one. In fact, they are interrelated. Thirdly, if a taking is established and the issue is ripe what is the remedy? It is not the invalidation of the regulation -- it is damages. The validity of the regulation is a prerequisite. If it is not valid, it would be struck, of course, assuming validity, what damages by way of compensation for the taking of

property interest is the property owner entitled to? The First Lutheran Church case addresses this third point. Lastly, how will these damages be measured? What will be the criteria, standards or methods for measurement of "just compensation"? Is fair market value of the rights taken established by acceptable appraisal techniques the short answer?

The answers to all four tiers are clearly found in existing case law. Lutherglen put to bed the one major unresolved issue: The Court faced it this time:

> "Four times this decade, we (United States Supreme Court) have considered similar claims and have found ourselves for one reason or another unable to reach the merits of the Agins rule. See MacDonald, Sommer Frates vs. Yollo County, 477 U.S. _____ (1986); Williamson County Regional Planning Commission vs. Hamilton Bank, 473 U.S. 172 (1985); San Diego Gas and Electric, Supra; Agins vs. Tiburon, Supra. at p.

The Agins rule involved the inability of a property owner to get temporary damages. However, on all four occasions the United States Supreme Court did either reach or give its guidelines or criteria for the first two tiers of analysis in the process. Other cases have also fortified that. Be there no question that compensation must be given where a regulation "goes too far", although the regulation is perfectly valid. Be there no question that when the

reasonable economic value of a piece of property has been regulatorily eliminated (it need not be confiscated) just compensation must be paid. Be there no question that if a property owner has taken all steps permitted to attempt to obtain permission by way of variance or whatever other method available to restore economic value that the issue is ripe. Since Lutherglen, the property owner may now obtain the fair market value of this taking -- even though the taking be temporary. Since Nollan, the linkage or permit condition technique will not provide protection. The message to governmental agencies is think before you leap.

B. The Ripeness Issue

In the MacDonald case the Supreme Court, in a closely split decision, addressed the ripeness issue. There the plaintiff property owner brought an action for inverse condemnation. In 1975 the plaintiff had submitted a subdivision map to defendant Yolo County Planning Commission. It proposed to divide farmland into 159 single family and multi-family residents. The proposal was rejected and the County Board of Supervisors affirmed the rejection on various grounds. The grounds specifically addressed in the U.S. Supreme Court decision were the inadequacy of public street access, sewer services, water supplies and police protection. The property was therefore limited to ranch and farm dwellings and agricultural storage facilities.

The plaintiff filed an action in the California Superior Court alleging that the denial appropriated the total economic use of the property to provide for the public a "open-space buffer". The court dismissed the complaint holding that its allegations were insufficient. The California Court of Appeal affirmed the Lower Court decision and the Supreme Court of California denied a Petition for Hearing. The plaintiff then perfected an appeal to the United States Supreme Court. The matter was taken "because of the importance of the question whether a monetary relief in inverse condemnation is constitutionally required in appropriate cases involving regulatory takings". The majority decision of the United States Supreme Court did not address the merits of the case, deciding that the issue was not ripe.

The primary issue addressed in the MacDonald case by the Supreme Court is that of "ripeness" in inverse condemnation actions. The Court pointed out that a plaintiff "must establish that the regulation has in substance 'taken' his property" (Id. at). In this context the Court stated that it is "an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property" (Slip Op. p.7). The Court proceeded to examine and emphasize that the factors as it related to this inquiry were "***such as the economic impact of the regulation, its interference with reasonable investment-

backed expectations, and the character of the governmental action*** - that have particular significance". (Slip Op. p.8). The Court quoted Kaiser Aetna v. United States, 44 U.S. 164, at 175 (1979) and also referred to Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124, 1978 verifying Ad Hoc factual inquiries. The Court then proceeded to cite United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958) for the proposition that this particular inquiry turns "upon the particular circumstances of each case". It is at this point that the Court made reference to the recent case of Williamson Planning Comm'n. v. Hamilton Bank, 473 U.S. --- , n.11 (1985) Id. at p. . The Court, in this regard, stated:

> "Until a property owner has 'obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property', it is impossible to tell whether the land retains any reasonable beneficial use or whether (existing) exception interest have been destroyed". Id. at p.

The Court then proceeded to set forth the important essence of where the law is today.

> "***a court cannot determine whether a municipality has failed to provide 'just compensation' until it knows what, if any Body intends to provide, quoting Williamson. ***The Local Agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other. (Slip Op. p.9)

The Court ultimately got to the essence of the inverse

condemnation cases:

> "Whether the inquiry asks if a regulation has "gone too far" or whether it seeks to determine if proffered compensation is 'just', no answer is possible until a court knows what use, if any, may be made of the affected property." (Slip Op. p. 9-10).
>
> The Court then stated in a footnote:
>
> "a property owner is of course not required to resort to piece-meal litigation or otherwise unfair procedures in order to obtain this determination. See Williamson Planning Commission v. Hamilton Bank, 473 U.S. at - (Slip Op. p.4-5); Stevens, J. Concurring in Judgment; United States v. Dickinson, 331 U.S. 745, 749 (1974). (Slip Op. p.10n.)

The Court reviewed all of the various condemnation cases that had proceeded the McDonald case. All uniformly mandate that compensation should be granted when the governing body would not permit "beneficial use" of the property. The Court's decision was very clear that in this recent McDonald holding:

> "***the holdings of both Courts below leave open the possibility that some development will be permitted, and thus again leave us in doubt regarding the antecedent question whether appellants property has been taken". (emphasis supplied) (Slip Op. p. 11-12).

Two other recent United States Supreme Court cases have addressed the ripeness issue, i.e. Williamson v. Riverside

Bayview Homes. In Williamson, MacDonald and Riverside Bayview Homes the ripeness issue was the ultimate one upon which these cases were resolved. In Williamson the United States Supreme Court did not get to the merits because the issue was not ripe. There the Hamilton Bank was the successor in interest of the developers of a tract of land in Williamson County, Tennessee. In 1973, the County Planning Commission changed its zoning ordinance to permit cluster development and approved such a development on a tract in question. Plot lines for 469 parcels were shown on the preliminary subdivision plot. There was a total of 736 units allowed on the parcel. After dedicating some 245 acres to the County for open space, the development project began in various sections. Approvals had been granted over a course of time. In the Williamson case the span of time was between 1973 and 1979. During this 6 year period, actions were taken by the developer in reliance upon the approvals.

There came a time in 1977 that the public body changed its position. It did this by way of zoning regulations. Yet, the Commission continued its policy of applying the 1973 ordinance in granting subsequent development approvals on the parcel in question until 1980. At that time the Commission then disapproved a plot for the tract because it failed to comply with the requirements of the 1977 ordinance. Hamilton brought suit against the Commission in Federal District Court. The Trial Court granted the

Commission's motion for directed verdict on the equal protection and substantive due process claims. A jury returned a verdict in Hamilton's favor, finding in answers to special interrogatories, that Hamilton had been denied economically viable use of its property in violation of the just compensation clause of the United States Constitution and further estopping the Commission from requiring compliance with the 1977 regulations as opposed to the 1973 regulations. Three-Hundred Fifty Thousand Dollars was awarded in damages for the temporary taking of the property measured from the time its plat was approved until trial. The Trial Court issued a permanent injunction requiring application of the 1973 regulations and granted the planning commission's request for summary judgment notwithstanding the verdict on the taking issue. That Court stated:

> Any damages which plaintiff suffered resulted from an attempt by the local government to apply regulations in a manner impermissible under State law. Because the State law itself prevents continued application of those regulations there can be no taking property prohibited by the just compensation clause of the Fifth Amendment. The U.S. District Court of Appeals reversed the District Court on the judgment notwithstanding the verdict and reinstated the $350,000 award. That Court stated that Justice Brennan's dissent in the case of San Diego that just compensation must be paid for a temporary regulatory taking.

The United States Supreme Court in the case of U.S. vs.

Riverside Bayview Homes, Inc., 106 Supreme Ct. 455 (1985) dealt with the issue of the jurisdiction of the U.S. Corps of Engineers as to a potential wetland tract. Ultimately the Court found that the Corps had jurisdiction. The Court, however, then proceeded to find that that "the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking". Id. at _____ .

The Court in Riverside reiterated the warnings, however, then Agins dictate that a taking will occur if either no "legitimate state interest" is advanced or the property owner is denied "economically viable use of his property". It concluded:

> "Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the property in question can it be said that a taking has occurred." Id.

Most of the U.S. Courts, Circuit and District, found the ripeness issue as a convenient vehicle to postpone the inevitable. In U.S. vs. Ciampitti, 583, F.Supp. 483 (1984) the U.S. Army Corps of Engineers enjoined the development of a substantial tract of land in Cape May County. The tract had been under development for decades with a public sewerage system (treatment of which was funded federally, and had been substantially developed previously). Once the Court found the property to be wetlands and under the jurisdiction of the Corps of Engineers, the property owner urged that their actions constituted a "regulatory

taking". The Court stated:

> "The defendants argue in a conclusory fashion that the 1907 Grant vests absolute property rights in the grantee and his successors. If defendants mean to argue by this that the Government may not "take" the property, their argument is premature. As defendant Ciampitti has not applied for a permit and, consequently, has not been refused a permit, and no taking without just compensation is presently cognizable: there has been no determination that the property may not be put in the uses desire. Avoyelles Sportsmans League, Inc. vs. Marsh, 715 F.2d 897, 927 (5th Cir. 1983)." at p.495-496.

The ripeness issue as one still reoccurring as a hurdle for the prospective condemnee. As for the involuntary condemnor, it provides little comfort, yet an opportunity to avoid inverse condemnation of reasonable permissive use in the permit process.

V. THE TAKING ISSUE:

Since 1882 the subject of balancing the police power with the eminent domain clause of the United States Constitution has been with us. In Mugler vs. Kansas, 123 U.S. 6 (1882) the United States Supreme Court acknowledged a strong police power in the states, not abrogated by the Fourteenth Amendment. In the past century an overwhelming number of cases, articles and books have been written on the simple issue of "what constitutes a taking"? Historically this question has been answered by a mirage of concepts without need for quantification by way of definition. For

starters a negative criteria is appropriate. Physical taking of the property is not an essential element, although physical invasion has always been acknowledged as a conclusive element in and of itself. As early as 1871 a plaintiff sought compensation from a private company acting under government authority for damages which occurred when the plaintiff's land was flooded by waters backed up by a dam that the defendant had constructed. Defendant argued that no taking occurred because the plaintiff remained in possession of the land. Defendant further argued that the damage incurred was a natural consequence of valid governmental action in the course of improvement of navigation. Pumpelly vs. Greenbay, 80 U.S. (13 Wal.) 166 (1871); Accord, Loretto vs. Teleprompter, 458 U.S. 419 (1982). Diminution in value surfaced, early on, as a major criteria in the landmark case of Penn Coal vs. Mahon, 260 U.S. 393 (1922). Throughout the decades this criteria has remained and now exists as the major factor. It is a criteria that is measured in ranges. The mere diminution in value in and of itself will not constitute a taking. However, the elimination of reasonable economic value of the property by the regulation will constitute a taking. Over the decades other criteria have been discussed. See the Nuisance Abandonment Test in Mugler vs. Kansas, Supra.; also see Brandice Dissent in Pennsylvania Coal, Supra., n.8 and review of various tests in G. Bauman, The Supreme Court Inverse Condemnation and the Fifth Amendment; Justice

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Brennan Confronts the Inevitable In Land Use Controls, 15 Rut. L.R. 15, 21 (1983) and Baumgardner, 30 S.W.L.J. 723, 726 (1976).

The economic feasibility criteria is strongly embedded and presently dominates the scene. The bottom line of the interplay between whether there is a taking and whether the issue is ripe gives rise to a strong two-fold economic value criteria. The tone of this criteria for the determination of whether there is a taking is clear in both the MacDonald, Williamson and Riverside cases. (Also see Conley vs. Pension Benefit Guarantee Corp., 106 S.Ct. 1018 (1986).

There are numerous lower court cases to give the practitioner ideas and guidance. Recently in Florida Rock Industries, Inc. vs. United States, 791 F.2d 893, 16 ELR 206, 71 F.Cir. 1986, the Circuit Court reversed and remanded a Claims Court ruling that the denial of a 404 U.S. Corps of Engineers permit constituted a "taking" as it related to the extraction of limestone from a wetland area. It found that the Claims Court had improperly diminished "market value" of the property on the question of whether the regulation had so substantially interfered with the use of the property as to prevent any economically feasible use. Here there was potential evidence that speculators that were prepared to purchase the property were excluded. This decision is thin but instructive. In Deltona Corp. vs. U.S., 657 F.2d 1194, Claims Ct. (1981) Cert. denied 455

U.S. 1017 (1982). A land developer claimed a taking as a result of the denial of a permit to dredge and fill five construction areas. Prior to denial permits for three areas were granted. The Court held that although there was an economic loss because the denial "substantially frustrated Deltona's reasonable investment backed expectations... [(it did not)] prevent Deltona from deriving many other economically viable uses from its parcel***. Id. at 1192. This decision is instructive to governmental agencies in giving partial approvals, also see Gentgen vs. U.S., 657 F.2d 1210 (Ct. Cl. 1981), Lane vs. United States, 661 F.2d 145 (Ct. Cl. 1981) involved a 160 acre island that was proposed to be developed into a breeding research facility for use in producing vaccines. A Corps permit was denied. Mutual Summary Judgment Motions were denied and the cases was remanded by the Appellate Court for trial since "[w]hether defendant has denied plaintiff any remunerative use is, therefore, a fact issue requiring trial. Id. 147. Thus, this issue is a trial court issue. This issue is one that the creative and talented trial lawyer may become the deciding factor.

VI. A PRACTICAL GUIDELINE FOR THE PRACTICING GOVERNMENTAL OR PRIVATE LAWYER

Out of the Spirit of Lutherglen, and the linkage of Nollan and the Yolo County, Williamson and Riverside cases,

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the new horizon of inverse condemnation provides the governmental and private practitioner with certain clear guidelines.

1. Governmental Agencies must be extremely cautious prior to exercising their legislative or executive regulatory prohibitionary type of power, whether it be on a permanent or on a moratorium basis. There is no solace or peace in the fact that the police power may permit such an exercise. The line of cases upholding moratoriums, for example, as a valid exercise of the police power, in no way are protected from the wrath of the Lutherglen remedy. That wrath is "we acknowledge a moratorium to be valid, however, you may have to pay just compensation to the property owner for such an option". The police power cases cannot (although they often do) be confused with the concepts of eminent domain. The private practitioner has a potential additional remedy available.

2. The determination of whether or not there is a taking will primarily be a factual one. It is one that will function in ranges. It will vary from case to case utilizing, presently, the reasonable economic real estate value standard. Diminution of value is not enough. The elimination of reasonable economic value is the criteria.

3. The taking issue interlines with the ripeness issue. It may very well be that prior to determining whether or not there is a taking the ripeness issue must be

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determined. Governmental Agencies should provide a process wherein some economic use of the property is permitted, regardless of the extent. This is government's major armor against inverse condemnation. The giving of concessions and compromise will indeed be a large money saver. The administrative process is much more geared to hearings addressed to such deviations than the judicial system. The private practitioner, on the other hand, must make sure that every available potential for development of the property for any economic use under the system provided is pursued.

4. When the issue is ripe and the taking has been found the value issues then surface into reality. The methodologies to be utilized in this respect will be primarily the well accepted real estate appraisal and economic theory approaches. This is the subject of another article. Expert testimony and support will be at the essence of this determination. The valuation determination also will be a factual one.

The Spirit of Lutherglen and the linkage of Nollan, long in rising, has risen. The new horizon of inverse condemnation is here to provide the balance between needed protection of sensitive environmental land areas and private property rights.

INSIGHTS FOR THE MUNICIPALITY WITH TIDELANDS AND WETLANDS WITHIN ITS BORDERS

N.J.S.B.A. MID-YEAR MEETING
NOVEMBER 12 - 16, 1986
PUERTO RICO

LOCAL GOVERNMENT LAW PRESENTATION

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INTRODUCTION

More and more the Municipal Attorney and the attorney dealing with the Local Government find at their doorstep the tideland and wetland physical facts of life. It brings with it the related legal issues which will be addressed in this presentation. The major category of the issues is twofold. Firstly, municipal regulation of wetlands and the question of preemption by the state and federal government. Secondly, is the issue of municipal tideland ownership and preferential riparian rights.

This presentation will address both accordingly.

I. MUNICIPAL REGULATION OF WETLANDS

A decade ago, a noted authority in the area of environmental and land use law observed that:

> [M]ost of the State wetlands Acts have been silent on the rule of local regulations in wetlands control, nor has the problem been addressed by the [federal] CZMA. As yet there has been little case law on this point, but the complete and clearly specified regulatory framework which the State wetlands law provide for these areas may well lead to judicial holdings that any supplementary and more stringent local regulation is preempted by the state program.(1)

This would seem to be largely the case in New Jersey. Under

both the Wetlands Act(2) and the Coastal Area Facilities Review Act(3), much of the regulatory control is in the hands of the Commissioner of the Department of Environmental Protection(4). For example, under CAFRA the legislature mandated a comprehensive and pervasive plan to establish state regulations regarding environmental protection and development restrictions. Both statutes are silent with regard to the role of local government and the assumption could be made that silence equates with preemption.

Case law makes clear, however, that this is not necessarily true. In Lusardi v. Curis Point Property Owners Ass'n.(5), the issue before the New Jersey Supreme Court was the validity of an ordinance prohibiting recreational uses of beaches. Because the municipality was located within the area subject to CAFRA, the administrative regulations promulgated thereunder relative to recreation and beaches(6) were relevant to an analysis of the ordinance. Thus,

> [a]lthough these regulations do not preempt local zoning authority, they embody carefully considered policies for the use of coastal resources that local officials must take into account in zoning shore-line property within their communities(7)?

The ultimate holding of the Court in Lusardi was that the laudable zoning goals of preserving the residential character of the neighborhood and aesthetic considerations must yield to the State policy of public recreational use(8).

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In Matter of Egg Harbor Associates (Bayshore Centre)(9), the issue before the Court was whether DEP could require a developer in the coastal zone to set aside a percentage of housing units for low and moderate income. Noting that CAFRA had been passed at least in part because "municipal land use control was inadequate to insure orderly and environmentally-sound development"(10), the Court upheld such a requirement. Referring to local regulation, it observed:

> In enacting CAFRA, the Legislature harmonized statewide concerns over the coastal zone with concerns of municipal zoning authority, N.J.S.A. 13:19-19, and provides for residential growth. N.J.S.A. 19:19-10 and -16. In further recognition of the shared concerns of DEP and municipalities in the CAFRA zone, the Legislature included in the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -99, effective in 1976, provisions relating to environmental conditions and regional needs. N.J.S.A. 40:55D-2, -28, -38.
>
> As a theoretical proposition, the legislative scheme leaves open the possibility for conflicting decisions from DEP and municipal land use agencies in the coastal zone. No such conflict, however, exists in the present case. Here, the applicant received final approval on two of seven phases of the development from the Board of Adjustment of Egg Harbor. Neither that Board nor the Governing Body was a party to or sought to intervene in the present proceeding.
>
> Any problems arising in future applications may be alleviated if, as is the practice of DEP, staff members meet with the applicant and

> municipal officials to discuss the effect of development on the municipality's obligation to meet its fair share of low income housing. In an appropriate case, DEP might even provide testimony in municipal proceedings on the provision of low and moderate income housing. Presumably, as here, municipal officials may also appear at public hearings conducted by DEP. If problems should develop because of overlapping jurisdiction of the municipality and DEP, the Legislature can resolve the conflict through amendments to the statutory scheme"(11).

Egg Harbor thus establishes that DEP and local government share the power to regulate development in the coastal zone(12). Such a construction is consistent with a decision out of the Law Division holding that the Pinelands Protection Act does preempt all facets of local government land use control(13). It would also appear to be a logical extension of certain language found in South Burlington County N.A.A.S.P. Mt. Laurel Tp(14):

> In the case of both the Pinelands and Coastal Areas, state agencies have been created with direct responsibility and power to classify areas for purposes of encouraging and discouraging growth, indeed with power to prohibit it completely. Our review of the present plans and policies of both the Division of Coastal Resources and the Pinelands Commission indicates that their classification process is well-advanced and most complex. Since the relationship of the work of these agencies, and of their classification of the area subject to their jurisdiction, to the SDGP was neither argued nor briefed, we decline to decide in this litigation

> which municipalities within their bounds are subject to Mount Laurel doctrine.
>
> Trial judges in Mount Laurel cases involving municipalities located either in the Pinelands or the coastal zone shall consider in detail the classification systems involved to determine whether imposition of the Mount Laurel doctrine would be consistent with the regional planning goals of the agency, and whether the constitutional obligation will under any circumstances override those goals.
>
> We realize that the construction of lower income housing in these coastal and pinelands areas where the Mount Laurel doctrine does apply will require approvals of agencies in addition to the municipality that the approval procedure can be difficult and time consuming, and that what may appear as a realistic opportunity in a zoning ordinance may turn out not to be so by virtue of the position or regulations of the Division or Commission. These complexities necessarily arise from this double layered system of municipal and state agency regulation designed to assure the greatest protection and coherence in the development of these highly sensitive environmental areas(15).

It is thus clear that under Mt. Laurel II, zoning in accordance with regional considerations is mandated(16). In this regard, the Municipal Land Use Law(17) provides in several places(18) that environmental needs, which of necessity transcend municipal boundaries, be considered. Of particular note may be the inclusion, in a master plan, of:

> A conservation plan element

> providing for the preservation, conservation and utilization of natural resources, including, to the extent appropriate, energy open space, water supply, forests soils, marshes, wetlands, harbors, rivers, and other waters, fisheries, endangered or threatened species, wildlife and other resources, and which systematically analyzes the impact of each other component and element of the master plan on the present and future presentation, conservation and utilization of those resources(19).

It thus appears that within the coastal zone, there is overlapping authority between DEP and the local governmental unit, although it is clear from Lusardi and Egg Harbor that in the event of a conflict, State policy will prevail. It has also been noted that, at least as the housing in the coastal zone, DEP is better equipped than local government to implement the Mt. Laurel requirements(20).

> [T]he plan promulgated by the DEP to implement CAFRA addresses issues critical to comprehensive controlled growth in the coastal zone. The DEP plan apprises potential developers and individual municipalities of the existing and potential housing needs for any particular area within the coastal zone(21).

Accordingly, with regard to law and moderate income housing in the coastal zone, it would probably not be incorrect to say that local government's traditional planning and zoning role will be relegated to nothing more than a shadow of its former self.

Conspicuous by its absence in CAFRA is any provision for local input in to the decision-making process. Comparison may be made to the Hackensack Meadowland Reclamation and Development Act(22) and the Pinelands Protection Act(23). Both of these laws contain provisions creating municipal committees(24) composed of the mayor of each constituent municipality. These committees are empowered to review matters required by law to be submitted to it. In the case of the Meadowlands Municipal Committee, the power is to reject any matter forwarded to it by the HMDC, subject to an override by 5/7 of the HMDC(25). Thus, in these two regional zoning districts local government does have input into the formalization of policy within the district. The same, however, cannot be said for municipalities within CAFRA.

Reverting again to Mount Laurel II,(26) one commentator has argued that:

> ...the court debased the municipal master plans which, according to the court's reasoning, are now subject to preemptive override by conflicting centrally developed state planning documents(27).

He suggests that the Court in Mount Laurel II,

> ... converted a voluntary informational and coordinating guide for state, county, and local officials [State Development Guide Plan] into an involuntary blueprint for municipal development mandated by the state(28).

Although the Supreme Court in Egg Harbor, supra, indicated

that CAFRA merely "supplemented" municipality zoning authority(29), a reading of that decision would seem to imply that local government's role in the development of the coastal zone is severely limited. To be sure, local zoning boards may retain original plan approval authority, such approval may well be withheld by DEP under CAFRA.

Comparison of the New Jersey situation with other jurisdictions is difficult because of the great variance in statutory language and philosophy. In Conneticut, for example, cities are given specific statutory authority to regulate wetlands(30). In Massachusetts, it has been held that under its Wetlands Protection Act(31), the power to regulate is shared jointly by the State and the Municipality(32). In Hawaii, it is up to the county plan commission in the first instance to determine whether a particular development is consistent with the objectives of the state CZMA(33).

II. THE MUNICIPALITY AND THE TIDELAND DILEMMA

A. General

New Jersey, as most coastal states, has a serious question of title ownership of areas that adjoin water, whether it be wetlands, marshes, estuarine areas, rivers, bays or shorelines. Basically title ownership is dictated by the ancient common law. In New Jersey all lands lying below the mean high water line of a tidal water body are owned by the sovereign State of New Jersey.

This presentation will not explore the background or the complexities of the application of this doctrine.(34)

B. The Municipality As A Riparian Owner

Many coastal municipalities own property adjoining ocean, bay, river or waterway of some nature. They are property owners that receive the benefits of a riparian owner. They are an owner which is encumbered with the burdens and restrictions of such property. As the owner of riparian lands it is entitled to the same incidents of ownership that any other owner would have.(35) Moreover, many states have expounded the traditional powers of the municipal riparian owners through statute. These statutes often assume the guise of a preferred status afforded to the political subdivision for acquiring riparian grants.(36)

Some courts have taken the position that when a municipality is a riparian proprietor because of a stream or river flowing within its boundaries, the entire municipal territory is rendered riparian investing it and all its inhabitants with full riparian benefits stream or river.(37) This rule, however, appears to be the minority view. The majority of cases stand for the proposition that a municipality, like any other corporation, is vested with riparian rights only in respect to such lands as it holds in a proprietary capacity, contiguous to the stream or shoreline.(38) The riparian rights of the inhabitants there are likewise limited to such lots of tracts as are actually contiguous to the stream or river.

Then there are the restrictions and burdens. It is a well accepted principle that when the municipality is vested with riparian rights, the exercise of those rights is subject to certain paramount rights of the public. Numerous cases have been litigated involving municipal titles and interests in riparian properties.(39) Evincible throughout the majority of these cases is an emphasis by the courts on the effect of municipal riparian ownership upon the public trust doctrine.(40) This philosophy often restricts the rights of the municipal corporation (and even the state in some instances) in utilizing and alienating their respective riparian lands.(41)

Thus, the municipal's title is subject to the State's tideland interest. It is subject to all of the restrictions of the public trust doctrine.

The doctrine was enunciated by the United States Supreme Court in Illinois Central Railroad Company v. People of the State of Illinois:

> It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control the regulation of Commerce with foreign nations and

among the states.(43)

Although the court was speaking specifically of the application of the doctrine to the States, it has become increasingly clear that the doctrine applies with equal force to the political subdivisions of those States.(44)

Originally the doctrine only applied to the ancient public prerogatives of navigation and fishing. It has since been extended to include other shore activities such as bathing, swimming and similar activities.(45) All of this evinces that the public trust doctrine has not been considered fixed or static but should be molded and extended to meet the changing conditions and needs it was created to benefit.(46)

C. Taxing Non-Municipal Riparian Properties

This part of the presentation will concern the role of the municipality with regard to privately owned riparian property. In this area, the paramount concern of the local entity involves the tax assessment of riparian lands. It is therefore necessary to embark upon a discussion of the valuation techniques and the methods utilized in assessing riparian rights. It is important, at this juncture, to note that the taxing authority must distinguish between those tideland situations where the owner has acquired the riparian rights from the State by means of a grant or lease and those cases involving a tideland title cloud in which the State claims an interest. State owned

tideland is not taxable.

It is generally held that riparian rights are assessed as part of the property in question.(47) The riparian right is therefore an asset which should be evinced in the value of the land. One author questions whether the assessor involved with a riparian valuation should consider the severability of the water right for use on other land and for other purposes, but concludes that this assumes that there might exist a market for those rights and that the price might be greater than the value of the right as part of the riparian land.(48) Irrespective of the method of valuation utilized, the assessor should consider the adaptability of the land for other uses.

In any event, the value of a riparian right cannot be less than the difference in the value of the riparian land with and without the water right.(49) Amovy v. Commonwealth,(50) involved a condemnation where the court reviewed and upheld a valuation which utilized the "before and after" method. The court determined that the amount paid by the condemnor to other riparian owners might furnish evidence of comparable sales if those transfers were made voluntarily.

Another way of examining this issue is to review those cases where the privately owned property is subject to tidelands or riparian rights vesting in the State. In Secaucus v. Damsil(51) the court determined that the question of a sovereign tideland claim could not be used to reduce a local property tax assessment even though the possibility of the state's claim did admittedly

impose a cloud on the owner's title and was the principle reason his purchase price was reduced by $56,500. The Court states that the discounted purchase price represented the buyers estimate of the cost to it of eliminating any adverse claim to the title either through purchase or litigation. The Court quoted from In re Appeal of Neptune(52), for the following proposition:

> The law requires an assessment of the value, not of the owner's title but of the land; the assessed value represents the value of all interests in the land.

The Court notes that there was no evidence that the state owned any interest in the land and if the petitioner believed the property was subject to the state's riparian claim he should have sought an exemption.

A similar result was reached in City of New York v. Archie Schwartz, et al, Assessors of the Town of Fallsburg,(53) in which the local assessor placed the riparian rights of New York City on his tax role. The Court noted that while riparian rights constitute an interest in property, they are not "land itself" and could not be considered land for taxing purposes. If riparian rights are assessed it must be in connection with the property to which it was connected.

Water power, water rights, or flowage rights, while not in general independently taxable apart from the land to which they are or in connection with which they are used(54) add to the value of the land. Such additional value must be considered when

land is assessed for purposes of taxation(55).

FOOTNOTES

1. Mandelker, Environmental and Land Controls Legislation 249 (1976).

2. N.J.S.A. 13:9A-1 et seq.

3. N.J.S.A. 13:19-1 et seq.; See Toms River Affiliates v. Dept. of Environmental Protection, 140 N.J. Super. 135 (App. Div. 1976) upholding the constitutionality of the Act.

4. N.J.S.A. 13:9A-4; 13:19-8-12

5. 86 N.J. 217, 430 A.2d 881 (1981)

6. N.J.S.A. 7:7E-8.13(a), (b); 7:7E-3.10(c)

7. 430 A.2d at 887 (emphasis supplied)

8. Id. at 887-88

9. 94 N.J. 358, 464 A.2d 1115 (1983)

10. 464 A.2d at 1120

11. Id. at 1121

12. Id. at 1122

13. Fine v. Galloway Tp. Committee, 190 N.J. Super, 432, 463 A. 2d 990 (L.Div. 1983)

14. 92 N.J. 158, 456 A.2d 390 (1983)

15. 456 A.2d at 434-35 (footnote omitted)

16. Id. at 430

17. N.J.S.A. 40:55D-1 et seq.

18. N.J.S.A. 40:55-D-2, 28, 38

19. N.J.S.A. 40:55D-18(b)(8)

20. Comment, 15 Ruf. L.J. 801, 810 (1984)

21. Id. (Footnote omitted)

22. N.J.S.A. 13:17-1 et seq.

23. N.J.S.A. 13:18A-1 et seq.

24. N.J.S.A. 13:17-7, N.J.S.A. 13:18A-7

25. N.J.S.A. 13-17-8; No rejection power is found in the Pinelands Act; rather, the municipal council shall merely state its position. N.J.S.A. 13:18A-7(g)

26. Blomquist, "Solar Energy Development, State Constitutional Interpretation and Mount Laurel II: Second-Order Consequences of Innovative Policymaking by the New Jersey Supreme Court", 15 Ruf. L.J. 573, 592 (1984).

28. Id. at 595

29. 94 N.J. 358, 464 A.2d 115, 1121 (1983)

30. Conn. Gen. Stat. Ann. §22a-42. See Aaron v. Town of Redding, 183 Conn. 532, 441 A.2d 30 (1981)

31. Mass. Gen. L. Ann, Ch.. (31, §40.

32. Southern New England Conference Ass'n. of Seventh Day Adventists v. Town of Burlington, 21 Mass. App. 701, 490 N.E. 2d 491 (1986)

33. Haw. Rev. Staf. §205A-1 et seq.; Alaloa v. Planning Commission of County of Maui, 705 P.2d 1042 (Hawaii 1985).

34. For a detailed practical analysis of this problem and its application in the practice of law see Handling Tideland Matters in Modern Real Estate Transactions by Porro, Alfred A. Jr., et als., The New Jersey Institute of Continuing Legal Education; 1983.

35. Oklahoma v. Texas, 258 U.S. 574, 66 Led 711, 42 S.Ct. 406 (1922). App. den 260 U.S. 711, 67 Led 476, 43 S.Ct. 251, 78 A.M. Jur. 2d §275; McQuillan, Municipal Corporations 28.09 p.17 §31.26 p. 213.

36. For example see N.J. § A12:3-33 et seq.

37. Canton v. Shock, 66 Ohio St. 19, 63 N.E. 600, 58 L.R.A. 637 Rep. 577.

38. Emporia v. Soden, 25 Kan 588; Lard v. Meadville Water Co. 135 Pd. 122, 19 A 1007 ( ) Appealed of Haupt, 125 Pa 211, 17 A 436 ( ).

39. McQuillan, Munc. Corp., §28.09, p.17; §31.26 p.213

40. Goldshore, The New Jersey Riparian Rights Handbook, County and Municipal Government Study Commission, 1979. See also Borough of Neptune City v. Borough of Avon by the Sea, 61

N.J. 296 (1972).

41. See Mayor and City of Baltimore v. Canton Co. of Baltimore, 186 Md. 618, 47 A.2d 775 (Ct. of App. 1946) involving a suit by the Mayor and Council of Baltimore to recover minor privilege charges imposed by them on defendant's piers built upon navigable waters. The Court ruled against the city. It determined that the provision of the City Charter of 1898 that title of the City in and to its waterfront, wharf property, and land underwater as inalienable does vest the sovereign title of the State in the City. The City's title is subject to the sovereign tideland interest.

42. 146 U.S. 387, (1892)

43. Id. at 435

44. Borough of Neptune City v. Borough of Avon City -The- Sea, Id.

45. Id. 294 A.2d at 47. See also Home for Aged Women v. Commonwealth, 202 Mass. 422, 89 N.E. 124, 129 (1909); Hixon v. Public Service Commission, 261 Wis. 2d 608, 146 N.W. 2d 577, 582 (1966); Muench v. Public Service Commission, 261 Wis. 492, 53 N.W. 2d 514, 520 (1952) affirmed on rehearing; 261 W.S. 492 55 N.W. 2d 40 (1952); State ex rel. Thornton v. Hay, 254 or 584, 462 P.2d 671 (1969); Gion v. City of Santa Crux, 2 Cal. 3d. 20, 84 Cal. Rpt. 162, 465 P.2D 50 (1970); Gewitz v. City of Long Beach, 69 Misc. 2d 763, 330 N.Y.S. 2d 495 (Sup. Ct. Nassau City (1972); See also Clark 1 Waters and Water Rights (1967) §36.4(b) pp.220-202; Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," 68 Mich. L.Rev. 471 (1970) at 556, 565; Note "The Public Trust in Tidal Areas: A Sometime Submered Traditional Doctrine," 79 Yale, L.J. 762 (1970) at 777- 778, 784-785; Note, Jaffee, "State Citizen Rights Respecting Greatwater Resource allocation: From Rome to New Jersey," 25 Rutgers L.Rev. 571 (1971) at 608 N. 226, 690, 701.

46. Borough of Neptune, Id. 294 A.2d at 54

47. See Janata, Property Tax Manual, Strategies and Techniques for Reduction and Control, Part II, p.100.

48. Water and Water Rights, supra. §77.1(A), p. 497).

49. Id. p. 497; also see Skeen, E.J., Water Rights in Relation to the Appraisal of land, The Appraisal Journal 373, July 1975 and Cunningham, F.M., The Appraisal of Riparian Rights, The Appraisal Journal 180, April 1973.

50. 321 Mass. 240, 72 N.E. 2d 549 (1949)

51. 120 N.J. Sup. 470, 295 A.2d 8 (App. Div. 1972), 62 N.J. 90, 299 A.2d 88 (1973)

52. 86 N.J. Super. 492, 207 A.2d 330 (App. Div. 1965)

53. 320 N.Y.S. 2d 983, 36 App. Div. 2d 402 (1971)

54. 51 Am. Jur. §714

55. See Central Main Power Co. v. Turner, 128 Me. 486, 148 A. 799 ( ); Blackstone Mfg. Co. v. Blackstone, 200 Mass. 82, 85 M.E. 800 18 L.R.A. (NS) 755; Lowell v. Middlesex County, 152 Mass. 372 25 N.E. 469, 9 L.R.A. 356.