

WELLINGTON'S VICTORY?

By Blair Gollihur, Coastal Zone Law, Marine Affairs 521, Spring, 1999

"It shall be city policy to promote the use of harbor front property for those uses that depend on the waterfront and to discourage those uses that can reasonably exist in other locations." Newport City Plan¹

"The logic of the marketplace, with the dollar as the decision-maker, has determined that the primary users of things in the harbor that require waterfront access are human beings in transient lodging situations,"
Edward J. Smith, owner of Ryan's toys on Thames Street, Newport, Rhode Island²

INTRODUCTION

From the early years of the 18th century the economy of Newport Rhode Island depended on the traditional marine-related industries of a port city -- including the presence of the U.S. Navy. Since the 1970's, however, the waterfront has undergone a complete transformation. Marine-related industries have all but been displaced by the ubiquitous trappings of the tourist industry. The waterfront's new image is one of condominiums, timeshares, hotels, restaurants, and the multitude of retail shops familiar to every tourist destination.

This paper will explore coastal zone access issues as they relate to waterfront development in Newport, Rhode Island. It will do so by focusing on the attempt to preserve public access to the water through the establishment of the "Harbor Walk" proposed by Friends of the Waterfront, a Newport-based citizens action group. More specifically, the paper will concentrate on a particular tract of land, the "Wellington property," which is a key component to the proposed Harbor Walk.

It will attempt to clarify the contentious history that shaped the present day Wellington property development; discuss its relevance to the public trust doctrine and other legal precedents, and; analyze the positions and actions taken by local and state governmental agencies with regard to these issues. Finally the paper will suggest a specific course of action for the resolution of some of these outstanding issues. It is hoped that by recounting the process of the Wellington development in detail, some light will be shed upon the problems facing public access to the Newport waterfront today.

¹ Elliot Krieger, "All Along the Waterfront," The Providence Sunday Journal, 15 January, 1984, sec. C, p. 2.

² Ibid.

PART I -- BACKGROUND

The Idea of the Harbor Walk

Over the past 25 years, the Newport waterfront has undergone a rapid evolution from a traditional working maritime community to a combination maritime-Navy town, and finally, to the year-round tourist destination it is today.

The construction of the Newport Bridge (renamed the Claiborne Pell Bridge) in 1969 opened “a new gateway to southern Rhode Island.” With the Navy downsizing in Newport, civic leaders and investors recognized that the tourist industry represented the most viable alternative for promoting economic growth. By the 1970’s many of Newport’s older, run-down neighborhoods were being torn down and turned into timeshares, hotels, retail shopping sites, and restaurants. At about this time, Friends of the Waterfront (FOW) was formed to monitor growth, take action when necessary to preserve public access, and to retain community control of the waterfront development.

Over the past seventeen years, this non-profit organization has been engaged in a grass roots struggle with its stated mission: *to protect public access to the water; to preserve historical uses, rights-of-way, and waterfront views, and; to help foster the development of Newport, Rhode Island’s waterfront and shoreline areas in ways that maximize public access.*³ One of the group’s projects has been to create a public Harbor Walk along Newport’s bustling waterfront by the year 2000.

The Harbor Walk is divided into two phases: Harbor Walk South and Harbor Walk North. Harbor Walk South is the first segment being addressed by FOW. The property under discussion in this paper is key to the successful completion of Harbor Walk South. Although this segment has been subdivided and subsequently renamed, it will simply be referred to as the “Wellington property” to avoid confusion.

The Wellington Property as an Engine for Economic Development

During this same period, studies were made and commissioned by local government, universities and urban planners for the economic development of the Newport waterfront. One 1978 study conducted by the University of Rhode Island⁴ analyzed the present and future needs for the city while suggesting viable development plans for the waterfront area. One of their recommendations included construction of 100 units of one- and two-bedroom townhouses on the Wellington property. The objective was to preserve the flavor of the residential area while providing an “effective and aesthetically pleasing buffer” to the “mixed uses along the waterfront”.⁵ It was also suggested that the townhouse development would provide considerable tax revenue while requiring a small amount of city spending.

³ Friends of the Waterfront, <<http://www.NewportHarborWalk.com>> April, 1999.

⁴ Bruce D. Bender, et al, “A Plan for the Newport Waterfront,” Community Planning and Area Development, University of Rhode Island Marine Bulletin 35, 1978.

⁵ Ibid., 45.

It appears that the planning for development on the Wellington property was considered a good venture. In 1983 plans to build the Wellington Complex, a \$35 million, 72-unit timeshare hotel and office complex with 125 parking spaces, were announced by developers.⁶

Over the course of Newport's waterfront development, from the heyday of construction in the early 1980's to the more recent plans for growth in 1999, the Wellington property has been the subject of continual debate, contention, and political manipulation. The disputes have, at one time or another, included tax assessment problems; timeshare development issues; identification of rights-of-ways; public access questions; building permit allocation over a known toxic site; zoning arguments; the illegal placement of floating docks in Newport Harbor; and now the illegal placing of a fence across a pedestrian right-of-way.

The Historical Evolution of the Wellington Property Development

The earliest tax records at City Hall relating to this property date to 1895. All prior records were lost in the City Hall fire of 1890. Records for the Wellington property at one time were listed at Newport City Hall's Tax Assessor's Office as Plat 35, Lot 204. Over the years the property has been subdivided, renumbered, renamed and rezoned to now comprise Plat 35, Lots 204, 119, 209, 143, 55, 125, 109, 200 and a lot referred to as Kirwan's 5th Ward. Records show that in 1895 the property was owned by Rhode Island Hospital Trust and John Nicholas Brown, and then sold to The Newport Gas Light Company in 1905. For many years thereafter, the Newport Gas Light Company operated a coal gassification utility plant at the site. Coal was shipped to the neighboring Coddington Wharf, unloaded and conveniently supplied to the adjacent utility company. This southern end of Thames Street, also called the Fifth Ward, was known as a grimy industrial area filled with Irish workers who lived in row houses built by the gas company on the very spot that the Wellington Yacht and Racket Club timeshare now stands. In the 1950's the utility plant was abandoned and razed after pipeline natural gas became common.⁷ The site remained abandoned until 1967.

At this point, the confusion between the players and their various partnerships becomes, at best, murky. Tax records indicate that the property was purchased in 1967 by Bay Front Realty. It was found, however, that Bay Front Realty is actually a subsidiary of Providence Gas Company. In 1971 Providence Gas absorbed the old Newport Gas Light Company and with it, the abandoned Wellington property. As mentioned, it appears that Providence Gas already had an interest in this rundown toxic abandoned lot. In 1985, in an attempt to diversify and broaden its investments outside natural gas distribution and energy-related holdings, Providence Gas formed a holding company, Providence Energy. Providence Energy in turn created a subsidiary named Patience Realty. As such, Providence Energy's first outside investment was the joint venture with Malloy Real Estate called Wellington Hotel Associates. Unfortunately, the timeshare business turned out to be significantly less lucrative than projected. Over the years, Providence Energy would lose roughly \$6.6

⁶ Note 1 at 2.

⁷ Editorial, "Newport Waterfront and Hidden Hazards," The Providence Journal, January 21, 1984

million on this investment, and ultimately sold its developmental rights for the remaining undeveloped property to Newport Partners in 1989.

Now the murkiness of who's who at the Wellington property reaches new depths. Wellington Hotel Associates is comprised of a few key players that keep reappearing under various incorporated names over the next 15 years. The principals are Providence Energy, Malloy Real Estate, and Joseph R. Paolino. The corporations involved with this property listing Joseph R. Paolino as either vice-president or president, include the Wellington Hotel Associates, Wellington Retail LLC, J.R.P. Associates, 57 Associates, Newport Partners and most recently, Wellington Cove Condominiums. Wellington Hotel Associates are the current managers of the timeshare operation with Joseph and Heather Paolino at the helm. There is also undoubtedly a connection between Malloy Real Estate and the contractors who provided construction on the timeshare, Malloy Real Estate Construction Co. These have all had at some time or do now have ownership or management interests in the retail, timeshare and condominium properties of the Wellington property.

Site Description

The Wellington property includes a pedestrian right-of-way which is a crucial link to the first segment of the proposed Harbor Walk beginning in the southeast corner of Newport Harbor adjacent to King Park. There is a recorded fifteen-foot pedestrian right-of-way that runs along approximately 650 feet of the cut-stone bulkhead in front of the Wellington Yacht and Racket Club timeshare and the two adjacent lots ending at the Coddington Wharf to the north. The finished timeshare development blocks the view of the harbor from Thames Street and the top of Wellington Avenue. The 6.8-acre area was built over former wetland using some fill from the federal harbor dredging project undertaken in the 1940s.

This right-of-way runs along the western edge of the property, parallel to the seawall and stretches from the City's Combined Sewage Overflow Plant at the edge of King Park (South and East of the property) to Coddington Landing (also known as Coddington Wharf). Coddington Landing is a public right-of-way owned by Newport, and there are plans by the City of Newport and FOW to beautify the small grass area leading to this old boat ramp. The Wellington path is underutilized by the general public due to its disrepair; its unmarked linkage to the public King Park at its southern end; its access being blocked by view from the busier Thames Street and Wellington Avenues, and; perhaps most importantly, a fence blocking the path in front of the timeshare development. Currently the area is also partially blocked by construction materials and debris lying along one-third of its path. The entire Wellington property is now subdivided into four lots. The four lots are comprised of the finished timeshare and three lots zoned for condominiums. Curiously, one of those lots is a marina also zoned for condominiums.



View of pedestrian right-of-way leading north towards Coddington Landing
(note pilings for marina and debris across path)

PART II: LEGAL AND POLITICAL ISSUES

The development and filling of the Newport Harbor over the centuries creates a situation that requires an extraordinary review of historical records, deeds, land records and other pertinent information necessary to establish a legitimate right-of-way. While the Wellington property does presently have an Easement for Pedestrian Way granted to the City of Newport by the Wellington Hotel Associates, it is important to understand the legal basis for the creation of public access to the shore. It is equally as important to understand the politics which permit the right-of-way to be effectively ignored.

THE LAW

This section will attempt to clarify the doctrines of public trust, easement by prescription, dedication, and custom by which the right to public access can be determined, and discuss their applicability to the Wellington property. Because the interpretation of the public trust doctrine is the overriding legal basis by which public access is derived, the primary focus will be on the historical and current rendering of this doctrine.

The Public Trust Doctrine and its Role in Rhode Island

To understand the underlying principle of the public trust doctrine, one must first recognize the tenet that not all land is privately owned and that some land should be held for the public's use by the State, as sovereign, in trust for the people. This concept is continuing to evolve as our coasts are becoming more developed and populated, traditional maritime industries are being replaced by commercial enterprises focused on tourism and entertainment, and the public in general is becoming more concerned with preserving our dwindling natural resources.

The public trust doctrine evolved from English common law and has its roots in Roman law. The Institutes of Justinian provided that "by the law of nature these things are

common to mankind—the air, running water, the sea, and consequently the shores of the sea.”⁸ A fundamental doctrine regarding public lands is the concept of *res communes* in which “the shores cannot be said to belong to anyone as private property”.⁹ It was after the Magna Carta, in English common law, that land was deemed to be held by the public (*jus publicum*) as well as to be held by the King (*jus privatum*). The *jus publicum* privileges were understood to be the inherent privileges of fishing, navigation and commerce and were long understood to be public rights in Rhode Island.¹⁰ The Sovereign holds the lands as trustee to ensure that public interests in the lands are protected.¹¹

Thus, there are thus two concepts of ownership that exist for tidal and submerged lands: the *jus publicum* privilege for the public’s use held in trust; and the *jus privatum* privilege of private property ownership. The tidelands and submerged lands lying below navigable waters are held in a *sus generis*, or different/special, capacity and title to the land cannot be held by either in full. Because the public trust doctrine has a special category of land ownership, it remains in flux and is subject to reinterpretation.

As the United States grew, states entering the Union would acquire rights to submerged lands and hold those rights in “trust” for the people it governed on an “equal footing” with the other states as determined in the U.S. Supreme Court decision of *Shively v. Bowlby*.¹² It states: “*The new States admitted into the Union since the adoption of the Constitution have the same rights as the original states in the tide waters, and in the lands below the high water mark, within their respective jurisdictions.*”¹³ All states are different, however, and Rhode Island’s charter of 1663 guaranteed the public’s inherent right of fishing, but did not specifically mention the right to navigate.¹⁴ The charter gave liberty to building of wharves in Rhode Island, and particularly Newport as one of the earliest colonial seaports, and encouraged commerce as it related to the fishing industry.

In the colonies, the king’s rights were transferred to the colonial governments, and they could alter established law with regard to the tidewaters or grant exclusive property within them such as the right to wharf out.¹⁵ The colonial government of Rhode Island progressed to our modern state authority with common law principles remaining intact. Rhode Island’s state government recognized the public trust doctrine when it guaranteed its citizens certain privileges in the state constitution in Article 1, Section 17, entitled Fishery rights -- Shore privileges -- Preservation of natural resources:

⁸ Donna R. Christie, *Coastal and Ocean Management Law* (St. Paul: West Publishing Co., 1994), 18

⁹ *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892)

¹⁰ *Nugent v. Malone*, 161 A.2d 802 (R.I. 1960)

¹¹ *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892)

¹² *Shively v. Bowlby*, 152 U.S. 1 (1894)

¹³ *Ibid.*, 11

¹⁴ Elaine Forman Crane, “A Report on the Historical Basis for Rights of Way to the Harbor in Newport, Rhode Island,” 23 January 1986

¹⁵ *Ibid.*, 10

*The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore and they shall be secure in their rights to the use and enjoyment of the natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.*¹⁶

This clearly enunciates Rhode Island's historical assessment of the public trust doctrine. While the passage does not specifically spell out what the shore privileges are, it does reiterate the basic principle that it is the state's duty to safeguard the inherent public rights to natural resources.

An important case in Rhode Island that established modern concepts of public access to the shoreline is *Javony v. Powel*.¹⁷ In this case, the Rhode Island Supreme Court confirmed that passage along the shore was a common-law public right and prevented the city of Newport from fencing a portion of Easton's Beach between the high- and low water marks.¹⁸

Because the Wellington property lies on filled land, it would appear that the public trust doctrine should apply to preserve public access to the shore.

Easement by Prescription

Another method to obtain a right-of-way across land or a waterway is by an easement by prescription. If the land is used in a continuous, open, notorious, and adverse manner for a prescribed period of time, an easement by prescription is possible. However, this method to obtain access to the shore is sometimes difficult to prove. The obligatory prescriptive period in Rhode Island is ten years¹⁹ and it must be clearly established that the property had been adversely passed for that period continually, not seasonally, or an easement by prescription will not apply. An easement by prescription is deemed more of a personal right and based on the intent of the user. The most common form of an easement is a right-of-way.

In this case, it would be difficult to establish an adverse continual passing across the Wellington property for the prescribed period because the property was unoccupied for a considerable period of time.

¹⁶ Constitution of the State of Rhode Island and Providence Plantations, <http://www.rilin.state.ri.us/gen_assembly/RiConstitution/C01.html> April, 1999

¹⁷ *Jakovny v. Powel*, 67 R.I. 218, 21 A.2d 554 (1941)

¹⁸ *Supra* note 8 at 32.

¹⁹ Dennis Nixon, "Public Access to the Shoreline: The Rhode Island Example," University of Rhode Island, Marine Reprint No. 108 (original work printed in *Coastal Zone Management Journal* (1/2):65-81, 1978)

Implied Dedication

Because easement by prescription may be difficult to prove, implied dedication is a more common method to acquire shore access by the public. Implied dedication is an “implied” giving of land by a landowner and an “implied” taking of the land, or easement, by the public for the public’s use. The public must use the land as if the lands were government owned, or publicly owned. If the land is used over a long period of time, and the owner does not dissent to its use, then the owner has “implied” consent to its use. In a way, he has implicitly donated his land for public use by not denying access by erecting trespass signs, fences, or other means of dissent.

Common law dedication to the public can thus be proved by either showing acquiescence of the owner in use of the land, or by establishing open and continuous use by the public for the prescriptive period.²⁰ The owner’s intent is a crucial factor in determining implied dedication whereas the intent of the public is the crucial factor in determining an easement by prescription. The landowner’s knowledge of the trespass, without an overt act of dissent thus proves an implied acquiescence to donate the land.

The Wellington property was abandoned but still used by local residents to access the waterfront for years. Implied dedication should be applicable in this case.

Custom

A far less common means to secure public access to the shoreline is the doctrine of custom. In common law, one of the critical elements of custom is the proof of uninterrupted use by the public since “ancient” times. Since it would be nearly impossible to prove this ancient use without the ability to rely on Indian and Colonists’ testimony, the doctrine of custom is not suitable for the Wellington property.

Current Trends in Rhode Island’s Public Trust Doctrine

Rhode Island has retained a balance between public and private interests as they apply to submerged lands by upholding the traditional principles of the public trust doctrine. However, when *Hall v. Nascimento* was decided by the Rhode Island Supreme Court in 1991, a new rendering emerged in which the court expanded the influence of the public trust and held that private rights are “subservient” to public interests.²¹ In this case, the Court ruled under the principles of the public trust doctrine on submerged lands subject to tidelands and littoral rights prior to dredging and filling. The Court ruled that a private party could not adversely possess public property unless by legislative statute.²² This ruling left it unclear whether private landowners could obtain absolute fee simple ownership of submerged lands. It also stated that owners of submerged land could only

²⁰ *Gion v. Santa Cruz*, 465 P.2d 50 (Cal. 1970)

²¹ Matthew D. Sleprow, “Shoring Up the Limits of Rhode Island’s Public Trust Doctrine: Greater Providence Chamber of Commerce v. State of Rhode Island Makes it Simple as One, Two, Fee”, 1 *ROGER WILLIAMS U. L. REV.* 183, 4 (1996)

²² *Hall v. Nascimento*, 594 A.2d 874, (RI. 1991)

have their rights validated “*when the effect is not inconsistent with the public trust*”.²³ This ruling caused quite a stir by both landowners and public access advocates as it could potentially affect most of Rhode Island’s shoreline. At this time, Friends of the Waterfront became active supporters of public access rights, and proposed a moratorium on all coastal building until a final determination of the ownership of the lands was established.²⁴ Littoral landowners and real estate businesses were equally alarmed at the ruling and its potential consequences. It was just a matter of time before a number of cases arose which tested this interpretation of the public trust doctrine.

In 1995, the Rhode Island Supreme Court created a formula whereby a decision can be drawn to ascertain what is public trust land in submerged lands. Specifically, the questions addressed by the court were: “*Is the fee simple absolute title to tidal land, which may have been filled as early in our history as the 1700s, in the private-record title holders? Or does the state hold such land for public trust purposes?*”²⁵ In *Greater Providence Chamber of Commerce v. State of Rhode Island*²⁶ a declaratory judgment was sought by a rather influential group of Providence property owners. This group of plaintiffs which included the Providence Chamber of Commerce, Rhode Island School of Design, Narragansett Electric Company and Providence Gas Company, sought a judgment on the effect the public trust doctrine would have on their property interests. The court created a two-part test to establish title in submerged lands that reflected “*the court’s effort to rein in the public trust doctrine*”²⁷ or as more conservatively stated, “*to narrow the scope of the traditional public trust in favor of a more pragmatic approach to tidal lands*”.²⁸ The test would be required on a case-by-case basis. Each case would have to determine whether the submerged land in question was filled with the tacit approval of the state and, if so, if improvements had been made to the land. Recognition was made of Rhode Island’s historical regard to the public trust doctrine by stating that “the public-trust doctrine was firmly and pervasively embedded in American jurisprudence”.²⁹ However, recognition was also made that each state, including Rhode Island, has its own peculiar way of applying it. The interesting issue here, however, is the reversal in direction from the earlier decision in *Hall v. Nascimento* wherein the court broadened the scope of the public trust doctrine.

It appears that this narrower approach was very recently restated in a case just decided by the State Supreme Court last week (23 April 1999). The court awarded the Providence and Worcester Railroad title to 33 acres of filled waterfront that was originally slated to become a container port.³⁰ The State claimed the rights to the property based on the public trust doctrine but apparently with evidence of

²³ Id.

²⁴ Supra note 19 at 13.

²⁵ *The Greater Chamber of Commerce et al. v. State of Rhode Island*, 657 A.2d 1038, (R.I. 1995)

²⁶ Id.

²⁷ Karen Hambleton, “Property Law—State Cannot Reacquire Title to Filled Tidal Land Solely on Basis of Public Trust Doctrine”, 30 SUFFOLK U.L. REV. 489, 1

²⁸ Supra note 20 at 23.

²⁹ Supra note 24.

³⁰ Doane Hulick, “Supreme Court awards railroad control of waterfront acreage,” The Providence Journal, 24 April 1999, Business Section, p. 4.

improvements on the sub-tidal land, and permission for the project granted by two state agencies (Coastal Resources Management Council and the Department of Environmental Management), it may have passed the two-part test invoked in Greater Providence Chamber of Commerce.³¹

It is vital to recognize that evolving interpretations of the public trust doctrine have had significant impact upon planning and development policies in Rhode Island. After Newport's building boom of the 1970's and early 1980's, the city planners began to take a different view towards public access and overbuilding. No doubt some of their concerns were not only for long-time residents but they also had an economic incentive to provide accessibility to the tourists flocking to the waterfront. Another concern was the increased traffic flow and parking problems exacerbated by this development. With these issues in mind, the city planners began to change their attitude towards growth along the waterfront.

PLANNING, PERMITTING AND POLITICS

Permission to Build?

On September 16th, 1983, the Newport Daily News led with the headline "*Confusion Muddles 72-unit Hotel Plans*".³² This headline does not do justice to the morass of problems associated with the development of the \$35 million Wellington hotel complex. In a quest to hasten approval prior to a pending zoning change, the property owners, Bay Front Realty, included in its permit application to the Coastal Resources Management Council (CRMC) a letter implying the City of Newport's permission to build. Because all construction within 200 feet of the waterfront must be approved by the CRMC, it was essential to get permission prior to construction. The chairman of the CRMC, upon reading the letter, accepted the letter as city approval for construction. The Newport Director of Planning, Samuel L. Jernigan, protested, "*Paraphrasing Yogi Berra, the project is not 'approved' until it is 'approved'*".³³ His concern was that approval by the CRMC would be met prior to city inspection or to the proposed zoning change. The zoning change was a critical issue, and would have altered the property from Waterfront Business to special Marine Business District disallowing hotel development. The zoning change did not occur, however, and the stage was set for further confrontation.

Toxic Shock

It was well known that the property would be a toxic nightmare for development due to its history as a coal gassification plant. Nonetheless, Bay Front Realty forged ahead by trying to circumvent local authority from restricting construction. After examining

³¹ Further research was hampered due to the decision just having been rendered; no information could be found on Westlaw or Nexis-Lexis at the time of writing.

³² Susan Heil, "Confusion muddles 72-unit hotel plans", The Newport Daily News, 16 September 1983

³³ Ibid.

the site for building approval, the Newport building inspectors determined that the development of the site would create a public safety hazard and refused to issue a permit. Bay Front Realty took the issue to Superior Court, where the judge ordered the city to issue the building permit for the hotel.³⁴ The city appealed to the state Supreme Court who in turn upheld the lower court's ruling, and ordered the city to issue a building permit. As a result, an unusual consent agreement (the first of its type in the state) was struck between the state Department of Environmental Management (DEM) and the developers. It required construction workers to take precautionary measures such as wearing protective suits and air masks, and to ensure that dumping of the material was done in a safe manner in a safe place. Meanwhile, the DEM conducted tests at the request of Bay Front Realty to determine if the chemicals (including benzene and toluene) posed any danger. DEM's hazardous materials division announced that the low concentrations found at the site did not pose serious concern, but if the soil and groundwater were disturbed, they would recommend workers wear protective gear.³⁵ A public outcry ensued from neighborhood groups legitimately concerned for their safety and health. An excerpt from a letter by a local resident to the director of the federal Environmental Protection Agency exemplifies this concern:

"The judge said that hazardous waste wasn't in the building inspector's jurisdiction. But it's funny that should health hazards arise and suits be brought, the city and the building inspector who issued the permit would be held liable and the judge has no culpability...Newport is becoming the speculator's paradise – like the Klondike...It has been our experience here, that once a big out-of-town developer gets a permit to build, they do what they damned well please. No one can stop them and the public be damned...Now what are you going to do about it?"³⁶

Concerns were also expressed by Newport's City Solicitor who said building inspectors should have the right to decide whether the public's health is endangered prior to issuing a building permit. It would appear that given the clear public health dangers posed by the unearthing of toxic chemicals, the concerns of local authorities should be paramount. Nevertheless, Bay Front Realty continued with its plans to develop the hotel complex. At that time, it would have been one of Newport's largest developments, containing five retail stores fronting Thames Street, a pool, and timeshares along Wellington Avenue and the harborfront. The ground broke for construction on July 1, 1984, with an opening date planned for September 1, 1985. Meanwhile, the CRMC became aware of Bay Front Realty's construction plans to build over an existing right-of-way. Because the role of the CRMC is ultimately critical in establishing public access to Wellington's shoreline,

³⁴ Tim Murphy, "Toxic elements found at planned Newport hotel site," The Providence Journal, 7 January 1984, sec. C, p A-7.

³⁵ Susan Heil, "Oily tank handled with care," The Newport Daily News, 5 March 1985.

(During construction protective gas masks were required when a submerged tank was uncovered containing a smelly, oil substance. The gas emitting from the tank was described as being too strong for the workers to breathe and the worst that the construction firm had ever encountered.)

³⁶ Ann Bowditch Canole Twomey. Letter to Mr. William Ruckelshaus, Director of EPA. 16 February 1984.

it is important to understand the policies and procedures that guide the CRMC's right-of-way designation process.



Facing north with view of unfinished Unit 1, recently completed Unit 2 (built by Newport Partners as Wellington on the Harbor Condominium), and Coddington Landing condo in background

CRMC's role in designating rights-of-way in Rhode Island

The Rhode Island General Assembly in 1971 created the Coastal Resources Management Council to act as public trustee to maintain the state's public trust responsibilities. The CRMC has the authority and responsibility to designate all public rights-of-way to the shore in Rhode Island. In *Sartor v. Coastal Resources Management Council*,³⁷ the responsibility was reaffirmed by the State Supreme Court. The CRMC encourages individuals and municipal governments to participate in the designation process, and has outlined a procedure to identify and establish public rights-of-way in a published manual.³⁸ The designation process entails a thorough search for evidence, or fact-finding stage, in which the following will be considered:

1. land evidence records;
2. the exercise of domain over a parcel such as maintenance, construction, or upkeep;
3. the payment of taxes;
4. the creation of dedication;
5. public use; and,
6. any other public record or historical evidence such as maps and street indexes.³⁹

The evidence is then reviewed by a subcommittee and, if there is a reasonable probability a public right-of-way exists, a recommendation is made for review by the full Council. This Council meets bi-monthly, and if the right-of-way is recommended again, a decision is written and, if not appealed, filed with the Secretary of State's office and

³⁷ Cecil D. Sartor v. Coastal Resources Management Council, et al, 542 A. 2d 1077 (R.I., 1988)

³⁸ Rhode Island Coastal Resources Management Council. (1994). A Citizen's Guide to Assisting in the Right-of-Way Designation Process.

³⁹ Ibid. p. 6.

recorded in the appropriate land evidence records. The guide stresses that the public right-of-way designation does not establish ownership rights. It merely identifies and preserves existing rights-of-way for future use.

The process can be long and tedious, but some progress appears to have been made over the years. In the latest rights-of-way progress report the CRMC states that out of a total of 337 rights-of-way reviewed, 216 were designated.⁴⁰ The report states that the goal of the CRMC is to designate at least one mile of public right-of-way for each mile of Rhode Island's 420-mile shoreline. This seems like a tall order when the yearly budget allocation is shown to be decreasing exponentially. The original funding was at \$30,000 a year, it then dropped to \$15,000 year, and last year's was only \$5,000.⁴¹

The Richmond Street Right-of-Way

As mentioned above, in 1984 FOW brought to CRMC's attention pre-existence of a right-of-way along Richmond Street, which ran through the middle of the Wellington property. Richmond Street was considered a private street that at one time was lined with rowhouses that served as residences for the gassification plant's predominantly Irish workers. The dispute arose the previous summer during CRMC hearings to determine rights-of-way along the Newport waterfront. Just as the contaminated site issue seemed to be resolved, the CRMC issued a stoppage order to any work on Richmond Street until a final decision regarding the Richmond Street right-of-way could be made.

Evidence was shown at a June 4, 1985, hearing that the street existed in 1873; that the City of Newport had paved and surfaced the street; that the area was not taxed as a private street; that the City provided illumination at no expense from at least 1950 to 1980; and, that ultimately, dedication did exist. However, the CRMC counsel dismissed the evidence without any questions or discussion, and declared that Richmond Street was private because he found no evidence indicating there was a taking or abandonment. There is no clear explanation why this decision was reached, but an agreement had been made with the developer that due to the sensitivity of the subject, no construction would take place on it. The former site of Richmond Street is now a paved parking lot for the Wellington retail complex.

Challenging the Authority of the CMRC

From the beginning, the involvement of the CRMC in the Wellington property development was characterized by acrimony and misunderstanding. Problems came to a head shortly after the dispute involving the Richmond Street right-of-way. The Wellington property included a private 16-slip floating dock marina. A permit for the marina had been issued by the CRMC, but it was later discovered that the marina was

⁴⁰ Coastal Resources Management Council, Subcommittee on Rights-of-Way (June 1998). Designation of Public Right-of-Ways to The Tidal Areas of the State (sic)

⁴¹ Ibid. p. 3.

built 2 to 6 feet north of its approved position, and was blocking part of a channel to the city's Coddington Landing.

In 1985, the CRMC ordered the removal of the misplaced floating docks by issuing a cease and desist order to the Bay Front Realty Company. The docks were removed at season's end but the pilings were left in place. In 1987 the CRMC issued another cease and desist order to the new owners, Wellington Hotel Associates, to remove the same docks.⁴⁴ Wellington Hotel Associates applied to the council for permission to put the floats back, requesting an "as built approval". After ten months of waiting for an approval, and with no response from CRMC, the docks were put back into the water at the same location.

The Wellington Hotel Associates said that the misplacement was minimal, done in error at the time of construction, and that it would cost \$88,000 to move the pilings. After the cease and desist orders, Wellington Hotel Associates appealed to the Superior Court. The Superior Court upheld the CRMC orders. With that decision, the Wellington Hotel Associates appealed to the Supreme Court challenging the constitutionality of the CRMC and, by extension, to many other constituted state authorities.⁴⁵

The attorney for Wellington Hotel Associates just "barely got out of the starting blocks"⁴⁶ when he was showered with a burst of questions by the justices. The counsel's argument was that the CRMC's authority was unconstitutional because its board members were appointed by both the governor and the legislature, thus violating the separation of powers inherent in a democratic society. He argued that the CRMC should be viewed as an executive agency. Judge Joseph R. Weisberger gave him a history lesson, and admonished him for his lack of understanding the state constitution in which most of the power is held by the General Assembly. The judge further pointed out that the power of making appointments was given up by the Assembly in the 1930's when Superior Court justices were appointed by the Governor.

CRMC's attorney, Allan J. Goldman, also pointed out that the state constitution doesn't divide the legislative, judicial and executive powers, but instead distributes the powers. He also clarified the "minimal error" of the misplacement of the docks as translating to a full 25% blockage of the Coddington public right-of-way. The court upheld the removal of the docks, the constitutionality of the CRMC, and questioned how the court could make a better determination of the dock matter than a regulatory agency. Goldman put the issue in more succinct terms:

"This is a classic case of a large developer, by error or design, encroaching on the waterfront."⁴²

⁴² Jim Hummel, "Developer seeks ruling on CRMC authority," The Providence Journal, 4/15/88, pp A-19.

The pilings were replaced.

The Pedestrian Right-of-Way

In 1989, Wellington Hotel Associates applied to the Newport Zoning Board to have the two unbuilt timeshare units rezoned for condominiums. As a concession, the Wellington Hotel Associates agreed to give a 15-foot wide pedestrian easement along the waterfront to the city.⁴³ The easement states that the public can use the gravel path from dawn to midnight. At that time it was the longest pathway along Newport's waterfront given to the public.

The Newport Daily News hailed the easement as a "big step toward a Harbor Walkway."⁴³ The action by the Wellington Hotel Associates measurably improved the developer's image in the community. They further agreed to maintain the path and claimed that they were not trying to make any kind of "deal" -- it was a "public spirited thing."⁴⁴ The easement was recorded in land evidence records nearly a year after its announcement.

It is interesting that this "spirit" seems to have dissipated since then. Some time between 1989 and today, a very well-maintained wooden fence appeared which blocks the path at its southern end by the timeshare. It clearly cuts across the pedestrian easement, and nearly prohibits (unless you traverse the seawall's edge) access from King Beach north to the Coddington Landing right-of-way. When recently asked about the fence, a Wellington Hotel Associates' spokesperson at first claimed no knowledge of the fence and then stated, "It was there when we came in. I know nothing about it."⁴⁵

A Taxing Issue

As if the foregoing were not sufficient, in yet another act of defiance to city government, Wellington Hotel Associates and two other timeshares refused to pay property taxes for a quarter of 1991, claiming excessive tax rates.⁴⁶ The City of Newport responded by threatening to list their properties for a tax sale. Wellington Hotel Associates sought a restraining order to stop the listing, and in the subsequent hearing, reached an agreement with the City. The agreement called for a reassessment of taxation on timeshare properties.

⁴³ Jim Mackinnon, "City takes big step toward a Harbor Walkway," Newport Daily News, 26 May 1989.

⁴⁴ Ibid.

⁴⁵ Phone conversation with Heather Paolino, 27 April 1999.

⁴⁶ Elizabeth Abbott, "3 time-share hotels pay taxes, avoid listing in auction," The Providence Journal, 2 January 1992.

This agreement was to the property owners' benefit. It was agreed that the property would be assessed on the basis of square footage rather than on the number of timeshare weeks sold. The taxes were paid, and the tax sale averted.

The Property Today

For several years, construction on the rezoned condominium property proceeded haphazardly. The fall of 1998 marked the completion of a condominium unit owned by Newport Partners at the far northern end of the Wellington property. There appears to have been some financial difficulties within Newport Partners, prompting the completion of this unit and the subsequent sale of an incomplete unit and the marina.

Through some investigation, it was learned that the middle portion of the property still under construction and the 16-slip marina rights were bought by neighbor Russel Hoyt (heir to B. Dalton Books). He apparently wanted to retain his view of the bay and purchased that view for \$1.2 million. His plans are to clean the lot; turn it into a private park; and retain the marina for private use. He has no intentions to block the easement and, thus far, encourages public use of it. There is even some talk of beautification for the area such as planters, lights, and benches.



Russel Hoyt's million dollar view

Recently the Friends of the Waterfront focused their energy on this end of the proposed Harbor Walk. They made a concerted effort at cleaning up the Coddington Landing and making it more amenable for public use. On Earth Day, 24 April 1999, a very successful clean-up campaign was undertaken at the site with over 100 people participating,

including the Mayor of Newport, Parks Superintendent and local businesses. An old fence was torn down that illegally ran across the Coddington right-of-way, brick was relaid, flowers planted, weeds pulled, and garbage hauled off. The resultant effort provided a promising vision of the Harbor Walk's future success.



Friends of the Waterfront at work, Earth Day, 1999

CONCLUSION

The struggle to maintain public access to Newport's waterfront is a good illustration of the tensions and contradictions generated when economic growth and environmental concerns collide in a welter of special interest politics. Although the concerns are often two sides of the same coin (i.e. without economic interest there is often precious little environmental concern), the fact remains that public access to Newport's Waterfront is an issue which must be resolved. Completion of the Harbor Walk South is a small part of this much larger concern but it represents an eminently identifiable and resolvable issue.

The simple fact of the matter is that a legally enforceable pedestrian right-of-way exists for the south portion of the Harbor Walk. That this right-of-way has been effectively ignored by the developers of the Wellington property after having agreed to (and even taken credit for) its very existence speaks volumes about the politics of the decision making process.

The steps involved in resolving the issue would seem to be rather simple and straightforward:

- After contacting a Newport City Councilwoman,⁴⁷ the advice was given to write a formal letter explaining the right-of-way issue and copy that letter to the City Solicitor.

⁴⁷ Phone conversation with Newport City Councilwoman Kate Leonard, 27 April 1999.

- Concurrently, the CRMC should be asked to address the issue by presenting the pertinent information and requesting that the issuer be heard at a hearing of the full council. The issue is clearly not one of ownership, over which the CRMC cannot make a determination. It is a simple reaffirmation of the designated right-of-way. As stated in its Citizens Guide to Assisting in the Right-of-Way Designation Process: *“A CRMC designation clearly identifies pre-existing ways over which the public has the right to pass and ensures the preservation and protection of these sites for current and future generations.”*⁴⁸

Ideally, the above actions should result in the complete restoration of public access to the Wellington property pedestrian right-of-way. Whether such a result actually materializes should provide an indication of the commitment of all parties to adhere to law and regulation or whether it's just business as usual in Newport.

⁴⁸ Supra note 41 at 7.

APPENDIX A

Chronology of Wellington Complex Development

- 9/16/83 - Newport Daily News article, "Confusion Muddles 72-unit hotel plans", cites state's impression that City of Newport had approved plans for hotel at Wellington site.
- 1/4/84 – Superior Court judge ordered city to issue a building permit for the Wellington Hotel development. City of Newport appeals to state Supreme Court.
- 1/7/84 – Providence Journal-Bulletin article, "Toxic elements found at planned Newport hotel site".
- 1/31/84 – Newport Daily News article, "City must issue permit to Gas Co.
- 3/2/85 – CRMC issued a stop order over disputed right-of-way on Richmond Street.
- 3/5/85 – The Newport Daily News article, "Oily Tank handled with Care". Submerged tank containing smelly, oily substance, uncovered at construction site, requiring protective gas masks to be worn by workers.
- 7/11/87 – The Newport Daily News article, "Wharf work draws cease-desist order". Cease-desist order from CMRC to Wellington Hotel Associates dated back to 5/14 to remove floating docks along waterfront
- 12/23/87 – The Newport Daily News article, "CRMC says misplaced docks must go". CRMC issues another cease and desist order to Wellington Hotel Associates to remove docks from site of original misplaced Bay Front Real Estate pilings in front of Wellington development.
- 4/27/88 - Newport Zoning Board grants Wellington Hotel Associates permission to become full-time condominiums for part (36 units) of its time-sharing resort company. As a concession, Wellington Hotel Associates has to provide a public 15-foot waterfront easement around the property from dawn to midnight
- 7/14/89 – The Newport Daily News article, "Utility gives up condo business". Portions of Wellington Yacht & Racquet Club sold for \$1.85 million to Joseph R. Paolino by Providence Energy Corporation of which Bay Front Real Estate is a subsidiary.
- 1/2/92 – The Providence Journal, "3 time-share hotels pay taxes, avoid listing for auction".
- February 1999 – Condominium Unit sold to Russell Hoyt (heir to B. Dalton Books) by Newport Partners, LLC, for \$1.2m in order to secure ocean view

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⁴⁴ "Wharf work draws cease-desist order," Newport Daily News, 11 July 1987

⁴⁵ Fredericksen, Robert C., "Coastal council faces challenge to authority," Providence Journal, 24 February 1988, pp A-17.

⁴⁶ Hummel, Jim, "Developer seeks ruling on CRMC's authority," Providence Journal, 15 April 1988, pp A-19.