Ocean and Coastal Law Journal

Volume 1 | Number 1 Article 5

1994

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I. INTRODUCTION

In Hawaii, a large portion of all beaches are owned by the public. In the 1968 decision, *In re Ashford*,[1] the Hawaii Supreme Court held that the boundary between privately-owned upland property and the publicly-owned beach was the vegetation line.[2] In most other jurisdictions the line delineating private and public property is the mean high tide line.[3] The vegetation line usually occurs further upland than the mean high tide line. Members of the public are therefore able to use a significantly greater portion of the coastal zone in Hawaii than in most other jurisdictions.

Swelling populations and the tourism industry have increased the need for access to Hawaii's state-owned beaches. Property owners of land abutting the vegetation line have previously attempted to meet the public's need for access to the shoreline recreation areas by allowing members of the public to cross over their land. A recent Hawaii Supreme Court decision, *In re Banning*,[4] further bolsters the ability of the public to enjoy the Hawaiian coastal zone by encouraging landowners to continue this practice.

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1. Michael A. Town & William Yuen, *Public Access to Beaches in Hawaii: "A Social Necessity,"* 10 HAW. B.J. 5 (1973) (citing *In re* Ashford, 440 P.2d 76 (Haw. 1968)). (This article was used extensively in writing the Hawaiian implied dedication section of this Note).

2. Town & Yuen, 10 HAW. B.J. at 5 (citing *In re* Ashford, 440 P.2d at 77).

3. *See generally*, Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10, 25 (1935) (holding that upper boundary of tidelands is medium high tide between the springs and the neaps).

4. 832 P.2d 724 (Haw. 1992).

The *Banning* court held that if the public's use of an accreted parcel fronting shoreline property was both open and continuous, that use did not raise a conclusive presumption that the littoral owner had implicitly dedicated the land to the public. The court's rejection of an easement in favor of the public in this particular accreted parcel will actually promote beach access. A private land owner in the future will continue to allow the public to use her property to access the beach without fear of losing her property rights through the doctrine of implied dedication.

The Supreme Court of Hawaii held correctly in *Banning*, because there is a strong public policy favoring open beaches within the State. This Note analyzes the doctrine of implied dedication and accretion in Hawaii. It then discusses the *Banning* court's ruling on whether a landowner is presumed to have dedicated her property to the public if she allows open and continuous use for the prescriptive period. The Note discusses California's contrasting approach to the doctrine of implied dedication. It concludes that the Hawaii court made a prudent decision, in line with at least eight other jurisdictions, that will promote public access to one of Hawaii's greatest natural resources, its beaches.

II. IMPLIED DEDICATION IN HAWAII

A. Common Law

A dedication is the devotion of land to a public use by an "unequivocal act of the owner of the fee manifesting the intention that it shall be accepted and used presently or in the future for such a public purpose."[5] A common law dedication can be either express or implied. It is express when the purpose to give the land to public use is embodied in a grant, such as a deed. It is implied when an intention to devote the land is clearly manifested by the conduct of the owner.[6] Because a court can take away an owner's property through implied dedication, it is essential that the required intent to dedicate the land be plainly manifest.

A common law dedication may occur without any statement, written or spoken, because a landowner who permits the public to use her land for a long period may be held to have made an offer of implied

5. 26 C.J.S. *Dedication* § 1 (1956).
6. Wensel v. Chicago M. & St. P. Ry. Co., 185 Iowa 680, 692 (1919).

dedication.[7] The rationale behind this theory is that the owner is estopped to deny permanent public access when she has allowed the public to use the land for an extended period of time.[8]

Hawaii courts adopted the theory of implied dedication in 1869 in *The King v. Cornwell*.[9] In *Cornwell* the Hawaii Supreme Court held that to establish implied dedication "there should be an intention and act of dedication on the part of the owner, and an acceptance on the part of the public."[10] When there is no express offer, the offer may be implied under the circumstances.[11] Acceptance may also be implied because public use of a beach has satisfied the "acceptance" element of the doctrine.[12] Therefore, the duration and type of public use can fulfill both the owner's intent to dedicate land to the public and the public's acceptance.[13] It is also noteworthy that the offer and acceptance in a dedication are questions of fact.[14]

The two commonly recognized forms of implied dedication are implied-in-fact and implied-in-law. The *Cornwell* court, however, did not divide the doctrine into its two current forms when it adopted implied dedication as part of Hawaiian common law.[15] Dedication implied-in-fact is a dedication for a period less than the prescriptive period that may be established by proof of the owner's actual consent to the dedication. When the owner has permitted the public to use the land for such a short time, her intent is critical.[16] Dedication implied-in-law occurs when the owner has acquiesced to the public use for longer than the prescriptive period. The public's use of the land becomes the critical factor in determining if the dedication was implied-in-law.[17] Thus, the owner's

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7. ROGER A. CUNNINGHAM, ET AL., THE LAW OF PROPERTY § 11.6, at 801 (2d ed. 1993).

8. *Id.*

9. 3 Haw. 154 (1869).

10. *Id.* at 161.

11. *See* Vitants M. Gulbis, Annotation, *Implied Acceptance, By Public Use, of Dedication of Beach or Shoreline Adjoining Public Waters*, 24 A.L.R. 4th 294 (1983); *see also* 26 C.J.S. *Dedication* § 37 (1956).

12. DAVID J. BROWER, ACCESS TO THE NATION'S BEACHES: LEGAL AND PLANNING PERSPECTIVES 23 (1978).

13. 23 AM. JUR. 2d *Dedication* §§ 36, 55 (1983).

14. Meshberg v. Bridgeport City Trust Co., 429 A.2d 865, 868 (Conn. 1980).

15. Town & Yuen, *supra* note 1, at 17.

16. *Id.* at 16 (citing Gion v. City of Santa Cruz, 465 P.2d 50, 55 (Cal. 1970)).

17. Gion v. City of Santa Cruz, 465 P.2d at 56.

intent to dedicate property for public use is implied not from the owner's acts but from the nature of the public's adverse use.

The difference between dedication implied-in-fact and dedication implied-in-law is in how each doctrine is proved. Dedication implied-in-fact is proved by showing the owner's actual intent to dedicate, while dedication implied-in-law is proved by the public's acceptance of the dedication.[18]

In addition to the two requirements of intent and acceptance, two other elements must be shown to establish an implied dedication of land. The first is the duration of use.[19] Courts differ in their durational requirement for dedication.[20] The second is "public use." This means that the use must be substantial rather than casual.[21] People must have used the property as they would have used a public recreation area. The policy behind these requirements lies in the power of the doctrine of implied dedication to strip a property right from a landowner. Courts do not want to allow infrequent use by a few people to be the basis of an action to secure rights through implied dedication. Hawaii's common law of implied dedication has reflected these and other policy considerations and has been supplemented by legislative action.[22]

B. Legislation

The Hawaii Supreme Court acknowledged in *Hawaii County v. Sotomura,*[23] that public policy "favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible."[24] The legislature codified this policy in 1969.[25] The Act's purpose is "to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons

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18. *Id.* at 55-56.

19. Town & Yuen, *supra* note 1, at 17.

20. *Compare* Gion v. City of Santa Cruz, 465 P.2d 50, 55 (1970) (five year requirement for implied dedication) *with* HAW. REV. STAT. § 657-31 (1985) (twenty year requirement for implied dedication). Hawaii's statutory period was changed from 10 to 20 years in 1973. Campbell v. Hipawai Corp., 639 P.2d 1119, 1121 (Haw. App. 1982).

21. County of Orange v. Chandler-Sherman Corp., 54 Cal. App. 3d 561, 565 (1976).

22. HAW. REV. STAT. § 520-1 (1985).

23. 517 P.2d 57 (Haw. 1973).

24. *Id.* at 61-62.

25. HAW. REV. STAT. §§ 520-1 to 520-8 (1985).

entering thereon for such purposes."[26] The legislature attempted to balance the need for beach access with the littoral landowners' rights to the enjoyment of their land. Striving to promote a spirit of community so that beach access will be widely available to the public, the legislature secured the littoral landowners' property rights in the same Act: "No person shall gain any rights to any land by prescription or otherwise, as a result of any usage thereof for recreational purposes as provided in this chapter."[27] It is the public's use, not the landowner's permission, that defines the applicability of this section. Recreational purpose is defined to include "swimming, boating-camping, and picnicking," activities that obviously give the public a broad range of use.[28]

The legislature sought to encourage landowners to make their lands available for recreational use, and it changed Hawaii's common law rules of liability and prescriptive use in order to achieve that goal.

C. California's Approach to Implied Dedication

California has taken a very different approach in developing the doctrine of implied dedication. A discussion of California case law provides a background for the choice the Supreme Court of Hawaii was faced with in deciding *In re Banning*.

Two California Supreme Court cases, *Gion v. City of Santa Cruz* and *Dietz v. King*,[29] form the critical case law in establishing implied dedication in California.[30] The *Gion* court found implied-in-law dedication by adverse use of beach property and granted an easement to the public. The court held that public use for the prescriptive period coupled with the acquiescence of the owner of the land is conclusive evidence of an intent to dedicate the property.[31]

The court's holding in *Gion* has been widely criticized. Allowing mere public use to create conclusive evidence of an owner's intent to dedicate strikes many as unfair. The two policy grounds on which most

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26. *Id.* at § 520-1 (1985).
27. *Id.* at § 520-7.
28. *Id.* at § 520-2(3).
29. The cases were consolidated and are hereinafter referred to as *Gion*.
30. Gion v. City of Santa Cruz, 465 P.2d 50 (Cal. 1970).
31. *Id.* at 56.

of the criticism has centered are that it is unfair to hospitable landowners and that it will cause widespread closing of previously open land.[32]

III. ACCRETION

Banning dealt with a parcel of land that had accreted onto the littoral owner's property. Accretion has been defined as an addition to riparian land gradually and imperceptibly made by the water to which the land is contiguous.[33] Accretion is new soil that has been deposited and increases the size of a piece of property. The Hawaii Supreme Court determined in *Halstead v. Gay* that "land now above the high water mark, which has been formed by imperceptible accretion against the shoreline of a grant, has become attached by the law of accretion to the land described in the grant and belongs to the littoral proprietor."[34] The public policy behind this grant of ownership to the littoral landowner is that it preserves littoral access.[35]

In 1985, the Hawaii legislature codified the common law of accretion by stating, in part, "[a]n applicant for registration of land by accretion shall prove by a preponderance of the evidence that the accretion is natural and permanent. 'Permanent' means that the accretion has been in existence at least twenty years."[36] In addition, the legislature modified the laws regarding adverse possession to allow "any person," not just the littoral landowner, to register a claim to accreted land by proving it has been natural and permanent for twenty years.[37]

IV. *IN RE BANNING*

A. Facts

In 1928, a community trust was established to operate a private beach club for the use of its members and to maintain four beach access-ways for members of a residential development located in Kailua

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32. John Briscoe & Jan Stevens, *Gion After Seven Years: Revolution or Evolution?* 53 LOS ANGELES B.J. 207, 219 (1977).

33. 65 C.J.S. *Navigable Waters* § 81 (1966).

34. Halstead v. Gay, 7 Haw. 587 (1889).

35. State v. Zimring, 566 P.2d 725, 734 (Haw. 1977).

36. HAW. REV. STAT. § 501-33 (1985).

37. HAW. REV. STAT. § 669-1 (1985).

on the island of Oahu, Hawaii.[38] This instrument gave the trustees ownership of two lots that are at the heart of the *Banning* dispute. Lot 20-A is a 1.36 acre rectangular portion of land joined on one side by residential lots and on the other side by a long, narrow beach access-way designated as lot 20-X.[39] In 1967, the City and County of Honolulu acquired a public easement for access over lot 20-X.[40] Lot 20-X is also bounded on one side by several residential lots.[41] Both lot 20-A and 20-X have a *mauka* (mountainside) boundary along North Kalaheo Avenue and a *makai* (oceanside) boundary along the high water mark.[42]

Since 1925, when the *makai* boundaries to lots 20-A and 20-X were first delineated, gradual accretion has occurred. An estimated .251 acre of land has slowly deposited onto lot 20-A.[43] The public has used the accreted parcel for access to the beach as well as for recreational purposes because access to lot 20-X was blocked. During the time period that accretion occurred, an ironwood tree grew in the way of lot 20-X and obstructed beach access. This forced the public onto the accreted parcel of lot 20-A.

B. The Land Court Decision

In September, 1988, the trustees filed a petition for Registration of Title and Redesignation of Lot with Accretion in Hawaii's land court to register the .25 acre of new soil in lot 20-A.[44] The State and a neighbor of lot 20-X argued that the accreted land was not natural and permanent. They also argued that the accreted parcel should be granted to the State

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38. Appellant's Opening Brief at 2, *In re* Banning, 832 P.2d 724 (Haw. 1992) (No. 15109).

39. *In re* Banning, 832 P.2d 724, 726 (Haw. 1992).

40. *Id.* at 727.

41. One of the residential lots is owned by the Bremners. The Bremners are also appellees in the appeal from the decree of the land court regarding accretion to lot 20-A. This Note, however, focuses on the State's arguments on appeal.

42. *In re* Banning, 832 P.2d at 727.

43. *Id.* Lot 20-X also has grown through accretion. This accretion is not at issue. The trustees guaranteed that they would permanently allow access to the beach through lot 20-X. Appellant's Opening Brief at 6, *In re* Banning, 832 P.2d 724 (Haw. 1992) (No. 15109).

44. *In re* Banning, 832 P.2d at 727. Registration was pursuant to HAW. REV. STAT. § 501-33 (1985). The land court has exclusive original jurisdiction of all applications for the registration of title to land and easements or rights in land. HAW. REV. STAT. § 501-1 (1985).

for the public's use and enjoyment because the trustees had acquiesced in the public use for such a long time.[45]

The land court made two holdings. It granted the trustees their petition for title to the accreted property. However, the land court reserved two easements in favor of the State of Hawaii because of the trustees' long acquiescence to public use. The land court determined that the rights to accreted land could be acquired by "adverse" public use under the theory of implied dedication as it had been articulated in the California case, *Gion v. Santa Cruz*.[46]

C. Arguments on Appeal

The trustees made several arguments on appeal. First, they argued that the land court erred in finding that there was continuous public use of the accreted land. The trustees argued that the land court's holding that the public had used the beach was clearly erroneous because it was impossible for the witnesses to differentiate beach club members from members of the public. The trustees also argued that the use of the beach had been blocked for a period of time and thus was not continuous.[47]

Second, they argued that the land court erred in finding that the accreted parcel had been dedicated by implication.[48] The trustees argued that the land court's reliance on the California case law was misplaced. There was no evidence that the trustees intended to dedicate their property. There was no evidence of continuous public use nor was there evidence that the government accepted the dedication. Further, the trustees argued that the land court erred when it concluded that the statute[49] did not apply to limit landowner liability and, in the alternative, that the land court erred when it concluded that the prescriptive period and the accretion period ran concurrently. Finally, the trustees argued that the easements must fail because they are vaguely defined.[50]

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45. *In re* Banning, 832 P.2d at 727.

46. Gion v. City of Santa Cruz, 465 P.2d 50 (Cal. 1970).

47. *In re* Banning, 832 P.2d at 728.

48. *Id.*

49. "Rights. No person shall gain any rights to any land by prescription or otherwise, as a result of any usage thereof for recreational purposes as provided in this chapter." HAW. REV. STAT. § 520-7(1985).

50. *Id.* at 728-32.

The State argued that the evidence demonstrated many years of public use and access over the accreted land. The State also argued that implied dedication of the accreted parcel had created two public easements.

D. The Hawaii Supreme Court Decision

The Hawaii Supreme Court held that implied dedication as articulated in *Gion* did not apply in Hawaii. The court followed their own standards as set forth in *Cornwell*.[51] "While continuous adverse public use raises an assumption of implied dedication in Hawaii ... it is not a conclusive presumption. Further, *Cornwell* requires adverse public use unopposed and acquiesced in for a period longer than the prescriptive period to infer public dedication."[52] The court used the statutory definition of the period for prescription: "No person shall commence an action to recover possession of any lands, or make any entry thereon, unless within twenty years after the right to bring the action first accrued."[53] Since the land court had not made a finding that the accreted parcel had been used for more than twenty years, the public's use of the accreted parcel was not a sufficient length of time to establish an easement by implied dedication.[54]

The court also held that the period for accretion could run concurrently with the period of prescription for implied dedication. The court stated as its rationale that "the legislature has indicated that adverse use can establish a claim to accreted land."[55] This allows any person to register a claim to accreted land.

Finally, the court held that even if there had been implied dedication in this case, the grant of the two easements would fail because its description is too vague.[56] Because the descriptions of the easements were not confined to a single line, each entrance onto the land would have defined the location of the easement.[57]

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51. 3 Haw. 154 (1869).

52. *In re* Banning, 832 P.2d at 730 (citations omitted).

53. HAW. REV. STAT. § 657-31 (1985).

54. *In re* Banning, 832 P.2d at 731.

55. *Id.* at 728, n.4.

56. *Id.* at 731.

57. Two other important holdings are beyond the scope of this Note. First, the court held that HAW. REV. STAT. § 264-1 (1985), which applies to trails, was not relevant in this case. The State had contended that it had an easement for public access

V. DISCUSSION

The Supreme Court of Hawaii's decision in *Banning* will lead to greater overall access to Hawaiian beaches. The court's interpretation of implied dedication is in line with the legislative purpose of encouraging owners of land to make land and water areas available to the public for recreational purposes.[58]

The land court had not applied the recreational prescription statute because it believed the trustees had not shown that they had asserted dominion over the property and then given the public permission to use it. The land court put the burden on the trustees to show that they had blocked entrance to the property instead of on the State to show a public claim of ownership. The Supreme Court of Hawaii correctly placed the burden on the State because the statute is conditioned on the public's usage and not the landowner's permission. *Banning* is significant because it is a matter of first impression in construing the intent of the legislature.

In rejecting the California doctrine of implied dedication, which holds that public use for the prescriptive period raises a conclusive presumption of a grant of property to the public, the court will preserve and promote the existing practice of landowners allowing the public to cross their land to access the beach.

Hawaii will avoid the problem of landowners fencing off their property for fear of losing it. This has happened in California as a result of *Gion*.[59] The reaction was summed up by the California Appellate

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along a shoreline trail whenever the owner fails to exercise acts of ownership over it and has acquiesced in the public's use of it for more than five years under this statute. The court held that the trustees had not built a trail for the public and therefore HAW. REV. STAT. § 264-1 did not apply. Second, the court held that the neighbors to lot 20-X had standing to enforce the rights of the general public in the parcel under Akau v. Olohana Corp., 652 P.2d 1130 (Haw. 1982). The necessary element of "injury in fact" had been demonstrated in the neighbor's case. *In re* Banning, 832 P.2d at 732.

58. HAW. REV. STAT. § 520-1 (1985).

59.

> Owners of coastal and inland waterway property have been fencing off access routes at a record rate in an effort to prevent a recent California Supreme Court decision from affecting their lands.... Under provisions of the Supreme Court ruling, those who have allowed trespassing or have failed to effectively halt it stand the greatest chance of losing their property or a portion of it.

Phillip Fradkin, *Owners of Waterway Property Pushing to Block Access Paths*, L.A. TIMES, July 34, 1970, §1 at 3.

Court in *County of Orange v. Chandler Sherman Corp.* "Reaction to [*Gion*] was prompt. In addition to soaring sales of chain link fences, as owners of shoreline property frantically attempted to bar the public from the use of their property, the case generated a spate of law review comment which was generally critical."[60]

The current state of the law in California was confirmed in *Bess v. County of Humbolt*.[61] *Bess* reiterated *Gion's* holding that litigants seeking to show that land has been dedicated to the public need only demonstrate that people have used the land as they would have used public land. Specifically, if the property were beach or shoreline, the litigant need merely show the land was used as if it were a public recreation area.[62]

Hawaii has followed many other jurisdictions in rejecting this approach to property allocation. Courts in New Jersey,[63] New Hampshire,[64] Michigan,[65] Maryland,[66] Florida,[67] Georgia,[68] and South

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60. 54 Cal. App. 3d at 564 (citing William G. Hayter, Note, *Implied Dedication in California: A Need for Legislative Reform*, 7 CAL. W.L. REV. 259 (1970); Michael M. Berger, *Nice Guys Finish Last—At Least They Lose Their Property:* Gion v. City of Santa Cruz, 8 CAL. W.L. REV. 75 (1971); Susan P. Finlay & David J. VanTil, *Californians Need Beaches—Maybe Yours!* 7 SAN DIEGO L. REV. 605 (1970); Richard E. Llewelyn II, Note, *The Common Law Doctrine of Implied Dedication and Its Effects on the California Coastline Property Owner:* Gion v. City of Santa Cruz, 4 LOY. L.A.L. REV. 438 (1971); Robert T. Burke, *Public or Private Ownership of Beaches: An Alternative to Implied Dedication*, 18 UCLA L. REV. 795 (1971); Note, *Implied Dedication of Beach to Public Use*, 59 CAL. L. REV. 231 (1971); Charles R. Manzoni, Jr., *Implied Dedication: A Threat to the Owners of California's Shoreline*, 11 SANTA CLARA L. REV. 327 (1971).

61. Bess v. County of Humbolt, 3 Cal. App. 4th 1544, 1550 (1992).

62. *Id.*

63. Murphy v. Burough of Point Pleasant Beach, 8 A.2d 116, 118 (N.J. 1939) (government money spent on upkeep of beach property and use by the public did not conclusively prove the land had been dedicated).

64. McInnis v. Hampton, 112 A.2d 691, 694 (N.H. 1972) (public use for more than twenty years did not compel a finding of implied dedication).

65. Kempf v. Ellixson, 244 N.W.2d 476, 478 (Mich. 1976) (a showing of public use did not conclusively determine an easement to the public had been granted in property on shore of lake).

66. Department of Natural Resources v. Mayor and Council of Ocean City, 332 A.2d 630, 635 (Md. 1975) (evidence of long public use did not raise conclusive presumption that oceanfront land had been dedicated to the public).

67. City of Miami Beach v. Miami Beach Improvement Co., 14 So. 2d 172, 175 (Fla. 1943) (mere fact of use by the public for an extended period of time without consent or objection of owner does not show an intent to dedicate ocean front land to

Carolina[69] all have held that permissive use alone will not, in itself, give rise to an implied dedication of property to the public.

Idaho, just as in Hawaii, has a statute encouraging landowners to make their lands available to the public.[70] In a 1979 decision, *State ex rel. Haman v. Fox*, the court rejected *Gion's* theory of implied dedication as inconsistent with legislative purpose and against public policy.[71]

VI. CONCLUSION

The Hawaii Supreme Court prudently rejected California's implied dedication approach. Although the public is not entitled to an easement granting access to the beach on the particular accreted parcel of land, the public will enjoy an overall benefit from the continued practice of landowners allowing the public to cross over their privately owned land. This general policy of promoting neighborly goodwill towards the public will far outweigh the loss of the easement to the public in the accreted parcel.

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public use).

68. Lines v. State, 264 S.E.2d 891, 897 (Ga. 1980) (mere use of one's property by a portion of the public, even for an extended period of time, is not sufficient to authorize an inference that the property has been dedicated to a public use).

69. State v. Beach Co., 248 S.E.2d 115, 119 (S.C. 1978) (dedication of beachfront area on an island could not be implied from permissive, sporadic and recreational use of the property even though some of it had been used extensively).

70. IDAHO CODE § 36-1604 (1977).

71. 584 P.2d 1093 (Idaho 1979).