

Mehaffy argued that since his father had reserved the right to place fill material in 1970, seven years before the passage of the CWA, his father—and by extension Mehaffy himself—could reasonably expect to be able to place fill material on the property. The court, however, rejected this reasoning. Mehaffy had not yet taken ownership of the property in 1970; rather, his ownership—and therefore his expectations in acquiring the property—began in 2000. Furthermore, the court considered Mehaffy's reasonable expectations when he applied for the permit, at which time he knew full well the requirements of the CWA. The court also noted that Mehaffy was still able to develop the property as long as Mehaffy complied with the § 404 permit process. Mehaffy had not done so, but he was free to re-apply again for permission to place fill on his property.

Third, the court considered the character of the government action at issue. The court noted the great public benefit of the CWA. In addition, the court emphasized that CWA regulations did not operate retroactively on Mehaffy's ownership interest and

that the Corps' actions were not directed particularly at Mehaffy.

Taking these *Penn Central* factors together and the second factor in particular, the court found that the Corps' denial of Mehaffy's § 404 permit did not amount to a regulatory taking and no just compensation was required. The United States' motion for summary judgment was granted and the court entered judgment in favor of the federal government.

### Conclusion and Implications

In affirming the Corps' denial of Mehaffy's § 404 permit application, the court emphasized the need to fully comply with CWA's procedural requirements in seeking such a permit. In particular, the court stressed the need to consider alternative sites and designs pursuant to the CWA guidelines. In light of this decision, those seeking a § 404 permit in the future should fully comply with the application process to ensure a successful application. (Danielle Sakai, Kevin Abbott)

## MARYLAND HIGH COURT AFFIRMS PROPERTY OWNERS' RIGHT TO EXCLUDE THE PUBLIC FROM PRIVATELY OWNED BEACH LAND

*Clickner v. Magothy River Association*, Case No. 13, September Term, 2011 (Md.App. Jan. 20, 2012).

On January 20, 2012, Maryland's Court of Appeals—the state's highest court—affirmed the right of property owners to exclude the public from privately owned beaches by applying an exception to the rules establishing prescriptive easements. In *Clickner v. Magothy River Association*, the Maryland Court of Appeals deemed that the public's long-standing use of beaches on Dobbins Island was presumptively permissive, shifting what normally would have been the land owner's burden of proof to those who sought the prescriptive easement. Deeming that the Magothy River Association (Association) and others failed to meet that burden, the Court reversed the trial court's ruling that privately-owned portions of beaches on Dobbins Island were available for public use. The Court's ruling was the first to apply this exception to inland shorelines and could dramatically reduce recreational access to these lands, which, at more than 3,000 miles in length, are a significant state resource.

### Background

Dobbins Island is a small, undeveloped island in the middle of the Magothy River. Accessible only by boat, it has been privately owned since 1769, when it was granted by patent to its surveyor, William Gambrel. Due to its appealing physical attributes and relative accessibility, members of the public have been using the island, and in particular, its beaches, for years.

In 2003, the Clickner family purchased the island, intending to build a home on the property. Upon discovering the island's extensive public use, the Clickners posted no trespassing signs along the perimeter and erected a fence along the beach at the approximate mean high tide line. The mean high tide line separates areas of the shore, which are intermittently covered and uncovered by the flow of the tide, from the dry sandy beach. It is that line, under Maryland

law, which separates the land that is held by the state in trust for the benefit of the public from land that can be owned by individuals. (See, Md. Code Ann., Envir. §16-101(o).)

After the Clickners erected the fence, the Magothy River Association and others (collectively: the Association) sued the Clickners, requesting the court to, in part, establish their rights “to continue to use the island as they have used it in the past” by declaring that a public easement exists on the property. The Association argued that an easement exists under four possible legal theories: implied dedication; custom; prescription; and an expansion of the public trust doctrine. The trial court dismissed all but the easement by prescription claim, and those dismissed claims were not appealed.

### Maryland State Law

Under Maryland common law, in order to acquire a prescriptive easement, a claimant must show an adverse, exclusive, and uninterrupted or continuous use of another’s real property for twenty years. See, *Banks v. Pusey*, 393 Md. 688 (2006). When a claimant argues that a prescriptive easement exists for the benefit of the public (as opposed to an individual), the exclusivity requirement turns not on the claimant demonstrating a right to use the property that is different from the rights of the community at large, but on a showing that all have an equal right to use the property, regardless of how many actually choose to do so. A use is adverse if it occurs without the landowner’s permission, so a claim to acquire a prescriptive easement will fail if the use occurred with the landowner’s permission. As adversity can be difficult to prove and would normally be the claimant’s obligation to show, courts in Maryland shift the burden of proof to the landowner when claimants can show that they used the privately owned land openly and continuously for the requisite twenty year period. If a claimant can make that showing, it then becomes the landowner’s burden to prove that the use was permissive as opposed to adverse. However, the burden of proof shifts back to the claimant when an easement is claimed on land that is unimproved or in a general state of nature. In such a scenario, known as the “woodlands exception,” there is a legal presumption that the use is with the landowner’s permission.

### The Trial Court’s Decision

In its ruling, the trial court held that prescriptive easements can be applied to privately owned inland beaches, a question of first impression in Maryland. In addition, the trial court found the “woodlands exception” inapplicable to the case at bar, and that the Clickners failed to prove that the public’s longstanding use of the Dobbins Island beach was permissive. The Clickners appealed, and the Court of Appeals reversed the trial court’s ruling based on the “woodlands exception.”

### The Decision on Appeal

On appeal, the parties agreed that the factual record developed at trial supported the conclusion that the public had been using the beaches continuously for more than twenty years. Consequently, the parties agreed that the outcome of the appeal would turn on whether inland beaches were susceptible to prescriptive easements, and if so, if the long history of public use of Dobbins Island occurred with or without the permission of the Island’s prior owners. Because the record was inconclusive as to this second issue, the outcome of the case largely came down to which party had the burden of proving that the public use was adverse to the interests of the owners of Dobbins Island.

### Prescriptive Easements and the Woodlands Exception

Following a lengthy recitation of the factual and procedural history of the dispute, the Court described, in two ways, the evolution of Maryland precedent associated with prescriptive easements. The first, according to the character of the property susceptible to a prescriptive easement, about which the court agreed with the findings of the trial court. The second, by tracking the development of the “woodlands exception” in evaluating the adversity requirement associated with prescriptive rights.

### Distinguishing Prior Caselaw

The Clickners argued that a prior decision by the Court of Appeals, in which a public claimant unsuccessfully argued that the public’s longstanding use of a private, undeveloped beach to store materials created a prescriptive easement, implied that public policy

cut against granting prescriptive easements along the shores of Maryland's inland waterways. See, *Thomas v. Ford*, 63 Md. 346 (1885). The Court disagreed with the Clickners' interpretation because it was broader than the *Thomas* court intended. Rather than categorically barring prescriptive easements for inland beaches, the court said, *Thomas* reflected the more general proposition that permissive use could not ripen into an adverse right, and that *Thomas* reflected the view that use of all beaches is presumptively permissive.

The *Clickner* Court also cited later a case in which the Maryland Court of Appeals found that no public prescriptive easement existed for an area of Maryland's Atlantic Ocean coastline because the area had not been in use for the requisite 20 years. See, *Department of Natural Resources v. Ocean City*, 274 Md. 1, 332 A.2d 630 (1975). Importantly, the court in that case cited *Thomas* for its description of the doctrine allowing for public prescriptive rights on roadways, and explicitly extended it to dry sand coastline. Extending that premise to its logical conclusion, the Court stated that:

...[w]e see no meaningful distinction between ocean and inland beaches sufficient to allow public prescriptive rights to accrue on one type of beach and not the other.

### Open Use and Continuity of Use

Once it established that prescriptive easements were available for the shores of inland waterways, the Court addressed whether the Association's use of the Dobbins Island beach was adverse for the requisite 20-year period. The Court held that the "woodlands exception," a doctrine more commonly used in situations where adverse rights are asserted over roads or wooded areas, was applicable to the beach on Dobbins Island because the beach was "in a general state of nature." The Association argued that the historical use of the "woodlands exception" was, in part, dependent on the parcel being shielded from view and not susceptible to regular observation by the parcel owner. And because the Dobbins Island beach was clearly not shielded from anyone's view, they reasoned that the exception should not apply. The Court disagreed, however, emphasizing the preeminence of the natural state of the property in making such determinations

because, as a general propositions:

...owners of unimproved lands ordinarily suffer no deprivation of their rights of use and enjoyment by allowing others access to their property.

Notwithstanding its ruling, the Court was careful to say that the "woodlands exception" was not applicable to every beach, and that its use would be dependent on other factors, including the characteristics of the area adjoining the beach. In this case, because the beach on Dobbins Island was attached to an uninhabited, uncultivated, and undeveloped island, the "woodlands exception" would apply, and any use of the beach by the public was presumed to be with the owner's permission. As the Association was unable to prove that the public used the beach without the permission of any of the owners before the Clickners purchased the Island, the Court said that the public's prior use of the beach would be more accurately described as a license, subject to revocation at any time by the property owners.

### Conclusion and Implications

The Maryland Court of Appeals ruling in *Clickner v. Magothy River Ass'n* is important in two regards. It is the first instance in which the state's highest court recognized that privately owned inland waterway beaches are susceptible to adverse rights claims by the public, where these claims had only previously been recognized for beaches abutting the ocean. Maryland's inland tidal shoreline measures over 3000 miles, nearly two orders of magnitude greater than its 35 miles of ocean shoreline. This expansion may encourage organizations to petition courts for prescriptive easements over other inland waterway beaches, or encourage land owners to take measures to restrict or prevent future public access to these natural resources for fear that inaction may result in a future encumbrance.

The Court also found that the "woodlands exception" may apply to beaches, which may act to temper the protective actions of landowners or give pause to the litigiously minded public. However, the use of the exception was qualified substantially in the Court's decision, so that it may only now apply, in an extreme but plausible example, to uninhabited islands. The Court acknowledged that it was concerned that if the "woodlands exception" did not apply to inland wa-

terway beaches, similarly situated landowners would erect fences similar to the one the Clickners built. Ironically, it is the Court's own narrow interpretation

of this exception that may cause land owners to erect those fences in the first place. (Parker Moore, Richard Davis)

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