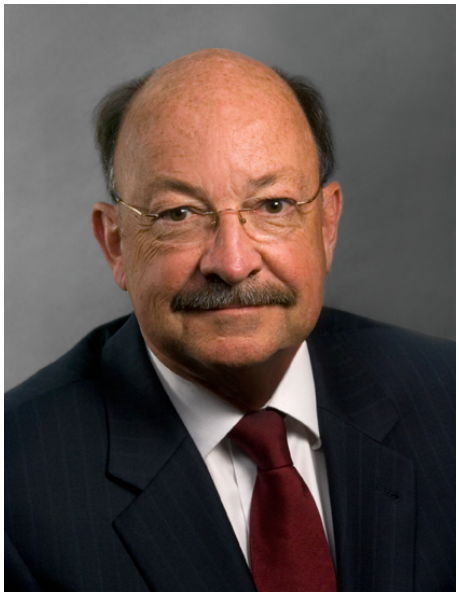
R.I. Supreme Court balancing public, private shore access rights well

By **John M. Boehnert** - July 27, 2018 1:20 am



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It's summer, and access to the shore is on the minds of many.

While the public throngs Rhode Island's beautiful beaches, some members of the public seek access along private waterfront property. It is not uncommon for the public to cross, and even encamp on, private land of waterfront property owners, asserting the rights of "passage along the shore."

Shore-access activists argue that Rhode Island's Constitution grants Rhode Islanders this right of passage along the shore. This argument relies on a 1986 amendment to the constitution that added "passage along the shore" as one of Rhode Islanders' public trust rights.

This 1986 amendment is seen as responding to a 1982 R.I. Supreme Court decision, which found that public trust rights applied to land below mean high tide, which shore-access activists assert results in such access being underwater part of each day.

It has even been asserted that our state courts are part of the problem because since 1986 none of the six Supreme Court shore-rights decisions has relied on the 1986 amendment, and the courts continue to recognize the 1982 decision as good law.

However, another explanation is that our state judiciary is very much a part of the solution, carefully balancing public and private rights at the shore.

Begin with the 1982 decision, State v. Ibbison, establishing the boundary between public and private rights at the shore, which is, in fact, still good law. The court reasoned that setting the boundary as the highest reaches of the spring high tides would unfairly take from owners private property that was usually dry land. Setting the boundary at mean low tide would unfairly limit the shore available to the public. It therefore struck a balance, setting the boundary as the mean high tide, which can be measured with mathematical precision, which is important when dealing with property boundaries.

As to our court ignoring the 1986 amendment and rights of passage along the shore, consider a court decision more than 40 years before that amendment.

In 1941, our court said that at the time of the adoption of the constitution, among the privileges of the shore was "a public right of passage along the shore, at least for certain proper purposes and subject, very possibly, to reasonable regulation by acts of the General Assembly in the interest of the people of the state."

Rather than ignoring the 1986 amendment, it is more likely our court is reading our state constitution as a whole.

The right of passage amendment was accompanied by another amendment to the constitution providing that government regulation to enforce the privileges of the shore would not constitute a public use of private property for which just compensation must be paid.

Normally, if government mandates public access across your property, you must be paid for this taking of your property rights; not so if the government says the public can use your private property for shore access.

It may be that the amendments, intended to counter the careful balance of public and private rights in the Ibbison decision, will have the opposite effect.

As good as the Ibbison decision was when rendered, given the specter of an uncompensated invasion of property rights after the 1986 amendments, it now appears more prescient and more vital.

Our Supreme Court has spent centuries balancing public and private rights at the shore.

Rather than turning a blind eye to one constitutional provision, our court has been eying the entire constitution, and the public has benefitted from that approach.

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